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COURT OF APPEALS
STATE OF NEW YORK
==========X

JOSE RIVERA, #-5-A-0469

-against-

THE STATE OF NEW YORK

==========X

NOTICE OF MOTION FOR LEAVE TO APPEAL

CLAIM NO. 120113

PLEASE TAKE NOTICE, that upon the annexed Statements pursuant to Court of Appeals Rule of Practice 500.22, the Final Order of the Appellate Division, Fourth Department, dated June 8, 2018, the Briefs of the Parties, the Appendix and the proceedings previously had in this matter, Claimant Jose Rivera will move the Court of Appeals of the State of New York, on the 9th day of July, 2018, at the Courthouse, 20 Eagle Street, Albany, New York 12207, for an Order Granting him Permission to Appeal, and for such other and further relief that this Court may deem just and proper.

Dated: June 14, 2018

By: Stacey Van Malden, Esq.
Of counsel
Goldberger & Dubin, P.C.
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To: Attorney General of the State of New York
Clerk of the Court

COURT OF APPEALS
STATE OF NEW YORK
==========X

JOSE RIVERA, #-5-A-0469

CLAIM NO. 120113

-against-

THE STATE OF NEW YORK

==========X

STATEMENT OF PROCEDURAL HISTORY

On or about June 10, 2011, Claimant was granted permission to file a late claim. This claim was assigned Claim number 120113. Defendant filed a Verified Answer dated July 26, 2011. By way of an Order dated September 14, 2017, the Court of Claims granted Summary Judgment to Defendants, resulting in dismissal of the claims of Appellant. Appellant filed a timely notice of appeal of the September 14, 2017 Order on September 25, 2017. A motion to amend the notice of appeal to include the Court of Claims Order of February 16, 2016 (filed February 19, 2016) was granted on December 7, 2017. An amended Notice of Appeal was filed on December 12, 2017. By order dated June 8, 2018, the Order of the Court of Claims was affirmed and the appeal dismissed. A Notice of Entry was received on June 13, 2018. This Motion for Leave is therefore timely.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal because it is the review of questions of law from the Final Order of the Appellate Division, Fourth Department.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did the Appellate Division err in affirming the Court of Claims grant of Defendant/Appellee's Motion for Summary Judgment when it held that Defendant's employee was not acting within the scope of his duties as a correction officer?

This exact issue was raised on appeal, and can be found in Claimant/Appellant's brief as Issue number 2. This issue was fully litigated in the Court of Claims through the motion for summary judgment of defendants. Thus, this issue is preserved for review.

This is a decision that needs to be reviewed because the existing case law essentially prevents any inmate who has been subjected to excessive force by a corrections officer any redress. The present state of the law gives corrections officers free reign to beat inmates without their employer being subjected to scrutiny. This decision, and the existing case law in the Appellate Divisions, leaves only individual suits against individual corrections officers. There are a number of problems with this. Initially, jurisdiction for suits against individual officers "acting beyond the scope of their duties" is in the Supreme Court, while cases against officers acting within the scope of their duties lies in the Court of Claims. Litigants will need to guess ahead of time which is the appropriate venue. Officers sued in their individual capacity will plead that they were acting within the scope of their duties, while those sued in the Court of Claims will plead they were acting beyond the scope of their duties to avoid liability. In either scenario defendants will attempt to demonstrate that the chosen venue is without jurisdiction over the matter. Furthermore, as in this case, the State may go years without pleading that their officer was acting beyond the scope of his duties, allowing the statute of limitations to run and the Claimant to believe that this defense was waived, only to be permitted to amend their answer on the eve of trial, and have the entire matter dismissed. For inmates who have been subjected to excessive force through no fault of their own,

there is no recourse which would produce a recovery under the present state of the law. And this means that there will be no checks against abuse of the powers of a correction officer until such time as a "pattern" can be properly proven, and a Monell claim against the New York State Department of Corrections becomes ripe. Clearly this is not a proper state of the law.

In this matter, the officers in question were in the facility, on duty, in uniform, and in charge of inmates in the mess hall. If these officers were not acting within the scope of their duties, then no officer can be found to be acting within the scope of their duties when they perpetrate unnecessary and unjustified harm against an inmate. The decision below discards this Court's definitions of acting within the scope of duty both generally and in the case of corrections officers.

The most often cited case is Riviello v Waldron,47 N.Y.2d 297 (1979). In Riviello, this Court set forth five factors with which to determine whether the acts of an employee are within the scope of employment. These factors are: the connection between the time, place and occasion for the act; the history of the relationship between the employer and employee in actual practice; whether the act is one commonly done by the employee; the extent of departure from normal methods of performance; and whether the act was one that the employer could have reasonably anticipated. Id. An employee is within the scope of his employment so long as he is discharging his duties, "no matter how irregularly or with what disregard of instructions." Id.

The Court of Claims and the Fourth Department in affirming, compared the facts of this case to those of the cases of Cepeda v Coughlin, 128 A.D.2d 995, 996, 997 (3d Dept. 1987) and Sharrow v. State of New York, 216 A.D.2d 844(3d Dept. 1995). The court held that the facts were more similar to Sharrow than Cepeda, and therefore Defendant was not responsible to Appellant for the acts of its employees. In Sharrow, correction officers had quelled a disturbance. Two officers transporting an inmate away from the disturbance took the inmate through a gate and beat

him with batons. The officers in Sharrow did not engage in their unjustified assault in full view of inmates and other staff members while the officers were supervising the mess hall as was done in the instant matter. Sharrow was a case which decided the State's responsibility to defend and indemnify corrections officers under law, a holding that is more similar to insurance defense than tort liability. In Cepeda, the court gave great weight to the fact that the correction officers were "actually on duty in the correctional facility performing a basic job function at the time of the incident, i.e., supervising and controlling the activities and movement of inmates."

Appellant would submit that defendant's employees were not acting for "purely personal reasons unrelated to the employer's interests" nor were they engaging in "conduct which is a substantial departure from the normal methods of performing his duties." Gore v. Kuhlman, 217 A.D.2d 890 (3d Dept. 1995). The defendant's employees were on duty, in uniform, on post, supervising other inmates, and exercising control over appellant. Because the test has come to be "whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions," defendant's employees were legally within the scope of their duties. Ierardi v. Sisco, 119 F.3D 183 (2d Cir. 1997), (citing, Riviello, supra). The conduct may have been unauthorized, but that in and of itself does not take it out of the scope of employment. Cepeda, supra. The facts of this case fall far short of being so clear cut as to permit a court to decide that defendant's employees acted beyond the scope of their employment as a matter of law.

"The master who puts the servant in a place of trust or responsibility or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty

or authority and inflicts an unjustifiable injury upon another." Rounds v Delaware Lackawanna & W. R. R. Co., 64 N.Y.2d 129, 134 (1876). The words of this Court, never reversed, describe the scope of employment. The facts of Appellant's case fall squarely within them. Defendant's employees were, as a matter of law, acting within the scope of their employment. If these employees of defendant are not found to be within the scope of their employment, then no remedy would exist for any Claimant when an employee engages in violent behavior. As a result the Court of Claims erred in granting summary judgment to defendant, the Fourth Department erred in its affirmance, and this Court must clarify the existing law and reverse.

II. Did the Court of Claims err in permitting the defendant/appellee to amend its Answer when such amendment caused great prejudice to the Claimant/Appellant?

This exact issue was raised on appeal and can be found in Claimant/Appellant's brief as Issue number 1. This issue was fully litigated in the Court of Claims through the motion for summary judgment of defendants. Thus, this issue is preserved for review.

Whether a litigant may amend its Answer is a question that all of the Courts in New York have addressed on too many occasions to count. However, the question that this Court must address is, when does the failure to plead an affirmative defense, which was known to the defendant at the time of the initial pleading, but not pleaded then, become so late that a litigant should be entitled to rely upon the waiver of that defense? In this instant matter, which is unlike any reported case, the defendant was well aware that this defense existed at the time it filed its initial answer. Instead of making a timely motion to amend, defendants waited until the close of discovery, a point in time nearly 5 years after the events in question, and 4 1/2 years after the submission of their initial answer, to amend, to include an affirmative defense that ultimately caused the dismissal of the action. Claimant submitted to the Court of Claims, and to the Appellate

Division that he was entitled to rely upon the waiver of such defense in preparing for trial because the facts underlying that defense had been in existence since the initiation of the action, were known to the defendant, and as a result, Claimant was surprised and prejudiced from the late amendment. Fundamental fairness should require that a defendant move within a reasonable time after acquiring knowledge of an affirmative defense to amend its Answer.

Wherefore, it is most respectfully requested that the decision and orders of the Court of Claims and the Appellate Division be reviewed by this Court, and for such other and further relief that this Court may deem just and proper.

Dated: New York, New York
June 14, 2018

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NEW YORK SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

JOSE RIVERA,
Claimant-Appellant,

-against-

NOTICE OF ENTRY

STATE OF NEW YORK,
Defendant-Respondent.

AD. No. CA 17-01986
OAG No. 11-121763
Claim No. 120113
(Appeal No. 1)

PLEASE TAKE NOTICE that the within is a true and complete copy of the Order duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Fourth Department on June 8, 2018.

Dated: Albany, New York
June __, 2018

BARBARA D. UNDERWOOD
Attorney General
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

By: _____
PATRICK A. WOODS
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New York, New York 10013

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CA 17-01986

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ.

JOSE RIVERA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120113.)
(APPEAL NO. 1.)

GOLDBERGER & DUBIN, P.C., NEW YORK CITY (STACEY VAN MALDEN OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Judith A. Hard, J.), entered February 19, 2016. The order, among other things, granted the motion of defendant for leave to amend its answer.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Architectural Bldrs. v Pollard*, 267 AD2d 704, 705 [3d Dept 1999]; *see also* CPLR 5501 [a] [1]).

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court

STATE OF NEW YORK COURT OF CLAIMS

JOSE RIVERA,

Claimant,

DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 120113
Motion Nos. M-90793
CM-90905

Defendant.

BEFORE: HON. JUDITH A. HARD
Judge of the Court of Claims

APPEARANCES: For Claimant:
Goldberger & Dubin, PC
By: Stacey Van Malden, Esq.

For Defendant:
Hon. Eric T. Schneiderman, NYS Attorney General
By: Michael T. Krenrich, Assistant Attorney General,
Of Counsel

PROCEDURAL HISTORY

After obtaining permission from the Court to file a late claim (Rivera v State of New York, Ct Cl, filed June 10, 2011, Fitzpatrick, J., Motion No. M-79308), claimant filed the instant claim on July 18, 2011 alleging a single cause of action for assault and battery (Claim, ¶ 3). This claim was assigned claim number 120113 by the Clerk of the Court. On February 21, 2012, claimant filed a second claim alleging six causes of action: failure to provide adequate protection; gross negligence; excessive force; failure to properly train and supervise correction

officers; negligence per se for assault and battery; and intentional infliction of emotional harm. The second claim was assigned claim number 120949 by the Clerk of the Court.[1]

On April 3, 2012, the New York State Attorney General's Office contacted Judge Bruening of this Court and stated that "there should be an agreement between the parties and Court that Claim No. 120949, is superfluous and should be formally discontinued." The letter asserted that claim number 120113 alleged the same causes of action as claim number 120949. A review of the claims by this Court shows that the claims did not set forth the same causes of action. On May 17, 2012, claim number 120949 was discontinued with prejudice by stipulation of the parties, and so ordered by another judge.

On June 26, 2015, defendant moved to amend its verified answer to add affirmative defenses. The Court granted said motion. The amended verified answer included a defense asserting that claimant's injuries were caused by the independent and superceding intervention of persons acting outside the scope of their official duties or employment (Amended Verified Answer, ¶ 6). After a change in attorneys, claimant filed a Note of Issue and Certificate of Readiness for Trial on August 31, 2015.

Claimant now moves for summary judgment. Defendant opposes the motion and cross-moves for summary judgment. Both motions were filed well after the deadline noted in the most recent scheduling order issued by the Court.

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[1] Defendant alleges that the second claim was not served upon it (Affirmation in Opposition to Claimant's Motion and in Support of Defendant's Cross-Motion for Summary Judgment, ¶ 9). In addition to the jurisdictional issue this allegation presents, the Court also notes that Judge Fitzpatrick's decision that granted claimant permission to file a late claim ordered that claimant file such claim within 45 days of the date that the decision was filed. The decision was filed on June 10, 2011, which allowed claimant until July 25, 2011 to file the claim. The first claim, claim number 120113 filed on July 18, 2011 is timely, while the second claim, claim number 120949 filed on February 21, 2012, was clearly not timely.

Claimant argues that the delay in filing his motion for summary judgment is due to defendant's failure to comply with the Court's order to produce documents for an in camera review. On the merits, claimant argues that there are no issues of material fact necessary for trial on any of the causes of action asserted in the claim.[2] Further, claimant argues that the correction officers were acting within the scope of their employment at the time of claimant's beating, thus rendering defendant's affirmative defense meritless. Defendant argues that the correction officers were acting outside their scope of duties at said time, rendering defendant not liable for the assault and battery committed by the correction officers.[3]

FACTS

The underlying facts of the claim are undisputed. On January 15, 2010, claimant was on line to enter the mess hall for breakfast, wearing a protective helmet for his seizure disorder. As claimant passed Correction Officer Wehby (Wehby), Wehby taunted him about his helmet, asking claimant what type of stickers he wanted for it. Claimant asked Wehby not to make such statements because he feared that the other inmates would hear them and also taunt him. Claimant proceeded to the serving line but another inmate told him that Wehby wanted claimant to return to him. When claimant approached Wehby, Wehby pulled him and struck the right side of his head and ear. Claimant fell to his knees and eventually fell face down on to the floor. Wehby continued to strike claimant as Sergeant La Tour applied handcuffs to claimant. After the handcuffs were applied, Wehby ripped off claimant's helmet, continued striking him, and

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[2] Claimant premises his argument on claim number 120949.

[3] Defendant premises its argument on claim number 120113.

stomped on his head. Claimant was brought to his knees and Wehby screamed at him: "die motherfucker." Claimant alleges that he lost consciousness at that point.

Wehby was indicted by a Grand Jury of Oneida County for assault in the second and third degree, but eventually pleaded guilty only to the misdemeanor of official misconduct. During the plea allocution, the Court asked him whether, on January 15, 2010, he committed some act relating to his employment with the intent to deprive another of a benefit, and whether that act was an unauthorized exercise of his official function. Wehby answered that he understood his action to be an unauthorized exercise of his official function, and officially pled guilty to the misdemeanor charge. Wehby was allowed to retire and required to pay a $1000.00 fine. The Court conditionally discharged the conviction, with the requirement that Wehby does not further violate any laws.

LAW AND DISCUSSION

Brill v City of New York, 2 NY3d 648 (2004), the seminal case regarding eleventh hour summary judgement motions, held that the allowance of late summary judgment motions for good cause under CPLR 3212 (b) requires a satisfactory explanation for the untimeliness, rather than simply permitting meritorious non-prejudicial tardy motions. Here, claimant argues that the tardiness of the application is due to the late receipt of dispositive discovery materials, to wit, the Inspector General's Report regarding this matter. On January 13, 2016, the Court ordered defendant to provide the Inspector General's Report within 45 days of the filing of the order. That order was filed on February 19, 2016. A year later, defendant still had not complied with the order, despite multiple communications with the Court. On April 10, 2017, the attorneys entered in to a confidentiality stipulation and the report was released to claimant's attorney. Claimant's

summary judgment motion was filed with the Court on July 17, 2017. The Court finds that claimant has demonstrated good cause for the filing of a tardy summary judgment motion. Defendant offered no explanation for the tardiness of its cross-motion.

Claimant's papers in support of his motion for summary judgment appear to argue the merits of claim number 120949, which was discontinued on May 17, 2012 by stipulation of both parties and so ordered by Judge Bruening.[4] Furthermore, claimant attached the discontinued claim, claim number 120949, to his motion. Notably, claimant's response to defendant's Demand for a Verified Bill of Particulars, signed on October 15, 2011, contains allegations relating only to the assault and battery claim. Noticeably absent from this response are any allegations relating to the five additional claims asserted in claim number 120949, including allegations pertaining to a claim of negligent supervision. CPLR 3212 (b) requires that a motion for summary judgment be supported by a copy of the pleadings filed in the action. The failure to attach the claim to the motion is a basis for the denial of the motion (Senor v State of New York, 23 AD3d 851, 852 [3d Dept 2005]; Deer Park Associates, 243 AD2d 443 [2d Dept 1997]; Niles v County of Chautauqua, 285 AD2d 988 [4th Dept 2001]). Claimant submitted the claim pertaining to claim number 120949 in support of his motion for summary judgment on claim number 120113. On this basis, claimant's motion for summary judgment is denied. However, even if the Court were to address the merits of claimant's assault and battery claim, summary judgment would be denied for the reasons stated below.

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[4] The Court notes that both claim number 120113 and claim number 120949 were filed by claimant's first attorney. In addition, the stipulation discontinuing claim number 120949 was executed by claimant's first attorney. The Court can only surmise that claimant's second attorney believed claim number 120949 to be the operative pleading in this matter.

Despite its unexplained tardiness, and in the interests of judicial expediency, defendant's cross motion for summary judgment is granted as the law does not sustain the viability of a cause of action for assault and battery as asserted in claim number 120113. "Summary judgment is a drastic remedy that 'should not be granted where there is any doubt as to the existence of [triable] issues [of fact], or where the issue is arguable'" (Hall v Queensbury Union Free Sch. Dist., 147 AD3d 1249, 1250 [3d Dept 2017], quoting Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]; see Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Stukas v Streiter, 83 AD3d 18, 23 [2d Dept 2011]). The proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [citations omitted]; see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Robinson v Kingston Hosp., 55 AD3d 1121, 1123 [3d Dept 2008]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d at 324; see Town of Kirkwood v Ritter, 80 AD3d 944, 945-946 [3d Dept 2011]). In considering the motion, the Court "must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations" (Black v Kohl's Dept. Stores, Inc., 80 AD3d 958, 959 [3d Dept 2011]; see Winne v Town of Duanesburg, 86 AD3d 779, 780-781 [3d Dept 2011]).

Governmental immunity applies to torts arising from "the negligent performance of a governmental function" (McLean v City of New York, 12 NY3d 194 [2009]). An intentional tort is not covered by such immunity (Greaves v State of New York, 35 Misc 3d 290 [Ct Cl 2011]). The State may be liable for an assault and battery committed by an employee in carrying out their duties under the theory of respondeat superior (Jones v State of New York, 33 NY2d 275 [1973]). Intentional torts can fall within the scope of employment (Riviello v Waldron, 47 NY2d 297 [1979]). It is normally required that the act complained of be in furtherance of the employer's business and within the scope of employment (id). If an employee "departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable" (Judith M. v Sisters of Charity Hosp., 93 NY2d 932 [1999], citing Jones v Weigand, 134 AD 644, 645 [1909]). In determining whether an act is within the scope of employment, one factor to be weighed is the extent of departure from normal methods of performance. Under 9 NYCRR § 7404.9, the use of physical force by staff at secure facilities "shall be reasonable under the circumstances . . . ."

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the [claimant] in imminent apprehension of harmful contact" (Gould v Rempel, 99 AD3d 759 [2d Dept 2012]; Bastein v Sotto, 299 AD2d 432 [2d Dept 2002]; Higgins v Hamilton, 18 AD3d 436 [2d Dept 2005]; Cotter v Summit Sec. Servs., Inc., 14 AD3d 475 [2d Dept 2005]).

"A valid claim for battery exists where a person intentionally touches another without that person's consent" (Wende C. v United Methodist Church, N.Y. W. Area, 4 NY3d 293 [2005]). Claimant must prove that there was bodily contact and that the contact was offensive and

wrongful under all circumstances (Goff v Clarke, 302 AD2d 725 [3d Dept 2003]). However, an action for battery may be sustained without a showing that the actor intended to cause an injury as a result of the offensive contact (Messina v Alan Matarasso, M.D., F.A.C.S., P.C., 284 AD2d 32 [1st Dept 2001]); but it is necessary to show that the intended contact was offensive. There must be an intent to make contact (id). Lack of consent is an indicia but not conclusive of offensive contact (Zgraggen v Wilsey, 200 AD2d 818 [3d Dept 1994]). Offensive contact may offend a reasonable sense of personal dignity (PJI 3:3 citing Restatement, [Second] of Torts §19; Prosser and Keeton, Torts [5th Ed] 39, 41-42 §9; 1 Harper and James, The Law of Torts 213, §3.2).

Defendant does not dispute that Wehby committed an assault on claimant. What remains is the legal issue of whether Wehby was acting within the scope of his official duties when he perpetrated the assault upon claimant.[5] In Riviello v Waldron, a case concerning whether the acts of a private sector employee fell within the scope of his employment, the Court noted that the test had evolved to be "'whether the act was done while the servant was doing the master's work, no matter how irregularly, or with what disregard of instructions'" (Riviello v Waldron, 47 NY2d 297, 302 (1979) [citations omitted]). The Riviello Court provided the factors to be weighed in determining whether an act falls within the scope of employment. These factors are: (1) the

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[5] The Court notes that a claim of negligent supervision is not properly before it, as claimant did not assert this cause of action in claim number 120113. However, even if claimant could amend the claim to include a negligent supervision cause of action within claim number 120113 and maintained that it was allowable under CPLR 203 (f), the relation back statute, the argument would fail. "[W]hen the nature of a newly asserted cause of action is distinct from the causes of action asserted in the original complaint, and requires different factual allegations as to the underlying conduct that were contained in the original complaint, the new claims will not 'relate back' in time to the interposition of the causes of action in the original complaint" (Calamari v Panos, 131 AD3d 1088, 1089 [2d Dept 2015] [citations omitted]). Claim number 120113 does not contain any allegations for a negligent supervision cause of action. Thus, claimant cannot avail himself of the benefits of the relation back statute.

connection between the time, place and occasion for the act; (2) the history of the relationship between the employer and the employee as spelled out in actual practice; (3) whether the act is one commonly done by such employee; (4) the extent of departure from normal methods of performance; and (5) whether the specific act was one that the employer could reasonably have anticipated (id at 303 [citations omitted]). The Court further stated that "where the element of general foreseeability exists, even intentional tort situations have been found to fall within the scope of employment" (id at 304 [citations omitted]).

Relying on Cepeda v Coughlin, 128 AD2d 995 (3d Dept 1987), claimant maintains that the correction officers were acting within the scope of their employment, and therefore defendant is liable for their actions. In Cepeda, plaintiffs alleged that correction officers used excessive force and assaulted them while transferring the plaintiffis from an outdoor exercise pen to their cells. According to the incident report, one of the plaintiffs initiated the disturbance by punching and kicking a correction officer. The Court noted that although Correction Law §137 [5] bars excessive force against inmates, some force is often required and used to control inmates. Using the factors set forth in Riviello, 47 NY2d 297 (1979), the Cepeda court held that the correction officers were performing an act commonly performed by correction officers—moving inmates to their cells. As transporting inmates within the correctional facility is expected of and usually performed by correction officers, the Court found that the correction officers were acting within the scope of their employment.

Defendant argues that the Third Department's holding in Sharrow v State of New York is applicable to the instant claim. In Sharrow, an inmate instigated an altercation in the yard which was quelled by staff of the correctional facility (Sharrow v State of New York, 216 AD2d 844,

844 [3d Dept 1995]). The inmate was handcuffed and brought through a gate where he was beaten with batons by two correction officers (id.). The inmate did not resist the correction officers' attempts to control and subdue him following the altercation (id.). Sharrow, a correction officer who had allegedly beaten the inmate, brought an Article 78 proceeding in Supreme Court after he was denied legal representation by the New York State Attorney General's Office. The Attorney General's Office found that Sharrow was acting outside the scope of his employment, thus relieving the Attorney General's Office of its obligation to indemnify him in the federal civil rights action filed by the inmate. The Court, citing the videotape of the beating along with evidence showing that the inmate did not resist efforts to control him, found that Sharrow's actions fell outside the scope of his employment (id. at 846). Thus, because the employee's conduct was a substantial departure from the essential correctional goal of maintaining discipline and control, the Attorney General properly denied him representation under Public Officers Law § 17.

The Court finds that the claim at issue here is analogous to Sharrow, as opposed to Cepeda. Here, the evidence is undisputed that Wehby committed an unprovoked assault on claimant. Unlike the correction officers in Cepeda, Wehby was not quelling a dispute, or performing some other duty of his employment as a correction officer, such as transporting inmates within the correctional facility. While the Court recognizes that Riviello and Cepeda have found correction officers to be acting within the scope of employment if they were doing their master's work, no matter how irregularly they may have acted, this Court finds that Officer Wehby's actions, as a matter of law, fell far afield from actions within the scope of his employment. Simply put, the Court finds no reasonable connection between Wehby's actions and

duties customarily performed by correction officers. The use of force here was wholly attributable to Wehby's own personal motive – which is reflected by the criminal charges filed against him, and the lack of any plausible explanation as to why he used such vicious force on claimant. Given these irrefutable facts, the guidelines of Riviello cannot be met on the facts of this case. Wehby's abhorrent actions are not within the normal and customary duties regularly performed by correction officers, and the Department of Corrections and Community Supervision could not reasonably anticipate that he would act in such a heinous way. If an employee acts for purely personal reasons unrelated to the employer's interests, which is unquestionably the case here, the acts are considered a substantial departure from the normal methods of performing his duties (Gore v Kuhlman, 217 AD2d 890 [3d Dept. 1995] [citations omitted]). Wehby's actions were personal, unrelated to defendant's interests, and a complete departure from performing the requisite duties of a correction officer in a reasonable manner. Consequently, although a harsh result, there is no viable basis upon which the State of New York may be held liable as Wehby's actions fall outside the scope of his employment.[6]

Based upon the forgoing, it is hereby

ORDERED that claimant's motion (M-90793) is denied, defendant's cross motion (CM-90905) is granted and the claim (Claim No. 120113) is dismissed.

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[6] The Court notes that claimant had other avenues available to him to seek redress for Wehby's actions, as he could have commenced an action against Wehby in his individual capacity under 42 USC § 1983 in either supreme court in New York, or federal court (see Haywood v Drown, 556 US 729, 741 [2009]). "[A] person has a private right of action under 42 USC § 1983 against [correction] officers who, acting under color of law, violate federal constitutional or statutory rights" (Delgado v City of New York, 86 AD3d 502, 511 [2d Dept 2011]). Gratuitous, unprovoked assaults committed by correction officers have been held to state a claim under 42 USC § 1983 (Hodges v Stanley, 712 F2d 34, 36 [2d Cir 1983]). Additionally, claimant could have commenced an action against Wehby for common law assault and battery in supreme court (see Holland v City of Poughkeepsie, 90 AD3d 841, 846 [2d Dept 2011]).

Albany, New York
September 12, 2017

Judith A. Hard

JUDITH A. HARD
Judge of the Court of Claims

Papers Considered:

1. Verified Claim, filed on July 18, 2011.
2. Affirmation in Support of Motion for Summary Judgment, affirmed by Jose Rivera on July 14, 2017, with exhibits.
3. Affirmation in Opposition to Claimant's Motion and in Support of Defendant's Cross-Motion for Summary Judgment, affirmed by Michael T. Krenrich, AAG on August 12, 2017, with exhibits.