

STATE SUPREME COURT DRASTICALLY EXPANDS POTENTIAL POLICE LIABILITY

A sharply divided Vermont Supreme Court has made a drastic change in the law of liability. In *Doe v. Forrest*, the Court decided that it is appropriate to impose vicarious liability on public employers for the negligent, unauthorized acts of their employees, at least in the realm of law enforcement. It stated, “if a plaintiff can show that an on-duty law enforcement officer was aided in accomplishing an intentional tort involving a sexual assault on the plaintiff by the existence of the employment relationship with the law enforcement agency, vicarious liability will apply.” *Doe v. Forrest*, 2003 Vt 37, at 48 (May 7, 2004).

The facts of this case that led to this change in the law are as follows: In December of 1997, Bennington County Deputy Sheriff Richard Forrest visited a convenience store in the Town of Dorset, which he had already visited twice that night. He was on duty, on a routine patrol in the area, fulfilling his “community policing function,” pursuant to a contract between the Town and the Sheriff’s Department. Throughout his visits to the store that evening, he jokingly threatened to handcuff or ticket the plaintiff (“Jane Doe”). He also bragged about his exploits as a law enforcement officer and that he was trained to “shoot to kill.” On the third visit, Deputy Forrest entered the store while no customers were present, and turned up the store’s thermostat to ninety degrees. He then selected some adult magazines from a shelf and showed various explicit pictures to the plaintiff. Eventually, Deputy Forrest forced the plaintiff to perform a sex act on him, after which he left the store, and she telephoned for help. It is important to note that at the time of the incident, Deputy Forrest was wearing his department-issued uniform, badge, gun, and handcuffs.

Deputy Forrest resigned from the Sheriff’s Department as a result of the incident, and eventually pled *nolo contendere* to a criminal charge of lewd and lascivious behavior. He also pled *nolo contendere* to a second criminal charge of neglect of duty by a public officer. He was sentenced to three-to-five years imprisonment (all suspended), placed on probation and ordered to have no contact with plaintiff or her family.

As a result of the incident, Plaintiff Doe filed a civil suit against the Bennington County Sheriff’s Department, Deputy Sheriff Forrest, Bennington County Sheriff Richard Forrest, and the State of Vermont. Deputy Forrest was eventually dismissed from the suit because of his lack of assets. The Plaintiff claimed the defendants should be held directly and/or vicariously liable for the injuries she suffered as a result of Forrest’s criminal conduct.

Prior to the decision in this case, imposing liability on public employers for the unauthorized acts of their employees was “disfavored” in Vermont, and in many other jurisdictions, for a number of reasons. Private employers, on the other hand, have been made subject to civil liability in this context. The law recognizes that potential negligence is a cost of doing business, and requires that those who commit such acts be held liable for damages resulting from injuries they have caused. Even when those acts are committed by an employee “outside the scope of their authority,” the law requires that private employers be held liable for those negligent acts. This is the legal doctrine of respondeat superior. In particular, public policy has evolved such that it recognizes the ability of private employers to pass on the costs of doing business to the end-user. The

private employer can always raise the price of widgets to pay for the costs involved in their production.

In contrast, public employers have not been burdened with this type of liability. Municipalities and other public entities do not enjoy the same ability to transmit costs so rapidly to the end-user. As such, the law has developed so that public employers do not have to bear the costs for injuries sustained as a result of negligent acts of their employees, committed outside the scope of their authority. Correspondingly, this policy has developed to protect the taxpaying public, who cannot choose whether to purchase a non-discretionary product such as law enforcement. On the other hand, a consumer can choose whether to purchase a widget which has become more expensive because the costs of liability have been factored into its retail value.

After the *Forrest* case was litigated all the way to the Vermont Supreme Court, three of the five Justices decided that in this circumstance, it was appropriate to impose vicarious liability on the Bennington County Sheriff's Department. Ostensibly, the reason for this change is that law enforcement officers enjoy a unique position in our society, and because of this, their employers should be held liable for the damage inflicted when they commit illegal acts. Law enforcement officers in a civil society must be imbued with strong powers in order to effectuate the interests of a law-abiding community. As such, they have the power to pull over motor vehicles, arrest criminal suspects, and detain them. Additionally, the public generally respects law enforcement officers, and calls upon the law enforcement community for help when emergencies arise. Because of these factors, law enforcers have a "special access" to citizens that the majority believes only exists as a result of their position within society. Justice Dooley, writing for the majority, stated that it was "Forrest's special access to plaintiff created by his job [that enabled] him to commit the tort." *Id* at 52. Moreover, "despite the fact that Forrest never used or threatened to use his gun on plaintiff, his position and implements sufficiently intimidated and scared plaintiff to enable him to commit the tort." *Id* at 56.

It is worth noting that the dissenting Justices, Skoglund and Amestoy, were quite vehement in their discontent with the majority's position. Justice Skoglund wrote, "The majority has created a threat of vicarious liability that knows no borders . . . Whether today's holding stands as a legal aberration, a special departure from the general principles of *respondeat superior* created exclusively for law enforcement agencies, or the first in a new line of cases imposing vicarious liability on public and private employers for the sexual misconduct of their employees, only time will tell." *Id* at 59. She continued, "In either case, irreparable and unwarranted damage will have been done, not only to the law enforcement agencies unfairly singled out for disparate treatment by today's decision, but to every public and private employer compelled to defend itself against the inevitable spate of lawsuits seeking to extend today's ruling."

What does this mean for Vermont communities with police departments? It means that you must make every effort (in addition to what you are already doing) to make sure that your officers are acting within the bounds of the law. Implicit in this concept is that your officers deserve the best training available, coupled with strong supervisory control to prevent small problems from escalating. One suggestion is that police officers be paired up on patrol. The theory is that an officer whose proclivity is to violate the law will be kept in check by the other. Whether this theory holds water is an open question, but it does show that the employer is making a strong effort to reduce the possibility of

employees committing criminal acts on the job. Beyond these efforts, it becomes apparent that no level of training can stop a determined wrongdoer from committing a criminal act on the job. Whether the Legislature will address this issue next session remains to be seen.

- Brian Monaghan, Attorney, VLCT Municipal Assistance Center

VLCT News, June 2004