

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

| | | |
|---------------------------------------|---|---------------------------|
| JANE D. W. DOE, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | C.A. No.: N10C-08-178 EMD |
| |) | |
| TANYA D. GIDDINGS, Administrator of |) | |
| the Estate of JOSHUA GIDDINGS and the |) | |
| STATE OF DELAWARE, |) | |
| |) | |
| Defendants. |) | |

Submitted: July 24, 2014¹
Decided: July 29, 2014

Upon Defendant the State of Delaware’s Motion for Summary Judgment
GRANTED

Upon Plaintiff Jane D. W. Doe’s Motion for Partial Summary Judgment
DENIED

Edmund Lyons, Esquire, The Lyons Law Firm, Wilmington, Delaware, *Attorney for Plaintiff Jane D.W. Doe.*

Michael McTaggart, Esquire, Deputy Attorney General, Wilmington, Delaware, *Attorney for Defendant State of Delaware.*

DAVIS, J.

INTRODUCTION

This is a civil action for damages. Through this action, Plaintiff Jane D.W. Doe seeks entry of a judgment for special, general and punitive damages against Defendant Tanya D.

¹ The Court had considered May 5, 2014 as the date of submission. On that date, the Court heard arguments on the various motions for summary judgment and took the matter under advisement. Since that date, however, the parties have filed additional papers in support of their respective positions. The most recent filings occurred on July 24, 2014.

Giddings, as administrator of the estate of Joshua Giddings, and Defendant State of Delaware (the “State”).

This action arises out of the March 19, 2009 arrest of Ms. Doe by Joshua Giddings. At the time of Ms. Doe’s arrest, Mr. Giddings was a Delaware State Trooper. Ms. Doe alleges that on that date, after being arrested on a misdemeanor charge, Trooper Giddings coerced her into performing oral sex on him in exchange for her release. Ms. Doe has filed this suit against the State based on a theory of *respondeat superior* for Trooper Giddings’ purported intentional, reckless and malicious tortious conduct.

Now before the Court, is Defendant State of Delaware’s Motion for Summary Judgment filed by the State (the “Summary Judgment Motion”), and the Motion for Partial Summary Judgment or Partial Adjudication Pursuant to Superior Court Civil Rule 56(a) filed by Ms. Doe (the “Partial Summary Judgment Motion”). For the reasons stated in this Opinion, the State’s Summary Judgment Motion is **GRANTED** and Ms. Doe’s Partial Judgment Motion is **DENIED**.

FACTUAL BACKGROUND

On March 19, 2009, a security employee at the JC Penny store in the Christiana Mall stopped Ms. Doe for shoplifting. At the time, Ms. Doe was subject to an outstanding *capias*. After about 45 minutes, Trooper Giddings arrived at the location and took Ms. Doe into custody. Trooper Giddings placed Ms. Doe in the rear of his police car and drove to several locations in the parking lot of the mall. Ms. Doe alleges that at the third location Trooper Giddings got out of the police car, opened the rear door and placed her hand on his genitals.

According to Ms. Doe, Trooper Giddings then drove to a remote area near the mall parking lot. Ms. Doe alleges that at that point, Trooper Giddings told Ms. Doe that he would let

her go home if she did something for him in return. Ms. Doe alleges that Trooper Giddings said that if she did not accede to his demands, he would have to take her to court and she would have to spend the weekend in jail. Ms. Doe alleges that this coerced her into performing oral sex on Trooper Giddings in the front seat of the police car. Afterwards, Trooper Giddings drove Ms. Doe home and told her to turn herself in on the *capias*.

Ms. Doe later reported the incident to a Delaware State Police Sergeant. This Sergeant then investigated and eventually arrested Trooper Giddings on charges of sexual extortion (11 *Del. C.* § 776), receiving a bribe (11 *Del. C.* § 1203) and official misconduct (11 *Del. C.* § 1211). Shortly thereafter Trooper Giddings committed suicide.

On August 18, 2010, Ms. Doe filed a complaint in this Court, naming Trooper Giddings' estate and the State as defendants. Ms. Doe alleges that Trooper Giddings' conduct constituted assault, battery and rape. Ms. Doe seeks damages against the State, alleging that the Delaware State Police is an agency of the State and that Trooper Giddings was acting under his authority as a State Trooper. Ms. Doe seeks to hold the State liable for Trooper Giddings' conduct under principles of agency and/or the doctrine of *respondeat superior*.

PROCEDURAL HISTORY

On May 7, 2012, this Court granted summary judgment in favor of the State, holding that the State could not be held liable for Trooper Giddings' actions under a theory of *respondeat superior*. This Court reasoned that Trooper Giddings' conduct was not within the scope of his employment because sexually assaulting a criminal suspect is a clear abuse of authority and is not incident to the arrest or detention of the suspect.² However, this Court did not address the

² *Doe v. Giddings*, 2012 WL 1664234, *3 (Del. Super. May 7, 2012) *rev'd sub nom. Doe v. State*, 76 A.3d 774 (Del. 2013).

State's alternative argument that Ms. Doe's claims were barred by sovereign immunity when granting summary judgment.

On appeal, the Supreme Court of Delaware reversed. The Supreme Court determined that the relevant test was not whether Trooper Giddings' sexual assault was within the ordinary course of business of his employer.³ Rather, the Supreme Court noted that the relevant inquiry was whether Trooper Giddings was acting in the ordinary course of business during the time in which the sexual assault was committed.⁴ The Supreme Court did not address the State's arguments based on sovereign immunity on appeal as the arguments were not addressed by this Court.

On March 20, 2014, the State again moved for summary judgment arguing that sovereign immunity precluded Ms. Doe from bringing her claims. Afterward, Ms. Doe moved for partial summary judgment on the issue of liability arguing that she is entitled to summary judgment on the issue based on the undisputed facts of the case. This Court heard oral arguments on May 5, 2014 and reserved decision on both motions. Since oral arguments, the parties – on their own – have filed additional submissions with the Court. The Court received the most of these filings on July 24, 2014. The Court has considered all papers filed by the parties in arriving at this decision.

PARTIES' CONTENTIONS

THE SUMMARY JUDGMENT MOTION

In the Summary Judgment Motion, the State contends that the doctrine of sovereign immunity bars Ms. Doe's claims. The State argues that the Law Enforcement Agency/Officers Professional Liability Insurance policy (the "Policy) issued by Imperial Casualty and Indemnity

³ *Doe v. State*, 76 A.3d 774, 777 (Del. 2013).

⁴ *Id.*

Company to the Department of Public Safety Division of State Police does not provide coverage for Ms. Doe's claims.⁵ Under 18 *Del. C.* § 6511, the State claims that sovereign immunity has not been waived due to a lack of insurance coverage. In support, the State points out that the Policy expressly excludes from coverage liability arising out of willful violations of penal codes. Therefore, the State maintains that it has not waived sovereign immunity as to Ms. Doe's claims because Ms. Doe's claims do not fall within the coverage provided by the Policy.

Ms. Doe contends that the State has in fact waived the defense of sovereign immunity through the insurance coverage under the Policy. Ms. Doe asserts that, as the Policy provides insurance coverage for Ms. Doe's claims, the State has consented to suit under 18 *Del. C.* § 6511. Ms. Doe thus claims that sovereign immunity has been waived. Further, Ms. Doe argues that under the exclusion provision relied upon by the State, there is an exception to the excluded coverage which applies to the State. As such, Ms. Doe argues that the exclusion provision does not deny coverage for Ms. Doe's claims and the State has therefore consented to suit through insurance coverage.

THE PARTIAL SUMMARY JUDGMENT MOTION

In the Partial Summary Judgment Motion, Ms. Doe contends that, based on the undisputed facts, Ms. Doe is entitled to summary judgment on the issue of liability. Ms. Doe argues that she has made out a claim for *respondeat superior* against the State because all four factors of scope of employment are satisfied. Ms. Doe also claims that an application for a warrant for Trooper Giddings for violation of 11 *Del. C.* §§ 776 ("Sexual Extortion – Perform an act which is calculated to harm another person") and 1203 ("Receiving a Bribe – Public Servant Benefit from Another for Violating Policy") constitutes an admission of a party opponent that

⁵ The record indicates that the Policy, while issued by the Imperial Casualty and Indemnity Company, is actually a self-insurance policy.

Trooper Giddings committed the alleged misconduct.⁶ Further, Ms. Doe maintains that the State's affirmative defense of sovereign immunity must fail as the liability arising out of Trooper Giddings' actions is covered by the State's Policy and sovereign immunity has therefore been waived.

The State opposes the Partial Summary Judgment Motion, arguing that the determination of whether the alleged conduct was within the scope of Trooper Giddings' employment is a question of fact for the jury. The State points out that the Supreme Court explicitly found that scope of employment was a jury question in the earlier appeal of this case. Therefore, the State maintains that Ms. Doe's contention that all the factors of scope of employment are satisfied as a matter of law is in direct contravention of the Supreme Court's decision on appeal. The State also contends that whether sexual misconduct on Trooper Giddings's part was foreseeable is also a question for the jury. Further, the State points out that it has a pending motion in limine regarding whether Trooper Giddings' arrest on the charge of sexual extortion should bar the State from arguing that Ms. Doe consented to any act of sex with Trooper Giddings.

STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."⁷ Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to

⁶ The State also applied for an arrest warrant under 11 *Del. C.* § 1211 – "Official Misconduct – Refrains from Performing a Duty." As this charge relates to Trooper Giddings failure to arrest Ms. Doe for her outstanding *capias*, Ms. Doe does not rely upon it as a basis for her various damage claims.

⁷ *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del .1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super.Ct.1973).

judgment as a matter of law.⁸ If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.⁹ The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.¹⁰ If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.¹¹

DISCUSSION

I. SUMMARY JUDGMENT MOTION

A. Sovereign Immunity

The State contends that sovereign immunity bars Ms. Doe from asserting her claims. Under the doctrine of sovereign immunity “neither the State nor a State agency can be sued without its consent.”¹² Further, “sovereign immunity only can be waived by an act of the General Assembly that expressly manifests an intention to do so.”¹³ Actions against the State are also limited by the State Tort Claims Act, 10 *Del. C.* §§ 4001-4005.¹⁴ The Supreme Court, in *Pauley v. Reinoehl*, articulated a 2-prong test to determine whether sovereign immunity bars an action under Delaware Law.¹⁵ Under the *Pauley* test, a plaintiff must show both that: “(1) the

⁸ *Merrill*, 606 A.2d at 99-100; *Dorr-Oliver*, 312 A.2d at 325.

⁹ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del.1962). *See also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del.Super.Ct. Feb. 22, 1990)(citing *Ebersole*, 180 A.2d at 467)(“Summary judgment will not be granted under any circumstances when the record indicates ... that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.”).

¹⁰ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del.1979)(citing *Ebersole*, 180 A.2d at 470).

¹¹ *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del.1995).

¹² *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004).

¹³ *State of Delaware Dep't of Health & Soc. Servs. v. Sheppard*, 864 A.2d 929 (Del. 2004) (citing Del. Const. Art. I § 9; *Pauley*, 848 A.2d at 573; *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 74 (Del.1962)).

¹⁴ *Pauley*, 848 A.2d at 573.

¹⁵ *Id.*

State has waived the defense of sovereign immunity for the actions mentioned in the complaint; *and*, (2) the State Tort Claims Act does not bar the action.”¹⁶

With regards to the first prong of this test, Ms. Doe contends that the State has waived sovereign immunity by obtaining insurance that provides coverage for losses resulting from her claim. Under 18 *Del. C.* § 6511:

The defense of sovereignty is waived and cannot and will not be asserted *as to any risk or loss covered by the state insurance coverage program*, whether same be covered by commercially procured insurance *or by self-insurance*, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.¹⁷

In *Pauley*, the Court stated that through the enactment of this statute, the General Assembly made it clear that it intended to waive sovereign immunity to the extent that either a self-insurance plan or commercial insurance policy covers the loss.¹⁸ Therefore, if the State has insurance and the insurance covers Ms. Doe’s claim, sovereign immunity is waived.

B. The Policy

The State and Ms. Doe disagree over whether the Policy provides coverage to the State here. Ms. Doe argues either: (i) that the Policy expressly provides coverage as the Policy’s exclusion provision does not apply to the State, or (ii) that the Policy is ambiguous as to coverage and when an insurance policy is ambiguous the Court is to interpret the policy broadly to provide for coverage. The State counters by contending that the Policy does not apply because Trooper Giddings was acting outside the course of his duty or that the exclusion provision applies and/or excludes coverage for a willful violation of a penal code or ordinance.¹⁹

¹⁶ *Id.* (emphasis added).

¹⁷ 18 *Del.C* § 6511 (emphasis added).

¹⁸ *Pauley*, 848 A.2d 573 (citing *Doe v. Cates*, 499 A.2d 1175, 1177 (Del. 1985)).

¹⁹ The Court will only address the State’s latter argument as the first argument is precisely the type of factual issue the Supreme Court held was properly left to a jury in this case.

Under Delaware law, the interpretation of contractual language, including that of insurance policies, is a question of law to be determined by the Court.²⁰ The actual purpose of an insurance policy is to compensate the insured to the extent of the agreed upon policy terms.²¹ Parties are free to agree upon any terms of an insurance policy so long as the policy is not inconsistent with a statutory provision or public policy.²² The Court’s interpretation of an insurance policy must rely on a reading of all the pertinent provisions as a whole, and not on any single passage in isolation.²³ The Court is not to use extrinsic evidence to interpret contract language when that language is “plain and clear on its face.”²⁴ Therefore, the only question for this Court is whether the plain language of the Policy suggests more than one interpretation.²⁵

The Policy provides coverage for all sums which the “Insured” shall become legally obligated to pay as damages for “Personal injury” because of wrongful acts arising out of “Law Enforcement” activities.²⁶ “Personal injury” is defined as follows:

PERSONAL INJURY means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, assault and battery, libel, slander, defamation of character, discrimination, violation of property or deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States of America or the State for which the named Insured may be held liable to the party insured in any action at law, suit in equity, or other proper proceedings for redress. However, no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the Insured.²⁷

The Policy provides that “Wrongful act” means “actual or alleged error, misstatement or misleading statements, omission, neglect or breach of duty by the Insured while the Insured is

²⁰ See, e.g., *O’Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

²¹ *Id.* at 291.

²² *Id.* at 286.

²³ *Id.* at 287.

²⁴ *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

²⁵ See *O’Brien*, 785 A.2d at 289.

²⁶ Defendant’s Motion for Summary Judgment, Exhibit 2 at State 000279 (emphasis added) (hereafter “Ex. 2 at State ”)

²⁷ Ex. 2 at State 000280.

acting or failing to act within the scope of employment or official duties pertaining to the law enforcement functions of the Insured.²⁸

Under the Policy, there is a provision which excludes coverage for liability that arises under certain circumstances. In that provision, the Policy states the following:

EXCLUSIONS:

THIS POLICY DOES NOT APPLY:

. . .

(B) to damages *arising out of the willful violation of a penal code* or ordinance committed by or with the knowledge or consent of any Insured or claims or injury arising out of acts of fraud committed by or at the direction of the Insured with affirmative dishonesty or actual intent to deceive or defraud, however, does not apply to the named Insured or the political subdivision in which the named Insured is located.²⁹

In order to determine whether the Policy provides coverage for Ms. Doe’s claims, the Court must interpret this subsection (B) of the Exclusions section of the Policy (“Subsection B”). Subsection B is in the disjunctive and relates to two types of claims. The first portion of Subsection B excludes coverage “arising out of willful violations of a penal code” which are committed “by or with the knowledge or consent of any *Insured . . .*” The second portion of the Subsection B relates to acts of fraud, excluding coverage for claims and injuries related to such acts unless the injury arises out of an act of fraud by the Named Insured or a political subdivision in which the Named Insured is located. This case does not allege injuries or damages resulting from acts of fraud, affirmative dishonesty or actual intent to deceive or defraud. Accordingly, the Court will focus on the first part of Subsection B in its analysis.

Next, the Court must look to other areas of the Policy to define the terms “Insured” and “Named Insured.”

²⁸ Ex. 2 at State 000280.

²⁹ Ex. 2 at State 000279-80 (emphasis added).

The term “Insured” is defined in a section of the Policy entitled “Definitions”:

DEFINITIONS:

...

INSURED Means (1) *Named Insured and all paid full or part time employees*; (B) unpaid volunteers or reserves while performing law enforcement functions for the named Insured; (C) the political subdivision in which the named Insured is located, should such political subdivision be named in any action or suit against the named Insured or any employee for any act, error or omission for which this policy affords protection, and elected or appointed officials or other personnel or units of the political subdivision of which the named Insured is a unit thereof, with respect to their responsibilities to law enforcement.³⁰

This section of the Policy clearly defines the term “Insured” as any individual or entity provided coverage under the Policy. This includes “all paid full or part time employees” as well as the “Named Insured,” which is not defined in this section.

“Named Insured” is defined on the declarations page of the Policy:

DECLARATIONS:

ITEM 1: Named Insured and Address:

Department of Public Safety, Division of the State Police

P.O. Box 430

Dover, Delaware 19901³¹

The Declarations page of the Policy clearly names the “Department of Public Safety, Division of the State Police” as the “Named Insured.” As pointed out by the State, the Policy does not appear to extend coverage to the defendant in this case, the State of Delaware.³²

³⁰ Defendant’s Motion for Summary Judgment, Exhibit 2 at *2-3 (emphasis added).

³¹ Defendant’s Motion for Summary Judgment, Exhibit 2 at *1.

³² Ms. Doe argues that the State, the Delaware State Police and the Department of Public Safety are all the same entity. As authority for this statement, Ms. Doe refers the Court only to *Janowski v. State of Delaware*, 981 A.2d 1166, n.1 (Del. 2009). This Court does not read the footnote in *Janowski* to stand for the proposition that the State of Delaware and the Delaware State Police are “one and the same.” The Supreme Court in that footnote was merely defining all respondents (Defendants Division of State Police, Defendant Department of Safety and Homeland Security, and the State of Delaware) as the “State” for reference purposes in its opinion. In any event, this does not matter as this Court holding on sovereign immunity would apply to the State if the State were the “Insured” or the “Named Insured.”

After defining the terms “Insured” and “Named Insured,” the meaning of the exclusion provision becomes clear and unambiguous. Subsection B expressly denies coverage for willful violations of the penal code that are committed by the “Insured” (which here would include Trooper Giddings and the Department of Public Safety, Division of State Police). Subsection B does not exclude coverage for the “Named Insured” (here the Department of Public Safety, Division of State Police) when the claim relates to acts of fraud. As this Court does not find Subsection B to be ambiguous, this Court gives the provision its plain and ordinary meaning – no coverage under the Policy for: (i) claims arising out of the willful violation of a penal code committed by an Insured, or (ii) claims arising out of acts of fraud unless the claim relates to the named Insured or the political subdivision in which the named Insured is located.

In a supplemental filing, Ms. Doe would argue that the Court should not adopt this straightforward approach to the terms and conditions of the Policy. Ms. Doe now seems to argue that other portions of the Policy work to create ambiguity as to coverage. As support, Ms. Doe refers the Court to *City of Greenville v. Haywood*.³³ In *Haywood*, a North Carolina appellate court addressed a substantially similar policy and situation (sodomy instead of rape) as presented here. The *Haywood* court did find the policy’s language to be ambiguous as the policy both provided coverage for the tort of assault and battery while excluding coverage for “willful violation of a penal statute.”³⁴

This Court declines to follow the reasoning set out in *Haywood*. The *Haywood* court found that the language of the policy was in such conflict as to make it “virtually impossible” for either an insured or a beneficiary to determine precisely which “perils are covered and which are

³³ 502 S.E.2d 430 (N.C. App. 1998).

³⁴ *Id.* at 275-76.

not.”³⁵ This Court does not see the same virtual impossibility in determining coverage under the Policy. The Policy provides coverage for certain intentional torts – like assault and battery, false imprisonment, slander, defamation, etc. – but expressly excludes coverage when those same intentional torts rise to the level of a willful violation of the penal code.³⁶ The language is clear and plain. No party to the Policy could be misled into thinking that personal injuries caused by a willful violation of a penal code by an Insured would be covered. This Court holds that Subsection B, reasonable construed, is applicable here. Moreover, it appears the majority of decisions interpreting the scope and applicability of this type of exclusion provision agree with this type of approach unless the exclusion provision makes coverage illusory.³⁷

C. Sovereign Immunity Has Not Been Waived

In the case at bar, the State has not waived sovereign immunity through insurance coverage because the Policy does not provide coverage to the State for Ms. Doe’s claims. The policy does not provide coverage for willful violations of the penal code by the “Insured.” As an employee of the “Named Insured,” Trooper Giddings would be categorized as an “Insured” under the Policy. Moreover, the Department of Public Safety, Division of State Police, as the “Named Insured” would be categorized as an “Insured” for purposes of subsection (B) of the Exclusions provision.³⁸ Ms. Doe is pursuing claims of personal injury arising out of Trooper Giddings purported violations of Delaware penal law – “Subject to this coercion Doe performed

³⁵ *Id.* at 278.

³⁶ Not all intentional torts are necessarily willful violations of a penal code or ordinance. For example, criminal assault in Delaware requires actual “physical injury.” *See, e.g.,* 11 *Del. C.* § 611(1); 11 *Del. C.* § 612(a)(1); 11 *Del. C.* § 613(a)(1). The intentional tort of civil assault does not necessarily require actual physical injury in order for a party to recover. *See, e.g., Browne v. Saunders*, No. 372,2000, 768 A.2d 467 (Table)(Del. Feb. 14, 2001)(plaintiff does not need to allege actual harm in a civil assault claim because there can be an entitlement to nominal damages for a technical invasion of the integrity of the person by entirely harmless, yet offensive, contact).

³⁷ *See, e.g., Allstate Ins. Co. v. Schmitt*, 570 A.2d 488, 490-492 (N.J. Super. Ct. App. Div. 1990); *see also National Fire & Cas. Co. v. West*, 107 F.3d 531, 536-37 (7th Cir. 1997); *Carney v. Village of Darien*, 60 F.3d 1273, 1280-81 (7th Cir. 1995); *Allstate Ins. Co. v. Norris*, 795 F. Supp. 272, 275-76 (S.D. Ind. 1992).

³⁸ If the Court were to adopt Ms. Doe’s legal argument that the State of Delaware and the Delaware State Police and the Department of Public Safety are all the same entity the State of Delaware would be an “Insured” or the “named Insured” under Subsection B.

oral sex on Giddings, without her consent, in violation of Delaware law.”³⁹ Because Trooper Giddings is alleged to have willfully violated the penal code, any personal injury resulting from such conduct is specifically excluded from the personal insurance coverage of the Policy.

Because the State has no insurance coverage for losses stemming from Ms. Doe’s claims, the State has not waived sovereign immunity through insurance coverage. Further, as Ms. Doe has put forth no other arguments with which to provide a basis for waiver of sovereign immunity, sovereign immunity does bar Ms. Doe’s claims. Therefore, the State is entitled to summary judgment on Ms. Doe’s claims.

II. PARTIAL SUMMARY JUDGMENT MOTION

Ms. Doe contends that she is entitled to judgment on the issue of liability on her *respondeat superior* claim against the State because the undisputed facts establish that Trooper Giddings was acting within the scope of his employment at the time he committed the alleged wrongful acts. On an earlier appeal in this case, the Supreme Court articulated the four factors required to determine that conduct was within the scope of employment:

Under the *Restatement of Agency (2d)* § 228, conduct is within the scope of employment if, “(1) it is of the kind he is employed to perform; (2) it occurs within the authorized time and space limits; (3) it is activated, in part at least, by a purpose to serve the master; and (4) if force is used, the use of force is not unexpected.”⁴⁰

The Supreme Court found that the first two factors were satisfied as the alleged assault occurred when Trooper Giddings was in uniform, on-duty and carrying out a police duty by transporting Ms. Doe to Court.⁴¹ However, as to the third factor—whether Trooper Giddings’ was activated in part to serve his employer—the Court stated that the factor “has been construed

³⁹ Complaint at ¶ 7. *See also*, Partial Motion for Summary Judgment at ¶ 4 (contending Trooper Giddings violated 11 *Del. C.* § 776 and 11 *Del. C.* § 1203)

⁴⁰ *Doe v. State*, 76 A.3d 774, 776 (Del. 2013) (citing *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 569 (Del. 1962)).

⁴¹ *Id.* at 777.

broadly as a matter for the jury to decide.”⁴² Further, with regard to the fourth factor, although the Court found that the record did not establish that Trooper Giddings’ alleged conduct was not unforeseeable, the Court did not state that as a matter of law this factor was satisfied.⁴³

Even if the State were to concede that Trooper Giddings’ committed the alleged conduct — which the State does not — all four factors of scope of employment have not been established as a matter of law. Based on the Supreme Courts findings on appeal, both the third and fourth factors remain matters for the jury to decide. Consequently, Ms. Doe has not established that Trooper Giddings’ was acting within the scope of his employment as matter of law. Therefore, Ms. Doe is not entitled to judgment on the issue of liability. Further, as argued above, sovereign immunity bars Ms. Doe’s claims against the State. Therefore regardless of whether Ms. Doe could otherwise succeed on a theory of *respondeat superior*, her claims cannot be brought against the State. Accordingly, the Partial Summary Judgment Motion must be denied.

CONCLUSION

Based on the reasoning above, the Court finds that the State has not waived sovereign immunity with regards to Ms. Doe’s claims. Therefore, as the doctrine of sovereign immunity precludes Ms. Doe from bringing her claims against the State, the State’s Summary Judgment Motion is **GRANTED**. Further, the Court finds that Ms. Doe has failed to show that, viewing the evidence in the light most favorable to the State, Ms. Doe is entitled to summary judgment on the issue of liability. Therefore, Ms. Doe’s Partial Summary Judgment Motion is **DENIED**.

IT IS SO ORDERED.

/s/ Eric M. Davis _____

Eric M. Davis
Judge

⁴² *Id.*

⁴³ *Id.*