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January 29, 2019

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
40 Centre Street
New York, NY 10007

RE: ***Ferreira v. City of Binghamton, et. al.***
Case Number: 17-3234

Dear Madam:

Please allow this letter to serve as Plaintiff-Appellant's Reply. The jury was free to consider whether the police practices and procedures, as admitted by the adverse witnesses - defendants themselves, and noted in plaintiff's January 14, 2019 submission and briefs, were violated by the City. It is long and well-established that:

"What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case." Becker v. Koch, 104 N.Y. 394, 401, 10 N.E. 701 (1887).

That said witnesses may have recanted their testimony somewhat upon questioning by their own counsel merely goes to their credibility and the weight to be afforded their testimony by the jury. There is NO requirement that plaintiff must have unopposed and unrebutted testimony with respect to violations of police practices. See, Lubecki v. City of New York,304 A.D.2d 224, 231 (1st Dept. 2003), *lv. den.*, 2 N.Y.3d 701 (2004) [plaintiff's expert made concessions on cross-examination and defendant's expert contradicted plaintiff's expert].

Because of the City's failure to provide the necessary intelligence and perform surveillance and reconnaissance, Miller and his unit had NO intelligence, NO knowledge of who was in the apartment, NO knowledge of its layout, how many people were present, if they were armed or their ages and locations. [Miller; A713, 876][1]. There was NO discussion about what equipment to bring. [Miller A 710-711]. The record is bereft of a copy of any purported Tactical Plan (or of any kind of plan). *Cf.*, Terebesi v. Terreso, 764 F.3d 217, 225 (2d Cir. 2014) [detailed Tactical Plan in evidence]. It took what seemed like an eternity to open the door[2], and this was a major concern to Miller, who was in the most dangerous spot, lacked any knowledge of what he was facing – he was going in blind, and was unnecessarily exposed to heightened danger as a result of the City's negligence. [Miller A714-715,712, 877-78]. The jury was free to consider, among the City's acts and omissions of negligence, how the defendants' violation of *any* of these police practices was *a* proximate cause of Miller shooting plaintiff.

It is axiomatic as the prevailing party at trial, plaintiff is to be given every favorable inference in reviewing the record. *See e.g.* Glaser v. United States, 315 U.S. 60, 80 (1942). As plaintiff-appellant has established that the "Special Duty Rule" does not apply when police violate good and accepted police practices, and that there was a sufficient proof of same, we respectfully submit that the jury's unanimous verdict should be reinstated, and the lower court reversed for setting aside their verdict.

Respectfully submitted,

Robert J. Genis, Esq.
Alexander J. Wulwick, Esq.
Cc: Brian S. Sokoloff, Esq.

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[1] The first time anyone claimed that the space was too tight for certain equipment was at trial; no one was aware of the existence and size of the hallway until *after* the botched entry. [Miller A713-14].

[2] The longer it takes to open the door, the more dangerous it is. [Hendrickson A 512, 503, 513].