DOCKET NO. CV-15-6075650-S	:	SUPERIOR COURT
SCARLETT LEWIS, ADMINISTRATRIX OF THE ESTATE OF JESSE LEWIS AND LEONARD POZNER, ADMINISTRATOR OF THE ESTATE OF NOAH POZNER	:	JUDICIAL DISTRICT OF NEW HAVEN
V.	:	AT NEW HAVEN
NEWTOWN BOARD OF EDUCATION AND TOWN OF NEWTOWN	:	MAY 7, 2018

MEMORANDUM OF DECISION
MOTION FOR SUMMARY JUDGMENT (#162)

STATEMENT OF CASE AND PROCEDURAL HISTORY

This action arises out of the tragic deaths of the plaintiffs' decedents, Jesse Lewis and Noah Pozner. The plaintiffs, Scarlett Lewis, administratix of the estate of Jesse Lewis, and Leonard Pozner, administrator of the estate of Noah Pozner, bring this wrongful death action against the defendants, the Newtown Board of Education (board) and the town of Newtown (town). On June 30, 2017, the defendants moved for summary judgment on the ground that the plaintiffs' claims fail as a matter of law. Specifically, the defendants argue that: (1) there is no genuine issue of material fact regarding whether they are negligent; (2) they are entitled to governmental immunity; (3) an intervening criminal act was the proximate cause of the decedents' deaths; and (4) the plaintiffs failed to produce expert testimony necessary to support their claims.[1] On November 11, 2017, the plaintiffs countered that the defendants failed to establish that there are no genuine issues of material fact and, thus, are not entitled to judgment as a matter of law. The parties submitted numerous exhibits in support of and in opposition to

[1]The defendants had additionally moved for summary judgment on the ground that the plaintiffs' claims were barred by General Statutes § 52-557n (b) (6) because their alleged acts or omissions were not the direct cause of the deaths of the plaintiffs' decedents. The defendants withdrew this argument in recognition of our Supreme Court's holding in *Elliot* v. *Waterbury*, 245 Conn. 385, 715 A.2d 27 (1998), in which the court held that § 52-557n (b) (6) does not establish a sole proximate causation or a direct causation standard. Id., 393.

the motion for summary judgment,[2] and the defendants filed a reply to the plaintiffs' objection on November 15, 2017. Oral argument on the motion was heard by this court on January 8, 2018.[3]

FACTS

The tragic events of December 14, 2012, are undisputed[4] by the parties, having been the subject of intense media scrutiny and a long and thorough investigation. On December 14, 2012, the doors to Sandy Hook Elementary School (school) were locked at 9:30 a.m., as they were every morning. (Revised Third Compl., Ct. 1, ¶ 15; Defs.' Mot. Summ. J., Ex. A, ¶ 32; Pls.' Mem. Opp'n, Ex. M pp. 5, 9). On that day, a 9:30 a.m., planning and placement team (PPT) meeting took place in room nine, attended by Principal Dawn Hochsprung, School Psychologist

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[2] The defendants submit the following exhibits: affidavit of Mark Pompano, Newtown Public Schools' Director of Security (Exhibit A); Newtown Public Schools Emergency Lockdown Guidelines for faculty and staff (Exhibit B); affidavit of Kris Feda, a teacher at the school (Exhibit C); affidavit of Natalie Hammond, a teacher at the school (Exhibit D); affidavit of Kathryn Cunningham, a teaching intern at the school (Exhibit E); affidavit of Richard Thorne, Jr., a school custodian (Exhibit F); a map of the school layout (Exhibit G); and a copy of the Plaintiffs' Supplemental Compliance with Defendants' Interrogatories and Requests for Production (Exhibit H). The plaintiffs submit the following exhibits: District Contact Information and Incident Command System and Guidelines (Exhibit A); town of Newtown Emergency Operations Plan, School Emergency section (Exhibit B); Sandy Hook Elementary School Emergency Response Plan (Exhibit C); Newtown Public Schools Emergency Lockdown Guidelines for faculty and staff (Exhibit D); monthly fire drills reports (Exhibit E); Hartford Courant article titled "Schools Told To Give Substitutes Keys" (Exhibit F); two affidavits of Emily Lukasiewicz, employee of Hartford Courant (Exhibits G & H); State Police evidence log (Exhibit I); affidavit of Newtown Police Chief Michael Kehoe (Exhibit J); affidavit of private investigator Benedict Frosceno (Exhibit K); a copy of an e-mail sent by Mark Pompano (Exhibit L); report of the State's Attorney for the Judicial District of Danbury (Exhibit M); certified transcript of Kenneth Trump's deposition (Exhibit N); State Police time line (Exhibit O); and an affidavit of plaintiffs' attorney (Exhibit P). The defendants submit the affidavit of Janet Robinson with their reply brief.

[3]By an order dated December 18, 2017 (#162.20), the plaintiffs were permitted to file a supplemental affidavit of the author of the Hartford Courant article, limited solely to statements attributed to Janet Robinson in said article. The plaintiffs instead filed a surreply with additional exhibits. The court does not consider this memorandum because it was outside the scope of its order and in violation of Practice Book § 11-10 (c) ("[s]urreply memoranda cannot be filed without the permission of the judicial authority").

[4]See the Defs.' Answer to the Plaintiffs' Revised Third Compl. (#152).

Mary Scherlach, a parent, and other staff. (Revised Third Compl., Ct. 1, ¶¶ 20-21; Defs.' Mem. Summ. J., Ex. C ¶¶ 16, 18; Defs.' Mem. Summ. J., Ex. D ¶¶ 17; Pls.' Mem. Opp'n, Ex. M p. 9). At approximately 9:35 a.m., Adam Lanza (Lanza) shot his way into the school through a plate glass window located next to the school doors. (Revised Third Compl., Ct. 1, ¶ 18; Defs.' Mot. Summ. J., Ex. F ¶¶ 5-7; Pls.' Mem. Opp'n, Ex. M pp. 9, 11).

Hochsprung and Scherlach were shot and killed upon leaving room nine to investigate, and then Natalie Hammond was shot and injured before crawling back into room nine. (Revised Third Compl., Ct. 1, ¶¶ 20-21; Defs.' Mot. Summ. J., Ex. D ¶¶ 22-24; Pls.' Mem. Opp'n, Ex. M p. 9). Lanza then entered and exited the main office, without shooting anyone in the office, and proceeded to classrooms eight and ten. (Revised Third Compl., Ct. 1, ¶ 24; Pls.' Mem. Opp'n, Ex. M p. 2). The order in which he entered these classrooms is not known, but while in the classrooms, he shot and killed four adults and twenty first-grade students with a rifle. (Revised Third Compl., Ct. 1, ¶ 28; Pls.' Mem. Opp'n, Ex. M pp. 2, 5, 10). The plaintiffs' decedents were two of the students killed. Lanza then took his own life at approximately 9:40 a.m. (Revised Third Compl., Ct. 1, ¶ 28; Defs.' Mot. Summ. J., Ex. F ¶ 14; Pls.' Mem. Opp'n, Ex. M pp. 10-12).

In their revised third complaint, filed on September 1, 2016, the plaintiffs allege that the defendants had a ministerial duty to create, enforce, and abide by a collection of rules and regulations regarding the management of the school and to ensure student safety pursuant to General Statutes §§ 10-220, 10-220f, and 10-221. The plaintiffs allege that the defendants were negligent because they (1) failed to provide the school with doors that could be locked from the inside; (2) failed to train and supervise staff in the proper way to implement the lockdown and evacuation procedures; (3) failed to provide certain teachers with keys to the classrooms or training concerning the lockdown procedures; (4) failed to provide a security guard or other type of law enforcement personnel to assist in the implementation of the policies and procedures; (5) failed to remove a non-safety glass window next to the locked doors; and (6) failed to follow their own guidelines regarding school safety by failing to provide adequate equipment and training to faculty and staff in accordance with §§ 10-220, 10-220f, and 10-221. The plaintiffs

allege that the safety protocols instituted by the defendants were ministerial, but that the defendants failed to provide the faculty and staff of the school with the necessary information, tools, and training to properly implement them. The plaintiffs further allege that the faculty and staff were, therefore, unable to implement the required safety protocols on December 14, 2012, even though harm was imminent and apparent, which resulted in the deaths of the plaintiffs' decedents. The plaintiffs, therefore, seek to hold the defendants liable for the deaths of their decedents.

STANDARD OF REVIEW

"[S]ummary 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.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820-21, 116 A.3d 1195 (2015). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319-20, 77 A.3d 726 (2013). "Once the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell–Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

"To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, 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 court under Practice Book § [17-45]." (Internal quotation marks omitted.) Id.

DISCUSSION

I

GOVERNMENTAL IMMUNITY

The defendants move for summary judgment as to all counts of the plaintiffs' revised third complaint on the ground that there are no genuine issues of material fact that they are entitled to governmental immunity for their discretionary acts and that there are no applicable exceptions to this immunity pursuant to General Statutes § 52-557n (a) (2) (B). The court notes that, apart from a couple of passing references to § 10-220f, once in a rhetorical question, the plaintiffs do not discuss nor counter in their objection that the three statutes they alleged in their revised third complaint impose ministerial duties on the defendants. In fact, the plaintiffs make no argument in their objection to the defendants' motion for summary judgment that the defendants had a ministerial duty to train and supervise their staff, hire a security guard, or put in specific or different windows and doors. To the contrary, the plaintiffs' entire objection instead concerns the argument that safety protocols, created by the defendants, imposed a ministerial duty on the faculty and staff in the school that required that they commence a lockdown and implement related proceudres, which is an entirely new theory of negligence than that being alleged in the operative complaint for the present motion, the plaintiffs' revised third complaint.

"The pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial. . . . The principle that a plaintiff may rely only [on] what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations [in] his complaint." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014). In the present case, the plaintiffs' theory of negligence articulated in their revised third complaint, is premised on allegations regarding acts and omissions by the board and the town *before*

December 14, 2012, rather than acts and omissions of the faculty and staff in the school *during* the shooting on December 14, 2012. Although the plaintiffs allege that the safety policies and procedures were ministerial, and not implemented by the faculty and staff, the revised third complaint is replete with allegations that negligence occurred as a result of the defendants' conduct. In other words, the plaintiffs allege that the safety protocols were not implemented and others were rendered ineffective *because* the board and the town *failed to provide adequate equipment and training* to the faculty and staff to implement the protocols *prior to* December 14, 2012. The plaintiffs' assertions in their objection that the *faculty and staff* were negligent in *failing to implement and follow* the safety protocols on December 14, 2012, sets forth a new theory of liability not previously alleged.

The gravamen of the plaintiffs' revised third complaint concerns the actions and inactions of the board and the town before the shooting occurred and the court notes it is only now, in response to the defendants' motion for summary judgment, that the plaintiffs assert that the board and the town are liable for the faculty and staff's actions and inactions during the shooting. The court finds that it is improper for the plaintiffs to raise an entirely new, alternative theory of liability for the first time in an opposition to the defendants' motion for summary judgment when it had not been pleaded in the revised third complaint. *White* v. *Mazda Motor of America, Inc.*, supra, 313 Conn. 629. If the plaintiffs had sought to hold the defendants liable for the acts or omissions of its employees in the school, then they were required to plead such a theory of liability in their revised third complaint or seek leave to further amend their complaint. Having failed to do so, the court will not consider the arguments raised by the plaintiffs asserting this new theory of liability. See *Moeller* v. *St. Luke's Foundation, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. X08-CV-04-0199334-S (June 27, 2007, *Jennings, J.*) ("[a] court is not required to reach the merits of a claim or argument raised for the first time in a memorandum in opposition to summary judgment" when "that theory is not pleaded in the complaint").

A

Ministerial or Discretionary Acts

The court, therefore, now turns to the well-settled principles regarding governmental immunity relevant to the resolution of the defendants' motion for summary judgment and the allegations as pleaded in the plaintiffs' revised third complaint. "[U]nder General Statutes § 52-557n, a municipality may be liable for the negligent acts or omissions of a municipal officer acting within the scope of his or her employment or official duties. . . . The determining factor is whether the act or omission was ministerial or discretionary. . . . [Section] 52-557n (a) (2) (B) . . . explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . .

"Discretionary acts are treated differently from ministerial acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . [D]iscretionary act immunity reflects a value judgment that–despite injury to a member of the public–the broader interest in having government officials 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." (Citations omitted; internal quotation marks omitted.) *Hull* v. *Newtown*, 327 Conn. 402, 407-408, 174 A.3d 174 (2017). "The hallmark of a discretionary act is that it requires the exercise of judgment. . . . If by statute or other rule of law the official's duty is clearly ministerial rather than discretionary, a cause of action lies for an individual injured from allegedly negligent performance. . . . [M]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Mills* v. *Solution, LLC*, 138 Conn. App. 40, 48, 50 A.3d 381 (2012).

"Whether conduct is ministerial or discretionary may be determined as a matter of law"; *Smart* v. *Corbitt*, 126 Conn. App. 788, 800, 14 A.3d 368, cert. denied, 301 Conn. 907, 19 A.3d 177 (2011); although this determination is ordinarily a question of fact. See *Strycharz* v. *Cady*, 323 Conn. 548, 565, 143 A.3d 1011 (2016). "[T]here are cases [in which] it is apparent from the complaint . . . [that the nature of the duty] . . . turns on the character of the act or omission complained of in the complaint. . . . Accordingly, [when] 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." (Internal quotation marks omitted.) Id.

In the present case, the defendants argue that the acts and omissions alleged in the plaintiffs' revised third complaint were discretionary, and that the plaintiffs have not articulated any statute, directive, or rule limiting the exercise of discretion. Specifically, the defendants argue that the training and supervision of staff was inherently discretionary, and that decisions regarding such things as whether to employ a security guard, and what types of doors or windows to utilize required the exercise of judgment. Moreover, the defendants assert that the statutes cited by the plaintiffs in their revised third complaint do not impose any kind of ministerial duty.

Our Supreme Court has recognized that managing and supervising school employees is a discretionary duty. *Strycharz* v. *Cady*, supra, 323 Conn. 569. "Although no Connecticut appellate tribunal has had an opportunity to examine whether general supervision of employees in a public school setting is a discretionary or ministerial function, several of our sister states have concluded that supervision of school personnel is a discretionary function. . . . In addition, both state and federal courts that have considered the issue in a different municipal or governmental setting also have concluded that general employee supervision is a discretionary function. . . . We agree with the rationale expressed in the foregoing cases. Furthermore, it is axiomatic that public school administrators perform a difficult . . . and . . . vitally important job in our society. . . . Because of the vital importance of their function to society, school administrators undoubtedly must be accorded substantial discretion to oversee properly their myriad responsibilities." (Citations omitted; internal quotation marks omitted.) Id., 567-69.

Similarly, the supervision of students is generally considered a discretionary act. See, e.g., *Rigoli* v. *Shelton*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-09-5007920-S (February 6, 2012, *Hiller, J.*) (53 Conn. L. Rptr. 466, 467) ("[w]hen presented with the issues of supervision of students, implementation of school policies and the control and management of a school and its students, Superior Courts have generally held that these . . . [duties] are carried out through discretionary acts"); *Romanella* v. *Nielson*, Superior Court, judicial district of New London, Docket No. CV-06-5100163-S (May 27, 2009, *Abrams, J.*) ("Connecticut law . . . considers the supervision of students a discretionary act"); *LaPerle* v. *Woodstock Academy*, Superior Court, judicial district of Windham, Docket No. CV-06-5000370-S (June 5, 2007, *Martin, J.*) (43 Conn. L. Rptr. 531, 532) ("[t]he duty of a [town board of education] to supervise students is discretionary rather than ministerial").

Thus, the foregoing authorities demonstrate that the acts and omissions alleged in the plaintiffs' revised third complaint are to be considered discretionary unless the plaintiffs can identify a statute, policy, or rule limiting the exercise of such discretion. See *Benedict* v. *Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010) ("for the purposes of § 52-557n, municipal acts that would otherwise be considered discretionary will only be deemed ministerial if a policy or rule limiting discretion in the completion of such acts exist"). The only source the plaintiffs allege in their revised third complaint that ostensibly create a ministerial duty are three referenced statutes: §§ 10-220, 10-220f, and 10-221. A plain reading of these statutes; see General Statutes § 1-2z; however, reveals that none of these sections limited the defendants' exercise of discretion in their supervision and management of the school or imposed clear, ministerial duties on the defendants with regards to the type of security measures or protocols they were to implement.

Section 10-220 sets forth the duties of all boards of education but does not prescribe the manner in which these duties are to be performed. Moreover, § 10-220 does not even mention safety protocols or procedures, apart from stating that boards of education shall provide a safe school setting. General Statutes § 10-220 (a) (4). Section 10-220f simply provides that local and regional boards of education *may* establish a school safety committee, but does not mandate that

such a committee be established. Additionally, § 10-220f does not prescribe how a board of education should manage the establishment, and subsequent running of, the school safety committee. Although § 10-220f states that "[p]arents and high school students shall be included in the membership of such committees," it does not mandate how many parents and high school students are to be included or how to choose them. Finally, § 10-221 pertains to policies and procedures regarding the textbooks to be used, management of school library media centers, homework, attendance, alcohol and drug issues, and other such things. See General Statutes § 10-221 (a) - (f). This statute, however, does not relate to security protocols, school design, or how faculty and staff are to be trained and equipped to implement security protocols. The plaintiffs present no argument or evidence to contradict this analysis. In sum, §§ 10-220, 10-220f, and 10-221 do not impose clear, ministerial duties on the defendants and, thus, the acts and omissions detailed in the plaintiffs' revised third complaint are discretionary. Therefore, the defendants are immune from liability absent an applicable exception to discretionary act immunity.

B

Exceptions to Discretionary Act Immunity

There are three exceptions to discretionary act immunity,[5] but only one is relevant to this action and which the plaintiffs raise: the identifiable person, imminent harm exception. "The exception requires three elements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm . . . . [Our Supreme Court] [has] stated previously that this exception to the general rule of governmental immunity has received very limited recognition in this state. . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come

[5]"Liability for a municipality's discretionary act is not precluded when (1) the alleged conduct involves malice, wantonness or intent to injury; (2) a statute provides for a cause of action against the municipality or municipal official for failure to enforce certain laws; or (3) the circumstances make it apparent to the public officer that his or her failure to act would be likely subject to an identifiable person to imminent harm . . . ." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 434 n.13, 165 A.3d 148 (2017).

within the imminent harm exception." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 435, 165 A.3d 148 (2017). "[T]he proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." (Internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 9, 176 A.3d 531 (2018). A harm is not imminent if it "could have occurred at any future time or not at all." *Evon* v. *Andrews*, 211 Conn. 501, 508, 559 A.2d 1131 (1989). "[T]he adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society." (Internal quotation marks omitted.) Id.

In the present case, no reasonable jury could find that the plaintiffs' decedents were subject to imminent harm at the time of the defendants' allegedly negligent conduct in creating school policies; training its faculty and staff in those policies; not hiring a security guard; not removing a plate-glass window; or choosing classroom doors that do not lock from the inside. In *Evon*, the plaintiffs brought a wrongful death action after their decedents died in an apartment fire, and alleged that the city and its officials failed to adequately inspect the premises, which the plaintiffs alleged violated various fire and housing codes. After concluding that the acts alleged were discretionary, the court turned to the plaintiffs' claim that their decedents were discrete, readily identifiable, and subject to imminent harm. *Evon* v. *Andrews*, supra, 211 Conn. 507. The court concluded that the plaintiffs' decedents did not fall within the exception, reasoning: "The gravamen of the plaintiffs' allegations is that the defendants had not done enough to prevent the occurrence of a fire. The risk of fire implicates a wide range of factors that can occur, if at all, at some unspecified time in the future. The class of possible victims of an unspecified fire that may occur at some unspecified time in the future is by no means a group of 'identifiable persons' . . . . Furthermore, the plaintiffs' decedents were not subject to 'imminent harm.' . . . In the present instance, the fire could have occurred at any future time or not at all. We cannot accept the proposition that the plaintiffs' decedents in this case were readily identifiable victims subject to imminent harm." Id., 507-508.

Like the fire in *Evon*, the shooting could have occurred at any future time or not at all. Moreover, any number of emergencies regarding these policies and training could have occurred at some unspecified time in the future. There are such a wide array of scenarios that could implicate a wide range of factors that can occur, if at all, at some unspecified time in the future; *Evon* v. *Andrews*, supra, 211 Conn. 508; and it simply cannot be said that a risk of such magnitude existed so as to give rise to a clear duty to act immediately to obviate the risk. See *Brooks* v. *Powers*, 328 Conn. 256, 276, 178 A.3d 366 (2018) ("if a harm is not so likely to happen that it gives rise to a clear duty to correct the dangerous condition creating the risk of harm immediately upon discovering it, the harm is not imminent" [internal quotation marks omitted]). Thus, this exception does not apply, and the plaintiffs' claims against the defendants are barred by governmental immunity.

II

New Theory of Liability

In light of the fact that both parties have briefed these issues extensively, the court will address the plaintiffs' arguments in their objection to the defendants' motion for summary judgment that the board's and the town's security protocols and policies imposed a ministerial duty on the defendants' faculty and staff to act in a prescribed manner in responding to the shooting during the attack. The court notes that the plaintiffs do not allege that any statutes, ordinances, or rules of law prescribe that these protocols are ministerial. See *Mills* v. *Solution, LLC*, supra, 138 Conn. App. 52. Resolution of this question depends on the interpretation of the security protocols and guidelines provided to the plaintiffs by the defendants during discovery.

"[W]here a question turns on the interpretation of a municipal ordinance or policy, it is inappropriate for a jury to decide." *Ventura* v. *East Haven*, 170 Conn. App. 388, 403, 154 A.3d 1020, cert. granted, 325 Conn. 905, 156 A.3d 537 (2017). Rather, "[a]s with any issue of statutory construction, the interpretation of a charter or municipal ordinance presents a question of law . . . ." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 607, 881 A.2d 978 (2005). Principles of statutory construction will therefore guide the court's analysis of the lockdown guidelines and other documents relating to emergency response and operation. See

Honulik v. *Greenwich*, 293 Conn. 698, 710, 980 A.2d 880 (2009) (observing that "[p]rinciples of statutory construction govern our interpretation of the town policy manual and pay plan"); see also *Hull* v. *Newtown*, supra, 327 Conn. 404-405 (determining whether certain Newtown Police Department policies and procedures imposed ministerial duty to search individual); *Coley* v. *Hartford*, 312 Conn. 150, 152-54, 95 A.3d 480 (2014) (determining whether police response procedures imposed ministerial duty to remain at scene).

"The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us to first consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

"The principles of statutory construction favor a rational and sensible [result]. . . . The unreasonableness of the result obtained by the acceptance of one possible alternative interpretation of an act is a reason for rejecting that interpretation in favor of another which would provide a result that is reasonable. . . . When two constructions are possible, courts will adopt the one which makes the statute effective and workable, and not one which leads to difficult and possibly bizarre results." (Citation omitted; internal quotation marks omitted.) *Ventura* v. *East Haven*, supra, 170 Conn. App. 404-405.

A

Ministerial or Discretionary Acts

In the present case, the plaintiffs argue that there were numerous policies and protocols

that looked at as a whole, created ministerial duties, that required faculty and staff to commence a lockdown and implement the security policies and protocols. There were two sets of procedures contained within the Newtown Public Schools Emergency Lockdown Guidelines for Faculty and Staff (lockdown guidelines): guidelines for a potential threat (general guidelines) and guidelines for when a threat was inside the building (code blue guidelines). The parties both agree that the code blue guidelines are most applicable to these claims; Defs.' Mem. Summ. J., p. 20; Pls.' Mem. Opp'n., p. 9; however, the plaintiffs contend that the code blue guidelines must be construed in light of the general guidelines as well as all the other emergency preparedness documents.

The court notes that a majority of these documents, submitted by the plaintiffs, are irrelevant as they do not concern whether the faculty and staff had a ministerial duty to act in a prescribed manner in responding to Lanza. As will be explained more fully below, contrary to the plaintiffs' position, construing the general guidelines, code blue guidelines, and the other emergency preparedness documents as imposing ministerial duties on the faculty and staff would lead to bizarre and unworkable results. Said guidelines and procedures were discretionary.

Emergencies, by their very nature, are sudden and often rapidly evolving events, and a response can never be one hundred percent scripted and directed,[6] and is a significant reason why police officers have been afforded broad discretion. See, e.g., *County* v. *Lewis*, 523 U.S. 833, 853, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (police have to make decisions "in haste, under pressure, and frequently without the luxury of a second chance" [internal quotation marks omitted]); *Smart* v. *Corbitt*, supra, 126 Conn. App. 801 ("responding to a public emergency . . . is a typical police officer function" that requires police officers to use judgment and make split-second decisions). To say that the faculty and staff of the school were to act in a prescribed manner in responding to an emergency situation would likewise be illogical and in direct

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[6]The plaintiffs present as evidence the deposition of the defendants' expert, Kenneth Trump. In discussing guidelines and using common sense in responding to the situation, he stated "The phrase that's used often is, You can't script every crisis." Pls.' Mem. Opp'n, Ex. N, 104:4-104:6.

contradiction to the very purpose of governmental immunity: allowing for the exercise of judgment without the fear of second-guessing. See *Edgerton* v. *Clinton*, 311 Conn. 217, 228 n.10, 86 A.3d 437 (2014).

It is clear that the code blue guidelines contain what is generally considered discretionary or qualifying language. The code blue guidelines provide in part: "Upon notification or personnel observation that an [imminent] emergency situation exists, it *may* become necessary for school administration to commence a 'Lockdown–Code Blue'. Generally, this order will be announced over the school's public address system . . . . Depending on circumstances however, the lockdown order *may* also be issued by telephone, two-way radio, and/or word of mouth."[7] (Emphasis altered.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D. A sensible reading of this language suggests that implementation of these guidelines requires discretion in two parts: judgment is initially exercised in determining whether the commencement of a lockdown is necessary, and judgment is exercised in examining the circumstances and determining how to issue the code blue order. There is no language contained within the code blue guidelines that mandates that a lockdown be commenced and/or prescribes when a faculty or staff member should commence the same. Thus, the very act of commencing a lockdown pursuant to the code blue guidelines is of a discretionary nature.

The remainder of the code blue guidelines likewise lacks the kind of clear, directory language prescribing a ministerial manner of performance. The guidelines provide that upon a lockdown order, "staff *should* immediately gather students, and if not already, escort them inside a classroom or securable room" and "*should* quickly check the lavatory and escort any students found to your classroom or securable room," if their classroom is right next to a student bathroom. (Emphasis added.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D. Staff

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[7]The general guidelines similarly provide in part: "Upon notification or personal observation that an emergency situation exists, it *may* become necessary for school administration to commence a 'lockdown' at any of our Newtown Public Schools. Generally, this order will be annoucned over the school's public address system. . . . However, depending on the circumstances, the lockdown order *can* also be given via telephone, two-way radio, and/or word of mouth." (Emphasis altered.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D.

members are told that they "*should* complete the following tasks," once inside a securable location and those assigned to the cafeteria "*should* perform the following tasks, in addition to those mentioned above."[8] (Emphasis added.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D. The actions of the faculty and staff upon notification of a code blue lockdown are clearly described with qualifying language of "may" or "should," indicating the ability to exercise judgment in performing the tasks. See *Ugrin* v. *Cheshire*, 307 Conn. 364, 392, 54 A.3d 532 (2012) ("[n]one of these comments constitutes a directive to the town giving rise to a ministerial duty because they all contain the qualifying words 'should' or 'could,' which indicates that the town had discretion to exercise its judgment in deciding whether to follow [the town counsel's] advice"). The code blue guidelines also provide that staff members assigned to the cafeteria should "[u]se a megaphone to announce the lockdown, *if possible*" and "move students/occupants into the kitchen area, *if possible*." (Emphasis added.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D. The use of the term "if possible" clearly qualifies these instructions, indicating that staff has discretion to exercise their judgment in determining how to proceed, in light of the situation and, whether it is safe or feasible to perform the tasks. See *Ugrin* v. *Cheshire*, supra, 392.

In addition to the qualifying language, the code blue guidelines do not prescribe any

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[8]Although the general guidelines provide that "staff shall complete one or more of the following tasks," and "[s]taff members assigned to the cafeteria during a lockdown shall perform the following tasks, in addition to those mentioned above"; Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D; this does not alter the court's conclusion that the lockdown guidelines, and particularly the code blue guidelines, are discretionary. The mere use of the word shall does not automatically render a task or function ministerial. See, e.g., *Coley* v. *Hartford*, supra, 312 Conn. 169-71; *Mills* v. *Solution, LLC*, supra, 138 Conn. App. 51. As with the code blue guidelines, the general guidelines do not prescribe any particular manner or order of performance, suggesting that faculty and staff retain discretion in performing those tasks even under the general guidelines. Further, the initial determination to commence a lockdown is discretionary under either set of guidelines and, thus, the duty to perform those tasks under the general guidelines would be triggered only once a lockdown order has been given. See *Wright* v. *Brown*, 167 Conn. 464, 471-72, 356 A.2d 176 (1975) (finding that initial determination of whether dog had bitten person was discretionary but subsequent duty to quarantine for fourteen days following that determination was ministerial).

particular manner of performance. Faculty and staff are told that they "should immediately gather students, and if not already, escort them inside a classroom or securable room that can be locked and secured from the inside." (Emphasis omitted.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D. This language, however, does not mandate that the location must always be one that can be locked and secured from the inside, leaving room for the exercise of judgment in light of the circumstances. Further, it does not preclude the possibility that leaving the school might be a better option. The code blue guidelines further provide that "[i]f your classroom is immediately adjacent to a student lavatory, you should quickly check the lavatory and escort any students found to your classroom or securable room." (Emphasis omitted.) Defs.' Mem. Summ. J., Ex. B; Pls.' Mem. Opp'n, Ex. D. Again, these code blue guidelines do not require that this be done, thus, leaving room for faculty and staff to evaluate the circumstances and determine whether that is an available and safe course of action. This allows the faculty and staff to exercise their judgment and decide whether it is safe to check the bathrooms, if there is time do so and, after the check is completed, whether it is safe to leave the bathroom to go to a classroom. Finally, the code blue guidelines include a list of tasks to complete once inside a securable location, such as turn off lights and close the window blinds. All of these provisions, however, lack any language mandating the order in which to complete the tasks, how certain tasks are to be performed, or that all tasks must be performed.

The plaintiffs contend that the code blue guidelines cannot be interpreted as discretionary because of specific language within the policy and the emphasis placed on certain words and phrases by way of bolding and underlining throughout both the general and code blue guidelines. The bottom of the first page of the lockdown guidelines states: "**Failure to comply with these rules can ultimately jeopardize the safety of all persons inside the classroom or neighboring classrooms in the immediate proximity.**" (Emphasis in original.) The plaintiff contends that this statement clearly indicates that the faculty and staff were to strictly comply with the directions in both the general and code blue guidelines. The code blue guidelines state that "The ONLY persons permitted in hallways or other non-securable locations inside the school building during a Lockdown-Code Blue are **law enforcement officers** from the Newtown Police

Department or Connecticut State Police. Staff members, including security officers, administration, and custodians must remain inside a secure location for the duration of the lockdown." (Emphasis in original.) On the basis of these statements and the emphasis contained therein, the plaintiffs argue that faculty and staff were required to remain inside the secure location and that Hochsprung, Sherlach, and Hammond violated this requirement when they left the conference room to investigate what was occurring.

Certainly, viewed in isolation, these statements, in conjunction with the emphasis added, might be construed as mandating strict compliance with the code blue guidelines. Mandatory or forceful language, however, does not necessarily render a duty ministerial as opposed to discretionary. See *Coley* v. *Hartford*, supra, 312 Conn. 169. "The mere fact that a statute uses the word 'shall' in prescribing the function of a government entity or officer should not be assumed to render the function necessarily obligatory in the sense of removing the discretionary nature of the function, and it is therefore not sufficient that some statute contains mandatory language nor that the public entity or officer was under an obligation to perform a function that itself involves the exercise of discretion." (Internal quotation marks omitted.) *Mills* v. *Solution, LLC*, supra, 138 Conn. App. 51; see also *Coley* v. *Hartford*, supra, 171 ("we decline the plaintiff's invitation to parse the policy language so as to create a ministerial duty to remain at the scene notwithstanding the discretionary performance of that duty"). To be clear, the court is not discounting the weight of this language and that it urges faculty and staff to adhere to the code blue guidelines and remain in a secure location. The court, equally, cannot discount the realities of an emergency and the necessity of discretion in responding to one. This is precisely why we afford police broad discretion. See, e.g., *Coley* v. *Hartford*, supra, 165 (recognizing the "considerable discretion inherent in law enforcement's response to an infinite array of situations implicating public safety on a daily basis"); see also *Gordon* v. *Bridgeport Housing Authority*, 208 Conn. 161, 180, 544 A.2d 1185 (1988) ("[t]he failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort against a city" [internal quotation marks omitted]). Accordingly, as in *Coley* and *Mills*, the court will not parse the language of either the general or code blue guidelines to find a ministerial duty to follow them in a strict

manner absent any exercise of judgment.

Furthermore, the plaintiffs' interpretation of the general and code blue guidelines would lead to bizarre and unworkable results contrary to the principles of statutory construction. For instance, under the interpretation advanced by the plaintiffs, it is a ministerial duty for all faculty and staff to remain inside a secure location. The plaintiffs assert this because the general guidelines provide that only a school resource officer or law enforcement officers are allowed in the hallway or non-securable location and the code blue guidelines provide that only law enforcement officers are allowed in the hallways and non-secure locations. This would be an illogical requirement because it would inhibit the ability of faculty and staff to evaluate the circumstances and determine the best course of action to take to protect those in the school. For example, Richard Thorne, a custodian at the school, was on the line with a police dispatcher from the beginning of the attack until the police arrived. Defs.' Mot. Summ. J., Ex. F ¶¶ 6-10; Pls.' Mem. Opp'n, Ex. M p. 11. During that time, he relayed information to the dispatcher that was then relayed to the police. Pls.' Mem. Opp'n, Ex. O. Additionally, he cleared the hallway of staff and students in part of the school. Defs.' Mot. Summ. J., Ex. F ¶¶ 11-13. His actions kept the police informed and helped get people to safety but his actions would be considered in violation of a ministerial duty if the plaintiffs' interpretation of the general and code blue guidelines were to be adopted. The record indicates that some students and staff escaped the school, some by climbing out windows. See Pls.' Mem. Opp'n, Ex. M pp. 11, 13; Pls.' Mem. Opp'n, Ex. O pp. 2, 4. Said staff would have violated ministerial duties because they did not remain inside a secure location or because they opened a window rather than closed the window blinds and stayed out of sight if the plaintiffs' interpretation was adopted.

The plaintiffs' interpretation of these guidelines as strict, inflexible directives that must be adhered to in a prescribed manner, would place the faculty and staff in compromising situations, like the ones described above. See *Ugrin* v. *Cheshire*, supra, 307 Conn. 383. Instead, a reasonable and workable interpretation of the code blue guidelines; see *Ventura* v. *East Haven*, supra, 170 Conn. App. 404-405; is as a resource for faculty and staff, providing advice on how to respond to an emergency situation "rather than as strict policy directives that they were obligated

to adhere to without the exercise of discretion or independent judgment." *Washburne* v. *Madison*, 175 Conn. App. 613, 626, 167 A.3d 1029 (2017). A "guideline" is commonly understood to reflect an informed suggestion or general instructions. See, e.g., *Washburne* v. *Madison*, supra, 626 ("[i]n common parlance, a 'guideline' is generally understood to reflect an informed suggestion"); *DiMiceli* v. *Cheshire*, Superior Court, judicial district of New Haven, Docket No. CV-11-6020016-S (March 13, 2014, *Fischer, J.*) (holding that United States Consumer Product Safety Commission's Handbook for Public Playground Safety standards did not impose ministerial duties on defendant but were available for guidance), aff'd, 162 Conn. App. 216, 131 A.3d 771 (2016). Thus, in the absence of specific and clear directory language, the lockdown guidelines "were informative rather than mandatory in nature." *Washburne* v. *Madison*, supra, 626.

"A ministerial duty on the part of an official often follows a quasi-judicial determination by that official *as to the existence of a state of facts*. Although the determination itself involves the exercise of judgment, and therefore is not a ministerial act, the duty of giving effect, by taking appropriate action, to the determination is often ministerial." (Emphasis in original; internal quotation marks omitted.) *Smart* v. *Corbitt*, supra, 126 Conn. App. 801-802. Therefore, even assuming that performance of the tasks was a ministerial duty, whether under the general or code blue guidelines, the initial determination to commence a lockdown was a discretionary decision. See, e.g., *Wright* v. *Brown*, 167 Conn. 464, 471-72, 356 A.2d 176 (1975) (finding that initial determination of whether dog had bitten person was discretionary but subsequent duty to quarantine for fourteen days following that determination was ministerial); *Smart* v. *Corbitt*, supra, 802 ("determination that a fire existed and how best to alert emergency dispatch of its location . . . was a discretionary determination that triggered the alleged ministerial duty"). Thus, even if the court were to interpret as ministerial the tasks that were to be carried out after a lockdown was initiated, this duty was not triggered because no lockdown order was given to commence the lockdown procedure and tasks. Defs.' Mem. Summ. J., Ex. C ¶ 24; Defs.' Mem. Summ. J., Ex. D ¶ 27.

As previously mentioned, in addition to the general and code blue lockdown guidelines,

the plaintiffs submit an array of other documents relating to emergency preparedness, such as an Incident Command System (command system) with district contact information and various sets of guidelines for different types of incidents, the school emergency section of the town's Emergency Operations Plan (operations plan), and the school's emergency response plan, establishing guides for different situations (response plan). The very breadth of emergency response guides suggests that only one response to an emergency situation cannot be dictated because the possible scenarios are endless. General emergency scenarios can be anticipated and guides can be created to help inform the response; however, it would be nonsensical to mandate that officials respond to an emergency in a prescribed manner, without the use of judgment in evaluating the circumstances of a particular emergency. In fact, the end of the school's response plan recognizes this, stating: "While not every crisis can be anticipated and a response scripted, we can have in place these guidelines for action steps." Pls.' Mem. Opp'n, Ex. C.

The plaintiffs' reliance on the command system and operations plan is misplaced. The command system states that it "is a field management system that has a number of basic system features. Because of these features, [the command system] has the flexibility and adaptability to be applied to a wide variety of incidents and events both small and large." Pls.' Mem. Opp'n, Ex. A. It is unclear, upon review of the command system, what a field management system is exactly or when this system would be applicable as such is not defined. A sensible reading of the command system would be as a structure for faculty and staff to manage the response to a particular incident. For example, the command system describes the type of facilities that are most commonly necessary for the school to function once an incident occurs, such as a command post, staging area, and incident base. Pls.' Mem. Opp'n, Ex. A pp. 8-9. "The Incident Command Post (ICP) is the location at which the primary command functions are performed." Pls.' Mem. Opp'n, Ex. A. "A staging area is a temporary location at an incident where personnel and equipment are kept while awaiting assignments." Pls.' Mem. Opp'n, Ex. A. "All primary service and support for the incident are usually located and performed at the [Incident] Base." Pls.' Mem. Opp'n, Ex. A. As provided in the documentation, the command system would be inapplicable in the midst of an incident or, at the very least, during the initial moments. To deem

otherwise would be illogical because during the hectic first moments of an emergency, such as a shooting, the faculty and staff cannot set-up a command post or a staging area while gunfire is occurring around them. Rather, the implementation of the command system and the establishment of these areas must logically take place in the aftermath of the incident, as officials are responding to the emergency. This interpretation is supported by the State Police time line, which the plaintiffs submit as Exhibit O, and that demonstrates the sequence of events. Pls.' Mem. Opp'n, Ex. O. Several individuals in the school called 911 as the shooting was unfolding and then, when the State Police, Newtown Police Department, and other first responders arrived at the incident, the field management system was established. See Pls.' Mem. Opp'n, Ex. O. Command centers were established, staging areas were set-up for emergency personnel, law enforcement, evacuated students and personnel, and arriving parents, and perimeters were set-up to keep bystanders back. Pls.' Mem. Opp'n, Ex. M, pp. 14, 23; Pls.' Mem. Opp'n, Ex. O, pp. 11, 14-15, 21-22, 24-25, 30. Accordingly, the command system did not impose any kind of ministerial duties on the faculty and staff in responding to the shooting because, when to set up the incident facilities was a wholly discretionary function. Moreover, the plaintiffs fail to point to any language in the documents that mandates such action or creates ministerial duties.

Next, the operations plan is not specific to any lockdown guidelines and in fact, does not even reference the lockdown guidelines. Pls.' Mem. Opp'n, Ex. B. Rather, the operations plan sets forth a broad structure for preparing and responding to an array of incidents and states that "[t]his plan is designed so that its preparedness and response components will meet the requirements of any foreseeable disaster, either those requiring coordination with other town authorities or those to which the department would respond unilaterally." Pls.' Mem. Opp'n, Ex. B. The plan concerns different phases of an emergency: "Increased Readiness or Watch Phase"; "Emergency Phase"; and "Recovery Phase"; and discusses weather-related emergencies and scenarios that may involve evacuation. Pls.' Mem. Opp'n, Ex. B. Thus, the operations plan cannot be read rationally to clearly compel a prescribed manner of action in implementing any lockdown guidelines. Finally, "assignments" in the operations plan, that list the responsibilities for superintendents, principals, teachers, etc; do not equate to ministerial duties. See *Ventura* v.

East Haven, supra, 170 Conn. App. 406-407. The operations plan does not limit those with listed responsibilities to complete *only* the tasks listed, prescribe an order to complete the tasks, and does not enumerate every action that must be taken, as evidenced by the fact that each listed responsibility is prefaced with the phrase: "are responsible for, *but not limited to*, the performance of the following functions under this plan." (Emphasis added.) Pls.' Mem. Opp'n, Ex. B.

Although certain tasks in the operations plan, read alone, may appear to mandate certain actions, as the plaintiffs suggest to the court, the operations plan as well as the entire set of emergency preparedness documents presented by the plaintiffs "must be read as a whole, and cannot be parsed to force the reading of one paragraph in a proverbial vacuum." *Ventura* v. *East Haven*, supra, 170 Conn. App. 408. When read together, the task assignments in the operations plan and the lockdown guidelines make sense only with the understanding that they do not impose ministerial duties on the faculty and staff but, rather, are meant to guide and inform their response to an emergency while retaining the ability to use judgment. See *Smart* v. *Corbitt*, supra, 126 Conn. App. 801 ("[t]here is a difference between laws that impose general duties on officials and those that mandate *a particular response to specific conditions*" [emphasis in original; internal quotation marks omitted]).

The fundamental policy underlying discretionary act immunity, allowing "government officers and employees [freedom] to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits"; *Doe* v. *Petersen*, 279 Conn. 607, 615, 903 A.2d 191 (2006); strongly weighs against interpreting any of the emergency preparedness documents submitted by the plaintiffs as imposing ministerial duties. Faculty and staff in a school responding to an emergency are in a situation analogous to that faced by police or other first responders, where the goal of governmental immunity holds similar weight, because of the need to make split-second decisions in "[responding] to an infinite array of situations implicating public safety on a daily basis." *Coley* v. *Hartford*, supra, 312 Conn. 165; see also *Edgerton* v. *Clinton*, supra, 311 Conn. 237 (noting that 911 dispatcher operates under time pressure); *Smart* v. *Corbitt*, supra, 126 Conn. App. 801 (concluding that defendant police officer's acts or omissions were discretionary because he "was responding to a public emergency,

which is a typical police officer function, in which he was required to use his judgment and to make split-second decisions"). In the present case, faculty and staff had to make split-second decisions in the face of an armed gunman and subjecting their decisions to scrutiny, aided by hindsight, would no less serve the public interest than subjecting a police officer's discretionary decisions to second-guessing. See *Coley* v. *Hartford*, supra, 172. In short, the actions of the faculty and staff in responding to the attack by Lanza required the exercise of discretion and immunity will apply unless the plaintiffs fall within an applicable exception.[9]

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[9]The plaintiffs also argue that a ministerial duty imposed on the defendants is an alleged district policy whereby teachers were to lock their classroom doors in the morning, thus allowing them to be slammed shut in the event of a lockdown. As evidence of this policy, the plaintiffs submit a newspaper article; Exhibit F; within which this policy is referenced in a paraphrased quote and statement attributed to Janet Robinson. The plaintiffs argue that the newspaper article and the statements made within are admissible because they provided an affidavit that avers that the article was published and that such is a business record. This newspaper article and the statements attributed to Robinson are hearsay; see, e.g., *Cherniske* v. *Jajer*, 171 Conn. 372, 376-77, 370 A.2d 981 (1976); *Windsor* v. *Loureiro Engineering*, Superior Court, judicial district of Hartford, Docket No. CV-11-6023672-S (October 7, 2015, *Sheridan, J.*); and it is improper for the court to consider the same on a motion for summary judgment. See *Nash* v. *Stevens*, 144 Conn. App. 1, 15, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013) ("[o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment" [internal quotation marks omitted]). Furthermore, a newspaper article is not a proper business record pursuant to General Statutes § 52-180 and § 8-4 of the Connecticut Code of Evidence and, even if it could be considered, the affidavits provided by the plaintiffs fail to properly authenticate the same pursuant to the statutory requirements in § 52-180. See *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 656, 137 A.3d 1 (2016). The plaintiffs submit two affidavits of Emily Lukasiewicz (Exhibits G & H). In one, Ex. G, she attests that she is a custodian of records at the Hartford Courant and that attached as exhibit A is a true and correct copy of an article titled "Schools Told To Give Substitutes Keys" published on February 1, 2013. This affidavit does not attach a copy of the subject article as required by Practice Book § 17-46 and, moreover, does not satisfy the foundational requirements of § 52-180. The second affidavit, Ex. H., references an article not submitted as evidence by the plaintiffs nor attached to the affidavit itself. Accordingly, the article cannot be reviewed by the court as it fails to comply with the business records exception to the hearsay rule and, thus, to the extent that the plaintiffs argue that Robinson's statements may fall within another hearsay exception, the court need not address the same because the plaintiffs have failed to properly authenticate the newspaper article.

B

Exceptions to Discretionary Act Immunity

As previously provided, the only exception the plaintiffs raise is the identifiable person, imminent harm exception. It is undisputed that when Lanza forced his way into the school, the plaintiffs' decedents were members of an identifiable class of foreseeable victims. See *Martinez* v. *New Haven*, supra, 328 Conn. 4. The defendants do not dispute, for purposes of this motion, that at the moment of the attack, the plaintiffs' decedents were subject to imminent harm. Accordingly, the court focuses its analysis on the apparentness prong.

"In order to meet the apparentness requirement, the plaintiff must show that the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm. . . . This is an objective test pursuant to which we consider the information available to the government agent at the time of her discretionary act or omission . . . . We do not consider what the government agent could have discovered after engaging in additional inquiry . . . . Imposing such a requirement on government officials would run counter to the policy goal underlying all discretionary act immunity, that is, keeping public officials unafraid to exercise judgment ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Edgerton* v. *Clinton*, supra, 311 Conn. 231-32.

In their objection to the defendants' motion for summary judgment, the plaintiffs argue that any reasonable individual would have known that leaving room nine upon hearing gunfire would expose the students, faculty, and staff to imminent harm; and moreover, that when Hammond was shot and returned from investigating the noises in the hallway, without Hochsprung and Sherlach, that it would have been especially apparent that a failure to initiate a lockdown or a code blue, would subject the students, faculty, and staff to imminent harm. For purposes of this exception, however, what a reasonable individual would have done or been aware of is irrelevant because ordinary negligence principles do not apply. See, e.g., *Brooks* v. *Powers*, supra, 328 Conn. 273 (holding that plaintiff could not prevail even under ordinary negligence principles and noting that "fundamental negligence principle," regarding foreseeability, "establishes a standard that is indisputably less demanding than the burden on the

plaintiff to demonstrate the applicability of the identifiable person, imminent harm exception to discretionary act immunity"); *Haynes* v. *Middletown*, 314 Conn. 303, 321, 101 A.3d 249 (2014) (contrasting "demanding imminent harm standard" with ordinary negligence standard).

Indeed, in *Edgerton* v. *Clinton*, supra, 311 Conn. 217, the justices in the majority disagreed with the dissenting justice's assertion that a material issue of fact existed regarding whether the defendant dispatcher acted as a reasonable dispatcher under the circumstances. Id., 228 n.10.[10] Justice Zarella, author of the majority opinion stated: "Imposing liability when a municipal officer deviated from an ordinary negligence standard of care would render a municipality's liability under § 52-557n no different from what it would be under ordinary negligence. This would run counter to the purpose of governmental immunity, which is to protect a municipality from liability arising from a municipal officer's negligent, discretionary acts unless the officer's duty to act is clear and unequivocal. . . . Therefore, unlike under an ordinary negligence standard of care, under the apparentness requirement of the identifiable person-imminent harm exception, there is no inquiry into the ideal course of action for the government officer under the circumstances. Rather, the apparentness requirement contemplates an examination of the circumstances of which the government officer could be aware, thereby ensuring that liability is not imposed solely on the basis of hindsight, and calls for a determination of whether those circumstances would have revealed a likelihood of imminent harm to an identifiable person." (Citations omitted.) Id.

With these legal principles in mind, the court turns to the evidence submitted by the parties and the circumstances the faculty and staff faced during the attack to determine whether the apparentness requirement is met. The exhibits submitted by both parties establish the following undisputed facts. On December 14, 2012, shortly after 9:30 a.m., Lanza, armed with a rifle, two pistols, and a large amount of ammunition, shot his way into the school. Hochsprung

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[10] In *Edgerton*, the court found that it could not have been apparent to the emergency dispatcher that her actions or inactions in responding to a volunteer firefighter's 911 call would likely have subjected a passenger in the vehicle being pursued by the volunteer firefighter, to imminent harm. *Edgerton* v. *Clinton*, supra, 311 Conn. 226-27, 234-39.

and Scherlach left room nine to investigate what was happening, followed shortly after by Hammond. Hochsprung and Sherlach were immediately confronted by Lanza and were shot and killed. Hammond was shot twice and another teacher down the hall was struck in the foot by a bullet. Hammond managed to crawl back inside room nine, where other staff and a parent remained, and the parent called 911. During that call, the parent told the dispatcher she believed the shooter was right outside the door, which Hammond held shut. During this time, Lanza inexplicably entered and then exited the main office, without shooting anyone. In an unknown order, he entered classrooms eight and ten, and shot and killed twenty children and four adults, before killing himself. The first 911 call was received at 9:35:39 a.m., and at 9:40:03 a.m., a single final shot, believed to be the suicide shot, was heard. The teacher shot in the foot called 911 at 9:38:00 a.m., and the call from the parent in the conference room was received at 9:38:43 a.m., where she informed the dispatcher that an adult in the room with her had been shot twice. Thus, in just three minutes Hochsprung and Sherlach were killed and Hammond and the other teacher were shot. In approximately two minutes, another twenty people were killed before Lanza committed suicide. Ultimately, twenty-six people were killed and others were wounded in approximately five minutes.

It is beyond cavil that the faculty and staff faced a horrible and unimaginable situation on the morning of December 14, 2012. The exact nature and extent of this attack was unknown to the individuals in room nine, as they did not know if there was more than one shooter or if the person who shot Hochsprung, Sherlach and Hammond was right outside the door, preparing to try and break in. See Pls.' Mem. Opp'n, Ex. O p. 4 (parent in conference room told dispatcher she believed shooter right outside the door). The individuals in the room, however, knew that two co-workers lay dead and a third was injured, shot twice by a high-powered weapon, while numerous gunshots continued to ring out. See Defs.' Mem. Summ. J., Ex. C ¶¶ 20-21; Defs.' Summ. J., Ex. D ¶¶ 19-25; Pls.' Mem. Opp'n, Ex. O pp. 4-5.

These were extraordinary circumstances, in which the individuals in room nine were forced to make split-second decisions while under attack themselves. Indeed, it bears repeating that Hammond had been shot twice and, thus, those in room nine were immediately dealing with

an emergency along with grappling with the fear that the shooter was outside their door. Defs.' Mem. Summ. J., Ex. D ¶ 24; Pls.' Mem. Opp'n, Ex. O p. 4. In a situation so extraordinary and unique, and so chaotic and violent, it could not have been apparent that their actions or inactions were likely to subject the students and other faculty to imminent harm. The State Police time line; Pls.' Mem. Opp'n, Ex. O; catalogues how rapidly the events of that morning unfolded. In an emergency situation, whereby those deemed to react in a discretionary manner are themselves under attack, no reasonable jury could find that anything would have been apparent to these individuals, under such explosive and rapidly evolving circumstances, as a matter of law.

"Discretionary decisions by government actors inevitably impact the lives of private individuals, sometimes with harmful effects. Moreover, such decisions are inescapably imperfect"; *Schnurr* v. *Board of County Commissioners*, 189 F. Supp. 2d, 1105, 1119 (2001); but imposing liability for every injurious consequence would ill serve the goal of keeping public officials and employees unafraid to exercise judgment. *Edgerton* v. *Clinton*, supra, 311 Conn. 232; see also *Evon* v. *Andrews*, 211 Conn. 508. Under these circumstances, the policy behind governmental immunity would be undermined if a jury, with the benefit of hindsight and the ability to consider options while not in the midst of a volatile emergency situation, were allowed to judge the actions of the faculty and staff in room nine that day. See *Edgerton* v. *Clinton*, supra, 228 n.10.

The following language in *Coley* v. *Hartford*, supra, 312 Conn. 172, is particularly applicable to this case: "The facts in the present case are undeniably tragic, and, understandably, the parties are left questioning whether anything more could have been done to prevent the realities that unfolded. It is, however, precisely because it can always be alleged, in hindsight, that a public official's actions were deficient that we afford limited governmental liability for acts that necessarily entailed the exercise of discretion. We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of [an official's] discretionary professional duty. Such discretion is no discretion at all." (Internal quotation marks omitted.) Id. The allegedly negligent acts of the individuals in the conference room required the exercise of discretion and the identifiable person, imminent harm

exception does not apply. Accordingly, the defendants are immune from liability.

III

CONCLUSION

For the foregoing reasons, the defendants' are entitled to judgment as a matter of law. Accordingly, the motion for summary judgment is granted.[11]

Robin L. Wilson

Wilson, J.

5/7/2018

[11]As the court has decided that the plaintiffs' claims against the defendants are barred by governmental immunity, the court need not address the defendants' alternative arguments.