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ALEXANDER J. WULWICK
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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.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The United States Court of Appeals for the Second Circuit has framed a certified question asking whether the special duty requirement applies to this case, which, if it does, means that the complaint must be dismissed. It further means that this Court will not hold actionable the shooting by police of an unarmed individual in violation of non-discretionary, accepted police practices. In our main brief, we advanced arguments explaining why the special duty rule should not apply. In the City's 61-page responding brief, the City has gone well beyond advocating

for what it believes should be the answer to the certified question. Instead, the City treats this Court as though it were merely providing a level of appellate review to determine the correctness of the circuit court's decision on a variety of issues. The City does so by challenging virtually every aspect of the decision: the circuit court's reconciliation of the jury's verdict; the court's determination of what constitutes a violation of acceptable police practice in determining whether governmental immunity applies, which the City "asks this Court to clarify" (Resp. Brief, p. 15); the sufficiency of the evidence underlying the jury's finding of a violation of the City's acceptable police practices; the applicability of the principle of respondeat superior to the City for the negligence of its employees; and proximate cause.

Nowhere is the City's request for appellate review by this Court more obvious than in the footnote on page 38 of its brief, where it asks the Court to grant the alternative relief of "remand[ing] for a retrial on the City's negligence in surveillance prior to the mission so, if the issue comes back here, there would be a better record of it."

The special duty issue is here because this Court was asked to, and did, accept, a single, specific, certified question from the Second Circuit regarding special duty. And, while the circuit court invited this Court "to reformulate or expand upon *this* question as it deems appropriate to de-

termine whether Ferreira has established the City's liability for its negligence in planning the raid in view of the fact that, as Ferreira concedes, the City owed no special duty to him beyond the duty of care it owed to the public generally" (975 F3d at 291) (italics added), it did not extend the invitation any further than that (*compare In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d 58, 70 [2d Cir. 2017] ["In certifying these questions, we do not bind the Court of Appeals to the particular questions stated. Rather, the Court of Appeals may expand these certified inquiries to address any further question of New York law as might be relevant to the particular circumstances presented in this appeal."]; *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F3d 265, 272 [2d Cir. 2016] [court welcomed Court of Appeals' "'guidance on any other pertinent questions that it wishes to address'"]; *Commodity Futures Trading Comm'n v. Walsh*, 618 F3d 218, 232 [2d Cir. 2010] [same]). Therefore, we respectfully submit that the Second Circuit did not contemplate a wholesale review of its decision by this Court and that the issues listed above are not within the Court's purview on this appeal.

As a final preliminary matter, we note that in two, identical, instances in its brief (pp. 6, 60), the City improperly went outside of the record and quoted from deposition testimony of plaintiff's expert, whom plaintiff did not call to testify and whose testimony was not read into the record

as evidence (while purporting to provide a page citation to the supplemental appendix, which does not contain the subject testimony). This testimony is dehors the record, and the Court should not consider it (*see Kolchins v. Evolution Markets, Inc.*, 29 NY3d 1140 [2017]; *Matter of Hayes' Will*, 263 N.Y. 219, 221 [1934]).

THE FACTS CONCERNING THE NEGLIGENT PLANNING OF THE RAID

Although we stated above that the Second Circuit's finding of sufficient evidence to support the jury's vicarious liability verdict against the City -- based on its employees' failure to follow acceptable practices in planning and executing the raid -- is not before this Court for review, we would be remiss if we did not address that evidence, since it occupies so much space in the City's brief (see Resp. Brief, pp. 12, 13, 14, 21, 22, 23, 32, 33, 36, 38, fn.8, 40, 44, 45, 46, 47, 55, 56, 57, 58).

Det. James Hawley applied for and obtained the no-knock warrant on the afternoon preceding the early morning raid and was in charge of the mission (SA63, 72, 229, 230, 240).[1] He arranged for a special weapons and tactics (SWAT) unit to execute the warrant because the target occupant of the apartment was thought to be armed and dangerous (SA64, 72, 77).

[1] Numerals preceded by "SA" refer to the pages of the supplemental appendix.

Surveillance of the target at his residence began at 8:00 the night before so that, as Det. Hawley testified, "I'd feel more reassured the next morning that he [the target] was going to be there when the SWAT team arrives" (SA73, 231). The surveillance was discontinued about an hour later, however (SA66, 235, 236), because Det. Hawley, for some unexplained reason, "figured he'd [the target] stay there for the SWAT team…" (SA231). In fact, the target was seen driving away (SA232, 234-235), and "no further surveillance [was] taken" (SA236). Det. Hawley, therefore, did not know whether the target had returned and would be home when the raid was scheduled to take place (SA236). He acknowledged that if he were not home "and then the SWAT team went out, that could be a wasted mission" (SA237-238). Det. Hawley said, "I didn't know who was in the apartment" (SA80) or how many (SA262).

Det. Hawley agreed that, since there was no surveillance in the intervening hours before the raid, "you had no idea whether 20 people came back to [the address] that were all armed and dangerous" (SA238). "And no one from the Binghamton Police Department kept [the address] under observation to tell the SWAT team who came in or out" (SA261). "No one did surveillance to say they're awake, they're not awake, there's noise or no noise, things of that nature" (SA261-262). Det. Hawley said that knowledge of who the occupants of the apartment were at the time

of the raid is a "factor[ ] [that] would be taken into consideration" (SA-250).

Det. Hawley was present when the SWAT team arrived the following morning (SA247). He said that the SWAT team "normally" does its own surveillance, and he was not asked to perform any additional surveillance or to gather "additional information or intelligence" (SA261).

Captain (then Sgt.) Larry Hendrickson, a 28-year veteran of the Binghamton Police Department (SA302), was in charge of the SWAT team that morning (SA332). He testified that "proper preparation" for a no-knock raid includes obtaining "surveillance of suspects and location" (SA342), as well as a "site survey of the location to determine avenues of approach and escape" (SA342). "Good intelligence," he said, "like planning, is critical to the success of a raid" (SA348), and "[p]oor planning and briefing" are common causes of deaths and injuries during raids (SA365).

Captain Hendrickson testified that it was not a good strategy to have arrested the target when he was seen outside his residence shortly after the warrant had been obtained because they did not know who else was in the apartment or if they were armed; "[w]e do not have intel", he said (SA413). Nor, for that matter, did they have "intel" as to who was in the apartment when the raid was executed. Officer Hendrickson said that

part of the "whole point" of performing pre-raid surveillance was "so you know what's going on and you know what you're up against so you can properly plan accordingly" (SA442-443).

Kevin Miller, the Binghamton police officer and experienced SWAT team member (SA564, 571) who shot plaintiff, testified that good and accepted police practice required that he be told, before entering the apartment, about whatever surveillance had been conducted (SA578). He testified that the SWAT team did not conduct its own reconnaissance before the raid, and he was not "privy to" any surveillance that may have been performed "before SWAT arrived on the scene" (SA577-578). Officer Miller and the other SWAT team members had only a mere belief that the target was in the apartment (SA769), and he, as the first person to confront plaintiff upon breaking in the door, was not aware of his presence (SA-586-587). Officer Miller considered it "important and significant and relevant…that there was no intelligence provided on the interior of the apartment" (SA767).

Joseph Zikuski, chief of Binghamton's police force for nine years as of the time of the raid (SA802, 812), testified that obtaining the proper knowledge and intelligence before a raid results in a safer operation for all concerned (SA844-845). Therefore, "the police must obtain and use all available and reliable intelligence" so as not to "expose members of the

public to unnecessary harm, as well as themselves" (SA845). The failure to do so "can doom the mission" (SA846).

It was Chief Zikuski who gave "the green light for" the raid (SA887-888), but it was only after the raid that he learned of the actual level of surveillance that had been conducted (SA859, 860).

Chief Zikuski testified that "proper planning is part of the professional standards of care of a professional police department" and "is required by good and accepted police practices and procedures", as well as "complies with the police safety rules of the road" (SA850). The failure to obtain proper intelligence is a violation of those rules (SA849).

With respect to obtaining "the layout of an apartment before you send people out on a mission," Chief Zikuski said that it must "always" be done and that it "complies with the requirements of the professional police standards of care" and accepted practices regarding safety and training for the benefit of both the police and the public (SA852-853). The same applies to surveillance, which "can yield important and significant information", such as how many people are occupying the apartment (SA853), "where they are, who they are, their ages," all for the purpose of conducting "a safer operation with a greater chance of success" (SA854).

THE FACTS CONCERNING THE NEGLIGENT PLANNING OF THE RAID SUPPORT THE SECOND CIRCUIT'S OPINION

Based on the foregoing, the City's argument (repeated in one form or another throughout its brief) that "the Circuit speculates the City's negligence derives from acts/omissions of *unidentified* 'other officers' who conducted surveillance before the SWAT team executed a search and arrest warrant" (Resp. Brief, p. 14)[2] (italics added); that "the Circuit speculates negligence by *unknown* people who planned the operation" (*id.*) (italics added) -- albeit they were all undisputedly employees of the City -- ; and that "[t]he officers…conducted surveillance *sufficient to determine the suspect's likely presence in the apartment*, and potentially two other occupants" (*id.*) (italics added), is patently without merit and belied by the record.

The testimony summarized above makes manifest that, beyond conducting a single hour's worth of surveillance long before the raid was scheduled to go off, none of the officers testified to having exercised any discretion whatsoever in determining that one hour was enough, let alone that it complied with acceptable police practice, and that no useful

[2] The City maintains at page 13 of its brief that, pursuant to a pre-trial stipulation, "the City and Plaintiff only agreed to *respondeat superior* liability for the actions of…four [named] officers (SA 41)", who were not involved in pre-raid intelligence gathering. That is demonstrably not what the stipulation says or is intended to say. It does not limit the City's vicarious liability to the actions of "only" four named officers. The City's vicarious liability attaches by operation of law.

purpose would be served by conducting any further surveillance. We submit that, in the words of this Court in *Haddock v. City of New York* (75 NY2d 478, 485 [1990]), which found no discretionary immunity and affirmed liability against the defendant city, "the key fact is that no City employee in the relevant time frame weighed the impact of" how the surveillance was conducted "or made a judgment that" additional surveillance should be performed.

Here, Det. Hawley wanted reassurance that the target would be home when the SWAT team arrived, yet the surveillance was discontinued after only an hour, and he did not know whether the target would be home or who or how many individuals were in the apartment. Det. Hawley said that the SWAT team conducted its own surveillance, but Officer Miller testified to the contrary that he, astonishingly, as lead officer in the stack, "wouldn't be privy to" surveillance information obtained "before SWAT arrived on the scene" (SA577-578). Meanwhile, Captain Hendrickson testified that the "whole point" of performing pre-raid surveillance includes "know[ing] what's going on and…what you're up against so you can properly plan accordingly" (SA442-443).

The above-quoted language from *Haddock* clearly applies here, as does the following (75 NY2d at 485): "The immunity afforded a municipality presupposes an exercise of discretion in compliance with its own pro-

cedures. Indeed, the very basis for the value judgment supporting immunity and denying individual recovery for injury becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion."

Contrary to the City's contention, the Second Circuit properly concluded that "Ferreira 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, [as relevant here]…, failing to conduct adequate pre-raid surveillance of the residence or gather other intelligence" (975 F3d at 272). "Accordingly," said the court, "the City was not entitled to discretionary immunity as to these failures" (*id.*, at 274), which "a jury could reasonably have concluded…contributed to the cause of Miller's shooting of Ferreira" (*id.*, at 275).

The circuit court pointed to the evidence that, while the SWAT team (having no real knowledge as to how many people were in the apartment or who they were) might have expected to encounter perhaps a woman and a child in addition to the target, there was no evidence they expected to encounter anyone else, let alone plaintiff. "Moreover, Chief Zikuski agreed at trial that 'who is in the apartment' can be an 'important fact,' that knowing the number of people in the apartment can result in a 'sa-

fer 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'" (975 F3d at 275). Here, too, said the court, "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" (*id.*).[3]

In view of the foregoing and contrary to the City's position, the Second Circuit's decision does not result in second-guessing the discretionary determination of what constitutes adequate pre-raid surveillance (Resp. Brief, p. 30). Nor does it amount merely to an argument that "the police *did not wait long enough* to execute the no-knock warrant" (*id.*, p. 51) (italics in original). As stated by the circuit court, "according to the testimony of the City's own police officers, certain actions of the City employees in the planning of the raid violated acceptable police practice" (975 F3d at 269).

We note that the Second Circuit was satisfied that, although this Court has not explicitly addressed whether the rules or policies that are violated must be internally recognized by the municipal department and

[3] An example of an actual SWAT-type plan of a similar raid is exquisitely detailed in *Terebesi v. Terreso* (764 F3d 217, 225 [2d Cir. 2014]). The stark contrast with the instant case makes it clear that there was no plan here.

be formalized in a writing, it was unnecessary to reach the first question "because the testimony of the Binghamton police officers [including the police chief] and SWAT team members showed that the relevant policies were in fact espoused -- however informally -- by the City" (975 F3d at 271).

As to the formality issue, the circuit court was aware "of no New York precedent supporting such a rule" (*id.*), because, whether conduct by a municipal officer rises to the "level of being so unreasoned or egregious" that discretionary immunity does not apply "does not depend on the existence of a formal policy to the contrary" (*id.*). The court also pointed to cases employing language such as "*acceptable police practice*" (975 F3d at 271) (italics in original), which "plainly sweeps beyond formal written policies" (*id.*).

The Second Circuit decided to "decline the City's invitation to fashion for New York a heightened requirement that plaintiffs demonstrate the violation of a formal written policy in order to defeat discretionary immunity -- particularly given that under this doctrine plaintiffs are already required to demonstrate more than is otherwise required to establish liability" (975 F3d at 271). The court emphasized, however, that "[w]hile we conclude that the alleged policy that was violated need not be a forma-

lized, written policy,…it must be sufficiently definite so as not to devolve into general standards of care" (*id.*, at 272, fn. 7).

We turn now to the issue of whether plaintiff may recover, notwithstanding the special duty rule.

ARGUMENT

The Certified Question Should Be Answered By Reaffirming Prior Case Law Declaring That The Special Duty Rule Has No Relevance To Cases Where Municipal Officers Inflict Injury In Violation Of Acceptable Practices And Policies.

In *Ohdan v. City of New York* (268 AD2d 86 [1st Dep't], *lv. denied*, 95 NY2d 769 [2000]), which, by a 3-2 vote, upheld the jury's verdict finding liability against the City but no proximate cause, the dissent addressed "the City's other contention that it cannot be held liable because of the 'special duty' rule", saying (*id.*, at 94): "As a general rule, a municipality bears no liability for its agent's negligent performance of governmental functions unless the agent assumed a special duty to the plaintiff [citation omitted]. The special duty rule, however, was designed for cases where a plaintiff alleges that the City improvidently allocated its resources, such as by not assigning sufficient security personnel to an area [citations omitted]. …In these situations, courts generally refuse to second-guess the governmental exercise of professional judgment" (*id.*).

"Yet," said the dissent, "as even defendant admits, the special duty rule has no relevance to cases where City officers actually inflict injury" (*id.*). Nor will such officers be protected by governmental immunity, where their acts "deviated from clearly accepted and established protocols and procedures" (268 AD2d at 96), as here.

Plaintiff submits that the law as pronounced by the dissent in *Ohdan*, and by appellate courts in other cases involving similar fact patterns, neatly, logically, and fairly provides parties injured at the hands of negligent municipal actors with a path to recovery, while also keeping faith with the various policy grounds (discussed at length in the City's responding brief here) arguing against the expansion of municipal liability. To be sure, however, plaintiff is not arguing for an expansion of liability, only the return to, or reaffirmation of, an approach to municipal liability that is workable, reasonable, and just and that comports with the policy behind the special duty rule.

The necessity for such a return is made clear in the City's own brief. On four occasions (pp. 15, 23, 31, 38), the City advances a variation of the following argument (Resp. Brief, p.15): "Plaintiff could and *should be able* to sue and recover against the officer and the City for wrongful actions…by the police officer who, upon entering the apartment and encountering Plaintiff, had a duty of care to him" (italics added). Yet,

in the next breath, the City also maintains (*id.*): "This Court has required -- and should continue to require -- an injured member of the public to show the allegedly negligent city actor assumed a *special duty* to him" (italics added). These statements are mutually exclusive.

The problem, so far as plaintiff is concerned, is obvious. If, as the City contends, the language in *Applewhite v. Accuhealth, Inc.* (21 NY2d 420 [2013]) (which the Second Circuit considered to be dicta) is the law applicable to this case, that is, "If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party" (*id.*, at 426), then how can an injured party in Mr. Ferreira's position ever recover even against the police officer who -- assuming a jury so finds -- negligently shoots him during the execution of a no-knock warrant? The answer is he could not. There would never exist in those circumstances a special relationship between the officer and the injured party, giving rise to a special duty owing from one to the other, just as there was no pre-existing special relationship between Officer Miller and plaintiff before or at the time of the raid.

The same dilemma applies where, as the jury here found, the police officers negligently violate mandatory and acceptable police protocols by failing to perform the surveillance necessary for the raid to succeed.

They, too, will have no special relationship with, and, therefore, will owe no special duty of care to, an individual, like Mr. Ferreira, who was unarmed and was not known or expected to be in the apartment and was shot because of the heightened danger that resulted in part from the negligent planning of the raid, as the unanimous jury found here.

In short, the consequence of accepting the City's position is that in only a tiny handful of cases, where the injured plaintiff can establish a special duty in the traditional *Cuffy v. City of New York* (69 NY2d 255, 260 [1987]) sense, will recovery be possible against a municipality for the negligence of its employees in violating a non-discretionary policy that directly results in injury to the plaintiff. To apply the special duty rule here would, we submit, be the epitome of the mechanical application of a rule "without regard for its underlying purpose" (*Kircher v. City of Jamestown*, 74 NY2d 251, 258 [1989]). That purpose, as the Second Circuit put it, is "to shield the government's decisions on the allocation of its limited protective resources and to prevent the government from becoming an insurer against harm inflicted by *third parties*" (975 F3d at 282) (italics added).

Here, the decision by the City's police department to mount an early-morning, no-knock raid based on no more than an *admittedly* ineffectual and pointless hour's worth of surveillance, in clear violation of ac-

ceptable police practices and policies, hardly constitutes a judicial imposition on the government's allocation of its limited resources, protective or otherwise. Rather, the City here set in motion a sequence of events leading directly to the shooting of the innocent and unarmed plaintiff -- whose presence was unknown to the SWAT team -- within mere seconds of breaking open the door.

In *Kircher*, the Court posited a situation where the application of the special duty rule in a plaintiff's favor would be justified where the City "determined how its resources are to be allocated…and…thereby created a 'special relationship'…based upon the municipality's own affirmative conduct…" (*id.*, at 256). While *Kircher* involved the classic duty of protection by "induc[ing] the citizen's reasonable reliance" on the municipality's assurances (*id.*), here, too, the City, in planning the no-knock raid, determined for itself how its resources were to be allocated. That determination, however, resulted in affirmative conduct by its police employees that was in violation of acceptable police practices and policies and negligently and unnecessarily resulted in severe and permanent injury to the innocent plaintiff.

Plaintiff would urge this Court to declare as dicta and as not controlling in the instant case the statements in *Applewhite v. Accuhealth* (21 NY3d at 426) and the other cases discussed (see 975 F3d at 287) that

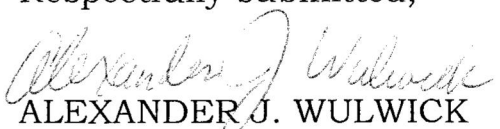
the Second Circuit viewed as dicta: "If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party." In place of that dicta, the Court should proclaim that the special duty requirement should be held not to apply where municipal employees negligently fail to adhere to non-discretionary, accepted practices and procedures in carrying out their duties and, in consequence of such negligence, come into direct contact with, and cause related harm to, the injured party.

CONCLUSION

The certified question should be answered in conformance with the Second Circuit's opinion.

Dated: New York, N.Y.
March 22, 2021

Respectfully submitted,



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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 March 23, 2021, he served 1 copy of the Reply Brief of Plaintiff-Appellant *(Jesus Ferreira v City of Binghamton)* on:

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