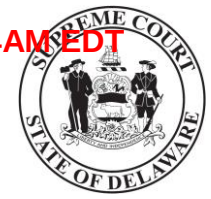

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES SHERMAN, et al.	)
	)
Plaintiff Below,	)
Appellant,	)
	)
v.	) No.: 206, 2017
	) In the Superior Court of
STATE OF DELAWARE, et al.	) the State of Delaware
	) In and For New Castle County
Defendant Below	)
Appellee.	)

APPELLANT'S OPENING BRIEF

EDMUND DANIEL LYONS - 0881
Attorney for Appellant
1526 Gilpin Avenue
Wilmington, Delaware 19806
(302) 777-5698

Dated: August 28, 2017

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NATURE AND STAGE OF THE PROCEEDINGS

In 2010 Plaintiff[1] Dawn Worthy filed suit against the State of Delaware and the Estate of Delaware State Trooper Joshua Giddings[2] alleging that in March, 2009, after he arrested her on a misdemeanor shoplifting charge and an outstanding misdemeanor warrant, he coerced her into performing oral sex on him. At trial there was no dispute that oral sex occurred. The claim against the State of Delaware was based solely upon the theory of *respondeat superior*. The State denied liability on the *respondeat* claims as well as on other grounds. In January 2017 a jury returned a verdict against Plaintiff. This is an appeal from the judgement entered pursuant to the verdict.

This is the third time this case has been before this Court. The first time this Court en banc reversed a grant of Summary Judgment in favor of the State. On remand the Superior Court again granted Summary Judgement in favor of the State, and also the Estate of the State Trooper.

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[1] Worthy died unexpectedly on January 28, 2015. Her Administrator (James Sherman) was then substituted as Plaintiff.

[2] Not long after he was arrested the Trooper committed suicide. The claim against the Estate was eventually dismissed by the Trial Court because it was not timely filed under 12 Del. Code 1202 (a). This dismissal was affirmed by this Court. *Sherman v. State*, 133 A.3d 774 (*Del.* 2016)

The second time before this Court the Court en banc again reversed a grant of Summary Judgment in favor of the State but affirmed a denial of Summary Judgment in favor of the Plaintiff, against the State.

TRIAL COURT ROUND ONE

In May, 2012 the Superior Court granted Summary Judgment and dismissed Plaintiff's *respondeat superior* claim against the State. The Court reasoned that the Trooper's wrongful act was not within the scope of his employment because it had not been authorized by the State Police. *Doe v. Giddings*, 2012 WL1664324 (Del. Super. 2012).

Worthy then appealed to this Court.

SUPREME COURT ROUND I

This Court en banc reversed the grant of Summary Judgement because the trial Court had not applied the proper elements of the Restatement of Agency 2d Section 228.

> "Under the Restatement of Agency (2d) § 228, conduct 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."
>
> ****
>
> "The Superior Court held that Giddings' conduct was not within the

scope of his employment because, '[c]ommon sense dictates that sexually assaulting a crime suspect, a clear abuse of authority under any circumstances, is not incidental to the arrest and detention of a suspect.'6 We agree. No one would argue that beatings, stabbings, shootings, or sexual assaults are incidental to almost any form of employment. Wrongful conduct, by definition, is not within the scope of employment in the sense that it is not conduct the employee was hired to perform. **The relevant test, however, is not whether Giddings' sexual assault was 'within the ordinary course of business of the [employer], ... but whether the service itself in which the tortious act was done was within the ordinary course of such business....' Stated differently, the test is whether the employee was acting in the ordinary course of business during the time frame within which the tort was committed."**

"Giddings was in uniform, on-duty, carrying out a police duty by transporting Doe to court. **The sexual assault took place in the police car, during the time that Giddings was supposed to be carrying out police duties. These facts would satisfy the first two factors under the Restatement—Giddings was doing the kind of work he was employed to perform, and he was acting within authorized time and space limits.** The third factor—whether Giddings was activated in part to serve his employer—has been construed broadly as a matter for the jury to decide. If the act of cutting someone's throat can be considered a service to the employer paving company on the theory that the employee was controlling traffic, then a sexual assault can be considered a service to the police on the theory that part of what Giddings was doing was transporting a prisoner. Finally, to be within the scope of employment, any force used must be 'not unexpectable.' Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks. The record does not establish the Giddings' conduct was unforeseeable."

Doe v. State, 76 A.3d 774, 777 (Del. 2013) (emphasis supplied)("Doe I") (footnote omitted)

The Court remanded for trial applying the proper Section 228 elements.

TRIAL COURT ROUND TWO

STATE AND WORTHY FILE CROSS MOTIONS FOR SUMMARY JUDGEMENT

Once back in the Superior Court, after further discovery, the Superior Court granted Summary Judgement against Plaintiff on a Sovereign Immunity defense. The Plaintiff's Motion for Summary Judgement was denied both because of Sovereign Immunity and because this Court had previously decided in *Doe I* that disputed issues of fact remained on a *respondeat* claim. *Doe v. Giddings*, 2014 WL4100925 (Del. Super. 2014).

SUPREME COURT ROUND II

REVERSED AS TO STATE'S CLAIM OF SOVEREIGN IMMUNITY; AFFIRMED AS TO DENIAL OF PLAINTIFF'S SUMMARY JUDGEMENT MOTION

This Court en banc reversed the grant of Summary Judgement in favor of the State based on Sovereign Immunity. The Court affirmed the denial of Plaintiff's Summary Judgement Motion. *Sherman v. State*, 133 A.3d 971 (Del. 2016) ("Doe II")

THIS COURT'S OPINION ROUND II

The following is taken from the Court's Opinion affirming denial of the Plaintiff's Summary Judgement Motion:

> "This Court further explained, in its 2013 opinion, that the first two factors of the Section 228 test are satisfied because 'Giddings was in

uniform, on-duty, carrying out a police duty *979 by transporting Worthy to court' and because '[t]he sexual assault took place in the police car, **during the time that Giddings was supposed to be carrying out police duties.**' (i.e., emphasis supplied)

****

"In our 2013 opinion, this Court held that the question of whether an employee acted in the scope of employment 'is ordinarily one for decision by the jury.'[27] The Superior Court correctly determined that our 2013 holding is the law of the case and, accordingly, properly denied Worthy's motion for summary judgement."

Sherman v. State, 133 A.3d 971, 978–79 (Del. 2016) (for ease of reference "Doe II")(emphasis supplied)(footnotes omitted)

On remand the jury returned a general verdict for the State. The Court denied Plaintiff's Motion for a New Trial. Exhibit D. This is Plaintiff's Opening Brief on appeal from the Judgement in favor of the State based on the verdict. The issues raised involve jury instructions and the Court's denial of Plaintiff's objection to one part of the State's final argument.

The Court's rationale for its decisions challenged on this Appeal are attached as Exhibits A-D (citations to the Exhibits are "Exhibit ___ pg ___").

A) Partial Transcript of Pretrial Conference August 8, 2016

B) Transcript of Prayer Conference January 19, 2017

C) Partial transcript of Side Bar Conference during State's final argument January 19, 2017

D) Court's decision denying Plaintiff's motion for new trial dated May 8, 2017.

SUMMARY OF ARGUMENT

RESPONDEAT SUPERIOR

I. The Court's Instruction regarding "Course and Scope of Employment" was erroneous for one or both of two reasons: A) Because it failed to make clear that what had to be a "service to the master" and "conduct" within the "course and scope" was Giddings' general activity and not specific wrongful activity occurring within that general activity; and B) Because it failed to explain that under the rule of "dual purpose" an intent to serve the master could be found if Giddings' wrongful conduct took place during performance of his police duties.

GENERAL NOT SPECIFIC UNFORESEEABILITY

II. The Court erred in failing to instruct the jury that the focus for unforeseeability was on in police work in police work in general and not the experience of the Delaware State Police either generally or with respect to Giddings specifically.

UNFORESEEABILITY AN AFFIRMATIVE DEFENSE

III. The Court erred by not instructing the jury that unforeseeability was an affirmative defense to *respondeat* that had to be proven by the State. Conversely, the Court was in error when it instructed the jury that foreseeability was an element that had to be proven by the Plaintiff to support a claim of *respondeat*.

UNFORESEEABILITY ARGUMENT OUTSIDE THE RECORD

IV. The Court erred in permitting the State to argue, without record support, that in thousands of State Police arrests since 1920 there had been no reports of police sexual misconduct and hence no foreseeability of such misconduct.

CONSENT NOT A DEFENSE--WORTHY COULD NOT CONSENT TO SEXUAL CONTACT WITH GIDDINGS EITHER AS A MATTER OF FACT OR AS A MATTER OF LAW

V. The Court erred by not instructing the jury that consent was not a defense or that Worthy could not consent to sexual contact with Giddings, either as a matter of fact or as a matter of law.

STATEMENT OF FACTS

THE TRIAL

Both Worthy and Giddings were deceased. Worthy's testimony was presented via her deposition. (A138)[3] In addition, a statement which she had given to the State Police when she first reported the assault was admitted (A41). Two statements Giddings made to the State Police investigator were admitted in evidence. (A89; A109)

Basically, Worthy and Giddings disagreed as to the issue of consent. Was the oral sex Worthy's idea or Giddings'?

WORTHY'S STATEMENT AND DEPOSITION

According to Worthy[4], Giddings arrested her at the Christiana Mall on a shoplifting charge about 9:00 p.m. and determined that she had an outstanding capias[5]. He handcuffed her, put her in his car and told Worthy that he was going to have to take her before a Justice of the Peace on the capias. Worthy knew that if

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[3]Citations to the Appendix are to "A___". These are to be distinguished from "Exhibit A" to this Brief.

[4]What follows is a summary distilled from the statement and deposition. The best way to appreciate Worthy's statement/deposition is to read them in pertinent part. (A41-78 statement; A157-211 deposition).

[5]A capias is an arrest warrant. This capias was for an old outstanding charge, probably a prior shoplifting. (A163)

Giddings took her to Court bail would likely be set she could not make and she would spend the night in custody. However, Giddings said he could just write her a summons for the shoplifting charge and not take her to Court on the capias if she would promise to turn herself in to the Court the next day.

Giddings did not immediately take Worthy to Court but first drove her around handcuffed in the rear of his police car in the mall parking lot. At one point Giddings stopped to help a motorist whose battery was dead and at another point Giddings left Worthy in the police car while he went back into the mall to use the restroom.

Worthy was frantic to return home to her two minor children and when Giddings said to her in substance "you haven't shown me that you want to go home" she realized that he was demanding sexual favors from her. At one point he told Worthy in substance, "you know what you have to do." At another time he got out of the car, opened the rear car door and, having removed Worthy's handcuffs, placed her hand on his genitals. This was in the mall parking lot.

At that point, Worthy decided that she would do whatever he wanted. Giddings then drove to a deserted spot about thirty yards from the parking lot up a dirt road.

Giddings got Worthy out of the car, uncuffed her and put her in the passenger front seat. He then unzipped his pants, pulled out his penis and pushed Worthy's head down onto it. When Giddings ejaculated in Worthy's mouth she spit it on her

jacket. The State stipulated that a DNA test showed this to be Giddings' semen.

After the assault, Giddings told Worthy she had to turn herself in on the capias the next day, and drove Worthy home, dropping her off outside her development.

When Worthy reported the assault to the State Police 18 days later she brought the jacket with her. The State Police took the jacket for further examination (A60).

GIDDINGS' TWO STATEMENTS[6]

Later that same day the investigator called Giddings in for a recorded interview. (A89-108) Giddings recalled giving Worthy a summons for the shoplifting and then taking her home on her promise to turn herself in the next day on the outstanding warrant. He denied any sexual contact with her. The investigator then told Giddings that Worthy said that she had spit his semen onto her jacket and that an initial test of the stain indicated human bodily fluid and semen. Giddings said that he "did not recall" the alleged sexual contact.

About ten days later, with an attorney, Giddings made a second recorded statement to the investigator (A109-132). He said that he had given Worthy the summons for the shoplifting and was going to transport her to Court but then decided to take her home instead because the Court would have held her in custody at least

[6]These are distilled below but are best read in whole. (A89-108 (first statement); A109-132 (second statement).

for the night on a high bail. Giddings admitted the oral sex but said that it was Worthy's idea and that this came up after he had already told her he was taking her home instead of to Court. He said he did "not recall" placing Worthy's hand on his genitals in the parking lot.

THE CRIMINAL COMPLAINT

The investigator testified (A361; A372 H, 372 I) that he **then** had the case reviewed by two Deputy Attorneys General (not the ones defending the State in this action) who approved the filing of a **sworn** Criminal Complaint against Giddings alleging:

> **Count I: "Felonious Sexual Extortion"** in violation of 11 Del. C. §776 in that he **"did intentionally compel or induce** [Worthy] to **engage in sexual penetration/intercourse** with him...
>
> **Count II: "Receiving a Bribe - Public Servant Benefit from Another for Violating Duty"** in violation of 11 Del. Code § 1203(a) in that he, "being a public servant **did solicit a personal benefit from another person for having violated his duty" ...**
>
> **Count III: "Official Misconduct - Refrain from Performing a Duty"** in violation of 11 Del. Code§ 1211(2) in that he "did **knowingly refrain from performing a duty** which was clearly inherent in the nature of his office, Joshua A. Giddings **failed to take the victim to Court to appear on an active capias**." (A133-138)

TESTIMONY OF COL. McLEISH AS TO GENERAL FORESEEABILITY

As to foreseeability of police misconduct the Plaintiff called State Police

Superintendent Thomas McLeish (Superintendent at the time of the Trooper's misconduct) who testified that there is a real risk in police work that a small number of male police officers will sexually assault women in their custody and that police agencies need to be aware of and address the problem. He agreed that the problem of sexual misconduct by officers warrants the full attention of law enforcement leadership. McLeish testified that these concerns were well founded even before Giddings' sexual assault on Plaintiff. (A378-379).

On cross-examination, McLeish testified that in 2009 the State Police had made "a couple hundred thousand" of arrests. He was not asked about the number of reports of sexual misconduct during those arrests.. He was not asked about arrest totals or sexual misconduct for any years prior to 2009. (A385)

INSTRUCTIONS

The Parties differed as to instructions regarding "Course and Scope," Foreseeability, Foreseeability as an Affirmative Defense, and Consent as an Affirmative Defense. The arguments and the Court's rulings are set out below as each Issue is discussed.

FINAL ARGUMENT

PLAINTIFF

Plaintiff argued that Giddings' sexual misconduct was within the course and

scope of his employment as a Trooper because it took place during arrest, custody and transport and he used his official powers to coerce Worthy into providing oral sex. (A451-453). Also, Giddings had a dual purpose –to benefit both himself (by the assault) and the State Police (by arrest, custody and transport). (A454 A-454 B).

As to the claim that oral sex was Worthy's idea the Plaintiff argued that even the State did not believe that because it filed criminal charges against Giddings for "Sexual Extortion" and "Soliciting" the oral sex.(A453-454)

STATE

The State argued that Giddings' sexual misconduct did not fall within the course and scope because it took place during a time when he was violating his "duties" as a State Trooper. (A459-462).

Over objection, the State also argued that Worthy had not proven foreseeability because per Col. McLeish even with hundreds of thousands of arrests going back to 1920 there was no evidence at trial of other reports of sexual misconduct. (Exhibit C pg 9).

As to consent, the State argued that "we will never know for sure what happened in that car." (A458).

ARGUMENT

RESPONDEAT SUPERIOR

QUESTION PRESENTED

I. Was the Court's Instruction as given regarding "Scope of Employment" erroneous because it failed to make clear that what had to be within the course and scope was Giddings' general activity and not specific wrongful activity occurring within that general activity? This question was preserved by Plaintiff during the Prayer Conference. (Exhibit B pgs 8, 39, 42, 44-45, 47)

TRIAL COURT'S JUDGEMENT AND RATIONALE (PRAYER CONFERENCE)

Attached as Exhibit B pgs 8, 39, 42, 44, 45, 47. Also at Exhibit D, pgs 9-12 (Order Denying Motion for New Trial).

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. *Citadel Holding v. Roven*, 603 A.2d 818(Del. Supr. 1992)

MERITS OF ARGUMENT

INSTRUCTION SHOULD HAVE BEEN TAILORED TO "COURSE AND SCOPE" FACTS OF THE CASE

THE USE OF CIVIL PATTERN JURY INSTRUCTIONS

In the Prayer Conference the trial judge indicated a preference for Pattern

Instructions:

> ". . .But if there is an instruction, standard instruction about conduct that is not within the scope of employment and it is a standard jury instruction, **then I don't know on what basis I wouldn't give it."** (Exhibit B pg 46)

This is not the law.

Pattern instructions do not trump all alternative requested instructions—**they are "guidelines," and "may require modification."** *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. Supr. 2002) And "in general, **a trial judge may explain the legal significance which the law attaches to a particular factual finding."** and not impermissibly comment on the evidence. *Capital Management Co. v. Brown*, 813 A.2d 1094, 1100 (Del. Supr. 2002).

SCOPE OF EMPLOYMENT INSTRUCTION

The Court's Instruction as given encompassed the elements of "Scope of Employment" as well as "Dual Purpose." **It was largely a form instruction save for a part that quoted almost directly from *Doe I*.**

The Instruction was erroneous because it failed to make clear that what had to be within the course and scope was Giddings' general activity and not specific wrongful activity occurring within that general activity

It is set out in pertinent part:

SCOPE OF EMPLOYMENT

****

"Accordingly, if you find that Officer Giddings committed the wrongful act, then you must next determine whether Officer Giddings was acting in the ordinary course of his employment during the time frame within which the wrongful act was committed. **The relevant test is not whether the wrongful conduct was authorized by the State, but whether the service itself was within the scope of employment and, thus, within the ordinary course of the State's business.**

Officer Giddings was acting within the scope of his employment if, and only if, you find all of the following by a preponderance of the evidence:

> (1) The **conduct** was of a type **that Officer Giddings was hired to perform;**
>
> (2) The **conduct** occurred substantially **within the authorized time and space limits of his work;**
>
> (3) The **conduct was motivated, at least in part, by an intent to serve his employer,** on this factor, even if Officer Giddings was **motivated in part by a personal desire** to commit the wrongful act, his **conduct** may still be attributed to the State where his **conduct was also motivated by a desire to serve the Defendant.**
>
> **AND**
>
> (4) If force was used, the use of **force was not unexpectable; *i.e.*, the force used was reasonably foreseeable**.

However, Officer Giddings' **conduct was not within the scope of his employment if his conduct was:**

(1) **Different in kind from what was authorized** by his employer;

(2) **Far beyond the authorized time or space limits** of his employment;

(3) **Too little motivated by an intent to serve his employer**;

OR

(4) Involved force that was not reasonably foreseeable." (Emphasis supplied) (A472-473)

FAILURE TO DEFINE "SERVICE"

During the Prayer Conference Plaintiff requested that the word "service" in the Court's "Scope of Employment" Instruction ("whether the service itself was within the scope of employment and, thus, within the ordinary course of the State's business") be described as a "general conduct". (Exhibit B pgs 38-40)

The Court ruled that it was not going to substitute the term "general conduct" for the term "service" **because it was following the exact language from the *Doe I* opinion.("whether the service itself in which the tortious act was done was within the ordinary course of such business....")** (Exhibit B pg 52)

Prior to that, the following exchange occurred.

"**MR. LYONS (Plaintiff's counsel): The only thing, I don't want to hear is an argument that oral sex has to be a service to the State** because we all know that's not true.

THE COURT: That is pretty obvious, that is –-

MR. MCTAGGART (State's counsel): There's going to be an argument that is along those lines. Part of what the test is whether or not this man was performing some service that was benefitting his employer.

MR. LYONS: That is exactly the point.

MR. MCTAGGART: I am going to make that argument, it was no benefit to the State what he was doing. I think I'm allowed to make that argument.

MR. LYONS: That is exactly what Justice Berger talked about; of course it wasn't authorized, of course it is not a benefit to the State. If that is the test, we might as well just leave. **That is not the test, because an intentional tort — this intentional tort will never be of service to the State.**

MR. MCTAGGART: That is not what the Supreme Court said, it was **a fact question for the jury to decide. One of these elements is what his motivation is, whether he was motivated by intent to serve his employer. (A431-432)**

Later in this same discussion:

"**MR. LYONS: Can we be clear that there is not going to be an argument that coercing oral sex has to be a service to the State. It never could be. Are we clear because Mr. McTaggart said he wanted to argue that.**

MR. MCTAGGART: I am reading exactly from this Opinion [This is from Doe I] that is exactly what the Supreme Court is saying here, whether or not — 'then a sexual assault can be considered a service to the police on the theory that part of what Giddings was doing was transporting a prisoner.' They sent the case back down on that issue. Whether or not that is a service. That is a jury question to determine. I don't know how I cannot argue that to the jury, that is

the question that the Supreme Court said is an issue. (parenthetical supplied)

MR. LYONS: Here is the problem, Your Honor, if you take that sentence out of context the point of the whole decision, was of course it wasn't authorized, intended to help anybody. That is not the point, and if you take that sentence out, that is an inartfully drafted sentence. I hate to say it, but it is. It just doesn't even fit with the rest of the Opinion, because what we are here for, if he is allowed to make that argument, why are we here?

THE COURT: I am not sure what you are asking me to do. I cannot take a decision from the Supreme Court and take that then narrow it so far that Mr. McTaggart is not allowed to make his argument about whether this conduct was within the course and scope. **If the Supreme Court is indicating that that particular act can be looked at, and the jury has to make its determination about whether this fits within those four factors, that is all I can do is just instruct them as to what the four factors are. That is what I am going to do. (Exhibit B pgs 51-52).**

But *Doe I* did not purport to dictate language for a jury instruction–it simply set out a principle of law. The challenge at trial was to translate that principle of law into an instruction.

That did not happen. "Service" should have been defined. Obvious questions were left unanswered. What does "service" mean? What "service" is being referred to? Does this mean general course of conduct, i.e., a continuum of arrest, custody and transport? Or does it mean something else? Did the wrongful conduct have to be a "service" to the State? We read *Doe I's* holding to be that the "service" to be examined

was Giddings' general course of conduct and not his wrongful conduct.

> "**MR. LYONS (Plaintiff's counsel): The only thing, I don't want to hear is an argument that oral sex has to be a service to the State** because we all know that's not true.
>
> **THE COURT: That is pretty obvious, that is –** (Exhibit B pg 40)

But because the Court's instruction did not define "service", the State was able to argue that coerced oral sex could never be a "service" to the State and thus not within the course and scope. See below. (A461) ***Doe I* held exactly the opposite.**

DUAL PURPOSE–FAILURE TO DEFINE "SERVICE" OR "CONDUCT"

The "Dual Purpose" portion of this same Instruction was also discussed in the Prayer Conference. The same issues of "general conduct" and of "service" rose again. During this discussion the Court advised that the State could argue that oral sex was not a service to the State.:

> **MR. LYONS: All I want to make sure is that Mr. McTaggart cannot argue that oral sex is not a service to the State, because we all agree on that. Trying to shut off that argument, Your Honor.**
>
> **THE COURT: I am going to let him make the argument because that is part of what the jury needs to consider what was the conduct and does it fit within the four factors they need to consider.** You are going to be able to make your argument, that goes beyond the assault and it had the dual purpose. You are allowed to make that argument **I can't tell Mr. McTaggart to shut down his whole case. His whole case is just that, that was not within the scope, course and scope of employment.** (Exhibit B pgs 42-43)

***Doe I* prohibits the argument that oral sex can never be a "service" to the State.**

"HOWEVER CLAUSE" FAILURE TO DEFINE CONDUCT

The references to "conduct" also occur in the last clause of the Instruction (we refer to this as the "However" clause). Plaintiff's counsel (in referring to conduct within the "However" clause) asked that any reference to the word "conduct" be instead "general conduct" or "conduct as a whole. . ." not specific unlawful conduct (Exhibit B pgs 45-47; A436-438). See also Prayer conference Exhibit B pgs 47-54)

The Court denied the request. (Exhibit B pgs 52-54) This was error because:

1) Sub-sections 1 and 2 of the "However Clause" exclude **conduct** "different in kind" from that authorized or "far beyond" authorized limits and have to refer to general and not wrongful conduct because wrongful conduct would always be viewed as unauthorized. (A473)

2) Sub-section 3 of the "However Clause" has to refer to general conduct because on the facts of this case, if the reference to conduct meant wrongful and not general conduct then such conduct would always be as in "too little motivated" by an intent to serve the employer. (A473)

STATE'S FINAL ARGUMENT TOOK ADVANTAGE OF "COURSE AND SCOPE" INSTRUCTION

In final argument the State said:

"I ask you to take a look at that warrant because one of the issues in this

case is **course and scope of Mr. Giddings' duties.** One of the charges that he got arrested for is **charge number two.** We haven't heard much about charge two, receiving a bribe. Mr. Giddings solicited a personal benefit. He did not solicit a benefit for the Delaware State Police or the State of Delaware. **He solicited a personal benefit from another person for having violated his duty. That was the charge, he violated his duty, his duty as an officer. Ladies and gentlemen, I've got to ask you quite simply; how in the world can he be acting within the course and scope of his duty when he violates his duty: Charge number three, Official Misconduct. Joshua Giddings did knowingly refrain from performing a duty.** Again, **one of his duties as a Delaware State Police Officer did he knowingly refrain from performing a duty,** which was clearly inherent in the nature of his office? Joshua Giddings failed to take the victim to Court to appear on an active Court capias. **How can he be acting within the course and scope of his duty when he fails to perform a duty, not only a duty, but a duty that is clearly inherent in the nature and scope of his office?**

"Ladies and gentlemen, Mr. Lyons made a statement at the very end of his argument that it is not the specific act of Mr. Giddings engaging in sex, but it is the general course of his conduct and you have to look at that. We submit to you ladies and gentlemen, and the evidence is pretty clear on this, at 9:30 p.m. Joshua Giddings handed a summons to Dawn Worthy. There is no dispute about that, that at 9:30 p.m. he was done with Dawn Worthy. His report was done. He either had to take her to Court or he had to let her go, that was it. That was his job as a Delaware State Police Officer and between 9:30 and 10:27 when she calls home, the train went off the tracks. **There was no benefit to anything he did from that point forward to the Delaware State Police.** We can dance around this as much as we want and say in a general sense maybe he was trying to help the State Police because he had her in the back seat, and maybe he had her handcuffed, and maybe in some ways he had her secured, then they ended up having sex in the front seat. **Ladies and gentlemen, this guy did not perform his job as a Delaware State Police Officer. He violated his duty.** As Mr. McLeish told you yesterday on the witness stand, he crossed the line. The line was there and he crossed it. This is not a close case. **He crossed the line. From**

> **9:30 to 10:30 he did not do what he was supposed to do. He was not even supposed to give her the summons. He was supposed to give her a warrant back at the Troop. He did not even do that."** (emphasis supplied) (A459-461)

This argument was fallacious because it referred to course and scope of "duty", not course and scope of "employment." But it was a permissible argument under the Court's prior refusal to define "service" and "conduct" as general conduct and ruling that the State could make the argument that oral sex was not a service to the State. ("I am going to let him make the argument. . .")(Exhibit B pg 42)

And consider the argument that "he crossed the line...he did not do what he was supposed to do." What line was crossed? The line between authorized and unauthorized conduct. That argument tied into the Instruction as given. It did not comport with *Doe I* where Justice Berger set out the question presented to the Court:

> "Giddings was in uniform, on-duty, carrying out a police duty by transporting Worthy to court. The sexual assault took place **in the police car, during the time that Giddings was supposed to be carrying out police duties. These facts would satisfy the first two factors under the Restatement—Giddings was doing the kind of work he was employed to perform, and he was acting within authorized time and space limits."** (emphasis supplied) *Doe I*, 76 A.3d 774, 777.

In sum, the untethered instruction on "course and scope" erroneously permitted the State's powerful argument that trampled on the holding in *Doe I*.

ARGUMENT

FORESEEABILITY/THE MCLEISH INSTRUCTION

QUESTION PRESENTED

II. Did The Court err by not giving Plaintiff's "McLeish" instruction setting out the relevance of General Foreseeability as opposed to Specific Foreseeability? This question was preserved at (Exhibit B pg 15)

TRIAL COURT'S JUDGEMENT AND RATIONALE

Attached as Exhibit B pg 10 (Prayer Conference); A401 and Exhibit D (Order Denying a Motion for New Trial) pgs 12-13.

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. *Citadel Holding v. Roven*, 603 A.2d 818 (Del. Supr. 1992)

MERITS OF ARGUMENT

REFUSAL TO GIVE THE McLEISH INSTRUCTION: TEST IS GENERAL FORESEEABILITY OF POLICE SEXUAL MISCONDUCT WHICH LED TO PREJUDICIAL ARGUMENT UNSUPPORTED IN THE RECORD

In a police sexual misconduct *respondeat* case, what has to be foreseeable is sexual misconduct by **arresting police officers generally** and not just by a Delaware police officer. In *Doe I* Justice Berger observed:

> Finally, to be within the scope of employment, any force used[7] must be "not unexpectable." **Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks.9** The record does not establish that Giddings' conduct was unforeseeable. *Doe v. State*, 76 A.3d 774, 777 (Del. 2013) (Doe I)

Why make reference to other Courts which have noted that sexual assaults are foreseeable risks, apparently as a matter of law, if we are not talking about a general risk of sexual misconduct? The question answers itself.

THE REJECTED MCLEISH INSTRUCTION

Plaintiff tendered an Instruction (the "McLeish Instruction")(A349)which put the focus on general foreseeability not specific foreseeability. It provided:

"KNOWLEDGE OF COL. MCLEISH"

> "In this case, Colonel McLeish, the former head of the Delaware State Police in 2009, testified. **If you find that Colonel McLeish was aware of a general problem within law enforcement that some police officers had sexually assaulted people in their custody then it was not completely unforeseeable to the State that such wrongful conduct could occur.**
>
> "The general problem of sexual abuse by arresting police officers does not have to have involved the State Police or any police in Delaware–it is enough if on a nationwide basis there was a general problem. Also, the problem did not have to involve a majority of police officers, it is enough if it were a very small number of officers." (A349).

---

[7] Throughout this case, the parties have treated "force" as including "coercion."

Colonel McLeish was uncontradicted that there is a generally acknowledged problem of police sexual misconduct during arrests:

(During the Prayer Conference)

> **THE COURT: "Isn't that what you established through Colonel McLeish, there was this small percentage of risk of injury that he knew existed in the police**. So even though that particular injury suffered does not have to be foreseeable, it wasn't foreseeable, meaning officer Giddings, would do this, **but only that the risk existed which, obviously, you established through that testimony from the Colonel."** (Exhibit B pg 13).

But the Court declined to give the "McLeish instruction" apparently because it viewed the instruction as a comment on the evidence (Exhibit B pgs 9-10) and thus allowed a specific foreseeability argument based upon the experience of the State Police alone. And the argument made by the State, as set out further below, compounded the problem by exceeding the bounds of the record regarding the State Police experience. To not give the "McLeish Instruction" awarded the State one free bite of the apple–no foreseeability exists until the first sexual assault occurs within the State Police. And Worthy had the misfortune of being that one free bite.

This was error.

QUESTION PRESENTED

III. Did the Court err by not instructing the jury that unforeseeability was an affirmative defense that had to be proven by the State? This question was preserved by Plaintiff during the Prayer Conference. (Exhibit B pgs 14-15).

TRIAL COURT'S JUDGEMENT AND RATIONALE

Attached as Exhibit B (Prayer Conference) pgs 3-4 and Exhibit D (Order Denying Motion for New Trial) pg 13.

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. *Citadel Holding v. Roven*, 603 A.2d 818 (Del. Supr. 1992)

MERITS OF ARGUMENT

FORESEEABILITY AS AN AFFIRMATIVE DEFENSE

Plaintiff tendered a "Complete Unforeseeability as an Affirmative Defense" Instruction (A345-346) The Instruction was rejected. Setting aside the Court's failure to give the Plaintiff's Instruction, the Court should at least have told the jury that the State had to prove unforeseeability of police sexual misconduct during an arrest as an affirmative defense to *Respondeat* liability and that it was not Plaintiff's burden to prove Foreseeability.

Plaintiff argued Lack of Foreseeability as an affirmative defense--based upon

both *Doe I*, reversing a grant of Summary Judgement in favor of the employer ("the Record [i.e., the State] does not establish that Giddings' conduct was unforeseeable" as one basis for denying the State's Motion) and in *Draper v. Olivere*, reversing grant of Summary Judgement to the employer(whether use of force was "so rare as to be unexpectable"...it was "incumbent" on the Defendant employer [i.e., the State] to produce the evidence.) *Draper v. Olivere*, 181 A.2d 565, 571 (Del. Supr. 1962)

The trial Court disagreed. (Exhibit B pgs 3-4). It distinguished these Opinions because they dealt with the "light most favorable" and "disputed facts" rules applied to summary judgement motions. We agree these rules are irrelevant when back in the trial court on the merits, that does not change the burden of proof–the duty to come forward with evidence meeting a preponderance standard-- applied by this Court in *Doe I* and *Draper*. Either a party has the burden of proof or it does not--no matter the stage of the proceeding.

We suggest that in the give and take of a trial there is a real difference between having the burden of proof (or not) as to a contested issue. In this case, if the State had the burden of proof it would have had to disavow Colonel McLeish's testimony–not just argue that the State Police experience defeated foreseeability-- an unenviable position in that the testimony was unchallenged.

But the Plaintiff's Instruction was not given. This was error.

ARGUMENT OUTSIDE THE RECORD

QUESTION PRESENTED

IV. Did the Court err in permitting the State to argue, without record support, that in thousands of State Police contacts with citizens there had been no reports of police sexual misconduct since 1920 and hence no foreseeability of such misconduct? This question was preserved at sidebar during final argument (Exhibit C pgs 9-10).

TRIAL COURT'S JUDGEMENT AND RATIONALE

Attached as Exhibit C pgs 9-10.

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. *Citadel Holding v. Roven*, 603 A.2d 818 (Del. Supr. 1992)

MERITS OF ARGUMENT

Over objection the Court permitted the State to argue, as a permissible inference, **that there was no evidence of any sexual misconduct by any State Police Officer in hundreds of thousands of citizen arrests since the 1920's**--hence, unforeseeability (Exhibit C pgs 9-10).

> Mr. McTaggart: You heard the testimony from Mr. MacLeish about the number of arrests that the State Police make in a
> course of a year, I think 100,000. **The State police have been around for a long time, 1920s. Have you heard any other incidents like this being admitted**

14 through the course of this trial? None. None. Is
15 this foreseeable that this is going to happen this one
16 time? (Exhibit C pgs 9-10)

But Col. McLeish did not testify at all to the number of sexual misconduct complaints against by State Troopers going back to the 1920's–only that there were a "couple hundred thousand" State Police arrests (criminal and traffic) in 2009. (A385). **In other words, the State bootstrapped a silent record into a claim that there was no misconduct at all in the entire history of the State Police. The Court deemed this a permissible inference from the record. (Exhibit C pg 10)**

And so, armed with the "no sexual misconduct since the 1920's" claim the State argued : "Is this foreseeable that this is going to happen this one time?" (Exhibit C pgs 9-10)

Argument outside the record is objectionable. *Michael v. State*, 529 A.2d 752, 762 (Del. Supr. 1987), abrogated on other grounds, *Stevens v. State*, 129 A.3d 286 (Del. 2005)This argument exploited the Court's failure to give the McLeish Instruction and erroneously placing the foreseeability burden on Plaintiff. Permitting this argument was error.

CONSENT

QUESTION PRESENTED

V. Did the Court err by not instructing the jury that consent was not a defense--that Worthy could not consent to sexual contact with Giddings, either as a matter of fact or as a matter of law? This question raised by pre-trial Motion (A212-216) and was preserved at the Pre-trial Conference (Exhibit A pgs 32-36)

TRIAL COURT'S JUDGEMENT AND RATIONALE

Attached as Exhibit A pgs 32-36 and Exhibit D (Order Denying Motion for New Trial) pgs 13-14.

STANDARD AND SCOPE OF REVIEW

Plenary review of a question of law. *Citadel Holding v. Roven,* 603 A.2d 818 (Del. Supr. 1992)

MERITS OF ARGUMENT

The Court's Instructions on Assault and Battery (A470-471) required the Plaintiff to prove the element of lack of consent. A "consent not a defense" instruction (A348) tendered by Plaintiff should have been given instead.

This issue was first raised by Plaintiff's Motion to bar any evidence or argument that Plaintiff consented to sexual contact with Giddings (A212-216). This Motion argued Judicial Estoppel and Judicial Admission based on the **sworn** Criminal

Complaint (charge of Sexual Extortion) (A133-138) the State filed against Giddings, after review by two Deputy Attorneys General, and also argued Plaintiff's inability to consent as a matter of law. The Court denied the Motion (distinguishing Plaintiff's authorities) and, therefore, Plaintiff's request for an Instruction which would have advised the jury that Plaintiff did not have to prove lack of consent. (Exhibit A pgs 75-82).

JUDICIAL ESTOPPEL OR JUDICIAL ADMISSION

Judicial Estoppel has been explained in *Pesta v. Warren*, 2004 WL1282214 (Del. Super. May 27, 2004) ("a party may be precluded from asserting in a legal proceeding, a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding")(Attached as Exhibit E). "Judicial Admissions" include "statements contained in pleadings" and bind the party making them. *Merritt v. United Parcel Service*, 956 A.2d 1196, 1201-1202 (Del. 2008).

The Sexual Extortion in the Criminal Complaint is the antithesis of consent. The Court disagreed; it held that there was no inconsistency; and also that the criminal Complaint was not filed in the civil proceedings (ignoring the "or in an earlier legal proceeding" language of the rule of Judicial Estoppel) and preclusion by Judicial Admission was a too extreme remedy (Exhibit A pgs 81-82).

How can the victim of Sexual Extortion consent to the assault? How is there no

inconsistency here ? Why was the Criminal Complaint not deemed filed "in an earlier legal proceeding" as per *Pesta v. Warren?* Why is the remedy too extreme when two other Deputies had approved the filing of the Complaint? What would it take?

Under the rules of Judicial Estoppel or Judicial Admission the Sexual Extortion Complaint should have bound the State and blocked evidence or argument on the issue of consent.

INABILITY TO CONSENT AS A MATTER OF LAW

In *Carrigan v. Davis*, 70 F. Supp. 2d 448, 461 (D. Del. 1999), in a civil rights action based upon a prison guard's alleged sexual contact with a female prisoner, because Plaintiff was in custody, given the coercive pressures on a prison inmate in a "custodial environment":

> ". . .it is of no import, whether as a factual matter, the Plaintiff. . . initiated the sexual encounter. . . ." Stated another way, the Court concludes, as a matter of law, that the consent defense is unavailable to Defendant Davis under these circumstances."

The Court distinguished *Carrigan* as applying only to custody in a prison, but did not explain why custody during an arrest should viewed differently except for noting that a Delaware statute (11 Del. Code 1259) expressly prohibits consensual sexual contact between a prisoner and prison guard. (Exhibit A pgs 80-81) This is a distinction without a difference. The opportunity for coercion is present either way. Plaintiff should not have been required to prove lack of consent as an element of

assault or battery.

And the State did raise the consent defense left open to it by the Court in its argument that "we will never know for sure what happened in that car." (A458).This was an argument–reading between the lines–that Worthy had consented to oral sex and therefore could not have been assaulted or battered.

The Court erred in rejecting the Plaintiff's claims of judicial estoppel, judicial admission and inability to consent as a matter of law.

CONCLUSION

For any one or more of the above errors the Judgement should be reversed and remanded for a new trial.

/s/Edmund Daniel Lyons
Edmund Daniel Lyons - 0881
Attorney for Appellant
1526 Gilpin Avenue
Wilmington, Delaware 19806
(302) 777-5698

Dated: August 28, 2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES SHERMAN, et al.	)
	)
Plaintiff Below,	)
Appellant,	)
	)
v.	) No.: 206, 2017
	) In the Superior Court of
STATE OF DELAWARE, et al.	) the State of Delaware
	) In and For New Castle County
Defendant Below	)
Appellee.	)

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirements of Rule 13(a)(I) because it has been prepared in Time New Roman 14-point typeface using WordPerfect 12.

2. This Brief complies with the type-volume limitation of Rule 14(d)(I) because it contains 7,731 words which were counted by WordPerfect 12.

/s/Edmund Daniel Lyons
Edmund Daniel Lyons - 0881
Attorney for Appellant
1526 Gilpin Avenue
Wilmington, Delaware 19806
(302) 777-5698

Dated: August 28, 2017