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Case Number 190,2015

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.	)	No. 190, 2015
THE STATE OF DELAWARE, and THE ESTATE OF JOSHUA GIDDINGS, Defendants Below Appellee.	)	In The Superior Court of the State of Delaware In and For New Castle County

APPELLEE STATE OF DELAWARE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATED: June 19, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee State of Delaware generally concurs in the Nature of the Proceedings set forth in the Appellant's Brief but does wish to add the following additional material.

On August 18, 2010, plaintiff filed a Complaint in the Superior Court against appellees, Tanya D. Giddings as Administrator of the Estate of Joshua Giddings and the State of Delaware. In *Doe I*, this Court reversed the trial court's grant of summary judgment on Doe's *respondeat superior* claim. *Doe v. State*, 76 A.3d 774 (Del. 2013). A motion for reargument was denied on October 8, 2013. *Id.* In *Doe I*, as an alternative ground for affirmance, the State of Delaware had argued that the plaintiff's claim was barred by sovereign immunity. *See State of Delaware Answering Brief*, at*26-28 (Appellee Appendix to Answering Brief B-59-61). The State had previously raised this issue in the Superior Court, which also did not address the issue in granting summary judgment. *See State's First Motion for Summary Judgment* (B-27). The Court did not decide this issue in *Doe I*. In *Doe I*, the Estate of Joshua Giddings was not a party to the appeal.

On remand, the trial court issued a new Scheduling Order (B-62) that permitted the parties to engage in limited discovery and set a deadline for dispositive motions. At the close of discovery, the State of Delaware renewed its motion for summary judgment on the issue of sovereign immunity. Doe also filed a cross motion for partial

summary judgment on liability for the *respondeat superior* claim. The Superior Court decided both motions in one decision that granted the State's motion and denied Doe's motion, finding disputed factual issues on the *respondeat superior* claim. *Doe v. Giddings*, 2014 WL 4100925(Del Super. July 29, 2014). The Estate of Giddings then moved for summary judgment which the Superior Court granted on April 8, 2015. *Doe v. Giddings*, 2015 WL 1566597 (Del. Super. Apr. 8, 2015).

For purposes of simplicity, references in this brief to "Appellant" will be to either "Jane Doe" or "Doe."

SUMMARY OF THE ARGUMENT

SOVEREIGN IMMUNITY

1.-4. Denied. The State does not waive Sovereign Immunity by adopting a Self-Insurance Plan, as the immunity is only waived to the extent that coverage exists. Under the plain reading of the Self-Insurance Plan, there is no coverage for the criminal acts of rape alleged by the appellant. The State has not conceded that the Self-Insurance Plan is ambiguous and the hypothetical deposition questions on legal opinion areas do not constitute a judicial admission. Finally, Doe has not sued the Named Insured on the Self-Insurance Plan and there is no coverage.

RESPONDEAT SUPERIOR

1. Denied. Doe's argument on *respondeat superior* is barred by the law of the case doctrine as this Court has previously held that there were disputed facts. The limited additional evidence from the record on remand does not change the disputed nature of the facts on whether the police officer was activated by a purpose to serve the Delaware State Police when he is alleged to have committed rape, and whether that conduct was foreseeable under the RESTATEMENT (SECOND) OF AGENCY § 228.

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

1. This argument is addressed to the appellee Estate of Joshua Giddings.

STATEMENT OF FACTS

In her complaint, Doe, alleged that on March 19, 2009, at approximately 8:00 p.m., Trooper Joshua Giddings was dispatched to the Christiana Mall on a shoplifting complaint. Complaint at ¶4 (B-1). Doe alleged that Giddings took her into custody and placed her in a State Police vehicle for transport to Court for an initial appearance and the setting of bail on the shoplifting charge. *Id.* at ¶5 (B-1-2). Doe asserted that Giddings then coerced her to perform oral sex without her consent, in lieu of going to court, where she would be held for failure to make bail. *Id.* at ¶6 (B-2). Doe alleged that Giddings' acts constituted the act of rape, and were done in an intentional, reckless, wanton manner. *Id.* at ¶¶9, 11 (B-2). The acts were also alleged to be done in bad faith, with no belief that the public interest would be served thereby. *Id.* at ¶13 (B-2).

The record before Superior Court in *Doe I* contained the deposition of Jane Doe who testified that Mr. Giddings was arrested because "he did something he wasn't supposed to do." *Appellant's Appendix to Opening Brief* A-98. Doe also conceded that she knew that the officer was required to take her to Court on an outstanding capias. (A-71, 81). Doe also knew that the police officer Giddings was breaking the law when he asked her to engage in oral sex. (A-79). Doe did testify that former officer Giddings was not transporting her to court at the time of the oral sex act in the

police car. The trooper, instead of driving out of the mall to the court, had driven off the public road into a construction site by means of a dirt road. (A-71-72). Photos of this area were produced during discovery. (B-84-85).

On April 16, 2009, former trooper Giddings gave a taped statement to Sergeant Maher, the chief investigator on the case. In his statement, Giddings admitted that he had sex with Doe in his police car but stated that the plaintiff consented to the act. *Giddings Statement April 16, 2009* at *5-12 (B-8-15). This statement was given prior to the issuance of the Giddings' arrest warrant on May 11, 2009. (A-125).

There was no evidence in discovery indicating any prior acts of misconduct by former Trooper Giddings or any records of any prior complaints by troopers, civilians, or members of the public against Trooper Giddings.

During *Doe I*, Doe also conducted the deposition of Debra Lawhead. This was not noticed as a Superior Court Civil Rule 30(b)(6) deposition (B-22), nor was Lawhead ever identified as an expert by the State. In this deposition, Doe's counsel asked a series of hypothetical questions seeking legal opinions, all of which were objected to by defense counsel. (A-231) ("I'm just going to object to this entire line of questioning. You've asked her nothing but legal questions, which is in my view not appropriate…."). Lawhead testified that she determined that the acts alleged in the plaintiff's complaint were excluded under the Exclusion B for criminal acts in the Self

Insurance Policy. (A-203-04).

Lawhead also testified that she denied the claim on the portion of the policy that excludes acts that are not done in regular course and scope of duty.[1] (A-212-13). With regard to Exclusion B, Doe's counsel asked if it was Lawhead's reading of the policy that the "however clause" at the end of the exclusion did not apply to the Penal Code Exclusion. Lawhead testified that she did not read the "however clause" to apply to the Penal Code Exclusion. A-206-09. In a series of purely hypothetical questions, Lawhead agreed that other people could have their different interpretations of the policy, and that those interpretations could be viewed as reasonable, and she would listen to those arguments. (A-210-11).

On remand, the trial court permitted the parties to engage in limited discovery. Doe deposed former Delaware State Police Colonel Thomas MacLeish.[2] MacLeish was asked by plaintiff's counsel to agree that 99.99% or more of the officers across the country do not engage in any type of sexual misconduct. (A-149-50, 154). In response to one question, MacLeish answered as follows:

> Q: Did I lose you there?
> A: When you say are vulnerable, I don't know. They are in the custody of a police officer. Your description earlier, 99.9 don't engage in this type of conduct.

1. In the Self Insurance Policy, the term "Personal Injury" excludes acts that are not "committed in the regular course of duty by the Insured." (A-30).
2. The witness's name was incorrectly spelled as McLeish in the deposition and Opening Brief.

Q. **Of course they don't.**
A. So to me, 99.9 percent of them are not vulnerable to this.

(A-154) (emphasis added). MacLeish also testified that in any year, the Delaware State Police handles about 100,000 traffic stops, 20,000 to 30,000 criminal cases, and over 100,000 non-arrest police contacts. (A-161-62). MacLeish also stated that the procedures for a trooper to call in mileage when transporting a suspect of the opposite sex are designed to protect both the trooper and suspect. (A-157-58). Finally, MacLeish testified that a trooper sexually assaulting a suspect is very clearly beyond the scope of anything that is permitted as part of a trooper's police duties and all troopers are aware of that. (A-165-66). MacLeish described the Delaware State Police selection process as very in depth and very arduous and designed to screen out potential bad candidates. (A-165).

Two of Giddings' former supervisors testified that they had no knowledge of any discipline problems involving Giddings such as any allegations of sexual misconduct or sexual harassment. (B-69-71, 80-81). The record also included DSP Rules that require all members to comply with all laws at all times. B-95.

I. THE SUPERIOR COURT CORRECTLY RULED THAT THE PLAINTIFF'S CLAIM WAS BARRED BY SOVEREIGN IMMUNITY AND NOT COVERED UNDER THE STATE POLICE SELF INSURANCE PLAN.

Question Presented

Whether the Superior Court correctly ruled that the Delaware State Police Self Insurance Plan barred Doe's claim of rape by a police officer and as such Doe's case was barred by the doctrine of sovereign immunity?

Standard and Scope of Review

This Court reviews a grant of summary judgment *de novo*. *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 708-09 (Del. 2008). The Court "reviews interpretations of insurance provisions as questions of law under a *de novo* standard." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

Merits of Argument

a. Penal Code Exclusion

Plaintiff in the Summary of Argument contends that State of Delaware has waived sovereign immunity by adopting a Self-Insurance Plan. *Appellant's Op. Br.*, at *6. This argument is legally incorrect as this Court has held that the State waives sovereign immunity by the purchase of insurance only to the extent that coverage is available and applicable to the particular risk. *Pauley v. Reinoehl*, 848 A.2d 569, 576 (Del. 2004); *see also* 18 *Del. C.* § 6511. The question raised in this appeal is whether

the act of rape alleged in the complaint is excluded under the coverage of the Delaware State Police Self Insurance Coverage Plan.

As detailed in the trial court's opinion, 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." *Doe v. Giddings*, 2014 WL 4100925, at *5 (Del. Super. 2014) (citing A-29). Under the Policy, the "NAMED INSURED" is the "Department of Public Safety, Division of State Police" as listed on the Declarations page. *Id.* at *6; A-29. The "INSURED" is defined to include full time employees such as former Trooper Giddings. (A-30-31.)

Doe challenges the ruling of the trial court that the Policy excluded coverage for the rape claim set forth in the complaint under the Exclusion in the Policy for violations of a penal code ("Penal Code Exclusion"). This Penal Code Exclusion appears along with a number of other exclusions near the beginning of the Policy and provides:

> 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.

A-30. In reviewing this Exclusion, the trial court stated that:

> 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 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.

Doe v. Giddings, 2014 WL 4100925, at *5. After further review of the entire policy, the trial court ruled that a reasonable construction of Subsection B, that contains the Penal Code Exclusion, is that it is applicable and expressly excludes coverage for willful violations of the penal code. *Id.* at *7.

The Superior Court's properly interpreted the policy based on the plain reading of the policy, reading the document in its entirety. *Id.* at *4 (citing *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286, 289 (Del. 2001); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997)). The trial court read Exclusion B so that the Penal Code Exclusion was part of the initial portion of the exclusion, and separated from the so-called Fraud Exclusion by the word "or." *See George Hyman Constr. Co. v. Occupational Safety and Health Review Comm'n,* 582

F.2d 834, 840 n.10 (4th Cir. 1978) (normally use of the disjunctive "or" indicates alternatives in a statute that require that they be treated separately unless such a construction renders the provision repugnant to the Act). The State submits that this is a fair reading from the plain meaning of the Policy. *See O'Brien*, 785 A.2d at 288 ("Clear and unambiguous language in an insurance contract should be given "its ordinary and usual meaning.").

The trial court's interpretation of the Policy to exclude coverage for willful violations of a penal code was also consistent with the other provisions of the Policy that limited coverage to wrongful acts "arising out of Law Enforcement activities," (A-29), and excluding coverage for personal injury caused by acts of an Insured not committed "in the regular course of duty by the Insured." (A-30). The trial court's reading was also in accord with the provision of the Policy that excludes coverage for Personal Injury sustained by any person "as a result of an offense, directly or indirectly related to the employment of such person by the named Insured." Exclusion I (A-30). The Superior Court's reading of the Policy and the Penal Code exclusion was also in accord with the public policy against the government insuring for the criminal conduct of its own employees. *See Guaranty Ins. Co. v. McGuire*, 173 F. Supp. 2d 1107, 1110 (D. Kan. 2001) (general rule of insurance that policy is void if intended to indemnify the insured against liability for his own criminal acts) (citing COUCH ON INSURANCE 2D

§ 45.11, p. 242 (rev. ed.); 7 APPLEMAN, INSURANCE LAW AND PRACTICE, §242(b) (1942)); *Mason v. Florida Sheriff's Self-Insurance Fund*, 669 So. 2d 268, 270 (Fla. Dist. Ct. App. 1997) (general rule is that one may not insure against one's own intentional misconduct because the availability of insurance will directly stimulate the intentional wrongdoer to violate the law), *approved by*, 695 So. 2d 309 (Fla. 1997).

Appellant argues that Exclusion B of the Policy is ambiguous because the "however clause" at the end of the Exclusion should be read to apply to both the Penal Code Exclusion and to the Fraud Exclusion at the end of the provision. Appellant argues that the Policy is ambiguous because it is subject to different interpretations and should be interpreted strictly against the State as the drafter of the policy. *Appellant's Opening Br.* at 22-23.

The appellant's argument that the policy is ambiguous does not create an ambiguity. The parties to a lawsuit cannot create an ambiguity by expressing disagreement over the interpretation of an insurance contract. *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010). In addition, the interpretation of the Self Insurance Policy is strictly a question of law that does not require analysis of the competing interpretations of the two parties of the Policy. *O'Brien*, 785 A.2d at 286. The Policy is a government-issued Self Insurance Policy, which is a limited waiver of sovereign immunity, and should not be subject to strict scrutiny application against the

State of Delaware. *See Hendricks v. Curators of University of Missouri*, 308 S.W.3d 740, 746 (Mo. Ct. App. 2010) (citing *Anderson v. Nw. Bell Tel. Co.*, 443 N.W.2d 546, 549 (Minn. Ct. App. 1989) ("The rules of insurance policy interpretation are not applicable in the context of self-insurance."); *McClain* v. *Begley*, 457 N.W.2d 230, 232 (Minn. Ct. App. 1990) ("a self-insurance plan is not construed strictly against the drafter, as insurance policies are"), *rev'd on other grounds*, 465 N.W.2d 680 (Minn. 1991); *Casey v. Chung*, 989 S.W.2d 592, 594 (Mo. Ct. App. 1998) (court will narrowly construe any waiver of sovereign immunity in interpreting insurance policy alleged to waive sovereign immunity). In addition, the appellant cannot seek to have the Self Insurance Policy strictly enforced against the State as Doe was never an insured or party under the terms of the Policy. *Steigler v. Ins. Co. of North America*, 384 A.2d 398, 401 (Del. 1978) (insurance contract should be read to accord with reasonable expectations of the purchaser of the contract); *Flexi-Van Leasing, Inc. v. Aetna Casualty & Surety Co.*, 822 F.2d 854, 856 (9th Cir. 1987) (a third party who is not a party to the contract is not usually entitled to strict construction of the contract in his favor under principles of insurance contract interpretation).

b. Judicial Admission Claim

Doe claims that the State has conceded that the Self-Insurance Plan is ambiguous based on deposition testimony of Debra Lawhead. During her deposition,

Lawhead, the claims manager for the State Insurance Coverage Office, testified that the Policy did not provide coverage for Doe's claim. (A-203-04). In response to a series of vague, hypothetical questions, Lawhead stated that others may interpret the Policy differently and she would be open to listen to other unknown person's interpretations of the Policy which she would consider reasonable. Doe now tries to seize on this testimony to argue that Lawhead, as a representative of the State, has conceded that the Policy is ambiguous and therefore the Policy must be interpreted strictly against the State so that coverage exists. Appellant's argues that Lawhead's testimony, which was given over objection to the legal opinion nature of the testimony, constitutes a binding judicial admission.

Appellant's argument is incorrect on several fronts. First, this Court has held that judicial admissions are only binding as to issues of fact. *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201(Del. 2008) (citing *Kopacz v. Day Kimball Hosp. of Windham County, Inc.,* 779 A.2d 862, 867 (Conn. App. Ct. 2001) ("Judicial admissions are voluntary and knowing **concessions of fact** by a party or a party's attorney occurring during judicial proceedings."); *John B. Conomos, Inc. v. Sun Co. Inc. (R & M)*, 831 A.2d 696, 712 (Pa. Super. Ct. 2003) ("**Statements of fact** by one party in … testimony, and the like, made for that party's benefit, are termed judicial admissions.")) (emphasis added). Statements made by Debra Lawhead about

interpretation of the meaning of a Self-Insurance Contract pertain to a purely legal question and are not statements of fact. This Court has explicitly ruled as such, stating that "[u]nder Delaware law, the interpretation of contractual language including that of insurance policies, is a question of law." *O'Brien*, 785 A.2d at 286. The open ended questions at Lawhead's depositions are far from the type of unequivocal admission required for a statement to qualify as a judicial admission. In fact, at no time was Lawhead ever asked if she believed the Policy was ambiguous, and she specifically testified that there was no coverage under the Policy. *See Bon Ayre Land LLC v. Bon Ayre Cmty. Assoc.*, 2015 WL 893256, at *6-7 (Del. Super. Feb. 26, 2015) (statements in stipulation of facts were not sufficiently unequivocal to serve as judicial admission); *see also MacDonald v. General Motors Corp.,* 110 F.3d 337, 341 (6th Cir. 1997) (counsel's statement regarding negligence was either a legal opinion or conclusion and was not a judicial admission); *Roger Miller Music Co. v. Sony/ATV Publishing, LLC*, 477 F.3d 383, 394 (6th Cir. 2007) (court is reluctant to treat statements of opinion and legal conclusions as judicial admissions and judicial admissions may only concern matters of fact); *American Towers LLC v. BPI, Inc.*, 2014 WL 7237980, at *5 (E.D. Ky. 2014) (statements by witness on standard of care were legal conclusions that could not constitute judicial admissions); *First Internet Bank of Indiana v. Lawyers Title Ins. Co.,* 2009 WL 2092782, at *4 (S.D. Ind. 2009) (tactic of trying to use Rule 30(b)(6)

deposition testimony as a judicial admission has little to recommend, and does not produce judicial admissions); *City of Arvada v. Colorado Intergovernmental Risk Sharing Agency*, 988 P.2d 184, 188 (Colo. Ct. App. 1999) (isolated portions of deposition would not serve as judicial admission when entire deposition made clear that there was no coverage for the claim), *aff'd*, 19 P.3d 10 (Col. 2001).

This Court has also rejected an argument similar to Doe's judicial admission argument in *O'Brien* where the plaintiff attempted to argue that post-policy enactment statements constituted binding admissions. *O'Brien*, 785 A.2d at 289-90 (Court rejected argument that internal records of Progressive established that policy contained ambiguity, and acts by insurer did not constitute an admission); *see also Sharp v. State Farm Fire and Casualty Ins. Co.,* 115 F.3d 1258, 1262-63 (5th Cir. 1997) (State Farm was not bound by statement of Texas Department of Insurance that policy language was unclear even if its representative served on the committee that issued report; question of interpretation was for court and coverage would not be created by estoppel).

Doe's claim that Lawhead's deposition testimony constituted a judicial admission is legally incorrect and the Superior Court committed no legal error by simply disregarding this argument in finding the claim was excluded from coverage under the Policy.

c. Assault and Battery Claim

Doe also advances an argument that the Self-Insurance Policy is ambiguous because even it contains an Exclusion for willful violations of a penal code, the definition for Coverage for "Personal Injury" includes assault and battery. Doe, relying on *City of Greenville v. Haywood*, 502 S.E.2d 430 (N.C. Ct. App. 1998), argues that assault and battery are crimes and it is inconsistent for the Policy to exclude violations of the penal code yet cover those crimes. Doe also argues that battery is a crime under Delaware law under the name of offensive touching. This argument about "offensive touching" does not appear to have been addressed to the trial court and is not mentioned in the summary judgment decision.

The beginning of the Policy does list a specific exclusion for willful violations of a penal code, the Penal Code Exclusion, as has already been identified. In the definition of "Personal Injury," the Policy lists a series of torts that are covered. This list of torts does include assault and battery. This definition clearly applies to civil torts as it limits coverage to acts for which the Insured could be held liable in an action "at law, suit in equity, or other proper proceedings for redress." (A-30).

The trial court did not find that there was a "virtual impossibility in determining coverage under the Policy." *Doe*, 2014 WL 41000925, at *7. The Superior Court noted that:

> 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. The language is plain and clear. 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.

Doe, 2014 WL 41000925, at *7.

The trial court's decision was a fair and correct reading of the Policy. The Doe's argument that there is a fatal inconsistency in the Policy is not supported by the plain language of the Policy. First, the Policy is clear to exclude all willful violations of a penal code under the Penal Code Exclusion. The Policy can be plainly read such that the Exclusion trumps the other portions of the policy which set forth coverage. This is not in any way an inherent ambiguity.

Second, appellant's argument is legally wrong in that it tries to conjecture, in an attempt to create an ambiguity, that every possible civil assault and battery must also constitute a crime of a willful nature under Delaware law. With regard to the civil tort of assault, the trial court correctly noted:

> 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).

Doe, 2014 WL 41000925, at *7 n. 36.

Doe's argument that the Policy is ambiguous because it appears to cover and exclude criminal battery is misplaced. Quite simply, there is no crime of "battery" under the Delaware Criminal Code, title 11, ch. 5 and one should not be read into this Policy. Doe then argues that the Policy should be read to include offensive touching which is the equivalent of the tort of battery. The words "offensive touching" are not even mentioned in the Policy. This Court has ruled that it will not create an ambiguity where none exists. *O'Brien*, 785 A.2d at 288 (quoting *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)). Furthermore, contrary to Doe's contention, the tort of civil battery does substantively differ from the crime of offensive touching, 11 *Del. C.* § 601. Under § 601, in order to convict for offensive touching, the State must prove that a person intentionally touched another person knowing that the person was **likely to cause offense or alarm** (emphasis added). The tort of civil battery does not require that the contact be "likely to cause offense or alarm" as there is no requirement that the contact be harmful, it merely must offend a person's integrity or dignity. *Brzoska v. Olson*, 668 A.2d 1355, 1360-61 (Del. 1995) ("The intent necessary for battery is the intent to make contact with the person,

not the intent to cause harm.").

The trial court also correctly ruled that the decision in the *City of Greenville* case, relied on by *Doe,* was distinguishable. In the *City of Greenville* case, the Court ruled that similar language in a commercial insurance policy was ambiguous. The court did apply a reading of the contract which strictly construed the policy to provide coverage. 502 S.E.2d at 433. This interpretation of an insurance policy is contrary to Delaware law which requires that "[c]lear and unambiguous language in an insurance contract" should be given "its ordinary and usual meaning." *O'Brien*, 785 A.2d at 288. The trial court in *Doe* correctly found that unlike in the *City of Greenville*, the Delaware State Police Policy did not contain any virtual impossibility preventing a determination of coverage. *Doe v. Giddings,* 2014 WL 4100925, at *7.

The *City of Greenville* case is a minority position and other courts that have considered similar language to that used in the Delaware State Police Self-Insurance Policy have found there to be no ambiguity and enforced the exclusion for violations of penal codes. For example, in *Carney v. Village of Darien*, 60 F.3d 1273 (7th Cir. 1995), a police officer harassed and threatened a motorist and passenger during a traffic stop during an attempt to coerce sexual acts. The insurance policy excluded willful violations of a penal statute, but also provided for coverage for false arrest, false imprisonment, wrongful detention. The Circuit Court ruled that the exclusion

applied to preclude coverage for any claim of false arrest or imprisonment. 60 F.3d at 1280-81. *See also National Fire and Casualty Co. v. West,* 107 F.3d 531, 536-37 (7th Cir. 1997) (police officer's criminal acts were excluded under the willful violation of a penal statute exclusion); *Allstate Ins. Co. v. Norris*, 795 F. Supp. 272, 275 (S.D. Ind. 1992) (policy excluding criminal act or omission had plain and ordinary meaning and would be enforced); *Fire Ins. Exchange v. Sullivan*, 224 P.3d 348, 352-53 (Colo. Ct. App. 2009) (coverage for acts of intentional conduct were unambiguously excluded under the insurance policy and there was no ambiguity in portion of policy which did cover invasion of privacy torts); *Farmer in the Dell Enterprises v. Farmers Mutual Ins. Co.*, 514 A.2d 1097, 1100 (Del. 1986) (enforcing intentional tort exclusion in homeowner's policy); *Michelet v. Scheuring Sec. Serv., Inc.,* 680 So. 2d 140, 147 (La. Ct. App. 1996) (court found no direct conflict between insurance provision which excluded coverage for criminal or intentional acts, and coverage for occurrences of assault and battery); *Allstate Ins. Co. v. Schmitt*, 570 A.2d 488, 490-92 (N.J. 1990) (enforcement of exclusion with unambiguous language barring coverage for reasonably foreseeable consequences of the insured's criminal act).

The trial court properly found that there was no inherent conflict in the Policy between the Penal Code Exclusion and the reference to coverage for intentional torts including assault and battery.

d. Named Insured Claim

The trial court, in dicta, noted that the Self-Insurance Policy does not provide coverage for the named defendant, the State of Delaware. *Doe v. Giddings,* 2014 WL 4100925, at *6 & n. 32. The Superior Court noted that the Self-Insurance Policy lists the Named Insured as the "Department of Public Safety, Division of the State Police." *Id.*

Doe argues that the named defendant, the State of Delaware, is interchangeable with the Named Insured in the Policy and the trial court should have so found as a matter of law. Doe contends that 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." Op. Br. at 28. For this point, Appellant cites to *Janowski v. State of Delaware*, 981 A.2d 1166, 1168 n. 1 (Del. 2009). Footnote 1 of the *Janowski* case contains no legal analysis by this Court and merely contains a listing of the actual defendants in that appeal. This case does not support the Doe's position. Doe also cites to *Tilghman v. Delaware State University*, 2014 WL 703869 (Del. Super. 2014) for the same legal proposition. This decision also does not support Doe's argument as it merely cites to pretrial motions in limine in that case. Doe does argue that there would have been no way to sue the Division of State Police, yet the plaintiffs in both the *Janowski* and the *Tilghman* were able to name and pursue claims against the State

Police as a named party defendant. The Delaware State Police is a recognized state agency under 11 *Del. C.* ch. 83

Appellant also cites to federal precedent that is distinguishable as only applying to cases where a state official is sued under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), in order for a plaintiff to avoid the bar of the Eleventh Amendment in District Court. *Op. Brief* at *30 (citing *Brown v. Eichler*, 664 F. Supp. 865, 871 (D. Del. 1987). Appellant also argues in passing that Ms. Lawhead did not deny coverage on the ground of the identity of the insured, but as previously stated, this is a legal issue that is not be decided by the Court under *O'Brien*, 785 A.2d at 286.

The facts of the instant case are more analogous to the case of *Hedrick v. Blake*, 531 F. Supp. 156 (D. Del. 1982), where a plaintiff attempted to bring a *respondeat superior* claim against the Town of Fenwick for the acts of two police officers. The District Court ruled that the insurance policy, while naming the Town of Fenwick as a Named Insured, only provided coverage for sums for which the Insured, defined as the police and sheriff's department, become liable. *See also Delaware State Troopers' Lodge Fraternal Order of Police, Lodge #6 v. State*, 1984 WL 8217, at *4 (Del. Ch. 1984) (no legal authority allowed the Fraternal Order of Police, who entered collective bargaining agreement with Division of Police, to bind the Governor and all other members of the Executive Department who were not parties to the contract).

The trial court did properly find, in dicta, that the Self Insurance Policy does not provide coverage for the named defendant State of Delaware.

The Superior Court committed no error in finding Doe's claim was barred by sovereign immunity.

II. DOE'S PARTIAL MOTION FOR SUMMARY JUDGMENT WAS CORRECTLY DENIED BASED ON DISPUTED MATERIAL FACTS, AND ALTERNATIVELY BASED ON THE LAW OF THE CASE DOCTRINE.

Question Presented

Whether the Superior Court correctly ruled that Doe's motion for partial summary judgment on the issue of liability on the *respondeat superior* liability claim should be denied because of disputed facts?

Standard and Scope of Review

This Court reviews a grant of summary judgment *de novo*. *Hazel*, 953 A.2d at 708-09.

Merits of Argument

The trial court denied Doe's motion for partial summary judgment on the issue of *respondeat superior* liability, after finding disputed material facts. The Superior Court followed the framework set out by this Court in *Doe I*, where the Court ruled:

> 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 unexpectable."

Doe, 76 A.3d at 776. This Court ruled that there were at least disputed facts as to Factors (3) and (4) and that a jury should decide the question of scope of employment. *Id.* at 777. The trial court found, in light of the record evidence and the Supreme

Court ruling, that there were disputed facts for a jury and denied Doe's motion. *Doe v. Giddings*, 2014 WL 41000925, at *8.

Doe argues for judgment as a matter of law on the *respondeat superior* claim and that the trial court had no choice but to grant summary judgment. The only "new evidence" that Doe points to since the remand is the deposition of former DSP Colonel Thomas MacLeish and that relates only to Factor #4 on the issue of foreseeability, under the RESTATEMENT § 228.

Doe's motion on this issue is barred by the law of the case doctrine. This Court has already ruled that the scope of employment issue in this case is a jury question to be decided at trial. *See Doe*, 76 A.3d at 775 ("There are other factors used to determine whether one is acting within the scope of employment, **and the jury must make that decision.")** (emphasis added). The Court went on to state that "[t]he question of whether a tortfeasor is acting within the scope of his employment is fact-specific, and, ordinarily, is for the jury to decide." *Id.* In reviewing the elements of the RESTATEMENT OF AGENCY, this Court specifically stated that "[t]he third factor-whether Giddings was activated in part to serve his employer-has been construed broadly **as a matter for the jury to decide**." *Id.* at 777 (emphasis added). This Court also ruled that there was disputed evidence regarding the fourth factor, the foreseeability of the risk. *Id.* The law of the case is that the issue of liability is an issue

for the jury to decide at trial. Plaintiff cannot now seek a different result from this Court by presenting the same argument in a different format. *See Insurance Corporation of America v. Barker*, 628 A.2d 38, 40 (Del. 1993) ("The 'law of the case' doctrine encompasses these principles arising from the 'mandate rule.' The doctrine stands for the proposition that 'findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or in a later appeal.'").

Appellant argues that the record evidence establishes as a matter of law that former trooper Giddings' act of raping Doe "was activated, in part at least, by a purpose to serve the master" and establishes Factor 3 of the RESTATEMENT OF AGENCY (2d) § 228. Op. Brief. at *31-33. Appellant presents no new testimony or evidence to support this argument, and instead asks this Court to revise or reinterpret the test applied in *Doe I*. Op. Brief at *31. The law of the case doctrine bars this type of argument.

Furthermore, the record evidence does not support Appellant's argument. As this Court recently ruled, there must be evidence from which a reasonable jury could find that the employee "was at least partially motivated by a desire to protect her employer." *Hecksher v. Fairwinds Baptist Church*, 2015 WL 2415121, at *11 (Del. May 21, 2015). Doe testified that she knew the officer was breaking the law at the

time of the sex act committed in the police car. (A-79). She also testified that she knew that the officer was supposed to take her to court because she had an outstanding capias. (A-71, 81). Instead, Giddings drove his police car down a dirt road away from the Christiana Mall and eventually parked in a secluded construction area where he engaged in sex with Doe. (A-71-72). Giddings never transported Doe to court and instead took her home after the encounter. (A-76-79).

Plaintiff's own complaint concedes that the acts of former officer Giddings were done in "bad faith, with no belief that the public interest would be served thereby." *Complaint* at ¶13. (B-2). The record on remand included the testimony of former Colonel MacLeish who testified that a trooper who committed a sexual assault on a suspect would be very clearly be beyond the scope of anything that is permitted as part of a trooper's police duties and also stated that all troopers are aware of this fact. (A-165-66). MacLeish's testimony is consistent with the Delaware law outlining the duties of a Delaware State Trooper. *See* 11 *Del. C.* § 8302 (a) (State Police … "shall be conservators of the peace throughout the State, and they shall suppress all acts of violence, and enforce all laws relating to the safety of persons and property.).

This Court has previously ruled that it is a fact question on whether Giddings was activated in part to serve his master. The only new addition to the record on this point cited by Doe is the testimony of MacLeish and this evidence actually supports the

State's case. *See also* RESTATEMENT OF AGENCY (SECOND) § 229 (various factors to consider in whether conduct was within scope, including: "(a) whether or not the act is one commonly done by such servants; ...(c) the previous relations between the master and the servant;...(f) whether or not the master has reason to expect that such an act will be done....(g) the similarity in quality of the act done to the act authorized. ...(j) whether or not the act is seriously criminal.").

The record evidence does not establish as a matter of law that Giddings was activated in part by a purpose to serve the Delaware State Police at the time he is charged with raping Doe in his police car. The State submits that a reasonable jury could not find any evidence in the record that Giddings could possibly have furthered any interest of the Delaware State Police by raping a suspect and then releasing her, rather than transporting her to the court. A reasonable jury could find that Giddings was in no way performing a "service" for his employer at the time he was performing a rape of a suspect as alleged by the plaintiff. *See generally West Virginia Regional Jail and Correctional Facility Auth. v. A.B.*, 766 S.E.2d 751, 770-72 & n. 25 (W. Va. 2014) (overwhelming majority of jurisdictions find that sexual assaults are not within the scope of employment; collecting cases)

As to the Factor #4, Doe argues that because MacLeish testified in deposition that there is a possibility that a sexual assault could happen and that the Delaware State

Police take steps to prevent them, that the acts are foreseeable as a matter of law. The correct legal analysis on this Factor is:

> The Court has noted that an employer may be held vicariously liable for "his servant's intended tortious harm 'if the act was not unexpectable in view of the duties of the servant.'" In other words, an employer may be held liable for misconduct if the employer could have foreseen that the misconduct **would occur, and if it failed to take any action to prevent harm to third parties.**

Hecksher, 2015 WL 2415121, at *11 (internal citations omitted).

Doe's argument appears to be that because sexual assault by a police officer "could" happen, then all police departments, including the Delaware State Police, are liable as a matter of law for this foreseeable risk. This Court did not in *Hecksher* adopt a strict liability rule for foreseeability. This is clearly a factual question for a jury. *See Jardel v. Hughes*, 523 A.2d 518, 525 (Del. 1987) (issue of whether property owner protected third parties against criminal conduct is a matter for jury determination); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 831 (Del. 1995) ("Considerations of foreseeability and what a reasonable person would regard as highly extraordinary are factual questions ordinarily resolved for the jury.") (citing PROSSER AND KEETON ON TORTS § 45 (5th ed. 1984)); *Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1962) (questions of proximate cause except in rare cases are to be decided by a jury); *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 569, 572 (Del. 1962)

(vicarious liability should extend only to "losses caused by torts of servants more or less certain to occur in the conduct of the master's business;" fact question to be determined at trial).

Doe relies on a portion of MacLeish's testimony that the Delaware State Police train officers to **not** engage in acts of sexual misconduct and require officers to report mileage when transporting a prisoner of the opposite sex. *Id.* Doe seems to argue that because the Delaware State Police take steps to **prevent** sexual misconduct from occurring, then the trial court was required to find as a matter of law that the State should have known that sexual misconduct would occur every time Mr. Giddings went out on patrol. This is clearly a fact question for the jury.

Doe also incorrectly states that there is no other record evidence contrary to her position that this type of sexual misconduct was foreseeable. In fact, in questioning Colonel MacLeish, Doe's counsel took the position that **99.99% or more** of officers across the country do not engage in any type of sexual misconduct. A-149-50, 154. It would be an astounding legal proposition if an employer could be held legally responsible under the doctrine of *respondeat superior* as a **matter of law** for an act of an employee when there was a .01% possibility or less that such an act might happen. In fact, Mr. MacLeish testified that in any year, the Delaware State Police handle about 100,000 traffic stops, 20,000 to 30,000 criminal cases, and over 100,000 non-arrest

police contacts. (A-161-62). The State also has identified former supervisors of Mr. Giddings who testified that they had no knowledge of any discipline problems involving any allegations of sexual misconduct or sexual harassment by Mr. Giddings. *See Deposition of Lt. Colonel James Paige* at *11-12 (B-74-75); *Deposition of Ray Peden at* *7-8 (B-81-82).

In *Doe I*, this Court ruled that scope of employment was a jury question and the record has not materially changed in that regard. This is a fact question to be decided by the jury. The trial court did not err in denying the plaintiff's motion for summary judgment on the *respondeat superior* claim as the appellant was not entitled to judgment as a matter of law.

III. IS 12 *DEL. C.* § 1202 (a) A NON-WAIVABLE STATUTE OF REPOSE OR A STATUTE OF LIMITATIONS WHICH MAY BE WAIVED?

Question Presented

Is 12 *Del. C.* § 1202(a) a non-waivable Statute of Repose or a Statute of Limitations which may be waived?

Merits of Argument

This Argument is directed to the Appellee Estate of Joshua Giddings who will present the responding argument in their Answering Brief.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be affirmed.

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CERTIFICATE OF MAILING AND/OR DELIVERY

The undersigned certifies that on June 19, 2015, he caused the attached *Appellee State of Delaware's Answering Brief* to be delivered via LexisNexis and U.S. Mail postage prepaid to the following person(s):

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