To be Argued by:
BRIAN S. SOKOLOFF
(Time Requested: 15 Minutes)

Case No. CTQ 2020-0007

Court of Appeals

of the

State of New York

JESUS FERREIRA,

Plaintiff-Appellant,

– against –

CITY OF BINGHAMTON and BINGHAMTON POLICE DEPARTMENT,

Defendants-Respondents,

– and –

POLICE OFFICER KEVIN MILLER, *et al.*,

Defendants.

BRIEF FOR DEFENDANTS-RESPONDENTS

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JURISDICTION STATEMENT

This Court obtained jurisdiction by accepting the certified question posed by the Second Circuit.

QUESTIONS PRESENTED

1. Should this Court reframe the certified question regarding special duty because the binary choice in the question seeks a one-size-fits-all answer unsuitable to the Court's special duty jurisprudence and the facts of this case?
2. Must Plaintiff prove the duty owed to him is greater than that owed to the general public when the "municipal negligence" –insufficient surveillance – is attenuated from lawful conduct that caused the injury?
3. Should this Court moot the certified question by it clarifying its governmental immunity law and applying it to the facts here?

This Court should answer each question in the affirmative

STATEMENT OF FACTS

A. Task Force Surveillance Prior to the Warrant

On August 19, 2011, Inv. Hawley, a Binghamton Special Investigation Unit member assigned to the Broome County Drug Enforcement Task Force ("SIU/BC"), learned through a Confidential Informant ("CI") that a man named Pride, and two other men recently robbed individuals (SA238; SA257). On August 24th, Hawley obtained a no-knock warrant authorizing the search of the first floor apartment of 11 Vine Street and arrest of Pride (SA72). To confirm whether Pride was still staying at 11 Vine Street, Invs. Hawley and Kane conducted an hour of surveillance from 8:00 until 9:00 PM (SA73; SA75; SA86). While conducting surveillance, they saw Pride engage in conduct consistent with a drug transaction at 11 Vine Street (SA67; SA86; SA234-35).

B. Preparing for Warrant Execution

Because of Pride's violent past, the Binghamton/Vestal/Johnson City SWAT Team ("SWAT"), consisting of officers from three municipalities, executed the search warrant (SA77; SA213; SA202; SA238). Before dawn on August 25th, SIU/BC briefed SWAT (SA257-58; SA259; SA222; SA550; SA578-9; SA582; SA586-87; SA598; SA750). SIU/BC instructed SWAT about the target location and the warrant's subject, Pride (SA64; SA586). SIU/BC also advised SWAT that intelligence gathering revealed a female and child might be in the apartment with

Pride and that a CI saw Pride in the last five to six days with two other males in a silver Infiniti with handguns[1] (A213; SA511; SA257).

At the briefing, SWAT decided to make a "dynamic entry" (SA199; SA206-7; SA640; SA490; SA574; SA609). SWAT officers received specific assignments. (Inv. Hawley was not a member of SWAT.) Officer Miller was "point man," *i.e.*, first to enter the apartment, followed by Officer Charpinsky, and then the team leader, Officer Spano (SA137; SA177; SA199; SA333; SA603; SA603; SA510-11; SA753). The rest of the team would enter in a specific "stack-order" while yelling for those inside to get down on the ground (SA141; SA437; SA489; SA544; SA551; SA751-52). SWAT would announce themselves by yelling warnings after the first ram strike and keep yelling until the last room was secured (SA186-89; SA198; SA436-37; SA490; SA746-47). Because a child was possibly in the apartment, the group ruled out diversionary devices, like "stun grenades" or "flash bangs" (SA213-15; SA421; SA434-35).

C. Execution of the Warrant

At 6:37 a.m. on August 25, 2011, SWAT executed the no-knock warrant (SA750; SA603). SWAT entered a small hallway that led from the front porch to the first floor apartment door (SA194-95, SA1626-30). Hawley remained on the

[1] The trial transcript erroneously states "handcuffs" instead of handguns. The CI informed Hawley that Pride and two other males had been seen with handguns (SA257; SA238).

front porch directing SWAT to the correct door (SA247; SA261). Because the apartment had a "hollow core" door, it did not open on the battering ram's first strike (SA138; SA190; SA199; SA436; SA755). It took multiple strikes and a kick from the ram operator for the door to fall from its hinges, allowing SWAT to enter the apartment's living room (SA131-32; SA189-90; SA263-64; SA605; SA755). At the first ram strike, officers began yelling, and continued yelling until they cleared the entire apartment (SA186-89; SA198; SA224; SA294; SA436-37; SA490; SA734; SA746-47).

D. Plaintiff's Version of Events

At trial, Plaintiff, Jesus Ferreira, testified he had recently traveled to Binghamton with his friend Pride (SA975-76). While in Binghamton, they stayed at Pride's girlfriend's apartment at 11 Vine Street and smoked marijuana (*id*.). He slept on a sectional couch in the living room (SA977; SA1021; SA1197; SA1631-32; SA1636-37).

On August 25th, he awoke to the sound of "yelling and banging in the hallway" (SA979; SA1026). After two bangs or two to three seconds of banging, the door flew open (SA1025-26; SA1035). Plaintiff claimed he stretched out his hands and turned his torso slightly toward the door "so [he] wouldn't be a threat to whoever was coming in" (SA979-80; SA1021; SA1028-29).

Cross-examination revealed Plaintiff gave inconsistent stories about his

body position and movements (SA982; SA1029-30; SA1032-33; SA1197). Plaintiff testified the first officer, Officer Miller, stood by the doorway and fired his weapon one time, hitting Plaintiff in the abdomen (SA979; SA1021; SA1035).

Although he admitted hearing yelling in the hallway, Plaintiff denied hearing anyone, including the first officer, telling him to "Get down!" before the shot (SA1026). Plaintiff admitted other officers streamed in the door and into the apartment after the shot, yelling for those inside to get down (SA1022; SA1026).

E. Officer Miller's Version of Events

As Officer Miller entered the living room, with his rifle's safety switched on, he saw a figure rising from the couch directly ahead of him (SA734; SA744-46; SA755-57; SA794-95; SA1197; SA1626-41). He yelled, "Down! Down! Down!" but the figure continued to stand up (SA784-85). Officer Miller focused on the figure's hands, which could carry a weapon (SA746). He testified, in that brief moment, he saw what appeared to be a small gray snub-nose .38 pistol in the figure's hand (SA658; SA733; SA789; SA794; SA1362).

After taking two to three steps into the room (or within two to three seconds), Officer Miller fired a single shot because: (a) he saw what he believed to be a gun in the figure's hand and (b) the figure ignored his order to get down. (SA671; SA734; SA744-45; SA748; SA794-95). Officer Miller testified he responded to specific stimuli as trained: "a man doing exactly the opposite of what

I was asking him to do when he had a gray object in his hands." (SA671.) Officer Miller's shot hit Plaintiff, knocking him down; Plaintiff ceased being a threat to Officer Miller or those officers behind him. No more shots were fired (SA758).

F. Expert Testimony

Despite disclosing an expert on police practices, Gene Maloney, a former NYPD firearms instructor, Plaintiff chose not to call his expert at trial (SA1085). Plaintiff presented no evidence to contradict the officer's testimony about how their decisions followed acceptable police practices. Maloney's deposition testimony did not support a theory speculating that more pre-operation intelligence/surveillance would have prevented Plaintiff's injury. When asked what surveillance had not been shared with SWAT, Maloney answered, "The occupants of the apartment." When asked, "How did the occupancy of the apartment affect Jesus Ferreira being shot?" he testified, "It did not." (SA766-67.)

Rather than provide expert testimony, Plaintiff focused on tools and tactics *not* used. Plaintiff failed to introduce any rules or policies removing discretion from the officers concerning surveillance or intelligence. Officer Miller, who shot Plaintiff, testified he had all the intelligence and equipment he needed (SA766-67).

Plaintiff also argued the Binghamton Police Department was obligated to obtain plans of 11 Vine Street's interior, but failed to prove such plans even existed. The trial court precluded argument about missing plans from counsel's

closing statement, effectively precluding jury consideration (SA1123).

PROCEDURAL HISTORY

A. Commencement & Federal District Court

Plaintiff filed a notice of claim on or about September 19, 2011. He sat for a General Municipal Law § 50-h hearing on April 5, 2012. On August 22, 2012, Plaintiff commenced this action in the Eastern District of New York; it was later transferred to the Northern District of New York.

On March 25, 2014, Plaintiff filed an Amended Complaint (SA1-SA14). The Amended Complaint alleged federal civil rights claims and state law tort claims. On January 8, 2015, the parties stipulated to the dismissal of Defendants Spano, Zikuski, Burnett, and Hendrickson; the trial court "so ordered" the stipulation (SA41-45).

On January 29, 2016, the City moved for partial summary judgment on all claims except Plaintiff's claims of excessive force and state law claims of assault and battery (*Ferreira v. Binghamton*, 2016 WL 3129224, at *1 [ND NY June 2, 2016, No.13-CV-107]). On June 2, 2016, the District Court granted partial summary judgment to the City, dismissing Plaintiff's claims for: (1) false arrest, (2) Eighth Amendment, (3) malicious prosecution, (4) "equal protection," (5) "due process," (6) *Monell*, (7) ADA, (8) negligent hiring and supervision, (8) denial of medical care, (9) and punitive damages against the City (*id*. at 10-11).

The claims remaining post-summary judgment were: (1) federal excessive force claim, (2) federal false imprisonment claim,[2] (3) state law claims of assault and battery against Officer Miller, and (4) *respondeat superior* liability against the City (*id*. at 10-11). After summary judgment, just Officer Miller and the City remained as defendants (*id*. at 10) (dismissing claims against Binghamton Police Department).

The trial began on January 17, 2017, and, on January 27th, the jury returned its verdict. (SA1459-62). It found the use of force by SWAT and Officer Miller reasonable under the circumstances (*id*.). The jury found the City not liable under *respondeat superior* for any state law battery by Officer Miller or *any other officer* (*id*.). As to Officer Miller's negligence, the jury answered, "No," finding Officer Miller not negligent (*id*.).

Incongruously, the jury found the City liable in negligence under *respondeat superior* (*id*.). The jury awarded Plaintiff $500,000 in past damages and $2.5 million in future damages for 30 years (*id*.). The jury found Plaintiff 10% comparatively negligent and the City 90% at fault (*id*.). District Court Judge McAvoy's immediate reaction was, "I think that's a problem" (SA1188-89).

On February 8, 2017, the City and Plaintiff moved for judgment as a matter of law. After extensive briefing, on September 27, 2017, the District Court issued

[2] Plaintiff discontinued this claim at trial after the close of the proof. SA1068-69 and SA1073.

a decision granting the City's FRCP 50(b) motion and dismissed Plaintiff's action against the City (SA1401-SA1414). On October 10, 2017, Plaintiff filed a Notice of Appeal (SA1435). On October 10, 2017, Plaintiff also moved for reconsideration (SA1418-SA1431). On August 17, 2018, the District Court denied Plaintiff's motion.

B. The Second Circuit & Certified Question

On January 24, 2018, Plaintiff submitted his briefing to the Second Circuit (SA1489). Plaintiff sought to overturn the jury's verdicts on excessive force, state law battery, and negligence in favor of Office Miller, as well as the dismissal of his state law negligence claim against the City (*id*.).

On May 7, 2018, the City filed its briefing (SA1569). On May 17, 2018, Plaintiff filed a Reply Brief (SA1642). On January 11, 2019, the Circuit heard oral argument. During the argument, the Circuit asked the parties to provide supplemental briefing with trial transcript annotations.

On January 14, 2019, Plaintiff filed a letter brief (SA1664). Plaintiff incorrectly argued "[o]nce the direct and/or circumstantial evidence permitted the jury to reasonably infer a violation of *any* of these practices, the 'Special Duty Rule' became inapplicable." (*Id*.)

On January 23, 2019, the City filed its letter brief (SA1668). The City explained how Plaintiff conflated the special duty rule and governmental immunity

defense. Plaintiff urged the Circuit to apply, in a special duty context, a narrow exception to the "governmental immunity" or "discretionary immunity" defense. That exception holds a municipality may not receive governmental immunity if the discretionary acts of its agent violated clearly defined policies, rules, and acceptable police practices (*id*. *citing Valdez v. City of New York*, 18 NY3d 69, 75-6 [2011]; *Johnson v. City of New York*, 15 NY3d 676 [2010]; *Malay v. City of Syracuse*, 151 AD3d 1625 [4th Dept 2017] and *Rodriguez v. City of New York*, 189 AD2d 166, 177 [1st Dept 1993]).

On September 23, 2020, the Circuit issued an 85-page decision certifying a single question to this Court (*Ferreira v. Binghamton*, 975 F3d 255 [2d Cir. 2020], *certified question accepted*, 35 NY3d 1105 [2020]). In its opinion, the Circuit identified not one, but *two* areas of New York law it believed this Court had not explicitly addressed. Before identifying an applicable duty, the Second Circuit discussed the City's governmental immunity defense:

> The City's argument implicitly raises two related but distinct legal questions, which the New York Court of Appeals has apparently not explicitly addressed: 1) whether, to defeat discretionary immunity, a plaintiff must demonstrate that a government employee violated rules or policies that are internally recognized by the municipal department or entity, and 2) whether those rules or policies must be formalized, as in a written manual.

(*Ferreira*, 975 F3d at 271.)

Despite its perceived uncertainty related to governmental immunity rules, the Circuit did not seek guidance from this Court on that topic via certified question. Instead, it declined, "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." (*Id*. at 271.) The Circuit appears to have fashioned its own lower standard—that mere espousals "however informal" by officers create acceptable police practices—precluding the City's governmental immunity defense (*id*.). This lesser protective standard contravenes this Court's holdings regarding how clearly defined policies and standards must be to preclude governmental immunity.

As for the certified question, the Circuit found the "scope of municipal liability is essentially a question of policy that the Court of Appeals is better situated than we are to decide," (*id*. at 291), and asked this Court:

> 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?

(*Id*.)

The certified question is substantively flawed. It conflates the special duty rule and governmental immunity defense, presupposing negligence before

resolving the question of duty. In so doing, the Circuit deviated from this Court's holdings about the nature of a "policy" or "acceptable police practice."

This Court needs to address both areas of state law identified by the Circuit as being "not explicitly addressed" by this Court. Should this Court define what constitutes "acceptable police practice" for governmental immunity purposes, it could moot the certified question. This would be appropriate because the litigation below did not reveal sufficient necessary facts to help this Court answer the certified question. A question as important and far-reaching as the one posed by the Circuit deserves an answer based on a record that at least identifies *who* committed the alleged negligence, *when* it occurred, and exactly *how* it caused Plaintiff to suffer harm. All of that is missing from this record.

Also missing from the record is any support for the insertion by the Circuit of the "John Does 1 through 10" and the "City of Binghamton Police Department" into the caption of this case. (*Compare Ferreira v. Binghamton*, 2016 WL 3129224, at *1 [ND NY June 2, 2016, No. 12-CV-107] [District Court's dismissal of claims against Binghamton Police Department as duplicative of claims against City] and *Ferreira*, 975 F3d at 278 [naming only Zikuski, Hendrickson, Burnett and Spano as stipulated out of the case].) Besides, neither the Amended Complaint (SA1) nor the Stipulation of Partial Discontinuance (SA-41) mentions "John Does 1 through 10."

The Circuit mistakenly stated, "[Plaintiff] brought suit against these other employees, but agreed to dismiss them as defendants on the understanding that the City would be liable under *respondeat superior* for their actions, so that it was redundant and unnecessary to name them separately as defendants." (*Id*.) In fact, the City and Plaintiff only agreed to *respondeat superior* liability for the actions of those *four* officers (SA41). The trial evidence does not show any of those officers were involved in pre-raid intelligence gathering; at trial, the only alleged tortfeasors identified were Officer Miller (the shooter) and members of SWAT.

The Circuit's theory of liability against the City rests on the post-trial insertion of unnamed defendants and liability theories never presented to—or decided by—the jury.

PRELIMINARY STATEMENT

Despite finding no breach of duty by Officer Miller, 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. The "other officers" neither planned nor executed the warrant and had no contact with Plaintiff. Plaintiff never sued these municipal actors or identified them as tortfeasors at trial.

SWAT entered the right apartment and fired just one shot when Plaintiff disregarded instructions and caused an officer to fear for his life. Because a jury found the City derivatively negligent without saying how, the Circuit speculates negligence by unknown people who planned the operation.

The actions of these unidentified officers involved discretion. They met the standard for a judge to sign a no-knock warrant; they demonstrated not just probable cause but also a need for speed and stealth to arrest a dangerous suspect and search for fleeting evidence. The officers then conducted surveillance sufficient to determine the suspect's likely presence in the apartment, and potentially two other occupants.

This case is about whether negligence liability attaches to a municipality for discretionary acts twice removed from a legally proper shooting. This Court has long forbidden exactly the type of municipal second-guessing Plaintiff's claim

invites: they should have done more surveillance, should have sought more intelligence, should have used different tactics, and so on.

Plaintiff could and should be able to sue and recover against the officer and the City for wrongful actions, intentional or negligent, by the officer who, upon entering the apartment and encountering Plaintiff, had a duty of care to him. Here, however, the assumedly negligent City employee had no contact with Plaintiff, gave no direction to Plaintiff, and had no idea he was or would be in the apartment. 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.

This Court's special duty cases occasionally have created confusion, causing courts to conflate the special duty rule with governmental (or discretionary) immunity, a related doctrine unique to municipal negligence cases. The Circuit, in fact, got both issues wrong here.

The City first asks this Court to clarify its rule on governmental immunity, which the Circuit found unclear. By doing so, this Court can avoid creating dangerous precedent on special duty on the poorly formed record presented here.

Should this Court address special duty, it should reframe the certified question to remove the binary choice it presents. As currently framed, the question straightjackets this Court by presenting a Yes or No choice, which invites a bad

one-size-fits-all rule. This Court has always evaluated special duty under the specific circumstances of the case before it, and should do so here.

Finally, should this Court not reframe the certified question, the Court should answer it in the City's favor requiring Plaintiff to prove the "other officers" owed him a special duty greater than that owed to the public when it conducted surveillance of a third-party criminal actor.

To comport with the certified question's legal framework the City addresses the reframing issue first.

ARGUMENT

The question posed by the Circuit raises yet again the thorny question of duty in the context of municipal liability. As this Court explained:

> Duty is essentially a legal term by which we express our conclusion that there can be liability [ ]. It tells us whether the risk to which one person exposes another is within the protection of the law. In fixing the bounds of that duty, not only logic and science, but policy play an important role [ ].
>
> A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden. But, absent legislative intervention, the fixing of the "orbit" of duty, as here, in the end is the responsibility of the courts [ ].

(*De Angelis v. Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983] [citations omitted]; *see also Lauer v. City of New York*, 95 NY2d 95, 103 [2000].)

I. THIS COURT SHOULD REFRAME THE CERTIFIED QUESTION

The certified question asks:

> 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 only 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?

(*Ferreira*, 975 F3d at 291.)

While the Circuit states, "there is no dispute that a special relationship did not exist between Ferreira and the City" (*id.* at 281), the "negligence cause of action" in Plaintiff's Amended Complaint, buried among 15 other theories of negligence, specifically pled "breach [of] special duty [sic]." (SA10 at ¶ 47.) That single phrase, inserted into an omnibus negligence cause of action, is how the special duty issue entered this case. Plaintiff's argument that he need not prove a special duty, now advanced by the Circuit, is a recent invention. He failed to prove special duty at trial and never sought its inclusion in the jury charge (SA1087-SA1112). Nor did the District Court find a breach of any duty of care, and it consequentially dismissed the negligence case for want of such a duty. But if the City had not addressed Plaintiff's special duty pleading, he would now argue the duty element of negligence had been conceded.

However, if the Circuit's question must be answered, it will be necessary for this Court to reframe the question. (*Ferreira*, 975 F.3d at 291 [inviting reformulation or expanding of the certified question].)

A. Special Duty is a Pleading Requirement

"Special duty" is not an immunity; it is a pleading requirement establishing a duty of care. (*Valdez*, 18 NY3d 69, 77-78 [2011] ["[T]here has been lingering confusion concerning the relationship between the special duty rule (establishing a

tort duty of care) and the governmental function immunity defense (affording a full defense for discretionary acts, even when all elements of the negligence claim have been established).”].)

Contrary to the certified question’s framing, the special duty rule does not protect municipalities from all liability unless a plaintiff can show the “duty breached is greater than that owed to the public generally.” (*Ferreira*, 975 F3d at 291.) The rule does not protect a municipality from negligence claims arising when government performs proprietary functions. (*Applewhite v. Accuhealth, Inc.*, 21 NY3d 420, 425 [2013] [“If the municipality’s actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties.”]; *see also Turturro v. City of New York*, 28 NY3d 469, 478 [2016] [highway design held proprietary, and plaintiff need not plead or prove special duty].)

B. Reference to “Municipal Employee” is Over Inclusive

The certified question straightjackets this Court with a binary choice: Yes or No. When a person claims negligence by a “municipal employee” —no matter how remote or attenuated from an alleged injury—must a plaintiff prove a duty to him or her? The binary question posed, perhaps collapsed for brevity by the Circuit, gives this Court no way to account for: (a) the wide variety of situations in which a municipal negligence can arise or (b) as here, a hypothetical and tenuous

connection between the alleged negligence and the injury. Accepting the question, as posed, risks upending decades of law from this Court without a full record to support it.

Officer Miller shot Plaintiff while executing a judicially approved no knock warrant when Plaintiff arose from a couch holding an object in his hand. The jury knew who shot Plaintiff, when he shot Plaintiff, and why he shot Plaintiff. Considering all the evidence about the shooting, the jury determined: (a) Officer Miller did not use excessive force because he reasonably believed his life was in danger when he shot Plaintiff, and (b) Officer Miller was not negligent when he shot Plaintiff. Put another way, a jury determined the municipal employee who actually caused Plaintiff's injuries committed no tort. After a full trial, that is an established fact, and not at issue before this Court.

The jury specifically found: (1) "Plaintiff [did not] prove his Section 1983 claim of excessive force/state law battery against Defendant Miller," (2) "the City of Binghamton [was not] liable for damages caused by the state law battery by Defendant Miller or *any other officer* under a respondeat superior theory," and (3) "Officer Miller [was not] negligent with respect to the incident on August 25, 2011." (SA1460 [emphasis added].)

While finding the injury-inflicting municipal employee was not negligent, the jury nonetheless proceeded to find the City negligent, although why it did so is

unclear. The Circuit presumed "the single question [on the verdict sheet] regarding the City's negligence was meant to encompass both Miller's shooting and the planning of the raid by other officers." (*Ferreira*, 975 F3d at 278.) It speculated the City's negligence liability came from the "planning of the raid," but only in one respect: not enough pre-raid surveillance by "other officers." (*id.*; *see also* *Ferreira* at 274-75.) The Circuit never resolved which (*if any*) of the stipulated defendants (*see supra* pp. 7 and 12) were responsible for the claimed insufficient surveillance. (*id*. at 278-79.) Even Plaintiff states, "[t]he officer in charge of the raid [was], *non-party* Officer James Hawley [.]" (Plaintiff's Ct. App. Brief at 4 [emphasis added].) The jury's incongruous verdict of negligence by the City thus stems from a person never sued and conduct not at issue during trial.

The certified question's reference to "municipal employee," therefore, apparently includes unidentified municipal actors never named as a party, depriving the City of notice of which acts, inaction, and actors to defend.

The certified question turns on the Circuit's erroneous hypothetical assumption that a lack of surveillance caused Plaintiff's injury. (*Compare* *Ferreira*, 975 F.3d at 275; SA257 [Hawley testimony concerning two additional males with "handguns" being with Pride].) This error led the Circuit to speculate, "The jury *apparently* concluded that, while Miller's decision to shoot Ferreira was objectively reasonable under the circumstances, he had been negligently placed in

that *unnecessarily dangerous position, with an unnecessarily heightened likelihood of shooting someone*, *by negligent planning on the part of other police employees*."[3] (*Ferreira*, 975 F3d at 278 [emphasis added].)

But ultimately, the jury found Officer Miller's actions were not negligent, the shooting justified, and SWAT's actions and planning reasonable under the circumstances and within constitutional bounds. The negligence, if any, *apparently* (but not definitely) stemmed from the actions of unknown actors at an unknown time. The Circuit, therefore, intended its question to capture unformed and unclear negligence by unidentified municipal employees no matter how remote from the injury.

A more helpful question for the Circuit, the lower courts, and municipalities across the state would be:

> Must a plaintiff claiming an injury from insufficient surveillance by an unidentified and unnamed municipal actor before police properly execute a judicially approved no-knock warrant establish a special duty to the injured party, requiring an unspecified amount of additional surveillance owed directly to him, as opposed to the public-at-large; or is the special duty rule inapplicable to this case?

[3] *But see Williams v. Weatherstone,* 23 NY3d 384, 400-01 (2014) (Holding even if municipal actor was negligent, creating a foreseeable hazard, "negligence does not create duty."); *Lauer v. City of New York*, 95 NY2d 95, 100 and 104 (2000) (Without a duty there is no liability "however careless the conduct or foreseeable the harm" and holding "negligent initiation of a course of events with foreseeable harm [would] simply not [be] a prudent expansion of the law."); *Los Angeles v. Mendez*, 137 SCt 1539, 1547 (2017)("[A] novel and unsupported path to liability, [the provocation rule] in cases [of reasonable force] instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force.").

A corollary question is:

> Where, by obtaining a no-knock warrant, (1) officers judicially establish probable cause for the location of a dangerous criminal suspect or easily destroyed evidence, and (2) the officers executing the warrant behave properly in all respects, may the municipality be held liable in negligence without proving a special duty to plaintiff on a theory that unknown municipal actors should have delayed executing the warrant for an indefinite time to conduct surveillance?

Should this Court reframe the question as requested by the City, it should answer the questions to negate liability here.

II. LONGSTANDING PUBLIC POLICIES REQUIRE THIS COURT TO FIND THAT SPECIAL DUTY APPLIES

First, the City does not contend that Officer Miller, the officer who shot Plaintiff, had no duty to Plaintiff. The City acknowledges that under New York and Federal law Plaintiff may establish viable claims against Officer Miller (and the City derivatively) for Officer Miller's intentional acts or negligence, if those acts or neglect were the proximate cause of Plaintiff's injury. Plaintiff had a full and fair opportunity to prove many such claims, but he could not. This case is about something different.

This case is about Plaintiff's ability to obtain relief from the City for negligence by unknown person(s) who had no contact with Plaintiff, who made professional investigative judgments, the end result of which was no excessive

force and no negligence by Officer Miller. This Court should clarify that the special duty requirement applies to a negligence claim so removed from the injury.

A. Evolution of Special Duty Constrains Municipal Liability

The Circuit correctly recognized the issue of whether Plaintiff needs to show a special duty "is more a matter of state policy than law." (*Ferreira*, 975 F.3d at 290.) The Circuit implies applying the special duty rule in this case would be against the weight of this Court's precedent and State's waiver of "sovereign immunity" in 1929. (*Id*. at 282-83.)

After New York State waived its sovereign immunity via N.Y. Court of Claims Act, this Court extended that waiver to its political subdivisions in *Bernardine v. City of New York* (294 NY 361, 365–66 [1945]). The Circuit, however, neglected to review or apply this Court's numerous post-*Bernardine* public policy pronouncements supporting the "special duty" rule.

In *Sharapata v. Town of Islip* (56 NY2d 332, 336 [1982]), holding punitive damages unavailable against a municipality, this Court recognized that "a statute in derogation of the sovereignty of a State must be strictly construed, waiver of immunity by inference being disfavored." Considering (and deciding in the negative) whether an injured party can sue a municipality for punitive damages, this Court explained why New York tort law must treat municipal corporations different from private corporations:

> The latter [private corporations] are largely created and administered for purposes of profit or for some other personal object. Those who become members of them do so voluntarily, and in the majority of instances in the hope of gain [. . .] The municipal corporation is different. It is not organized for any purpose of gain or profit, but it is a legal creation engaged in carrying on government and administering its details for the general good and as a matter of public necessity" [ ].

(*Sharapata* at 337.)

This difference between "municipal" and "private" corporations lies at the heart of several rules and immunities unique to municipalities created by this Court after 1929, including the "special duty" rule now up for examination. (*See e.g. Applewhite*, 21 NY3d 420, 425-26 [2013] [A municipality's proprietary actions — akin to actions of private enterprise—are subject to ordinary negligence rule, but a municipality's governmental functions may trigger the special duty rule or governmental immunity defense].)

In the 75 years since *Bernardine*, this Court articulated many separate, but closely related, "public policies" undergirding the special duty doctrine. Among those policies are: (a) separation of powers prevents courts (or juries), under the guise of negligence, from second-guessing legislative/executive decisions about the allocation of limited police resources; (b) expanding tort duties and potential liability might impose a crushing financial burden discouraging municipalities from providing any services, rather than better services; and (c) perfection in the

execution of governmental functions—and particularly police services—by flawed humans is not realistic.

In municipal negligence cases, this Court has long stressed the need to find a duty from the municipal defendant to the injured plaintiff. In *Florence v. Goldberg* (44 NY2d 189, 194–95 [1978]), the Court compared the search for a municipal duty to the search for duty required with a private defendant:

> As in the case of an individual or private corporation, however, a municipality's liability must be premised upon the existence and breach of a duty flowing from the municipality to the plaintiff. [ ] Absent the existence and breach of such a duty, the abrogation of governmental immunity, in itself, affords little aid to a plaintiff seeking to cast a municipality in damages.
>
> Moreover, to sustain liability against a municipality, the duty breached must be more than a duty owing to the general public. There must exist a special relationship between the municipality and the plaintiff, resulting in the creation of 'a duty to use due care for the benefit of particular persons or classes of persons.'

(*citing Motyka v. City of Amsterdam*, 15 NY2d 134, 139 [1965].)[4]

Special duty as expressed in *Florence* and *Motyka* was an explicit effort by this Court to constrain municipal liability related to the performance of its governmental functions. (*Compare Ferreira*, 975 F3d at 274-75, 278, 291 ["[As

[4] *See also Tara N.P. v. W. Suffolk Bd. Of Co-op. Educ. Servs.*, 28 NY3d 709, 714 (2017); *Applewhite*, 21 NY3d 420, 426 (2013); *McLean v. City of New York*, 12 NY3d 194, 199 (2009); *Lauer v. City of New York*, 95 NY2d 95, 100–01 (2000); *Kircher v. City of Jamestown*, 74 NY2d 251, 255–56 (1989) and *Cuffy v. City of New York*, 69 NY2d 255, 258 (1987).

Plaintiff] concedes, the City owed no special duty to him beyond the duty of care it owed to the public generally."].)

B. Second-Guessing Legislative-Executive Allocation of Resources

This Court has repeatedly recognized the special duty rule protects municipalities when the issue raised involves allocation of scarce governmental resources. As early as 1960, this Court issued this caution in a case involving roadway design:

> [C]ourts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits; something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public.

(*Weis v. Fote*, 7 NY2d 579, 588 [1960].)

Judicial hesitation to intrude in governmental decisions about resource allocation is equally strong in matters challenging allocation of police resources. In *Riss v. City of New York* (22 NY2d 579, 581-82 [1968]), the Court explained, "[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed." (*See also Balsam v. Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997] [Rejecting claim allowing jury to "impermissibly second-guess 'a

considered legislative-executive decision as to how those resources may be deployed.'"].)

This Court refused to proclaim a "new and general duty of protection in the law of tort" because it "would inevitably determine how the limited police resources of the community should be allocated and without predictable limits." (*Riss*, 22 NY2d at 582-83.) The special duty rule worked to keep the courts from second-guessing resource allocation decisions:

> To be sure these are grave problems at the present time, exciting high priority activity on the part of the national, State and local governments, to which the answers are neither simple, known, or presently within reasonable controls. To foist a presumed cure for these problems by judicial innovation of a new kind of liability in tort would be foolhardy indeed and an assumption of judicial wisdom and power not possessed by the courts. Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses.

(*Id.*)

This Court has repeatedly reaffirmed this principle. (*Balsam*, 90 NY2d at 968 [Tort suits testing police discretion in public safety are disfavored because "they implicate choices about the allocation of finite police resources that are 'better left to the discretion of the policy makers.'"]; *Kircher v. City of Jamestown*, 74 NY2d 251, 255-56 [1989] [Police protection is a "resource-allocating function [better left to the discretion of the policy makers."]; *Cuffy v. City of New York*, 69

NY2d 255, 260 [1987]; *Sorichetti v. City of New York*, 65 NY2d 461, 468-69 [1985] and *O'Connor v. City of New York*, 58 NY2d 184, 189-90 [1983].)

Planning for the execution of a court-approved no-knock warrant to apprehend a dangerous suspect and recover easily destroyed evidence is a textbook example of police resource allocation. Those responsible for planning such a search (who did not *participate* in the search) must weigh (1) financial and manpower costs incurred by delay, for hours or days, while conducting more surveillance against (2) the public safety need to apprehend the suspect and recover the evidence.

Here, jettisoning the special duty rule would not trample just on legislative-executive decisions, it would interfere with judicial discretion, too. Where, as here, the issue involves alleged negligence in *surveillance* prior to *planning for* (not executing) a no-knock warrant, the court issuing the warrant has already weighed in on both the need for speed and danger of delay. New York Criminal Procedure Law § 690.35(4)(b) authorizes a court to allow police entry without notice where they have shown "there is reasonable cause to believe that (i) the property sought may be easily and quickly destroyed or disposed of, or (ii) the giving of such notice may endanger the life or safety of the executing officer or another person, or (iii) in the case of an application [ ] for the purpose of searching for and arresting a person who is the subject of [a felony warrant], the person

sought is likely to commit another felony, or may endanger the life or safety of the executing officer or another person." (NY Crim. Pro. L. § 690.35[4][b].)

The Legislature and Governor, by enacting Section 690.35(4)(b), endorsed the need for speed in limited situations with judicial approval; codifying a state policy favoring swift execution of search/arrest warrants. A judicially imposed rule of negligence law requiring delay for additional surveillance or intelligence would thwart the public policy established by the state legislature and executive.

The Circuit and Plaintiff mistakenly say the issues before this Court do not involve resource allocation because "the government itself inflict[ed] the injury." (*Ferreira*, 975 F.3d at 285 and 290; *see also* Plaintiff' Ct. App. Brief at p. 15.) That is inaccurate. The Circuit found the City's failure to conduct "adequate pre-raid surveillance" was the proximate cause of Plaintiff's injury. (*Ferreira*, 975 F.3d at 274.) "Adequate pre-raid surveillance"[5] by definition involves allocating manpower and man-hours, not to mention overtime, compensatory time, and other personnel and equipment costs. Requiring extra surveillance means police personnel cannot confront other public safety dangers.

Police services are one of the most basic resources a municipality can allocate. This Court's long-standing precedent insulates from second-guessing the

[5] Neither Plaintiff nor the Circuit say how much surveillance is "adequate." An hour? A day? Three days? A week? Neither identify how those planning for the warrant execution are to know when personnel reached the "adequate" time spent surveilling the premises to allow the search to proceed.

legislative-executive decisions allocating public resources. Plaintiff, of course, can sue the officer who shot him, claim excessive force or negligence, and recover fully if he proves his case. Such an action does not intrude on decisions about manpower or costs that this Court has said are not the province of courts without a special duty.

C. Excessive Financial Burdens Discourage Provision of Services

Imposing liability in cases like this without requiring Plaintiff to prove a special duty will impose a crushing cost on municipalities, to the detriment of the public:

> To hold otherwise would be to subject municipalities to open-ended liability of enormous proportions and with no clear outer limits. The imposition of such liability, in addition to posing a crushing financial burden, might well discourage municipalities from undertaking activities to promote the general welfare. [. . .] The deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers, however, demands continued adherence to the existing rule. All the more is this so when there has been reliance for decades on this doctrine for purposes of municipal fiscal planning. If liability to individuals is to be imposed on municipalities for failure to enforce statutes or regulations intended for the general welfare, that imposition should come from the Legislature.

(*O'Connor*, 58 NY2d at 191-92.)

Even more recently, in *Applewhite* (21 NY3d at 430), this Court observed:

> Public policy considerations support this analysis. The rationale underlying the government-function doctrine rests on several critical concerns: that the costs of tort recoveries would be

> excessively burdensome for taxpayers; the threat of liability could dissuade municipalities from maintaining emergency medical and ambulance services; and extensive exposure to liability could consequently render municipal governments less, not more, effective in protecting their citizens [ ]. This, in turn, would place the public at greater risk of danger, [ ].

([citations omitted]; *see also McLean v. City of New York*, 12 NY3d 194, 204 [2009] ["Lawsuits, as we said in *Pelaez* [ ], are not the only way of dealing with governmental failure—and might even impel governments to withdraw or reduce their protective services."] [citations omitted]; *Laratro v. City of New York*, 8 NY3d 79, 82 [2006]; and *Sharapata v. Town of Islip*, 56 NY2d 332, 338-39 [1982] ["[I]t would be anomalous to have 'the persons who bear the burden of punishment, i.e., the taxpayers and citizens', constitute 'the self-same group who are expected to benefit from the public example which the granting of [punitive] damages supposedly makes of the wrongdoer.'"].)

Imposing liability in cases like this – here $2.7 million dollars – could easily dissuade municipalities from executing necessary warrants in dangerous situations for fear a jury, after the fact, will second-guess *not how the officers on the scene conducted themselves*, but how unidentified actors at unidentified times conducted surveillance. Liability here could dissuade police from executing any warrants or taking any actions that could subject them to second-guessing liability. This Court said it best in *In re World Trade Center Bombing Litigation* (17 NY3d 428, 452 [2011]): "Given the finite nature of police resources, the mechanisms by which

security and police protection is afforded cannot be dictated by the edict of a court or the retrospective conclusions of a jury. Police protection is best left in the hands of those most expert and qualified to render informed, deliberate decisions on implementing the most reasonable safeguards."

The rule Plaintiff seeks does not just pay insufficient heed to this Court's general policy edicts, but also would also overrule directly longstanding vibrant case law from this Court. Plaintiff wants municipalities to be liable whenever a person suffers an injury remotely caused by a municipal actor, regardless of the absence of: (1) the municipal actor's direct contact with the injured party; (2) the injured party's reliance on a municipal actor; and (3) the control valves this Court has previously imposed in municipal negligence. The open-ended liability Plaintiff seeks would overrule *Lauer* and *Applewhite* because a municipal actor caused the injuries in those cases, too.

In *Lauer*, a municipal medical examiner failed to correct an autopsy report or death certificate about the cause of death of a child and failed to notify officers the child's father was no longer a suspect. Those failures caused the plaintiff-father to suffer severe injuries directly attributable to the medical examiner's inaction. (*Lauer*, 95 NY2d at 97-99.) This Court, applying decades old law, found the special duty rules precluded plaintiff's action. "The Medical Examiner never undertook to act on plaintiff's behalf. He made no promises or assurances to

plaintiff, and assumed no affirmative duty upon which plaintiff might have justifiably relied. Plaintiff alleges no personal contact with the Medical Examiner, and therefore also fails to satisfy the most basic 'direct contact' requirement of [the special duty] test. There is, moreover, no indication the Medical Examiner knew that plaintiff, or anyone else, had become a suspect in the case." (*Lauer*, 95 NY2d at 102-03.) As sympathetic as this Court found plaintiff's case, even where a municipal actor directly caused plaintiff's injuries, it required plaintiff to demonstrate a special duty, which he could not do.

In *Applewhite*, even more recently, plaintiff claimed municipal actors, emergency medical technicians, caused her severe injuries by choices they made while administering medical care to her. Even though Plaintiff charged the municipal actors with injuring plaintiff, this Court answered in the affirmative the lower court's certified question, requiring plaintiff to prove a special duty, without which the case would fall. (*Applewhite* at 425 and 432.)

Plaintiffs in both *Lauer* and *Applewhite* sympathetically suffered severe injuries at the hand of municipal actors, but this Court recognized the greater public policy damage by punishing municipalities for wrongs incurred absent a duty assumed to the injured party.

Applewhite (21 NY3d at 425-6), citing decades of cases, catalogues governmental functions municipalities voluntarily assume, including police and

fire services, anti-terrorism security, oversight of juvenile delinquents, teacher supervision, and garbage collection. (*See also Tara N.P.*, 28 NY3d at 709 [municipality's voluntary creation of "welfare to work" program].) Municipal ability or willingness to provide these services, constrained by finite budgets, will be imperiled by extending potential liability to every plaintiff injured by any municipal actor no matter how remote *the negligent actor is* from a plaintiff.[6]

D. Not Every Error By a Municipal Actor Creates Liability

This Court has long recognized that not every injury traceable to municipal negligence merits recovery. Cases are legion where people suffered injuries theoretically traceable to municipal human error and this Court barred recovery citing the special duty rule.

Just recently, in *Tara N.P.* (28 NY3d at 716), the municipality negligently referred a sex offender to an educational program who later sexually assaulted plaintiff. This Court outlined the municipal negligence and plaintiff's injuries but it nonetheless concluded, "As we have observed in some prior cases, this unfortunately is 'a case in which a failure by government to do its job has caused harm'… Nonetheless, our well-settled rule of law mandates our holding that the County is immune from liability to this plaintiff." (*Id.* at 716 [citation omitted].)

[6] Binghamton does not ask this Court to excuse all municipal negligence. Plaintiffs can still sue for negligence in proprietary and governmental functions if, as in *Applewhite* and *Lauer*, they meet the special duty requirement. Here, Plaintiff cannot meet that test.

In *McLean* (12 NY3d at 197), this Court observed: "Once again we confront a case in which a failure by government to do its job has caused harm, and once again we hold that this is not one of the few cases in which such a failure subjects the government to liability." This Court instructed, "A well settled rule of law denies recovery in cases like this, and that rule, by its nature, bars recovery even where a government blunder results in injury to people deserving of the government's protection." (*Id.* at 204; s*ee also Laratro*, 8 NY3d at 81-82 ["Since municipalities are run by human beings, they sometimes fail in that duty, with harmful, even catastrophic, consequences. When that happens, as a general rule, the municipality is not required to pay damages to the person injured."] and *O'Connor*, 58 NY2d at 192.)

Here, the "apparent" alleged error by an unidentified municipal actor—insufficient surveillance of an apartment where Plaintiff neither resided nor was expected—is just as remote from Plaintiff's injury as in the cases when this Court identified municipal negligence but still barred recovery for lack of special duty. Neither Plaintiff nor the Circuit articulate how any extra surveillance of the apartment would have alerted anyone to Plaintiff's presence or more importantly his reaction upon Officer Miller's entry.[7]

[7] The Circuit easily disposed of Plaintiff's other "Monday morning quarterbacking" theories, the City brought the wrong battering ram, etc. (*Ferreira*, 975 F.3d at 272-74). The Circuit's last remaining theory connecting the alleged negligence to the injury is just as speculative as the others it rejected. (*Id.*)

Even if planning can be connected to the injury, this Court should still not answer the question to impose liability on the City. *Palaez v. Seide* (2 NY3d 186 [2004]) is instructive. In two cases combined on appeal, plaintiffs sued municipalities alleging negligence during apartment inspections and health counseling provided to plaintiffs. (*Id.* at 191-96.) This Court dismissed both cases for lack of a special duty because even though officials had direct contact with plaintiffs neither municipality voluntarily assumed a duty. (*Id.* at 196.) This Court observed, "[i]n retrospect, the municipal employees in both cases may have carried out their duties imperfectly, and it surely would have been far better – and the harm perhaps avoided – had the [ ] authorities been more aggressive and the New York officials more thorough. But that is not the test. If it were, municipalities in all their governmental functions would be insurers of the safety of their citizens and be open to liability whenever it could have or should have done better." (*Palaez*, 2 NY3d at 202.)

Palaez makes another important point: this Court has distinguished been "primary" and "secondary" negligence, with government liability for primary negligence but not secondary: "In the special relationship cases we are generally asked to impose liability on the government because it failed to prevent the acts of third persons who are the *primary* wrongdoers. This involves a form of secondary liability which we have restricted out of respect for the public treasury." (*Palaez*, 5

NY3d at 205.) The public treasury deserves the same respect here as it did in *Palaez*.

Those who conducted surveillance here are equivalent to those whose secondary liability is not actionable. Primary liability, if any, falls to those who directly caused Plaintiff's injury, which here is the officer who executed the warrant and fired his weapon.[8] The officers conducting surveillance or deciding how much surveillance was enough had no more ability to affect the immediate events causing Plaintiff's injuries than the municipal officials in the legion of police, detectives, inspectors, and program coordinators had in cases where this Court required a special duty.

E. Plaintiff Misconstrues this Court's Precedent

Although acknowledging its certified question largely is a matter of public policy, the Circuit ignored this Court's many policy statements concerning special duty. Instead, it stated, "[t]he *Haddock* and *McCummings* line of cases, therefore, along with the underlying rationale for the special duty rule as articulated by the Court of Appeals, supports [Plaintiff's] argument that the special duty requirement has no applicability in a case in which the harm is inflicted by governmental

[8] It is hard to square the jury's finding that the officers on the scene, who directly caused Plaintiff's injuries, did nothing wrong with the Circuit's speculation that the jury believed insufficient surveillance caused Plaintiff's injury. The easiest course for this Court is to deem those two findings irreconcilable and (a) dismiss the negligence finding against the City as logically impossible or (b) remand for a retrial on the City's alleged negligence in surveillance prior to the mission so, if the issue comes back here, there would be a better record about it.

actors." (*Ferreira*, 975 F.3d at 285.) In so doing, the Circuit either improperly relied on this Court's silence when the doctrine was legally inapplicable or misconstrued the cases.

i. *Haddock*

First, citing *Haddock v. City of New York* (75 NY2d 478, 483 [1990]), the Circuit takes this Court's silence on special duty to mean special duty does not apply whenever a "governmental actor" injures a plaintiff. (*Ferreira*, 975 F3d at 285.) In *Haddock*, a parks department employee raped plaintiff, a minor, in the park. (*Haddock*, 75 NY2d at 483.) Unlike Officer Miller, the municipal employee causing the injury in *Haddock* committed a crime outside the scope of his employment. Plaintiff in *Haddock* sued the municipality for negligently retaining the employee. (*Id.* at 483-84.) This Court did not discuss—even obliquely—the issue of special duty. Instead, the case turned on whether the City's pre-hiring investigation of the rapist employee, or lack thereof, triggered governmental immunity. (*Id*.)

Haddock carries no weight on the special duty issue now before this Court. Because municipal hiring/retention decisions are not typically "undertaken by the government for the protection and safety of the public pursuant to [their] general police powers," they do not implicate the special duty rule. (*Compare Tara N.P.*, 28 NY3d at 713 [2017] [County's referral of the sex offender, who raped the

plaintiff, was a governmental function because the referral was pursuant to a program meant to fight recidivism].) In contrast, the planning and execution of a judicially authorized search/arrest warrant occurs for "the protection and safety of the public" under the City's "general police powers."

ii. *McCummings*

The Circuit and Plaintiff also misconstrue *McCummings v. New York City Transit Auth.* (81 NY2d 923 [1993]), where a police officer shot plaintiff in a subway station. Plaintiff sued, claiming the officer negligently shot him. The parties at trial differed sharply on whether the officer shot Plaintiff in the back, how far from the officer plaintiff was, and whether the officer had seen plaintiff committing a crime. (*McCummings* at 925-26.) This Court observed, "The principal question is a narrow one: whether the evidence in the record warrants the trial court's denial of defendant's dismissal motion made at the close of plaintiff's case and renewed at the close the evidence." (*Id*. at 926.)

The case turned on that issue, not special duty. The majority opinion said not a word about special duty, nor is that surprising. The *McCummings* plaintiff, unlike Plaintiff, did not try to sue the city for actions or inactions of unknown city workers who sent the officer on patrol. The *McCummings* plaintiff did not claim someone besides the shooting officer should be liable for actions or inactions before placing the transit officer on duty. The *McCummings* jury found the

"municipal employee" was negligent and engaged in excessive force. *McCummings v. New York City Transit Auth.*, 177 AD2d 24, 26 [1st Dept 1992] *aff'd*, 81 NY2d 923 [1993].) In contrast to *McCummings*, the jury in this case found Officer Miller was neither negligent nor unreasonable in his use of force.

If the jury had found the transit officer not liable and the plaintiff had then attempted to stretch liability to the alleged negligence of a secondary actor as Plaintiff does here, perhaps this Court would have discussed special duty. Instead, *McCummings*' silence on special duty means nothing.

iii. *Applewhite*

Finally, the Circuit and Plaintiff misread this Court's holding in *Applewhite v. Accuhealth, Inc.* (21 NY3d 420 [2013]). In *Applewhite*, plaintiff sued the city for injuries caused by its employees. This Court correctly remanded for an examination of whether the injured plaintiff could satisfy the special duty test required to sustain the claim. The Circuit attempts to discount the remand by misconstruing the claim as one for "the failure of the municipal EMTs to respond adequately to an injury inflicted by another [non-municipal actor]." (*Ferreira*, 975 F3d at 286.) It also incorrectly stated, "the actions of a non-governmental nurse had caused the danger prior to the arrival of the municipal EMT employees" by administering "an apparently noxious medication." (*Id.*)

Respectfully, the Circuit's statement of facts is wrong. This Court found plaintiff "required the intravenous administration of a prescribed medication" by the visiting nurse; there is no indication the prescribed medication was "noxious" or administration negligent. (*Applewhite* at 424.) The injury was not the injection; it was serious brain damage due to oxygen deprivation caused by a delay in transportation. (*Applewhite* at 424, 429, and 431.)

Based on this factual misunderstanding, the Circuit concluded this Court in *Applewhite*, "applied the special duty rule in a case involving the government's failure to respond adequately to or protect against an injury inflicted by a third party." (*Ferreira*, 975 F3d at 286.)

The *Applewhite* plaintiff alleged more than that the EMT's stood by passively and failed to prevent a problem caused by another non-municipal actor. The EMTs arguably caused plaintiff's injuries. Remand to search for proof of a special duty, therefore, significantly indicates the need for an injured plaintiff to prove such duty even where a municipal employee inflicts an injury. (21 NY3d at 431.)

Applewhite pairs neatly with this Court's holding in *Lauer v. City of New York* (95 NY2d 95 [2000]), in which the Circuit correctly understood this Court to require proof of a special duty even where a municipal actor inflicted the injury to plaintiff. For all the reasons set forth in *Lauer* and elsewhere in this brief, neither

Plaintiff nor the Circuit articulated sufficient reason to wreak the public policy havoc to follow from overruling it.

iv. *Davis*

Plaintiff cites *Davis v. S. Nassau Communities Hospital* (26 NY3d 563 [2015]) to support expanding the scope of municipal liability here. But it is inapt and actually cautions against recognizing the broad municipal duty Plaintiff seeks.

In *Davis*, this Court found a doctor owed a duty to a motorist injured by the doctor's patient in a car accident, after the doctor administered opioids to the patient and failed to warn her not to drive. The case, a 3-2 ruling, is easily distinguishable.

This Court discussed "the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care. We have previously noted that, '[w]hile the temptation is always great to provide a form of relief to one who has suffered, … the law cannot provide a remedy for every injury incurred.'" (26 NY3d at 580 [citation omitted].) Additionally, "Courts resolve legal duty questions by resort to concepts or morality, logic and consideration of the social consequences of imposing the duty." (*Id*. at 572.)

This Court's reasoning for recognizing a doctor's potential duty to a non-patient motorist was that imposing the duty worked little change to the parties' conduct and expectations. First, the doctor already had a duty to warn his patient

about the drug's dangers. Second, the duty only required the doctor to warn the patient, but not to restrain her from driving. Therefore, extending the doctor's duty worked no practical change.

In contrast to *Davis'* "no practical change" analysis, imposing a duty on every municipal actor to every member of the public would severely disrupt how government operates. The potential liability is boundless if imposed on an earlier decision-maker, remote from the scene and a stranger to the injured party.

Extending the scope of duty, as in *Davis,* to municipalities would fundamentally change how they function, unlike the doctor in *Davis*. Fear that any decision could trigger future liability, however remote the injury might be from that decision, would paralyze government. This is not the type of caution the Court counseled in *Davis*.

Plaintiff cherry picks a quote in *Davis* from *Hamilton v. Beretta U.S.A. Corp.* (96 NY2d 222, 223 [2001]): "This is not an instance in which defendants' 'relationship with … the tortfeasor ... place[d] [them] in the best position to protect against the risk of harm.'" That construct prompted this Court to observe that the doctor in *Davis* could warn her patient against driving while impaired, thereby causing the patient-driver to change her conduct (driving under the influence), averting the injury. By contrast, in *Hamilton*, the gun manufacturer could *not*

prevent the criminal from misusing a firearm it manufactured, counseling against expanding a duty.

The problem with Plaintiff's analysis is that, unlike *Davis*' impaired driver and *Beretta*'s criminal wrongdoer, both of whom *wrongfully* caused injuries, here the jury found Officer Miller did not wrongfully cause any injury. Plaintiff asks this Court to reach backward in time past perfectly appropriate and legal conduct to an unknown person determining the amount of surveillance.

Those deciding pre-operation surveillance were in no position to prevent anybody's wrongful conduct because there was none. Plaintiff cannot claim either the City or "other officers" conducting surveillance *caused* or *could have prevented* Officer Miller's *wrongful* actions, because the jury found that Officer Miller's conduct was not wrongful.

There is no end to taxpayer liability if the Court adopts Plaintiff's rule. Could the City be liable in negligence simply for deciding to obtain a warrant in the first place? Or could the City be liable just for having a police department at all? The rule Plaintiff seeks does not follow from *Davis*.

III. THIS COURT CAN AVOID THE CERTIFIED QUESTION BY EXAMINING THE CIRCUIT'S FAULTY PREDICATE REJECTION OF GOVERNMENTAL IMMUNITY

The Circuit puts this Court in the unenviable position of answering a question about special duty on a poorly formed record due to misinterpreting this

Court's holdings on governmental immunity. A proper reading of governmental immunity cases, a predicate to even reaching the special duty rule, would enable this Court to avoid the certified question and defer the issue to a case with a better-formed record.[9] Put another way, the only reason the Circuit causes this Court to reach the special duty issue is that it misunderstood or misapplied New York governmental immunity law by asserting this Court has not provided sufficient guidance. Because the Circuit's governmental immunity errors affect the disposition of the special duty issue in the certified question, this Court, as the authoritative author of New York negligence law, should correct them.

The Circuit found just one "violation of acceptable police practice" that it speculated might have led to Plaintiff's injuries: the amount of pre-warrant execution surveillance. Without supporting its finding with evidence in the record, the Circuit found that "the City's failure to conduct additional surveillance" could have allowed a reasonable jury to find that this was the proximate cause of Plaintiff's injury. (*Ferreira*, 975 F3d at 274.) The Circuit pronounced the decisions made about pre-mission surveillance outside of the bounds of acceptable police practice, and thus outside the bounds of governmental immunity.

[9] "Hard cases. A phrase used to indicate judicial decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: 'Hard cases make bad law.'" (*Black's Law Dictionary* 646 [5th ed. 1970].)

The Circuit did this without pointing to a violation of any statute, regulation, oral or written policy, "violation of acceptable police practice," or even testimony outlining "acceptable police practice." Instead, the Circuit looked solely to answers by Chief Zikuski to vague, aspirational questions that fail to adduce the evidence necessary to defeat governmental (or discretionary) immunity. The Circuit cited to Chief Zikuski's trial testimony where he agreed to unobjectionable general statements, like "'who is in the apartment' can be an 'important fact;'" "knowing the number of people in the apartment can result in a 'safer operation with a greater chance of success;'" and "would generally result in a 'better likelihood of not exposing the public to unnecessary harm.'" (*Ferreira*, 975 F3d at 275.)

On this "evidence" alone the Circuit divined a violation of an "acceptable police practice," precluding governmental immunity. (*Id.*) This Court's long-standing precedent shows Chief Zikuski's mere agreement with such aspirational statements is insufficient to defeat governmental immunity.

In *Tango v. Tulevech* (61 NY2d 34, 41 [1983]), this Court, set the standard for a governmental immunity defense:

> [T]he rule to be derived from the cases is that discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a *governing rule or standard with a compulsory result*. [emphasis added].

In *Kenavan v. City of New York* (70 NY2d 558, 569-70 [1987]), a case in which an injured motorist sued the City claiming a firefighter improperly positioned his firetruck at a scene, this Court examined what a plaintiff must show to defeat governmental immunity:

> While expert testimony established that proper fire fighting procedure called for parking the fire truck behind rather than ahead of the burning vehicle and for the erection of "fire lines", there was no evidence that these were *immutable procedures that must invariably be followed* at the scene of a vehicle fire. Indeed, *every witness and every regulation left room for judgment and discretion in these matters*, depending on the particular circumstances presented. That Ogno might have positioned the engine differently, or that Verdonik might have established a more effective warning to traffic are, under the circumstances of this vehicle fire, matters of judgment within the ambit of ordinary negligence for which no cause of action against a municipality will lie [ ].

Three years later, in *Haddock* (75 NY2d 478, 485 [1990]), this Court denied governmental immunity because the city personnel charged with investigating job applicants failed follow the city's procedures for the applicant in question. This Court instructed, "The immunity afforded a municipality presupposes an exercise of discretion in compliance with its own procedures. 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." (*Haddock* at 485.)

A year later, in *Mon v. City of New York* (78 NY2d 309, 315-16 [1991]), a plaintiff shot by an off-duty police officer sued the city for negligently hiring a man with a criminal record as a police officer. The city invoked governmental immunity for the discretionary acts of officials charged with investigating the applicant. (*Id.*) Relying on *Haddock*, plaintiff argued that the city's defense of governmental immunity was improper because the city violated "statutory and regulatory provisions concerning employment practices" in hiring the officer. (*Id*.) The Court rejected the argument because the civil service rule plaintiff cited said the municipality "*may refuse* […] to certify an eligible" candidate who lies on a job application. The discretionary hiring rule did not say the municipality *must not* refuse to certify. (*Mon* at 316 [emphasis added].) Thus, because the city's exercise of discretion did not run afoul of the statute, this Court recognized the governmental immunity defense.

A year later, in *McCormack v. City of New York* (80 NY2d 808, 811 [1992]), this Court again considered the governmental immunity defense, also known as "the professional judgment rule." There, plaintiff, the estate of a deceased officer, proved that the commanding officer's order to the deceased officer not shoot a barricaded subject, even if fired upon, was "unusual" and against typical operating procedures. This Court relying upon *Kenavan* held that proof of "unusual" and

atypical decisions outside the typical protocols "alone was not sufficient to render the discretionary no-shoot order in this case actionable." (*McCormack* at 811.)

In *Johnson v. City of New York* (15 NY3d 676, 680-81 [2010]), a plaintiff bystander hit by police gunfire in a shootout with a robbery suspect sued the city in negligence for her injuries. The city claimed discretionary immunity from the officer's decision to shoot. Plaintiff responded that officers lost their immunity because their weapon's discharge violated the department's use of deadly physical force guidelines. (*Johnson* at 679.) This Court held a written policy permitting the exercise of discretion will not preclude the professional judgment rule (*id*. at 681.)

This Court analyzed the legal landscape and departmental policy at issue and sided with the City:

> Immunity under the professional judgment rule " 'reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury'" [ ].
>
> This immunity, however, presupposes that judgment and discretion are exercised in compliance with the municipality's procedures, because "the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion" [ ].
>
> The guideline here calls for such judgment, i.e., the police must not discharge their firearms if doing so would "unnecessarily endanger innocent persons." It does not prohibit officers from

> discharging their weapons when innocent bystanders are present in every instance. Rather, the guideline grants officers the discretion to make a judgment call as to when, and under what circumstances, it is necessary to discharge their weapons.

(*Johnson* at 680-81 [citations omitted] *citing Rodriguez v. City of New York*, 189 AD2d 166, 175-76 [1st Dept 1993] and *Lubecki v. City of New York*, 304 AD2d 224, 234-35 [1st Dept 2003] *lv. denied*, 2 NY3d 701 [2004].)

The Appellate Division cases this Court cited approvingly in *Johnson* are instructive. In *Rodriguez*, the First Department considered whether a municipality was liable in negligence to a bystander injured in a shootout between officers and a suspect. In a variation on Plaintiff's argument now, Rodriguez argued the officer waited *too long* to arrest an armed suspect and the delay increased the danger to innocent bystanders. Plaintiff similarly argues the police *did not wait long enough* to execute the no-knock warrant. The First Department held the officer's decision about approaching the suspect triggered governmental immunity:

> There was no evidence presented by the plaintiff, through his expert or otherwise, to show any immutable departmental procedures that must invariably be followed in *every* arrest [ ]. The decision whether to stop and apprehend an individual acting in a suspicious manner or to observe said individual for a period of time is a discretionary decision for the officer and cannot be held hostage to "second-guessing" after the fact. *When* to make the arrest, as presented by the circumstances herein, involved the exercise of professional judgment by the officer. His tactical decision, while it may have evidenced poor judgment in retrospect, nevertheless, entailed the exercise of discretion or expert judgment in a

policy matter and thus is cloaked with governmental immunity (*Rodriguez*, 189 AD2d at 177-78 *citing Kenavan*, 70 NY2d at 569; *McCormack v. City of New York*, 80 NY2d 808, 811 [1992]; and *Mon*, 78 NY2d at 313.)

The *Rodriguez* plaintiff tried another negligence theory, too: the officer negligently shot at the suspect with a crowd present. Again, the city invoked governmental immunity, and Appellate Division analyzed it. On this theory, the First Department found no governmental immunity because, in shooting with a crowd present, "[t]he evidence submitted by the plaintiff showed *clearly defined and specific standards* on when officers should and should not discharge their weapons. In essence, the testimony of the expert was that the firing by the officer into the crowd was 'outside the realm of acceptable police practice.'" (*Rodriguez*, 189 AD2d at 178.) The court cited *Velez v. City of New York* (157 AD2d 370, 373 [1st Dept 1990], *lv. app. den.*, 76 NY2d 715 [1990]), which, in turn, denied governmental immunity to an officer because "it was outside the realm of acceptable police practice to have permitted decedent to enter the apartment before it was searched, and that this departure from *clearly defined practice* constituted a failure to exercise ordinary care in protecting decedent from foreseeable harm." (*Velez* at 370-71 [emphasis added].)

In *Johnson* this Court also cited *Lubecki v. City of New York* (304 AD2d 224, 234-35 [1st Dept 2003] *lv. denied*, 2 NY3d 701 [2004)]) approvingly. There,

the First Department reviewed a jury verdict finding the municipality liable for the wrongful death of a hostage during a shootout between officers and a bank robber. (*Id.*) The Appellate Division rejected a "professional judgment" defense because the evidence showed police violated *clearly established protocols and procedures*," rendering the professional judgment rule inapplicable. (*Id.* at 235 [emphasis added].)

In 2011, the year Plaintiff suffered his injury in this case, this Court revisited "governmental immunity" or the "professional judgment rule." In *Valdez v. City of New York* (18 NY3d 69, 77-79 [2011]), this Court reiterated, "[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent." (*Valdez* at 76.) The Court further explained, "[D]iscretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions *direct adherence to a governing rule or standard with a compulsory result.*" (*Id*. at 76 and n. 3 [emphasis added] *citing Tango v. Tulevech*, 61 NY2d 34, 41 [1983].)

In *Shipley v. City of New York* (25 NY3d 645, 658 [2015]), this Court applied governmental immunity to a medical examiner who conducted an autopsy and returned a family member's body but retained decedent's brain and other

tissues without advising the family. This Court had to decide whether the governing rules gave the medical examiner discretion. While the lower court held Public Health Law compelled the medical examiner to either return the body parts or notify the family of their retention, this Court rejected that holding, finding ambiguity in the statutory language. Given the lack of clarity inherent in the governing statute, this Court found no liability. (*Shipley* at 655-56 and 658.)

Two recent Appellate Division decisions warrant discussion. *Malay v. City of Syracuse* (151 AD3d 1624, 1626 [4th Dept 2017] *lv. denied*, 30 NY3d 904 [2017]) resembles this case. During a hostage standoff, Syracuse police fired tear gas canisters into an apartment, unexpectedly injuring plaintiff, whom the officers did not know was present. Plaintiff sued the officers in negligence for firing the gas canister. The court found governmental immunity appropriate because, although Plaintiff claimed the officers did not comply with the chemical munitions manual, she presented no evidence "through [her] expert or otherwise, to show any *immutable departmental procedures* that must invariably be followed' in the use of CS gas canisters." (*Malay* at 1626 [emphasis added].)

Violating guidance in the gas manufacturer's manual did not preclude immunity because "there was no evidence [ ] that the police officers violated their '*own* internal rules and policies'." (*Id*.) Moreover, even if the city had adopted the manual, it would not have affected immunity because "the manual did not contain

mandatory directives but, rather, afforded officers 'discretion to make a judgment call as to when, and under what circumstances, it [was] necessary to discharge' the gas canisters." (*Id*.)

Relf v. City of Troy (169 AD3d 1223, 1227 [3rd Dept 2019]) is another similar recent Appellate Division case. There, a Troy police officer released a canine dog to search for a suspect not knowing plaintiff, who was not a suspect, was in the area. The dog bit plaintiff. The Third Department found the "professional judgment rule" protected the city. Although plaintiff produced expert testimony that the officer's actions "did not comport with generally accepted police standards," this was insufficient to defeat the immunity. Relying on this Court's decisions in *Haddock* (75 NY2d at 485) and *Johnson* (15 NY3d at 681), plaintiff failed to show the officer violated "*the City's enacted policy*." (*Relf*, 169 AD3d at 1227.)

At trial here, Plaintiff identified no clear and definite policies violated by those who conducted surveillance. That absence of evidence did not trouble the Circuit or dissuade it from rejecting governmental immunity because, it said, this Court has "apparently not explicitly addressed" or otherwise defined the type of statute, regulation, oral or written policy or "acceptable police practice" needed to preclude governmental immunity (*Ferreira*, 975 F3d at 271). As the Third

Department laid out in *Relf* in 2019 and, as the Fourth Department recognized in *Malay* in 2017, that is just not so.

For 38 years, since at least *Tango v. Tulevech*, this Court has repeatedly and consistently maintained a coherent definition of what type of rules, policies, and practices a municipal actor must violate for the municipality to lose discretionary immunity. Whether statutes, regulations, internal policies, or "acceptable police practices," this Court has required a "clearly defined standard," a "specific standard," a "clearly defined practice," a "clearly established protocol and procedure," or an "immutable procedure that must invariably be followed" —all of which mandate a "compulsory result." Put another way, a statute, regulation, internal policy, or "acceptable police practice," must be so defined and have directives so definite that it precludes the exercise of any discretion.

Neither Plaintiff nor the Circuit relies on any statute, regulation, or internal policy; there is simply no such evidence in the record. Instead, Plaintiff and the Circuit rely solely on an alleged "acceptable police practice" about the amount of necessary surveillance supposedly derived from Chief Zikuski's cross-examination. In the Circuit's own words, the Chief merely agreed with a vague assumption that more surveillance "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.'" (*Ferreira*, 975 F3d at 275.)

Testimony about what "can be," "can result," "would generally," and "better likelihood" are all speculative and indefinite and fall far short of the requirement for clearly established, definite, and immutable rules.

Even if a municipality's general "acceptable police practice" suffices, the Chief's testimony falls far short of the definiteness this Court requires to preclude governmental immunity. How many hours of additional surveillance did this case require? Following from the Chief's testimony, how many hours or days of surveillance must officers do before executing any search warrant? How will officers know they have performed an acceptable amount of surveillance before commencing the operation? What knowledge of the occupancy of the apartment must officers have, and with what degree of certainty must they have it? Must officers know every occupant of any structure before executing a warrant?

The Circuit's interpretation of governmental immunity does not instruct the City what it did wrong, nor does it give police departments across the State any guidance for avoiding similar liability. Instead, the Circuit created an immutable standard: perfection.

The Circuit's reliance on the phrase, "better likelihood of not exposing the public to unnecessary harm" contradicts this Court's holding in *Johnson v. City of New York* (15 NY3d at 680-81), there this Court found a guideline that officers "must not discharge their firearms if doing so would 'unnecessarily endanger

innocent persons'" was insufficient to defeat immunity. (*Id*.; *see also Kenavan*, 70 NY2d at 569.)

The Circuit's conclusion that Chief Zikuski's testimony proved an "acceptable police practice" also conflicts with its own rejection of Plaintiff's theory about the police obligation to search for nonexistent floorplans. The Circuit observed:

> [Plaintiff] also relies on similarly broad, indefinite principles, such as that "police are never allowed to unnecessarily expose members of community to unnecessary danger," see Appellant's Letter Br. at 2. A conclusion that a police officer "unnecessarily exposed members of the public to danger" is insufficient as a matter of law for a jury to conclude that the City violated acceptable police practice so as to defeat discretionary immunity. Were this not the case, then discretionary immunity would essentially serve no function, because it would be defeated in any case in which the police would otherwise be liable. While we conclude that the alleged policy that was violated need not be a formalized, written policy, see supra, *it must be sufficiently definite so as not to devolve into general standards of care*.

(*Ferreira*, 975 F3d at 272 n. 7 [emphasis added].)

The vague testimony the Circuit accepted as sufficient to deny discretionary immunity regarding surveillance is as infirm as the language it rejected for Plaintiff's other theories.

IV. SUREVILLANCE PRIOR TO WARRANT EXECUTION WAS NOT THE PROXIMART CAUSE OF INJURY

The record here contains no evidence, beyond speculation, showing insufficient surveillance of the apartment, and specifically Plaintiff's presence there, proximately caused his injuries.

In *Kush v. Buffalo* (59 NY2d 26, 32-33 [1983]), this Court imposed a duty "upon owners or possessors of hazardous substances to safeguard against unsupervised access by children." (*Hamilton v. Beretta* U.S.A. Corp., 96 NY2d 222, 235 *opinion after certified question answered*, 264 F3d 21 [2d Cir. 2001].) This Court required a plaintiff asserting a negligence claim to prove "defendant's negligence was a substantial cause of the events which produced the injury."

Further, according to the Court, "an intervening intentional or criminal act will generally sever the liability of the original tortfeasor"; but, if the "intervening act is a natural and foreseeable consequence of a circumstance created by defendant, liability will subsist." (*Id*.)

In Kush, this Court found, because the school district gave minors unsupervised access to laboratory chemicals, their negligent conduct was foreseeable, and the district's failure was the proximate cause of plaintiff's injury. (*Id.*)

Officer Miller's shooting of Plaintiff was not a foreseeable consequence of an allegedly insufficient amount of surveillance—that is, not knowing every occupant of the apartment. Given his briefing about the presence of occupants,

Officer Miller fully expected to encounter Pride in every room he entered. Who Officer Miller expected to encounter is irrelevant, but what Officer Miller encountered is dispositive.

Officer Miller explained he responded to "a man doing exactly the opposite of what I was asking him to do when he had a gray object in his hands." (SA671; SA766-67). Miller's actions, which the jury must have found credible given its excessive force and assault findings, were the proximate cause of Plaintiff's injury, not Plaintiff's identity. Plaintiff's own expert, when asked, "How did the occupancy of the apartment affect Jesus Ferreira being shot?" testified, "It did not." (SA766-67).

CONCLUSION

This Court should obligate Plaintiff to prove a special duty existed between him and the "other officers" who conducted surveillance before execution of the search and arrest warrant. The City also implores this Court to avoid the special duty question by clarifying that governmental immunity properly applies to municipal decisions made about adequacy of surveillance.

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NEW YORK STATE COURT OF APPEALS
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