UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Lin Li Qu, et al. *Plaintiff*,	)	
v.	)	CA No. 09-053-S-DLM
Central Falls Detention Facility Corporation, et al., *Defendants*.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action arrives before the Court on Motion for Summary Judgment by the United States of America ("Defendant, "U.S." or "Government") and Supporting Memorandum ("Defendant's MSJ")[1] filed on February 27, 2012. In Defendant's MSJ, the United States argues that the tort claims brought against it pursuant to the Federal Torts Claim Act ("FTCA") (28 USC §§ 1346(b), 2671-2680 (2006)) by Plaintiff will not lie for a number of reasons. Among these, Defendant avers wrongly that the independent contractor and discretionary function exceptions to the FTCA prevent Plaintiff from bringing her claims against the government. Defendant also avers, again improperly, that certain other direct negligence actions she has against the United States fail as a matter of law. Many of these issues were addressed in this Court's June 14, 2010 Order (Docket #172)

Plaintiff will show as a matter of law, that either Immigration and Customs Enforcement ("ICE") and/or, the Department of Homeland Security ("DIHS"), directly committed negligence

[1] References to the Defendant's MSJ will be in the form (Defendant's MSJ, ___.)

against Plaintiff's decedent, Jason Ng ("Ng or Mr. Ng"), which was not predicated on any action or failure to act by the Wyatt Detention Center ("Wyatt") and/or its parent corporation, Central Falls Detention Facility Corporation. Rather, ICE, itself, was negligent by breaching a duty it owed to Mr. Ng through its failure to follow its own internal policies regarding mandatory visits to detainees like Mr. Ng in its contracted detention facilities. Thus, Plaintiff will show as a matter of law that neither the independent contractor nor the discretionary function exceptions to the FTCA are applicable to this action. She will also show that all underlying negligence claims she alleges in her Fifth Amended Complaint (Corrected) ("Complaint, 16th Cause of Action ")[2] are properly brought pursuant to state law(s) as required by the FTCA. Plaintiff will also show that ICE is liable for a variety of negligent acts stemming from the forced visit Mr. Ng made to ICE offices in Hartford, Connecticut, July 30, 2008. Plaintiff will show as a matter of law that Defendant breached a duty to Mr. Ng in not seeking medical care for Ng when he was in ICE's Hartford office.

In sum, Plaintiff's claims against the government pursuant to the FTCA are entirely appropriate and no exceptions to the FTCA properly lie. Plaintiff also makes a proper showing of all of the elements of negligence necessary to carry her burden at the summary judgment stage of litigation according to the laws of either Rhode Island or Connecticut as required. Therefore, Defendant's MSJ should be denied in its entirety.

II. STATEMENT OF FACTS

A. ICE's Knowledge of Mr. Ng's Serious Medical Condition

Jason Ng was arrested by ICE on July 19, 2007. (Plaintiff's Facts 133). He was moved to various facilities over the next year as an ICE detainee under ICE custody. (Plaintiff's Facts

[2] References to the Complaint will be in the form (Complaint, ___.)

134, 135) He was detained under the authority of the Immigration and Nationality Act and could only be discharged to ICE or other entities authorized by ICE. (Plaintiff's Facts 135) Prior to being transferred by ICE for the second time to the Donald W. Wyatt Facility ("Wyatt") in early July, 2008, Mr. Ng was held at the Franklin County Jail in St. Albans, Vermont. (Plaintiff's Facts 138)

While Mr. Ng was detained in Vermont, his attorney, Ted Cox, wrote to ICE stating that Mr. Ng was suffering from chronic back pain and skin irritation and asking ICE to transfer Mr. Ng to a different facility so that Mr. Ng could receive proper medical care. (Plaintiff's Facts 139) Around this same time, Mr. Ng submitted a health request form to the Vermont facility asking to see a doctor for a skin problem and an "itchy rash all over my body." He wrote, "I think there is something wrong with my body that causes the skin problem" and further stated "please let ICE know that I need medical attention badly." (Plaintiff's Facts 140) On July 1, 2008, the Vermont facility notified an ICE agent of Mr. Ng's skin condition. (Plaintiff's Facts 141)

On July 3, 2008 Mr. Ng was transferred to Wyatt. ICE Agent Larry Smith signed the transfer form indicating that Mr. Ng was being transferred due to "medical issues." Within the first week of his stay at Wyatt, Mr. Ng submitted three health service request forms stating that he was suffering from a very itchy rash all over his body and increasingly worsening back pain that began while he was detained in Vermont. He indicated that he was unable to sleep at night because of the pain and repeatedly requested to see a doctor. (Plaintiff's Facts 142-145)

On July 11, 2008 Mr. Ng's brother-in-law Brian Zhao sent an email to the warden at Wyatt expressing serious concern about Jason's medical condition. He stated that Mr. Ng was experiencing serious back pain and that he was not receiving sufficient medical care. He further

noted that Mr. Ng sounded very weak and in extreme pain when he spoke to him on the phone and that Mr. Ng was also having problems getting on to his bed. (Plaintiff's Facts 146)

On July 14, 2008, shortly after Brian's email to Wyatt, Attorney Cox again wrote to ICE indicating that Mr. Ng was continuing to suffer from serious back pain and also putting ICE on direct notice that Jason was being denied his right to proper medical treatment at Wyatt. (Plaintiff's Facts 147, 148)

On July 16, 2008, after receiving an email reply from Wyatt, Brian Zhao again emailed the warden expressing extreme concern about his brother-in-law's condition. Brian noted that Jason was continuing to suffer from unbearable back pain but that Jason's suffering was not being take seriously by the Wyatt medical staff. Brian wrote that he was heartbroken when he visited Jason because Jason looked so horrible and weak, and that Jason was now having problems standing up. He was concerned that Jason may have suffered a spinal injury or fracture and again requested adequate medical care for Jason. (Plaintiff's Facts 148) By July 17, 2008, Jason could no longer walk on his own. He submitted yet another health service request. "I need x-ray on my back and I need cane because I can't walk." (Plaintiff's Facts 151)

On July 22, 2008 Brian Zhao urgently emailed Wyatt for a third time, now literally begging for medical treatment for Mr. Ng. He explained that Jason had difficulty getting out of bed, had lost sensitivity in his right leg which had also begun to swell, had difficulty walking with a cane and was unable to sleep because of extreme pain. He had visited Jason twice within the past week and noticed that Jason's condition was getting worse and worse. (Plaintiff's Fact 152)

On July 24, 2008 Associate Warden Tapley forwarded Brian's emails to ICE Agent Aldean Beaumont. (Plaintiff's Facts 153, 154) ICE was already on notice of Mr. Ng's serious

medical problems from Mr. Cox's previous letters. ICE was now on notice of explicit details of Mr. Ng's desperate medical problems as set forth so urgently in Brian Zhao's series of emails. ICE Agent Beaumont that day approved a "non-emergency" medical examination for Mr. Ng. Under the ISA between Wyatt and ICE, Wyatt had access to an off-site emergency provider at all times, yet Ms. Beaumont who was ICE's "technical representative" pursuant to the ISA, testified that she did not know what the procedure was for emergency situations under the ISA, and further incredibly testified that based on the information that she had received on July 24th, she did not deem Mr. Ng's situation to be an emergency, and that although she could not recall how she felt reading Mr. Zhao's emails, that she "wouldn't be overly concerned" reading the contents of it. (Plaintiff's Facts 156, 158)

ICE was also separately notified on July 24, 2008 by Mr. Cox again when he wrote to ICE agent Nadine Mesereau requesting a custody review and parole because of Jason's "serious and rapidly deteriorating health problems." (Plaintiff's facts 157) ICE was again notified by Wyatt on July 28th that Mr. Ng's attorney, Andy Wong, had contacted Wyatt with several questions pertaining to Jason's medical condition. He indicated that he had left several messages for ICE in the past two weeks, however no one from ICE had returned his phone calls. (Plaintiff's Facts 159)

B. ICE's Failure to Comply with Mandatory Violation Standards

The United States, through its agent, ICE, failed utterly to follow its own internal policy directives mandating both scheduled and unscheduled visits to ICE's contracted detention facilities, including Wyatt. (Plaintiff's Facts 167-168) Pursuant to the ICE Detention Standard: Staff Detainee Communication ("ICE Communication Standard") (Plaintiff's Facts 164-167), scheduled visits were to occur at least weekly (and more regularly for "larger" facilities) and

were for the express purpose of "address[ing] detainees' personal concerns and to monitor living conditions." (Plaintiff's Fact 167) The required unscheduled visits were to "encourage informal communication between staff and detainees [allowing ICE agents to] informally observ[e] living and working conditions [of the detainees and detention facility staff.]." (Plaintiff's Fact 166) ICE agents were required to log visits to Wyatt. The Wyatt log shows that no such visits were made by ICE in July, 2008, the month during which Mr. Ng's health was in precipitous decline prior to his death on August 6, 2008. (Plaintiff's Fact 168) Additionally, ICE's Field Office Director, Bruce Chadbourne, testified that ICE officers were notified that visits to all contracted detention facilities were required irrespective of any understaffing at ICE, that such visits should occur at least bi-weekly, and, to the extent that the scheduled visits did not occur weekly, this was in violation of ICE policy. (Plaintiff's Fact 168) Mr. Chadbourne also testified that written complaints and/or other communications submitted by ICE detainees at Wyatt were not collected in July, 2008, since no ICE agent visited that detention center. (Id.)

C. ICE's Negligence Ordering Plaintiff to Hartford and Its Treatment of Plaintiff on July 30, 2008

On July 29, 2008 Mr. Smith ordered that Mr. Ng be transported to the Hartford ICE office based solely on information provided to him by a Wyatt transportation officer. This information was that Mr. Ng was complaining about his treatment at Wyatt; that Mr. Ng had not gone on a scheduled appointment for a CT scan; and that Mr. Ng was not able to make telephone calls from Wyatt to his family members or his attorneys. Prior to ordering that Mr. Ng be sent to Hartford, Mr. Smith made no inquiries to Wyatt to determine why Mr. Ng required a CT scan, and made no inquiries with anyone at Wyatt as to why Mr. Ng was unable to make telephone calls at Wyatt. (Plaintiff's Facts 170, 171)

Mr. Smith also had no knowledge of whether ICE employees were following the ICE Detention Standard that required them to travel to Wyatt every week to meet with detainees being held at Wyatt and to address the concerns of the detainees. Further, prior to ordering that Mr. Ng be transported to Hartford Mr. Smith did nothing to determine whether any Hartford ICE detention officers would be visiting Wyatt. (Plaintiff's Facts 172, 174)

When Mr. Smith first observed Mr. Ng at the Hartford ICE office, Mr. Ng complained to Mr. Smith that he had medical problems, including pain, and that he was unable to make telephone calls at Wyatt. Mr. Smith did nothing to investigate why Mr. Ng was unable to make calls at Wyatt. He stated that he was not concerned "at all" that Mr. Ng would be unable to make phone calls when he returned to Wyatt and that Mr. Smith "wasn't there to solve the problem" but rather to "accommodate the individual that day."

Mr. Ng's sister, Wendy Ng, initially received a call from Mr. Smith in Hartford that morning. Mr. Smith initially spoke to Wendy about Mr. Ng's immigration case. Wendy was then allowed to speak to her brother who was crying and told her that he couldn't walk. Mr. Ng next told Wendy that he had been tortured by the staff at Wyatt. She testified that she did not recall specifically whether Mr. Ng was speaking English or Chinese when he described the torture to her, although she does recall that Mr. Smith was in the background screaming at Mr. Ng to speak English. Wendy's testimony regarding this portion of this telephone call with her brother and Mr. Smith is as follows:

Q. And did the officer identify himself when he called you?
A. I don't remember the name. I think the maybe the last name is Smith, Smith.
Q. Was it Larry Smith or Lawrence Smith?
A. I don't know the name.
Q. But you heard the name Smith?

A. Yeah.
Q. So he identified himself to you, and then he he said can you tell me that again.
A. He had, urn - he mentioned my brother's name. I say I know this person. And he say - he say should we release him on the street or should you guys talk to your lawyer to we drop the case. To we drop the immigration case. Yes.
Q. And what else did the officer say to you?
A. He say, I don't know why - how come Ng, he's in here. I don't know why Donald Wyatt, they pull him to the --- he say he didn't know why the Donald Wyatt, the people over there, they took him to the office. He says he didn't know why.
Q. Were you - anything else? Did he say anything else to you?
A. And then I think I could able to talk to my brother a little bit. He was crying, he was crying. And the officer say, speak English, speak English. You cannot speak Chinese. So he say, speak English. I hear from the background the officer was screaming at him, he say speak English.
Q. And was that the same officer that you had spoken to?
A. Yes.
Q. And what was it your brother told you at that time during that phone call? What did he say?
A. That phone call, he was - he was crying. I-ic said my - my at first he one of them, they - one of the things, he couldn't walk. But end up that they, they pull him out -- the Donald Wyatt people, they pull him out from the gate and then they tortured him. He told me with detail. Then he say they torture him. Then, he told them he couldn't walk. He said I don't want to survive if my both legs cannot walk.
Q. And did he tell you this in what language? What language?
A. English. Because the officer, he was screaming in the background, English. English or Chinese, I - I don't remember details.
Q. So it's possible he may have said it in Chinese?
A. It's possible, too, yes.

(Plaintiff's Facts 180, 181)

Wendy further states that her brother was "begging" Mr. Smith in Hartford that day for medical care and to be taken to the hospital. She testified:

Q. Do you know whether he asked anyone in the Hartford ICE -4mmigration and Custom Enforcement office to get him medical care on the 301h?
A. He was begging them.
Q. He was begging the folks at ICE that day to get him medical care?
A. Because I - I want to get him to the hospital where - I don't care, I could pay for that. They wouldn't let him do it. I mean, I don't understand. Yes, he was begging them when he was in Hartford, too. What kind of person is. -.
Q. Did he say who he asked at Hartford to let him go to the hospital?
A. No, I don't know. The officer. I don't know. He was begging them. He

needs to go to the hospital.
Q. Take your time. It's all right.
A. It just make me so mad. I don't understand why.

(Plaintiff's Fact 182)

Mr. Smith testified that he did not seek emergency services for Mr. Ng while at Hartford because "he did not physically appear to be hurting." He based his judgment on conversations he had with Wyatt. He did not examine Mr. Ng to see if he could walk and explained that he decided to return Mr. Ng to Wyatt rather than bring him to a hospital because "he was not in pain or agony. He wasn't screaming." (Ex. A, pp. 126-127). This testimony is contrary to several other accounts of Ng's physical appearance on July 30, 2008 and is highly suspect in light of the videotape of events at Wyatt on July 30, 2008. (Plaintiff's Fact 183)

ICE "Guidelines for the Use of Hold Rooms at Field Office Locations" states "staff shall immediately call the local emergency service when a detainee is determined to need urgent medical treatment. Staff shall immediately notify supervisory personnel of all emergencies." (Ex. C).Mr. Smith's decision that Mr. Ng did not need emergency medical care was allegedly based not on his own observation but in reliance on the medical staff at Wyatt. (Plaintiff's Fact 185)

According to Peter Barletta's testimony Mr. Smith never spoke directly with medical personnel at Wyatt that morning. When questions were raised about Mr. Ng's medical condition Mr. Barletta called Wyatt on his cell phone, spoke to the medical department and acted as the "go-between" asking questions to Wyatt and then relaying Wyatt's answers to Mr. Smith and Mr. Ng and his family. Mr. Smith was receiving answers to Mr. Ng's very serious medical issues allegedly from medical personnel at Wyatt relayed to him through Wyatt's bus driver, Barletta, who stated to ICE agents earlier that morning that there was "nothing wrong" with Mr. Ng. (Plaintiff's Fact 188)

Mr. Ng told Mr. Smith that he was not satisfied with the medical treatment he was getting at Wyatt and asked if he could see his own physician. He also asked for a wheelchair and "other things." Mr. Smith did not know at the time whether ICE had the ability to intervene on Mr. Ng's behalf or to order that Mr. Ng see another doctor. (Plaintiff's Fact 186 - 187)

Prior to Mr. Smith ordering that Mr. Ng be brought to Hartford, Mr. Ng's attorney, Andy Wong, contacted ICE on many occasions to request that Mr. Ng receive better treatment, including medical treatment from Wyatt and access to an attorney. Mr. Smith contacted Attorney Wong by speaker phone from Hartford on July 30, 2008 with Mr. Ng present. During this call Mr. Ng stated that he could not walk and needed a wheelchair while at Wyatt and as a result of not being able to walk he could not get his medication at Wyatt. Mr. Ng also stated that he was concerned that the condition would deteriorate until he would become completely disabled. (Plaintiff's Facts 190 - 191)

While at Wyatt in July, 2008, Mr. Ng's physical condition became so painful and deteriorated so much that:

a. he was unable to walk to pick up his medication at the medication counter at Wyatt;

b. he had difficulty getting off his bed to use the toilet that was located in his cell;

c. he needed the assistance of other inmates to bring him food and help him to the bathroom;

d. he was unable to take a shower or leave his cell for five days in a row;

e. he was unable to meet with Attorney Wong when Attorney Wong drove from New York to visit Mr. Ng on July 26, 2008; and

f. he was unable to go to a scheduled CT scan on July 29, 2008.

Mr. Ng repeatedly requested a wheelchair while at Wyatt that would have permitted him access to each of these activities. He was repeatedly denied use of one. (Plaintiff's Fact 192)

During his telephone conversation with Mr. Smith Attorney Wong requested that Mr. Smith grant a wheelchair at Wyatt. Officer Smith told Mr. Wong that the determination was made by a doctor at Wyatt and that Mr. Ng was not and would not be given a wheelchair. Mr. Ng further described his back and leg pain, told Mr. Smith and Attorney Wong that he could not walk, and asked Attorney Wong to help him obtain a wheelchair because he could not otherwise move. Officer Smith replied that Mr. Ng needed to do exercises, not stay in bed and needed to cooperate with Wyatt to get medical treatment. Mr. Smith further stated that Mr. Ng had refused to get in a wheelchair for his CT scan the day before and that Mr. Ng would not be permitted to be examined by an outside doctor. Mr. Ng then told Attorney Wong that he had to be released from Wyatt within two weeks because "he could no longer withstand the suffering inside the facility." Mr. Smith stated that Mr. Ng would need to withdraw all of his appeals before the Board of Immigration before ICE would begin the approval process. (Plaintiff's Fact 195 – 196)

Mr. Smith testified that if Mr. Ng in the future needed to use the telephone that he possibly would bring him back to Hartford if requested to do so by the Wyatt transportation officer. Mr. Smith also testified that he did not believe that a man in his thirties who could not walk constituted a medical emergency. When sending Mr. Ng back to Wyatt Mr. Smith, with the assistance of three other men, helped assist Mr. Ng back into the van. At that time he knew that Mr. Ng could not get out of his wheelchair on his own, that Mr. Ng could not get into the van on his own, and that Mr. Ng needed a number of people to pick him up and place him in the van. (Plaintiff's Facts 197 - 198)

III. LEGAL STANDARDS

Federal Rule of Civil Procedure 56 says that summary judgment is "appropriate only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Chopmist Hill Fire Dep't. v. Town of Scituate*, 780 F. Supp. 2d 179, 184 (D.R.I. 2011) (Internal quotation omitted). *See also F.R.C.P. Rule 56.* Issues are "genuine" if "a rational fact finder could resolve the issue in favor of either party, and a fact is 'material' if it has the capacity to sway the outcome of the litigation under the applicable law." (*Id*.) In other words, "on a summary judgment motion, [a] genuine issue exists where a reasonable jury could resolve the point in favor of the nonmoving party." *Estrada v. Rhode Island*, 594 F.3d 56, 62 (1st Cir. 2010) (internal quotations omitted.) In the first instance, the moving party bears the burden under Rule 56 to show that no genuine issue of material fact exists. (*Id*.) Once the moving party so shows, the non-moving party must set out specific facts sufficient to show genuine issues for trial. *See* Rule 56(e)(2). *See also, Chopmist*, 780 F.2d at 184. The non-moving party "may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in [the] rule – set out specific facts showing a genuine issue for trial." (*Id*.) And, pursuant to Rule 56, the parties must submit admissible evidence supporting and opposing motions for summary judgment. *(Id*.) Finally, the court must view *the entire record* "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Fiacco v. Sigma Alpha Epsilon Fraternity*, 528 F.3d 94, 98 (1st Cir. 2008).

Plaintiff presents sufficient evidence herein for the Court to determine that Defendant's MSJ should be denied as a matter of law. Plaintiff's Complaint and supporting admissible

depositions, affidavits and other documents offer more than enough admissible evidence for this Court to determine that several issues of material fact remain to be determined in this litigation and that Defendant is not entitled to judgment as a matter of law. As such, Defendant's MSJ should be denied on all grounds.

IV. LEGAL ARGUMENT

A. The FTCA Serves To Waive The United States' Sovereign Immunity And Renders It Liable For Certain Torts Claims, Barring Any Applicable Exception.

In general, "the FTCA subject to various exceptions waives sovereign immunity from suits for negligent or wrongful acts [by employees of the United States government.]."[3] *U.S. v. Gaubert*, 499 U.S. 315, 319 (n.4) (1991); *See* 28 U.S.C. §§ 1346(b). Among the exceptions recognized by the Supreme Court are two cited by Defendant in the MSJ: namely, a) the independent contractor exception (Defendant's MSJ, 10-15) (*See* 28 U.S.C. § 1346(b)(1) (only torts committed by "employee(s) of the Government" are subject to liability under the FTCA) and b) the discretionary function exception (Defendant's MSJ, 16-24) (*See* 28 U.S.C. § 1346) (there is no waiver of sovereign immunity where a claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.") While these exceptions are recognized by the First Circuit. *See e.g., Carroll v. US*, 661 F.3d 87, 92 (1st Cir. 2011); *Limone v. U.S.*, 579 F.3d 79, 101 (1st Cir. 2009), neither is applicable to shield the United State from liability under the facts of this case. Accordingly, the

[3] Plaintiff does not dispute Defendant's argument that Wyatt was an independent contractor and not an agency of the Government (Defendant's MSJ, 12). Plaintiff argues strenuously, however, that the independent contractor exception to the FTCA does not apply in this case as her Complaint clearly is lodged directly against the United States for the claims against it which are the subject of the present action. (*Supra*, IV, A, 1.)

United States may be found liable in tort pursuant to the FTCA for its own actions and inactions in this case.

1. The Independent Contractor Exception to the FTCA is not Applicable to Defendant's Motion for Summary Judgment.

The United States would have this Court believe that "the crux of Plaintiff's negligence claims against the United States rests on the actions or omissions of independent contractors," (Defendant's MSJ, 10). However, the "crux" of Plaintiff's negligence claims for purposes of the present action is not in any way, shape, or form directed to the actions or omissions of Wyatt[4] or to those of any other independent contractor. Rather, Plaintiff's Complaint and discovery responses plainly allege that the United States, itself, through the actions of its employees at ICE and DIHS, exhibited negligent and tortious conduct under the laws of Rhode Island toward Mr. Ng while he was a detainee in the custody of ICE between July 3, 2008 and his tragic death from metastatic liver cancer on August 6, 2008.

In short, the Plaintiff's claims against the United States are based on allegations of its ***own*** actionable conduct and not based on the vicarious liability of Wyatt and others. Specifically, Plaintiff avers that United States employees:

- failed to follow the policy directives of ICE that mandated that ICE representatives visit detainees at Wyatt on both an unscheduled and scheduled basis; scheduled visits were to be conducted at a minimum weekly and were for the express purpose of "address[ing] detainees' personal concerns and to monitor

[4] Nothing in this Opposition is intended to waive or modify any claims that Plaintiff has or intends to bring against Wyatt or the Central Falls Detention Corporation at the appropriate time. Plaintiff simply argues that the foundation of her claim against the United States now does not rest upon any acts or failure to act by Wyatt, nor does Plaintiff dispute that Wyatt was an independent contractor of the United States for purposes of the FTCA. *See Carroll* , 661 F.3d at 87(the United States not liable for negligence of its independent contractor day care center and its independent contractor landscaper when a child enrolled at the latter was injured while playing while the landscaper mowed the lawn).

living conditions;" (Plaintiff's Facts 164 - 169) See ICE Detention Standard: Staff Detainee Communication ("ICE Communication Standard") III, A, 2.

- despite notice and an obligation owed to people under its custody, employees of the United States failed to take action when it knew that Mr. Ng was being seriously mistreated while detained at Wyatt; (Plaintiff's Facts 153 – 163)
- inflicted cruel and unusual punishment on Mr. Ng when they negligently ordered him transported to Hartford, Connecticut when they knew or should have known that his medical condition was severe; and (Plaintiff's Facts 170 – 174)
- failed to provide him with medical care after observing his condition in Hartford and then ordered him returned to Wyatt where it knew or should have known he was receiving severely inadequate medical care. (Plaintiff's Facts 175 – 198)

Plaintiff also properly brings each and every one of her negligence claims on recognized causes of action under appropriate state law as required by the FTCA. 28 USC § 1346(b)(1).

Plaintiff's claims against the United States do not seek a remedy for the negligence of government contractors under a vicarious liability theory. Instead, the Plaintiff quite clearly brings suit ***directly*** against the United States through its agents and employees at ICE and DIHS. Plaintiff's complaint specifically alleges that United States government employees, themselves, were negligent and directly violated the duty the United States owed to Mr. Ng. She does not aver that the United States is vicariously liable for the conduct of Wyatt or others.[5] Therefore, no independent contractor exception is relevant or applicable and this Court has subject matter jurisdiction over this matter because the United States has not waived its sovereign immunity. That is, the Government is subject to suit under the FTCA for the negligent acts of its own

[5]Defendant is incorrect, however, that the allegations in Count Sixteen are vicarious in nature. (Complaint, 241-244.)

employees.[6] *See Miller v. George Arpin & Sons, Inc et al.*, 949 F. Supp. 961, 965 (D.R.I. 1997) ("Under the FTCA, the United States is liable to the same extent as a private party for torts of its employees acting within the scope of their employment."); *National Railroad Passenger Corp. v. URS Corp.*, 528 F. Supp. 2d 525, 530-531 (E.D. Pa. 2007); 28 U.S.C. § 1346(b). Therefore, Defendant's reliance on the independent contractor defense is misplaced and totally irrelevant to this complaint.

In her Complaint and in various discovery responses, Plaintiff has leveled the following claims against the United States for careless and negligent acts committed directly by employees of the United States against Mr. Ng:

- Failing to follow the express policies articulated in the ICE Communication Standard requiring regularly scheduled and unscheduled visits by ICE to the detention centers, including Wyatt, that it contracted with; (Plaintiff's Facts 164 – 169)
- ICE officials ordering Mr. Ng to be transported to Hartford, Connecticut on July 30, 2008 when they knew or should have known the transport would cause Mr. Ng excruciating pain and suffering, (Complaint, ¶ 243 (b));
- Failing to ensure his proper treatment during his transportation to and from Hartford, CT on July 30, 2008, (Complaint, ¶ 243 (c));
- Failing to obtain medical care for and ordering Mr. Ng back to Wyatt, the place where he was being neglected and abused, in complete dereliction of its duty and on full knowledge of Mr. Ng's precarious condition; (Plaintiff's Facts 175 – 198) and

[6]Count Sixteen's allegations for negligence are brought against "the United States of America, by and through its agents, servants, and employees." (Complaint, 243.) The Defendant cannot reasonably content that such parties do not include ICE and DIHS.

- Despite actual notice of the inadequate medical care, failing to ensure adequate medical care to Mr. Ng during his federal detention and acting with deliberate indifference to Mr. Ng's medical condition, (Complaint, ¶ 243 (e)).

Again, these allegations are made directly against the United States, by and through its agents and/or employees and are not directed at contractors or through vicarious liability. Instead, Plaintiff's claims "are premised squarely upon acts or omissions of federal employees" and "raise the specter of negligence on the part of federal employees acting within the scope of their employment." *Miller*, 949 F. Supp. at 966. This Court found previously that it had subject matter jurisdiction regarding Plaintiff's FTCA claims and should continue to find so now. (See p. 14, Opinion and Order on the Defendant's Motion to Dismiss filed June 14, 2010 ["June 14 Order"].) Plaintiff alleges sufficient facts to show that no independent contractor exception to the FTCA should be recognized and the United States has waived sovereign immunity for such claims and is subject to liability under the FTCA.

2. The Discretionary Function Exception to the FTCA is Similarly Unavailing Against Plaintiff's Claims for the Negligent Acts Committed by ICE in Rhode Island and, Subsequently, the United States can be held Liable for those Acts.

a. The discretionary function exception does not bar negligence claims against the government where there has been a deliberate failure to follow regulations.

Defendant argues that the discretionary function exception to the FTCA protects the United States from liability for Plaintiff's tort claims in this action. (Defendant's MSJ, 16-25.) However, Defendant is incorrect. Relevant case law[7] clearly shows that where the government

[7]Defendant's reliance on *Carroll*, 661 F.3d 87 (Defendant's MSJ, 17, 21) is once again misplaced. As will be fully argued at IV, A, 2, b, unlike in *Carroll* where the court found that the government did not have a duty to oversee the work of its contractors because of the discretionary function exception, the United States here is ***directly liable*** for its independent tortious conduct in failing to follow its own internal policies to visit detainees like Mr. Ng on at least a weekly basis. Incidentally, Plaintiff does not find *Carroll* (*Id*.) to be "exceedingly similar" to the case at bar.

fails to follow promulgated regulations, reliance upon the discretionary function exception is unavailing. Not only can Plaintiff show that ICE routinely shirked its responsibility to visit Wyatt detainees at least weekly, in clear violation of its own Communication Standard, Plaintiff more importantly, can show that ICE failed to visit Wyatt ***at all*** from July 3, 2008 – August 1, 2008, the period during which Mr. Ng was detained there for the second time. This is the same time frame during which Ng's urgent medical needs were utterly ignored by medical personnel at Wyatt. Further, as required by the FTCA, Plaintiff can also prove that a viable tort claim exists against the United States under the law of Rhode Island stemming from ICE's failure to comply with the visitation policy articulated by the Communications Standard. (*See* 28 USC §§ 1346(b), 2671-2680 (2006).)

The discretionary function exception to the FTCA renders claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 USC § 2680(a)), not subject to the FTCA. Therefore, any such claim falling within the exception cannot be brought against the United States because it retains its sovereign immunity in such situations. *See Carroll v. U.S.*, 661 F.3d, 87, 99-100 (1st Cir. 2011).

Several of the First Circuit's sister courts of appeal have held that where a government agency or entity fails to follow promulgated internal rules and regulations, an FTCA action still properly lies against the government.[8] For example, the Second Circuit has held that a plaintiff prisoner's suit for negligence was not barred by the FTCA's discretionary function exception

(Defendant's MSJ, 20.) Defendant apparently finds it so since, to its mind, Plaintiff's case fails because of the independent contractor and discretionary function exceptions to the FTCA. Plaintiff believes and avers that the two exceptions are not applicable, indeed are irrelevant, to this action and, therefore, *Carroll* is dissimilar in the extreme.

[8]As fully briefed at Section 2-b *supra*, Defendant's arguments (Defendant's MSJ, 27) that the violation of statutes and regulations by the United States do not constitute claims under the FTCA are not relevant to the internal policies by agencies and other employees of the government at issue here.

where a Bureau of Prison Guideline required prison officials to visit inmate wellness areas to determine whether equipment was properly positioned and used. *Coulthurst v. U.S.*, 214 F.3d 106, 108 (2nd Cir. 2000). In *Coulthurst*, the Plaintiff was injured by an exercise machine when a cable snapped. The court remanded the action for a determination of the facts regarding whether the machines were inspected negligently. In doing so, the *Coulthurst* court held "that if the inspector failed to perform a diligent inspection [as required by the aforementioned Bureau of Prison Guideline] out of laziness or was carelessly inattentive, the [discretionary function exception] does not shield the United States from liability." *Coulthurst*, 214 F.3d at 110. In so finding, the court noted that the Plaintiff's case "involve[d] negligence unrelated to any plausible policy objectives [and therefore outside of the scope of the discretionary function exception]." *Id*. at 111.

Likewise, the Ninth Circuit in *Bolt v. U.S.*, 509 F.3d, 1028, 1030 (9th Cir. 2007) upheld the district court's finding that the "discretionary function exception to the FTCA's grant of jurisdiction … did not apply because Army policies set forth specific and mandatory rules for snow and ice removal from parking areas [which were violated by the U.S. when it failed to remove snow from a parking lot at a U.S. Army apartment complex.]" More importantly to the case at bar, the *Bolt* court specifically rejected the argument made by Defendant herein (Defendant's Statement of Undisputed Facts filed with Defendant's MSJ, 23-25) that budgetary constraints (or presumably, other lack of resources) serve as a reason for the government not to follow its own policies. *See id.* at 1034 ("in enacting § 2680, however, Congress did not intend to protect decision-making based on budgetary constraints.); *see also Whisnant v. U.S.*, 400 F.3d 1177, 1183 (9th Cir. 2005) ("The government argues that implementation of the De CA regulations regarding health and safety required employees 'to balance the agency's goal of

occupational safety against such resource constraints as costs and funding.' In addressing government negligence in the implementation of safety precautions, we have several times rejected this precise argument.").

While the First Circuit has apparently not directly decided whether the government's failure to follow an internal policy directive prevents it from claiming the discretionary function exception, it has held that when the government fails to follow promulgated regulations, such dereliction ***can*** be used as an indication of lack of due care in establishing a negligence claim. *Federal Express Corp. v. State of R. I. Dept. of Transp., Airport Div.*, 664 F.2d 830, 835 (1st Cir. 1981) ("The standards of conduct to which the defendants are held in the present case are defined largely by operations manuals promulgated by the government. Although slight deviations from manual procedures to not necessarily constitute negligence, we have previously indicated that 'a substantial and unjustified failure to follow procedures made mandatory by the manual is persuasive as an indication of lack of due care.'") (quoting *Delta Air Lines, Inc. v. U.S.*, 561 F.2d 381, 390 (1st Cir. 1977) (some internal citations omitted).) Therefore, Plaintiff respectfully submits that this Court should follow the reasoning in *Federal Express Corp.*, 664 F.2d at 835, and that of its sister courts and find that if Defendant failed to follow its own policies and procedures that the discretionary function exception is unavailable and that a claim for negligence will properly lie against the United States pursuant to the FTCA.

b. ICE did not comply with its own regulations regarding visiting detainees and the United States cannot claim the discretionary function exception to the FTCA to retain its immunity from liability.

The ICE Communication Standard very clearly ***requires*** ICE agents and/or staff to make regular announced and unannounced visits to detainees held at its contracted facilities, including

Wyatt. (Plaintiff's Facts 164 - 168).[9] For example, the Communication Standard says that "detainees often require regular access to key ICE staff." (Communication Standard, III, A) (*Id.*) To facilitate that regular access the Communication Standard requires both unannounced and announced visits by ICE personnel to the detention facilities it contracts with:

- Policies and procedures shall be in place to ensure and document that the ICE Officer in Charge (OIC), the Assistant Officer in Charge (AOIC), and designated department heads conduct regular unannounced (not scheduled) visits to the facility's living and activity areas to encourage informal communication between staff and detainees and informally observing living and working conditions. [The unannounced visits are specifically to include housing, recreation areas, dining units (preferably during lunch), special management units, and the infirmary].
- In IGSA's [such as Wyatt]: the ICE Field Office Director ***shall*** devise a written schedule and procedure ***for weekly detainee visits*** by District ICE deportation staff … . Written schedules shall be developed and posted in the detainee living areas and other areas with detainee access … . ***IGSA's with larger populations should be visited more often if necessary***.

[9] Apparently referencing the periodic inspections required by the IGSA (which Plaintiff acknowledges occurred), the United States argues that "'the FTCA does not apply where the negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs,'" (Defendant's MSJ, 27) (quoting *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 536 (1st Cir. 1997). To the extent that the United States also seeks to apply this argument to the scheduled and unscheduled visits to Wyatt mandated by the Communication Standard, its argument is unavailing. The scheduled and unscheduled visits are not creatures of statute but, rather, are mandated by internal policy (i.e. the Communication Standard). Therefore, *Sea Air Shuttle Corp.*, 112 F.3d at 536 and most of the other cases cited by Defendant are simply not applicable. (Defendant's MSJ, 27.) And, one case cited by Defendant for the proposition that the FTCA does not apply to the scheduled and unscheduled visits actually, makes the very point Plaintiff argues. *Dalrymple v. United States*, 460 F.3d 1318, 1327 (11th Cir. 2006) does not stand for the proposition that the FTCA excepts claims where the government does not follow internal policy but, instead, makes the fairly boiler plate point that claims based on such a failure to follow internal policy must be brought only subject to the law of the state where the claim arose. (See also Defendant's MSJ, 27.) Plaintiff does not argue to the contrary.

Communications Standard III, A, 1, 2b. (Plaintiff's Facts 164 – 168) (Emphasis added) Regarding the scheduled visits in particular, the purpose specified in the Communication Standard is to "address detainees' personal concerns and to monitor living conditions … the visiting officer should be familiar with the ICE detention standards and report all violations to the Field Director." Id. at III, A, 2.

The record is replete with proof of ICE's utter failure to conduct any required scheduled or unscheduled visits between July 3, 2008 and August 1, 2008 during Mr. Ng's second detention at Wyatt. Indeed, several ICE officials provided deposition testimony to the effect that no ICE visits were scheduled or conducted during that period. Some of the testimony also indicated that ICE knew that failure to visit was contrary to ICE policy. For example, Bruce Chadbourne, the ICE field office director in Boston, testified that he was aware that lack of staffing was causing fewer visits to ICE's contracted facilities in his region as required. While he refused to testify that no visits occurred at Wyatt while Mr. Ng was detained there, he did testify that failure to visit was a violation of ICE policy and that this was true ***even if*** it was for a reason of understaffing. (Plaintiff's Facts 168 – 169) (His understanding on this point is consistent with case law which states that lack of resources is not a valid reason for the government to violate internal policies.) *See Bolt*, 509 F.3d at 1030; *Whisnant*, 400 F.3d at 1183.) Additionally, Chadbourne testified that Wyatt was a "large facility." As stated earlier, large facilities were required to have more than weekly scheduled visits by ICE. Mr. Chadbourne also testified that detainees could communicate with ICE officials in writing but acknowledged that since Wyatt officials had no access to the lock boxes where those communications were deposited and since ICE failed to visit while Mr. Ng was detained, such written communications were not submitted to ICE. In any event, even if the writings had been

collected, there remains no question that they did not properly stand in the stead of the visits required by the Communication Standard. Finally, Mr. Chadbourne testified that even in the era of low-staffing: "We [i.e. ICE] encouraged all of the sub offices that they should be [visiting] at least once every two weeks." (Plaintiff's Facts 168 - 169)

In addition, neither ICE agent, George Sullivan (the Assistant Field Office Director for ICE) nor Aldean Beaumont (a supervisory deportation officer for ICE), could testify at their depositions that ICE conducted the required visits to Wyatt while Mr. Ng was detained there. Mr. Sullivan said that during that period "the frequency at that time should have …was weekly visits. It changed. At some points it was bi-weekly visits, monthly visits. But I believe at that time it was weekly visits." (Plaintiff's Fact 169) Finally, and perhaps most importantly, Ms. Beaumont testified that based on the Wyatt logs, no ICE agent visited the Wyatt detention center between July 3, 2008 and August 1, 2008. (*Id.*) Both Mr. Sullivan's and Ms. Beaumont's deposition testimonies plainly support that ICE was not following the mandates set out by the Communication Standard regarding scheduled and unscheduled visits to Wyatt.[10]

[10] While Plaintiff does not argue, contrary to Defendant's apparent position, that the United States' policies regarding detainee visitation were related to the desire of the Government to monitor its contractors, the Plaintiff disagrees wholeheartedly that "nothing that occurred between Mr. Ng's arrival at Wyatt on July 3, 2008, and Mr. Ng's ultimate diagnosis on August 1, 2008 [] would have put ICE on notice of any systemic or significant concern as to whether Wyatt was providing medical care as contracted, or with the quality of that care." (Defendant's MSJ, 22.) The record virtually overflows with evidence of Mr. Ng's poor treatment and the Government's knowledge thereof as detailed in Plaintiff's Statement of Undisputed Facts. For example, the United States knew when ICE granted Mr. Ng's transfer to the Wyatt facility on July 3, 2008 that it was expressly for medical purposes. The government also knew from correspondence and other communication with Mr. Ng's family, his attorney, and with Wyatt that Mr. Ng's condition was worsening and that, while he technically was prescribed medication and testing at the facility, he was denied access to these items because of his inability to walk. And, finally, the Government, through ICE, was well aware of Mr. Ng's grievous condition because ICE agents ***actually saw and interacted with him*** on July 30, 2008. At this point, ICE knew both that Mr. Ng wanted to go to a hospital and that he was severely bruised due to mistreatment that morning at Wyatt. (That Mr. Smith apparently disagrees that Mr. Ng was bruised when he arrived at the ICE office is a question of fact, and resolved in favor of the non-moving party at the summary judgment phase. *See*, *Fiacco*, 528 F3d at 98; See also *infra*,IV,B.)

Even if the United States successfully argues that it was not on notice of Mr. Ng's condition, it ***should have been***. As will be briefed fully, herein, by failing to provide the visits required by the Communication Standard, ICE breached a duty to Mr. Ng that resulted in needless weeks of suffering for him.

In summary, ICE was required by its own Communication Standard to conduct scheduled and unscheduled visits to the Wyatt facility. The former visits were to be conducted at least weekly under the policies and, quite probably more often, since Wyatt was considered a large facility (Plaintiff's Fact 165) And, evidence provided by the deposition testimony of Messrs. Chadbourne and Sullivan and Ms. Beaumont shows that these visits did not occur and the direct purpose of the visits as articulated in the Communication Standard was not met. That is, no one in the Government "address[ed Mr. Ng's] personal concerns [or] monitor[ed his] living condition." As such, the United States is not entitled to immunity because the discretionary function exception to the FTCA is not available where the government fails to follow its own internal policies. *See Coulthurst,* 214 F.3d 106; *Bolt,* 509 F.3d 1028; *see also Federal Express Corp.*, 664 F.2d at 835.

c. Even if this Court finds that the failure to follow internal policy by ICE does not render the discretionary function exception to the FTCA inapplicable, Defendant is still not shielded from liability.

Even if the Court is not convinced that ICE's failure to follow the internal policies regarding visitation articulated in the Communication Standard is, in and of itself, fatal to the discretionary function exception, the Government still cannot shield itself from liability. In short, the policies articulated in the Communication Standard were not discretionary so the exception-- on its very face-- is unavailing.

In *Carroll,* the First Circuit recognized the following test for determining whether the discretionary function exception was applicable:

> [a] court must first identify the conduct that is alleged to have caused the harm, then determine whether that conduct can fairly be described as discretionary, and if so, decide whether the exercise or non-exercise of the granted discretion is actually or potentially influenced by policy considerations.

Carroll, 661 F.3d at 100, quoting *Fothergill v. United States*, 566 F.3d 248, 252 (1st Cir. 2009) and collecting cases.

In the instant matter, the Court need only reach the first prong of the test because the policies regarding visitation were clearly not discretionary but mandatory ("the ICE Field Office Director ***shall*** devise a written schedule and procedure for weekly detainee visits;" "policies and procedures ***shall*** be in place to ensure and document [that ICE] conduct[s] regular unannounced (not scheduled) visits to the [detention facility]".). (Plaintiff's Facts 164 - 167) As such, any decision regarding whether ICE conducted the visits or not could not "fairly be described as discretionary," *Carroll*, 661 F.3d at 100, and the discretionary function exception is not applicable.

d. Plaintiff's claim for negligence against the United States is supported by Rhode Island law.

The FTCA allows negligence actions to lie against the United States for the tortious actions of its employees only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 USC § 1346(b)(1). Subsequently, Plaintiff's showing that the independent contractor and discretionary function exceptions to the FTCA do not apply to the case at bar must be coupled with proof that a negligence action will lie in Rhode Island against the United States for ICE's utter disregard of internal policy manifested by the failure to visit Wyatt at all while Mr. Ng was detained there. Plaintiff can easily prove such a negligence claim.

In Rhode Island, to bring a negligence action, a plaintiff must allege "(1) a legally cognizable duty owed by defendant to plaintiff; (2) breach of such duty; (3) that the conduct primarily caused the injury; and (4) actual loss or damage." *Rhode Island Resource Recovery Corp, v. Van Liew Trust Co.*, No. PC-10-4503, 2011 WL 1936011 (Trial Order) (R.I. Super. May

13, 2011) (Internal citations omitted). Rhode Island courts have recognized that "there is no clear-cut formula for creation of a duty [,] but rather whether a duty exists in a particular case is a question of law, which involves an ***ad hoc*** approach and turns on the particular facts and circumstances of a given case." *Malouin v. Moore*, Nos. 2006-0110, 2007-379, 2009 WL 798051 (R.I. Super. March 6, 2009) (quoting *Benaski v. Weinberg*, 899 A.2d 499, 502 (R.I. 2006). In deciding whether duty exists, a court will "consider all relevant factors, including the relationship between the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations and notions of fairness." *Id*., (quoting *Hennessey v. Pyne*, 694 A.2d 691, 697 (R.I. 1997).

As this Court has already recognized, the Government owed a duty to Mr. Ng. In the June 14th Order at p. 15, the Court said that Plaintiff's Complaint "paint[ed] a harrowing picture" of Mr. Ng's treatment while he was detained and found that "Plaintiff alleg[ed] sufficient facts to support it was negligent [for the Government] to act as it did after it was put on notice of Jason's condition." (*Id.*) ICE was not simply an innocent bystander in the relationship between Wyatt and Mr. Ng. Rather, Mr. Ng was being detained by the United States government through ICE. (Plaintiff's Facts 135 – 136) The only reason Wyatt was involved at all was because ICE made it so. Any "notion of fairness," as stated by the *Hennessey* court 694 A.2d at 697 would not be served if a government agency could simply warehouse a detainee and walk away, ignoring any standard of care owed to that individual. Sadly, however, that is what the United States now seeks to do.

There is another reason to impose legal duty on the United States in this case. Contrary to the Defendant's assertions, the Plaintiff does not primarily argue that ICE did not promulgate or formulate policies (Defendant's MSJ, 18) but rather that it failed utterly to implement them.

This Circuit has held that a failure to follow policies by a government agency is contrary to law and is "persuasive as an indication of a lack of due care." *Federal Express Corp.*, 664 F.2d at 835 (Internal quotation omitted).[11] ICE's failure to follow the Communication Standard is just such an indication of lack of due care and one that had the gravest of results. If even a single ICE officer had made contact with Mr. Ng during the month he was detained at Wyatt, particularly after the United States Government was put on actual notice of the serious medical concerns Mr. Ng had, it would have been readily evident that Mr. Ng was in a dire physical condition.[12] In short, ICE had a legal duty to follow its own regulations, *Federal Express Corp.*, 664 F.2d at 835, a duty which it clearly breached.

Having borne its burden to establish legal duty and the breach thereof by the United States, the Plaintiff does not need to prove issues of proximate cause and damages at the summary judgment phase. *See Santana v. Rainbow Cleaners*, 969 A.2d 653, 658 (R.I. 2009) ("It is well-settled that issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner … . However, in the absence of a duty, the trier of fact has nothing to consider and a motion for summary judgment must be granted.") (Internal citations and quotations omitted). Therefore, since Plaintiff has shown as a matter of law that: 1) the discretionary function exception does not lie; 2) the United States had a duty under Rhode Island law to visit the Wyatt facility at least weekly under the terms of the Communication Standard; and 3) this duty was breached, Defendant's Motion for Summary Judgment must be denied on these grounds.

[11] The First Circuit applies the substantive law of Rhode Island in *Federal Express Corp.*, 644 F.2d at 834.

[12] Plaintiff does not concede that ICE was not on notice otherwise of Mr. Ng's physical condition because as set forth in Plaintiff's Statement of Undisputed Facts of his request for a transfer to Wyatt from a previous facility because Wyatt had medical facilities, because Mr. Ng's family and attorney were in regular contact with both Wyatt and ICE, and because of the actual notice ICE had of Mr. Ng's condition on July 30, 2008, when he was brought to the ICE office in Hartford, Connecticut, at the behest of Lawrence Smith.

B. Defendant United States Clearly Breached Its Duty In Its Actions Toward Mr. Ng In Hartford, Connecticut On July 30, 2008 And, Therefore, Plaintiff's Remaining Negligence Claim Against The United States Constituted Negligence As A Matter Of Law.

Defendant argues that Plaintiff's claims against it should also be dismissed against the United States because "under the FTCA, '[t]he United States shall be liable … [only] in the same manner and to the same extent as a private individual under like circumstances …'" (Defendant's MSJ, 25 *citing* 28 USC § 2764 (2006)). Therefore, negligence will lie only if the actions of the United States were tortious under the laws of the state they occurred, in this instance, Connecticut. Because the allegations in of Plaintiff's complaint against the United States either sound in general negligence, a well-recognized and well-established tort in Connecticut jurisprudence, or meets one of the exceptions whereby the government can be held liable for the injuries caused to Mr. Ng by a third party, Defendant's argument must fail.

For general negligence to lie in Connecticut, a Plaintiff must show that a defendant has a duty, the breach of that duty, and actual injury. *LaFlamme v. Dallesio*, 802 A.2d 63, 67 (Conn. 2002); *see also Sullivan v. Lincoln Plaza Development*, No. CV 1060017225, 2012 WL 954089 *2 (Conn. Super, March 5, 2012). In addition, while duty is typically a matter of law, "'[other] issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner …, summary judgment is particularly ill-adapted to negligence cases where … the ultimate issue in contention involves a mixed question of law and fact.'" *Doe v. Westport Bd. of Educ.*, No. CV 085015710 S, 2012 WL 1004308 *8 (Conn. Super, February 29, 2012) (quoting *Busque v. Oakwood Farms Sports Center, Inc.*, 836 A.2d 463, 465 (Conn. App. 2003) cert. denied 841 A.2d 1190 (2004).[13] To make a proper showing of legal

[13] Interestingly, the *Westport Bd. of Educ.* court recognizes that even duty is sometimes not appropriate for summary adjudication because it too may involve a determination of a mixture of law and facts. *Id*.

duty, a plaintiff must satisfy two prongs: "(1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result [i.e. foreseeability] and (2) a determination on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case [i.e. public policy]." *Id*. (Internal quotations omitted).

There is little doubt that the United States, through ICE, owed a legal duty to Plaintiff and her decedent, Jason Ng. Mr. Ng was a civil immigration detainee and not a convicted criminal and, as such, under the Due Process Clause, the conditions and restrictions imposed on him by a detention facility could not amount to punishment. *Bell v. Wolfish*, 441 US 520, 535 (1979). There is little doubt that reasonable people treated as Mr. Ng was by ICE would view such utter disregard for his well-being as punishment, indeed. Mr. Ng received grossly inadequate medical care while in the custody of ICE and its contracted detention facilities, the Franklin County Jail ("FCJ"), the Franklin County House of Corrections, and at Wyatt. Ample evidence also supports that ***employees*** of the United States were on actual notice of Mr. Ng's poor health at least from July 3, 2008 when Mr. Ng was granted a transfer to Wyatt for medical reasons, and also knew about the inadequate medical care being offered to Mr. Ng. (Statement of Facts 153 – 163)

Among other things, Mr. Ng's attorneys notified ICE officials in July of 2008 of the lack of adequate medical treatment and care for Mr. Ng. For example, in a July 14, 2008 letter to the ICE Field Office Director in Boston, Massachusetts, Mr. Ng's attorney requested emergency medical treatment due to his very serious back pain. On July 24, 2008, Mr. Ng's attorney sent a letter to Officer Naydeen Mersereau at ICE in Hartford, Connecticut requesting parole and a custody review due to the fact that Mr. Ng was experiencing serious and rapidly deteriorating

health problems. (Plaintiff's Facts 148, 157) ICE was not only on notice of Mr. Ng's deteriorating condition and his poor care at Wyatt but also had the duty and power to obtain emergency care for him. (Plaintiff's Facts 184 – 185) "A DRO officer will observe every individual before placing them in a hold room, checking for obvious mental or physical conditions. If any conditions are apparent the officer will immediately notify a supervisor;" [at p. 3] "Any . . . complaints shall immediately be addressed and reported to a supervisor;" and [at p. 4] "staff shall immediately call the local emergency service when a detainee is determined to need urgent medical treatment. Staff shall immediately notify supervisory personnel of all emergencies.")). Because such care was not obtained by ICE, it was entirely foreseeable that serious harm would result to Mr. Ng. It is also entirely consistent with public policy that if the government takes someone into custody and thereby prevents him from caring for himself that if that person falls ill, the government should be held liable. Thus, a legal duty exists against the United States here. *See, Westport Bd. of Educ.*, 2012 WL 1004308 at *8.

Additionally, agents of the United States, most especially Lawrence Smith, wrongfully inflicted extreme and unnecessary pain on Mr. Ng by ordering him to be transported to the ICE office in Hartford, Connecticut, despite his near-death medical condition. Then, in complete dereliction of their duty and on actual knowledge of Mr. Ng's serious condition derived by speaking to him about his pain and his desire for treatment while he was in the ICE office, ICE failed to get Mr. Ng medical care he desperately needed and ordered him back to Wyatt, the place where he was being neglected and abused. (Plaintiff's Facts 170 – 199) In fact, ICE was on actual knowledge of Mr. Ng's abuse because he arrived at the ICE office severely bruised. Mr. Smith indicated in his deposition testimony that he saw only redness around Mr. Ng's wrists, presumably from restraints which he removed, and that Mr. Ng wore long sleeves. (Defendant's

Facts 63 – 64). However, video taken at Wyatt the morning of Mr. Ng's trip to Hartford refutes Mr. Smith's recollections, showing that Mr. Ng wore short sleeves that day. (SeeVideotape of Mr. Ng – Under Seal) Another photograph taken immediately upon Ng's return to Wyatt shows severe bruising on Mr. Ng's arms. (See Fifth Amended Complaint (Corrected) Exhibit A). There is very little possibility that Mr. Smith could have failed to notice Mr. Ng's bruises, and these photographs certainly raise at the very minimum questions of fact concerning Mr. Smith's truthfulness in his testimony. Such questions of fact are to be resolved in favor of the non-moving party (Plaintiff here) at the summary judgment phase. (*See Fiacco*, 528 F.3d at 98) (the court must view ***the entire record*** "in the light most hospitable to the party opposing summary judgment; indulging all reasonable inferences in that party's favor.").

The United States also clearly breached a duty in ordering Mr. Ng to be transported to Hartford, Connecticut on July 30, 2008, as it knew or should have known such transport would cause Mr. Ng excruciating pain and suffering. This is precisely the type of thing that an ordinary person in ICE's position would have known, precisely the type of harm that the same ordinary person would have known would result to Mr. Ng, and was in utter disregard of any public policy that could be contemplated. For these reasons, the United States should be found once again to have had a legal duty to Mr. Ng and Plaintiff. *See Westport Bd. of Educ.*, 2012 WL 1004308 at *8.

Finally, in complete dereliction of its duty and with full knowledge of Mr. Ng's serious condition, the United States' government employees in Hartford failed to get him medical care and ordered him back to Wyatt knowing that he had been neglected and abused and having no reasonable expectation such mistreatment would not continue. Despite actual notice of the practically non-existent medical care afforded to Ng, the United States also failed to provide

adequate medical care to Mr. Ng throughout his federal detention, even though ICE had the power, indeed the duty, to seek such care for Mr. Ng at least while he was in Hartford. There also is evidence that Mr. Smith never spoke directly with any medical staff but rather was conveyed information from the Wyatt bus driver acting as a "go-between." The same bus driver who previously declared to ICE personnel at Hartford that there was "nothing wrong" with Mr. Ng. (Plaintiff's Fact 188)

Under the provisions of the IGSA, DIHS "act[ed] as the agent and final health authority for ICE on ***all off-site detainee medical and health related matters***. The relationship of the DIHS to the detainee equals that of physician to patient." (Plaintiff's Fact 137) Certainly, no reasonable physician or any other reasonable person seeing the pitiful state of Mr. Ng including his bruising, his severe pain and his inability to walk, his pleas to go to the hospital, especially when coupled with the Government's full notice that Mr. Ng was not receiving his medication or any other adequate care at Wyatt would have ordered him back to Wyatt. In fact, DIHS acting in the role of Mr. Ng's physician had the duty to do one thing and one thing only: seek immediate emergency care for Mr. Ng. Smith, ICE's agent with the most contact with Mr. Ng on July 30, 2008, had the power to obtain that care for Mr. Ng. However, even if he thought he did not, he had the responsibility under both the IGSA and the Hold Room Guidelines to contact DIHS who had "final health authority for ICE on all off-site detainee medical and health-related matters." (IGSA, Article VI, G.) (See also p. 4 of the Hold Room Guidelines) ("Staff shall immediately notify supervisory personnel of all emergencies.") (Plaintiff's Facts 164 – 167, 184) This he failed to do, thereby breaching the United States' clear duty to Mr. Ng.[14] Therefore, Defendant's

[14] Plaintiff also notes that the failure of DIHS to comply with the terms of the IGSA on July 30, 2008, and exercise its duty to seek emergency care for a detainee as obviously ill as Mr. Ng, was a failure to follow a promulgated internal regulation. Plaintiff believes and avers that DIHS was directly liable in general negligence for its actions on July 30, 2008. However, to the extent the United States argues that liability against the government is prohibited by

averments, notwithstanding, "[there was something] in law compell[ing] lay employees of the United States who saw Mr. Ng in Hartford to elect immediate emergency room care rather than returning Mr. Ng to Wyatt." (Defendant's MSJ, 28.)[15]

Furthermore, ICE had a duty to protect Mr. Ng from the harm of a third party because he was being detained by ICE. In *De Shaney v. Winnebago Co. Dept. of Social Services*, 489 US 189,196, 205 (1989), the United States Supreme Court, while recognizing that the Due Process Clause did not confer a general right to protection from harm by a third party on the government, nevertheless found that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself and at the same time fails to provide for his basic human needs – e.g. food, clothing, shelter, medical care and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."

Connecticut, like some other jurisdictions has expanded upon *De Shaney*, 489 US 189 and has found two exceptions to the general rule that the Government is not liable for an injury to an individual by a third party. The first exception recognizes that a "special relationship" exists in a number of contexts including for the incarcerated individual as recognized by the *De Shaney* court. *See Sylvia v. Rivera*, No. 57719, 2001 WL 359215 *6-*7 (Conn. Super. March 14,

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the discretionary function exception, Plaintiff states that the exception is not availing where the government fails to follow its own internal policy.

[15] Both the abuse suffered by Mr. Ng and the negligence exhibited by the United States are supported by the expert testimony of Dr. Scott Allen and Michael Hackett. In his report, Dr. Allen stated, "Finally, and most pointedly, when Mr. Ng was transferred to Hartford for the specific purpose of assessing the appropriateness of his medical care, it should have been obvious to an untrained layperson that he was in need of urgent medical care. The failure of the ICE staff in Hartford to respond to his obvious and acute distress and disability by referring him to urgent medical evaluation is disturbing. Mr. Hackett said, "After spending several hours with Mr. Ng, discussing his concerns with him and Mr. Wong, Agent Smith clearly knew and reasonably should have known of Mr. Ng's pain, suffering and inability to walk or stand. Even after being put on notice by Mr. Wong and by his own observations, Agent Smith took no action to provide further for Mr. Ng, thus demonstrating deliberate indifference to his plight and condition." (Plaintiff's Facts 200 - 201)

2001). The second is the state-created danger exception. *See id* at *7. ("There is obviously a state-created danger when a state official, for example, inflicts or encourages or incites the danger. But there may be situations as to which the exception applies where the state played no part in the creation of the danger but somehow made the injured party 'more vulnerable' to the danger."); s*ee also Aselton v. Young East Hartford*, 890 A.2d 1250, 1253 (Conn. 2006) (a special relationship exists if the victim is in the care or custody of the government and the state-created danger exists if and when "the state affirmatively creates or increases the victim's risk of danger at the hands of a private action.").

By routinely turning a blind eye to the plight of Mr. Ng, its detainee, ICE caused a state-created danger by "affirmatively … increas[ing] the victim's [Mr. Ng's] risk of danger at the hands of [Wyatt]. *Aselton*, 890 A.2d at 1257. Therefore, the United States through its agent, ICE, should be liable for the harm Wyatt caused Mr. Ng, harm that would have been avoided if the United States had not breached its duty to Mr. Ng. Even if this Court does not find the claims here rise to a state-created danger, Defendant clearly was in a special relationship to Mr. Ng under Connecticut law since the United States was detaining him. *Id*. This special relationship also created a duty in the United States to protect Mr. Ng from Wyatt's harm since he was not in a position to protect himself. *Id*.

In conclusion, Defendant claims that Plaintiff cannot properly bring a claim for negligence regarding Mr. Ng's treatment in Connecticut because she cannot show damages (Defendant's MSJ, 29.) In the first place, Plaintiff does not bear the burden of establishing damages at the summary judgment phase (and possibly need not bear the burden as to legal duty in Connecticut either if this Court accepts that the determination of that is a mixture of law and facts.) *See Westport Board of Educ.*, 2012 WL 1004308 at *8. However, Plaintiff can properly

show damages in any event. Defendant claims that the only injury to Mr. Ng resulted from the short delay of treatment between the time he was not sent for emergency care and when he was seen by a Wyatt physician upon his return to the detention center. (Defendant's MSJ, 29). But, this is not the case. Plaintiff will provide proof at trial that her damages are properly measured at least from June 27, 2008, when ICE first learned that Mr. Ng was suffering debilitating back pain. Those damages continued through Mr. Ng's entire detention at Wyatt, during which ICE's own failure to follow promulgated policies caused it to not visit Mr. Ng and discover the extent of his pain and the lack of care given to him, and, finally, culminated in the extreme and cruel disregard of his physical condition and the failure to seek emergency care for him by the ICE agents in Hartford, Connecticut, on July 30, 2008.

In summary, Defendant has failed to establish that the negligence of United States employees as outlined above is not a recognized state cause of action, upon which an FTCA claim can be based. In the light most favorable to Plaintiff, at this stage of the litigation, the United States cannot argue that Plaintiff is not entitled to relief on these facts and their proof as a matter of law.

V. CONCLUSION

This Court has subject matter jurisdictions, pursuant to the FTCA to preside over the Plaintiff's claims against the United States. Sovereign immunity has been waived for these claims and no defense to that waiver applies. Plaintiff has stated a valid claim against the United States for which relief can be granted as is supported by her Fifth Amended Complaint (Corrected). Pursuant to this Court's standard of review on Defendant's MSJ, Defendant's Motion for Summary Judgment should be denied in its entirety.

Dated: April 9, 2012 Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of the foregoing document was electronically served, to all Counsel of Record on this 9th day of April, 2012.

/s/Robert J. McConnell