

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALFRED ROGERS,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03C-03-218-PLA
	)	
DELAWARE STATE	)	
UNIVERSITY, a Delaware	)	
corporation and UMIYA, t/a	)	
DOVER INN, a limited	)	
partnership,	)	
Defendants.	)	

Submitted: September 19, 2005
Decided: October 5, 2005

UPON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
GRANTED.

Philip M. Finestrauss, Esquire, Wilmington, Delaware, Attorney for
Plaintiff.

William L. Doerler, Esquire, Wilmington, Delaware, Attorney for
Defendant.

ABLEMAN, JUDGE

Plaintiff Alfred Rogers (“Rogers”) has sued the Delaware State University (“DSU” or “University”) to recover damages for injuries incurred as a result of a physical attack that occurred at the Dover Inn. On motion for Summary Judgment, DSU argues that it is protected by the State’s sovereign immunity, or in the alternative, by the State Tort Claims Act (“Act”). DSU additionally argues that it cannot be held liable because the attack was unforeseeable.

Having considered the arguments carefully, the Court finds that DSU has no claim to sovereign immunity. In the Court’s judgment however, DSU is entitled to Summary Judgment because the attack was neither preventable nor foreseeable thereby eliminating any duty DSU had to protect Plaintiff. The Court further finds that DSU’s failure to provide security patrols at the Dover Inn was not the proximate cause of Plaintiff’s injuries. Accordingly, there being no genuine issue of material fact, DSU is entitled to judgment as a matter of law. The Motion for Summary Judgment is therefore GRANTED.

I. Statement of Facts

In the Spring of 2001, DSU rented twelve rooms from the Dover Inn for overflow student housing. Students were expected to move back on-campus as soon as room became available. Plaintiff Rogers was one of the students offered housing at the Dover Inn.

On March 23, 2001, at about 6:45 p.m., Rogers was sitting in his car in the parking lot of the Dover Inn, warming it up, when his friend,

Chemica Wyche, drove into the parking lot, and stopped her vehicle next to his car. She jumped out of her car and into Rogers'. Ms Wyche was upset and crying and asked Rogers to take her to the police station because her ex-boyfriend, Michael Denby ("Denby"), was chasing her.

At this point, Denby abruptly drove into the parking lot, got out of his vehicle and began shouting for Ms. Wyche to get out of the car. Instead, Ms. Wyche begged Rogers to take her to the police station. As Rogers was backing the car out of its parking space, Denby began pounding on the car with his forearm. Ms. Wyche testified that she had earlier told Denby that she was seeing Rogers and that they were getting to be more than just friends.

After dropping Ms. Wyche at the police station, Rogers returned to the Dover Inn to collect Ms. Wyche's car and deliver it to her at the police station. Rogers' roommate accompanied him so Rogers would not have to wait for Ms. Wyche. The police officer taking Ms. Wyche's statement asked Rogers whether Ms. Wyche would be staying with him and Rogers informed him she would not. When Rogers' roommate indicated that he thought Rogers should let Ms. Wyche stay with them, Rogers replied, "That's how innocent people get hurt." There is no indication from the record that either Rogers or the police ever contacted any security officer, policeman, or official at DSU to advise the University of the incident earlier that evening.

Rogers later returned to the Dover Inn around 11:45 p.m. As he was turning off the car's engine, Rogers heard a gunshot and turned toward the noise. The next shot went through the driver's side window and struck him in the face. Rogers testified that as his head jerked back from the impact, he saw the shooter, whom he unequivocally identified as Denby, step into the light, apparently from an alley between the motel buildings. Rogers sustained serious injuries as a result of the gunshot.¹

II. Legal Standard

A motion for summary judgment is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.² After the moving party makes this initial showing, the burden then shifts to the non-moving party to demonstrate that issues of material fact do exist.³ The Court must view the facts in a light most favorable to the non-moving party.⁴ This means that the Court will accept as established all undisputed factual assertions. The court will then draw all rational inferences that favor the non-moving party.⁵

¹ The Dover Inn was originally named as a defendant but has since been dismissed by Plaintiff.

² *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

³ Super. Ct. Civ. R. 56(e); *Lum v. Anderson*, 2004 WL 772074 (Del. Super.) (citing *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979)).

⁴ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

⁵ *Id.*

III. Discussion

A. DSU Is Not Protected By Sovereign Immunity

Defendant's first argument is that, as an agency of the State of Delaware, DSU is entitled to the State's sovereign immunity protection, thereby precluding it from liability in lawsuits such as the instant one.

The doctrine of sovereign immunity is written into the Delaware Constitution by Article I, § 8. This immunity is an absolute bar to all suits against the State and extends to all state agencies, unless waived by the General Assembly.

DSU contends that it is a state agency and therefore protected from liability. Specifically, DSU argues that by virtue of the University's status as a public instrumentality serving the public interest in education, the money granted the University by the State,⁶ its statutorily granted corporate status,⁷ and the gubernatorially-appointed Board members⁸ it is entitled to sovereign immunity protection. While true, these factors are inapposite because an instrumentality established by the State to discharge a public purpose does not necessarily render it a state agency entitled to sovereign immunity.⁹

The degree of discretion exercised by the governing body of a state instrumentality has previously been held to be of primary importance in

⁶ See e.g. 14 Del. C. § 6508 (providing that twenty percent of federal money received for state land grant universities must be paid to DSU).

⁷ *Id.* § 6501.

⁸ *Id.* § 6504(b). Six of the eleven Trustees are appointed and commissioned by the Governor. The other five are elected by a majority of the Board.

⁹ *Beck v. Claymont School Dist.*, 407 A.2d 226, 229 (Del. Super. Ct 1979) *aff'd*, 424 A.2d 662 (Del. 1980).

determining whether a specific activity or undertaking is so closely state-connected as to allow it to fall within the protections of sovereign immunity.¹⁰ DSU's Board of Trustees was granted the exclusive authority to "conduct all concerns of the institution" by 14 *Del. C.* § 6505. As such, DSU essentially has complete autonomy within its statutory framework and is, therefore, sufficiently independent of State control to be outside the protections offered by sovereign immunity.

Even more compelling is DSU's incorporated status, as established by 14 *Del. C.* §§ 6501 and 6503, in which the General Assembly specifically provided that DSU shall be incorporated and have all the powers and franchises incident to a corporation. The Delaware General Corporation Law provides that every corporation has the power to sue and be sued in its corporate name.¹¹ Relying on *Kennerly v. State*,¹² DSU argues that its general designation as a public corporation is not sufficiently specific to be considered a waiver of immunity.¹³ The instrumentality in *Kennerly*, however, was the Delaware Administration for Specialized Transportation, incorporated as "a body corporate and politic,"¹⁴ but not granted all powers incident to a corporation. The decision by the General Assembly to incorporate DSU, granting the

¹⁰ *Id.* at 229.

¹¹ 8 *Del. C.* § 122(2).

¹² 705 A.2d 244 (Del. 1998).

¹³ Plaintiff also relies on *Heany v. New Castle County*, 672 A.2d 11 (Del. 1995), for the proposition that general enabling statutes are not sufficient to waive immunity. The discussion of immunity waiver in that case, however, applies to statutory exceptions to immunity granted under the County and Municipal section of the Tort Claims Act, not waiver of sovereign immunity via incorporation.

¹⁴ 2 *Del. C.* §§ 1304, 1307.

University “all the powers and franchises incident to a corporation” indicates a specific intent to waive sovereign immunity protection.¹⁵ This Court has previously recognized that waiver in *Brandywine Lock & Safe Co., Inc. v. John L. Briggs & Co.*¹⁶ when it held that the Delaware State University (then College) was subject to a mechanic’s lien as a corporation.¹⁷

Even if DSU were protected by sovereign immunity, DSU waived any entitlement it may have had by purchasing liability insurance. In 1953 the General Assembly enacted 18 *Del. C.* § 6511 to permit suits for injury caused by the State while still protecting the State Treasury.¹⁸ To accomplish this end the General Assembly waived the State’s defense of sovereign immunity where insurance coverage was procured pursuant to an intended state insurance program.¹⁹ Funding for the insurance program never materialized and the application of the statute was disputed.²⁰ Initially the Delaware Supreme Court held merely that the existence of some commercial insurance *could* waive sovereign immunity.²¹ Later, the Supreme Court held that § 6511 reflected a public policy favoring allowing suit against the State where insurance

¹⁵ *Wilmington Hous. Auth. v. Williamson*, 228 A.2d 782 (Del. 1967).

¹⁶ 1984 Del. Super. LEXIS 796.

¹⁷ 25 *Del. C.* § 2704; *Brandywine Lock & Safe*, 1984 Del. Super. LEXIS 796 at *11.

¹⁸ *Turnbull v. Fink*, 668 A.2d 1370, 1375 (Del. 1995).

¹⁹ 18 *Del. C.* § 6511 states in part:

The defense of sovereign immunity is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program...

²⁰ *Doe v. Cates*, 499 A.2d 1175 (Del. 1985).

²¹ *Id.* at 1183.

was purchased.²² As a result, the Court held, the existence of commercial insurance *would* waive sovereign immunity.²³ Most recently, in *Pauley v. Reinoehl*, the Supreme Court held that the purchase of insurance waives sovereign immunity to the extent coverage is available. DSU admits that it carries liability insurance. As such, DSU has waived sovereign immunity to the extent of the coverage.

B. DSU is not Protected by the State Tort Claims Act

DSU additionally contends that its liability is limited under the State Tort Claims Act.²⁴ The Act protects the State and its employees and agencies from liability where their actions (1) arose from official duties involving the exercise of discretion; (2) were done in good faith; and (3) were without gross or wanton negligence. The term ‘state agency’ has been construed broadly by the Delaware Supreme Court to include state instrumentalities and organizations that would not otherwise be considered “an arm of the State” for the purposes of sovereign immunity.²⁵

The General Assembly, however, has the power to waive the immunity granted by the Act by providing the state agency with the ability to sue and be sued. The initial Tort Claims Act was passed by the General Assembly in 1979 and applied only to county and municipal

²² *Kennerly v. State*, 580 A.2d 561 (Del. 1990).

²³ *Id.* at 566 (“The General Assembly’s adoption of 18 *Del. C.* § 6511... reflects a public policy that liability insurance purchased with public funds must be considered as a source for payment of claims against State agencies.”).

²⁴ 10 *Del. C.*, Ch. 40.

²⁵ *Sandt v. Delaware Solid Waste Auth.*, 640 A.2d 1030 (Del. 1994).

entities. That statute, now Subchapter II of the Act, provides “[t]hat a [municipal or county] governmental entity has the power to sue or be sued... shall not create or be interpreted as a waiver of the immunity granted in this subchapter.”²⁶ The following year, the General Assembly passed Subchapter I, limiting liability for state agencies and officers. Subchapter I does not contain a “sue or be sued” disclaimer similar to that in Subchapter II.²⁷

The Supreme Court of Delaware has previously recognized that the absence of the disclaimer in Subchapter I demonstrates that the General Assembly intended the provision extending immunity to corporate entities with the power to sue and be sued to apply only to county and municipal entities, and not to incorporated state agencies.²⁸ Therefore, the power to sue and be sued operates to waive Tort Claims Act immunity where a State instrumentality is involved.²⁹

DSU is almost certainly a state agency for the purposes of the act, and although the actions here meet the criteria for immunity under the Act in that they are discretionary, in good faith, and without gross negligence, DSU’s Tort Claims Act immunity has been waived by the General Assembly by virtue of its incorporation and grant of all powers incident thereto.³⁰

²⁶ *Id.* § 4011(a) (emphasis added).

²⁷ *Id.* § 4001.

²⁸ *Sandt*, 640 A.2d at 1033.

²⁹ *Masten v. State*, 626 A.2d 838 (Del. Super. Ct. 1991).

³⁰ 14 *Del. C.* §§ 6501, 6503.

C. The Question of Negligence

While DSU's reliance upon sovereign immunity or the State Tort Claims Act is unavailing with respect to the University, an analysis of the relationship of DSU to the Plaintiff, the particular duty, if any, it owed to Plaintiff as a result of that relationship, the control DSU had over the premises involved, and the question of foreseeability of the harm sustained by Plaintiff, leads ultimately to the conclusion that Summary Judgment in favor of Defendant is appropriate in light of the facts of this case.

Plaintiff maintains that DSU is liable for his injuries because DSU failed to extend University security services to the overflow student housing at the Dover Motel Inn. Because the University agreed to provide Plaintiff with on-campus student housing, but instead substituted off-campus overflow housing, the relationship between DSU and Plaintiff was such that DSU owed a duty to Plaintiff to provide reasonably safe housing. Though DSU owed Rogers a duty to protect, as will be discussed more fully below, DSU is not an insurer of Plaintiff's safety and DSU had no duty to protect Plaintiff against unforeseeable attacks. Furthermore, DSU's failure to provide security patrols was not the proximate cause of Plaintiff's injury because the presence of a security guard would not have deterred an ambush spurred by a personal vendetta.

1. DSU Owed No Duty to Protect Plaintiff from Unforeseeable Harm

Negligence is generally defined as a failure to meet the standard of care required by law.³¹ In order to be held liable, however, the defendant must have owed a legal duty to protect the plaintiff from the risk of harm that caused his injuries.³² Whether a duty exists is purely a question of law for the Court to decide by reference to the body of statutes, rules, principles and precedents that make up the law.³³

The existence of a duty depends, in part, on the legal relationship between the parties.³⁴ This is because duty is essentially a question of whether the relationship between the parties gives rise to a legal obligation to act for the benefit of the injured party.³⁵ Duty is also predicated on the foreseeability of the occurrence in question.³⁶ That is to say, duty is determined not only by the relationship between the parties but also by the foreseeable consequences implicated by the relationship in question.³⁷ This is because the existence of a duty does not transform an actor into an insurer of the injured party's safety.³⁸

³¹ *Furek v. Univ. of Delaware*, 594 A.2d 506, 516 (Del. 1991).

³² *New Haverford P'ship v. Stroot*, 772 A.2d 792, 798 (Del. 2001) ("To state a claim for negligence one must allege that defendant owed plaintiff a duty of care; defendant breached that duty; and defendant's breach was the proximate cause of plaintiff's injury.").

³³ *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002).

³⁴ *O'Connor v. Diamond State Telephone Co.*, 503 A.2d 661, 663 (Del. Super. Ct. 1985).

³⁵ *Kuczynski v. McLaughlin*, 835 A.2d 150, 153 (Del. Super. Ct. 2003) (citing 57A Am. Jur. 2d *Negligence* § 81 (1989)).

³⁶ *Id.* at 154.

³⁷ 57A Am.Jur. 2d *Negligence* § 76 (2004). The Court notes that foreseeability is also a component of causation analysis. *See, e.g., Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821 (Del. 1995). For now, the Court will focus on foreseeability as it relates to duty analysis, to be followed by causation analysis *post*.

³⁸ *See, e.g., Marshall v. Univ. of Delaware*, 633 A.2d 370 (Del. 1993) (a University is not an insurer of student safety); *Jardel v. Hughes*, 523 A.2d 518 (Del. 1987) (landowner not insurer of visitor's safety).

Thus, there can be no duty to prevent an unforeseeable harm even where there may be a general duty to protect.³⁹

An occurrence cannot be considered foreseeable unless Defendant knows or has reason to know that it is likely to occur.⁴⁰ In negligence actions the question is whether the risk of particular consequences is "sufficiently great to lead a reasonable man ... to anticipate them, and to guard against them."⁴¹ Past experience may provide a reason to know of the likelihood of conduct by third parties.⁴² The relationship of the Defendant to the Plaintiff and to the premises are both factors to be considered. The key factor in this case, however, is the foreseeability of the harm.

The question of the legal relationship between a University and its students was examined at length in *Furek v. University of Delaware*.⁴³ In *Furek*, the Delaware Supreme Court held that a University could no longer be considered to stand *in loco parentis* to its students. Still, the Court was careful to note: "[w]hile we agree that the University's duty is a limited one, we are not persuaded that none exists."⁴⁴ The *Furek* Court went on to find that the University of Delaware could be held liable for dangerous hazing practices of on-campus fraternities as an assumed

³⁹ See *Brower v. Metal Indus., Inc.*, 719 A.2d 941 (Del. 1998) (holding that manufacturer owed no duty to persons harmed by the unforeseeably improper use of the product).

⁴⁰ *Furek*, 594 A.2d at 521.

⁴¹ *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981) (citing W. Prosser, *The Law of Torts* 145 (4th ed. 1971)).

⁴² *Jardel*, 523 A.2d at 524-25; *Davis v. Delaware State Educ. Ass'n, Inc.*, 1989 WL 167407 (Del. Super. Ct.).

⁴³ 594 A.2d 506 (Del. 1991).

⁴⁴ *Id.* at 517.

duty imposed under Restatement § 323,⁴⁵ and under a landlord-invitee relationship.⁴⁶ The duty ascribed to the University of Delaware in *Furek* under § 323 was based on the conclusion that the University's anti-hazing policy and the weak attempts to enforce it constituted an assumed duty. That duty was founded on *Mullins v. Pine Manor College*⁴⁷ in which the Supreme Judicial Court of Massachusetts upheld a jury verdict against a college for failure to provide adequate security to a student who was assaulted in a dormitory.⁴⁸ This Court has since recognized the duty of a University to protect its students residing in their dormitories.⁴⁹

In the case at bar, Plaintiff argues that DSU had a duty to provide security services at the Dover Inn by virtue of the student housing made available there by the University. Plaintiff further contends that DSU undertook to provide, and made representations regarding, security services for residential student areas. DSU counters that the Dover Inn is a public motel located on private property, that the Dover Inn is outside the jurisdiction of the University Police,⁵⁰ and that DSU can only be held to have assumed a duty to protect on-campus residential

⁴⁵ Restatement (Second) of Torts § 323 (2004).

⁴⁶ *Furek*, 594 A.2d at 520-23.

⁴⁷ 449 N.E.2d 331 (Mass. 1983).

⁴⁸ *Id.* at 520.

⁴⁹ *Pochvatilla v. University of Delaware*, 2005 WL 434495 (Del. Super. Ct.).

⁵⁰ 14 *Del. C.* § 6503(b) states in part:

The University police shall be law-enforcement officers of the State and conservators of the peace with the right to investigate and arrest, in accordance with the laws of the State, any person for violation of federal or state laws or applicable county or city ordinances when such violations occur on any properties or facilities which are under the supervision, regulation and control of the Delaware State University or on contiguous streets and highways.

students because the University never explicitly indicated that it would provide security services at the Dover Inn.

Restatement § 323 offers a persuasive rationale for a University's duty to provide reasonably safe housing to the students it moved off-campus. Section 323 addresses the duty owed by one who assumes direct responsibility for the safety of another through the rendering of services:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

DSU placed Plaintiff at the Dover Inn because the University was unable to accommodate him on-campus, as it had undertaken to do. The Dover Inn was temporary student housing provided and arranged by DSU, and as soon as on-campus housing became available, students moved from the Dover Inn back to dormitories on-campus. It was reasonable for the overflow students to believe that the substitute off-campus housing would meet the same standards as that offered to students living on-campus with regard to quality and reasonable safety, because DSU had implicitly assumed a duty to provide reasonably safe housing to students who requested it. DSU cannot claim, as it has attempted herein, that its duty to the students no longer existed the moment it moved the students off-campus. It would be an extraordinary

leap of logic to imagine that DSU would be within its rights to place students in uninhabitable or unsafe accommodations as a temporary substitute for reasonably safe and habitable housing on DSU property.

While it is true that the University police do not have the statutory right to arrest or investigate individuals off University property, the statute does not absolve DSU of duties the University voluntarily assumed. University Police may have no jurisdiction to arrest or investigate outside DSU property limits, but the statute does not prohibit University Police from patrolling areas where students were temporarily housed under University authority. Alternatively, DSU could have assigned their duty contractually to the Dover Inn to provide for the students' reasonable protection.

Although DSU had assumed a duty to provide the displaced students with reasonably safe accommodations, the University did not assume a duty as an absolute insurer of the students' safety. The *Furek* decision noted that "[t]he university is not an insurer of the safety of its students nor a policeman of student morality..."⁵¹ The University, though it had a duty to protect, had only a duty to protect against reasonably foreseeable occurrences.

⁵¹ *Furek*, 594 A.2d at 522.

With respect to the foreseeability of crimes, the only relevant criminal activity is that occurring on the premises in issue.⁵² Evidence of crimes occurring in the area, but not on the property, cannot be used as a basis for determining what a defendant knew or should have known regarding the risks of criminal activity on his property.⁵³ Moreover, evidence of only one prior criminal incident, irrespective of a higher crime rate in the area of the property, is insufficient as a matter of law with regard to the issue of foreseeability.⁵⁴

Denby's attack on Plaintiff was planned as an ambush and could not have been reasonably foreseen by DSU. DSU had no knowledge, and was not informed, of the incident involving Rogers, Ms. Wyche and Denby earlier that day. Indeed, the one individual who may have been in the best position to foresee the attack was Plaintiff himself. Plaintiff even acknowledged to his roommate that he wanted to avoid any involvement between Wyche and Denby because "innocent people get hurt that way." Plaintiff, however, failed to notify DSU about the earlier events of the day, rendering DSU without knowledge of the altercation and without any forewarning of potential problems at the motel. Without such

⁵² *Davis v. Delaware State Ed. Ass'n Inc.*, 1989 WL 167407 at 3 (Del. Super.) (rejecting plaintiff's effort to have the Court adopt a "totality of circumstances" test and consider criminal activity in the vicinity of defendant's property when determining the foreseeability of criminal activity).

⁵³ *Id.* at 4 (granting summary judgment in favor of the defendant in a premises liability parking lot rape case. The Court found that "defendant should not have realized that its parking lot involved an unreasonable risk of harm" where there was only one prior criminal incident on the property, regardless of the crime rate in the vicinity).

⁵⁴ *Id.* at 4.

information, which could easily have been provided by Plaintiff, DSU had no reason to foresee a possible reprisal by Denby.

While DSU had assumed a duty to protect students to whom it offered housing, DSU had no duty to prevent this unforeseeable attack against Plaintiff. Because DSU was under no duty, the University cannot be held liable for Plaintiff's injuries.

2. DSU's Failure to Provide Security Patrols at the Dover Inn Was Not a Breach of Duty

Summary judgment remains appropriate in this case even if the Court were to assume, *arguendo*, that DSU had a duty to prevent this particular attack. DSU is entitled to judgment as a matter of law because no reasonable jury could find that DSU's failure to provide for patrols of the Dover Inn was the proximate cause of Plaintiff's injuries.

Where a duty of care does exist, it is measured in terms of reasonableness.⁵⁵ This is because negligence cannot be predicated on a failure to anticipate extraordinary and unprecedented acts by others.⁵⁶ The attack in this case was planned and targeted, the result of a jealous ex-boyfriend, and, as such, constitutes an intervening, superceding cause. Denby had apparently lain in wait for Plaintiff's return to the motel, firing at Plaintiff almost immediately upon his entering the parking lot. Plaintiff had just turned off his car and was shutting off his lights when he heard the first shot. There was no forewarning or

⁵⁵ *Delmarva Power & Light Co*, 435 A.2d at 718.

⁵⁶ *Suburban Propane Gas Corp. v. Papen*, 245 A.2d 795 (Del. 1968).

confrontation just prior to the shooting and Rogers did not even know of Denby's presence in the parking lot until after the shooting had already begun.

An attack of this sort, vindicating a personal vendetta, is not one generally deterred by security patrols.⁵⁷ If Denby's purpose was to "get back at" Plaintiff, he would have done so despite security measures provided by DSU. Indeed, Denby had already been given explicit instructions from the police not to harass Wyche and was not particularly amenable to cooperation with the police or to conforming his behavior to the law. There is no evidence that a patrol would have deterred Denby, particularly because the attack was one of retaliation. Because Denby's actions were retaliatory, they could, and most likely would, have taken place anywhere. Had Denby not encountered Plaintiff in the parking lot of the motel, it is likely, given his mindset, that he would have found Plaintiff elsewhere as it was Plaintiff who had "wronged" him, and it was Plaintiff whom he was "out to get".

Plaintiff's only argument seems to be that the event was foreseeable because Denby's identity as the attacker has not been conclusively proven.⁵⁸ Assuming that the evidence could reasonably be construed to support such a finding of fact, the attack would still be

⁵⁷ Plaintiff suggests that DSU could have posted a permanent security guard at the Dover Inn. However, there was no evidence that DSU went to such lengths, even on-campus.

⁵⁸ This, notwithstanding Plaintiff's own testimony that he saw Denby step out into the light from an alleyway still firing the gun at him, and that he recognized that person as the man who had earlier pounded on his vehicle and was identified by Chemica Wyche as Denby, her ex-boyfriend. Pl.'s Dep. p. 11-16, Nov. 12, 2004.

unforeseeable. The Dover Inn had experienced no criminal incidents over the past three years and Plaintiffs entered no evidence to the contrary. As such, the attack would still have been unforeseeable.

Aside from the fact that Plaintiff himself is the one who identified Denby as his assailant, Plaintiff's reliance upon Denby's acquittal in the related criminal action is immaterial. The burden of proof is more exacting in a criminal prosecution, and there could be a whole host of reasons why a jury was unwilling to convict, including the potential that Denby's ex-girlfriend may have been less cooperative some months later, as is often the case in domestic violence-related prosecutions. Since it is the Plaintiff who has testified that Denby was the one who shot him, the Court is somewhat baffled by this attempt on Plaintiff's part to discredit his own identification.

Viewing the evidence in the light most favorable to the non-moving party, even though DSU may have had a duty to protect Plaintiff, DSU cannot be held liable for the unforeseeable targeted attack by Denby.

IV. Conclusion

For all of the foregoing reasons, this Court determines, as a matter of law, that DSU cannot avail itself of either sovereign immunity or the protections of the State Tort Claims Act. The Court further holds that, viewing the evidence in the light most favorable to the non-moving party, liability will not rest with DSU because it was under no duty to protect Plaintiff from a targeted attack. Moreover, the undisputed facts

reveal that DSU's actions were not the proximate cause of Plaintiff's injuries.

Accordingly, Defendant's Motion for Summary Judgment is hereby **GRANTED.**

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary - Civil
cc: Philip M. Finestrauss, Esquire
William L. Doerler, Esquire