No. APL-2018-00162

To be argued by:
Patrick A. Woods
15 minutes requested

State of New York
Court of Appeals

JOSE RIVERA,

Claimant-Appellant,

v.

STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR THE STATE OF NEW YORK

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Court of Claims Claim No. 120113
Fourth Department Nos. CA 17-01986; CA 17-01987

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PRELIMINARY STATEMENT

In January 2010, an on-duty corrections officer, Michael Wehby, gratuitously inflicted a brutal beating on claimant José Rivera, who was a state prison inmate at the time. There was no justification at all for the use of force. The officer was criminally prosecuted for assaulting Rivera, and he ultimately pleaded guilty to official misconduct.

Represented by counsel, Rivera brought this claim in the Court of Claims, seeking to hold the State vicariously liable for the assault. The Court of Claims (Hard, J.) granted summary judgment to the State dismissing the claim because Wehby acted outside the scope of his employment when he assaulted Rivera without provocation or justification. The Appellate Division, Fourth Department unanimously affirmed for the reasons stated by the Court of Claims. The Appellate Division also affirmed, under CPLR 5501(a)(1), a prior nonfinal order in which the Court of Claims granted the State permission to amend its answer to include an affirmative defense on the scope-of-employment issue. This Court has granted Rivera permission to appeal.

This Court should affirm. First, summary judgment dismissing the claim was properly granted. Rivera's own version of the events

demonstrates that the officer's unprovoked attack was such a substantial departure from his official duties as to fall outside the scope of his employment as a matter of law. That is, the officer committed the brutal assault without any basis for using force at all and without serving any legitimate work-related objective. Although Rivera now attempts to premise the State's liability on the actions of two other officers who were present during the attack but did not stop it, this contention is unpreserved. And, in any case, Rivera's own testimony indicated that neither of those officers caused his injuries.

Second, the courts below did not abuse their discretion as a matter of law when they permitted the State to amend its answer to add the scope-of-employment defense. Rivera failed to establish that the amendment would cause him substantial prejudice within the meaning of CPLR 3205. In any event, it is a jurisdictional requirement under the Court of Claims Act that the officer act within the scope of employment and the scope-of-employment defense simply negates that requirement. As such, it is a challenge to the Court of Claims' jurisdiction that can be raised at any time. Consequently, the Appellate Division's order should be affirmed.

QUESTIONS PRESENTED

1. Was the State properly granted summary judgment on the ground that corrections officer Wehby acted outside the scope of his employment when he beat inmate Rivera without provocation or justification?

2. Has Rivera failed to show that the courts below abused their discretion as a matter of law when they permitted the State to amend its answer to assert the defense that Wehby acted outside the scope of his employment?

STATEMENT OF THE CASE

The following facts are either undisputed or taken from Rivera's affidavit, Rivera's bill of particulars, or Rivera's testimony provided at the criminal trial of former corrections officer Wehby.

A. Officer Wehby Unjustifiably Attacks Rivera

At the time of the events in question, claimant José Rivera was an inmate in the custody of the New York State Department of Corrections and Community Supervision (DOCCS) housed at Mid-State Correctional Facility in Oneida County. On the morning of January 15, 2010, Rivera

was on line to enter the mess hall for breakfast, wearing a protective helmet for a preexisting seizure disorder. Officer Wehby taunted Rivera about the protective helmet and Rivera asked him to stop, fearing other inmates would join in the taunting. (A75-76; A249; A290-91.) When Rivera proceeded to the serving line, Wehby called him over to the mess hall's door. (A75; A292.)

When Rivera arrived at the door, Wehby grabbed Rivera by the front of his coat, then dragged him into the entrance hall, saying "You piece of shit." (A76; A293-94.) Wehby then struck Rivera in the head repeatedly, causing him to fall to his knees, and then battered him to the floor. (A76; A294-95.) Two other officers—Sergeant Latour and Officer Femia—were present during parts of the assault and Latour cuffed Rivera. (A296-299.) Wehby stomped, kicked, and punched the prone Rivera, screaming "Die motherfucker" in his face. (A76; A295-96.)

Wehby then dragged Rivera back to his knees and ripped off the protective helmet. (A70; A292-293.) Wehby recommenced punching Rivera in the head, sending him back to the floor, where he kicked Rivera in the head approximately 30 times and struck Rivera repeatedly in the

head with his radio. (A294-95; A298.) The blows were so forceful that the batteries came out of the radio. (A300-301.)

Throughout all of this, Rivera did not struggle or resist. (A295.) Though Latour and Femia were present and assisted in cuffing Rivera, Rivera later testified that whatever force those officers exerted was not the source of any of his injuries. (A302-303.) A fourth officer who witnessed the attack saw Wehby strike Rivera while he was held down, but did not see either of the other officers strike Rivera. (A100.)[1]

An investigation by the DOCCS Inspector General corroborated Rivera's account. (A96-102.) The report found that Wehby had assaulted Rivera, that Latour failed to supervise Wehby, and that Wehby, Latour, and Femia had all lied when reporting the incident and during a related disciplinary proceeding against Rivera. (A102.) DOCCS sought to fire all three officers for their conduct. (A105-110.)

Wehby was also indicted by an Oneida County grand jury on one count of assault in the second degree, one count of attempted assault in

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[1] The Inspector General's Investigative Report (A96-102) and the Notices of Discipline against Wehby, Femia, and Latour (A103-110) have been filed in this Court under seal.

the second degree, and one count of assault in the third degree. (A315.) Rivera testified at Wehby's criminal trial that Wehby was the sole cause of his injuries. (*See* A287-304.) Specifically, Rivera testified as follows:

> Q: So it was Corrections Officer Wehby that inflicted whatever injury you had, according to your testimony?
>
> A: Yeah.
>
> Q. Not Femia?
>
> A. Not Femia.
>
> Q. Not Latour?
>
> A. Latour, only thing I can say about Latour, he should have stopped it. That's it. He had the power to stop it. He should have stopped it. (A302-303.)

and

> Q. Did any of the officers put you in a headlock?
>
> A. No.
>
> Q. Did anyone kick you besides Wehby?
>
> A. No. (A304.)

The jury, however, deadlocked. (A319.) Wehby eventually pleaded guilty to official misconduct. (A319-324, 328-332.) During the plea allocution, Wehby acknowledged that he committed an act related to his

employment that he understood to be unauthorized. (A323.) As a condition of Wehby's plea bargain, he retired and paid a fine. (A328; 330.)

B. Rivera Brings This Claim, the State's Answer is Amended, and The Parties Cross-Move for Summary Judgment

In July 2011, having obtained permission to file a late claim, Rivera filed this action (Claim No. 120113), alleging one count of assault and battery based on the attack. (A34-35; 219-20.) The State answered, denying liability but setting forth no affirmative defenses. (A37-38.) Although nothing stopped him from doing so, Rivera did not separately sue officers Wehby, Femia, or Latour in Supreme Court or federal court before the statutes of limitations on any individual claims expired in January 2013. (*See* Rivera Br. 5.)[2]

Represented by prior counsel, Rivera commenced a second action in the Court of Claims (Claim No. 120949), asserting causes of action for failure to provide adequate protection, gross negligence, excessive force, failure to properly train and supervise, assault and battery, and

[2] Rivera did not obtain his current counsel until just after the statutes of limitation had run. (*See* Rivera Br. at 5.)

intentional infliction of emotional distress. (A121-136; 247-262; 264.) That action, however, was subsequently discontinued with prejudice by so-ordered stipulation of the parties (A266-67), leaving the first claim as the sole remaining claim.

In June 2015, the State moved for leave to amend its answer to assert three new affirmative defenses. (A333-43.) Among other things, the State sought to plead that Rivera's injuries were "caused by the superseding intervention of persons . . . acting outside the scope of their official duties or employment." (A327.) Rivera opposed the motion, arguing that the defense lacked merit and that allowing the amendment would prejudice him because he had not filed suit against Wehby individually and the statute of limitations to do so had run. (A338-41.) Rivera did not identify any additional discovery that he would have pursued but for the State's delay in seeking to amend its answer, or any other form of prejudice he would suffer from the amendment.

While the motion to amend was pending, in August 2015 Rivera sought additional discovery related to the attack (A144-152) and later that month filed a note of issue and certificate of readiness for trial (R142-

43). The certificate of readiness represented that all discovery proceedings known to be necessary were complete. (A143.)

By order dated February 19, 2016, the Court of Claims granted the State leave to amend its answer. (A11-16.) As relevant here, the Court held that the scope-of-employment defense had sufficient merit and, further, that Rivera suffered no prejudice from the amendment, because he "failed to show that he has been hindered in the preparation of his case or prevented from taking some measure in support of his position." (A15.) By the same order, the Court of Claims resolved certain discovery disputes, by granting subpoenas to the District Attorney's Office that prosecuted Wehby and requiring production of the Inspector General's report for in camera review. (A17-19.)

In July 2017, Rivera moved for summary judgment on liability. In support, Rivera submitted, among other things, an affidavit in which he described the assault without mentioning Officer Femia and without attributing any of his injuries to Sergeant Latour. (A74, 75-77.) Rivera's motion, however, was incorrectly predicated on the second verified claim (Claim No. 120949), which had been dismissed by stipulation and which had alleged causes of action in addition to the single assault cause of

action raised in this case. (A121-134.) In support of his motion, Rivera asserted that no issues of fact remained with respect to the State's affirmative defense of scope of employment. (A91-92.) Rivera did not argue that any additional discovery was still outstanding or necessary on any issue.

The State cross-moved for summary judgment. (A210.) The State argued that Rivera's own proof showed that Officer Wehby was solely responsible for the assault (A201) and that Wehby's outrageous and unjustifiable conduct was beyond the scope of his employment as a matter of law (A201-210). The State also opposed Rivera's motion on technical grounds: it was incorrectly predicated on the second, dismissed claim (Claim No. 120949) and must be denied for failing to attach the correct pleading to his motion papers. (A197-99.) Rivera filed no response to the cross-motion.

C. Summary Judgment is Granted to the State, and the Fourth Department Affirms

The Court of Claims denied Rivera's motion because he had moved based on the dismissed claim and had attached the incorrect pleading to

his motion. (A26.)[3] The court then granted summary judgment to the State, holding that although there was no dispute that "Wehby committed an assault on claimant" (A29), the State was not liable on the theory of *respondeat superior* (A31-32). Based on the undisputed evidence, the court concluded that Wehby's attack "fell far afield from actions within the scope of his employment" because the attack was entirely unprovoked and not performed as part of some appropriate duty such as "quelling a dispute . . . or transporting inmates within the correctional facility." (A31.) The Court of Claims also observed in a footnote that Rivera could have pursued claims against Wehby or others in Supreme Court or federal court, but had failed to so. (A32 n.6.)

Rivera appealed from both the final judgment dismissing the claim and the prior non-final order permitting the State to amend its answer. In two separate orders, the Fourth Department unanimously dismissed the appeal from the non-final order because it was brought up for review by the appeal from the final judgment (A5), and unanimously affirmed

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[3] That branch of the Court of Claims' decision is not at issue in this appeal.

the judgment for the "reasons stated in the decision at the Court of Claims" (A6). This Court then granted Rivera leave to appeal. (A3.)

ARGUMENT

POINT I

THE STATE WAS PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING RIVERA'S ASSAULT CLAIM

A. Wehby Acted Outside the Scope of His Employment as a Corrections Officer When He Assaulted Rivera Without Justification or Provocation

As the Appellate Division and the Court of Claims correctly found, the State was entitled to summary judgment dismissing Rivera's claim for damages suffered at the hands of former corrections officer Wehby. Accepting Rivera's version of the events for purposes of summary judgment, Wehby's unprovoked attack on Rivera fell far outside the scope of the duties of a corrections officer, served no legitimate goal of his employer, and was not a natural incident of a corrections officer's duties.

"As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underling acts were within the scope of the employment." *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116, 119 (1996). The rationale underlying vicarious liability is

that "the losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are most fairly allocated to the employer as a required cost of doing business." *Id.* (citations and internal quotation marks omitted). Thus, an "employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment." *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933 (1999). The *respondeat superior* doctrine applies with equal force in Court of Claims damages actions against the State based on the tortious acts of its employees. *See Lundberg v. State*, 25 N.Y.2d 467, 470-71 (1969). As further discussed below, state officers or employees must be acting "as such officers or employees" for the Court of Claims to have jurisdiction over tort claims based on their conduct. Court of Claims Act § 9(2).

Although the issue of whether conduct is within the scope of employment is typically a question of fact for trial, summary judgment on this issue is nevertheless appropriate when, as here, the material facts are not in dispute. *See, e.g., Joseph v. City of Buffalo*, 83 N.Y.2d 141, 146 (1994) (city was properly granted summary judgment on the issue of its

vicarious liability for the acts of an off-duty police officer); *Maloney v. Rodriguez*, 156 A.D.3d 1404, 1405 (4th Dep't 2017) (same). In this case, the Appellate Division and the Court of Claims assumed the truth of Rivera's version of the brutal assault inflicted by Wehby, making summary disposition of the scope-of-employment issue appropriate.

Whether an employee's conduct was within the scope of his employment turns on whether the act complained of was done "while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions." *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979) (internal quotations omitted); *see Matter of Sagal-Cotler v. Bd. of Educ. of the City School Dist. of the City of N.Y.*, 20 N.Y.3d 671, 675 (2013). The relevant factors include "the connection between the time, place and occasion for the act; the history of the relationship between the employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated." *Riviello*, 47 N.Y.2d. at 303.

Although the State may be vicariously liable when a corrections officer is authorized to use some force in furtherance of a legitimate penological objective but goes too far, this is not such a case. Wehby's undisputedly egregious, unprovoked, and criminal conduct was not performed in furtherance of any work-related goal, such as defending himself, enforcing an order, or intervening to stop inmate-on-inmate violence.

Indeed, there is no dispute that Wehby was not authorized to use any force whatsoever on Rivera. Rivera did not initiate any violence, attempt to escape, refuse a direct order, or resist in any way. Every one of the many blows Wehby inflicted on Rivera was in derogation of his responsibilities as a corrections officer. Wehby's use of force was so unjustified and egregious that he was criminally prosecuted for his actions. At his plea allocution, Wehby acknowledged that he knew his actions were unauthorized when he committed them. When Wehby was asked by the sentencing judge whether it was true that "with intent to deprive another of a benefit you committed some act relating to your employment which was an unauthorized exercise of your official

functions and that you knew such act was unauthorized," Wehby answered: "Yes." (A317.)

Both the Correction Law and DOCCS's regulations plainly prohibit corrections officers from doing what Wehby did. Correction Law § 137(5) provides that:

> No officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self-defense, or to suppress a revolt or insurrection. When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.

DOCCS regulations make these limitations on the use of force even more explicit. Prison employees are each "personally charged under law and the policies of the department with responsibility for acting in good faith" in exercising "the greatest caution and conservative judgment" in determining "(1) whether physical force is necessary; and (2) the degree of such force that is necessary." 7 N.Y.C.R.R. § 251-1.2(a). Prison employees are not allowed to use force at all without notifying the superintendent "unless there is an immediate danger to safety, security,

or property." 7 N.Y.C.R.R. § 251-1.2(c). Even when force is necessary, "only such degree of force as is reasonably required" is permitted. 7 N.Y.C.R.R. § 251-1.2(b); *see also* 7 N.Y.C.R.R. § 251-1.2(d), (e). Simply put, engaging in a vicious and unprovoked assault on an unresisting inmate is not within a correction officer's discretion for the use of force. Such an attack is neither a foreseeable result nor a natural incident of employment as a corrections officer.

This conclusion finds ample support in the case law. Although this Court has yet to decide a case with analogous facts, the Appellate Divisions have done so. When there is no genuine dispute that corrections officers have engaged in conduct that is a "direct violation of institutional rules and [a] substantial departure from the normal method of performing [their] duties," the Appellate Divisions have consistently found the officers were acting outside the scope of their employment. *Gore v. Kuhlman*, 217 A.D.2d 890, 891 (3d Dep't 1995) (discussing *Spitz v. Coughlin*, 161 A.D.2d 1088 (1990)). For example, in *Murray v. Reif*, 36 A.D.3d 1167, 1168 (3d Dep't 2007), a correction officer acted outside the scope of employment by assaulting an inmate, threatening the inmate, reading the inmate's legal mail, and trying to deny the inmate

meals. Similarly, in *Sharrow v. State*, 216 A.D.2d 844 (3d Dep't 1995), the court held that corrections officers had acted outside the scope of their employment when they beat an inmate who had been handcuffed and secured after he had participated in an earlier altercation.

Rivera's attempt (Br. at 10-11) to distinguish *Sharrow* is unpersuasive. At issue in *Sharrow* was whether the State was required to defend the officers under Public Officers Law § 17, a statute governing state employees' conditional rights to public defense and indemnification in civil actions brought against them. Public Officers Law §§ 17(2)(a), (3)(a), however, applies the same standard as the common law for purposes of deciding whether a tort "occurred while the employee was acting within the scope of his public employment or duties." Indeed, *Sharrow* relied on two cases, *Matter of Polak v City of Schenectady*, 181 A.D.2d 233, 236 (3d Dep't 1992), and *Mathis v. State*, 140 Misc. 2d 133 (Sup. Ct. Alb. Co. 1988), which expressly apply the scope-of-employment factors identified in *Riviello*. Although claimant points out (Br. at 11) that the unjustified assault in *Sharrow* occurred outside the view of other inmates and staff, the more visible attack on Rivera here does not render it any less gratuitous or unjustified.

The Third Department's holdings in *Murray* and *Sharrow* are in harmony with this Court's *respondeat superior* principles. That is, in order for vicarious liability to attach, the employee's tortious conduct must have been foreseeable and, however poorly judged, performed in the service of some interest of the employer. Where purely personal motives animate the conduct, the employer is not vicariously liable. *See N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251-52 (2002); *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932 (1999). In cases where courts have imposed *respondeat superior* liability for an unprovoked assault committed by an employee, the employee was serving some interest of the employer. *See, e.g.*, *Sims v. Bergamo*, 3 N.Y.2d 531, 535 (1957) (assault by a bartender on a patron could have been undertaken to maintain peace or protect property); *Ramos v. Jake Realty*, 21 A.D.3d 744, 746 (1st Dep't 2005) (building superintendent assaulted a plaintiff who was gathering evidence to use against the superintendent's employer); *see also cf. Lazo v. Mak's Trading Co.*, 84 N.Y.2d 894, 897-900 (1994) (Titone, J., concurring).

Rivera does not point to any legitimate correctional or other interest of DOCCS that could plausibly have been served by Wehby's unprovoked

attack. Contrary to Rivera's assertion (Br. at 15-16), it is not undisputed that Wehby believed he was "controlling an out of control inmate" or that Wehby beat Rivera in a misguided attempt to terrify the inmate witnesses into more rapidly complying with the orders of the guards. Nothing in this record supports these assertions. The record is silent as to what Wehby truly thought at the time of the attack. Given that Rivera had done nothing wrong and Wehby pleaded guilty to official misconduct, no reasonable jury could have concluded that Wehby was motivated by a legitimate interest of his employer.

Equally meritless is Rivera's assertion that Wehby must have been performing the business of his employer because Wehby was in uniform, on duty, and the assault occurred in front of other inmates. The fact that an employee committed a tort while on or off duty is not dispositive. *See Frazier v. State*, 64 N.Y.2d 802, 803 (1985) (issue of fact as to whether an off-duty corrections officer who shot a bystander was acting within the scope of his employment); *Lazo v. Mak's Trading Co.*, 84 N.Y.2d 894, 897-900 (1994) (Titone, J., concurring) (truck driver who got into a fight while unloading the truck was not within the scope of employment); *Green v. Himon*, 151 A.D.3d 516, 517 (1st Dep't 2017) (on-duty bike messenger

who assaulted a taxi driver was not within the scope of employment); *Mark v. Vasseur*, 213 A.D.2d 927, 927 (3d Dep't 1995) (correction officer transporting inmates in a van was not acting within the scope of employment for purposes of a traffic accident). Indeed, the corrections officers in *Spitz* and *Sharrow* were on duty and in uniform when they committed the intentional torts at issue. *Spitz*, 161 A.D.2d at 1089; *Sharrow*, 216 A.D.2d at 844.

To the contrary, the primary concern is whether the *acts constituting the tort* were foreseeable and done to further the employer's interests. Wehby's attack on Rivera was not in furtherance of any legitimate State interest. Nor was the attack foreseeable to DOCCS. The "history of the relationship between the employer and employee as spelled out in practice" does not indicate that DOCCS ever authorized Wehby to assault inmates. *Riviello*, 47 N.Y.2d 303. Nothing in the record indicates that DOCCS could have "reasonably anticipated" that Wehby would attack a blameless inmate. *Id.* Wehby's unprovoked and vicious assault on Rivera was a wholesale departure from DOCCS procedures and not an act "commonly done by" a corrections officer. *Id.*

Cepeda v. Coughlin, 128 A.D.2d 995 (3d Dep't 1987) and *Gore v. Kuhlman*, 217 A.D.2d 890 (3d Dep't 1995), relied upon by Rivera, are not to the contrary. In each of those cases, the officers' acts were within the normal responsibilities of a correction officer. In *Cepeda*, the corrections officers who allegedly used excessive force were doing so as part of their attempt to quell a disturbance brought on by "plaintiffs' own acts of violence." *Id*. at 996. Similarly, in *Gore*, corrections supervisors allegedly committed tortious acts concerning "disciplinary action, [] requests for leave and other similar matters" related to the plaintiff's employment as a corrections officer.

Nor does *Arteaga v. New York*, 72 N.Y.2d 212 (1988) help Rivera. *Arteaga* did not concern scope-of-employment, but rather addressed when prison officials are entitled to governmental function immunity. In that context, this Court observed that DOCCS employees who exceed their authority would not be entitled to such immunity. *Id.* at 220-221. But corrections officers may exceed their authority, for instance, by abandoning an assigned post for another one without proper approval, while still acting as such officers. Similarly, *Jones v. New York*, 33 N.Y.2d 275 (1973), which Rivera does not cite or discuss, holds only that the

State is not wholly immune from liability for intentional torts based on excessive force. It does not address when a correction officer's intentional tort against an inmate falls outside the scope of his employment.

The sister-state cases cited by Rivera are not to the contrary. These cases apply scope-of-employment principles that are essentially the same as those this Court identified in *Riviello*. It is true that, depending on the circumstances, a public employee could commit a malicious assault while acting in the scope of employment, so long as the public employee was attempting in part to serve his employer's objectives. For instance, in *Daigle v. City of Portsmouth*, 534 A.2d 689, 699-700 (N.H. 1987), cited by Rivera (Br. at 18), the court held that an off-duty police officer acted within the scope of his employment when he assaulted a suspect in the course of apprehending him. The court in *Daigle* itself distinguished a case where the officer's actions in committing an assault were driven by "purely personal" motivations. *Id.* at 700 (distinguishing *Fitzgerald v. McCutcheon*, 410 A.2d 1270 (Pa. Super. Ct. 1979)). Unlike *Daigle*, here there is no evidence that Wehby was motivated in part by an intent to serve a DOCCS objective when he gratuitously assaulted Rivera.

B. Rivera's Reliance on the Conduct of the Other Officers Present for the Attack Is Unpreserved and, In Any Event, Misplaced

Unable to establish that Wehby was serving DOCCS's interests when he brutally beat him without provocation or justification, Rivera points to the participation of officers Latour and Femia, and argues that they acted within the scope of their employment. Rivera points to his allegations that Latour and Femia were present for the attack but did not intervene, and filed false reports asserting that Rivera had failed to follow their direct orders (Br. at 4). Rivera complains that the Court of Claims, in granting summary judgment to the State, did not consider the actions of these other officers (Br. at 8, 16). These contentions should be rejected for any of three independent reasons.

First, Rivera's contention concerning the officers' failure to intervene and their filing of false reports is unpreserved. The operative verified claim asserted a single cause of action, seeking damages only for the assault. (A34-35.) The claim did not plead separate causes of action for damages premised on a failure to intervene, failure to supervise, or the filing of false reports. Although the second claim filed by former

counsel pleaded such claims (A247-61), that claim was discontinued, with prejudice, by stipulation. (A266-67.)

Second, Rivera waived his contention that the acts of the other two officers could form the basis for the State's vicarious liability under his assault claim. Rivera's own proof showed that Wehby was solely responsible for his injuries: his trial testimony (A302-04) and the account of events in his affidavit in support of his motion for summary judgment (A74-77) each attributed his injures *only* to Wehby and not to the other two officers present. While Rivera now complains that the Court of Claims did not specifically address the acts of Latour and Femia, Rivera himself failed to oppose the State's cross-motion for summary judgment, which cited Rivera's undisputed evidence that neither officer was the source of his injuries. Thus it is not surprising that the Court of Claims did not expressly discuss the issue, though it recognized that Officer Latour was involved in the incident. (A24 (describing Latour as having handcuffed Rivera)). Indeed, it was not until Rivera's reply brief in the Appellate Division that he made any clear argument that Latour and Femia were individually responsible for Rivera's injuries, rather than

simply having been present and having lied about the incident later.[4] (A400-402.)

Having failed to oppose the State's argument concerning the other two officers in the Court of Claims—which was based on Rivera's own account of the assault—and having raised the issue of their responsibility for his injuries for the first time on appeal and in reply, Rivera failed to preserve the issue for this Court's review. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 215 n.2 (2000). Consequently, this Court lacks jurisdiction to address this issue. *See Bingham v. N.Y. Transit Auth.*, 99 N.Y.2d 355, 359 (2003).

Third, if and to the extent their conduct could be considered with respect to Rivera's assault cause of action, Latour and Femia would each have been acting outside the scope of their employment as well. Rivera put forward no evidence from which the Court of Claims could have concluded that either Latour or Femia were acting in the service of DOCCS's interests. Each allegedly assisted in subduing Rivera at

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[4] Rivera did argue in his opening brief to the Appellate Division that the two officers were acting within the scope of their employment during the incident, but that is a distinct issue from the issue of whether their conduct was responsible for his injuries.

relatively early points during the attack. Latour, for example, cuffed Rivera before Wehby removed Rivera's helmet. It is no more within the scope of a correction officer's duty to assist another officer in committing an unprovoked and vicious assault on an unresisting inmate than attacking the inmate is within the scope of duty of the officer who commits the assault. Although these officers allegedly filed false reports, those actions are not the proximate cause of Rivera's alleged injuries, all of which stem solely from the assault. As mentioned, no separate cause of action based on the filing of false reports was pleaded in the claim.

C. Rivera's Policy Arguments are Without Merit.

There is no merit to Rivera's assertion (Br. at 13-14) that assaulted prisoners will have no recourse if this Court affirms. In making this argument, Rivera misstates the scope of the State's waiver of its sovereign immunity and the interplay between the Court of Claims Act, the Correction Law, and the Public Officer's Law.

When state employees commit a tort while acting within the scope of employment, the injured person may sue the State in the Court of Claims under a *respondeat superior* theory, or may sue the tortfeasors in their individual capacities in Supreme Court (except for DOCCS

employees, as discussed below), or federal court, or both. The State will pay a Court of Claims judgment rendered against it or indemnify a judgment against the individual employee where the requirements of the Public Officer's Law are met. *See* Court of Claims Act § 9(2) (granting jurisdiction over torts for state employees or officers "while acting as such officers or employees"); Public Officer's Law §§ 17(2)(a), (3)(a) (providing for defense and indemnification of public employees for torts that "occurred while the employee was acting within the scope of his public employment or duties" where certain other requirements are met).

Importantly, the State has not waived its sovereign immunity from tort liability where the tortfeasor public employee was acting outside the scope of employment. Likewise, the State has limited its duty to indemnify public employees to situations where there was no "intentional wrongdoing on the part of the employee." Public Officer's Law §§ 17(3)(a). These limitations reflect a legislative policy judgment that taxpayer funds should not be used to pay for injuries caused by the torts of public employees who were not acting in furtherance of their employer's objectives or to absolve state employees of the burden of paying for their own intentional wrongdoing.

Correction Law § 24, which Rivera alludes to but does not directly cite, is a limited exception, applicable only to DOCCS employees, to the general rule allowing a tort action in Supreme Court directly against the state employee tortfeasor. That provision requires that actions seeking damages based on the state law torts of DOCCS employees that arise "out of any act done or the failure to perform any act within the scope of employment and in the discharge of the duties by such officer or employee" be brought only in the Court of Claims. *See, e.g., Rothschild v. Braselmann*, 157 A.D.3d 1027, 1028 (3d Dep't 2018). The provision, however, does not apply where DOCCS employees act outside the scope of their employment. *See, e.g., Ierardi v. Sisco*, 119 F.3d 183, 188-189 (2d Cir. 1997) (Correction Law § 24 did not require dismissal of state common law claims brought in federal court based on sexual harassment). Additionally, Correction Law § 24 does not require the dismissal of federal constitutional torts, such as those brought under 42 U.S.C. § 1983, regardless of whether the DOCCS employee was acting within the scope of their employment. *Haywood v. Drown*, 556 U.S. 729 (2009).

Thus, injured prisoners have several avenues of relief. If the DOCCS employee committed a tort when acting within the scope of employment, the injured inmate may sue for damages in the Court of Claims against the State under a theory of *respondeat superior,* and may also sue the DOCCS employee individually under the federal civil rights laws in either Supreme Court or federal court. If the correction officer was acting outside the scope of his employment, the remedy is a lawsuit against the officer individually in Supreme Court or federal court for both the state law tort and any federal civil rights violation. Where there is any possible question concerning the scope of employment, nothing prevents a prudent prisoner from commencing parallel actions in the Court of Claims and Supreme Court or federal court; prisoners commonly do just that. In short, the law affords adequate redress for victims of assaults by corrections officers.

POINT II

THE APPELLATE DIVISION DID NOT ABUSE ITS DISCRETION WHEN IT AFFIRMED THE COURT OF CLAIMS' ORDER PERMITTING THE STATE TO AMEND ITS ANSWER

The Appellate Division did not abuse its discretion as a matter of law when it upheld the Court of Claims' order permitting the State to

amend its answer to assert the scope-of-employment defense. CPLR 3025 is plain that "[a] party may amend his or her pleading . . . at any time by leave of court" and that "[l]eave shall be freely given upon such terms as may be just." Accordingly, "[l]eave to amend shall be freely given absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies & Assoc., Inc. v. N.Y.C. Health & Hosps. Corp.*, 59 N.Y.2d 755, 757 (1983) (mem.) (citations and internal quotation marks omitted).

As this Court has recognized, "[a]pplications to amend pleadings are within the sound discretion of the court, and that of the Appellate Division. Courts are given considerable latitude in exercising their discretion." *Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014) (citations and internal quotation marks omitted). "While a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where there is no prejudice." *Id.* at 413-14 (discussing *Murray v. New York*, 43 N.Y.2d 400 (1977)). This Court's authority is limited to reviewing whether the Appellate Division abused its discretion "'as a matter of law.'" *Id.* at 411 (quoting *Matter of Von Bulow*, 63 N.Y.2d 221, 224 (1984)).

As the party opposing amendment, Rivera bore the burden of establishing that the amendment would cause him to suffer substantial prejudice. *Kimso Apts., LLC*, 24 N.Y.3d at 412. The fact that the amendment would allow a party to plead a meritorious defense is not prejudice within the meaning of CPLR 3025. *Id.* Prejudice requires more than a mere shift in the potential liability of the parties. As this Court has said, "[p]rejudice, of course, is not found in the mere exposure of the defendant to greater liability." *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981). "Rather, 'there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position.'" *Kimso Apts., LLC*, 24 N.Y.3d at 411 (quoting *Loomis*, 54 N.Y.2d at 23).

Rivera attempts to show two types of prejudice that allegedly stemmed from allowing the State to amend its answer: that it hindered his ability to prepare his case in this action, and that had he known about the scope-of-employment defense earlier, he would have brought a separate action directly against Wehby in Supreme Court or federal court before the statutes of limitations expired on those claims. Neither argument has merit.

Rivera's first claim of prejudice is unpreserved. Although he now argues that he would have conducted discovery differently and can no longer obtain relevant discovery due to the passage of time (Br. 26-27), he made no such arguments before the Court of Claims (*see* A345-46). At most, he observed that time had passed and some discovery had already been conducted without an eye to the scope-of-employment issue. (A346.) There is no reason to believe that further discovery really was necessary. After the State was permitted to amend its answer in February 2016, a year and a half elapsed before Rivera moved for summary judgment in July 2017. Yet at no point during this time frame did Rivera seek any new discovery "on whether the actions of these officers was foreseeable to their superiors," as he now claims he would have if the State had amended its answer earlier. (Br. at 26.).

Rivera's second claim of prejudice also fails. The gratuitous nature of the assault at issue plainly raised a question about whether Wehby had acted within the scope of his employment, and the failure of Rivera's former counsel to bring a separate action against Wehby individually was a strategic error that cannot be blamed on the State. Nothing prevented Rivera from timely suing Wehby directly in another court. Nor could the

State's failure to assert the scope-of-employment defense in its initial answer have reasonably caused him to refrain from doing so. Individuals allegedly assaulted by prison guards or state police officers routinely pursue parallel actions against the State in the Court of Claims and the individual officers in either federal court or Supreme Court. These parallel actions present distinct advantages not available in Court of Claims actions, including the availability of attorney's fees under 42 U.S.C. § 1988, the right to a jury trial, and the absence of the Court of Claims Act's stringent jurisdictional requirements.

Of particular relevance here, these advantages existed whether or not the State raised the scope-of-employment defense in its answer. Consequently, it was not reasonable for Rivera's former attorney to have foregone a parallel action against Wehby simply because the State did not initially raise this defense in its answer. This decision cannot constitute prejudice within the meaning of CPLR 3205.

Nor can Rivera claim surprise given that the State's scope-of-employment defense was based on Rivera's own 2012 trial testimony and his verified bill of particulars. (*See* A336-37.) This Court held in *Murray* that a plaintiff is "not permitted to claim surprise or prejudice" where the

plaintiff's own evidentiary submissions showed that she knew, or should have known, about the facts underlying the defense. *Murray v. New York*, 43 N.Y.2d at 406. Thus, Rivera cannot claim surprise now when the State's defense was based on his own evidentiary submissions.

Finally, Rivera could not have been prejudiced by the amendment because it was legally unnecessary as a means to raise the defense of scope-of-employment. The State sought to amend its answer out of an abundance of caution. *See* David D. Seigel, NEW YORK PRACTICE 4th Ed. § 223 (advising practitioners to raise affirmative defenses even if not required by CPLR). But as a technical matter, a showing that a state employee acted within the scope of employment is a jurisdictional requirement of the Court of Claims. Consequently, Rivera could not have been prejudiced by the State amending its answer to assert a defense that it did not need to plead at all.

Specifically, section 9(2) of the Court of Claims Act limits the court's jurisdiction to "the torts of [the State's] officers or employees while acting as such officers or employees." The phrase "while acting as such officers or employees" is the functional equivalent of "within the scope of employment," "discharge of duties," and similar phrases—all of which

"have long been regarded as interchangeable" by this Court. *See Matter of Sagal-Cotler*, 20 N.Y.3d at 675-76. The provisions in section 9(2)—which have been unchanged since 1939—thus limit the jurisdiction of the Court of Claims to damages actions against the State for the torts of its officers or employees acting within the scope of their official duties. *Goodyear Aluminum Prods., Inc. v. State*, 12 A.D.2d 692, 693 (3d Dep't 1960), illustrates this principle. There, a corporation sought damages for allegedly slanderous remarks made by an Assistant Attorney General. The Appellate Division dismissed the claim, finding that because the Assistant Attorney General was not acting within the scope of his official duties when he uttered the allegedly slanderous remarks, the State was not liable for his tort "and the Court of Claims [was] without jurisdiction" under Court of Claims Act § 9(2). *Id.*

Compliance with the jurisdictional limitations of the Court of Claims Act is strictly required. *See Kolnacki v. State of New York*, 8 N.Y.3d 277, 281 (2007). Although certain statutorily identified defects or defenses are waivable, *see* Court of Claims Act § 11(c), the requirement that the state employee have acted in the scope of employment is not one of them. Thus, the defense that an officer was acting outside the scope of

his employment is a challenge to the Court of Claims' subject matter jurisdiction which "may be raised at any time and may not be waived." *Manhttan Telecom. Corp. v. H & A Locksmith, Inc.,* 21 N.Y.3d 200, 203 (2013) (*quoting Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976)).

Contrary to Rivera's suggestion (Br. at 19), the Court of Claims Act does not create jurisdiction over all suits against the State where the state employee is "on duty, in uniform and 'on the clock," because those conditions may be satisfied even though the employee is not acting "as such," that is, within the scope of employment or official duties.

For similar reasons, a scope-of-employment defense is not an affirmative defense within the meaning of CPLR 3018(b). Scope of employment is not among CPLR 3018(b)'s list of defenses that must be raised to avoid waiver because *respondeat superior* liability is not a defense at all, but a basis for a defendant's liability that must be pleaded and proven by a plaintiff. *See, e.g., VFP Invs. I LLC v. Foot Locker, Inc.,* 147 A.D.3d 491 (1st Dep't), *lv. denied,* 29 N.Y.3d 910 (2017) (dismissing cause of action where plaintiff inadequately alleged *respondeat superior* liability). Thus, a claim asserting that the State has tort liability on the basis of the acts of its employees necessarily raises the factual issue of

scope of employment. Consequently, it need not be pleaded as an affirmative defense under CPLR 3018(b). For these reasons, Rivera has not shown prejudice from the court's order permitting the State to amend it answer.

CONCLUSION

The Appellate Division's order should be affirmed.

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February 12, 2019

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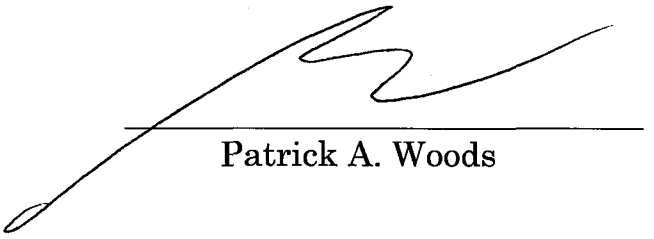
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Patrick A. Woods, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8319 words, which complies with the limitations stated in § 500.13(c)(1).



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