DOCKET NO. CV-02-0819015-S

MARIA TORRES, INDIVIDUALLY AND AS ADMINISTRATRIX	:	SUPERIOR COURT
VS.	:	JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
STATE OF CONNECTICUT, Department of Correction	:	JANUARY 13, 2005

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLYING TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In an attempt to distract this Court from the essential flaws in their case, plaintiffs have cross-moved for summary judgment in a case in which they bear the burden of proof and in which there are so many disputed facts that there is no reasonable likelihood of summary judgment in their favor. Indeed, plaintiffs' "Statement of Facts", while having some emotional appeal, is entirely removed from the facts in this case, is unsupported by the attachments plaintiffs provide, and is at best sensationalism. Granting plaintiffs' Motion for Summary Judgment for judgment in their favor with numerous disputed issues and with no real basis in law would fly in the face of long-established precedent.

Plaintiffs seek to maintain this action despite the lack of any legal duty on behalf of the defendant State of Connecticut Department of Correction, which is the basis for defendant's Motion for Summary Judgment. Defendant urges this Court to consider this matter based on the verifiable undisputed facts before it and not be deterred by plaintiffs' stretching of both the facts and the law in this matter. The real question before this Court is the existence of a duty to the

plaintiffs. "The determination of whether a duty exists between individuals is a question of law. . . . ***Only if a duty is found to exist does the trier of fact go on to determine whether the defendant has violated that duty."*** *Biller Assocs. v. Peterken,* 269 Conn. 716, 722 (2004) (emphasis added); *see also Dugan v. Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 807 (2003).

Defendants address in this memorandum both the plaintiffs' Cross Motion for Summary Judgment and the plaintiffs' argument as to why a duty exists. Defendants note that, despite the existence of numerous factual disputes which preclude judgment as a matter of law for plaintiffs, who bear the burden of proof, there exist no factual disputes which render this case inappropriate for summary judgment in defendant's favor on the sole legal issue of whether a duty was owed or not. This is because the issue of duty is one this Court can decide based upon the undisputed facts as alleged by plaintiffs: A convicted offender in the custody of the Connecticut Commissioner of Correction, after never having been in that custody before, escaped that custody after never having escaped custody before and, two months later, killed a child with whom he had no previous contact in a state to which the defendant did not know he had traveled.

These facts alone preclude any legal duty upon the defendant State, and those facts which plaintiffs seek to churn about are then irrelevant. As already stated, the existence of a duty is entirely a question of law to be determined by the Court. Prosser & Keeton on the Law of Torts § 37, at 236 (W. Keeton 5th ed. 1984). For this reason, the defendant will first address plaintiffs' arguments regarding the existence of a legal duty. The defendant State will then

demonstrate why the extraneous facts plaintiffs allege are insufficient to render summary judgment in plaintiffs' favor.

A. There is No Legal Duty in this Case

Plaintiffs quarrel with the applicability of the public duty doctrine in this case, and also quarrel with defendant's assertion that, no matter how tragic this case, the law does not impose on Connecticut officials a duty to every conceivable victim of an escaped criminal. In the end, a foreseeable victim is required in every negligence case, regardless of the nature of the defendant.

The public duty doctrine is merely an expression of the undeniable fact that "Private persons do not possess public duties." *Stone v. North Carolina,* 347 N.C. 473, 478 (N.C. 1998). While private persons do not possess public duties, there are times, such as this, when the law attempts to treat a public entity as if it were private, that is, as if it were not in possession of sovereign immunity. It is the victim and his or her forseeability, and the nature of the duty, rather than the nature of the defendant, that determines when the public duty doctrine applies or, for that matter, when a duty exists for any negligence defendant.

1. Public Duty Doctrine Survives Waiver of Sovereign Immunity

That the legislature's waiver of sovereign immunity in Connecticut seeks to put a state entity in the same position as if it were a private entity is clear, as that is what Connecticut's statute sets forth:

> The General Assembly may … reject any such [Claims Commissioner] recommendation and grant or deny the claimant permission to sue the State under the provisions of this section when the General Assembly deems it just and equitable and believes the claim to present an issue of law or fact under which the State, were it a private person, could be liable.

Conn. Gen. Stat. § 4-159.

Putting the State in the shoes of a private person, however, does not mean that the public duty doctrine is inapplicable. Indeed, when a state has contracted its public duty to be performed by a private corporation, the public duty doctrine has been applied to the private corporation. *Tri-State Mint, Inc. v. Riedel Environmental Services*, 29 F.3d 424 (1994). In *Tri-State Mint, Inc.*, a state hired a private corporation to test for hazardous substances. *Id.* at 425. An allegation that the corporation performed negligently was "legally barred under the public duty doctrine". *Id.* at 426. The Eighth Circuit Court of Appeals reasoned "the duty of the State of South Dakota regarding discharges of hazardous waste … are **public duties** and when the State hired the defendant [corporation] to test substances in question the duties created by that employment remained a **public duty**…. [The corporation] owes no duty to any private persons." *Id.* (emphasis added).

Numerous courts have noted the distinction between a defendant invoking the public duty doctrine and a lack of sovereign immunity. The Court of Appeals of Missouri states, "It has long been held that the abrogation of sovereign immunity … in no way impliedly abrogated the public duty doctrine." *Green v. Missouri Highway & Transp. Comm'n.*, 2004 Mo. App. LEXIS 1716 (Mo. App. Nov. 12, 2004), attached. The Ninth Circuit, applying the law of the State of Washington, clarified the confusion between sovereign immunity and the public duty doctrine as follows:

> **[U]nder Washington law, the liability of a state of municipal governmental entity is the same as that of a private person or corporation. …Although Washington recognizes a "public duty doctrine" applicable to actions of law**

> **enforcement officers, … this is merely "a mechanism for focusing upon whether a duty is actually owed to an individual claimant." … The Washington court has noted that the abrogation of sovereign immunity "was not intended to create new duties where none existed before."**

Louie v. United States, 776 F.2d 819, 825 (9th Cir. 1985); *see also Jeffrey v. West Virginia Department of Public Safety*, 204 W. Va. 41, 43, 511 S.E.2d 152, 154 (W. Va. 1998).

The federal courts provide significant guidance in this area. The Federal Torts Claim Act, like Connecticut's law in this case, holds that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Applying this law, federal courts still apply the public duty doctrine when considering claims under state law against the United States, as required by the Federal Torts Claim Act. *See, e.g., Saunders v. United States*, 99 Fed. Appx. 814, 2004 U.S. App. LEXIS 10332 (9th Cir. 2004); *Dawkins v. United States*, 226 F. Supp.2d 750 (M.D.N.C. 2002); *Grange Ins. Assoc. v. United States*, 1989 U.S. Dist. LEXIS 17389 (W.D. Wash. 1989), attached. In *Saunders*, the Ninth Circuit noted that one case holds "a duty to all is a duty to no one", especially when there is no obligation to "identify and protect a particular and circumscribed class of persons." *Id.*

2. The Public Duty Doctrine Applies to State

The plaintiffs argue that the public duty doctrine "has absolutely no application to this action." Pl. Br. 5. The plaintiffs claim that the public duty doctrine applies only to actions against municipal employees, and goes so far as to claim that defendants have not "located any Connecticut case in which the Court precluded a claim against a state entity based on the public duty doctrine." Pl. Br. 6; 6 n. 1. Both claims are erroneous.

a. Connecticut Law

The very first case in Connecticut in which the public duty doctrine was applied, *Leger v. Kelley,* 142 Conn. 585 (1955), is a Connecticut Supreme Court matter in which the Connecticut Supreme Court did, in fact apply the public duty doctrine **to a state official**. *Id.* at 586-591. The defendant in *Leger* was the former Commissioner of Motor Vehicles, and was sued in connection with his duties as a state Commissioner. *Id.* at 586. The Commissioner was accused of performing his duty to ensure that a given car had required safety glass pursuant to state statute. *Id.*

In applying the public duty doctrine to this State Commissioner, the Connecticut Supreme Court did not distinguish between state or municipal entities, but rather, referred to "public officials" generally. *Id.* at 589, 590. Indeed, the Court stated the "test" of liability as follows:

> [T]he test is this: If the **duty** imposed upon the **public** official …is of such a nature that the performance of it will affect an individual in a manner different in kind from the way it affects the **public** at large, the statute is one which imposes upon the official a **duty** to the individual, and if the official is negligent in the performance of that **duty** he is liable to the individual.

Id. at 590-591 (emphasis added).

If, as plaintiffs allege, only municipal entities were entitled to invoke the public duty doctrine, then municipal entities would be entitled to greater protection under the law than state entities, a surprising outcome. Indeed, one Judicial District recently applied the public duty doctrine to the State of Connecticut Department of Public Health, just as in this case defendant seeks its application to the State of Connecticut Department of Correction. *Ward v. Greene,*

2001 Conn. Super. LEXIS 714 (J.D. New London March 8, 2001), attached. Applying the public duty doctrine as set forth in *Leger*, *supra*, the Court noted, "any duties imposed by Section 17a-106 are **public duties, i.e. DPH's duty was public in nature and it owed no specific duty"** to the plaintiff to conduct a background check in a certain manner. *Id.* at *12. The Court found no specific duty owed to plaintiff **even when investigating a specific day care operator/foster mother where the plaintiff's particular children** were sent and even when the plaintiff's child died due to harm inflicted by the defendant provider! *Id.* In applying the public duty doctrine to the State of Connecticut Department of Public Health, the Court relied upon the language of the Connecticut Supreme Court in *Shore v. Stonington:*

> If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public and not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it or to perform it properly, is an individual wrong, and may support an individual action for damages.

187 Conn. 147, 152 (1982).

If the public duty doctrine applies precludes plaintiff's claim in *Greene* against a state entity and in the context of a far more foreseeable victim than the one in this case, it would be illogical not to apply it in this case.[1]

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[1] The plaintiffs rely upon *Short v. State*, which it attaches. Plaintiffs cite this case as holding that the public duty doctrine does not apply to a state entity, however, that case states in a contrary fashion, "the 'official responsibility rule' as articulated in *Shore* is applicable only where a plaintiff sues an individual as an officer of the State." *Id.* What the *Short* case did hold was that the defendant needed to be an individual and not a state or municipal Department or entity. *Id.* at 3. This holding misunderstands the public duty doctrine, however, which depends *not* on the identity of the defendant but on the nature of the duty owed.

The *Greene* case is not singular in its recognition that the public duty doctrine applies to the State of Connecticut. In *Nealy v. State of Connecticut*, the trial court considered the public duty doctrine as it applied to the State, noting, "**A negligence action against a state or local government entity cannot be predicated on the breach of a general duty owed to the public."** *Nealy v. State of Connecticut*, 1997 Conn. Super. LEXIS 2552, *5 (J.D. Waterbury 1997) (emphasis added), attached to defendants Motion for Summary Judgment. With no question that the public duty doctrine applied to the defendant State, the Court further noted that the law requires "a showing of harm to an identifiable victim." *Id.*, quoting *Shore, supra*, 187 Conn. at 156.

In *Nealy*, the plaintiffs were passengers in a car driven by an intoxicated person. *Id.* at *6. The car was stopped by state troopers, who took the names and ran checks on all the passengers, ultimately plaintiffs, then let the car go. *Id.* The plaintiffs later alleged that the troopers should have recognized the driver as intoxicated. *Id.* Clearly, these plaintiffs were not only identifiable but had been identified! *Id.* Thus, the public duty doctrine was not applicable in that there were identifiable victims. *Id.* The Court carefully considered the doctrine's applicability in *Nealy*, however, and never concluded that, had the car been stopped by municipal officers, the public duty doctrine might apply, but that it would not apply given the State as a defendant.

The public duty doctrine should and does apply equally to the State as to municipal defendants as it is grounded in the nature of the duty, not the nature of the defendants.

Connecticut courts have applied the public duty doctrine to the State, and it is plaintiffs who have failed to provide contrary authority.

b. Law Generally Applies to State Defendants

Other states applying the public duty doctrine routinely apply it to a state as defendant or to defendant state entities. In *Green, supra,* 2004 Mo. App. LEXIS 1716, the Missouri Appellate Court affirmed an application of the public duty doctrine to the state Department of Transportation noting the plaintiff "was required to plead facts establishing … individual duty to her." *Id.* at *14. Other courts have applied the public duty doctrine to, inter alia, the government of the Virgin Islands,[2] the State of West Virginia,[3] the District of Columbia,[4] the State of Iowa,[5] the State of North Carolina Department of Labor,[6] and the State of Utah.[7] Thus, plaintiffs' argument that the public duty doctrine is inapplicable to a state entity fails.

3. The Public Duty Doctrine Applies to these Facts

Indeed, courts have persuasively applied the public duty doctrine to state defendants given facts with striking similarity to those at hand in this matter. In *Tucker v. Department of Correction,* 207 W.Va. 187, 530 S.E.2d 448 (W. Va. 1999), an inmate with a history of violence escaped the State's custody while on furlough and killed the decedent, within the same state. *Id.*

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[2] *Perez v. Gov't. of the Virgin Islands,* 847 F.2d 104 (3d Cir. 1988).
[3] *Jeffrey v. West Virginia Department of Public Safety,* 204 W. Va. 41, 511 S.E.2d 152 (W. Va. 1998).
[4] *Allison Gas Turbine Division of GM Corp. v. District of Columbia,* 642 A.2d 841 (D.C. App. 1994).
[5] *Bockelman v. Iowa,* 366 N.W.2d 550 (Iowa 1985).
[6] *Hunt v. N.C. Department of Labor,* 348 N.C. 192, 499 S.E.2d 747 (1998).
[7] *Ferree v. State of Utah,* 784 P.2d 149 (1989).

at 188. The State's Supreme Court affirmed the application of the public duty doctrine in this case in which the decedent had no relation whatsoever to his killer. *Id.* The Court stated, "the 'public duty doctrine' is a doctrine which, independent of the constitutional doctrine of governmental immunity, holds, in its common law form, that a recovery for negligence may be had against the State … acting in a nonfraudulent, nonmalicious or nonoppressive manner, only if the State had a 'special relationship' with the party." *Id.* at 189. The Court noted the lack of any "special relationship" between the victim and the State. *Id.* at 190.

The Utah Supreme Court similarly affirmed a case in which an inmate on work release killed plaintiff's decedent. *Ferree v. State*, 784 P.2d 149 (Ut. 1989). Plaintiff had complained about the placement of the inmate turned killer at a half-way house, a classification decision by the defendants. *Id.* at 150. The Court noted, as a policy matter that to allow plaintiff's recovery:

> Would impose too broad a duty of care on the part of Correctional Officers toward individual members of the public. It would expose the state to potentially every wrong that flows from the necessary programs of rehabilitation and paroling of prisoners.

Id. at 151.

4. Discretionary Acts, not Ministerial, Constitute Plaintiffs' Allegations

The plaintiffs set forth facts claiming that the classification of the inmate in this case ignored numerous risk factors, that placing the inmate in a medium level facility caused his escape, and the like. Plaintiffs then claim, laughably, that the actions complained of in this case were ministerial, not discretionary, and thus the public duty doctrine is inapplicable. This argument is unpersuasive. If no discretion were involved in Connecticut's maintenance of Quiles, there would be no complaint that the defendant State improperly classified him,

improperly granted him a job with access to the outside, or improperly put him in a facility with only one fence. The plaintiffs cannot have it both ways. They cannot claim the State misused its discretion in the keeping of the inmate, then claim it was a non-discretionary act.

5. Public Duty Doctrine Aside, No Duty Exists

In somewhat muddled fashion, the plaintiffs assert that their case has all the elements of negligence, including a duty to the victim, and claim that this duty existed "regardless of whether Yoana was an identifiable victim." Pl. Br. 8. Plaintiffs rely on Section 315 of the Restatement (2d) of Torts. Pl. Br. 8-9. Section 315 states, in pertinent part:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

This section does not help the plaintiffs. The third person, Quiles, did have a special relationship with the State at one time, that is, the State incarcerated him. During that time, the State had an obligation to take reasonable measures to control his conduct. But that relationship was not indefinite, and Section 315 provides no basis for plaintiffs to claim that, once Quiles was out of its physical control, the Department of Correction had a continuing duty to take reasonable measures to control his conduct. This duty cannot be indefinite. It is analogous to the facts in *Murdock v. Croughwell,* cited by plaintiffs in which police department was not in a special relationship an off-duty police officer such that it had a duty to control his behavior. While the inmate was in the custody of the Department of Correction, it had a duty to take reasonable

measures to control his behavior—to keep him away from drugs or alcohol, weapons and fighting and to limit his visitors and mail. It had a duty to take reasonable efforts to maintain him in custody. But after he was no longer in Department of Correction's custody for an extended period, the duty had to cease, as the Department of Correction could no longer control his environment, his intake of substances, or his violence. A duty to control the behavior of one whose whereabouts are unknown for an extended period is not a duty to control one in a special relationship. The duty referred to in § 315, as well as § 319 of the Restatement, no longer existed.

More importantly, this general duty does not mean a duty was owed to the victim in this case. The Restatement sections plaintiffs cite still do not render the victim as one legally foreseeable, for all the reasons set forth in defendant's previous brief. As one court put:

> Section 319 establishes a duty. Assuming breach of that duty [which defendant does not concede due to the distance in time and space, set forth above], there is negligence. Having established negligence, however, liability does not automatically ensue. The public duty doctrine does not state that the entity cannot be deemed negligent, it simply states that the entity cannot be held liable.

Jeffrey, *supra*, 204 W. Va. at 45.

Under Connecticut law, it is a requirement for a negligence claim that a victim be foreseeable. *Fraser v. United States*, 236 Conn. 625, 632 (1996). While the facts of *Fraser* are distinct from the facts here, the Connecticut Supreme Court did not limit its statement of the long-standing requirement under negligence law that there exists "no duty to those who are not identifiable victims." *Id.* While plaintiffs attempt to limit *Fraser* to its facts, the general precepts and requirements of negligence are not so limited. Certainly, the Supreme Court in

Fraser did not limit the forseeability requirement to those cases with no custodial element, but rather, discussed negligence in general, stating:

> In any determination of whether **even a special relationship should be held to give rise to a duty to exercise care to avoid harm to a third person, forseeability plays an important rule. Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific person to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. Although no universal test for duty ever has been formulated our *threshold* inquiry has always been whether the specific h arm alleged by the plaintiff was foreseeable to the defendants.**

Fraser, 236 Conn. at 632-33 (emphasis added) (internal cites, quotes omitted).

Despite the Connecticut Supreme Court's clear instruction that forseeability is a ***threshold*** issue to the element of duty, and the element of duty is "imperative" to a negligence action, the plaintiffs try to persuade this Court by stating, with no Connecticut authority whatsoever, that the element of forseeability in terms of an identifiable is not applicable given these facts.

Without citing to any persuasive Connecticut law, plaintiffs claim that defendants ignore law in other jurisdictions finding liability with a duty to control dangerous persons. Pl. Br. at 13. Not all other states, however, apply the public duty doctrine, and so many of those decisions are

inapposite in Connecticut.[8] Likewise, many of the decisions cited by plaintiffs involve harm to someone near by to an escape either temporally or spatially, making those victims identifiable.[9]

6. Victim Not Foreseeable

Fantastically, plaintiffs claim the victim in this case was foreseeable. Even taking all of plaintiffs' allegations in this case as true, however, this claim only holds water in retrospect. If this victim was foreseeable, then all victims were foreseeable, and the requirement is meaningless. The inmate is alleged to have had a history of assaulting both a minor and an adult. Pl. Br. 2-3. So, were all persons in the continental United States foreseeable? Canada is closer to Florida, so is Canada to be included? Or Puerto Rico?

And for how long after the escape would a victim be foreseeable? 2 months? 4 months? 6 months? One year?

The defendant urges the Court to keep in mind that after the inmate had escaped and not surfaced for some time, the Department of Correction could do nothing more. How long did its duty continue to exist in the absence of any practical steps it could take?

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[8] For example, *Natrona v. Blake,* 81 P.3d 948, 952 (Wyo. 2003) specifically notes that the public duty doctrine does not exist in Wyoming; *see also Ryan v. Arizona,* 134 Ariz. 308, 656 P.2d 597 (Ariz. 1982).

[9] In *Natrona,* n. 8, the decedent was killed two days later. *Id.; Nova University, Inc. v. Wagner,* 491 So.2d 1116 (Fla. 1986) (victims beaten day after escape in same state); *Rum River Lumber Co. v. Minnesota,* 282 N.W.2d 882 (1979) (on date of escape, fire set); *Finkel v. State of New York,* 37 Misc.2d 757, 237 N.Y.S.2d 66 (1962) (on date of escape escapee entered nearby home and perpetrated crime); *see also Ryan v. Ariz.,* supra n. 8; *Clouse v. Arizona,* 199 Ariz. 196, 16 P.3d 757 (Ariz. 2001).

7. Public Policy Considerations Regarding Duty

The plaintiffs now claim that the defendant cannot seek to limit its liability because the legislature waived sovereign immunity. Pl Br. 18. But at the time plaintiffs sought this waiver, they stated:

> We are asking for the opportunity to present the case to the Court. **We think it is important for the Court to set a strict standard relative to claims against the government.**
> **…**
>
> We think it's the type of matter where issues should be addressed by a Court and determined by a Court.

See Legislative Transcript, attached (emphasis added). Having represented to the legislature that this Court should set a strict standard, they now claim that the only public policy interest in this case is to award the plaintiffs damages, and that the policy of sensible limits on liability for criminal acts beyond the State's control should be ignored.

The plaintiffs argue that other cases in which a rehabilitative program such as furlough or a half-way house was at issue are distinct, and that no rehabilitation was occurring for Quiles, the escapee. This argument ignores that inmate jobs are considered rehabilitative, and that correctional officials constantly walk a tightrope between overly restricting inmates lest their actions be considered unconstitutional and contrary to rehabilitation, and not restricting them enough. See testimony of J. Sieminski, Claims Tr. 5/2/01, attached, p 14. The United States Supreme Court has stated:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the

> inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication.

Procunier v. Martinez, 416 U.S. 396, 404-405 (1974). Thus, a less restrictive prison environment is seen as enhancing rehabilitation, and plaintiffs' dismissal of Quiles' classification as bearing on his potential rehabilitation is overly simplistic.

B. Plaintiffs' Motion for Summary Judgment Must Be Denied

When defendants moved for summary judgment in this matter, they moved on one narrow, legal ground, the existence of a duty owed the plaintiffs. This single ground could be determined accepting all of plaintiffs' allegations as true for purposes of the motion. Plaintiffs, bearing the burden of proof on all negligence elements, chose to move for summary judgment in this negligence case. While the argument set forth above, entitling the defendant State of Connecticut to summary judgment in its favor on the single issue of duty, also serve to defeat the plaintiffs' cross Motion for Summary Judgment, the defendant addresses plaintiffs' motion out of an abundance of caution lest the Court grant it absent objection. The motion, however, is misplaced, and obviously a tact to divert the Court from the weakness of plaintiffs' position vis-à-vis the law of duty.

"It is …. well established that 'summary judgment procedure is especially ill-adapted to negligence cases, where, as here, the ultimate issue in contention involves a mixed question of fact and law, and requires the trier of fact to determine whether the standard of care was met in a specific situation." *Michaud v. Gurney*, 168 Conn. 431, 434 (1975); *see also Fogarty v. Rashaw*, 193 Conn. 442, 446 (1984).

In this case, plaintiffs present a version of facts not restrained by the evidence presented at the Claims Commission hearing under oath or by their own exhibits.[10] Accordingly, defendants provide that testimony, and use it to demonstrate numerous occasions in which plaintiffs overstate their case in an effort to win this Court's sympathy. See Claims Tr., attached. Defendants now discuss plaintiffs' "factual" presentation, reminding the Court that many basic facts are undisputed, as set forth in defendants Memorandum of Law in support of their Motion for Summary Judgment.

Plaintiffs make allegations about Quiles' dangerousness at the time of his escape, relying on Quiles' Pre-Sentence Investigation Report. Pl. Br. 1. Quiles' Pre-Sentence Investigation Report, however, was conducted at the time of his sentencing, and is dated in April of 1988. (PSI is attached to plaintiffs' presentation). Quiles escaped on August 31, 1990, almost 2 ½ years later. Escape Log. Thus Quiles' Pre-Sentence Investigation Report had minimal bearing on his status at the time of his escape.

Plaintiffs claim Quiles could wander around the facility completely unsupervised, and just "walk away." Pl. Br. 1. Quiles was not, however, allowed to roam outside the prison completely unsupervised while working, but was managed on outside clearance status after establishing appropriate behavior while institutionalized. Claims Tr. 5/2/01 p. 11. On an outside

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[10] Defendants' references to plaintiffs' Exhibits are hampered by the fact that none of them are marked or separated. Defendants are not sure if that is how the Exhibits are presented to the Court, but will do their best to describe them.

work detail, an inmate "would be monitored by an Officer assigned to that detail." 1/20/00 Claims. Tr. p. 17.

Plaintiffs claim Quiles planned his escape while working. Pl. Br. 1. There is no evidence, however, that Quiles planned his escape while on work detail. 5/2/01 Claims Tr. 12. Quiles did not "simply walk out of the prison"; he scaled an 18-20 foot fence with razor wire, and the fence was guarded. 1/20/00 Claims Tr. pp. 4-5, 24. The fence had an alarm and a sensor in it. 1/20/00 Claims Tr. 5.

The plaintiffs claim that Quiles escaped while "staff partied at the facility's lake." Pl. Br. 1. All facility posts, however, were fully staffed at the time of Quiles' escape with all on-duty personnel accounted for that night. 1/20/00 Claims Tr. 14.

The plaintiffs claim that "Intake services at [Somers Correctional Institution] … concluded that Quiles posed an extreme danger, and, further, that Quiles would not rehabilitate or be capable of living in society without educational and rehabilitative therapy." Pl. Br. 3. Plaintiffs' Exhibits do not, however, demonstrate this extreme statement.

The plaintiffs claim that "accordingly" Somers staff classified Quiles as a "Level 4" inmate, "The highest risk level classification possible for a non-death penalty inmate." Pl. Br. 3. The uncontroverted testimony at the Claims Hearing, however, was that inmates can receive a "Level 5" and not be a "death penalty inmate." 5/2/01 Claims Tr. 6. In fact, Quiles was initially a "5". 5/2/01 Claims Tr. 26.

The plaintiffs claim that Quiles classification reflected some sort of measured "judgment that Quiles required a high level of security in his confinement in light of the clear and

continuing danger he posed." Pl. Br. at 3. This is not supported, however, by any of plaintiffs' Exhibits. Plaintiffs claim that Quiles refused to participate in any rehabilitative therapy. Pl. Br. 3. Quiles did apply for and maintain inmate jobs, however, which are considered rehabilitation. P. 23 of plaintiffs' Exhibit of Classification manual.

Plaintiffs claim that Quiles was then transferred to a "minimum to moderate level facility", Carl Robinson Correctional Institution. Pl. Br. 3. Carl Robinson, however, is considered a medium level facility to the extent such facilities are classified in that manner. 5/2/01 Claims Tr. 7.

Plaintiffs claim that Carl Robinson is surrounded by a simple fence. Pl. Br. at 3. As stated above, however, it is an 18-20 foot fence with razor wire and a motion sensor and alarm. 1/20/00 Claims Tr. pp. 4-5, 24; 1/20/00 Claims Tr. 5.

Plaintiffs claim that, prior to his escape, staff questioned Quiles' classification as a Level 3 out of 5 inmate. Pl. Br. 3. This "questioning", however, did not occur until after Quiles' escape. 5/2/01 Claims Tr. 13.

Plaintiffs attempt to link a denial of furlough for Quiles as inconsistent with his classification. Pl. Br. at 3. These two actions, however, were completely consistent with each other and with classification principles. 5/2/01 Claims Tr. 12-13.

Plaintiffs claim Quiles was giving away his belongings the night before his escape, and this activity could only have meant he planned an escape. Pl. Br. 4 and supplemental transcript. This testimony, however, was largely discredited at the Claims Hearing. 11/17/99 Claims Tr. 6-14; 19-20.

Plaintiffs claim there were escapes preceding Quiles' escape. Pl. Br. at 4. Plaintiffs provide no context for the court, however, in terms of the numbers of inmates at the facility or within the Department of Correction generally.

After four days of hearings, the Claims Commissioner denied the plaintiffs' claims against the State of Connecticut, and only when the plaintiffs went to the legislature and said they wanted a court of "set a strict standard" for this claim was permission to sue granted. There are numerous disputed issues of material fact that preclude summary judgment in plaintiffs' favor in this matter, and the defendant State urges this Court to grant summary judgment in its favor on this issue of duty, and deny plaintiffs' motion in its entirety.

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent by first-class mail, postage prepaid, and/or hand-delivered to the following on this 13th day of January, 2005:

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