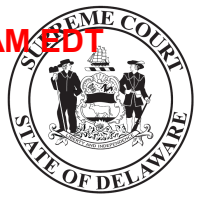

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANE D.W. DOE,	)	
	)	
Plaintiff Below	)	
Appellant,	)	
	)	
v.	)	C.A. No. 447, 2012
	)	
THE STATE OF DELAWARE,	)	On appeal from the New
	)	Castle County Superior
	)	Court
Defendant Below	)	
Appellee.	)	

APPELLEE STATE OF DELAWARE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATED: October 17, 2012

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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, appellant Jane D.W. Doe 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. The complaint alleges that plaintiff was sexually assaulted by on-duty former Trooper Joshua Giddings on March 19, 2009 and contains a claim against the State on theories of agency and respondeat superior. Complaint at ¶¶4-7, 12 (D.I. #4) (B-1-2). The complaint alleges that the acts of former Trooper Giddings "were done in bad faith, with no belief that the public interest would be served thereby." *Id.* at ¶13. (B-2).

Doe has filed a timely appeal and filed an Opening Brief ("OB") seeking reversal of the decision of the Superior Court. This is the Appellee State of Delaware's Answering Brief.

SUMMARY OF ARGUMENT

I.-III. Denied. The Superior Court correctly granted summary judgment, after ruling as a matter of law, that the acts of a police officer raping a suspect instead of returning the suspect to Court on an outstanding warrant are not within the employee's scope of employment. The ruling of the Superior Court follows controlling Delaware case law and the applicable provisions of Restatement (Second) of Agency (1958) and Restatement (Third) of Agency (2006). Cases from other jurisdictions relied upon by Doe do not follow Delaware law and are not precedential.

II. State of Delaware, as an alternate ground for affirming the ruling of the Superior Court, submits that Doe's claims are barred by the doctrine of sovereign immunity as the State's self-insurance coverage for Delaware State Police specifically excludes criminal acts and acts outside the scope of an employee's duties.

STATEMENT OF FACTS

The State of Delaware generally agrees with the Statement of Facts set forth in the Appellant's OB. The State does add additional facts which were set forth in the State's Motion for Summary Judgment.

Appellant Doe testified that Mr. Giddings was arrested because "he did something he wasn't supposed to do." *Doe Depo.* at 63. (B-12). Doe also conceded that she knew that the officer was required to take her to Court on an outstanding capias. *Id.* at 36, 46 (B-7, 10). Doe also knew that the police officer Giddings was breaking the law when he asked her to engage in oral sex. *Id.* at 44 (B-9).

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.

I. SUPERIOR COURT CORRECTLY RULED AS A MATTER OF LAW THAT THE STATE OF DELAWARE WAS ENTITLED TO SUMMARY JUDGMENT.

Question Presented

Whether a police officer acts within the scope of employment when he rapes a suspect?

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 must "examine the record to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991). The moving party is entitled to summary judgment as a matter of law when the nonmoving party has failed to make a sufficient showing of proof on an essential element of the case for which she has the burden of proof. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

Argument

a. The Decision of the Superior Court Granting Summary Judgment Followed Settled Delaware Law

The Superior Court granted summary judgment to the State after a review of the Delaware test for scope of employment which has existed for the last sixty years. *Doe v. Giddings*, 2012 WL

1664234, at *2-3 (Del. Super. May 7, 2012) ("*Doe Opinion*"). The trial court relied on the test established by this Court in *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 570 (Del. 1962) which adopted the Restatement (Second) of Agency § 228. The *Draper* Court held that "conduct of a 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 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." 181 A.2d at 570.

The trial court found that common sense dictated that Mr. Giddings was not performing his arrest duties when he was sexually assaulting a crime suspect. *Doe Opinion*, at *3. The trial court also found that Giddings' suggestion of a *quid pro quo* to the suspect to engage in sex in lieu of arrest on a capias was not authorized conduct by a Delaware State Police officer. *Id.* The Superior Court further ruled that Giddings acted contrary to his statutory duty as a police officer, 11 *Del. C.* § 8302(a), by committing a violent crime against a suspect. *Id.* at *4. The Superior Court also rejected Doe's argument that Giddings' rape of a suspect was expected because the State had settled other police complaints since 1990. The Court found this argument "far-fetched" and ruled that the former officer's act was so outrageous that it

would be unreasonable as a matter of law for a jury to find that Giddings acted in the scope of his employment. *Id.*

The Superior Court correctly determined under factors 1, 3, and 4 of the Restatement (Second) of Agency § 228 that the acts by Giddings were not within the scope of his employment. Doe, OB at 14, contends that only factor 4 is in dispute but this argument is not correct in light of the arguments advanced by the State and accepted by the trial court at the summary judgment stage. The factors in § 228 and adopted by *Draper* are inclusive and require proof of each factor in order for there to be a finding that the person engaged in conduct within the scope of employment. *See Draper*, at 570; Restatement (Second) of Agency § 228. The failure to establish any one of the factors supports a conclusion that the person was not acting within the scope of employment.

As to factor 1, the evidence in the record supported the finding that Giddings did not engage in conduct that he was employed to perform when he committed the act of rape on the suspect Doe. This factor 1 cannot be proven in light of Doe's own complaint which asserts that Giddings acted in "bad faith" and "with no belief that the public interest would be served thereby." *Complaint* at ¶13 (B-2). This is also a case where the employee's job duties were specifically enumerated by Delaware law, 11 *Del. C.* § 8302(a). Under § 8302(a), Giddings as a Delaware State Trooper

was required to suppress all acts of violence and enforce all laws relating to the safety of persons and property, including investigations of rape. No part of Giddings' statutory employment duties under § 8302(a) included commission of rape against a crime suspect and the subsequent failure to arrest that person on an outstanding capias. In fact, the Delaware State Police arrested Giddings for the very conduct which Doe now asserts was within the scope of the officer's employment duties. *See Giddings' Arrest Warrant* (B-13). Doe testified that Giddings was arrested because "he did something he wasn't supposed to do." *Doe's Deposition* at 63 (B-12). Doe further testified that she knew the police officer had to take her to Court on her outstanding capias. *Id.* at 36, 46 (B-7, 10). Doe also testified that she knew the officer was breaking the law when he asked her to engage in oral sex. *Id.* at 44 (B-9). Under Delaware law, Giddings had no discretion to decide not to arrest Doe on an outstanding capias. *See Heine v. Connelly*, 644 F. Supp. 1508, 1511 (D. Del. 1986). On the record evidence, the Superior Court correctly found as a matter of law that Giddings was not authorized to perform the act of rape on a suspect and to do so in lieu of making an arrest.

As to factor 3 of the Restatement, § 228, there is absolutely no evidence in the record to find that Giddings in any way acted in a manner that furthered the purpose of the State. As previously

set forth, Giddings could not under any set of inferences be found to be furthering the interest of the Delaware State Police by committing a rape on a suspect and releasing her, rather than performing his statutory duty to investigate and present wanted suspects to Court on outstanding warrants. The Superior Court correctly found that Doe had not established this element as matter of law.

Factor 4 requires proof that, if the employee used force, then it was not unexpectable by the master. Stated differently, the act of force is outside the scope of employment if it was unexpected by the employer. *See* BLACK'S LAW DICTIONARY 1371 (5th ed. 1979)("unexpected" means "[n]ot expected, coming without warning, sudden"). Doe asserts, OB at 14, that under *Draper*, the burden is on the State to prove that Giddings' actions were not unexpected. The *Draper* Court did state that the nonmoving party was obligated to produce any evidence of whether the use of force by the employee was so rare as to be unexpected. 181 A.2d at 571. This statement in *Draper* rests in tension with the subsequent ruling of this Court that it is the obligation of the party bringing suit to make a sufficient showing of the essential elements of the case. *Burkhart*, 602 A.2d at 59 (quoting *Celotex*, 477 U.S. at 322-23). Under either standard, the trial court correctly concluded that the act of a police officer committing rape on a suspect was so

outrageous that it would not be expected by the State as the employer. *Doe Opinion*, at *4. The record at summary judgment contained no allegation that the Delaware State Police were aware of any prior complaints filed against Giddings by members of the public and certainly no complaints indicating that Giddings was prone to commit the act of rape on a suspect. On this record, it would defy common sense for any jury to conclude that the State of Delaware should have expected that one of its Troopers would arrest a suspect and then rape her in lieu of taking her to court on an outstanding capias.

Doe points to a newspaper article regarding the arrest of a Lewes police officer in 1995 on criminal charges of raping a suspect to prove that Giddings' acts were to be expected. (A-129). Doe claims that this evidence was presented to the State which refused to investigate the matter at Doe's behest. The State first notes that this newspaper article was produced after the close of discovery. At that time, Doe's counsel did request that the State through counsel investigate whether the Delaware State Police were involved in this Lewes matter. As the discovery deadline was over, counsel for the State was unable to comply with the request. (B-26-31). A newspaper article is not admissible evidence that can be considered at summary judgment for purposes of opposing a properly supported motion. *See* DEL. SUPER. CT. R. 56(c). Furthermore, this

newspaper contains no substantive evidence to reasonably conclude that the Delaware State Police was aware of this matter and it put the agency on notice that former Trooper Giddings should be expected to rape a suspect.

Doe also relies on allegations of prior claims filed against the Delaware State Police regarding improper execution of the police officers' duties. *Doe OB* at 14, (A-68). Evidence of these prior claims was obtained by Doe in discovery after the trial court granted a contested motion to compel. (D.I. #43)(B-25). The evidence of prior settled, disputed claims by the State is inadmissible at trial under D.R.E. 408. *See Affiliated Mfr. Inc. v. Aluminum Co. of America,* 56 F.3d 521, 526 (3d Cir. 1995) (F.R.E. 408 limits settlement evidence offered to establish liability or the validity or amount of the claim). The evidence should also not be considered as proper evidence in opposition to a motion for summary judgment as it could not be presented at trial. *See* Rule 56(c). The trial court also properly found that the "number of complaints of police misconduct filed in the past twenty-two years, all of which were resolved out of court" did not create a presumption that the DSP should expect officers to commit the crime of rape on a suspect in the future. *Doe Opinion*, at *4.

b. The Superior Court's Grant of Summary Judgment Follows the State Tort Claims Act

The Superior Court's decision granting summary judgment is also consistent with the provisions of the Delaware State Tort Claims Act, 10 *Del. C.* ch. 40. This case brought by Doe asserted that the State employee Giddings committed criminal acts that "were done in bad faith with no belief that the public interest would be served thereby." *Complaint* at ¶¶7, 13 (B-2). The complaint further seeks to hold the State liable for the "intentional, reckless, wanton and tortuous conduct" committed by Giddings. *Id.* at ¶12 (B-2). Under the State Tort Claims Act, 10 *Del. C.* § 4002, the State is obligated to indemnify State employees who would be entitled to immunity under 10 *Del. C.* § 4001. Section 4001 limits immunity to claims involving an act or omission committed in connection with the performance of an official duty, committed in good faith, and done without gross or wanton negligence. Under this statute, the State of Delaware would not indemnify Giddings for the conduct alleged by plaintiff as it was outside the scope of his official duties, done in bad faith, and done in at least a wanton manner, all as alleged by the plaintiff. The trial court's ruling that the State is entitled to judgment as a matter of law is consistent with the statutory determination that the State has no duty to indemnify Giddings or his estate in this action.

c. Doe's Argument for a "But For" Test of Respondeat Superior Is Contrary to Delaware Law

Doe argues for what appears to be a "but for" strict liability rule for the application of vicarious liability. Doe contends that an employer is strictly liable for the acts of an employee if those acts occurred after the employee began work and had previously performed some duties within the scope of assigned duties. *Doe OB*, at 11-13, 15-18. In raising this argument, Doe relies on portions of the decision in *Draper* and *Simms v. Christiana Sch. Dist.*, 2004 WL 344015 (Del. Super. Jan. 30, 2004). Doe's theory of recovery is contrary to the holding and reasoning of both of these cases and other Delaware case law.

Doe cites to *Draper* for the argument that under the Restatement (Second) of Agency § 228, the Court should only focus generally on the duties of the employee and not look to the employee's specific misconduct except with regard to the issue of expectablility. *Doe OB*, at 12 (citing *Draper*, 181 A.2d at 569). The *Draper* decision involved an incident where a construction worker struck a driver who had mistakenly driven down a blocked off road. *Draper*, 181 A.2d at 566-67. The *Draper* Court found that it was not entirely unexpected that a construction worker whose job was to enforce security of a road site would use unnecessary force to secure the site. *Id.* at 572-73. The Court made clear that the

force or violence used by the employee had to be related to the employee's duties. The Court noted that "if a servant elects to perform his duties by the use of unauthorized violence, the master will be liable if the violence is not unexpectable, **and if it is used to carry out the duties of the employment.**" *Id.* at 572 (emphasis added). The *Draper* Court did not adopt a "but for" test to apply vicarious liability. The case is also distinguishable from the instant appeal as there is no evidence that Giddings' use of force to rape a suspect was in any way related to his statutory duties under Delaware law, 11 *Del. C.* § 8302(a).

In *Simms*, the Superior Court held that repeated sexual abuse of a mentally impaired student by a residential counselor could not be found within the scope of the employee's duties as a residential counselor. *Simms*, at *7. Doe attempts to distinguish this case on the basis that the employee was not engaging in employment activity at the time of the sexual abuse. *Doe OB*, at 17. The *Simms* Court did not adopt a "but for" test, but instead considered a number of factors under Restatement (Second) of Agency § 229. Those factors include: whether the act is one commonly done by such employees, the similarity of the act done to the act authorized, the extent of the departure from the normal method of accomplishing an authorized result, and whether the act is seriously criminal. *Simms*, at *5. Based on an analysis of these factors, the Superior Court found

that the employee had clearly taken advantage of his position as a counselor but was not engaged in employment related activity when sexually abusing the plaintiff. *Id.* at *7. The *Simms* court did not adopt a "but for" test, and instead employed the § 229 factors which closely mirror the § 228 test adopted in *Draper*.

A review of other Delaware decisions has not uncovered any case that would hold an employer strictly liable for intentional criminal acts committed by an employee under a "but for" analysis. *See Wilson v. Joma,* 537 A.2d 187, 189 (Del. 1988)(analyzing dual purpose rule under Restatement (Second) of Agency § 228); *Coates v. Murphy,* 270 A.2d 527, 528 (Del. 1970)(applying Restatement 2d, Agency § 228 to question of whether employee on lunch was within scope of employment); *Johnson v. E.I. DuPont,* 182 A.2d 904, 906 (Del. Super. 1962)(act by employee attorney was outside authorized duties and did not serve the employer, if at all, only to an insufficient degree); *Keating v. Goldick,* 2004 WL 772077, at *3-4 (Del. Super. 2004)(common sense that drunken brawl by roofers who used company truck after hours did not engage in conduct to benefit employer); *A.R. Anthony & Sons v. All-State Investigation Sec. Agency, Inc.*, 1983 Del. Super. LEXIS 647, at *3-4, 8-9 (Del. Super. 1983)(acts by security guard in starting fire at bus depot were not a direct outgrowth of his job duties and did not further employer's business).

d. The California Decision in Mary M. v. Los Angeles and Restatement (Second) of Agency § 219 are contrary to Delaware law and should not be followed by this Court.

i. *Mary M Decision.* Doe urges this Court to adopt the reasoning and holding of the Supreme Court of California in *Mary M. v. Los Angeles*, 814 P.2d 1341 (Cal. 1991). The California Supreme Court ruled that when an on-duty police officer misuses his official authority to rape a woman, then his employer can be held vicariously liable. *Id.* at 1352. The *Mary M* Court ruled that a jury could find that the officer who raped a suspect was acting in the course of his employment. *Id.* The Court reached this holding on purely policy reasons, *id.* at 1348-49, and did not follow the Restatement (Second) of Agency § 228 test used in Delaware cases. The Superior Court rejected application of the *Mary M.* ruling on the ground that no Delaware court had ruled that the State police officers should be held to a higher standard of civil liability. *Doe Opinion*, at *10-11.

The State submits that this Court should also refrain from considering adoption of the policy based ruling in *Mary M.* The holding is contrary to the Restatement (Second) of Agency § 228 test set forth in *Draper* and followed by Delaware courts for sixty years. The *Mary M.* decision is also of questionable validity and has been harshly criticized by subsequent California decisions. *See Mary M.*, 814 P.2d at 1366 (Baxter, J., concurring) (majority

opinion will allow for vicarious liability whenever an on duty police officer commits rape or sexual assault against a citizen detained by officer's official authority). *See also Farmers Ins. Group v. Santa Clara*, 906 P.2d 440, 498-99 (Cal. 1995)(George, J., concurring)(police officers should be governed by same standard as all other employees as *Mary M.* was wrongly decided); *M.P. v. Sacramento*, 98 Cal. Rptr. 3d 812, 814 (Cal. Ct. App. 2009)(questionable whether holding in *Mary M.* is still viable). In addition, the *Mary M.* decision purports to carve out a special rule of liability for police officers who engage in criminal conduct which has the effect of holding police employers responsible for all acts of their police employees. This rule, to the limited extent it has been followed by other courts, appears to be the minority rule and should be rejected by this Court. *See Bates v. United States*, 701 F.2d 737, 741-42 (8th Cir. 1983) (conduct of military policeman in murdering and raping suspects not within scope of duties); *Rabon v. Guardsmark, Inc.*, 571 F.2d 1277, 1279 (4th Cir. 1978) (security guard's assault and rape of employee was manifestly not in furtherance of employer's business); *Green Cove Springs v. Donaldson*, 348 F.2d 197, 201 (5th Cir. 1965) (act of police officer committing rape of citizen was not to be expected by a person with prudent human foresight); *Gambling v. Cornish*, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977) (police officers who shot at and

then sexually assaulted citizen were not within scope of employment); *Webb v. Jewel Co.*, 485 N.E.2d 409, 410-12 (Ill. App. Ct. 1985)(employer not liable for acts of security guard in detaining and sexually assaulting customer); *Bates v. Doria*, 502 N.E.2d 454, 455-57 (Ill. App. Ct. 1985) (deputy sheriff who raped and stabbed citizen committed outrageous act outside scope of employment); *Barnett v. Clark*, 889 N.E.2d 281, 283-84, 286 (Ind. 2008)(under Restatement (Third) of Agency § 7.07, deputy in trustee's office who committed sexual assault of employee did not within scope of employee's duties); *Wolfe v. Anne Arundel County*, 761 A.2d 935, 940-42 (Md. Ct. Spec. App. 2000)(police officer's act of sexually assaulting a detainee was not within scope of employment; acts that are unprovoked, highly unusual, and quite outrageous tend to be considered purely personal), *aff'd*, 821 A.2d 52 (Md. 2003); *Heindel v. Bowery Savings Bank*, 138 A.D.2d 787, 788 (N.Y. App. Div. 1988) (act by mall security guard in raping customer was committed for personal motives and complete departure from work duties).

ii. Restatement (Second) of Agency § 219(2)(d). As an alternative theory of recovery, Doe cites to Restatement (Second) of Agency § 219(2)(d) as supporting recovery. This section provides:

(2) A master is not subject to liability for the torts

> of his servants acting **outside the scope of their employment**, unless:
>
> …
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id. (emphasis added).

The plain wording of § 219(2)(d) purports to hold an employer liable for acts of an employee committed outside the scope of the employee's duties. The commentary to § 219(2)(d) limits application of this provision to cases involving misrepresentation and deceit. *Zsigo v. Hurley Med. Center*, 716 N.W.2d 220, 224 (Mich. 2006); Combs, Casenote, *Costos v. Coconut Island Corp: Creating a Vicarious Liability Catchall Under the Aided-by-Agency-Relation Theory*, 73 U. COLO. L. REV. 1099, 1105-11 (2002)(comment e of § 219(2)(d) limits scope of section to cases of apparent authority, reliance, or deceit). The trial court correctly found that no Delaware court has ever adopted or approved of this provision of the Restatement. *Doe Opinion* at *4. Doe argues that "Section 219 (although different subsection) has been cited as setting forth the law in Delaware." *Doe OB* at 21-22 (citing *Draper*, 181 A.2d at 569). The *Draper* Court did not "adopt" § 219 as the law of Delaware; instead the Court merely cited to Restatement of Agency (2d) § 219, comment "a" for the purpose of general discussion on the nature of the master-servant employment

relationship. *Draper* specifically held that it was only considering the issue of when an employee acts within the scope of his employment, not imposing liability on an employer when an employee acts outside his work duties. 181 A.2d at 570. The Superior Court in *Simms* found no Delaware authority to support the application of § 219(2) and the Court declined to extend an employer's liability for acts of an employee outside the scope of his duties. *Simms*, at *8. The State notes that § 219(2)(d), to the extent it attempts to hold an employer liable for an employee's acts outside the scope of duty, is contrary to the provisions of 10 *Del. C.* §§ 4001-4002 which limit indemnification of state employees for acts that "arose out of and in connection" with the performance of an official duty.

The use of Restatement § 219(2)(d) has also been subject to sharp criticism and rejected by a number of courts. In *Zsigo,* the Michigan Supreme Court rejected § 219(2)(d) noting that a literal application of the exception would "amount[] to an imposition of strict liability upon employers. Indeed, it is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always 'aided in accomplishing the tort.'" 716 N.W.2d at 226. The *Zsigo* Court noted that due to the broad exception to vicarious liability created by the literal application

of § 219(2)(d), courts have generally limited application of this section to employee sexual harassment or discrimination cases. *Id.* at 227. *See also Mahar v. Stonewood Transport*, 823 A.2d 540, 546(Me. 2003)(declining to apply § 219(2)(d) to conduct of truck driver outside scope of duty as § 219 (2)(d) limited to acts of apparent authority or misrepresentation or deceit); *Doe v. Forrest*, 853 A.2d 48, 70 (Vt. 2004)(Skoglund, J., dissenting)(adoption of § 219(2)(d) creates a threat of vicarious liability that knows no borders; adoption of this section will cause unwarranted damage to public and private employers compelled to defend itself against the inevitable spate of lawsuits). The Court also should reject Restatement (Second) of Agency § 219(2)(d) as that section has been superseded by the provisions of the Restatement (Third) of Agency. The Restatement of Agency was updated in 2005 when the American Law Institute adopted and promulgated Restatement (Third) of Agency. This latest version of the Restatement is applicable to the events alleged in the plaintiff's complaint in 2009. This current version of the Restatement does not contain the provision of Restatement (Second) of Agency § 219. Instead, Restatement (Third) of Agency limits scope of employment to when "[a]n employee [is] performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course

of conduct not intended by the employee to serve any purpose of the employer." Restatement (Third) of Agency § 7.07. The former Restatement (Second) of Agency § 219(2)(d), along with other sections in the former Restatement, are now set forth in Restatement (Third) of Agency § 7.08. *See* Restatement (Third) of Agency § 7.08 *Reporter's Notes*, at *234). Section 7.08 provides:

> A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.

Id. *See also* Restatement (Third) of Agency § 7.08 Comment b at *227 ("When an agent's conduct constitutes a tort such as assault or arson, only in unusual circumstances would a third party harmed by the tort believe that the agent acted with actual authority in committing it. It is also unlikely that such tortuous conduct would occur while an agent acts with actual authority."). The Restatement (Third) of Agency also makes clear that the doctrine of apparent authority is generally inapplicable to claims against the State. Restatement (Third) of Agency § 2.03 Comment g ("The doctrine of apparent authority generally does not apply to sovereigns and entities that have been created by sovereigns to achieve governmental ends.").

Doe has advanced an argument that this Court has previously

ruled that it is not bound by changes from a Second to a Third Restatement. *Doe OB* at 22-23 (quoting *Riedel v. ICI Americas, Inc.*, 968 A.2d 17, 20-21 (Del. 2009). The *Riedel* decision is limited to this Court's ruling declining to adopt sections of the Restatement (Third) of Torts as those provisions were in conflict with Delaware law on duty. *Id.* The *Riedel* decision did not address any provision of the Restatement (Third) of Agency and the Court is able to do so at this time. Doe has not made any substantive argument as to why this Court should not follow the new Restatement (Third) of Agency.

The State notes that a number of Delaware trial courts have previously adopted the Restatement (Third) of Agency as well as surrounding jurisdictions. *See Bohnsack v. Varco, L.P.*, 668 F.3d 262, 273 (5th Cir. 2012) (recognizing vicarious liability test in Restatement (Third) of Agency § 7.07(1)); *Engler v. Gulf Interstate Engineering, Inc.*, 280 P.3d 599, 602 (Az. 2012) (adopting Restatement (Third) of Agency § 7.07 for scope of employment questions); *Barnett,* 889 N.E.2d at 283-84, 286 (Ind. 2008)(applying Restatement (Third) of Agency § 7.07 to claim against employer for sexual assault by deputy sheriff); *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 296 n.5 (Me. 2009)(Restatement (Third) of Agency § 7.07 is stated in more general terms and takes into account changes in workplace practices); *84 Lumber Co. v. Derr,*

2010 WL 2977949, at *4 (Del. Super. 2010) (application of Restatement (Third) of Agency § 3.03 on question of apparent authority); *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *6 n.22 (Del. Ch. 2009) (applying Restatement (Third) of Agency § 8.06 on duties of agent regarding property of master); *Nichols v. Lewis*, 2008 WL 2253192, at *4-5 (Del. Ch. 2008)(application of apparent authority provisions in Restatement (Third) of Agency § 1.03, 2.01, 3.03), *aff'd*, 956 A.2d 31 (Del. 2008); *Pisano v. Delaware Solid Waste Auth.*, 2006 WL 3457686, at *9 (Del. Super. 2006) (Restatement (Third) of Agency "provides that doctrine of apparent authority generally does not apply to governmental entities.").

For these reasons, the State submits that the Court should not adopt Restatement (Second) of Agency § 219(2)(d) as the law of Delaware, or in the alternative the Court should adopt the current provisions of the Restatement (Third) of Agency §§ 7.07-7.08. Even if the Court considers applying § 219(2)(d), there is no legal basis for Doe to recover on the facts of this case as a matter of law. The plaintiff conceded in her testimony that she was aware that Giddings was breaking the law at the time of the sexual assault, (*Doe Deposition* at 44)(B-9), and cannot now claim that she relied on Giddings' apparent authority to engage in that conduct. Furthermore, there is no allegation or record evidence that Giddings engaged in any misrepresentation or deceit to trick Doe

into believing that the sexual assault was authorized. As such, the Restatement (Second) of Agency § 219 (2)(d) does not apply to create a theory of recovery in this case.

e. The provisions of the State Self-Insurance Plan do not support Doe's argument that the criminal acts by Giddings were foreseeable.

Doe argues that the provisions of the State Police Self-Insurance Plan support her argument that acts of rape by an on-duty officer is foreseeable. OB at 23-24. To advance that argument, Doe cites to the definition of "personal injury" and "wrongful act" in the policy and argues that, from these definitions, the State must have anticipated that officers would engage in bad acts on duty which must therefore put the State on notice that troopers would commit the act of rape. Doe fails to acknowledge that the State Policy specifically excludes coverage for criminal acts of an employee (Exclusion B) (B-19) and excludes coverage for acts committed outside the scope of an employee's employment duties (Definition of Personal Injury) (B-19). Insurance policies excluding criminal conduct or intentional torts have been found enforceable by the courts. *See Farmer in the Dell Enterprises, Inc. v. Farmers Mutual Ins. Co.*, 514 A.2d 1097, 1099-1100 (Del. 1986) (intentional tort exclusion in commercial policy enforceable); *Continental Ins. Co. v. Kovach*, 2007 WL 2343771, at *12 (W.D. Pa. 2007) (courts have upheld criminal act exclusions in

insurance policies). Doe's argument appears to be that the State, by excluding these risks from coverage, should therefore be found to have been aware that the risks possibly existed and should therefore be found legally responsible under a strained theory of forseeability. The State submits that the Superior Court correctly found this argument "far-fetched." *Doe Opinion* at *4; *see also Green Cove Springs,* 348 F.2d at 201 ("[T]he appropriate test of foreseeability is whether the type of negligent act involved in a particular case has so frequently previously resulted in the same type of injury or harm that in the field of human experience the same type of result may be expected again."). In addition, State notes that evidence of liability insurance is excluded under D.R.E. 411. As this evidence would not be admissible at trial, Doe cannot attempt to rely on it at the summary judgment stage. *See Krohn v. New Jersey Full Ins. Underwriters Assoc.*, 720 A.2d 640, 642 (N.J. Super. App. Div. 1998) (general rule under N.J.R.E. 411 that probative value of information about insurance is substantially outweighed by the potential for due prejudice).

II. THE SUPERIOR COURT'S DECISION SHOULD BE AFFIRMED ON THE INDEPENDENT BASIS THAT THE DOE'S CLAIM IS BARRED BY SOVERIGN IMMUNUTY.

Question Presented

Could this Court affirm the trial court decision based on the independent grounds that plaintiff's claims are barred by sovereign immunity even through the trial court did not rule on that issue presented by defendant? This issue was raised in the State's motion for summary judgment, at *4 contained in the Appellant's Appendix at A-12.

Standard and Scope of Review

The Court reviews the applicability or construction of a statute *de novo*. *State v. Lewis,* 797 A.2d 1198, 1199 (Del. 2002). The Court may affirm on grounds presented to the trial court, but not decided by it. *Unitrin, Inc. v. American General Corp.,* 651 A.2d 1361, 1390 (Del. 1995)

Argument

The Superior Court's challenged Decision may also be affirmed on the independent grounds in the undisputed record that Doe's claims are excluded from coverage and therefore not subject to a waiver of sovereign immunity. *See* 18 *Del. C.* § 6511;[1] *Pauley*

1. 18 *Del. C.* Section 6511 provides: The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by

v. Reinoehl, 848 A.2d 569, 576 (Del. 2004)(State waives sovereign immunity by purchase of insurance only to the extent that coverage is available). The State's self-insurance plan, which is based on an expired commercial insurance policy (B-19), does not provide coverage for criminal acts of an employee (Exclusion B[2]) (B-19), or for acts committed outside the scope of an employee's employment duties (Definition of Personal Injury[3] (B-19). The State Tort Claims Act expressly limits indemnification to those cases where the state employee's conduct would be immune under 10 *Del. C.* § 4001. Moreover, section 4005 authorizes the purchase of insurance, but excludes coverage for any act not subject to the immunities under § 4001, "any applicable policy of insurance to the contrary notwithstanding." *See* 10 *Del. C.* § 4002, §4004 (restricting identification to instances where there would be immunity under § 4001). There is no other evidence in the record to support a finding that the State of Delaware has waived its sovereign immunity and consented to suit in this

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self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.

2. [This policy does not apply] "to damages arising out of the willful violation of the penal law or ordinance committed by or with the knowledge or consent of any insured…"

3."[]However, no act shall be deemed to be the result in personal injury unless committed in the regular course of duty by the Insured."

matter.

The Superior Court's May 7, 2012 decision may be affirmed by this Court on the grounds of sovereign immunity. *Unitrin, Inc.*, 651 A.2d at 1390 ("We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court.") (citation omitted)).

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 October 17, 2012, 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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