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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES SHERMAN, as Administrator of the Estate of JANE D.W. DOE, Plaintiff Below, Appellant, v. THE STATE OF DELAWARE, and THE ESTATE OF JOSHUA GIDDINGS, Defendant Below, Appellee.	**No.: 190, 2015** In The Superior Court of the State of Delaware In and For New Castle County

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE STATE HAS WAIVED SOVEREIGN IMMUNITY BY ADOPTING A STATE INSURANCE PLAN WHICH COVERS THE UNDISPUTED WRONGFUL ACTIONS OF THE STATE TROOPER

MERITS OF ARGUMENT

Exclusions and Exceptions Under State Insurance Plan

As far as the Superior Court's Decision to give effect to the limitation of the "**However Clause**" only as to the "**Fraud Clause**" but not to the "**Penal Code Clause**", the Opinion offered no analysis supporting its conclusion except perhaps by reference to the Plan's identification of the "**Named Insured**" and the "**Insured.**" Doe v. Giddings, 2014 WL 4100925 at 6. Doe pointed this lack of analysis out in her Opening Brief at page 15. The State has not responded.

In observing that a contract must be read as a whole to determine the meaning of language in any one part of the contract, the State does not note that the Exclusions in the Contract are broken out into sub-parts (A) through sub-part (I). The "**Penal Code**" exclusion and "**Fraud**" exclusion are found together in one sub-part, (B). This is the only sub-part under **Exclusions** which contains an **Exception** to the **Exclusion**.

If the drafters of the Plan intended the "**Named Insured**" exception to only apply to the "**Fraud Clause**", logically they would have broken out the "**Fraud Clause**" followed by the exception exclusion into its own sub-paragraph thus separating it from the

"**Penal Code**" exclusion. They did not. Why? Because the Exception applies to and vitiates both parts of the Exclusion.

In defending the Superior Court's Opinion the State sets forth other arguments upon which the Superior Court did not rely. The State refers to the reference in the policy to coverage in the Plan for wrongful acts "arising out of Law Enforcement activities" (A-29) and excluding coverage for acts not committed "in the regular course of duty by the Insured." (A-30). The State's argument is that criminal acts are not within the scope of State Police authorized acts. This, however, is an argument that the State has already lost in Round One where this Court focused not on the wrongful act itself but instead asked the question: "whether the service itself in which the tortious act was done was within the ordinary course of the employer's business." Doe v. State, 76 A.3d 774, 777 (Del. Supr. 2013).

The State also argues that insuring against criminal conduct contravenes public policy. To support this proposition the State cites two cases from other states that did not involve a Government Insurance Policy and cites Appleman and Couch, which also did not address Government insurance policies. The clause excepting the State out of the exclusion for criminal wrongdoing was in the original third party policy. Under the original policy, presumably the State would have wanted to be covered (even if the wrongdoer was not) in the event a *respondeat* claim was successful against it.

Now the shoe is on the other foot. No coverage for wrongdoer, no coverage for State. Voila, sovereign immunity.

As to public policy, excepting the State from the exclusion does not reward a wrongdoer -- which is the whole point of the public policy rule.

Contra Proferentum

In arguing that self-insurance programs are not subject to the Rule of *contra proferentum*, the State does not discuss Title 18 Chapter 65 (18 Del. C. §6501 et seq.) which refers to the State Insurance Program as existing "for the protection of the State **and the public**. . ." 18 Del. C. §6502. It also makes no mention of the Attorney General's Opinion that the purpose of the Act [Id.] "was to provide protection **for both the public** and the State by waiving Sovereign Immunity. . ." Del. Op. Atty. Gen. 2004 WL 473854.

The State adopted this Plan per this statutory mandate -- and it should be interpreted in light of that statutory purpose. A stingy interpretation of the Plan does not serve that purpose.

The State also ignores the fact that the Plan is simply a wholesale adoption of a prior third party liability Policy which existed for the protection of the State and the public. That insurance policy would have been subject to the *contra proferentum* in favor of coverage in the event of an ambiguity. How can the same language be interpreted one way when the State is insured by

a third party and another way just because the policy was converted to self-insurance? Put another way, the State had a sword when an insurance company was providing coverage and wants a shield when it is self-insuring the risk. This cannot be so.

Application of the "However Exception" to the "Penal Code Exclusion" Conceded as Reasonable by State

The State spends three pages of its Brief seeking shelter from the storm created by Debra Lawhead's concession that Doe's reading of the interplay of the **"Penal Code", "Fraud" and "However" clauses of the Policy** was reasonable -- thus creating a conflict between her reading and Doe's reading of the policy -- both reasonable[1], and thus an ambiguity in the Policy.[2] To accomplish this it attacks Doe's argument as a claim of "**judicial admission**" -- which is not what Plaintiff argued.

Doe argued that Lawhead's testimony was similar to a "**judicial admission**" but did not claim the benefit of the "**judicial admission**" Rule. Thus, spending three pages of its Brief rebutting the technical elements of a **judicial admission** claim does not help the State. The Lawhead argument was made by Doe in the Superior Court but never mentioned in the Court's Opinion (Exhibit A to

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[1]Per Lawhead.

[2]However, Doe does not abandon her position as above that there is only one reasonable interpretation of the Policy (her own) -- that the exception applies to both clauses of the Exclusion - and is, therefore, not ambiguous.

Doe's Opening Brief). How can this be where both parties **agree** that Doe's reading of the policy is reasonable? Seen in this light there was not even a disagreement between the parties as to ambiguity according to Lawhead. There was nothing for the Court to decide as to this issue other than to apply the Rule of *contra proferentum*. To decide was error.

"Assault or Battery" Coverage versus "Penal Code Exclusion" Creates Ambiguity

In Doe's Opening Brief we argued that the Superior Court erred when it focused on the crime of **"Assault"** instead of on the crime of "**Offensive Touching**". There is no point in repeating the entire argument Doe made but it is worth noting that the Superior Court's analysis was not addressed by either party below because neither party made that precise argument. The bottom line is simply that all civil batteries violate one or more provisions of criminal law -- including rape. If all civil batteries are expressly covered by the policy how can civil batteries that violate the criminal law (all of them) be excluded?

The State meets this argument halfway by addressing a claim based upon both civil assault and civil battery. Doe's argument has nothing to do with civil or criminal assault.

Civil Assault and Civil Battery are two different concepts under the law. Civil assault does not require unwelcome contact - civil battery does. When the State does get around to focusing on

the "**Battery**" argument it points out that the word "**Battery**" does not appear in the Criminal Code while the term "**Offensive Touching**" does not occur in the Plan. It never, however, addressed Doe's reliance on the Commentary to Delaware Criminal Code 1972, 11 Del. C. §601 (Offensive Touching) which says that "offensive touching is the offense known as battery under the former criminal law." The last paragraph of the Commentary also makes it clear that "**offensive touching**" as a crime is a lesser included offense of both sexual and other serious assaults found in Delaware's Criminal Code. In other words the rape in this case is both a civil battery and a criminal battery included within the crime of rape.

Stretching to differentiate civil battery from a criminal battery the State argues that the crime requires contact "**likely to cause offense or alarm**" while the civil battery does not use that language but rather substitutes "**offend a person's integrity or dignity.**" Aren't these two ways of saying the same thing? Reading the Plan as suggested by the State renders the civil battery coverage "illusory or meaningless." Every single covered civil battery will be excluded by the "**Penal Code**" provision. Holding that battery coverage trumps the Criminal Act Exclusion eliminates the problem. Sonitral v. Marceau, 607 A.2d 1177, 1183 (Del. Supr. 1992).

The Superior Court conceded that Greenville v. Haywood, 502 S.E. 2d 430 (NC Ct. App. 1998) considered "a substantially similar

policy and situation (sodomy instead of rape) as presented here." (Exhibit A to Doe's Opening Brief at *6). The Court's differentiation was grounded, however, on a misreading, as above, of Delaware criminal law.

Moreover, the cases relied on by the Court to distinguish Greenville are inapposite.

Fire Ins. Exchange v. Sullivan, 224 P.3d 348 (Colo. Ct. App. 2009) gave effect to an intentional conduct exclusion for civil invasion of privacy where the civil tort could be made out without intentional conduct. That is not the case. In Michelet v. Scheuring, 680 So.2d 140 (La. Ct. App. 1996) the Court applied the criminal act exclusion despite the fact that the policy defined an "occurrence" as including assault and battery. According to the Court the "occurrence" endorsement "did not declare that the policy covered assault and battery." That is not this case. Farmer In The Dell v. Farmer's Mutual Insurance, 514 A.2d 1097, 1100 (Del. Supr. 1986) did not involve tension between civil tort coverage and criminal act exclusion -- rather, it simply involved the application of an "intentional tort" exclusion. Allstate Insurance v. Schmitt, 570 A.2d 488, 490-92 (N.J. 1990) similarly did not deal with the tension between civil tort coverage and criminal offense exclusion. Thus, the legal and logical underpinning of the State's argument and the Superior Court's Opinion falls apart. Greenville v. Hayward is unrebutted by the foregoing Opinions.

Identity of the Named Insured Clause

The Superior Court did not note and the State did not explain why an argument regarding the identity of the **Named Insured** was never raised in the State's original Motion for Summary Judgment (Round 1) nor in this Court (Round 1) but surfaced for the first time in its Summary Judgment Motion in Round 2. The State has also not explained why, in the second Summary Judgment Motion, this argument was raised in one sentence supported by no authority (Dkt. #50).

The probable reason why the argument was not made until Round 2 and then only as a "throw away" is that when the Plan Administrator was asked in deposition (Round One) the basis of her opinion that there was no coverage under the State Insurance Plan she made no mention of this argument or provision of the Policy to support her position (A229).

The State relies on Hedrick v. Blake, 531 F.Supp. 156 (D. Del. 1982) but the applicability of Hedrick to this case is difficult to divine. In Hedrick two police officers and the town of Fenwick Island were named as the Defendants on an excessive force claim. The claim against Fenwick Island was based upon a theory of *respondeat superior*. The Opinion reflects that in the insurance policy in play[3] the Town was the **Named Insured** while the **policy**

[3]If covered the Town waived sovereign immunity, if not it did not.

only covered identified Insureds -- the individual police officers but not any department or agency of the Town. This case is different -- the Department of Public Safety is a **Named Insured and Insured** under the policy. More mysterious is the State's reliance on Delaware State Troopers Lodge FOP (Lodge #6) v. State, 1984 WL 8217 at *4 (Del. Ch. 1984). In that case, the FOP entered into a collective bargaining agreement (CBA) with the Department of Public Safety. To enforce rights under the CBA the FOP sued the State but the Chancellor held that because the Governor and other members of the Executive Department were not parties to the CBA they had no obligations under it.

The dispute involved contractual obligations of the Department of Public Safety to put certain raises in effect for the police -- but the General Assembly had declined to fund the raises. Although it is not entirely clear, it appears that the Court found that the Department of Public Safety could not bind the Governor and other members of the Executive Department to actually fund the raises unless the General Assembly authorized the expenditure of such funds in the State Budget. Thus the CBA did not require either the State or the Department to pay the raises. Funded raises would likely have been another matter.

But the State's argument based upon Delaware State Troopers, supra shifts the focus far afield from where it should be. The State Insurance Plan exists for the benefit of the State and the

citizens of this State whether funded by a third party insurance policy or self funded. The statute says so and an Opinion of the Delaware Attorney General says so. Surely a one sentence argument without authority raised only during Round 2 of this litigation is not sufficient to upset this apple cart particularly where even the State Insurance Plan Administrator made no mention of it as the basis for a denial of coverage under the Plan.

And by raising this argument late in the game with no authority, the State has waived the issue.

> "[T]he failure to provide any support for [a party's] legal arguments would ordinarily justify a Ruling that this claim has been waived." Flamer v. State, 953 A.2d 130, 134 (Del. Supr. 2008). . . [T]he reasoning of the Supreme Court in connection with issues on appeal applies with equal force to legal arguments that are asserted by counsel in the trial Courts."

Hartford v. Community Systems, 2009 WL 1027103 (Del. Super. 2009); See also, Flamer supra. at n.8 and accompanying text.

This issue should be deemed waived despite the fact that the Superior Court addressed it in **dicta**. Notably, the Superior Court did not cite any authority for the proposition that the State was not effectively a **"Named Insured"** other than to distinguish authority relied upon by Doe in opposition to its **"Named Insured"** argument.

Summary Judgment Motion - *Respondeat Superior*

As to Plaintiff's Motion on liability the State makes

primarily a "***law of the case***" argument. But this argument falters in light of this Court's holding that:

> "The Doctrine. . .applies only to those matters necessary to a given decision and those matters which were decided on the basis of a fully developed Record. Where, as here, this Court could not have envisioned the full factual posture of a particular claim, the prior ruling cannot be considered to be the *law of the case.*"

Zirn v. VLI Corporation, 681 A.2d 1050 n.per.7 (Del. Supr. 1996). See also, State v. Wright, 2015 WL 475847 (Del. Super. 2015).

Because the State is obviously aware that the Record has changed since Round I in this Court it eventually addresses the additional record developed after the original appeal.

Partial Service To The Master

As to the "service to the master" element of *respondeat superior,* in our Opening Brief we argued that this Court's original Decision could be interpreted so that if the Record on remand presented uncontroverted facts (i.e., "part of what Giddings was doing was transporting a prisoner") then there could be no conclusion other than that Giddings was acting in part to serve his employer. Put another way, there was no way any rational jury could find that arresting and transporting a prisoner was not of service to the master and we have asked how the trial Judge was supposed to instruct the jury if this issue went to the jury as argued by the State.

What is the definition of partial service to the master? The State has suggested no answer to this question. Nor has the State suggested on these facts how a jury could make any other finding regarding partial service to the master when this Court's focus in its original Opinion was not on the servant's wrongful act but rather the context within which it arose. This is yet another argument that the State has addressed by ignoring it.

It is true that the Court's original Opinion contains certain language regarding certain issues as jury questions. However, the issue before the Court at that time was whether the State was entitled to Summary Judgment on the undisputed facts of the case. The Court's Decision addressed that question and answered in the negative. The Court said--in so many words--that the State had not demonstrated that the facts were undisputed underlying its claim for Summary Judgment.

The current issue is different -- are the undisputed facts sufficient to make out the partial service to the master element as a matter of law? In other words, we believe that the question posed in this litigation now is not "Is the State entitled to Summary Judgment" but rather "Is Doe entitled to Summary Judgment on the same facts?" We think this question was not addressed by this Court in Round One because it was not asked the question. The *law of the case* requires a decision on an "adjudicated issue" that was actually "involved and decided." Kenton v. Kenton, 571

A.2d 778, 784 (Del. Supr. 1990); and Brittingham v. State, 705 A.2d 577, 579 (Del. Supr. 1998).

That is our position, however, inartfully expressed in our Opening Brief. Arguing *law of the case* without considering its elements, as the State did, is unhelpful. For those reasons we suggest that *law of the case* does not bar a finding that the factor of partial service to the master is made out on the undisputed facts of this case.

Entire Unexpectability and Foreseeability

Here the State also falls back on the *law of the case* argument. But the facts have changed since Round One so *law of the case* is inapplicable.

The State obviously knows this so it addresses the additional facts brought forth by the deposition testimony of Lt. Col. James Paige at *11-12 (B74-75) and deposition of Sgt. Ray Peden at *7-8 (B81-82). Paige and Peden testified that they knew of no disciplinary problems with Giddings involving sexual misconduct.

But this misses the point.

This case does not present a negligence claim based upon negligent supervision. The issue is not foreseeability of misconduct by a particular State Trooper but rather whether police sexual misconduct in general is "entirely unexpectable." Draper v. Olivere, 181 A.2d 565, 571 (Del. Supr. 1962). In relying on the testimony of Paige and Peden the State chooses to ignore the

holding of this Court in Jardel Co. Inc. v. Hughes, 523 A.2d 518, 524 adopting the rules set forth in Section 334 of the Restatement (Second) of Torts and comment F to this Section:

> "[The Defendant] may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual."

Jardel was a negligence (failure to protect but not negligent supervision) case and did not involve a claim of *respondeat* based upon the intentional misconduct of an employee. Duphily v. Delaware Elec. Coop., 662 A.2d 821, (Del. Supr. 1995) is likewise a negligence (but not negligent supervision) case and also holds that foreseeability does not run to the "particular circumstances" of the act causing the injury. The testimony of Paige and Peden is simply irrelevant to the issue of "entire unexpectability".

And the deposition of Col. McLeish slams the door on the issue of foreseeability raised by the State. In our Opening Brief we outlined that testimony. We pointed out McLeish's testimony acknowledged a recognized problem (existing before this case arose) of police sexual misconduct. We pointed out McLeish's agreement with an article in the magazine of the International Association of Chiefs of Police which echoed McLeish's acknowledgment. We pointed out prior claims of police misconduct going back over 19 years prior to Giddings' misconduct, include two allegations of sexual

misconduct. The State discussed none of this. Presumably this failure was due to the fact that there was nothing in this Record to rebut that testimony.

Moreover, the State does not discuss the real point of Lt. Col. McLeish's testimony -- acknowledging a **problem known to him** involving police officers who engage in sexual misconduct during the course of an arrest. Just how can police sexual misconduct known to Col. McLeish to be a problem within law enforcement be "entirely unexpectable?" No answer by the State.

Regarding the argument that proximate cause is usually a jury issue, that is not an issue presented by the question of liability -- the subject of our Summary Judgment Motion. We agree that proximate cause is a jury issue on the question of damages.

Finally, Draper v. Olivere, 181 A.2d 565 (Del. Supr. 1962) does not hold that there is a requirement under *respondeat* that agent misconduct be "more or less certain to occur. . ." Id. at 569. That language in Draper is tempered by its actual holding the question is whether the tort of the agent was "not entirely unexpectable." Id. At 571; Doe v. State, 77 A.3d 774, 777 (Del. Supr. 2013) ("not unexpectable") (Round One). This is a far cry from the cherry picked quote relied upon by the State. That is simply not the law in Delaware.

In addition, missing from the State's Answering Brief is any discussion of argument that lack of foreseeability is an

affirmative defense on which the State bears the burden. In Round One this Court observed that the Record did not contain any evidence of lack of foreseeability, which would have supported the State as to this element. Id. at 777. It still does not. Also missing from the State's Answering Brief is a discussion of the observation of this Court that other Courts "have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks." Doe v. State, 76 A.3d 774, n.9 and accompanying text (Del. Supr. 2013). We read that as foreshadowing Doe's current Summary Judgement motion on an expanded record which is what we have here.

ARGUMENT

II. 12 DEL. C. §2102(a) IS A STATUTE OF LIMITATIONS WHICH MAY BE WAIVED

MERITS OF ARGUMENT

In this case, the Superior Court adhered to a strict Supremacy-of-Text interpretation of the State Insurance Plan to deny coverage and thus found that Plaintiff's claim was defeated by the defense of Sovereign Immunity. However, when the Superior Court reached the issue of proper application of 12 Del. C. §2102(a)[4] it left the Supremacy-of-Text Canon and adopted a Spirit of the Law approach. Why the inconsistency?

The Estate of the Trooper takes comfort in the Superior Court's reliance on Dellaversano v. DiSabatino, 1988 WL 960702 (Del. Super. 1998) and Cummings v. Lewis, 2013 WL 2987903 (Del. Ch. 2013). We have treated both Opinions in our Opening Brief and rely upon the arguments noted there.

The Estate of the Trooper also relies upon Estate of Holton, 1976 WL 5206 (Del. Ch. 1976). The problem with reliance on Holton is that Section 2102 then existed in a different form than it does today because it made no reference to "other statute of limitation."

Section 2102 then provided:

> "(a) If the register observes the requirements

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[4]We apologize for incorrectly citing the statute in our Opening Brief.

> of Section 2101 of this Title, all claims against the Estate of the decedent. . . not presented to the executor. . .within six months of the date of the granting of letters to the executor or administrator shall be forever barred." (Text set out in Holton).

Holton therefore is irrelevant to the present dispute.

The last case relied upon by the Estate is Cheswold Volunteer Fire Company v. Lambertson, 489 A.2d 413, 421 (Del. Supr. 1984). Cheswold dealt with the operation of 10 Del. C. §8127 and that statute makes no reference to "other statute of limitation."

These arguments were made to the Court below but ignored by it.

12 Delaware Code §2102(f)

Finally, if this Court were to rule that Section 2102(a) creates a statute of repose which cannot be waived, then the Court should provide in its ruling that its Order affirming the dismissal of Plaintiff's claim against the Estate of the Trooper is subject to 12 Del. C. §2102(f) which provides that:

> "nothing [in the statute] affects or prevents, to the limits of the insurance protection only, any proceeding to establish liability of the decedent where the personal representative for which the decedent is protected by liability insurance." Doe made this argument below (Dkt. #145).

We concede that before Section 2102(f) can come into play this Court would have to find that the "**Penal Code Clause**" is totally ineffective as argued elsewhere in this appeal -- even as to the Trooper -- because it is impossible to reconcile with the policy's

express coverage of "**batteries.**" In other words if the "**Penal Code** Exclusion" does not apply even as to the Trooper then the Estate of the Trooper would be protected by the Insurance Plan and Section 2102(f) comes into play.

This argument was expressly made to the Court below and not mentioned in the Opinion granting Summary Judgment (A251).

CONCLUSION

1. The State is covered by the State Insurance Plan.

2. The "Penal Code" exclusion in the State Insurance Plan does not apply to the State.

3. The "Penal Code" exclusion in the State Insurance Plan is void as illusory.

4. The Trooper was acting in part to serve the State by arresting and transporting Doe.

5. The Trooper's misconduct was not "entirely unexpectable."

6. Summary Judgment should have been awarded to the Plaintiff on the issue of liability.

7. Section 2102(c) equates itself with a "statute of limitation." As such it can be waived and was waived in this case.

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