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| MARIA TORRES, INDIVIDUALLY | : | SUPERIOR COURT |
| and as ADMINISTRATRIX OF THE | : | |
| ESTATE OF YOANNA MARIA NODA | : | JUDICIAL DISTRICT OF HARTFORD |
| | : | |
| v. | : | AT HARTFORD |
| | : | |
| STATE OF CONNECTICUT, | : | |
| DEPARTMENT OF CORRECTIONS | : | December 7, 2004 |

**PLAINTIFF'S MEMORANDUM OF LAW**
**IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
**AND CROSS MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

Yoanna Maria Noda would have turned 16 years old on October 31, 2004. Two days before her second birthday, an escaped convict, Alcides Quiles (AQuiles≅), raped her and then strangled her until she was dead. Defendant had allowed Quiles, the convicted perpetrator of violent sexual assaults and batteries, including on a six year old boy, who had been sentenced to eighteen (18) years in prison, and whom it had determined posed an "extreme threat" to the public with no ability to control his impulses, to exit the prison and wander the perimeter unattended and unsupervised where he could plan an escape, and then allowed him to simply walk out of the prison, climb over an unguarded fence, and drive away.

While purporting to be sympathetic to this tragedy, defendant asks the court to: (A) shield it from liability based on a doctrine of governmental immunity even though the legislature has agreed to waive the state's immunity and all defenses based on the governmental nature of the conduct at issue; (B) hold that its duty to control Quiles was no greater than the duty of a psychologist treating an outpatient with no known dangerous propensities, even though the law is directly to the contrary; and (C) conclude that no reasonable finder of fact could conclude that

Yoanna's rape and murder were foreseeable, even though the presumably reasonable members of the legislature, having reviewed the fact of this case, "believe[d] the claim to present an issue of law or fact under which the state, where it a private person, could be liable." C.G.S. § 4-159.

For the reasons set forth herein, this court should deny defendant's motion for summary judgment, grant plaintiff's cross motion for summary judgment, and, after fourteen years, finally allow Maria Torres to rest her daughter's memory in peace.

## II. STATEMENT OF FACTS

In May 1988, the court convicted Quiles to eighteen (18) years in prison (suspended after twelve years), based on charges relating to Quiles= violent sexual assaults, robberies and batteries on a number of victims, including a six year old boy. (Exhibits A & B, hereto). Prior to committing Quiles, the defendant was on notice that Quiles was an extremely dangerous individual based not only upon his criminal history, but upon:

A. Quiles= Pre-Sentencing Intake Report (PSI), in which Quiles admitted to a lengthy history of heavy use of alcohol, cocaine, marijuana, glue and heroin for a number of years, which had a profound effect on his cognitive processes. The PSI observed that **Quiles had no ability to control his impulses and represented an Aextreme threat≅ to the public.** (Exhibit A); and

B. Quiles= conduct during pretrial detention, during which he received a number of disciplinary tickets for fighting and assaults, including an armed assault against another inmate. (Exhibit C).

Based upon this information, the defendant committed Quiles to a maximum security prison facility, CCI-Somers (ASCI≅). (Exhibits B, C, D).

Intake services at SCI similarly concluded that Quiles posed an extreme danger, and, further, that Quiles would not rehabilitate or be capable of living in society without educational and emotional therapy. (Exhibits D, E, F). Accordingly, SCI classified Quiles as a ALevel 4" danger, which is the highest risk level classification possible for a non-death penalty inmate. (Exhibits E, F). This classification reflected, among other things, a judgment that Quiles required a high level of security in his confinement in light of the danger he posed. (Id.) Quiles refused to participate in any educational or emotional therapy. (Exhibits G, H).

Nevertheless, in June 1990, defendant transferred Quiles to a Aminimum to moderate≅ level security prison, the Carl Robinson Correction Institution (ACRCI≅). (Exhibits G, H, I, J and K). The staff at CRCI allowed Quiles to **exit the prison facility and wander the perimeter unattended and unsupervised**. (Exhibit L; See also Exhibit M at pp.33, 34.). The inmate housing units at CRCI are surrounded by a simple fence, with no guard towers or guard dogs. (Exhibit N).

Defendant knew that Quiles continued to pose a high risk to the public: CRCI staff, itself, questioned the decision to transfer Quiles to CRCI, (Exhibit K, p.3), and, just days before his escape, CRCI staff denied Quiles= request for a furlough away from prison grounds because of the "violent nature of the I.O. [initial offense]." (Exhibit L).

Defendant also knew or should have known that Quiles intended to escape on the night of August 31, 1990, after CRCI staff had denied his request for furlough. Quiles could not have more clearly broadcast his intent to do so: At 6:30 p.m., on the evening of August 31, 1990, in full view of at least two prison guards, Quiles said farewell to his fellow prisoners, and passed out his prison belongings to them. (Exhibit O). Only inmates who were about to be release from prison engaged in this behavior, and they only did so within a few hour of their release. Id. It would be extremely unusual for a prisoner such as Quiles, who had a substantial prison term left to serve, to pass out his belongings to fellow prisoners because these belongings are valuable and difficult to obtain in prison. Id. Of course, there could be only one explanation for a prisoner with more than five years left to serve to make farewells to his fellow prisoners.

Two and a half months before, on June 16, 1990, three inmates had escaped from CRCI by scaling the fence at night – one of the escapee's reached California before being captured, and one of the escapees had successfully evaded capture. (Exhibit P). Just three weeks previously, on August 5, 1990, another inmate had escaped and had also avoided recapture. (Id.) Despite Quiles' suspicious conduct, and the recent rash of escapes, no prison guard made any inquiry or move from his or her station, or placed Quiles on heightened surveillance.

That very evening, while CRCI corrections officers and staff attended a retirement party, Quiles climbed the fence in a poorly illuminated area, met a waiting car, and escaped from the facility. (Exhibit K). CRCI staff learned of the escape of an as-yet unidentified inmate almost immediately, but failed to notify local residents, police officials and local businesses of the escape until almost 10:00 that night. (Exhibit Q). Having escaped from prison by car, with a substantial lead time before anyone was notified of his escape, Quiles was able to flee to Florida to avoid recapture, where he abducted two year old Yoanna from the front yard of her home,

sexually abused her, assaulted her, and strangled her to death. (Exhibits R, S, T). At the time of her death, Yoanna had a life expectancy of 74.8 years. (Exhibit U).

## III. ARGUMENT

### A. THE PUBLIC DUTY DOCTRINE DOES NOT SHIELD DEFENDANT FROM LIABILITY IN THIS CASE

Defendant argues that the "public duty doctrine" shields it from liability. Def. Br., pp.14-16. The public duty doctrine, which expands the immunity of municipal employees for discretionary actions taken pursuant to an official duty to the public, has absolutely no application to this action. Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 166-170, 544 A.2d 1185 (1988) (describing the doctrine and its history); Fraser v. United States, 236 Conn. 625, 634, 674 A.2d 811 (1996); Shore v. Stonginton, 187 Conn. 147, 153, 444 A.2d 1379 (1982); See Short v. State, No. 298291, 4 Conn. L. Rptr. 77, 1991 WL 86168, (May 13, 1991) (J.D. New Haven) (Schimelman, J.) (attached).

First, the public duty doctrine only applies to actions against municipal employees - it does not apply to an action directly against a state entity, as in this case. See Short v. State, No. 298291, 6 CSCR 550 (May 13, 1991) (J.D. New Haven) (Schimelman, J.) In Short, supra, the plaintiffs sought to recover against a state hospital for the stabbing death of their daughter by an escaped patient with known dangerous propensities. The court rejected the State's argument that the public duty doctrine immunized it from liability because, among other things, the public duty doctrine only applies to claims against municipal employees.[1]

[1] While the court in Nealy v. State of Connecticut, 1997 Conn.Super.LEXIS 2552 (J.D. Waterbury 1997), upon which defendant relies, stated that the public duty doctrine applied to "action against a state or local governmental entity," neither of the cases that Nealy cited support this statement. Id., citing, Sestito v. Groton, 178 Conn. 520, 423 A.2d 165 (1979) (applying public duty doctrine to police officer who was a municipal employee); Shore, supra (same). Plaintiff has not located any Connecticut case in which the Court precluded a claim against a state entity based on the public duty doctrine – nor apparently has defendant.

Second, as defendant acknowledges, the public duty doctrine does not apply to ministerial acts. Def. Br., p.15; Shore, 187 Conn. at 153-55. This case involves the failure to perform a ministerial act – the act of incarcerating a convicted felon for the court ordered term of his sentence. See Doe v. United Soc. and Mental Health Serv., 670 F.Supp. 1121, 1132 (D.Conn. 1987) (holding that defendants did not have discretion to release convict, which distinguished the case from those in which defendant had discretion, such as Shore, supra); Cansler v. State, 234 Kan. 554, 570, 675 P.2d 57 (Kan. 1984) (rejecting claim of immunity for discretionary acts because "[t]he duty to confine and the duty to warn are imposed by law and are ministerial, not discretionary."); Maroon v. State, Dept. of Mental Health, 411 N.E.2d 404, 415 (Ind.App. 1980) (public duty doctrine inapplicable where State was obligated to confine criminal); White v. United States, 780 F.2d 97, 104 (D.C.Cir. 1986) (obligation to confine was not discretionary.)

Finally, the public duty doctrine does not apply to this case because the legislature has waived the state's immunity and "all defenses which might arise from the eleemosynary or governmental nature of the activity complained of," and has agreed that, in this action, defendant's liability shall be "coextensive with and shall equal the rights and liability of private persons in like circumstances." C.G.S. § 4-160(c); Short, supra. Having waived its immunity, "the state is precluded from raising any issues or defenses of a governmental nature, and thus stands in the shoes of a private person," for whom the "public duty doctrine" is not a defense. Id.; See also Natrona County v. Blake, 2003 WY 170, 81 P.3d 948, 954 (Wy. 2003) (public duty doctrine has no application to claim by victim of escapee where there has been a waiver of immunity.); Ryan v. State, 134 Ariz. 308, 308-310, 656 P.2d 597 (1982) (because court had abolished governmental immunity, the public duty doctrine did not apply to claim by victim of

escapee, and thus plaintiff need not establish the "identifiable victim" exception to this doctrine); Dudley v. Offender Aid & Restoration of Richmond, Inc., 241 Va. 270, 276-277, 401 S.E.2d 878 (1991) (public duty doctrine does not apply to private parties and thus victim of escapee need not establish "identifiable" victim exception to this doctrine.)

The public duty doctrine is an expansion of the immunity of public officials that defendant does not even attempt to argue would apply to actions between private parties. Allowing the state to assert the public duty doctrine – or conversely, requiring the plaintiff to establish an exception to this doctrine of government immunity - after the legislature has already agreed to waive immunity, to waive all defenses of a governmental nature, and to allow defendant to be treated as if it were a private party in this litigation, would make a mockery of C.G.S. §§ 4-159 and 4-160 and improperly disregard the will of the legislature. As in Short, this court should decline the defendant's invitation to do so.

## B. THIS CASE HAS ALL THE ELEMENTS OF NEGLIGENCE

### 1. Defendant Had A Duty To Securely Confine Quiles

#### a. As A Matter of Law, Defendant Had A Duty To Control Quiles To Prevent Him From Causing Physical Harm To Another, Regardless of Whether Yoanna Was An "Identifiable Victim."

Section 315 of the Restatement (Second) of Torts ("Section 315"), which Connecticut has adopted, provides that "[t]here 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." Murdock v. Croughwell, 268 Conn. 559, 848 A.2d 363 (2004). The custodial relationship between a prison and a prisoner that existed in this case is a "special

relationship" that creates a duty on the part of the prison to control the conduct of the prisoner to prevent him from causing physical harm to others under Section 315(a). Murdock, at 568-569, citing, Section 319 of the Restatement (Second) of Torts ("Section 319");[2] White, at 1132.[3]

Defendant's argument, that "an identifiable victim or group of victims of the harm must exist in order for a duty of care to be imposed," where, as here, the defendant had custody and control of a known dangerous convict, is misguided. Def. Br., pp.5-9. In Fraser, supra, upon which the defendant relies to support this contention, the court articulated and applied the principal that "**absent a special relationship of custody or control"** under Section 315(a), the court will only impose a duty to control the conduct of a third person where the plaintiff establishes a "special relation" between the defendant and the victim (as provided by Section 315(b)) – which requires a showing that the defendant knew or had reason to know that the third person would attack the victim, i.e. that the victim was "an identifiable victim." Fraser, 236 Conn. at 632-634, 637 (emphasis added), citing, Tarasoff v. Regents of University of California,

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[2] Section 319 is entitled "Duty of Those in Charge of Person Having Dangerous Propensities" and provides that "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

[3] See also. Doe, 670 F.Supp. at 1131; Natrona County, supra (Wyoming detention center, which had custody and control of convict with dangerous propensities, had a duty to the public, which included Colorado victim of the escapee); Tamsen v. Weber, 166 Ariz. 364, 367-68, 802 P.2d 1063 (Az.App. 1990) (psychiatrist who had custody of involuntarily committed criminal with known dangerous propensities had a duty to the public, which included the victim); Nova University, Inc. v. Wagner, 491 So.2d 1116, 1118 (Fla. 1986) (custodians of dangerous minors owed a duty to the general public, which included the victims of escapees); Cansler, supra, 234 Kan. at 558-562 (state, which had custody and control of individuals with known dangerous tendencies, had duty to public, which included victims of escapee); Maroon, supra, 411 N.E.2d 404 (Indiana hospital that had custody of dangerous committed inmate had a duty to Illinois victim of escapee); Ryan, supra (corrections center with custody of dangerous individual had duty to public, which included victim harmed by escapee); Rum River Lumber Co. v. State, 282 N.W.2d 882, 884 (Minn. 1979) (hospital with custody of mental patient with known dangerous tendencies owed duty to public which allowed recovery by company harmed by escapee's conduct); Finkel v. State of New York, 37 Misc.2d 757, 758-59, 237 N.Y.S.2d 66 (1962) (where individual has already been classified as dangerous, and requiring constant supervision, the duty element is established and the only question is whether the duty has been breached.); Semler v. Psychiatric Instit. Of Wash. D.C., 538 F.2d 121, 124 (4th Cir. 1976).

17 Cal.3d 425, 444, 551 P.2d 334 (1976). This was because, in Fraser, supra, the court was addressing the narrow question of "whether a psychotherapist has a duty to exercise control to prevent an **outpatient, who was not known to be dangerous**, from inflicting bodily harm." Id., at 630 (emphasis added); Tarasoff, supra.

The decision in Fraser, is not relevant to this case because the "point of departure" of the Court's entire analysis was that the "special relationship of custody or control," which would otherwise establish such a duty, and which exists in this case, was "absent" from that case. Id., at 632.[4] Nor does Fraser support defendant's contention that "courts in other jurisdictions have overwhelmingly declined to extend any duty to control to encompass harm to unidentified third persons" by custodians of individual with known dangerous tendencies. Def. Br., p.5. Instead, as Fraser observed, "state courts in other jurisdictions have overwhelmingly concluded that an unidentifiable victim has no claim in negligence **against psychotherapists who were treating the assailant on an outpatient basis."** See Fraser, 236 Conn. at 635-637 (emphasis added). These non-custodial cases, upon which the court in Fraser appropriately relied, do nothing to support the imposition of an "identifiable victim" requirement in this case, where defendant had custody and control of a dangerous convict.[5] As the court in Rum River, supra, observed, these

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[4] For example, the court characterized the immunity of municipal employees as a "related area[] of Connecticut negligence law," because, similar to the presumption that a municipal employee is immune from liability in the performance of discretionary governmental acts, there is a presumption that a private party who does not have custody or control over a third party, has no duty to control the conduct of that third party, and both of these presumptions can be overcome by showing that the victim was "identifiable." Fraser, 236 Conn. at 232-234. Conversely, however, where a municipal employee undertakes a ministerial act, and where a private individual assumes custody of an individual with known dangerous propensities, there is no presumption of immunity that must be overcome by a showing that the victim was "identifiable." See e.g. Doe, at 1132, citing and distinguishing, Shore, 187 Conn. at 153 on this basis.

[5] See Santa Cruz v. N.W. Dade Com. Health, 590 So.2d 444, 445-446 (Fla.App. 3 Dist. 1991) (defendant did not have a duty because it did not have control of the outpatient within the meaning of Section 319, and specifically stating that defendant would have had a duty if the patient had been an involuntarily committed inpatient.); Boulanger v. Pol, 258 Kan. 289, 300-305, 308, 900 P.2d 823 (1995) (no duty because defendant does not have control over voluntary inpatient within the meaning of Section

cases "are largely irrelevant" in the context of assessing the failure to prevent a dangerous individual from escaping custody. Id., 282 N.W.2d at 886.

The case law that is on point in this case, and which defendant conveniently overlooks, is legion in holding that custodians of dangerous individuals within the meaning of Section 315(a), such as defendant, have a duty to victims harmed by escapees regardless of whether the victim was an "identifiable victim" within the meaning of Section 315(b). Doe, supra, at 1131-1132 (rejecting argument that victim could not prevail unless she proved that she was "identifiable," because defendant had assumed a custodial duty over a known dangerous individual.);[6] Prosser & W. Keeton, *Torts* at 383 (5th Ed. 1984) (stating that, "even in the absence of such a special relation toward the person injured, the defendant may stand in such a relation toward the third person himself as to give him a definite control over his actions, and carry with it a duty to exercise that control to protect the plaintiff.") Indeed, as evidenced by defendant's own authorities, the courts only require the plaintiff to prove that the victim was "identifiable":

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319, and specifically stating that a duty does exist with respect to involuntarily committed patients for whom there has necessarily been a prior finding of dangerousness.); Hamman v. County of Maricopa, 161 Ariz. 58, 775 P.2d 1122 (1989) (involving outpatient); Kirk v. Michael Reese Hosp. & Med. Ctr., 117 Ill.2d 507, 530-531, 513 N.E.2d 387 (1987) (involving outpatient with no known dangerous propensities, and specifically distinguishing cases in which the defendant has physical custody and control of a known dangerous person.); Davenport v. Community Corrections, 962 P.2d 963, 967-968 (Colo. 1998) (finding no duty because private community corrections facility did not exercise control over offender, who spent substantial unsupervised time off-premises, and there was no evidence that he posed a danger); Tarasoff, 17 Cal.3d at 444 (non-custodial relationship with student); Thompson v. County of Alameda, 27 Cal.3d 741, 614 P.2d 728 (1980) (involving released minor who was no longer in defendant's custody) Bailor v. Salvation Army, 51 F.3d 678, 682-683 (7th Cir. 1995) (finding the Salvation Army did not possess sufficient control to create a duty under Section 319 of the Restatement (Second) of Torts where offender was free to leave and the Salvation Army was prohibited from detaining him or using physical force to restrain him.)

[6] See also Natrona County, 81 P.3d at 954, quoting, Schear v. Board of County Commissioners of Bernalillo County, 101 N.M. 671, 687 P.2d 728, 731 (1984) (ejecting the argument that defendant did not owe a duty to the victim of an escapee because the victim was not an "identifiable victim."); Tamsen, 166 Ariz. at 367-68 (same); Nova University, Inc., 491 So.2d at 1118 (same); Cansler, 234 Kan. at 558-562 (same); Maroon, supra (same); Ryan, 134 Ariz. at 310 (same); Rum River Lumber Co., 282 N.W.2d at 884 (same); Finkel, 37 Misc.2d at 758-59 (same); Semler, 538 F.2d at 124 (same); See also Tarasoff, 17 Cal.3d at 435-36 (plaintiff need only establish a relation that meets the requirements of either Section 315(a) or 315(b) – the plaintiff need not prove both types of relations existed.)

(1) where the defendant did not have custody and control of an individual with known dangerous propensities;[7] or (2) where the defendant was entitled to governmental immunity unless the plaintiff could establish that the "identifiable person" exception to the public duty doctrine.[8]

As the courts have explained, the scope of duty imposed on one who does not have custody or control of a third party "necessarily differs" from that which applies to one who does have custody and control: While a non-custodian cannot monitor and control the individual's interaction with the public, and thus his duty to protect the public from the individual is limited to identifiable potential victims whom he can warn, a custodian can control the individual, "and can by the prudent exercise of such control protect the public from the [individual's] dangerous propensities. If [custodian defendant] knew or should have known of [the individual's] dangerous propensities, then [custodian defendant] had a duty to act with due care to protect others by controlling [the individual.]" Tamsen, 166 Ariz. at 368. Thus, it is not surprising that defendant has failed to cite a single authority in which the court imposed an "identifiable victim"

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[7] See Footnote 3, supra. Indeed, in the two authorities that defendant cites in which the defendant did have custody and control of the perpetrator, the court found that this relationship would have given rise to a duty pursuant to Section 319 of the Restatement, but for the fact that the defendants in those cases did not have any reason to know that perpetrator was likely to cause bodily harm if not controlled. Def. Br., p.9, citing, Buchler v. Oregon Corrections Div., 316 Or. 499, 505-507, 853 P.2d 798 (Or. 1993) (finding there was no evidence that "permits a reasonable juror to infer that this prisoner was 'likely to cause bodily harm to others.'") & Solano v. Goff, 985 P.2d 53, 55 (Colo.App. 1999) ("Nothing in the record indicated that defendant was aware that the inmate posed a danger to others.")

[8] See Robinson v. Estate of Williams, 721 F.Supp. 806, 807-808 (S.D.Miss. 1989) (applying public duty doctrine to claim against sheriff); Vann v. Department of Corrections, 662 So.2d 339 (Fla. 1995) (same as to DOC); Department of Corrections v. McGhee, 653 So.2d 1091 (Fla.App. 1 Dist. 1995) (following Vann, supra); Id., dissent at 1095-1097 (noting that Florida regularly recognizes the special duty owed by those with custody of known dangerous individuals in cases involving private entities and the majority applied a different standard because the defendants were public entities), citing, Nova University, Inc. v. Wagner, 491 So.2d 1116 (Fla. 1986) (applying Section 319 to hold that private residential rehabilitation program with custody of disturbed minors had duty to randomly chosen victims who were killed by residents who escaped from the program.); Fryman v. Harrison, 896 S.W.2d 908, 910 (Ky. 1995) (applying public duty doctrine); Commonwealth Corrections Cabinet v. Vester, 956 S.W.2d 204, 206 (1997) (applying public duty doctrine and specifically distinguishing the case from one in which the defendant was a private party.); Id., dissent at 207 (descrying the majority's "double standard in assigning responsibility for negligence when comparing state to private interests.")

requirement where the defendant had custody and control of an individual with known dangerous propensities, as defendant asks this court to do in this case.[9]

In sum, it is a matter of undisputed fact that Quiles was a convicted, violent sexual offender and pedophile that presented a known "extreme danger" to the public, and that defendant undertook the duty to confine Quiles. As a matter of law, and as defendant appears to concede, having taken custodial control over Quiles following his conviction and sentencing, defendant had a duty "to the public at large" to securely confine Quiles to prevent him from inflicting foreseeable harm on third parties. Murdock, 268 Conn. at 569; Doe, 670 F.Supp. at 1131, citing, W. Prosser & W. Keeton, *Torts* at 383 (5th Ed. 1984); Restatement 2d Torts, §§ 315, 319; Def. .Br., p.14. Defendant's argument, that it did not owe a duty to Yoanna, even though she was clearly a member of "the public at large," is nothing more than an attempt create "a duty to none where there is a duty to all," which this court should reject. See Natrona County, 81 P.3d at 954.

**b. Yoanna Was In A Foreseeable Class Of Victims To Which Defendant Owed A Duty**

Defendant had a duty to Yoanna even if the Fraser standard, which applies to non-custodians, applied to this case. In Fraser, the Court held that an individual owes a duty to both identifiable victims, and to those within a foreseeable class of victims. Fraser, at 630, 636. There was no foreseeable class of victims in Fraser, because the there was a complete absence of evidence indicating that the perpetrator had a propensity to cause harm. Id., at 631, 637.

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[9] Defendant does cite two other cases in this section of its brief, both out of Louisiana. Def. Br., p.8, citing, Graham v. State, 354 So.2d 602 (La.App. 1977) and Marceaux v. Gibbs, 699 So.2d 1065 (La. 1997). Neither of these cases applied the "identifiable victim" requirement. Instead, these cases turned on the Louisiana court's conclusion that, as a matter of law, the only injuries that can be deemed to be proximately caused by the state negligently allowing a committed patient or prisoner to escape are those injuries occurring "during or as an integral part of the escape process." Marceaux, 699 So.2d at 170; Graham, 354 So. 2d at 604-606. No other state had adopted Louisiana's restrictive holding, which is contrary to Connecticut's definition of proximate cause. See Section B(3), infra.

However, Fraser cited Naidu v. Laird,539 A.2d 1064 (Del. 1988) as an example of a case in which the victim was within foreseeable class. Fraser, at 636. In Naidu, five and a half months after the defendant psychiatrist had released the perpetrator from the hospital, the perpetrator, in a psychotic state caused by his failure to take his medication, randomly ran his car into another car, killing the driver.

The Delaware Supreme Court in Naidu, supra, upheld the finding that the victim was within a foreseeable class of victims and that the defendant psychiatrist thus owed a duty to the victim, because the perpetrator had "twice been involved in automobile accidents while in a psychotic state, possessed a driver's license at the time of his release, and could be expected to drive a motor vehicle on public roadways. Further . . . it was not unforeseeable that Putney [the perpetrator] would cease taking his prescribed medication upon release from institutional restraints and would again become a danger to himself or others, especially while driving an automobile." Naidu, at 1073.

In this case, as well, the evidence shows that Yoanna was within a foreseeable class of victims to which defendant owed a duty. Quiles' had been committed to defendant's custody for violent and sexual assaults, including against a minor; Quiles' PSI and intake report both concluded that he posed an "extreme threat" to the public and that Quiles, who had refused therapy, would have no chance of rehabilitation or improvement in the absence of therapy. Indeed, defendant plainly did foresee that Quiles posed a high risk of flight[10] and of committing violent crimes against members of the public when it denied his request for a furlough just days before his escape, precisely because of his history of violence against others. It was thus clearly foreseeable, or, at minimum, it was not unforeseeable, that if Quiles escaped from defendant's custody, he would commit not only a violent crime, but the violent sexual assault against a minor

[10] The foreseeability of Quiles' risk of flight is discussed more fully in Section B(3), supra.

that he committed in this case. See e.g., Stokes v. Lyddy, 75 Conn.App. 252, 270, 815 A.2d 263 (2003).[11] Accordingly, as in Naidu, the plaintiff in this case was within a class of foreseeable victims.

**c. Public Policy Supports Imposing A Duty In This Case**

Defendant's argument, that the court should undertake a "public policy analysis" and decline to impose a duty on the defendant in this case because it would "burden[] the State of Connecticut with liability for any and all acts, no matter how outrageous"; would impose on the state a "limitless duty to all persons harmed by any person negligently released from its custody" and subject "discretionary decisions the State makes" to review, utterly disregards the facts and procedural posture of this case. Def. Br., pp.10-11.

First and foremost, the legislature has already conducted a "public policy analysis," and has determined that, in this particular case, the state's interest is best served by subjecting the defendant's conduct, including its "discretionary decisions," to judicial review as if defendant were a private person, thereby "remedying a situation that is rationally seen as the equitable responsibility of the state of Connecticut." See Vogel v. State, CV 99-0588391-S 2001 WL 761153 (Conn.Super.), 30 Conn. L. Rptr. 10, (June 14, 2001) (Rubinow, J.) (J.D. Hartford at Hartford.) The legislature legitimately determined that, in this particular case, that there was an "overarching public interest" in "remedying an injustice caused by the state." Id. This determination "rests in the sound judgment of the legislature, and the courts should not override the legislature's conclusion if it can be supported by any reasonable ground." Id.

[11] In Stokes, the court held that a landlord could reasonably foresee that (1) his tenant would own a dog; (2) that the tenant would be negligent and allow the dog to escape; and (3) that, having escaped, the dog would attack and bite a pedestrian on a public sidewalk - "that is not an incident that could be characterized as too remote" to be reasonably foreseeable to the landlord. Id., at 270. The court ultimately declined to impose a duty on the landlord because he was not an "owner" or "keeper" of the dog. Id. In this case, it is undisputed that defendant was the "keeper" of Quiles.

The public interest is well served by holding that the defendant had a duty to exercise reasonable care to confine Quiles to prevent him from harming members of the public, including Yoanna Maria Noda. As the Fifth Circuit observed, "[a]ccountability acts as an incentive for professional and efficient administration . . . As government grows and the potential for harm due to its negligence increases, the need to compensate individuals bearing the full burden of that negligence also increases. Suits . . . prove a fair and efficient means to distribute the losses as well as the benefits of a parole system." Payton v. United States, 636 F.2d 132, 148 (5th Cir. 1981). The same is true with regard to the penal system. Further, "[t]he potential for public embarrassment, in light of the grievous losses sustained by [the plaintiff], appears far greater from the exemption of liability in instances of wanton or negligent errors than from the imposition of liability." Id.; Accord Vogel, supra.

Nor does defendant's partial quotation and misleading characterization of Bailor, supra, support declining to find a duty in this case on the basis of public policy. Def. Br., pp.11-12. As a preliminary matter, Bailor held that the public interest in transitioning convicts to self-sufficiency did **not** outweigh "the extraordinarily important interest in protecting the members of the public from brutal assaults at the hands of those still serving a sentence to incarceration." Id., at 684. Further, defendant has failed to explain how defendant's decision to place an "extreme threat" to the public in a minimum security prison, with unsupervised access to the exterior of the prison, after he had refused to participate in the therapy that defendant, itself, had concluded was essential to any chance for his rehabilitation, served the public interest in transitioning convicts to society. While Bailor, implicated this interest because the Bureau of Prisons had allowed the convict to serve his final six months at a half-way house in order to ease his transition from prison to society, Bailor, 51 F.3d at 680, in this case, Quiles was years away from

completing his sentence, defendant had determined that Quiles was not even eligible for a furlough from prison, and, most importantly, defendant failed to take any action to ensure that Quiles participated in therapy, the one and only activity that could possibly allow Quiles' a chance of successfully transitioning to society. Immunizing defendant in this case would thus undermine, not support, the public interest in the rehabilitation of criminals.

Second, holding that defendant had a duty in this case would not impose upon the state a "limitless" duty and liability to "all persons" for "all acts" by persons "negligently released." As a preliminary matter, this case does not involve the "negligent release" of a prisoner, but an escape, and the defendant would not even face the *potential* for liability for future escapes unless and until either the Commissioner or, as here, the legislature, determined that a particular case presented "just and equitable" circumstances for the State to waive its immunity. Further, as defendant is well aware, merely recognizing the existence of a duty does not dispose of the requirement that a plaintiff establish a breach of duty, causation, and damages. See e.g. Cansler, 234 Kan. at 570 (concluding state had a duty and whether it exercised reasonable care was a question of fact for the jury.) Regardless of whether it has a duty of care, the State will not be subject to liability if it exercises reasonable care, or if the harm resulting from its negligence in a particular case was not foreseeable. See Prosser, Law of Torts § 56, pp. 348-50 (4th ed. 1971) ("the duty is not an absolute one to insure safety, but requires only reasonable care, and there is no liability when such care has been used, or where the defendant neither knows nor has any reason to know that it is called for.")

Finally, defendant's argument that the State would suffer some unspecified "enormous" "burden" by having its "discretionary decisions" subjected to review is without merit. Def. Br., p.11. The defendant did not have discretion to allow Quiles to escape. Further, as the court in

Payton, supra, observed: "judicial review, in and of itself, poses no threat to governmental processes . . . the only issue before the court in trying such actions would be the reasonableness of the injurious activity, not whether the best alternative was chosen. There is ample room for vigorous governmental implementation of policies when the only limit placed upon such activities is that officials do not act in a manner so unreasonable that no sensible, well-intentioned person could accept it." Id., 636 F.2d at 148.[12]

**2. Defendant Breached Its Duty**

As a matter of undisputed fact, defendant had a duty to take steps to prevent the escape of its dangerous inmates, including Quiles; defendant allowed Quiles unsupervised access to the exterior of the facility to plan his escape; and defendant allowed Quiles to simply walk, without impediment, out of the prison into a waiting get-away car. It is beyond dispute that at the time of the escape, defendant was charged with custody and control of both Quiles and the prison from which he escaped, and that Quiles could not, in the ordinary course of events, have been able to escape in the absence of *some* carelessness by the defendant. Thus, the doctrine of *res ipsa loquitur*, literally the thing speaks for itself, permits the court to infer, from the fact of the escape alone, that defendant breached its duty of care. See e.g. Barretta v. Otis Elevator Co., 242 Conn. 169, 173-176, 698 A.2d 810 (1997) (describing requirements for application of doctrine); Giles v. New Haven, 228 Conn. 441, 636 A.2d 1335 (1994) (same); Maroon, 411 N.E.2d at 414-415 (applying *res ipsa loquitur* to infer that defendant's negligence allowed the convict to escape.); See also Semler, 538 F.2d at 125 (holding that the court order of confinement established the standard of care, which was that defendant was to retain custody until the court ordered time for release, and that "no lesser measure of care would suffice.")

[12] To the extent the "burden" that defendant anticipates is financial, rather than operational, "any financial uncertainty . . . can be budgeted for or covered by liability insurance." Payton, at 148. In Connecticut, the legislature appropriates funds to pay such claims. C.G.S. § 4-160(j).

The court could conclude that defendant failed to exercise reasonable care to confine Quiles even in the absence of *res ipsa loquitur*: First, defendant transferred Quiles to a Aminimum to moderate≅ level security prison even though (a) defendant knew that Quiles had been adjudged an "extreme threat" who would be unable to control his violent impulses if allowed access to the public; (b) defendant knew that Quiles required a high level of security in light of the danger he posed; and (c) defendant knew that Quiles would have no chance of any meaningful rehabilitation or improved ability to live in society unless he obtained educational and emotional therapy, and that Quiles had failed to participate in any therapy. Then, even though it recognized that Quiles presented such a high risk to the public that it denied his request for a furlough away from prison grounds, defendant allowed Quiles to exit the compound and perimeter unattended and unsupervised, where he could plan his escape. Finally, defendant failed to take any steps to monitor, supervise, or further confine Quiles when, only one month after a different prisoner had escaped, Quiles effectively broadcasting his intent to also attempt an escape from the prison in the very near future. These facts give rise to only one reasonable conclusion – that defendant failed to exercise any care, much less reasonable care, to prevent Quiles from escaping. See e.g. Tamsen, 166 Ariz. at 366 (Doctor was negligent where "[d]espite [patient's] history, Dr. Weber granted unsupervised grounds privileges to [patient].")

### 3. Defendant's Negligence Was the Proximate Cause of the Injury

The court should also reject defendant's argument that it cannot be held liable for Quiles conduct following his escape because it was (a) an "intervening cause" that (b) was too far removed in time from the escape. Def. Br., pp.11-13. Proximate cause exists so long as "the harm which occurred was of the same general nature as the foreseeable risk created by the

defendant's negligence." Merhi v. Becker, 164 Conn. 516, 521, 325 A.2d 270 (1973).[13] The fact that a defendant "neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. Neither foreseeability of the extent nor the manner of injury constitutes the criteria for deciding questions of proximate cause." Id., at 521. Moreover, where the risk created by the defendant's negligence includes the criminal act of another, this criminal act will not relieve the defendant of liability unless the harm caused was not within the scope of the risk created by the defendant's conduct. Restatement (Second) Torts § 442B; Mehri, 164 Conn. at 522, citing, Restatement (Second), 2 Torts § 442B. The cases "in which the chain of causation is found to have been broken [by an intervening act] are exceptional." Mellish v. Cooney, 23 Conn.Sup. 350, 183 A.2d 753 (1962). This is not one of those exceptional cases.

As set forth in Section B(1)(b), supra, the risk of sexual assault upon a minor such as Yoanna was within the scope of foreseeable risk created by defendant's failure to securely confine Quiles. See White, 780 F.2d at 107 (concluding that "we have no difficulty holding that the assault [by the escaped patient] was proximately caused by the Hospital's breach of its obligation to confine" given the "close match between the reasons the Hospital was required to keep [the patient] and the unfortunate consequences of its negligence.); Semler, 538 F.2d at 126 ("the probation order imposed on appellants the duty to protect the public from assaults by Gilreath because this danger was reasonably foreseeable when the order was entered. The breach of this duty, followed by the foreseeable harm on which it was predicated, in itself demonstrates proximate cause.")

Moreover, contrary to defendant's contention, plaintiff does not need to show that it was

[13] It is plain that "cause in fact," or "but for" cause exists in this case – but for Quiles' escape from defendant's custody, he could not have raped and killed Yoanna. Defendant does not seriously attempt to dispute that its negligence was the cause in fact of the injuries alleged in this case.

foreseeable that Quiles would commit the crime outside of the state, or that he would do so within some unspecified period after his escape. "When it is found that a man ought to have foreseen in a general way consequences of a certain kind, it will not avail him to say that he could not foresee the precise course or the full extent of the consequences, being of a kind, which in fact have happened." Alberone v. King, 26 Conn.Sup. 98, 101-102, 213 A.2d 534 (1965); Merhi, at 521. Nevertheless, defendants could have reasonably anticipated that, having escaped defendant's custody with the majority of his sentence still unserved, Quiles would flee the state to avoid recapture, and thereafter commit his violent crime. See e.g. Exhibit P (prisoner who escaped from CRCI just two months previously was captured in California); Doe, supra (escapee drove to Massachusetts where he raped and murdered the victim); Maroon, supra (escapee from Indiana facility fled to Illinois where he kidnapped and killed a minor); Natrona County, supra (escapee from Wyoming facility fled to Colorado, where he committed a murder.)[14]

At a minimum, it would be anomalous for this court to hold that "the minds of reasonable men could reach only one conclusion"[15] on this issue (*viz.* that defendant could not be held liable), when the presumably reasonable members of the General Assembly, having reviewed the fact of this case, "believe[d] the claim to present an issue of law or fact under which the state,

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[14] The courts of this state have regularly held that, having left one's keys in a parked car, it is reasonably foreseeable that a thief will steal the car and, while driving the car, injure another – and this is notwithstanding that the vast majority of the population is law abiding. Mellish, supra; Alberone, supra; Watkins v. Yamaguchi, No. CV311983S 1996 WL 502172, 17 Conn. L. Rptr. 405 (August 28, 1996). Defendant's argument that the longer that Quiles remained at large, the less foreseeable it was that he would commit a violent crime, is equivalent to arguing that the longer a car remained parked with the keys in it, the less foreseeable it would be that a thief would steal the car. This argument is utterly illogical. As the court in Dudley, supra, explained, the longer an escapee remains at large, the greater the class of potential victims to whom the defendant owes a duty becomes: "the class of potential victims at risk may extend to all who are present within the area to which the prisoner will foreseeably have access during the period of his freedom." Dudley, 241 Va. at 279.

[15] Doe v. Manheimer, 212 Conn. 748, 756-57, 563 A.2d 699 (1989), modified, Stewart v. Federated Department Stores, Inc., 234 Conn. 597, 608, 662 A.2d 753 (1995) (explaining that "[t]he issue of proximate cause is ordinarily a question of fact for the trier . . . if there is room for reasonable disagreement the question is one to be determined by the trier of fact.")

where it a private person, could be liable." C.G.S. § 4-159.

## IV. CONCLUSION

Quiles was an extremely dangerous individual with a history of committing violent, heinous acts against random victims, including children, for which the court sentenced Quiles to 18 years in prison. Defendant undertook the responsibility to securely confine Quiles, as ordered by the court. It was foreseeable that, if defendant failed to exercise reasonable care, Quiles would escape custody, flee the state to avoid recapture, and sexually assault and abuse a child, once again. Defendant did allow Quiles to escape, and, as a result, a two year old girl suffered a terrifying, painful death at the hands of Quiles, and her mother was left to live with the most heart-wrenching loss that an adult can suffer. As a matter of law, defendant may be held liable to the victims of this foreseeable consequence of defendant's negligence. For the foregoing reasons, plaintiff respectfully requests that the court deny defendant's motion for summary judgment and enter judgment in her favor.