



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

Edmund Daniel Lyons - 0881
Attorney for Appellant
1526 Gilpin Avenue
P. O. Box 579
Wilmington, Delaware 19899
(302) 777-5698

Dated: October 31, 2012

ARGUMENT

GRANT OF SUMMARY JUDGMENT NOT SUPPORTED BY DRAPER'S FOCUS ON GENERAL DUTIES AND THEN FOCUS ON SPECIFIC TORT

In our Opening Brief we argued that the standards set forth by this Court in Draper under Restatement (Second) of Agency Section 228 (with the exception of Standard 4-regarding the tort itself) focused on the **general** duties undertaken by the employee at the time of his wrongful acts. The precise language of this Court in Draper in applying the Section 228 factors to the facts before it are important:

"From the facts recited, however, it will be obvious that at least part of the tests to determine if a particular conduct is within the scope of employment laid down in the Statement of Agency (Second), Section 228, has been met without question. Thus [the tort feisor] was employed, *inter alia*, to direct traffic. This he did. This occurred during the tort feisor's working hours and on the site where he was then employed. The act of telling [plaintiffs] to go back was in performance of [the employer's] business, and, indeed, from the recital of facts given, his [the tort feisor's] descent from the grader must be assumed to have been from the same purpose." Draper v. Olivere Paving and Construction Co., 181 A.2d 565, 570-71 (Del. Supr., 1962).

The State accurately sets forth the holding in Draper regarding application of the test set forth in the Restatement (Second) of Agency Section 228:

"[The] conduct of the servant 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 limit;

(3) It is activated in part, at least, by a purpose to serve the master; and

(4) If force is used, use of force is not unexpected by the master." 181 A.2d at 570. (Answering Brief at 5).

But having done so, the State chose to address Doe's argument regarding general versus specific focus, which severely undercuts its position, by simply ignoring it. The distinction in focus is important and the State's failure to address it ignores the question: If an employee commits a tort during a continuous series of events that otherwise clearly falls in course and scope of employment, can the employer escape liability simply by saying "I never authorized that tort?" If non-authorization of the tort were the law there would almost never be vicarious liability for intentional torts-and that is not the law in Delaware. Rather, Draper holds that whether authorized or not, was the tortious activity "not unexpected in view of the duties of the servant?" Id. at 442. Or, put somewhat differently: was the tort "so rare as to be unexpected" or "entirely unexpected." Id. at 443. And as Draper observed, the Doctrine of *Respondeat Superior*:

"certainly includes acts of the servant **so closely connected** with what he is employed to do, **so fairly incidental** to it, that they are to be regarded as methods elected by the servant, even though improper, of carrying out the master's business."

(Emphasis supplied) Draper v. Olivere Paving & Const. Co., 54 Del. 433, 441, 181 A.2d 565, 569 (1962)

Is not an abuse of power to arrest (on duty and in uniform) afforded by the State, "so closely connected", so "fairly incidental" to an act of arrest, that the master should be held to answer?

UNEXPECTABILITY

What does it mean to be "unexpect**ABLE**?" The State believes that the quoted phrase means "unexpect**ED**" and wants to use the terms interchangeably. (Answering Brief at 8) (equating "unexpectable" with "unexpected"). There is a difference between being "able to be expected" and "in fact expected." Importantly, the Opinion in Draper refers to "unexpectability" in one form or another eight times and not once to actual expectation.¹ Draper v. Olivere Paving & Const. Co., supra.

Like it or not, the test in Draper is one of being able to be expected--"not entirely unexpectable." Buried in the confusion and conflation of the two concepts, the State argues that the trial Court was correct in considering that Giddings' act was "so outrageous that it would not be expected by the State as the employer." (Answering Brief at 8-9). But **actual** expectation of

¹ The opinion did refer once to "reason to expect" but that is not the same as **actual** expectation. Draper v. Olivere Paving & Const. Co., supra at 443.

behavior is not required. **Possible** expectation is. And even "outrageous" behavior can be expectable. In Draper, the employee slashed the neck of the Plaintiff with a can opener. The Plaintiff probably thought that this was fairly outrageous.

SHOWING REQUIRED BY STATE OF UNEXPECTABILITY LACKING

Draper requires the *employer* must make an un rebutted showing of unexpectability to prevail on a Summary Judgment Motion in this context.²

But here the State made no showing at all. To remedy this weakness the State argues "that it is the obligation of the party bringing suit to make a sufficient showing of the essential elements of the case" citing Burkhart v. Davies, 602 A.2d 56, 59 (Del. Supr. 1991) (Answering Brief at 8). This is not exactly what Burkhart v. Davies said. That Opinion addressed a situation where the non-moving party failed to make a sufficient showing of an **essential** element of her case with respect to which she has the burden of proof. But Draper considered a claim of unexpectability to be in the nature of **an affirmative defense on which the Defendant employer has the burden of proof**. We suggest Draper

² "If there is any proof to that effect [unexpectability of misconduct] it was incumbent upon [employer] as the moving party to produce it." Draper at 571. And this was where the employee directing traffic had used a deadly weapon to injure a member of the public!

accurately sets forth the law, and that the State's failure to carry its burden is fatal to its argument.

**RECORD SUPPORT FOR FACTUAL SHOWING NEGATING A CLAIM OF
UNEXPECTABILITY**

The State does respond to our claim that the Record does contain evidence negating an unsupported claim of unexpectability but does so disingenuously. The State acknowledges that on a Motion for Summary Judgement, the Record is viewed in a light most favorable to the Plaintiff as the non-moving party. Burkhart v. Davies, 602 A.2d 56, 58-59 (Del. Supr. 1991)

1. LEWES POLICE OFFICER CHARGED WITH RAPE

Regarding the 1995 arrest of a Lewes police officer for allegedly raping a suspect, this came to Plaintiff's attention after the Motion for Summary Judgement was filed-and after unexpectability was at issue. The State claims that it "was **unable** to comply with the [Plaintiff's] request for information "because the discovery deadline had passed." (Answering Brief at 9). In fact, the State **refused** to comply with the request but could have done so. This head in the sand approach belies the State's claim it had no reason to consider sexual misconduct as expectable. The newspaper article itself could even be admissible evidence (on the issue of notice and therefore expectability)³ but a State Police admission that it investigated the Lewes case would certainly be

³ Offered not to prove the truth of the matter asserted (DRE 803) and thus not hearsay.

admissible as bearing on the issue of unexpectedability. Just who did investigate that case?

2. PRIOR CLAIMS OF WRONGFUL ACTS OF DELAWARE STATE
POLICE OFFICERS

Regarding the evidence of prior claims against the Delaware State Police regarding improper behavior by its officers, Rule 408 would prohibit use of such evidence to prove "liability for or validity of the claim or its amount." However, the Rule "does not require exclusion when the evidence is offered for another purpose" such as, in this case, bearing on the issue of unexpectedability. This theory of relevance and admissibility is clearly set forth in Doe's Opening Brief and the State's failure to respond on the merits betrays the weakness of its position.

3. THE STATE INSURANCE PLAN

Other arguments in the Opening Brief regarding expectability were also ignored by the State. Specifically, there was no discussion regarding the State's Self Insurance Plan coverage of "wrongful acts"--including assault (Opening Brief at 23). Also ignored was the argument that "wrongful acts" covered by the State Insurance Plan include "neglect and breach of duty." The State further ignored arguments⁴ in Doe's Opening Brief that Doe's construction of the State's Self-Insurance Plan was conceded by the State Insurance Plan Administrator to be "reasonable." (A-135)

⁴ And Record evidence.

If "wrongful acts", including assault and breach of duty are covered by the Plan, aren't they "not entirely expectable?"

Rather than confront the issue head on the State argues first that the State Plan excludes coverage for "criminal acts of an employee" but does **not** point out that the Penal Code Exclusion does not apply to the State: **"However, does not apply to the named insured [Delaware State Police] or a political sub-division in which the named insured is located."** (B-19). This interpretation of the Plan was also termed "reasonable" by the Plan Administrator in deposition. (A-134) ⁵

Finally, again, disingenuously, the State argues that evidence of liability insurance is generally inadmissible under DRE 411. This much is true--the Rule does bar evidence of insurance offered to prove that someone acted "negligently or otherwise wrongfully." The Rule does, however, permit evidence of insurance offered for another purpose -- in this case as bearing on the issue of unexpectability--something the State has put in play and can be expected to argue at any trial.

4. 1995 LAWSUIT ALLEGING THAT STATE TROOPER RAPED DETAINEE

The State also ignored the argument in Doe's Opening Brief

⁵ The State also argues that Doe claims that by excluding criminal acts from the State Insurance Plan coverage this shows that the State was "aware the risks possibly existed." (Answering Brief at 25). This is **not** Doe's argument--these risks were not excluded from coverage but, in fact, were included within coverage.

that there was a [eventually dismissed as time barred] lawsuit in 1995 alleging that a State Trooper had raped an individual during the execution of his duties. The State has not responded to our argument that a filed lawsuit bears on the issue of unexpectedness regardless of its procedural dismissal. (Opening Brief at 14 n.5).

5. REPORTED JUDICIAL DECISIONS OF LAW ENFORCEMENT
SEXUAL MISCONDUCT

Moreover, the State has failed to respond to our argument and logic of Draper that "the many reported Decisions" from other jurisdictions involving allegations of misconduct similar to that charged here "would lead one to believe that the use of force [in this case sexual misconduct] in such situations is not entirely unexpected." Draper, supra, at 446; Opening Brief at 13.

Decisions from other jurisdictions involving allegations of police sexual misconduct include not only Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. Supr. 1991), but cases cited at 19-20 of our Opening Brief. In addition, even more to the point, is the State's list of Opinions at pages 16-17 of its Brief, each of which involves an allegation of police or security guard sexual misconduct. The cases cited by the State date back as far as 1965 and include Decisions in both Federal and State Courts, albeit not finding "course and scope." But these Decisions do betray the State's unsupported claim that police sexual misconduct is unexpected.

STATE TORT CLAIMS ACT "CONSISTENT WITH" SUPERIOR COURT'S DECISION

The State's logic is difficult to follow but appears to be that under the Tort Claims Act (10 Del. C. §§ 4001 - 4005), Giddings would not be entitled to indemnification by the State if he were found liable to Doe. The State then argues that since the State would not have to indemnify Giddings, the State could not be found liable to Doe on a claim of *Respondeat Superior*. Nothing in the State Tort Claims Act requires that result either expressly or implicitly. Without greater explication by the State of the basis for its argument it is impossible for Doe to respond further.

"BUT FOR" THEORY OF *Respondeat Superior*

Doe did not make such an argument, at least, in the general terms proposed by the State -- Doe is not claiming strict liability for "those acts" [tortious] which occurred after the employee began work and had previously performed some tasks within the scope of assigned duties. That would be the "time and place" argument rejected by the Superior Court in Simms v. Christiana School District, 2004 WL 344015 (Del. Super. 2004) and also by the Supreme Court in Draper.

We do suggest that when misconduct occurs during authorized activity **and** involves an abuse of power afforded to the employee within "the course and the scope," which is "not unexpected," then liability should be found. Or at this stage of the

proceedings, if the facts support such a claim, Summary Judgment in favor of the employer should not be granted.

**SIMMS V. CHRISTIANA SCHOOL DISTRICT, 2004 WL 344015
(DEL. SUPER. 2004)**

The Opinion in Simms was addressed in our Opening Brief because we believed, and still believe, that the Superior Court misconstrued Simms and misapplied it to the facts in this case. What the State finds discomfoting about Simms is that the Superior Court, in Simms, while rejecting a "time and place" argument, implicitly said that if the misconduct arose **during** the execution (not just at the time and place) of authorized duties⁶, then liability can be found. We believe that does accurately set forth the law. The State apparently agrees but says that Simms is inconsistent with Draper (Answering Brief at 14). The Court in Draper did make the noted statement about "unauthorized violence" (Answering Brief at 13) but that is because it was dealing with an "unauthorized violence" case. Cherry picking that snippet of the Draper Opinion does not change the general principals of application of Draper set forth in Doe's Opening Brief.

⁶ That is to say, the employer breached his duties and that breach injured Plaintiff.

MARY M. V. CITY OF LOS ANGELES, 814 P.2D 1341 (CAL. SUPER 1991)

The discussion in our Opening Brief regarding the principles guiding the Mary M. Decision has not been rebutted by the State. We do not ask the Court to fashion a new Rule based on Mary M. but do ask it to consider the observations set forth in the Mary M. Decision when passing upon the applicability of Draper to this case.

RESTATEMENT (SECOND) OF AGENCY SECTION 219(2)(d)

We raised Restatement (Second) of Agency Section 219(2)(d) because we believed that its focus on abuse of power afforded by the employment relationship was a core principle recognized in Simms and a core principle that would fall within the *Respondeat Superior* tests set forth in Draper. We still believe that to be true. In other words, we think that this Court can consider Section 219(2)(d) as it applies Draper to the facts in this case. We do not think it is necessary for us to ask nor have we asked the Court to throw out 60 years of jurisprudence under Draper and supplant it with Section 219(2)(d).

RESTATEMENT (THIRD) OF AGENCY SECTIONS 7.07 AND 7.08

We do not think it is necessary for resolution of this case to engage in an extended debate over adoption of certain provisions of the Restatement (THIRD) of Agency. If the Court were to adopt the standards in Restatement (THIRD) of Agency Sections 7.07 and 7.08 it would *de facto* be turning its back on and supplanting the test

set forth in Draper discussed above, and that is not necessary to resolve this matter. We note parenthetically that the tort in this matter was carried out during the execution of Giddings' **actual authority** to effect and process an arrest.

If nothing else, this case proves the wisdom of the Supreme Court's observation in Draper:

"The phrase 'scope of employment' is at best indefinite. It is nothing more than a convenient means of defining those tortious acts of the servant not ordered by the master for which the policy of law imposes liability upon the master. The phrase, itself, contains no guide to its application." Draper v. Oliver, supra at 569.

What we have tried to do is demonstrate that within the framework of the law as set forth by Draper--as applied once by the Superior Court in Simms and even within the Second Restatement of Agency there are certain core principles of application that compel "the policy of law"⁷ to impose liability upon an employer if Doe can prove her allegations as supported by the Record in this case. This case does not necessarily compel a choice between whether to adopt the Restatement (Second) of Agency Section 219(2)(d) or, in the alternative, the Restatement (Third) of Agency Sections 7.07 and 7.08.

⁷ Draper v. Oliver, supra at 565.

THE STATE'S CLAIM OF SOVEREIGN IMMUNITY

SUMMARY OF ARGUMENT

Denied. The State's claim of Sovereign Immunity is based on a claim that the State's Insurance Plan does not cover the alleged acts. The Plan does cover the acts alleged. Alternatively, the State claims that the State Tort Claims Act prohibits coverage under the State Insurance Plan. The Act does not so provide. Insured risks under the State Insurance Plan are not subject to a claim of Sovereign Immunity.

I. THE STATE'S CLAIM OF SOVEREIGN IMMUNITY IS NOT WELL FOUNDED

QUESTION PRESENTED

Should this Court affirm the Trial Court's grant of Summary Judgement on a claim of Sovereign Immunity raised by the State below but not ruled on by the Trial Court?

STANDARD AND SCOPE OF REVIEW

Discretionary power to review this claim. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1390 (Del. 1995). Plenary review of a question of law if addressed.

ARGUMENT

STATE'S SELF INSURANCE PLAN DOES COVER THE ACTS ALLEGED

The State's argument is two-fold--first based on a claim that the State's Self Insurance Plan did not cover the alleged acts of

Giddings.⁶ As set forth above, the State has not addressed the fact that the "criminal act" exclusion is not available to the State in this case by the very terms of the policy. This argument should be rejected.

WRONGFUL ACTS COVERED UNDER STATE INSURANCE POLICY

The State then argues that the Insurance Plan does not cover acts outside the scope of employment but as argued above, the State Insurance Plan covers "wrongful acts" to include assault and covers employee breaches of duty. Thus, even "wrongful acts" fall within the coverage of the policy. Put another way, if a State employee is otherwise acting within the course and scope of his employment and commits a wrongful act, the act is covered by the policy. The State Insurance Plan administrator testified in deposition that such an interpretation of the policy is reasonable (A-135). Accordingly, this Court should apply the Rule of *Contra Proferentum* and apply that interpretation of the policy favorable to the Plaintiff, who was not involved in drafting or adopting any provisions of the policy. Twin City Fire Insurance Co. v. Delaware Racing Ass'n., 840 A.2d 624, 629 (Del. Supr., 2003).

**THE STATE TORT CLAIMS ACT DOES NOT PROHIBIT
STATE INSURANCE COVERAGE**

The State also reasserts reliance on the State Tort Claims Act

⁶ The State notes that the State Self Insurance Plan is based on a prior commercial insurance policy purchased by the State. That is true but the Plan itself was in effect at all relevant times in this case.

but in its argument confuses principles of **indemnification** and **coverage**. Contrary to the State's argument, 10 Del. C. §4005 does not exclude **coverage** for any act not subject to the immunities under §4001 but rather excludes **indemnification** for such act despite any policy language to the contrary.

In other words, the State's Self Insurance Plan does cover acts as alleged and the State Tort Claims Act provisions regarding indemnification do not affect coverage under the Insurance Plan. As such, the Plan constitutes a waiver of the defense of Sovereign Immunity. 18 Del. C. §6511.

CONCLUSION

We request that the Superior Court's grant of Summary Judgement in favor of the State be reversed and the matter remanded for trial subject to this Court's Decision (if the issue is considered) that the State does not have the benefit of Sovereign Immunity.

/s/Edmund Daniel Lyons

Edmund Daniel Lyons - 0881
Attorney for Plaintiff
1526 Gilpin Avenue
P. O. Box 579
Wilmington, Delaware 19899

Dated: October 31, 2012