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COURT OF APPEALS

STATE OF NEW YORK

JOSE RIVERA,

Appellant,

-against-

NO. 92

STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
October 24, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 92, Rivera v. The
3 State of New York.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Good afternoon, Counsel.

6 MS. VAN MALDEN: Good afternoon. May it please
7 the court; good afternoon, everyone. My name is Stacey Van
8 Malden. I represent Mr. Jose Rivera. And I may
9 respectfully request four minutes for rebuttal?

10 CHIEF JUDGE DIFIORE: Four?

11 MS. VAN MALDEN: Four, please.

12 CHIEF JUDGE DIFIORE: You may.

13 MS. VAN MALDEN: I'm here today to respectfully
14 request that you reverse the decision of the Fourth
15 Department that affirmed the decision of the Court of
16 Claims, which granted summary judgment to the defendant
17 upon the affirmative defense - - -

18 CHIEF JUDGE DIFIORE: Counsel, was the correction
19 officer, under the circumstances presented here, was he
20 authorized to use any physical force, under those
21 circumstances?

22 MS. VAN MALDEN: The circumstances - - - the
23 facts are that Mr. Rivera - - - Ofc. Wehby asked Mr.
24 Rivera, who wears a protective helmet, what kind of
25 stickers he'd like for that helmet. And Jose said, please



1 don't do that in front of the other inmates. And then he
2 proceeded on to the chow line. Ofc. Wehby called him back
3 and he ignored him. So this was a violation of discipline.

4 When ultimately he was - - - did go back, is when
5 the force began, so to speak.

6 JUDGE WILSON: There's also evidence in the
7 record that he - - - that Mr. Rivera was impolite; is that
8 right?

9 MS. VAN MALDEN: It - - - apparently he dropped
10 an F bomb and said go F yourself, which can make somebody
11 emotional, and even though - - -

12 JUDGE STEIN: But this isn't what the claimant
13 was alleging in the lawsuit, and it's not what the IG
14 found, it's not what the State was claiming. So it's a
15 little confusing to me as to what - - - whether there
16 really are - - - whether those allegations on the part of
17 the officer are relevant to this at all, whether there
18 really is any - - - any disputed issue of fact as to what
19 happened, which is not what you're suggesting now, in this
20 particular lawsuit, in the Court of Claims.

21 MS. VAN MALDEN: Well - - - well, that's what
22 happens when you grant summary judgment. There's only - -
23 - the - - - the facts cannot be brought out entirely. It
24 was - - - Jose does - - -

25 JUDGE STEIN: Well, no, no, no. The - - - the -

1 - - in opposition to the summary judgment motion, you
2 attempt to present the - - - the - - - the conflicting
3 facts, but so - - - so yes, you do have an opportunity to
4 bring them all out.

5 MS. VAN MALDEN: Well, he - - - the facts have
6 always been that he was imp - - - impolite, so to speak,
7 and that that was what brought on the initial aggression
8 from Ofc. Wehby. Now the State is saying that he is - - -
9 it was unprovoked. There is a provocation there.

10 And regardless of what Wehby did, there were two
11 other officers there who were acting within the scope and
12 were not ment - - - they are in the initial claim. The
13 initial claim names Ofc. Wehby, Sgt. Latour - - -

14 JUDGE STEIN: But there's no allegation that they
15 - - - that they exerted any violence, any force.

16 MS. VAN MALDEN: No, but they did - - -

17 JUDGE STEIN: And there - - - and there are - - -

18 MS. VAN MALDEN: Well, there's acting in concert.
19 And so many of my clients who have been found guilty of
20 acting in concert did not wield the gun, did not wield the
21 knife, but they stood around. That's what we have the - -
22 -

23 JUDGE WILSON: Was the - - -

24 JUDGE RIVERA: Counsel, I thought a part of your
25 argument was that there's not a dispute that at a minimum,



1 what these two other officers did was come to Wehby's - - -
2 how's it pronounced, I'm sorry - - - [Way-be's]?

3 MS. VAN MALDEN: [Way-be].

4 JUDGE RIVERA: Wehby's assistance and - - -

5 MS. VAN MALDEN: And if they - - -

6 JUDGE RIVERA: - - - and restrain - - - excuse me
7 - - - and restrained your client - - -

8 MS. VAN MALDEN: Which is - - -

9 JUDGE RIVERA: - - - which - - -

10 MS. VAN MALDEN: That's right.

11 JUDGE RIVERA: - - - restraint of an inmate seems
12 to be within the scope of employment.

13 MS. VAN MALDEN: I agree with you completely.
14 And that has been the argument, that their - - - when Sgt.
15 Latour and - - - and Femia are responding to what they - -
16 - they are not next to Wehby when this starts. They
17 respond from different parts of the mess hall. And what
18 they're seeing is an officer that perhaps needs assistance.

19 Now, whether they were telling the truth or
20 lying, they were both - - - Latour and Femia ultimately
21 were dismissed, one for lying about the incident, one for
22 lying and participating. Strangely enough, Wehby was
23 permitted to retire. Although he was indicted for assault
24 2 and 3, there's a hung jury.

25 Ultimately, he pleads guilty to official



1 misconduct that during the course of his employment he
2 acted in an unauthorized manner.

3 JUDGE RIVERA: Yeah, but getting back to these
4 other two officers for one moment, you say they came in
5 later. You said it seems to be undisputed, because even
6 the State has it in their brief, that they participate in,
7 at a minimum, the restraint - - - right - - - of the
8 claimant.

9 MS. VAN MALDEN: Correct.

10 JUDGE RIVERA: Okay.

11 MS. VAN MALDEN: So they're act - - - they are
12 acting within the scope of their authority, because - - -

13 JUDGE WILSON: Well, and there was a - - -

14 JUDGE RIVERA: Well, does - - - there's - - -
15 there's at least a fact question as to what they thought
16 was going on, correct?

17 MS. VAN MALDEN: Correct; correct. And the Court
18 of Claims did not take into consideration any of the
19 actions of the other officers and focused solely on - - -

20 JUDGE FAHEY: Is that because the court rejected
21 a negligent supervision claim and said it wasn't carried
22 over from the original claimant?

23 MS. VAN MALDEN: Well, this was even - - - even
24 just - - - we have - - -

25 JUDGE FAHEY: But just stick with my question.



1 Is - - -

2 MS. VAN MALDEN: No, the question is we only - -
3 -

4 JUDGE FAHEY: - - - is that - - - is that why the
5 court didn't, because it rejected the negligent supervision
6 claim, so he didn't take into account the sergeant and the
7 other officer?

8 MS. VAN MALDEN: I don't know what the court was
9 thinking, most respectfully. I - - - I can't answer that
10 question, because ultimately the only - - -

11 JUDGE FAHEY: Let me ask this, then. Was the
12 negligent supervision claim brought in the - - - in the
13 claim - - - the - - - that's part of the underlying action
14 here?

15 MS. VAN MALDEN: No. There's - - -

16 JUDGE FAHEY: All right - - -

17 MS. VAN MALDEN: - - - as - - - just an assault.

18 JUDGE FAHEY: - - - was it brought in the
19 original complaint?

20 MS. VAN MALDEN: No, the original claim was the
21 assault claim.

22 JUDGE FAHEY: So there was never a negligent
23 supervision claim brought in any forum?

24 MS. VAN MALDEN: No, there was a claim brought.
25 It was extraordinary - - - extraordinarily late. It was



1 filed without leave of court, and it was ultimately
2 stipulated out of the case.

3 JUDGE FAHEY: I see.

4 JUDGE GARCIA: With prejudice, it was dismissed.

5 JUDGE FAHEY: I see.

6 MS. VAN MALDEN: Yes, it was.

7 JUDGE FAHEY: Thank you.

8 JUDGE RIVERA: Yes, but your argument now is not
9 about supervision?

10 MS. VAN MALDEN: Not at all. Not at all. There
11 are three officers, corrections officers - - -

12 JUDGE FEINMAN: So - - -

13 MS. VAN MALDEN: - - - who are engaged - - -

14 JUDGE FEINMAN: - - - I - - - I want to focus, if
15 we can, for a moment, on the various factors that are set
16 forth in Riviello. And if we are trying to figure out
17 whether the officer's conduct here is within or without the
18 scope of his employment, do we look at those factors with
19 equal weight? And if so, did the Court of Claims do that,
20 or did it sort of just decide this based on one factor,
21 i.e., the fourth factor?

22 MS. VAN MALDEN: All the factors - - -

23 JUDGE FEINMAN: What I'm trying to get you to do
24 is discuss how the five factors apply to the facts here?

25 MS. VAN MALDEN: The factors - - - if - - - we'll



1 start with the - - - it's very difficult for me to read and
2 see at the same time. The connection between time, place,
3 and occasion. They're in the mess hall. They are
4 supervising in - - - emp - - - employees - - - they were
5 supervising the inmates and making sure they take the
6 correct number of plate - - - you know, plates and forks.
7 So this is definitely a factor that weighs in favor of
8 being within the scope.

9 History and relationship between the employer and
10 employee. Force and excessive force happens, because of
11 the nature of the job. This court has - - -

12 JUDGE STEIN: But - - -

13 MS. VAN MALDEN: - - - recognized that.

14 JUDGE STEIN: - - - but that sounds to me like
15 the aid and agency theory or whatever. And I - - - I don't
16 know that we've ever adopted that, that any use of force,
17 because of the situation, is within the scope of
18 employment, because some use of force is permitted.

19 For example, let's take an extreme one - - - you
20 know, a sex offense, okay. If you put somebody in a
21 position where they might be able to do that, and does that
22 mean that the State has waived its sovereign immunity with
23 respect to that, that it's within the scope of employment?
24 Maybe that's a little too extreme.

25 But - - - but just to - - - and to back that up a



1 little bit, I - - - I think we have said that it is one
2 thing to - - - to you know, exceed - - - where there's
3 force permitted, to exceed the level of force permitted,
4 and there's another to - - - to completely depart from the
5 standard of conduct and from - - - from anything that's
6 permissible.

7 MS. VAN MALDEN: I don't disagree. But when
8 you're talking about - - - when - - - when you take a
9 prisoner into a separate place and you beat him, that's a
10 frolic of your own, so to speak. But when you are
11 essentially showing all these other inmates that if you
12 talk back to me and you don't listen, you're going to be
13 immediately disciplined; did he go too far? Sure. Of
14 course. But was it because of the passions aroused by the
15 situation that he had been placed in and the discretion
16 given to him by the Department of Corrections? Also sure.

17 JUDGE RIVERA: When this started, it was visible
18 to inmates?

19 MS. VAN MALDEN: Absolutely. It - - - all of it
20 was visible to inmates. What I found out many years after-
21 the-fact was - - -

22 JUDGE RIVERA: Well, I thought they were behind a
23 door?

24 MS. VAN MALDEN: They were not behind - - - they
25 were - - - they were in full view.



1 JUDGE RIVERA: I'm sorry, the - - - the door was
2 closed, and they were in some other section, yeah.

3 MS. VAN MALDEN: No, they were - - - they were in
4 view of all the inmates who were able to give witness
5 statements to the Inspector General.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MS. VAN MALDEN: Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: Counsel?

9 MR. WOODS: May it please the court, Patrick
10 Woods on behalf of the State of New York. I feel like I'm
11 about to get a question.

12 JUDGE FEINMAN: Well, I - - - I want to start
13 where - - -

14 JUDGE RIVERA: Several. Several.

15 JUDGE FEINMAN: - - - I ended with her, which is
16 if you could walk through the five factors and whether or
17 not you think the factor 4 is a determinative factor?

18 MR. WOODS: I think it can be a determining
19 factor. I don't think that they need to all be
20 individually weighed the same. I think it depends on the
21 facts of the case. And I think that's particularly true
22 because some of the factors can bleed into each other in
23 terms of what facts matter.

24 And here, a number - - - a number of the factors
25 - - - it's not just one factor here that matters. There's



1 nothing in this record that shows that the State should
2 have known that this officer was likely to do something
3 like this, that it was foreseeable to the State. There's
4 no authorization for - - -

5 JUDGE FEINMAN: Foreseeability is factor 5. I'm
6 just trying - - -

7 MR. WOODS: Right.

8 JUDGE FEINMAN: - - - sort of think about how
9 they end up balancing out.

10 MR. WOODS: Well, I think certainly, where one of
11 the factors - - - where somebody's acting completely
12 outside of the - - - of - - - whether it's completely - - -
13 where it's unforeseeable, where there's no history of it
14 happening, where there's no authorization for this kind of
15 conduct, and where there's no benefit to the employer from
16 the conduct, that those factors can outweigh and should
17 outweigh another factor, as in - - - as in time and place,
18 for example - - - it being while they're on duty.

19 JUDGE RIVERA: So why - - - why - - - why isn't
20 there a material triable issue of fact as to what - - - not
21 - - - not Wehby - - - is it [Way-be] or [Whi-be]? I'm
22 sorry, do you know the pronunciation?

23 MR. WOODS: I have - - - I have been pronouncing
24 it [Wee-be].

25 JUDGE RIVERA: [Wee-be]. Okay. One of the



1 above. But that's the officer I want to talk about. The
2 other two officers, Sgt. Latour and Ofc. Femia, I believe
3 is how that name is pronounced - - - in any event, why
4 isn't there a - - - a material triable issue of fact as to
5 whether or not they were acting within the scope of
6 employment, since they're not the ones who initiate the
7 beat-down? That's Ofc. Wehby - - - or [Wee-be], however
8 it's pronounced. And - - - and they come later, and they
9 are restraining him, which allows, of course, for this
10 beating. But they may very well believe that they are
11 coming to the aid of an - - - of a correction officer,
12 who's at risk, in danger, been provoked?

13 MR. WOODS: Well, I'll say three things about
14 that.

15 JUDGE RIVERA: Yes.

16 MR. WOODS: First, to the extent that there's
17 liability to - - - supposedly being ascribed on the basis
18 of the other officers, that wasn't really in front of the
19 Court of Claims. Part of the reason that the - - -

20 JUDGE RIVERA: That wasn't - - - I'm sorry?

21 MR. WOODS: That wasn't really in front of the
22 Court of Claims at summary judgment. But - - -

23 JUDGE RIVERA: Well, it's your motion for summary
24 judgment.

25 MR. WOODS: That's - - -



1 JUDGE RIVERA: You're the one who's got to show
2 that no one is acting within the scope of employment.

3 MR. WOODS: That's correct, Judge, and in our
4 motion, we argued that only Wehby was responsible for the
5 actions, and there wasn't even a reply filed to our motion.
6 The - - -

7 JUDGE RIVERA: Yes, but the - - - but the - - -
8 but the position from the claimant has always been the
9 three have been involved. I mean, there's no way around
10 that.

11 MR. WOODS: Not that the three were responsible
12 for the - - - for the assault or any of the injuries from
13 the assault.

14 JUDGE RIVERA: Well, no, no, no. He has taken
15 the position that Wehby is the one who beat him, but he has
16 never said anything other than these other two restrained
17 him. And I believe, at Wehby's criminal trial, he
18 testified that Latour could have and should have stopped it
19 and didn't. And that's the same thing that the - - - the
20 IG found.

21 MR. WOODS: That - - - that's correct, Judge.

22 JUDGE RIVERA: In fact, the IG's reports only
23 mention that Wehby used excessive force, it doesn't even
24 refer to the other two in that way.

25 MR. WOODS: That - - - that's correct, Judge.



1 And if there had been a failure to protect claim here, a
2 failure to intervene claim here, a failure to train and
3 supervise claim here, I would not be standing here in front
4 of you.

5 JUDGE RIVERA: But those are not the claims - - -
6 that's not the claims they're going on. His - - - as I
7 understand his claim, is that he's assaulted, the State is
8 vicariously liable for the actions within the scope of
9 employment of the officers that are the proximate cause of
10 these injuries. Wehby's the one who's actually beating
11 him. Maybe or maybe not that's within the scope of
12 employment.

13 But I'm asking about the other two, because I
14 find that your motion is deficient with respect to those
15 two, and that's what I'm having a problem with.

16 MR. WOODS: Well - - -

17 JUDGE RIVERA: I mean, your - - - it's your
18 motion, it's your burden.

19 MR. WOODS: I'll say two things - - -

20 JUDGE RIVERA: Yeah.

21 MR. WOODS: - - - in respect to that. The first
22 is I don't think the record shows that the other two
23 officers were not within sight of the beginning of this
24 altercation. And I don't think that it's clearly - - - I
25 don't think that you can say that it's within a scope of an



1 officer's duty or their employment to assist another
2 officer in an unjustified assault on an inmate.

3 JUDGE RIVERA: But that's what I'm saying. Are
4 there not questions of fact - - - material, triable
5 questions of fact as to what they understood?

6 MR. WOODS: I - - - I don't think there are,
7 where there isn't - - -

8 JUDGE RIVERA: With the development of these
9 events?

10 MR. WOODS: I don't think there are - - - I don't
11 think there are with respect to our burden, when we argued
12 and moved and said only this officer is responsible for the
13 conduct and there was nothing that came back - - -

14 JUDGE RIVERA: But that's your assertion.

15 MR. WOODS: - - - that there's evidence in the
16 record to the contrary.

17 JUDGE RIVERA: She's got other things that
18 they've asserted.

19 JUDGE WILSON: In page 310 of the record - - -

20 JUDGE STEIN: But did they assert them in
21 opposition to the motion, I think, is the - - -

22 MR. WOODS: They didn't file an opposition to our
23 cross-motion.

24 JUDGE RIVERA: Well, if you don't carry your
25 burden, they don't have to say anything.



1 MR. WOODS: They don't, Judge, but I - - - I
2 think we did meet our burden of pleading, here. And if
3 could - - -

4 JUDGE WILSON: At page 310 - - - at page 310 - -
5 - I'll let you go ahead in a second. At page 310 of the
6 record, there's what appears to be an internal
7 determination in the report that Ofcs. Femia and Latour are
8 not culpable, which at least to me suggests factual support
9 for the idea that they were acting - - - there was an
10 internal determination they were acting within the scope of
11 their employment.

12 MR. WOODS: I'm - - - I'm trying to pull that up.

13 JUDGE WILSON: Yeah.

14 MR. WOODS: But - - - because I don't think you
15 can argue that we've been estopped - - -

16 JUDGE WILSON: The arrest, indictment, grand jury
17 heading at the very - - - it's the last line there.

18 MR. WOODS: I'm sorry, can you - - -

19 JUDGE WILSON: Sure. There's a - - - there's a
20 heading on page 310, part of the way down the page,
21 "Arrest, indictment, grand jury".

22 MR. WOODS: Okay.

23 JUDGE WILSON: There's a last sentence there.

24 MR. WOODS: Oh. I mean, as I understand that to
25 - - - to mean it's that they're not responsible for the



1 injuries that were reflected for the assault here. And if
2 you look at the write-ups of them, the - - - there's not an
3 asser - - - neither one is found to have used excessive
4 force themselves.

5 JUDGE WILSON: Which suggests they were acting in
6 the scope of their employment in what they did, or not
7 culpable?

8 MR. WOODS: I would not agree with that, Judge.

9 JUDGE WILSON: Okay.

10 JUDGE FAHEY: Let me ask you this, on a little
11 bit larger question, the underlying public policy question
12 and the meaning of our determination here. I've always
13 found these scope-of-employment cases to be difficult.

14 But it seems the logic of a case like this, where
15 it says that when an inmate fights back, and then law
16 enforcement officers use excessive force, the - - - and the
17 inmate then sues for the use of that excessive force, that
18 that person - - - that they're - - - that they're offered a
19 defense and indemnification, and they're protected from any
20 financial liability that may result.

21 But if an inmate doesn't fight back, takes a
22 beating, and then attempts to say that - - - it was
23 excessive force to beat me in response to me using lan - -
24 - inappropriate language, then that person doesn't have the
25 right to sue.



1 So in other words, if you're getting beaten, and
2 - - - and they beat you too hard, you can sue, but if
3 you're not getting beaten and they beat you too hard,
4 there's nothing you can do about it.

5 MR. WOODS: It - - -

6 JUDGE FAHEY: You understand the conundrum that -
7 - - that this kind of creates.

8 MR. WOODS: I - - - I understand that that is
9 certainly the pet - - - position that appellant has taken,
10 but it's respectfully - - -

11 JUDGE FAHEY: Well, tell me what's - - -

12 MR. WOODS: - - - it's not - - - it's not
13 correct.

14 JUDGE FAHEY: - - - factually in - - - no, no,
15 slow down. Slow down. Granted, it's their position here
16 and I've seen it in other cases too. Tell me why that
17 isn't a correct recitation of the position?

18 I understand your point of view. I - - - I'm not
19 saying that you don't have an argument to make. That's not
20 what I'm saying at all. What the State is saying is that
21 we're only liable - - - this is the State now. The State
22 isn't liable for everything this person does. That's a
23 reasonable point of view to take.

24 My question to you is: is that factually
25 correct? Is that the state of the law here?



1 MR. WOODS: No, Judge, it is not - - -

2 JUDGE FAHEY: Okay, tell me - - -

3 MR. WOODS: - - - the state - - -

4 JUDGE FAHEY: - - - why not.

5 MR. WOODS: - - - of the law here. And - - -

6 because if - - - as I'm understanding your question, I
7 think you conflated two - - - two separate parts. It's
8 whether there's - - -

9 JUDGE FAHEY: All right, well, let me give it to
10 you again, so you do understand my question.

11 My question is - - - is if - - - if an inmate
12 resists something by a police officer and does something
13 physical, the police officer, if the response of the
14 officer - - - the correction officer is excessive force,
15 that inmate can sue because the officer was responding in
16 the course of the scope of his employment.

17 If the inmate does not do anything physical, says
18 something stupid, and then excessive force is used against
19 him, that inmate cannot sue.

20 MR. WOODS: And that's where I disagree with you,
21 Judge. It is not the case - - -

22 JUDGE FAHEY: Okay, tell me - - -

23 MR. WOODS: - - - that that inmate cannot sue.

24 JUDGE FAHEY: Tell me why not.

25 MR. WOODS: That inmate can absolutely sue. It's



1 just that that inmate may not, in the Court of Claims, be
2 able to make out a respondeat superior basis on the
3 assault.

4 JUDGE STEIN: Can they sue the State directly for
5 other liability in addition to suing the officers
6 themselves?

7 MR. WOODS: They could, Judge. They - - - in
8 addition to suing the officers themselves, they could sue
9 on a fa - - - a failure to train and supervise claim. They
10 could sue on a failure to protect claim. They could sue on
11 - - -

12 JUDGE GARCIA: Which would be a theory that would
13 accommodate your failure to control the use of excessive
14 force in the situation where there was no initiating
15 activity.

16 MR. WOODS: Correct. Those are areas where it's
17 the State's independent duty to ensure the safety of an
18 inmate, for example. And it is not the case that - - -

19 JUDGE FAHEY: So in - - - in those actions, they
20 wouldn't be brought in the Court of Claims, then, they'd be
21 brought in State Supreme Court or federal - - -

22 MR. WOODS: The ind - - - the individual actions
23 against the officer would be brought in either State
24 Supreme Court or in federal court. The failure to protect,
25 failure to train and supervise type claims would be brought



1 in the Court of Claims against the State.

2 JUDGE FAHEY: Thank you.

3 JUDGE FEINMAN: So of course, if we have court
4 consolidation or simplification, we won't have these
5 problems.

6 MR. WOODS: Well - - -

7 JUDGE FEINMAN: But that's - - - that's a
8 different - - -

9 JUDGE RIVERA: Can I just clarify that last - - -

10 JUDGE FEINMAN: - - - different debate for a
11 different day.

12 JUDGE RIVERA: - - - one? They - - - they could
13 proceed on the failure to supervise and - - - and train in
14 federal court, though, under 1983?

15 MR. WOODS: Not directly against the State of New
16 York. They could - - -

17 JUDGE RIVERA: But against the officers?

18 MR. WOODS: Against, the officer. They could not
19 - - - I mean, they couldn't make out a Monell claim,
20 because it's the - - -

21 JUDGE RIVERA: Right.

22 MR. WOODS: - - - State and not a municipality.

23 JUDGE RIVERA: A municipality, right.

24 MR. WOODS: But they - - - they certainly can
25 proceed under an Eighth Amendment violation, and because



1 the officer's outside the scope of their employment, they
2 can proceed on a simple assault, under - - - common-law
3 assault.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.
5 Counsel?

6 MS. VAN MALDEN: I just wanted to pick up a
7 little bit on that. There are other causes of action. But
8 does the inmate actually get anything? Because if they
9 file suit in federal court saying the officer acted beyond
10 the scope or in Supreme Court saying the officer acted
11 beyond the scope, the State's not going to defend nor
12 indemnify. And you get an empty judgment.

13 So there's no reason why anyone - - -

14 JUDGE GARCIA: Couldn't you sue the State for
15 failure to supervise in the Court of Claims?

16 MS. VAN MALDEN: You could.

17 JUDGE GARCIA: And wouldn't - - -

18 MS. VAN MALDEN: But - - -

19 JUDGE GARCIA: - - - they have to pay, if they're
20 found liable?

21 MS. VAN MALDEN: If they're found liable. It's a
22 lot easier, though, to - - - to get - - - it's harder - - -
23 as you go jumping up - - - we have to dem - - -

24 JUDGE GARCIA: Because it seems like you're
25 shoehorning you last claim, which is a respondeat superior



1 claim, which we have to consider sovereign immunity issues
2 and the extent to which the State has agreed to be liable
3 here - - - which is under the same theory any employer
4 would be liable and no more.

5 So we have to apply those factors. And I don't
6 think from this argument that you're asking us to overrule
7 Riviello, at least as applied here, right?

8 MS. VAN MALDEN: No, certainly not. But is a
9 corrections officer that is beating an inmate different
10 than a school para-professional who uses corporal
11 punishment that's absolutely against all the rules, but yet
12 within the scope of employment? Is it - - -

13 JUDGE FEINMAN: What about the DHL worker who
14 gets into a road rage situation, and takes out his, you
15 know, I don't know, baseball bat, and goes and smashes the
16 window of the car in front of him, beats the other
17 passenger?

18 MS. VAN MALDEN: That - - - DHL - - - I - - - I -
19 - - their - - - the court - - -

20 JUDGE FEINMAN: To just take it out of the
21 government concept.

22 MS. VAN MALDEN: Right, taking - - - taking it
23 out - - - I - - - I don't know that that's within the scope
24 of his employment. It's much like the bicycle messenger
25 provoking an attack.

1 But what about the City employee who's doing
2 asphalt and hits the - - - a motorist over the head with a
3 shovel? That's within the scope of employment.

4 There are any number of cases that are within the
5 scope of employment that were more egregious than what Ofc.
6 Wehby and certainly less than what the other two officers
7 had done.

8 JUDGE FEINMAN: All right, so I just want to be
9 clear. You're not asking us to make a new rule. You're
10 not asking us to change the rule. It's just a matter of
11 clarifying how the court applied those factors in Riviello?

12 MS. VAN MALDEN: Exactly. And also perhaps
13 noticing a - - - a difference between cases decided under
14 Public Officers Law 17, which is about defense and
15 indemnification, verse cases that are respondeat superior,
16 because the - - - when you're working in an insurance area
17 as opposed to a tort area, the - - - it can be slightly
18 different in your interpretation.

19 When you look at all of this court's prior
20 statements and - - - and holdings, there's always - - - you
21 know, no matter how the Riviello standard - - - no matter
22 how far off, if you're within the scope, even if it's
23 because of emotion, it's still within the scope.

24 JUDGE WILSON: I just want to make sure I got
25 your last point. It's that the State can choose to



1 indemnify or not indemnify to whatever degree it wants or
2 doesn't want, but that doesn't have to be coterminus with
3 respondeat superior liability to the common law. Is that
4 right?

5 MS. VAN MALDEN: That - - - that's exactly my
6 argument. And while I still have time, I - - - the test is
7 whether the act was done while the servant was doing his
8 master's work no matter how irregularly or with what
9 disregard of instruction.

10 Wehby may have lost his temper because of the
11 passions aroused by circumstance and occasion. But that
12 does not change the fact that he was acting within the
13 scope of his responsibility on January 15, 2010. Thus I
14 would most respectfully request that the decisions of the
15 courts below be reversed and that this case be remanded to
16 the Court of Claims for trial.

17 JUDGE RIVERA: Before - - - before your red light
18 goes on, do you want to address the question of the motion
19 to amend, or you want to stay on your brief?

20 MS. VAN MALDEN: Well, the motion to amend, this
21 is not a case where, all of a sudden, down the road, the
22 plaintiff has a - - - creates - - - you know, gives
23 information that allows the defendant to amend. This is a
24 situation where they knew all this information before we
25 even filed the claim, back in 2010. They knew.



1 JUDGE STEIN: But so did you, so what's the
2 surprise here? This has all been - - -

3 MS. VAN MALDEN: The surprise to - - -

4 JUDGE STEIN: - - - played out in various forums.

5 MS. VAN MALDEN: Because when you plead - - - the
6 - - - the officer is found not-guilty of assault, so we
7 don't know how heinous the beating was. And then the other
8 two - - - and also he's permitted to retire, and he pleads
9 guilty to official misconduct, which is within the scope of
10 his - - - while during the course of his employment, he did
11 an unauthorized act.

12 JUDGE STEIN: Well, how - - - how did - - - how
13 did it impact your ability, though, to de - - - to
14 prosecute this case?

15 MS. VAN MALDEN: For four-and-a-half years, we -
16 - - the - - - the State is denying that - - - that
17 excessive force was used or that it was not justified.
18 Four-and-a-half years. You're going into - - - the - - -
19 the note of issue is about to be filed. Discovery is
20 closed.

21 This is the case that the State has been
22 presenting. Now, all of a sudden, oh, by - - -

23 JUDGE STEIN: Did you ask for an opportunity to
24 conduct further discovery? I think there was about maybe a
25 year-and-a-half or so - - - my understanding was - - -



1 between the time that this - - - that the - - - that it was
2 amended and the time that the - - - that the note of issue
3 was filed.

4 MS. VAN MALDEN: The note of issue was filed in
5 August of 2015; the motion was made June 2015. The note of
6 issue had to be filed by August 31st, of 2015. A decision
7 was not made until 2016.

8 And the additional discovery which was supposed
9 to be provided to the court within forty-five days was not
10 provided for over a year to us. So we didn't know, at that
11 point, whether we were going to have the information or not
12 have the information.

13 Had we had it within forty-five days, I could
14 have moved to strike the note of issue and done some other
15 investigation. But it - - - based on - - -

16 JUDGE STEIN: But did you ever - - - did you ever
17 indicate what you would - - - what more you would have done
18 or asked for permission to go beyond, because of all those
19 circumstances you've just described?

20 MS. VAN MALDEN: The - - - actually, the - - -
21 the bottom line is that what I was given by the Inspector
22 General, I probably didn't need more. The - - - the big
23 prejudice here is it's - - - you get an unfair advantage.
24 Can the State do this all the time?

25 They know that there's a beyond-the-scope issue



1 when they answer initially, and they wait four-and-a-half
2 years, which is beyond any time - - -

3 JUDGE STEIN: You haven't indicated what the
4 unfair advantage is. If you had all the discovery you
5 needed, you got everything you - - - you needed to know
6 from the IG, then - - -

7 MS. VAN MALDEN: The claim.

8 JUDGE STEIN: - - - what's the unfair advantage?

9 MS. VAN MALDEN: The claim. The claim is gone.

10 I can't file - - - if - - - this is the kind of thing you
11 bring up in a pre-answer motion to dismiss or you plead - -
12 -

13 JUDGE RIVERA: But that argument is that the
14 prejudice is that they have a meritorious defense. And I
15 don't think that's what we meant in the case law.

16 MS. VAN MALDEN: We - - -

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MS. VAN MALDEN: Thank you.

19 CHIEF JUDGE DIFIORE: Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Jose Rivera v. The State of New York, No. 92 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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