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| NO: CV 02 0820429S | : | SUPERIOR COURT |
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| PAUL HABERERN | : | J.D. OF HARTFORD |
| | : | |
| vs. | : | AT HARTFORD |
| | : | |
| FLOYD CASTONGUAY and | : | |
| THE EAST HARTFORD BOARD OF | : | |
| EDUCATION | : | |

**PLAINTIFF'S RESPONSE TO**
**DEFENDANT'S REPLY TO**
**PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

Defendants' "Reply to Plaintiff's Objection to the Defendant Board of Education's Motion for Summary Judgment" goes beyond the permissible bounds of zealous advocacy and hurls headlong into the realm of fiction – representing the facts and holdings of cases to be what the defendant wishes they were, in utter disregard of the actual facts and holdings of the authorities cited. Accordingly, plaintiff is compelled to submit this Sur-Reply, which he respectfully requests the court to consider.

### 1. C.G.S. § 52-557n Abrogates Defendant's Immunity for the Negligence Alleged In Count Seven

In defendant's first fiction, defendant pretends that C.G.S. § 52-557n creates a special species of negligence, separate and apart from "common law negligence," and that the Court in Williams v. New Haven, 243 Conn. 763, 707 A.2d 1251 (1998) held that "common law negligence claims do not survive governmental immunity." Def. Reply, p.1. Nothing could be further from the truth. Our Supreme Court explained in Williams, and in subsequent cases, that: (a) C.G.S. § 52-557n is a statutory abrogation of governmental immunity for common law negligence; and (b) a plaintiff need not even cite C.G.S. § 52-557n in its pleading at all, so long as defendant is "sufficiently apprised

of the applicable statute during the course of the proceedings." Williams, 243 Conn. at 767-769 ("the general rule developed in our case law is that a municipality is immune from liability for negligence *unless the legislature has enacted a statute abrogating that immunity*. . . The legislature has acted to limit governmental immunity . . . in General Statutes § 52-557n" but noting that "[t]he plaintiffs have not relied on" this statute.)[1] Accordingly, summary judgment in defendant's favor on Count Seven on the basis of governmental immunity would be improper.[2]

**2. Whether Defendant Failed to Perform A "Discretionary Act" Involves Resolution of Disputed Issues of Fact**

Defendant next fiction is that, "[w]ether an act is discretionary or ministerial is a question of law for the court." Def. Reply, p.6. None of the cases that defendant cites make this statement, or even support it. See Wysocki v. Derby, 140 Conn. 173, 98 A.2d 659 (1953) (court determined issue because case was tried to the court); Shore v. Stonington, 187 Conn. 147, 444 A.2d 1379 (1982) (issue was not in dispute); Brown v. Branford, 12 Conn.App. 106, 110-111, 529 A.2d 743 (1987) (same.)

Whether an act is discretionary or ministerial "is a factual question" that should normally be resolved by the finder of fact. Gauvin v. New Haven, 187 Conn. 180, 186, 445 A.2d 1 (1982); Colon, 60 Conn.App. at 181. Even more specifically, whether the

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[1] See also Spears v. Garcia, 263 Conn. 22, 28-38, 818 A.2d 37 (2003) (affirming appellate court's reversing of summary judgment); Colon v. City of New Haven, 60 Conn.App. 178, 188, fn.4, 758 A.2d 900 (2000)

[2] Plaintiff reiterates that defendant's challenge to the legal sufficiency of plaintiff's complaint, on the ground that plaintiff failed to specifically cite C.G.S. § 52-557n in various counts of the complaint (Def. Reply, pp.1 & 2), is improper on a motion for summary judgment. A claim that the plaintiff failed to state a legal cause of action "should be raised before the pleadings are closed by way of a motion to strike pursuant to Practice Book § 10-39. See Burke v. Avitabile, 32 Conn.App. 765, 772, 630 A.2d 624 ("the office of a motion for summary judgment is not to test the legal sufficiency of the complaint, but is to test the presence of contested factual issues"), cert. denied, 228 Conn. 908, 634 A.2d 297 (1993).

defendant school board had a ministerial duty to screen Mr. Casontguay before employing him, and to supervise Mr. Castonguay, is a question of fact to be resolved by a jury. See Little v. Booth, 1993 Conn.Super.LEXIS 2878 at * 10-11 (June 30, 1993) (whether school board violated a discretionary or ministerial duty in failing to supervise teacher, resulting in sexual abuse, was a question of fact.) (attached to plaintiff's opposition brief); Little v. Booth, 1997 Conn.Super.LEXIS 524 at *3-4 (February 28, 1997) (attached to plaintiff's opposition brief.);[3] Doe v. Coffee City Board of Education, 852 S.W.2d 899, 909 (Tenn.App. 1992) (re: negligent hiring of teacher).

Next, defendant mistakenly claims that summary judgment is warranted because plaintiff has failed to provide evidence to show that the acts were ministerial. Def. Br., 6. The defendant, as the party seeking judgment, "has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle [it] to a judgment as a matter of law." DeCorso v. Watchtower Bible & Tract Society of New York, Inc., 78 Conn.App. 865, 871, 829 A.2d 38, cert. denied, 266 Conn. 931, 837 A.2d 805 (2003). Only after the defendant has met its burden of establishing that there is no genuine issue of material fact, does the burden shift to the plaintiffs to present evidence that demonstrates the existence of some disputed factual issue. Allstate

[3] Defendant's attempt to distinguish Little on the ground that "the statute relied upon by the court in Little deals with the evaluation of teachers" is misguided. Def. Reply, p.7. In addition to the failure to evaluate, the plaintiff alleged that the defendant failed to supervise the teacher, as does the plaintiff in this case. Little, at *3. The court clearly held that the allegation that the defendant failed to supervise the teacher could establish the breach of a ministerial duty separate and apart from the breach of the duty to evaluate. The case of Drahan v. Board of Education of Regional School District No. 18, 42 Conn.App. 480, 680 A.2d 316 (1996), cited by defendant is utterly irrelevant to this case. Not only did that case involve the teacher evalution statute, which, as defendant acknowledges is not at issue in this case, but that case addressed whether a *teacher* had a cause of action based on the school's negligent evaluation of her performance. Id., at 498-99. The case has nothing to do with whether the duty to evaluate is discretionary or ministerial for purposes of governmental immunity.

Ins. Co. v. Barron, 269 Conn. 394, 405-406, 848 A.2d 1165 (2004). Merely arguing that plaintiff has failed to set forth evidence does not demonstrate the absence of a genuine issue of material fact. Defendant failed to present any evidence in its moving papers to support the claim that the acts at issue were discretionary, and has failed to do so in its reply, as well, and has thus failed to meet its burden to justify summary judgment.

Defendant's only "evidence," the testimony of Bennett Plotkin, the former assistant superintendent, does not show that there were no prescribed procedures for hiring teachers, or that the decision of whether to screen potential teachers is discretionary. Def. Reply, p.7. First, Mr. Plotkin testified that, although he could not *remember* a written policy proscribing the means for screening teachers prior to hiring (Def. Ex. B, p.73:1-5), the school board "must have had [such] policies" in place. (Def. Ex. B, p.73:12-23). Mr. Plotkin also testified that it was standard procedure to contact former employers (Plotkin Trans., pp.25:3-27:2). A jury could find that this procedure established a ministerial duty. See Gauvin, 187 Conn. at 186 (testimony regarding policies and procedures relevant to determination of whether duty violated was ministerial or discretionary).[4]

Second, while Mr. Plotkin testified that the decision whether to contact references and check prior employees was at his discretion, he also testified that this discretion was *outside of the norm* – it was the result of the fact that his superintendent "was very busy and he was very overwhelmed, and" as a result "I could do what the heck I wanted to do,

[4] See also Treschetta v. Harrington, 2004 Conn.Super.LEXIS 98 at*7-8 (January 12, 2004) (if the school has a prescribed policy or procedure related to the alleged duty, that duty may be considered ministerial.); Moffo v. Voss, 2001 Conn.Super.LEXIS 3432 at * 9 (December 3, 2001) (same); Ocasio-Maldonado v. City of Hartford, 1997 Conn.Super.LEXIS 1182 at *6-7 (April 24, 1997) (Hennessey, J.) (policies and procedures can establish ministerial duties) (all attached to plaintiff's opposition brief.)

the way I wanted to do it." (Def. Ex. B, p.77:8-20.) The school cannot transform its ministerial duty to contact Mr. Casontguay's former employer into a discretionary act, simply by giving the assistant superintendent the freedom to do "what the heck [he] wanted to do." Pursuant to defendant's argument, any governmental entity could transform its ministerial duties into discretionary acts (and thereby immunize itself from liability for negligence) by simply (and negligently) giving its employees the freedom to **disregard and refuse** to perform the ministerial act. There is no authority to support such an amorphous and self-serving manner of determining whether a duty is ministerial or discretionary, and this would clearly contravene the public policy of this state.

### 3. The Identifiable Victim-Imminent Harm Exception to Governmental Immunity Applies In This Case

#### a. The Identifiable Person/Imminent Harm Exception Applies to the Defendant Board of Education

There is a long line of authority holding that identifiable/imminent harm exception to governmental immunity applies to school boards. See e.g. Purzycki v. Fairfield, 244 Conn. 101, 708 A.2d 937 (1998); Burns v. Board of Education, 228 Conn. 640, 649-50, 638 A.2d 1 (1994); Colon, 60 Conn.App. at 184-185 (2000). Defendant's claim, that the Supreme Court casually reversed this long line of authority in a footnote in a case that did not involve the immunity of a school board, and that does not even reference any of these cases or refer to the immunity of school boards, is unsupported and unsupportable. Def. Reply, pp.8-9. The court in Pane stated only that the identifiable person/imminent harm exception does not apply to direct claims against a *municipality*. Pane, at 677, fn.9. Defendant has not cited any case in which a court has held that this statement in Pane applied to any type of entity other than a municipality, itself – nor

could it. Indeed, contrary to defendant's representation, in the post-Pane case upon which defendant relies, Doe v. Peterson, 2004 WL 3105898 (November 30, 2004), the court repeatedly cited to, and relied on Purzycki and Burns, supra, thereby recognizing their continuing validity, and the court applied the identifiable person/imminent harm exception, but concluded that the plaintiff failed to present sufficient facts to support that she fell within that exception. Peterson, 2004 WL 3105898 at * 7-10.[5]

As the court in Ficocelli v. O'Connor, 2001 Conn.Super.LEXIS 136 at *7 (January 17, 2001) (attached to plaintiff's opposition brief), made clear – "the [school] board, [is] an agent of the municipality, and not the municipality itself" and thus the identifiable person/imminent harm exception applies to the school board. Id., at * 3, fn.1, citing, Russell v. McKenna, judicial district of New London at New London, Docket No. 541208 (February 26, 1998, *Handy, J.*) ("[student] was one of a class of foreseeable victims to whom the *Board and* the Superintendent owed a duty of care in relation to the maintenance and care of school property. Accordingly, governmental immunity does not shield the *Board or* the Superintendent from liability.")

**b. The Identifiable Person/Imminent Harm Exception Is Not Retroactive Legislation**

In perhaps its most bizarre argument of all, defendant claims, without citation to any supporting authority, that the court is precluded from applying the identifiable person/imminent harm exception to the Board's immunity because it is a "classification" that "did not exist until 1979 when it was developed in the matter of Sestito v. Groton, 178 Conn. 520, 527-28, 423 A.2d 165 (1979)," at which time it was purportedly a "change in substantive law" that could not have retroactive effect. Def. Reply, p.9.

[5] Although the court was clearly aware of Pane, it did not even refer to that case in its discussion of the identifiable person/imminent harm section of its decision. Peterson, at *6 & 7-10.

The decision in Sestito, itself, contradicts defendant's contention, as it relied on cases dating from the 1950's in which the court had held that a plaintiff could prevail on a claim against a governmental entity if it presented facts to support that the defendant owed a duty to the specific plaintiff. Sestito, 178 Conn. at 170-171, citing, Steibitz v. Mahoney, 144 Conn. 443, 446-447, 134 A.2d 71 (1957) and Leger v. Kelley, 142 Conn. 585, 589-91, 116 A.2d 429 (1955). Further, the Court in Sestito gave its own decision retroactive effect - it reversed a directed verdict and ordered a new trial in which the plaintiff could present evidence that the defendant owed a duty to the plaintiff, rather than simply to the public at large. If nothing else, this clearly resolves any question as to whether the court viewed its decision as a substantive change in the law that could not be given retroactive effect.

**4. Defendant Owed A Duty to Plaintiff Regardless of Whether He Was An "Identifiable Victim" Subject to "Imminent Harm."**

Defendant's argument that it is entitled to summary judgment because plaintiff was not a member of a foreseeable class of victims to which it owed a duty is similarly misplaced. Def. Reply, pp.11-12. The Connecticut Supreme Court has rejected this same argument. See Steibitz v. Mahoney, 144 Conn. 443, 446-447, 134 A.2d 71 (1957).

In Steibitz, the plaintiffs sued the chief of police for negligence in hiring and supervising a policeman who sexually assaulted them. In rejecting the defendant's argument that the plaintiffs had failed to establish that the defendant owed a duty specifically to them, the Supreme Court explained that:

> while the line that separates the duties owed solely to the general public from those owed to individuals is, at times, in shadow and difficult to trace, we are satisfied that, under the facts averred by the plaintiffs in their complaint, **the duty to appoint proper persons to the police force and to remove or suspend officers who might indulge in such outrageous acts of force and indecency** as

> Mahoney is alleged to have committed **was a duty owed to** both the general public and **every individual who might come in contact with such officers.**

Steibitz, at 446-447. The Supreme Court has since re-affirmed the validity of this holding. See Shore v. Stonington, 187 Conn. 147, 155, 444 A.2d 1379 (1982). In Shore, the Court explained that the scope of the duty owed by an official in the hiring and supervision of employees is equivalent to the scope of duty owed by a private party, because the act of hiring and supervising government employees is not a uniquely governmental function. Id. By contrast, where the official is performing a uniquely public function, such as enforcing the law, his duty is limited to only narrowly defined identifiable victims of imminent harm. Id., at 156-157.

As in Steibitz, supra, and unlike in any of the cases on which defendant relies, this case involves the hiring of an individual who had previously "indulged in such outrageous acts of force and indecency," and which defendant, by complying with its own policies, and by the exercise of even the most minimal care, would have discovered. As in Steibitz, defendant owed a duty to "every individual who might come in contact with" Castonguay.

### B. WHETHER DEFENDANT IS VICARIOUSLY LIABILE FOR MR. CASTONGUAY'S ACTS INVOLVES DISPUTED ISSUES OF FACT THAT PRECLUDE SUMMARY JUDGMENT ON PLAINTIFF'S EIGHTH AND TENTH COUNTS

The court should deny defendant's motion for summary judgment on the vicarious liability counts (eight and ten) of the complaint, even if it concludes that defendant cannot be directly liable for its own negligence. Contrary to defendant's representation, plaintiff has cited a specific statute, C.G.S. § 52-557n, which expressly states that: "**a political subdivision of the state shall be liable for damages** to person or

property **caused by**: (A) **The negligent acts or omissions of** such political subdivision or **any employee, officer or agent thereof acting within the scope of his employment or official duties** . . ." None of the cases cited by defendant even remotely stands for the proposition that, contrary to the express terms of C.G.S. § 52-557n, "a municipality cannot be held vicariously liable for common law claims against an employee." Def. Reply, p.2. [6]

The primary authority on which defendant relies for this proposition, Sanzone v. Board of Police Commissioners, 219 Conn. 179, 186-187, 192, 592 A.2d 912 (1991) did not even involve an attempt to hold a municipality "vicariously liable" for "common law claims" against an employee. Indeed, Sanzone turned on the fact that the plaintiff was **not** asserting a "common law" claim. In that case, the plaintiff sought to hold the city directly liable for damages caused by a defective highway, and liable to indemnify its employees for their liability for those damages. The court held that this claim was properly a claim under the defective highway statute, and C.G.S. § 52-557n(a)(C) specifically excludes municipalities from the ambit of this **statutory cause of action**, and that the plaintiff could not circumvent the exclusion in C.G.S. § 52-557n by asserting a claim for indemnification under C.G.S. § 7-465(a). That case has nothing to do with this case, or with defendant's characterization of the law.

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[6] Defendant's argument is inexcusable. It is well established that "[a] board of education can be held liable for negligence pursuant to General Statutes § 52-557n(a)(1)(A), which permits a direct action against such board for the negligence of its employees." Russel v. McKenna, Superior Court, judicial district at New London at New London, Docket No. 541208 (February 26, 1998) (Handy, J.) (1998 Ct. Sup. 2244); *Bongiovanni v. Board of Education*, Superior Court, judicial district at Stamford Norwalk, Docket No. CV90-0110243, 11 Conn. L. Rptr. (April 29, 1994) (Lewis, J.) (9 C.S.C.R. 617) (1994 Ct. Sup. 4630). Even the case of Doe v. Peterson, 2004 WL 3105898 at * 6 (November 30, 2004), cited by defendant elsewhere in its brief, specifically cited C.G.S. § 52-557n in support of the proposition that "an employer is vicariously liable for compensatory damages arising out of the tortious conduct of his employee . . ."

In the other two cases cited by defendant, the court specifically recognized that C.G.S. § 52-557n(a)(1) provides for the liability of political subdivisions for the negligence of their employees, but noted that the plaintiffs in those cases had not relied on that section of the statute to support their claims. Williams, 243 Conn. at 766-767 & fn.4 (plaintiff failed to rely on C.G.S. § 52-557n at all); Pane v. Danbury, 267 Conn. 669, 677 & fn.9, 841 A.2d 684 (2004) (plaintiff did not rely on C.G.S. § 52-557n or even attempt to argue that her claim for invasion of privacy was a "negligent act or omission" within the meaning of the statute.)

In this case, plaintiff has clearly relied on C.G.S. § 52-557n. Under the plain terms of the statute, defendant may be held liable for Mr. Castonguay's acts if (a) his conduct was (a) negligent, and (b) connected to his employment, both of which involve disputed issues of fact that preclude summary judgment, as set forth in plaintiff's opposition and below.

**1. Whether Mr. Castonguay Engaged In Negligent, Non-Criminal Misconduct Is, At Minimum, A Disputed Question of Fact**

The court should reject defendant's attempt to avoid liability for the negligent acts of Mr. Castonguay simply because he also committed intentional acts. Defendant failed to cite any authority to support this argument in its Motion for Summary Judgment, and the additional case of Doe v. Peterson, 2004 WL 3105898 (November 30, 2004), which defendant cites in its reply brief also does not support this argument.

In Peterson, as in the cases cited by defendant in its moving papers, the plaintiff claimed that **a single act of sexual assault** constituted both intentional and negligent

assault.[7] Peterson, at *6. The court explained that "[o]ur Supreme Court has stated that **the same conduct** cannot reasonably be determined to have been both intentionally and negligently tortious." Peterson, at *6, citing, American Nat'l Fire Insurance Co. v. Schuss, 221 Conn. 768, 777, 607 A.2d 418 (1992). The court then explained that, while there are cases in which the nature of the conduct may be in dispute, thereby precluding summary judgment, "[h]ere the evidence is not in dispute as to the nature of the sexual assault which is alleged." Peterson, at *6-7.

In stark contrast to Peterson, in this case, the plaintiff has alleged **numerous distinct** acts, over a three year period, many of which were negligent and **which plaintiff does not claim were intentional or criminal**, such as verbal assaults.[8] Def. Reply, p.3. Defendant has failed to present any evidence whatsoever to refute that Mr. Castonguay negligently harmed plaintiff by acts that were **different from** his intentional assaults on plaintiff, defendant has failed to cite a single case that supports summary judgment under these circumstances, and defendant has failed to address or distinguish Jonelis v. Russo, 863 F.Supp. 84 (D.Conn. 1994), which supports plaintiff's position.

**2. Whether Mr. Castonguay's Misconduct Was Connected With His Employment Is, At Minimum, A Disputed Question of Fact**

Whether Mr. Castonguay was acting within the scope of his employment and duties when he conducted the counseling sessions with plaintiff is, at minimum, a disputed question of fact. Plaintiff has presented evidence that Mr. Castonguay was acting with the scope of his employment because the counseling sessions were assertedly part of a broader effort to educate and interest plaintiff in academics. Def. Ex. A, p.38;

[7] Defendant erroneously represents that, as in this case, Peterson involved sexual assaults on "several occasions." Def. Reply, p.3.

[8] See Haberern Depo., pp.93, 119; Complaint, Count Two (Negligent Assault and Battery); Count Three (Negligence); Count Five (Unintentional Infliction of Emotional Distress).

Def. Ex. B, pp.81, 86; Haberern Depo., pp.65-68, 86. Defendant's argument, **without citation to any evidence**, that Mr. Castonguay's tutoring and counseling of plaintiff was not "in any official capacity," (Def. Br., p.3), cannot justify taking this issue away from the jury. See Mullen v. Horton, 46 Conn.App. 759, 763-68, 700 A.2d 1377 (1997) (denying motion for summary judgment.); Marinelli v. Bridgeport Roman Catholic Diocesan Corp., 989 F.Supp. 110, 118 (D.Conn. 1997) (denying motion for summary judgment), aff'd in part and rev'd in part on other grounds after trial, 196 F.3d 409 (2d Cir. 1999).

Nor does Mullen help defendant's argument. As defendant correctly points out, in Mullen, the court of appeals held that summary judgment on the plaintiff's claim of vicarious liability was improper because the evidence supported that the sexual relations between the priest and the plaintiff "directly grew out of, and were the immediate and proximate results of, the church sanctioned counseling sessions."[9] Defendant overlooks, however, that as in Mullen, in this case there is evidence from which a reasonable jury could conclude that the sexual relations between Castonguay and the plaintiff directly grew out of school sanctioned counseling sessions. Other than plaintiff's own testimony, Castonguay's teacher evaluations reveal that defendant was not only aware of Castonguay's student home visits, out of which the sexual relations grew, and that these visits were for school purposes, but that defendant expressly **sanctioned these counseling sessions and commended Castonguay for engaging in them**.[10]

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[9] It is incredible that defendant implies that plaintiff attempted to mislead the Court by failing to "set forth" this language in Mullen. Def. Reply, p.3 The plaintiff not only quoted **this precise language** from Mullen in his brief, but he discussed, and applied it to this case. Pl. Oppos., pp.17-18.

[10] See Exhibit 1, attached hereto (teacher evaluation form which states that Castonguay "….through home visits and parent conferences he has met with success in reaching about 90% of

Finally, Mullen directly contradicts defendant's argument that Mullen supports that the counseling sessions must have occurred on school property in order to have been school "sanctioned." As in this case, the much of the sexual misconduct occurred at the plaintiff's home, and the court of appeals in Mullen refused to find this fact dispositive, as defendant asks this court to do. Compare, Mullen dissent at 773-775 with Mullen majority at 764, quoting, Glucksman v. Walter, 38 Conn.App. 140, 144, 659 A.2d 1217 (1995).

**CONCLUSION**

For the foregoing reasons, plaintiff respectfully requests that the court deny defendants' motion for summary judgment.

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his class."); Exhibit 2, hereto (positive evaluation by Principal stating that "Floyd has made an excellent beginning. He is so interested in knowing the 'why' of certain reactions of his children that he has gone all out in trying to find their point of view – even to making home visits."); Exhibit 3, hereto (correspondence from Mrs. William T. Lutzen to Helen A. Green, Principal of the Woodland school commending Floyd Castongway for his interest in his students including her son and further confirming a home visit by Castonguay to discuss "how to get the best out of our son.")