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

Jane D.W. Doe,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N10C-08-178 PLA
	)	
Tanya D. Giddings,	)	
Administrator of the Estate	)	
of Joshua Giddings and the	)	
State of Delaware,	)	
Defendants.	)	

UPON PLAINTIFFS' APPLICATION FOR CERTIFICATION
OF INTERLOCUTORY APPEAL
DENIED

Submitted: May 11, 2012
Decided: May 23, 2012

This 23rd day of May, 2012, it appears to the Court that:

1. This case arises from the alleged sexual assault by a Delaware State Trooper against a suspect being held on shoplifting charges, ostensibly in exchange for not arresting the suspect on an outstanding capias. By opinion issued May 7, 2012, this Court granted summary judgment to the State of Delaware ("State") on Plaintiff Jane D.W. Doe's claim against the State.[1] The Court concluded that the State could not be held liable to the plaintiff on a theory of *respondeat superior*. The plaintiff has now filed this

[1] *Doe v. Giddings*, 2012 WL 1664234 (Del. Super. May 7, 2012).

application for certification of an interlocutory appeal from the Court's decision.

2. Under Delaware Supreme Court Rule 42, an interlocutory appeal will not be certified unless the trial court's order determines a substantial issue, establishes a legal right, and meets at least one of the five additional criteria set forth in Rule 42(b).[2] Plaintiff argues that the decision granting the State's Motion for Summary Judgment satisfies the requisite criteria under Rule 42(b)(i) because it presents an original question of law. In response, the State denies that the Court's decision granting summary judgment resolved an original question of law.

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[2] The five criteria provided under the rule are as follows:

> (i) *Same as Certified Question.* Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
> (ii) *Controverted Jurisdiction.* The interlocutory order has sustained the controverted jurisdiction of the trial court; or
> (iii) *Substantial Issue.* An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
> (iv) *Prior Judgment Opened.* The interlocutory order has vacated or opened a judgment of the trial court; or
> (v) *Case Dispositive Issue.* A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

Del. Supr. Ct. R. 42(b).

The reasons for which the Supreme Court will accept certified questions of law under Rule 41 include, in relevant part, that "[t]he question of law is of first instance in this State." Del. Super. Ct. R. 41(b)(i).

3. Contrary to Plaintiff's assertion, the Court's decision did not resolve an original question of law. The issue before the Court was whether the State could be held liable under the principles of *respondeat superior* for a State trooper's alleged rape of a suspect in a shoplifting case. It is well-established that Delaware courts apply section 228 of the Restatement (Second) of Agency in analyzing claims for recovery under the theory of *respondeat superior*.[3] Restatement section 228 provides that an employee's conduct is within the scope of his employment when:

> (1) It is of the kind he is employed to perform;
> (2) It occurs within 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.[4]

4. In her application, Plaintiff contends that the Court decided an original question of law when it refused to allow Plaintiff to hold the State liable under section 219 of the Restatement (Second) of Agency, which

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[3] *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 569 (Del. 1962); *see also Simms v. Christiana Sch. Dist.*, 2004 WL 344015, at *5 (Del. Super. Jan. 30, 2004).

[4] Restatement (Second) of Agency, §228 (1958). The Restatement (Second) of Agency has been superseded by the Restatement (Third) of Agency, which was adopted in 2005 and published in 2006. The analogous section in the Third Restatement provides that an "employee acts within the scope of employment [for purposes of imposing liability on an employer] when 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 (2006).

addresses liability pursuant to an agent's apparent authority. Plaintiff argues that she is entitled to recover under the principles of *respondeat superior* because the police officer "used his position and power as a police officer to commit sexual assault."[5]

5. Plaintiff's argument regarding section 219 is a red herring. Rather than presenting an original question of law, this case required the Court to apply a unique set of facts to the well-established principles of *respondeat superior*.[6] Delaware courts have routinely rejected the argument that outrageous conduct could serve as the basis for imposing liability on an employer under *respondeat superior* on the grounds that the employee's tortious conduct was simply an improper means of carrying out the employer's business. In *Draper v. Olivere Paving & Construction Co.*, for example, the Delaware Supreme Court declared that "liability for the torts of the servant is imposed upon the master when those torts are committed by the servant within the scope of his employment which, theoretically at least, means that they were committed in furtherance of the master's business."[7] The *Draper* court further noted that the Restatement of Agency contemplated that an employer could be held liable for an employee's torts,

[5] Plaintiff's Mot. for Cert. of an Interlocutory Appeal at ¶ 8.
[6] *See, e.g., Achtermann v. Bussard*, 2007 WL 1152720 (Del. Super. April 10, 2007).
[7] 181 A.2d 565, 569 (Del. 1967).

including intentional torts, when the act was "not unexpectable in view of the duties of the servant."[8] Thus, in *Simms v. Christina School District*,[9] this court rejected the plaintiff's argument that a residential counselor's sexual abuse of a teenage student was an improper method of teaching the student about sexual or hygiene matters, concluding that no reasonable juror could accept that argument. The *Simms* court also specifically declined the plaintiff's invitation to extend the doctrine of *respondeat superior* under Restatement (Second) of Agency section 219(2), which imposes liability for delegating a non-delegable duty of the master.[10] The Court is convinced that the facts of this case – however outrageous or unusual – fit squarely within the established principles of *respondeat superior*, which do not permit a finding that the officer's alleged sexual assault of a suspect was within the scope of his employment.

7. The Court is satisfied that its decision to grant the State's Motion for Summary Judgment was based upon settled law. For the reasons discussed in both the Court's original opinion and this order, the Court concludes that the instant case does not present an original question of law. No other basis for granting certification has been presented by the plaintiffs,

[8] *Id.* at 442 (quoting Restatement (Second) Agency, §245).
[9] 2004 WL 344015, at *7.
[10] *Id.* at *7-*8.

and the Court does not consider any of the other alternative criteria for certification under Supreme Court Rule 42(b) to be applicable. Therefore, Plaintiffs' Application for Certification of Interlocutory Appeal is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Peggy L. Ableman
Peggy L. Ableman, Judge

Original to Prothonotary
cc: Edmund D. Lyons, Jr., Esquire
Marc P. Niedzielski, Esquire
Ronald D. Smith, Esquire