IN THE SUPREME COURT OF THE STATE OF IOWA

No. 21-1072

Muscatine County No. LACV022876

SHARI L. MARTIN, Plaintiff-Appellant,	)
vs.	)
THOMAS A. TOVAR, Individually And in his official capacity and CITY OF MUSCATINE, IOWA, Defendants-Appellees.	)

APPEAL FROM IOWA DISTRICT COURT FOR MUSCATINE COUNTY
THE HONORABLE STUART P. WERLING

PLAINTIFF-APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE

The undersigned attorney hereby certifies on December 30, 2021, I electronically filed the foregoing Plaintiff-Appellant's Brief with the Clerk of the Supreme Court of Iowa using the EDMS system which will send notification of such filing to each of the attorneys of record of all parties.

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CERTIFICATE OF FILING

The undersigned attorney further certifies that the foregoing Plaintiff-Appellant's Brief was electronically filed with the Supreme Court of Iowa by using the EDMS system, on this 30th day of December, 2021.

/s/ M. Leanne Tyler

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ROUTING STATEMENT

Shari Martin, Plaintiff-Appellant, asserts that this is a case for review, by the Iowa Supreme Court, pursuant to Iowa R.App.P.6.1101. It concerns the vicarious liability of the City of Muscatine "hereinafter Muscatine" for sexual assault, by a Police officer, while on duty, who was in contact, with Shari Martin, hereinafter "Martin", as part of official police duties. This case involves an issue of broad public importance, requiring ultimate determination by the Iowa Supreme Court. Iowa R.App.P.6.1101(2)d.

This case also involves a substantial issue of first impression in Iowa. Iowa R.App.P.6.1101(2)c.

Lastly, it involves enunciating a legal principle, as to liability of a city (police department) for a police officer sexually assaulting a person with whom the officer comes in contact, as part of his official duties. Iowa R.App.P.6.1101(2)f.

NATURE OF CASE

This is an appeal, after Confession of Judgment, pursuant to Iowa Code §677.7, by Thomas Tovar, hereinafter "Tovar", for damages claimed in Plaintiff's Petition, related to

Count I (Sexual Assault) and Count II (Battery). (Vol.I.App.pp.351-354,Confession of Judgment filed 7/5/2021; Vol.I.App.pp.358-359,Order on Confession filed 7/8/2021.) On 1/4/2018, the District Court entered summary judgment in favor of Muscatine, absolving the city of liability for the rape of Martin by Tovar. (Vol.I.App.pp.315-328,Ruling on Muscatine's Motion for Summary Judgment.) This ruling is appealed, after final judgment in the matter. (Vol.I.App.pp. 315-328,Ruling entered 1/4/2018; Vol.I.App.pp. 351-354,Confession of Judgment entered 7/5/2021; Vol.I.App.pp. 358-359,Order on Confession entered 7/8/2021; Vol.I.App.pp.360-362,Notice of Appeal filed 8/3/2021.)

COURSE OF PROCEEDINGS

On 2/4/2015, Martin brought an action against Tovar, a police officer, and Muscatine (through the Police Department), claiming that Tovar, who came in contact with her in his official capacity, sexually assaulted and battered her, on 2/16/2013. (Vol.I.App.pp.8-22,Petition at Law and Jury Demand filed 2/4/2015; Vol.I.App.pp.32-46,Amended Petition filed 5/19/2017.)

Martin asserted several counts, which included sexual assault and battery. (Vol.I.App.pp. 8-22,32-46,Petition and Amended Petition at Law; Vol.I.App.pp.315-328,Ruling Summary Judgment filed 1/4/2018.) Martin also asserted that Muscatine, through its Police Department (hereinafter "PD"), was responsible for the damages caused to Plaintiff, pursuant to the doctrine of *respondeat superior* and Iowa Code §670.2. (Vol.I.App.pp.12,36,Petition and Amended Petition,p.5, para.26.)

The Confession of Judgment relates to Count I and Count II of Plaintiff's Petition (sexual assault and battery). (Vol.I.App.pp. 351-354,Confession of Judgment, filed July 5, 2021.) Tovar was charged and convicted of Sexual Abuse in the Third Degree, a Class "C" felony, in Case No. FECR049753. (Vol.II.Conf.App.pp.21,32-33,Plaintiff's Response to Defendant's Statement/Undisputed Facts-para.2,Exh.1; Vol.I.App.p.71,Muscatine's Statement/Undisputed Facts,para.8.)

A review of the docket indicates this civil case was continued because of the ongoing criminal jury trial of Tovar,

and to allow Tovar to exhaust all his appellate remedies. Tovar's criminal case was concluded after the Supreme Court denied further review. (Appellate Criminal Case No. 16-1440, *procedendo* entered 1/17/2019.) The Court is requested to take judicial notice of that case completing. This is only relevant to the proceedings because it indicates why this case was in abeyance for a period of time, in combination with pandemic issues.

Of relevance, is that prior to Confession of Judgment, by Tovar, a Motion for Summary Judgment was filed by Muscatine, with extensive filings on behalf of both Martin and Muscatine. The Court ruled on Muscatine's Motion on 1/4/2018. (Vol.I.App.pp.56-58,Muscatine's Motion for Summary Judgment filed 6/5/2017;Vol.I.App.pp.315-328,Ruling/Summary Judgment filed 1/4/2018.)

The remainder of the proceedings, that are relevant, relate to the Motion for Summary Judgment filed and Resistance thereto, pursuant to Iowa R.Civ.P.1.981.

Muscatine's Motion for Summary Judgment, and Plaintiff's Resistance related to one issue: liability of

Muscatine under the doctrine of *Respondeat Superior* for rape of Martin by Officer Tovar. Tovar has confessed judgment for sexual assault-Count I and battery-Count II of Plaintiff's Petition. (Vol.I.App.pp.351-354,Tovar confession filed 7/5/2021.)

Muscatine, filed its two Answers on March 12, 2015 and on 5/22/2017. (Vol.I.App.pp.23-31,Answer; Vol.I.App.pp.47-55,Muscatine's Amended Answer.)

The following are the Motions relevant to the Summary Judgment. On 6/5/2017, Muscatine filed a Motion for Summary Judgment seeking to absolve themselves of liability for the sexual assault of Martin, by Tovar, while he was in contact with her on duty. (Vol.I.App.pp.56-58,Motion for Summary Judgment.) Also, on 6/5/2017, Muscatine filed a Statement of Undisputed Facts and Memorandum of Authorities in support of the Motion for Summary Judgment. (Vol.I.App.pp.70-126,Statement/Undisputed Facts; Vol.I.App.pp.59-69,Memorandum of Authorities.)

On 8/18/2017, the Plaintiff filed her Resistance to Defendant's Motion for Summary Judgment, Response to

Defendant's Statement of Undisputed Material Facts and Additional Undisputed Material Facts, and Memorandum of Authorities. (Vol.I.App.pp.127-129,Resistance to Motion for Summary Judgment; Vol.II.Conf.App.pp.21-188,Response to Defendant's Statement/Undisputed Facts and Statement/Additional Undisputed Facts; Vol.I.App.pp.130-143,Plaintiff's Memorandum of Authorities.)

Muscatine then filed a Reply to Plaintiff's Resistance on 8/24/2017. (Vol.I.App.pp.156-186,Reply to Resistance.) Also, on 8/18/2017, Plaintiff filed a Motion to Compel certain documents that the City failed to produce, including documents produced with substantial redactions. (Vol.I.App.pp.144-145,Plaintiff's Motion to Compel.) As indicated in the Court's Ruling on Motion to Compel, these included:

1. A Citizen's Complaint and letter to the complainant, or of understanding, that were part of Thomas Tovar's personnel file.
2. A Professional Standards Inquiry Report.
3. Letter to the Complainant.

4. Thomas Tovar's personnel file. (Vol.I.App.pp.219-222,Ruling on Motion to Compel filed 8/30/2017.)

The Court required Muscatine to produce the unredacted copies of the above referenced documents. (Vol.I.App.pp. 219-222,Ruling on Motion to Compel, filed 8/30/2017.)

After some necessary discovery on these documents, on 12/6/2017, Plaintiff filed a Supplemental Statement Undisputed Material Facts and Supplemental Memorandum of Authorities, relative to matters discovered after the Court's ruling on the Motion to Compel, including facts discovered at depositions, and derived from documents provided after the Ruling. (Vol.I.App.pp.229-272,Supplemental Statement/ Undisputed Material Facts; Vol.I.App.pp.223-228, Supplemental Memorandum/Authorities.) Muscatine, then filed a Supplemental Statement/Facts in reply on 12/13/2017. (Vol.I.App.pp.284-306,Muscatine's Supplemental Statement/Facts.) Plaintiff then filed a Response to Defendant, Muscatine's, Supplemental Statement/Facts on December 21, 2017. (Vol.I.App.pp.307-314,Response to Supplemental Statement/Material Facts.)

Oral argument was held on 8/29/2017. (Transcript of Hearing,pp.2-32.) The Court ruled, on Muscatine's Motion for Summary Judgment, finding Muscatine not liable for Tovar's sexual assault, of Martin, while he was in uniform, on duty, and in contact with her as part of his official duties. (Vol.I.App.pp.315-328,Ruling on Motion for Summary Judgment filed 1/4/2018.)

Plaintiff obtained confession of judgment, against Tovar, as indicated above, on 7/5/2021, with the Court filing its Order on the Confession, on 7/8/2021. (Vol.I.App.pp. 351-354,Confession of Judgment; Vol.I.App.pp. 358-359,Order/ Confession of Judgment.) Plaintiff, Martin, then filed her Notice of Appeal on 8/3/2021. (Vol.I.App.pp. 360-362,Notice of Appeal.)

STATEMENT OF FACTS

Before proceeding, in reference to the Statement/Facts, Martin, asserts the following: In the Ruling on Summary Judgment, the Court sets forth facts in relation to Tovar's sexual assault and battery of Martin. (Vol.I.App.pp. 315-328,Ruling of 1/4/2018.) Further facts are set forth in the

Court's ruling describing Tovar's record as an officer of law, including that Muscatine PD experienced consistent, recalcitrant behavior by Tovar prior to his sexual assault of Martin, and that he was a substandard officer with a history of poor performance reviews, insubordination, interference with investigation, disciplinary actions, and suspensions. (Vol.I.App.pp.315-328,Ruling,p.7-8.) Further, the Court found that Tovar had issues with romantic relationships and was subject to rumors (about such), and that there was one report, by a citizen, B.W., who testified that Tovar had sexually assaulted her at the Muscatine PD in September, 2010 (before Martin's rape on 2/16/2013). (Vol.I.App.pp.322-323,Ruling on Summary Judgment,p.8-9;Vol.II.Conf.App.p21,32-33,Plaintiff Response to Defendant's Statement/Undisputed Facts-para.2-Exh.1-Jury Verdict.) This evidence was discovered, by Plaintiff, after the Court's ruling on the Motion to Compel. (Vol.I.App.pp. 219-222,Ruling on Motion to Compel, filed 8/30/2017.)

It is not alleged that the Court's factual summary, in reference to Tovar's bad behaviors, is incorrect. However,

some elucidating, troubling and relevant facts are not in the Court's ruling.

Further, the Court is correct in that, for unknown reasons, the Service Rating Form, of Thomas Tovar, in 2011-2012, never materialized from Muscatine, after the Ruling on Motion to Compel. (Vol.I.App.pp.326-327,Ruling on Motion for Summary Judgment entered 1/4/2018,p.12-13.) This would have been the Service Rating Form for Tovar immediately prior to his sexual assault and battery of Martin, on 2/16/2013. (Vol.I.App.pp.315,326-327,Ruling on Motion for Summary Judgment-pp.1,12-13.)

The below facts were garnered from documentation from the Muscatine PD, Tovar's criminal transcript and depositions.

On 2/16/2013, in the wee morning hours, Muscatine Police officers initiated a traffic stop of a David Faust, on suspicion of operating while intoxicated. (Vol.I.App.pp.70,76-77,Muscatine's Statement/Undisputed Facts-para.2-Exh.A-para.7-11.) Martin was a passenger in David Faust's vehicle. (Vol.I.App.pp.70,76-77,90,Muscatine's Statement/Undisputed Facts-para.3-Exh.A-para.7-11-Exh.B-para.8-11.) Tovar was

one of the Muscatine police officers participating in the traffic stop and criminal investigation. (Vol.I.App.pp.70,76-77,90,Muscatine's Statement/Undisputed Facts-para.3-Exh.A-para.7-11-Exh.B-para.7-11.) It was common practice, of the Muscatine PD, to give intoxicated individuals, not under arrest, a courtesy ride home. Following that practice, Tovar, still on duty, escorted Martin to the Clarion Hotel near the traffic stop. (Vol.I.App.p.316,Ruling/Summary Judgment-p.2,ll.1-2; Vol.I.App.pp.71,77-78,Muscatine's Statement/Undisputed Facts-para.4-Exh.A-para.14-25; Vol.II.Conf.App.p.23,41-42,Plaintiff's Additional/Undisputed facts filed 8/18/2017-para.9-Exh.2-Tovar's criminal trial transcript-hereinafter "Tr.Trans."-Tr.p.292,ll.24-25,p.293,ll.1-24.)

Tovar was convicted, in Case No. FECR049753, of the Class "C" felony of sexual abuse in the 3rd degree, based on his rape of Martin, at the Clarion Hotel, on February 16, 2013. (Vol.II.Conf.App.pp.21,32-33,Plaintiff's Response/Muscatine's Statement/Material Facts-para. 2-Certified copy of jury verdict-Exh.1;Vol.I.App.p.71,Muscatine's

Statement/Undisputed Facts-para.8.) Tovar admitted, upon arrival at the Clarion Hotel, that he turned off the camera, in his vehicle, and body microphone. (Vol.I.App.pp.72,104,109-Muscatine's Statement/Undisputed Facts-para.10-Exh.D,pp.457,494-5.)

Tovar received another dispatch call to respond to a domestic disturbance while at the hotel with Martin. (Vol.I.App.pp.72,106,109, Muscatine's Statement Undisputed Facts-para.14-Exh.D. pp.468,496.) Tovar drove to the domestic disturbance call without his lights, siren, or camera activated to avoid a recording showing that he was still at the Clarion hotel when he received the call. (Vol.I.App.pp.72,107,109-110,Muscatine's Statement/Undisputed Facts-para.15-Exh.D-pp.469,495,497.)

Tovar resigned his employment on 2/19/13, with the Muscatine PD. (Vol.I.App.pp.73,Muscatine's Statement/Undisputed Facts-para.18; Vol.II.Conf.App.p.8-13,16-20-Muscatine's Responses to Request for Admissions-Exh.F-Response No. 6,8,10,12,14; Exh.G-notes of Chief Brett Talkington.) Martin takes significant issue with Muscatine's

contention it was not notified, prior to 2/16/2013, that Tovar would engage in, or be accused of, any type of sexual assault. (Vol.I.App.p.73,Muscatine's Statement/Undisputed Facts-para.19.)

From Plaintiff's Statement/Undisputed Material Facts (filed 8/18/2017): As found in the Court's Ruling, it was common practice for officers, of the Muscatine PD, to give intoxicated persons a ride home. (Vol.II.Conf.App.pp.23,41-42,Plaintiff's Statement/Additional Material Facts filed 8/18/2017-para.9-Exh.2-Tovar Tr.Trans.p.292,ll.24-25,p.293,ll.1-24.) The Muscatine PD had no policy, on whether an officer should enter the intoxicated person's home, or hotel room, when giving them a ride. (Vol.II.Conf.App.pp.23,42,Plaintiff's Statement/Additional Material Facts-para.10-Exh.2-Tovar Tr.Trans.p.293,ll.1-25,p.294,ll.1-9.) Tovar was employed by Muscatine for more than twenty years at the time of his rape of Martin. (Vol.II.Conf.App.pp.23,41,135,Plaintiff's Statement/Additional Material Facts-para.11-Exh.2, Tovar Tr.Trans.p.292-para.4-5-Exh.20-Stamped 0193.)

Tovar was armed, wearing his police uniform, and on-duty when he sexually assaulted Martin on 2/16/2013. (Vol.II.Conf.App.pp.23,144,Plaintiff's Statement/Additional Material Facts-para.13-Exh.2; Tovar Tr.Trans.p.496,ll.11-12.)

Lieutenant Kies, of the Muscatine PD, supervised Tovar, on the night of the sexual assault/battery of Martin (2/16/2013). (Vol.II.Conf.App.pp.23,35,36,Plaintiff's Statement/Additional Material Facts-para.15-Exh.2-Tovar Tr.Trans.p.236,ll.1-25,p.237,ll.1-25,p.238,ll.1-25,p.239,ll.1-6.) David Faust called the police department the morning of 2/16/2013, to report Martin had been assaulted by a police officer. (Vol.II.Conf.App.pp.24,36,Plaintiff's Statement/Additional Material Facts-para.16-Exh.2, Tovar Tr.Trans.p.240,ll.8-14.) When Lieutenant Kies took this call, he took it on speaker phone while Tovar was present, allowing Tovar to hear the entire accusation. (Vol.II.Conf.App.pp.24,37,Plaintiff's Statement/Additional Material Facts-para.17-Exh.2, Tovar Tr.Trans.p.242,ll.4-25,p.243,ll.1-12.)

When Tovar arrived, at the Clarion Hotel, with Lieutenant Kies, Tovar told Lietenant Kies that his story, about Martin breaking a hotel key, that he described earlier, was a lie. Lieutenant Kies became concerned. (Vol.II.Conf.App.pp.24,38,Plaintiff's Statement Additional Material Facts-para.18-Exh.2-Tovar Tr.Trans.p.249,ll.2-25,p.250,ll.1-11.) Lieutenant Kies purposely turned off his body microphone so that this conversation with Tovar could not be recorded. (Vol.I.App.pp.24,39-40,Plaintiff's Statement Additional Undisputed Material Facts-para.19-Exh.2-Tovar Tr.Trans.p.275,l.25,p.276,ll.1-25,p.277,ll.1-2.) The Muscatine PD had notice of the rape, on the same day as the alleged rape, 2/16/2013, per Captain Snider. (Vol.II.Conf.App.pp.24,163-167,Plaintiff's Statement Additional Material Facts-para.20-Exh.25-Captain Snider's report.)

Tovar's disciplinary history, with the PD, was seriously deficient for his entire tenure. (Vol.II.Conf.App.pp.24,47-Plaintiff's Statement Additional Material Facts-para.21-Exh.2-Tovar Tr.Trans.p.543,ll.10-17.) Tovar had an affair with an assistant county attorney, Kerrie Snider, with whom he

worked on cases. (Vol.II.Conf.App.pp.24,45,Plaintiff's Statement Additional Material Facts-para.22-Exh.2-Tovar Tr.Trans.p.501,ll.4-25,p.502,ll.1-9.)

Lieutenant Kies, supervisor to Tovar, in 2013 (the year of Martin's rape) had heard rumors that Tovar had sexual relations with members of the public while on duty. (Vol.II.Conf.App.pp.24,48-50,53-55,Plaintiff's Statement Additional Material Facts-para.23-Exh.3, Kies Dep.Tr.p.4,ll.21-25,p.5,ll.1-4,p.2,p.9,ll.22-25,p.10,ll.10-21-Exh.4-Muscatine's Answer to Interrogatory No.14.) Lt. Kies, was aware of allegations that Tovar had sexual relations with Rachel Loos, a/k/a Meeks, a local chiropractor who was indicted for theft. (Vol.II.Conf.App.pp.25,50-51,Plaintiff's Statement Additional Material Facts-para.24-Exh.3-Kies Dep.Tr.p.12,ll.1-21,p.13,ll.1-10.) Chief Brett Talkington was aware that Tovar had issues with his performance before Talkington became chief, in approximately February, 2011. (Vol.II.Conf.App.pp.25,56,58-59,Plaintiff's Statement Additional Material Facts-para.25-Exh.5-Talkington Dep.Tr.p.3,ll.22-25,p.4,ll.1-2,p.24,ll.22-25,p.25,ll.1-3.)

Tovar was disciplined in 1993 for refusing to comply with a directive to "park and walk" on his patrol and instead hung out at an off-duty officer's house when he was supposed to be patrolling on foot. (Vol.II.Conf.App.pp.25,64-65,Plaintiff's Statement Additional Material Facts-para.26-Exh.6-Bates 127-128). During this 1993 incident, Tovar used his radio to misrepresent what he was doing to dispatch. (Vol.II.Conf.App.pp.25,65,Plaintiff's Statement Additional Material Facts-para.27-Exh.6-Bates 128.)

Tovar was suspended for three days in 1996 because he jumped the fence at the city-owned pool after a bar closing and trespassed to go swimming. (Vol.II.Conf.App.pp.28,59-60-Plaintiff's Statement Additional Material Facts-para.28-Exh.5, Talkington Dep.Tr.p.27,ll.1-18,p.28,ll.1-25,p.29,ll.1-2.) Tovar was cited for misconduct, for interference with official acts, bringing disrepute upon the department, and attempting to cover up his misconduct with the assistance of other police officers. (Vol.II.Conf.App.pp.25,66,67,Plaintiff's Statement Additional Material Facts-para.29-Exh.7-Bates 125-126.)

After Tovar joined the investigative division in 2003, Tovar's poor performance and attitude resulted in the elimination of his detective position and a demotion back to patrol in July, 2004. (Vol.II.Conf.App.pp.25,68-71,Plaintiff's Statement Additional Material Facts-para.30-Exh.8-Bates 169-172.)

As far back as his 2003-2004 Service Rating Form, Tovar had 14 evaluation categories that required improvement or were not satisfactory. (Vol.II.Conf.App.pp.26,68-72,Plaintiff's Statement Additional Material Facts-para.31-Exh.9-Dep.Tr.Snider,p.4,ll.8-16-Exh.8-Bates 0169-0172.) Quoting Captain Snider, on Tovar's 2003/2004 Service Rating Form:

> "In a review of Officer Tovar's file, I have found a career spanning 12 years with the Muscatine Police Department. During this time he consistently has displayed times of high work productivity and decision-making, followed by issues in direct contrast, making poor decisions and completing marginal work and directly violating existing policies and practices of the department." (Vol.II.Conf.App.pp.26,72,68-71,Plaintiff's Statement Additional Material Facts-para.31-Exh.9-Dep.Tr. Snider,p.4,ll.8-16, Exh.8-Bates 0169-0172.)

In defiance to a superior's authority regarding dress code, Tovar wore the same clothes for two months straight.

(Vol.II.Conf.App.pp.26,70,Plaintiff's Statement Additional Undisputed Material Facts-para.32-Exh.8-Bates 171.) Tovar defied a direct supervisor's order and took an issue directly to the County Attorney, disregarding chain of command. (Vol.II.Conf.App.pp.26,70,Plaintiff's Statement Additional Undisputed Material Facts-para.33-Exh.8-Bates 171.)

Tovar was disciplined, on September 24, 2010, when he removed a suspect female driver (who was a witness in a previous drive-by shooting) who had fled the scene of an automobile accident, who then called Tovar to pick her up.(Vol.II.Conf.App.pp.26,61,76,Plaintiff's Statement Additional Undisputed Material Facts-para.34-Exh.5-Talkington Dep.Tr.p.38,ll.3-25,p.39,ll.1-10-Exh.10-Bates 717-719.) Tovar picked up this woman and did not return her to the scene or notify the investigating officers, but took her home. (Vol.II.Conf.App.pp.26,76,Plaintiff's Statement Additional Undisputed Material Facts-para.35-Exh.10-Bates 717-719.) A witness, M.K., believed that the female Tovar transported home, on this occasion, was under the influence of drugs.

(Vol.II.Conf.App.pp.26,81,Plaintiff's Statement Additional Material Facts-para.36-Exh.11-Bates 133.)

A Citizen's Complaint was filed regarding Tovar, because the citizen, M.K. (vice president of a bank), who listened to the suspect female driver call Tovar grew concerned with the conversation he was hearing between the suspect driver and Tovar. (Vol.II.Conf.App.pp.27,76,Plaintiff's Statement Additional Material Facts-para.37-Exh.10-Bates 717-719.) Tovar received only a "Letter of Understanding" in reference to the above-described interference with a hit and run investigation. (Vol.II.Conf.App.pp.27,89,Plaintiff's Statement Additional Material Facts-para.38-Exh.12-Bates 663.)

Tovar was later written up in 2010 for untimely reports and losing evidence in a sexual assault case. (Vol.II.Conf.App.pp.27,90-91,Plaintiff's Statement Additional Material Facts-para.39-Exh.13-Bates 182-183.) Tovar was again suspended for three days in 2011. (Vol.II.Conf.App.pp.27,77,87,Plaintiff's Statement Additional Material Facts-para.40-Exh.11-Bates 129-139.) Tovar's 2011 suspension was for numerous infractions, including

untimeliness of his reports, dereliction in investigations, dereliction in maintaining evidence, poor attitude, undermining investigations, and insulting another officer in public. (Vol.II.Conf.App.pp.27,81-88,Plaintiff's Statement Additional Material Facts-para.41-Exh.11-Bates 133-140.) Tovar was removed from the investigations division and returned to patrol, again, in April, 2011. (Vol.II.Conf.App.pp.27,87,Plaintiff's Statement Additional Material Facts-para.42-Exh.11-Bates 139.)

In 2011, Tovar received a new memorandum, from Chief Talkington, about numerous derelictions of duty and placing him on weekly performance evaluations. This memo, dated 9/16/2011 stated:

> "This memo is intended to outline expectations for your job performance over the next several months. As has been discussed with you there have been issues related to your performance as a police officer. It is the department's goal to assist you in achieving acceptable performance in all areas related to your duties. This will be done over the next six months with regular assessment and evaluations of your progress.
>
> Expectations for improved performance:
>
> <u>Attitude:</u>
>
> At this time, you are being referred to the EAP.It is

> expected that you will sign a release allowing them to confirm your attendance. It is also expected that you will cooperate and comply with any recommendations stemming from your sessions. The first appointment will be arranged by Human Resources; you may schedule subsequent appointments at times most convenient for you.
>
> Refrain from negative comments about/toward coworkers, supervisors, or the department.
>
> Perform all job duties as required at an acceptable level regardless of personal opinion. I have attached a copy of the Job Summary and Essential Functions and Duties of a Muscatine Police Officer.
>
> Performance:
>
> Improvement in a number of areas must be noted. These include meeting deadlines for reports as requested by the supervisor, completing reports in a timely and thorough manner, completing appropriate case follow up, and proper handling, documentation, and submission of all types of evidence." (Vol.II.Conf.App.pp.27,92-93,Plaintiff's Statement Additional Material Facts-para.43-Exh.14-Bates 0664-0665.)

The weekly performance evaluations of Tovar were for approximately six (6) months, ending 3/21/2012. (Vol.II.Conf.App.pp.28,94-126,Plaintiff's Statement Additional Material Facts-para.44-Exh.15-Bates 0668-700.) This was part of an EAP (Employee Assistance Program). (Vol.II.Conf.App.pp.28,73,192-193,Plaintiff's Statement

Additional Material Facts-para.44-Exh.9-Dep.Tr. of Steve Snider,p.23,ll.21-25,p.24,ll.1-25; Exh.14-Bates 0664-0665.)

Tovar's 2010-2011 Service Rating Form (performance evaluation), found him as requiring improvement, or not satisfactory, in ten (10) evaluation categories. In quoting Captain Snider, with review by Chief Talkington:

> "All of Officer Tovar's performance issues are self created. He needs to take a hard look at himself, how he is performing his duties, and how he is being perceived by others and make the appropriate changes in his behavior. Continuing down his current path is not an option and will only result in additional disciplinary action. Officer Tovar's future lies solely in his hands and his ability to correct these performance deficiencies that continue to plague him." (Vol.II.Conf.App.pp.28-29,128,131,Plaintiff's Statement Additional Material Facts-para.45-Exh.16-Bates 0142-0145.)

Lt. Kies indicated the Muscatine PD was aware of prior sexual incidents (to Martin's rape) with other women, in front a lay person, at the criminal trial of Tovar, on 6/7/2016, in a conversation with Special Agent Richard Rahn. This lay person signed an Affidavit for Martin.

(Vol.II.Conf.App.pp.29,141-142,Plaintiff's Statement Additional Material Facts filed 8/18/2017-para.46-Exh.21-Affidavit of Randy Hildebrant.)

Captain Snider indicated, at deposition, that he supervised Tovar, in 2010-2011, and that Tovar had to be constantly supervised, did not do his work, was abrasive with peers, and had poor judgment. (Vol.II.Conf.App.pp.29,75,Plaintiff's Statement Additional Material Facts-para.47-Exh.9-Dep.Tr. of Snider,p.33,ll.11-25,p.34,ll.1-22.) Lt. Kies also said there were rumors of a relationship with Rachel Loos, a chiropractor who was indicted for theft, prior to the Martin incident. (Vol.II.Conf.App.pp.29,50-51,Plaintiff's Statement Additional Undisputed Material Facts-para.48-Exh.3-Dep.Tr. of L. Kies,p.12,ll.21-25,p.13,ll.1-12.)

Captain Snider indicated, in the 1990s, there was a domestic abuse complaint against Tovar, by a live-in girlfriend. The criminal charge was later dropped. (Vol.II.Conf.App.pp.29,74,Plaintiff's Statement Additional Material Facts-para.49-Exh.9-Dep.Tr. of Snider,p.32,ll.2-16.)

When Lt. Kies supervised Tovar, shortly prior to the Martin sexual assault, Tovar **OFTEN** (emphasis added) did not keep his mic on. (Vol.II.Conf.App.pp.29,52,Plaintiff's

Statement Additional Undisputed Material Facts-para.50-Exh.3-Dep.Tr. of Lt. Kies,p.19,ll.22-25.)

Plaintiff filed a Motion to Compel, in reference to certain key evidence Muscatine failed to produce, including the name of the witness with whom Tovar was claimed to have sexual relations, prior to the assault on Martin. (Vol.II.Conf.App.pp.29,144-147,76,Plaintiff's Statement Additional Material Facts-para.51-Exh.23, Subpoena-City of Muscatine-Exh.10-Bates 0717-0719;Vol.I.App.pp.144-155,Motion to Compel filed 8/18/2017.)

Defendant failed to produce Tovar's final service rating, (performance evaluation), for 2011-2012 (last rating prior to the rape of Martin), with no explanation why the police department did not have such. (Vol.II.Conf.App.pp.30,143,57-58,63,Plaintiff's Statement Additional Material Facts-para.53-Exh.22-letter of Martha Shaff-Exh.5-Dep.Tr. Talkington,p.6,ll.9-12,p.7,ll.13-22,p.8,ll.1-9,p.64,ll.10-13.) The Final Service Rating Form was not preserved, by the City of Muscatine, even though they had notice of the alleged rape of Martin on the date of occurrence: 2/16/2013.

(Vol.II.Conf.App.pp.30,163-167,Plaintiff's Statement Additional Material Facts-para.54-Exh.25-Bates 0082-0086-Report of Cpt. S.W. Snider, dated 2/16/13.)

Defendants have Tovar's other Service Rating Forms (performance appraisals), from anniversary date to anniversary date, yearly, almost completely back to the beginning of his employment, except the 2011-2012 Service Rating Forms. (Vol.II.Conf.App.pp.30,68-71,170-171,143,Plaintiff's Statement/Additional Material Facts-para.55-Exh.8-Bates 0169-0172-Exh.16-Bates 142-145-Exh.26 Bates 0178-0179-Exh.27-Bates-0146 to 0147-Exh.22-letter of Martha Shaff.)

Tovar refused to appear for his deposition, at the Newton Correctional Facility. (Vol.II.Conf.App.pp.31.132,Plaintiff's Statement Additional Material Facts-para.56-Exh.17-Tovar Dep.Tr.p.3,ll.1-21.)

Plaintiff's Motion to Compel was ruled upon, requiring Defendant to produce the following:

1. Unredacted copies of the Citizen's Complaint;
2. Unredacted copies of Professional Standards Inquiry Report;

3. Unredacted copies of letter to Complainant;

4. Unredacted and complete Thomas Tovar personnel file. (Vol.I.App.pp.219-222,Ruling of August 30, 2017.)

Martin then learned the following facts:

B.W. was the subject of a Citizen's Complaint involving Tovar. (Vol.I.App.pp.229,239-241,Plaintiff's Supplemental Statement Material Facts-para.57-Exh.33-Bates Stamped no. 0717-0719.) B.W. met then-Detective Tovar in 2010 when she "got in some trouble" while living in Muscatine. (Vol.I.App.pp.229,243,Plaintiff's Supplemental Statement Material Facts-para.60-Exh.34-B.W. Dep.Tr.p.7,ll.1-14,p.8,ll.1-2.)

B.W. was arrested, taken to the Muscatine Police Department and held in a room where Tovar was one of two detectives who questioned B.W. about a drive-by shooting. (Vol.I.App.pp.230,244,Plaintiff's Supplemental Statement Material Facts-para.61-Exh.34-B.W.Tr.p.10,ll.1-11,p.11,ll.1-11.) This was the first time B.W. met Tovar. (Vol.I.App.pp.230,244,Plaintiff's Supplemental Statement

Material Facts-para.62-Exh.34-B.W.Tr.p.12,ll.9-11.) B.W. felt uncomfortable alone with Tovar. (Vol.I.App.pp.230,244-Plaintiff's Supplemental Statement Undisputed Material Facts-para.63-Exh.34-B.W.Tr.p.11,ll.6-8.) During the interview, Tovar pulled up close and squeezed B.W.'s leg. (Vol.I.App.pp.230,244,Plaintiff's Supplemental Statement Material Facts-para.64-Exh.34-B.W.Tr.p.11,ll.1-19,p.12,ll.1-3.) B.W. asked for another detective to be present. (Vol.I.App.pp.230,244,Plaintiff's Supplemental Statement Material Facts-para.65-Exh.34-B.W.Tr.p.12,ll.3-8.)

Tovar obtained B.W.'s cellphone number and began contacting her and appearing places where she was located. (Vol.I.App.pp.230,244,Plaintiff's Supplemental Statement Material Facts-para.66-Exh.34-B.W.Tr.p.12,ll.12-21.) B.W. identified the shooter to police in a drive-by shooting case, but was never required to testify. (Vol.I.App.pp.230,245,256-Plaintiff's Supplemental Statement Material Facts-para.67-Exh.34-B.W.Tr.p.13,ll.10-15,p.58,l.15,p.59,l.7.)

On or about September 21, 2010, B.W. was involved in a hit-and-run accident. (Vol.I.App.pp.230-245,Plaintiff's

Supplemental Statement Material Facts-para.68-Exh.34-B.W.Tr.p.13,ll.16-23,p.16,ll.3-5.) B.W. was drunk and driving her uncle's car with passengers. (Vol.I.App.pp.230,258-Plaintiff's Supplemental Statement Material Facts-para.69-Exh.34-B.W.Tr.p.65,ll.10-24.) It was raining and B.W.'s car swerved and slid into someone's yard when B.W. tried to avoid another police officer who was pulling her over. (Vol.I.App.pp.230,258,Plaintiff's Supplemental Statement Material Facts-para.70-Exh.34-B.W.Tr.p.65,l. 18,p.66,ll.1-2.) B.W. ran from the scene and into a nearby landscape company. (Vol.I.App.pp.231,242-244,Plaintiff's Supplemental Statement Material Facts-para.71-Exh.34-B.W.Tr.p.3-10.)

B.W. told the owner at the landscaping company she needed to call her grandma, but she called Tovar instead. (Vol.I.App.pp.231,258,Plaintiff's Supplemental Statement Material Facts-para.73-Exh.34-B.W.Tr.p.67,ll.8-10.) B.W. called Tovar to pick her up because she was drunk. (Vol.I.App.pp.231,258,Plaintiff's Supplemental Statement Material Facts-para.74-Exh.34-B.W.Tr.p.67,ll.11-23.) Tovar picked B.W. up in his white truck and drove her to Park

Avenue and dropped her off. (Vol.I.App.pp.231, 258-259,Plaintiff's Supplemental Statement Material Facts-para.75-Exh.34-B.W.Tr.p.67,l.24,p.68,l.4,p.68 l.19,p.69,l.4.)

M.K. was the owner of the landscape company to which B.W. ran. He is Vice President at Community Bank and Trust. (Vol.I.App.pp.231,264,Plaintiff's Supplemental Statement Material Facts-para.78-Exh.35-Dep.ofM.K.Tr.p.7,ll.3-15.) M.K. said the female who came into his landscape company was barefoot, soaking wet, shaking and appeared to be under the influence; she seemed nervous and paranoid. (Vol.I.App.pp.232,265,Plaintiff's Supplemental Statement Material Facts-para.80-Exh.35-M.K.Tr.p.12,ll.3-13.) B.W. asked M.K. to use the telephone. (Vol.I.App.pp.232,265-Plaintiff's Supplemental Statement Material Facts-para.81-Exh.35-M.K.Tr.p.11,ll.6-12.) When she spoke to the friend, "she was laughing and acting like she got out ofwhatever trouble she was in". (Vol.I.App.pp.232,265,Plaintiff's Supplemental Statement Material Facts-para.82-Exh.35-M.K.Tr.p.11,ll.21-25.)

M.K. demanded to know what was going on, but B.W. didn't explain. M.K. told B.W. to leave because it was almost time to close; B.W. said Tovar would pick her up. (Vol.I.App.pp.232,265,Plaintiff's Supplemental Statement Material Facts-para.84-Exh.35-M.K.Tr.p.9,ll.13-25,p.10,ll.1-8,p.12,ll.14-20.) M.K. indicated that it "didn't seem right" when the woman said Tovar got her out of trouble all of the time. (Vol.I.App.pp.232,265-266,Plaintiff's Supplemental Statement Material Facts-para.86-Exh.35-M.K.Tr.p.12,ll.1-24,p.13,ll.1-2.)

M.K. and his wife drove past Tovar's house, (as they were neighbors), and confirmed that Tovar had been the person who picked up B.W. (Vol.I.App.pp.232,233,265-266,Plaintiff's Supplemental Statement/Material Facts-para.85, 88-90-Exh.35-M.K.Tr.p.12,ll.21-24,p.13,ll.22-25,p.14,ll.1-18,p.15,ll.1-11.) M.K. then learned, that a vehicle had crashed into a yard, near his landscape company, and that everyone ran from the scene. (Vol.I.App.pp.233,266,Plaintiff's Supplemental Statement Material Facts-para.91-Exh.35-M.K.Tr.p.15,ll.17-22.)

M.K. called the Muscatine police to report what had happened. Lieutenant Snider (now Captain) responded to the call. (Vol.I.App.pp.233,267,Plaintiff's Supplemental Statement Material Facts-para.92-Exh.35-M.K.Tr.p.17,ll.12-24; Vol.II.Conf.App.p.72,Exh.9, Snider Dep.Tr.p.4,ll.15-16.) M.K. did not believe that Lieutenant Snider took his statement seriously. In fact, M.K. felt that he was being questioned for reporting the incident and that Lieutenant Snider was offended that M.K. had called. (Vol.I.App.pp.233,234,267-269,Plaintiff's Supplemental Statement Material Facts-para.93-Exh.35-M.K.Tr.p.18,ll.2-20,p.22,ll.1-9,p.23,l. 5,p.26,ll.14-23.) M.K. believed Tovar's actions were a serious issue and that (now Captain) Snider marginalized inappropriate police conduct. (Vol.I.App.pp.234,269,Plaintiff's Supplemental Statement Material Facts-para.94-Exh.35-M.K.Tr.p.25,ll.22-25,p.26,ll.1-3.)

M.K. identified B.W. as the woman who he referenced in his citizen's complaint. (Vol.I.App.pp.234,264,Plaintiff's Supplemental Statement Material Facts-para.96-Exh.35-M.K.Tr.p.8,ll.2-23.)

B.W. went to the police station the next day, September 22, 2010, to meet with Tovar in the basement, where the detectives were located (Vol.I.App.pp.234,245-247,Plaintiff's Supplemental Statement Material Facts-para.98-Exh.34-B.W.Tr.p.13,ll.20-23,p.20,ll.18-25,p.21,ll.1-5.) The detectives' office is an open room about the size of 25 feet by 15 feet with two desks.(Vol.I.App.pp.234,247,Plaintiff's Supplemental Statement Material Facts-para.99-Exh.34-B.W.Tr.p.21,ll.6-14.) One other detective was in the office, but he left quickly when B.W. arrived. (Vol.I.App.pp.234,247,Plaintiff's Supplemental Statement Material Facts-para.100-Exh.34-B.W.Tr.p.21,ll.15-21.) B.W. identified the other detective, from photos, as Detective DeVrieze. (Vol.I.App.pp.235,246,271-272,Plaintiff's Supplemental Statement Material Facts-para.101-Exh.34-B.W.Tr.p.18,ll.1-9,p.19,ll.1-18-Exhibits 36-37-Deposition Exh.25-26.)

B.W. testified that DeVrieze's look at her made her feel something bad was going to happen and gave her "that chill" that made her want to get out of the detective's office fast. (Vol.I.App.pp.235,248-249,Plaintiff's Supplemental Statement

Material Facts-para.103-Exh.34-B.W.Tr.p.27,ll.12-25,p.29,ll.1-3.) B.W. signed the papers as quickly as she could. (Vol.I.App.pp.235,247,Plaintiff's Supplemental Statement Material Facts-para.104-Exh.34-B.W.Tr.p.21,ll.22-24.)

When B.W. started to leave, Tovar grabbed her and pulled her down, handcuffing her to a desk. (Vol.I.App.pp.235,247,Plaintiff's Supplemental Statement Material Facts-para.105-Exh.34-B.W.Tr.p.22,ll.1-2.) Tovar forced his fingers, in the detectives' room, under B.W.'s clothing into her vagina while she was handcuffed to the desk. (Vol.I.App.pp.235,247,Plaintiff's Supplemental Statement Material Facts-para.105-106-Exh.34-B.W.Tr.p.22,ll.7-14,p.23,ll.18-25.) B.W. screamed at the top of her lungs-she could not understand why no one would respond because there were rooms nearby. She screamed very loudly; even when Tovar put his hand over her mouth, she screamed "let me go". (Vol.I.App.pp.235,247-249,261-262,Plaintiff's Supplemental Statement Material Facts-para.107-Exh.34-B.W.Tr.p.22,ll.15-20,p.25,ll.22-25,p.28,ll.1-25,p.29,ll.1-

25,p.30.ll.1-7,p.80,l. 25,p.81,ll.1-6.) B.W. struggled, but Tovar was on top of her. (Vol.I.App.pp.235,247,Plaintiff's Supplemental Statement Material Facts-para.108-Exh.34-B.W.Tr.p.24,ll.12-21.)

Tovar threatened B.W.'s life and her family if she ever told anyone what happened and called her a "whore" and "white trash." (Vol.I.App.pp.235,261,Plaintiff's Supplemental Statement Material Facts-para.109-Exh.34-B.W.Tr.p.78,ll.1-7,p.79,ll.1-17.) Tovar did not lock the detective's office doors at the time this happened. (Vol.I.App.pp.235,247,Plaintiff's Supplemental Statement Material Facts-para.110-Exh.34-B.W.Tr.p.23,ll.9-10.)

B.W. left the office crying and in fear for her life. (Vol.I.App.pp.236,247,Plaintiff's Supplemental Statement Material Facts-para.111-Exh.34-B.W.Tr.p.24,ll.1-9.) B.W. was bleeding vaginally from Tovar's fingernails and had purple marks on her hands where the handcuffs were clinched down. (Vol.I.App.pp.236,259,Plaintiff's Supplemental Statement Material Facts-para.112-Exh.34-B.W.Tr.p.72,ll.5-14.)

As B.W. walked out of the police station, DeVrieze was coming back down the stairs and looked at her with disdain. (Vol.I.App.pp.236,247-248,Plaintiff's Supplemental Statement Material Facts-para.113-Exh.34-B.W.Tr.p.24,ll.22-25,p.25,ll.1-16.) Detective DeVrieze was only about 9 or 10 feet away from the detectives' office when B.W. saw him as she left immediately after Tovar uncuffed her. (Vol.I.App.pp.236,248,Plaintiff's Supplemental Statement Material Facts-para.114-Exh.34-B.W.Tr.p.26,ll.1-25,p.27,ll.1-11.) B.W. believed that DeVrieze was there at the bottom of the stairway the whole time she was being assaulted by Tovar because he may have been aroused by it. (Vol.I.App.pp.236,249,Plaintiff's Supplemental Statement Material Facts-para.115-Exh.34-B.W.Tr.p.29,ll.4-24.)

About a month after Tovar sexually assaulted B.W., on September 22, 2010, Tovar showed up at her residence with DeVrieze and another detective. (Vol.I.App.pp.236,249-Plaintiff's Supplemental Statement Material Facts-para.116-Exh.34-B.W.Tr.p.30,ll.1-12,p.31,ll.1-6.) B.W. felt uncomfortable that the officers came into her apartment, and

indicated that Tovar tried to corral B.W. into her bedroom while DeVrieze was in another room. (Vol.I.App.pp.236,250-Plaintiff's Supplemental Statement Material Facts-para.118-119-Exh.34-B.W.Tr.p.33,ll.1-20,p.34,ll.6-21.)

Muscatine indicated that M.K. was not perturbed, at the police department, in its Supplemental Statement/Facts and Reply to Plaintiff's Supplemental Memorandum. (Vol.I.App.p.285,Muscatine's Supplemental Statement Facts/Reply to Plaintiff's Supplemental Memorandum of Authorities/Argument filed 12/13/2017-para.37.) Plaintiff asserts that, at deposition, M.K. clearly indicated he was perturbed with the police department. In fact, M.K. clarified, by saying, when asked:

"Q: Were you making the Complaint because of the woman or because of Detective Tovar, or both?"

M.K. clearly answered:

"A: I think because Detective Tovar and the way the whole thing went down."

M.K. further stated, that the reason he reported the incident, with B.W., after her hit and run, is because he

thought there was some police action, by Tovar, that was not conforming, and that, in fact, Tovar may be aiding and abetting a crime. (Vol.I.App.pp.308-309,Plaintiff's Responses to Defendant's, Muscatine's, Supplemental Statement Facts, filed 12/21/2017-para.37;Vol.I.App.p.268-269,Exh.35-M.K.Tr.p.22,ll.22-25,p.23,ll.1-5,p.24,ll.6-10,p.25,ll.22-25,p.26,ll.1-23.) M.K. clarified that if a policeman, is picking someone up, who is being looked for by the police department, and not reporting until the next morning, that's an issue. (Vol.I.App.pp.308-309,269,Plaintiff's Responses to Muscatine's Supplemental Statement Facts-para.37-Exh.35-M.K.Tr.p.25,ll.22-25,p.26,ll.1-6.)

Confession of Judgment and order on sexual assault and battery were entered on 7/5/2021 and 7/8/2021 respectively, against Tovar. (Vol.I.App.pp. 351-354,Confession of Judgment;Vol.I.App.pp. 358-359,Order for Judgment.)

The Ruling on Summary Judgment was entered, much earlier, as explained in the Course of Proceedings, (Vol.I.App.pp. 315-328,Ruling/Summary Judgment entered 1/4/2018.)

ARGUMENT

I. MUSCATINE IS LIABLE FOR TOVAR'S RAPE OF SHARI MARTIN UNDER THE AIDED-BY-AGENCY THEORY RELATIVE TO THE DOCTRINE OF *RESPONDEAT SUPERIOR* WHEN TOVAR COMMITTED THE SEXUAL ASSAULT ON DUTY, IN A POSITION OF AUTHORITY AND TRUST.

A. Preservation of Error

This case is appealed after Confession of Judgment, by Tovar, the police officer who sexually assaulted and battered Martin. (Vol.I.App.pp. 351-354,Tovar Confession of Judgment-7/5/2021; Vol.I.App.pp. 358-359,Order on Confession-7/8/2021.) Martin sued Muscatine, asserting that the city is liable for the sexually assaultive and battering behavior, of its police officer on duty, in contact with Plaintiff as part of his duties. (Vol.I.App.p.12,Petition at Law filed 2/4/2015-para.26; Vol.I.App.pp.32-46,Amended Petition filed 5/19/2017.)

The Ruling granting City of Muscatine's Motion for Summary Judgment, was entered 1/4/2018. Because it was an interlocutory ruling, appeal is not automatic, but permission must be granted. Iowa R.App.P.6.104(1)(a). At

that time, appeal would have been premature, because liability had not been determined against Tovar. Liability was determined, against Tovar, on 7/8/2021, in his Confession of Judgment to Counts I (Sexual Assault) and II (Battery). (Vol.I.App.pp. 351-354,Confession of Judgment; Vol.I.App.pp. 358-359,Order on Confession of Judgment.)

In reference to permission to file an interlocutory appeal, Martin would have been asking the Court to do a speculative ruling, in reference to liability, which had not been determined, against Tovar, on an issue of unsettled law. Furthermore, this is an issue of controversy as to how much protection the public is to be afforded, against a city, for an officer's on-duty sexual assault. The past couple of years has indicated the depth of that controversy.

B. Scope and Standard of Review

This appeal is directed to the Summary Judgment granted Muscatine, in reference to its liability for the acts of its police officer, on duty, who sexually assaulted/battered Shari Martin. (Vol.I.App.pp. 315-328,Ruling on Summary Judgment.) The standard of review, for district court rulings

on summary judgment, is for corrections of law. *Kunde v. Estate of Bowman*, 920 N.W.2d 803,807 (IA.2018). Evidence is viewed in the light most favorable to the party opposing summary judgment. *Murtha v. Cahalan*, 745 N.W.2d 711,713-14 (IA.2008).

C. Argument

1. Standard for Summary Judgment.

Summary judgment may only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P.1.981(3) (2017). The burden is on the moving party to prove that the facts are undisputed. *Phillips v. Covenant Clinic*, 625 N.W.2d 714,717 (IA.2001).

In considering the record before it, the court must view the facts "in a light most favorable to the party resisting the motion." *Phillips v. Covenant Clinic*, 625 N.W.2d 714,717 (IA.2001). Indeed, the court "must consider on behalf of the nonmoving party every legitimate inference that can be

reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714,717-718 (IA.2001). There is a genuine issue of material fact precluding summary judgment if reasonable minds could differ on how to resolve an issue. *Phillips v. Covenant Clinic*, 625 N.W.2d 714,717 (IA.2001).

2. Muscatine is liable for Officer Tovar's rape of Martin pursuant to the aided-by-agency doctrine set forth in *Restatement Second of Agency* §219(2)(d).

Several states have determined that the reasonable, humane, course of action, in light of police responsibility, to the public, is to hold a police department liable when an officer is on duty, and the officer uses that opportunity to commit a sexual assault. Iowa has not yet determined whether a police officer, interacting with the public, as part of his duties, who sexually assaults a person, would create liability for the police department. However, several states have adopted the "aided-by-agency theory", as it applies to police officers committing sexual assaults, on persons with whom they come in contact as part of their police duties.

3. Relevant Facts – Issue I

In the early morning hours of 2/16/2013, Muscatine Police officers initiated a traffic stop of David Faust, for suspicion of operating while intoxicated. (Vol.I.App.pp.70,76-77,City of Muscatine Statement/Undisputed Facts-para.2-Exh.A,para.7-11; Vol.I.App.pp.89-90,Defendants' Answer to Plaintiff's Petition, Exh.B-para.7-11.) At the time of the traffic stop, Martin was a passenger in Faust's vehicle, and Tovar was one of the Muscatine Police officers participating in the traffic stop and criminal investigation. (Vol.I.App.pp.70,76-77,89-90,City of Muscatine's Statement/Undisputed Facts-para.2-Exh.A,para.7-11-Exh.B,para.7-11.)

After the traffic stop, Tovar transported Martin to her hotel room, at the Clarion Hotel in Muscatine, and sexually assaulted her. (Vol.I.App.pp.71,77,Muscatine's Statement/Undisputed Facts-para.4-Exh.A,paras.14-15.) Tovar was convicted, in Case No. FECR0409753, of Sexual Abuse in the 3rd Degree, in violation of Iowa Code §709.4. (Vol.I.App.p.78,City of Muscatine's Statement Undisputed Facts-para.8; Vol.II.Conf.App.p.32,Exh.1-Jury Verdict

Criminal Case FECR 049753-para.2.) Pursuant to Iowa Code §709.4, Sex Abuse in the 3rd Degree is a Class C felony that carries ten years in prison. Iowa Code §709.4(2); See also Iowa Code §902.9(1)(d).

Although not part of the record, Tovar has now exhausted all criminal case appeal remedies, of which this Court may take judicial notice. (Vol.I.App.p.348,*Procedendo* entered on 1/18/2019-Appellate Case No.16-1440.)

It was common practice, at the Muscatine PD, for officers to give intoxicated persons a ride home in a police vehicle. (Vol.II.Conf.App.pp.23,41-42,Plaintiff's Statement/Additional Undisputed Material Facts-para.9-Exh.2, Tovar Tr.Trans.p.292,ll.24-25,p.293,ll.1-24.) The police department did not have a policy on whether or not an officer should enter the intoxicated person's home, or hotel room, when giving the person a ride home. (Vol.II.Conf.App.pp.23,42,Plaintiff's Statement/Additional Undisputed Material Facts-para.10-Exh.2, Tovar Tr.Trans.p.293,l.25,p.294,ll.1-9.) Thomas Tovar was employed by the Muscatine PD for more than twenty years at

the time of his rape of Shari Martin. (Vol.II.Conf.App.pp.23,41-Plaintiff's Statement/Additional Undisputed Material Facts-para.11-Exh.2-Tovar Tr.Trans.p.292,ll.4-5-Exh.20-Stamped 0193.)

Thomas Tovar was on duty, armed, wearing his police uniform, when he assaulted Shari Martin on 2/16/2013. (Vol.II.Conf.App.pp.23,44,Plaintiff's Statement/Additional Undisputed Material Facts-para.13-Exh.2-Tovar Tr.Trans.p.496,ll.11-12.)

Lieutenant Kies is an officer with the Muscatine PD, who was supervising Thomas Tovar on the night of the Sexual Assault/battery of Shari Martin (2/16/2013). (Vol.II.Conf.App.pp.23,35-36,Plaintiff's Statement/Additional Undisputed Material Facts-para.15-Exh.2-Tovar Tr.Trans..Vol.2,p.236,ll.1-25,p.237,ll.1-25,p.238,ll.1-25,p.239,ll.1-6.) Lieutenant Keys took the phone call reporting the sexual assault, and was on speaker phone with Tovar present, allowing Tovar to hear the accusation against him. (Vol.II.Conf.App.pp.24,37,Plaintiff's

Statement/Additional Undisputed Material Facts-para.17-Exh.2-Tovar Tr.Trans.,p.242,ll.4-25,p.243,ll.1-12.)

When Tovar arrived, at the Clarion Hotel, with Lieutenant Kies, later, he told Lieutenant Kies that his story, about Shari breaking her hotel key, that he had told Kies earlier, was a lie. Lietenant Kies started to become very concerned. (Vol.II.Conf.App.pp.24,38,Plaintiff's Statement/Additional Undisputed Material Facts-para.18-Exh.2-Tovar Tr.Trans.,p.249,ll.2-25,p.250,ll.1-11.) Lieutenant Kies purposely turned off his body microphone so that his conversation with Tovar would not be recorded. (Vol.II.Conf.App.pp.24,39-40,Plaintiff's Statement/Additional Undisputed Material Facts-para.19-Exh.2-Tovar Tr.Trans.,p.275,l.25,p.276,ll.1-25,p.277,ll.1-2.)

The Muscatine PD had notice of the alleged rape on the same day as the rape, per report of Captain Snider dated 2/16/2013. (Vol.II.Conf.App.pp.163-167,Plaintiff's Statement/Additional Undisputed Material Facts-Exh.25-Report of Captain Snider.)

Plaintiff herein pled that Muscatine, through its agency, the Muscatine PD, is responsible for the damages caused to Plaintiff under the doctrine of *respondeat superior* and Iowa Code §670.2. (Vol.I.App.p.36,Plaintiff's Amended Petition filed 5/19/2017-para.26.)

Martin is asking Iowa to adopt an agency theory in reference to doctrine of *respondeat superior* pled by her at paragraph 26 of her Petition and Amended Petition at Law. (Vol.I.App.pp.12,Petition filed 2/14/2015-para.26; Vol.I.App.p.36,Amended Petition filed 5/19/2017-para.26.) The doctrine of aided-by-agency has been adopted in circumstances in which an officer creates a relationship between the officer and a member of the public, within the context of the officer's official duties, and the officer sexually assaults that member of the public. *Doe v. Forrest,* 176 VT.476,488, 853 A.2d 48,67 (VT 2004).

4. *Restatement Second of Agency* § 219(2) and policy – other state authority.

Pursuant to *Restatement Second of Agency*, §219(2), a master is not subject to liability for torts of his servants, acting

outside the scope of their employment, unless . . . (b) the master was negligent or reckless, or (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, **OR HE WAS AIDED IN ACCOMPLISHING THE TORT BY THE EXISTENCE OF THE AGENCY RELATION** [emphasis added]. *Restatement Second of Agency* §219(2)(b) and (d) (1957).

There are at least six states, of which Plaintiff is aware, that have imposed liability upon a police department (Muscatine through its PD), for sexual assault by an officer on duty, because he was aided in accomplishing the tort by the existence of an agency relationship. Each state is addressed below.

Delaware imposed liability and found that a State police officer was aided in accomplishing sexual misconduct, occurring during an arrest, by existence of the agency relationship with the state. In *Sherman*, an officer told an arrestee that if she performed oral sex on him, that he would release her, but if she failed to comply, the officer would make

her spend the weekend in jail. *Sherman v. State Department of Public Safety*, 190 A.3d 148,180 (Del.2018).

The Delaware court found, that from the standpoint of an ordinary person, this threat would have real force. *Sherman v. State Department of Public Safety*, 190 A.3d 148,179-180 (Del.2018). The Delaware Court espoused:

> ". . . courts in other jurisdictions have held that [*Restatement Second of Agency*] §219(2)(d) (1957) applies . . . when 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'." *Sherman v. State Department of Public Safety*, 190 A.3d 148,180 (Del.2018) quoting *Doe v. Forrest*, 853 A.2d 48,67 (VT.2004).

The Delaware Court pointed out that police officers, with arrest authority, have coercive power that distinguishes them from most employees, as those they arrest are required to comply, and not resist, even peacefully, their authority. The wrongful act floats in from the very exercise of the officer's authority. *Sherman v. State Department of Public Safety*, 190 A.3d 148,180-181 (Del.2018) quoting a California case: *White v. City of Orange*, 166 Cal.App.3d 566,571 (Calif.Ct.App.1985).

In *Sherman*, the Court found that had the officer not been in uniform, in a marked patrol vehicle and effectuating an arrest, Doe would not have stopped at his direction and the events that followed would not have occurred. *Sherman v. State Department of Public Safety*, 190 A.3d 148,181 (Del.2018) quoting *White v. City of Orange*, 166 Cal.App.3d 566, 571 (Calif.Ct.App.1985).

In finding that *Restatement Second of Agency*, §219(2)(d) (1957) applied to that 2018 case, Delaware took into account the critical difference between officers, who arrest people, and employees of most businesses. The Delaware Court indicated no other employee has the presumptive legal authority to deprive a person of their liberty, and subject the person to a period of incarceration. *Sherman v. State Department of Public Safety*, 190 A.3d 148,181 (Del.2018).

Delaware indicated it may be argued that *Restatement Second of Agency* §219(2)(d) only applies to situations in which a tortfeasor exercises apparent authority, and tricks the victim into believing he has been authorized, by the employer, to commit the tort itself. *Sherman v. State Department of Public*

Safety, 190 A.3d 148,181 (Del.2018). But, the U.S. Supreme Court has rejected the argument that §219(2)(d) only applies in situations involving apparent authority, reasoning that such an interpretation would render the second qualification, of §219(2)(d), superfluous . . . The Delaware Court, thus indicates *Restatement Second of Agency* §219(2)(d) covers not only cases involving abuse of apparent authority, but also cases in which the tortious conduct is made possible, or facilitated by, the existence of the agency relationship. (The second prong of *Restatement of Agency* § 219(2)(d).) *Sherman v. State Department of Public Safety*, 190 A.3d 148,181 (Del.2018) citing *Faragher v. City of Boca Raton*, 524 US 775, 802,118 S.Ct. 2275 (1998). Faragher is the U.S. Supreme Court case dealing with supervisor harassment employing the doctrine of *Restatement Second of Agency* §219(2)(d), along with the companion case: *Burlington Industries, Inc., v. Ellerth*, 524 US 742, 765, 802, 118 S.Ct. 2257, 2275 (1998). The U.S. Supreme Court indicated it adopted agency concepts to the practical objectives of Title VII. *Faragher v. City of Boca Raton*, 524 US 775,802, 188 S.Ct.2257,2275 (1998).

In *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553,572,573 (IA.2017), the Iowa Supreme Court quotes *Ellerth,* indicating the U.S. Supreme Court reasoned harassment committed, by a supervisor, was aided by the agency relation within the scope of §219(2)(d), when a supervisor takes a tangible employment action, against the employee, because the injury could not have been inflicted absent the agency's relation. *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553,572,573 (IA.2017) citing *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742,761-62,763, 118 S.Ct.2257,2269 (1998). See also *Faragher v. City of Boca Raton,* U.S. 524 U.S. 775,802, 118 S.Ct, 2275,2290 (1998).

Haskenhoff approving the *Ellerth/Faragher* analysis, states:

> "In implementing Title VII, it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency relation principle embodied in §219(2)(d) of the *Restatement* provides an appropriate starting point for determining liability." *Haskenhoff v. Homeland Energy Sols., LLC,* 897 N.W.2d 553,572 (IA.2017) quoting *Faragher v. City of Boca Raton*, 524 U.S. 775,802, 118 S.Ct. 2275,2290 (1998).

Haskenhoff continued indicating:

> "In addition, even when no tangible employment action results, the Court observed that 'a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor is always aided by the agency relation." *Haskenhoff v. Homeland Energy Sols., LLC,* 897 N.W.2d 553,572 (IA.2017) quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742,763, 118 S.Ct. 2257,2269 (1998).

In *Sherman v. State Department of Public Safety*, the Court found it persuasive that the risk of misconduct, of a police officer sexually assaulting a member of the public while on duty, be borne by the employee and police agency. *Sherman v. State Department of Public Safety*, 190 A.3d 148,188 (Del.2018). Delaware said, consistent with the policy judgment of *Restatement Second of Agency*, §219(2)(d) (1957), the unique context of cases of this kind, against police officers, makes it sensible for *respondeat* liability to exist. *Sherman v. State Department of Public Safety*, 190 A.3d 148,188 (Del.2018). Victims are poorly positioned to protect themselves from wrongful sexual misconduct, by a police officer because, by law, they are not supposed to use even peaceable means to resist arrest, and the gauntlet required to

successfully bring and prove a case (as in the case at hand), is daunting at best. *Sherman v. State Department of Public Safety*, 190 A.3d 148,188 (Del.2018).

The Delaware Court found, by contrast, police agencies are well positioned, through careful hiring, training, and other practices, to address the risk of sexual misconduct by their officers. *Sherman v. State Department of Public Safety*, 190 A.3d 148,188 (Del.2018). *Sherman* found state police already engage in some of these activities. These activities include training officers on the proper way to interact with the public, tips to monitor time officers spend with arrestees to ensure that it's not suspiciously long, and police technology such as body cameras, make the police departments better positioned to deter and prevent sexual wrongdoing by officers. *Sherman v. State Department of Public Safety*, 190 A.3d 148,189 (Del.2018).

The Delaware Court went on to indicate, importantly, as follows:

> "Absent the potential for *respondeat superior* liability; however, the incentives for police agencies to take these steps will be diminished and the risk of misconduct

> placed on a class of victims poorly positioned to protect themselves." *Sherman v. State Department of Public Safety*, 190 A.3d 148,189 (Del.2018).

In that case, Delaware vacated a jury verdict, and found liability against the State PD, as a matter of law, with a jury trial remaining on damages if the parties were unable to resolve the case. *Sherman v. State Department of Public Safety*, 190 A.3d 148,189 (Del.2018).

In this case, Tovar, at best, was a seriously bad officer who had a history of poor performance reviews, insubordination, interference with investigations, disciplinary actions, and suspensions. (Vol.I.App.pp.321-322-Ruling/Summary Judgment-pp.7-8.) Plaintiff's Statement of Facts provides a litany of bad behavior by Officer Tovar during his time at the police department from the very beginning of his employment, and consistently throughout. Furthermore, Tovar had previously sexually assaulted a woman at the Muscatine PD in September, 2010. (Vol.I.App.pp.322,Ruling on Motion for Summary Judgment,p.8.) We know, minimally, that another detective, Detective DeVrieze, was present right after the victim arrived, and was believed, by the victim, to be

a part of, or know, what was going to happen to her, in September, 2010, when she was handcuffed, and fingered vaginally by Thomas Tovar at the police station. (Vol.I.App.pp.322-323,Ruling on Motion for Summary Judgment-pp.8-9.)

Prior to *Sherman v. State Department of Public Safety*, 190 A.3d 148 (Del.2018), the Supreme Court of Vermont applied an aided-by-agency theory to a police officer's on-duty sexual misconduct. *Doe v. Forrest*, 176 Vt. 476,853 A.2d 48,67 (VT.2004). *Doe v. Forrest* held a genuine issue of material fact existed whether a sheriff's deputy, on duty, intimidated and scared a sexual assault victim, so as to enable the officer to commit sexual assault, thus precluding summary judgment, wherein the victim sought to hold the sheriff's department vicariously liable for the deputy's misconduct, under the theory that the deputy's agency relationship with the department aided in the accomplishment of the tort, pursuant to *Restatement Second of Agency* §219(2)(d). *Doe v. Forrest*, 176 Vt. 476,503, 504, 853 A.2d 48,67 (VT.2004).

In *Doe v. Forrest*, the deputy in question regularly visited a convenience store as part of his community policing function. The deputy struck up a familiar relationship with a twenty year old cashier. *Doe v. Forrest*, 176 Vt. 476,479,480, 853 A.2d 48,67 (VT.2004). On one particular occasion, the deputy took a hold of the cashier's hair, which was in a ponytail and used it to move her head in various directions. He told her he liked women who wore their hair in a ponytail so he could control them. He then put his arm around the Plaintiff, who said nothing, but moved away from him and returned to the checkout counter. *Doe v. Forrest*, 176 Vt. 476,480, 853 A.2d 48,67 (VT.2004). The Sheriff's deputy then selected a store-displayed adult magazine, and showed the cashier a picture of a woman performing fellatio. After a short conversation, pertaining to the sexual act depicted, he began to maneuver her into a secluded area of the store, where he coerced her to perform oral sex. He also kissed and fondled her breasts. After approximately fifteen minutes, she departed the store and telephoned for help. *Doe v. Forrest*, 176 Vt. 476,480, 853 A.2d 48,67 (VT.2004).

The Plaintiff sued based on numerous theories, but the theory, which Shari Martin asserts applies herein, that the Iowa Court should adopt, is that the Defendants are vicariously liable under *Restatement Second of Agency* §219(2)(d) (1957) "aided-by-agency". *Doe v. Forrest*, 176 Vt. 476,481, 853 A.2d 48,67 (VT.2004).

Again, summary judgment is inappropriate herein because the question of material fact remains as to whether Defendant should be held vicariously liable under the last clause of *Restatement Second of Agency* §219(2)(d), which authorizes liability for torts committed outside the scope of the servant's employment, if the servant were aided in accomplishing the tort by the existence of the agency relation. *Doe v. Forrest*, 176 Vt. 476,482, 853 A.2d 48,67 (VT.2004).

As in the *Doe v. Forrest* case, the Plaintiff argues that the agency relationship aided the commission of the tort in two ways: 1) By giving Tovar unique access to and authority over Plaintiff to commit the tort; and 2) By giving Tovar the instruments, in particular the uniform, firearm, and badge,

and opportunity [emphasis added] (squad car transport of Martin), to prevent resistance.

As in *Forrest*, Martin asserts that Tovar could not have committed the Sexual Assault, on her, except by virtue of his police position, conferred by Muscatine. His police position allowed him to come into contact with her, at the arrest of Faust for OWI, to accompany Martin to her hotel room, and to gain access to the hotel room when assigned the responsibility to drive her there, by the Muscatine PD. (Vol.II.Conf.App.pp.23,41-42,44,Plaintiff's Statement/Undisputed Facts-para.13-Exh.2-Tovar Tr.Trans.292,ll.24-25,p.293,ll.1-24,p.294,ll.1-9,p.496,ll.11-12; Vol.I.App.pp.70-71,76-78,89-90,Defendant's Statement/Undisputed Facts-paras.3,4,8-Exh.A,paras.7-25;Exh.B-paras.7-11.)

As in *Doe v. Forrest*, Tovar's official powers and responsibilities aided him in accomplishing the tort on Plaintiff. *Doe v. Forrest*, 176 Vt. 476,488, 853 A.2d 48,67 (VT.2004). The Court, in *Doe v. Forrest*, also indicated that *Restatement Second of Agency*, §219(2)(d) (1957) has been

comprehensively and persuasively construed in the employment law area, by the United States Supreme Court, in *Burlington Industries, Inc. v. Ellerth*, 524 US 742, 118 S.Ct. 2257 (1998); and *Faragher v. City of Boca Raton*, 524 US 775, 118 S.Ct. 2275 (1998).

Doe v. Forrest, 176 Vt. 476,490, 853 A.2d 48,67 (VT.2004) discussed the *Faragher* and *Ellerth* constructs because the Vermont Court found the application of §219(2)(d), in the two cases persuasive authority and helpful in the application of *Restatement Second of Agency* §219(2)(d) in relation to police Sexual Assault, committed on duty on a citizen the law enforcement officer is charged to protect. *Doe v. Forrest*, 176 VT.476,490-493, 853 A.2d 48,67 (VT.2004). The Vermont Court pointed out that not only is the supervisor, in the *Faragher* decision placed in a position to sexually harass the employee, but the fear of retaliation prevents the employee from resisting and complaining. *Faragher v. City of Boca Raton*, 524 US 775, 803 (1998). In like manner, when a law enforcement officer is wrongdoing, the citizen is also stripped of the official protection society provides. The citizen

is particularly vulnerable and defenseless. *Doe v. Forrest*, 176 Vt. 476,493, 853 A.2d 48,67 (VT.2004).

The *Faragher* Court also emphasized the unique access to commit the tort the employment relationship can provide, in a very similar way the law enforcement officer has unique access to a citizen who is depending upon the law enforcement officer for protection. *Doe v. Forrest*, 176 Vt.476,493, 853 A.wd 48,67 (VT.2004) citing *Faragher v. City of Boca* Raton, 524 U.S. 775,803 (1998).

Furthermore, modern law enforcement philosophy increases the significance of this factor. The *Doe v. Forrest* Court found that we live in an era of community policing. As a result, the emphasis on police work is more on prevention and interaction with community members to create conditions to inhibit crime. *Doe v. Forrest*, 176 Vt. 476,493, 853 A.2d 48,67 (VT.2004) citing *D. Stevens Community Policing and Police Leadership and Policing and Community Partnerships*, 163, 165 (D. Stevens Ed. Prentice Hall 2001).

In this case, it was a common practice of the officers of the Muscatine PD to give intoxicated persons a ride home.

(Vol.II.Conf.App.pp.23,41-42,Plaintiff's Statement/Additional Undisputed Facts-para.9-Exh.2-Tovar Tr.Trans.p.292,ll.24-25,p.293,ll.1-24.) Furthermore, the police department did not have a policy to indicate that an officer couldn't enter the intoxicated person's hotel room, after giving them a ride. (Vol.II.Conf.App.pp.23-42,Plaintiff's Statement/Additional Undisputed Facts-para.10-Exh.2-Tovar Tr.Trans.p.293,l.25,p.294,ll.1-9.) Tovar did just that, entering Shari Martin's hotel room and raping her while on duty on 2/16/2013, and while wearing a uniform and after giving her a ride in his police squad. (Vol.II.Conf.App.pp.23,21,32-33,44,Plaintiff's Response to Defendant's Statement/Disputed Facts and Statement/Additional Undisputed Facts-para.13-para.2-Exh.1-Jury Verdict-Exh.2-Tovar Tr.Trans.p.496,ll.1-12.)

Doe v. Forrest found the role, of police officer, requires community members to place confidence and trust in law enforcement officers, as partners in preventing crime, as "officer friendly". Thus, the interaction between Deputy

Forrest, and the Plaintiff in that case, occurred because Forrest was acting as Plaintiff's protector. *Doe v. Forrest*, 176 Vt. 476,493-494,853 A.2d 48,67 (VT.2004). In this case, when Tovar gave Shari Martin a ride home, he was acting similarly. (Vol.II.Conf.App.pp.23,41-42,Plaintiff's Statement/Disputed Material Fact para.9–Exh.2-Tovar Tr.Transcript p.292,ll.24-25,p.293,ll.1-24.)

Doe v. Forrest agreed with the California Appellate Court, in *Mary M. v. City of Los Angeles*, 814 P.2d 1341,1347 (CA.App.1991), when California indicated imposing liability on the City may prevent reoccurrence of tortious conduct by creating an incentive for vigilance for those in the position to prevent it.

Mary M. involved a case of a stop of Mary M., who had been drinking, and a drive to Mary M.'s house, by the officer, who then put his hand over her mouth and raped her. *Mary M. v. City of Los Angeles*, 814 P.2d 1341,1344 (CA.App.1991). As herein, criminal charges were filed against Sergeant Schroyer, in *Mary M.'s* case, and a jury convicted him of rape.

Mary M. v. City of Los Angeles, 814 P.2d 1341,1343 (CA.App.1991).

Vermont, in *Doe v. Forrest*, indicated no incentive to prevent this kind of conduct is created by leaving the victim uncompensated, nor did the Vermont Court think it created adequate incentive by requiring a Plaintiff to provide that the employer inadequately supervised the officer. *Doe v. Forrest*, 176 Vt. 476,493-494,853 A.2d 48,67 (VT.2004). *Doe* indicated:

> "We want the police department to supervise its officers in this domain with especial care, and so we do not impose on the plaintiff the burden of establishing negligent supervision." *Doe v. Forrest*, 176 Vt. 476,493-494,853 A.2d 48,67 (VT.2004).

Mary M. also points out that rationale, for police department liability, very clearly:

> "At the outset, we observed that society has granted police officers extraordinary power and authority over its citizenry. An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. As visible symbols of that power, an officer is given a distinctively marked car, a uniform, a badge, and a gun. As one court commented, 'police officers [exercise] the most awesome and dangerous power that democratic states possess with respect to its residents-the power to use lawful force to arrest and detain them." *Mary M. v. City of Los Angeles*, 814 P.2d

1341,1347 (CA.App.1991) quoting *Policeman's Benev. Association of N.J. v. Washington Tp.,* 850 F. 2d 133, 141 (3rd Circ.1988).

Inherent in this formidable power is the potential for abuse. The cost resulting from misuse of that power should be borne by the community, because of the substantial benefits a community derives from the lawful exercise of police power. *Doe v. Forrest*, 176 Vt.476,494,495 (VT.2004) citing *Mary M. v. City of Los Angeles*, 814 P.2d 1341,1349 (CA.App.1991).

Louisiana has issued numerous decisions on holding city police departments responsible for sexual assault by on-duty officers. In *Applewhite v. City of Baton Rouge*, a woman was plucked off the street by a Baton Rouge police officer and a Louisiana corrections officer. The officer forced her into the K9 unit car, with the two officers, and drove her to an area, near Memorial Stadium, where she was forced to engage in oral copulation with Officer Crowe, and sexual intercourse with both Officer Crowe and the corrections officer. *Applewhite v. City of Baton Rouge*, 380 So.2d 119, 120-121 (LA.App.1979). *Applewhite* gave a similar rationale, to *Mary M.*

v. City of Los Angeles, 814 P.2d 1341,1349-1952 (CA.App.1991):

> "We particularly note that Officer Crowe was on duty in uniform and armed, and was operating a police unit at the time of the incident. He was able to separate the plaintiff from her companions because of the force and authority of the position that he held. He took her into police custody, and then committed sexual abuse upon her in the vehicle provided for his use by the employer. A police officer is a public servant given considerable public trust and authority. Our review of the jurisprudence indicates that, almost uniformly, where excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties. This is unquestionably the case because of the position of such officers in our society." *Applewhite v. City of Baton Rouge*, 381 So.2d 119,121 (LA.App.1979).

In conclusion as to policy, *Doe v. Forest* indicates that the application of *Restatement/Second Agency*, §219(2)(d), to a Sexual Assault, on a citizen, by an on-duty law enforcement officer, is probably the strongest application of the core principles behind §219(2)(d) as explained in *Faragher v. City of Boca Raton*. *Doe v. Forrest*, 176 VT.476,500 (VT 2004) citing *Faragher v. City of Boca Raton*, 524 US 775, 118 S.Ct. 2275 (1998).

Again, *Doe v. Forrest* rightfully held that 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 existence of the employment relationship with the law enforcement agency, vicarious liability will apply. *Doe v. Forrest*, 176 VT.476,500 (VT 2004).

Again, Martin was a passenger in a vehicle operated by David Faust, who was stopped for suspicion of operating while intoxicated. (Vol.I.App.pp.70,76-77,City of Muscatine's Statement/Undisputed Facts-para.3-Exh.A-paras.7-11;Vol.I.App.pp.89-90,City of Muscatine's Answer to Plaintiff's Petition–Exh.B,ll.7-11.) Defendant Tovar was a Muscatine Police Officer who participated in the traffic stop and criminal investigation. (Vol.I.App.pp.70,76-77,89-90,City of Muscatine's Statement/Additional Facts-para.3-Exh.A.-paras.7-11-Exh.B-paras.7-11.) Defendant Tovar transported Plaintiff back to her hotel room, at the Clarion Hotel, in Muscatine, and sexually assaulted her. (Vol.I.App.pp.71,77-78,City of Muscatine's Statement/Undisputed Facts-para.4-Exh.A.-paras.14-25.) It is common practice for officers, at the

Muscatine PD, to give intoxicated persons a ride home. (Vol.II.Conf.App.pp.23,41-42,Plaintiff's Statement/Additional Material Facts-para.9-Exh.2-Tovar Tr.Trans.p.292,ll.24-25,p.293,ll.1-24.) There was no police policy against Officer Tovar entering the hotel room, after giving Shari Martin a ride there. (Vol.II.Conf.App.pp.23,42,Plaintiff's Statement/Additional Material Facts-para.10-Exh.2-Tovar Tr.Trans.p.293,l.24,p.294,ll.1-9.) Officer Tovar was wearing his police uniform, and on duty, when he sexually assaulted Shari Martin. (Vol.II.Conf.App.pp.23,44,Plaintiff's Statement/Additional Material Facts-para.13-Exh.2, Tovar Tr.Trans.p.494,ll.11-12.) Thomas Tovar was convicted of Sexual Abuse 3rd, a ten-year felony, against Shari Martin, in reference to this incident on February 16, 2013. (Vol.I.App.pp.21,32-33,Plaintiff's Response to Defendant's Statement/Undisputed Material Facts-para.2-attached Certified Copy of Jury Verdict-Exh.1 dated June 10, 2016.)

In addition to the above cases, the federal court in New Mexico has employed the agency theory, pursuant to *Restatement Second of Agency* §219(2)(d) (1957), under New

Mexico law, to create liability against a correctional facility contractor, under the theory of vicarious liability, for alleged physical and Sexual Assault by the contractor's employee while the Plaintiff, Pena, was incarcerated. *Pena v. Greffet*, 110 F.Supp.3d 1103 (N.M.2015). The New Mexico Federal Court found the aided-by-agency theory, of vicarious liability, applies to situations where the tortfeasor's relationship, with his employer, gives him "extraordinary power" over his victim. In such a case, the employer creates the opportunity by giving the tortfeasor such power. Liability was imposed, relying on *Restatement Second of Agency* §219(2)(d) citing *Doe v. Forrest*, 176 Vt. 476 (VT.2004). *Pena v. Greffet*, 110 F.Supp.3d 1103, 1134-1136 (N.M.2015). *Pena v. Greffet* quoted *Doe v. Forrest* in indicating: "What makes the circumstances of this case virtually unique from a policy perspective is the extraordinary power that law enforcement officer has over a citizen." *Pena v. Greffet*, 110 F.Supp.3d 1103, 1134-1135 (N.M.2015).

In a Louisiana case that is very factually similar to the Martin/Tovar rape, an intoxicated Nicholls State University student, in Thibodaux, requested that the police officer,

Morris, who was a patrolman for the Thibodaux Police Department, drive her to her nearby on-campus apartment. Morris was in full uniform and driving a marked police squad. As herein with Tovar, the department had a custom and policy that its on-duty patrolmen would honor requests to drive intoxicated people home.

When Officer Morris arrived at the apartment complex, with Doe, he entered the apartment. Before leaving her apartment, Morris had oral and vaginal sex with Doe. Doe testified that after she was in the second-floor apartment, she had trouble getting her key in the door lock. She said she heard and felt things, but was too intoxicated to move her body. *Doe v. Morris*, 2013 WL 3933928 (Fed.Supp.ED.LA.2013). Doe said she felt someone flip her over on her back and put his penis in her mouth. She testified she did not recall vaginal intercourse, but when she woke, she knew she had had vaginal intercourse. *Doe v. Morris*, 2013 WL 3933928 (Fed.Supp.ED.LA.2013).

The Federal Court, in Louisiana, determined that summary judgment was not warranted in *Doe v. Morris*. *Doe v.*

Morris, 2013 WL 3933928 (Fed.Supp.ED.LA.2013). The court found relevant facts were undisputed, which are very similar to the facts in the Shari Martin/Tovar case.

In summary, *Doe v. Morris* concluded, like the other Louisiana cases involving sexual assaults by police officers (or correctional officers), in the service of their duties, the officers were in a position to commit the sexual act only because of the authority of their position, and the policies of the police department. *Doe v. Morris*, 2013 WL 3933928 (Fed.Supp.ED.LA.2013) citing *Applewhite v. City of Baton Rouge*, 280 So.2d 119, 121-122 (LA.App.1979); *Latullas v. State*, 658 So.2d 800, 805 (LA 1995); *Turner v. State*, 494 So.2d 1292, 1296 (LA.App.2nd Cir. 1986).

A recent case in Indiana Supreme Court case clearly articulates the reasoning behind holding special application of *respondeat superior* to police officers who commit sexual assaults on duty. In *Cox v. Evansville Police Department*, 107 N.E.3d 453,457 (IN.2018), Officer Montgomery took *Cox* home after a domestic abuse call and forced her to have oral, anal, and vaginal sex with him. For these acts, he was convicted of

two (2) counts of felony criminal deviate conduct. *Cox v. Evansville Police Department*, 107 N.E.3d 453,457 (IN.2018). Another companion case within the same decision involved Officer Rogers, who drove an intoxicated woman to the hospital where she showed high alcohol level of .255. She was discharged to be taken to lock up, but Officer Rogers drove her to an uninhabited area where he raped her, then drove her home. Officer Rogers pleaded guilty to three (3) felonies: official misconduct, sexual misconduct and rape. *Cox v. Evansville Police Department*, 107 N.E.3d 457,458 (IN.2018)

In the *Cox* case, the Court found that when a police officer misuses employer confirmed power and authority to commit sexual assault, the city is liable for the assault, if it naturally or predictably arose from the officer's employment activities. *Cox v. Evansville Police Department*, 107 N.E.3d 453, 462 (Indiana 2018). *Cox* found cities outfit their officers with visible signs of their employee conferred authority, a marked car, uniform, badge and weapons, which officers use to carry out their employment duties. These duties frequently authorize and involve entering homes and detaining criminal

suspects at gun point. *Cox v. Evansville Police Department*, 107 N.E.3d 453, 462-463 (Indiana 2018). Investing officers with these considerable and intimidating powers comes with an inherent risk of abuse. *Cox v. Evansville Police Department*, 107 N.E.3d 453, 463 (Indiana 2018).

The Indiana Court then simply found that when abuse is a tortious act arising naturally or predictably from the police officer's employment activities, it falls within the scope of employment for which the city is liable. *Cox v. Evansville Police Department*, 107 N.E.3d 453,463 (IN. 2018). The Indiana Court then gave the policy underlying the scope of employment liability:

1) The city benefits from the lawful exercise of police power, so when the tortious abuse of that power naturally or predictably flows from employment activities, the city equitably bears the cost of the victim's loss. *Cox v. Evansville Police Department*, 107 N.E.3d 453,463 (IN.2018).

2) Holding the city liable encourages it to guard against recurrent assaults, particularly because cities vest considerable power and authority in police officers. The *Cox*

Court indicated it wanted cities to exercise vigilance in hiring and supervising officers. *Cox v. Evansville Police Department*, 107 N.E.3d 453,463 (IN.2018). Therefore, Indiana concluded the scope of employment rule shaped by the underlying policies allowed employer liability for an officer's sexual assault. *Cox v. Evansville Police Department*, 107 N.E.3d 453,463 (IN.2018).

Indiana affirmed the denial of summary judgment on the *respondeat superior* issue stating that its decision came from the maxim that "With great power comes great responsibility." Franklin D. Roosevelt's text of final FDR speech released, "*The Daily Illini",* April 14, 1945 (3) cited by *Cox v. Evansville Police Department*, 107 N.E.3d 453,456 (IN.2018).

One wonders if this had been the law of Iowa, early in Tovar's employment, if Muscatine would have terminated his employment early in his career, thus avoiding considerable public "bad will" toward the police. Its risk of liability would have likely encouraged termination of an obvious bad officer, sooner, rather than after much community "bad will" and danger to the public.

Liability under *Restatement Second of Agency* §219(2)(d) (1957) certainly encourages a police department to remove officers from service who likely violate police policy, including committing crimes. Based on Tovar's record, the Muscatine PD may claim it didn't know he was going to rape anyone, but they clearly knew that he skirted dangerously close to violating the law, did not implement good police procedure, and violated police policy over and over, often and consistently throughout his entire service. (See the Statement/Facts, which detail all the problems the department had with Tovar from service start to finish.)

5. Summary – Issue I

The Summary Judgment should be reversed, because a jury could find Muscatine vicariously liable under §219(2)(d) of *Restatement Second of Agency* – in that Tovar was aided in accomplishing the tort by the existence of the agency relationship. *Doe v. Forrest*, 176 VT.476,500, 503 (VT.2004); *Sherman v. State of Delaware Department of Public Safety*, 190 A.3d 148,180, 183, 188-189 (Del.2018); *Pena v. Greffet*, 110 F.Supp.3d 1103, 1134, 1136 (Fed.Supp.N.M.2015).

II. A FACT QUESTION EXISTED AS TO WHETHER TOVAR'S CONDUCT WAS WITHIN THE SCOPE OF HIS EMPLOYMENT BECAUSE HIS CONDUCT WAS FORESEEABLE BY MUSCATINE.

A. Preservation of Error

This issue was preserved for appellate review because it was ruled upon, by the Court in its Summary Judgment Ruling filed 1/14/2018. It was addressed in Plaintiff's Memorandum of Authorities in Support of Resistance to Muscatine's Motion for Summary Judgment. (Vol.I.App.pp.130-143,Memorandum of Authorities filed 8/18/2017; Vol.I.App.pp.318-322,Ruling/Summary Judgment,pp.4-8.)

B. Scope and Standard of Review

This appeal is directed to the Summary Judgment granted Muscatine. The standard of review for district court rulings, on summary judgment, is for corrections of law. *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 807 (Iowa 2018); see also *Mason v. Vision Iowa Board*, 700 N.W.2d 349, 535 (IA.2005). Evidence is viewed in the light most favorable to the

party opposing summary judgment. *Murtha v. Cahalan,* 745 N.W.2d 711, 713-14 (IA.2008).

C. Argument

1. Standard for Summary Judgment

The standard for summary judgment is previously addressed and briefed, under Issue I, which is incorporated into Issue II by reference to Issue I.

2. A jury question existed as to whether Tovar's conduct was within the scope of his employment, because his conduct was foreseeable by Muscatine.

Normally, the question of whether conduct was in the scope of employment, is a fact question for a jury. *Godar v. Edwards*, 588 N.W.2d 701, 706 (IA.1999). Among the factors used to determine whether a Defendant acts within the scope is: 1) Whether or not the master has reason to expect such an act will be done; and 2) Whether or not the instrumentality, by which harm is done, has been furnished by the master to the servant. *Godar v. Edwards*, 588 N.W.2d 701, 706 (IA.1999) quoting *Restatement Second of Agency* §229(2)(f) and (h).

In this case, the Plaintiff sued Muscatine, pursuant to the doctrine of *respondeat superior* and all agency principles employed in reference thereto, including those set forth in *Restatement Second of Agency* §229(2)(f) and (h) (1957).

In *Godar*, the Court found the duty of the school district, concerning supervision and safety of students, is not unlimited, rather the scope of the school's duty is limited by what risks are reasonably foreseeable. *Godar v. Edwards*, 588 N.W.2d 701, 708 (IA.1999) citing *Marquay v. Eno*, 662 A.2d 272, 279 (NH 1995). Harmful activities will be foreseeable if the district knew, or in the exercise of reasonable care, should have known of the risks. *Godar v. Edwards*, 588 N.W.2d 701, 708 (IA.1999) citing *Peck v. Siau*, 827 P.2d 1108, 1112 (WA 1992).

Applying this "foreseeability and instrumentality" test to the rape of Shari Martin, while Tovar was on duty, and charged with her protection as a member of the public, Plaintiff asserts that Lieutenant Tovar's sexual assault, of Martin, was foreseeable by the City, and the instrumentality by which the harm was done was furnished by Muscatine to

Tovar. *Godar v. Edwards,* 588 N.W.2d 701,706 (IA.1999).

A. Instrumentality.

Clearly, Tovar used his badge and police uniform, strapped on police gun, squad car, and the opportunity to take Shari Martin back to her room at the Clarion hotel, after the arrest of David Faust (in which he participated), as instrumentalities to commit the sexual assault on Shari Martin.

Thomas Tovar employed the authority and the significant power of the State to commit the sexual assault on Shari Martin. (Vol.II.Conf.App.pp.21,32-33,Plaintiff's Statement/Additional Material Facts-para.2-certified copy of jury verdict convicting Tovar of Sexual Assault "3rd Degree", a 10 year felony-Exh.1.) It is common practice for officers of the Muscatine PD to give intoxicated persons a ride home. (Vol.II.Conf.App.pp.23,41-42,Plaintiff's Statement/Additional Material Facts-para.9-Exh.2-Tovar Tr.Trans.p.292,ll.24-25,p.293,ll.1-24.) Tovar was armed, wearing his police uniform and on duty when he sexually assaulted Martin on approximately 2/16/2013.

(Vol.II.Conf.App.pp.23,44,Plaintiff's Statement/Additional Material Facts-para.13-Exh.2-Tovar Tr.Trans.p.496,ll.11-12.)

Tovar was even equipped with his radio when he assaulted Shari Martin at the Clarion Hotel. (Vol.II.Conf.App.pp.23,44,Plaintiff's Response/Defendant's Statement/Undisputed Material Facts/Plaintiff's Statement/Additional Material Facts-para.14-Exh.2 Tovar Tr.Trans.p.496,ll.1-7;Vol.I.App.pp.70,76-77,89-90,City of Muscatine's Statement/Undisputed Facts-para 3-Exh.A-paras.7-11-Exh.B-paras.7-11.)

Therefore, the instrumentality was provided by the Muscatine PD in this case, pursuant to *Restatement Second of Agency* §229(2)(h) (1957); *Godar v. Edwards*, 588 N.W.2d 701,706 (IA.1999).

B. Foreseeability.

"Foreseeability", is the fighting issue on this theory of liability. *Godar v. Edwards,* 588 N.W.2d 701, 708 (IA.1999) citing *Restatement Second of Agency* §299(2)(f) (1957).

The District Court correctly finds that the Plaintiff asserted, and the record supported, that the City of Muscatine

had numerous significant problems with Tovar throughout his twenty year history, prior to his sexual assault of Martin. At best, he was a seriously substandard officer, from the very start of his employment, with an extreme history of poor performance reviews, insubordination, interference with investigations, disciplinary actions, and suspensions. (Vol.I.App.pp.321-322,Ruling on Defendant's City of Muscatine's Motion for Summary Judgment,pp.7-8; Vol.II.Conf.App.pp.24-30,Plaintiff's Statement/Undisputed Additional Material Facts-paras.21-50,53,54,55.) The Court is correct, as indicated in the Statement/Facts, the Summary Judgment record is replete with examples of Tovar failing to meet expectations and follow department procedures. (Vol.I.App.p.322,Ruling on Summary Judgment,p.8.) The Court correctly finds there are numerous instances of Tovar having issues in romantic relationships, including with a county attorney, and a chiropractor who he arrested, and an incident of domestic abuse with a girlfriend early in his employment. Vol.I.App.p.322,Ruling on Summary Judgment,p.8.)

The Court is correct that there is no previous finding, in all of Tovar's disciplinary actions, investigations, suspensions, employee assistant program involvement, indicating that he had been involved in sexual misconduct, except what the Court discussed below, which is an assault, at the police station, in the detective interview room, of B.W. (Vol.I.App.pp.322-323,Ruling on Defendant's City of Muscatine's Motion for Summary Judgment-pp.8-9.)

B.W., who claimed to be assaulted by Tovar, alleged that the incident happened in the police department in September, 2010, long before the rape of Martin on 2/16/2013. (Vol.I.App.pp.322-323,Ruling/Summary Judgment-pp.8-9.) B.W. claimed another detective, Detective DeVrieze, was present in the interview room when B.W. arrived, and left shortly thereafter. (Vol.I.App.pp.322,Ruling/Summary Judgment,p.8.) Tovar handcuffed B.W. to the desk, forced his fingers under her clothing and into her vagina, as found by the Court. (Vol.I.App.pp.322,Ruling/Summary Judgment,p.8.) B.W. screamed, and Tovar put his hand over her mouth and threatened to harm her and her family if she told anyone what

happened. (Vol.I.App.p.322,Ruling on Defendant's City of Muscatine's Motion for Summary Judgment,p.8.)

B.W. testified after the assault, she quickly left the detective room, and saw DeVrieze on the stairs about 9 or 10 feet from the room. (Vol.I.App.p.322,Ruling/Summary Judgment,p.8.) B.W., as the Court found, believed that DeVrieze left the detective room because he knew what was going to happen to her. (Vol.I.App.pp.322-323,Ruling/Summary Judgment,pp.8-9.) B.W. also believed that DeVrieze could hear her screaming during the assault, and DeVrieze potentially watched the assault through one-way glass mirror windows in the detective room. (Vol.I.App.pp.322-323,Ruling/Summary Judgment-pp.8-9.)

The Court then found that there was no indication that Tovar's actions, in assaulting Martin, were foreseeable, or otherwise stated, that the City knew, or should have known that Tovar would commit the Sexual Assault, based on his history. (Vol.I.App.pp.315-328,Ruling/Summary Judgment.)

The Court did not cite that in Plaintiff's Exh.21, Randy Hildebrant indicated that he had overheard Lieutenant Kies,

on August 9, 2017, indicate that it was not Tovar's first rodeo, when he was present, at Tovar's criminal trial. Randy Hildebrant, a member of the community, signed a sworn Affidavit that Officer Kies inferred the Muscatine PD knew, prior to Martin's rape, that Tovar had engaged in inappropriate sexual conduct, with females, prior to Shari Martin's assault, on 2/16/2013. (Vol.II.Conf.App.pp.29,141-142,Plaintiff's Statement/Additional Undisputed Material Facts-para.46-Exh.21.)

Other evidence, that the Court did not cite in its opinion, is that a vice president of a bank, M.K., witnessed an incident with Tovar and B.W., on September 21, 2010, wherein B.W. called Officer Tovar, and he picked her up at a landscaping company, owned by M.K., after she had an accident while intoxicated. (Vol.I.App.pp.231,264,Plaintiff's Supplemental Statement/Undisputed Facts-para.78-Exh.35-M.K.Dep.Tr.p.7,ll.3-15.) M.K. found Tovar's behaviors as very inappropriate for a police officer. Because M.K. was concerned about Tovar's behaviors, he tried, unsuccessfully, to follow Tovar. (Vol.I.App.pp.232,265-266,Plaintiff's Supplemental

Statement/Undisputed Facts-paras.82,83,86-Exh.35-Dep.Tr.M.K.,p.9,ll.13,p.10,l.8,p.11, ll.21-25,p.12,ll.16-24,p.13,ll.2-20.)

M.K. was concerned enough, about Tovar's actions relative to the incident, that M.K. called the Muscatine PD. (Vol.I.App.pp.233,266,Plaintiff's Supplemental Statement/Undisputed Facts-paras.91,92-Exh.35-Dep.Tr.M.K.p.15,ll.17-22,p.16,ll.1-10.) Lieutenant Snider (now Captain) responded. M.K. indicated that Snider did not take the complaint about Tovar's inappropriate police behavior, seriously. (Vol.I.App.pp.233-234,267-269,Plaintiff's Supplemental Statement/Undisputed Facts-paras.92,93-Exh.35-Dep.Tr.M.K.,p.17,ll.12-24,p.18,ll.4-20,p.22,ll.9,p.23,ll.1-5,p.26,ll.4-13-Exh.9-Dep.Tr.Snider,p.4,ll.15-16.) M.K. felt he was being interrogated for reporting the incident, and that Snider, now Captain Snider, was offended M.K. called. (Vol.I.App.pp.233-234,268-269,Plaintiff's Supplemental Statement/Undisputed Facts-para.93-Exh.35-Dep.Tr.M.K.,p.22,ll.1-9,p.23,ll.1-5,p.26,ll.4-13.) M.K. believed Tovar's actions were a serious

issue. (Vol.I.App.pp.234,269,Plaintiff's Supplemental Statement/Undisputed Facts-para.94-Exh.35-Dep.Tr.p.25,ll.22-25,p.26,ll.1-3.)

When B.W. claimed she was sexually assaulted in the basement of the police department, by Tovar, it was the next day, after the incident with Tovar that M.K. witnessed: 9/22/2010. (Vol.I.App.pp.234,246-247,Plaintiff's Supplemental Statement/Undisputed Facts-para.98-Exh.34-Dep.Tr.B.W.,p.20,ll.18-23,p.21,ll.1-5.)

Further, troubling in this case is that Muscatine never provided Tovar's 2011/2012 Service Ratings Forms, in spite of being ordered to do so on a Motion to Compel. (Vol.II.Conf.App.p.30,Plaintiff's Statement/Additional Undisputed Material Facts-para.55.)

However, the Court addresses the failure to provide this 2011/2012 Service Rating Form, by indicating there is no evidence that such form ever existed, and Martin could not show the City intentionally destroyed the form. (Vol.I.App.p.327,Ruling on Defendant's City of Muscatine's Motion for Summary Judgment,p.13.) However, the

Defendant, City of Muscatine, had Tovar's other Service Ratings Forms for almost every other year. (Vol.II.Conf.App.pp.30,68-71,128-131,168-173,143,Plaintiff's Response to Defendant's Statement/Undisputed Material Facts and Plaintiff's Statement/Additional Undisputed Material Facts-para.55-Exh.8-Exh.16-Exh.26-Exh.27-Exh.22-letter to Martha Shaff.) These ratings forms established Tovar's horrific police behavior.

The City had no explanation as to why it did not have the 2011/2012 Service Rating Form. (Vol.II.Conf.App.pp. 30,143,Plaintiff's Statement/Additional Undisputed Material Facts-para.55-letter of Martha Shaff Exh.22-Exh.5-Dep.Tr.Talkington,p.6,ll.9-12,p.7,ll.13-22,p.8,ll.1-9,p.64,ll.10-13.)

Shari Martin asserts that it was "foreseeable", given Tovar's terrible track record, for twenty years, that Tovar would eventually commit a crime while on duty. Tovar was employed by the City of Muscatine for more than twenty years at the time of his sexual assault of Martin.

(Vol.II.Conf.App.pp.42,135,Exh.2-Tovar Tr.Trans.p.294,ll.4-5-Exh.20,Stamped 0193.)

This explains why Lt. Kies turned off his body microphone, so his conversation with Tovar would not be recorded at the scene of the rape. (Vol.II.Conf.App.pp.24,39-40,Plaintiff's Supplemental Statement/Undisputed Facts-para.19-Exh.2-Tovar Tr.Trans.p.275,l.25,p.276,ll.1-25,p.277,ll.1-2.) It also explains why Lt. Kies put the rape report call on speaker, in front of Tovar, allowing him to hear the accusations against him. (Vol.II.Conf.App.pp.24,37-Plaintiff's Supplemental Statement/Undisputed Facts-para.17-Exh.2-Tovar Tr.Trans.p.242,ll.4-25,p.243,ll.1-2.)

It is unreasonable for Martin to have to prove that it had to have been foreseeable that Tovar would commit the **exact crime** [emphasis added] of Sexual Assault in order to bring the City of Muscatine into the dictates of *Godar v. Edwards*, 588 N.W.2d 701, 706 (IA.1999); *Restatement Second of Agency* §229(2)(f) (1957) as to whether or not the master had reason to expect the act will be done. *Godar v. Edwards*, 588 N.W.2d 701, 706 (IA.1999).

This record is full of Tovar's despicable police behavior, of which Muscatine was aware, over his 20-year tenure. Tovar's conduct reminds one of the frightening movie *Training Day*, wherein an experienced officer commits crimes and unconscionable, evil behavior in front of a rookie officer.

Muscatine knew that Tovar was likely to, and was, regularly committing crimes while on duty. It seems an impossible burden to put on Martin to provide that the City knew Tovar would exactly commit the crime that he did against Shari Martin: Sex Abuse in the 3rd Degree, a 10-year felony. (Vol.II.Conf.App.pp.21,32-33,Plaintiff's Supplemental Statement/Undisputed Facts-para.2-Exh.1-Jury Verdict.)

The evidence provided by B.W. and M.K., all occurring in September, 2010, further bolsters the argument that Tovar's tortious conduct was foreseeable by Muscatine; indeed, it was aware of Tovar's proclivity to have inappropriate contact with women. The testimony of these witnesses generates a genuine issue of material fact about whether or not Tovar's actions were foreseeable. (Vol.II.Conf.App.pp.234-236,Plaintiff's Supplemental Statement/Undisputed Material Facts paras.98,

105-112.) The September, 2010, behavior, with B.W., was more than two years before Tovar assaulted the Plaintiff on 2/16/2013. (Vol.II.Conf.App.pp.21,32-33,Plaintiff's Response to Defendant's Statement/Undisputed Material Facts-para.2-Exh.1-Jury Verdict.)

M.K., is an upstanding citizen in Muscatine-a bank vice president and an owner of a small business. (Supp.Statement 78.) He was bothered enough by Tovar's unorthodox removal of an intoxicated female from a crime scene, that he undertook his own investigation of the matter and even tried to follow Tovar's pickup truck. (Supp.Statement-paras.84-91.) Of note, M.K., who had no interest in Tovar other than his sense of civic duty, immediately sensed that Tovar was corrupt and engaged in inappropriate police conduct. M.K**.** was so incensed that he reported it to the Muscatine PD. However, Lieutenant Snider (now Captain Snider) brushed off the report. (App.p.233-234,267-269,Plaintiff's Supplemental Statement/Material Facts-paras.92-94-Exh.35-Dep.Tr.M.K.,p.17,ll.12-24,p.18,ll.4-20,p.22,ll.1-9,p.23,ll.1-5,p.25,ll.1-22,p.26,ll.1-23.)

If an unbiased citizen was able to ascertain, within a few minutes of contact, that Tovar was a "dirty cop", why then did it take the City of Muscatine twenty years, and the rape of Shari Martin, to determine this? Tovar's record is replete with reprimands, suspensions, interventions. (See Statement of Facts.) With this record, the City of Muscatine PD clearly foresaw that Tovar would commit a criminal act on duty, and should have terminated him years before. Therefore, his rape of Shari Martin was foreseeable, and they should be held liable under the doctrine of *respondeat superior. Restatement Second of Agency* §229(2)(f) and (h) (1957); *Godar v. Edwards*, 588 N.W.2d 701,708 (IA.1999).

CONCLUSION

The Court should reverse the ruling on Summary Judgment, and allow this case to proceed to jury trial, against Muscatine, for damages, based on the Judgment obtained against Thomas Tovar, herein, under Counts I and II, and the City's responsibility therefore under the doctrine of *respondeat superior* both on the (Issue I) *Restatement Second of Agency* §219(2)(d) (1957), aided-by-agency theory, and (Issue II)

Restatement Second of Agency §229(2)(f) and (h) (1957) (foreseeability and instrumentality theory).

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Shari Martin, requests the Court to grant oral argument on all issues submitted in this matter.

Respectfully submitted,
Shari Martin, Plaintiff-Appellant

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing Appellant's Brief was $0.00.

/s/ M. Leanne Tyler
M. Leanne Tyler

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