To Be Argued By:
Stacey Van Malden, Esq.
Time Requested: 15 Minutes

APL-2018-00162

Court of Appeals

STATE OF NEW YORK

JOSE RIVERA, #05-A-0469,

Claimant-Appellant,

—against—

THE STATE OF NEW YORK,

Defendant-Respondent,

BRIEF FOR CLAIMANT-APPELLANT

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

JURISDICTIONAL STATEMENT

This Court has jurisdiction to decide the instant appeal because it is called upon to determine two questions of law. The claim before this Court properly began in the Court of Claims, and was appealed as of right the Supreme Court, Appellate Division, Fourth Department, the decision of the Appellate Division was based upon a final judgment of the court below.

The questions of law presented herein were decided by two Orders of the Court of Claims and were presented to the Appellate Division as issues I and II in the Brief of the Appellant. A350

As a result, this Court has Constitutional and Statutory jurisdiction to decide this appeal.

STATEMENT OF FACTS

The following facts are not in dispute. On January 15, 2010, Appellant was a prisoner at Mid-State Correctional Facility. A096. Due to a pre-existing head injury and seizure activity, Appellant was required by defendant to wear a protective helmet. Id. On that morning at about 7 a.m., Appellant went to eat breakfast. Id. Upon entering the mess hall, Officer Wehby made a comment to Appellant regarding Appellant's helmet, and then called Appellant over to him. Id. The Appellant did not immediately respond to Officer Wehby and had to be told to return to Officer Wehby. At that time, Officer Wehby grabbed the front of Appellant's coat and pulled Appellant into the entrance hall in full view of all inmates in the mess hall. Id. Wehby punched Appellant on the right side of his head and ear, causing him to fall to his knees. Id. Sgt. LaTour then handcuffed Appellant and pushed him to the floor face down. Id. Wehby pulled off Appellant's protective helmet and hit him in the head with a radio. Id. While on the floor, Appellant was punched, kneed and kicked in the head while his face was being pushed directly into the floor. Id. While being held to the floor by Femia and Latour, Wehby stomped on Appellant's head, and stated "I hope you fucking die." Id. Appellant was brought to the infirmary. Id. Appellant had 2-3 seizures. Id. Appellant suffered a large raised ecchymotic area to the right side of his head, a superficial cut to the right eyebrow, his right ear was swollen and

discolored, he had 2 abrasions on his forehead, a 1-2" superficial cut on the back of his head, bruises on both of his wrists, a small open area on his right hand, 4th knuckle, his face was swollen, and he need four skin staples to close a scalp laceration. Id. There was no blood on the inside of his protective helmet. Id. This version of events was confirmed by 5 inmates, 2 nurses, and one correction officer. Id.

Officer Wehby, Sgt. Latour, and Officer Femia however, filed reports and gave interviews which tended to relate that their actions were justified because the Appellant had failed to heed their direct orders. Id. Sgt. Latour stated that he witnessed Officer Wehby call Mr. Rivera back to him after Rivera had passed Wehby on his way to the mess hall. Id. Latour stated that Rivera slapped Wehby's hand, Rivera pushed Wehby and then Rivera pinned Wehby against the wall. Id. It was only after these actions that Latour pushed Rivera to the floor. Id.

This version of events, under oath, was ultimately found to be false and led to the dismissal of Latour and Femia from defendant's employ. A103. Wehby was permitted to retire from Defendant's employ. A115.

As a result of the investigation by defendant, criminal charges were instituted against Officer Wehby. (People v. Wehby, Ind. No. 2011-460 Oneida

County). Although the jurors were unable to reach a verdict after trial, Wehby pled guilty to Official Misconduct in violation of P. L. §195.00(1). A112.

Appellant retained an attorney and was granted permission to file a late claim. This claim was assigned Claim number 120113. A196. It set forth a single claim for assault and battery. Id. Defendant filed a Verified Answer dated July 26, 2011. A138. The Answer asserted no defenses, and generally denied most of the allegations in the complaint. Id.

Discovery proceeded, various assistant attorney generals were assigned to the case, Appellant changed attorneys, and the case was transferred from one judge to another. Appellant hired Goldberger & Dubin, P.C. on January 15, 2013, one day after the statute of limitations ran on any 42 U.S.C. § 1983 actions that might have been brought on Appellant's behalf, and 2 years after any additional intentional tort claims could have been brought in State or Federal Court on behalf of the Appellant.

The Note of Issue was filed on August 31, 2015. A142. At the time the Note of Issue was filed, there were two outstanding motions, one by the plaintiff and one by the Defendant. A145. The Plaintiff's motion was for the issuance of subpoenas: to the Oneida County District Attorney for evidence used at the trial of Michael Wehby; to the Department of Corrections for medical reports of their employees; and to the Inspector General of defendant for documents

material and necessary to the prosecution of this action. Id. The Defendant sought to amend its answer to include three affirmative defenses: that the correction officers involved were acting beyond the scope of their duties; that Appellant's claims should be subject to comparative negligence; and, that some third party was responsible for Appellant's injuries. Id. This motion was filed on or about June 26, 2015, 5 1/2 years after the events in question, and over 4 years from the time of Defendant's initial answer. Id. It should be noted that Appellant did not cause any delays in the prosecution of this case from the time new counsel was substituted, and that all discovery sought by Defendant from Appellant with the exception of fresh medical releases had been completed prior to counsel's substitution. A231.

Appellant opposed Defendant's motion to amend based upon the extreme prejudice that would accrue to Appellant as a result of such an amendment. A345. Specifically, in addition to arguing that the defense was not meritorious, and that it was waived, Appellant argued,

> 15. Additionally, for four years, Appellant has engaged in discovery, and proceeded believing in good faith, that Defendant would not be seeking to avoid liability under a theory that a correction officer, on duty, would be acting outside the scope of his duties.
>
> 16. If such an affirmative defense had been timely pled, Appellant could have brought suit under

a different theory in a court which would have jurisdiction over that correction officer.

17. At this late date, the Appellant would have absolutely no recourse against the officer individually due to statute of limitations issues.

18. Such a complaint would be out of time and would not relate back under the CPLR or the Federal Rules of Civil Procedure.

19. Thus, Appellant would suffer real and irreparable prejudice if Defendant were permitted to add this affirmative defense. Id.

By way of Order dated February 18, 2016, the Court of Claims granted defendant's application to amend its answer, and granted Plaintiff's application to the extent that the defendant was to provide the Court with the materials responsive to Plaintiff's request from the Inspector General in camera, with proposed redactions. A165. The Court of Claims specifically held that the Appellant "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." Id. Defendant filed their amended answer on or about March 4, 2016. A176.

On or about July 12, 2017 Appellant filed a motion for Summary Judgment. Defendant cross-moved for the same relief. By way of an Order dated September 14, 2017, the Court of Claims granted the cross-motion,

resulting in dismissal of the claims of Appellant. A022. The basis for the Court's decision is that Officer Wehby was not acting within the scope of his employment. Id. There is no indication in the Order that the actions of the other officers involved were considered. Indeed, the facts as found by the Court do not even mention the full actions of Sgt. Latour, or any actions of Officer Femia. In a footnote, the Court acknowledged that Appellant could have filed other causes of action, almost mirroring the argument made by Appellant in opposition to Defendant's motion to amend their answer. Id. fn 6. The Court failed to acknowledge that at the time it had granted the prior motion to amend, the statute of limitations on any such other claims had run. Id.

Appellant filed a timely notice of appeal of the September 14, 2017 Order on September 25, 2017. A007. 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 by the Appellate Division on December 7, 2017. A011. An amended Notice of Appeal was filed on December 12, 2017. A008. The Appeal was denied by the Appellate Division on June 8, 2018. Claimant's motion for leave to appeal was granted by this Court on September 6, 2018. This appeal follows.

ARGUMENT

I. The Appellate Division Erred in Affirming the Court of Claims Grant of Defendant/Appellee's Motion for Summary Judgment when it held that Defendant's Employees were not acting Within the Scope of Their Duties as Correction Officers

The Court of Claims held, and the Appellate Division affirmed, that the defendants are not liable to Mr. Rivera because its correction officer employees were acting beyond the scope of their duties. This Court has not directly decided this issue in the circumstances similar to that of Mr. Rivera. The Court of Claims, and then the Appellate Division, relied upon two cases involving corrections officers to make this determination, Sharrow v. State of New York, 216 A.D.2d 844 (3d Dept. 1995), and Cepeda v. Coughlin, 128 A.D. 995 (3d Dept. 1987). The decision of the Appellate Division must be reversed when the circumstances of Mr. Rivera's case both factually and procedurally are more similar to those in Cepeda, and more importantly, because the State is responsible for the acts of their employees, when such employees "through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstance and occasion…inflict[s] an unjustifiable injury upon another." Rounds v. Delaware Lackawanna & W. R. R. Co., 64 N.Y.2d 129, 134 (1876).

More recently than the decision in Rounds, this Court decided the case of Riviello v. Waldron, 47 N.Y.2d 297 (1979). 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. In the spirit of Rounds this Court stated that 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." Riviello, supra.

In cases involving corrections officers in this State, even the defendant herein admits that it is within the scope of a corrections officer's duties to use force against prisoners. Regulations allow for the individual officer to use his own discretion as to when and how much force is to be used against a prisoner. 7 N.Y.C.R.R. § 251-1.2(a).

Defendant relies upon a number of cases to support its position, although the Court of Claims relied heaviest upon Sharrow v. State of New York, 216 A.D.2d 844 (3d Dept. 1995). Sharrow, was a case in which officers that had been sued individually in a Federal Civil Rights action pursuant to 42 § 1983 sought defense

and indemnification from the State through an Article 78 proceeding. This case, its forebears and progeny interpret Section 17 of the Public Officers Law which sets forth the standard upon which courts must adhere in determining whether public officers are entitled to defense and indemnification when sued individually for acts which occur while engaged in official duties in either State or Federal Court. In Sharrow the Court held that the officers were acting beyond the scope of their duties and not entitled to indemnification from the State. 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.

Likewise, in Spitz v. Coughlin, 161 A.D.2d 1088 (3d Dept. 1990), the plaintiff was sued individually in Supreme Court, and sought indemnification from the State. It was held that the plaintiff was acting outside the scope of his employment for purposes of indemnification when he knowingly and intentionally allowed other officers into a prisoner's jail cell for the purpose of beating the inmate. This was found to be a pre-planned attack. Once again, there is a difference factually between Spitz and the instant matter. In the instant matter, three corrections officers engaged in an unjustified assault while ostensibly

supervising inmates in the lunchroom, in full view of all inmates. There is nothing to indicate that this incident was preplanned by the officers off on a frolick of their own. This incident occurred during the regular course of business for these officers.

The instant matter is more like the case of Gore v. Kuhlman, 217 A.D.2d 890 (3d Dept. 1995), in which the court dismissed plaintiff's claims in Supreme Court because the defendants were found to have been acting within the course of their employment. The defendants in Gore, were plaintiff's employment supervisors, and the acts complained of were supervisory in nature, even though they might have been a "departure from the normal methods of performing the duties of employment." Gore, supra.

In Murray v. Reif, 36 A.D.3d 1167 (3d Dept 2007), the court reinstated a claim brought in Supreme Court against a correction officer when based upon the allegations of the claim, it could not be decided whether the officer was, or was not, acting within the scope of his employment.

In Cepeda v Coughlin, 128 A.D.2d 995, 996, 997 (3d Dept. 1987) appeal denied, 512 N.E.2d 550; 70 N.Y.2d 602(1987), the court held that the claim was improperly filed in the Supreme Court when the acts of the defendant correction officers were held to be within the scope of their duties. The allegations in Cepeda, were that corrections officers used excessive force in response to inmate

violence. In holding that the officers were acting within the scope of their employment, 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."

In addition to the factual differences from Mr. Rivera's case (with the exception of the Cepeda case), these cases also demonstrate one of Mr. Rivera's points set forth in his leave application. Under the present state of the law, an inmate is forced to file two actions in two different courts on any claim involving the excessive use of force by a correction officer. This creates a situation in which a plaintiff can never be successful in being compensated for his damages. For a successful action to be brought in Supreme Court against an individual defendant, it must be found that the officers acted outside the scope of their duties, otherwise the action must be dismissed, because it should have been brought in the Court of Claims. Or, the claimant could file in Federal Court for a civil rights violation. But, if either the Supreme Court or Federal action is successful, the State will not be obligated to pay. If that same claim had been initiated in the Court of Claims, it would not be successful under the present state of the law, and the State will not be obligated to pay. The only way a claimant could be successful is if excessive force is used by an officer AFTER the claimant has used some type of force. Only

inmates who instigate violence with an officer would be entitled to compensation. [1] This cannot be the intent of the governing laws which waive sovereign immunity. It cannot be the proper interpretation of the conjunction of the Court of Claims Act, Public Officers Law and Corrections Law and still be consistent with the waiver of sovereign immunity.

Although this Court has not decided this particular issue, in Arteaga v. New York, 72 N.Y.2d 212 (1988), this Court held that absolute immunity is applicable to judicial and quasi-judicial acts of corrections officers and administrators. While discussing those facts, this Court did state that a cause of action against correction officers would lie in the Court of Claims "for unlawful actions of employees taken beyond their authority or in violation of the governing rules and regulations ." Arteaga, citing, Riviello v. Waldron, 47 N.Y.2d 297, 303; Cepeda v. Coughlin, 128 A.D.2d 995, 996, 997; Della Pietra v. State of New York, 71 N.Y.2d 792. This recognition tends to demonstrate that the acts of the officers in the instant matter are indeed cognizable in the Court of Claims, even if they acted beyond authority or in violation of rules and regulations.

[1] The State cites to Trenching v. McGrath, 2018 U.S. Lexis 101783, 17-cv-1256 (N.D.N.Y. 2018) to support this proposition. Cepeda v. Coughlin, 128 A.D.2d 995, 996, 997 (3d Dept. 1987) appeal denied, 512 N.E.2d 550; 70 N.Y.2d 602(1987) also involves excessive force claims by officers after an inmate disturbance.

It is undisputed that Officer Wehby, Sgt. Latour and Officer Femia were in uniform and on duty supervising inmates in the mess hall prior to and during the incident. It is further undisputed that these officers believed that they were controlling an out of control inmate at the time they undertook their actions. If these officers were not supervising inmates when this incident occurred, then all of the remaining inmates in the mess hall were completely unsupervised.

Using the five-factor test of Riviello, supra, it is clear that these employees were acting within the scope of their employment. The time, place and occasion of the acts were at breakfast, in the mess hall, while supervising inmates. The history of the relationship between the employer and employee in regular practice, whether the act is one commonly done by employees, and the extent of departure from regular practices of the employer all weigh in favor of acting within the scope because of the wide discretion correction officers have in their use of force against inmates. It is part of the regular course of the corrections business and is considered to be "normal." Based upon such discretion in applying force, the use of excessive force is certainly one that the employer could have reasonably anticipated. These officers were discharging their duties even though they were discharging their duties irregularly and in disregard of appropriate rules and regulations. These officers did not enter into a conspiracy to enter Mr. Rivera's cell and beat him without knowledge of superiors. These officers did not hide

their activities by pulling Mr. Rivera into an empty secluded space and beating him. These officers intended to show all the inmates that they were supervising that if you do not immediately respond to an officer when spoken to you will be subjected to discipline. Discipline that is immediate, physical and violent.

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, especially when the Court of Claims did not even consider the full actions of Sgt. La Tour or any acts of Officer Femia.

Other jurisdictions have rules similar to that of New York. In California, the rules for determining whether an employee is engaged in the scope of his employment has been summarized as follows:

> For example, "the fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." Thus, acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment. Moreover, "'where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.' It is also settled that an employer's vicarious liability may extend to willful and malicious torts of an employee as well as negligence. Finally, an employee's tortious act may be within the scope of employment even if it contravenes an express company rule and confers no benefit to the employer. Farmers Ins. Group v. County of Santa Clara, 11 Cal.4th 992, 906 P.2d 440, 47 Cal.Rptr.2d 478 (1995)(internal citations omitted).

In Indiana, “an employee's tortious act may fall within the scope of his employment "if his purpose was, to an appreciable extent, to further his employer's business." Stropes v. Heritage House Children’s Ctr. (1989), Ind., 547 N.E.2d 244, 247. Even the commission of an intentional criminal act may be considered as

being within the scope of employment if "the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope." Kemeny v. Peters, 622 N.E.2d 1296 (1993). In New Hampshire, "[i]t has long been accepted…that even malice in the use of excessive force will not require a finding that the force is outside the scope of employment, if at least some degree of force would be appropriate. Dangle v. Portsmouth, 534 A.2d 689, 129 N.H. 561 (1987)(citing, Richard v. Company, 79 N.H. 380, 383, 109 A. 88, 91-92(1920)). In Bosch v. Cherokee, 305 P.3d 994 (2013), the Oklahoma Supreme Court held that the State would be liable for intentional torts committed by their employees as long as such torts were committed within the scope of employment. "As a general rule, it is not within the scope of an employee's employment to commit an assault on a third person. However, this general rule does not apply when the act is one which is ' fairly and naturally incident to the business,' and is done ' while the servant was engaged upon the master's business and be done, although mistakenly or ill advised, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business.' An employee's act is within the scope of employment if it is incident to some service being performed for the employer or arises out of an emotional response to actions being taken for the employer." Bosch citing, Nail v. City of Henryetta, 1996 OK 12, 911 P.2d 914. In Nail, liability was found when a

police officer shoved an intoxicated 15-year-old who was handcuffed and not resisting arrest. In Bosch itself, the plaintiff was attacked while standing at a booking desk at the jail while restrained with his hands behind his back. Even in Texas, ["a]n official acts within the scope of her authority if she is discharging the duties generally assigned to her." Lancaster v. Chambers, 37 Tex. Sup. J. 980 (1994). Thus, in other jurisdictions with laws very similar to ours, the acts of the correction officers against Mr. Rivera would be considered to be within the scope of their official duties.

Appellee may also argue that if the subject officers were not acting within the scope of their duties, then the Court of Claims lacks subject matter jurisdiction over this matter. This argument is nothing more than a red herring. The Court of Claims is the sole venue available to sue State Officers acting in their official capacities. Morels v. Balasubramanian, 514 N.E.2d 1101; 70 N.Y.2d 297 (1987). Thus, Appellant's suit against the Department of Corrections is only cognizable in the Court of Claims when his personal injury was caused by the tort of an officer or employee of the state while acting as such officer or employee. Court of Claims Act, § 10, subd 3. There is no doubt these men were on duty, in uniform and "on the clock." Thus, the officers were official employees of the State. The question, were the employees acting beyond the scope of their employment negating the State's liability under respondeat superior, is separate from the jurisdictional issue.

"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). These words, 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 Appellate Division erred in affirming that decision, these decisions must be vacated, and Appellant must be permitted to proceed to trial.

II. The Appellate Division Erred in Affirming the Court of Claims Decision to Permit the Defendant/Appellee to Amend its Answer when such Amendment Caused Great Prejudice to the Claimant/Appellant

While it is true that leave to Amend a pleading should be freely granted, when the opposing party will suffer prejudice, leave must be denied. In the instant matter, the Court of Claims granted defendant leave to amend its answer 6 years after the events in question, well past any applicable statute of limitations or relation back period, to include affirmative defenses that Appellant could and should not have had to address due to the lateness of the amendment. The very prejudice which Appellant asserted in opposition to the motion to amend caused dismissal of the action. Because it was an abuse of discretion to have allowed Defendant to Amend its Answer, that decision must be reversed thereby allowing this matter to proceed to trial.

An affirmative defense is waived if it is not pled in an Answer or the subject of a pre-answer motion to dismiss. S*ee* CPLR 3018 (b); Bryant v. Broadcast Music, Inc.*,* 27 A.D.3d 683, 810 N.Y.S.2d 910 (2d Dept 2006). The Defendant/Appellee herein offered no Affirmative Defenses in their initial Answer. Defendant never asserted that its employees were acting beyond the scope of their employment, and Plaintiff had the right to rely upon this admission. After five- and one-half years after the events in question, four- and one-half years of

litigation, discovery complete, and the case in a trial posture, Defendant was permitted to amend its Answer to include this affirmative defense.

The Court of Claims correctly cited the law regarding the ability to amend an answer. Appellant submits to this Court that the Court of Claims application, and the Appellate Division's affirmance of that application of these facts to that law was error. It is uncontested that if an amendment is meritorious and does not cause prejudice to the opposing party leave to amend an answer should be freely given. (McGrath v. Town of Irondequoit, 120 A.D.3d 968, 969, 990 N.Y.S.2d 758; *see* CPLR 3025 [b]). "Prejudice to the opposing party is shown where that party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position." (Opinion 2016 order)(citing cases).

Appellant argued to the Court of Claims that leave to amend could result in the ultimate prejudice to Appellant, dismissal of his claim. Defendant sought to include the affirmative defense of its employees acting beyond the scope of employment. While not conceding that such a defense would be meritorious, Appellant argued that if the amendment were permitted, he would be barred from pursuing his claim if it were found that the employees were acting beyond the scope of their duties. Appellant submits to this Honorable Court that dismissal of Appellant's action is the type of prejudice which fits the definition of having been

hindered in preparation or prevented from taking measures in support of its position. Specifically, had this affirmative defense been timely pled, Appellant could have brought an appropriate action in Federal Court against the Department of Corrections, as well as the individual officers, or focused discovery upon the proving of the elements necessary to demonstrate that the officers were acting within the scope of their duties . Haywood v. Drown, 9 N.Y.3d 481 (2007). Instead, knowing all the facts, the State chose to engage in tactics which caused prejudicial surprise to Mr. Rivera.

The State argued below that the mere loss of a cause of action should not be considered prejudice in the calculus of a motion to amend. Citing to Williams v. NY Cent. Mut. Fire Ins., 108 A.D.3d 112 (4th Dept 2013), the State argued that the prejudice "must be some unfair detriment in the case *currently being litigated,* not in other hypothetical lawsuits that could have been but were not, brought against other parties, in other courts." A380. This interpretation of the law by the State was based upon the statement by the Court in Williams, taken out of context, that "[t]he fact that an amended pleading may defeat a party's cause of action is not a sufficient basis for denying [a] motion to amend" (Matter of Gagliardi v. Board of Appeals of Vil. of Pawling, 188 A.D.2d 923, 923, *lv denied* 81 N.Y.2d 707)." However, that statement must be read together with the correct statement of law "[p]rejudice may be found where a party has incurred some change in position or

hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment." In Williams, the defendant insurance company was permitted to amend its answer to include the defense that plaintiff was not a covered person and that they had no duty to insure. Not only did the insurance company learn the facts to support that defense from the plaintiff during the course of the litigation, but had this defense been in the initial Answer, the plaintiff could not have recovered in any court. The Court also addressed equitable estoppel, the right of the plaintiff to rely upon the initial answer. In holding that there was no waiver of the defense, the court noted that the defendant had disclaimed coverage from the beginning of the action and reserved the right to assert further grounds for non-coverage in their Answer.

Mr. Rivera would submit that had this defense been contained in the original pleading, at least two things would have been different. First, he would have conducted Discovery in a different manner. Second, he would have filed individual actions against the officers either in Supreme Court or in Federal Court. This distinguishes his case from Williams in every way. In this case the State did not assert any defense, affirmative or otherwise. In this case, they did not learn of the facts supporting the defense from the plaintiff. Mr. Rivera could have brought additional suits elsewhere had the defense been timely asserted. Most

importantly, waiver or estoppel should apply here because there was no reservation of rights nor any inkling that such a defense would ultimately be asserted.

In supporting their arguments below, the State cited to numerous cases in which leave to amend was properly granted because the defendant had learned the information necessary to assert a new defense from the plaintiff during the course of litigation. See e.g., Kimso Apts LLC v. Ghandi, 24 N.Y.3d 43 (2014); Murray v. New York, 43 N.Y.2d 400 (1977). In the instant case, that is certainly not the case. The State was well aware of all facts necessary to plead the defense at the time it served and filed its original Answer.

The lateness without excuse of the amendment coupled with the resulting prejudice further demonstrates the abuse of discretion of the lower court. Edenwald Contracting Co., Inc. v. City of New York 60 N.Y.2d 957, 959 (1983). The Defendant, State of New York had access to information at all times which would have permitted them to assert this affirmative defense since the initiation of the action below. After a thorough investigation, The State of New York brought criminal proceedings against Officer Wehby in 2011. Wehby pled guilty to Official Misconduct on September 17, 2012. This was a matter of public record. At the same time, this Defendant did not bring criminal charges against the other officers involved. There was absolutely no reason that the defendant could not have pled this defense in its initial answer, or amended that answer years ago.

Likewise, Appellant had no reason to believe that the defendant would be relying on this defense because of these very circumstances. Had this affirmative defense been pled in a more timely fashion, as stated above, Appellant could have protected his cause of action by filings in other appropriate forums. But after 5 years Appellant should have been able to rely upon defendant's admission that their employees were acting within the scope of their employment.

Throughout the four and one-half years of litigation in this matter, plaintiff conducted discovery and prepared the case in reliance upon the defendant's waiver of any scope of employment defense. This was reasonable reliance when both parties were fully aware of the facts and circumstances underlying the case. At a minimum, the amendment caused not only prejudice to appellant, but it was a surprise after the length of time and the proceedings which had been had before.

Discovery would have focused more on whether the actions of these officers was foreseeable to their superiors, or foreseeable in the performance of their duties as correction officers. But having made this application after the close of discovery, and nearly 6 years after the fact, Appellant was prejudiced by being unable to go back in time to do further discovery, or even had he been able to conduct further discovery, after a passage of time as long as this, it is unlikely that any evidence of value would have been obtainable from these witnesses. Moreover, Appellant was justified in his reliance on the defendant's waiver of this

defense, and further, was entitled to treat this as an admission that the subject officer was acting within the scope of his duties. When there is an admission of a fact, there is no need for a litigant to pursue discovery to prove that fact.

Appellee may argue that mere passage of time is not a reason to deny amendment. While this is a fair statement of law, the full statement is, that passage of time should not bar amendment, unless there is prejudice or surprise to the opposing party. Stengel v. Clarence Materials, 144 A.D. 2d 917 (4th Dept. 1988). In this case, there was not only prejudice to discovery, but it was a surprise that after all of these years, with the knowledge held by the defendant for that same period of time, that such a defense would be asserted. As set forth above, the defendant's waiver of this defense acted as an admission that the officer was acting within the scope of his duties, and there was no reason for appellant to pursue any discovery to prove a fact which had already been admitted.

Because the decision by the court below to grant leave to defendant to amend its answer, and the affirmance of that decision resulted in prejudice to Appellant it was an abuse of discretion and it must be reversed.

CONCLUSION

Wherefore, it is most respectfully requested that the decision and orders of the Court of Claims and Appellate Division, Fourth Department be vacated and

that this case be remanded for trial, and for such other and further relief that this Court may deem just and proper.

Dated: October 31, 2018

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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