



## **II. Facts**

On the evening of March 19, 2009, Plaintiff Jane D.W. Doe (“Doe”) was stopped by store security for shoplifting items at the JC Penney store in the Christiana Mall. Doe had been previously arrested, had an outstanding capias, and knew that the police would take her to court, where she would be committed to jail over the weekend. Plaintiff waited for about forty-five minutes before Delaware State Police (“DSP”) Trooper Johsua Giddings (“Giddings”) arrived at the Christiana Mall. Giddings placed Plaintiff in the rear of the police car and drove the police car from JC Penney to several locations in the mall parking lot. Plaintiff alleges that Giddings eventually drove off to a third location, got out of the police car, and opened the car door to place her hand on his genitals. Plaintiff testified at her deposition that Giddings then drove to a remote area away from the mall. Plaintiff alleges that Giddings told her that he could let her go home if she did something in return. Eventually, Giddings uncuffed the plaintiff, had her sit in the front seat of the police car, and perform oral sex on him. Giddings then drove Plaintiff home and told her to turn herself in on the capias. Plaintiff later reported Giddings’ actions to DSP Sergeant Maher. Sgt. Maher investigated the complaint and eventually arrested Giddings on charges of sexual misconduct, bribery, and official misconduct. Shortly after the arrest, Giddings committed suicide.

On August 18, 2010, Plaintiff filed a Complaint in this Court, naming Giddings' estate and the State of Delaware ("State") as defendants. Plaintiff seeks to hold the State liable for Giddings' conduct under principles of agency and the doctrine of *respondeat superior*. The Complaint alleges that at all times relevant to the Complaint, the DSP was an agency of the State and that Giddings was acting pursuant to his authority as a DSP trooper. The Complaint also alleges that at all times, Giddings was acting in bad faith and without a purpose to serve the public interest.

### **III. Parties' Contentions**

The State has filed a motion for summary judgment pursuant to Superior Court Civil Rule 56, asserting that it is entitled to judgment as a matter of law because the facts clearly indicate that Giddings was not acting in the scope of his employment at the time of the alleged assault. The State contends that raping a crime suspect is obviously not what Giddings was employed to do, that he was not motivated in any part to serve the State by doing so, and that the State could not reasonably have anticipated that Giddings would use force in this manner. To further support its assertion that Giddings acted outside the scope of his employment, the State points out that Giddings had no discretion under Delaware law either to rape a crime suspect or to fail to arrest that person on an outstanding *capias*. Finally, the State asserts that it is entitled to summary judgment because

the doctrine of sovereign immunity bars suits against the State for criminal acts by the State's employees.

In response, Plaintiff contends that Giddings was acting within the scope of employment because the rape occurred while Giddings was on duty as a police officer and he had taken Plaintiff, a crime suspect, into custody. Plaintiff argues that the scope of employment question turns on whether Giddings' use of force against Plaintiff could have been expected by the State. Plaintiff contends that a number of complaints alleging misconduct by DSP officers since 1990 create an issue of fact as to whether the State could reasonably have expected that Giddings might use force in an unauthorized manner. As to the State's sovereign immunity argument, Plaintiff argues that the state's insurance coverage plan covers torts such as "false arrest, false imprisonment, malicious prosecution, [and] assault and battery" and therefore includes Giddings' alleged assault on Plaintiff. Furthermore, Plaintiff points out that the state's insurance plan covers personal injury resulting from a wrongful act.

#### **IV. Standard of Review**

Summary judgment is appropriate where the record presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>1</sup> When reviewing a motion for summary judgment, the Court must view all facts in

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<sup>1</sup> Super. Ct. Civ. R. 56(c).

the light most favorable to the non-moving party.<sup>2</sup> Generally speaking, issues of negligence are not susceptible of summary adjudication.<sup>3</sup> Only when the moving party establishes the absence of a genuine issue of any material fact respecting negligence may summary judgment be entered.<sup>4</sup>

## V. Discussion

The primary issue presented by this motion is whether Giddings could reasonably be found to have been acting within the scope of his employment when he allegedly raped the plaintiff on March 19, 2009. In Delaware, responsibility for an employee's tortious conduct, committed in the scope of employment, will be imputed to the employer by the doctrine of *respondeat superior*.<sup>5</sup> *Respondeat superior* is a common law doctrine whereby "losses caused by the torts of the servant *more or less certain to occur* in the course of the master's business as a matter of policy are placed upon the master because he is better able to bear them."<sup>6</sup> Similarly, liability is imposed on the master to create an incentive to conduct business with due regard for the safety of others.<sup>7</sup>

Liability for the torts of the servant will only be imposed upon the master when those torts are committed by the servant within the scope of employment

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<sup>2</sup> E.g., *Merrill v. Crothall-American*, 606 A.2d 96, 99 (Del. 1992).

<sup>3</sup> *Ebersole v. Lowengrub*, 54 Del. (4 Storey) 463, 469 (Del. 1962).

<sup>4</sup> *Id.*

<sup>5</sup> *Fisher v. Townsends*, 695 A.2d 53, 58 (Del. 1998) (citing *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427, 432 (Del. 1965)).

<sup>6</sup> *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 569 (Del. 1967) (emphasis added).

<sup>7</sup> *Id.*

which, at least in theory, means that they were committed in furtherance of the master's business.<sup>8</sup> When a servant's tortious action arises from a personal need or motivation not engendered by anything connected with the employment, the servant is outside the scope of employment and the master may not be held liable.<sup>9</sup> To determine whether an employee's conduct is within the scope of employment, the Court examines whether

- (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 unexpected by the master.<sup>10</sup>

Ordinarily whether an alleged tortfeasor was acting in the course and scope of his employment is a question of fact for the jury; however, the court may decide the issue as a matter of law where the facts clearly indicate that the tort was not committed in the scope of employment.<sup>11</sup>

Because of the highly fact-specific nature of the inquiry, there is no generally applicable rule as to whether an employer may be held liable under *respondeat superior* for the tortious and criminal acts of an employee. Thus, for example, in *Simms v. Christina School District*,<sup>12</sup> this Court granted summary judgment to the school district in a case where a residential counselor at a school

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<sup>8</sup> *Id.* at 570.

<sup>9</sup> *A.R. Anthony & Sons v. All-State Investigation Security Agency, Inc.*, C.A. No. 82C-AP-18 (Del. Super. Sept. 27, 1983) (Poppiti, J.)

<sup>10</sup> *Id.* at 570 (citing Restatement (Second) of Agency §228 (1958)).

<sup>11</sup> *Id.* at 569.

<sup>12</sup> 2004 WL 344015 (Del. Super. Jan. 30, 2004).

for the hearing-impaired repeatedly molested a student. In finding that the molestation was not, as a matter of law, within the scope of the counselor's employment, the Court emphasized the extent of the counselor's violation of his duties: "While [the counselor] was clearly taking advantage of his position as a residential advisor during work hours and at the workplace, no employment related activity was even remotely taking place when [he] was sexually abusing the plaintiff."<sup>13</sup> The *Simms* Court held that this fact distinguished that situation from cases where the Court had held that the employee's tort occurred in the context of otherwise authorized acts.<sup>14</sup>

One such case, relied upon by the plaintiff here, is *Draper v. Oliverie Paving & Construction Company*,<sup>15</sup> where the Delaware Supreme Court held that it was error to grant summary judgment to a road construction company whose employee got into an argument with a motorist who had driven into a construction zone and subsequently slashed the motorist's throat. In *Draper*, the Court conceded that the employee's use of force was grossly excessive but noted that the record presented a "close and difficult question of fact" as to whether the assault was purely a product

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<sup>13</sup> *Id.* at \*7.

<sup>14</sup> *Id.*

<sup>15</sup> 181 A.2d 585 (Del. 1967).

of the employee's anger or it occurred while the employee was performing his assigned duties for the construction company.<sup>16</sup>

Upon review of the record, the Court concludes that Giddings' conduct falls outside the scope of his employment as a matter of law. While it is true that Giddings was on duty as a police officer and had the plaintiff in custody for shoplifting at the time of the alleged incident, there is nothing in the record that would support a finding that he was acting in the scope of his employment. Common sense dictates that sexually assaulting a crime suspect, a clear abuse of police authority under any circumstances, is not incidental to the arrest and detention of a suspect. Moreover, Giddings' alleged suggestion of a *quid pro quo*, whereby he told the plaintiff that he would not take her to jail if she performed a sexual act, demonstrates that the assault did not occur in the context of otherwise authorized duties because Giddings did not have discretion, as a DSP officer, not to arrest a suspect on an outstanding *capias*, particularly in exchange for sexual favors.

Plaintiff argues that Giddings' act was in the scope of employment because the DSP could easily have anticipated such an action, citing numerous reports of police misconduct (including one rape) reported since 1990. Plaintiff is essentially suggesting that a number of complaints of police misconduct filed in the past

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<sup>16</sup> *Id.* at 571.

twenty-two years, all of which were resolved out of court, should create a presumption that DSP officers will use excessive force, to the point that the State will be required to act as their insurer should the police injure anyone by committing any violent crime in the course of their duties. Any police officer who commits a violent crime has acted contrary to his duty under the law to “suppress all acts of violence.”<sup>17</sup>

To be sure, police officers are indeed frequent targets of citizen complaints of misconduct as a result of the use of excessive force. Plaintiff’s argument that this circumstance means that the DSP should expect that the conduct of this officer was within the scope of an officers’ employment is asking this Court to adopt a concept of police behavior that is too far-fetched. While law enforcement officers are often confronted with violent individuals and situations that demand the use of force, raping a young woman while she is being held in a police vehicle is a far cry from that scenario. Indeed, forcible rape by a police officer during an otherwise uneventful arrest cannot in any way be considered the type of misconduct that is frequently manifested by police officers in the line of duty. A crime, such as the one allegedly committed by Giddings against the plaintiff, is so outrageous, and such a clear abuse of Giddings’ position and authority as an officer of the peace,

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<sup>17</sup> 11 *Del. C.* §8302(a).

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

Plaintiff has also suggested that the State may be held liable under Section 219 of the Restatement (Second) of Agency because Giddings used his position and power as a police officer to commit sexual assault.<sup>18</sup> The Supreme Court of California applied similar reasoning in *Mary M. v. City of Los Angeles*,<sup>19</sup> which held that the city could be liable on a theory of *respondeat superior* where an on-duty police officer raped a woman he had detained. The California court emphasized the “unique position of trust” that police officers hold over members of society, noting, “Those who challenge an officer’s actions do so at their peril; anyone who resists an officer’s proper exercise of authority or who obstructs the performance of an officer’s duties is subject to criminal prosecution.”<sup>20</sup> The difficulty with Plaintiff’s argument, however, is that there are no Delaware cases of which the Court is aware that adopt section 219 of the Restatement (Second) of Agency as the law of Delaware, nor are there any that suggest that an employer may be held liable for an employee’s torts if the employee used his or her apparent authority as an employee to further the commission of the crime. Similarly, no

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<sup>18</sup> Restatement (Second) of Agency §219 (2)(d) provides, “A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: [...] the servant purported 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.”

<sup>19</sup> 54 Cal.3d 202 (Cal. 1991).

<sup>20</sup> *Id.* at 206.

Delaware court has specifically addressed whether the State should be held to a higher standard of civil liability for acts of wrongdoing by police officers, which would be the ultimate result of imposing liability under the plaintiff's proposed apparent authority theory.

Because the Court finds as a matter of law that the State could not be held liable under *respondeat superior* for Giddings' actions, it is unnecessary to reach the parties' sovereign immunity argument.

## **VI. Conclusion**

The Court recognizes the horrific nature of Giddings' actions and is sympathetic to the plaintiff's desire to hold someone accountable for what happened. Unfortunately, however, the law does not permit holding the State liable for the outrageous and criminal conduct of one of its police officers. It is inconceivable that the State could have anticipated that one of its police officers would rape a crime suspect. To hold, as the plaintiff suggests, that an act so clearly contrary to a police officer's duty to protect the public was within the scope of his employment would vitiate the traditional limitations on the doctrine of *respondeat superior* and would, if carried to its logical conclusion, subject the State to liability for any and all acts of wrongdoing by law enforcement officers.

For the reasons set forth above, the Court concludes that a state police officer's alleged rape of a crime suspect is not within the scope of the officer's

employment under Delaware law. As such, the State cannot be held liable under *respondeat superior* for the officer's actions. The State's Motion for Summary Judgment is therefore GRANTED.

**IT IS SO ORDERED.**

*/s/ Peggy L. Ableman*

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**PEGGY L. ABLEMAN, JUDGE**

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