17-3234-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JESUS FERREIRA,

Plaintiff-Appellant,

v.

CITY OF BINGHAMTON, KEVIN MILLER, POLICE OFFICER,

Defendants-Appellees,

and

CITY OF BINGHAMTON POLICE DEPARTMENT, JOSEPH ZIKUSKI, AS POLICE CHIEF OF THE BINGHAMTON POLICE DEPARTMENT, JOHN DOES 1 THROUGH 10, WHOSE NAMES ARE FICTITIOUS AND IDENTITIES ARE NOT CURRENTLY KNOWN, JOHN SPANO, POLICE SERGEANT, LARRY HENDRICKSON, POLICE SERGEANT, ROBERT BURNETT, POLICE SERGEANT,

Defendants.

On Appeal from the United States District Court
for the Northern District of New York

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

SONIN & GENIS
Attorneys for Plaintiff-Appellant
One Fordham Plaza, Suite 907
Bronx, New York 10458
718-561-4444

ALEXANDER J. WULWICK
Appellate Counsel
160 Broadway, 4th Floor
New York, New York 10038
212-732-6566

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UNTITED STATES COURT OF APPEALS
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vs.

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POLICE OFFICER KEVIN MILLER,

Defendants-Appellees.

On Appeal From the United States District Court
For the Northern District of New York

BRIEF OF PLAINTIFF-APPELLANT

JURISDICTIONAL STATEMENT

The District Court properly exercised jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343, and 1367, and 42 U.S.C. §§ 1983 and 1988. This Court possesses jurisdiction over this matter because the District Court's judgment is final within the meaning of 28 U.S.C. § 1291.

Plaintiff timely filed his notice of appeal on October 10, 2017 from the final judgment, entered on September 28, 2017, disposing of all parties' claims.

THE ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was legally insufficient to support the jury's finding that plaintiff did not prove his negligence claim against defendant Police Officer Kevin Miller, pursuant to Fed.R.Civ.P. 50.

2. Whether the jury's finding that plaintiff did not prove his negligence claim against defendant Police Officer Kevin Miller was against the weight of the evidence, pursuant to Fed.R.Civ.P. 59.

3. Whether the jury's finding that defendant City of Binghamton was liable for negligence was supported by the evidence.

4. Whether the evidence was legally insufficient to support the jury's finding that plaintiff was comparatively negligent, pursuant to Fed.R.Civ.P. 50.

5. Whether the jury's finding that plaintiff was comparatively negligent was against the weight of the evidence, pursuant to Fed.R.Civ.P. 59.

STATEMENT OF THE CASE

I. AS TO OFFICER MILLER'S LIABILITY

A. Some Undisputed Facts

1. The standard of care applicable to the police

At 6:37 on the morning of August 25, 2011, a Binghamton Police Department SWAT team executed a "no-knock" warrant at 11 Vine Street. A. 173, 235, 338, 659, 712.[1] Plaintiff was an overnight guest

[1] Numerals preceded by “A.” are to the pages of the trial transcript reproduced in the appendix, unless otherwise noted

sleeping on the couch in the living room, near the front door. A. 1364, 1367, 1374.

James Hawley, the officer in charge of executing the no-knock warrant, A. 338, testified that in a situation involving the potential for the use of deadly force, the applicable standard of care is that a police officer should "not use more force...than is reasonably necessary under the circumstances." A. 161, 162. Officer Hawley further testified that "the officer should look and objectively identify deadly physical force before they shoot." A. 171-72. Officer Robert Charpinsky, who was one of the officers involved in the execution of the warrant, A. 251, 286, testified to the same effect. A. 209. So did Officer Larry Hendrickson, A. 435, 439, 516-17, an instructor with the Binghamton Police Department, A. 433, and Officer John Spano, A. 614-16, who was in charge of the SWAT team on the day in question, A. 619-20. Officer Kevin Miller, who shot plaintiff, admitted that if he did not “positively and objectively see and identify” a weapon, he was “not allowed to use deadly physical force.” A. 783, 674, 677-80.

Binghamton's police chief, Joseph Zikuski, A. 910, testified that a police officer who uses deadly physical force in the absence of "an objectively reasonable threat of imminent deadly physical force being used against someone...has...violated good and accepted police practice and procedures." A. 943-44. Chief Zikuski further testified that an officer may not speculate as to the presence of a weapon, A. 943, and should "be

able to differentiate between a real weapon and a toy Xbox controller." A. 947.

2. The difficulty of the entry into the apartment

The entry into the apartment was supposed to be "dynamic", which means quickly and by surprise and before the individuals inside have time "to reach for something or do something bad." A. 212, 239-40, 247-48, 467-68, 475-76, 503, 683, 986. The entry in this case was made by use of a one-man battering ram weighing 25-40 pounds. A. 239, 241, 542, 712. The goal was to breach the door on the first try. A. 239-40, 712, 986.

As it turned out, the entry was anything but quick or surprising; it took the officer using the ram several attempts, estimated at as many as 10, over a period of as long as a minute, to get the wooden door open. A. 240-41, 298, 372-73, 714, 856, 863. All the while, the officers were yelling, "Police, police, get down." A. 295-97, 599, 854-56.

After breaching the door, the several officers entered the apartment in a low, close formation known as a "stack"; Officer Miller led the way, and Officer Charpinsky was the number two man immediately behind Miller, literally touching him "gear to gear" and "right on his heels". A. 250-52, 286, 712, 854, 862. Officer Miller went off to his right and Officer Charpinsky to his left. A. 253, 299-300, 862.

3. Plaintiff was unarmed and not a subject of the warrant.

Plaintiff was not the subject of the warrant, and the police did not know he was in the apartment. A. 172-73, 189, 620, 695-96. As Officer Hawley put it, "Jesus Ferreira was at the wrong place at the wrong time." A. 173. There is no dispute that plaintiff was unarmed and that no weapon was ever found in his possession or anywhere near him; nor was any weapon found in the apartment. A. 188-89, 374-75, 257-58, 259, 260-61, 262, 628, 732-33, 767, 784, 976.

4. The Xbox controller has no resemblance to a .38 snub-nosed revolver.

Officer Hawley testified that the Xbox controller retrieved from the room, as it appears in the photographs in evidence (see A. 1739-40), does not look like the .38 snub-nosed revolver that Officer Miller thought he saw that morning. A. 381-82. Officer Hendrickson gave the same testimony, A. 486, 502-03, as did Officers Spano, A. 636-37, 652 and Miller, A. 885 and Chief Zikuski. A. 947.

As can be seen from a comparison of the photographs of the Xbox controller taken from various angles and the photographs of various .38 snub-nosed revolvers taken off the internet (see A. 1742), the controller, unlike the metal revolver, has the appearance of plastic, has rounded curves and multiple multi-colored buttons (green, blue, red, orange,

black and white) is whitish in color, A. 382, is far larger and bulkier, has more surface area, and is designed to be held with two hands.[2]

Officer Miller testified that his training as a member of the SWAT team included being able to recognize the difference "[b]etween a real weapon" in someone's hand "and something that's not a weapon." A. 887-88. Officer Hendrickson similarly testified that "one of the purposes of the training is to be able to tell a real weapon from a harmless object that is not a weapon." A. 440.

5. Plaintiff did not threaten Officer Miller.

By Officer Miller's own testimony, plaintiff did not verbally threaten him in any way, or curse at him, or attempt to leave the room or to conceal himself before the shooting. A. 733-34, 748. Nor did plaintiff resist arrest or become violent after he was shot. A. 749.

6. The distance between plaintiff and Officer Miller when plaintiff was shot

Officer Miller testified that as soon as the door to the apartment was breached (it had come off its frame, A. 299, 864), he entered two to three steps, encountered plaintiff, and fired his AR-15 rifle once into plaintiff's torso at a distance of three to six feet. A. 723-24, 731, 732, 851. According to Miller, the sequence of events of crossing the threshold and shooting plaintiff took a "[c]ouple seconds;" A. 853-54. However, ac-

[2] A .38 snub-nosed revolver has a barrel of 2.5 inches or less. See https://en.wikipedia.org/wiki/Snubnosed_revolver.

cording to Officer Charpinsky, who was directly behind Miller, A. 250-52, 286, 862, he heard the shot before he entered the room. A. 300, 305. Officer Christopher Governanti, who was part of the stack, A. 598, heard a shot "immediately" upon the door being breached, A. 569, and Officer Brent Dodge, also part of the stack, heard the pounding on the door stop and then an immediate shot. A. 659-60. Miller admitted that these other police officers were truthful and correct when they testified that the shooting was immediate upon the opening of the door. A. 722-23.

Shooting immediately upon opening the door is a violation of proper police standards. A. 950.

7. The report of the incident contained no claim of the presence of a gun or that plaintiff was a threat, and no facts to indicate the shooting was necessary, reasonable, or justified.

The day after the events in question, Officer Hawley drafted a written report of the entire incident, including the shooting. A. 375-77. He characterized the report as "complete, thorough, fair, accurate" and objective. A. 376.

Officer Hawley acknowledged that "[n]owhere" in his report did he "indicate that somebody thought that the person that was shot had a weapon," or that he was holding something. A. 377-78. Whether the person was holding something was "a very important fact", which Officer Hawley would have put in his report had he known about it. A. 377-78.

Nor did the report indicate that plaintiff "was threatening in any manner", "was standing at the time he was shot," A. 378, "was advancing on anyone", or "that there was any apparent imminent threat of deadly physical force being used by [plaintiff] before he was shot." A. 379. Officer Hawley's report contained no facts "to indicate that it was necessary...[or] reasonable to shoot [plaintiff]." A. 379. This was corroborated by Officer Charpinsky, who was inches from Miller, and admitted he never saw plaintiff off the couch, standing up or advancing on Miller, or with anysthing in his hand. A. 253-54, 272.

The City's Crime Scene Unit lead investigator, Sgt. Stebbins, found no indication that plaintiff was advancing or standing, and the police records indicated that the plaintiff was on the couch at the time he was shot. A. 1308-09, 1316-17, 1358. Chief Zikuski also conceded that the police records stated that plaintiff was shot on the couch. A. 1002. Nevertheless, Sgt. Stebbins testified that no one told her that plaintiff was alleged to have held the Xbox controller. A. 1306-07, 1317.

B. The Key Disputed Facts Surrounding the Shooting

1. Plaintiff's version

Plaintiff testified that at about 2:00 in the morning of August 25, 2011, he fell asleep on a couch while watching a movie in his friend's apartment. A. 1363-64, 1367-68. Plaintiff had used an Xbox controller to watch the movie, A. 1368-70, and left it on the floor by the side of the couch. A. 1371, 1429-30. He was lying on the couch shown in the upper

right-hand section of the diagram of the apartment, facing the television in the upper left-hand corner of the diagram. (See A. 1741). A. 1367-68, 1374.

Plaintiff awoke to the noise of the battering ram and of yelling in the outer hallway. A. 1368, 1415. He twisted himself somewhat to his left toward the door, raised himself a little, and put his arms out, "[j]ust so I wouldn't be a threat to whoever was coming in." A. 1368-69, 1417-18.[3] Plaintiff's hands were empty. A. 1374.

Plaintiff said that while he was still on the couch, "[t]he door flew open and I seen a cop shoot me". A. 1368, 1424. “[T]he door flew open, and he was shot “in the same instant”. A. 1424. Plaintiff saw from their uniforms and equipment that police officers had entered the apartment. A. 1428. The police flipped him on his stomach on the couch, frisked him and handcuffed him behind his back, and then placed him on the floor on his right side. A. 1371-72, 1425-26.

Dr. Scott LaPoint, a board-certified pathologist, A. 1079, 1086-87, concluded that based on the trajectory of the bullet, it was impossible for plaintiff to have been standing up, and that he was likely on the couch. A. 1124-15, 1126, 1165.[4] He also testified that, contrary to what is

[3] Miller admitted that plaintiff’s arms were outstretched. A. 737. Chief Zikuski admitted that outstretched hands are usually a sign of surrender. A. 1000.

[4] Defendant’s expert later conceded the same upward trajectory of the bullet that Dr. LaPoint testified about. A. 1536.

shown in the movies and on television, being shot does not spin the person around, A. 1130-31, as Officer Miller had testified.

The Crime Scene Investigation revealed four bullet holes in each of plaintiff's shirts, all caused by one bullet. A. 1290-91. See A. 1719-38. Defendant's expert, Dr. Terzian, testified that multiple bullet holes from one bullet usually mean the victim was lying down, not standing up, causing the shirt to "be bunched up". A. 1506. Dr. Terzian admitted that there was no blood anywhere due to plaintiff standing up, A. 1504-05, and that the police investigative records he reviewed did not indicate that plaintiff was standing. A. 1516. Sgt. Stebbins, the crime scene investigator, made a similar admission. A. 1308-09, 1316-17.

Officer Hendrickson testified that it would "[n]ever [be] appropriate to shoot a man laying on a couch with his hands in the air showing no resistance", A. 546, and Police Chief Zikuski testified that if plaintiff had been lying on the couch, showing his hands, "he should not have been shot." A. 1005. Most critically, Officer Miller himself said that if there were "nothing in his [plaintiff's] hands," it would have been "a wrongful shooting." A. 739, 766.

Plaintiff testified that he heard one of the officers say to him, "[W]hy did you have that joystick [the Xbox controller] in your hand. Put the joystick in his hand and be quiet. Things like that." A. 1372-73. He

then saw "somebody's foot kick the joystick next to my stomach." A. 1375, 1425-26.[5]

Charpinsky admitted to moving the Xbox controller with his foot after plaintiff was shot. A. 267-68.

2. Officer Miller's version

Officer Miller testified that, because the execution of the no-knock warrant was a dynamic entry, at 6:37 AM[6], A. 683, 690, the team could not take the time to adjust to the darkness of the room they were entering. A. 718-19. That can make it "harder for the officer to see things", including a gun, A. 719, but he never claimed it was too dark for him to see what plaintiff was allegedly holding.[7] Officer Miller was also concerned that the several attempts and the extended period of time it took to breach the door caused them to lose the element of surprise and put them in a more dangerous situation, A. 714-15, 877-78, which was stressful to begin with. A. 742.

Immediately upon entering the room, Officer Miller took two or three steps, saw plaintiff, who was draped in a blanket over his shoulders, "coming up [rapidly off the couch], I'm going towards him, I'm yelling down, down, down, he's not doing that." A. 844, 737, 778, 854-56,

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[5] Plaintiff consistently stated the same facts from the moment he was shot. A. 1319-20.
[6] Sunrise was at 6:22, and it was “getting light out.” A. 598
[7] Neither Miller nor any other officer was supplied with night vision goggles. A. 236-37, 967-68.

893-94, 900, 903. He focused on plaintiff's outstretched hands and saw an object -- he did not recall in which hand A. 804, 895 -- and, thinking it was a gray or silver .38 snub-nosed revolver, shot plaintiff once in the torso. A. 813, 842-43, 733, 854-55, 900. Officer Miller testified that plaintiff had not taken a shooter's stance, with either one or two hands. A. 895.

Officer Miller testified that the bullet spun plaintiff around so that he landed face down onto the couch. A. 844, 849-50, 867, 879.[8] At that point, plaintiff began digging through the couch cushions, which Officer Miller perceived to mean that the gun was there and that plaintiff was trying to retrieve it. A. 844, 867-8. He and Officer Charpinsky, who had entered right behind him, also began digging in the couch and pulled plaintiff onto the floor and handcuffed him. A. 742-43, 867-68, 293. Immediately thereafter, Miller and Charpinsky searched for "the gun and directly underneath, underneath him [on the floor] is the [Xbox] controller," A. 843-45, 768, where plaintiff said he put it the night before. That was when Officer Miller realized that what he thought was a gun in plaintiff's hand was the controller, A. 768, 785, 844-45, which he never disclosed to Officer Hawley for inclusion in his report.

[8] The trial was the first time Miller mentioned that the plaintiff "spun" after being shot. A. 800-01. Dr. LaPoint testified that, contrary to what is often depicted in the movies, people do not spin upon being shot. A. 1130-31. Defendants' Dr. Terzian did not dispute his testimony.

Officer Miller testified that if he reasonably believed he or his team members were in danger, he did not have to "recognize an actual gun" in plaintiff's hands before shooting him. A. 841-42. He also testified that it was necessary to shoot plaintiff only once "to stop the threat." A. 867.

* * *

Despite Officer Miller's claim that he mistook the Xbox controller for a revolver, and a second search warrant was obtained to perform forensic testing on the controller, such as fingerprints or DNA (which would have indicated if plaintiff had ever held the controller or how it was held, with how many hands and with which fingers), A. 1287-88), the police chose not to perform such testing. A. 1296-97, 1320. Nor did the City grant the request by Sgt. Michelle Stebbins, of the Crime Scene Unit, A. 1270, for an independent investigation of the shooting. A. 1285-86. Miller was not aware of any reason not to gather, test, and analyze all relevant evidence. A. 809.

II. AS TO THE CITY'S LIABILITY

A. Negligent Breach of Door

As stated earlier, the execution of the no-knock warrant was supposed to have been by dynamic entry, but it was anything but that. In performing a dynamic entry, specialized equipment is utilized. These include one- and two-man battering rams, sledge hammers and fire axes. A. 470. The professional standards of care require that the police bring

multiple tools for a variety of reasons, including in case the door opens outward instead of inward. A. 470-71.

While the SWAT team here owned more than one type of battering ram, A. 986, the City failed to bring the two-man battering ram and all types of rams that it owned to the scene. A. 238, 321-22, 243. There was no discussion about which type of battering to use in this case, A. 237-38, 242, 713. The newly minted claim at trial of inadequate space to use the two-man ram is belied by the fact that none of the police were aware of the size or existence of a "tight" hallway until *after* the fact; the first time this claim was mentioned was at trial, years later. A. 713.

Also as previously stated, it took several attempts to breach the door. The failure by the police to open the door at the residence "was a major concern" to Miller and the police because it caused them to lose the crucial element of surprise. A. 715. Miller testified that as he was standing by the unbreached front door for what seemed like an eternity, while the police were slowly and obviously losing the crucial elements of surprise, stealth and speed, he was placed in a more dangerous situation, and the danger to him was heightened. A. 877-78.

The jury was free to consider, as it unanimously found, that this heightened danger caused by the City's negligence was a proximate cause of Miller shooting Ferreira. While Miller was also negligent for shooting an unarmed man lying on a couch showing his empty hands, there may be more than one negligent cause of injury.

B. Negligent Preparation: Necessity for a Plan

Police standards and procedures require that every aspect of the raid, from intelligence gathering to contingencies for the unexpected, must be considered. A. 450. It is good and accepted police practice and procedure to have contingency and alternative backup plans for when things go wrong, A. 332-33, including a secondary team and a secondary means of entrance; different plans should be ready for different contingencies. A. 473. Police need sufficient personnel in order to comply with these practices, and failing to have them violates the applicable standards of care. A. 979.

The SWAT team is taught that the longer it takes to open the door to breach the apartment in a dynamic entry, the more dangerous it is for them. A. 512, 503. Any possible delay can cause heightened danger to the police. A. 513. If a raid cannot be conducted in relative safety, it should not be conducted, and a different method should be used. A. 464. Depending on how much the speed or surprise is compromised, the police may have to consider aborting the mission. A. 468.

While a briefing meeting was purportedly held before the raid (no records or documentation of such a meeting actually being conducted was ever entered into evidence by the defendants), the police did *not* discuss any alternative or backup plans, or what they should do if they encountered problems breaching the door. A. 331-32. Conspicuous by its

absence was a tactical plan of action for this raid.[9] No such document was ever placed into evidence by the defendants or referred to by any of the police during this trial.

The City's negligence in failing to have a proper plan was a proximate cause of plaintiff's harm, since it contributed to the heightened danger imposed upon Miller.

C. No Intelligence

To ensure that the police properly safeguard and protect the public and themselves, police must obtain and use all available and reliable intelligence. A. 954. A police department that fails to provide sufficient and proper intelligence to its officers to safely perform their duties violates professional police standards of care, A. 958-59, and exposes the public and the police to unnecessary harm. A. 955, 959.

Information obtained from a confidential informant (CI) is sometimes not accurate. A. 975. As was made abundantly clear in the instant case, the information allegedly obtained from the CI was wrong on several levels (there were no weapons, no large quantities of drugs; the target, a Mr. Pride, did not possess large sums of cash, there were no children present but the plaintiff was). When using a CI, as was done here, it is a

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

good and accepted police practice to obtain corroborating information before sending out the police in a raid A. 973[10].

Despite these standards of care, the Chief did *not* know if SWAT had any intelligence that corroborated what the CI said. A. 974. The Chief read the reports and at trial still did not know if there was ever any corroboration of the story given by the CI. A. 895. Tellingly, the Chief did *not* recall if he asked to see if there was sufficient knowledge and intelligence to successfully perform this operation. Such an important "fact" was not written down. A. 997.

The negligence of the City in failing to obtain all (or even any) intelligence was a proximate cause of the excessive force and negligent shooting of the plaintiff. Simply put, Miller had no idea what he was up against, and this lack of knowledge further heightened the danger he felt, and was a substantial factor contributing to his negligent shooting of plaintiff.

D. <u>No Layout</u>

The Chief testified that in compliance with applicable police standards, the police should always try to determine the layout of an apartment before sending a SWAT team out on a mission, A. 961, because

[10] Corroboration means "the traditional sort of independent corroboration by the police in checking out the truth of the informant's tip through information obtained from a source *other than the informant's statement*". *People v. DiFalco*, 80 N.Y.2d 693, 698 (1993). *See also*, *Delgado v. City of New York*, 86 A.D.3d 502, 509 (1st Dep't 2011).

such knowledge can be useful in planning or performing an operation, and can result in a safer operation. A. 960. To this end, the City has a building construction department, to which the police have access. A. 960-61.

Just as it is important to know the layout of building that is the target of a possible raid, intelligence, like planning, is critical to the success of a raid, and to this end, police can never do too much reconnaissance A. 457. Having a sketch or photographs of a location, noting the placement of doors, windows, the street, the driveway, fences, and shrubs, is good police practice. A. 452-53. Tools to obtain this information include GoogleEarth satellite, drive-bys, and surveillance. A. 453-54.

However, the Binghamton police did not gather, and were not given, any building plans with the layout of the premises. A. 697. They did not have any blueprints for building before they went in. A. 321. Before the SWAT team arrived at the premises, they did not know how wide or narrow the hallway leading to the subject apartment was. A. 321.

The negligence of the City in failing to even attempt to obtain basic information, such as a layout of the premises, also played a role in the shooting of plaintiff. Lacking a plan, having no intelligence, Miller did not know the layout of the room he entered, further heightening the danger and increasing the likelihood of negligent or excessive use of unnecessary and deadly force.

E. No Surveillance

Preparation begins before the raid, and part of proper preparation is pre-raid surveillance. A. 451. Proper surveillance can alert the police to the number of people in the apartment, including the presence of children, the lighting conditions, and other important facts, thereby increasing the chance of success and not expose the public to unnecessary danger. A. 962-64.

While Officer Spano, the officer who led the ill-fated raid, said that all of the intelligence they had was from Hawley, A. 620, Hawley, the officer in charge of the operation flatly contradicted this statement and said that SWAT does its own reconnaissance and obtains layout information. A. 370. Miller testified that reconnaissance is gathering intelligence, A. 684, and that SWAT did *not* do any prior reconnaissance or surveillance. A. 686. There was no surveillance before SWAT arrived. A. 606. Officer Miller confirmed that no one conducted further surveillance to tell the team who was in the apartment, the number of people present, or if whoever was home was awake or asleep. A. 347, 370-71.

F. Failure to Bring and Use Equipment

To properly safeguard and protect the public and the police, the police have to receive all necessary equipment. A. 977-78, including specialty equipment, A. 452, to prepare for various contingencies. A. 471. The police failed to bring, let alone use, all the equipment they should

have brought. The police did not use ballistic shields for protection[11], or under-the-door cameras or pole cameras or tactical mirrors, A. 224, all of which compounded defendants' negligence and made a bad situation worse.

If police use tactical mirrors, pole cameras, under-the-door cameras or infrared (night vision) goggles, the police can better see the layout of the apartment, the number of people present, if these people are awake, and if there are any weapons visible. A. 708. It is for these reasons that SWAT is supposed to train using cameras and mirrors or other devices and to get all available intelligence. A. 887.

Yet, tactical mirrors were not used here. A. 967. This was not the result of any deliberative process or judgment; there were no discussions as to why these safety devices were not used. A. 709-11. No officer used or discussed using a tactical mirror or pole camera in the obvious and easy location: an open window to the room on the other side of the door being breached and a noisy fan giving cover to the police to utilize the open space next to the fan. A. 706.

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[11] Shields are protective equipment for the police. A. 995. Ballistic shields can stop a bullet for bodily protection, A. 225, 697. Ballistic shields or body bunkers can reduce dangers to the police. T 463, 465. Shields were not brought to the scene or given to SWAT to use for this raid A. 699, 996. Contrary to the freshly raised claim at trial, nobody said that because of the then unknown dimensions of the then unknown hallway, that it would be "tight" if the police had brought ballistic shields. A. 322.

Similarly, under-the-door cameras were not used here. A. 886. Chief Zikuski did not know if SWAT had even brought such cameras to the location; he was not aware of SWAT being told to bring such devices to have available as a choice. A. 996.

No one brought or used night vision goggles, which allow the police to see in limited light. A. 967, 236-37. This fact was corroborated by the Chief, who did not know if night vision goggles were even given to SWAT as a choice; Zikuski did not believe that these devices were given to SWAT. A. 967-68.

What makes the City's failure to bring all equipment more egregious is that the City knew from a prior training exercise for a similar dynamic entry, that among other deficiencies noted, was the SWAT team's failure to use all equipment and communicate. Despite this notice, these deficiencies in training and performance/execution of a dynamic entry raid were not cured. A. 215-16.

The City sent Miller blindly into this unknown situation in every sense, making it more likely that excessive or deadly force would be negligently used.

G. <u>No Diversionary Equipment Provided or Tactics Used</u>

To assist the police in successfully performing a dynamic entry, and to assist, support and further its crucial elements and goals of speed and surprise, distraction by way of noise and/or flash diversionary devices are common and may be necessary. A. 434, 466, 468-69, 972. Em-

ploying distractive devices or techniques gives the police more time, so that they can rapidly enter the premises and overcome the suspects "before they even know what happened." A. 476.

As no attempts were made at distraction by the City, the jury was free to consider that Miller lost precious time to evaluate or control the situation, and precipitously shot plaintiff.

H. Less Than Lethal Force Not Made Available

Police are trained to always use least amount of force, A. 677-78, 931, and unnecessary force constitutes a violation of the applicable standards of care and is excessive force. A. 679, 945. It was undisputed that less than lethal force equipment was available to SWAT, A. 166, such as TASERs, beanbag shotguns and chemical restraints, which can be safely used against people that are violent. A. 323.

Miller was not given any of these devices. A. 699-701. As such, the City's negligence in failing to properly equip Miller proximately caused him to use excessive and deadly physical force against plaintiff.

SUMMARY OF ARGUMENT

A. As to Defendant Miller

The single most important piece of evidence warranting judgment in plaintiff's favor on the issue of negligence, or at least a new trial, and to which the District Court gave mere passing mention (SPA9), is that Officer Hawley's report of the incident prepared the very next day failed to corroborate *anything* Officer Miller testified to in his defense at trial.

Thus, "[n]owhere" in the report is there a claim by Officer Miller that he thought plaintiff had a weapon or was even holding anything, let alone an Xbox controller, as a justification for the shooting. Officer Hawley said, "If I would have known that for a fact I would [have] put that in the report", because it was "a very important fact." A. 377-78.

The report also failed to indicate that plaintiff "was threatening in any manner", "was standing at the time he was shot," "was advancing on anyone", or "that there was any apparent imminent threat of deadly physical force being used by [plaintiff] before he was shot" -- nothing "to indicate that it was necessary...[or] reasonable to shoot [plaintiff]," A. 378-79 -- nothing to corroborate Miller's trial account of the shooting in any way.

The conspicuous absence from the report of any exculpatory facts, which Officer Miller would only later testify to at trial, is incomprehensible and "powerfully supports the proposition that there were none and thaA... [Miller's shooting of plaintiff] was due to his negligence and nothing else." *Manhattan by Sail, Inc v. Tagle*, 873 F.3d 177, 183 (2d Cir. 2017).

Nor was there any corroboration from Officer Charpinsky, who entered the confined quarters of the room immediately after Miller and was in a position to see what Miller allegedly saw. That officer did not observe plaintiff standing or approaching Miller or holding something in his hand or being spun around upon being shot. In fact, no other officer corrobo-

rated Officer Miller's testimony, except to the extent of finding the controller on the floor underneath plaintiff and that plaintiff was face down on the couch after the shooting.

Indeed, the City's Crime Scene Unit and its own investigation found no evidence the plaintiff was advancing or standing or holding the Xbox controller; it found the plaintiff was on the couch when he was shot.

Notably, the City chose to disregard its own Crime Scene Unit and failed to perform any testing that would have possibly corroborated Miller's story. It is most curious that the police department did not perform testing that might have exculpated Miller, putting aside that Miller inexplicably said nothing exculpatory to officer Hawley for inclusion in his report. It may also be wondered why no trajectory analysis was performed at the time or a re-creation of the shooting. While Chief Zikuski testified as to the importance of a complete and thorough investigation, and how it should utilize physical evidence and forensics, he closed this investigation without looking at any such forensic evidence and did so because he did not want all the facts. This makes sense only if at the time the City believed such evidence would inculpate Miller.

Officer Miller's justification for the shooting could have been plausible only if plaintiff had had a death wish, an invalid and unsupportable conclusion. Otherwise, there is no rational explanation, and none was offered, for plaintiff to have approached Officer Miller under the circum-

stances he, Miller, testified to but failed, incredibly, to inform Officer Hawley about for inclusion in his thorough and complete report.

Officer Miller's defense was that plaintiff approached him, heedless of his command to get down, while holding an object in his hand that Miller (somehow) mistook for a small .38 snub-nosed revolver. Putting aside plaintiff's testimony that he never got off the couch and that he displayed his empty hands to the police as they bashed in the door and entered the room, the mistaken object, a large and bulky, curvy-shaped X-box controller, was admittedly so unlike the revolver in appearance that Officer Miller's testimony that he mistook it for a gun beggars belief.

Officer Miller conceded that plaintiff did not verbally threaten him or show signs of menacing or resisting and did not even point the object he allegedly had in his hand at Miller.

Officer Miller said he shot plaintiff to neutralize him as a threat, yet he took no such action when he claimed to have seen plaintiff digging through the couch cushions for the gun he thought was in his hand only a moment earlier. Why did Officer Miller not feel threatened at that time as well and shoot plaintiff again to make absolutely sure he was no longer a threat? He certainly could have shot him again, since he testified that if he reasonably believed he or his team members were in danger he did not have to "recognize an actual gun" in plaintiff's hands before shooting him. A. 841-42.

Officer Miller and another officer testified that they found the Xbox controller on the floor by the side of the couch, exactly where plaintiff said he left it when he fell asleep the night before while watching a movie. Nevertheless, defendants argued, again incredibly, that plaintiff must have had the bulky controller in his hand all night as he slept; that he must have kept it in his hand when he awoke and quickly got off the couch when the police burst into the room; and that he must have kept it in his hand as he approached Officer Miller while still draped in a blanket, with arms outstretched[12] and refusing Miller's commands to get down -- more testimony that strains credulity.

Plaintiff's board-certified pathologist testified that the upward and rearward trajectory of the bullet indicated that plaintiff and Miller were at least three feet apart, as Miller had testified, and that plaintiff had to have been in a partially reclined position on the couch, not standing, as Officer Miller testified, but which he never informed Officer Hawley of for inclusion in his report.

And what of the several bullet holes in plaintiff's shirt, all caused by one bullet? As defendant's expert originally reported to the defendants, these holes were the result of plaintiff's shirt being bunched up, consistent with his being in a reclined position on the couch, as he testified and as Dr. LaPoint concluded.

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[12] Miller conceded that, as plaintiff testified, Ferreira showed his hands, which were outstretched.

The totality of the evidence demonstrates that either Miller shot plaintiff immediately upon entering the room and without any necessity to do so, and, therefore, violated police standards; or he had adequate time to see what plaintiff was allegedly holding and, in the exercise of reasonable care, should have been able to see that either he was not holding anything or that if he were, it was not a weapon and, there-fore, he should not have shot plaintiff.

These facts, as further elaborated upon below, are so overwhelmingly in plaintiff's favor on the issue of negligence that plaintiff should be awarded judgment as a matter of law, or, at the very least, a new trial on liability against Officer Miller and on the issue of plaintiff's comparative negligence.

One further observation is warranted, which, although not critical to our argument, is telling in what it reveals about the City's desire, or lack of it, to get to the bottom of why Jesus Ferreira was shot.

The solitary piece of evidence that would have supported Miller's story that plaintiff was allegedly holding the Xbox controller was never sought after: fingerprints or plaintiff's DNA. Despite a second search warrant being obtained, the City never attempted to obtain that objective, forensic evidence from the Xbox. It was not until the plaintiff's deposition, years after the City's investigation had been prematurely concluded, that the City learned that plaintiff had held the Xbox controller the night before. At the time of the City's internal investigation, the City conspicu-

ously failed to act on its own search warrant, despite the requests made by its Chief Crime Scene Unit Investigator, Sgt. Stebbins, to do so and to conduct an independent investigation. In other words, the City was fearful at the time of the shooting that there would be no proof that plaintiff had ever touched the Xbox and, therefore, that Officer Miller's story would not hold up under scrutiny.

B. As to defendant City of Binghamton

The City, through its SWAT team officers, was negligent for numerous reasons involving failing to conduct a proper no-knock warrant entry via proper surveillance, intelligence gathering, planning, and bringing the proper equipment to the raid, all of which were violations of proper police procedures, and served to heightened the danger that already surrounded the entry, thus making it more likely that Officer Miller would shoot plaintiff and obviating the application of the special duty rule.

THE STANDARDS OF REVIEW

A. As to Fed.R.Civ.P. 50(b)

As stated in *Stratton v. Department for the Aging for City of N.Y.*, 132 F.3d 869, 878 (2d Cir. 1997),

> [i]n ruling on a motion for judgment as a matter of law under Rule 50(b), a district court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the

> credibility of the witnesses, or substitute its judgment for that of the jury. [citations omitted].

The court further stated that it "may properly grant the motion only if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [the moving party]." *Id.* (internal quotation marks and citations omitted).

Plaintiff submits that he has satisfied this burden and is entitled to judgment as a matter of law.

B. <u>As to Fed.R.Civ.P. 59</u>

The District Court stated the applicable standard of review on plaintiff's Rule 59 motion in this case as follows (SPA 3):

> The court may…grant a new trial on all or some of the issues… for any reason for which a new trial has heretofore been granted in an action at law in federal court[.] Fed. R. Civ. P. 59(a)(1)(A). A decision is against the weight of the evidence…if and only if the verdict is [1] seriously erroneous or [2] a miscarriage of justice. [Internal quotation marks and citations omitted]. Such a motion can be granted even if there is substantial evidence to support the jury's verdict. [Internal quotation marks and citations omitted]. Though a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner…the court should only grant such a motion when the jury's verdict is egregious. [Internal quotation marks and citations omitted]. Thus, a

court should rarely disturb a jury's evaluation of a witness's credibility. [Internal quotation marks and citations omitted].

Here, too, in the alternative, plaintiff has satisfied this burden and is entitled to a new trial as to Officer Miller and on the issue of plaintiff's comparative negligence.

ARGUMENT

POINT I

The Evidence Supporting Defendant Miller's Liability On The Issue Of Negligence Is so Overwhelming That Plaintiff Is Entitled To Judgment As A Matter Of Law. At the Very Least, The Jury's Exoneration Of Officer Miller On That Issue Was A Miscarriage Of Justice And Against The Weight Of The Evidence, For Which Plaintiff Is Entitled To A New Trial.

The verdict exonerating Officer Miller on the issue of negligently shooting plaintiff is both insufficient in law and against the weight of the evidence. The same evidence presented at trial supports both conclusions, and we will treat it as such herein.[13]

This Court's recent decision in *Manhattan By Sail, Inc. v. Tagle*, 873 F.3d 177 (2017), although factually dissimilar to the instant case, is conclusive of plaintiff's negligence cause of action in the sense that it underscores the complete lack of evidence to support the verdict here and points to the verdict as being both seriously erroneous and a miscarriage of justice.

[13] Plaintiff is limiting his argument to his state-law claim based on Officer Miller's negligent shooting of plaintiff.

In *Tagle*, the appellant, a passenger aboard a sailing vessel, was injured when a deckhand lost his grip on a weighted halyard (a rope or tackle for lowering or hoisting), which swung free and struck her in the head. The shipowners offered no explanation for the accident. The district court entered a judgment for the shipowners after a non-jury trial, and this Court vacated the judgment and directed that a finding of negligence be entered in the passenger's favor.

The deckhand who dropped the halyard testified at trial that he reported to the captain that he could not recall why he lost control of it. The appellant passenger argued, therefore, that she was entitled to the application of res ipsa loquitur, which the district court rejected on the ground that, even when exercising ordinary care, sailors sometimes do lose control of a line due to the wind or an unexpected wave. Therefore, the district court reasoned that this was not the sort of accident that could happen only because of negligence.

On appeal, this Court found that the doctrine of res ipsa loquitur was applicable and that "[a] deckhand who *carefully* exercises the *skills* required for the seamen's job will not ordinarily lose hold of an extended weighted halyard", since "[w]aves and wind, and the consequent shifting and rolling of the deck, are" to be expected at sea. *Id.*, at 181. (Italics in original). The Court acknowledged that, while "sudden unexpected turbulence can be of such force that a seaman's loss of control of a line could be deemed non-negligent, there was no evidence in the record of any

such abnormal circumstance that caused the halyard to slip from [the deckhand's] grasp." *Id.*, at 181-82.

More to the point of the instant case, the Court was not concerned that perhaps the circumstances surrounding the incident were not particularly memorable to the deckhand, thus justifying his failure to proffer evidence of a non-negligent cause of the accident, because

> it was instantly known by [the deckhand] and the captain that, when [the deckhand] lost control of the halyard, it struck Tagle in the head and caused an injury. The captain immediately made a log entry noting the event. If some external force outside of the ordinary had caused [the deckhand] to let go of the halyard, [the deckhand] and the captain had every reason to note, record, and remember it. But [the deckhand] testified that he did not know why he lost control of the halyard. He did not identify any non-ordinary condition to explain the mishap. The ship's log reflects no explanation for [the deckhand's] losing control of the halyard, and the captain testified that [the deckhand] had acknowledged that the line "*slipped out of his hands*." 873 F.3d at 182-83 [Italics in original].

The Court went on to say that "[t]he absence of any evidence of unusual circumstances *powerfully* supports the proposition that there were none and that [the deckhand's] loss of control of the line was due to his negligence and nothing else. Tagle's evidence was thus sufficient to support the application of res ipsa loquitur." *Id.*, at 182–83. (Italics added).

Res ipsa loquitur is not pertinent to the instant case, but here is where *Tagle* is on all fours with case at bar: It was of course instantly known by Officer Miller that he had shot plaintiff. And, as is the case

with the immediate reporting of the incident in *Tagle*, the very next day Officer Hawley, the officer in charge of executing the warrant, made a report of the entire incident, which he characterized as accurate, thorough, fair, complete, and objective. Also, as in *Tagle*, if some exculpatory factor had induced Officer Miller to shoot plaintiff, he and Officer Hawley "had every reason" to record that "very important fact." A. 377-78. But, the most that Officer Miller testified to -- which was absent from the report -- was that (for some inexplicable reason) plaintiff rose rapidly from the couch and approached him, heedless of his orders to get down, draped in a blanket and with hands outstretched while holding an object (the Xbox) in his left or right hand, which Officer Miller focused on and mistook for a snub-nosed revolver. Here, too, as is the case with the deckhand in *Tagle*, who testified only that the line slipped out of his hands, it is most significant that Officer Miller did not explain *why* he thought the Xbox appeared to be a revolver. He did not claim, for example, that it was too dark to tell the difference or that both objects had the same general appearance. Miller justified the shooting by saying only that he believed plaintiff was holding was a small revolver.

It cannot be overstated that the perceived .38 snub-nosed revolver is not even close in size to the Xbox controller, to say nothing of the differences in shape and color. Officer Miller's claimed reasonable "belief" that the controller was a gun borders on the incredible.

To take Officer Miller's "belief" argument to its logical, but absurd, conclusion, he would have been reasonable in mistaking plaintiff's holding a ham sandwich for a .38 revolver, or maybe a book, or perhaps a shoe, or anything else, large or small, that might be imagined. As several of the police officer witnesses themselves testified, the perception must be objective and reasonable; it cannot depend merely on what the officer insists he perceived, despite the realities of the situation. *See Manhattan By Sail, Inc. v. Tagle*, 873 F.3d at 183-84.

Officer Miller's shooting of plaintiff was all the more baffling in view of Miller's testimony that, although he was approaching him, plaintiff did not verbally threaten or curse at him, or attempt to leave the room or to conceal himself, or behave in a menacing, belligerent, or provocative way. Plaintiff did not resist arrest or become violent after he was shot. Here, again, as with the deckhand in *Tagle*, Officer Miller did not testify to any extraordinary circumstances to justify shooting the unarmed plaintiff, a fact that speaks volumes.

Furthermore, as was true of the captain's report in *Tagle*, the police report prepared by Officer Hawley "reflects no explanation for" the shooting. Indeed, it contained nothing to indicate that plaintiff "was threatening in any manner", "was standing at the time he was shot," "was advancing on anyone", or "that there was any apparent imminent threat of deadly physical force being used by [plaintiff] before he was

shot. In short, there was nothing "to indicate that it was necessary...[or] reasonable to shoot" plaintiff. A. 378-79.

In the *Tagle* decision, the Court wrote that the deckhand's testimony that he did not act intentionally in dropping the halyard and was handling it "'as carefully as possible'", 873 F.3d at 184, did not rebut the inference of negligence in the absence of evidence of some extraordinary cause to explain why he did drop it. The Court further stated: "And as we have already noted, the evidence included no reason to doubt that, had there been a cause other than negligence for [the deckhand's] loss of control, [the deckhand] *would have reported it.* One who drives a car onto the sidewalk injuring pedestrians does not successfully contradict the logical inference of lack of due care or due skill merely by asserting that he was driving carefully." *Id.* (Italics added).

But, that is exactly what Officer Miller claimed. Here, too, had there been a cause of the shooting other than negligence, Officer Miller would have reported it. Instead, his defense at trial was merely that he "thought" and "believed" and "judg[ed]" that plaintiff was armed with a .38 snub-nosed revolver, because he thought he saw *something* in his hand, which he later opined was the Xbox, A. 733, 767, 780, 813, 842-43, 900, which he admitted did not resemble a revolver. A. 885. Miller's explanation is self-contradictory. It is in effect: "I thought it looked like something it did not look like." That is hardly a non-negligent explanation.

To continue with the comparison to *Tagle*, the Court noted that the shipowners did not call into doubt the passenger's evidence on the elements of her negligence claim. It further observed that a seaman's duty is "to act with the care and skill required of a reasonably prudent *seaman*, not that of a reasonably prudent *person*." 873 F.3d at 183. (Internal quotation marks and citations omitted) (Italics in original).

Here, as stated, the standard of care was testified to by the police officers themselves: to "not use more force...than is reasonably necessary under the circumstances" and to "look and objectively identify deadly physical force before they shoot." A. 161-62, 171-72, 209, 435, 439, 516-17, 614-16, 942-44, 947, 674, 677-80, 783, 943-44. Police Chief Zikuski testified that an officer may not speculate as to the presence of a weapon, A. 942-43, and should "*be able to differentiate between a real weapon and a toy Xbox controller*." A. 947. (Italics added). Officer Miller himself testified that he was trained to recognize the difference "[b]etween a real weapon" "and something that's not a weapon." A. 887-88.

Under this standard, the evidence was patently insufficient for the jury to have exonerated Officer Miller based on nothing more than his excuse that he shot plaintiff at close range because he mistakenly "thought" the large and bulky Xbox plaintiff was allegedly holding was a small revolver. Officer Miller, by his own and his fellow officers' testimony, was bound to a higher standard than that -- a standard that would apply to any police officer. Therefore, and in the absence of "evidence

supporting an inference of any cause other than negligence, no issue of material fact that might contradict or undermine the inference of negligence was presented to the fact-finder." 873 F.3d at 184.

That Officer Miller was simply mistaken in his belief that the Xbox was a gun is *the* critical factor in this case, which is an insufficient explanation and warrants judgment in plaintiff's favor or a new trial at least. Miller's unexplained and uncorroborated mistake in shooting plaintiff is not made any the more excusable by his (implausible) testimony that plaintiff -- for some unfathomable reason -- rose from the couch and approached him -- something no one else saw, including Charpinsky, who was "right on Miller's heels". If, without more, plaintiff were approaching Miller with an Xbox in his hand -- not threatening him, to be sure – Miller would have had no justification for shooting him. Nor did he offer one. His mere uncorroborated "belief" that the Xbox was a gun was no better an excuse than the motorist's claim that he was driving carefully even as he drove onto the sidewalk and struck a pedestrian.

It is no answer to say that the tension and heat of the moment justified Officer Miller's mistake, which not even he offered as an explanation. And, just as the deckhand in *Tagle* was "required to exercise the care and skill necessary to prevent it [the halyard] from pulling loose," 873 F.3d at 184, under the to-be-expected conditions of a sudden wave or wind or rolling of the deck, Officer Miller was required to exercise the care necessary under the to-be-expected conditions of a failed dynamic

entry and to be able to discern a .38 snub-nosed revolver, not from a *toy* gun, but from the Xbox controller that he claimed was in plaintiff's hand. As Officer Hendrickson, an instructor with the police department, testified, "the standards of procedure" for the SWAT team provide that "failure to breach the primary entrance point or have an unexpected resistance is part of the contingency planning" when executing a no-knock warrant. A. 370.

Indeed, Officer Miller's attorney reminded the jury that "he's just not some rookie cop off the street who just walked in and made a jerk fire." A. 1623. Rather, Officer Miller was a highly trained and experienced member of the SWAT team who was "just doing his job." *Id.* Yet, nowhere in all the testimony does any witness, let alone Officer Miller himself, point to any particular extraordinary circumstance to render the shooting reasonable; certainly nothing that Officer Miller informed Officer Hawley of for inclusion in his report. It bears repeating that Miller's sole defense at trial was nothing more than that he thought plaintiff had something in his hand and he thought that it was an Xbox, which he thought was a gun. That, of course, begs the question of *why* he thought that, to which his answer was, in effect, "Because."

Officer Miller testified that it was necessary to shoot plaintiff only once to neutralize the threat he allegedly posed. This was accomplished when plaintiff was shot, spun around[14], and fell face down on the couch.

[14] A newly minted claim for trial A. 800-01.

At that point, "[t]here's no reason for me to continue boom, boom, boom, boom, boom. ...[W]e're not looking to kill somebody, we're just trying to stop the threat." A. 867.

This laudable sentiment, however, does not withstand scrutiny, considering Miller's testimony that when he saw plaintiff digging through the couch cushions he feared plaintiff was trying to retrieve the very gun he, Miller, had earlier "thought" was in his hand. That being the case, it is curious in the extreme that the officer did not shoot plaintiff again to neutralize him permanently this time. How could Officer Miller have known or assumed plaintiff would not locate the gun under the cushions and shoot him or another member of the team? Here, again, Officer Miller's version of the events does not ring true and may not be dismissed simply by deferring to the jury's weighing of his credibility.

We would further note that while Officer Miller was "not looking to kill" plaintiff, he did shoot him in the torso at close range with an AR-15 rifle, an act presenting the distinct possibility of plaintiff's demise. It was only by pure happenstance that plaintiff was not killed; it is undisputed that he suffered extensive life-threatening and permanent internal injuries. A. 1480-85.

Yet another piece of evidence that undermines Officer Miller's account is that he and Officer Charpinsky found the controller exactly where plaintiff said he placed it the night before -- on the floor by the couch -- when he used it to watch a movie and then fell asleep. The Ci-

ty's attorney conceded on summation that "[w]e all agree that he [plaintiff] had been lying on a couch. He was asleep." A. 1611. Yet, desperate to place the controller in plaintiff's hands the next morning, counsel for the City argued, "How many of us have fallen asleep with the re-mote in our hand?" A. 1617.

Was it possible that plaintiff did that? Of course. Was it within the realm of probabilities? Not in the least, considering that the controller's large and bulky size are unlike the flat cylindrical or rectangular shape of an ordinary TV remote control device, which is designed to be held comfortably in one hand. It is hardly likely that the sleeping plaintiff kept this device in his hand, or hands, all night and then, upon being startled awake by the banging and yelling of "Police, police" outside the door, got up off the couch, still draped in his blanket, and kept the controller in one or the other hand as he approached Officer Miller -- for no apparent or discernable reason -- with arms outstretched and heedless of Miller's shouted commands to get down. This contrived scenario beggars belief and mocks common sense.

Defendants' newly raised argument that plaintiff must have had the Xbox controller in his hand all night was key to the defense, because Officer Hendrickson testified that it would "[n]ever [be] appropriate to shoot a man laying on a couch with his hands in the air showing no resistance", A. 546, and because Police Chief Zikuski testified that if plaintiff had been lying on the couch, showing his hands, "he should not have

been shot." A. 1005. And, Officer Miller himself said that if there were "no-thing in his [plaintiff's] hands," it would have been "a wrongful shooting." A. 739, 776.

Officer Charpinsky, who was right behind Miller in the close-formation stack and entered the room immediately after him, did not see plaintiff standing or approaching Miller, and he did not see plaintiff holding anything or hear him say anything. A. 253-54, 272. Charpinsky also testified that he heard the shot before he crossed the threshold, which would explain why he did not see plaintiff standing or approaching Miller or with anything in his hand. Officer Charpinsky's testimony strongly suggests that Officer Miller shot plaintiff immediately upon the door being breached and without Miller taking the time to detect whether the revolver he thought he saw in plaintiff's hand was really an Xbox controller. Believing Miller's testimony makes it very difficult to believe that Charpinsky saw none of what Officer Miller testified to, even peripherally, given the very close quarters of the room and that Charpinsky entered the room a split-second behind Miller. Officers Governanti, Spano, and Brent Dodge, who were part of the SWAT team's entry, all testified they heard a shot immediately upon the door being breached, A. 569, 628, 659-60, which is consistent with Miller's having shot plaintiff with-out justification.

In what may well have been a telling Freudian slip, Officer Charpinsky testified he saw plaintiff "sitting on the couch" when he entered

the room, A. 320, which he quickly corrected to "[h]e's on the couch, so Ferreira is on the couch." A. 320. If plaintiff were sitting on the couch, that would contradict Officer Miller's testimony that he was spun around by the bullet and fell face down.

The undeniable inference to be drawn from the above testimony is that, despite Officer Miller's having been trained to distinguish "[b]etween a real weapon" in someone's hand "and something that's not a weapon," A. 887; and see A. 440, he negligently shot plaintiff immediately and without an objective basis for discerning whether he was armed and posed an actual threat. It bears repeating that Officer Hawley testified that "[t]he officer has to look and see objectively if there is a reasonable belief of imminent use of deadly physical force about to take place." A. 170. Officer Miller admitted that if he did not “positively and objectively see and identify” a weapon, he was “not allowed to use deadly physical force.” A. 783. Officer Hendrickson testified that an officer who bangs open a door "and immediately upon entry shoots a man laying on a couch, that's wrong," A. 443. Chief Zikuski said that doing so is a violation of proper police practice. A. 950.

In the circumstances of this case, it is overwhelmingly more likely than not that Officer Miller did exactly that by negligently failing to make the proper distinction, even assuming, arguendo, plaintiff had the controller in his hand at all.

Finally, we would point to the testimony of plaintiff's board-certified pathologist, Dr. LaPoint, who, after a detailed explanation, A. 1119-23, categorically concluded that the bullet's upward[15] and rearward trajectory confirmed that plaintiff was shot from a distance of at least three and a half feet -- within Officer Miller's estimated range, A. 851 -- and that plaintiff was in a partially reclined position on the couch, not standing A. 1123-24, 1128, 1165, precisely where Officer Charpinsky placed him in his slip-of-the-tongue.[16]

Dr. LaPoint also stated that the absence of blood on the couch, as opposed to only on the floor, made it "unlikely" that plaintiff was shot and spun around face down on the couch. A. 1131-33, 1136. Moreover, he said that, contrary to what is often depicted in the movies and on television, being spun round by a bullet "actually really doesn't happen." A. 1130-31. This is because the projectile, in this case a "high-powered" bullet shot into plaintiff's torso from Officer Miller's AR-15 rifle from a distance of only a few feet, A. 1157-58, 1172, "moves through the body so rapidly that people typically flinch towards it", not away. A. 1130-31. Conspicuously absent from defendants' Dr. Terzian's testimony was a denial of Dr. LaPoint's testimony that plaintiff would not have been spun around upon being shot.

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[15] Defendant's expert later conceded the fact of an upward trajectory. A. 1536.

[16] Even the defense expert conceded that the multiple bullet holes caused by one bullet indicated that plaintiff's shirt was bunched up and that probably he was lying down and not standing. A. 1506.

* * *

The evidence presented was insufficient to permit the jury to conclude that plaintiff was shot under the circumstances testified to by Officer Miller. His account was not even hinted at in the report of the incident prepared the very next day, and it runs counter to ordinary human experience, to wit, that plaintiff had no possible reason to do what Miller said he did, save for a desire to die at that moment, which is an invalid assumption and which no view of the evidence supports. For these and other reasons, judgment should be entered in plaintiff's favor on his negligence claim, pursuant to Fed.R.Civ.P. 50, but at the very least, plaintiff is entitled to a new trial on those claims, pursuant to Fed.R.Civ.P. 59.

POINT II

The Evidence Supports The Jury's Verdict That The City Was NegligenA.

A. The Special Duty Rule Is Not Applicable.

In overturning the jury's verdict and granting the defendant City's motion to dismiss plaintiff's claim against it, the district court ruled that plaintiff failed to show the City owed him a "special duty". Plaintiff respectfully submits that this immunity is inapplicable herein.

The district court's decision was predicated on what it perceived to be plaintiff's allegation of negligent investigation by the City, a claim the plaintiff never alleged. Rather, his claim against the City was based on the negligent execution, preparation and planning of the no-knock raid

at 11 Vine Street. The evidence adduced at trial shows that the City violated good and accepted police practice, procedures, and policies, as well as professional standards of care and training.

The jury's verdict of no liability against Miller and liability against the City is based on consistent evidence presented at trial. The negligent execution, preparation, and planning of the City's police department placed Officer Miller in a situation of heightened danger that would not have existed but for the City's negligence. This negligence, along with Officer Miller's own negligence in shooting an unarmed man, was a proximate cause of plaintiff's injuries, thus obviating the need for a special relationship. As noted in *Lubecki v. City of New York*, 304 A.D. 224, 233-234 (1st DepA. 2003), *lv denied* 2 N.Y.3d 701 (2004)[17]:

> [T]he immunity afforded a municipality for its employee's discretionary conduct does not extend to situations where the employee, a police officer, violates acceptable police practice (*Rodriguez, supra* at 178; *see Velez v City of New York,* 157 AD2d 370, 373 [1990], *lv denied* 76 NY2d 715 [1990]). Hence, the judgment error rule is not triggered by the action of a police officer who injures an innocent bystander in an altercation involving a violation of established police guidelines governing the use of deadly physical force by police officers (*see e.g. Summerville v City of New York,* 257 AD2d 566, 567 [1999], *lv denied* 94 NY2d 755 [1999]) as is evidenced in the above factual narrative.

[17] Curiously, the district court acknowledged in footnote 3 of its decision this very case and its holding.

Here, the failure to follow established procedures and guidelines is a violation of ministerial, nondiscretionary, day-to-day operations of government. *Weiss v. Fote*, 7 N.Y.2d 579, 585 (1960); *see also Rodriguez v. City of New York*, 189 A.D.2d 166, 173 (1st DepA. 1993). It is well established that such violations are actionable in negligence. *See, e.g.*, *Meistinsky v. City of New York*, 285 App. Div. 1153, *aff'd*, 309 N.Y. 998 (1956) (training]; *Zulauf v. State of New York*, 119 Misc. 2d 135, 137, *aff'd*, 110 A.D.2d 1042 (4th Dept. 1985); *Saarinen v. Kerr*, 84 N.Y.2d 484, n. 3 (1994).

This City's employees' negligence was not an act of misfeasance or requiring the exercise of reasoned judgment. Indeed, it is not a question of whether the defendant's plan was inadequate; there was *no* plan. *See Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983); *Haddock v. City of New York*, 75 N.Y.2d 478, 485-486 (1990) (immunity rejected where there was no evidence City complied with its own personnel procedures); *see also Davis v. City of New York*, 03-civ-0503 (SDNY May 25, 2005); *HH v. City of New York*, 11-cv-4906 (EDNY August 7, 2017).

In *Wyatt v. State of New York*, 176 A.D.2d 575, 576-577 (1st Dept. 1991), the court held that "[w]here the Department of Correctional Services made no meaningful effort to comply with its own rules and policies, such omission cannot be cured by later supposition that, had a proper investigation been made of the 1984 incident, the employee's status would have remained unchanged.

In *Clancy v. County of Nassau*, 142 A.D.2d 626 (2d Dept. 1988), the court found that "the defendant Wagner's actions, through his negligence in the handling of the situation which developed, his failure to use proper police procedure, and his hasty and unwarranted resort to deadly force, were the proximate cause of the death of the deceased."

In *Salcedo v. New York City Housing Authority*, 179 A.D.2d 440 (1st Dept. 1992), the plaintiff was permitted to amend claims to include negligence in reacting to a 911 telephone call placed by her sister, in calling back her apartment while the intruders were present, and in confronting the gunmen in the apartment without necessary and appropriate preparation or backup.[18]

In the instant case, plaintiff adduced evidence wrung from the reluctant mouths of the defendants as to the requirements of proper police procedures, practices, standards of care, training and rules.[19] To the extent the City's cross-examination of these witnesses elicited contrary testimony, the determination of its credibility was in the jury's province.

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[18] New York is not alone in this regard. Numerous courts have found similar or analogous situations to constitute actionable negligence. *Raiche v. Pietroski,* 623 F.3d 30, 36 (1st Cir. 2010) (where an officer creates conditions that are highly likely to cause harm and unnecessarily so, and the risk so created actually, but accidentally, causes harm, the municipality may be liable for the excessive force used]; *Munoz v. Olin*, 24 Cal. 3d 629 (1979) (pre-shooting negligence; City liable for intentional shooting by police officer); *Harris v. Carter*, 768 So.2d 827 (LA CA. App. 2000), *writ den.*, 778 So.2d 602 (LA 2001). *See also, Zerbe v. Town of Carencro*, 884 So.2d 1224 (LA CA. App. 2005), *writ den.*, 889 So.2d 271 (La 2005) (excessive force).

[19] Testimony with respect to proper police procedures is admissible even in the absence of written rules. *See, e.g., Selkowitz v. County of Nassau*, 45 N.Y.2d 97 (1978) (negligence standard).

Rodriguez v. City of New York, 189 A.D.2d at 178. *See Zulauf v. State of New York*, 119 Misc. 2d at 137; *Saarinen v. Kerr*, 84 N.Y.2d at 484, n. 3. The jury's verdict clearly shows it found sufficient evidence to find the City's employees were negligent in the execution, preparation and planning of the 11 Vine Street insertion. *Vermont Plastics v. Brine, Inc.*, 79 F.3d 272, 277 (2d Cir. 1996).

The City would have the Court believe that where its officers are negligent and that such negligence is a substantial factor in causing its officer to shoot someone, it remains immune from the consequences of its negligence. It is, however, beyond cavil that the City may be liable for the negligence of its officers for shooting someone; there is no immunity for such conduct.[20]

There is similarly no such immunity for claims of excessive force. *McCummings v. NYCTA*, 81 N.Y.2d 923 (1993), *cert. den.*, 510 U.S. 991 (1993); *Jones v. State of New York*, 33 N.Y.2d 275 (1973) (citing, *McCrink v. City of New York*, 296 N.Y. 99 (1947); *Flamer v. City of Yonkers*, 309 N.Y. 114 (1955); *Steitz v. City of Beacon*, 295 N.Y. 51 (1945); *Bernardine v. City of New York*, 294 N.Y. 361 (1945); *McCarthy v. City of Saratoga*

[20] The law on this subject is long and well established. *See, e.g., McCummings v. New York City Transit Authority*, 81 N.Y.2d 923 (1993); *Wilkes v. City of New York*, 308 N.Y. 726; *Lubelfeld v. City of New York*, 4 N.Y.2d 455; *Flamer v. City of Yonkers*, 309 NY 114; *Adamo v. P.G. Motor Frgt*, 4 A.D.2d 758; *McCrink v. City of New York*, 296 N.Y. 99; *Meistinsky v. City of New York*, 309 NY 998. *See also, Kull v. City of New York*, 32 N.Y.2d 951, *rev'g on op. of dissent*, 40 A.D.2d 829 (2d Dept. 1972); *Collins v. City of New York*, 11 Misc. 2d 76, *aff'd*, 8 A.D.2d 613, *aff'd*, 7 N.Y.2d 822 (1959).

Springs, 269 App. Div. 469 (3d Dept. 1945) (in support of the lack of immunity for similar types of claims); *Hinton v. City of New York*, 13 A.D.2d 475 (1st Dept. 1961); *Bastian v. City of New York*, 261 A.D.2d 129 (1st Dept. 1999).

The City's negligence in failing to have a proper plan was a proximate cause of plaintiff's injuries. Its failure to obtain all (or even any) intelligence or perform any surveillance or reconnaissance, such as a layout of the premises, substantially contributed to the negligent shooting of the plaintiff. Similarly, the jury was free to, and did, find that the City's failure to provide any of the necessary equipment heightened the danger imposed upon Miller and was a proximate cause of the harm plaintiff sustained. *See DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir 1998).

In *Greggo v. City of Albany*, 58 A.D.2d 678, 679 (3d Dept. 1977), the appellate court found that in a police shooting case, "since the plaintiff's injury was well within the scope of the risk created by the police officers' negligent acts, their negligence was the proximate cause of plaintiff's injury...."

In ruling in favor of the defendants' motion and overturning the jury's verdict, the district court cited *Rodriguez v. City of New York*, 189 A.D.2d 166. The facts of *Rodriguez* are very different from those at bar. There, the plaintiff was shot during a running gun battle between the police and an alleged hostage taker. *Id.* at 169. The gun-play occurred

suddenly and unexpectedly, and an impromptu emergent re-sponse was made. Here, the shooting was not incidental to an ongoing gun fight involving the police and a third party. As noted above, in the instant case, the City had information obtained from its confidential in-formant at least five days before hand; this information was the basis of the no-knock warrant, obtained about 15 hours before this shooting. The police were not responding to a shooting in progress; they initiated the assault, and the only shooter and the only armed person was the police officer.

The district court also overlooked the fact that in *Rodriguez* the on-ly error committed was that the trial court should not have permitted the jury to consider plaintiff's alternative theory that Officer Young negligent-ly failed to stop and arrest Flores before Flores shot at Joglar; this was the only instance where the special relationship doctrine applied. Plaintiff here made no such claim. In *Rodriguez*, the appellate court specifically held that the special duty rule is limited, and has no application to plain-tiff's theory of negligence in the officer firing across the crowded street and hitting plaintiff. 189 A.D.2d at 173, 178.

Moreover, where the police inflict the injury, there is no require-ment for a special duty. *See, Ohdan v. City of New York*, 268 A.D.2d 86, 94 [1st Dept. 2000, *dissent*, citing *Snyder v. City of Rochester*, 124 A.D.2d 1019 (4th Dept. 1986) and noting City's admission to this effect]. In *Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d 420, 432 (2013), Judge

Smith noted in his concurring opinion that this doctrine does not apply to situations involving the firing of a gun by police.

The City misapprehends the nature of the claimed immunity. It was the rule (unless a special relationship were established) that only negligent *failure to act* is immune. For example, it was observed in *Tango v. Tulevech*, 61 NY2d at 40, that "[m]unicipalities surrendered their common-law tort immunity for the *misfeasance* of their officers and employees long ago (citations omitted)...." *See also, Parvi v. City of Kingston*, 41 N.Y.2d 553 ("The case law is clear that even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care" [citations omitted]); *Persaud v. City of New York*, 307 A.D.2d 346 (1st Dept. 1999) ("The alleged liability of the municipal defendant is predicated upon *misfeasance* of the defendant police officer in directing Miro to move without inquiring whether she was licensed to drive... *[A]ccordingly the plaintiffs were not required to demonstrate a special relationship* [citations omitted]").

B. Plaintiff Did Not Claim Negligent Investigation

***Ellsworth* is inapplicable**

The district court found that plaintiff had made a claim for negligent investigation and that the jury premised its verdict against the City on such a theory. The court, therefore, granted the defendants' motion to set aside the unanimous jury verdict on these grounds, and in doing so

mistakenly relied in part on *Ellsworth v. City of Gloversville*, 269 A.D.2d 654 (3d Dept. 2000). The court's citation of *Ellsworth* is misplaced.

In *Ellsworth*, the plaintiff had been arrested on a warrant for criminal trespass. The criminal court dismissed the complaint for insufficient evidence. 269 A.D.2d at 655. Plaintiff then made claims of false arrest, malicious prosecution, and negligent arrest and investigation, as well as a civil rights action against the City of Gloversville and the police. *Id.* The plaintiff in *Ellsworth* did not claim excessive force or raise any of the claims made here. The trial court dismissed the plaintiff's action on summary judgment. *Id.* The Appellate Division upheld the dismissal, noting that the plaintiff did not rebut the presumptive validity of the arrest warrant and, therefore, there was no cause of action for negligent arrest and investigation. *Id.* at 656-57.[21]

In the instant matter, the plaintiff never questioned the sufficiency of the search warrant. He was not the subject of the warrant and, as noted by the defendants, was never formally charged with a crime and never formally placed under arrest. The charge to the jury made no mention

[21] Claims for negligent investigation do not set forth a cause of action separate from those for false arrest and malicious prosecution. *Guntlow v. Barbera*, 76 A.D.3d 760, fn.1 (3d Dept. 2010) (citing *Carlton v Nassau County Police Dept.*, 306 AD2d 365, 366 [2003]; *Lorensen v State of New York*, 249 AD2d 762, 763 n 2 [1998], *lv denied* 92 NY2d 807 [1998]; *Heath v State of New York*, 229 AD2d 912, 912 [1996]). *Cf*, *Martinetti v. Town of New Hartford Police Dept.*, 307 A.D.2d 735 (4th Dept. 2003) [notwithstanding the warrant, issues of fact whether the arrest was made with probable cause. Also, issues of fact with respect to negligent training and supervision of police].

of false arrest or malicious prosecution and did not discuss any allegations with respect to any impropriety of the no-knock warrant itself. The verdict was not premised on, nor did plaintiff argue, that the warrant should not have been issued or that it was somehow defective or invalid because the police negligently investigated this matter.

CONCLUSION

Plaintiff respectfully submits that judgment be entered as a matter of law in his favor against defendant Miller. In the alternative, pursuant to Fed.R.Civ.P. 59, the verdict in defendant Miller's favor, as well as that finding plaintiff 10 percent at fault for his injuries, should be set aside as a miscarriage of justice and against the weight of the evidence and plaintiff granted a new trial on liability as against him. Furthermore, the verdict against the defendant City of Binghamton should be reinstated and judgment entered against it in the amount found by the jury.

Dated: Bronx, New York
January 24, 2018

Respectfully submitted,

/S/ Alexander J. Wulwick
ALEXANDER J. WULWICK
Appellate Counsel to:

SONIN & GENIS
Attorneys for Plaintiff-Appellant

ROBERT J. GENIS
On the Brief

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,264 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word in Bookman Old Style, 12 point font.

/S/ Alexander J. Wulwick
ALEXANDER J. WULWICK

SPECIAL APPENDIX

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Decision and Order of the Honorable Thomas J. McAvoy, dated September 27, 2017, Appealed From SPA1

Judgment of the United States District Court, Northern District of New York, entered September 28, 2017, Appealed From, with FRAP Rule 4 ..... SPA15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JESUS FERREIRA,

Plaintiff,

vs. 3:13-CV-107

CITY OF BINGHAMTON,
BINGHAMTON POLICE DEPARTMENT, and
OFFICER KEVIN MILLER

Defendants.

Thomas J. McAvoy,
Sr. U.S. District Judge

DECISION and ORDER

The parties in this matter, which concerns a shooting of the unarmed Plaintiff by a member of the Binghamton, New York, Police Department, have filed post-trial motions. The Court has considered the motions on the filings and without the aid of oral argument.

I. BACKGROUND

In the early morning hours of August 25, 2011, a Binghamton Police Department SWAT team executed a "no-knock" warrant at 11 Vine Street, a residence in that city. Plaintiff, an overnight guest, was sleeping on the couch in the living room, which was located near the front door. After using a battering ram to break through the front door, officers entered the living room. Defendant Kevin Miller, the first member of the SWAT team to enter the building, shot the Plaintiff once. Plaintiff suffered severe injuries,

leading to the removal of his spleen.

Plaintiff sued the City of Binghamton, the Binghamton Police Department, and Officer Miller, among others. Plaintiff alleged that Defendants violated his constitutional rights to be free from excessive force and false arrest, both through the conduct of Defendant Miller and through the policies and practices of the Binghamton Police Department. Plaintiff also raised state-law tort claims. After motion practice, the only remaining Defendants were the Police Department, the City and Officer Miller. After Defendants filed a motion for summary judgment, the case went to trial.

At the close of trial, the jury found that Defendant Miller had not committed battery or used excessive force against the Plaintiff. See dkt. # 170. The jury also found that Officer Miller had not been negligent with respect to the shooting. Id. The jury found, however, that the City of Binghamton had been negligent. Id. The jury awarded Plaintiff $500,000 in past damages and $2.5 million in future damages. The jury also found that Plaintiff was 10% liable for damages.

The parties filed post-trial motions. After the Court provided time for the preparation of the trial record, the parties filed briefs in support of their motions, bringing the case to its present posture.

II. LEGAL STANDARD

Both parties seek judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. A court may grant judgment notwithstanding the verdict "only if the evidence viewed in the light most favorable to the non-movants, without considering credibility or weight, reasonably permits only a conclusion in the movant's favor." Doctor's Assocs., Inc. v. Weible, 92 F.3d 108, 111-12 (2d Cir. 1996). The Court "may

not weigh evidence, assess credibility, or substitute its opinion of the facts for that of the jury." Vermont Plastics v. Brine, Inc., 79 F.3d 272, 277 (2d Cir. 1996). A trial court may grant the motion only when "there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded [persons] could not arrive at a verdict against [it]." SEC v. Ginder, 752 F.3d 569, 574 (2d Cir. 2014) (quoting Tepperwiev v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 567 (2d Cir. 2011)).

In the alternative, the parties seek a new trial pursuant to Federal Rule of Civil Procedure 59, which provides that "[t]he court may, on motion, grant a new trial on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]" FED. R. CIV. P. 59(a)(1)(A). "'[A] decision is against the weight of the evidence . . . if and only if the verdict is [1] seriously erroneous or [2] a miscarriage of justice.'" Raedle v. Credit Agricole Indosuez, 670 F.3d 411, 417-18 (2d Cir. 2012) (quoting Farrior v. Waterford Bd. of Educ., 277 F.3d 633, 635 (2d Cir. 2002)). Such a motion can be granted "even if there is substantial evidence to support the jury's verdict." United States v. Landau, 155 F.3d 93, 104 (2d Cir. 1998). Though a trial judge "is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner . . . the court should only grant such a motion when the jury's verdict is 'egregious.'" DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 134 (2d Cir. 1998) (quoting Dunlap-McCuller v. Riese Organization, 980 F.2d 153, 157 (2d Cir. 1992)). Thus, "a court should rarely disturb a jury's evaluation of a witness's credibility." Id.

III. ANALYSIS

A. Plaintiff's Motion

Plaintiff seeks judgment as a matter of law pursuant to Rule 50(b) or, in the alternative, a new trial pursuant to Rule 59(a), arguing that the jury should have found Defendant Officer Kevin Miller liable for shooting him. Though the Court instructed the jury that it could find Defendant liable for battery or negligence in this matter, Plaintiff offers only a generalized argument and does not attempt to explain how Officer Miller could have been specifically liable under either theory. The Court will address each theory, after summarizing the relevant evidence elicited at trial.

i. Evidence

The trial in this matter consumed a number of days. Several police officers involved in executing the warrant that led to Plaintiff's shooting testified, as did the Police Chief and others involved in planning the action. Evidence indicated that Officer Miller shot Plaintiff very quickly after he entered the apartment. Plaintiff's case emphasized that Police botched the execution of the warrant by failing to use a sufficiently large ram to knock down the door, failing to obtain plans for the apartment, and failing to use alternative and less lethal means–other than guns–to incapacitate and subdue anyone in the apartment. Plaintiff contended that he had not been moving towards Officer Miller at the time he was shot, and that he did not have anything in his hands. He also alleged that officers placed an Xbox controller near his hand after the shooting in an effort to make it appear that he had appeared to present a danger to Officer Miller when he shot him. Two medical experts testified about the shooting, offering differing interpretations of Plaintiff's location at the time of the shooting and the

path of the bullet that injured him passed through his body.

Both Officer Miller and the Plaintiff testified about the shooting. Officer Miller testified that he was the first officer in line to enter the apartment. Trial Transcript ("T."), dkt. # 179, at 632. He had "the most dangerous spot" in the line of officers who entered. Id. Officers used a battering ram to enter the apartment. Id. Because the ram was too small, however, several strikes were required before the door could be opened. Id. at 634. For Miller, the delay in getting the door opened "felt like a long time." Id. Miller worried that the banging would wake everyone in the apartment–he feared that the officers had "lost the element of surprise." Id. at 635.

Examined by his attorney, Miller testified that he took "two to three steps" after he entered the apartment and before he shot Plaintiff. T., dkt. # 180, at 773. He estimated that a "[c]ouple [of] seconds" passed between the entry and shooting. Id. at 774. Miller testified that upon entering the apartment he saw "an individual coming off the couch, you know, coming towards me." Id. at 775. He looked towards Plaintiff's hands, "because hands are what will carry a weapon if there is one." Id. Miller testified that he shot Plaintiff because he thought he had something in his hands and was moving towards him, failing to comply with the officer's commands. Id. at 789-90.

Even before he entered the room, Miller testified that he was yelling "[d]own, down, down, down, down," and identifying himself as "Police." Id. at 776. He and other officers began these shouts as soon as they began to use the ram for entry into the apartment. Id. Plaintiff did not comply with this command to get down when Miller entered the apartment. Id. at 777. Miller testified that "[i]f someone's standing up after hearing those [commands] or if they did hear these [commands] and [are] making a

move towards you, without something even in their hands," that person was not complying with the command. Id. If a non-complaint person has something in their hand, Miller related, an officer would "respond in kind . . . You perceive it to be a weapon, you fire." Id. at 777-78. Miller further testified that the "no-knock" warrant in this case meant that, for the SWAT team:

> the only time we get called is if somebody reasonably believes or has done, you know, an investigation and they have a belief that there's you know, firearms or something, that they're a violent individual. Anything that would require that next step which is what we are. We're not your standard knock on your door, pull a car over, something like that.

Id. at 778.

Miller testified that the battering ram did not work well. Id. at 784. The door frame began to come apart, and the door itself would not "pop" open. Id. Eventually, the door "kind of shatter[ed] a little bit in pieces and start[ed] . . . kind of breaking down so you have kind of just a gap[.]" Id. Miller used his shoulder to break through that gap and clear a way for himself and the officers following him into the apartment. Id. When he entered and shot Plaintiff, he perceived that he had something in his hands. Id. at 790. Miller shot when he was concerned for his safety and the safety of the other officers entering the room. Id. Miller denied that he shot Plaintiff while he was "laying on the couch minding his own business with his hands in the air showing no resistance." Id. at 793-94.

Plaintiff's story of the shooting is quite different. He testified that on the night before the early morning raid that led to his shooting, he put a movie into the Xbox player, took his shoes off, relaxed, and "[l]aid down." T., dkt. # 182, at 1286. He used an "Xbox joystick" to operate the machine and make the movie play. Id. at 1290. Once

the movie started, he put the controller by his side on the floor. Id. at 1291. Plaintiff fell asleep at about two a.m. Id. at 1287. He woke up the next morning to "yelling and banging in the hallway." Id. at 1288. Still laying on the couch, he put out his arms and twisted towards the door in attempt to show that "I wouldn't be a threat to whoever was coming in." Id. "The door flew open and I seen a cop shoot me." Id. Plaintiff testified that he never got off the couch. Id. After his shooting, he saw "police running in the house, yelling, saying, you know, police, Binghamton, whatever they were saying. Freeze." Id. at 1289. Plaintiff screamed from pain and tried to pull himself up. Id. "I couldn't move."

Plaintiff testified that when police entered the room after shooting him, "[t]hey came over to me and flipped me on my stomach at the end of the couch and frisked my body or whatever and placed my arms over my head" in a position similar to if he were flying. Id. at 1291. He was lying on the couch. Id. at 1292. Eventually, Police laid him on the floor on his right side, handcuffed. Id. Plaintiff testified that "somebody yelled put the game joystick in his hand and that someone kicked it towards you as you lay on the ground." Id. at 1293. Plaintiff testified that he was on the couch when he was shot, was not "advancing on the police officer" and had nothing in his hands. Id. at 1294. Instead, he raised his hands, outstretched, to the officer as he entered the room. Id.

ii. Excessive Force/Battery

Plaintiff contends that the jury should have found that Officer Miller used excessive force and committed a battery when he shot Plaintiff after entering the apartment. Excessive force claims brought pursuant to the Fourth Amendment "'are properly analyzed under the Fourth Amendment's 'objective reasonableness'

standard.'" Shamir v. City of New York, 804 F.3d 553, 556 (2d Cir. 2015) (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)). Using "excessive force renders a seizure of the person unreasonable and for that reason violates the Fourth Amendment." Id. To decide whether the force was reasonable, the fact-finder should pay "'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" Soares v. Connecticut, 8 F.3d 917, 921 (2d Cir. 1993) (quoting Graham, 490 U.S. at 396). This standard focuses on "'a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" Brown v. City of New York, 798 F.3d 94, 100 (2d Cir. 2015) (quoting Graham, 490 U.S. at 397). Under that standard, "'the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain and rapidly evolving–about the amount of force that is necessary in a particular situation.'" Rogoz v. City of Hartford, 796 F.3d 236, 246 (2d Cir. 2015) (quoting Graham v. Connor, 490 U.S. 386, 396-97 (1989)). "To establish a claim of objective force, 'a plaintiff must show that the force used by the officer was, in light of the facts and circumstances confronting him, 'objectively unreasonable[.]'" Davis v. Rodriguez, 364 F.3d 424, 431 (2d Cir. 2004) (quoting Finnegan v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990)). The same standard applies to Plaintiff's state-law battery claim. Posr v. Doherty, 944 F.2d 91, 94-5 (2d Cir. 1991).

Plaintiff contends that no rational juror could have found for Defendant Miller, and that the verdict represents a miscarriage of justice. For the jury to believe Miller's

story, Plaintiff contends, the jury would have to conclude that Plaintiff was "suicidal" and willing to ignore repeated calls to "get down." Plaintiff argues that Officer Miller's explanation for the shooting–that Plaintiff got up from the couch and moved towards him as he entered the room, carrying an Xbox controlled that looked like a revolver is so implausible that no juror could accept that claim. The Xbox controller looks nothing like a revolver, and officers testified that they found the device exactly where Plaintiff testified he left it the night before. Moreover, he contends, the next officer in line did not support Miller's testimony that Plaintiff was moving towards him when he entered the room, nor did the report of the shooting police prepared. The testimony of Plaintiff's pathologist about the angle at which the bullet entered Plaintiff's body also supports a finding that Plaintiff was on the couch when shot. Defendants respond that Plaintiff's argument does not really address the issue of excessive force, but instead concentrates on the negligence issue. Moreover, Plaintiff's arguments, Defendants contend, address only the standard for a new trial, not a directed verdict. Plaintiff cannot meet even that lower standard, Defendants insist.

The Court will deny the motion with respect to these claims. As for the motion for judgment notwithstanding the verdict, the Court cannot find that "there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded [persons] could not arrive at a verdict against [it]." Ginder, 752 F.3d at 574. A reasonable juror could certainly accept Miller's testimony that he shot Plaintiff after he entered the apartment and saw Plaintiff advancing on him with a device in his hand that appeared to be a weapon. The

SWAT team entered the apartment after being informed that occupants of the apartment likely had weapons, and after they had lost the element of surprise because the ram did not immediately open the door. A juror could credit Miller's testimony and reject Plaintiff's about what Plaintiff did as officers entered the apartment, and rejecting this testimony would lead the juror to conclude that the use of force was reasonable under the circumstances. Davis, 364 F.3d at 431.

Likewise, the Court will deny the motion insofar as it seeks a new trial on this issue. As explained above, the jury's decision here turned on a question of whose story to believe, Miller's or the Plaintiff's. If the jury had accepted Plaintiff's claim that he remained on the couch and raised his empty hands to Miller as Miller entered the room, the jury would have likely found that Miller lacked a reasonable justification for the shooting under the circumstances. The jury apparently believed Miller's claims that Plaintiff ignored his commands to stay on the ground, but instead moved towards him with an item in his hand that Miller–incorrectly–believed to be a gun. The Court does not find these conclusions to be either "'[1] seriously erroneous or [2] a miscarriage of justice.'" Raedle, 670 F.3d at 417-18 (2d Cir. 2012)). The Court will not disturb the jury's efforts to resolve the credibility issue in this case. DLC Mgmt. Corp., 163 F.3d at 134.

iii. Negligence

As explained above, Plaintiff does not separate his argument regarding the jury's verdict concerning Officer Miller into the two claims the jury decided. Instead, Plaintiff simply argues that the facts of the case indicate that he did not pose any sort of threat to Officer Miller, and that by shooting Plaintiff when he did not pose a threat, Officer

Miller violated the standard of care. Defendants contest this claim, contending that the force used was reasonable under the circumstances.

Setting aside the issue of a special relationship, discussed below, a showing of negligence in New York requires that the Plaintiff demonstrate "(1) the defendant owed the plaintiff a cognizable duty of care; (2) the defendant breached that duty; and (3) the plaintiff suffered damage as a proximate result." Williams v. Utica Coll. of Syracuse Univ., 453 F.3d 112,116 (2d Cir. 2006). Plaintiff contends that the jury could only have found that Miller breached the standard of care by shooting him under the circumstances.

The Court will deny the motion in this respect as well. First, judgment as a matter of law is unwarranted under the circumstances, largely for the reasons stated above with reference to the excessive force/battery claim. Assuming that an officer breaches the standard of care by shooting an unarmed person without any justification, the facts related above demonstrate that Defendant Miller entered a room under circumstances where he had reason to believe he would encounter an armed and dangerous person. His testimony indicates he believed he had encountered such a person. Though mistaken, that mistake and the shooting that resulted does not indicate that he violated the standard of care in a manner in which no reasonable juror could fail to assign him liability.[1] The motion will be denied in this respect.

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[1]Again, assuming that Miller could be liable for violating some standard of care, the evidence in this case is not such that a juror could find Miller violated the standard of care articulated in Rodriguez v. New York, 189 A.D.2d 166, 178, 595 N.Y.S.2d 421, 428 (1st Dept. 1993). Miller exercised his expert judgment in deciding to shoot in the specific circumstances of executing the warrant. He did not, as the officer in Rodriguez did, fire into a crowd of innocent bystanders without regard to their safety.

A new trial is likewise unwarranted. As explained above with reference to excessive force, the jury's decision about whether Miller violated the standard of care in shooting Plaintiff hinged on a question of credibility. The Court will not disturb the jury's decision in that respect.

B. Defendants' Motion

The Defendant City moves, in relevant part, for judgment as a matter of law. The City argues that, under the facts elicited at trial, the jury's finding that the City was negligent by its own conduct is legally and factually impossible.

The Second Circuit Court of Appeals has explained the circumstances under which a municipality may be liable in negligence to an injured party. When "a municipality . . . acts in a governmental capacity, a plaintiff may not recover without proving that the municipality owed a 'special duty' to the injured party." Velez v. City of New York, 730 F.3d 128, 135 (2d Cir. 2013).[2] To create liability, "'the duty breached'" by the municipality "'must be more than that owed the public generally.'" Id. (quoting Valdez v. City of New York, 18 N.Y.3d 69, 75, 936 N.Y.S.2d 587 (2011)). The plaintiff must prove that such a "special relationship" existed by demonstrating "four elements":

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Id. (quoting Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 430-31, 972 N.Y.S.2d 169,

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[2]Plaintiff offers no response to Defendants' argument that a "special relationship" is necessary to prove negligence against the City.

176 (2013)); see also, Sorichetti by Sorichetti v. City of New York, 65 N.Y.2d 461, 468, 482 N.E.2d 70, 75 (1985) ("where there is no special relationship, a municipality does not owe a duty to its citizens in the performance of governmental functions, and thus courts will not examine the 'reasonableness' of the municipality's actions."). In other words, "under the 'special relationship' doctrine, a municipality may not be held liable in negligence for a police officer's failure[s] . . . absent the establishment of a special relationship with the plaintiff." Rodriguez, 189 A.D.2d at 172.

Plaintiff admits that he was "not the subject of the no-knock warrant for 11 Vine Street on the morning of August 25, 2011, and the police did not know he was in the apartment." No evidence at trial or in the record indicates that Plaintiff ever had any direct contact with the Binghamton Police or any Binghamton official before the SWAT team arrived to execute the no-knock warrant. Likewise, no evidence produced at trial indicated that the Defendant City ever took on any particular duty to the Plaintiff. Under those circumstances, no claim against the City for negligence could lie. As such, "there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded [persons] could not arrive at a verdict against [it].'" Ginder, 752 F.3d at 574. The Court will therefore grant the Defendants' motion. Judgment as a matter of law will be granted to the City.[3]

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[3]Defendants also argue that governmental immunity prevents the Plaintiff from collecting on a negligence cause of action against the City. New York courts have found that "[m]unicipalities surrendered their common-law tort immunity for the misfeasance of their officers and employees long ago[.]" Tango by Tango v. Tulevech,

As that decision absolves the City of any liability in this matter, the Court will decline to address the remainder of the City's motion.

IV. CONCLUSION

For reasons stated above, the Plaintiff's motion for judgment as a matter of law or, in the alternative, a new trial, dkt. # 175, is hereby DENIED. The Defendants' motion for judgment as a matter of law, dkt. # 174, is hereby GRANTED. The Clerk of Court is hereby directed to enter final judgment for the Defendant City of Binghamton and Binghamton Police Department on all claims raised in the Plaintiff's Amended Complaint.

IT IS SO ORDERED.

Dated: September 27, 2017

Thomas J. McAvoy
Senior, U.S. District Judge

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61 N.Y.2d 34, 40, 459 N.E.2d 182 (1983). Still, "other recognized limitations still govern the tort liability of municipal officers." Id. Once such rule supplies that "when official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice." Id. Under this standard, "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 standards with a compulsory result." Id. This rule does not apply in "situations where the employee, a police officer, violates acceptable police practice." Lubecki v. City of New York, 304 A.D.2d 224, 234, 758 N.Y.S.2d 610, 617 (1st Dept. 2003). Plaintiff elicited evidence in this case that Miller's conduct violated acceptable police practices by shooting Plaintiff without first establishing he represented a danger. A jury did not, however, find that Miller violated such practices in shooting Plaintiff, and the City's immunity therefore would apply. Plaintiff elicited additional evidence that the City improperly investigated the home at 11 Vine Street and used improper judgment in planning the raid. The tort of negligent investigation, however, does not apply, as "it is well settled that an action for negligent . . . investigation does not exist in the State of New York." Ellsworth v. City of Gloversville, 269 A.D.2d 654, 657, 703 N.Y.S.2d 294, 297 (3d Dept. 2000).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

JESUS FERREIRA
Plaintiff(s)
vs.

CASE NUMBER: 3: 13-CV-107

CITY OF BINGHAMTON, et al
Defendant(s)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that Plaintiff's amended complaint is dismissed against Defendants Joseph Zikuski, John Spano, Larry Hendrickson and Robert Burnett with prejudice in accordance with the parties' Stipulation of Partial Discontinuance filed on January 8, 2015 [see dkt ## 26 and 42].

IT IS FURTHER ORDERED AND ADJUDGED pursuant to Defendants Binghamton Police Department, City of Binghamton and Kevin Miller's motion for summary judgment, the Court dismissed Plaintiff's Section 1983 claim for false arrest at the scene of the search, Eighth Amendment claim, malicious prosecution claim, 1983 equal protection/Section 1981 due process claims, Monell claims against the City of Binghamton, ADA claims, state-law claims for negligent hiring and supervision, state-law claims for delay and obstruction of medical care, claims against the City of Binghamton Police Department, and punitive damages claim against the City of Binghamton in accordance with Decision and Order of the Honorable Judge Thomas J. McAvoy dated February 7, 2017 [see dkt ## 86 and 98].

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff agreed to dismiss his claim of false arrest/state-law unlawful detainment at the close of the evidence and the court dismissed that claim.

IT IS FURTHER ORDERED AND ADJUDGED as to the Plaintiff's remaining causes of action brought under 1983 excessive force/state-law battery claim, the jury returned its verdict of NO CAUSE OF ACTION in favor of Defendant Kevin Miller only [see dkt # 170].

IT IS FURTHER ORDERED AND ADJUDGED as to the Plaintiff's remaining cause of action brought as a negligence claim under a respondeat superior theory and a theory of negligence against the City, the jury returned its verdict in FAVOR OF PLAINTIFF against Defendant City of Binghamton only, awarding past compensatory damages in the amount of $500,000.00 and future compensatory damages in the amount of $2,500,000.00, calculated over a 30 year period, for a total award of $3,000.000.00. Such award is reduced by 10% based upon the jury's findings of Plaintiff's contributory negligence. Total amount of damages awarded to Plaintiff Jesus Ferreira is $2,700,000.00 against Defendant City of Binghamton.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to the Honorable Thomas J. McAvoy's Decision and Order filed on September 27, 2017, the Defendants City of Binghamton and Binghamton Police Department's post-verdict motion for judgment as a matter of law was granted in favor of Defendant City of Binghamton and Binghamton Police Department [see dkt. ## [174] and [204]].

DATED: September 28, 2017

Lawrence K. Baerman
Clerk of Court

s/ C. M. Ligas, CRD
Deputy Clerk

Federal Rules of Appellate Procedure
Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;
(ii) a United States agency;
(iii) a United States officer or employee sued in an official capacity; or
(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.