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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LOREN BIANCA SCHALLER, a Minor, etc. et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA, Defendant and Respondent.	A124966 (San Francisco County Super. Ct. No. 473684)

Plaintiffs Loren Bianca Schaller, a minor, by and through her guardian ad litem Linda Schaller, and Kermit Kubitz appeal from a judgment dismissing their first amended complaint against defendant State of California (the state) after the court sustained the state's general demurrer without leave to amend. Plaintiffs seek to reinstate their lawsuit. We conclude plaintiffs have failed to set forth sufficient allegations to support a cause of action against the state, and, accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Before his release on parole, Scott Thomas was incarcerated at San Quentin State Prison, where he was classified as an inmate requiring "high control" supervision. Because Thomas' status was "the highest control or risk classification" in the California Department of Corrections and Rehabilitation (CDCR), his release on parole was subject to Penal Code section 3060.7. In pertinent part, Penal Code section 3060.7 requires the

[1] Because plaintiffs' action was resolved by demurrer, we set forth the facts as alleged in the first amended complaint, the operative pleading. (*Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1156.)

parole authority to notify high control or risk inmates that they "shall be required to report to [their] assigned parole officer within two days of release from state prison." (*Id.*, subd. (a).) To facilitate the inmate's ability to meet the reporting requirement time frame, CDCR employees are required to adjust an inmate's scheduled release date so that the inmate is not released on a day before a holiday or weekend, i.e., a Friday. (*Id*., subd. (e).) Additionally, because Thomas was confined in an administrative segregation unit, his release on parole was subject to CDCR's *Procedures for Inmates Releasing to Parole from a Security Housing Unit or Psychiatric Services Unit*. In pertinent part, those procedures require CDCR employees to either (1) transfer a security housing unit inmate to an institution in the county in which the parolee would serve his parole (in this case a county in Southern California) or (2) arrange for a parole agent to travel to San Quentin to take direct custody of the inmate and arrange for his transfer to the county in which the parolee would serve his parole. Plaintiffs allege the state employees responsible for Thomas' release violated the aforenoted statute and CDCR procedures by authorizing his unsupervised release into the community on Friday, May 18, 2007. By the next day, Saturday, May 19, Thomas had acquired a large hunting knife. He entered a San Francisco bakery, and proceeded to use the knife to repeatedly stab plaintiff Loren Schaller. Plaintiff Kermit Kubitz came to Schaller's aid, and Thomas repeatedly stabbed him as well. Both plaintiffs suffered severe and disabling injuries.

In their first amended complaint plaintiffs set forth a single cause of action for negligence, alleging, in pertinent part, that Thomas' unsupervised release on parole into the community on a Friday occurred as a result of (a) the negligent failure of supervisory and non-supervisory state employees to use due care in the control and supervision of Thomas, (b) the negligent failure of supervisory and non-supervisory state employees to comply with the requirements of Penal Code section 3060.7 and CDCR's *Procedures for Inmates Releasing to Parole from a Security Housing Unit or Psychiatric Services Unit;* and (c) the failure of state supervisory and management personnel to properly train and supervise their subordinates in the implementation of the statutory and procedural rules

governing the release of high control inmates.[2] It was further alleged that the described negligent acts of state employees created an unreasonable and foreseeable risk that Thomas would harm an individual or individuals following his release, and a "proximate result" of the alleged errors and misconduct of state employees was Thomas' assaults on plaintiffs. Plaintiffs also alleged there was no statutory immunity that barred their claim against the state for the negligent acts of its employees.

The state filed a demurrer to the first amended complaint, which plaintiffs opposed. After argument, the court sustained the demurrer without leave to amend. The court entered a judgment of dismissal in favor of the state. Plaintiffs' timely appeal ensued.

DISCUSSION

"Our review of the trial court's ruling sustaining the general demurrer is de novo. We independently evaluate the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. [Citation.] Treating as true all material facts properly pleaded, we determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory, regardless of the title under which the factual basis for relief is stated. [Citation.] Because plaintiff[s] [do] not contend [they] should be allowed a further opportunity to amend the factual allegations in [their] latest complaint, we review whether the demurrer was well taken." (*Burns v. Neiman Marcus Group, Inc*. (2009) 173 Cal.App.4th 479, 486-487, fn. omitted (*Burns*).)

[2] Plaintiffs also alleged that state employees negligently failed to take reasonable steps "to summon medical care" for Thomas prior to his release on parole in violation of Government Code section 845.6. In the trial court, the state demurred to this claim on the grounds that plaintiffs lacked standing to raise it and the state was immune from liability. In response, plaintiffs withdrew this claim. On appeal, plaintiffs do not seek to reinstate this claim.

A. *Plaintiffs Cannot Maintain a Private Right of Action Based on Violation of Penal Code Section 3060.7 by State Employees*

Plaintiffs contend they can maintain a negligence cause of action against the state based on the failure of its employees to comply with Penal Code section 3060.7. We disagree.

Government Code section 815.6[3] provides a basis for liability "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury," and such an injury was "proximately caused" by the public entity's "failure to discharge that duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

"The controlling issue [in a section 815.6 analysis] is whether the challenged statute was designed to impose an obligatory duty to take specific official action to prevent particular foreseeable injuries, thus providing an appropriate basis for civil liability. [Citation.]" (*Zolin v. Superior Court* (1993) 19 Cal.App.4th 1157, 1161, disapproved on another ground in *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 500, fn. 2 (*Haggis*).) "First and foremost, application of section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.]" *(Haggis, supra*, 22 Cal.4th at p. 498.) "Second, but equally important, section 815.6 requires that the mandatory duty be 'designed' to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is ' "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty." ' [Citation.]" (*Haggis, supra*, 22 Cal.4th at p. 499.)

[3] All further unspecified statutory references are to the Government Code.

Penal Code Section 3060.7 reads, in pertinent part: "(a) Notwithstanding any other law, the parole authority shall notify any person released on parole who has been classified by the Department of Corrections as included within the highest control or risk classification that he or she shall be required to report to his or her assigned parole officer within two days of release from the state prison. [¶] This section shall not prohibit the parole authority from requiring any person released on parole to report to his or her assigned parole officer within a time period that is less than two days from the time of release. [¶] (b) The parole authority, within 24 hours of a parolee's failure to report as required by this section, shall issue a written order suspending the parole of that parolee, pending a hearing before the parole authority, and shall issue a warrant for the parolee's arrest. [¶] . . . [¶] (e) With regard to any inmate subject to this section, the Department of Corrections shall release an inmate one or two days after his or her scheduled release date if the release date falls on the day before a holiday or weekend."

We agree with plaintiffs that liability pursuant to section 815.6 does not require that Penal Code section 3060.7 expressly impose civil liability in favor of members of the public who are injured by inmates who are released in violation of its provisions. "When an enactment establishes a mandatory governmental duty and is designated to protect against the particular kind of injury the plaintiff suffered, section 815.6 provides that the public entity 'is liable' for an injury proximately caused by its negligent failure to discharge the duty. *It is section 815.6, not the predicate enactment, that creates the private right of action*. If the predicate enactment is of a type that supplies the elements of liability under section 815.6 — if it places the public entity under an obligatory duty to act or refrain from acting, with the purpose of preventing the specific type of injury that occurred — then liability lies against the agency under section 815.6, regardless of whether private recovery liability would have been permitted, in the absence of section 815.6, under the predicate enactment alone. [Citation.]" (*Haggis, supra*, 22 Cal.4th at pp. 499-500.)

We also agree with plaintiffs that Penal Code section 3060.7 imposes a mandatory duty on state employees. "As used in section 815.6, the term 'mandatory' refers to an obligatory duty which a government entity is required to perform, as opposed to a permissive power which a governmental entity may exercise or not as it chooses." (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) "In determining whether a mandatory duty actionable under section 815.6 ha[s] been imposed, the Legislature's use of mandatory language (while necessary) is not the dispositive criteria. Instead, the courts have focused on the particular action required by the statute, and have found the enactment created a mandatory duty under section 815.6 only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled. Thus, actionable mandatory duties have been found where a county failed to release an arrestee after dismissal of charges as required by Penal Code section 1384 [citation], or where the agency failed to register a dismissal of charges as required by Penal Code section 1384 [citation], or where the entity failed to release the arrestee under the duty to release on bail prescribed by Penal Code section 1295 [citation]. In each of these cases, the required action was clear and discrete and required no evaluation of *whether* it had in fact occurred." (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 260, fns. omitted (*de Villers*).) So, too, in this case the unambiguous and explicit language of Penal Code section 3060.7 requires state employees to adjust a high control inmate's release date so that there will be no release on a Friday. This statutory requirement was included in Penal Code section 3060.7 to "put an end to Friday releases." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 856 (1995-1996 Reg. Sess.), as amended May 23, 1995, pp. 1, 4.)[4] Given the evident purpose of the provision, and the explicit statutory

[4] In support of its demurrer, the State submitted certain documents concerning the legislative history of Sen. Bill No. 856 (1995-1996 Reg. Sess.). Plaintiffs have filed a request asking us to take judicial notice of other documents also reflecting the legislative history of Sen. Bill No. 856 (1995-1996 Reg. Sess.), which are referred to in the first amended complaint. We deferred consideration of the request until this time. We now

language, we cannot but conclude that Penal Code section 3060.7 imposes a "mandatory duty" as that phrase is used in section 815.6.

Nevertheless, we must reject plaintiffs' argument that the imposition of the mandatory duty imposed by Penal Code section 3060.7 was designed to protect against the type of injury for which they seek relief — independent criminal acts committed by a released parolee. Plaintiffs contend it is "preposterous" to argue that not even one of the statute's intended consequences was the prevention of violent assaults by recently released parolees. The State argues Penal Code section 3060.7 was "designed" to facilitate the ability of a released parolee to meet his reporting requirement, not to prevent the type of random attack that occurred in this case, and the prevention of injury to innocent parties is an incidental benefit of Penal Code section 3060.7, that cannot serve as a basis for liability under section 815.6. We conclude the State's argument prevails.

In determining whether Penal Code section 3060.7 was designed to protect against the kind of injury plaintiffs suffered in this case, "[w]e must, . . . examine the language, function and apparent purpose of" the statutory enactment. (*Haggis, supra*, 22 Cal.4th at p. 500.) "That the enactment 'confers some benefit' on the class to which plaintiff belongs is not enough; if the benefit is 'incidental' to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under section 815.6. [Citation.]" (*Haggis, supra*, 22 Cal.4th at p. 499.)

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grant the request, which is not opposed by the State. (Evid. Code, §§ 452, subd. (a), 459, subd. (a); see *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 922, fn. 5 (*Ladd*).)

After briefing was completed in this matter, plaintiffs filed a second request for judicial notice of two documents that appear on CDCR's website: (1) the CDCR "Vision," "Mission," and "Values," Statement, and (2) "California Fiscal Outlook: LAO Projections 2007-2008 Through 2012-2013." The State opposes this second request for judicial notice on both procedural and substantive grounds. We deferred consideration of this request until this time. We now deny plaintiffs' second request for judicial notice because our consideration of the material on CDCR's website is not necessary to resolve this appeal. (See *Mangini v. R.J. Reynolds Tobacco Co*. (1994) 7 Cal.4th 1057, 1063, overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

The mandatory language prohibiting the release of high control inmates on certain days must be read in the context of the entire statutory provision. (*Burns, supra*, 173 Cal.App.4th at p. 493.) The statute imposes a reporting requirement on high control inmates released on parole to ensure that such inmates report to their parole agents as quickly as reasonably possible by subjecting them to suspension of their parole and arrest in the event of a failure to timely report. (Pen. Code, § 3060.7, subds. (a), (b).) Because Penal Code section 3060.7 "does not ' "unmistakably" ' reveal a legislative intent" to grant plaintiffs a private right to sue for injuries caused by inmates released in violation of its provisions, "we look to the legislative history." (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 598.)

As explained by the author of Senate Bill No. 856, later enacted as Penal Code section 3060.7: "This bill has been introduced in response to the recent slaying of a Sonoma County Sheriffs' Deputy by a recently released parolee from Pelican Bay. This bill is an effort by the sponsor and author to solve several deficiencies in the Department of Corrections [hereinafter CDC] parole policies. Under CDC's current policies, inmates were given between 24 and 72 hours, excluding weekends, to report to their parole agents in their county of release. If a parolee fails to report in the prescribed time frame, the individual parole agent has the discretion and up to 30 days to declare the parolee a Parolee at Large, request a revocation of parole from the Board of Prison terms, and issue a warrant for the parolee's arrest. [¶] In the Sonoma case, the inmate, Robert Scully, had a history of violence. He was released on a Friday and was required to report to his parole agent in San Diego the next business day. Because of the intervening weekend, he was not required to report until Monday. He did not report on that day and allegedly killed a Sonoma County Deputy Sheriff on Wednesday. . . . [¶] This bill is designed to insure that parolees report to their parole agent in a timely manner; and if they fail to report, that law enforcement is notified immediately. There is no place in the state that someone cannot travel to within 48 hours on public transportation. In addition, this bill will put an end to

Friday releases, which give inmates an additional two days of unsupervised activity." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 856 (1995-1996 Reg. Sess.), as amended May 23, 1995, pp. 3-4.)

Concededly, the criminal acts of a recently released inmate on parole prompted the enactment of Penal Code 3060.7. It is also true that had Thomas not been released on a Friday, he would not have been free on Saturday to attack plaintiffs. Nevertheless, the legislative history establishes the statutory prohibition against releases on certain days was to facilitate a released inmate's ability to timely report to his parole agent. The fact that no releases on Fridays prevents an inmate from committing criminal offenses against members of the public on the weekend because he would not be free to do so, must be aptly described as "incidental" to the purpose of Penal Code section 3060.7. (*Haggis, supra*, 22 Cal.4th at p. 503; see *Fleming v. State of California* (1995) 34 Cal.App.4th 1378, 1384 [state and its parole agent not liable for failure to comply with Penal Code section 3059 (parolee who leaves the state without permission shall be held as escaped prisoner and arrested), which violation allowed parolee to commit out of state murder, as statute was "aimed at keeping the parolee available to meet with the parole officer by subjecting him or her to arrest as an escapee," and "was not intended to protect the public against the risk of criminal attack by a parolee who leaves the state without permission"].) Contrary to plaintiffs' contention, regardless of the statutory prohibition on releasing inmates on certain days, the statute's purpose was to ensure that an inmate promptly reported to his parole agent under threat of suspension of parole and arrest; it was not designed and could not prevent a released inmate from reoffending once he is released into the community. "[I]f a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1150.)

We therefore must conclude that a cause of action does not lie in favor of plaintiffs based on Penal Code section 3060.7[5] because the statute does not impose a mandatory duty on the state or its employees that is designed to protect against the particular injury for which plaintiffs seek relief.[6]

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[5] In light of our determination, we do not need to consider the parties' arguments as to whether a violation of Penal Code section 3060.7 is too tenuous, as a matter of law, to satisfy the proximate cause element of section 815.6.

[6] "[S]ection 815.6 'applies to public entities the familiar rule of tort law that violation of a legislatively prescribed standard of care creates a rebuttable presumption of negligence.' [Citation.] This rule is codified in Evidence Code section 669, subdivision (a). Discussions of whether a mandatory duty exists under . . . section 815.6 and whether a standard of care has been legislatively prescribed under Evidence Code section 669 are therefore interchangeable." (*Brenneman v. State of California* (1989) 208 Cal.App.3d 812, 816-817, fn. 2 (*Brenneman).*) "Evidence Code section 669 allows proof of a statutory violation to create a presumption of negligence in specified circumstances." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927 (*Elsner*).) However, the Evidence Code permits the use of statute to create a presumption of negligence only if "[t]he person suffering . . . the injury to his person . . . was one of the class of persons for whose protection the statute . . . was adopted." (Evid. Code, § 669, subd. (a)(4).) Because we have concluded that plaintiffs were not of the class of persons for whose protection Penal Code section 3060.7 was adopted, we conclude that no cause of action lies for negligence per se as codified in Evidence Code section 669 based on a violation of Penal Code section 3060.7 by state employees. Nor may a cause of action lie for negligence per se as codified in Evidence Code section 669 or pursuant to section 815.6 based on CDCR procedures by state employees, as conceded by plaintiffs in their reply brief. (See *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 720 ["Evidence Code section 669.1 forbids the use of [the California Highway Patrol Officer Safety] [M]anual to establish the presumption of negligence that otherwise would arise under Evidence Code section 669"]; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 982 [neither the county nor its employees can be held liable to third parties for violations of the employee manual provisions pursuant to section 815.6]; *Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 295 ["[d]epartmental or municipal policy directives may prescribe what conduct is expected of police personnel under particular circumstances but a deviation from those directives can only serve as a basis for administrative action. They cannot create a duty to individual citizens"].)

B. No Cause of Action Lies Based on State's Vicarious Liability for Negligent Acts of Its Employees

Plaintiffs also argue that even if Penal Code section 3060.7 does not impose a mandatory duty for which they may seek relief under section 815.6, the state may still be held liable for the negligent release of Thomas, which breached the duty of care owed to the public by the culpable state employees acting within the course and scope of their duties. We disagree.

The state's potential liability for the personal injuries sustained by plaintiffs can be premised on two grounds: (1) the state's "own conduct and legal obligations;" and (2) the state's vicarious "liability, based on respondeat superior principles, for the misconduct of their employees that occurred in the scope of their employment." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127 (*Zelig*).) In their reply brief, plaintiffs contend their claim against the state is premised only on a theory of vicarious liability, and they do not seek to pursue a claim of direct liability against the state. Consequently, our discussion is limited to whether plaintiffs may maintain a cause of action against the state for vicarious liability. We conclude plaintiffs cannot maintain such a cause of action.

Plaintiffs' claim of vicarious liability is based on two sections of the Government Code: Section 815.2 reads, in pertinent part, "a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative," unless "the employee is immune from liability." (*Id*., subds. (a), (b).) Section 820 reads, in pertinent part: "(a) Except as otherwise specifically provided by statute, . . . a public employee is liable for injury caused by his act or omission to the same extent as a private person."

"Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior. [Citation.]" (*Zelig, supra*, 27 Cal.4th at p. 1128.) "When

assessing a claim for vicarious liability against a governmental employer based on the acts or omissions of its employee, a court must examine whether the employee who acted or failed to act would have been personally liable for the injury. [Citations.]" (*de Villers, supra,* 156 Cal.App.4th at p. 249; see *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1180.)

To withstand a demurrer challenging a cause of action for negligence, the complaint must allege sufficient facts to show that " 'the defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.' [Citations.] The existence of a duty is a question of law to be decided by the court." (*Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 639.)

Preliminarily, we note section 845.8, in pertinent part, explicitly states that "[n]either a public entity nor a public employee is liable for . . . [a]ny injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release." (*Id.*, subd. (a).) Consequently, appellants acknowledge no cause of action lies against state employees based on "the decision to parole Thomas." Nor do plaintiffs seek to maintain a negligence cause of action based on state employees' alleged failures "to properly decide how to supervise Thomas [after his release]," "to warn all those in the Bay Area or the entire state of [Thomas'] release," "to follow . . . Thomas after his release," or "to immediately launch a manhunt for Thomas."

Instead, plaintiffs seek only to maintain a cause of action based on the failure of state employees to act with due care in processing the release of Thomas by failing to comply with Penal Code section 3060.7 and CDCR procedures. Essentially, plaintiffs seek to impose on state employees a duty to control Thomas so as to prevent his attack on plaintiffs. We conclude there is no basis on which a duty to control a released parolee is or should be imposed in favor of members of the public who are injured by the independent criminal acts of released parolees.

Contrary to plaintiffs' contention, both *Thompson v. County of Alameda* (1980) 27 Cal.3d 741 (*Thompson*), and *Brenneman, supra,* 208 Cal.App.3d 812, are instructive on the issue before us. In *Brenneman*, a convicted child molester on parole, molested and murdered a 12 year old child. (*Id*. at p. 815.) Plaintiffs, the murdered child's parents and sisters, sued the state on the theory of negligent failure to control the parolee or to warn of the parolee's proclivities. (*Ibid*.) *Brenneman* upheld an order dismissing the second amended complaint after a demurrer was sustained without leave to amend. (*Id*. at p. 815.) In so ruling, *Brenneman* concluded the plaintiffs had not, and could not, allege the state had a duty, under general tort law, to supervise or otherwise control the parolee, or to warn the murdered child or his family of the danger the parolee, for the following reasons: "*Thompson, supra*, cogently explains why we may not find a duty to control or warn in this case. *Thompson* upheld an order sustaining a demurrer without leave to amend on the following facts. J., a juvenile, had been in county custody. He had ' "latent, extremely dangerous and violent propensities regarding young children . . . ." ' [Citation.] While in custody, he threatened that, if released, he would kill some young child living in the neighborhood. No particular child was specified. The county released J. to his mother's custody on temporary leave, without warning the police or local residents. Within 24 hours J. murdered the plaintiff's son in J.'s mother's garage. [¶] Our Supreme Court held the county had no duty to warn the police or the mothers of neighborhood children concerning J.'s release or propensities. Noting the general rule that one owes no duty to control the conduct of another, the court found no applicable exceptions to that rule. The court went on to explain the public policies underlying its decision: 'By their very nature parole ... decisions are inherently imprecise. . . . [A] large number of parole violations occur. . . . Although . . . not all violations involve new or violent offenses, a significant proportion do. [¶] Notwithstanding the danger . . ., parole and probation release nonetheless comprise an integral and continuing part in our correctional system . . . , serving the public by rehabilitating substantial numbers of offenders and returning them to

a productive position in society. The result, . . . , is that "each member of the general public who chances to come into contact with a parolee bear[s] the risk that the rehabilitative effort will fail. . . ." [Citation.] . . . [¶] Bearing in mind the ever present danger of parole violations, we nonetheless conclude that public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made *nonspecific threats of harm directed at nonspecific victims*. Obviously aware of the risk of failure of probation and parole programs the Legislature has nonetheless as a matter of public policy elected to continue those programs even though such risks must be borne by the public. [Citation.]' (*Thompson . . . , supra*, 27 Cal.3d at pp. 753-754.) [¶] *Beauchene v. Synanon Foundation, Inc*. (1979) 88 Cal.App.3d 342, 347-348, cited with approval in *Thompson*, [*supra*, 27 Cal.3d at p. 754], relied upon the same public policy considerations to hold that a rehabilitation agency, whether public or private, has no duty to control a convict participating in its rehabilitation program. *Cardenas v. Eggleston Youth Center* (1987) 193 Cal.App.3d 331, 334-335 reached the same conclusion." (*Brenneman*, *supra*, 208 Cal.App.3d at pp. 819-820; see *Rice v. Center Point, Inc.* (2007) 154 Cal.App.4th 949, 955 (*Rice*) [accord].)[7]

As applicable to the circumstances here, generally, "one owes no duty to control the conduct of another. . . ." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203.) "An exception to this rule has been recognized, however, where a special relationship exists between the defendant and either the person whose conduct needs to be controlled or the foreseeable victim of the third party's conduct. [Citation.]" (*Rice*, *supra*, 154 Cal.App.4th at p. 955.)

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[7] We see no merit to plaintiffs' attempt to distinguish this case from the duty to control analysis in cases concerning escapes from private rehabilitation facilities because the core function of such facilities is not a duty to protect the general public from dangerous inmates, and the cases do not involve state law or the agency's own regulations designed to protect the public.

In this case, it is clear that the state employees responsible for Thomas' release "did not owe a duty to plaintiffs as the foreseeable victims of [Thomas'] criminal conduct. Such a duty is imposed only where the injury is foreseeable and the intended victim is identifiable. [Citations.]" (*Rice, supra,* 154 Cal.App.4th at p. 955.) Nor may a duty of care be imposed based on plaintiffs' "contention the state's special relationship to [Thomas] imposed on the state a duty to control [his] conduct. This argument was rejected in *Thompson,* [*supra,* 27 Cal.3d at pp. 753, 758], which . . . confined the special relationship exception to situations involving a direct or continuing relationship between the state and the *plaintiff* (or plaintiff's decedent) or 'a prior threat to a specific identifiable victim.' [Citations.]" (*Brenneman, supra,* 208 Cal.App.3d at p. 820.) Plaintiffs rely on section 319 of Restatement Second of Torts, which sets forth a general rule 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." However, we agree with those courts that have held that the duty to control the criminal conduct of others as enunciated in section 319, "is not necessarily one owed to the world at large; the element of foreseeability remains. The custodian must have knowledge of a specific risk to an identifiable and foreseeable victim. [Citations.]" (*Megeff v. Doland* (1981) 123 Cal.App.3d 251, 257; see *Thompson, supra,* 27 Cal.3d at pp. 752-753; *Hooks v. Southern Cal. Permanente Medical Group* (1980) 107 Cal.App.3d 435, 444; *McDowell v. County of Alameda* (1979) 88 Cal.App.3d 321, 325.)[8]

[8] We therefore reject plaintiffs' suggestion that a special relationship may be found to exist between state employees and Thomas based on dictum in *Duffy v. City of Oceanside* (1986) 179 Cal.App.3d 666, 671-672, and *Ladd, supra,* 12 Cal.4th at p. 916, which briefly address the possibility of prison officials' liability for allowing a dangerous felon to escape from custody. Plaintiffs' reliance on *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231 (*Giraldo*), is also misplaced. In *Giraldo,* our colleagues in Division Two held that the special custodial relationship between a jailer and a prisoner gives rise to a duty of care on the part of prison officials to protect *the prisoner* from foreseeable harm inflicted by other inmates. (*Id.* at p. 246.) Unlike the situation in

Nor is there any merit to plaintiffs' argument that no special relationship needs to be alleged because state employees either created a danger to the plaintiffs or rendered them more vulnerable to an existing danger by releasing Thomas on a Friday into the general community. Had the state employees not released Thomas into the community on Friday, the harm to plaintiffs would have been eliminated because Thomas would not have been in a position to attack plaintiffs on Saturday. However, the temporary proximity between the release and Thomas's attack on plaintiffs does not "equate" to an increase in the risk of harm to plaintiffs based on the release. (*City of Santee v. County of San Diego* (1989) 211 Cal.App.3d 1006, 1015-1016.) The risk of harm in this case was created by Thomas' independent criminal acts against plaintiffs. There are no allegations that any state employee did anything "to render [plaintiffs] any more or less capable of defending [themselves] from a violent attacker than any other member of the general public." (*Estate of Gilmore v. Buckley* (1st Cir. 1986) 787 F.2d 714, 721-722.) Nor are there allegations that any state employee played a role in the conception or execution of Thomas' assaultive acts on plaintiffs, or otherwise condoned or encouraged Thomas' criminal conduct. (*Ibid*.)

We also see no merit to plaintiffs' argument that a common law cause of action for negligence against the state lies based on its employees' failure to follow Penal Code section 3060.7 and CDCR procedures regarding the release of high control inmates on parole. (*Rice, supra*, 154 Cal.App.4th at p. 957 & fn. 4.)[9] " '[I]t is the tort of

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Giraldo, in this case there is no special relationship between state employees and plaintiffs that gives rise to a duty to control a released parolee from committing criminal acts against members of the public.

[9] "Statutes may be borrowed in the negligence context for one of two purposes: (1) to establish a duty of care, or (2) to establish a standard of care. [Citations.]" (*Elsner, supra*, 34 Cal.4th at p. 927, fn. 8.) In Point A of the discussion, *ante*, we have previously concluded that neither Penal Code section 3060.7 nor CDCR procedures give rise to a separate private right of action in favor of plaintiffs based on either a mandatory duty pursuant to section 815.6 or the presumption of negligence pursuant to Evidence Code section 669.

negligence,' " and not the violation of Penal Code section 3060.7 or CDCR procedures, which would entitle plaintiffs to recover civil damages. (*California Service Station etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1178.) The issue here is whether Penal Code section 3060.7 and CDCR procedures may "serve[] the subsidiary function of providing evidence of an element of a preexisting common law cause of action." (*Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 125.) We conclude state employees' failures to follow the statute and CDCR procedures "would at most demonstrate a lack of reasonable care, i.e., breach of the duty of care if such a duty were first determined to exist." (*Rice, supra*, 154 Cal.App.4th at p. 958.)

As explained in *Thompson, supra*, 27 Cal.3d 741: "[I]n considering the existence of 'duty' in a given case several factors require consideration including 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]' " (*Id.* at p. 750, quoting from *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) As we have discussed, *Thompson* declined to impose a duty to control a released juvenile so as prevent his commission of criminal acts against third parties. (*Thompson, supra*, 27 Cal.3d at p. 753.)

Plaintiffs argue, however, that "[n]either the [s]tate nor the trial court questioned the obvious"—that the release of a high control inmate from administrative segregation into the community in violation of a statute and administrative policy created a foreseeable risk of harm to one or more individuals—even if the names of those individuals previously were unknown to either the inmate or the prison system, and the public policy considerations mentioned in *Thompson* do not apply in this case. We disagree. The public policy and foreseeability considerations discussed in *Thompson* are equally applicable to

support our conclusion that in this case state employees' failure to comply with Penal Code section 3060.7 and CDCR procedures do not give rise to a duty to the general public to exercise ordinary care to control the criminal behavior of released parolees. The release of an inmate on parole, even at the end of a term of imprisonment "is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts." (*People v. Burgener* (1986) 41 Cal.3d 505, 531, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 752-754.) Nevertheless, neither the Legislature, nor the courts have deemed the risk so unreasonable as to create a right of action for damages in favor of members of the public who are injured by the independent criminal acts of released parolees.

Nor do the remainder of the *Rowland v. Christian* factors support a conclusion that a duty of care in favor of plaintiffs should be imposed on state employees for their alleged negligent release of Thomas. The state employees' "affirmative violation" of explicit state law and CDCR policy does not support a finding of moral blame, as plaintiffs suggest. The moral blame for plaintiffs' injuries lies primarily, if not exclusively, with Thomas. We fail to see how state employees could have prevented Thomas' attack on plaintiffs, short of minute-to-minute supervision to ensure that Thomas did not commit criminal acts against members of the public. Further, the fact that plaintiffs may not recover damages from the state in this case does not render either the state or its employees "unaccountable for public safety." (*Rice, supra*, 154 Cal.App.4th at p. 959.) As acknowledged by plaintiffs, the Office of the Inspector General's *Special Review into the California Department of Corrections and Rehabilitation's Release of Inmate Scott Thomas*, included recommendations that the warden of San Quentin monitor the work of the state employees responsible for Thomas' release who failed to comply with Penal Code section 3060.7 and

CDCR procedures, and if appropriate, provide remedial training and take disciplinary action.[10]

C. *Section 845.8, Subdivision (a), Provides Governmental Immunity for Acts of State Prison Employees in Releasing Thomas Unsupervised Into the Community on a Friday*

Even if plaintiffs have alleged an affirmative duty of care under Penal Code section 3060.7 or the general principles of negligence, and even if violations of those duties proximately caused damages to plaintiffs, we conclude any cause of action against the state and its employees is barred by section 845.8.

Section 845.8 reads, in pertinent part: "Neither a public entity nor a public employee is liable for: [¶] (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

The seminal case on the interpretation of section 845.8 is *Johnson v. State of California* (1968) 69 Cal.2d 782 (*Johnson*). In that case, the plaintiff was injured by a juvenile offender who had been placed as a foster child in plaintiff's home. (*Id*. at p. 784.) Plaintiff alleged the state employee who placed the juvenile offender was negligent in that he failed to adequately warn plaintiff about the juvenile's homicidal tendencies and background of violence and cruelty, which was known or should have been known to the state's agents. (*Id*. at p. 785 & fn. 1.) In determining the state was not entitled to immunity under section 845.8, subdivision (a), the *Johnson* court explained: "The Law Revision Commission comment to this section specifies its limited goal: to allow the proper officials 'unfettered' discretion to determine '[t]he extent of the freedom that must

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[10] Because we conclude state employees owed no duty of care to plaintiffs to prevent Thomas' attack on them, we do not address the parties' contentions regarding whether a cause of action may be maintained based on the negligence of supervisory personnel in failing to properly supervise subordinate employees in the appropriate administration of state law and CDCR policies concerning the release of high control inmates.

be accorded to prisoners for rehabilitative purposes.' [Citations.] But, although section 845.8 requires that each member of the general public who chances to come into contact with a parolee bear the risk that the rehabilitative effort will fail, nevertheless well-intentioned foster parents, whose direct and continuous contact with the parolee drastically increases the dangers to them, need not go without a remedy. Once the proper authorities have made the basic policy decision—to place a youth with foster parents, for example—the role of section 845.8 immunity ends; subsequent negligent actions, such as the failure to give reasonable warnings to the foster parents actually selected, are subject to legal redress." (*Id*. at p. 799.)

Since *Johnson*, the courts have struggle with the concept of when immunity under section 854.8, subdivision (a), ends. Nevertheless, as explained by the court in *Martinez v. State of California* (1978) 85 Cal.App.3d 430, 435: "In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity [citation]. Not covered are ministerial acts in carrying out the decision to release the person, and an allegation of negligence must be determined on a case-by-case basis [citations]."

Plaintiffs argue they are not challenging the decision to release Thomas on parole, but only the state employees' violation of Penal Code section 3060.7 and CDCR procedures requiring staff to not release Thomas on a Friday into the general community, but to release him on another day into the custody of his parole agent. According to plaintiffs, their allegations are complaints of "ministerial acts in carrying out the decision to release" Thomas, which are not within the ambit of section 845.8 governmental immunity. We disagree.

By its terms, section 845.8 provides governmental immunity for both the decision to parole Thomas and the separate decision to release Thomas. (§ 845.8.) As relevant to our discussion here, plaintiffs' attempt to delineate the immunized determination of releasing a

prisoner on the basis of discretionary" or "ministerial" acts, is misplaced. *State of California v. Superior Court* (1974) 37 Cal.App.3d 1023 (*State of California*), is particularly instructive. In that case, American Indemnity Company (American) filed a complaint against the state and various agencies and employees seeking to recover damages for an arson of a building for which American had provided fire insurance. (*Id.* at p. 1025.) The arson was allegedly committed by two prisoners released into the general population by guards at a state community center. (*Ibid*.) In its complaint, American alleged, in pertinent part, "that the [s]tate was negligent in the *application* of rules and regulations" of the facility, which " 'dictated when, and under what circumstances,' " the two inmates who committed the arson were to be released into the community. (*Ibid*. & fn. 2.) The second cause of action alleged "that unnamed guards permitted the . . . inmates to be released despite the fact these inmates were not eligible for release," pursuant to "certain regulations . . . which dictated the times, dates and occasions when [the inmates] would be permitted to leave . . . and enter into the surrounding community . . . ." (*Ibid*. & fn. 3.) The court held all the acts complained of clearly fell within the ambit of release procedures immunized from tort liability under section 845.8. (*Id*. at pp. 1027-1028.) In so ruling, the court rejected American's arguments "that section 845.8, subdivision (a), provides immunity only with respect to *discretionary* acts concerning 'determinations' to release particular prisoners," and that in the case before the court "the [s]tate's neglect lies not in the realm of discretion, but rather in the failure to perform the *ministerial* acts of applying already established rules and regulations." (*Id.* at p. 1026.) The court also commented that unlike in *Johnson*, American's complaint did not "involve a situation where, after there has been an actual release, there is a *continuing relationship* between the State and some particular member of the public. Rather American stands with other general members of the public; it must bear the risk that rehabilitative efforts will fail." (*Id*. at p. 1027.)

Plaintiffs' attempt to distinguish *State of California, supra,* 37 Cal.App.3d 1023, is unavailing. Like the allegations found to be insufficient in *State of California*, plaintiffs here are in fact challenging the immunized decision to release Thomas by their allegations that Thomas was "not eligible for release" on Friday, May 18, 2007, because state law and CDCR procedures dictated he should not be released on a day before a weekend (or a holiday) into the general community, but rather the release should have occurred on some other day into the direct custody of his parole agent. Unlike the situation in *Johnson, supra,* 69 Cal.2d 782, plaintiffs do not allege that any state employees negligently acted or failed to act *after* Thomas was released into the community for which acts or omissions they are liable to plaintiffs.

We must also reject plaintiffs' argument that immunity for the act of releasing Thomas does not lie in this case because "the [s]tate cannot identify any adverse effect on prisoner release and rehabilitation programs which would follow" the imposition of liability in favor of plaintiffs. "[I]n light of *Johnson, supra,* [69 Cal.2d 782], Government Code section 845.8, subdivision (a) not only 'removes the necessity for the court to determine whether the particular conduct described in the . . . provision embraces policymaking functions requiring insulation from judicial surveillance in tort litigation and thus identifiable as a "discretionary" activity' but also that it 'makes it unnecessary for the public entity to establish that conduct falling within its purview represented a conscious policy decision entitled to immunity. A showing of this kind is essential to a claim of immunity under [section] 820.2; but, under a specific immunity section, the legislature seemingly has already concluded that all conduct within its terms is entitled to immunity without regard to its rationality.' [Citation.]" (*Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 712-713, fn. & citation omitted (*Whitcombe*).)[11]

[11] *Whitcombe* "effectively rebuts [plaintiffs'] argument that the demurrer was improperly sustained" (*Whitcombe, supra,* 73 Cal.App.3d at p. 713) because "[a]bsent facts outside the record, the [c]ourt cannot determine either that the alleged failures to follow unambiguous statutory and policy directive were inseparable from the prior decision to parole Thomas or

In sum, we are compelled to conclude section 845.8, subdivision (a), bars plaintiffs from pursuing a cause of action based on the alleged negligent acts of the state employees responsible for Thomas' release. "While we recognize the greviousness of [plaintiffs'] injuries, the legislation which we have construed is concerned with a greater social injury," and accordingly, "liability [is] foreclosed." (*Whitcombe, supra,* 73 Cal.App.3d at p. 717.)

D*. **Conclusion***

As recognized by our Supreme Court, "[t]he issues herein presented are difficult and we are sensitive to the tragic consequences herein presented, and the necessity, to the extent possible, of preventing their repetition." (*Thompson, supra,* 27 Cal.3d at p. 755.) Nevertheless, we are constrained to uphold the dismissal of the first amended complaint in this case as plaintiffs have failed to demonstrate that their allegations are sufficient to hold the state vicariously liable for the acts of its employees in releasing Thomas.

DISPOSITION

The judgment is affirmed. Defendant State of California is awarded costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.

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whether imposition of liability will actually have any deleterious effect whatsoever on the correctional and parole system."