RECORD NO.

17-1210

In The
United States Court of Appeals
For The Second Circuit

LUANN BATT, JOSEPH BATT, TIMOTHY BATT,

Plaintiffs – Appellants,

v.

JOSEPH BUCCILLI, in his personal capacity,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF NEW YORK AT BUFFALO

BRIEF OF APPELLANTS WITH SPECIAL APPENDIX

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JURISDICTIONAL STATEMENT

The court below had subject matter jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. Final judgment was entered in the court below on March 31, 2017. SPA-41.

Plaintiffs Timothy, LuAnn, and Joseph Batt filed a timely notice of appeal on April 27, 2017. A-397. The appeal is from a final judgment that disposes of all Plaintiffs' claims against the sole defendant, Lt. Joseph Buccilli of the Orchard Park Police Department.

STATEMENT OF THE ISSUES

1. In 2004, the Supreme Court declared that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh v. Ramirez*, 540 U.S. 551, 564 (2004). Eight years later, Lt. Buccilli forcibly entered the Batts' home without consent or a warrant. The court below declined to follow *Groh* because Lt. Buccilli conducted a "welfare check." **On April 17, 2012, were warrantless "welfare checks" in a home, conducted without consent or exigency, presumptively unconstitutional?**

2. In 2006, it was clearly established in this Circuit that the "emergency aid" exception to the Fourth Amendment applied only if officers were "confronted by an urgent need to render aid or take action," *Harris v. O'Hare*, 770 F.3d 224, 233-4 (2d Cir. 2014), because "a person [was] in 'danger.'" *Kerman v. City of New York*, 261 F.3d 229, 236 (2d Cir. 2001). Lt. Buccilli forced his way into the Batts' home knowing only that Adult Protective Services (APS) had requested a welfare check. No evidence, whether direct nor circumstantial, suggested anyone inside needed immediate aid. The District Court granted qualified immunity to Lt. Buccilli without considering this Court's decision in *Harris*. **On April 17, 2012, did Lt. Buccilli's warrantless entry fall within the exigent circumstances exception to the Fourth Amendment?**

STATEMENT OF THE CASE

On April 17, 2012, defendant-appellee Lt. Joseph Buccilli of the Orchard Park Police Department entered the home of plaintiffs-appellants Timothy Batt, LuAnn Batt, and Joseph Batt (collectively "the Batts") to conduct a welfare check on LuAnn Batt's father, Fred Puntoriero. Lt. Buccilli did not have consent to enter, and did not have a warrant. The Batts filed a civil action against Lt. Buccilli under 42 U.S.C. § 1983 on December 4, 2012, alleging that Lt. Buccilli had entered their home without consent, prior judicial approval, or exigency, in violation of the Fourth Amendment. A-9.

On March 31, 2017, the Honorable Frank P. Geraci, Jr. of the United States District Court for the Western District of New York entered summary judgment for Lt. Joseph Buccilli on grounds of qualified immunity. SPA-24. The Batts filed a timely notice of appeal to this Court on April 27, 2017. A-397.

STATEMENT OF FACTS

When "articulating the factual context of [a] case" at summary judgment, the "'evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 572 U.S. ___, 134 S. Ct. 1861, 1863 (2014), *quoting Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Because this case involves a Fourth Amendment claim against a police search, "[t]he 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." *United States v. Klump*, 536 F.3d 113, 117-18 (2d Cir. 2008) (emphasis added). Accordingly, we divide the facts into two categories: those known by Lt. Buccilli on April 17, 2012, and those discovered during litigation.

A. Facts Known by Lt. Buccilli on April 17, 2012.

On April 17, 2012, Defendant Joseph Buccilli, a Lieutenant with the Orchard Park Police Department, received a call from his dispatcher requesting that he assist Officer Joseph Kadi in conducting a welfare check at 3122 Bieler Road, in Orchard Park, New York. A-286, A-292. When Lt. Buccilli arrived at the address, he parked his squad car in the driveway of the private residence, approached Officer Kadi, and was advised that somebody had called Erie County Adult Protective Services (APS) about a potential welfare issue with an older gentleman who

lived in the house, and that APS had asked the Orchard Park Police Department to conduct a welfare check. A-293.

While the officers were talking in the driveway, they were approached by Plaintiff Joseph Batt. A-293. There was nothing in Joseph's hands as he approached the officers. A-309. The officers told Joseph that APS had received an allegation of a potential welfare issue, and had requested that the police conduct a welfare check. A-294. Joseph told the officers that his name was "Joe," that he lived in the house, and that his grandfather, Fred Puntoriero, was also in the house. A-294. Joseph told Lt. Buccilli that Fred was fine, that Joseph's mother, Plaintiff LuAnn Batt, was a nurse, and that a nurse's aide had left the Batt home a few hours before. A-295, A-311. Lt. Buccilli told Joseph that he would be coming into the Batts' home to conduct a welfare check, and that if Joseph attempted to obstruct his entry, he would be arrested. A-311-312. Joseph repeatedly told Lt. Buccilli that he did not have permission to enter, and no other resident gave him permission to enter. A-305-306. Lt. Buccilli understood that he did not have permission to enter the Batt home. A-305.

Joseph decided to call his parents. He told Lt. Buccilli that he was going inside to make a private phone call, reiterated that Lt. Buccilli was not to come inside, and reentered the home through a side door. A-295-296, A-297-299. Lt. Buccilli followed Joseph into the doorway, jammed his foot between the door and

the doorframe as Joseph attempted to close the door for privacy, forced the door open against Joseph's will, and entered the Batt home, followed by Officer Kadi. A-297-299. Joseph once again told the officers that they did not have permission to enter the home. A-305, A-307. Officer Kadi left the Batt home, while Lt. Buccilli remained inside. A-199.

After Lt. Buccilli entered the Batts' home, Joseph began recording the encounter using his phone's camera. A-101. During his deposition, Lt. Buccilli stated that he had reviewed a copy of the recording two days earlier with his lawyer. He said that he did not see anything in the recording that suggested that his words had been altered, and that the statements he made in the recording were true and accurate when he made them. A-58.

In that recording, Lt. Buccilli made the following admissions, the most notable of which is that he *didn't* know any specifics about Fred Puntoriero's situation:

> I'll tell you why we're here. Somebody contacted -- and keep [the video] rolling, please. Somebody contacted Adult Protective Services -- Erie County Adult Protective Services. And they contacted us, a social worker, requesting that we do a welfare check on you [Fred]. *I don't know the basis or the allegations of what the welfare concerns are.* But as I have been trying to explain to your grandson, Joe, and the other two individuals out there, that we do have a right to come in here when an allegation is made. And notice how I used the word *'allegation' that somebody's welfare **may** be in jeopardy*. I don't need a search warrant. I don't need to ask permission to Joe and anybody else. . . .
>
> I don't know [the identity of the caller to APS]. I don't know, because that information is confidential. Now, if you want to contact, or you want to contact, or your grandson Dan wanted to contact Adult Protective Services and

> file a Freedom of Information for the allegation of the report, then more power to you. But I can't give you information that I don't have. *All I know is a county agency called. And based on their request, I have a right to enter the house and forcibly [sic], if need be, when somebody's welfare is* ***possibly*** *in question.* And that's why I'm here. The allegation was made that they wanted a welfare check done on you. . . .

A-290, A-292-293, A-306-307, A-248-249, A-251-252 (emphasis added).

Lt. Buccilli told Joseph several times that if he obstructed Lt. Buccilli from observing Fred, he would be arrested. A-309. Joseph said that while Lt. Buccilli did not have permission to be in the home, Joseph would not obstruct him. A-311-312. Joseph did not lay hands on Lt. Buccilli, or use threatening words. A-309.

Lt. Buccilli went into the Batts' living room, where he spoke with Fred who was sitting in a chair, well-dressed and well-groomed, with a bowl beside him. A-299. As he was leaving, Lt. Buccilli said, "That's it. For now. *We may be back. If they [APS] call again, we gotta come back*." A-290 (emphasis added).

Lt. Buccilli remained outside until Plaintiffs Timothy and LuAnn Batt arrived. The Chief of the Orchard Park Police Department and a social worker, Nancy Sullivan, also arrived. LuAnn consented to letting Ms. Sullivan enter the home. A-300. She told Ms. Sullivan that she was a nurse, that Fred was under the care of Dr. Garbarino, that Fred was in Hospice care, that Fred was regularly visited by a nurse and social worker. A-125-126. She said that Fred was never left home alone without another responsible adult, and that LuAnn provided her with the contact information for Fred's hospice nurse. A-126. Ms. Sullivan then interviewed Fred's

Hospice nurse, who confirmed that Fred was "well cared for" and that she had "no concerns" about the level of care Fred was receiving in the Batt home. A-309.

Three days later, APS closed its investigation after determining that no further action was needed. A-212.

B. Facts Learned Through Subsequent Discovery.

The following facts did not come to Lt. Buccilli's attention until discovery. We include them here for the convenience of the Court, even though they did not motivate Lt. Buccilli's actions on April 17th. On April 17, 2012, Donna Locicero, a Senior Case Worker at Erie County Department of Social Services, Adult Protective Services, received a call from Annette Puntoriero, Fred's daughter-in-law. A-287. It was this call that prompted Lt. Buccilli's visit to the Batts' home.

The call stemmed from several ongoing family disputes. Fred had lived with Annette and her husband, Joseph Puntoriero, prior to moving in with the Batts in December of 2011. The move occurred after LuAnn expressed concerns about the level of care Fred was receiving. A-304. Fred had dementia, was wheelchair bound, and had been diagnosed in 2009 with failure to thrive while in the care of Joseph and Annette Puntoriero. A-286. LuAnn, who was trained as a nurse, offered to take over his primary care. A-304. Fred was well cared for in the Batt home. A-309. LuAnn and Joseph Puntoriero were also involved in a dispute over some of Fred's property that was at Joseph's house, which Joseph refused to return. A-304-

305. The result of all this was that Fred was occasionally visited by Joseph Puntoriero, but was never visited by Annette, making Annette's account of his condition second-hand at best. A-309.

On April 17th, Annette called APS, alleging that her husband, Joseph Puntoriero, was concerned about Fred's welfare. A-287. Annette told Ms. Locicero that she had not been to the Batt home. She said her husband had told Annette *two weeks earlier* that Fred was very lethargic, could not stay focused on the conversation, and that Fred might have been dehydrated because he often did not drink enough water. A-287-288, A-305. Annette also told Ms. Locicero that her husband had told her that he had been prevented from seeing Fred the previous day, and that he suspected that he was denied entrance because Fred was not doing well. A-287-288. According to APS records, Fred himself never called APS to report concerns about his father. A-203-212.

LuAnn categorically denied Annette's second-hand account of her brother's visit on April 16th. LuAnn denied that she had refused to let her brother visit Fred. On the contrary, Joseph Puntoriero did not ask to see Fred on April 16th, and left after talking to LuAnn about returning Fred's furniture. A-304.

Ms. Locicero then asked Annette questions about the Batt home and the care Fred was receiving. A-154. Annette told Ms. Locicero that she "didn't know" and "couldn't possibly know what was going on" in the Batts' home, and could not an-

swer questions about Fred's eating or feeding habits because she had not personally visited the Batt home on April 16, 2012. A-154, A-305. This is consistent with LuAnn's testimony during discovery that Annette never came to visit Fred after he moved into the Batts' home.

Annette also said that Joseph, Annette, and LuAnn did not see eye to eye on what was in Fred's best interests, and that there was "some animosity" between Annette and LuAnn. A-150-151. During discovery, an APS worker testified that the agency frequently receives reports that arise out of an underlying family dispute, and these reports are often false. A-305. When asked how often family disputes lead to false allegations, the caseworker said, "Frequently. I can't give you a number but it happens a lot." A-140.

Upon receiving Annette's call, APS asked the Orchard Park Police Department to conduct a welfare check at the Batts' home. A-286. Ms. Locicero told the dispatcher that APS had received "a call today with some concern about [Fred] who lives with his daughter and son-in-law in Orchard Park," that Annette expressed "a concern over [Fred's] well-being," that "the concern is that another family member was not allowed to get into the house when he went to visit yesterday, and they're not sure if [Fred] is ok," that the last time Joseph Puntoriero had seen Fred was "the second or third of April," and that LuAnn had denied Joseph Puntoriero entry on April 16, 2012. A-291-292.

Ms. Locicero told the dispatcher that Annette was the reporter, gave the dispatcher Annette's phone number, and said nothing about Joseph's suspicions about Fred's previous lethargy and dehydration on April 2 or 3. A-291-292. Buccilli and Officer Kadi were then dispatched to the Batts' home. A-292.

C. Procedural History.

On December 4, 2012, the Batts filed a complaint against Lt. Buccilli under 42 U.S.C. § 1983, alleging that his warrantless entry violated the Fourth Amendment. A-9. Lt. Buccilli answered on February 4, 2013, A-23, and moved for summary judgment on December 15, 2014. A-31. The Batts opposed this motion on January 30, 2015, A-258, and Lt. Buccilli filed a reply on March 2, 2015. A-320.

On July 18, 2016, Magistrate Judge Leslie G. Foschio issued a report and recommendation that the District Court grant Lt. Buccilli qualified immunity on two grounds. First, Magistrate Foschio found that "the undisputed evidence in the record establishes that under the circumstances, Defendant's warrantless entry into the Batts' home to conduct the welfare check of Mr. Puntoriero was not unreasonable and, as such, did not violate Plaintiffs' Fourth Amendment right to be free from unreasonable searches." SPA-18. Second, he concluded that "absent any Supreme Court or Second Circuit precedent clearly establishing a right to traditional Fourth Amendment protections during the type of police entry at issue here, particularly, the warrantless entry into a residence to check on the welfare of an elderly

person pursuant to complaint received by APS from a confidential, but not anonymous, call made by a close family member, a reasonable police officer would not have understood that such entry would have violated the Fourth Amendment rights of any resident or owner of the home." SPA-21-22.

The Batts objected to Magistrate Foschio's findings on August 19, 2016, arguing that there were genuine issues of disputed material facts; the recommendation resolved these disputes in favor of Lt. Buccilli instead of the Batts; that "the type of police entry at issue here" (a warrantless "welfare check"), like any other warrantless entry into a home, is presumptively unreasonable; and that Lt. Buccilli's actions were not covered by any exigency exception to the Fourth Amendment. A-353. On March 31, 2017, the Honorable Frank P. Geraci, Jr. issued an order rejecting Magistrate Foschio's conclusion that Lt. Buccilli's actions were constitutional, but accepting his conclusion that Lt. Buccilli was entitled to summary judgment as a matter of law. SPA-24. The Batts filed a notice of appeal to this Court on April 27, 2017. A-397.

D. Rulings for Review.

At issue are the final order and judgment, entered on March 31, 2017 by United States District Court Judge Frank P. Geraci, Jr., in the matter of *Timothy Batt, LuAnn Batt, and Joseph Batt v. Lt. Joseph Buccilli*, Case No. 1:12-CV-1198. SPA-24.

SUMMARY OF THE ARGUMENT

Eight years before Lt. Buccilli's warrantless entry, "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh*, 540 U.S. at 564.

This rule is as old as the amendment itself.[1] "[T]he Fourth Amendment has drawn a firm line at the entrance to the house," *Payton v. New York*, 445 U.S. 573, 590 (1980), because the physical entry of the home is "the chief evil" against which it is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). This is a "basic" and "axiomatic" principle. *Payton*, 445 U.S. at 586; *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). Every federal circuit agrees.[2]

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[1] *See United States v. United States District Court*, 407 U.S. 297, 316 (1972) ("Lord Mansfield's formulation [in *Leach* v. *Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765)] touches the very heart of the Fourth Amendment directive: that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises. . . .").

[2] *See, e.g., United States v. Allen*, 813 F.3d 76, 85 (2d Cir. 2016) ("While the 'ultimate touchstone of the Fourth Amendment is "reasonableness,"' it remains true that 'searches and seizures inside a home without a warrant are presumptively unreasonable'"), *quoting Riley v. California*, 134 S. Ct. 2473, 2482 (2014) *and Brigham City v. Stewart*, 547 U.S. 398, 403 (2006). *See also DeMayo v. Nugent*, 517 F.3d 11, 18 (1st Cir. 2008); *United States v. Doe*, 703 F.2d 745, 746 (3d Cir. 1983); *United States v. Yengel*, 711 F.3d 392, 396 (4th Cir. 2013); *Gates v. Texas Dep't of Protective and Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008); *United States v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984); *Hawkins v. Mitch-*

The District Court granted qualified immunity because it found no "controlling case that clearly establishes the answer to this question: when performing a welfare check on an individual in response to a request from adult protective services (or a similar agency), may a police officer enter a location to determine the welfare of that individual?" SPA-38. But the "correct inquiry" is "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct *in the 'situation he confronted.'*" *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015), *quoting Brousseau v. Haugen*, 543 U.S. 194, 199-200 (2004) (emphasis added). The District Court's question omitted at least four critical details:

1. Lt. Buccilli performed a welfare check in the Batts' *home*;
2. Lt. Buccilli entered the Batts' home *without* consent or a warrant;
3. Lt. Buccilli entered the Batts' home knowing *only* that APS had requested a welfare check; and
4. Lt. Buccilli didn't have any *specific* allegations, confront any *emergent* circumstances, or seek a court order *before* entering the Batts' home.

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ell, 756 F.3d 983, 991-2 (7th Cir. 2014); *Mitchell v. Shearrer*, 729 F.3d 1070, 1076 (8th Cir. 2013); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008); *Mascorro v. Billings*, 656 F.3d 1198, 1204-5 (10th Cir. 2011); *Bashir v. Rockdale County*, 445 F.3d 1323, 1327-28 (11th Cir. 2006); *Corrigan v. District of Columbia*, 841 F.3d 1022, 1029-30 (D.C. Cir. 2016).

The District Court placed great weight on the fact that Lt. Buccilli called his warrantless entry a "welfare check," and granted Lt. Buccilli qualified immunity because it couldn't find a precedential "welfare check" case on-point. SPA-20-21. The Magistrate similarly granted summary judgment because there was no "precedent clearly establishing a right to *traditional* Fourth Amendment protections during the type of police entry at issue here [a 'welfare check']." SPA-11.

This is incorrect. Lt. Buccilli physically intruded into the Batts' home without consent or a warrant. A Fourth Amendment search occurs whenever "the Government obtains information by physically intruding on a constitutionally protected area," *United States v. Jones*, 565 U.S. 400, 406 n. 3 (Jan. 23, 2012), and "when it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013); *see also Georgia v. Randolph*, 547 U.S. 103, 115 (2006). "[A]ny physical invasion of the structure of the home, 'by even a fraction of an inch'"—including a "welfare check"—triggers the strongest Fourth Amendment protections, *Kyllo v. United* States, 533 U.S. 27, 37 (2001), and is both *presumptively* and *per se* unreasonable in the absence of a warrant. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Payton*, 445 U.S. at 586. A "welfare check" is not a talisman against the Fourth Amendment.

ARGUMENT

I. Lt. Buccilli's warrantless entry clearly violated the Fourth Amendment.

The central question presented here—whether Lt. Buccilli is entitled to qualified immunity for his warrantless entry into the Batts' home—is a mixed question of fact and law. *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir. 2004). To prevail on summary judgment, Lt. Buccilli must prove both that "there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-8 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). All factual disputes are resolved in the light most favorable to the Batts, *Tolan*, 134 S. Ct. at 1863, and all questions of law—including whether a right was "clearly established at the pertinent time," *Kerman*, 374 F.3d at 108—are reviewed de novo. *United States v. Reyes*, 353 F.3d 148, 151 (2d Cir. 2003).

On April 17, 2012, Lt. Buccilli forcibly entered the Batts' home, without consent or a warrant, to conduct a "welfare check." On that day, federal law prohibited police from forcibly entering a home without consent or a warrant for any reason whatsoever, unless the circumstances fell within one of the established and narrowly-drawn exigency exceptions to the warrant requirement. Any warrantless entry into a home—including a "welfare check"—was subject to that rule. And the circumstances Lt. Buccilli confronted presented no exigency whatsoever. Because

Lt. Buccilli's entry was clearly illegal, he is not entitled to qualified immunity and cannot prevail on summary judgment. The decision below should be reversed.

A. Any warrantless entry into a home is presumptively and per se unreasonable.

More than thirty years ago, the Supreme Court declared that "the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton*, 445 U.S. at 590. This "firm line" prohibits any warrantless entry, no matter how small. "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 37. "[A]ny physical invasion of the structure of the home, 'by even a fraction of an inch,'" triggers the Amendment's protections. *Id.*, *citing Silverman v. United States*, 365 U.S. 505, 512 (1961).

Lt. Buccilli knew he was entering a home. He was told at least twice that he didn't have consent to enter. A-305-306. He didn't have a warrant, and claimed he didn't need one. A-290, A-292-293, A-306-307, A-248-249, A-251-252. And he entered the Batts' home, not by fractions of an inch, but for an extended inspection. A-297-299.

Any reasonable officer would have known Lt. Buccilli was entering dangerous waters. The Supreme Court has repeatedly warned that "[t]he warrant clause of the Fourth Amendment is not dead language." *U.S. District Court*, 407 U.S. at 315. "Over and again this Court has emphasized that the mandate of the [Fourth]

Amendment requires adherence to judicial processes," *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951), and that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." *U.S. District Court*, 407 U.S. at 317.

The Fourth Amendment's protections are at their zenith in the inner sanctum of the home. There, warrantless searches are not only *per se* unreasonable but *presumptively* unreasonable as well. *Payton*, 445 U.S. at 586. This is the black letter law for *every* officer who enters a home without a warrant, regardless of the circumstances he confronts, and whether his actions are ultimately deemed "reasonable"[3] or "unreasonable."[4]

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[3] *See, e.g.*, *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006) (emergency aid in response to an observable fracas); *United States v. Gallo-Roman*, 816 F.2d 76, 79 (2d Cir. 1987) (exigency to prevent destruction of evidence); *United States v. Cattouse*, 846 F.2d 144, 146 (2d Cir. 1988) (exigency to secure a potentially armed narcotics dealer); *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998) (emergency aid in response to a domestic disturbance).

[4] *See, e.g.*, *Kyllo*, 533 U.S. at 37 (no exigency to justify investigative search with infrared scope); *Groh*, 540 U.S. at 559 (no exigency to justify investigative search not authorized by particularized warrant); *Kerman*, 261 F.3d at 235 (no emergency for warrantless home entry in response to 911 call); *Loria v. Gorman*, 306 F.3d 1271, 1283-4 (2d Cir. 2002) (no exigency for warrantless home arrest for

B. There is no "welfare check" exception to the Fourth Amendment.

The law on warrantless home searches is among the most developed in all jurisprudence. In 2002, the Supreme Court declared that "police officers need either a warrant or probable cause *plus* exigent circumstances in order to make a lawful entry into a home." *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (emphasis added). *See also Groh*, 540 U.S. at 564.

Lt. Buccilli is a police officer. He entered the Batts' home. And he didn't have a warrant. For that entry to be lawful, he bears the burden of proving that he had probable cause to enter *and* there were exigent circumstances when he did so. *Welsh*, 466 U.S. at 749-50.

This burden isn't *de minimis*. First, the officer must identify "the exigencies of the situation" that made his warrantless entry "imperative." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). If no emergency precluded a warrant application, and the officer simply didn't pursue one, the entry is unconstitutional. An inconvenience to the officer, or the prospect of "delay in preparing papers," is "no justification for by-passing the constitutional requirement" of a warrant. *McDonald v. United States*, 335 U.S. 451, 454 (1948); *see also Johnson v. United States*, 333 U.S. 10, 15 (1948).

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noise ordinance violation); *Harris*, 770 F.3d at 231-2 (no exigency for warrantless entry in response to uncorroborated informant tip).

Second, the "exigency" itself cannot be *de minimis*. On the contrary, "warrants are generally required to search a person's home . . . unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). Only a "compelling" exigency, that rises to the level of "exceptional circumstances" or a "grave emergency," will permit a warrantless entry in the inner sanctum of a home. *McDonald*, 335 U.S. at 454-455.

Third, the officer isn't free to "create" an exigency. Instead, he bears the burden of proving that the "exigency" he confronted falls within one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Johnson*, 333 U.S. at 15; *Jones v. United States*, 357 U.S. 493, 499 (1958). If no established Fourth Amendment exception covers his warrantless entry, it remains presumptively and per se unreasonable.

The District Court treated Lt. Buccilli's actions as if they fell within a "welfare check" exception to the Fourth Amendment. Indeed, it went so far as to dismiss the precedential value of judicial opinions—including Supreme Court decisions—that "never discuss[] or even mention[] the concept of welfare checks or any similar term" because they contain merely "general doctrines" that are "too broad" for this case. SPA-37.

The problem is that Lt. Buccilli bears the burden of proving his warrantless entry into the Batts' home entry fell within one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Johnson*, 333 U.S. at 15. This is an essential element of proving that he is entitled to "judgment as a matter of law." FED. R. CIV. P. 56(a). And there is no Fourth Amendment exception for "welfare checks." In *Kentucky v. King*, decided almost a year before Lt. Buccilli entered the Batts' home, the Supreme Court identified only three exigencies that "may justify a warrantless search of a home." 563 U.S. 452, 460 (2011). Two of these—"hot pursuit" and the "imminent destruction of evidence"—clearly have no relevance to this case. That leaves just one exception available to officers like Lt. Buccilli: the "emergency aid exception." *Id*.

C. Lt. Buccilli's warrantless entry into the Batts' home does not qualify for the emergency aid exception.

The bottom-line is that a "welfare check" is just as unconstitutional as any other warrantless entry into a home, unless it falls within one of the "exigency" exceptions to the Fourth Amendment. In fairness to Lt. Buccilli, he never claimed any "welfare check" exception to the Fourth Amendment. He relied, instead, on the "emergency aid exception," and claimed that his "welfare check" fell within that exception. A-219. But his actions lie far beyond the pale of that exception.

1. The decision below does not discuss the emergency aid exception.

The District Court's analysis of qualified immunity consists chiefly in distinguishing two cases—*Brigham City v. Stewart*, 547 U.S. 398 (2006) and *Montanez v. Sharoh*, 444 Fed. Appx. 484 (2d Cir. 2011)—from this one. SPA-36-38. The court dismissed *Brigham* as "far too broad" and *Montanez* as "easily distinguishable," and then granted Lt. Buccilli both qualified immunity and summary judgment. SPA-37-38.

The irony is that it was Lt. Buccilli, and not the Batts, who originally suggested *Brigham* and *Montanez* were controlling. A-219-221. At one level, Lt. Buccilli's request made sense. He claims his "welfare check" falls within the "emergency aid" exception, and *Brigham* is the controlling case on that exception. Similarly, *Montanez*, while a summary order, appears to be the only case in this Circuit to refer to a warrantless entry as a "welfare check," and it was decided by a unanimous panel of this Court prior to April 2012.

The Batts readily agree that the *legal rules* presented in *Brigham* are controlling, and that those in *Montanez* are, at the very least, persuasive. A-267-268, A-270-272. Where the Batts and Lt. Buccilli *disagree* is on whether the *facts* in *Brigham* and *Montanez* are analogous to those Lt. Buccilli faced. He claims they are. A-219-221. The Batts disagree. A-267-268, A-270-272. And to the extent it

opined on the matter, the District Court agrees with the Batts that the facts in *Montanez* are "easily distinguishable" from those presented here. SPA-38.

This is no small dispute. Because the exigency exception hinges on "the facts, as they *appeared at the moment of entry*," *Klump*, 536 F.3d at 117-18, Lt. Buccilli needs to identify at least some authority for his position that the facts he encountered at the Batts' home gave rise to an exigency sufficient to trigger the emergency aid exception. Thus, the fate of his motion is tied directly to *Brigham* and *Montanez*. Without them, he loses the two cases he claims justify his warrantless search, and defaults to the rule that a warrantless entry into a home is presumptively and per se unreasonable.

The Batts' case is not so precarious. While the Batts claim *Brigham* and *Montanez* support their position, and offer Lt. Buccilli no sustenance, there is no shortage of authority for the Fourth Amendment's most basic command that a warrantless home entry is presumptively and per se unconstitutional. Nor has Lt. Buccilli pointed to any case that, upon close reading, supports his assertion of "exigent" circumstances.

2. The emergency aid exception is only available if it is objectively reasonable to believe that an emergency exists.

We begin with *Brigham City* itself, as the controlling precedent on the emergency aid exception. There, four police officers responded to a 911 call at 3 a.m. about a "melee" occurring in a home. 547 U.S. at 400. When they arrived at the

home, they heard a loud tumult from within, and observed through the screen door a juvenile strike an adult with sufficient force to draw blood. *Id.* at 400-1.

In 2006, *Brigham* presented two essential rules. First, even in the "emergency aid" context, any legal analysis begins with the "'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable,' . . . unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 403, *quoting Groh*, 540 U.S. at 559, *Payton*, 445 U.S. at 586, *and Mincey*, 437 U.S. at 393-4. A warrantless entry to render emergency aid may fall within an *exception* to the basic rules of the Fourth Amendments; it isn't *exempt* from those rules.

Montanez's summary order affirms this as well. The decision opens its Fourth Amendment analysis with *Payton's* general rule, then lists emergency aid as one of the "certain exceptions" to it, citing both *Brigham* and this Court's 1998 decision in *Tierney v. Davidson*, 133 F.3d 189 (2d Cir. 1998). *See Montanez*, 444 Fed. Appx. at 486. *Tierney*, which is not a summary order, involved a warrantless entry into a home under the emergency aid exception, and began its analysis with the "basic rule" that "[w]arrantless searches inside a home are presumptively unreasonable." *Tierney*, 133 F.3d at 196, *quoting Payton*, 445 U.S. at 586.

These decisions all held that the "emergency aid" exception was subject to traditional Fourth Amendment rules, including the presumption that warrantless entries into a home are per se unreasonable. Combined with other like decisions in this Circuit, they provided ample notice to Lt. Buccilli.

The second essential rule in *Brigham* is that the proffered "emergency" must be clear, obvious, articulable, and imminent at the moment the officers enter the home. When the *Brigham* officers arrived at the home, they "could see that a fracas was taking place inside the kitchen" which had "sen[t] [an] adult to the sink spitting blood." *Id.* at 406. "In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." *Id.* at 406. This made "the officers' entry here . . . plainly reasonable under the circumstances." *Id.*

The importance of "these circumstances" to the Court's decision cannot be overstated. The *Brigham* court distinguished its decision from the outcome of *Welsh v. Wisconsin*, which also involved a warrantless entry into a private home. *Welsh*, like *Brigham*, begins with the "axiomatic" principle that "searches and seizures inside a home without a warrant are presumptively unreasonable." 466 U.S. at 749. But unlike *Brigham*, the officers in *Welsh* did not confront any "emergency" that justified a departure from the warrant requirement. "There [in *Welsh*]," the *Brigham* Court explained, "the 'only potential emergency' confronting the officers

was the need to preserve evidence (*i.e.*, the suspect's blood-alcohol level)—an exigency that we held insufficient under the circumstances to justify entry into the suspect's home." *Brigham*'s circumstances were entirely different. "Here, the officers were confronted with *ongoing* violence occurring *within* the home. *Welsh* did not address such a situation." *Brigham*, 547 U.S. at 405 (emphasis in original).

Tierney and *Montanez* faithfully follow this rule. In *Tierney*, the police came to the home after receiving a report that a bad domestic dispute was in progress. 133 F.3d at 192, 197. Outside the home, they encountered two men who reported that they had "heard screaming and banging up until [the officer's] approach." *Id.* at 192. The officer then noticed a broken pane of glass near the door, and reasoning that the silence in the home could mean someone had been injured or worse in the scuffle, he reached through the broken pane, unlocked the door, and entered the residence. *Id.* at 192-3. Given what the officer knew at the time, this Court found it reasonable for the officer "to believe that someone inside had been injured or was in danger, that both antagonists remained in the house," and that there was an emergency. *Id.* at 196-7.

In *Montanez*, police assisted case workers from the Department of Children and Families in performing a "welfare check" on the safety of children in a home without prior judicial approval. This Court applied the emergency aid exception, but only after finding multiple exigencies. Mere hours before, police had "seiz[ed]

. . . guns and drugs that were easily accessible to children" pursuant to a valid search-and-seizure warrant, including "three loaded 30-round magazines, two empty 30-round magazines, one handgun holster, and two boxes of ammunition (.22 and .380 caliber)." *Montanez*, 444 Fed. Appx. at 487. They also found "one Uzi 9mm pistol," which did not fit the holster. *Id*. Montanez had been asked to return home earlier in the day, but didn't show, leading the police to put out an APB for him under suspicion that he was armed and dangerous. *Id.*

These facts, combined with DCF's disclosure that there was a history of DCF involvement with the occupants of Montanez's home, prompted the police to provide an escort to the case workers and, upon arriving at the Montanez home, perform a brief sweep of the residence to determine if Montanez was inside, without first obtaining a warrant. *Id.* at 487 & n. 1. Given what the officers observed at the home while executing the search warrant, and the information gained from DCF, this Court held "[i]t was objectively reasonable for [the officers] to believe that Montanez may have been at the residence and that he posed a threat to not only the child, but also to the DCF worker attempting to conduct a welfare check." *Id*. at 487. That exigency was strong enough to overcome the weighty constitutional presumption against warrantless home searches.

Taken individually and collectively, *Brigham*, *Tierney*, and *Montanez* forcefully illustrate the level of "exigency" that animates the emergency aid exception.

And they are representative of a much larger body of law. The Eleventh Circuit, summarizing the state of the law as it existed on March 1, 2011, noted that while "courts have held police officers' belief that someone inside a home needs immediate assistance objectively reasonable under various circumstances," "these circumstances have in common the indicia of an urgent, ongoing emergency, in which officers have received emergency reports of an ongoing disturbance, arrived to find a chaotic scene, and observed violent behavior, or at least evidence of violent behavior." *United States v. Timmann*, 741 F.3d 1170, 1179 (11th Cir. 2013).

In other words, "indicia of an urgent, ongoing emergency" is the hallmark of the emergency aid exception. *Id.* at 1180. This was clearly established in April 2012. *See Kerman*, 261 F.3d at 236 (distinguishing "the level of suspicion required for a Terry stop," which "is obviously less demanding than for probable cause," from the standard for a warrantless home entry, where "[p]robable cause for a forced entry in response to exigent circumstances requires finding a probability that a person is in 'danger'"), *quoting Tierney*, 133 F.3d at 196-7 *and Alabama v. White*, 496 U.S. 325, 330 (1990).

3. Neither Lt. Buccilli nor the District Court identified any urgent, ongoing emergency leading up to Lt. Buccilli's warrantless entry.

In his original motion for summary judgment, Lt. Buccilli tried to cast the events of April 17, 2012 as an "urgent, ongoing emergency." But to do so, he had

to cherry-pick facts favorable to him—most of which came to light only in the hindsight of discovery—while simultaneously ignoring other less-favorable entries in the discovery record. He pointed to allegations that Fred Puntoriero was "lethargic, unfocused, and possibly dehydrated," and his "condition was an urgent concern and could be fatal." A-214. He claimed there was a "report from Adult Protective Services that Mr. Puntoriero, an elderly unhealthy individual was in imminent danger." A-220. He twice suggested a possibility of death in the Batt home. A-220-221. And he never addressed his recorded statement on April 17th, where he claimed to know none of these things. Of course, the facts most favorable to the Batts paint a very different picture. And if Lt. Buccilli's motion depends on the facts most favorable to *him*, then it fails as a matter of law. *Tolan*, 134 S. Ct. at 1863.

Not only that, but "[t]he 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." *Klump*, 536 F.3d at 117-18 (emphasis added) (citation and internal quotation marks omitted). When Lt. Buccilli arrived at the Batts' home:

- He didn't know about Annette's allegations of dehydration, lethargy, or dementia;

- He didn't know that Fred Puntoriero had been diagnosed in 2009 for failure to thrive, while living with Joseph and Annette Puntoriero;
- He didn't know about Annette's claim that Fred hadn't been seen in two weeks; and
- He didn't know that a family member had placed the call.

All this came out in discovery—as did the fact that Annette had never visited Fred Puntoriero at the Batts' home, her allegations were untrue, and her call was prompted by improper motives. But at the moment of entry, all Lt. Buccilli knew was that APS had asked the police to conduct a welfare check.

The mere fact that somebody from APS asked the police to conduct a welfare check, without more, does not establish an urgent, ongoing emergency. Even Lt. Buccilli's own expert agrees on this point. In his deposition, Mr. Leach was asked, "Officer Buccilli, if when he arrived knew only that there was a request for a welfare check and he arrived and Joseph wouldn't let him in the house, would that be sufficient for him to enter the house?" Mr. Leach replied, "Would that be enough to make -- I don't think without doing a further check with the agency to find out a little bit more of the circumstances, then I don't think that would probably be the appropriate thing to do at the time." A-172.

The expert's opinion on this point is consistent with clearly established law. In preparing his report, Mr. Leach reviewed various materials prepared for litiga-

tion, as well as an article entitled "Exigent Circumstances," published in the Winter 2010 issue of *Point of View*.[5] A-193. When discussing when concerns about "sick or injured person[s]" rise to the level of an "imminent danger," the article opines that officers "certainly may [enter a residence] if they reasonably believed that the person needed immediate aid," but that "officers may not enter a residence merely because they reasonably believed that someone inside was sick or injured." "Exigent Circumstances" at 5.

"In most cases," the article suggests, "such a belief will be based on direct evidence," *id.* at 5, although "[t]he existence of an emergency may also be based on circumstantial evidence" known and collected by the officers. *Id.* at 6. *Brigham* is clearly an example of direct evidence: when the officers arrived on the scene, they observed a "fracas" in the interior that drew blood. *Tierney* and *Montanez* are examples of circumstantial evidence: the officers didn't observe an in-progress emergency, but they did observe evidence that strongly suggested that an emergency situation was present inside the home (the evidence of an in-progress burglary in *Tierney*, and the missing handgun and missing suspect in *Montanez*).

Here, Lt. Buccilli clearly didn't have direct evidence. When he was dispatched, Lt. Buccilli knew only that APS had requested a welfare check, and when

[5] Alameda County Office of the District Attorney, "Exigent Circumstances," *Point of View* 1-20 (Winter 2010), *available at* http://le.alcoda.org/publications/point_of_view/files/ POV_Winter2010.pdf (accessed August 4, 2017) (hereinafter "Exigent Circumstances").

he and Officer Kadi arrived, they certainly didn't witness an in-progress emergency. They didn't see Fred Puntoriero passed out in the home, or any other danger to the welfare of its occupants. And any circumstantial evidence they collected was innocuous at best. While there are genuine evidentiary disputes about what Joseph Batt did and didn't tell Lt. Buccilli in the driveway, there's no dispute that the lieutenant didn't feel threatened by Joseph. Nor is there any indication that Joseph said anything or did anything that led Lt. Buccilli to believe he was going to harm Fred Puntoriero as he retreated into the Batt home for a private phone call. All Lt. Buccilli learned was that Mr. Puntoriero was in the house, LuAnn was a nurse, a nurse's aide had been there just a few hours before, Joseph Batt was going inside to make a private call, and Lt. Buccilli didn't have permission to enter. If anything, this mitigated the threat of an "ongoing emergency" within the home. It isn't sufficient "circumstantial evidence" to prove that an immediate warrantless entry was necessary to safeguard Fred Puntoriero's life and well-being.

This Court has opined at least twice on how officers should conduct themselves in cases such as this one, when the evidence before the officer doesn't rise to the level of an emergency. In *Kerman*, decided in 2001, this Court declined to apply the emergency aid exception to officers who stormed into an apartment without a warrant in response to a 911 call. 261 F.3d at 232-3. But there were problems with the 911 call—it lacked sufficient "indicia of reliability"—and the police

failed to "conduct any investigation to confirm the call" prior to entering the home. *Id*. at 235-6. This didn't create the level of urgency required to trigger the emergency aid exception.

Harris v. O'Hare, which discussed the state of the emergency aid exception as it existed in 2006, reached a similar conclusion. The court declined to extend the exception to officers who entered a home without a warrant based on a tip from a parolee. 770 F.3d at 227, 233-4. Again, the initial information obtained by the police was limited, and wasn't corroborated at the scene. When the officers arrived at the scene, they proceeded directly into the yard and house without stopping to perform an independent investigation to corroborate the tip. *Id.* at 227-8. This Court held that when the officers arrived at the home, they were not "confronted by an urgent need to render aid or take action," giving them sufficient time to investigate before they forced their way into the home. They chose not to do so, which proved disastrous; there was "simply insufficient evidence to warrant the application of the exigent circumstances exception" to their warrantless search. *Id.* at 233-4.

The Batts discussed both *Kerman* and *Harris* at length in their original opposition to Lt. Buccilli's motion for summary judgment. A-272-275. Both cases clearly directed Lt. Buccilli that when he arrived at the Batts' home and did not observe any emergency, the reasonable thing to do was to search for more evidence instead of forcing his way in. And he had multiple avenues to do so. Lt. Buccilli

could have requested additional information from APS—perhaps the specific allegations that had been made, or the relationship of the caller to Mr. Puntoriero, all of which he claimed he didn't know at the moment of entry. He could have investigated Joseph Batt's assertion that a nurse's aide had been at the home to care for Mr. Puntoriero only a few hours before. He could have sought contact information for LuAnn Batt to corroborate Joseph Batts' account that she was trained as a nurse.

Most importantly, if Lt. Buccilli had believed Mr. Puntoriero was in any immediate danger, he could have availed himself of the fact that both the Orchard Park Courthouse and the Erie County Court were open and in session, and New York law makes available to officers an expedited process to obtain an access order if they reasonably believe an individual's welfare is at stake. *See* N.Y. [Social Services] Law § 473-c(1) – c(2) (2014). What Lt. Buccilli *couldn't* do was forcibly enter the Batts' home, based on the limited information he possessed. That's the course of action he chose. And that course of action was patently illegal on April 17, 2012.

Tellingly, the Magistrate could only find "indicia of an urgent, ongoing emergency" by cherry-picking disputed facts, all of which he resolved in Lt. Buccilli's favor. A-361-369. This, of course, violates *Tolan*. And the District Court, while acknowledging Lt. Buccilli's admissions in the video recording that

he knew virtually nothing about Fred Puntoriero's situation, still failed to identify any "indicia of an urgent, ongoing emergency" in the facts that might justify a warrantless intrusion into a home. *Timmann*, 741 F.3d at 1179.

This omission kills Lt. Buccilli's defense. If there are no particular, articulable indicia of an urgent, ongoing emergency in the summary judgment record, his warrantless search *cannot* fall within the emergency aid exception. It cannot overcome the constitutional presumption of *per se* unreasonableness. On the contrary, it is patently illegal. An officer cannot receive qualified immunity—whether at summary judgment or at trial—for a patently illegal search. And there is no evidence of an urgent emergency in the summary judgment record.

II. Lt. Buccilli is not entitled to summary judgment.

Since *Brigham* was decided, this Court has encountered its fair share of difficult Fourth Amendment cases. And in the fact-specific context of the Fourth Amendment, it is likely to do so again. But this isn't a difficult case. The question in this case is simple: was Lt. Buccilli's warrantless entry and welfare check in the Batts' home justified by the exigent circumstances exception to the warrant requirement? The "basic rule[s]" that govern that situation are among the clearest in the Constitution. Had the District Court followed those rules, it would not have granted summary judgment to Lt. Buccilli.

A. The District Court came perilously close to requiring a case "on all fours" to deny Lt. Buccilli qualified immunity.

On April 17, 2012, "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh*, 540 U.S. at 564. This case clearly falls within that "basic," "well established" rule. There is no dispute that Lt. Buccilli entered a private home. He did so knowing he didn't have consent, and without a warrant. That search is therefore presumptively unconstitutional, unless "the exigencies of the situation made that course imperative," *Coolidge*, 403 U.S. at 455, and that exigency is both "compelling," *Mincey*, 437 U.S. at 393-94, and falls within one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Johnson*, 333 U.S. at 15; *Jones*, 357 U.S. at 499. There is no "welfare check" exception to the Fourth Amendment. And Lt. Buccilli did not carry his burden of proving his warrantless entry fell within the emergency aid exception to the warrant requirement.

But the decision below deemed these rules "too general," looking instead for a case that addressed a "welfare check" on an elderly adult (not merely "the emergency aid doctrine"), a request from APS (or a similar agency), a 911 call from APS to the police, a call from a family member of the individual allegedly at risk to APS (or a similar agency), and a plaintiff who refused to let an officer see the individual who was allegedly in distress. SPA-38. If a precedent didn't include all

of these elements (or, in the case of *Brigham*, used the phrase "emergency aid exception" instead of "welfare check"), it ran the risk of being "too general to put Lt. Buccilli on notice under the specific facts and circumstances of this case," and wasn't considered. SPA-38.

This, of course, is not the standard for qualified immunity. "[I]t has never been required that the right be defined so narrowly as to require precedent that is 'on all fours' . . ." *Vega v. Miller*, 273 F.3d 460, 477 (2d Cir. 2001). On the contrary, "[a] prior judicial decision holding conduct such as [Lt. Buccilli's] to be a basis for suit [is] not necessary to apprise [him] of a rule which should come as no surprise. . . ." *Selzer v. Fleisher*, 629 F.2d 809, 812 (2d Cir. 1980). *See also Jeffries v. Harleston*, 21 F.3d 1238, 1248 (2d Cir. 1994) *vacated on other grounds*, 115 S. Ct. 502 (Mem) (1994) ("The defendants, in effect, believe they can act as they choose until there is a case on all fours. We reject such jural insouciance. The defendants should have known their actions were illegal from the decisions reproving closely analogous conduct").

B. The District Court failed to follow Mullenix v. Luna.

The District Court relied heavily on *Mullenix v. Luna* to conclude that no clearly established law spoke to Lt. Buccilli's actions. SPA-33-35. But a close examination reveals that in its zeal to follow *Mullenix*, the decision below departs from its most basic rule.

The Supreme Court has repeatedly held that qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 201-2 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The rule is illustrated vividly in *Mullenix*, where the Supreme Court considered whether a police officer who fatally shot the driver of a car during a high-speed chase was entitled to qualified immunity. 136 S. Ct. at 306-7. The totality of circumstances in that case was expansive. The chase on a lightly-trafficked interstate lasted 18 minutes, at speeds of between 85 and 110 miles per hour. *Id.* at 306. Twice during the chase, the driver had claimed to have a gun and threatened to shoot the police if they continued their pursuit. *Id*. The officer who fired had not received training in shooting out the tires of a high-speed automobile. *Id.* Six shots were fired, just as the car arrived at a spike strip. *Id.* at 307. The driver was killed by four bullets, which struck his upper body. *Id.*

Under *Saucier* and *Brousseau*, all of these details should have factored into the Fifth Circuit's analysis of qualified immunity. Instead, the court of appeals merely held that "Mullenix violated the clearly established rule that a police officer

may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'" *Id.* at 308-9. The Supreme Court reversed, holding that "[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* at 308. Pointing back to *Brousseau*, the Court explained that "[t]he correct inquiry . . . was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted.'" *Id.* at 309, *quoting Brousseau*, 543 U.S. at 199-200.

The Court then spelled out the situation confronted by Officer Mullinex: "Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road." *Mullenix*, 136 S. Ct. at 309. Given these circumstances, "[t]he relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances 'beyond debate.'" *Id.*, *quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Juxtaposed with these specific facts, the Court unremarkably concluded that "[t]he general principle that deadly force requires a sufficient threat hardly settles this matter." *Mullenix*, 136 S. Ct. at 309.

Although the decision below clearly wishes to follow *Mullenix*, the execution misses the mark. The District Court reduced qualified immunity to this question: "when performing a welfare check on an individual in response to a request

from adult protective services (or a similar agency), may a police officer enter a location to determine the welfare of that individual?" SPA-38. But this question omits at least three vital details in the "situation [Lt. Buccilli] confronted," *Mullenix*, 136 U.S. at 309: Lt. Buccilli performed a welfare check in the Batts' private home, he did so without consent or a warrant, and he didn't know or observe any emergent facts prior to his forcible entry. Each of these details is essential to understanding both the factual and legal situation he confronted on April 17, 2012.

As has already been explained at length, each of these critical details should have raised essential constitutional issues that the District Court wasn't free to ignore. By failing to discuss them, the decision below severely mischaracterized the heavy burden that Lt. Buccilli bore under the Fourth Amendment, and failed to apply the stringent burden of proof that attaches to officers who enter homes without warrants. This renders the court's immunity analysis constitutionally defective as a matter of law.

C. Lt. Buccilli's warrantless entry was clearly illegal on April 17, 2012.

The proper question is whether the *contours* of the Fourth Amendment were clear enough on April 17, 2012 that a police officer in Lt. Buccilli's situation would have known he couldn't enter the Batt home to conduct a welfare check without first obtaining consent or a warrant. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). They clearly were.

Lt. Buccilli wanted to enter a home without consent or a warrant. But in 2004, the Supreme Court said that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh*, 540 U.S. at 564. In 2001, it had warned that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained," that "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much." *Kyllo*, 533 U.S. at 37.

During litigation, Lt. Buccilli claimed his entry fell within the emergency aid exception. But at the time, he said "all [he] knew" was that APS had asked the police to perform a welfare check. In marked contrast, the Supreme Court held as early as 1948 that there is no exception to the warrant requirement unless there is a "compelling" exigency that rises to the level of "exceptional circumstances" or a "grave emergency." *McDonald*, 335 U.S. at 454; *Mincey*, 437 U.S. at 393-94. It had clarified in 2006 that the "emergency aid" exception extends only to "ongoing" emergencies within the home, not "potential emergenc[ies]" that the officer don't comprehend at the moment of entry. *Brigham*, 547 U.S. at 405.

Lt. Buccilli also had guidance from this court. On the one hand, both *Tierney* and *Montanez* had applied the emergency aid exception only when the officers observed clear, articulable evidence of an emergency—a burglary-in-progress, and a

missing suspect with a missing firearm. *Tierney*, 33 F.3d at 196-7; *Montanez*, 444 Fed. Appx. at 487. On the other, *Kerman* and *Harris* had rejected an emergency aid defense when the officers didn't observe any emergent circumstances on the scene, and refused to engage in further investigation to corroborate their tips, prior to bursting into a private residence. *Kerman*, 261 F.3d at 235-6; *Harris*, 770 F.3d at 233-4.

There's no doubt "exigency" is a fact-dependent sliding scale. There's also no doubt that the circumstances Lt. Buccilli confronted on April 17th were no more "emergent" than those in *Kerman* and *Harris*, and worlds away from those in *Tierney* and *Montanez*. Even the District Court seems to agree. SPA-37 (finding *Montanez* "easily distinguishable" from the present case). Even so, Lt. Buccilli felt he could forcibly enter the Batts' home without a warrant under the emergency aid exception. No reasonable officer—including Lt. Buccilli's own expert—would have agreed.

CONCLUSION

On April 17, 2012, numerous Supreme Court cases—including *Payton*, *Kyllo*, *Kirk*, and *Groh*—condemned warrantless entries into the home in the strongest language possible. *McDonald*, *Mincey*, and *Brigham* all clarified that this condemnation must be overcome even by officers in "emergency aid" cases. This Court had twice explained what warranted the "emegency aid" exception, in *Tier-*

ney and *Montanez*. And it had twice explained what *didn't* warrant it in *Kerman* and *Harris*.

Had a reasonable officer looked beyond this circuit, the answer would have been the same. Across the land, the circumstances confronted by officers in emergency aid cases "have in common the indicia of an urgent, ongoing emergency, in which officers have received emergency reports of an ongoing disturbance, arrived to find a chaotic scene, and observed violent behavior, or at least evidence of violent behavior." *Timmann*, 741 F.3d at 1179. And if the officer was *still* in doubt about whether his specific circumstances qualified as "an urgent, ongoing emergency," a tailor-made, expedited process to obtain an "access order" from a neutral magistrate was available. N.Y. [Social Services] Law § 473-c(1) – c(2) (2014).

Lt. Buccilli transgressed the Fourth Amendment when he forcibly entered the Batts' home. The contours of the Batts' Fourth Amendment rights were clearly established law in April 2012, putting reasonable officers on notice that their actions were illegal. *Jeffries*, 21 F.3d at 1248. The District Court's decision to the contrary is clearly erroneous as a matter of law and should be reversed. Lt. Buccilli has not proven he is entitled to qualified immunity. The Batts are entitled to their day in court on their Fourth Amendment claims.

Respectfully submitted this 4th day of August, 2017:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of August, 2017, I caused this Brief of Appellants with Special Appendix and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 4th day of August, 2017, I caused the required number of bound copies of the Brief of Appellants with Special Appendix and Joint Appendix to be filed with the Clerk of the Court via UPS Next Day Air.

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Counsel for Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: August 4, 2017

/s/ James R. Mason,III
Counsel for Appellants

RECORD NO.

17-1210

In The
United States Court of Appeals
For The Second Circuit

LUANN BATT, JOSEPH BATT, TIMOTHY BATT,

Plaintiffs – Appellants,

v.

JOSEPH BUCCILLI, in his personal capacity,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF NEW YORK AT BUFFALO

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY BATT,
LUANN BATT, and
JOSEPH BATT,

Plaintiffs,

v.

JOSEPH BUCCILLI,

Defendant.

REPORT
and
RECOMMENDATION

12-CV-01198G(F)

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JURISDICTION

This case was referred to the undersigned on February 5, 2013, by Honorable Richard J. Arcara.[1] The matter is presently before the court on motions for summary judgment filed by Defendant on December 15, 2014 (Dkt. 32), and by Plaintiff on January 30, 2015 (Dkt. 35).

BACKGROUND

On December 4, 2012, Plaintiffs Timothy Batt ("Mr. Batt"), LuAnn Batt ("Mrs. Batt"), and Joseph Batt ("Joe Batt") (together, "Plaintiffs" or "the Batts"), commenced this action pursuant to 42 U.S.C. § 1983, alleging Defendant Orchard Park Department of Police Lieutenant Joseph Buccilli ("Defendant" or "Buccilli"), violated their Fourth Amendment rights against unreasonable searches on April 17, 2012, when Buccilli entered the Batts' home without permission and in the absence of exigent circumstances, to conduct a welfare check on Mrs. Batts' father, Fred Puntoriero ("Puntoriero"). Defendant's answer (Dkt. 5), was filed February 4, 2013.

On December 15, 2014, Defendant filed a motion for summary judgment (Dkt. 32) ("Defendant's Motion"), attaching the Affidavit of Paula M. Eade Newcomb, Esq., in Support of Summary Judgment Motion (Dkt. 32-1) ("Newcomb Affidavit"), Defendant's Memorandum of Law in Support of Motion for Summary Judgment (Dkt. 32-15) ("Defendant's Memorandum"), a Rule 56 Statement of Uncontested Facts (Dkt. 32-16) ("Defendant's Statement of Facts"), and exhibits A through N (Dkts. 32-2 through 32-14, and Dkt. 33 (manually filed video and audio tapes)). On January 30, 2015, Plaintiffs filed a cross-motion for summary judgment (Dkt. 35) ("Plaintiffs' Motion"), attaching

[1] This matter has since been reassigned to Honorable Lawrence J. Vilardo, March 7, 2016 Text Order (Dkt. 43), and further reassigned to Chief District Judge Frank P. Geraci, Jr. April 8, 2016 Text Order (Dkt. 44).

Plaintiffs' Memorandum in Opposition to Defendant's Summary Judgment Motion and in Support of Plaintiffs' Cross-Motion (Dkt. 35-1) ("Plaintiffs' Memorandum"), Plaintiffs' Rule 56(a)(1) Statement of Uncontested Facts in Support of Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 35-2) ("Plaintiff's Statement of Facts"), the Affidavit of Counsel James R. Mason, III, in Support of Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 35-19) ("Mason Affidavit"), and an appendix of exhibits filed in 16 parts (Dkts. 35-3 through 35-18) ("Plaintiffs' Exh(s). __, Appendix Pt. __ at __"). Also filed on January 30, 2015, was Plaintiffs' Memorandum in Opposition to Defendant's Summary Judgment Motion and in Support of Plaintiffs' Cross-Motion (Dkt. 36) ("Plaintiffs' Response"),[2] attaching Plaintiffs' Rule 56(a)(2) Opposing Statement of Uncontested Facts and Statement of Additional Material Facts (Dkt. 36-1) ("Plaintiff's Opposing Statement of Facts").

On March 2, 2015, Defendant filed the Affidavit of Paula M. Eade Newcomb, Esq., in Opposition to Plaintiffs' Motion for Summary Judgment and in Further Support of Defendant's Motion for Summary Judgment (Doc. No. 38) ("Newcomb Response Affidavit"), Defendant's Memorandum of Law in Further Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 39) ("Defendant's Response"), Defendant's Reply to Plaintiffs' Statement of Uncontested Facts (Dkt. 40) ("Defendant's Opposing Statement of Facts"), and Defendant's Reply to Plaintiffs' Statement of Contested and Uncontested Facts in Opposition Set Forth in Opposition to Defendant's Motion for Summary Judgment (Dkt. 41) ("Defendant's Reply Statement of Facts"). On March 16, 2015, Plaintiffs filed

[2] The court notes that the same document has been filed as Plaintiffs' Memorandum (Dkt. 35-1) and as Plaintiffs' Response (Dkt. 36).

Plaintiffs' Reply Memorandum of Law (Dkt. 42) ("Plaintiffs' Reply"), attaching the Affidavit of Counsel James R. Mason, III, in Support of Plaintiffs' Cross-Motion for Summary Judgment (Dkt. 42-1) ("Mason Reply Affidavit"), and the Affidavit of Peter K. Kamakawiwoole, Jr., Esq. (Dkt. 42-2) ("Kamakawiwoole Affidavit"). Oral argument was deemed unnecessary.

Based on the following, Defendant's Motion should be GRANTED; Plaintiffs' Motion should be DENIED. The Clerk of the Court should be directed to close the file.

FACTS[3]

This action arises out of a police welfare check ("the welfare check"),[4] performed by Defendant Joseph Buccilli ("Buccilli"), a Lieutenant with the Orchard Park Police Department in Orchard Park, New York ("Orchard Park"), at a home located at 3122 Bieler Road, in Orchard Park ("Batts' home"), on April 17, 2012. Residing at the Batts' home at the time of the welfare check were Plaintiffs Timothy Batt ("Mr. Batt"), LuAnn Batt ("Mrs. Batt"), and Joseph Batt ("Joe Batt") (together, "Plaintiffs"), additional children Gianna Batt ("Gianna Batt"), Veronica Batt ("Veronica Batt"), and Anthony Batt ("Anthony Batt"), and the 82-year old father of Mrs. Batts, Fred Puntoriero ("Puntoriero"), who moved into the Batts' home in December 2011. Puntoriero had previously lived in his own home in Depew, New York ("the Depew home").

[3] Taken from the pleadings and motion papers filed in this action.

[4] A "welfare check" occurs when a police officer is directed to check on the well-being of a person – usually a senior citizen – whom the police have a reason to believe, based on a report received from a third party – often a relative or friend – is injured or in danger. *See* What is a police welfare check?, available at https://www.reference.com/government-politics/police-welfare-check-351b1aea09018746#, last visited July 12, 2016.

In 2009, Puntoriero, then living on his own in his Depew home, was taken to Millard Fillmore Suburban Hospital in Amherst, New York, a local hospital ("the hospital"), where he was diagnosed with "failure to thrive" based on Puntoriero's inability to adequately eat and drink to maintain his health. Mrs. Batt Dep. Tr[5]. at 31-32. Because the hospital refused to discharge Puntoriero to return to live alone in his Depew home, requiring Puntoriero either enter assisted living or live with a family member, Puntoriero initially moved into the Batts' home. In January 2010, however, the decision was made that because the Batts still had a number of children living in the home, whereas Puntoriero's son Joseph ("Joseph Puntoriero"), and Joseph Puntoriero's wife (and Puntoriero's daughter-in-law), Annette ("Annette Puntoriero"), did not then have any children living in their home, Puntoriero would return to his Depew home into which Joseph and Annette Puntoriero would also move to provide care to Puntoriero.

Although Puntoriero's health was good for the rest of 2010, with the exception of some mild dementia, in 2011, Puntoriero's health began to fail with Puntoriero becoming depressed, requiring the use of a walker, and having a poor appetite. On February 28, 2011, while Joseph and Annette Puntoriero were living with Puntoriero in the Depew home, Puntoriero signed a deed transferring ownership of the Depew home to Joseph Puntoriero and reserving to Puntoriero a life estate. Mrs. Batt, who was Puntoriero's power of attorney, was unaware of the transaction. Puntoriero was hospitalized in March and July 2011. In August 2011, Puntoriero passed out while in the Depew home and was sent by Annette Puntoeriero, unaccompanied, to the emergency room at the hospital. It was then decided that Puntoriero would move back into the Batts' home

[5] References to "Mrs. Batt Dep. Tr." are to the page of the transcript of Mrs. Batt's deposition, filed as Defendant's Exh. F (Dkt. 32-7).

because caring for Puntoriero had proven to be too much for Joseph and Annette Puntoriero. Puntoriero moved into the Batts' home in December 2011. While living in the Batts' home, Puntoriero, who had dementia and was wheelchair bound, was primarily cared for by Mrs. Batt, who is a registered nurse, but also received Hospice care from a nurse's aide several times a week.

On April 17, 2012, Annette Puntoriero placed a telephone call to the Erie County Department of Social Services ("DSS"), Adult Protective Services ("APS"), advising that on April 16, 2012, family members had been denied access to Puntoriero who, the last time he was seen, appeared very lethargic and dehydrated.[6] APS Senior Case Worker Donna Locicero ("Locicero"), contacted the Orchard Park Police Department via the 911 emergency call number, reported APS had received a call from a daughter-in-law who was concerned about the welfare of her father-in-law who lived with his daughter and son-in-law. According to Locicero, the previous day Puntoriero's son, Joseph, had been denied access to Puntoriero, and the son had not seen his father since April 2nd or 3rd, at which time Puntoriero appeared lethargic and dehydrated. Locicero, identified Annette Puntoriero as the person who made the complaint, provided Annette Puntoriero's telephone number, and requested the Orchard Park Police Department conduct a welfare check on Puntoriero at the Batts' home for which Locicero provided the address along with one of the homeowners' names, specifically, LuAnn Batt. Orchard Park Police Lt. Buccilli and Officer Kadi ("Kadi")[7] (together, "the police officers"), traveling in separate police patrol vehicles, were dispatched to the Batts' home to conduct the welfare check on Puntoriero as requested by APS based on the

[6] Annette Puntoriero's report included no explanation of the circumstances of the denial, later described by Mrs. Batt as pertaining to a property dispute with Joseph Puntoriero. *See* Discussion, *infra*, at18.
[7] Kadi is not a Defendant to this action.

concerns of a family member for Puntoriero's health and the fact that a family member had recently been denied access to Puntoriero. Officer Kadi arrived first at 4:30 P.M. on April 17, 2012, and parked in the driveway to the Batts' home, and Buccilli, who arrived about 30 seconds later, also parked in the driveway behind Kadi. Buccilli and Kadi had been advised by Orchard Park Police dispatch only that a call had been received from APS which had received a call from a family member who was "gravely concerned" about having been denied access to an elderly male family member for "almost two weeks." Buccilli Deposition Tr.[8] at 36.

Also on April 17, 2012, Punterioro was in the Batts' home while Mr. Batt was at work and Mrs. Batt was running errands. A health care worker had been at the Batts' home earlier in the day to check on Mr. Puntoriero's condition, but had departed by the late afternoon when Joe Batt, then 23 years old, was responsible for Puntoriero's care when Defendant arrived. Also present in the Batts' home at that time were Joe Batt's younger siblings Gianna, Veronica, and Anthony Batt, all teenagers with Anthony the youngest.

Upon arriving at the Batts' home, Buccilli and Kadi were met in the driveway by Joe Batt who had no idea why the police were there and identified himself only as "Joe" who lived in the house. Joe Batt Dep. Tr.[9] at 36-37, 44-45, 55. In response to Buccilli and Kadi's explanation that they were there to conduct a welfare check on Puntoriero in response to a request by APS based on a confidential call, Joe Batt maintains he advised that a nurse's aide had just left, thereby confirming that Puntoriero lived there.

[8] References to "Buccilli Dep. Tr." are to the page of the transcript of Buccilli's deposition, filed as Defendant's Exh. C, Dkt. 32-4.
[9] References to "Joe Batt Dep. Tr." are to the page of the transcript of Joe Batt's deposition, filed as Defendant's Exh. E, Dkt. 32-6.

Id. at 45-46. When Buccillo and Kadi replied that they still needed to check on Puntoriero's welfare, Joe Batt stated he first needed to make a telephone call and asked the officers to remain outside. *Id*. at 48-49, 55. Buccilli asked Joe Batt to bring Puntoriero outside or to a window but Joe Batt continued to refuse to allow Buccilli and Kadi to see his grandfather, Puntoriero. Buccilli Dep. Tr. at 42. Buccilli also asked Joe Batt to provide a telephone number for a parent or homeowner for the residence, but Joe Batt did not cooperate with the request and instead walked back toward the home. Joe Batt entered the home through a side door and attempted to slam the door on the officers who were closely following, but was prevented by Buccilli who stuck his foot in the door. Buccilli and Kadi then entered through the side door of the Batts' home into the kitchen and explained they were there to conduct a welfare check on Puntoriero and did not intend to search the home. According to Buccilli, the police officers' entry into the Batts' home was pursuant to the Orchard Park Department of Police standard policy that police officers responding to a welfare check dispatch would proceed to the designated home so long as some allegation of reasonable concern had been made. Buccilli Dep. Tr. at 38-39. Once the officers were inside the kitchen, Joe Batt began recording the incident with his cell phone's video camera. While the video camera was running, Joe Batt argued with the police officers as to whether they were lawfully present inside the Batts' home, asserting no exigent circumstances justified their presence, Joe Batt Dep. Tr. at 60-61, to which Buccilli informed he was there with respect to a call placed to APS. *Id*. at 63. Joe Batt maintains he did not think it was reasonable for the police officers to conduct a warrantless welfare check on Puntoriero based solely on a complaint received by APS. *Id*. at 73.

While the police officers were in the Batts' home's kitchen arguing with Joe Batt, Anthony Batt placed a telephone call to another brother, Dan Batt ("Dan Batt"), who is employed as a Secret Service Agent stationed in Buffalo, New York. Joe Batt Dep. Tr. at 64-67. Buccilli spoke with Dan Batt, advising no warrant was necessary to perform a welfare check. *Id*. at 66-67. Eventually, Anthony Batt showed Buccilli into the living room where Puntoriero was seated in an armchair. Joe Batt then did not obstruct the officers from conducting the welfare check on Puntoerio, but he did repeat that the officers did not have permission to do so. *Id*. at 68-69.

Buccilli chatted with Puntoriero for several minutes, advising he was there in connection with an APS complaint made by a family member concerned about Puntoriero's welfare. Buccilli observed that despite appearing frail, Puntoriero was well dressed and groomed, with a bowl of soup next to him, and that the residence appeared orderly with nothing causing Buccilli to believe any immediate action was needed other than to refer the matter back to APS for follow-up. Buccilli Dep. Tr.aat 50-51. Joe Batt used his cell phone to videotape Buccilli's conversation with Puntoriero. Prior to exiting the premises, Buccilli wrote down and provided Joe Batt with the complaint number for the welfare check, and then advised Orchard Park Police dispatch of the welfare check result, including that Puntoriero appeared to be in a good environment with no dire need for further action. *Id*. at 52-53. Buccilli also requested dispatch have APS send a caseworker to the residence to determine if any further investigation was required. *Id*. at 53.

Buccilli and Kadi remained outside the residence for about half an hour awaiting the arrival of the APS case worker, Nancy Sullivan ("Sullivan"). While they waited, Joe

Batt telephoned his mother and informed her of the presence of police officers at the home. Buccilli and Kadi moved their respective patrol vehicles from the driveway of the Batts' house to the street in compliance with Joe Batts' request that the police officers leave the premises. Buccilli Dep. Tr. at 54. Orchard Park Chief of Police Benz ("Chief Benz") then arrived at the Batts' home and was advised by Buccilli of the situation including Joe Batt's "belligerent" or "hostile" attitude toward the police officers, and that Joe Batt had continued to refuse to produce any identification. Joe Batt stated to the police officers he intended to file a personnel complaint against Buccilli and Kadi. *Id*. at 60.

The police officers and Chief Benz remained in the street waiting for the caseworker when first Mr. Batt and then Mrs. Batt arrived home. Buccilli Dep. Tr. at 58-59. Mr. Batt apologized for Joe Batt's behavior and Mrs. Batt escorted Sullivan, the APS caseworker who had also arrived, into the home. *Id*. at 59. Mrs. Batt and Sullivan were inside the home about five minutes, after which Sullivan reported to Chief Benz that there were no further issues regarding the welfare check of Puntoriero. *Id.* at 60-61.

It is undisputed that aside from briefly speaking with Puntoriero, Buccilli did not conduct any search of the premises or of any person within the house, Joe Batt Dep. Tr. at 72-73, and that Buccilli advised Joe Batt the reason for his presence – to conduct a welfare check on Puntoriero pursuant to a confidential telephone call – prior to entering the Batts' home on April 17, 2012. No criminal charges were filed in connection with the welfare check.

DISCUSSION

1. Summary Judgment

Summary judgment of a claim or defense will be granted when a moving party demonstrates that there are no genuine issues as to any material fact and that a moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) and (b); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). The court is required to construe the evidence in the light most favorable to the non-moving party. *Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011). The party moving for summary judgment bears the burden of establishing the nonexistence of any genuine issue of material fact and if there is any evidence in the record based upon any source from which a reasonable inference in the non-moving party's favor may be drawn, a moving party cannot obtain a summary judgment. *Celotex*, 477 U.S. at 322; *see Anderson*, 477 U.S. at 247-48 ("summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). "A fact is material if it 'might affect the outcome of the suit under governing law.'" *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson*, 477 U.S. at 248).

"[T]he evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions." *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988)). A defendant is entitled to summary judgment where "'the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on'" an essential element of a

claim on which the plaintiff bears the burden of proof. *In re Omnicom Group, Inc., Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010) (quoting *Burke v. Jacoby*, 981 F.2d 1372, 1379 (2d Cir. 1992)). Once a party moving for summary judgment has made a properly supported showing of the absence of any genuine issue as to all material facts, the nonmoving party must, to defeat summary judgment, come forward with evidence that would be sufficient to support a jury verdict in its favor. *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir. 1995). "[F]actual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial." *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996).

Plaintiffs' claims seek damages for alleged violations of their constitutional rights pursuant to 42 U.S.C. § 1983 ("§ 1983"), which imposes civil liability upon persons who, acting under color of state law, deprive an individual of rights, privileges, or immunities secured by the Constitution and laws of the United States. Section 1983, however, does not itself provide a source of substantive rights, but instead provides the mechanism by which a plaintiff may seek vindication of federal rights conferred elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Here, Plaintiffs' claim violations of their Fourth Amendment rights, as made applicable to the states by the Fourteenth Amendment.

2. Official Capacity Claims

Defendant argues that without alleging and proving an official custom or policy was the cause of the alleged constitutional violations, Plaintiffs' claims must be

dismissed as against Defendant in his official capacity. Defendant's Memorandum at 12. Plaintiff has not responded in opposition to this argument.

It is settled that the naming of a government official in his official capacity is equivalent to suing the government entity for which no § 1983 claim lies absent establishing the challenged conduct was undertaken pursuant to the municipality's official custom or policy. *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004) ("[W]hen the defendant sued for discrimination under . . . § 1983 is a municipality – or an individual sued in his official capacity – the plaintiff is required to show that the challenged acts were performed pursuant to a municipal policy or custom." (internal citations omitted)). In the instant case, not only have Plaintiffs failed to allege that Buccilli's actions were pursuant to any official custom or policy of the Orchard Park Police Department, but Buccilli is named in the Complaint as sued only in his personal capacity. Accordingly, summary judgment should be GRANTED in favor of Defendant insofar as Plaintiffs assert any claims against Buccilli in his official capacity.

3. Punitive Damages

Defendant moves to dismiss all claims for punitive damages, arguing punitive damages cannot be awarded against a police officer in his official capacity, and that insofar as Buccilli is sued in his individual capacity, punitive damages may be awarded only if the unlawful conduct was motivated by evil intent or involved reckless or callous indifference to the federally protected rights of others. Defendant's Memorandum at 13. Plaintiffs have not argued in opposition to Defendant's request to dismiss all claims for punitive damages.

Insofar as the complete absence of any assertion that Defendant's alleged violation of Plaintiff's constitutional rights was pursuant to any municipal policy or custom is fatal to any claim against Defendant in his official capacity, punitive damages also cannot be awarded against Defendant in his official capacity. *See Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 262 (2d Cir. 1997) (insofar as municipal officers are sued in their official capacity, they enjoy the same immunity from punitive damages as the municipality). Further, as in the instant case, absent evidence of an "evil motive or intent" or "callous indifference" to Plaintiff's constitutional rights, punitive damages are not recoverable against municipal officials in their individual capacities. *Id*. (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). Summary judgment should thus be GRANTED in favor of Defendant insofar as Plaintiffs seek punitive damages against Defendant either in his official or individual capacity.

4. Fourth Amendment

Defendant argues in support of summary judgment that his warrantless entry into the Batts' home to conduct the welfare check of Puntoriero was justified by the exigent circumstances exception to the Fourth Amendment warrant requirement. Defendant's Memorandum at 4-9. Plaintiffs argue in opposition to summary judgment as to Defendant and in support of summary judgment in favor of Plaintiffs that the circumstances on April 17, 2012 do not support a finding that it was objectively reasonable for Defendant to enter the Batts' home to conduct a welfare check on Puntoriero, Plaintiffs' Memorandum at 9-21, and that there is sufficient information in the record upon which a reasonable jury could find that Defendant knew the report received by APS was insufficient to support a determination that Puntoriero's condition

was an "urgent concern." *Id*. at 21-24. In further support of summary judgment, Defendant reiterates that no warrant was required based on the exigent circumstances confronting Defendant, Defendant's Reply at 4-10, while Plaintiffs maintain that "welfare checks" do not arise to "exigent circumstances" and, as such, should not be "freed" from their "constitutional moorings." Plaintiffs' Reply at 3-10. Summary judgment should be granted in favor of Defendant because his entry into the Batts' home to check on Puntoriero's welfare was not in violation of the Fourth Amendment.

"'It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Kentucky v. King*, 563 U.S. 452, 459 (2011) (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (further citation and quotation marks omitted)). Nevertheless, the Supreme Court has "recognized that this presumption may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Id*. (quoting *Brigham City*, *supra*, at 403). "Accordingly, the warrant requirement is subject to certain reasonable exceptions." *Id*. at 403. Among the exceptions identified by the Court as justifying the warrantless entry into a home are exigent circumstances including the need to enter a home "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," *id*. (citing *Brigham*, *supra*, at 403), provided the exigent circumstances were not manufactured by the responding law enforcement officers. *Id*. (citing *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004)). "This 'emergency aid exception' does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises.'" *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (citing *Brigham City*, *supra*, at 404-

05). Rather, the emergency aid exception "requires only an objectively reasonable basis for believing that a person within the house is in need of immediate aid." *Id*. (internal quotation marks, brackets, and citations omitted). Nor does a responding police officer "need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception." *Fisher*, 558 U.S. at 49. As such, a reviewing court should not "replace th[e] objective inquiry into appearances with its hindsight determination that there was in fact no emergency." *Id*. In short, "the ultimate decision of whether a search was objectively reasonable in light of exigent circumstances is a question of law." *United States v. Andino*, 768 F.3d 94, 98 (2d Cir. 2014).

In the instant case, the court limits its consideration of the facts to those circumstances confronting Defendant upon responding to the police dispatch directing him to the Batts' home in response to an APS call for a welfare check on an elderly man whose relative had been denied access to the day before and who had been known to suffer from lethargy and dehydration. Upon arriving at the Batts' home, Joe Batt essentially refused to speak with Buccilli and Kadi other than to tell the police officers to leave the property. Joe Batt Dep. Tr. at 42-45. Joe Batt also refused to cooperate with Buccilli's alternative request that, rather than allowing the police officers into the home, Joe Batt could bring Mr. Puntoriero to the door where the officers could speak with him, or to a window to permit the officers to visually ascertain whether Mr. Puntoriero appeared to be in any distress or in need of assistance. Buccilli Dep. Tr. at 42. A reasonable police officer would also interpret Joe Batt's demeanor in storming back inside the house and attempting to slam the door on the police officer as a possible attempt to conceal a problematic situation, especially given that Buccilli and Kadi were

responding to a report from APS that was based on a confidential, but not anonymous, call from a concerned family member who reported that the previous day, another family member had been denied access to Mr. Puntoriero who was elderly and who had previously been diagnosed with failure to thrive. *See Howard v. Town of DeWitt*, 2015 WL 2382334, at ** 3-4 (N.D.N.Y. May 19, 2015) (holding police officer's warrantless entry into home to conduct welfare check of minor child did not violate Fourth Amendment where welfare check was dispatched in response to father's report that the child's mother failed to bring child for scheduled visitation and, upon police officer's arrival at mother's residence, mother refused to answer the door, refused officer's request that the minor child be brought to the door of residence where the officer could observe her, and mother's only response was that "no one's hurt, no one's bleeding").

Insofar as Mrs. Batt testified at her deposition, Mrs. Batt's Dep. Tr. at 10-13, that because she home-schooled her children, she had repeatedly advised her children that they were vulnerable to anonymous accusations of educational neglect and instructed her children not to allow any social worker or police officer into the house, neither Buccilli nor Kadi would have been aware of such circumstances, nor does Joe Batt maintain that he informed Buccilli or Kadi that he was denying them access to the home because of his mother's instructions. Notably, nothing in the record establishes that Buccilli or Kadi were even aware that the Batts home-schooled their children, and Joe Batt denies ever being instructed by his parents not to allow the police into the house. Joe Batt Dep. Tr. at 36. Accordingly, Mrs. Batt's assertion regarding her belief that her home may be targeted by law enforcement officials to harass her for homeschooling is not a consideration with regard to Buccilli's qualified immunity defense. Nor is there

anything in the record indicating either Buccilli or Kadi had any knowledge of any property dispute, *i.e.*, the transfer of the Depew home to Joseph Puntoriero, between the Batts and other family members, or that on the previous day, Mrs. Batt had not necessarily denied her brother access to the father, but, as Mrs. Batt maintains, Mrs. Batt Dep. Tr. at 23-29, requested her brother step outside the Batts' home to discuss outside of Puntoriero's hearing her request that Joe Puntoriero bring some of the father's furniture to the Batts' home, hoping the presence of some items of sentimentality would help with Puntoriero's dementia, and that once outside, Joe Puntoriero became angry and left without having seen or visited with his father.

Furthermore, the video of Buccilli and Kadi inside the kitchen of the Batts' home, and of Buccilli questioning Puntoriero, captured by Joe Batt using the video camera on his cell phone, Defendant's Exh. M, is consistent with Buccilli's report of the encounter, with Buccilli calmly explaining to Joe Batt that the police were present solely to conduct a welfare check of Puntoriero pursuant to a call placed by a confidential source to APS, and Buccilli briefly speaking with Puntoriero, asking questions pertaining to Puntoriero's well-being and whether Puntoriero was in need of anything. The audio of the confidential call made by Annette Puntoriero to APS, Defendant's Exh. N, is consistent with the information provided by the Orchard Park Police Department dispatch, with the exception that the name of the caller is not provided by dispatch to the police.

Accordingly, the undisputed evidence in the record establishes that under the circumstances, Defendant's warrantless entry into the Batts' home to conduct the welfare check of Mr. Puntoriero was not unreasonable and, as such, did not violate Plaintiffs' Fourth Amendment right to be free from unreasonable searches. Summary

judgment should thus be GRANTED in favor of Defendant on the Fourth Amendment claim.

5. Qualified Immunity

Alternatively, Defendant is entitled to qualified immunity on the Fourth Amendment claim. "Qualified immunity shields law enforcement officials from § 1983 claims for money damages provided that their conduct does not violate clearly established constitutional rights of which a reasonable person would have been aware." *Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013) (citing *Ashcroft v. al-Kidd*, __ U.S. __, 131 S.Ct. 2074, 2080 (2011), and *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). A qualified immunity analysis asks two questions including whether "the facts show that the office's conduct violated plaintiff's constitutional rights," and, if so, whether "the right was clearly established at the time of defendant's actions." *Id*. (citing *al-Kidd*, 131 S.Ct. at 2080, and *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007)). Courts are no longer required to sequentially answer these two questions; rather, it is particularly appropriate to address the second question first where the first question "turns on difficult or novel questions of constitutional or statutory interpretation, but it is nevertheless clear that the challenged conduct 'was not objectively unreasonable in light of existing law.'" *Id*. at 389 (quoting *Coolick v. Hughes*, 699 F.3d 211, 219-20 (2d Cir. 2012), and citing *al-Kidd*, 131 S.Ct. at 2080).

"To determine whether a right was clearly established, we consider 'whether the right in question was defined with reasonable specificity,' 'whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question,' and 'whether under preexisting law a reasonable defendant officer would

have understood that his or her acts were unlawful.'" *Barnes v. Furman*, 629 Fed.Appx. 52, 55-56 (2d Cir. Oct. 22, 2015) (quoting *Dean v. Blumenthal*, 577 F.3d 60, 68 (2d Cir. 2009)). Even if the right at issue were clearly established, if it was objectively reasonable for the defendant to believe that his act did not violate the plaintiff's constitutional rights, the defendant may nevertheless be entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001); *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 568-69 (2d Cir. 1996). This "objective reasonableness" part of the test is met if "officers of reasonable competence could disagree on the [legality of the defendant's actions]." *Malley v. Briggs*, 475 U.S. 335 (1986). "The availability of the defense depends on whether a reasonable officer could have believed his action to be lawful, in light of clearly established law and the information he possessed." *Weyant v. Okst*, 101 F.3d 845, 858 (2d Dir. 1991) (internal quotation marks and citation omitted). Also to be considered in determining whether a police officer is qualifiedly immune from personal liability under the Fourth Amendment is "whether [the officer] is entitled to a qualified good faith immunity based on his following the policy and training of the police department . . . ." *Dodd v. City of Norwich*, 827 F.2d 1, 4 (2d Cir. 1987). Where, however, the objective reasonableness of an officer's actions depends on disputed facts, summary judgment based on qualified immunity is properly denied. *Rivera v. United States*, 928 F.2d 592, 607 (2d Cir. 1991).

Accordingly, "qualified immunity provides a broad shield. It does so to ensure 'that those who serve the government do so with the decisiveness and the judgment required by the public good.'" *Zalaski*, 723 F.3d at 389 (quoting *Filarsky v. Delia*, __ U.S. __, 132 S.Ct. 1657, 1665 (2012)). "Toward that end, it affords officials 'breathing

room to make reasonable but mistaken judgments' without fear of potentially disabling liability." *Id*. (quoting *Messerschmidt v. Millender*, __ U.S. __, 132 S.Ct. 1235, 1244 (2012)). "In sum, qualified immunity employs a deliberately 'forgiving' standard of review," providing "'ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Id*. (quoting *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010), and *Malley*, 475 U.S. at 341). In the instant case, regardless of whether Buccilli lawfully entered the Batts' home on April 17, 2012, it is clear from the undisputed facts that a reasonable police officer confronted with similar circumstances would not have believed his entry, without a warrant, into the Batts' home to check on the welfare of Puntoriero was in violation of the Fourth Amendment.

In particular, as Buccilli explains, Buccilli Dep. Tr. at 38-39, Buccilli's entry into the Batts' home was pursuant to standard policy, to wit, whenever the Orchard Park Police Department dispatched a welfare check, the responding officer would proceed to the designated home provided some allegation of reasonable concern had been made. *See Dodd*, 827 F.2d at 4 (2d Cir. 1987) (whether defendant police officer in § 1983 action was following police department's policy and training is relevant consideration on qualified immunity defense). Further, absent any Supreme Court or Second Circuit precedent clearly establishing a right to traditional Fourth Amendment protections during the type of police entry at issue here, particularly, the warrantless entry into a residence to check on the welfare of an elderly person pursuant to complaint received by APS from a confidential, but not anonymous, call made by a close family member, a reasonable police officer would not have understood that such entry would have

violated the Fourth Amendment rights of any resident or owner of the home. Significantly, Plaintiffs fail to point to any contrary authority.

Accordingly, Buccilli is entitled to qualified immunity on Plaintiffs' Fourth Amendment claim.

CONCLUSION

Based on the following, Defendant's Motion (Dkt. 32), should be GRANTED; Plaintiff's Motion (Dkt. 35), should be DENIED. The Clerk of the Court should be directed to close the file.

Respectfully submitted,

/s/ *Leslie G. Foschio*

_____

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: July 18, 2016
Buffalo, New York

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(d) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiffs and the Defendant.

SO ORDERED.

/s/ *Leslie G. Foschio*

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: July 18, 2016
Buffalo, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY BATT,
LUANN BATT, and
JOSEPH BATT,

Plaintiffs,

Case # 12-CV-1198-FPG

DECISION AND ORDER

v.

LT. JOSEPH BUCCILLI,

Defendant.

INTRODUCTION

On April 17, 2012, Lieutenant Joseph Buccilli ("Lt. Buccilli") of the Orchard Park Police Department entered the home of Timothy, LuAnn, and Joseph Batt ("the Batts") without a warrant or the Batts' consent to check on the welfare of LuAnn Batt's father, Fred Puntoriero. The parties differ sharply on the two key issues in this case: whether Lt. Buccilli's entry into the Batt's home violated the Fourth Amendment, and whether Lt. Buccilli is entitled to qualified immunity.

For the following reasons, the Court declines to resolve the first question, because even if a violation of the Fourth Amendment occurred, Lt. Buccilli is indeed shielded by qualified immunity, and this case must be dismissed.

BACKGROUND[1]

On April 17, 2012, Lt. Buccilli was employed by the Town of Orchard Park Police Department, and at all times relevant to this action, was working in his capacity as a police officer.

[1] Courts must view the facts and their reasonable inferences in the light most favorable to the party opposing summary judgment. "In qualified immunity cases, this usually means adopting…the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007). As such, the facts are drawn from the Batts' Statement of Material Facts (ECF No. 35-2), and are viewed in the light most favorable to them.

Fred Puntoriero is the father of LuAnn Batt. Prior to April 17, 2012, Fred Puntoriero had dementia, was wheelchair bound, and had previously been diagnosed in 2009 with failure to thrive. On April 17, 2012, Timothy Batt, LuAnn Batt, Joseph Batt, and Fred Puntoriero all resided at 3122 Bieler Road, Orchard Park, New York.

On April 17, 2012, Donna Locicero, a Senior Case Worker employed by the Erie County Department of Social Services, Adult Protective Services, received a call of concern from Annette Puntoriero, the daughter-in-law of Fred Puntoriero, regarding Fred Puntoriero. Adult Protective Services had not received any prior calls of concern regarding Fred Puntoriero.

During this call, Annette Puntoriero told Adult Protective Services[2] that Fred Puntoriero was living in the home of Timothy and LuAnn Batt; that Joseph Puntoriero and LuAnn Batt shared a "joint POA [Power of Attorney]" for Fred Puntoriero; and that LuAnn Batt "is making all the decisions" regarding Fred Puntoriero's care because Joseph Puntoriero is "out of town so often"

Annette Puntoriero also told Adult Protective Services that, at some point prior to April 17, 2012, her "husband had told her that [Fred Puntoriero] was very lethargic and could not stay focused on the conversation. And then Joseph [Puntoriero] thought that [Fred Puntoriero] could be dehydrated again, because [Fred Puntoriero] often doesn't drink enough water."

Annette Puntoriero further told Adult Protective Services that no one had seen Fred Puntoriero for two weeks; that Joseph Puntoriero told her that he went to the Batts' home on April 16, 2012; that Joseph Puntoriero told her that he was not permitted to see Fred Puntoriero on April 16; and that Joseph Puntoriero told her that he suspected Fred Puntoriero was not doing well and that was why he was not permitted to see Fred Puntoriero on that day.

[2] The Batts do not dispute that these statements were made to Adult Protective Services by Annette Puntoriero on April 17, 2012, however, they do dispute the underlying truth of some of her statements.

Annette Puntoriero stated that she and LuAnn Batt did not see eye to eye on what was in the best interests of Fred Puntoriero; that Joseph Puntoriero and LuAnn Batt "did not agree on there being an issue with [Fred Puntoriero] at this time; and that there was "some animosity" between her and LuAnn Batt.

Annette Puntoriero further told Adult Protective Services that she "couldn't possibly know what was going on in LuAnn and Timothy's home; that she "didn't know what was going on in the other home;" that she "couldn't answer . . . questions" about whether Fred Puntoriero was eating or feeding; that there was a family dispute between Annette Puntoriero, Joseph Puntoriero, and LuAnn Batt; that she had not personally been to the Batts' home on April 16, 2012; that she had not personally been denied access to the Batts' home on April 16, 2012; and that she did not know what the condition and interior of the home was like. Adult Protective Services attempted to get as much information as possible from the Annette Puntoriero, but they did not ask her if Fred Puntoriero was under the care of Hospice or an outside caregiver.

After receiving this report from Annette Puntoriero, that same day, April 17, 2012, Donna Locicero, in consultation with her supervisor, Francine Amato, called 911 to request that the Orchard Park Police Department go to the Batts' home to conduct a welfare check on Fred Puntoriero.

Donna Locicero informed the Orchard Park Police Department that Adult Protective Services had received "a call today with some concern about [Fred Puntoriero] who lives with his daughter and son-in-law in Orchard Park;" that the reporter expressed "a concern over [Fred Puntoriero's] well-being;" that "the concern is that another family member was not allowed to get into the house when he went to visit yesterday, and they're not sure if [Fred Puntoriero] is ok;" that the last time Joseph Puntoriero had seen Fred Puntoriero was "the second or third of

April;" and that LuAnn Batt had denied Joseph Puntoriero entry to the Batts' home on April 16, 2012. Based on this 911 call, the Orchard Park Police Department dispatched Lt. Buccilli to assist Officer Kadi, who was on his way to the Batts' home to conduct the requested welfare check on Fred Puntoriero.

On the afternoon of April 17, 2012, Joseph Batt was in the Batts' home. At about 4:30 p.m. Joseph looked out the front window of the Batts' home and saw Lt. Buccilli and Officer Kadi standing outside their parked cars, talking in the Batts' driveway. While standing in the Batts' driveway, Officer Kadi was advising Lt. Buccilli of what the dispatcher had relayed to Officer Kadi with regard to Annette Puntoriero's complaint to Adult Protective Services.

Lt. Buccilli was aware that somebody had contacted Adult Protective Services about a potential welfare issue with Fred Puntoriero, and was aware that Adult Protective Services had requested that the Orchard Park Police Department conduct a welfare check on Fred Puntoriero.

Joseph Batt walked outside the Batts' home through a side door and approached Lt. Buccilli and Officer Kadi in the Batts' driveway. Joseph Batt did not have anything in his hands. Lt. Buccilli asked for Joseph Batt's name, and Joseph said his name was "Joe" and that he lived in the home. Lt. Buccilli asked Joseph Batt if he had a license or any identification, and Joseph Batt replied that he did not have it on him.

The officers then told Joseph Batt that they were there to conduct a welfare check at the request of Adult Protective Services. Joseph Batt told Lt. Buccilli that Fred Puntoriero was in the Batts' home, and also told Lt. Buccilli that he did not have permission to enter the Batts' home. Lt. Buccilli stated that he did not need permission from anyone to enter the Batts' home, and stated that he did not need to seek or obtain an access order from a court to enter the residence.

After speaking with Lt. Buccilli and Officer Kadi in the Batts' driveway, Joseph Batt re-entered the Batts' home through the side door. Lt. Buccilli and Officer Kadi followed Joseph Batt into the Batts' home through the side door. Joseph Batt attempted to close the side door through which he had entered the Batts' home, but Lt. Buccilli was already partially inside the doorway to the Batts' home. Lt. Buccilli put his foot in doorway to block the side door through which Joseph Batt had entered the Batts' home, and both Lt. Buccilli and Officer Kadi entered the Batts' home through the side door. Once inside, Joseph Batt again told Lt. Buccilli and Officer Kadi that they did not have permission to enter the Batts' home. Officer Kadi removed himself from the Batts' home.

While Lt. Buccilli and Officer Kadi were inside the Batts' home, Joseph Batt began recording the encounter using his phone's camera. During that encounter, Lt. Buccilli said "I'll tell you why we're here. Somebody contacted -- and keep [the video] rolling, please. Somebody contacted Adult Protective Services -- Erie County Adult Protective Services. And they contacted us, a social worker, requesting that we do a welfare check on you [Fred]. I don't know the basis or the allegations of what the welfare concerns are. But as I have been trying to explain to your grandson, Joe, and the other two individuals out there, that we do have a right to come in here when an allegation is made. And notice how I used the word 'allegation' that somebody's welfare may be in jeopardy. I don't need a search warrant. I don't need to ask permission to Joe and anybody else."

Lt. Buccilli also said "I don't know [the identity of the caller to Adult Protective Services]. I don't know, because that information is confidential. Now, if you want to contact, or you want to contact, or your grandson Dan wanted to contact Adult Protective Services and file a Freedom of Information for the allegation of the report, then more power to you. But I can't give

you information that I don't have. All I know is a county agency called. And based on their request, I have a right to enter the house and forcibly [sic], if need be, when somebody's welfare is possibly in question. And that's why I'm here. The allegation was made that they wanted a welfare check done on you."

Lt. Buccilli told Joseph Batt that he would be arrested if he obstructed Lt. Buccilli from observing Fred Puntoriero. Joseph Batt did not lay hands on Lt. Buccilli or initiate any physical contact with Lt. Buccilli, nor did Lt. Buccilli lay hands on Joseph Batt.

Lt. Buccilli ultimately observed Fred Puntoriero, who was sitting in the Batts' living room. He appeared well-dressed, well-groomed, and had a bowl of soup or something similar sitting beside him. Lt. Buccilli spoke with Fred Puntoriero in the Batts' living room for a few minutes, and asked Fred Puntoriero to provide and spell his last name.

After speaking with Fred Puntoriero, Lt. Buccilli left the Batts' home through the side door by which he had entered. As he was leaving, Lt. Buccilli told Fred Puntoriero and Joseph Batt, "All right. That's it. For now. We may be back. If they [Adult Protective Services] call again, we gotta come back."

After leaving the Batts' home, Lt. Buccilli informed dispatch that Fred Puntoriero appeared to be in a good environment, and that there was no need for further action on behalf of the Orchard Park Police Department other than referring the matter back to Adult Protective Services. Lt. Buccilli asked the dispatcher to contact Adult Protective Services and request that they send a case worker to the Batts' home. Lt. Buccilli and Officer Kadi remained at the Batts' home until they were ultimately joined by Timothy Batt, LuAnn Batt, Orchard Park Chief of Police Anthony Benz, and Senior Case Manager Nancy Sullivan of Erie County Department of Social Services, Adult Protective Services.

Ms. Sullivan does not remember what information she was provided prior to arriving at the Batts' home. She did not seek or obtain a warrant to enter the Batts' home, and did not believe that she needed to seek or obtain a warrant to enter the Batts' home on April 17, 2012. She stated that whenever she receives a report regardless of suspected abuse or neglect, regardless of what she knew or did not know, she would want to see the subject of a report within 24 hours, because Adult Protective Services received a phone call.

LuAnn Batt permitted Ms. Sullivan to enter the Batts' home and speak with Fred Puntoriero. LuAnn Batt told Ms. Sullivan that Fred Puntoriero was under the care of a doctor, that Fred Puntoriero was in Hospice care and was regularly visited by a Hospice nurse and a Hospice social worker, that LuAnn Batt was an R.N., that Fred Puntoriero had been seen by a nurse's aide earlier that day, that Fred Puntoriero was never left home alone, and that another adult was always present to care for Fred Puntoriero. She also provided Ms. Sullivan with contact information for Fred Puntoriero's Hospice nurse.

Ms. Sullivan interviewed Fred Puntoriero's Hospice nurse on April 19 and 20, 2012, who stated that that Fred Puntoriero was under Hospice care, that Fred Puntoriero was "well cared for," that "the family was taking wonderful care of [Fred Puntoriero]," and that the Hospice nurse had "no concerns" about the care Fred Puntoriero was receiving in the Batts' home.

Ms. Sullivan concluded that there was no reason to continue further investigation in to Fred Puntoriero's care, and advised Annette Puntoriero that Adult Protective Services would be closing the case. On April 20, 2012, Adult Protective Services formally closed its investigation into Annette Puntoriero's report.

PROCEDURAL HISTORY

The Batts filed this civil rights lawsuit under 42 U.S.C. § 1983. They allege that on April 17, 2012, Lt. Buccilli, while acting under color of state law, deprived the Batts of their rights under the Fourth Amendment by entering their home. The case was originally assigned to United States District Judge Richard J. Arcara, who referred the case to United States Magistrate Judge Leslie G. Foschio pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B). ECF No. 7.

After discovery, the parties filed competing summary judgment motions. Lt. Buccilli's motion argues that (1) no Fourth Amendment violation occurred, and (2) even if a violation occurred, he is entitled to qualified immunity. ECF No. 32. On the other hand, the Batts motion argues that Lt. Buccilli's warrantless entry into their home violated the Fourth Amendment, and because their Fourth Amendment rights were clearly established, qualified immunity does not protect Lt. Buccilli from liability. ECF No. 35. After briefing was completed, this case was transferred to United States District Judge Lawrence J. Vilardo (ECF No. 43), and was subsequently reassigned to this Court (ECF No. 44).

On July 18, 2016, Magistrate Judge Foschio issued his Report and Recommendation, which concludes that Lt. Buccilli did not violate the Fourth Amendment when he entered the Batt's home, and in any event, that Lt. Buccilli would be protected by the doctrine of qualified immunity. ECF No. 45. The Batts have filed objections (ECF No. 48) and argue that both of Magistrate Judge Foschio's conclusions are erroneous; Lt. Buccilli has filed a memorandum (ECF No. 49) in support of Magistrate Judge Foschio's determinations.

DISCUSSION

The Court must conduct a *de novo* review of the portions of Magistrate Judge Foschio's Report and Recommendation to which objections have been made. *See* 28 U.S.C. § 636(b)(1)(C). In doing so, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

There are two key issues presented in this case. First, did Lt. Buccilli's entry into the Batts' home violate the Fourth Amendment? Second, is Lt. Buccilli shielded from liability under the doctrine of qualified immunity?

I. Was the Fourth Amendment Violated?

For many years, the Supreme Court mandated a two-step sequence to determine whether a government official was entitled to qualified immunity. First, courts had to determine if the Plaintiff's facts established that a constitutional right was indeed violated. Only if a plaintiff satisfied the first step would the court then decide whether the right at issue was clearly established at the time of a defendant's alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

In 2009, the Supreme Court determined that the two-step *Saucier* analysis under was no longer mandated. Instead, the "judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Magistrate Judge Foschio concluded that Lt. Buccilli's entry into the Batts' home did not violate the Fourth Amendment, and the Batts strenuously object to that conclusion. In the Court's view, the question of whether a Fourth Amendment violation occurred is a close call. But ultimately, the Court does not need to answer the Constitutional question under the specific

facts and circumstances of this case, so the Court declines to adopt Magistrate Judge Foschio's conclusion that no Fourth Amendment violation occurred. Instead, the Court finds that the second prong of the qualified immunity analysis – whether the right was clearly established at the time of Lt. Buccilli's alleged misconduct – is dispositive in this case, and under *Pearson*, the Court elects to answer that question without addressing the Constitutional question first.

II. Is Lt. Buccilli Entitled to Qualified Immunity?

Public officials are immune from suit under 42 U.S.C. § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff v. Rickard*, --- U.S. ----, 134 S. Ct. 2012, 2023 (2014) (internal quotation marks omitted). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," *id.*, meaning that "existing precedent ... placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011).

In other words, official conduct violates clearly established law "when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To this end, a plaintiff need not show a case "directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *al–Kidd*, 563 U.S. at 743.

Under the Second Circuit's test, courts determine whether the relevant law was "clearly established" by considering the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a

reasonable officer in light of preexisting law. *See Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010). An exactly on-point case is not necessarily required, and the Second Circuit "may nonetheless treat the law as clearly established if decisions from this or other circuits clearly foreshadow a particular ruling on the issue." *Terebesi v. Torreso*, 764 F.3d 217, 230–31 (2d Cir. 2014) (alterations, and internal quotations and citations omitted).

Magistrate Judge Foschio determined that Lt. Buccilli did not violate "clearly established" rights of the Batts when he entered their home to check on the welfare of Fred Puntoriero, a determination to which the Batts vehemently object. Specifically, Magistrate Judge Foschio held that there is no "precedent clearly establishing a right to traditional Fourth Amendment protections during the type of police entry at issue here." ECF No. 45 at 21.

To resolve this dispute, the key question is this: how should the Court define the right that is (or is not) "clearly established" in this case?

The Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine…will apply to the factual situation the officer confronts." *Mullenix v. Luna*, --- U.S. ----, 136 S. Ct. 305, 308 (2015).

This point is illustrated by the Supreme Court's decision in *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). There, the Ninth Circuit had denied qualified immunity to a police officer who shot a suspect that was fleeing in a car. In doing so, the Ninth Circuit held that the officer violated a clearly established rule, set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985), that

"deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical hard, either to the officer or to others." *Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003).

The Supreme Court summarily reversed and held that the Ninth Circuit's use of *Garner's* "general" test for excessive force was "mistaken." *Brosseau*, 543 U.S. at 199. Instead, the Supreme Court explained that the correct inquiry was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the "situation [the officer] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 199-200. The Supreme Court went on to find that the officer was entitled to qualified immunity, as none of the cases discussed by the parties "squarely governs the case here." *Id.* at 201.

A similar scenario played out in *Anderson*. There, qualified immunity was denied in the courts below, who found a clearly established "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances." *Anderson*, 483 U.S. at 640. The Supreme Court faulted this broad and general characterization of the question presented, and criticized the lower court's holding for failing to address the actual question at issue: whether "the circumstances with which Anderson was confronted .. constitute[d] probable cause and exigent circumstances." *Id.* at 640-41.

Mullenix further demonstrates the level of specificity required in defining the contours of whether the right at issue is clearly established. There, Chadrin Mullenix, a Trooper with the Texas Department of Public Safety ended a high speed chase of a fugitive, Israel Leija, by firing six shots from his police rifle into Leija's vehicle as it drove on the highway below where Mullenix was stationed. Four of the shots hit Leija and killed him. The district court and the

Fifth Circuit denied Mullenix qualified immunity, finding that he had violated the clearly established rule that a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Luna v. Mullenix*, 773 F.3d 712, 725 (5th Cir. 2014). The Supreme Court rejected this formulation, finding that "the general principle that deadly force requires a sufficient threat hardly settles this matter." *Mullenix*, 136 S. Ct. at 309. Rather, the Supreme Court framed the question of whether the right was clearly established as this:

> In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably *in these circumstances* 'beyond debate.'

Id. (emphasis added.)

Only two months ago, the Supreme Court found it "again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal citations omitted). In vacating the lower courts' denial of qualified immunity, the Supreme Court found that the Tenth Circuit "misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.*

In this case, the Batts primary argument is that "[N]o less than nine opinions of the Supreme Court, Second Circuit, and the Western District of New York put Lt. Buccilli on

specific notice that even warrantless 'welfare checks' in the home are subject to traditional Fourth Amendment analysis." ECF No. 48 at 18 (emphasis in original). For support, they posit that "'Welfare checks' have been subject to this general rule since the Supreme Court's 2006 'emergency aid' decision, *Brigham City [v. Stuart]*, 547 U.S. [398], 403 [2006], and the Second Circuit's unanimous decision in November 2011 which held that a warrantless 'welfare check' fails the 'emergency aid' test unless '[t]he objective circumstances at the time of [the officers]' entry could cause a reasonable officer to believe that there were exigent circumstances requiring prompt entry. *Montanez [v. Sharoh]*, 444 F. App'x [484], 486-87 [(2d Cir. 2011) (unpublished)]." ECF No. 48 at 18-19. This argument overstates the holding of these cases, overstates their importance to the present analysis, and fails to take into account the Supreme Court's directions regarding the required level of specificity when defining the "clearly established" right at issue.

To begin, there is no doubt that *Brigham City* discusses a great deal of general Fourth Amendment principles and it certainly talks about the emergency aid doctrine. But those general doctrines are far too broad for purposes of examining the "clearly established" right, and critically, the Supreme Court never discusses or even mentions the concept of welfare checks or any similar term within the *Brigham City* decision.

Next, the Second Circuit's decision in *Montanez* is greatly overstated by the Batts. First, *Montanez* is an unpublished Summary Order, which does not have precedential effect in the Second Circuit. Second, the panel in *Montanez* held that "Appellants did not violate Montanez's Fourth Amendment rights," so this decision cannot be used as an example of where an officer actually violated the Fourth Amendment violation. Indeed, the Second Circuit found that determining the second part of the qualified immunity inquiry – namely, whether the right was

"clearly established" – was unnecessary in light of their determination that no Fourth Amendment violation occurred. *See id.* at 487.

Third, *Montanez* is easily distinguishable. While the decision does use the term "welfare check," the facts of that case are very different from the present matter. In *Montanez*, the officers went to the house at issue having been "informed that Montanez was armed and dangerous and a convicted felon wanted for weapons and narcotics violations…[and] were also warned to use 'extreme caution' if they located Montanez." *Id.* Further, the police had seized an Uzi 9mm firearm and drugs from the home at issue less than 24 hours earlier, and also seized an empty holster and boxes of .22 and .38 caliber ammunition – but not a weapon that corresponded to the holster or those calibers of ammunition. *Id.* Officers also "knew that there was a documented history of [children's services] involvement with Montanez's seven-year-old step-daughter, which included substantiated complaints," and based upon all of this information, children's services "wanted to remove the child due to concerns about her health, welfare, and safety." *Id.* As such, even though the decision references welfare checks, it does so under circumstances so distinct from the present matter that it could not "clearly establish" a right in a situation that would be analogous to the situation faced by Lt. Buccilli – and again, the decision was a summary order, which does not establish precedent in the Second Circuit.

The Batts' further argument that "Lt. Buccilli acted in the shadow of two local opinions…*United States v. Paige*, 493 F.Supp.2d 641 (W.D.N.Y. 2007) and *United States v. Sikut*, 488 F.Supp.2d 291 (W.D.N.Y. 2007)" fares no better. Simply stated, it is doubtful that two district court opinions could create a "clearly established" principle for the purposes of the qualified immunity analysis under the Second Circuit's test. *See Scott*, 616 F.3d at 105 ("To determine whether a right is clearly established, we look to (1) whether the right was defined

with reasonable specificity; (2) whether Supreme Court or court of appeals case law supports the existence of the right in question, and (3) whether under preexisting law a reasonable defendant would have understood that his or her acts were unlawful.") In any event, two district court cases certainly fall short of being a "robust consensus of cases of persuasive authority." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

In the end, no one has pointed this Court to any controlling case that clearly establishes the answer to this question: when performing a welfare check on an individual in response to a request from adult protective services (or a similar agency), may a police officer enter a location to determine the welfare of that individual?

But even if the answer to that question was "clearly established" or "beyond debate," those answers could still be too general to put Lt. Buccilli on notice under the specific facts and circumstances of this case – which also include a 911 call, information relayed to adult protective services from a family member of the individual allegedly at risk, and Joseph Batt's actions of refusing to let Lt. Buccilli see the individual who was allegedly in distress.

For all of these reasons, the answer to the constitutional rule under the specific facts and circumstances of this case was not clearly defined with the requisite specificity, nor was the issue "beyond debate." *al–Kidd, 563 U.S. at 741.* Indeed, "the constitutional question in this case falls far short of that threshold." *Id.* As a result, even if Lt. Buccilli's entry into the Batt's residence violated the Fourth Amendment – a question the Court declines to resolve – he is entitled to qualified immunity, because the right was not "clearly established," and even if Lt. Buccilli's belief that his actions were justified was incorrect, he was not "plainly incompetent." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

CONCLUSION

Magistrate Judge Foschio's Report and Recommendation (ECF No. 45) is ADOPTED IN PART. The Court declines to adopt Judge Foschio's conclusion that no Fourth Amendment violation occurred, and the Court accepts and adopts Judge Foschio's conclusion that Lt. Buccilli is entitled to qualified immunity for the reasons stated in this decision. The Batts' summary judgment motion (ECF No. 35) is DENIED, Lt. Buccilli's summary judgment motion (ECF No. 32) is GRANTED, and this case is DISMISSED WITH PREJUDICE. The Clerk of Court is directed to enter judgment and to close this case.

IT IS SO ORDERED.

DATED: March 31, 2017
Rochester, New York

HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

TIMOTHY BATT, et al

v.

JOSEPH BUCCILLI

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 12-CV-1198G

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that Magistrate Judge Foschio's Report and Recommendation is Adopted In Part; that the Court declines to adopt Judge Foschio's conclusion that no Fourth Amendment violation occurred; that the Court accepts and adopts Judge Foschio's conclusion that Lt. Buccilli is entitled to qualified immunity; that the Batts' summary judgment motion is Denied; that Lt. Buccilli's summary judgment motion is Granted and that this case is Dismissed With Prejudice.

Date: March 31, 2017

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/Suzanne Grunzweig
Deputy Clerk