SOKOLOFF STERN LLP

179 WESTBURY AVENUE, CARLE PLACE, NEW YORK 11514 PHONE (516)334-4500 FAX (516)334-4501 WWW.SOKOLOFFSTERN.COM

BRIAN S. SOKOLOFF
BSOKOLOFF@SOKOLOFFSTERN.COM

January 23, 2019

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 1007

Re: Ferreira v. City of Binghamton, et al.
Docket No.: 17-3234

I represent Appellee City of Binghamton and submit this post-argument letter at the invitation of Court during oral argument. I write to address two issues the Court raised during argument: (a) immunity for discretionary decisions and (b) the special duty requirement.

At trial following a SWAT raid, the jury found Officer Miller used no more force than necessary when he shot plaintiff. The jury determined Miller reasonably feared for his life when, upon entry, he immediately encountered Ferreira rising from the couch with an object in his hand, disregarding loud instructions to get down the police gave to occupants in the apartment while they worked to breach the front door with a battering ram. The jury found for Officer Miller on plaintiff's 42 U.S.C. § 1983 claim and state law battery claim. The jury also found for Miller on a negligence claim. The jury found for the City of Binghamton on plaintiff's *Monell* claim. Incongruously, the jury found against the City under *respondeat superior* for the negligence of unidentified persons (and without a jury charge regarding the negligence of anyone besides Miller).[1] It imposed substantial damages against the City, and the lower court set aside the verdict for lack of evidence of a special duty to plaintiff by the City.

Judge McAvoy's reasoning was sound, but other reasons exist why the jury's verdict cannot stand, including discretionary immunity, which Judge McAvoy did not discuss because he deemed Plaintiff's failure to prove a special duty dispositive. (A1956-8).

In *Valdez v. City of New York*, 18 N.Y.3d 69, 77-8 (2011), the New York Court of Appeals sought to disentangle two separate legal concepts appearing in municipal negligence cases: governmental immunity and special duty. "[T]here has been lingering confusion

[1] As to negligence, Judge McAvoy charged the jury only based upon a negligence claim against Miller and a *respondeat superior* claim against the City for Miller's negligence. (A1511-13)("The City of Binghamton is implicated in the state law claims under the theory known as respondeat superior which means, which is a Latin phrase meaning let the superior reply. Translated into plain English, if Officer Miller was working for the city at the time and was performing duties as a police officer during the events at issue, if he's liable then the city is liable." A1511). Although the jury had no opportunity to consider separately the alleged negligence of any other discrete person but Miller, it nonetheless imposed *respondeat superior* liability on the City for the actions or deficiencies of one or more unidentified people.

concerning the relationship between the special duty rule (establishing a tort duty of care) and the governmental function immunity defense (affording a full defense for discretionary acts, even when all elements of the negligence claim have been established). . . . For this reason, we have endeavored here to explain the rationale underlying each doctrine in the hope of bringing further clarity to this complex area of the law."[2] The concepts are distinct.

Discretionary Immunity

In *Valdez v. City of New York*, 18 N.Y.3d 69, 75-6 (2011), New York's Court of Appeals explained that, while "the State long ago waived sovereign immunity on behalf of itself and its municipal subdivisions, the common law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions." (Citations omitted). Accordingly, "[a] public employee's discretionary acts – meaning conduct involving the exercise of reasoned judgment – may not result in the municipality's liability even when the conduct is negligent." *Id.* at 76 (Citation omitted).

As the Eastern District of New York explained in a high profile case where a civilian died because of how the police handled a situation, "[T]he Court concludes that Dinkins and Brown are immune from individual liability under plaintiffs' state common law claims. This conclusion is consistent with New York authority, which holds that, when confronted with stressful emergency conditions, governmental officials should not be inhibited in the exercise of their professional judgment by the specter of civil litigation." *Estate of Rosenbaum by Plotkin v. City of New York*, 982 F.Supp. 894, 896 (E.D.N.Y 1997) (Emphasis added. Citation omitted.)

A narrow exception to the discretionary immunity defense exists where police officers violate specific departmental rules governing the conduct of the officers in issue. In *Johnson v. City of New York*, 15 N.Y.3d 676 (2010), a case involving alleged negligence stemming from a police shooting, the New York Court of Appeals upheld summary judgment for defendants based on discretionary immunity. The Court of Appeals explained discretionary immunity "presupposes that judgment and discretion are exercised in compliance with *the municipality*'s procedures because 'the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates *its own internal rules and policies* and exercises no judgment or discretion.'" 15 N.Y.3d at 681. (Emphasis added, *quoting Haddock v. City of New York*, 75 N.Y.2d 478, 485 (1990)). In *Johnson*, the Court considered whether the officers involved in the shooting violated New York City Police Department Procedure No. 2013-12, which delineated the proper circumstances for using deadly physical

[2] Plaintiff suffers from the pre-*Valdez* confusion, citing in his post-argument letter evidence bearing on the discretionary immunity question while claiming it relates to the "Special Duty Rule." No evidence cited in Plaintiff's letter relates to the existence *vel non* of a special duty to plaintiff.

force. Finding the officers complied with NYPD's policy, the Court of Appeals recognized the officers had discretionary immunity.

A recent Fourth Department case nicely illustrates the issue before this Court. In *Malay v. City of Syracuse*, 151 A.D.3d 1624 (2017), plaintiff brought a negligence claim against Syracuse after police officers fired CS gas canisters into plaintiff's apartment during a hostage standoff. The Fourth Department sustained a discretionary immunity defense for the City. Using italics to emphasize the kind of evidence that could cause a negligent municipal defendant to lose immunity, the Fourth Department explained:

> Contrary to plaintiff's contention, '[t]here was no evidence presented by … plaintiff, through [her] expert or otherwise, to show any immutable *departmental* procedures that must invariably be followed' in the use of CS gas canisters *Rodriguez v. City of New York*, 189 A.D.2d 166, 177, 595 N.Y.S.2d 421 [emphasis added.].

The Fourth Department noted an officer's failure to follow general standards outside of the police department are insufficient to destroy discretionary immunity: "Although plaintiff contends that the police officers did not comply with the chemical munitions manual provided by the Defense Technology Federal Laboratories, *there is no evidence that the manual was ever adopted by the City of Syracuse Police Department* and thus no evidence that that police officers violated their '*own* internal rules and policies.'" (Emphasis added, quoting *Johnson v. City of New York, supra*.)[3]

With that backdrop, plaintiff cites no trial evidence showing the Binghamton SWAT team's execution of a judicially sanctioned "no knock warrant" on August 25, 2011 failed to comply with specific immutable procedures of the Binghamton Police Department in place on the day of the incident. He cites no governing internal rules or policies the officers violated. Not a single one.

Plaintiff's citations contain witness opinions on abstract propositions. It would be a good idea if the officers did *X*. Doing *Y* is good. Plaintiff does not cite a single standard applicable in the Binghamton Police Department on August 25, 2011 violated by anybody, much less identify who violated it.

Plaintiff's citations miss his required mark, and occasionally are incomplete. Some comment and counter-citation is in order.

---

[3] Although lacking evidence to support it, Plaintiff here appears to bank on a rule that destroys discretionary immunity when an officer violates generalized standards of care. The standard Plaintiff appears to adopt swallows the immunity whole. Discretionary immunity would cease to exist if it applied only to municipal actors who are not negligent.

- A995-96: Chief Zikuski testified SWAT has shields, not SWAT must use them on every deployment. *Compare* A314:2-13: Shields would have been "very tight" and slow.

- A321: Charpinsky testified he lacked a layout of the apartment. Plaintiff produced no proof (a) such drawings existed, and (b) such plans in the hands of the police would have altered the entry or changed the outcome. In fact, the District Court sustained the City's objections to counsel's reference to the layout in his closing because of a lack of proof in the record. (A1647:6-20).

- A331-32: Charpinsky testimony about no *record* of a briefing, no discussion of back up plans, or what to do if there was a problem breaching the door. The testimony relates to the intelligence briefing, failure drills, and training on hollow core doors. On the next page, Charpinsky testified, "There wasn't a problem breaching the door." (A333:9).

- A332-33: Charpinsky testimony to assert there was no "*record* of any plan." In fact, no SWAT officer testified they had no plan. Their testimony shows all the elements of a plan, including timing, personnel assignments, and selection of equipment. *See* A860:24-25-A861:1-8 (Miller's description of plan).

- A347: Hawley testimony asserting there was "no surveillance or reconnaissance." The cited testimony relates only to August 24, 2011. (A346). On A347, he merely states they did no additional surveillance in the 15 hours before the entry. He also testified about a five-day investigation, including visits to the property on August 18 and 19, 2011. (A349:17-18; A344:24-5-A345:1-2).

- A686: Miller testimony there was "no surveillance or reconnaissance." In fact, Miller testified he had all of the intelligence he needed. (A875:24-25-A876:1-2).

- A699-701: Miller testified he did not have a taser, aerosol restraining device, or bean bag shot gun. Miller also testified he would not want them and had never used any of this equipment for a dynamic entry of the type here. (A872:15-25-A873:1-4). The jury found Miller used no more force than necessary under the circumstances.

The evidence in the trial record does not show the August 25, 2011 dynamic execution of a no knock warrant violated departmental rules. The evidence, in fact, showed the police complied with the broader standard of accepted police practices.

Using a One-Man Battering Ram was Appropriate[4]

Plaintiff offered no proof using a one-man ram on a hollow core door violated any accepted police practice or procedure. The trial evidence showed the contrary. Officer Charpinsky, a training officer, testified a two-man ram "wouldn't have mattered in this situation" (A242:19-20) and would have been "useless." (A243:15-18). Bringing a two-man ram would have been pointless, "Because we don't use it." (A322:2-3). According to Charpinsky, "There was no room in the hallway for a two-man ram." (A304:16-18; A305:1) Charpinsky even testified, "I don't know why we need to have a two-man ram." (A242:23).

Capt. Hendrickson, an instructor specializing in SWAT (A441), testified the two-man ram typically is used on "very solid fortified" doors, *i.e.*, not flimsy hollow core doors. (A543:L1-8; transcript mistakenly states "45" instead of "fortified".) He explained, "For mechanical doors [SWAT] basically [uses] a battering ram for an inward opening door and a sludge [sic] hammer and Halligan tool for an outward opening door." (A471:2-8).

Officer Miller testified the one-man ram was "our standard ram. The big one [the two-man ram] would generally not be used in a smaller setting like that." (A713:5-11; A873:11-18).

Reconnaissance and Surveillance

The trial evidence shows Investigators Hawley and Kane of SIU conducted a five-day investigation (A349:17-18); conducted surveillance on August 18 and 19, 2011 (A344:24-5-A345:1-2); researched the criminal background of Mr. Pride, the subject of the warrant (A194:1-2); worked with a confidential informant (A185:19-22; A366:2-6); planned and conducted surveillance of 11 Vine Street on August 24, 2011 (A174:22-25; A182:3-6; A184:5-17A194:19-23; A195:8-10); and corroborated information from the confidential informant with evidence of a drug transaction at 11 Vine Street on August 24, 2011. (A176:11-22; A195:15-25 to A196:1, A343:21-25 to A344:1).

Investigator Hawley provided his SIU intelligence to SWAT to assist with planning (A366:2-6) and accompanied SWAT to point out the correct apartment door. (A356: 11; A370:16-20).

[4] At 4:46 of the oral argument in this Court, plaintiff's counsel pointed out that Officer Miller never testified he shot in a panic or was influenced by "the stress of the situation." As such, plaintiff's theory that some deficiency in the planning for the entry (or the manner in which the officers entered) negligently caused the shooting is off base. Plaintiff's idea that some unknown person(s) created a "heightened danger" is without evidence. The time it took the police to enter this apartment, according to the evidence, was within normal range. Any argument that it took longer than normal cuts against plaintiff. The officers testified that, while they attempted to breach the door with the battering ram, they continued yelling "Police! Get down!," affording plaintiff the opportunity to avoid being a position likely to startle the officer upon entry.

There Was a Plan

Although in his post-argument letter plaintiff argues there was "no *record* of a meeting or briefing before raid" and "no *record*" of any plan for the warrant's execution, an examination of the record reveals these representations no more than semantics. (Dkt. 126 at p.3).

The testimony at trial shows there was a briefing or meeting immediately before executing the search warrant. (A237:25-38:1-4; A310:19-23; A322:11-14; A358:2-10; A365:17-25-A366:1-11; A620:5-13; A685:22-24; A687:16-25-A688:1-3; A691:10-17; A695:3-8; A707:14-15; A859:3-9). Based on the SIU intelligence, SWAT planned to make a "dynamic entry" (A308:1-18; A315:13-20; A316:7-18; A543:9-20; A599:8-11; A681:1-7; A683:8-11; A718:19-23; A731:1-2), as opposed to a "stealth entry." "Dynamic entries" involve "speed, surprise and distraction if at all possible." (A466:17-25). In contrast, a "stealth entry" entails approaching a barricaded suspect and may not be an entry at all. (A212:4-17; A466:17-25; A477:6-16; A481:21-25-A482:1-4; A681-1-7; A685:17-19). Cameras, mirrors, shields, and similar equipment are almost exclusively used for a "stealth entry", not for "dynamic entries." (A543:9-20; A477:6-16 A681:1-7; A683:25-A684:1-4; A685:17-19). While the surprise element of a "dynamic enter" often involves a diversionary device," also known as a "stun grenade" or "flash bang," (A466:17-25), these were ruled out of "the plan" because of a child's possible presence. (A322:11-16; A530:2-3; A543:2-25-A544:1-9; A620:5-10; A695:24-25-A696:1-2). *See also* A447:1-9 (discussing that SWAT pre-plans assignments/equipment).

Plaintiff argues the police should have looked for a blueprint of the apartment before entering. He supplied no proof any such blueprint existed, nor did he show how such imaginary blueprint would have changed the outcome of this dynamic entry. While Plaintiff cites Chief Zikuski's testimony on A961 that he "always" tries to find the layout prior to a "mission," the Chief did not concede failure to obtain a layout violates any policy or procedure. Plaintiff offered no testimony regarding acceptable SWAT practices in 2011. Whether to obtain a layout is discretionary according to acceptable police practice, and Plaintiff offered no evidence to the contrary. (A220:12-18).

The Officers Had Appropriate Equipment

Charpinsky testified the sergeant or Team Leader decides the necessary equipment for an entry. (A229:22-25-A230:1-3). Team Leader Spano testified, but plaintiff failed to ask a single question regarding the selected equipment. Charpinsky opined SWAT lacked no equipment required for the raid. (A310:3-5). Miller testified that he had all the equipment he needed for the entry at 11 Vine Street. (A876:3-5).

Charpinsky testified night vision goggles would have been inappropriate. (A237:3-8, A706). He indicated SWAT had all equipment necessary; tasers, bean bag shotguns, and

chemical agents would not have been used, and the decision not to use them was made by the Team Leader. (A310:3-15).

Miller testified SWAT never uses bean bag shotguns or tasers on dynamic entries because they are ineffective. (A872:15-25-A873:1-4). SWAT never uses tactical mirrors during dynamic entry. (A859:10-24).

Capt. Hendrickson testified, "No SWAT team" would use pole cameras, under-the-door cameras, or tactical mirrors for a dynamic entry. (A525:5-7; A543:9-20).

Plaintiff adduced no evidence showing the equipment or tactics chosen for this entry fell outside of the range of acceptable police practices.

Contingency Planning

Plaintiff provides no evidence showing SWAT's preparation and planning for various contingencies violated any acceptable police practice. The evidence shows SWAT trained on entry into similar residences (A613:16-18); SWAT trained on hollow core doors (A331:8-13); SWAT routinely conducted "failure drills" (A332:9-13); and SWAT trains together for contingencies (A876:16-23).

In fact, every SWAT member who testified in the trial, if asked, testified the team's breach of the hollow core door at 11 Vine complied with acceptable police practice. Charpinsky testified, "There wasn't a problem breaching the door." (A333:9). Hendrickson testified the thirty to forty seconds taken to breach the door at 11 Vine was "fine" in terms of time taken. Charpinsky agreed that "ten strikes in 30 to 40 seconds to get in a room" is a successful entry. (A324:18-20).

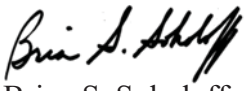
Special Duty

In *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420 (2013), New York's Court of Appeals made clear, even if a negligence plaintiff surmounts a municipal defendant's discretionary immunity, he still must demonstrate the municipal defendant owed him a special duty. The Court lays out the appropriate four-part test, and holds, "A plaintiff must satisfy each of these factors in order to establish a special relationship." 21 NY.3d at 431. In this case, plaintiff can satisfy none of them. No post-*Applewhite* case shows the special duty requirement inapplicable to police *negligence* cases like the one before the jury here.

This Court should affirm the decision below.

Very truly yours,

SOKOLOFF STERN LLP



Brian S. Sokoloff

BSS/--
cc: Counsel of Record

VIA ECF