To be Argued by:
ALEXANDER J. WULWICK
Time requested: 15 minutes

CTQ 2020-00007
New York County Clerk's Index No. 154388/2015

Court of Appeals
State of New York

JESUS FERREIRA,

Plaintiff-Appellant,

against

CITY OF BINGHAMTON, BINGHAMTON POLICE DEPARTMENT,

Defendants-Respondents,

and

POLICE OFFICER KEVIN MILLER et al.,

Defendants.

BRIEF OF PLAINTIFF-APPELLANT

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Dated: January 20, 2021

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(141-20A)
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QUESTION PRESENTED

In this municipal negligence action tried in federal district court, plaintiff, Jesus Ferreira, unarmed and minding his own business while sleeping over at his friend's apartment on the living room couch, was shot in the abdomen by defendant Police Officer Kevin Miller, who was part of a botched, "no-knock" search warrant raid that left the plaintiff permanently injured. The officer in charge of executing the warrant said that plaintiff was in "the wrong place at the wrong time." The jury unanimously found in favor of Officer Miller but against his employer, defen-

dant-respondent City of Binghamton, on plaintiff's claim that the City, through its police officers, violated non-discretionary, proper and acceptable police practices in planning and conducting the raid.

The district court overturned the verdict against the City and awarded it judgment as a matter of law on the ground that plaintiff failed to establish that the City owed him a special duty and, in the alternative, because the City had discretionary immunity.

On appeal, the United States Court of Appeals for the Second Circuit rejected the district court's discretionary immunity ground for dismissing the complaint and indicated its preference for plaintiff's claim that the "special duty" rule did not apply to the facts presented herein. The court noted, however, that, "[b]ased on the conflicting [New York Court of Appeals] precedents reviewed [in its opinion], we find it very difficult to reach a conclusion on the scope of the special duty requirement -- which is more a matter of state policy than of law" (975 F.3d 255, 290).[1] Therefore, the court certified the following question, which this Court has accepted for review:

[1] The Second Circuit affirmed the district court's denial of plaintiff's motion for judgment as a matter of law against the officer who shot him, despite the appellate court's finding that plaintiff presented "compelling evidence" (975 F.3d at 266), "strong arguments" (*id.*, at 267), "not unreasonable" arguments (*id.*, at 268), and "reasonable arguments" (*id.*) for overturning the verdict, albeit not sufficiently compelling as a matter of law.

Does the "special duty" requirement -- that to sustain liability in negligence against a municipality, the plaintiff must show that the duty breached is greater than that owed to the public generally -- apply to claims of injury inflicted through municipal negligence, or does it apply only when the municipality's negligence lies in its failure to protect the plaintiff from an injury inflicted other than by a municipal employee?

JURISDICTIONAL STATEMENT

This Court took jurisdiction of the instant appeal upon accepting for review the above certified question by order dated October 20, 2020.

THE RELEVANT ESTABLISHED FACTS SUPPORTING THE CITY'S LIABILITY

The Failure To Gather Pre-Raid Intelligence Was A Proximate Cause Of Plaintiff's Injury.

As determined by the Second Circuit and as relevant here in terms of the City's liability, plaintiff "elicited sufficient evidence to support a jury finding that the City, through the actions of its employees in the police department and SWAT unit, violated established police procedures and acceptable police practice by…failing to conduct adequate pre-raid surveillance of the residence or gather other intelligence" (975 F.3d at 272, and see 273).

The Court pointed to the testimony of the City's Chief of Police, defendant Joseph Zikuski, that "for police to ensure that they do not unnecessarily expose themselves and members of the public to harm, they

must obtain and use all available and reliable intelligence" (*id.*, at 273). This "includes pre-raid surveillance of the suspects and location, and an advance site survey of the location to determine avenues of approach and escape" (*id.*). Failure to do so "would violate police 'rules of the road' and professional standards" (*id.*).

The officer in charge of the raid, non-party Officer James Hawley, "acknowledged that failure to obtain and use adequate intelligence can unnecessarily expose members of the public to unnecessary harm, and Miller similarly testified that when officers have more intelligence they are in a better position to avoid use of dangerous force" (*id.*, at 273-274). Officer Miller testified as well "that it would be important to know before entering a residence if the people inside had serious firearms, and that it is acceptable police practice for a supervisor to tell a SWAT team about any surveillance conducted, and any relevant intelligence generally, during a preoperation briefing" (*id.*).

As further evidence supporting the jury's "finding of inadequate surveillance to conform to acceptable practice" (*id.*, at 274), the Second Circuit observed that, while "[t]he sole intended purpose of the raid was to catch [the alleged drug-dealing, suspect/occupant of the apartment] unaware", "[n]o surveillance was conducted…to determine whether" the suspect, who had left the apartment the night before the raid, "had re-

turned before the raid was conducted" (*id.*). Therefore, "the police also acquired no information as to how many people, and of what description, would be found in the residence" (*id.*).

Officer Hawley "testified that, on the morning of the raid, the SWAT team had 'no idea' how many people were inside the residence and whether those inside were awake or asleep" (*id.*). Without that knowledge, said the Court, "it might have been…inadvisable to expose the officers and other persons to the inevitable risks of such an operation," as opposed "to more conservative procedures such as waiting to arrest [the suspect] at an opportune moment and executing the search warrant at that time" (*id.*).

The court wrote that, '[b]ased on the above evidence, a jury could have reasonably concluded that the City was not only negligent but further violated acceptable police practice by failing to conduct adequate pre-raid surveillance" (*id.*). On that basis the circuit court concluded that "the City was not entitled to discretionary immunity as to these failures" (*id.*), citing *Johnson v. City of New York* (15 NY3d 676, 681 [2010] [judgment error rule not applicable where police officer's use of deadly force against innocent bystander violated established police guidelines]), *Newsome v. County of Suffolk* (109 AD3d 802 [2d Dep't 2013]), *Lubecki v. City of New York* (304 AD2d 224, 233-234 [1st Dep't 2003] [discretionary con-

duct did not extend to shooting of hostage that violated acceptable police practice), *Rodriguez v. City of New York* (189 AD2d 166, 178 [1st Dep't 1993] [firing into crowd deviated from accepted and established police protocols and did not implicate judgment error rule]), and *Velez v. City of New York* (157 AD2d 370, 373-374 [1st Dep't], *lv. denied*, 76 NY2d 715 [1990] [outside realm of acceptable police practice to allow decedent civilian to enter apartment before it was searched]) (975 F.3d at 270, 271).

The circuit court further determined that the City's failure to conform to clearly defined police practice on the surveillance issue was, as the jury had found, "a proximate cause of Miller's shooting the unarmed Ferreira" (975 F.3d at 274). The court reasoned that, "[a]lthough the SWAT team was aware that a woman and child might be present in addition to [the suspect], there is no evidence that the SWAT team expected to encounter anyone in the apartment other than those three individuals" (*id.*, at 275). In addition, the jury had the causation testimony of Chief Zikuski "that 'who is in the apartment' can be an 'important fact,' that knowing the number of people in the apartment can result in a 'safer operation with a greater chance of success,' and that this would generally result in a 'better likelihood of not exposing the public to unnecessary harm'" (*id.*).

"Based on this testimony," the Court declared, "the jury could have reasonably concluded that additional surveillance would have alerted the SWAT team to Ferreira's presence, and that this would have caused the team to conduct the raid differently, or to wait until no one was present other than the regular occupants of the apartment. We conclude that Ferreira's evidence was sufficient to support a jury verdict that the City's violation of acceptable police practice was a proximate cause of his injury" (*id.*).

ARGUMENT

The Special Duty Requirement Does Not Apply To The Police Officer's Shooting Of Plaintiff During A Negligently Executed, No-Knock Search Warrant, In Violation Of Non-Discretionary, Acceptable Police Procedures.

The Second Circuit wrote a lengthy, exhaustive, and closely-reasoned opinion in reversing the district court's granting of the City's motion for judgment as a matter of law. The court found that there was sufficient evidence to support the jury's verdict that the City, through its police officers, violated acceptable police practice in planning and executing the raid, and that the City's negligence was a proximate cause of the unarmed plaintiff's injury.

The Second Circuit could not, however, decide whether, contrary to the district court' conclusion, the special duty requirement applies here. While noting that "[t]here is no dispute that a special relationship did not

exist between Ferreira and the City" (975 F.3d at 281), the court found itself leaning strongly in favor of plaintiff's argument "that the special duty requirement applies only in cases in which the allegedly negligent government conduct is the failure to protect from or respond adequately to a separately imposed injury, but does not apply where the negligent conduct alleged involves the municipal government's own infliction of injury" (*id.*, at 282).

Notwithstanding its preferred outcome, the court declined to rule in plaintiff's favor on this issue. It found "conflicting guidance from the New York Court of Appeals" (*id.*) to the effect that, despite a "decades-long decisional pattern" in Court of Appeals cases "suggest[ing] that Ferreira's interpretation of the special duty rule is correct, and…is consistent with the stated rationale for the rule,…more recently, the Court of Appeals has frequently stated in dictum that the special duty requirement applies whenever the municipality acts in a governmental capacity…regardless of whether the alleged injury is inflicted by a municipal employee or by a third party" (*id.*, at 282).

We think it serves no useful purpose to repeat here at length the court's comprehensive reasoning for viewing plaintiff's "interpretation of the special duty rule…more logical -- and more consistent with the rule's stated rationale -- than the broader version of the rule favored by the Ci-

ty, which would immunize a municipality from liability in many cases in which its employee or agent negligently inflicts harm" (*id.*). Indeed, the court's discussion extends for more than eight pages in the Federal Reporter (975 F.3d at 282-290).

Ultimately, the Second Circuit declared that it "would find it surprising that the New York Court of Appeals intends to shield municipalities from liability in these circumstances [involving "harm inflicted on a member of the public in a 'one-off' capacity"], which would go very far towards reinstituting the very immunity that New York's legislature disavowed in 1929" (*id.*, at 290). However, "[b]ased on the conflicting precedents reviewed above," said the court, we find it very difficult to reach a conclusion on the scope of the special duty requirement -- which is more a matter of state policy than of law" (*id.*).

Indeed, policy is key, and "'[t]he question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is [one] of law for the courts'" (*Davis v. South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015], quoting *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]; *see Lauer v. City of New York*, 95 NY2d 95, 100 [2000]). In *Davis* and in numerous cases from this Court, where the issue was the scope of the duty of care owed the plaintiff, policy was ex-

plicitly referred to as a justification for either recognizing or rejecting a duty.

In *Davis*, the Court wrote (26 NY3d at 572.): "'Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty' (*Tenuto v Lederle Labs., Div. of Amer. Cyanamid Co.*, 90 NY2d 606, 612 [1997]; *see Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 586 [1994]). A critical consideration in determining whether a duty exists is whether 'the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm' (*Hamilton* [*v. Beretta U.S.A. Corp.*], 96 NY2d [222] at 233 [2001])."

The Court in *Davis* went on to say that "our calculus is such that we assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost" (26 NY3d at 572). In *Gilson v. Metropolitan Opera* (5 NY3d 574 [2005]), the Court framed the duty issue as follows (*id.*, at 576-577):

> In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff. As we observed only last month in *Matter of New York City Asbestos Litig.* (5 NY3d 486, 493 [2005]), we make this determination "by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like

> liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." We noted our reluctance to extend the duty of care such that a defendant may become liable for failure to control the conduct of others, imposing such duty only where "the defendant's relationship with either the tort-feasor or the plaintiff places the defendant in the best position to protect against the risk of harm; and that the specter of limitless liability is not present" (*id.* at 494 [internal quotation marks omitted]).

Applying these principles to the facts of the present case argues in favor, we submit, of finding the special duty requirement inapplicable. The defendant City's relationship with Officer Miller and the other members of the SWAT team, and with plaintiff himself, naturally placed the City "in the best position to protect against the risk of harm" to plaintiff -- and, of course, to control the conduct of its own employees -- by adhering to the accepted police surveillance practices that the jury and the Second Circuit found were not observed, resulting in serious injury to plaintiff. It may safely be said here that "the reasonable expectations of [the] parties and society generally" would not be offended by a finding that the City, through its agents, owed a duty to plaintiff to have followed those procedures and thereby avoid the claimed necessity of having to shoot the unarmed and unthreatening plaintiff during what the circuit court accurately described as a "botched entry" (975 F.3d at 268).

As stated by the Second Circuit, "where government employees have inflicted the injury, municipal liability is not based on an alleged misallocation of protective resources" (*id.*, at 285). This is unlike "the context of third-party-inflicted harm because 'a different rule "could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits," *Sorichetti* [*v. City of New York*, 65 NY2d 461, 468] (quoting *Riss* [*v. City of New York*, 22 NY2d 579, 582])[. T]his concern is absent when the government itself inflicts the injury'" (*id.*).

Here, as in *Sorichetti* (although not in the context of an injury inflicted by a third party), "[a] key element" is that there was "some direct contact between agents of the municipality and the injured party" (65 NY2d at 469; *see Kircher v. City of Jamestown*, 74 NY2d 251, 257 [1989] ["The requirement of direct contact…serves to rationally limit the class of persons to whom the municipality's duty of protection runs… ."]). The direct contact here was the no-knock raid, negligent initiated, which led to the shooting of plaintiff.

Among the policy-related considerations in determining whether a legally recognized duty to the plaintiff exists is the Court's historical "reluctance to expand an existing duty of care" (*Davis v. South Nassau Communities Hops.*, 26 NY3d at 572), particularly "to an indeterminate, face-

less, and ultimately prohibitively large class of plaintiffs, as opposed to 'a known and identifiable group'" (*id.*, quoting *Palka v. Servicemaster Mgmt. Servs.*, 83 NY2d at 589). There should be no fear of expanding an existing duty here, let alone to an indeterminate class of plaintiffs. As the Second Circuit observed in its decision, this Court and intermediate appellate courts "have generally *not* applied the special duty rule" "in cases where plaintiffs seek to hold municipalities liable for injuries inflicted by negligent acts of municipal employees, although applying discretionary immunity where appropriate" (975 F.3d at 284-285, citing cases) (italics in original).

In those cases, the courts engaged, whether deliberately or not, in a "balancing [of] factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Gilson v. Metropolitan Opera*, 5 NY3d at 576-577). The above concerns do not present themselves here in favor of limiting municipal liability. Indeed, plaintiff submits that it would come as quite a shock to the ordinary person on the street to learn that, as a matter of public policy, a municipality bears no responsibility for the conduct of its police officers as governmental actors when they negligently fail to com-

ply with accepted police practices and procedures and, in consequence thereof, shoot an unarmed civilian during the execution of a no-knock search warrant.

The "unfairness" that is "at the heart of most of the[ ] 'special duty' cases" (*Cuffy v. City of New York*, 69 NY2d 255, 261 [1987]) where the element of reliance was present is manifest in the case at bar, albeit under different circumstances.

In *Kircher v. City of Jamestown* (74 NY2d 251), the majority of the Court, which affirmed the appellate division's reversal and granting of summary judgment to the City, recognized "that no rule should be so unyielding that it is mechanically applied without regard for its underlying purpose" (*id.*, at 258). Applying the special duty requirement to the facts of the instant case would, in essence, be a purely mechanical application and would not be in keeping with the rule's purpose, as succinctly stated by the Second Circuit: "where government employees have inflicted the injury, municipal liability is not based on an alleged misallocation of protective resources" (975 F.3d at 285). And, we would add that the infliction of injury followed upon the negligent performance of a ministerial rule, as here. There should be no uncertainty, therefore, that permitting liability to attach to the City in the circumstances of this case will result

in an exception "swallowing the general rule of governmental immunity" (*Kircher*, 74 NY2d at 259).

On the other hand, we submit that the special duty rule would be mechanically applied here if this Court were to transform into law the dicta that the circuit court was not sure has become the law, namely, "that the special duty requirement applies regardless of whether the injury was inflicted by a third party or by a governmental actor, so long as the government was acting in a governmental (rather than proprietary) capacity" (975 F.3d at 287). The circuit court cited several cases from this Court as examples of such dicta, while also noting that "[a]lmost all of the[ ] statements" in those cases, like the one quoted immediately above, "were made in the context of 'failure to protect'-type cases" (*id.*) and "did not involve injuries inflicted by government employees" (*id.*, at 288).

In regard to whether the special duty requirement is now applicable to all cases involving the government defendant acting in its strictly governmental capacity, the Second Circuit was particularly troubled by this Court's decision in *Lauer v. City of New York* (95 NY2d 95). There, in the circuit court's words, "the Court of Appeals held that a negligence complaint failed for lack of special duty notwithstanding that the injury -- emotional distress resulting from a seventeen-month police investigation

-- was inflicted by the government" (975 F.3d at 289). The Second Circuit noted, however, that *Lauer* did not overrule, or even purport to address prior cases, such as *Haddock v. City of New York* (75 NY2d 478 [1990]), for example, in which municipal liability was imposed for injuries inflicted by municipal employees.[2]

Indeed, the circuit court pointed to the incongruity of "[a]pplying the special duty requirement to cases of government-inflicted injury[, which] would appear to extend the rule far beyond its underlying rationale, as articulated by the Court of Appeals" (975 F.3d at 289-290). "In such a case," said the court, "the plaintiff is not claiming a special entitlement to resources or protection from the municipality, but rather that the government itself has culpably inflicted the injury" (*id.*, at 290). The Second Circuit further stated that it is "not persuaded that *Lauer* --or any subsequent case containing a broad statement in dictum of the special duty rule -- was intended to overturn, *sub silentio*, the longstanding *Haddock* line of cases in which the Court of Appeals did not apply the special duty requirement to claims of government-inflicted injury" (*id.*).

Here, the duty devolving upon the City to exercise reasonable care toward plaintiff, and anyone else who might have been found in the

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[2] In *Tara N.P. v. Western Suffolk Board of Cooperative Educational Services* (28 NY3d 709 [2017]), involving a somewhat similar fact pattern to *Haddock's*, the Court noted that only the issue of ministerial-versus-discretionary activity was addressed in *Haddock*, not the special duty requirement (*id.*, at 716, fn.*).

apartment, arose when its police officers initiated the no-knock search warrant. The duty was breached when, in executing the raid, the officers violated mandatory and accepted police practices by failing to gather sufficient intelligence regarding the occupants of the apartment and, as a result, shot the innocent-bystander plaintiff, who happened to be visiting there.

The entire affair qualifies as direct personal contact between plaintiff and the municipal employees, and it came about only because of their negligence in violating police procedures. These circumstances should be enough to attach liability to the City for having "launched a force or instrument of harm" (*H.R. Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 168 [1928]), inflicted by its police officers, where the City, as employer, had the authority and ability to control the conduct of its employees (*see generally Davis v. South Nassau Communities Hosp.*, 26 NY3d at 573; *Purdy v. Public Adm'r of County of Westchester*, 72 NY2d at 8).

Direct personal contact between the plaintiff and the medical examiner was missing in *Lauer v. City of New York* (95 NY2d at 102 ["Plaintiff alleges no personal contact with the Medical Examiner".]), and the medical examiner did not function "as a law enforcement agency but solely to impart objective information to the appropriate authorities for the benefit of the public at large" (*id.*, at 103). The absence of "'some di-

rect contact between the agents of the municipality and the injured party'" (*Cuffy v. City of New York*, 69 NY2d at 261, quoting *Sorichetti v. City of New York*, 65 NY2d 461, 469 [1985]) suffices to distinguish *Lauer* from the instant case, notwithstanding that, as the Second Circuit pointed out, the plaintiff's injury in *Lauer* was inflicted by an agent of the government.

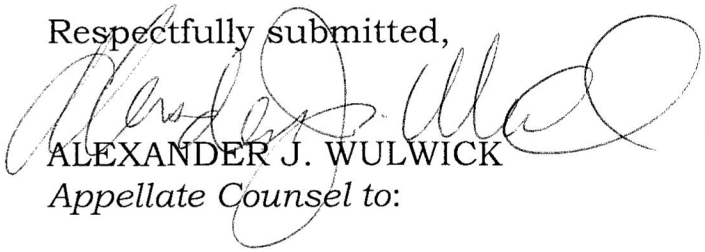
CONCLUSION

Plaintiff submits that municipal liability would not be unduly expanded, and municipalities would not be exposed to an unlimited class of plaintiffs, if the certified question were answered as follows:

The special duty requirement does not apply, and a municipality may be found liable in tort, where municipal employees negligently fail to adhere to non-discretionary, accepted practices and procedures in carrying out their duties, and where, as a result of such negligence, they come into direct contact with, and cause related harm to, the injured party.

Dated: New York, New York
January 11, 2021

Respectfully submitted,



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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

Julian S. Vila, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to this action, and resides at 225 First Street Apt 1M, Mineola, New York 11501.

That on January 21, 2021, he served 1 copy of the Brief of Plaintiff-Appellant and 1 copy of the Appendix *(Jesus Ferreira v City of Binghamton)* on:

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by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a mail depository regularly maintained by the United States Postal Service in the Borough of Manhattan, City of New York, addressed as shown above.

Sworn to before me on
January 21, 2021

BUSHRA T. KHAN
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