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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANE D.W. DOE, Plaintiff Below Appellant, v. THE STATE OF DELAWARE, Defendant Below Appellee.	)	**No.: 447, 2012** In The Superior Court of the State of Delaware In and For New Castle County

CORRECTED APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

1. Plaintiff filed suit against the State of Delaware and the Estate of a Delaware State Trooper alleging that after the Trooper arrested her on a misdemeanor shoplifting charge he coerced her into performing oral sex on him. The claim against the State of Delaware is based on the theory of *respondiate superior*.

2. The State of Delaware filed a Motion for Summary Judgment against Plaintiff in its favor arguing, among other things, that *respondeat superior* was inapplicable on the facts.

3. On May 7, 2012 the Superior Court granted Summary Judgment in favor of the State of Delaware and dismissed Plaintiff's claim against the State (The Court's Opinion is attached hereto as Exhibit A).

4. On May 23, 2012 the Court denied Plaintiff's Motion to Certify an Interlocutory Appeal from the Court's grant of Summary Judgment in favor of the State of Delaware (The Court's Opinion is attached hereto as Exhibit B).

5. There is a remaining claim against the Defendant, the Estate of Joshua Giddings. A trial date has not been set on this claim.

6. On August 8, 2012 on application of the Plaintiff, the Court, pursuant to Superior Court Civil Rule 54(b) expressly determined that there was no just reason for delay of Plaintiff's appeal of the Court's Order of Summary Judgment and expressly

directing entry of judgment in favor of the State and against the Plaintiff on the Summary Judgment Motion (attached hereto as Exhibit F) (A-136)[1].

7. On August 10, 2012 Plaintiff filed a Notice of Appeal in this Court from the final judgment dismissing Plaintiff's case against the State of Delaware.

8. This is Plaintiff's Opening Brief on appeal.

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[1]Appendix citations are marked as "(A-___)".

SUMMARY OF ARGUMENT

1. The Superior Court erred as a matter of law in granting Summary Judgment to the State.

2. The Summary Judgment Pleadings set forth a jury question as to whether the tortious act of the State's employee, Giddings, was within the course and scope of his employment thereby binding the State as his employer under the doctrine of *respondeat superior*.

3. This is so under case law of the Delaware Supreme Court as informed by authorities from other jurisdictions as well as the Restatement of Agency.

STATEMENT OF FACTS

Plaintiff accepts the Statement of Facts filed by the State of Delaware in support of its Motion for Summary Judgment in the trial Court. The Statement of Facts (A-9-10) follows verbatim (with paragraph breaks added for clarity):

> "On the evening of March 19, 2009, plaintiff was stopped by store security for shoplifting items at the JC Penney store in the Christiana Mall. Plaintiff Dep. at 21-25 (ex. #1). Plaintiff had been previously arrested, had an outstanding capias, and knew that the police would take her to Court where she would be committed to jail over the weekend. *Id.* at 25-27.
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> "Plaintiff waited for about forty-five minutes before Delaware State Police ("DSP") Trooper Joshua Giddings arrived to the Christiana Mall. *Id.* 25-26. Giddings placed plaintiff in the rear of the police car. *Id.* at 30. Giddings searched the DSP computer system and found that plaintiff did have a capias for her arrest. *Id.* at 31.
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> "Giddings drove the police car from the JC Penney entrance to several locations in the mall parking lot. *Id.* at 32-33. Plaintiff alleges that Giddings eventually drove off to a third location, exited the police car, and then opened the car door to place plaintiff's hand on his genitals. *Id.* at 35.
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> "Plaintiff testified that Giddings then drove to a remote area away from the mall. *Id.* at 36. Plaintiff then alleges that Giddings told her that he could let her go home if she did something in return. *Id.* at 36-37. Eventually, Giddings uncuffed the plaintiff had her sit in the front seat of the police car, and perform oral sex on him. *Id.* at 38-39. Plaintiff's complaint alleges that Giddings committed the crime of rape. Plaintiff's Complaint at ¶19 (ex. #2). Giddings then drove plaintiff home and told her to turn herself in on the capias. *Id.* at 41-43. Plaintiff later reported Giddings' actions to DSP Sergeant Maher. *Id.* at 51-52. Sgt. Maher investigated the complaint and eventually arrested Giddings on charges of sexual misconduct, bribery, and

official misconduct. *Giddings Arrest Warrant* (ex. #3). Shortly after the arrest, Giddings committed suicide. *Plaintiff's* Dep. at 63."

FACTS VIEWED IN A LIGHT MOST FAVORABLE TO THE PLAINTIFF

Viewing the foregoing facts in a light most favorable to the Plaintiff, a jury could reasonable find that Giddings used his position and powers as a State Police officer to coerce Plaintiff to perform oral sex on him. Under Delaware law such behavior constitutes Unlawful Sexual Intercourse in the Second Degree, a Class B felony. 11 Del. C, §772(a)(1)(intentionally engaging in sexual intercourse with another without that person's consent; 11 Del. C. §761(g)(oral sex included within "sexual intercourse"); 11 Del. C. §761(j)(1)("without consent" defined); §791(4)(further definition of "without consent").

THE COURT'S OPINION GRANTING SUMMARY JUDGMENT

The trial Court found that the primary issue arising from the Summary Judgment Motion was whether a question of fact was presented concerning applicability of the Doctrine of *respondeat superior*. In so doing, the Court focused on the Opinion of this Court in Draper v. Olivere Paving and Construction Company, 181 A.2d 565, 569 (Del. 1967).

In its analysis, the Court employed the following standards to guide its Decision:

> "When a servants tortious action arising from a personal need or motivation not engendered by anything connected with the employment, the servant is outside the scope of employment and

> the master may not be held liable [citing A.R. Anthony and Sons v. All-State Investigation Security Agency, Inc., C.A. No. 82C-AP-18 (Del. Super. Sept. 27, 1983) (Poppiti, J.)]. To determine whether an employee's conduct is within the scope of employment, the Court determines whether:
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> > (1) It is of the kind to use employed to perform;
> >
> > (2) It incurs within authorized time and space limits;
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> > (3) It is activated, in part at least, by a purpose to save the master; and,
> >
> > (4) If force is used, the use of force is not unexpectable by the master." [Citing again, A.R. Anthony and Sons].

The Court then recognized the "course and scope" is ordinarily a jury question but that the issue can be decided as a matter of law where the facts "clearly indicate" that "the tort was not committed within the scope of employment." [Again, citing A.R. Anthony and Sons}.

The Court then considered two cases for further guidance in addressing this issue. The first was Simms v. Christina School District, 2004 WL344015 (Del. Super. Jan. 30, 2004) (attached hereto as Exhibit D). There, the Superior Court held that a school residential counselor's molestation of a student was not within the scope of employment because, [quoting the Simms Opinion]:

> "While [the counselor] was clearly taking advantage of his position as a residential advisor during work hours and at the workplace, no employment school related activity was even remotely taking place when [he] was sexually abusing the Plaintiff."

The trial Court in this case found of consequence the fact that:

> "The Simms Court held that this fact distinguished that situation from cases where the Court had held that the employees tort occurred in the context of otherwise authorized acts." [Citing Simms].

Next, the Court considered this Court's Opinion in Draper v. Olivere Paving and Construction Company, 181 A.2d 585 (Del. Supr. 1967) (attached hereto as Exhibit E). In its Opinion, the trial Court found instructive the fact that:

> "The [Draper Court conceded] that the employee's use of force was grossly excessive but noted that the Record presented a 'close and difficult question of fact' as to whether the assault was purely a product of the employee's anger or it occurred when the employee was performing his assigned duties for the construction company."

In applying the foregoing standards, the Court (in this case) concluded that *respondeat superior* was not applicable on the uncontested facts of this case.

> "Common sense dictates that sexually assaulting a crime suspect, the clear abuse of police authority under any circumstances, is not incidental to the arrest and detention of a suspect. Moreover, Giddings' alleged suggestion of a *quid pro quo*, whereby he told the Plaintiff that he would not take her to jail if she performed a sexual act,

> demonstrates that the assault did not occur in the context of otherwise authorized duties because Giddings did not have discretion, as a DSP Officer not to arrest the suspect on an outstanding capias, particularly in exchange for sexual favors."

The Court then addressed and rejected certain of Plaintiff's arguments regarding "scope of employment" that the State Police could have "anticipated such an action, citing numerous reports of police misconduct" (including one rape) reported since 1990." The Court rejected any argument that prior complaints of police misconduct "should create a presumption that DSP Officers will use excessive force" such that *respondeat superior* would bind the State on the issue of liability for "any violent crime in the course of [police] duties." The Court observed that: "Any police officer who commits a violent crime has acted contrary to his duty under the law to 'suppress all acts of violence.'" [Citing 11 Del. C. §8302(a)].

In rejecting Plaintiff's argument of "expectability"[2] the Court observed:

> "To be sure, police officers are indeed frequent targets of citizen complaints of misconduct as a result of the use of excessive force.
>
> Plaintiff's argument that this circumstance means that DSP should expect that the conduct of this officer was within the scope of an officer's employment is asking this Court to

[2]A key issue in Draper -- an act being "not unexpectable" supports a finding of "course and scope."

> adopt a concept of police behavior that is too far fetched. While law enforcement officers are often confronted with violent individuals in situations that demand the use of force, raping a young woman while she is being held in a police vehicle is a far cry from that scenario. Indeed, forcible rape by a police officer doing an otherwise uneventful arrest cannot in anyway be considered the type of misconduct that is frequently manifested by officers in the line of duty. A crime, such as the one allegedly committed by Giddings against the Plaintiff, is so outrageous, and such a clear abuse of Giddings' position and authority as an officer of the peace, it would be unreasonable as a matter of law to a jury, to find that Giddings acted in the scope of his employment."[3]

The Court also rejected Plaintiff's argument regarding the Restatement (Second) Agency Section 219 in that Giddings "used his position and power as a police officer to commit such an assault." [The Restatement (Second) Agency Section 219(d) provides: "that among other things a master can be bound for the torts of his servants arising outside the scope of their employment if "the [tortfeasor] was aided in accomplishing the tort by the existence of the Agency relation."]

The Court rejected this argument in that there have been no Delaware cases that have adopted Section 219 of the Restatement as the law in Delaware, "nor are there any that suggest an employer may be held liable for an employee's torts if the employee used

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[3]The Court did not address Plaintiff's claim that the State Insurance Program covered "wrongful acts" of State employees including breaches of duty - and that this bears on the expectability of wrongful acts, abuse of power and breach of duty.

his/her apparent authority as an employee to further commission a crime." Lastly, the Court rejected any argument based upon similar reasoning as adopted by the Supreme Court of California in Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. Supr. 1991).

In light of all of the foregoing, the trial Court granted the State's Motion For Summary Judgment based upon the inapplicability of the Doctrine of respondeat superior[4] to the facts of this case as seen in a light most favorable to the Plaintiff.

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[4]The Court's Opinion denying Certification reaffirmed its statement of the law in the original Opinion.

ARGUMENT

QUESTION PRESENTED

Did the trial Court properly grant Summary Judgement and reject a theory of vicarious liability of the State because on the Record viewed in a light most favorable to the Plaintiff, no reasonable juror could find that Trooper Giddings' actions were within the course and scope of his employment by the State of Delaware? This was precisely the issue decided by the trial Court in its Opinion (Exhibit A) rejecting arguments made by the Plaintiff in its Response to the Summary Judgment Motion (A-56).

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law.

MERITS OF THE ARGUMENT

CLAIM THAT ACT OUTSIDE THE SCOPE OF EMPLOYMENT

We contend that the trial Court misapplied Draper v. Olivere, supra, the lead case relied on by the Superior Court in its Opinion. Draper involved a construction worker directing traffic at a road site who used a cork screw to slash the neck of a motorist with whom he had a dispute while he was working. The construction worker had been directing traffic in the vicinity of an obstruction caused by road work. His traffic directions led to an apparently racially motivated argument with the Plaintiff. The slashing followed. The Plaintiff sued the employer of the construction worker for personal injuries on a theory of *respondeat*

superior. The Trial Court granted Summary Judgement in favor of the construction worker's employer, reasoning that the worker's actions could not be proven to fall within the "course and scope of employment".

On appeal this Court reversed. The Court held that "course and scope" normally presents a factual dispute to be resolved at trial. Draper v. Olivere, 181 A.2d 565, 569 (Del. Supr. 1962)

The Court looked to Restatement (Second) of Agency Section 228 as setting forth the standard for "scope of employment":

> ...the conduct of a servant is within the scope of his 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 by the master. Id. at 579.

In applying these tests, there is no difference in applying the Rule if tort is intentional or one of negligence. Id at 569. As to tests ONE to THREE, the Court looked not to the slashing (an intentional assault) **but to the general duties undertaken by the assailant at the time** (directing traffic) and found "course and scope." **Only as to the expectability test (FOUR) did the Court look to the specific tortious conduct charged. The Court then found that there was a factual dispute as to expectability even though the** force apparently used by the employee was "grossly excessive.":

> The only element about which there can be any real debate is whether or not Willie's use of intentional force was expectable by Olivere. As to this, we think men might differ. **Certainly, there is nothing in this record to throw any light whatsoever on the question of whether or not the use *445 of force by traffic directors on construction jobs is so rare as to be unexpectable. If there is any proof to that effect, it was incumbent upon Olivere as the moving party to produce it. Ebersole v. Lowengrub, Del. Supr., 180 A.2d 467. Indeed, the many reported decisions in other jurisdictions involving the use of excessive force by watchmen, guards, etc., would lead one to believe that the use of force in such situation is not entirely unexpectable.** (emphasis supplied).
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> To be sure, Willie used grossly excessive force upon Norman, but the use of excessive force as well as the question of expectability of the use of any force are matters of fact to be decided by the trier of fact in the light of the circumstances of the individual case. Restatement (Second) of Agency, Section 245(a) and (c). Draper v. Olivere Paving & Const. Co., 181 A.2d 565, 571 (1962)

Two points from Draper are important here: 1) In addressing the Motion for Summary Judgment, the burden was not on the Plaintiff to show expectability but on the Defendant to show non-expectability (no such showing was made here), and 2) The Supreme Court was willing to rely on reported Decisions from other jurisdictions involving excessive force by watchmen, guards, etc., in believing as a matter of law, on a silent record, that such force was "not entirely unexpectable." Id.

Here, using the Draper **general** focus (until factor FOUR is reached), Giddings' misconduct took place in exercising the State sanctioned power of arrest, at an authorized time and place, and was (until the misconduct) intended to serve the State.

EXPECTABILITY AND NOTICE

Only as to factor FOUR--expectability-is there any dispute in this case a factual one at that, and the burden is on the Defendant to show non-expectability. No such showing was made here.

Moreover, expectability and notice can be shown in this case as shown in the Record below. 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[5], and multiple assaults. See Exhibit B attached to the Plaintiff's response to Summary Judgment Motion below (A-68). In 1995 a Lewes police officer pled guilty to on duty unlawful sexual intercourse with a woman in custody. See Exhibit B-1 attached to Plaintiff's response to Summary Judgment Motion (A-129). On information and belief the Lewes misconduct case would have been investigated by the Delaware State Police. At time of litigation of the Summary Judgement Motion below, Plaintiff asked the State to advise of the involvement of the State Police in the Lewes investigation but it refused.[6] If the State truly had no

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

[6]This evidence came to the Plaintiff's attention for the first time during briefing of the Summary Judgment Motion and was brought to the Trial Court's attention.

possible expectation of sexual misconduct by a police officer, it should have made that showing as suggested by the Court in Draper.

The Superior Court also misapplied Draper regarding expectability and notice. First, the test is not that the misconduct should be "expectable," but that it should be "entirely unexpectable" with the burden on the Defendant to show unexpectability as a type of affirmative defense. Next, the misconduct need not be "frequently manifested" by the police, but merely "not unexpectable." Further, the Plaintiff need not create a "presumption" that misconduct will occur; the Defendant must make a showing that the misconduct is "unexpectable." Finally, contrary to the Court's holding that "outrageous" misconduct was "such an abuse" of Gidding's duty that it could never be within the scope of his employment, that is not the test. Rare outrageous behavior can still be within the scope so long as not unexpectable and occurring in the context of otherwise authorized acts.

SIMMS V. CHRISTIAN SCHOOL DISTRICT

Nor does the second case relied upon by the trial Court in its Opinion below support its ruling. In Simms v. Christina School District, 2004 WL344015 (Del. Super. 2004) (attached as Exhibit D hereto), the Superior Court in Simms found there that **"no employment related activity was even remotely taking place"(emphasis supplied)** at the time of the alleged misconduct

(sexual abuse of the Plaintiff-a mentally impaired minor--by an advisor in a residential school for the hearing impaired):

> Connor's responsibility as a residential advisor for providing "a safe and orderly home-like environment," included counseling students about hygiene issues. As mentioned, the responsibilities of a residential advisor also included developing and implementing programs to promote student growth, although no specific programs had been established.
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> The plaintiff also mentions the Indiana case of *Stropes v. Heritage House Childrens Center of Shelbyville, Inc.*[14] The employee in that case was a nurse's aide who worked at a facility which cared for people placed there as wards of the State. The employee's duties included feeding, bathing, changing the bedding and clothing of residents, and monitoring their comfort and safety. The victim was a fourteen-year-old ward who suffered from cerebral palsy and severe mental retardation. **One day the employee entered the victim's room to change his bedding and clothes for the day. After the employee stripped off the sheets, he got into bed with the victim and performed oral and anal sex upon him. The employee then finished changing the victim's clothes.** The court held that a jury could find that the sexual assault was within the scope of the employee's duties. The factual similarity between that case and this one should, the plaintiff, argues, lead to denial of the motion for summary judgment in this case as well. (emphasis supplied)
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>
> **In *Draper* [discussed in this brief supra], *Screpesi*[7], and Stropes, the assaults occurred in the**

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[7] *Screpesi v. Draper-King Cole, Inc.*, 1996 WL 769344 (Del. Super.). "In that case the employee, a truck driver, became involved in a fight with another motorist when both pulled their vehicles off the roadway. The court reasoned that it is foreseeable that a truck driver may assault another driver as a result of a dispute arising out of work-related driving and that

> **context of employment related activity. In Stropes, the court noted that the episode of sexual assault began and ended with the performance of fully authorized acts. This case, however, is distinguishable. This case involves continuous sexual abuse which does not occur in the context of otherwise authorized acts.** While Connor was clearly taking advantage of his position as a residential advisor during work hours and at the workplace, **no employment related activity was even remotely taking place when Connor was sexually abusing the plaintiff. The plaintiff's effort to cast Connor's conduct as being a choice by him of a method, although improper, of carrying out the purpose of advising the plaintiff about sexual or hygiene matters, is unpersuasive. In my opinion, no reasonable juror could accept that argument.** I conclude that a jury could not find that Connor's continuous sexual abuse of the plaintiff was actuated, at all, by a purpose to serve his employer, or that his misconduct was, in any way, expectable by his employer. Simms v. Christina Sch.Dist., 2004 WL 344015 (Del. Super. Jan. 30, 2004) (emphasis supplied)

Unlike Simms, this case does involve sexual abuse taking place "within the context of authorized **acts**" as did Draper, Screpesi and Stropes [found at 547 N.E.2d 244 (Indiana Supreme Court 1989)]

Connors did not abuse his powers as an advisor-although he did so at a time and place when he was present as a residential advisor. Here it was not just the time and place that characterized Giddings' tortious act. It was Giddings' position as a police officer that gave him the power to arrest Doe and during the arrest he abused his power of arrest by suggesting that if Doe engaged in

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a jury could find that there was "no break in the driving and the assault." Simms v. Christina Sch. Dist., 2004 WL 344015 (Del. Super. Jan. 30, 2004)

sexual conduct with him, he would not take her before a Justice of the Peace to answer to several warrants against her. Thus, his misconduct took place within the context of authorized acts.

MARY M. v. CITY OF LOS ANGELES, 814 P.2d 1341 (Cal. Supr. 1991)

Mary M. is the leading case in support of the proposition that whether sexual misconduct by an arresting police officer binds the officer's employer presents a question of fact. We commend the Opinion of the Court at pages 1341 to 1352 to this Court for its consideration. We believe it is forcefully persuasive and consistent with the law here in Delaware.

The following principles emerge from the majority Opinion:

(1) **". . .it is necessary to examine the employee's conduct as a whole, not simply the tortious act itself."** Id. at 218-219. (emphasis supplied). Quoting another California case: "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." Id. at 1351. This factor has been found important in the Delaware cases set forth above.

(2) And quoting another California case: **"The proper inquiry is not whether the wrongful act was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal."** Id. (emphasis supplied). Reliance

on this factor also is found in the cases from our State set forth above.

(3) **Principal among the factors examined by the Court was, as in Delaware, the expectability (put another way, foreseeability) of the misconduct:**

> "As we mentioned earlier, the test for determining whether an employee is acting outside the scope of employment is whether "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."

Id. at 1347 (1991)

(4) The Court noted that police have great power and control over citizen to include the power of arrest, non-consensual touching, and use of force (including deadly force). Accordingly,. "it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. **The precise circumstances of the assault need not be anticipated, so long as the risk is one that is reasonably foreseeable[8]. Sexual assaults by police officers are fortunately uncommon; nevertheless, the risk of such tortious conduct is broadly incidental to the enterprise of law enforcement**, and thus liability for such acts may

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[8] **[Thus so in Delaware.]**

appropriately be imposed on the employing public entity." Id. at 1349-50. (emphasis supplied).

The rationale of Mary M. had previously been adopted by at least one other Court holding *respondeat superior* may be used to attribute liability to a Government employing police officers who act wrongfully. See e.g., *Applewhite v. City of Baton Rouge,* 380 So.2d 119, 121-22 (La.App.1979)(where sexual excesses are committed by police officers, their employers may be held to be responsible for their actions).

Subsequent to Mary M. a number of other cases (but not all)[9] have adopted its rationale. See, e.g., St. John v. United States, 240 F.3d 671, 675-78 (8th Cir.2001) (sexual assault by police officer facilitated by threat of arrest could have been within the scope of employment); Moor v. Hosier, 43 F.Supp.2d 978, 991 (N.D.Ind.1998) (fact question for the jury whether county sheriff's assault was within the scope of employment because originating in activities closely associated with employment); Battista v. Cannon, 934 F.Supp. 400, 406 (M.D.Fla.1996) (fact question whether sexual battery by deputy sheriff was within scope of employment; Carney v. White, 843 F.Supp. 462, 479-80 (E.D.Wis. 1994) (fact question as to whether actions of police officer attempting to induce sexual

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[9]See , Doe v. White, 00 C 0928, 2003 WL 256889 (N.D. Ill. Feb. 5, 2003) vacated sub nom. Doe v. City of Chicago, 360 F.3d 667 (7th Cir. 2004)

relations was within the scope of employment); Ingram v. City of Indianapolis, 759 N.E.2d 1144, 1146-48 (Ind.App.2001)(use of powers as a City police officer to solicit sex can be within scope of employment); See also, Doe v. City of Chicago, 360 F.3d 667, 671 (7th Cir.2004) (considering at length the rationale of Mary M. finding vicarious liability for sexual harassment by police officer but not resolving issue).

We suggest that the rationale of Mary M. is consistent with the law of the State of Delaware regarding *respondeat* and should not have been disregarded by the Superior Court.

RESTATEMENT OF AGENCY SECTION 219(2)(d)

Under the Restatement (Second) of Agency Section 219(2)(d), (copy attached hereto as Exhibit C), if an employee uses a position or power afforded by the employment relationship to commit a tort the employer is vicariously liable even if the tort would otherwise be outside the course and scope of employment. We suggest that this test is consistent with the question asked by the Superior Court in Simms, supra, was there an abuse of power during employment related activity? If so, then vicarious liability under Simms, with similar vicarious liability under Section 219.

The Superior Court declined to accept Plaintiff's argument that Section 219 compelled a denial of the Summary Judgment Motion because no Court in Delaware had yet ruled on its applicability in this State. That much is true, but Section 219 (although different

subsection) has been cited as setting forth the law in Delaware. Draper v. Olivere, 181 A.2d 565, 569 (Del. Supr. 1962) Here, a reasonable jury could conclude that Giddings committed the acts charged by abusing his power as a State Officer to arrest and hold Doe in custody and threatening to take her to Court unless she performed oral sex on him. Thus, vicarious liability could be found by a jury under Section 219(2)(d).

Courts have varied in their willingness to endorse reliance on Section 219(2)(d). Compare, Costos v. Coconut Island Corp., 137 F.3d 46, 50 (1st Cir. 1998)(under Section 219(d)) as applied by Maine Courts vicarious liability could be found where hotel manager went to Plaintiff's room, used a hotel key to enter and rape Plaintiff) and Doe v. Forrest, 853 A.2d 48, 69 (2004)(applying Section 219(2)(d) so that position and powers of police officer who intimidated Plaintiff into sexual act could support finding of vicarious liability) with Zsigo v. Hurley Med. Ctr.,716 N.W.2d 220, 225-29 (Michigan Supreme 2006)(criticizing and rejecting Costos and Doe rationale).

CLAIM THAT RESTATEMENT OF AGENCY THIRD TRUMPS RESTATEMENT SECOND

The State argued below that the Restatement of Agency Third has superceded the Restatement Second does not support the Plaintiff's vicarious liability argument and now binds this Court. This rationale was neither relied upon nor rejected by the Superior Court in granting Summary Judgment. The short answer to this

argument is that this Court has not bound itself by changes from the Second to the Third Restatement on any subject. Riedel v. ICI Americas Inc., 968 A.2d 17, 20-21 (Del. 2009):

> At this time, we decline to adopt any sections of the Restatement (Third) of Torts. The drafters of the Restatement (Third) of Torts redefined the concept of duty in a way that is inconsistent with this Court's precedents and traditions.
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> ****
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> Whether the expansive approach for creating duties found in the Restatement (Third) of Torts is viewed as a step forward or backward in assisting courts to apply the common law of negligence, it is simply too wide a leap for this Court to take. Therefore, at the present time we continue to follow the Restatement (Second) of Torts.

Riedel v. ICI Americas Inc., 968 A.2d 17, 20-21 (Del. Supr. 2009)

RELEVANCE OF STATE INSURANCE PLAN TO FORESEEABILITY

The Court below did not address the Plaintiff's argument that the State's Self Insurance Plan[10] covers "wrongful acts" and breaches of duty such as alleged here and therefore betrays any claim of non-expectability.

"**PERSONAL INJURY**" covered by the State's Self Insurance Plan includes "false arrest...false imprisonment, malicious prosecution, assault and battery...." (A-50). If the foregoing are covered, logically, the Plan does not require that covered torts be

[10]The terms of the Plan were before the Court in connection with a claim of Soverign Immunity by the State -- a claim the Court did not decide.

authorized. This interpretation of the Plan was termed "reasonable" by the Plan Administrator in Deposition (A-135). Thus even unauthorized torts such as assaults can be deemed "not unexpectable."

And if the Insurance Plan covers all of these wrongful acts, including assault, then the State has anticipated that such can occur within the course and scope of employment. This being the case, then the State has vicarious liability for Giddings' actions (sexual assault) as alleged in this case.

Moreover, the Plan covers "**PERSONAL INJURY**" resulting from a "**WRONGFUL ACT**." "**WRONGFUL ACT**" is a defined term and includes **"neglect or breach of duty by the Insured Individual. . . while acting or failing to act within the scope of his employment or official duties pertaining to the law enforcement functions of the Insured."** (A-50). See also, 18 Del. C. §6503. (Goal of State Insurance Plan to protect public from "wrongful actions of ...State employees")

Not only does this cement the notion that wrongful acts are "not unexpectable" thus "within the course and scope" as a matter of the public policy of this State as evidenced by the terms of the State Insurance Program, all of this is consistent with the rule of Draper v. Olivere.

Put another way, if the State self insures against wrongful acts and breaches of duty, these torts are "not entirely

unexpectable" and thus can fall within "course and scope" as alleged here.

CONCLUSION

The Court below erred in finding that the facts of this case did not present a jury question regarding application of the Doctrine of *respondeat superior* (based on several theories) to vicariously bind the State. The final Judgement in favor of the State based on the grant of Summary Judgement should be reversed.

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Dated: September 21, 2012