

PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiffs-Respondents Jean Bridenbaker and Garry K Connors, as Administrators of the Estate of Matthew Ryan Connors, in opposition to Defendants-Appellants City of Buffalo, Buffalo Police Department and Officer James T. Reese's appeal of the Order of the Erie County Supreme Court entered October 29, 2014, which denied Defendants-Appellants' motion for summary judgment, and granted Plaintiffs-Respondents' motion to compel discovery.

QUESTIONS PRESENTED

1. DID THE TRIAL COURT PROPERLY GRANT PLAINTIFFS' MOTION TO COMPEL THE DEFENDANTS TO DISCLOSE DEFENDANT REESE'S EMPLOYMENT RECORDS FOR *IN CAMERA* REVIEW AFTER THE NOTE OF ISSUE WAS FILED, WHERE THE INFORMATION WAS REQUESTED TWO YEARS EARLIER BUT THE DEFENDANTS FAILED TO FULLY DISCLOSE THE EMPLOYMENT FILE?

The court below answered this question in the affirmative.

2. ARE THE DEFENDANTS ENTITLED TO JUDGMENT AS A MATTER OF LAW WHERE THE ONLY WITNESSES TO THE INTENTIONAL KILLING WERE DEFENDANTS, AND WHERE PLAINTIFFS PROFFERED CIRCUMSTANTIAL AND FORENSIC EVIDENCE THAT DEFENDANTS' JUSTIFICATION DEFENSE WAS IMPLAUSIBLE AND DEFENDANTS ACCOUNTS OF THE KILLING WERE NOT CREDIBLE?

The court below answered this question in the negative.

3. ARE THE DEFENDANTS ENTITLED TO QUALIFIED IMMUNITY EVEN IF THEY ARE NOT ENTITLED TO JUDGMENT ON THE MERITS IN AN UNREASONABLE FORCE CASE, WHERE THE STANDARD FOR REASONABLE CONDUCT IS IDENTICAL?

The court below answered this question in the negative.

STATEMENT OF FACTS

This claim arises out of the fatal shooting of 23-year-old Matthew Ryan Connors (“Matthew”) by Defendant Officer James T. Reese (“Defendant Reese”) on August 7, 2009, while Matthew was in his residence at 873 East Eagle Street, Buffalo, New York. Well prior to the killing, Matthew’s primary care physician described him as “totally disabled” as the result of a March 2005 car accident [R. 1448]. Matthew’s friends described that at the time of the killing Matthew could barely move around due to chronic back injuries, and was incapable of fighting with anyone. [R. 972-974].

Despite Matthew’s disability, the Defendants assert that Defendant Reese was involved in a life-or-death struggle with Matthew, causing Defendant Reese to take Matthew’s life to save his own. Defendant Reese shot Matthew point blank range in the back, which severed his spine and caused his death. [R. 548]. The only two witnesses to the struggle were Defendant Reese and Matthew himself. Photographs of the crime scene demonstrate that Matthew was beaten about the face, head and upper body; that his teeth were knocked out; and that he had numerous cuts and scratches about his face, head and arms. [R. 452-494, 557-559]. Blood ran down the door frame of Matthew’s apartment, pooling in the basin of a humidifier, on an end table, on and inside the couch, on the floor, on a play mat, and on the wall in the front room. *Id.* Medical records and photographs of Defendant Reese show that other than a few minor cuts and scratches, he was completely unscathed. [R. 534-540, 358-362].

Matthew’s friends provided sworn testimony that this was not the first interaction Defendant Reese had with Matthew. Rather, they had an extensive history causing Defendant Reese to have a personal animus against him. [R.595-598]. Among other incidents, within one month of Matthew’s death, Matthew was in an altercation with Defendant Reese’s wife outside

of a convenience store parking lot [R. 597]. Matthew had drive his girlfriend's brand new Buick Rendezvous to a convenience store, and Defendant Reese's wife pushed a shopping cart into the vehicle. [R. 597]. Defendant Reese's wife called Matthew a "little shit," and said that she didn't have to give Matthew her insurance information, and that her husband was a police officer. [R. 597]. After the altercation, Defendant Reese harassed Matthew every day. [R. 974]. Though Defendant Reese denied knowing Matthew prior to the incident, his actions on August 7, 2009 demonstrate otherwise.

Defendants allege that prior to the shooting, Matthew held up the Seneca Pharmacy located at 1979 Seneca Street, Buffalo, New York. A pharmacist, later identified as Tracy Ardalan, called 911 and told the dispatcher that a male with a hooded sweatshirt tied tightly around his face came into the pharmacy with a gun and directed her to give him all their oxycontin. [R. 425]. The pharmacist reported the make, model, and license plate number a vehicle that the suspect was alleged to have fled the scene from [R. 425] The 911 dispatch operator broadcast the year, make, model and registered owner and address to where the vehicle was registered, and officers were subsequently dispatched to 873 East Eagle Street. [R.426]. Defendant Reese requested dispatch to repeat the name (not the address) of the individual to whom the vehicle was registered. [R.426]. When it was repeated that the vehicle was registered to Jamie Everett, Matthew Connors's live-in girlfriend, Defendant Reese changed his destination from that of the pharmacy, to which he was originally responding based on his close proximity, to 873 East Eagle Street. [R. 426]. Upon arriving at the 873 East Eagle, Defendant Reese told dispatch that he was trying to get through and dispatch claimed there were too many vehicles responding. [R. 427].

Defendant Reese walked up the front porch of 873 East Eagle and was met by two older white women, one with brown hair and one with gray hair, who were sitting in chairs on the front porch. [R. 315]. He questioned the women as to who owned the vehicle parked in front. *Id.* The gray haired woman, the eighty-six year old Helen Christian, acknowledged that it belonged to her granddaughter/daughter (Reese could not recall) and that her boyfriend just came home and was in upper apartment. [R. 315, 1046]. The woman with the brown hair told Defendant Reese that the boyfriend had locked the door behind him. [R. 315] The officers on the scene threatened to kick the door in if they were not allowed into the house. [R. 1514]. The gray haired woman then told Reese to follow her through the door on the left and through her lower apartment. [R. 315]. According to Reese, “she was in front of me. She showed me through the apartment to the stairwell to the upper apartment.” *Id.* According to Captain Baranski, it would have been protocol for an officer entering a dwelling after a robbery suspect to notify radio upon entry of the dwelling, and there is no evidence that Defendant Reese did so before entering the apartment. [R. 1238].

What transpired after Defendant Reese entered the house is highly in dispute. According to Defendant Reese, after he reached the middle landing of the back stairwell to the upper apartment, someone was standing at the top of the stairs facing him, with both hands on a plastic bag [R. 119-120]. Defendant Reese testified that decedent Matthew Connors then pointed a gun at Defendant Reese, which he believed to be an automatic handgun [R. 121, 156]. Defendant Reese claims to have struggled with Connors through the apartment, until he was at a disadvantage [R. 121]. Defendant Reese then claims to have had lost his grip on the weapon he alleges Matthew was holding, and fired his own weapon into Matthew’s back. [R. 125-127].

When Captain Baranski arrived on the scene, several patrol cars were in front of the house [R. 1226]. He tried to speak with Officer Miller-Williams and the woman on the porch, but “[t]hey were engaged in their own conversation.” [R. 1226-1227]. At that point, he traversed the downstairs apartment all the way to the back door, where he met Officer Skrabacz who was outside, with another officer or two securing the rear of the house. [R. 1227-1228]. While Captain Baranski was attempting to let Officer Skrabacz into the house, Officer Skrabacz broke open the door with his night stick. [R. 1228]. Captain Baranski ran up the stairs, and when he got to the landing, could hear some yelling from inside the apartment. [R. 1229].

According to Captain Baranski, he could hear Officer Reese yelling for help, and then he heard a shot. *Id.* He ran through the kitchen and the living room, over to Officer Reese, tried to pick him up and asked if he was okay. [R. 1230]. At that point, Officer Reese got off the individual he was laying on, staggered backwards, and fell into the corner. [R. 1230]. Matthew was face down, partially on the couch, and partially on an end table [R. 1230]. Captain Baranski was not sure whether Matthew was alive when he entered the room, but “he didn’t appear to be.” [R. 1230]. He got on top of Matthew to make sure, and upon seeing a gun on a couch, “shoved it up further on the couch.” [R. 1231]. At that point he could hear other officers coming up the stairs. [R. 1231]. According to Captain Baranski, he remained on Matthew for “three minutes or so at the most.” [R. 1231]. When the officers began entering the room, he believed one of the officers has secured or taken the gun. [R. 1232]. He called for two ambulances, and then started his duty of making sure the integrity of the scene was kept. [R. 1239].

After Matthew’s father was notified of his son’s death, he attempted to view the crime scene, but the police would not allow Matthew’s father to approach the house or identify his son’s body [R. 1513]. On August 10, Matthew’s father went to the police precinct to speak with

Captain Baranski. [R. 1513]. Captain Baranski was evasive, and would not provide any information about the shooting. [R. 1513]. Captain Baranski referred to the shooting as “an accident.” [R. 1513].

Plaintiffs-Respondents commenced the present action asserting claims for wrongful death, conscious pain and suffering; negligent hiring, training, supervision; battery; excessive force; and deprivation of life without due process. [R. 9-27]. On January 29, 2014, Defendants moved for Summary Judgment, requesting that the Court dismiss Plaintiffs’ Amended Complaint pursuant to CPLR 3212(b). [R. 28-29]. On May 21, 2014, Plaintiffs cross-moved for an Order requiring the Defendants to turn over for *in camera* review certain documents that were requested and implied to have been turned over during the regular course of discovery, but which were not. [R. 1523-1524]. On October 24, 2014, Hon. John L. Michalski, J.S.C., denied the Defendants’ Motion for Summary Judgment in its entirety, and granted Plaintiffs’ Motion to obtain the requested discovery. [R. 3, 5-8]. The Defendants appealed said Order, which appeal is presently before this Court.

ARGUMENT

It is well-settled that in deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089 [4th Dept 2004]), and that the motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

As a preliminary matter, Defendants' motion for summary judgment is premature where the Defendants are in possession of material discovery that they failed to turn over during discovery, while implying that they had disclosed all materials responsive to Plaintiffs' demands. As such, the court below properly granted Plaintiffs' motion to compel the Defendants to turn over Defendant Reese's entire employment record for an *in camera* review by the court.

However, even without the outstanding discovery, Plaintiffs proffered evidence sufficient to demonstrate the existence of material issues of fact as to whether Defendant Reese used excessive force when he shot and killed Matthew Connors, and the trial court properly denied Defendants' motion for summary judgment. Defendants do not contest that Officer Reese intentionally caused the death of Matthew Connors. *Appellants' Brief* at 19. Rather, Defendants assert that Defendant Reese was justified in intentionally causing the death of Matthew Connors. The evidence of Matthew's injuries alone should be sufficient for a jury to conclude that Defendant Reese acted with excessive force—Matthew, a totally disabled man, had his teeth knocked out and his blood spilled before he was shot point-blank in the back by Defendant Reese.

The Defendants' opposition is reliant upon the fact Defendant Reese testified that he was in a life-or-death struggle with Matthew, and that the Plaintiffs failed to produce a first-hand account to contradict his testimony. Thankfully, where the only witness to an intentional killing was the killer himself, courts look to circumstantial evidence to determine whether the self-serving testimony is incontrovertible, or whether a jury must determine the weight to be given to the defendant's account. When viewing all of the evidence in the light most favorable to the Plaintiffs, the evidence tends to show that the Defendants' account is not only controvertible, but entirely implausible:

Defendant Reese had been accused multiple times of using excessive force in furtherance of his duties, and was known to have a personal animus against Matthew. When Defendant Reese heard that Matthew was the suspect of a crime, he inexplicably diverted his course to Matthew's home. When he arrived at Matthew's home, despite ostensibly believing Matthew to be armed and dangerous, and despite the presence of multiple police officers on the scene, Defendant Reese asked an elderly woman to escort him alone to an internal stairway to Matthew's apartment. After Defendant Reese entered Matthew's apartment, Matthew Connors was severely beaten and shot in the back, while Defendant Reese left the "life-or-death" struggle against a totally disabled man almost completely unscathed. Defendant Reese and other members of the Buffalo Police Department have accounts of the incident that vary wildly as to material details of the killing. However, the Buffalo Police Department failed to follow protocol and procedure when investigating Matthew's killing, leaving the Plaintiffs without vital evidence tending to affirmatively disprove Defendant Reese's story.

Given the implausibility, inconsistency, contradiction, and spoliation of evidence relevant to the Defendants' account of Matthew's killing, the trial court properly denied the Defendants' motion for summary judgment, and its decision should be upheld in its entirety.

POINT I

THE TRIAL COURT PROPERLY GRANTED PLAINTIFFS' MOTION TO CONDUCT ADDITIONAL DISCOVERY

The October 29, 2014 Order of the Hon. John L. Michalski, J.S.C., properly granted Plaintiffs' motion to obtain an *in camera* review of Defendant Reese's employment records, copies of which the Defendants erroneously represented were already provided to the Court prior to Plaintiffs' filing the Note of Issue, constituting an unusual or unanticipated circumstance permitting the Court to compel disclosure.

Pursuant to 22 NYCRR § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." "Although disclosure following the filing of a note of issue and certificate of readiness is limited to unusual or unanticipated circumstances, the trial court nonetheless has discretionary power regarding this issue as part of its oversight of disclosure." *Harris v Erfurt*, 122 AD3d 1155, 1156 (3d Dept 2014) (internal citations omitted). Specifically, where "the facts are peculiarly within the opposing party's knowledge, a court is justified in exercising its discretion and relaxing the rigid enforcement of the [statement of readiness] rule." *Cooper v Swallow*, 55 AD2d 752 (3d Dept 1976).

For example, in *Cole v Rappazzo Elec. Co.* (267 AD2d 550 [3d Dept 1999]), three months after the plaintiff filed the note of issue, plaintiff sought disclosure to supplement discovery responses provided by the defendant five years prior, where the requested information was solely within the defendant's knowledge. *Id.* at 551. The Appellate Division, Third Department, held that trial courts have "broad discretionary power to relax the rigid enforcement of 22 NYCRR 202.21 (d) and to compel additional discovery after the filing of the trial term note of issue," and that the trial court did not abuse its discretion in requiring the defendants to supplement their post-discovery responses. *Id.* at 552 (internal citations omitted). Likewise, in *Covell v Slocum*, (130 AD3d 1551 [4th Dept 2015]), this Court afforded the defendant additional rights of discovery pursuant to 22 NYCRR 202.21 (d), where the plaintiff failed to disclose the identity of a witness in response to defendant's discovery demands. *See also Lopez v Retail Prop. Trust*, 84 AD3d 891, 892 (2d Dept 2011) (court permitted additional discovery after the filing of a conditional note of issue where the defendant was impeding discovery prior to filing of the note of issue); *Karakostas v Avis Rent A Car Sys.* 306 AD2d 381, 382 (2d Dept 2003) (after filing of the note of issue plaintiff served a supplemental response to discovery, indicating plaintiff would call an expert, thus, there were "unusual or unanticipated circumstances" to reopen discovery); *Cooper v Swallow*, 55 AD2d 752 (3d Dept 1976) (court allowed examination before trial to be held more than one year after note of issue and statement of readiness filed.)

As in *Cole*, here the Plaintiffs did not seek to conduct additional discovery; merely to supplement the discovery that Plaintiffs demanded prior to the Note of Issue, and which Defendants led Plaintiffs to believe were fully provided to the court. The Plaintiffs duly demanded copies of Defendant Reese's employment records. [R. 1535]. Through reliance upon

the correspondence and conversations between counsel from April 1, 2011 to June 3, 2011 [R. 1550-1559, 1561-1580], Plaintiffs justifiably believed counsel was forwarding Defendant Reese's entire personnel file to the Court for an *in camera* review pursuant to NY Civil Rights Law § 50-a, which provides, in pertinent part (emphasis added):

All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law shall be considered confidential and not subject to inspection or review without the express written consent of such police officer, except as may be mandated by lawful court order.

Plaintiffs had no reason to believe that Defendants were only forwarding excerpts of Defendant Reese's personnel file, and not forwarding the entirety of Defendant Reese's personnel records to the Court. Defense counsel represented that all § 50-a documents were provided for *in camera* review, continued to refer to Defendant Reese's employment records in conversations and correspondence exchanged between counsel, and specifically referred to Civil Rights Law §50-a which defines the scope of documents covered by the section. The foregoing presents unusual and certainly unanticipated circumstances sufficient for the court to allow further discovery for the narrow purpose of *in camera* review by the court for a determination as to discoverability, as previously agreed by Defendants.

The Plaintiffs' motion succinctly identified as Officer Reese's employment records. Merely because Plaintiffs could not identify the specific documents within Officer Reese's employment record—information solely within the custody and knowledge of the Defendants—does not prejudice the Defendants. In contrast, Plaintiffs would be severely prejudiced if this Court were to deny Plaintiffs' discovery of the personnel file. Defendant Reese's employment and disciplinary records are critical to Plaintiffs' claim that Defendants negligently hired, trained

and supervised Defendant Reese. The Defendant City and Buffalo Police Department continued to employ Defendant Reese, despite his repeated abuse of power and authority and his propensity towards cruel and inhumane treatment of suspects and civilians, which clearly rendered him unfit to be and/or hold the trusted and valued position of a Buffalo Police Officer.

POINT II

THE COURT PROPERLY DENIED SUMMARY JUDGMENT BECAUSE QUESTIONS OF MATERIAL FACT EXIST

If this Court determines that the trial court properly ordered Defendants to produce the requested discovery, the inquiry need not progress any further, as outstanding discovery renders Defendants' motion premature. Regardless, even without the outstanding discovery, Defendants are not entitled to summary judgment, as the Plaintiffs have established triable issues of fact as to their claims against Defendants.

It is well settled that in deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Russo v YMCA of Greater Buffalo*, 12 AD3d 1089 (4th Dept 2004); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Even if the issue of fact is debatable, summary judgment should be denied. *Brooks v. Anderson*, 18 Misc3d 1109(A), 856 NYS2d 22 (Sup Ct 2007) (*citing Stone v Goodson*, 8 NY2d 167 [1960]).

A. Defendants' are not entitled to a justification defense as a matter of law because Defendant Reese's use of force was objectively unreasonable.

There is no dispute that Defendant Reese intentionally killed Matthew Connors. Thus, the Defendants' motion for summary judgment as to Plaintiffs' claims for battery, wrongful death, excessive use of force, and deprivation of life without due process, are dependent upon whether Defendants have established a justification defense. However, because significant issues of fact exist as to whether Defendant Reese's use of deadly physical force was objectively reasonable under the circumstances, the Defendants are not entitled to summary judgment.

The Supreme Court of the United States has held "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tenn. v Garner*, 471 US 1, 6 (1985). Likewise, NY Penal Law § 35.30 (1), only permits the use of physical force by an officer "to the extent he or she reasonably believes such to be necessary." *Id.* A police officer may only apply "force that is objectively reasonable under the prevailing circumstances." *Passino v State of NY*, 669 NYS2d 793, 795 (Ct Cl 1998). "In order for it to be objectively reasonable for an officer to use deadly force to apprehend a suspect, he must have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Pub. Adm'r v City of NY*, 2009 U.S. Dist. LEXIS 18350, *14 (SDNY Feb. 24, 2009) (*citing Tenn. v Garner*, 471 US 1, 3 [1985]) (emphasis added).

"Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide." *Holland v City of Poughkeepsie*, 90 AD3d 841, 844 (2d Dept 2011) (emphasis added). "Resolution of excessive force claims may depend upon an assessment of witness credibility and the weight to

be ascribed to the evidence by the trial court in resolving factual disputes.” *Tomaino v State*, 869 NYS2d 750 (Ct Cl 2008). “If any reasonable trier of fact could find that the defendants’ actions were objectively unreasonable, then the defendants are not entitled to summary judgment.” *Lennon v Miller*, 66 F3d 416, 420 (2d Cir 1995). Federal courts have consistently denied motions for summary judgment when substantial and material differences exist between plaintiff and defendant’s account of events leading to the use of force. *See Weyant v Okst*, 101 F3d 845, 852 (2d Cir 1996); *Thomas v Roach*, 165 F3d 137, 143 (2d Cir 1999); *Maxwell v City of NY*, 380 F3d 106, 109 (2d Cir 2004).

Further, where the victim in a deadly force case is deceased, courts must be reluctant to grant summary judgment to the defendant. “[T]he court may not simply accept what may be a self-serving account by the police officer . . . [T]he court must also consider circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.” *Pub. Adm’r, supra* at **10-11; *O’Bert v Vargo*, 331 F3d 29, 37 (2d Cir 2003).

For example, in *Pub. Adm’r v. City of New York*, the court held that the plaintiff raised material issues of fact as to whether the defendant officer was justified in using deadly force against the decedent, based upon the “(1) proximity, order, and number of shots fired by [the defendant officer], (2) the inconsistencies between the testimony of [the defendant officer] and the forensic findings, (3) the failure to fingerprint [the defendant officer’s] weapon, the alleged possession of which by [the decedent] is the basis of [the defendant officer’s] justification for using deadly force, and (4) the lack of evidence that [the decedent] held a weapon other than [the defendant officer’s] potentially self-serving testimony.” 2009 U.S. Dist. LEXIS 18350, *15.

Likewise, in *O’Bert v Vargo*, the Second Circuit Court of Appeals found that summary judgment as to the reasonableness of an officer’s conduct was inappropriate based upon the circumstantial evidence, including: one of the officers on the scene “put away his own gun,” belying the defendants claim that the decedent was armed; the defendant’s testimony was inconsistent as to whether the decedent’s movement was provoked; evidence that the decedent’s threat to “to blow the officers’ heads off” had subsided after the defendant observed the decedent unarmed; and evidence contradicting the defendant’s position that the decedent’s trailer was dimly lit. *O’Bert* at 39.

Similar to *Pub Adm’r* and *O’Berto*, in the present case, the Plaintiffs offered a plethora of circumstantial evidence tending to show that Defendant Reese’s use of force was unreasonable, and that a jury must assess the credibility of Defendant Reese’s and other police accounts of the incident. As set forth in the sections below, there was significant evidence that Matthew was physically incapable of engaging in any struggle, much less the struggle described by Defendant Reese. Defendant Reese knew Matthew, and had a personal animus against Matthew. He knew Matthew’s vehicle, his residence, and his girlfriend’s name prior to the date of the incident. Defendant Reese unnecessarily entered the residence without any backup, escorted by an elderly woman, belying his stated belief that Matthew was dangerous. Defendant Reese severely beat Matthew before he fatally shot him, while himself remaining almost pristinely unscathed. Specifically, Defendant Reese knocked out several of Matthews teeth, and caused him to spew blood from his eye, ear, mouth and nose. The Defendants completely mishandled the weapon forming the basis for the justification defense—they moved the weapon, cleaned blood off the weapon, and failed to take fingerprints from the weapon. The Defendants spoliated other relevant evidence at the scene of the killing.

1. *Matthew was incapable of engaging in the struggle as set forth by Defendant Reese.*

Matthew, only twenty-three years of age at the time of his death, had a significant medical history which rendered him totally disabled. Matthew's primary care physician, Dr. Christian D. Lates, M.D. began treating Matthew on or about July 27, 2007. [R. 1443]. Matthew presented with a past medical history of chronic back pain secondary to a motor vehicle accident which occurred in or about March of 2005, and a surgical history of an L4-S1 fusion with bilateral transpedicular screws at L4, L5 and S1, lateral posterolateral bone grating, as well as bilateral anterior carbon-type grafts at L4-L5 and L5-S1 and decompression at L4 and L5 laminectomies performed in or about October 2005. [R. 1444].

One June 3, 2008, Matthew exacerbated his back injuries after a fall, at which time he was noted to have a skin infection at his incision sites and erythema in his lumbar region [R. 1444]. In July 2008, Matthew was assessed with chronic back pain and a fungal infection and continued on Oxycontin and Hydrocodone. [R. 1445]. In August 2008, Matthew was diagnosed with conjunctivitis and dependent edema. [R. 1445] On September 2, 2008, he was evaluated by infectious disease specialist Alicia Hermogenes, M.D., at Mercy Comprehensive Care Center for drainage next to the wound site with induration, and tested positive for mucor species, staphylococcus aureus and hemolytic streptococcus [R. 1446]. On October 23, 2008, he was seen at Mercy Comprehensive Care Center with complaints of swelling of his lower extremities. Drainage in his back was noted with Methicillin sensitive staph on wound culture and the wound culture report came back positive for streptococcus anginosus, and was prescribed Bactrim and was to follow with the neurosurgeon regarding surgical intervention. [R. 1446].

At office visits of February 9, 2009 and March 2, 2009, Matthew complained of break through pain, and had questions about pending neurosurgery which was scheduled at Buffalo General Hospital by Dr. Hermogenes secondary to the fungal infection. [R. 1447]. On March 30, 2009, Matthew was noted to be compliant with his medications, **completely and totally disabled** at the time, and was referred for pain management. [R. 1447]. At the time of Matthew's last visit to Dr. Lates in June, 2009, according to Dr. Lates, "[d]ue to his significant back problems and recurrent infections, **Matthew was considered to be totally disabled by me.**" [R. 1448].

2. *The injuries to Matthew are inconsistent with a legitimate need for Defendant Reese to defend himself or a third person.*

The nature of a victim's injuries can constitute evidence of the legitimacy of an justification defense. For example, *People v Torres* (252 AD2d 60 [1st Dept 1999]), the Appellate Division, First Department held that the defendant was not entitled to a charge of a justification defense. In so holding, the court noted that "defendant's actions in continuing to assault [a victim] after he had been brought to the ground evidence an intent to inflict injury without reference to any legitimate need to defend himself or a third person. This intent was also manifested in defendant's attack on [a second victim], whom he struck in the back and who, unarmed, was struggling with [an accomplice] on the ground." *Id.* at 65.

Likewise, in *People v Vecchio*, (240 AD2d 854, 855 [3rd Dept 1997]), the Appellate Division, Third Department upheld the trial court "refusing defendant's request for a justification charge since ... his use of a dangerous instrument against an unarmed individual cannot be viewed as anything other than an excessive use of force."

Here, as in *Torres* and *Vecchio*, the circumstantial evidence supports the conclusion that Defendant Reese intended to inflict injury beyond that reasonably necessary to defend himself. There is an issue of fact as to whether Matthew Connors was armed at the time he was killed by Defendant Reese. Considering that Matthew was shot in the back, the length of time Defendant Reese testified to having his hand on the fake weapon alleged to have been possessed by Matthew, and the extensive tampering with the weapon by the police, (*see* Point II (A) (2), *infra*), a reasonable jury could conclude that Matthew was not armed or that Defendant Reese knew that the weapon was not real. Even if Defendant at one time reasonably believed Matthew to be a threat to his life, a reasonable jury could conclude that at the time Defendant Reese shot Matthew in the back, such a belief was no longer reasonable.

3. *The police failed to follow material procedures and protocol investigating the incident.*

Likewise, the failure of police to follow investigative protocol, or to preserve evidence tending to disprove the justification defense, constitutes circumstantial evidence that can defeat an officer's motion for summary judgment. *See Pub. Adm'r v. City of New York* at 15 (summary judgment denied considering "the failure to fingerprint ... weapon, the alleged possession of which ... is the basis of ... justification for using deadly force," particularly where a "lack of evidence that [the decedent] held a weapon other than ... self-serving testimony"). The Plaintiffs in the present case provided a litany of examples where the Defendants' mismanagement of the investigation failed to preserve evidence tending to disprove the justification defense:

- Defendant Reese did not prepare his own report until five days after the shooting. [R. 315]

- Although Captain Baranski testified to securing the crime scene, his testimony was contradicted by Officer Skrabacz's improper handling of the BB gun, plastic bag, pill bottles, and clothing. [R. 1240, 499].
- The police failed to take photographs of Defendant Reese until after he was cleaned up. [R. 560-571, 1376]
- The crime scene photographs show blood and tissue on the handle of the BB gun [R. 460-461], which appears to have been cleaned off prior to discovery and inspection [R.452].
- There is no indication that the police ever analyzed blood found on Defendant Reese's clothing and boot.
- Despite numerous blood samples being collected at the scene, none of the blood samples were tested nor are they available to be tested. Defendant City of Buffalo could not produce the blood samples at the discovery and inspection.
- All of the fingerprint evidence and swabs collected at the scene of the pharmacy, at the scene of the shooting, and from the vehicle driven from the scene of the robbery were never tested to determine the identity of who robbed the pharmacy.
- The BB gun was never fingerprinted and/or analyzed to determine whether Matthew had used it.
- The pill bottles were not fingerprinted and/or analyzed to determine whether Matthew had touched them.
- Fingerprints were not collected from the pharmacy shelving to determine whether Matthew was present at the pharmacy.
- The swabs taken from the pharmacy and the automobile that fled the scene of the pharmacy no longer exist.
- The swabs of blood taken at the scene no longer exist.
- The pill bottles and pills held by Detective Minor at the scene no longer exist.

- Detectives failed to obtain a sworn, written statement from the woman alleged to have given the officers permission to enter her home without warrant.

The evidence reports demonstrate that any evidence that would have tended to support Plaintiff's position that the Defendants spoliated any evidence that would have tended to show that Matthew Ryan Connors did not rob the pharmacy at gunpoint. [R. 1008-1015]. Said evidence included, but is not limited to, the video from pharmacy which recorded the robbery, fingerprints taken at the pharmacy, from the automobile in which the suspect fled the scene, from the gun the suspect used, and from the pill bottles the suspect was alleged to have taken from the pharmacy.

4. *Reese's own testimony was contradictory and implausible as to material facts.*

As in *Pub Adm'r* and *O'Bert*, here Defendant Reese's testimony was contradictory and contradicted by other forensic and circumstantial evidence, and thus should preclude summary judgment in his favor:

- Defendant Reese's P-73 and deposition differed as to the circumstances under which he first encountered Matthew [R. 316, 1327], and Matthew's reaction to the first encounter [R. 316, 1331].
- Defendant Reese's testimony that he did not fight, strike, or kick Matthew [R. 1342] is completely inconsistent with photographs of the scene, and the injuries sustained by Matthew [R. 452-494].
- Defendant Reese's description of the altercation with Matthew is completely inconsistent with the medical opinion of Matthew's primary care physician, who described Matthew as "totally disabled," [R. 1448], and the statements of Matthew's friends, who described that Matthew could barely move around due to chronic back injuries, and was incapable of fighting with anyone. [R. 972-974].

- Defendant Reese's testimony as to the absence of excessive force claims against him was belied by the statement of Christopher Patterson [R. 1521-1522], and the nineteen (19) disciplinary charges made against him between 1994 and 2009. (Excerpts of Defendant Reese's employment records were not reproduced in the court below, or in the record on appeal, based upon their confidential nature. However, as in the court below, counsel offers to submit the same under confidential separate cover at this Court's request.)
- Defendant Reese denied knowing Matthew Connors prior to the shooting at 973 East Eagle. [R. 1318]. However, his response to Jamie Everett's name over dispatch inferred his knowledge of her. [R. 1505-1506]. Likewise, the affidavits of Luke Davidson [R. 595-598], and Justin Janczylik [R. 974] reference two incidents in 2003 and another in June 2009 involving Matthew and Defendant Reese. According to Janczylik, Defendant Reese harassed Matthew almost every day [R. 974].

5. *The accounts of other police officers offered contradictory and implausible explanations to material facts.*

Not only was Defendant Reese's own testimony implausible and contradicted by other evidence, so was the testimony and written reports of other police officers. As such, their accounts of the killing are subject to a credibility determination, and must be rejected on Defendants' motion for summary judgment:

- Captain Baranski claims to have checked Defendant Reese for injuries and found none. He made no mention of observing blood on Defendant Reese. Other officers, however, claim that Defendant Reese had enough blood on his person that caused them to believe that Defendant Reese had been shot. [R. 314-326].
- Captain Baranski's report indicated that Matthew was still struggling when he entered the room, [R. 495], but he later testified that Matthew did not appear to be alive when he entered. [R. 1231]
- The officers' reports offered conflicting versions as to the location of the gun alleged to belong to Matthew Connors—some officers observed the gun on the couch, another observed it on the floor, another picked it up, handled it, and put it back down. [R. 314-326].

- Defendant Reese, Captain Baranski and Officer Skrabacz each testified that they had moved the BB gun, each under a contradictory set of circumstances. [R.1341, 499, 1232]. Specifically, it is wholly implausible that it took three officers to move a BB gun out of reach of an incapacitated suspect. Although Officer Miller-Williams did not testify to moving the BB gun, she observed the BB gun at an entirely inconsistent location. [R. 500].
- The officers provided materially different accounts of the location of Matthew's body [R. 495-509]. Different officers place the body on the couch, partially on the couch, on an end table, on both an end table and a couch, on a coffee table, and/or on the floor. [R. 314-326].
- Not only do the officers disagree as to the location of Matthew's body, but also how it got there. [R. 495-509]. Some of the officers documented that they observed Matthew's body fall to the floor while others who were present at that same time make no reference to the body falling. [R. 314-326]. Some say they observed the body fall after Baranski got off the suspect, while others claim the body slumped to the floor on its own for no apparent reason. *Id.*
- Detective Minor's report noted material evidence at the scene that the other officers should have noted if present, including a baseball cap, gun scope, and orange pills in a plastic bag. [R. 495-593].
- None of the reports prepared by any of the officers on the scene document the blood that is clearly depicted in the photographs – not the blood on the floor, on the wall, on the couch, on the play mat, on Reese's boot, running down the door frame, on the end table, in the base of a humidifier, nor the significant amount depicted coming from Matthew's nose, mouth and arm. [R. 314-326].
- The autopsy fails to address the source of blood in Matthew's stomach, the blood profusely spewing from Matthew's mouth and nose, or the quantity of blood on the walls and Defendant Reese's boot, in light of the gunshot wound being a contact wound with little if any blood at the wound site and without the bullet exiting Matthew's body. [R. 548-552].
- According to the police, a video existed depicting the suspect in the pharmacy [R. 426], yet the owner of the pharmacy stated that no such video existed.

Given the extent of the evidence proffered by the Plaintiff, a reasonable jury could conclude that Defendant Reese had a personal animus against Matthew, entered Matthew's residence without legal justification or authority, brutally assaulted Matthew before shooting him point-blank in the back, and that Defendant Reese and other members of the Buffalo Police Department acted to cover up Defendant Reese's actions either intentionally, or through a combination of both intentional and reckless mismanagement of the investigation. However, such a conclusion is not necessary. **Even assuming, *arguendo*, that Matthew Connors did commit the crime alleged by the Defendants, Defendant Reese's use of force must nonetheless be reasonable.** It is sufficient for Plaintiff to defeat summary judgment that a reasonable jury could conclude that Defendant Reese acted with excessive force under the circumstances. Given the pristine condition of Defendant Reese, compared to Matthew's injuries—multiple missing teeth, his blood throughout his apartment, and a bullet through his back—a reasonable jury could certainly conclude that Defendant Reese was never in imminent danger, and certainly not at the time he shot Matthew in the back and killed him.

B. Defendants are not entitled to summary judgment on Plaintiffs' remaining claim for negligent hiring, training and supervision.

As set forth in Point I above, given the failure of the Defendants to fully comply with Plaintiffs' discovery requests, the Defendants' motion for summary judgment is premature. The motion is premature particularly in relation to those claims specifically relating to the knowledge of Defendants City of Buffalo and Buffalo Police Department's knowledge and tolerance of Defendant Reese's extensive history of employing excessive force to subdue suspects. The Plaintiffs requested Defendant Reese's entire employment record for exactly the reason now objected to by the Defendants—the belief that it contained evidence that Defendant Reese had a

history of excessive force, which was ignored, tolerated, and/or encouraged by the municipal Defendants. When the Defendants initially provided Defendant Reese's employment records, they represented that the documents provided contained the entirety of what was requested. After Plaintiffs' counsel performed an independent investigation and found individuals who claimed to have submitted complaints against Defendant Reese, which were not included within the Defendants' discovery responses, it became readily apparent that the disclosed materials were not fully responsive to the entirety of Plaintiffs' request. As such, Defendants are not entitled to summary judgment as to Plaintiffs' *Monell* claim, or Plaintiffs' claim for negligent hiring, training and supervision.

POINT III

DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants' arguments as to qualified immunity are duplicative of their arguments as to Defendant Reese's use of force. "In Fourth Amendment unreasonable force cases . . . the qualified immunity inquiry is the same as the inquiry made on the merits." *Pub. Adm'r, supra*, at 13 (quoting *Scott v Henrich*, 39 F3d 912, 914 (9th Cir 1994)). "[P]aradigmatically, the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?" *Saucier v Katz*, 533 US 194, 210 (2001) (Ginsburg, J., concurring in the judgment).

When viewing the reasonableness standard for qualified immunity, it is readily apparent that the argument is duplicitous. In a case involving the use of deadly force, a defendant officer is only entitled to qualified immunity “if the defendant’s action was ‘objectively legally reasonable’ ... in light of the legal rules that were clearly established at the time it was taken.” *O’Bert v Vargo*, 331 F3d 29, 36 (2d Cir 2003). Police officers must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, justifiably warrant” the particular intrusion. *Aikman v County of Westchester*, 491 FSupp2d 374, 381-382 (SDNY 2007). If an officer believes his actions were lawful, but that belief is not objectively reasonable, “qualified immunity offers him no solace and the plaintiff’s claims must be allowed to proceed.” *Loria v Gorman*, 306 F3d 1271, 1282 (2d Cir 2002).

Thus, if there is an issue of fact as to whether Defendant Reese used excessive force against Matthew, then there is an issue of fact as to whether Defendant Reese is entitled to qualified immunity, as both rely on the same standard of reasonableness. “Summary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to the determination of reasonableness.” *Thomas v Roach* 165 F3d 137, 143 (2d Cir 1999). When the circumstances surrounding the use of force are in dispute, and “contrasting accounts ... present factual issues as to the degree of force actually employed and its reasonableness, a defendant is not entitled to judgment as a matter of law on a defense of qualified immunity.” *Mickle v Morin*, 297 F3d 114, 122 (2d Cir 2002).

As discussed in further detail in Point II, above, at the very least an issue of fact exists as to whether Defendant Reese’s actions were objectively reasonable under the circumstances, and thus summary judgment is inappropriate.

CONCLUSION

The Defendants' motion for summary judgment is premature where the Defendants are in possession of material discovery that they failed to turn over during discovery, while implying that they had disclosed all materials responsive to Plaintiffs' demands. As such, the court below properly granted Plaintiffs' motion to compel the Defendants to turn over Defendant Reese's entire employment record for an *in camera* review by the court.

However, even without the outstanding discovery, Plaintiffs proffered evidence sufficient to demonstrate the existence of material issues of fact as to whether Defendant Reese used excessive force when he shot and killed Matthew Connors. The evidence of Matthew's injuries alone should be sufficient for a jury to conclude that Defendant Reese acted with excessive force—Matthew, a totally disabled man, had his teeth knocked out and his blood spilled before he was shot point-blank in the back by Defendant Reese.

Defendant Reese had been accused multiple times of using excessive force in furtherance of his duties, and was known to have a personal animus against Matthew. When Defendant Reese heard that Matthew was the suspect of a crime, he inexplicably diverted his course to Matthew's home. After Defendant Reese entered Matthew's apartment, Matthew Connors was severely beaten and shot in the back, while Defendant Reese left the "life-or-death" struggle against a totally disabled man almost completely unscathed.

In the ensuing investigation, Plaintiff asserted multiple instances of the Defendants' conduct that suggested that they were either covering up evidence, or at the very least that their negligence was leading to its spoliation. Given the myriad inconsistencies with the Defendants' testimony and positions, the Plaintiff set forth more than enough facts to defeat summary

judgment. It is respectfully requested that this Court uphold in its entirety the Order of the Erie County Supreme Court entered October 29, 2014, which denied Defendants-Appellants' motion for summary judgment, and granted Plaintiffs-Respondents' motion to compel discovery.

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Amherst, New York

Respectfully submitted,
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