EFiled: Nov 21 2017 09:16AM EST
Filing ID 61383099
Case Number 206,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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Dated: November 21, 2017

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I. THE COURT'S INSTRUCTION REGARDING "COURSE AND SCOPE OF EMPLOYMENT" WAS ERRONEOUS BECAUSE IT FAILED TO STATE THAT THE REQUIRED "SERVICE" TO THE MASTER AND "CONDUCT" WITHIN THE "COURSE AND SCOPE" WAS "GENERAL" ACTIVITY AND NOT SPECIFIC WRONGFUL ACTIVITY

The State argues that Plaintiff's request that "general" and "specific" wrongful conduct be distinguished was, in essence, a request that the Court improperly comment on the evidence. In addition, the State argues that the "general/specific wrongful conduct" distinction is unsupported by the Decision in *Doe I*.

It is true that the trial Court cut and pasted certain language from *Doe I* into the Pattern Scope of Employment Instruction as given. And the State correctly notes that the passage quoted from *Doe I* did not contain the words "general" or "specific."

Therefore, the State argues, the Instruction did not need to be refined to set out the distinction between general conduct and specific wrongful conduct . **But the State's argument compares apples to oranges.** We suggest although the instruction given was a correct statement **of the law** as cut and pasted directly from Doe I it was not "reasonably informative" **as an instruction** without the requested "general/specific" language.

Put another way, appellate courts set out principles of law for lawyers and lower courts, but do not generally dictate jury instructions unless so noted. Thus so in *Doe I*.

The State does not address this Court's recognition that Pattern Instructions "may require modification" in a particular case to focus the jury's attention on the legal standards it must apply. *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (*Del. Supr.* 2002) And jury instructions "must give a correct statement of the substance of the law" **and also must be "reasonably informative"** *Cabrera v. State*, 747 A.2d 543, 544 (*Del. Supr.* 2000) (overruled on other grounds in *Brooks v. State*, 440 A.3d 346 (*Del. Supr.*) Plaintiff argues that the *Respondeat* Instruction was not "reasonably informative" without the "general/specific" distinction.

The State takes comfort in the fact that the jury presented no questions at trial during deliberations but does not consider that a jury that misinterprets an instruction would not know to ask the question. You just don't know what you don't know.

And the opportunity for juror confusion was there. In our Opening Brief we demonstrated why the Court's failure to distinguish between "general" and "specific" unlawful conduct left a door for the State to drive a truck through in final argument. The State's final argument is set out in our Opening Brief and will not be repeated here. However, we note that (by our count) three times the State argued that because

Giddings violated "his duty"[1] as a police officer that his actions could not have been within the course and scope of that "duty." Per the State's final argument any violation of duty cannot be within the "course and scope." **But *Doe I* held exactly the opposite.** And including the "general/specific" language requested would have stopped this argument.

The State claims that Plaintiff waived that argument in failing to object during the argument or requesting a further Instruction. This is hard to understand. The State fails to acknowledge that under the Instruction--given over objection (stated in the Prayer Conference)-- the State's argument was permissible and the Court had already so ruled:

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

[1] **I.e.**, committed a specific wrongful act.

ARGUMENT

II. THE COURT'S FAILURE TO GIVE PLAINTIFF'S "McLEISH INSTRUCTION" SETTING OUT THE RELEVANCE OF GENERAL FORESEEABILITY AS OPPOSED TO SPECIFIC FORESEEABILITY WAS ERROR

First, the State falls back on the Pattern Instruction argument and ignores the fact that Pattern Instructions are "guidelines" and "may require modification". *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (*Del. Supr.* 2002). We do agree that "a party is not entitled to particular wording" in an Instruction. However, this Court has also held that Jury Instructions must be "reasonably informative". *Cabrera v. State*, 747 A.2d 543, 544 (*Del. Supr.* 2000) (overruled on other grounds in *Brooks v. State*, 440 A.3d 346 (*Del. Supr.*). Absent the "McLeish Instruction" the instructions as given were not reasonably informative and left open the real possibility of jury confusion as to whether foreseeability of police sexual misconduct was to be measured only by the Delaware State Police history (and there was only 2009 in the Record) or rather by the experience of law enforcement generally.

As to the "McLeish Instruction" itself, the Court's refusal to give the Instruction was based upon its belief that the Instruction would involve a forbidden comment on the facts. (McLeish's testimony should not be "highlighted as having more weight than any of the other witnesses. . ."). (Exhibit B to Appellant's Opening

Brief (Prayer Conference) at page 10). But that is not what the "McLeish Instruction" sought to accomplish–it was not about "weight" but rather about advising the jury of the proper legal standard to apply. The State argues that the pattern instruction on foreseeability given by the Court solved the problem. How could it? It talked about a foreseeable "risk of injury" but did not explain the need to look to police experience in general and not just the history of the Delaware State Police.

As far as directing a verdict on the issue of foreseeability, that argument misses the point --the Instruction was conditional ("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.") (A349) This Instruction left the issue of whether or not "Colonel McLeish was a general problem within law enforcement" for the jury to decide. Did they credit McLeish's testimony or not? If they did, then his testimony had a certain "legal significance." "[I]n general, **a trial judge may explain the legal significance which the law attaches to a particular factual finding."** *Capital Management Co. v. Brown*, 813 A.2d 1094, 1100 (Del. Supr. 2002).

As to "complete unforeseeability" found in the "McLeish Instruction", the State argues, in so many words, that this is not the law in *Respondeat* cases in Delaware.

The State ignores *Draper v. Olivere Paving and Const. Co.*, 181 A.2d 565, 571 (*Del. Supr.* 1962) where this Court talked about a lack of foreseeability using the words "entirely unexpectable." [2] Plaintiff's "McLeish Instruction" simply substituted "completely unforeseeable" for "entirely unexpectable."[3]

Doe I did not reject either one of these formulations.

The "McLeish Instruction" does not create a strict liability offense. As argued elsewhere in this Brief, the Defendant is entitled to contest Plaintiff's showing on foreseeability (and thus a *Respondeat* theory of liability) by proof of a complete lack of foreseeability. This is true whether, lack of foreseeability (in *Draper* "unexpectability") is an affirmative defense or not.

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[2] Also, the Opinion in Doe I appears to equate "foreseeable" with "not unexpectable." 76 A.3d 774, 777 (*Del. Supr.* 2013)

[3]Other language from *Draper* talked about a lack of "expectability" using the language "so rare as to be unexpectable." Id.

ARGUMENT

III. FAILURE TO INSTRUCT THAT UNFORESEEABILITY IS AN AFFIRMATIVE DEFENSE THAT HAD TO BE PROVEN BY THE STATE WAS ERRONEOUS

As to the "law of the case" argument, the "law of the case" here was that neither side would be entitled to a directed verdict on liability but that *Respondeat* factual issues had to be determined by a jury. *Sherman v. State,* 133 A.3d 971, 978-79 (Del. Supr. 2016) This does not compel the conclusion that entire unexpectability or complete lack of foreseeability is not an affirmative defense to be proven by the State. As far as the argument that under the Restatement of Agency (2d) Section 228, an essential element of a claim is that "the use of force is not unexpectable", Plaintiff addressed this in its Case in Chief through the testimony of Colonel McLeish--even if a lack of foreseeability is not an affirmative defense.

Finally, as to this issue, the State claims that Plaintiff's counsel conceded that "that the jury Instructions read to the jury were accurate statements of the law." The transcript reference given (B208) did not refer to all jury instructions but only to that regarding *Respondeat* – where Plaintiff had asked that the "general" versus "specific" language referenced above be included in that Instruction to avoid confusion.

ARGUMENT

IV. IT WAS ERROR TO PERMIT THE STATE TO ARGUE WITHOUT RECORD SUPPORT THAT IN THOUSANDS OF STATE POLICE CONTACTS WITH CITIZENS THERE HAD BEEN NO REPORTS OF POLICE SEXUAL MISCONDUCT SINCE 1920 AND HENCE NO FORESEEABILITY OF SUCH MISCONDUCT

The State conclusorily claims that its counsel's argument was simply a permissible inference drawn from the evidence. Inferences have to be reasonable and based on the evidence. How could the State reasonably infer that since the 1920's there had been no reports of police sexual misconduct within the State Police when there was just no evidence either way?

The State also argues that: "Appellant had not introduced any other evidence of prior instances of police misconduct at the trial." State's Answering Brief at 30. This inaccurate assertion must be inadvertent. McLeish testified that there is a real risk in police work of sexual misconduct during an arrest, that police agencies need to address the problem, that sexual misconduct by officers warrants the full attention of law enforcement leadership and that these concerns were well founded even before Giddings' sexual assault on the Plaintiff. (A378-379)

ARGUMENT

V. REFUSAL TO INSTRUCT THE JURY THAT CONSENT WAS NOT A DEFENSE EITHER AS A MATTER OF FACT OR AS A MATTER OF LAW WAS ERROR

AS A MATTER OF FACT

As far as **Judicial Estoppel** is concerned the State emphasizes that Giddings was not arrested for the charge of rape. So?

And the **State's investigator swore, under oath, that the facts in the Affidavit attached to the Criminal Complaint showed that Giddings was guilty of sexual extortion ("compel or induce [Worthy] to engage in sexual intercourse/penetration with him).** [4] **(A133 - 137)** The State argues that arrest warrants (i.e., criminal charges) only have to be based on probable cause not a preponderance. But it is not the fact that a charge was filed **but rather the sworn statement of facts underlying the charge of sexual extortion that is important here.** How on earth can the State argue consent as a defense, however fleetingly, when a State Police investigator , upon advice by the Attorney General's Office, swore that Worthy was "**compelled or induced** to engage in sexual intercourse /penetration?" (A134, A372)

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[4] And the State even referred to Dawn Worthy as the "victim" in final argument. (A460)

The State argues the significance of the statutory caption of the "Receiving a Bribe" charge (Count II) of the Criminal Complaint (A134) but misses the fact that the allegation underlying the charge is that Giddings "solicited" the oral sex from Worthy and not that Worthy offered it.

The State says that the allegations were not "so clear" as to foreclose an argument on consent. It calls the sexual extortion that its investigator swore occurred here a simple "*quid pro quo* exchange." If that were true no coercive sexual assault could ever be brought. For example, "I won't hurt you if you do not resist my sexual assault." Is this merely a "*quid pro quo*?"

As far as **Judicial Admission**, the State says that it is not applicable because the criminal case was different from the civil case. This is a distinction only a lawyer could appreciate. The allegations as to Giddings' wrongful conduct in each were the same. And the State was a party to each action and during the two cases made two irreconcilable arguments–non-consensual sexual assault versus consensual sex, *ergo* no sexual assault. How can this be permitted?

AS A MATTER OF LAW

Regarding the debate between *Carrigan v. Davis, (70 F.Supp.2d 448, 461)* and *Phillips v. Byrd (2003 WL22953175)* on the issue of inability to consent as a matter of law, the principle we seek to apply is the same one underlying the rule we all

learned in law school –- minors cannot consent to a sexual assault by an adult. Here the adult was "on the clock", wore a State Police uniform, had a gun, a badge and handcuffs and held Plaintiff in custody. Statute or not, it is the helplessness of the victim whether child or arrestee that should compel a conclusion to disallow any consent defense. We suggest that *Carrigan* properly applied the principle and *Phillips* erroneously ignored it.

The State claims that its counsel did not argue a consent defense despite the fact that one would have been permissible under the Court's Instructions. Exactly what was the prosecutor talking about when he said "we will never know for sure what happened in that car"? (A458) Why bring this up if not to claim the Plaintiff should be disbelieved when she said that she had not consented? And lack of consent was an essential element in the Court's instructions on Assault and Battery. A470-471. The State was not talking about "course and scope", or foreseeability.

HARMLESS ERROR

Finally, the State argues that even if it was error to refuse to instruct the jury that consent was not a defense, the error was harmless. The State claims that Plaintiff's counsel "insisted" on a general verdict form –- this is not exactly true. In pre-trial proceedings the State originally requested a special verdict and Plaintiff's counsel objected. Dkt entry 59414803 August 12, 2016 (Letter from Plaintiff's

counsel to the Court) However, at trial, the parties jointly requested a general verdict. Dkt entry 60094306 January 19, 2017 (Joint Verdict Form) See also Exhibit B to Plaintiff's Opening Brief at page 54.

The State then argues that a general jury verdict must be upheld (despite multiple claims of error) unless it is against the great weight of the evidence and cites *Mitchell v. Haldar, 883 A.2d 32, 43 (Del. Supr. 2005)* But Mitchell involved an appeal from denial of a new trial Motion based upon a "weight of the evidence" claim. Id. at 41-43. Plaintiff is not making a "weight of the evidence argument." There is nothing more to say.

CONCLUSION

The judgement below should be reversed and the case remanded for a new trial.

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Dated: November 21, 2017