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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

POINT I

The Jury's Exoneration Of Defendant Miller Was Both Irrational And Against The Overwhelming Weight Of The Evidence.

Upon reading appellees' brief, one thing becomes conspicuously noticeable by its absence. Their brief contains not one word dealing with the report of the shooting that Officer Hawley prepared the following day; the one he testified

was "complete, thorough, fair, accurate and comprehensive" (A376). Yet, despite its purported comprehensiveness, the report utterly failed to corroborate the principal justification Officer Miller offered at trial for shooting plaintiff: that plaintiff was standing and advancing on him and "doing exactly the opposite of what I was asking him to do when he had a gray object in his hands" (A780), which Officer Miller said he saw and believed to be a small, silver or gray, .38 snub-nosed revolver.

Officer Hawley testified (A377-78):

> Q. Nowhere in your report did you indicate that somebody thought that the person who was shot had a weapon, true?
> A. That's correct.

If Hawley had known that "very important fact", he would have put it in his report (A377).

Hawley further testified (A378):

> Q. And nowhere in your report does it state that the man who was shot was holding anything before he was shot, true?
> A. That's true.

That, too, was "an important fact" that was not in Hawley's report, because Officer Miller never told him about it (A378).

Officer Hawley gave this testimony as well (A378):

> Q. You never indicated in your report anywhere that the man who was shot was threatening in any manner before he was shot, true?
> A. That's true.
> …

Q. You never indicated in your report anywhere in any way shape or manner that the man who was shot was standing at the time he was shot, correct?
A. Correct.

That was Miller's claim at trial.

And further (A379):

Q. Nowhere in your report does it state that the man who was shot was advancing on anyone.
A. Correct.
Q. In fact, crystal clear, you never indicated in your report anywhere that the man who was shot was advancing on the shooter in any way shape or manner, correct?
A. Correct.

That, too, was Miller's claim at trial.

Officer Hawley conceded that there were no facts in his report to indicate that it was "necessary" or "reasonable" to shoot plaintiff (A379) or that plaintiff presented "any apparent imminent threat of deadly physical force" to Officer Miller or to any of the other officers at the scene (A379).

It is astounding and most telling that appellees have seen fit to avoid dealing with the absence in the report of any justification whatsoever for Miller to have shot plaintiff, who was found to have had no gun in his possession. Indeed, no gun was found in the apartment. A reasonable person would certainly have expected someone in Miller's situation to want to offer, at the first available opportunity, the same exculpatory account he would later offer at trial and now trumpets on appeal (see Appellees Brief, pp. 12, 20-21, 26, 29, 32, 40, 43),

namely, that Miller was not negligent in shooting plaintiff because plaintiff had got up off the couch and was approaching Miller and, therefore, was "doing exactly the opposite of what I was asking him to do when he had a gray object in his hands" (A780). Those were the "stimuli" Officer Miller testified he was trained to respond to in making his "judgment call" to shoot plaintiff (A780), but which he inexplicably failed to mention, even in passing, to a fellow officer investigating the incident or to anyone at the scene for that matter.

Appellees' deliberate failure to address the damning implications of Hawley's report is a concession that there is nothing they can say to refute them or diminish their import.

Appellees take umbrage at plaintiff's supposed suggestion "that officer Miller shot him in cold blood and without provocation in front of a team of highly trained police officers" (Appellees Brief, p. 20, and see p. 27). Putting aside the absurdity of these "attempted murder" suppositions (*id.*, p. 26), they underscore the sheer incomprehensibility of Miller's failure to explain as soon as possible, particularly to a sympathetic ear, why he was justified in shooting plaintiff. And, they underscore as well why this Court need not defer to the jury's credibility determinations and place what appellees are counting on as a rubber stamp of approval of the jury's verdict.

The conspicuous and inexplicable absence of any exculpatory facts in Hawley's report -- which it was in Miller's interest to have provided -- calls forth what this Court wrote in *Manhattan By Sail, Inc. v. Tagle*, 873 F.3d 177 (2017),

discussed in plaintiff's main brief: "[H]ad there been a cause other than negligence for Biggins's loss of control, Biggins would have reported it." *Id.*, at 184.

In *Tagle*, a sailboat deckhand (Biggins) lost control of a halyard, which struck the plaintiff. Both the deckhand and the captain were aware of the incident, which the captain immediately noted in the log, but the deckhand did not inform the captain of any extraordinary or external circumstances to explain why he lost control. The captain testified at trial that the deckhand told him "that the line *slipped out of his hands*." 873 F.3d at 183 (italics in original).

It was the deckhand's failure to explain *why* the line slipped that constituted what this Court characterized as powerful evidence against him and warranted its directing of a verdict on appeal. Said the Court: "We recognize that it is unusual for an appellate court to direct a verdict of negligence. What is unusual in this case, however, is the absence of any evidence by the person who caused the accident of a justifying cause in circumstances where *he would have had to have been aware of any such cause at the time of the injury*. … [W]ithout evidence of a justifying cause, the only inference reasonably supported by the evidence is of negligence." *Id.*, at 184 (italics added).

Although *Tagle* is admittedly factually unrelated to the instant case, it is, nevertheless, on all fours in principle and because of the Court's common-sense approach to the facts of the case -- the same approach that should be taken here.

Appellees attempt to distinguish *Tagle* by pointing to the absence of a claimed "external force" causing the deckhand to lose control of the halyard,

whereas, here, they claim that "*[p]laintiff* was the external force, and the jury properly found Plaintiff's action triggered Officer Miller's reaction" (Appellees' Brief, p. 32) (italics in original). This distinction is without merit. If plaintiff were the external force triggering the shooting, why did Officer Miller not tell Hawley, at the very first opportunity, "of a justifying cause in circumstances where he would have had to have been aware of any such cause at the time of the injury"? Indeed, why not tell everyone at the scene? Miller had every reason, especially self-interest, immediately to identify a justifiable, non-negligent excuse for the shooting, to wit, plaintiff's approaching him with what Miller thought was a gun. His failure to do so is powerful evidence that plaintiff did no such thing.

This Court need not refrain from deciding that the verdict is completely unsupported by the evidence or against the weight of the evidence, where, in addition to the absence of Miller's claimed justifiable excuse in Hawley's report, there is abundant other evidence pointing to the utter incredibility of Miller's account of the shooting. First, there is the inexplicability of plaintiff's approaching Miller in the first place and his allegedly doing the opposite of what Miller was "asking" him to do. What possible reason could plaintiff have had for engaging in such suicidal behavior?

Neither Miller nor any other officer testified that he heard plaintiff uttering threats or being verbally provocative. Similarly, no one claims plaintiff attempted to hide or to hit, kick, or otherwise assault the officers. Indeed, not one of them, all trained observers, including Charpinsky, who was inches from

Miller, ever claimed to have seen plaintiff rise from the couch, stand, advance, or brandish any object in his hands, and then spin and fall back onto the couch. Plaintiff admittedly and undisputedly showed both his hands.

Then there is the sheer implausibility of plaintiff's having the Xbox controller in one of his hands in the first place as he approached Miller. This requires the farfetched supposition that plaintiff kept the bulky controller in his hands *all night* as he slept on the couch and then *held onto it* as he allegedly got up off the couch and (for some unfathomable reason) approached Miller, heedless of his shouts to get down. Or, perhaps plaintiff (for some unfathomable reason) made sure he picked the controller up off the floor, where he had left it earlier that night, and *held onto it* as he purportedly approached Miller. Why would he behave that way?

The improbability of Miller's account is further borne out by his *unexplained* confusion, *see Tagle*, 873 F.3d at 182-83, between the Xbox controller he later concluded plaintiff was holding in one of his outstretched hands (A768, 785) and the small, silver or gray, .38 snub-nosed revolver he claimed he saw at the time (A842-43). It is noteworthy that Officer Miller did not merely see *a* gun in plaintiff's hand; rather, he specifically described its color, size, and model, which means that, with plaintiff upright and his hands outstretched, Miller was able to identify it "immediately" upon taking the "two or three steps into the room" and encountering plaintiff (A843). He said, "I *looked* at it and believed it was a gun" (A813) (italics added).

Here, too, is where Miller's story falls apart. If, as he claims, he looked and saw a gun, his testimony is false because there was *no* gun. If he looked and saw what he claimed must have been the Xbox controller, he admittedly should not have shot. Miller was an experienced SWAT team member who was trained to distinguish in those stressful situations "[b]etween a real weapon and something that's not a weapon" (A887). Yet, he offered no explanation for mistaking the Xbox for the gun, except that he "thought" it was a gun, which is no explanation at all. Miller did not say, for example, that it was too dark to have seen what plaintiff was holding; or that the blanket draped over plaintiff's shoulders somehow obscured his outstretched hands (in fact, he said it had probably fallen off his shoulders [A800]); or even that the heat of the moment resulting from the failed dynamic entry caused him to shoot without really looking.

The only explanation is negligence -- that he shot without looking. If Miller could not make out a weapon, he should not have shot plaintiff. He testified that if he could not "positively and objectively see and identify" a weapon, he was "not allowed to use deadly physical force" (A783, 674, 677-80).

It beggars belief that Miller mistook the controller for the gun he described, since it was conceded by all concerned that the two objects look nothing alike, which is something the Court can see for itself.

It is no answer to say, as appellees argue, that, of course, one can easily see the difference between the controller and the gun "in a [well-lit] quiet courtroom" (Appellees Brief, p. 29). The argument is without merit, because Officer

Miller said he looked and saw a specific color and kind of gun. Where was his explanation for how he could have confused the two?

Appellees attempt to excuse Miller's shooting by asserting that "he was glimpsing an unknown object believed to be a gun in the hands of a man advancing towards him in a dangerous setting" (Appellees Brief, p. 29). First, as stated, Miller conceded he was not allowed to use deadly physical force if all he saw was an unknown object.

Second, Miller did not merely *glimpse* "an unknown object believed to be a gun." He said: "I *looked* at it and believed it was a gun" (A813) (italics added). Nor was it an *unknown* object; it was, by his own description, a small, silver/gray, .38 snub-nosed revolver. That sounds like more than a belief.

Third, as we have already argued, if Miller's mistake was as simple as he claimed, why did he not covey that explanation to Officer Hawley when he was conducting his inquiry and preparing his thorough and comprehensive report? Why not get it on the record as soon as possible? And, why not say it to everyone there? Not a single police officer testified that Miller made such a statement at the scene or after.

Based on the foregoing, what appears from Miller's testimony is that, even though he was an experienced SWAT team member, the *heightened* danger he was placed in due to the City's negligence caused him to panic and negligently shoot plaintiff immediately upon entering the room, without discerning that he was holding, allegedly, a harmless electronic toy. In fact, the testimony by the other officers in the stack bears out this probability. Officer Charpinsky,

who was "right on the heels of" and "very close" behind Miller when the door was breached (A251-52) (not on the staircase outside the door, as appellees merely suggest [Appellees Brief, p. 8]), said he heard Miller's shot "[b]efore I made entry into the room" (A300, 305). Officers Governanti, Spano, and Dodge similarly testified that they heard the shot as soon as the door was breached (A569, 628, 659-60). Police Chief Zikuski testified that "[i]f the door is just swung open and you fire," that would be "a violation of professional police standards of care" (A950).

To sum up, Officer Miller's failure to inform the investigating officer that he shot plaintiff because, as he would later testify at trial, plaintiff failed to comply with his request to get down and was holding a white/gray, oddly-shaped plastic object with multi-colored buttons that Miller mistook for a silver/gray, .38 snub-nosed revolver simply does not add up. Nor is it helped by the fact that Miller claimed to have seen plaintiff rummaging around in the couch for the gun he thought he was holding but did not shoot him a second time so as to neutralize him permanently, which Miller claimed he was privileged to do.

Nevertheless, even accepting Miller's account that, "[a]fter taking two to three steps into the room (or within two to three seconds of entering the room)" (Appellees' Brief, p. 12), he shot the non-compliant plaintiff, it is difficult to believe that Officer Charpinsky did not see any of the things Officer Miller said plaintiff did: rise from the couch, stand, and approach Miller, draped in a blanket and with arms outstretched, holding an object resembling a gun and

then be shot and spin around and fall face-down on the couch. We understand that Charpinsky went off to the left to help secure the apartment, but he was immediately behind Miller, and that front room, after all, was quite small.

Appellees rely heavily on Dr. Terzian's opinion that, based on the trajectory of the bullet, he "believe[s] [plaintiff] was standing up or *at least partially standing up* when he was shot and facing the shooter…" (A1468) (italics added), thereby confirming Officer Miller's testimony. Dr. Terzian's opinion does not go quite that far. His testimony that plaintiff may have been partially standing is consistent with plaintiff's testimony that -- as one would expect -- when he heard the shouting and banging on the door he raised his hands and himself a few inches off the couch and twisted to the left, *toward* the door and Miller, who then shot him without provocation (A1368-69, 1417-18).

Plaintiff's testimony explains why it did not make sense to Dr. Terzian that Officer Miller would have had to turn and face plaintiff and shoot down at him as he was lying on the couch (A1468-69), because that is not what plaintiff testified to. We would also note that Officer Miller testified he entered the room in a "hunched, sort of like half squat kind of" gait (A854) when he shot plaintiff. That would have put him more at plaintiff's level on the couch, thus undermining Dr. Terzian's testimony that plaintiff had to have been standing when he was shot.

Finally, we address what appears to be appellees' mere *suggestion* of an argument -- it is not really put forth as one -- that "[p]laintiff's actions when Officer Miller entered the apartment" constituted "[a]n intervening act", which re-

lieves a defendant of liability if it is so extraordinary or attenuating that the plaintiff's injury may not reasonably be attributable to the defendant (Appellees Brief, pp. 40-41). In a footnote, appellees cite several cases involving various forms of threatening or aggressive conduct by the plaintiffs that was found to be a superseding cause of their injuries (*id.*, p. 41). These cases, however, serve only to underscore what did *not* take place here.

As testified to by Officer Hawley, his report not only contains no claim that plaintiff was standing or holding a weapon when he was shot, it does not state he was holding anything, or was approaching or advancing on anyone, or that he posed a threat of any kind, or that it was necessary or reasonable to shoot him (A377-79). Even Officer Miller could not bring himself to testify that plaintiff was being evasive, resistive, or provocative (A733-34), and he *never* claimed that plaintiff had pointed the object that he saw as the .38 snub-nosed revolver at him.

Based on the foregoing, plaintiff submits that he is entitled to judgment as a matter of law on his state law claim for negligence, because there was "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 [plaintiff] that reasonable and fair minded [persons] could not arrive at a verdict against" him. *Stratton v. Department for the Aging for City of N.Y.*, 132 F.3d 869, 878 (2d Cir. 1997).

In the alternative, plaintiff is entitled to a new trial on his state law claim, because the jury's verdict is against the weight of the evidence, as it is either seriously erroneous or a miscarriage of justice. *See Farrior v. Waterford Bd. of Educ.*, 277 F.3d 633, 635 (2d Cir.), *cert denied*, 536 U.S. 958 (2002).

POINT II

Plaintiff's Claim For Negligence Against Officer Miller Was Properly Based On Miller's Negligent Perception Of Himself As Being Privileged Or Justified In Shooting Plaintiff. In Any Event, Appellees Failed To Raise Their Point II Argument Prior To Submission Of The Case To The Jury.

We begin by noting that appellees' argument in Point II of their brief, that plaintiff's claim of negligence against Officer Miller is legally defective because allegations of intentional conduct cannot be the basis for a negligence claim (Appellees' Brief, p. 23), was not raised prior to submission of the case to the jury, when it should have been, and, therefore, has been waived. As this Court wrote in *Gibeau v. Nellis*, 18 F.3d 107 (1994), "[w]here a party has failed to raise an argument in the district court, an appellate court may only consider the argument where necessary to serve an 'interest of justice.' *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 822 (2d Cir.1984)." 18 F.3d at 109. Since appellees have not demonstrated that any interest of justice would be served by considering their intentional-act argument, it should not be entertained. *See Id.*; *Atkins v. New York City*, 143 F.3d 100, 103 (2d Cir. 1998).

The argument is patently without merit in any case. *See McCummings v. New York City Tr. Auth.*, 81 N.Y.2d 923, 925 (1993) ("The theory of plaintiff's case as submitted to the jury was common-law negligence -- i.e., that Officer

Rodriguez, in employing deadly physical force in an effort to apprehend plaintiff, did not exercise that degree of care which would reasonably be required of a police officer under similar circumstances (*see, e.g., Flamer v City of Yonkers,* 309 NY 114; *Herndon v City of Ithaca,* 43 AD2d 634, 635));" *see also Velez v. City of New York*, 730 F.3d 128, 136, fn. 11 (2d Cir. 2013) (stating New York law that a municipality is vicariously liable for a police officer who negligently fires a gun, citing *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 432 [2013] [Smith, J., concurring]); *Pelaez v. Seide*, 2 N.Y.3d 186, 205 (2004) (noting availability of vicarious municipal liability in "instances in which the government employee directly causes the injury, as where a police officer negligently shoots or otherwise injures someone" [citations omitted]).

Officer Miller himself testified that he had to act reasonably in responding to a threat (A841-42).

Also, as explained in *Mazzaferro v. Albany Motel Enterprises, Inc.*, 127 AD2d 374 (3d Dep't 1987), cited by appellees, "[u]nreasonably excessive force would" remain "an issue in the case if defendants had asserted the defense of privilege or justification for the assault", *id.*, at 376, which was claimed here. "Likewise, if the assaultive acts were committed under a mistaken belief as to the true facts, the reasonableness of the misapprehension would be at issue only with respect to a defense of privilege or justification", *id.*, which, again, was asserted here. In *Mazzaferro*, no such defense was interposed.

Here, the jury was properly given plaintiff's state law negligence claim against Officer Miller. *See Lubecki v. City of New York*, 304 A.D.2d 224, 232-33

(1st Dep't 2003), *lv. denied*, 2 N.Y.3d 701 (2004); *Cerbelli v. City of New York*, 2008 WL 4449634 at *23 (E.D.N.Y. 2008). The District Court itself quoted *Lubecki* as applying "in 'situations where the employee, a police officer, violates acceptable police practice'" (SPA14). The District Court further stated that "[p]laintiff elicited evidence that Miller's conduct violated acceptable police practices by shooting Plaintiff without first establishing he represented a danger", but that the jury did not so find (*id.*). Therefore, appellees' argument that plaintiff's negligence claim is legally defective should be rejected as without merit.

POINT III

The Special Duty Doctrine Is Irrelevant Here And Does Not Immunize The City From Liability.

What the Court of Appeals wrote in *Pelaez v. Seide*, 2 N.Y.3d 186 (2004), is sufficient to rebut appellees' special duty argument. "In the special relationship cases we are generally asked to impose liability on the government because it failed to prevent the acts of third persons who are the *primary* wrongdoers. This involves a form of secondary liability which we have restricted, out of respect for the public treasury. ...Here, the municipalities are not charged with having caused the lead paint injuries. If that were the case, as where the municipality owned the premises, it would be answerable to same extent as any other owner or landlord." *Id.*, at 205-06 (italics in original) (*abrogated on other grds*, in *McLean v. City of New York*, 12 N.Y.3d 194 [2009]).

Here, the City's affirmative acts and omissions, through the SWAT team members in negligently planning, preparing, and executing the no-knock raid in the course of their employment, created a heightened sense of danger, which was a proximate cause of Officer Miller's shooting of plaintiff, not that the City failed to prevent the shooting through the failure of another City employee to act. Therefore, plaintiff was not required to show a special duty or breach thereof.

With respect to the City's argument that the SWAT team engaged in untouchable discretion in determining what equipment they would bring to enable them to execute the warrant, and, thus, that the City was entitled to governmental immunity, the evidence shows that for the most crucial part of the raid -- the entry -- there was no discussion about which type of battering ram to use (A237-38, 242, 713-14). It was only at trial that the claim was raised for the first time that it was *assumed* the space was too tight to use the two-man ram, as opposed to the one-man ram (A713). None of the officers was aware of the size or existence of the hallway until *after* the botched entry (A713-14). This was apparently because the SWAT team did not obtain any building plans with the layout of the premises before the raid (A697, 321).

With respect to whether the information obtained from the confidential informant was reliable, Chief Zikuski testified that, even after reading the reports, he did not know if SWAT had any intelligence that corroborated what the informant had told them (A974-75).

Officer Miller testified that SWAT did not do any prior reconnaissance or surveillance prior to the raid (A686). Officer Hawley confirmed that no one conducted further surveillance to tell the team who was in the apartment, the number of persons present, or if the occupants were awake or asleep (A347, 370-71).

Chief Zikuski testified that a police department's failure to provide sufficient and proper intelligence, including the layout of the apartment being raided, in advance of a raid is a violation of police standards (A958-59). Since the City violated police procedures, the special duty doctrine is inapplicable in the instant case. *See Lubecki*, 304 A.D.2d at 232-33.

Under these circumstances, it appears that little, if any, reasoned judgment or discretion was exercised prior to the entry and, therefore, the governmental immunity doctrine does not come into play. *See Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983); *Haddock v. City of New York*, 75 N.Y.2d 478, 485-86 (1990) (immunity rejected where no evidence City complied with its own personnel procedures); *see also Davis v. City of New York*, 03-civ-0503 (S.D.N.Y. May 25, 2005); *HH v. City of New York*, 11-cv-4906 (E.D.N.Y. August 7, 2017).

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 lay-out of the premises, substantially contributed to the negligent shooting of the plaintiff. The jury properly found that the City's failure to provide crucial, necessary equipment and sending Miller in blind and unaware of any of the crucial, necessary facts, such

as who was home, where they were, and what they were doing, heightened the danger imposed upon Miller and was a proximate cause of the harm plaintiff sustained.

In view of the foregoing, there is no basis for disturbing the jury's verdict against the City of Binghamton.

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
May 17, 2018

Respectfully submitted,

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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 it contains 4,514 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 it has been prepared in a monospaced typeface using Microsoft Word in Bookman Old Style, 12-point font.

/s/ Alexander J. Wulwick
ALEXANDER J. WULWICK