IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES SHERMAN, as Administrator of the Estate of JANE D.W. DOE, Plaintiff Below, Appellant, v. THE STATE OF DELAWARE, and THE ESTATE OF JOSHUA GIDDINGS, Defendant Below, Appellee.	)	No.: 190, 2015 In The Superior Court of the State of Delaware In and For New Castle County

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF THE PROCEEDINGS

In August, 2010, Plaintiff[1] filed suit against the State of Delaware and the Estate of a Delaware State Trooper[2] alleging that in March, 2009, after the Trooper arrested her on a misdemeanor shoplifting charge, he coerced her into performing oral sex on him. There was no punitive damage claim.[3] The claim against the State of Delaware was based upon the theory of *respondeat superior*.

This is the second time this case has been before this Court. The first time this Court *en banc* reversed a grant of Summary Judgment to the State and against Plaintiff. On remand the Superior Court granted Summary Judgement in favor of the State and the Estate of the State Trooper. The Court also denied Summary Judgement sought by the Plaintiff. Plaintiff now appeals those rulings.

ROUND ONE

The State originally filed a Motion for Summary Judgment against Plaintiff arguing, among other things, that *respondeat superior* was inapplicable on the facts. The Estate did not file a Motion for Summary Judgment.

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[1]The Plaintiff died unexpectedly on January 28, 2015. Earlier in the litigation, Plaintiff's deposition had been taken by the State.

[2]Not long after he was arrested for his wrongful acts the Trooper committed suicide.

[3]The Superior Court opinion mistakenly stated that there were punitive damages claimed.

In May, 2012 the Superior Court granted Summary Judgment and dismissed Plaintiff's claim against the State. The Court reasoned that the Trooper's wrongful act was not within the scope of his employment because it had not been authorized by the State Police (attached as Exhibit B).

Plaintiff then timely appealed to this Court from the final judgment dismissing Plaintiff's case against the State.

Pending outcome of Plaintiff's appeal, the trial of Plaintiff's claim against the Estate was stayed by the Superior Court.

SUPREME COURT I

On appeal, Plaintiff argued that the Superior Court had misapplied the Doctrine of *respondeat superior*. The State argued the reverse. In addition, the State raised two issues which it had pursued below that the Superior Court had not ruled upon -- Sovereign Immunity and application of the State Tort Claims Act -- as a basis to affirm the grant of Summary Judgment. In the exercise of its discretion, this Court did not address these issues in its ultimate Opinion on *respondeat*.

This Court *en* banc reversed the grant of Summary Judgment because the trial Court had not applied the proper elements of the Restatement of Agency 2d Section 228 (defining the doctrine of ***respondeat superior***). In the Court's Opinion it observed:

> "Giddings was in uniform, on-duty, carrying out a police duty by transporting Doe to court. The sexual assault

> took place in the police car, during the time that Giddings was supposed to be carrying out police duties. These facts would satisfy the first two factors under the Restatement—Giddings was doing the kind of work he was employed to perform, and he was acting within authorized time and space limits. The third factor—whether Giddings was activated in part to serve his employer has been construed broadly as a matter for the jury to decide if the act of cutting someone's throat can be considered a service to the employer paving company on the theory that the employee was controlling traffic, then a sexual assault can be considered a service to the police on the theory that part of what Giddings was doing was transporting a prisoner. Finally, to be within the scope of employment, any force used must be "not unexpectable." Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks. The Record does not establish that Giddings' conduct was unforeseeable. Doe v. State, 76 A.3d 774, 777 (Del. 2013), reargument denied (Oct. 8, 2013)

The Court remanded for trial applying the proper Section 228 elements. Doe v. State, 76 A.3d 774 (Del. Supr., 2012) (copy attached hereto as Exhibit C).

ROUND 2

STATE AND PLAINTIFF FILE CROSS MOTION FOR SUMMARY JUDGEMENT

Once back in the Superior Court, after further discovery, the State and the Plaintiff filed cross-Motions for Summary Judgment. At that time the Estate of the Trooper filed no Motion for Summary Judgment. The State argued that it was entitled to judgment based upon the Doctrine of Sovereign Immunity because the State Self-Insurance Plan did not cover the State Trooper's misconduct. It also argued that the State Tort Claims Act compelled judgment in its favor. Plaintiff sought Summary Judgment on the issue of

liability. In that Motion Plaintiff argued that on the undisputed facts of the case she should prevail against the State on issue of the Trooper's liability and the issue of ***respondeat superior***.

The Superior Court granted Summary Judgment against Plaintiff on the Sovereign Immunity defense. The Court did not address the State Tort Claims Act argument. The Plaintiff's Motion for Summary Judgement was denied both because of the finding of Sovereign Immunity and because the Court determined that disputed issues of fact remained on the ***respondeat*** claim.

ESTATE OF TROOPER FILES MOTION FOR SUMMARY JUDGMENT

At that point trial was set for September, 2014. In July, 2014 the Estate of the Trooper, for the first time, raised the argument that it was entitled to judgment based upon Plaintiff's failure to comply with 12 Del. C. §2102(a) (which requires claims to be presented against a decedent's estate no later than eight months after decedent's death.)[4] Plaintiff argued that the Estate had waived the defense by not raising it until five weeks before trial.

The Court then ruled that non-compliance with 12 Del. C. §2102(a) could not be waived because the statute was a statute of repose and Plaintiff's failure to present her claim within eight months of the Trooper's death barred the claim.

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[4]The client had first spoken with counsel 15 months after the Trooper's death.

This is Plaintiff's Opening Brief on Appeal from final judgments dismissing her claims against Defendants and denying her Motion for Summary Judgment.

SUMMARY OF ARGUMENT

SOVEREIGN IMMUNITY

1. The State has waived Sovereign Immunity by adopting the State's Self-Insurance Plan.

2. The State's Self-Insurance Plan covers the Trooper's wrongful acts. This is so whether compelled by the plain language of the Plan, or a reading of the Plan favorable to Plaintiff if parts of the Plan are ambiguous.

3. The State has conceded Plan ambiguity.

4. The State is insured under the Self Insurance Plan as an alter ego or real party in interest of the Named Insured.

RESPONDEAT SUPERIOR

1. Under Restatement of Agency 2d §228 ***respondeat superior*** is made out on the undisputed facts of the case. The first two of the four elements of ***respondeat superior*** have been have been found by this Court to be undisputed on this Record -- (1) tortfeasor engaged in acts of a type he is employed perform; (2)wrongful act occurs within the authorized time and space limits.

2. The third and fourth elements -- (3) wrongful act activated, at least in part, by a purpose to serve the master; and, (4) if force is used, the use of force is not unexpectable -- are found in the undisputed Record developed on remand from this Court.

As such, Plaintiff is entitled to summary judgment on the issue of liability.

PROPER INTERPRETATION OF 12 DEL. C. § 1202(a)

1. By its plain language, 12 Del. C. §1202(a) is a statute of limitations and not a statute of repose. As such, although it requires claims against a decedent's Estate to be presented within eight months of decedent's death, it may be waived and was waived in this case.

STATEMENT OF FACTS

RECORD REGARDING UNDERLYING INCIDENT

In her deposition taken by the State, Plaintiff presented sworn testimony as follows. (A36-124)[5]. On March 19, 2009 the Trooper was in uniform and on duty when he arrested Plaintiff on a shoplifting complaint pursuant to his powers and duties as a Delaware State Trooper. The Trooper then placed Plaintiff in his marked State Police car and prepared to transport her to a Justice of the Peace Court for an initial appearance and setting of bail. However, instead of promptly transporting Plaintiff to Court, the Trooper advised Plaintiff that if she did not accede to his demands for oral sex, he would take her to Court and she would likely remain in jail over the weekend for her failure to make bail. If she did accede, the Trooper would not take her to Court but would simply give her a summons to appear so she could go home. Subject to this coercion, Plaintiff performed oral sex on the Trooper without her consent in violation of Delaware law.

In a sworn application for a warrant for the Trooper, based on his wrongful acts, the State's agent, a State Police Sergeant alleged ("based on knowledge, information and belief") that the Trooper compelled Plaintiff to engage in "sexual penetration/intercourse" by threatening to take her to Court. (A125).

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[5]Appendix citations are marked "(A____)."

There is no admissible evidence in this Record to the contrary.

RECORD REGARDING APPLICATION OF *RESPONDEAT SUPERIOR*

THIS COURT'S EN BANC OPINION ON THE APPEAL OF THE ORIGINAL SUMMARY JUDGMENT ORDER IN FAVOR OF THE STATE(ROUND I)

In its Opinion (attached as Exhibit C), 76 A.3d 774 (Del. Supr. 2013) this Court rejected the trial Court's holding that if the wrongful act was not authorized by the employer it was not within the scope of employment. Rather, this Court held:

> "Under the Restatement of Agency (II) Section 228, conduct is within the scope of employment if, (1) it is of the kind he is employed perform; (2) it occurs within the authorized time and space limits; (3) it is activated, at least in part, by a purpose to serve the master; and, (4) if force is used, the use of force is not unexpectable." Id at 776.

And further:

> "[the Trooper] was in uniform, on duty, carrying out a police duty by transporting Plaintiff to Court. The sexual assault took place in the police car during the time that [the Trooper] was supposed to be carrying out police duties. These facts would satisfy the first two factors under the Restatement. . ." Id at 777.

In addressing the issue of whether the Trooper "was activated in part to serve his employer" the Supreme Court observed that:

> The third factor—whether Giddings was activated in part to serve his employer has been construed broadly as a matter for the jury to decide. If the act of cutting someone's throat can be considered a service to the employer paving company on the theory that the employee was controlling traffic, a sexual assault can be considered a service to the police on a theory that part of what [the Trooper] was doing was transporting a prisoner." Id at 777.

This Court also stated: "To be within the scope of employment, any force used must be 'not unexpectable'." The Opinion equated the term "expectable" with "foreseeable." Id.

This Court also held that the Record before it **at that time** did not establish non-foreseeability. It continued: "Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks." Id. at n.9 and accompanying text.

FORESEEABLE RISK OF POLICE SEXUAL MISCONDUCT

TESTIMONY OF THE FORMER STATE POLICE SUPERINTENDENT

On remand, former Delaware State Police Superintendent Thomas McLeish (Superintendent at the time of the Trooper's misconduct) testified in deposition that there is a risk in police work that a small number of police officers will engage in sexual assault or similar misconduct involving detainees in their custody. (A136, 147-158).

In addition, McLeish was shown an article in the magazine of the International Association of Chiefs of Police. (A174).[6] The article was in May, 2011 two years after the assault. It addressed the small but significant problem of police sexual assault on detainees of the opposite sex and strongly suggested that police

[6] Acknowledged by McLeish to be a leading if not the leading, law enforcement association of chiefs of police in the United States and perhaps the world.. Both McLeish and the Delaware State Police are members of the International Association of Chiefs of Police. (A136).

agencies be aware of and address the problem: The problem of sexual misconduct by officers warrants the full attention of law enforcement leadership." McLeish did not disagree with any observations in the article and testified that they would have been well founded even before the Trooper's sexual assault on Plaintiff. (A147-153).

McLeish also testified that to guard against such occurrences the State Police requires its officers to call in and note their car mileage and time when they take an opposite sex detainee into custody and when they release the detainee from custody. (A155-157).

PRIOR CLAIMS OF POLICE MISCONDUCT

The State has, since 1990, been presented with allegations that individual State Troopers committed unauthorized and wrongful acts during execution of their duties, including one rape[7], and multiple assaults. (Exhibit B to Plaintiff's Response to State's Motion for Summary Judgment filed October 22, 2012) In 1995 it was publically reported that a Lewes police officer pled guilty to on duty unlawful sexual intercourse with a woman in custody. (Exhibit B-1 to Plaintiff's Response to State's Motion for Summary Judgment filed October 22, 2012)[8].

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[7]In the alleged rape case, suit was filed but was apparently dismissed as time barred. A filed lawsuit is notice that such behavior might occur regardless of a final decision on the merits.

[8] These exhibits take together are quite lengthy. They can be authenticated per Superior Court R. Ev. 901(a)(produced by

In this Record, there is no evidence to the contrary.

SELF-INSURANCE PLAN

The Self-Insurance Plan (A29) covers "all sums which the Insured shall become legally obligated to pay as damages because of **wrongful acts arising out of law enforcement activities, as follows: Coverage A - PI (personal injury).**" (A29).

"**Personal Injury**" is defined in the Plan as including "**assault and battery.**" (A30).

"**Wrongful Act**" is defined by the Plan as including "breach of duty by the insured individually or collectively, while **'acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the insured.**" (A30).

In deposition the State Insurance Plan Administrator agreed that although she interpreted the Plan differently, it was reasonable to read the Plan (as did Plaintiff) so that each of these provisions covered the Trooper's wrongful actions **("wrongful act," "assault and battery," "acting or failing to act," "scope of employment," "official duties").** (A212-223).

NAMED INSURED AND INSURED

The "**Division of Public Safety, Delaware State Police**" is

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opponent) or 902(6)(Newspapers, etc.). Neither is offered for the truth-both are offered on the issue of notice-hence neither is hearsay.

listed as **Named Insured** in the Plan. The **Insured** under the Plan includes the **Named Insured** and its employees. (A30).

EXCLUSIONS AND EXCEPTION

The State Insurance Plan also includes a **"penal code"** exclusion of:

> "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 the 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 sub-division in which the named insured is located.** (A30).

Plaintiff"s interpretation of the Plan that the **"however exception"** applies to and renders both the **"penal code" and "fraud" exclusion** inapplicable to this case - that is, the exclusion does **not** vitiate coverage -- was termed "reasonable" by the Plan Administrator in deposition although she read the Plan **"however exception"** to apply only to the **"fraud" exclusion.** (A30).

NAMED INSURED

Tellingly, the Plan Administrator did not rely upon the fact that the State was not identified as **Named Insured or Insured** in the Plan to support her claim that the Plan did not cover the Trooper's wrongful acts. (A229).

RECORD REGARDING 12 DEL. C. §2102(a)

After his arrest, the Trooper committed suicide. The Estate

is judgment proof with personal debts exceeding assets regardless of Plaintiff's claim. The Plaintiff did not file a claim with the Trooper's Estate within eight months of his death.

The Estate was kept open even at the time of its Summary Judgment Motion because of Plaintiff's pending claim. The Complaint was filed in 2010. An Answer was filed on behalf of the Estate at that time. It made no mention of a Statute of Repose defense. This defense was raised for the first time in a Summery Judgment Motion just before trial. Opinion of Superior Court granting Summary Judgment in favor of Estate of Trooper (attached as Exhibit B at 2).

THE OPINION OF THE COURT BELOW REGARDING SOVEREIGN IMMUNITY

PLAN DEFINITIONS

To address the issue of Sovereign Immunity the Superior Court correctly observed that the Plan provided coverage for all damages which the "Insured" was required to pay for "**Personal Injury**" because of "**Wrongful Acts**". [9] (Exhibit A at 4).

EXCLUSIONS AND EXCEPTION

The Court then moved to application of the **"penal code" Exclusion** from the Plan and an **Exception** to that **Exclusion** found within the Plan. The Court examined sub-section (B) under the portion of the policy setting forth **Exclusions**: The pertinent language:

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[9]If a **wrongful** act covered by the State Insurance Plan, Sovereign Immunity is waived. 18 Del. C. §6503.

> "(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 of 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 sub-division in which the named Insured is located.**" (A30).

The question addressed by the Court was whether the **"however" clause** at the end of Section (B) was an **Exception** to both the **"penal code" clause and the "fraud" clause exclusions** or only to the **"fraud" clause.** The Plaintiff said yes. The Court said no.

The Court stated that it thought the language was "plain" and that the **"however" exception** applied only to the **"fraud" clause and not to the "penal code" clause.** Because the **Insured** under the Self Insurance Plan included the Trooper and the Department of Public Safety, Division of State Police, while the **Named Insured** in the Plan included only the Department of Public Safety, Division of State Police, the Court read the **Exception** to apply to the **"Fraud Claims"** but not also to the **"penal code"** clause (Exhibit A at 5). That was the only apparent logic supporting the Court's conclusion.

IDENTITY OF NAMED INSURED

Alternatively, the Court concluded that the State of Delaware was not covered by the Self-Insurance Plan because the **Named Insured** was only the "Department of Public Safety, Division of the State

Police" and not the State.[10] However, the Court continued "this does not matter as this Court's holding Sovereign Immunity would apply to the State if the State were the **'Insured'** or the **'Named Insured.'**" (Exhibit A at 5).

PLAN AMBIGUITY: "ASSAULT OR BATTERY" V. PENAL STATUTE VIOLATION

The Superior Court rejected the Plaintiff's argument that the phrase **"willful violations of a penal statute"** is ambiguous in that it is directly in conflict with other provisions in the Self-Insurance providing that the Plan covers **"Assault or Battery."** (Exhibit A at 4).

The Superior Court reasoned that a **criminal assault** under Delaware law (11 Del. C. §§ 611-612) requires a physical injury, thus it would be possible for the Plan to cover the **civil tort of assault** and yet exclude a claim for **criminal assault** because the **civil assault** can involve only offensive contact with no injury while the **criminal assault** requires an injury. Therefore the two concepts are not inconsistent and there is no tension between the two rendering them ambiguous. (Exhibit A at 5 n.36).

The Court then addressed Plaintiff's reliance on Greenville v. Haywood, where the North Carolina Court of Appeals addressed almost, if not exactly, the identical issue presented here and found that

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[10]This argument was not raised in the State's original Summary Judgment Motion in Round I of these proceedings. In the second Summary Judgment Motion it was raised in one sentence, supported by no authority, for the first time.(Dkt. 50)

excluding willful penal code violations while covering assaults and batteries presents a classic ambiguity which is resolved in favor of coverage of the sexual assault claim against a police officer. 502 S.E.2d 430 (NC Ct. App. 1998). The Court declined to follow Greenville and instead relied on a string cite of one case from New Jersey and three cases from the Federal Courts (Exhibit A at 5).

Thus, the Court found no Plan ambiguity: "No party[11] 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." (Exhibit A at 5).

For these reasons the Court granted the State's Motion For Summary Judgment.[12]

OPINION OF THE COURT BELOW REGARDING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court denied Plaintiff's Motion for Summary Judgment based on a **respondeat** claim because in Round One, this Court indicated that existence of the third factor under Restatement (2d) Section 228 (at least partial purpose to serve master) "has been construed broadly as a matter for the jury to decide." (Exhibit A at 6). Accordingly, the Superior Court found that the existence of this factor remained in dispute and should be presented to a jury. Further, as to the fourth factor under Section 228 of the

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[11] Appellant was not a party to the Self-Insurance Plan.

[12] The Court never addressed the Tort Claims Act argument raised by the State.

Restatement (whether force is not foreseeable) the Superior Court was influenced by the fact that "the [Supreme] Court did not state that as a matter of law this factor was satisfied." Thus, Summary Judgment was denied.[13] (Exhibit A at 6).

OPINION OF THE COURT BELOW REGARDING 12 DEL. C. §2102(a)

The Court found 12 Del. C. §2102(a), barring claims against a decedent's Estate first made more than eight months after death to be a **"statute of repose."** (Exhibit B at 3). As a **statute of repose,** a Defendant cannot waive its protections; accordingly, the fact that the Estate did not raise the defense until shortly before trial was not relevant. (Exhibit B at 3).

The Court rejected Plaintiff's argument that Section 2102(a) is a **statute of limitations** which can be waived. The Court began by setting out the language of the statute:

> "All claims against a decedent's Estate. . ., if not barred earlier by other statute of limitations, are barred against the Estate. . . unless presented. . . within eight months of the decedent's death. . . 12 Del. C. §1202(a) (Exhibit B at 2).

The Court continued:

> The phrase 'if not barred earlier by other statute of limitations' suggests that Section

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[13] However, the Court observed that the State had not conceded that the Trooper committed the charged wrongful acts. (Exhibit A at 6). This is erroneous. Although the State denied this in its Answer, their agent, the Trooper who arrested the defendant Trooper swore that he had. (A125). Also, there is no other evidence on this issue in the Record than Plaintiff's sworn testimony that he had.

> 2102(a) is, in fact, a statute of limitations. In addition, Section 2102 is titled Limitations on Claims Against Estates, further suggesting that this is a statute of limitations. (Exhibit B at 2-3).

The Court then observed:

> The difficulty lies in determining what the General Assembly meant when it used the phrase 'statute of limitations'. The definition of 'statute of limitations' has changed over the past few decades. Simply because the phrase 'statute of limitations' was used does not necessarily mean that the statute is a statute of limitations. (Exhibit B at 3).

The Court then cited a portion of the Opinion in CTS Corp. v. Waldburger, 134 S.Ct. 2175, 2185 (2014):

> While the term 'statute of limitations' has acquired a precise meaning, distinct from 'statute of repose' and while that is its primary meaning, it must be acknowledged that the term 'statute of limitation' is sometimes used in a less formal way. In that sense, it can refer to any provision restricting the time in which a Plaintiff must bring suit.

Exhibit B at 3 n.12.

With that preamble, the Court then found that despite its language, §1202 is, in fact, a statute of repose (which cannot be waived) and not a statute of limitations under Delaware law.. The Court relied upon Dellaversano v. DiSabatino, 1988 WL960702 (Del. Super. 1998) which commented in a footnote that §2102 was "akin" to a statute of repose (which cannot be waived) and is distinguished from a "general" statute of limitations (Exhibit B at 3).

The Court also relied on Cummings v. Lewis, 2013 WL2987903 (Del. Ch.) which states that the purpose of §2102(a)(to permit settlement of estates within a reasonable time) and found that §2102 is a statute of repose which cannot be waived. Because Plaintiff's claim was not presented to the Estate of the Trooper within eight months of his death, it was barred (Exhibit B at 3).

ARGUMENT

SOVEREIGN IMMUNITY

QUESTION PRESENTED

Has the State waived immunity by coverage of the claim through the State's Self-Insurance Program? This was the issue decided by the trial Court in its Opinion (Exhibit A) rejecting arguments made by the Plaintiff in its Summary Judgment Motion against the State of Delaware (A236) and in its Response to the State's Summary Judgment Motion (A247).

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. Citadel Holding v. Roven, 603 A.2d 818(Del. Supr. 1992)

MERITS OF ARGUMENT

This issue was raised both in the State's Motion for Summary Judgment and in the Plaintiff's Motion for Summary Judgment.

The question boils down to the obvious -- whether the State Insurance Plan covers the undisputed wrongful actions of the State Trooper. If there is coverage the State is not immune. 18 Del. C. §6511.

EXCLUSIONS AND EXCEPTIONS UNDER STATE SELF INSURANCE PLAN

The Superior Court held that the Plan, on its face, covered the Trooper's wrongful actions (Exhibit A at n.28 and accompanying text). This is accurate. The Court then focused on the **Exclusions**

to the Plan and found that the **"however" exception** did not apply to the **"penal code" exclusion"**. Id.

APPLICATION OF THE "HOWEVER EXCEPTION" TO THE "PENAL CODE EXCLUSION" CONCEDED AS REASONABLE BY STATE

Plaintiff reads the **"however exception"** as applicable to the **"penal code exclusion[14]"** and to the **"fraud exclusion"** so that the State cannot take advantage of the exclusion:

> "(B) [coverage does not apply] 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 of 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 sub-division in which the named Insured[15] is located.**" (emphasis supplied) (A30).

As to the interplay between the **"penal code exclusion clause,"** and the **"however exception"**, the State Insurance Plan Administrator testified that Plaintiff's reading of these provisions (that the **exception** negated the **penal code exclusion**) was reasonable although she read the Policy in a different fashion (A205-210)[16] Two different reasonable interpretations of a contract make it

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[15] The **Named Insured** is the "Department of Public Safety, Division of the State Police." Under the law, the State Police is the primary law enforcement agency "throughout the State." 11 Del. C. §8302(a). It is not located in any one "political sub-division." Thus, the phrase **"the political sub-division in which the Named Insured is located"** is meaningless within the Plan (definition of **Insured** and **"however clause."** (A29-30).

ambiguous. Nw. Nat. Ins. Co. v. Esmark, Inc., 672 A.2d 41, 43 (Del. Supr. 1996). "...[A]n insurance contract is ambiguous when it is 'reasonably or fairly susceptible of different interpretations or **may have two or more different meanings.**'" ConAgra Foods, Inc. v. Lexington Ins. Co., 21 A.3d 62, 69 (Del. Supr. 2011).

So read in favor of Plaintiff by the Administrator, the **"penal code exclusion"** is subject to **"however clause" exclusion** and is irrelevant here under the Doctrine of ***contra proferentum*** which requires an ambiguous contract provision to be construed against the drafting party.[17]

CONCESSION BY THE STATE

The concession by the Insurance Administrator that Plaintiff's reading of the Plan was reasonable was similar to a **"judicial admission"** which in most cases is binding on the Court:

> Voluntary and **knowing concessions of fact** made by a party during judicial proceedings (*e.g.*, statements contained in pleadings, stipulations, **depositions**, or testimony; responses to requests for admissions; counsel's statements to the court) are termed "judicial admissions". Although there are no Delaware cases directly on point, judicial admissions, as distinguished from evidentiary admissions, 17 are traditionally considered conclusive *1202 and binding both upon the party against whom they operate, and upon the court. Consequently, A tribunal may, however, in the exercise of its discretion, relieve a party from the conclusiveness of its judicial admissions."

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[17] Stigler v. Insurance Company of North America, Del. Supr. 384 A.2d 398, 400 (1978).

Merritt v. United Parcel Serv., 956 A.2d 1196, 1201 02 (Del. Supr. 2008)[18] We recognize that this concession was one of an application of law to fact but still argue that it should have been considered by the Superior Court. The Superior Court erred by ignoring this concession by the State that there were two reasonable ways to interpret the Plan - which leads to the conclusion that under the law, the Plan language is ambiguous.

"ASSAULT OR BATTERY" VERSUS "PENAL CODE EXCLUSION" CREATES AMBIGUITY

There is another reason the "**penal code**" exclusion is inoperable here - the Plan says that it covers **assault or battery** (a battery happened here) and then excludes coverage for criminal acts - which, one would think, includes **assault or battery. Thus, ambiguity.**

The Superior Court reasoned that a **criminal assault** under Delaware law (11 Del. C. §§ 611-612) requires a physical injury because it would be possible for the policy to cover the **civil tort of "assault"** and yet exclude a claim for **criminal assault** because the **civil "assault"** does not require an injury while the **criminal "assault"** requires an injury. The Court erred in focusing on **criminal "assault"** and should also have considered that the crime of

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[18] "Under Delaware law, the interpretation of contractual language, including that of insurance policies, is a question of law." O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 286 (Del. Supr. 2001).

"Offensive touching" requires no injury under 11 Del. C. §601:

> "a) A person is guilty of offensive touching when the person ...Intentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such other person."

Battery[19] is an undefined term in the Insurance Plan. This Court has held:

> "The tort of battery is the intentional, unpermitted contact upon the person of another which is harmful or offensive. . .In addition, the contact need not be harmful, it is sufficient if the contact offends the person's integrity." Brzoska v. Olson, 668 A.2d 1355, 1360 (Del. Supr. 1995).

Civil Battery requires no injury. In other words, the Trooper's touching (through compelled sex) of the Appellant was, among other things, both a **civil battery** and also a **criminal battery** -- Offensive Touching[20]. Commentary to Delaware Criminal Code 1973, 11 Del. C. §601(Offensive touching). In fact, all civil batteries violate one or more provisions of criminal law -- including rape. How can the Plan deny coverage to any civil tort (expressly covered) just because the same tort also violates the criminal law? Logically it cannot.

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[19] Although the Superior Court referred to **"assault"** it would have been more accurate to speak of a **"battery."**

"Contracts are to be interpreted in a way that does not render any provisions illusory or meaningless." O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 287 (Del. Supr. 2001) That did not happen here. The Superior Court's reading of the Plan renders the **battery** coverage illusory and meaningless and was in error.

This was the finding of the Court in the North Carolina Court of Appeals in Greenville v. Haywood, supra, which addressed almost, if not exactly, the identical issue presented here and found that excluding willful penal code violations while covering assaults and batteries presents a classic ambiguity which is resolved in favor of coverage of the sexual assault claim against a police officer. When the Superior Court declined to follow Greenville, supra, it relied upon the foregoing misreading of Delaware criminal law regarding a "battery." The Court's string cite reliance on "the majority of decisions interpreting the scope and applicability of this type of exclusion provision"[21] begs the question. None of these authorities dealt with the argument presented here -- that covering "assaults or batteries" but excluding criminal acts creates an ambiguity to be construed against the State. Rather, each simply affirmed that a

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[21] Allstate Ins. Co. v. Schmitt, 570 A.2d 488, 490-492 (N.J. Super. Ct. App. Div.1990); National Fire & Cas. Co. v. West, 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). (Exhibit A at 7).

penal act exclusion, without more, is valid. As above, that is not the issue here.

The bottom line is that whether through a plain reading of the **Exclusions and Exception** portion of the policy, or by construction against the State of ambiguous or illusory language elsewhere in the Policy, via the rule of **contra proferentum**,[22] the **exclusion** is negated and results in coverage of the Trooper's wrongful actions by the Plan.

IDENTITY OF NAMED INSURED

In its Motion for Summary Judgment the State argues in one sentence with no authority, for the first time (this argument was never raised in its original Motion for Summary Judgment) (Docket #50) that there is no coverage under the Plan because the **Named Insured** does not expressly include the State of Delaware. The Superior Court observed in **dicta** that the State's argument appeared well founded. This cramped interpretation of the State Insurance Plan makes no sense.

First, the Plan Administrator made no mention of this argument when asked the basis of her opinion that there was no coverage (A229). In essence, this was a concession the Named Insured

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[22] Stigler v. Insurance Company of North America, Del. Supr. 384 A.2d 398, 400 (1978).

argument was of no force. And why did the State not raise this argument in Round 1 before the Superior Court?[23]

Next, the State Insurance Committee adopted in slapdash fashion without much thought (then or thereafter) the form of its previous third party insurance policy as the Self-Insurance Plan. For example, the **Named Insured** was identified as the "Department of Public Safety, Division of State Police." There is no Department of Public Safety at present nor has there been for some time. Does this mean that there is no **"Named Insured"** under the State Insurance Plan? [24]

Moreover, this Court has treated the Division of State Police, the Department of Safety and Homeland Security and the State of Delaware as one and the same. Janoski v. State of Delaware, et al., 981 A.2d 1166, 1168 n.1 Del. Supr., 2009. In Janoski this Court referred to all three as "collectively, State." We read this to mean that this Court viewed these three entities as having an identity of interest and a functional identity. Hence, for

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[23]Probably because there are no provisions in the enabling statutes of the Department of Homeland Security and Delaware State Police (11 Del. C. §8301 et seq) creating a right "to sue and be sued" in the State Police. How could Plaintiff have sued the State Police anyway?

[24] A number of parts of the Plan, lifted verbatim from the previous third party policy and irrelevant to the Plan, include any reference to the Insurance Company, notice to the Company"s agent, premium charged, cancellation of prior policies, "supplementary payments," almost the entire last two pages of the policy setting out 14 different "conditions" and the Duty to Defend (A30-33).

practical purposes the State is a Named Insured. See also, Tilghman v. Delaware State University, et al., 2014 WL703869 (Del. Super. 2014) (to same effect).

And 18 Del. C. § 6502, provides in part:

> "Insurance for the protection **of the State** and the public; determination of coverage"
> "... The Committee shall from time to time determine the method of insuring, the amount of insurance, and the class of coverage covering **any type of risk to which the State may be exposed...**"

Even the Attorney General has opined:

> The purpose of the Act was to provide protection for both the public **and the State** by waiving sovereign immunity and **permitting members of the public to bring suit against the State** for alleged wrongful acts while at the same time protecting the State from direct exposure on such claims through a program of insurance coverage. See Turnbul v. Fink, 668 A.2d 1370, 1374-77 (Del. Supr. 1995).

Del. Op. Atty. Gen. 2004 WL(2004)473854.

The only way the State can ever be exposed to liability is through the acts of its agents - and since the Department of Public Safety, Division of State Police (a State agency) is a **Named Insured**, so functionally is the State.

The Rule (under the Eleventh Amendment to the Federal Constitution) is:

> ...that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. .... Here the order requested would require the Director's official affirmative action, [would] affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States.

State of Hawaii v. Gordon, 373 U.S. 57, 58, 83 S. Ct. 1052, 1053, 10 L. Ed. 2d 191 (1963)

Thus, "When state officials are sued in their official capacity, the State is a real party in interest and can invoke its sovereign immunity protection." Brown v. Eichler, 664 F. Supp. 865, 871 (D. Del. 1987) Put another way, even if suit had been filed against the Department of Public Safety, Division of State Police, the State was the real party interest and should be treated under the Plan as the equivalent of the **Named Insured**.

The Plan should be read to cover the State.

ARGUMENT

QUESTIONS PRESENTED

Should the Plaintiff's Summary Judgment Motion Have Been Granted? The Summary Judgment Motion was decided by the trial Court in its Opinion (Exhibit A) rejecting arguments made by the Plaintiff in its Summary Judgment Motion against the State (A236).

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. Citadel Holding v. Roven, 603 A.2d 818 (Del. Supr. 1992)

MERITS OF ARGUMENT

Respondeat superior

The Superior Court denied Plaintiff's Motion for Summary Judgement based, in part, upon the defense of ***sovereign immunity*** as above. It also did so because it felt that the last two factors (#s 3 and 4) of the four factor ***respondeat*** test under Restatement of Agency 2d §228 were **disputed issues of fact**--3) whether tortfeasor's act was motivated at least by a partial purpose to serve the master and 4) if force is used whether it was "not unexpectable." It did so by finding that factors 3 and 4 were disputed issues of fact per this Court's Opinion (Exhibit A at 6).

Respectfully, the Superior Court's analysis and rationale regarding Plaintiff's Summary Judgment Motion are flawed.

We recognize that this Court indicated that existence of the third factor under Restatement (2d) Section 228 (at least partial

purpose to serve master) "has been construed broadly as a matter for the jury to decide." (Exhibit A at 6). But that does not mean that this issue must go to jury if the facts are truly uncontested. For example, although he issue of negligence normally cannot be decided summarily, "...when the moving party establishes the absence of a genuine issue of any material fact respecting negligence ... summary judgment may be entered." Ebersole v. Lowengrub, 180 A.2d 467, 469 (Del. Supr. 1962) The same Rule should apply to "partial service to the master."

PARTIAL SERVICE TO THE MASTER

There is no issue of disputed fact as to element three since the only evidence that Giddings' wrongful act took place during the course of an arrest and by means of abuse of the power of an arrest. We believe that this Court's language in its Opinion (". . . a sexual assault **can be considered** a service to the police on the theory that part of what Giddings was doing was transporting a prisoner[25]") should be read "**[would satisfy" the requirement of]** a service to the police." The **"would satisfy"** language was used by this Court finding that the first two elements of ***respondeat*** are made out on this Record:

> "...[the Trooper] was in uniform, on duty, carrying out a police duty by transporting Plaintiff to Court. The sexual assault took place in the police car during the time that [the Troope
>
> duties. These facts **would satisfy** the first two factors

[25]76 A.3d 777.

under the Restatement. . ." Id at 777.

Transporting a prisoner either is or isn't a service to the police. It's what the police do following an arrest. The facts in this case are undisputed. That is what was occurring when Giddings assaulted the Plaintiff by abusing his powers of arrest.

Consider this - if it is undisputed that Giddings acted as alleged in the course of arresting and transporting the Plaintiff, but this issue (of service to the master) is submitted to the jury, how could any reasonable jury find against Plaintiff in light of this Record and this Court's Opinion? Just how would a trial Judge instruct the jury in this case?

ELEMENT FOUR OF RESPONDEAT -- NON-FORESEEABILITY: AN AFFIRMATIVE DEFENSE?

FORESEEABILITY ON UNDISPUTED FACTS ELIMINATES THE AFFIRMATIVE DEFENSE

The Superior Court further observed that this Court did not conclude that as a matter of law Giddings' wrongful act was "unforeseeable." That much is true -- but that does not end the analysis. This Court looked at the Record **as it then existed** to decide if the State (not the Plaintiff) was entitled to Summary Judgment, (i.e., was it undisputed that sexual misconduct was unforeseeable?) Id at 777. If the State could show this, it would support, at least as to one factor, the Summary Judgement in its

favor; if not, it would not. It had the burden on this issue--obviously as an affirmative defense.[26]

The failure of the State to prove that the wrongful act was "entirely unforeseeable"[27] is different from whether the Plaintiff (even without the burden of proof) **on Remand with further discovery resulting in a different Record** (deposition of Col. MacLeish (A130) and IACP article (A174), can eliminate the possibility of affirmative defense by showing that the wrongful conduct was foreseeable as a matter of undisputed fact. Either something **is foreseeable** or it is not if the facts are undisputed.

Doubtless, the State will argue that Colonel McLeish had no reason to believe that Giddings would abuse a detainee. But this is not a negligence but a ***respondeat*** claim and the foreseeability issue focuses not on Giddings' behavior but on that of police officers (and not just Delaware State Troopers) as a whole. Jardel Co., Inc. v. Hughes, 523 A.2d 518, 525, (Del. Supr. 1987) In this Record there is no evidence that it was entirely unforeseeable that some police officers will abuse detainees. **In fact it is undisputed that the reverse is true**. Applying the proper analytic focus there is no factual dispute as to this factor either.

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[26] Delaware has long allocated the burden of proof on this issue (non-foreseeability) to the party claiming its benefit. Draper v. Olivere Paving & Const. Co., 181 A.2d 565, 571 (Del. Supr. 1962)

[27] Actually "entirely unexpectable" per Draper v. Olivere, 181 A.2d, 565, 571 (Del. Supr. 1962)

As to this element (no matter who has the burden of proof), former Delaware State Police Superintendent Thomas McLeish (Superintendent at the time of Giddings' misconduct) testified in deposition (on remand) that there is a general risk in police work that a minority of police officers will engage in sexual assault or similar misconduct involving detainees in their custody (A147).

McLeish also testified that to guard against such occurrences the State Police requires its officers to call in and note their car mileage and time when they take an opposite sex detainee into custody as well as call in and note their car mileage and time on release from custody (A153).

There is no contrary evidence.

Considering this along with claims of misconduct by State Police officers and a Lewes officer (including sexual misconduct) as set forth in the Statement of Facts, how can such misconduct be entirely unforeseeable? In **negligence claims**, as to foreseeability:

> "the question is whether the risk of particular consequences is sufficiently great to lead a reasonable man ... to anticipate them, and to guard against them. W. Prosser, The Law of Torts 145 (4th ed. 1971). While the social utility of the activity must be balanced against the risk, the question is not one of mathematical probability alone **and (as) the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less.**" (internal quotes and citations omitted)

Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 719 (Del. Supr. 1981).

We have located no Delaware authority defining foreseeability in a ***respondeat*** case. Presumably the test would be the same. Note however that the issue here is only foreseeability, not negligence and the duty to guard.

The gravity here of police sexual misconduct is great although its occurrence, fortunately, is not an everyday event. However, it is frequent enough that the Colonel McLeish acknowledged it as a known risk even at the time of the assault here. In fact, in its Opinion in this case this Court noted: "Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks" (Exhibit C, footnote 9 and accompanying text).

How could a properly instructed jury ever reasonably find that it was "entirely unexpectable"[28] or entirely unforeseeable that police sexual misconduct might occur during the course of an arrest?

The undisputed facts in this case compel application of the Doctrine of ***respondeat superior*** as a matter of law.

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[28]Draper v. Olivere, 181 A.2d 565, 571 (Del. Supr. 1962).

ARGUMENT

QUESTION PRESENTED

Is 12 Del. C. §1202(a) a non-waivable Statute of Repose or a Statute of Limitations which may be waived? This was the issue decided by the trial Court in its Opinion (Exhibit B) rejecting arguments made by the Plaintiff in its Response to the Estate's Summary Judgment Motion (A251).

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. Citadel Holding v. Roven, 603 A.2d 818 (Del. Supr. 1992)

MERITS OF ARGUMENT

INTERPRETATION OF 12 DEL. C. §1202(a)

The logic in the Superior Court's Opinion is difficult to follow. After observing that unambiguous statutes are to be applied pursuant to their "plain meaning," the Court observed that the reference in §2102(a) to "other statute of limitations" suggests that §2102(a) is, in fact, a statute of limitations. Isn't this plain language?

However, relying on CTS Corp. v. Waldburger, 134 S.Ct. 2175, 2185 (2014) the Superior Court and concluded that the definition of "statute of limitations has changed." (Exhibit B at n.12). In CTS Corp., the United States Supreme Court observed that despite although the "primary meaning" of the phrase "statute of limitations" is simply black letter law, it can "sometimes [be] used

in a less formal way." We suggest that the word **"sometimes"** does not, without more, support the Superior Court's statement that the meaning of "statute of limitations" **"has changed** over the past few decades." (Exhibit B at 3). Always? Or just "sometimes?" The Superior Court transformed "sometimes" to "always" to justify the *ipse dixit* result of its Opinion. This was error.

With that preamble, the Court then found that despite its language, §1202 is, in fact, a statute of repose and not a statute of limitations. The Court relied upon Dellaversano v. DiSabatino, 1988 WL960702 (Del. Super. 1998) which noted in a footnote that §2102 was "akin" to a statute of repose and is distinguished from a "general" statute of limitations (Exhibit B at n.14). We are unaware of any authority supporting the notion that Delaware law recognizes both "general" and "non-general" statutes of limitations.

The Court also relied on Cummings v. Lewis, 2013 WL2987903 (Del. Ch.) which found that §2102 is a statute of repose. But Cummings did not even discuss the pertinent statutory language - "other statute of limitations" found in the statute. [29]

We believe that the holdings of Dellaversano and Cummings were in error and that §2102 is a statute of limitations which can be

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[29] For what it is worth, the trial Court did observe that the equities "clearly favor" the Plaintiff on this issue (strong claim of liability against the Trooper's Estate, three and one-half year delay in asserting §2102 by the Estate, the Trooper's Estate remaining open pending resolution of Plaintiff's claim and no claim of lack of notice. (Exhibit B at 3).

waived. That should have been the Court's finding here and Summary Judgment by the Estate of the Trooper should have been denied.

CONCLUSION

The Opinions of the Superior Court as to Sovereign Immunity and 12 Del. C. §2102 ignored plain language where it did exist and ignored ambiguity based on two reasonable readings of Insurance Plan contested language conceded by the Insurance Plan Administrator. In addition, the Court did not account for the undisputed Record as to the issue of ***respondeat superior***.

The State's Motion for Summary Judgement should have been denied, the Plaintiff's Motion granted and the Motion of the Estate of the Trooper denied.

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