16-3935

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

KENNETH CHAMBERLAIN, JR., as the administrator of
THE ESTATE OF KENNETH CHAMBERLAIN, SR.,

Plaintiff-Appellant,

—against—

CITY OF WHITE PLAINS, P.O. ANTHONY CARELLI, P.O. MAURICE LOVE,
P.O. STEVEN DEMCHUK, P.O. MAREK MARKOWSKI, SGT. STEPHEN FOTTRELL,
SARGEANT KEITH MARTIN, LT. JAMES SPENCER,

Defendants-Appellees,

WHITE PLAINS HOUSING AUTHORITY, P.O. STEVEN HART,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The core question put before this Court is whether the Fourth Amendment protections of the sanctity of the home must be applied equally to all persons, whether police are responding to an aided call to a person living in public housing who they believe may have a mental illness, or, to a person living in a private home suspected to have engaged in criminal activity. The gravamen of this appeal is when, how and by whom should a determination of the reasonableness of the police response, for both Fourth Amendment and qualified immunity purposes, be made – particularly when the warrantless entry arose from police-created exigency and proximately caused the use of excessive and deadly force. The district court's resolution of these fundamental questions, at both the pleading and summary judgment stages, ignored well established precedent of this Court, and the United States Supreme Court, that dictate that where the complaint plausibly alleges such claims or there are genuine factual disputes, a pre-trial dismissal on motion should not occur.

In the early morning hours of November 19, 2011, Mr. Kenneth Chamberlain, Sr. was alone in his apartment when his medical alert device was accidentally activated. The police dispatcher for the White Plains Department of Public Safety ("WPDPS") was contacted by the LifeAid monitoring service to check on his welfare. Almost immediately after police arrived, 68 year-old Mr.

Chamberlain opened his door, told the police he was fine, that he did not call them and that he did not want to let them into his apartment. In fact, shortly after the police arrived, LifeAid contacted the police dispatcher and attempted to cancel the call but was informed by the police department that they were going to take Mr. Chamberlain's door down anyway. Within minutes of arriving at Mr. Chamberlain's door, they used a master key to open his door without his consent. The police then placed a halligan tool in the door opening to prevent Mr. Chamberlain from closing it. Approximately 90 minutes after the police arrived at Mr. Chamberlain's apartment, his apartment door was fully and forcibly removed, Mr. Chamberlain was shot twice with a Taser, struck four times with projectiles from a less-lethal shotgun (once in the back) and then killed by a gunshot fired by Defendant P.O. Anthony Carelli.

Under this discrete set of facts, the police officers had no authority to breach Mr. Chamberlain's door, as there was an insufficient basis for a reasonable officer to conclude that the emergency aid exception to the warrant requirement existed at the time the warrantless entry was initiated. The district court, at both the motion to dismiss and summary judgment stages, ignored the facts alleged in the Amended Complaint, and those adduced during discovery, that the defendants' initiation of the warrantless entry, by using a master key to open the apartment door and then control it by inserting a halligan tool, caused Mr. Chamberlain fear and agitation.

The police, and the district court, then used the observations of Mr. Chamberlain's escalating fear and agitation, caused by the defendants' unconstitutional acts, to justify bringing the door fully down under the emergency aid exception to the warrant requirement. The district court further held that, even if the warrantless entry was unjustified, the Defendants were entitled to qualified immunity because a reasonable officer could believe Mr. Chamberlain had "implicitly consented" to the police entering his apartment because he possessed a medical alert device. Such rulings fly in the face of well-established Fourth Amendment precedent that enshrine the sanctity of the home against warrantless government intrusion, and misapplied the precedents which govern motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") and under Rule 56 of the Federal Rules of Civil Procedure ("Rule 56").

JURISDICTIONAL STATEMENT

The district court's jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1367(a). Plaintiff-Appellant brought this action pursuant to 42 U.S.C. § 1983 to redress the deprivations of constitutional and civil rights of decedent Kenneth Chamberlain, Sr. as secured by the Fourth and Fourteenth Amendments to the United States Constitution. Judgment was entered on November 21, 2016. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. On November 18, 2016, Plaintiff filed a notice of appeal. Joint Appendix ("A") at 3518.

ISSUES PRESENTED

1. Whether in the Rule 12(b)(6) ruling the district court erroneously granted Defendants' motion to dismiss the unlawful entry claim where the Amended Complaint sufficiently set forth a plausible claim of a Fourth Amendment violation.

2. Whether the district court erred in granting the individual Defendants qualified immunity for their unlawful entry into Mr. Chamberlain's apartment.

3. Whether the district court erred in granting Defendant Sergeant Keith Martin's motion to dismiss his discharge of four less-lethal shotgun blasts in using excessive force by failing to analyze each of the four shots separately.

4. Whether the district court erred in holding that even if Defendant Sergeant Martin used excessive force, he would be entitled to qualified immunity at the motion to dismiss stage.

5. Whether the district court erred in granting summary judgment dismissing the excessive force claim against Defendant Sergeant Martin, although a genuine dispute of material fact existed as to whether he shot Mr. Chamberlain in the back when he was not a threat.

6. Whether the district court erred in granting summary judgment to dismiss the supervisory liability claims against Defendants Sergeant Martin and Sergeant Stephen Fottrell.

7. Whether the district court erred in granting summary judgment dismissing the *Monell* claim against the Defendant City of White Plains, although genuine disputes of material fact existed as to whether the City had a constitutionally adequate policy for responding to situations where a possible emotionally disturbed person refused to permit the police to enter his home.

8. Whether the district court erred in granting the Defendants' motions *in limine*, unduly limiting the scope of the evidence that the jury could consider.

STATEMENT OF THE CASE

Kenneth Chamberlain, Jr., as the Administrator of the Estate of Kenneth Chamberlain, Sr. ("Mr. Chamberlain"), filed this action, in the Southern District of New York (Seibel, J.), against the City of White Plains ("Defendant City"), P.O. Anthony Carelli ("Defendant Carelli"), P.O. Steven Hart ("Hart"), P.O. Maurice Love ("Love"), P.O. Steven Demchuk ("Defendant Demchuk"), P.O. Marek Markowski ("Markowski"), Sgt. Stephen Fottrell ("Defendant Fottrell"), Sgt. Keith Martin ("Defendant Martin"), Lt. James Spencer ("Spencer") and the White Plains Housing Authority ("WPHA").[1] Plaintiff alleged, *inter alia*, that Defendants unlawfully entered Mr. Chamberlain's home, used excessive force and, ultimately, deadly force, in violation of the Fourth and Fourteenth Amendments. Claims were also asserted under New York State law for assault, battery, conscious pain and suffering, and fear of impending death.

[1] Plaintiff will not be appealing the following claims from the Amended Complaint (A-41-88): Excessive Force against Defendants P.O. Hart, P.O. Love, P.O. Demchuk, P.O. Markowski, Sgt. Fottrell, and Lt. Spencer; Unlawful Entry against Defendants P.O. Love, P.O. Markowski, and Lt. Spencer; § 1983 Conspiracy Claim; *Monell* claims against WPHA; Supervisory liability claims against Lt. Spencer; State law claims of Conscious Pain and Suffering against Defendants P.O. Love, P.O. Markowski, Lt. Spencer, and WPHA; State law claim of Assault and Battery against Defendants P.O. Hart, P.O. Love, P.O. Markowski, and Lt. Spencer; State law claim of Negligence against all Defendants; and State law claim of Wrongful death against all Defendants. (A-41-88).

SUMMARY OF THE ARGUMENTS

At the motion to dismiss stage, the district court erroneously dismissed Plaintiff's unlawful entry claim and mistakenly utilized LifeAid and Taser recordings and transcripts to reach an impermissible result. Despite the Plaintiff's Amended Complaint setting forth a plausible claim of unlawful entry, the lower court found the entry to be justified by exigent circumstances. Special Appendix ("SPA") at 16-17. The court held that even if Defendants wrongfully entered, they were shielded by qualified immunity because it was reasonable for them to conclude that there was an emergency and that entry was necessary. (SPA-16). Moreover, the court concluded that even if it were unreasonable for them to believe that there was an emergency, it would have been reasonable for the officers to assume they had implied consent to enter, because Mr. Chamberlain possessed a medical alert device, and were thus entitled to qualified immunity. (SPA-17).

The court also erred in dismissing Plaintiff's excessive force claim against Defendant Martin for his use of the less-lethal shotgun. (SPA-22). Instead of evaluating each of the four shotgun blasts, individually, and determining their respective reasonableness, the court concluded that Martin was entitled to qualified immunity for his use of the less-lethal shotgun. (SPA-22). Plaintiff appeals the lower court's decision that impermissibly ruled on the four less-lethal shots, collectively, and not individually. Further, the court prematurely determined that

Martin was entitled to qualified immunity despite the existence of factual issues with respect to the use of the less-lethal shotgun.

At the summary judgment stage, the lower court erroneously dismissed Plaintiff's supervisory liability claims against Defendants Martin and Fottrell for their failure to formulate a plan for entry into Mr. Chamberlain's apartment and the use of force, if necessary. (SPA-132). The court held that the record did not contain evidence that Martin and Fottrell failed to develop a plan for entry and seizure. (SPA-132). In reaching that conclusion, the court below ignored evidence that established that there was a genuine dispute of material fact as to whether the sergeants had developed a plan for entry and the use of force, before Mr. Chamberlain's door was removed, and whether, if in fact such a plan had been devised, the sergeants had communicated it to anyone. (SPA-131).

Secondly, the lower court wrongfully granted summary judgment as to the excessive force claim against Defendant Martin. The district court primarily held that the evidence presented did not create a genuine dispute of material fact sufficient to change its previous determination that Martin was entitled to qualified immunity. (SPA-118). The court reaffirmed its decision to award qualified immunity based upon the fact that reasonable officers could differ in regard to the necessity of a fourth projectile from the less-lethal shotgun. (SPA-119). However, the district court's determination was clearly erroneous because the law is clear

that each discharge of a weapon must be evaluated separately and there were significant disputes of material fact as to the necessity for each shot from the less-lethal shotgun.

Thirdly, the district court improperly granted summary judgment with respect to the *Monell* municipal liability claim against the Defendant City. (SPA-129). The court explicitly held that since the White Plains police officers had received training on how to respond to EDPs, the Plaintiff had not established that the City exhibited deliberate indifference regarding EDPs. (SPA-130). In reaching that conclusion, the district court ignored the evidence which demonstrated that the City's EDP policy was grossly inadequate. After having presented the New York City Police Department's ("NYPD") EDP policy, Plaintiff argued that the NYPD's plan provided guidance to its officers on how to respond to a call when a possible EDP refused entry. By contrast, the Defendant City's policy failed to provide any guidance to its officers as to how to respond to such a situation. Consequently, the court committed error by failing to properly consider the City's deficient EDP policy that was in effect at the time of the incident.

Finally, at the motion *in limine* stage, the lower court improperly precluded Plaintiff from introducing evidence that the assault claim arose prior to the removal of the apartment door; when Mr. Chamberlain stated that he saw officers in the hallway with their weapons drawn and at the ready. (SPA-164-67). The court's

conclusion contradicted the earlier determination at the Rule 12(b)(6) stage, wherein the court had opined that the Amended Complaint had plausibly alleged that prior to the door's removal, Mr. Chamberlain apprehended imminent physical injury due to the display of weapons by the officers. (SPA-44-45).

The district court also wrongfully precluded Plaintiff from presenting any documentary evidence in the form of medical records, regarding Mr. Chamberlain's health condition and medical diagnoses. This documentary evidence included progress notes of his last several doctor visits, including one that occurred on November 14, 2011, just one week before he was killed. (A-1814).

On November 7, 2016, the trial commenced against the remaining Defendants-Appellees (Defendants Carelli and City of White Plains). On November 17, 2016, a jury verdict for the Defendants-Appellees was entered. On November 21, 2016, the district court entered judgment in favor of the Defendants-Appellees. On November 18, 2016, Plaintiff filed a Notice of Appeal.

STATEMENT OF FACTS

A. Facts Alleged in the Amended Complaint

On November 19, 2011, at approximately 5:00 a.m., 68 year-old Marine Corps veteran Mr. Kenneth Chamberlain, Sr. was in his apartment at 135 S. Lexington Avenue in White Plains, New York when his medical aid device triggered accidentally. (A-43, ¶ 10). The device was provided to Mr. Chamberlain, and monitored 24 hours a day, by LifeAid because of his serious, debilitating

health problems. (A-43, ¶ 11). LifeAid attempted unsuccessfully to contact Mr. Chamberlain via a two way communication device that immediately began recording communications to and from his apartment when the medical alert device was activated. (A-43, ¶ 12). When he did not respond to the LifeAid operator's queries, LifeAid contacted WPDPS which directs and controls White Plains's police, firefighters, emergency technicians, and emergency service unit personnel. (A-43-44, ¶ 13).

At approximately 5:05 a.m., Police Officer Ferdinando Cianci ("Cianci") received the call from LifeAid and forwarded it to Police Officer Vincenzo Battaglia ("Battaglia") who was assigned to the radio dispatch console in the communications room of WPDPS. (A-44 at ¶ 14). Upon receiving the call, Battaglia dispatched an ambulance to the scene along with the patrol car of Officer Love. (A-44, ¶ 15). Battaglia also conducted a computer history check of Mr. Chamberlain and his home location. From his computer check, Battaglia learned there had been several prior EDP calls involving Mr. Chamberlain. Battaglia also learned that on June 5, 2011, officers had been dispatched to Mr. Chamberlain's apartment for a welfare check involving an EDP at the location. Battaglia downgraded the ambulance call response and dispatched Officer Markowski and Defendant Martin to the scene. All units were advised that there had been several previous "emotionally disturbed person calls" at the location. (A-44, ¶ 16).

Defendant Fottrell, who was aware that an EDP had activated his LifeAid system and was refusing entry to officers and paramedics, was at headquarters when Lt. Spencer received a call from Martin who requested tactical officers to respond to the scene. Spencer directed Fottrell and Demchuk to respond to the scene with their tactical gear. (A-44, ¶ 17).

Prior to his departure, Fottrell retrieved from the Armory an orange shotgun and loaded it with five less-lethal rounds. Defendant Demchuk retrieved a plastic riot shield. Both men drove together to the scene. (A-44, ¶ 18). Spencer ordered Defendant Carelli and Hart to respond to Mr. Chamberlain's home because they had a master key to the Winbrook Housing apartments, where Mr. Chamberlain resided. Both Carelli and Hart were advised to get tactical gear. (A-44-45, ¶ 19).

At the scene, Martin advised Fottrell that Mr. Chamberlain was in his sixties. (A-45, ¶ 20). The assembled officers were equipped with: less-lethal shotgun, riot police shield, halligan tool, axe, Taser, handguns, pepper spray and were wearing tactical gear. (Martin was not wearing his tactical gear). (A-45, ¶ 21). Fottrell and Martin were the supervisory officers at the scene. Lt. Spencer was the highest ranking officer on duty at headquarters. On information and belief, Spencer never reported to the scene in person. (A-45, ¶ 22).

Carelli and Hart, members of the WPDPS's Neighborhood Conditions Unit ("NCU"), were still at headquarters after their shift was over because they were

completing reports for a late arrest. (A-45, ¶ 23). NCU is a tactical unit of the WPPD assigned to patrol the commercial district along Mamaroneck Avenue where several bars and restaurants are located as well as the nearby municipal housing complex, Winbrook Houses, where Mr. Chamberlain lived. (A-45, ¶ 24). The WPHA had provided to NCU a master key affording them access to all apartments in the Winbrook Houses, including Mr. Chamberlain's apartment, without the residents' knowledge or permission. (A-45, ¶ 25).

Immediately after the police officers arrived at Mr. Chamberlain's home they began banging loudly on his door and ordering him to let them in. (A-45, ¶ 26). Through the door, Mr. Chamberlain told the officers that he did not call them and that he was okay. (A-45, ¶ 27). Nevertheless, the police officers continued to bang on his door and insist that he open it. (A-46, ¶ 28). The LifeAid operators told Mr. Chamberlain that if the officers could tell that he was okay they would go away. (A-46, ¶ 30). Mr. Chamberlain then continued to speak to both the LifeAid operators and the police officers, without opening his door, insisting that he was okay and not in need of assistance. (A-46, ¶ 31).

The LifeAid operators, reassured by Mr. Chamberlain that he was not in need of assistance, attempted to cancel the medical aid call with the WPDPS dispatcher. However, the police officers on the scene refused LifeAid's request and advised that entry would be made into the apartment. (A-46, ¶ 33). Despite both

Mr. Chamberlain and LifeAid's attempts to cancel the medical aid call, the police continued relentlessly in their attempts to forcibly gain entry to the apartment. (A-46, ¶ 34).

LifeAid, using Mr. Chamberlain's emergency contact list, called his sister who lives in North Carolina. She advised LifeAid that her daughter Tonyia Greenhill, Mr. Chamberlain's niece, lived in the same apartment building and was on her way downstairs to assist in resolving the situation. (A-46-47, ¶ 35). Ms. Greenhill, pleaded with the officers to allow her to speak with her frightened uncle. (A-47, ¶ 36). However, the police officers on the scene thwarted Ms. Greenhill's offer to assist and did not allow Ms. Greenhill to communicate with her uncle as he remained alone and afraid inside his apartment. (A-47, ¶ 37).

The LifeAid recordings document Mr. Chamberlain's growing fear and agitation as the siege continued and escalated for over one hour. (A-47, ¶ 38). During the time that the police were outside Mr. Chamberlain's home, they continuously banged loudly on his door and on an outside window, cursed at him, and continued to speak to him loudly, threateningly, disrespectfully, and mockingly. At least one officer taunted him with racial slurs. (A-47, ¶ 39). One of the racial slurs came from Hart, who stood outside the window of Mr. Chamberlain's first floor apartment and called him a "nigger." He had been ordered by the sergeants to go to Mr. Chamberlain's window to "distract" him. (A-

47, ¶ 40).

The master key provided by the WPHA to the NCU was used by Martin and/or Hart to unlock Mr. Chamberlain's door, but a safety lock prevented the door from being opened more than a few inches. However, the door did open sufficiently for the officers to visually confirm that Mr. Chamberlain was not in need of medical assistance. (A-47, ¶ 41). Martin wedged a halligan tool into the opening to prevent Mr. Chamberlain from closing it.[2] Martin kicked the door several times. And, at a subsequent point, Fottrell ordered Carelli to use a bolt cutter to remove the slap lock on the door.

After more than an hour of unsuccessfully attempting to gain entry into the apartment, Demchuk was ordered to violently breach Mr. Chamberlain's door. Love assisted in the door's removal. (A-47-48, ¶ 42). Once the door had been removed from its hinges and the slap lock cut, Demchuk, Martin and Fottrell pushed the door several times, hitting Mr. Chamberlain. Once the door was down, Mr. Chamberlain was seen by the officers in his apartment wearing boxer shorts. (A-48, ¶ 43). As the officers forced open his door, Mr. Chamberlain communicated to the LifeAid operators that he was in fear for his life and that he had observed several officers outside his door, with shotguns and handguns drawn. (A-48, ¶ 44).

[2]During discovery, Defendant Carelli testified in his deposition that Mr. Chamberlain was using a knife to poke at and disturb the halligan tool that was preventing his door from closing. (A-1235). It should be noted that in the record there is no mention of a knife until after the halligan tool had been put in place.

As the door was being pushed forcibly off its hinges, Mr. Chamberlain repeatedly begged the officers to stop their actions, chanting "Don't" and "Leave" over and over again. He expressed his fear that the police officers were going to take him to White Plains police headquarters, beat him and kill him. (A-48-49, ¶ 48).

As the door fell open, a camera on a Taser being held by Fottrell recorded Mr. Chamberlain standing approximately six to eight feet away from the doorway wearing only a pair of boxer shorts. (A-49, ¶ 49). After the door had been removed, Fottrell stood in the doorway and prepared to discharge his Taser at Mr. Chamberlain, who at all times remained in his apartment. (A-49, ¶ 50). Prior to the Taser's discharge, Carelli and Hart stood in the hallway with their guns drawn, and Demchuk retrieved the police shield in anticipation of entry.

At no time did Fottrell or Martin, the supervisory officers, consider using pepper spray to distract Mr. Chamberlain, or to use the less-lethal shotgun to knock Mr. Chamberlain down, instead of the Taser. Nor was any tactical plan devised to use the shield as cover for the other officers as they proceeded to engage Mr. Chamberlain. Nor was there any plan to use the batons, in combination with the shield, to attempt to disarm or contain Mr. Chamberlain once the door was down. (A-49, ¶ 51).

Fottrell discharged the Taser, but did so in a negligent manner, whereby both electrical prongs did not enter Mr. Chamberlain's body. (A-49, ¶ 52). Because of

that negligent discharge, Mr. Chamberlain's flesh was severely burned and electric shocks were repeatedly sent throughout his body, but the Taser failed to incapacitate him. (A-49, ¶ 53). Video from the Taser recorded its tortious and torturous effects on Mr. Chamberlain. (A-49, ¶ 54). After the improper use of the Taser failed to fell Mr. Chamberlain, Martin grabbed a shotgun being held by Markowski that contained less-lethal ammunition. (A-50, ¶ 55). Prior to entering the apartment Martin, while he stood in the hallway, fired several shots from the less-lethal shotgun, striking Mr. Chamberlain's thigh and chest. After the less-lethal shotgun rounds were deployed, Mr. Chamberlain went down, but there was no effort to contain him using the shield, batons, or physical force. (A-50, ¶ 56). Immediately after the less-lethal shotgun rounds were discharged, Carelli fired his handgun twice, one bullet striking Mr. Chamberlain. Martin, Fottrell, Carelli, and Demchuk then entered the apartment. (A-50, ¶ 57). Demchuk grabbed Mr. Chamberlain's feet and dragged him out of the apartment. (A-50, ¶ 58).

The autopsy of the Mr. Chamberlain's body revealed several abrasions caused by the Taser and the less-lethal shotgun projectiles. (A-50, ¶ 59). The autopsy also revealed that the fatal bullet had entered Mr. Chamberlain's right upper arm and passed through his lungs, spine and ribs in a straight line. (A-50, ¶ 60). The autopsy also confirmed that Mr. Chamberlain, prior to his death, was taking several medications for his various medical conditions, but that he had no

drugs of abuse in his system. (A-50, ¶ 61).

Throughout the incident, at no time did Mr. Chamberlain leave his apartment or initiate contact with any of the officers. (A-51, ¶ 64). Once it became clear that the Defendants' actions were causing Mr. Chamberlain to become increasingly fearful and agitated, culminating in delusions, hallucinations and flashbacks from his military service, Defendants took no actions to defuse and resolve the situation that their own actions had brought about. (A-51, ¶ 68). Instead, Defendants exacerbated the situation, used excessive and unnecessary force, and, ultimately caused Mr. Chamberlain's death. (A-51, ¶ 69).

At all times, the responding officers and supervisors knew that Mr. Chamberlain was an EDP whose LifeAid system had been triggered accidentally. (A-51, ¶ 71). Addressing EDPs requires separate and careful attention in order to prevent the escalation of incidents with persons in need of medical aid or assistance. (A-51-52, ¶ 72). White Plains's policy regarding Mentally/Emotionally Disturbed Persons (PR-87) provides no guidance to its police officers with respect to how to respond to an incident involving an EDP. A copy of the policy was attached as Exhibit A to the Amended Complaint. (A-52, ¶ 75; A-69-71). White Plains's policy only addressed what was to be done when a person is brought by the Police Department to White Plains Hospital for psychiatric evaluation. The policy did not address what procedures should be used when confronting an EDP

or what steps should be taken to contain or restrain an EDP or otherwise render aid. (A-52, ¶ 76).

In contrast to White Plains's policies for handling EDP and barricaded persons, New York City's policies provide that any action which might agitate or provoke an EDP subject should be avoided. The White Plains policy contains no such provisions. (A-54, ¶ 87). The New York City policies provide that if the barricaded person is contained and poses no immediate threat or danger to any person, no additional action will be taken without the authorization of the precinct commander /duty captain at the scene. The White Plains policy contains no such requirement or procedure. (A-54, ¶ 88). David E. Chong, the Public Safety Commissioner for the City of White Plains, served for over 22 years in the New York City Police Department, and retired as Lieutenant Commander of Detectives. He has also served as the Police Commissioner of Mt. Vernon and Deputy Commissioner of Public Safety in White Plains. Given that background, he knew or should have known of the aforementioned policies of the Police Department and failed to adopt or recommend the adoption of policies similar to New York City's regarding EDPs or barricaded persons. (A-54, ¶ 89).

B. The LifeAid and WPDPS Recordings

With respect to the events that unfolded during the siege of Mr. Chamberlain's apartment, the LifeAid recordings, memorialized in real-time,

statements that were made by the officers and Mr. Chamberlain. However, there were gaps in the LifeAid recordings at critical times during the incident. Additional recordings were made by the WPDPS system and by the Taser device on the scene. Those recordings were provided to Plaintiff in a FOIL request prior to the filing of the original complaint. In the decision on the Rule 12(b)(6) motion, the district court used those recordings to determine the plausibility of Plaintiff's claims and, in large part, ignored the allegations of the Amended Complaint.

On the date in question, at 5:02 a.m., in response to the accidental triggering of his medical alert device, LifeAid contacted Mr. Chamberlain on a two-way communication speaker phone. (A-196-97, Life Alert Clip 101). After he did not respond, LifeAid disconnected the call to initiate a call at 5:05:16 a.m. to WPDPS. (A-196-97, Life Alert Clip 102). LifeAid then called Mr. Chamberlain's sister, at 5:06:38 a.m., because she was listed as his emergency contact. (A-196-97, Life Alert Clip 103). Defendant Martin was dispatched to the scene at 5:10:44 a.m. At 5:17:47 a.m., Martin was informed by headquarters (located a half block away) that officers were en route with a master key that could unlock Mr. Chamberlain's door.

The next LifeAid recording of Mr. Chamberlain occurred when *he* initiated a second contact with LifeAid, at 5:24:06 a.m. He said he needed LifeAid's help, because, in his words, "I have the White Plains Police Department banging on my

door and I did not call them and I am not sick." (A-196-97, Life Alert Clip 201). Significantly, what was occurring inside and outside of Mr. Chamberlain's apartment for the 22 minutes between Clip 101 and Clip 201 is not memorialized by any LifeAid or police dispatch recordings.

In response to Mr. Chamberlain's second contact with LifeAid, between 5:24:57 a.m. and 5:30:24 a.m., LifeAid contacted the White Plains police and the LifeAid operator stated, "I am on the line with Mr. Chamberlain he's ok at this time." (A-196-97, Life Alert Clip 202). At 5:26:17 a.m., the LifeAid operator advised the police operator, Cianci, "I am attempting to cancel that dispatch for Kenneth Chamberlain at 135 South Lexington." LifeAid tells Cianci, "[W]e are on the line with him on a two-way communication. He's saying he's not going to open the door and he's scared they are going to break his door down." Cianci responds, "Right. They're gonna make entry anyway." He further advised LifeAid that, "They have a key and they're not gonna break it down." LifeAid responded to Cianci, "Oh, because they're banging on it, we can hear on the line." (A-196-97, Life Alert Clip 203).

After communicating with Cianci, LifeAid contacted Mr. Chamberlain and advised that he must go to the door and speak with the police department or "they will break your door down." (A-211). Mr. Chamberlain reiterated several times that he was o.k., that the police could hear him, and that he would not open the

door. Mr. Chamberlain repeatedly informed the officers that he was "o.k." and that they should leave. Martin responded by demanding that Mr. Chamberlain open the door. Mr. Chamberlain reported to LifeAid, "they broke my door down."

Between 5:30:33 a.m. and 5:35:11 a.m., when Martin continued to insist that he see Mr. Chamberlain, the senior refused and reaffirmed that he was "o.k." Martin then asked him, "Do you want me to break your door down?" (A-196-97, Life Alert Clip 205). At approximately 5:33:20 a.m., Mr. Chamberlain informs LifeAid to "please record this…the police are forcing my door and I did not call them." (A-196-97, Life Alert Clip 207).

C. Facts Relevant to the Summary Judgment Decision

1. Mr. Chamberlain's Condition on November 19, 2011

On November 19, 2011, Mr. Chamberlain lived alone in a small one-bedroom apartment on the first floor of the Winbrook Houses, a public housing complex located one block from police headquarters, in White Plains, New York. (A-1581-93). Mr. Chamberlain was a Marine Corps veteran and had received medical care at the Veterans Affairs Medical Center ("VAMC") in the Bronx. At the time of his death, Mr. Chamberlain was 68 years of age and in poor health. His VAMC medical records document his multiple medical problems. Less than one week before he was killed, on November 14, 2011, Mr. Chamberlain visited the VAMC for evaluation and management of his chronic illnesses which included

chronic obstructive pulmonary disease, arthritis, hypertension, obesity, and hearing loss. (A-1543; A-1813-26).[3]

2. The Entry Without a Plan

At various times during the encounter, Defendant Martin communicated via cell phone with the tour commander, Lt. Spencer. Spencer advised Martin that there was "no rush" and that the officers should take their time. (A-1342-43). Martin appeared to agree with Spencer's admonition, but approximately fifteen minutes after his last call with Spencer, Martin told his team he "wanted to take the hinges" but never communicated what triggered that decision. (A-1195). Martin then personally hit the door, with such force, that it was completely removed from its frame but continued to stand upright, allegedly because of a chair Mr. Chamberlain had pushed up against the door. (A-1193). Defendant Fottrell ordered Defendant Demchuk to "shield up," but gave him no further instructions, and Defendant Carelli was directed to be "lethal cover in anticipation of entry," but given no further instruction. (A-1203).

No entry plan, or plan for the seizure of Mr. Chamberlain once entry into the apartment occurred, was communicated between the sergeants or with the officers under their command. (A-1203-06). Demchuk said he would have taken whatever actions his sergeants instructed him to take but that his two supervisors were telling

[3] At 6:29:48 a.m. a call went out over the police communications of "shots fired." (A-1348).

him "nothing." (A-1206; A-1209). Although no orders were given, Demchuk anticipated that, as the "shield man, he would "be the first guy there" to serve as "a barrier between Mr. Chamberlain and ourselves." Should Mr. Chamberlain come out threatening with a knife, Demchuk noted that he would have used the shield to assist in taking him down. (A-1207-08). But in the absence of any commands, Demchuk merely stood by, and did nothing, while the events unfolded.

3. The Taser Discharges

When the door fell, Fottrell fired the Taser twice. He fired the second time on Martin's command after Mr. Chamberlain reportedly did not fall to the ground in response to the initial firing. There is a dispute among the officers, and questions raised by the autopsy report, as to whether both prongs of the Taser made contact with Mr. Chamberlain or, alternatively, whether there was sufficient spread between the prongs for the Taser to be effective. (A-811-24; A-1473). After the first firing, Fottrell asked Martin if he had a second Taser cartridge, and was told no. Martin ordered Fottrell to squeeze the Taser trigger again. Martin knew, or should have known, that firing a Taser in such close proximity would not have the desired effect of temporarily incapacitating the target. (A-1482; A-1484-85).

4. Defendant Martin's Less-Lethal Shotgun Shots[4]

After Fottell's use of the Taser failed to have the desired effect, Martin grabbed the less-lethal shotgun from Markowski. (A-1212; A-1309). Martin was not in tactical gear, unlike Fottrell, Demchuk and Carelli. (A-1187). Fottrell was also a certified user of the less-lethal shotgun at the time. (A-1144). But Martin made the decision that he, not Fottrell, should move from the hallway into the apartment wielding the less-lethal shotgun and firing it four times at Mr. Chamberlain. Martin's failure to have his tactical gear was a violation of the department policy which required all members of the Special Response Team ("SRT") to have their tactical gear in their vehicle and readily available while on duty. (A-1218; A-1237; A-1276; A-1277-78).

5. Factual Disputes Regarding the Use and Impact of the Less-Lethal Shotgun

At the summary judgment stage there were significant disputes of material fact regarding Martin's use of the less-lethal shotgun and the impact that each discharge had on Mr. Chamberlain. The district court, in concluding that the use of the shotgun was not excessive and/or that Martin was entitled to qualified immunity, ignored those factual disputes. And rather than analyzing each discharge, the court below gave a blanket ruling that immunized Martin's conduct.

[4] In the training materials for the less-lethal shotgun, it is stated that the projectile has the force greater than a punch by Mike Tyson or a fastball by a major league pitcher. (A-1565).

Martin claimed, that when he fired the first shot from the shotgun, he had not been told anything about Mr. Chamberlain's medical condition nor did he know how old the senior was. (A-1283-84). He further testified that he then fired two more rounds at Mr. Chamberlain's "abdomen" area, and claimed that nothing happened after the first shot, but that Mr. Chamberlain "took a half step back" after the second. (A-715).

Martin stated that when he started to advance, Mr. Chamberlain "kind of reared up." Martin further testified that he fired the fourth shot, "probably at the doorway" and hit Mr. Chamberlain "in the right shoulder, in an attempt to get him to drop the knife." (A-715-16). According to Martin, after the fourth shot, "we were, as a team, entering the apartment. I crossed the threshold after the fourth round, stepped to the right, because I had my tactical team behind me with tactical gear." (A-1285). Martin testified that Mr. Chamberlain never lost his balance or fell to the ground after the fourth shot. (A-1285-86).

Fottrell, who was standing in the doorway, recounted a different version of the events. He testified that, after he fired the Taser, he observed Martin at his right shoulder with the less-lethal shotgun, and that Martin inquired, "Is this ready to go?" and Fottrell responded "Yes, loaded with five." (A-1168). Fottrell said that the first time Martin fired the less-lethal shotgun he was standing to Fottrell's right, slightly behind him and farther from the doorway. (A-1169). According to Fottrell,

he directed Martin to fire at Mr. Chamberlain's thigh with the intention of knocking him to the ground and then "we'd have Officer Demchuk cover him with the shield and then disarm him again."[5] (A-1169). With the first shot to the thigh, Fottrell observed Mr. Chamberlain take "like a half step back, and grunted, and then started to move forward again." Martin then fired two more rounds in succession into Mr. Chamberlain's chest, at which point Mr. Chamberlain "backed into the apartment and moved to my left down the hallway where I lost sight of him." Fottrell testified that Martin moved into the apartment and turned left. (A-1170).

Interestingly, no other officer testified that Mr. Chamberlain went to the left after being shot with a less-lethal shotgun round. According to Fottrell, Martin was inside the apartment when he fired the fourth shot. Martin, as noted above, claimed that he was outside the apartment when the fourth shot was fired. Fottrell also testified that he could see only Martin's back when the fourth shot was fired but could not see Mr. Chamberlain. (A-1171).

Hart's deposition testimony conflicted with the testimony of Fottrell and Martin. According to Hart, between the first and second shot Martin was not moving towards the door, but was standing still. Then between the second and third shot he made "small advancements towards the door." The fourth shot was

[5] As previously noted, Demchuk testified that no such "plan" was ever communicated to him.

fired closer to the door but Martin was still outside the apartment. (A-1129). Pursuant to Hart's testimony, after the fourth shot Mr. Chamberlain went down. Martin then entered the apartment.

Defendant Carelli, the fatal shooter, had yet another version of these events. He testified that when Martin first fired the less-lethal weapon he was a few feet away from Mr. Chamberlain, "not directly in front of the doorway. If he wasn't in the center of the doorway he was just off to the left." (A-1242-43; A-1554). According to Carelli, the first shot was to Mr. Chamberlain's thigh and had "minimal effect," but caused him to flinch. (A-1244). From the "same general area in front of the door," Martin then fired the second shot, which appeared to hit Mr. Chamberlain in the abdomen, causing a "minor flinch." The third shot caused Mr. Chamberlain to "stumble back into his apartment." (A-1245). Carelli observed, "my understanding was after the third beanbag that it actually, that he felt that one and it hurt him." Mr. Chamberlain was then, according to Carelli, "no longer standing right in front of the door threatening. He stumbled back into his apartment." (A-1245-46).

When Mr. Chamberlain stumbled, Defendant Demchuk did not take any action to approach him with the shield, and, as previously noted, nor was an order given for him to do so. (A-1246). Instead, as Mr. Chamberlain was backing up into the apartment, Carelli said "Sergeant Martin began to follow him and walked into

the apartment." (A-1246). Carelli said he observed Mr. Chamberlain stumble "pretty straight back" and "when he had stumbled back he actually appeared to have lost his footing a little bit" and then Martin entered and moved in "on a stronger diagonal to the right." (A-1247). Carelli testified that after Mr. Chamberlain lost his footing, he went down on his "butt" (A-1247-48). At this point, contrary to Hart's testimony, Carelli testified that Martin then fired the fourth less-lethal shot after Mr. Chamberlain purportedly hit the ground on his "butt" then quickly "popped up, rolled up" and charged at Martin while bent over "in the lower center of gravity." (A-1248-49). Carelli testified this was what occurred when he fired his service weapon and fatally wounded Mr. Chamberlain with one of the two shots.

ARGUMENT

POINT I

DISMISSAL OF PLAINTIFF'S UNLAWFUL, WARRANTLESS ENTRY CLAIMS ON THE RULE 12(b)(6) MOTIONS WAS ERROR

Plaintiff appeals the district court's findings on the Rule 12(b)(6) motion that probable cause for a warrantless entry into Mr. Chamberlain's apartment existed at the moment the entry was initiated or, alternatively, that the officers were entitled to qualified immunity.

First, the district court determined, as a matter of law, that "the facts as alleged by Plaintiff make clear that the officers' entrance to the apartment was

authorized pursuant to the emergency aid doctrine." (SPA-16). Second, even if the warrantless entry was not justified, the responding officers are entitled to qualified immunity because "it would not be unreasonable for an objective officer to conclude that there was a risk that an occupant of the apartment needed police or medical assistance that justified the officers' entry into the apartment." (SPA-17). Third, that even if the warrantless entry was unjustified, the Defendants were entitled to qualified immunity because it was reasonable for the police officers to believe that Mr. Chamberlain's subscription to the LifeAid medical monitoring service constituted an unrestricted implied consent for the police to forcibly enter his home without a warrant or consent. (SPA-17). The dismissal was manifest error on all grounds because the district court impermissibly assumed the role of finder of fact, improperly relied on the aforementioned recordings to supplement the allegations of the Amended Complaint, failed to give proper credence to Plaintiff's allegations, and overextended the deference afforded to the Defendant police officers in regard to the reasonableness of their actions. *See Tolan v. Cotton,* 134 S.Ct. 1861, 1866-67 (2014).

A. Standard of Review for Rule 12(b)(6) Motions

The district court's dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed *de novo*, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the Plaintiff's favor. *Chambers v. Time*

Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* As this Court has noted:

> Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. The choice between or among plausible inferences or scenarios is one for the fact-finder. The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. Fact-specific questions cannot be resolved by the pleadings. A court ruling on such a motion may not properly dismiss a complaint because the court finds a different version more plausible….Rule 12(b)(6) does not countenance…dismissals based on a judge's disbelief of a complaint's factual allegations.

Anderson News, LLC v. American Media Inc., 680 F.3d 162, 185 (2d Cir. 2012).

Contrary to this Court's clear pronouncement, that it is not for the district court to choose between two plausible inferences, the court below did just that and rejected the Amended Complaint's allegations. That error was compounded by the court's use of the LifeAid recordings and transcripts which did not fully capture all of the events as they transpired. Instead of relying on the Amended Complaint, the court relied almost exclusively on the information gleaned from the recordings.

Thus, the court below undercut the Plaintiff's claims and committed error by relying on extraneous and incomplete evidence.

B. The Amended Complaint Sufficiently Set Forth a Plausible Unlawful Entry Claim

The Fourth Amendment guarantees the right of the people to be secure in their persons against unreasonable searches and seizures. U.S. CONST. amend. IV. As this Court has stated:

> This right adheres whether the seizure is for purposes of law enforcement or due to an individual's mental illness. Assuming that the term 'mental illness' can be given reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom. To handcuff and detain, even briefly, a person for mental health reasons an officer must have probable cause to believe that the person presented a risk of harm to himself or others.

Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016) (citing *Kerman v. City of New York (Kerman I)*, 261 F.3d 229, 237 (2d Cir. 2001)).

The Amended Complaint alleged facts sufficient to set forth an unlawful entry claim, in violation of the Fourth Amendment, based on the Defendant police officers' response to a LifeAid call. The totality of the circumstances, as alleged in the Amended Complaint, and partially memorialized by the LifeAid and Taser recordings, occurred over an approximate 90 minute period. However, the entry to Mr. Chamberlain's apartment was initiated within minutes of Defendant Martin's arrival when he ordered the door to be opened with a master key, and inserted a

halligan tool within that opening, to prevent Mr. Chamberlain from being able to open or close his door.

The court's dismissal of Plaintiff's unlawful entry claim was based on the conclusion that the emergency aid exception applied to the police officers' actions in making a warrantless entry. But the defining characteristic of that doctrine is the officer's objectively reasonable belief in an "urgent need to render aid or take action." *Anthony v. City of New York*, 339 F.3d 129, 135 (2d Cir. 2003) (internal quotation and citation omitted). The reasonableness of an officer's belief that the situation was sufficiently urgent "must be assessed in light of the particular circumstances confronting the officer at the time." *Kerman I*, 261 F.3d at 235 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)); *see United States v. Simmons*, 661 F.3d 151, 157 (2d Cir. 2011). That rule does not apply when police gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. *See Kentucky v. King*, 563 U.S. 452, 469-70 (2011).

Contrary to the district court's view, the Amended Complaint and the LifeAid recordings do not provide the factual predicates necessary for the emergency aid doctrine to apply prior to the initiation of the entry with the master key and insertion of the halligan tool. Instead of relying on the allegations of the Amended Complaint, the district court singularly, prematurely, and impermissibly, drew inferences, and made factual conclusions, from recordings that were subject

to interpretation and that offered an incomplete and inaccurate picture of the events leading up to Defendants' initial entry.

It was error to conclude from the recordings that Mr. Chamberlain's reactions were unequivocally demonstrative of a man in need of immediate forcible seizure to prevent harm to himself or others. It was equally plausible, from the allegations of the Amended Complaint, that the emergency aid exception to the warrant requirement was not established when the individual who was the subject of a medical alert advised responding police officers that he was not in need of help and they then take no steps to investigate the situation before initiating entry. This is especially the case when the very company that called for the police to render aid, almost immediately contacted the police to cancel the call.

The Amended Complaint clearly contained sufficient allegations, uncontradicted by the recordings, that prior to the initial entry Mr. Chamberlain was agitated that police were banging on his door and refused to leave despite repeated pleas and indications that Mr. Chamberlain was not in need of assistance and that he, and LifeAid, had attempted to cancel the medical alert call.[6]

[6] The error of the district court's decision to foreclose the unlawful entry claim is borne out by additional evidence obtained during discovery. Defendant Martin testified at his deposition that Mr. Chamberlain did, in fact, open his door voluntarily within two minutes of Defendant Martin's arrival and advised him he was not in need of assistance and then closed the door. (A-1266-67). *See King*, 563 U.S. at 470 (even if occupant chooses to open door and speak with officers, he need not allow the officers to enter the premises and may refuse to answer questions at any time). The district court drew a factual conclusion from the recordings that the officers hearing Mr. Chamberlain through the door, occasionally speaking as if to another person,

The lower court also erred in dismissing the unlawful entry claims by relying upon the video, made by the Taser that was deployed by Defendant Fottrell, because that video only captured events occurring over one hour after the unlawful entry was initiated. As this Court has stated, the core question is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer to believe that there was an urgent need to render aid or take action. *Harris v. O'Hare*, 770 F.3d 224, 235 (2d Cir. 2014) (emphasis supplied). Rather, the district court used 20/20 hindsight and supported the reasonableness of the officers' decision to make the initial entry with events captured on the

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suggested either the actual presence of another person who could be in danger or that Mr. Chamberlain was hallucinating and posed a danger to himself. In fact, the Amended Complaint alleges, and the recordings establish, that Mr. Chamberlain was speaking to the LifeAid operators, not another person in the apartment. (A-46, ¶¶ 29-31). And this plausible allegation was later confirmed during discovery, when police officers testified that they heard other voices in the apartment but that it was clear they belonged to LifeAid. (A-1220; A-1190). During discovery crime scene photographs and deposition testimony established that the Defendants were plainly incompetent in their failure to investigate whether Mr. Chamberlain was alone in his apartment. The photographs evinced that the inside of his small first floor apartment was completely visible through his bedroom and living room windows except for the area just inside the front door which was visible through the opening of the door. According to the testimony of Hart, no observations were made through the living room window. The police made no effort to question the LifeAid operators as to whether they heard any other voices inside the apartment nor even asked Mr. Chamberlain himself if anyone else was inside with him. The failure to take even basic steps to investigate whether someone else in Mr. Chamberlain's apartment might be in need of assistance before taking the draconian measure of initiating a warrantless entry was both unreasonable and plainly incompetent. *See Kerman I*, 261 F.3d at 238-39. Lt. Spencer, the tour commander, told Martin on the telephone from headquarters that there was "no rush" and "we can take our time unless something else happens."(A-1342-43). In response to discovery demands and a non-party subpoena by the Plaintiff, enhanced versions of the LifeAid audio tapes that were created for the WPDPS's investigation of the use of the word "nigger" by an officer during the incident were produced. The enhanced tapes revealed communications not discernible on the recordings reviewed by the Court when deciding the motion to dismiss. Police officers can be heard laughing and joking outside the door – evidence undermining the court's exigency conclusion. (A-196-97).

recordings that occurred after the warrantless entry had been initiated. Surely, the preclusion of applying "20/20" hindsight with respect to a police officers' decision to use deadly force, as set forth in *Graham v. Connor*, must equally apply to protecting the constitutional rights of victims to be free from warrantless entries into their homes and from the use of excessive and deadly force against them. *See Graham v. Connor*, 490 U.S. at 386.

Rather than rely on the Amended Complaint, the district court cherry picked from the recordings, hopscotching through the actual chronology of events, and restructured what occurred to support the reasonableness of the police officers' decision to make a warrantless entry based on the emergency aid exception. These conclusions were infused with inaccuracies, speculation, conjecture and impermissible fact-finding. (SPA-16).

The district court expressly rejected the relevancy of the allegations of the Amended Complaint, as supported by the recordings, that the triggering of the LifeAid alert was accidental, that Mr. Chamberlain denied activating the device, that LifeAid tried to cancel the call, and that one officer, in face of Mr. Chamberlain's denial, seemingly accepted that the activation had been accidental. Despite these supported allegations, the district court concluded that none of those facts plausibly showed that the officers knew, for a fact, that the device was triggered accidentally. (SPA-17, n.7). In so concluding, the district court

erroneously imposed an unprecedented, heightened pleading standard where a plaintiff must demonstrate, to a court's satisfaction, that the allegations are immutable facts.

The district court dismissed the unlawful entry claim on a Rule 12(b)(6) motion essentially because the court mistakenly believed that the contents of the recordings were more plausible than the Amended Complaint's allegations. While that may be, under certain circumstances, permissible on a summary judgment motion, it was error for the district court, at the motion to dismiss stage, to choose between two plausible inferences that could be drawn from the factual allegations. *See Scott v. Harris*, 550 U.S. 372, 384 (2007) (use of recordings to dispute factual contentions at summary judgment stage may be appropriate). Therefore, dismissal of the unlawful entry claim should be reversed. *See Anderson News, LLC v. American Media Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

C. The Lower Court Erred in Finding that Even if Defendants' Warrantless Entry was Unjustified They Would be Entitled to Qualified Immunity

The district court erred in finding, at the pre-trial motion to dismiss stage, that even if the warrantless entry into Mr. Chamberlain's apartment was unjustified, the responding officers were entitled to qualified immunity for their actions. (SPA-17).

It is well established that a traditional qualified immunity defense by executive branch personnel making discretionary decisions may be asserted on a Rule 12(b)(6) motion as long as the defense is based on facts appearing on the face of the complaint. *McKenna v. Wright*, 386 F.3d 432, 435-36 (2d Cir. 2004). When a defendant raises the affirmative defense of qualified immunity on a Rule 12(b)(6) motion, a more stringent standard is applicable. The plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also facts that defeat the immunity defense. *Id.*

The district court erred by failing to afford Plaintiff the requisite benefit of all reasonable inferences in regard to the asserted claims and to Defendants' qualified immunity defenses. As this Court has guided, though mistaken judgments reasonably arrived at are protected, qualified immunity does not protect an official against redress for performance that was plainly incompetent. *Rodriguez v. City of New York*, 72 F.3d 1051, 1065 (2d Cir. 1995). The Amended Complaint alleged sufficient facts, not contradicted by the LifeAid recordings, precluding a determination as a matter of law, on the Rule 12(b)(6) motions, that the responding officers' actions, particularly those of Defendant Martin, were reasonable or plainly competent.

A public official is entitled to qualified immunity if his or her actions do not "violate clearly established statutory or constitutional rights of which a reasonable

person would have known" or if it were "objectively reasonable" for the public official to believe that the actions were lawful at the time they occurred. *McClellan v. Smith*, 439 F.3d 137, 147 (2d Cir. 2006) (internal quotation marks omitted). And while "a qualified immunity defense can be presented in a Rule 12(b)(6) motion, ... the defense faces a formidable hurdle when advanced on such a motion" and is usually unsuccessful. *See McKenna*, 386 F.3d at 434.

It is well established that the objective reasonableness of a defendant officer's conduct is a mixed question of a law and fact. *Jackson v. Tellado*, No. 11 Civ. 3028 (PKC), 2017 WL 627410, at *9 (E.D.N.Y. Feb. 15, 2017) (citing *Zellner v. Summerlin*, 494 F.3d 344, 367 (2d Cir. 2007)). Such an inquiry is primarily focused on the specific facts of each case. *See Kerman v. City of New York (Kerman II)*, 374 F.3d 93, 109 (2d Cir. 2004). However, the ultimate determination of whether it was objectively reasonable for an officer to believe that his or her conduct did not violate a clearly established right is to be decided by the court. *Zellner*, 494 F.3d at 367. But, where factual disputes exist, those questions must be resolved by the fact finder before the court can determine the issue of qualified immunity. *Kerman II*, 374 F.3d at 109. Thereafter, the court must review the facts that are pertinent to the qualified immunity issue, and based upon the jury's findings as to those facts, decide whether or not the officer's conduct was objectively reasonable. *See Zellner*, 494 F.3d at 368; *see also Lennon v. Miller*, 66

F.3d 416, 421 (2d Cir. 1995) (qualified immunity is a legal determination for the court to make once disputes of fact are resolved).

By concluding that the responding officers were entitled to qualified immunity, the district court impermissibly alleviated the Defendant's burden to overcome what this Court has described as the formidable hurdle faced by parties seeking qualified immunity on a Rule 12(b)(6) motion. *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006).

Here, the district court removed any hurdle for the Defendants to obtain qualified immunity on a Rule 12(b)(6) motion by determining as a matter of law, that it was reasonable for officers to conclude that Mr. Chamberlain's use of a LifeAid device constituted his implied consent to a warrantless entry. The district court reached this extreme conclusion without citation to any legal or factual predicate. The Defendants, in their motion to dismiss, made only a passing, superficial mention of that concept, without offering any legal support. The district court then adopted, whole-cloth, this unsubstantiated argument.

To support granting qualified immunity at the action's earliest stage, the district court drew the following unsupported legal and factual conclusions in the Rule 12(b)(6) Opinion and Order:

> The Life Aid device is intended to contact emergency personnel when activated; indeed, the entire purpose of the device is to summon emergency aid. It was reasonable for the officers to conclude that by employing such a device, Chamberlain consented to having emergency responders enter the

> apartment in the event the device was activated, and that a subsequent withdrawal of that consent – by a clearly unstable person and in circumstances where a third person might have been present – should not be honored.

(SPA-18, n.8).

Neither the Defendants nor the district court provided any basis for its conclusion as to the medical device's purpose. Nor was there any basis to conclude that by its mere possession Mr. Chamberlain granted unfettered and unrestricted entry to his home regardless of the circumstances. Moreover, none of the recordings relied upon by the trial court contained a statement from any officer that they believed they had Mr. Chamberlain's consent to break his door down because he possessed a medical alert device. Needless to say, during the depositions, no officer made that assertion.

Even if some legal basis for assuming implied consent had been proffered, the Amended Complaint (substantiated by the recordings) sets forth the plausible allegation that Mr. Chamberlain unequivocally refused consent for the police to enter his apartment. Therefore, no reasonable officer could believe that any purported pre-existing implied consent (which they were unaware of) continued. Finally, the implied consent issue required answers to factual questions and therefore was unresolvable as a matter of law on the Rule 12(b)(6) motions. *See Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991) (factual issues preclude finding as

matter of law that an order of protection granted police the right to make entry when there is room for an inference that there was not an emergency situation).

D. The Lower Court Erred Dismissing the Excessive Force Claim Against Defendant Martin for Use of the Less-Lethal Shotgun

The district court, with a one paragraph explanation, ruled that Defendant Martin was entitled to qualified immunity for the use of the less-lethal shotgun. (SPA-22). The Amended Complaint alleged that Martin stood in the hallway and fired several shots from the less-lethal shotgun at Mr. Chamberlain, and that after the shots were deployed, Mr. Chamberlain went down. (A-50, ¶¶ 55-56). The Amended Complaint also alleged that the autopsy revealed several abrasions caused by the Taser and the shots from the less-lethal shotgun. (A-50, ¶ 59).

In opposition to the Defendants' motions for summary judgment, Plaintiff urged that a grant of qualified immunity would preclude an analysis of whether each of the four shots was unreasonable and excessive. *See generally O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003). After discovery, a clear factual dispute existed as to whether, when the fourth and final shot was discharged, Mr. Chamberlain was a threat to anyone. Despite clear evidence of this factual dispute having been presented to the district court, it reaffirmed on summary judgment that the Rule 12(b)(6) dismissal of the excessive force claim against Martin applied to all four shots. (SPA-118-19).

But contrary to the district court's conclusion, there existed a triable issue as to whether Martin was entitled to qualified immunity for each of the four shots he fired at Mr. Chamberlain. By failing to consider each shot separately, the court committed reversible error. *O'Bert*, 331 F.3d at 40 (earlier threat did not extend authority to shoot indefinitely); *see Kerman I*, 261 F.3d at 239-40 (jury should decide whether the force used was excessive and whether the defendant was entitled to qualified immunity where there were disputed factual issues as to defendant's conduct following the initial use of force); s*ee also Estate of Jaquez v. City of New York*, 104 F.Supp.3d 414, 438-39 (S.D.N.Y. 2015) (circumstantial evidence raised triable issue as to whether plaintiff threatened officers just prior to moment final shot fired).

POINT II

THE LOWER COURT'S SUMMARY JUDGMENT DECISION WAS ERROR BECAUSE THERE EXISTED GENUINE DISPUTES OF MATERIAL FACTS

A. Standard of Review for Rule 56 Motions

Upon an appeal from a grant of summary judgment, this Court can review the record de novo to determine whether genuine issues of material fact existed that required a trial. *Mario v. P & C Food Mkts.*, 313 F.3d 758 (2d Cir. 2002). Summary judgment is only appropriate if there are no genuine issues of material fact and the moving party is entitled to such judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A material fact is one

capable of influencing the case's outcome under governing substantive law, and a genuine dispute is one as to which the evidence would permit a reasonable juror to find for the party opposing the motion. *Figueroa v. Mazza*, 825 F.3d 89, 98 (2d Cir. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) (internal quotations omitted). When deciding a motion for summary judgment, the court is required to view the record in the light most favorable to the non-moving party. *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 44 (2d Cir. 2015); *Anthony v. City of New York*, 339 F.3d 129, 134 (2d Cir. 2003).

B. The Lower Court Erred in Granting Summary Judgment on Plaintiff's Supervisory Liability Claims

The district court erred by granting summary judgment dismissing the supervisory liability claims, against Defendants Martin and Fottrell, in light of their failure to devise an action plan once Mr. Chamberlain's apartment door was removed. (SPA-130). Contrary to the district court's conclusion, there was ample evidence that the supervisors failed to develop a plan for entry and/or use of force. The evidence further demonstrated that the supervisors did not communicate with each other as to how to proceed in light of Mr. Chamberlain's reluctance to open his door. A reasonable juror could find, under the circumstances, that the failure to do so evinced gross negligence or deliberate indifference in their management of their subordinates at the scene.

Martin's actions, as the first supervisor on the scene, were particularly egregious and the jury could reasonably have found his supervision grossly negligent, reckless, deliberately indifferent, and/or plainly incompetent beginning with his arrival just minutes after LifeAid contacted the WPPD. Martin's own deposition testimony establishes that he concluded a warrantless entry should be made after Mr. Chamberlain opened his door and advised Martin he was not in need of assistance. (A-1266-67). Martin personally ordered the first use of the master key by Carelli to open the door against Mr. Chamberlain's express wishes. He then personally used the key to open the door with the master key a third time and inserted a halligan tool, after Mr. Chamberlain reclosed the door after the first two attempts. (A-975).

Martin's initiation of the warrantless entry early on in the incident was done without any investigation as to whether the emergency aid exception could be legally invoked and without any plan for entry into the apartment and/or seizure of Mr. Chamberlain. Additional evidence of Martin's reckless and incompetent supervision is that when he initiated the opening of Mr. Chamberlain's door, and inserted the halligan tool, there were no officers on the scene in tactical gear. (A-976). Martin's actions in initiating entry, in conjunction with his loud banging and aggressive words and tone, were objectively unreasonable to any police supervisor

responsible for, and who had received training for, dealing with individuals whose reactions to such actions may be effected by a mental health issue.

There was sufficient evidence that, once Fottrell arrived, both supervisors failed to communicate with their subordinates how or whether force should be utilized once the door was fully removed. Most tellingly, there was evidence that although Defendant Demchuk held the shield at the ready and was standing in the hall next to the apartment door, he had been given no instruction as to how, whether, or when to use the shield. There was no evidence that the supervisors arranged the officers in a stack for a tactical entry with the "shield man" going in first. Furthermore, there was no explanation as to why Martin, who was not wearing tactical gear, entered the apartment first, instead of the officers who wore tactical gear—including heavy vests and helmets.

Demchuk stated in his deposition that after the door was breached there was no order given to move towards the apartment. (A-1203). Demchuk further testified there was no plan of action for entry. (A-1205-06). Demchuk stated that the supervisors had not told him anything regarding an entry plan because "[w]e were just trying to get the door off so they could get a better understanding of the situation we were dealing with." (A-1206). When he was asked about the communications to the officers before the door came down, Demchuk testified "[t]here was nothing communicated." (A-1206; emphasis supplied).

Similarly, Defendant Carelli testified that he was unaware of any particular safeguards in place to ensure officer safety or as part of a larger safety plan. (A-1240). He also stated that he did not remember either of the sergeants on the scene giving any orders to Demchuk in terms of how to proceed with the shield. (A-1240). Furthermore, Carelli testified that he did not believe either Martin or Fottrell gave him any directions on what to do if and when the door was opened. (A-1241).

Martin and Fottrell had time to formulate a plan well before the door was opened and, ultimately, removed. This was not a situation where the police were forced to make split-second decisions. Martin was explicitly instructed by Lt. Spencer, his commanding officer, to take his time and not rush. (A-1342-43). Thus, this collective failure on behalf of the supervisors was avoidable and, is yet, another example of gross negligence in supervising their subordinates. While Martin and Fottrell testified as to their expectations as to what was going to occur once the door went down, there was no evidence that they communicated their respective beliefs to any of their subordinates. Martin stated that "you just fall in line." (A-1276; A-1161; A-1166).

In sum, prior to entering the apartment, Defendants undertook a violent and forcible breach of the door, in which the hinges were repeatedly bashed with a sledgehammer while two halligan tools were used to manipulate an opening. In the

midst of this, Mr. Chamberlain overtly expressed fear that the police were breaking down his door and were going to kill him. (A-207-60). Yet, in spite of this extremely sensitive and escalating situation, Martin and Fottrell failed to supervise their fellow officers and/or each other by failing to communicate how officers were to proceed once the door was removed. Such a failure jeopardized everyone's safety, both the police officers and Mr. Chamberlain. In short, the lack of planning that occurred in this case was the epitome of gross negligence.[7] And upon all of the aforementioned evidence, it is clear that the district court failed to view this evidence in the light most favorable to the non-moving Plaintiff. *Robinson*, 781 F.3d at 44; *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007). Simply, the evidence that was presented to the district court on summary judgment supported a finding that there was a genuine dispute of material fact as to whether the Defendants had a plan. The district court's decision to the contrary should be reversed.

[7] The district court observed in its motion to dismiss order that "Fottrell and Martin were the ranking officers on the scene, and they had a significant amount of time to assemble a safe and orderly plan for how the officers would proceed tactically when entering Chamberlain's apartment." (SPA-38). The lower court determined that it was at least plausible that Martin and Fottrell were grossly negligent in their failure to devise a plan. (SPA-38). Further, the court stated that it did not know the details of their plan at the motion to dismiss stage. (SPA-38). Those concerns served as Plaintiff's blueprint over the course of discovery. It is obvious, from the record above, that discovery did not settle this genuine dispute of material fact. Yet, the court reversed itself by granting summary judgment, dismissing this supervisory liability claim for failure to plan.

C. The Lower Court Erred in Confirming the Dismissal of the Excessive Force Claim Against Defendant Martin

On summary judgment, the district court concluded there was no genuine dispute of material fact as to whether Defendant Martin was entitled to qualified immunity for the discharge of the fourth shot from the less-lethal shotgun.[8] (SPA-118-19). The lower court also determined that "[a]t the very least, reasonable officers could disagree as to whether the fourth beanbag shot was necessary" thus entitling Martin to qualified immunity. (SPA-119). In reaching that conclusion, the district court failed to analyze each discharge of the less-lethal shotgun. While the law is clear with respect to the use of force, *each* discharge of a weapon must be evaluated separately. *See, e.g.*, *Tracy v. Freshwater*, 23 F.3d 90, 98 (2d Cir. 2010); *Garcia v. Dutchess*, 43 F.Supp.3d 281, 295 (S.D.N.Y. 2014) (subsequent uses of forces are not automatically justified, even though the initial use may have been, because officers may encounter situations that require them to "recalibrate the amount of forced deployed"). The district court erroneously failed to evaluate each use of the less-lethal shotgun.

[8] At the motion to dismiss stage, the district court found that Martin was entitled to qualified immunity for discharging the less-lethal shotgun and dismissed the excessive force claim. In the Motion to Dismiss Opinion and Order, the lower court examined each Taser discharge individually and found that the second Taser discharge survived. (SPA-19-21). Yet, when analyzing the use of the less-lethal shotgun, the lower court seemingly concluded that Martin was entitled to qualified immunity for his general use of the less-lethal shotgun. However, due to the lack of clarity in the court's decision, Plaintiff raised the issue of the individual shots from the less-lethal shotgun, specifically, the fourth and final shot, on summary judgment.

Police officers are occasionally forced to make such split-second decisions as situations unfold. *Rogoz v. City of Hartford*, 796 F.3d 236, 246 (2d Cir. 2015) (citing *Graham*, 490 U.S. at 396). As a result, the specific use of force must be scrutinized from the perspective of a reasonable police officer on the scene and not with 20/20 hindsight. *Graham*, 490 U.S. at 396. Nevertheless, "[a]lthough a police officer may be justified in using some degree of force when making an arrest, the officer is not entitled to use an unlimited amount of force, even where the arrestee resists or assaults the officer." *Garcia v. Greco*, No. 05 Civ. 9587 (SCR)(JFK), 2010 WL 446446, at *4 (S.D.N.Y. Feb. 9, 2010). The force used by the officer must be reasonably related to the nature of resistance and the force used, threatened or reasonably perceived to be threatened, against the officer. *See Sullivan v. Gagnier*, 225 F.3d 161, 166 (2d Cir. 2000).

Again, the district court failed to view the evidence in the light most favorable to the Plaintiff and concluded that the abrasion on Mr. Chamberlain's back "shows no more than at some point Mr. Chamberlain turned away from the beanbag gun, no surprise, given that anyone would flinch or try to turn away in those circumstances." (SPA-119). Yet, there is no evidence in the record, whatsoever, to support that conclusion. Plaintiff submitted evidence, such as the autopsy report and autopsy photographs of the less-lethal shotgun wounds, which

clearly showed that Mr. Chamberlain was struck in the middle of the right scapular region (the shoulder blade). (A-11-24; A-1591).

With respect to the fourth shot, there was sufficient evidence of a material factual dispute regarding whether Mr. Chamberlain was facing the officer when he was shot with the less-lethal shotgun, whether he was on the ground, or whether he had his back to the officer. However, instead of analyzing each shot separately or recognizing the existence of a factual dispute, the district court accepted a one-sided view of the evidence – in the light most favorable to the Defendants. That was reversible error.

As set forth above, there are significant factual disputes concerning what the effects of the less-lethal shotgun blasts were. For example, two officers (Defendant Carelli and Hart) gave sworn testimony that Mr. Chamberlain fell to the ground after the less-lethal shotgun projectiles had been fired. (A-1129-30; A-1247-48). Carelli testified that when Mr. Chamberlain lost his footing, he remembers that Mr. Chamberlain went down to the ground on his "butt." (A-1247-48). Further, Carelli also testified that he never lost sight of Mr. Chamberlain. (A-1246). Although Hart testified that he believed Mr. Chamberlain had fallen to the ground because he could see his heels on the ground with his toes up in the air, (A-1129-30), Martin, on the other hand, testified that he did not recall ever seeing Mr. Chamberlain lose his balance or ever fall to the ground at any time. (A-1285-86).

These contradictions show that it was error to prevent a jury from making determinations of fact in light of the serious credibility issues presented by the officers' diverging testimony and the patently evident factual disputes. Undeniably, there was, and is, a significant dispute as to the effects of each of the four projectiles fired at Mr. Chamberlain.

The district court also prematurely decided the qualified immunity issue despite the factual disputes regarding the use of force by Martin. As this Court has instructed "where factual disputes exist, those factual questions must be resolved by the fact finder before the court can determine the issue of qualified immunity." *Kerman II*, 374 F.3d at 109. Here, the question as to whether Mr. Chamberlain was on the ground and not a threat to Martin at the time he was shot with the fourth shot from the less-lethal shotgun, should have been addressed by a jury before any qualified immunity ruling.

D. The Lower Court Erred in Dismissing the *Monell* Claim Arising from the Inadequacy of the City's EDP Policy

Plaintiff's claim under municipal liability, also known as *Monell* liability, is that the Defendant City's EDP policy was unconstitutional on its face due to the WPDPS's failure to establish written policies pertaining to the seizure of EDPs, who are inside the sanctity of their own homes. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (holding that municipalities can be

sued directly under § 1983 where the alleged action is unconstitutionally implemented or executed). Here, the Defendant City clearly knew they would encounter EDPs as they had a policy in place that advised on how to transport EDPs to the hospital. (A-1410-11). The gravamen of the Plaintiff's claim is that at the time of this incident, there was no policy or instruction directing officers how to seize an EDP for transportation to a medical facility. (A-1410-11). Consequently, the failure to provide a policy and/or procedure for the officers to follow assuredly amounts to a deliberate indifference of EDPs' constitutional rights. *See Russo v. City of Cincinnati*, 953 F.2d 1036, 1047-48 (6th Cir. 1992) (disagreeing that the mere fact that the City had a policy of dealing with barricaded persons constitutes conclusive proof that it was not deliberately indifferent to the rights of individuals); *see also Gibson v. Cty. of Washoe*, 290 F.3d 1175 (9th Cir. 2002) (lack of instruction in the county's policy could be found to be the moving force behind the deprivation of decedent's due process rights), *cert. denied*, 123 S. Ct. 872, 154 L. Ed. 2d 775 (U.S. 2003); *Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997) (evidence showed it was common for police to be confronted with situations involving EDPs or mentally ill individuals).

Here, the failure to have such a policy resulted in the police officers creating the exigent circumstances by threatening to engage, and then actually engaging in, conduct violative of the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 462

& n.4 (2011) ("There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted").[9] Inevitably, this guesswork did not sufficiently safeguard and protect the constitutional rights of EDPs. Furthermore, the patently inadequate policy was a proximate cause of the constitutional violations inflicted upon Mr. Chamberlain because the Defendant City had a policy which failed to inform and instruct police officers how to proceed in responding to, and possibly seizing, an EDP in his home without violating his Fourth Amendment rights. *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (when there is a "moral certainty" that officers will be confronted with such situations, a failure to train could appropriately be determined a deliberate indifference to one's constitutional rights). Due to the absence of a policy on this matter, the police officers unlawfully entered Mr. Chamberlain's residence, used excessive force, and killed him. Such a direct, causal link is quintessential of a deliberate indifference to Mr. Chamberlain's rights, and the Fourth Amendment rights of EDPs generally. Accordingly, the facially unconstitutional EDP policy under *Monell* is intertwined with the second *Monell*

[9] Unlike the facts in *Kentucky v. King*, here there was evidence of threats that the Defendants were going to enter without permission.

claim for failure to train because it is axiomatic, there can be no training of a policy that does not exist.

Plaintiff argued to the court below that the City failed to adopt an adequate policy for responding to EDP situations and Plaintiff relied upon the City of New York's EDP policy as a model that delineated a course of conduct for its officers when confronted by a barricaded EDP. (A-1413-18). By contrast, the EDP policy of the City of White Plains, at the time of the incident, merely advised the officers what actions to take when transporting an EDP to the hospital.[10] (A-1410-11). Thus, the policy failed to advise officers how and when to take an EDP into custody. Despite these inadequacies, the district court concluded that since some training on EDPs had been provided to some officers, a constitutional violation had not been established.

Defendant City's failure to have policies and procedures in place advising officers on how to perform a seizure of an EDP violated Mr. Chamberlain's constitutional rights. Unlawful entry and excessive use of force are constitutional violations that were the direct consequence of Defendant City's failure to adopt *any* departmental guidelines on how to provide assistance to an EDP and when to affect a seizure. The record shows that the Defendants did not know what to do in

[10] While the WPDPS had possession of a master key to the Winbrook Housing Units, Defendant City's policies and procedures were silent as to how and when to use such keys in a barricaded EDP situation. (A-53, ¶ 84; A-54, ¶ 90; A-58, ¶¶ 110-11; A-60, ¶ 120).

this kind of situation and acted contrary to any purported training they may have received in that regard in the past.[11]

Unlike the New York City Police Department's ("NYPD") EDP policy, Defendant City failed to adequately instruct their officers how to avoid violating the constitutional rights of EDPs that they encountered. (A-1413-18). Furthermore, the WPPS policy in place at the time of the incident was insufficient because it was extremely limited to what actions to take once a person was brought to a healthcare facility for a psychiatric evaluation. (A-1410-11). That policy did not address what procedures should be used when confronting an EDP or what steps should be taken to contain or restrain an EDP, or otherwise to render assistance. (A-1410-11). By contrast, the NYPD EDP policy provides guidelines and procedures for handling situations involving EDPs. (A-1413-18). Primarily, the underlying purpose of the NYPD EDP policy is to "safeguard a mentally ill or emotionally disturbed person who does not voluntarily seek medical assistance." (A-1413-18). Among other things, the NYPD EDP policy provides that officers should attempt to isolate and

[11] Some of the members of the WPDPS underwent training in the handling of situations involving EDPs. Defendants Martin and Fottrell, as well as Lt. Spencer, had all attended specialized training at John Jay School of Criminal Justice sponsored by the NYPD. The City of White Plains's deliberate indifference was not reflected in their failure to send some of their police officers to training courses, but by the City's failure to adopt any policies and/or procedures that incorporated, applied or were consistent with, the tenets of the John Jay curriculum. (A-1380-1408; A-1410-11). On November 19, 2011, the City's policies and procedures for police officers handling situations involving "Mentally/Emotionally Disturbed Persons" set forth no procedures regarding how to make initial contact or interact with such an individual. Again, the City cannot train and supervise its police officers for a policy or procedure that does not exist.

contain the EDP, maintain firearms control, utilize protective and non-lethal devices, request the assistance of the EDP's family, friends, or any appropriate public or private agency, and consider the use of alternate means of restraint. (A-1413-18). The Defendant City's policy provides no guidance, at all, to its officers on responding to a call involving an EDP. (A-1410-11).

Indeed, the absence of a policy and/or procedure demonstrated the City's deliberate indifference to the constitutional rights of EDPs. Police officers are not mental health professionals and EDPs do not respond well to the escalation of force; tactics normally used when dealing with criminal suspects. Defendants failed to adopt a uniform departmental policy. And, at the very least, the WPPDS' EDP policy should have directed the officers to avoid escalating the situation and to respect an EDP's constitutional rights. (A-1410-11).

The Defendant City's lack of a policy provided a lesser standard for handling encounters with EDPs than criminal suspects. (A-1410-11). And although the Defendants were responding to a medical alert call, every action they undertook made a physical confrontation inevitable, even though there was not a hint of criminality suspected. The violation of Mr. Chamberlain's constitutional rights directly arose from the failure of the policy in effect on the day of the incident. *See Jenkins v. City of New York*, 478 F.3d 76, 94 (2d Cir. 2007) (citing *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992)); *see also Green v.*

City of New York, 465 F.3d 65, 81 (2d Cir. 2006) (inadequacy of the municipality's training program must be closely related to the ultimate injury, such that it actually caused the constitutional deprivation). A jury should have been allowed to determine whether the Defendant City's failure to have a policy established such deliberate indifference.

POINT III

THE LOWER COURT ERRED BY UNDULY LIMITING THE SCOPE OF THE EVIDENCE THE JURY COULD CONSIDER AT TRIAL

A. The Lower Court Erred in Granting Defendants' Motions to Preclude Plaintiff from Introducing Evidence as to Defendant Carelli's Liability for the Assaults that Occurred Outside Mr. Chamberlain's Home

By granting Defendants' motions *in limine*, the district court precluded the Plaintiff from introducing evidence that the assault of Mr. Chamberlain occurred before the door was completely breached. (SPA-164-67). The court ruled that Defendant Carelli's act of displaying his gun, allegedly in the low ready position, did not create reasonable fear of imminent harm until he raised it to fire at Mr. Chamberlain. (SPA-164-67). The court committed obvious error when it limited the scope of the trial and Plaintiff's assault claims to the seconds before Mr. Chamberlain was shot. Such a conclusion directly contradicted the lower court's earlier determination regarding the assault claim:

> Defendants argue that Plaintiff's assault claim should be dismissed because given the fast-paced nature of the situation, Chamberlain did not have sufficient time to apprehend imminent physical injury, a necessary element of a claim for assault. (*See, e.g.*, City Ds' Mem. 22.) I disagree. It is clear from the recordings

> that Chamberlain was well aware that the officers outside his door were attempting to enter his apartment and had their guns drawn. (*See, e.g.*, Life Aid Transcript 42 ("Oh, they got their shotguns."); *id.* at 43 ("I know I'm gonna get hurt."); Taser Transcript 5 ("They have shotguns, stunguns, they have their Glocks out.").) When they ultimately entered with the Taser, less-lethal shotgun, and handguns, he plausibly apprehended imminent physical injury.

(SPA-44-45, n.24; emphasis supplied).[12]

Ultimately, on the eve of trial, and in an eleventh hour surprise to the Plaintiff, the district court foreclosed his assault claims to only the moment when "…Carelli aimed his gun at the victim in the apartment and shot him…" (SPA-166-67).

Under New York law, an assault is the intentional placing of another person in fear of imminent harmful or offensive contact. *Hernandez v. Lattimore*, 612 F.2d 61, 67 (2d Cir. 1979) (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom. Employer–Officer John, #1765 Badge Number v. Johnson*, 414 U.S. 1033, 94 S. Ct. 462, 38 L.Ed.2d 324 (1973)); *Merzon v. Cty. of Suffolk*, 767 F.Supp. 432, 448 (E.D.N.Y. 1991) (see authorities cited therein); *Coopersmith v. Gold*, 172 A.D.2d 982, 984, 568 N.Y.S.2d 250, 252 (3d Dep't 1991); 6A N.Y. JUR.2D ASSAULT – CIVIL ASPECTS § 1 (2d ed. 2017). Assault does

[12] The court at the summary judgment stage dismissed assault claims against Defendants Martin and Fottrell because the court mistakenly concluded that assault claims under state law are identical to excessive force claims under § 1983. (SPA-133). However, as demonstrated above, assault claims under state law are distinct claims. Accordingly, Plaintiff asserts that the assault claims against Martin and Fottrell should have gone to the jury because the elements were satisfied and there were genuine factual disputes.

not require intent to cause physical injury. *Gomez v. City of New York*, No. 05 Civ. 2147 (GBD), 2008 WL 3833811, at *2 (S.D.N.Y. Aug. 14, 2008). Plainly, the act must be done with the intention of putting the other person in apprehension of an immediate and harmful or offensive contact, if it is done for the purpose of causing such an apprehension, or with knowledge that, to a substantial certainty, such apprehension will result. *See* RESTATEMENT (SECOND) OF TORTS § 21(1), cmt. (1)(d) (1965) (updated Mar. 2017). Notably, the plaintiff must demonstrate a reasonable *belief* that he is about to receive imminent bodily injury, but there need not be actual physical contact to constitute assault. *Sweeney v. Bruckner Plaza Assoc. LP*, No. 23941/00, 2004 WL 5641519 (N.Y. Sup. Ct. July 12, 2004) (citing *Masters v. Becker*, 22 A.D.2d 118 (2d Dep't 1964)). Put differently, there must be proof that there was physical conduct that placed the plaintiff in imminent apprehension of harmful contact. *Bastein v. Sotto*, 299 A.D.2d 432, 433 (2d Dep't 2002); *see, e.g.*, *Cerbelli v. City of New York*, No. 99 Civ. 6846 (ARR)(RML), 2008 WL 4449634, at *21 (E.D.N.Y. Oct. 1, 2008) (officers pointing gun at plaintiff may constitute assault and whether plaintiff apprehended harm or imminent danger from such action is a question of fact for the jury to resolve).

Here, the district court incorrectly limited the trial's scope and denied Plaintiff the opportunity to fully present his case. Consequently, the district court's decision to prevent Plaintiff from admitting evidence that could be considered for

purposes of liability was harmful error. In effect, the district court adopted the Defendants' version of the facts by stating that Carelli pulled his weapon in the hallway and held it in the low ready position. (SPA-164). The lower court also explained that if the officer had intended fear of imminent harm, he would have held the gun up. (SPA-164). However, in the Taser video, Carelli's hand can be seen with the gun pointed *upwards* and *not* in the low ready position. (A-196, Taser recordings, Clip 3, at 1:57). Thus, the video disputes Carelli's testimony, as well as the testimony of his codefendants. (A-196, Taser recordings, Clip 3). Additionally, screenshots of the third Taser video clearly depict that Defendant Carelli's service weapon is being held at chest level, aimed in the direction of the apartment. (A-196, Taser recordings, Clip 3, at 1:57).

There is clear evidence, memorialized by the recordings, of Mr. Chamberlain's reasonable fear of imminent physical harm when he observed the that Defendants had their weapons at-the-ready outside of his apartment door prior to Carelli's actual use of deadly force. As the lower court noted in the decision on the motion to dismiss, Mr. Chamberlain is heard stating, "I know I'm gonna get hurt. I know that. I know I'm gonna get hurt." (A-234). Moreover, Mr. Chamberlain is also heard yelling, "[t]hey have stunguns and shotguns at the ready. They gonna hit me with the stungun. They'll probably kill me because I have a bad heart." (A-235; emphasis supplied). Officers did nothing to quell his fears. To the

contrary, they continued to display their weapons to him. Tellingly, Mr. Chamberlain reiterated "[t]hey're getting ready to kill me or beat me up." (A-236). The fear he experienced was readily apparent from his observations: "[t]hey have shotguns, stunguns, they have their Glocks out, they are planning on taking me to the White Plains Police Headquarters and beat me and then kill me." (A-237). Mr. Chamberlain continued to tell the Defendants, "[y]ou see I'm ok, you see I'm ok I'm alright, I'm ok, I'm alright." (A-238). It was thus reasonable to conclude that Mr. Chamberlain was in reasonable fear of imminent harm based upon the Defendants' conduct, with both lethal and less-lethal weapons drawn, outside Mr. Chamberlain's apartment. (SPA-44-45, n.24). In fact, that was how the district court viewed the allegations in the Amended Complaint when ruling on the Rule 12(b)(6) assault issues. However, at the summary judgment stage, the district court inexplicably took the opposite position and unduly and wrongfully limited the scope of the evidence and arguments that could be made to the jury.

B. The Lower Court Erred in Granting Defendants' Motions to Preclude Plaintiff from Introducing Mr. Chamberlain's Medical Records from Veterans' Affairs that Showed His Poor Physical Condition

Finally, at the motion *in limine* stage, the district court prevented the Plaintiff from presenting any evidence of Mr. Chamberlain's medical conditions. The district court's decision to preclude the introduction of the VA medical records at trial was error. (SPA-272). Plaintiff sought to introduce the notes and

observations by his treating physicians as certified business records. Fed. R. Evid. 803(6), 902(11). Some were made within days and weeks prior to his death. (A-1813-26). Mr. Chamberlain's medical information should have been presented to the jury to assist them in weighing the credibility of the Defendants' testimony with respect to the herculean physical actions they alleged Mr. Chamberlain undertook; actions which supposedly necessitated the overwhelming use of force, including deadly force, against him.

The probative value of Mr. Chamberlain's medical records was not substantially outweighed by their prejudicial effect. *See* Fed. R. Evid. 403. The term "unfair prejudice" has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *United States v. Ashburn*, No. 11-CR-303 (NGG), 2015 WL 5098607, at *29 (E.D.N.Y. Aug. 31, 2015) (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)). Courts should also consider "the availability of other means of proof." *Old Chief*, 519 U.S. at 184 (citation omitted). Here, Mr. Chamberlain's medical records would have provided assessments of his physical and mental condition at, or near, the time of his death. (A-1813-26). Ultimately, evidence that has any negative connotations, such as illustrating the significant flaws in the police officers' versions of events, did not equate to the prejudice that Rule 403 seeks to prevent.

Unfortunately, Mr. Chamberlain is dead and could not testify as to what occurred on November 19, 2011. It was thus an abuse of discretion not to allow Plaintiff to present his medical records to the jury; relevant and important evidence for them to consider. First, it would provide context as to why Mr. Chamberlain had a medical alert device (rather than leave the jury with the impression he had no medical conditions, other than potential mental health issues). Second, and more significantly, the jury should have been allowed to consider whether Mr. Chamberlain was truly a threat when shot by Defendant Carelli. Evidence, such as his autopsy report, a bullet hole in the wall just 16 inches from the floor, and disputed police officer testimony regarding the impact of the less-lethal shotgun projectiles, created a basis for a reasonable juror to find that that Mr. Chamberlain was on the ground when Carelli shot and killed him and would have been physically incapable of bouncing up and flying through the air, as Defendants have alleged. [13]

[13] At trial the district court also precluded the jury from hearing testimony from the Medical Examiner describing "emphysema" following testimony that the autopsy revealed Mr. Chamberlain had pulmonary emphysema at the time of his death. (A-3158-59). Furthermore, the district court also prevented the admission of medical records, including a progress note that stated Mr. Chamberlain "walked slowly and has to stop walking upstairs after ½ flight." (A-1814).

CONCLUSION

For the foregoing reasons, the district court's decisions on the Rule 12(b)(6), Rule 56, and motions *in limine*, as challenged on appeal, should be reversed and a new trial ordered. *Harris v. O'Hare,* 770 F.3d 224, 238-39 (2d Cir. 2014); *Brooks v. Brattleboro Mem'l Hosp.*, 958 F.2d 525, 530-31 (2d Cir. 1992).

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and in conjunction with the Court's April 20, 2017 Order, Debra S. Cohen hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 15,947 words and complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure.

Dated: May 5, 2017
New York, New York

/s/Danielle B. Sullivan
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