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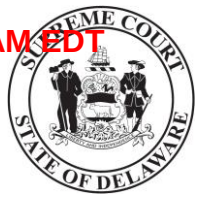

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE STATE OF DELAWARE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
/s/ Lynn Kelly
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DATED: October 27, 2017

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NATURE AND STAGE OF THE PROCEEDINGS

In 2010, Plaintiff Dawn Worthy filed suit against the State of Delaware and the Estate of Joshua Giddings, alleging that she was sexually assaulted by on-duty former trooper, Joshua Giddings, on March 19, 2009. The Plaintiff sued the State on theories of agency and *respondeat superior*.[1] The complaint alleges that the acts of former Trooper Giddings "were done in bad faith, with no belief that the public interest would be served thereby."[2]

In May 2012, the Superior Court granted summary judgment and dismissed the agency claims against the State, holding that the Trooper's wrongful act was not within the scope of employment because it had not been authorized by the State Police.[3] Plaintiff appealed to this Court.

On September 12, 2013, this Court reversed and held that factual disputes remained for a jury to determine regarding whether Trooper Giddings was acting within the scope of his employment during the time the alleged assault took place.[4]

On April 8, 2015, the Superior Court again granted summary judgment for the State on the issue of sovereign immunity holding that the professional liability

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[1] Complaint at ¶¶4-7, and 12 (Appellee's Appendix B-11-12).
[2] *Id.* at ¶13. (B-12).
[3] *Doe v. Giddings*, 2012 WL 1664234 (Del. Super. May 7, 2012), *rev'd* 76 A.3d 774 (Del. 2013).
[4] *Doe v. State*, 76 A.3d 774 (Del. 2013) (*en banc*).

policy excluded the circumstances of this case.[5] In addition, the Superior Court denied Plaintiff's motion for summary judgment on the basis that the four factors of the scope of employment test were not satisfied and ruled that the scope of employment was a jury question.[6]

On February 16, 2016, this Court reversed and held that the State waived sovereign immunity for Plaintiff's claims, but denied Sherman's appeal on the denial of summary judgment, holding that the scope of employment issue was controlled by Doe under the law of the case and was a question of fact for jury.[7]

On April 28, 2016, appellant filed an amended complaint substituting James Sherman as the Administrator of the Estate of Dawn Worthy, with similar allegations.[8]

A three day jury trial was held January 17, 2017 through January 19, 2017. On January 19, 2017, a Superior Court jury returned a verdict in favor of the State.[9]

On May 8, 2017, the Superior Court denied Plaintiff's motion for new trial and motion to set aside the verdict.[10] Appellant filed a timely appeal and Opening

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[5] *Doe v. Giddings*, 2014 WL 4100925, at *7 (Del. Super. July 29, 2014), *rev'd* 133 A.2d 971 (Del. 2016).
[6] *Id.*
[7] *Sherman v. State*, 133 A.3d 971 (Del. 2016)(*en banc*).
[8] Amended complaint at ¶¶4-7, 9, and 12 (B-15-16). The amended complaint was filed as a result of Plaintiff Worthy's death.
[9] *See* Verdict Form (B-179-80).
[10] *See Sherman v. State Dept. of Public Safety*, 2017 WL 1900268 (Del. Super. May 8, 2017).

Brief ("OB") seeking reversal of the Superior Court's denial of a new trial. This is the Appellee State of Delaware's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Denied. The trial court's "Scope of Employment" instruction was a correct statement of the law and followed the language from this Court's decision in *Doe.*[11]

II. Denied. The trial court correctly denied Appellant's request for an alternative instruction on foreseeability that was an incorrect statement of the law and would have required an improper comment on the evidence.

III. Denied. The trial court's "Scope of Employment" instruction set forth the correct statement of Delaware law on foreseeability, tracked the language of the *Doe*[12] opinion, and followed the law of this case.

IV. Denied. The trial court did not commit error in overruling Sherman's objection to a portion of the defense's closing argument that properly mentioned the lack of evidence in the plaintiff's case on foreseeability.

V. Denied. The trial court did not commit error in submitting the issue of consent to the jury as a part of the standard jury instructions on assault and battery; any error was harmless as there was sufficient evidence to support the verdict that employee Giddings was not acting within the scope of his employment.

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[11] *Doe v. State*, 76 A.3d 774, 776-77 (Del. 2013) (*en banc*).
[12] *See id.*

STATEMENT OF FACTS

On the evening of March 19, 2009, Dawn Worthy was stopped by store security for shoplifting items at the JC Penney store in the Christiana Mall.[13] Ms. Worthy 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.[14]

When Delaware State Police ("DSP") Trooper Joshua Giddings arrived at the Christina Mall, he placed Ms. Worthy in the rear of the police car.[15] Giddings searched the DSP computer system and found that Ms. Worthy did have a capias for her arrest.[16] Giddings drove the police car from the JC Penney entrance to several locations in the mall parking lot.[17] Ms. Worthy alleges that Giddings eventually drove off to a third location, exited the police car, opened the car door, and placed plaintiff Worthy's hand on his genitals.[18] Ms. Worthy stated that

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[13] *See* Deposition of Dawn Worthy, April 25, 2011 (A-158-162); s*ee also* Interview of Joshua Giddings, April 16, 2009 (A-112). Plaintiff read in the deposition of Dawn Worthy at trial and played the taped statement of Worthy and the two taped statements of Giddings.

[14] *See* Deposition of Dawn Worthy, April 25, 2011 (A-163); s*ee also* Interview of Joshua Giddings, April 16, 2009 (A-113).

[15] *See* Deposition of Dawn Worthy, April 25, 2011 (A-167); s*ee also* Interview of Joshua Giddings, April 16, 2009 (A-113).

[16] *See* Deposition of Dawn Worthy, April 25, 2011 (A-168); s*ee also* Interview of Joshua Giddings, April 16, 2009 (A-113).

[17] *See* Deposition of Dawn Worthy, April 25, 2011 (A-169-171).

[18] *See* Deposition of Dawn Worthy, April 25, 2011 (A-172).

Giddings got out of the car 70 times to cuff her, then uncuff her.[19] At one point, Giddings handcuffed Ms. Worthy's right hand to a bar in the back seat of the police car and placed her left hand in his neck collar.[20] Ms. Worthy testified that Giddings then drove to a remote area away from the mall.[21] The investigating officer, Sgt. Maher, described the area as a dirt area surrounded by woods used to store fill dirt and construction equipment.[22] Ms. Worthy alleges that Giddings told her that he could let her go home if she did something in return.[23]

Eventually, Giddings uncuffed plaintiff, had her sit in the front seat of the police car, and Ms. Worthy performed oral sex on him.[24] Instead of taking Ms. Worthy to court, Giddings drove Ms. Worthy home and told her to turn herself in on the capias.[25] Plaintiff later reported Giddings' actions to DSP Sgt. Maher.[26] Sgt. Maher investigated the complaint and eventually arrested Giddings on charges of sexual misconduct, bribery, and official misconduct.[27] Shortly after the arrest, Giddings committed suicide.

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[19] *See* Recorded Interview of Dawn Worthy April 6, 2009 (A-51-52).
[20] *See* Recorded Interview of Dawn Worthy April 6, 2009 (A-45-46).
[21] *See* Deposition of Dawn Worthy, April 25, 2011 (A-174).
[22] *See* Trial testimony of Sgt. Maher, (A-372CC-372DD); *see also* Pictures of the scene, Trial Exhibits (B-73-78).
[23] *See* Deposition of Dawn Worthy, April 25, 2011 (A-173-175).
[24] *See* Deposition of Dawn Worthy, April 25, 2011 (A-175-176); *see also* Recorded Interview of Dawn Worthy April 6, 2009 (A-67-69).
[25] *See* Deposition of Dawn Worthy, April 25, 2011 (A-180).
[26] *Id.* at (A-180-181).
[27] *See* Giddings Arrest Warrant (A-133-138).

Ms. Worthy admitted that she knew that the officer was required to take her to court on the outstanding capias.[28] Ms. Worthy also knew that Giddings was breaking the law when he asked her to engage in oral sex.[29] Ms. Worthy stated that she consented to performing the act because she did not want to go to jail and she wanted to go home.[30] Ms. Worthy also admitted that she performed the sexual act because she believed that Giddings was not going to arrest her and Giddings was going to take care of her warrant.[31]

Sgt. Maher testified that Ms. Worthy was unable to identify Giddings's vehicle after the incident.[32] Sgt. Maher also testified that the bar that Ms. Worthy described in her statement did not exist in Giddings's vehicle.[33] Lastly, Sgt. Maher testified that his investigation of Ms. Worthy's account of being handcuffed to the bar in the back seat and reaching through the plastic divider in the middle of the car was not possible.[34]

Giddings said that the oral sex was Ms. Worthy's idea and that he did not promise to do anything for her at any point.[35] Giddings denied placing Ms.

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[28] *See* Deposition of Dawn Worthy, April 25, 2011 (A-173, A-183).
[29] *Id.* at (A-181).
[30] S*ee* Recorded Interview of Dawn Worthy April 6, 2009 (A-52-53, A-74).
[31] *Id.* at (A-63, A-74).
[32] *See* Trial testimony of Sgt. Maher (A-372X-372Y).
[33] *Id.*
[34] *Id.* at 27 (A-372AA); *see also* pictures of the Delaware State Police car, Trial Exhibits, (B-366-70).
[35] *See* Recorded Interview of Joshua Giddings, April 16, 2009 (A-120, A-A-125).

Worthy's hand on his groin at any point prior to the oral sex.[36] Giddings also denied handcuffing Ms. Worthy to anything in the car.[37]

Sgt. Maher testified that Giddings was not authorized by DSP procedure to issue Ms. Worthy a summons.[38] DSP procedure for issuing a criminal summons required Giddings to take Ms. Worthy to Troop 9 to obtain a warrant from a magistrate because Ms. Worthy had an outstanding capias.[39] Although a criminal summons was issued, Ms. Worthy was never taken to court for the outstanding capias.[40]

There was no evidence at trial indicating any prior acts of sexual misconduct by former Trooper Giddings or any records of any prior sexual complaints by troopers, civilians, or members of the public against Giddings. Specifically, Ray Peden and James Paige testified that they were not aware of any allegations of sexual misconduct against Giddings during the time they supervised Giddings.[41]

At the time of this incident in 2009, Thomas MacLeish was the Colonel of

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[36] *Id.* at (A-20-121).
[37] *Id.* at (A-122-133).
[38] *See* Trial testimony of Sgt. Maher (A-372FF-372GG).
[39] *Id.*
[40] *Id.* at p. 21 (A-372U). Appellant's brief states "Giddings did not immediately take Worthy to Court ...." (*See* Opening brief, p. 9). Any inference that Giddings took plaintiff Worthy to court should be disregarded as Sgt. Maher's undisputed testimony is clear that plaintiff Worthy was never taken to court.
[41] *See* Trial testimony of Ray Peden (B-48-55) and deposition testimony of James Paige read into record at trial (B-56-68).

the Delaware State Police.[42] Colonel MacLeish testified that he was aware in 2009 that an extremely small percentage of law enforcement officers engage in sexual misconduct during an arrest, noting that the same occurs in other occupations where people are given authority and responsibility to take care of others.[43] MacLeish also testified that DSP takes many steps in hiring and training to prevent acts of sexual misconduct from occurring on the force.[44] MacLeish testified that the Delaware State Police started as an agency in April, 1923.[45] Furthermore, Mr. MacLeish stated that, in calendar year 2009, the Delaware State Police made about "a couple hundred thousand arrests."[46]

Although not fully recited herein, the following documents are referenced in Appellee's Opening Brief: (1) Appellant's Opening Brief to Supreme Court filed 10/1/12;[47] (2) Appellant's Opening Brief to Supreme Court filed 6/3/15;[48] (3) Superior Court Civil Pattern Instruction 18.5;[49] (4) Superior Court Civil Pattern Instruction 21.6;[50] (5) Portions of the pretrial conference;[51] (6) Prayer conference;[52]

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[42] *See* (A-378-379).
[43] *Id.*
[44] *See* (A-383-385).
[45] *See* (A-382).
[46] *See* (A-385).
[47] *See* (B-225).
[48] *See* (B-300).
[49] *See* (B-176).
[50] *See* (B-178).
[51] *See* (B-1-10).
[52] *See* (B-79-135).

(7) Plaintiff's opening statement at trial;[53] (8) Portions of Defendant's closing statement at trial;[54] and (9) Jury charge by the trial court.[55]

[53] *See* (B-25-46).
[54] *See* (B-136-47).
[55] *See* (B-148-75).

I. THE TRIAL COURT'S "SCOPE OF EMPLOYMENT" INSTRUCTION WAS PROPER IN THAT THE LANGUAGE FOLLOWED THE LANGUAGE FROM *DOE*[56] AND WAS A CORRECT STATEMENT OF THE LAW.

Question Presented

Whether the Superior Court's "Scope of Employment" instruction was proper where the instruction was a correct statement of the law?

Standard and Scope of Review

This Court reviews a claim of error in a trial court's instructions *de novo*.[57] When a party claims error in a jury instruction, "reversal is only appropriate 'if the alleged deficiency in the jury instructions undermined ... the jury's ability to intelligently perform its duty in returning a verdict.'"[58]

Argument

Sherman argues that the trial court's "Scope of Employment" instruction given at trial was legally deficient because it should have been modified to instruct that "general conduct" be viewed by the jury rather than just "conduct."[59] Essentially, Appellant argues that, pursuant to *Doe v. State,*[60] the jury should have

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[56] *Doe,* 76 A.3d at 776-77.
[57] *Guy v. State*, 913 A.2d 558, 563 (Del. 2006) (citing *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayres v. State*, 844 A.2d 304, 309 (Del. 2004)).
[58] *Guy*, 913 A.2d at 568 (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (internal quotations omitted)).
[59] *See* Appellant's Opening Brief at *19-20; *see also* transcript at trial of Course and Scope of Employment instruction read to the jury at trial, (B-158-160).
[60] *Doe*, 76 A.2d at 777.

been instructed to take a broad focus on Giddings's general conduct of placing Ms. Worthy under arrest when the jury determined whether Giddings actions were within the course and scope of his employment and ignore the rest of his conduct.[61] Appellant's argument requested that the trial court comment on the evidence, defining "general conduct" as Giddings' arrest of Ms. Worthy, in its instruction to the jury rather than allow the parties to make arguments based on the evidence. Such request was improper.[62] The specific distinction now argued between "general and specific conduct" does not appear in any portion of the *Doe* decision or in the RESTATEMENT (SECOND) OF AGENCY § 228.

Delaware law requires that "jury instructions must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading.'"[63] The language of the Scope of Employment instruction given by the Superior Court followed the language of the course and scope standard set forth in *Doe v. State.*[64] Specifically, this Court stated, "The relevant test, however, is not whether Giddings' sexual assault was 'within the ordinary course of business of

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[61] *See* Appellant's Opening Brief, at *17.

[62] *See* DEL. CONST. ART. IV, § 19 states that "judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law." Section 19 was adopted as a new provision in the 1897 Constitution to ensure that judges confined themselves to making determinations of law and leaving juries to determine the facts. *Herring v. State,* 805 A.2d 872, 876 (Del. 2002) (citing three debates and proceedings of the constitutional convention of the State of Delaware 1729-30 (1958)).

[63] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002).

[64] *Doe*, 76 A.2d at 777.

the [employer], ... but whether the service itself in which the tortious act was done was within the ordinary course of such business....'"[65] The above sentence is not part of the civil Pattern Instruction on course and scope but was added to ensure that the jury was instructed in accordance with correct standard set forth by the Court for this case. The trial court used the exact words of the "service test" that was part of the ruling in the *Doe* case.[66] This language did not have to be further defined as now argued by Appellant as the trial court gave a clear, accurate statement of the law.[67]

Appellant has repeatedly asserted in these proceedings that foreseeability of a sexual assault by a DSP trooper is both established by case law and by the facts of this case such that summary judgment was warranted.[68] Such argument was denied by this Court on the basis that the analysis was a fact question for the jury.[69] Despite repeated refusals from this Court to allow summary judgment on the issues of foreseeability and course and scope generally, Appellant continues to argue, even after trial, that the Superior Court should have instructed the jury on the foreseeability element of the course and scope analysis, specifically in Appellant's

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[65] *Id.*

[66] (A-472-73).

[67] *See Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998) (jury instructions must be viewed as a whole and not in a vacuum).

[68] *See* Appellant's Opening Brief filed with this Court on October 1, 2012 (B-242-49); *see also* Appellant's Opening Brief filed with this Court on June 3, 2015 (B-338-41).

[69] *Doe,* 76 A.3d at 777; *see also Sherman*, 133 A.3d at 979.

favor. Ironically, Appellant conceded that the course and scope jury instruction submitted to the jury were accurate statements of the law:

> The Court: ...So, I have two questions. The first is, do you have any case law today that has not been submitted in your briefs that talks about the differences in this distinction?
>
> Mr. Lyons: I do not.
>
> The Court: You do not. And do you think that the jury instructions that were provided were not accurate statements of the law?
>
> Mr. Lyons: **They were accurate statements of the law** but they weren't helpful in terms of the issue of general versus specific...[70] (emphasis added).

There can be no argument on appeal that Appellant was deprived of jury instructions that conform to Delaware law because Appellant confirmed that the instructions were a correct statement of the law. Here, Sherman has conceded that the trial court's instructions were a correct statement of the law, and this concession should be sufficient to establish that this claim is without merit.[71]

Notwithstanding his concession, Appellant asserts that the "Scope of Employment" instruction must have led to jury confusion because the first portion of the sentence states "wrongful conduct" and the second part of the sentence states "service".[72] However, the jury presented no questions to the trial court during jury deliberations. The instruction was also a correct statement of the law. As such,

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[70] *See* Transcript from Motion for a New Trial, at *28. (B-208).
[71] *See Corbitt,* 804 A.2d at 1062.
[72] *See* Appellant's Opening Brief at *19.

any assertion that the jury was confused by this instruction is without support.

Importantly, the instruction given on "Scope of Employment" is nearly identical to the language this Court set forth in *Doe* in its discussion of the RESTATEMENT (SECOND) OF AGENCY § 228.[73] Any further incorporation of the *Doe* inferences, noted at the summary judgment level, would have taken the issue of scope of employment away from the jury. *Doe* is very clear that the issue of course and scope of employment was a fact issue for the jury. The jury instruction on scope of employment was tailored by the trial court to conform with the RESTATEMENT and *Doe* to ensure that it was a correct statement of the law and not misleading to the jury.

Appellant next argues that the second portion of the Scope of Employment instruction should have read:

> However, Mr. Giddings' ***general and not specific unlawful***[74] 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 employer;
> (3) Too little motivated by an intent to serve his employer;
> ***OR***
> (4) Involved force that was not reasonably foreseeable.[75]

The instruction given by the trial court, which omitted the bold/underlined language[76], was a correct statement of the law and consistent with RESTATEMENT

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[73] *See Doe,* 76 A.3d at 777.
[74] Bold and underline denoted to indicate language as requested by Plaintiff.
[75] *See* Appellant's Opening Brief at *21.
[76] *See* Trial Court's jury charge (B-158-160).

(SECOND) OF AGENCY § 229. The language was also based on the language contained in the Superior Court Pattern Instruction 18.5.[77] This Court previously explained that "[t]he 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."[78] The trial court's Scope of Employment instruction tracked language from *Doe* that discussed the service test and was a correct statement of the law. Under Delaware law, a party is entitled to a correct statement of the substantive law in the jury instructions but is not entitled to an instruction in a particular form.[79] The trial court made no error in its rulings regarding the Scope of Employment instruction.

The language proposed by Sherman is also legally incorrect and terribly confusing. Under the proposed language, the jury would have to decide whether the "general conduct" of the officer being on the job was not motivated by an intent to serve the employer under the third factor. The third factor clearly focuses on whether the alleged wrongful conduct was too little motivated by the employee to serve the employer.[80]

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[77] *See* Superior Court Pattern Instruction 18.5 –When Employee Tends to Personal Affairs and At the Same Time Is Acting Within Scope of Employment (B-176).
[78] *Doe*, 76 A.3d at 777.
[79] *Guy,* 913 A.2d at 563.
[80] *See Doe*, 76 A.3d at 777.

Lastly, Appellant appears to assert that there was error in Defendant's closing remarks based upon the Scope of Employment instruction.[81] This was not identified as a separate issue of error in the Opening Brief. Appellant failed to object to Defendant's closing remarks or request a curative instruction. Thus, Appellant has waived this issue for appeal. Generally, a party must timely object to improper statements made in closing argument to preserve a claim on appeal. If a party fails to object, he waives the right to raise the issue on appeal, and this Court will not review his claim unless "plain error" is shown.[82] Plain error is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[83] Defendant's closing remarks, which referenced the evidence in the case,[84] were proper and without plain error.

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[81] *See* Appellant's Opening Brief at *21-23.

[82] *Robertson v. State,* 596 A.2d 1345, 1356 (Del. 1991); *Ray v. State,* 587 A.2d 439 (Del. 1991); *Weber v. State,* 547 A.2d 948, 960 (Del. 1988); DEL. SUPR. CT. R. 8. *See also State v. Halko,* 193 A.2d 817, 830 (Del. Super. 1963) ("Counsel must preserve alleged error committed by the Court by timely ... objections ... if he wishes to assert such matters as grounds for a new trial"), *aff'd,* 204 A.2d 628 (Del. 1964).

[83] *Thomas v. State*, 113 A.3d 1081 (Table) (Del. May 8, 2015).

[84] *White v. State*, 840 A.2d 643, 2003 WL 23019194 at *4 (Del. 2003); *Fenton v. State*, 567 A.2d 420, 1989 WL 136962, at *2 (Del. 1989) (prosecutor may "explain all the legitimate inference of the appellant's guilt that flow from [the] evidence" in closing argument) (citing *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980)); *see also* 23B AM. JUR. PL. & PR. FORMS TRIAL § 261 (closing arguments of counsel are for the purpose of discussing the evidence).

II. THE TRIAL COURT CORRECTLY DENIED SHERMAN'S REQUEST FOR AN INSTRUCTION ON FORESEEABILITY THAT WAS AN INCORRECT STATEMENT OF THE LAW AND WOULD HAVE REQUIRED AN IMPROPER COMMENT ON THE EVIDENCE.

Question Presented

Whether the trial court correctly declined to give a special instruction on foreseeability requested by Sherman where that instruction was an improper statement of the law and would have required the trial court to improperly comment on the evidence?

Scope and Standard of Review

This Court reviews a claim of error in a trial court's instructions *de novo*.[85] When a party claims error in a jury instruction, "reversal is only appropriate 'if the alleged deficiency in the jury instructions undermined ... the jury's ability to intelligently perform its duty in returning a verdict."[86]

Argument

Appellant claims that the trial court erred in refusing to give the so-called "MacLeish Instruction" which was offered by Appellant prior to the prayer conference.[87] This instruction was not a Pattern Instruction but was created by plaintiff solely for this case in an attempt to essentially obtain a directed verdict at least on the element of foreseeability. This contested instruction provided:

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[85] *Guy*, 913 A.2d at 563; *Ayres,* 844 A.2d at 309.
[86] *Guy*, 913 A.2d at 568.
[87] Sherman incorrectly refers to the witness as "McLeish."

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.[88]

At the prayer conference, the defense objected to this MacLeish instruction.[89] The trial court refused to give the instruction, and ruled that the MacLeish instruction was an incorrect statement of the law.[90] After further discussion, the plaintiff agreed that the trial court could give the standard instruction on foreseeable injury.[91] Plaintiff agreed to this instruction while still arguing that the MacLeish instruction was more accurate or should also be given.[92]

The Pattern Instruction on Foreseeability as given in this case, provided:

> A foreseeable act is one that an ordinary person, under the circumstances, would recognize or anticipate as creating a risk of injury. It is not necessary that the particular injury suffered was itself foreseeable, but only that the risk of injury existed.[93]

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[88] *See* (A-349).
[89] *See* Transcript of prayer conference at *10, Ex. B to App. Op. Brief.
[90] *Id.* at *10-12.
[91] *Id.* at *13.
[92] *Id.*
[93] *See* (B-160).

The trial court did not commit legal error in this case by instructing the jury on the issue of foreseeability based on the Superior Court Pattern Instruction as modified for this case. Superior Court Pattern Instruction 21.6, Foreseeable Injury, is based on prior holdings of this Court and is a correct statement of the law on the question of foreseeability in a tort action.[94]

Under Delaware law, a party is not entitled to particular wording in a jury instruction, but rather is entitled to an instruction that is a correct statement of the law.[95] In this trial, the jury was given an instruction on foreseeability that was a correct statement of the law. The trial court's decision to give this Pattern Instruction cannot be the basis for reversible error.

Furthermore, the trial court correctly ruled that the MacLeish instruction was an incorrect statement of the law. Plaintiff had no right to have the jury instructed on incorrect principles of the law.[96]

Under Appellant's proposed instruction, the trial court would have been directing the jury to find for Appellant on the element of foreseeability. This element was in dispute. This Court has previously rejected Appellant's argument

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[94] *See* Superior Court Pattern Instruction 21.6 (B-178) (citing *Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202, 1209-10 (Del. 1997); *Duphily v. Delaware Elec. Coop.*, 662 A.2d 821, 830 (Del. 1995)).

[95] *Lloyd v. State*, 152 A.3d 1266, 1271 (Del. 2016) (citing *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991)).

[96] *See Lloyd*, 152 A.3d at 1271 (each party has the unqualified right to a correct statement of the substance of the law).

now raised in *Sherman v. State*.[97] In that appeal, one of Sherman's arguments was that the testimony of Mr. MacLeish in his deposition established the element of foreseeability as a matter of law.[98] This Court specifically rejected that argument and ruled, consistent with the first *Doe* opinion, that under the law of the case, the issue of scope of employment was to be decided by the jury.[99] Appellant's proposed instruction would have required the trial judge to direct the jury to find for the plaintiff on this element, which is directly contrary to the law of the case and would have been clear legal error.

In addition, Appellant's proposed instruction creates legal concepts that are contrary to Delaware law. Under plaintiff's proposal, a risk would be foreseeable unless it was not "completely unforeseeable."[100] This would be a strict liability approach to foreseeability. This language conflicts with the standard used in the Pattern Instruction, namely whether the risk is one that an ordinary person would recognize or anticipate as creating a risk of injury, which follows settled Delaware law.[101]

The trial court also correctly noted in the denial of the motion for a new trial that this proposed instruction would have been an improper comment on the

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[97] 133 A.3d 971 (Del. 2016).
[98] *Id.*
[99] *Id.* at 979.
[100] *See* (A-349).
[101] *See Delaware Elec. Coop.*, 703 A.2d at 1209-10.

evidence.[102] This Court has held that it was improper for a trial judge to make a comment on the evidence that interfered with the jury's ability to weigh the credibility of a witness.[103] In a similar factual pattern, this Court upheld the trial court's refusal to give a missing witness instruction that would have amounted to an impermissible comment on the evidence.[104]

The MacLeish instruction would have required the trial judge to explain to the jury the general substance of Mr. MacLeish's testimony and how the jury should weigh that evidence against an incorrect legal standard. This instruction would leave no doubt to the jury that it was to find in favor of the plaintiff on this issue, contrary to this Court's prior holding in the earlier *Sherman* case. In summary, the trial judge's ruling refusing to give the MacLeish instruction was legally correct and cannot serve as a basis for trial error. The Pattern Instruction on Foreseeable Injury was legally correct and did not undermine "the jury's ability to intelligently perform its duty in returning a verdict."[105]

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[102] *See Sherman v. State*, 2017 WL 1900268, at *5 (Del. Super. May 8, 2017); s*ee also* DEL. CONST. art. IV § 19.

[103] *See Ward v. State*, 366 A.2d 1194, 1195-96 (Del. 1976).

[104] *See Boyer v. State*, 436 A.2d 1118, 1124 (Del. 1981); s*ee also Capital Management Co. v. Brown*, 813 A.2d 1094, 1100 (Del. 2003) ("An improper comment or charge on 'matters of fact' is an expression by the court, directly or indirectly, that may convey to the jury 'the court's estimation of the truth, falsity or weight of testimony in relation to a matter in issue.'").

[105] *See Guy*, 913 A.2d at 568.

III. THE TRIAL COURT'S "SCOPE OF EMPLOYMENT INSTRUCTION" SET FORTH A CORRECT STATEMENT OF DELAWARE LAW AS TO FORESEEABILITY, TRACKED THE LANGUAGE OF *DOE*[106] OPINION, AND FOLLOWED THE LAW OF THIS CASE.

Question Presented

Whether the Superior Court properly denied Appellant's proposed instruction on foreseeability as an affirmative defense where that instruction was an incorrect statement of the law?

Scope and Standard of Review

This Court reviews a claim of error in a trial court's instructions *de novo*.[107] When a party claims error in a jury instruction, "reversal is only appropriate 'if the alleged deficiency in the jury instructions undermined … the jury's ability to intelligently perform its duty in returning a verdict."[108]

Argument

Appellant argues that, pursuant to *Draper v. Olivere*,[109] the trial court erred in failing to read Appellant's proposed jury instruction, "Complete Foreseeability

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[106] *See id.*
[107] *Guy*, 913 A.2d at 563 (citing *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayres*, 844 A.2d at 309.
[108] *Guy*, 913 A.2d at 568 (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (internal quotations omitted)).
[109] 181 A.2d 565 (Del. 1962).

as an Affirmative Defense" to the jury.[110]

Appellant has repeatedly asserted, based on a narrow reading from *Draper,* throughout the course of this litigation that unforeseeability is an Affirmative Defense that must be proven by the State.[111] Appellant's arguments were twice rejected by this Court on the basis that the analysis was a fact question for the jury.[112] It is important to note that this Court's decision in *Sherman* clearly identifies the 2013 holding, that the question of whether an employee acted in the scope of employment "is ordinarily one for decision by the jury", as the *law of the case*. [113] In Doe, this Court listed the four factors that the plaintiff had to prove to establish a claim, with the fourth factor clearly being foreseeability.[114] In so ruling, this Court followed the provisions of the RESTATEMENT (SECOND) OF AGENCY § 228 which also lists four elements of the *prima facie* claim including foreseeability.[115] Even more, this Court considered the *Draper* argument before

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[110] *See* Appellant's Opening Brief, at *27-28.
[111] *See* Appellant's Opening Brief filed with this Court on October 1, 2012, (B-242-49); *see also* Appellant's Opening Brief filed with this Court on June 3, 2015, (B-338-41).
[112] *See Doe v. State,* 76 A.3d 774, 777 (Del. 2013) (holding that all four factors of the scope of employment analysis were fact issues for the jury to decide); *see also Sherman v. State*, 133 A.3d 971, 979 (Del. 2016) (affirming the Superior Court's determination that the scope of employment issue is a question for the jury and the law of the case).
[113] *See Sherman*, 133 A.3d at 979 (emphasis added).
[114] *Doe*, at 777.
[115] *Id.* at 776 (quoting RESTATEMENT (SECOND) OF AGENCY § 228).

issuing its decision in both *Doe* and *Sherman*.[116] Appellant brings forth no additional authority, beyond *Draper*, to attempt to relitigate an issue already decided by this Court in 2013.

The law of the case doctrine requires that issues already litigated by the same court should be adopted without relitigation.[117] Additionally, once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of the case, which will not be disturbed by that court unless compelling reason to do so appears.[118] The law of the case doctrine also "stands for the proposition that 'findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or in a later appeal.'"[119]

The trial court did not err in following the *Doe* ruling that the scope of employment was a question for the jury because the trial court was bound to follow the law of the case.[120] Thus, the trial court ruled at the prayer conference that *Draper v. Olivere Paving & Construction Co.*,[121] did not stand for the proposition

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[116] *See Doe*, 76 A.3d at 776; *see also Sherman*, 133 A.3d at 978 fn. 23.
[117] *See Johnson v. Preferred Professional Ins. Co.*, 91 A.3d 994, 1009 (Del. Super. 2014).
[118] *Id.*
[119] *Id.* (*citing Ins. Corp. of America v. Barker*, 628 A.2d 38, 40-41 (Del. 1993) (*citing Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984)).
[120] *Id.*
[121] *Draper*, 181 A.2d 565 (Del. 1962).

that "lack of foreseeability" under § 228 was an affirmative defense.[122] The trial court noted:

> Plaintiff's contention rested on a solitary line in *Draper*. *See id.* at 571 ("If there is any proof to that effect, it was encumbent [sic] upon Olivere as the moving party to produce it." (citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962)). This Court ruled that Plaintiff conflated this statement, which in context referred to the burden of the moving party on summary judgment to produce evidence showing that party was entitled to judgment as a matter of law.[123]

Appellant's attempt to circumvent the law of the case by making identical arguments without new authority should be rejected by this Court as legally barred.

Lastly, Appellant's counsel agreed at the hearing on the motion for a new trial that the jury instructions read to the jury were accurate statements of the law.[124]

The "Scope of Employment" jury instruction read by the trial court to the jury stated, in relevant part, as follows:

> 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

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[122] *Sherman v. State,* 2017 WL 1900268, at *5 (Del. Super. May 8, 2017); *see also* Transcript of prayer conference (B-81-82).
[123] *Sherman*, 2017 WL 1900268, at *5, n. 35.
[124] *See* Transcript from Motion for a New Trial, p 28. (B-208).

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 was reasonably foreseeable. [125]

Appellant now argues that the "Complete Unforeseeability as an Affirmative Defense" should have been read to the jury and was an accurate statement of the law.[126] Appellant's proposed "Complete Unforeseeability as an Affirmative Defense" jury instruction stated, in relevant part, as follows:

> Worthy does not have to prove that police sexual misconduct was foreseeable. Instead the State must prove by a preponderance of the evidence that sexual assault by any police officer during an arrest was completely unforeseeable by the State.[127].... Remember that as to the claim of complete unforseeability, Worthy does not have to prove anything.[128]

Appellant has admitted that the jury instruction read at trial was a correct statement of the law. Appellant's proposed jury instruction conflicts with the instruction read to the jury and is an incorrect statement of the law. Thus, the trial court did not err in rejecting the proposed instruction.

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[125] *See* (B-125) (**emphasis added**).
[126] *See* Appellant's Opening Brief, pgs. 27-28.
[127] *See* (A-345).
[128] *See* (A-346).

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN OVERRULING APPELLANT'S OBJECTION TO A PORTION OF THE DEFENSE CLOSING ARGUMENT THAT PROPERLY MENTIONED THE LACK OF EVIDENCE IN THE APPELLANT'S CASE ON FORESEEABILITY.

Question Presented

Whether the Superior Court correctly denied an objection during trial that claimed defense counsel improperly referred to the absence of evidence in the Appellant's case on the issue of foreseeability?

Scope and Standard of Review

This Court reviews a trial judge's denial of an objection at trial based on a claim of improper comments of counsel at trial under an abuse of discretion standard.[129]

Argument

Appellant claims that the trial court erred in failing to sustain his objection to one comment made during the defendant's closing argument. The portion of the closing argument in issue is as follows:

> Mr. McTaggart: One of the elements as the Judge will instruct you is whether or not this was unexpected or foreseeable. We submit to you it was not foreseeable. 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 through the course of this trial? None. None. Is this

[129] *DeAngelis v. Harrison*, 628 A.2d 77, 79 (Del. 1993).

foreseeable that is going to happen this one time?[130]

In objecting to this comment, Appellant's counsel stated that the defense counsel was "finessing the record" as there was no testimony from Mr. MacLeish to support this statement.[131] The Trial Judge denied the objection.[132]

Appellant objects to this portion of the argument and claims that counsel made an improper inference that there was no misconduct in the history of the State police. Appellant claims this is an impermissible inference from the record.[133]

This Court has long held that an attorney in closing argument is permitted "to argue and explain all legitimate inferences … that flow from the evidence."[134]

In this case, former Colonel Thomas MacLeish testified that the Delaware State Police started as an agency in April, 1923.[135] This statement in the closing argument was supported by the record. Furthermore, Mr. MacLeish testified that, in calendar year 2009, the Delaware State Police made about "a couple hundred

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[130] (B-144).

[131] (B-144-45).
[132] (B-145).
[133] *See* App. Op. Br. at *29-30.
[134] *White,* 840 A.2d 643, 2003 WL 23019194 at *4; *Fenton v. State*, 567 A.2d 420, 1989 WL 136962, at *2 (prosecutor in closing argument may "explain all the legitimate inference of the appellant's guilt that flow from [the] evidence" in closing argument).
[135] *See* (A-382).

thousand arrests."[136] Defense counsel's statement in argument referencing 100,000 arrests actually underestimated the number of arrests.

Defense counsel also noted to the jury the lack of evidence that the plaintiff had produced on the issue of foreseeability. This reference was a correct summary and assessment of the evidence. Appellant had not introduced any other evidence of prior instances of police misconduct at the trial. A party should be permitted to point out to a jury that the opponent has failed to support the elements of its claim. Defendant did not assert a personal opinion and simply asked the jury whether the element of foreseeability had been proven by the Appellant. According to this Court's decision in *Doe*,[137] these issues were fact questions for the jury to decide and defense counsel should have been permitted to argue the Appellant's failure to establish his claim.[138] Appellant relies solely on *Michael v. State*[139] in support of this argument. In that criminal case, this Court ruled that prosecution's references to the workings of the Pagan motorcycle gang were outside the trial record but not plain error. There is no such reference in this case to evidence outside the record

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[136] *See* (A-385).

[137] 76 A.3d at 777.

[138] *See also Stewart v. Terhune*, 95 Fed. Appx. 205, 206 (9th Cir. 2004) (prosecutor's comments about absence of evidence to support defendant's theory of the case were not improper); *United States v. Brennan*, 326 F.3d 176, 188 (3d Cir. 2003) (prosecutor's comments in closing argument about lack of evidence in the record to support defense were permissible argument).

[139] 529 A.2d 752, 762-64 (Del. 1987), *abrogated on other grounds*, *Stevens v. State*, 129 A.3d 206 (Del. 2015).

and the *Michael* case is distinguishable.

As there was no error in the defense counsel's closing argument, this claim as a basis for a new trial should be denied.

V. THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING THE JURY TO CONSIDER THE ISSUE OF CONSENT AS PART OF THE STANDARD JURY INSTRUCTION ON ASSAULT AND BATTERY; ANY ERROR WAS HARMLESS AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT THAT EMPLOYEE GIDDINGS WAS NOT ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

Question Presented

Whether the Superior Court correctly permitted the jury to hear evidence on consent where the torts alleged in the case are assault and battery?

Scope and Standard of Review

This Court reviews the trial judge's determination to allow the defense of consent to go to the jury under plenary review.[140]

Argument

a. Ruling on Consent Defense

In a pretrial ruling, the Superior Court properly denied Appellant's motion in limine which sought to bar any evidence on the issue of consent at trial.[141] The Superior Court ruled that the doctrines of judicial estoppel and judicial admission, as argued by the Appellant, were inapplicable outside the same case, and found no authority under Delaware law that a suspect in police custody could not consent as a matter of law.[142]

The doctrine of judicial estoppel has never been applied against the State of

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[140] *See Zimmerman v. State*, 628 A.2d 62, 66-67 (Del. 1993).
[141] *See* (A-212).
[142] (B-5-8).

Delaware.[143] "Judicial estoppel is an extreme remedy, to be used only 'when [a party's] inconsistent positions are tantamount to a knowing misrepresentation to or even fraud on the court."[144] Judicial estoppel will apply if the statement taken in the other action is clear so that "nothing will be left to be explained by argument or to be taken by inference."[145]

The arrest warrant[146] for Mr. Giddings did not allege facts so clear such that they foreclose any argument on consent. The arrest warrant charged the crimes of Receiving a Bribe for receiving sex in return for not taking plaintiff Worthy to court on a capias.[147] The Official Misconduct charge similarly charged Giddings with refraining from taking plaintiff Worthy to court to appear on a capias. Neither of these charges implicated the claim of assault. The arrest warrant did contain a charge for sexual extortion but does not contain a claim for rape. The sexual extortion charge essentially alleged a *quid pro quo* exchange between Giddings and plaintiff Worthy. There is an inference that probable cause was lacking for the crime of rape or sexual assault which was the subject of the current suit. The arrest

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[143] *State v. Chao*, 2006 WL 2788180, at *9 (Del. Super. 2006).
[144] *Chao v. Roy's Constr. Inc.,* 517 F.3d 180, 186 n. 5 (3d Cir. 2008).
[145] *Pesta v. Warren*, 2004 WL 1282214, *1 (Del. Super. May 27, 2004), *aff'd*, 888 A.2d 232 (Del. 2005) (defendant's prior filing in the Justice of the Peace Court identifying the case as "Landlord/Tenant" rather than "Trespass" estopped defendant from now disputing the tenancy in the pending action) (*citing Rudnick v. Shoenberg*, 122 A. 902 (Del. 1923)).
[146] *See* (A-133).
[147] *Id.*

warrant also described Giddings' statement that "the victim told him she would do anything he wanted in order to go home" and that plaintiff Worthy agreed to perform oral sex.[148] Giddings was never tried or convicted on any of these charges as he committed suicide shortly after his arrest. In sum, the arrest warrant does not allege facts so clear such that they foreclose any argument on consent.

Moreover, the issuance of an arrest warrant is based on the standard of probable cause. The jury in this case was asked to decide the questions of fact under the much different preponderance of the evidence standard.[149] The issuance of the arrest warrant for different charges in a separate criminal proceeding under a different standard of proof did not estop the State from proceeding with the defense of the assault claim in this case.[150]

Appellant Sherman also argues that the filing of the arrest warrant is a judicial admission. "A judicial admission does not apply to positions taken in **different cases**. The moment we leave the sphere of the same cause, we leave

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[148] *See* Arrest Warrant at ¶¶20-29 (A-136).

[149] *See Woody v. State*, 765 A.2d 1257, 1263 (Del 2001) (probable cause requires a showing that is considerably less than a preponderance of the evidence).

[150] *See State v. Maxwell*, 624 A.2d 926, 929-30 (Del. 1993) ("To establish probable cause, the police are only required to present facts which suggest, when *those facts* are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime."); s*ee also Zimmerman,* 628 A.2d at 67 (defendant in criminal case is entitled to have jury instructed on affirmative defense if any reasonable juror could find the defense by a preponderance).

behind all questions of judicial admissions."[151] The doctrine of judicial admission has no application to the consent issue regarding Ms. Worthy and her dealings with Mr. Giddings in this civil case.

Sherman also argued in Superior Court that Ms. Worthy could not consent to sexual relations as a matter of law based on the decision in *Carrigan v. Davis.*[152] In *Carrigan*, a prison inmate alleged that she was forced to engage in sex by a correctional officer. The correctional officer admitted to the commission of the sex act but claimed it was consensual. The District Court found under 42 U.S.C. § 1983 that the defense of consent was not available to the officer. The Court based its decision primarily on the basis that Delaware has enacted a specific statute, 11 *Del. C.* § 1259 which criminalizes all sexual acts in a prison facility.[153]

In *Phillips v. Byrd*,[154] the District Court considered a claim by a prison inmate that she engaged in consensual sex with a prison correctional officer. The Court noted that "*Carrigan* opinion repeatedly cites Delaware's enactment of 11 *Del. C.* § 1259 as the basis for its conclusion that even consensual sex is a *per se* violation of the Eighth Amendment."[155] The *Phillips* case did not find that § 1259 set forth a standard of decency for conduct in the prison and did not find that other

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[151] *Pesta v. Warren*, 2004 WL 1282214, at *1 (Del. Super. May 27, 2004) (emphasis added), *aff'd*, 888 A.2d 232 (Del. 2005).
[152] *Carrigan v. Davis*, 70 F. Supp. 2d 448, 459-60 (D. Del. 1999).
[153] *Carrigan*, 70 F. Supp. 2d at 453, 459.
[154] *Phillips v. Byrd*, 2003 WL 22953175 (D. Del. 2003).
[155] *Id.* at *5 (*citing Carrigan*, 70 F. Supp. 2d at 460).

case law supported a finding that consensual sex in prison violated the Eighth Amendment.[156] The *Phillips* Court ruled that the plaintiff's allegations failed to set forth a claim for a violation of the Eighth Amendment and dismissed the case.[157]

Neither *Carrigan* nor *Phillips* supports Sherman's argument that plaintiff Worthy was unable to consent as a matter of law under Delaware law. Unlike *Carrigan*, there is no specific Delaware statute that criminalizes all sexual acts in a police car or in police custody. *Carrigan* relied primarily on the provisions of 11 *Del. C.* § 1259 for its holding. The Court in *Phillips* rejected the plaintiff's argument that she could not voluntarily agree to engage in sex with a correctional officer. No Delaware case has adopted the principle of law proposed by the Appellant. In fact, consent is a recognized defense to a tort of assault and battery under Delaware law.[158]

Sherman also appears to claim that the defendant improperly argued the consent defense at the trial. Sherman refers to a passing comment in closing where counsel simply stated that "we will never know for sure what happened in that car."[159] This is simply a reference to the fact that the two main participants in this case were deceased and the defendant did not believe Appellant could prove his case. There is no reference to the so-called defense of consent in the trial record

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[156] *Id.*
[157] *Id.*
[158] *See* (A-470-71).
[159] *See* (A-458).

and any error in allowing this defense to go to the jury was harmless. Appellant was permitted to submit the arrest warrant[160] to the jury and question the investigating officer at length[161] about the content of the warrant. Sherman also admitted two lengthy statements from Dawn Worthy[162] in which she essentially indicated that she was forced to commit the acts because of the actions of the police officer. The contrary statements of Giddings, which are also contained in the arrest warrant, were also admitted and played at the trial.[163] Any question of fact on the issue of consent was presented to the jury by Appellant and not argued by Defendant.

b. Harmless Error

In addition, at this trial, Appellant's counsel insisted on a general verdict form which simply allowed the jury to find for the plaintiff or the defense.[164] With this type of verdict form, defendant submits that the correct standard to review any alleged error is whether there is sufficient evidence in the record to support the jury verdict on any theory. "A jury verdict is presumed to be correct and will be upheld unless it is against the great weight of the evidence. The Delaware Constitution sets forth this Court's standard of review: on appeal from a verdict of a jury, the

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[160] *See* (A-133).
[161] *See* (A-372G-A-372I).
[162] *See* (A-52-53, A-59-60, A-174-178).
[163] *See* (A-117-19).
[164] *See* (B-179-80).

finding of the jury, if supported by the evidence, shall be conclusive."[165]

The jury's verdict in favor of the defendant should be presumed as conclusive under DEL. CONST. ART. IV, § 11(1)(a), as there was sufficient evidence, viewed in the light most favorable to the defendant, to find that Mr. Giddings was not acting within the course and scope of his employment at the time of the sexual act in question. At this stage, the evidence is viewed in the light most favorable to the State as the prevailing party.[166]

In this case, Defendant disputed all factors of the course and scope analysis. For example, Defendant presented testimony from Sgt. Maher that Giddings failed to perform his hired duty to take Ms. Worthy to JP Court 11 on the night in question to dispute that Giddings's conduct was of a type that he was hired to perform.[167] Under police procedure, Giddings was required to take Ms. Worthy to a court to be heard on the outstanding capias.[168] Giddings was not authorized to issue a summons to a suspect who had an outstanding warrant.[169] In addition, Defendant disputed that Giddings's conduct occurred during an authorized time through testimony from Sgt. Maher that at the time the summons was issued, at

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[165] *Mitchell v. Haldar*, 883 A.2d 32, 43 (Del. 2005) (internal citations and quotations omitted).
[166] *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co., Inc.*, 866 A.2d, 1, 6 (Del. 2005).
[167] *See* (A-372P).
[168] *See* (A-372U).
[169] *See* (A-372EE).

approximately 9:30, Ms. Worthy should have been taken to JP11.[170] However, instead, Giddings was not available for additional police calls until approximately 10:36.[171] Defendant also presented testimony from Sgt. Maher to support that the place the sexual contact took place, the dirt road, was not within the space that Giddings should have been conducting police work.[172] Maher testified that this dirt road area was only covered with construction equipment and dirt from the nearby construction site.[173]

On the motive issue, the jury could easily infer from the recorded statements of both Giddings and Ms. Worthy that Giddings had no purpose to benefit his employer throughout any of this encounter and was pursuing his own personal non-police interests.[174] There was never any serious argument presented at trial that the actions of Giddings in any way benefited his employer. Based on the evidence highlighted herein, the jury was free to find that Giddings was **not** acting with an intent to serve his employer.

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[170] *See* (A-372Q).
[171] *See* (A-372R).
[172] *See* (A-372CC); (B-73-78).
[173] *See* (A-372CC).
[174] *See Worthy Statement at* A-51-52 (officer got out of the car in the parking lot seventy times and touched her right hand on his privates and cuffed and uncuffed her); *see Worthy Statement at A-74-75* (knew that she had a warrant and that was job of police to take her in and she did not go in); *see Worthy Deposition at* A-173, A-175, (Giddings told her you know what you have to do if you want to go home; forced her to engage in sex act; had an understanding that officer's acts were against the law); *see Giddings' Statement* at A-117-18 (description of Giddings engaging in sex act instead of transporting Ms. Worthy to court).

On the fourth factor of the scope of employment analysis, foreseeability, former Colonel Thomas MacLeish testified that he was aware in 2009 that an **extremely small percentage** of law enforcement officers engage in sexual misconduct during an arrest and stated it was no different than any other occupation.[175] MacLeish also testified that DSP takes many steps in hiring and training to present acts of sexual misconduct from occurring on the force.[176] In addition, Ray Peden and James Paige testified that they were not aware of any allegations of sexual misconduct against Giddings during the time they supervised Giddings.[177] The jury was free to determine foreseeability in favor of the Defendant based upon the disputed evidence. Moreover, Appellant's opening statement at trial acknowledged that Defendant did not do anything wrong. As such, Appellant waived any argument on foreseeability in opening statement.[178]

The trial testimony supports the jury's verdict in favor of the defendant and the finding that Appellant did not prove the elements of the scope of employment claim, and, pursuant to DEL. CONST. ART. IV, § 11(1)(a), the Superior Court judgment should be affirmed on this alternative ground.

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[175] *See* (A-379).
[176] *See* (A-383-84).
[177] *See* (B-48-55, B-57-68).
[178] See (B-31).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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