UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TIMOTHY BATT, LUANN BATT, and JOSEPH BATT; ***Plaintiffs,***	)	
v.	)	**CIV No. 12-cv-01198-RJA**
JOSEPH BUCCILLI, in his personal capacity, ***Defendant.***	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S SUMMARY-JUDGMENT MOTION AND IN SUPPORT OF PLAINTIFFS CROSS MOTION

Joseph, Timothy, and LuAnn Batt brought this action under 42 U.S.C § 1983 against defendant Lt. Joseph Buccilli of Orchard Park Police Department. On April 17, 2012, Buccilli entered the Batts' home without judicial authorization, without consent, and without exigent circumstances. Because there are disputed material facts, which when viewed in the light most favorable to Plaintiffs would allow a jury to rule in favor of the Batts, Buccilli is not entitled to summary judgment. Additionally, because the legal issues surrounding the emergency-aid exception to the Fourth Amendment's warrant requirement were clearly established, Buccilli is not entitled to qualified immunity. Defendant's motion for summary judgment should be denied.

Furthermore, when the facts are viewed in the light most favorable to Buccilli, his actions did not fall within the emergency-aid exception to the Fourth Amendment as clearly established in April 2012. Summary judgment should be awarded to Plaintiffs on the issue of liability.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). "[T]he mere existence of *some* alleged factual dispute between the parties" will not defeat a motion for summary judgment, unless the factual dispute is both material under the substantive law controlling the case, and genuine in that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-8 (1986). The moving party bears "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Axiomatic to summary judgment analysis is the rule that, "[i]n articulating the factual context of the case, . . . '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, __ U.S. __, 134 S.Ct. 1861, 1863 (2014), *quoting Anderson*, 477 U.S. at 255. This rule applies with equal force to both prongs of qualified-immunity analysis. *Tolan*, 134 S.Ct. at 1866 ("Courts have discretion to decide the order in which to engage these two prongs. But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment") (internal citations omitted). Even where courts must review the "specific context of the case" to determine whether a search or seizure violated a "clearly established" right, the court "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Id.* at 1866.

II. FACTS IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFFS

Based on the evidentiary record before this court, a reasonable jury could find the following facts when viewing the evidence in the light most favorable to the Plaintiffs:

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 (Plaintiffs' Rule 56 Statement of Uncontested Facts ¶ 38) (hereinafter "Pl.56.U.F."). When 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 (Pl.56.U.F. ¶¶ 41-43).

While the officers were talking in the driveway, they were approached by Plaintiff Joseph Batt (Pl.56.U.F. ¶ 44). There was nothing in Joseph's hands as he approached the officers (Pl.56.U.F. ¶ 45). 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 (Pl.56.U.F. ¶¶ 42-43, 48). 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 (Pl.56.U.F. ¶¶ 46, 49). Joseph told 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 (Pl.56.U.F. ¶ 49; Plaintiff's Rule 56(a)(2) Opposing Statement of Uncontested Facts ¶¶ 20, 82-83) (hereinafter "Pl.56.O.S."). 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 (Pl.56.O.S. ¶ 84). Joseph repeatedly told Buccilli that he did not have permission to enter, and no other resident gave him permission to enter (Pl.56.U.F. ¶¶ 50-51; Pl.56.O.S. ¶¶ 46-47, 53). Buccilli understood that he did not have permission to enter the Batt home (Pl.56.U.F. ¶ 52; Pl.56.O.S. ¶ 46).

Joseph decided to call his parents. He told Buccilli that he was going inside to make a private phone call, reiterated that Buccilli was not to come inside, and reentered the home through a side door (Pl.56.U.F. ¶¶ 55-56; Pl.56.O.S. ¶¶ 20, 22-23, 86). 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 (Pl.56.U.F. ¶¶ 57-61; Pl.56.O.S. ¶¶ 22-23). Joseph once again told the officers that they did not have permission to enter the home (Pl.56.U.F. ¶ 62). Officer Kadi left the Batt home, while Buccilli remained inside (Pl.56.U.F. ¶ 63).

After Buccilli entered the Batts' home, Joseph began recording the encounter using his phone's camera (Pl.56.U.F. ¶ 64). During his deposition, 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 (Pl.56.U.F. ¶¶ 65-70). In that recording, Buccilli admitted that he did not know what the welfare concerns were:

> 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. . . .

(Pl.56.U.F. ¶¶ 71-72; Pl.56.O.S. ¶¶ 10, 14, 51-52) (emphasis added).

Buccilli told Joseph several times that if he obstructed Buccilli from observing Fred, he would be arrested (Pl.56.U.F. ¶ 75). Joseph said that while Buccilli did not have permission to be in the home, Joseph would not obstruct him (Pl.56.O.S. ¶ 85). Joseph did not lay hands on Buccilli, or use threatening words (Pl.56.U.F. ¶¶ 77-78).

Buccilli went into the Batts' living room, where he saw Fred sitting in a chair, well-dressed and well-groomed, with a bowl beside him (Pl.56.U.F. ¶ 79). Buccilli spoke with Fred. (Pl.56.U.F. ¶¶ 80-81). As he was leaving, Buccilli said, "That's it. For now. *We may be back. If they [APS] call again, we gotta* [sic] *come back*" (Pl.56.U.F. ¶¶ 82-83) (emphasis added).

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 (Pl.56.U.F. ¶ 86). LuAnn allowed Ms. Sullivan to enter the home. 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. 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 (Pl.56.U.F. ¶¶ 86, 91-93). 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 (Pl.56.U.F. ¶ 94). On April 20, 2012, APS closed its investigation, because no further action was needed (Pl.56.U.F. ¶¶ 95-96).

During discovery, the parties learned that on April 17, 2012, Donna Locicero, a Senior Case Worker at Erie County Department of Social Services, APS, received a call from Annette Puntoriero, Fred's daughter-in-law. Fred had lived with Annette and her husband, Joseph Puntoriero, but moved in with the Batts in December of 2011, after LuAnn expressed concerns about the level of care Fred was receiving (Pl.56.U.F. ¶¶ 4, 6, 27). Fred had dementia, was wheelchair bound, and had been diagnosed in 2009 with failure to thrive (Pl.56.U.F. ¶ 7).

Fred was well cared for in the Batt home (Pl.56.U.F. ¶ 17). Fred was occasionally visited by Joseph Puntoriero, and was never visited by Annette (Pl.56.U.F. ¶¶ 23-24). Prior to April

17th, LuAnn and Joseph were involved in an ongoing dispute over some of Fred's property that was at Joseph's house, which Joseph refused to return (Pl.56.U.F. ¶ 28).

On April 17, 2012, Annette called APS, alleging that her husband, Joseph Puntoriero, was concerned about Fred's welfare (Pl.56.U.F. ¶ 11). 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 (Pl.56.U.F. ¶ 16; Pl.56.O.S. ¶ 45). 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 (Pl.56.U.F. ¶ 22). But Joseph Puntoriero was not denied access to the Batt home on April 16, 2012 (Pl.56.U.F. ¶¶ 25, 28-29).

Ms. Locicero then asked Annette questions about the Batt home and the care Fred was receiving (Pl.56.U.F. ¶ 33). 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 answer questions about Fred's eating or feeding habits because she had not personally visited the Batt home on April 16, 2012 (Pl.56.U.F. ¶ 32). 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 (Pl.56.U.F. ¶ 26). LuAnn and Joseph disagreed about some of Fred's property, which was still at Joseph's house, but LuAnn had never denied Joseph access to Fred (Pl.56.U.F. ¶¶ 25, 28-29). Instead, Joseph did not ask to see Fred, and left after talking to LuAnn about returning Fred's furniture (Pl.56.U.F. ¶¶ 25, 29).

APS frequently receives reports that arise out of an underlying family dispute, and these reports are often false (Pl.56.U.F. ¶¶ 30-31). 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." *Id.*

APS asked the Orchard Park Police Department to conduct a welfare check at the Batts' home (Pl.56.U.F. ¶ 36). 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 (Pl.56.U.F. ¶ 37). Ms. Locicero told the dispatcher that Annette was the reporter, gave the dispatcher with Annette's phone number, and said nothing about Joseph's suspicions about Fred's previous lethargy and dehydration on April 2 or 3 (Pl.56.O.S. ¶ 12). Buccilli and Officer Kadi were then dispatched to the Batts' home (Pl.56.U.F. ¶ 38).

III. LT. BUCCILLI IS NOT ENTITLED TO SUMMARY JUDGMENT

"'[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, __ U.S. __, 134 S.Ct. 2473, 2482 (2014), *citing Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The "reasonableness" inquiry operates in the shadow of two core constitutional presumptions. First, because "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *United States v. Hassock*, 631 F.3d 79, 84 (2d Cir. 2011), *quoting Payton v. New York*, 445 U.S. 573, 585 (1980), "[t]he core premise underlying the Fourth Amendment is that warrantless searches of a home are presumptively unreasonable." *United States v. Simmons*, 661 F.3d 151, 156 (2d Cir. 2011). "'T]he right of a man to retreat

into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment." *Groh v. Ramirez,* 540 U.S. 551, 559 (2004) (internal quotation marks and alterations omitted). The "reasonableness" of a particular search is analyzed objectively, from the perspective of "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," to account for the fact that officers are "often forced to make split-second judgments." *Plumhoff v. Rickard,* __ U.S. __, 134 S.Ct. 2012, 2020 (2014).

Second, "the most basic constitutional rule in this area is 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." *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971) (internal quotations omitted). The exceptions to the warrant requirement are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), and "the burden is on those seeking the exemption to show the need for it." *United States v. Jeffers,* 342 U.S. 48, 51 (1951). Absent such a showing, "the mandate of the Amendment requires adherence to judicial processes," *id.*, and "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry v. Ohio,* 392 U.S. 1, 20 (1968).

It is undisputed that Buccilli entered the Batt home without judicial authorization (Pl. R. 56 St. ¶¶ 54, 71). It is undisputed that Buccilli lacked consent to enter (Pl. R. 56 St. ¶¶ 50-52). In the video recording, Buccilli said that he did not need a search warrant or consent to enter the Batt home even though he admitted that he did not know the basis for the concerns about Fred's wellbeing (Pl. R. 56 St. ¶¶ 64-73). The Fourth Amendment's core presumptions against warrantless searches conducted in a home are clearly triggered in this case. Because a reasonable jury could conclude that Buccilli's entry into the Batts' home did not fall within an exception to the

warrant requirement—whether the record is viewed in the light most favorable to the Batts or to Lt. Buccilli—his motion for summary judgment must fail and the Batts are entitled to summary judgment on the issue of liability.

A. *The "emergency-aid exception" does not apply*.

One "jealously and carefully drawn" exception to the warrant requirement is when "the exigencies of [a] situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978). In the Second Circuit, "[t]he essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an 'urgent need' to render aid or take action." *United States v. MacDonald*, 916 F.2d 776, 769 (2d Cir. 1990) (*en banc*), *citing Dorman v. United States*, 545 F.2d 385, 391 (D.C. Cir. 1970).

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." *Brigham City*, 547 U.S. at 403. In describing the "emergency-aid exception," the Second Circuit has held that "the common theme through these cases is the existence of a *true emergency*," such that an otherwise presumptively unreasonable search becomes "objectively reasonable." *Simmons*, 661 F3d. at 157 (emphasis added). In identifying "a true emergency," "[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) (citation and internal quotation marks omitted). This test "is an objective one that turns on the totality of the circumstances confronting law enforcement agents *in the particular case*." *Id.* at 117 (emphasis added). The Second Circuit's careful approach to the emergency-aid exception reflects its recognition that courts "must be cognizant of the Supreme Court's admonition that 'exceptions to the warrant requirement are few in number and carefully

delineated and that the police bear a *heavy burden when attempting to demonstrate an urgent need* that might justify warrantless searches or arrests.'" *Harris v. O'Hare*, 770 F.3d 224, 234 (2d Cir. 2014), *quoting Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984) (emphasis added).

1. The United States Supreme Court and the "emergency-aid" exception.

Prior to April 17, 2012, the United States Supreme Court had decided two cases involving the "emergency-aid exception." *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006); *Ryburn v. Huff*, __ U.S. __, 132 S.Ct. 987 (Jan. 23, 2012). In *Brigham City*, four police officers responded to a 911 call at 3 a.m. about a "melee" occurring in a home in Brigham City, Utah. 547 U.S. at 400. The officers entered the home after they heard shouting from within, observed two juveniles drinking beer in the backyard, and observed an altercation through a screen door as four adults attempted to restrain a juvenile, who then managed to break free and strike one of the adults in the face, drawing blood. *Id.* at 400-1. When the officers arrived at the scene, they heard a loud tumult, and personally observed a violent altercation. Their entry into the home was "plainly reasonable," because "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.

The evidence in this case, viewed in the light most favorable to the Batts, does not rise to the level of a "true emergency," and no officer could reasonably believe that it did. On April 17, 2012, Buccilli told Joseph Batt that "I don't know the basis or the allegations of what the welfare concerns are," that "All I know is a county agency called," and that "I have a right to enter the house and forcibly [sic], if need be, when somebody's welfare is *possibly* in question." (Pl.56.U.F. ¶¶ 71-72; Pl.56.O.S. ¶¶ 10, 14, 51-52, 77-81) (emphasis added). Taking Buccilli at his word, all he knew was that there was a *possibility* that someone's "welfare" in the Batt home was "in question," based on allegations made to APS that he knew nothing about. Indeed, this is

how Defendant's Memorandum of Law describes how Buccilli viewed APS's complaint. *See* Def. Mem. S.J. at 7-8 (arguing that Buccilli was responding to "clear and urgent exigent circumstance[s]" because "[t]he elderly individual *could* be in the [sic] need of medical assistance or have passed away") (emphasis added). By his own admission, Buccilli was responding to a possible concern. There was no observable, ongoing, and escalating emergency.

Similarly, in *Ryburn*, two police officers went to the Huff home after a school principal reported that Huff's son, Vincent, was rumored to have written a letter threatening to "shoot up" the school. 132 S.Ct. at 988. After learning from one of Vincent's classmates that Vincent "was capable of carrying out the alleged threat," the officers went to the Huff home to interview Vincent. *Id.* When no one answered the door, the police unsuccessfully attempted to call the Huffs' house phone, before reaching Mrs. Huff on her cell phone. *Id.* When Mrs. Huff came out to the front porch, one of the officers asked if there were guns inside the Huff home and Mrs. Huff immediately ran inside the house. *Id.* at 988-9. Fearing that she may have been running for a gun, the officers entered the home, where they remained for a total of five to ten minutes. *Id.* On appeal, the Supreme Court granted qualified immunity to the police officers because their entry was prompted by "officer safety concerns" when the officers observed Mrs. Huff's abrupt reentry into the home. *Id.* at 990. Because the officers were witness to a chain of events that gave rise to "a reasonable basis for concluding that there [was] an imminent threat of violence," the Court held that "the need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency." *Id.* at 990-92.

Defendant summarizes *Ryburn* as "unanimously granting immunity and dismissing the complaint against officers conducting a warrantless search," and likens this case to *Ryburn* because Buccilli was "in the house a short period of time and did not conduct a search, but only

checked on the welfare of Mr. Puntoriero." Def. Mem. S.J. at 10-11. Defendant, however, says nothing of *Ryburn*'s factual context—specifically that the initial allegations involved firearms and a potential school shooting. The Court held that the officers' concern for their own safety made their entry into the home reasonable because of the way Mrs. Huff abruptly went back inside when they asked her about guns. Their fear of "an imminent threat of violence," and "the need to protect or preserve life or avoid serious injury" was essential to the outcome of the case.

Ryburn serves to underscore the unreasonableness of Buccilli's search. In *Ryburn*, Mrs. Huff's behavior in the context of all of the information the officers knew reasonably raised concerns for their safety. In this case, Buccilli had only vague reports of "concerns" for Fred's well-being and when he arrived at the home Joseph told him Buccilli that that Fred was "fine," that LuAnn was a nurse, and that a nurse's aide had just left the Batt home a few hours earlier (Pl.56.U.F. ¶¶ 48-49; Pl.56.O.S. ¶¶ 20, 82-83). This additional information flatly contradicted APS's vague report, instead of corroborating it, yet Buccilli proceeded to enter the Batt home anyway, because he felt he had to complete APS's request for a welfare check. Had he taken a few minutes to verify that a nurse's aide had been there earlier, this whole situation could have been avoided. Instead, he relied on a vague report, made by a person who lacked firsthand knowledge, and who admitted to be having "issues" with the Batts—a situation that is well known to lead to false reports. A jury could easily find that Buccilli's search was unreasonable.

2. <u>The Second Circuit and the "emergency-aid" exception.</u>

In *Tierney v. Davidson*, 133 F.3d 189 (2d Cir. 1998), a case Defendant does not discuss, a police officer was dispatched to the Tierney home after the police received a "priority" call from an unnamed woman reporting that yet another "bad" domestic dispute was in progress. *Id*. at 192, 197. When the officer arrived, he encountered two men standing outside the home. One told him that it was his wife who had called. They told him that there had been other disturbances in

the residence, that this was the worst one yet, and that they had "heard screaming and banging up until [the officer's] approach." *Id.* at 192. The officer was concerned that both parties to the fight were still present, and that the silence in the home could mean that someone was injured. *Id.* He reached through a broken pane of glass, unlocked the door, entered the residence, and saw Tierney, upset and shaken, with her two small children. *Id.* at 193. Concerned that the other participant was still there, and that children might be exposed to violence, he surveyed the visible areas of the house, and was grabbed by Tierney's boyfriend, who was promptly subdued by police. *Id.*

The Second Circuit held that, given "the circumstances then confronting the officer," the search was justified by exigent circumstances. *Id.* at 197. The court noted that the officer had been trained to expect violence at domestic disturbance calls, and that the officer had been told going in that this was a "bad" domestic disturbance. *Id*. Upon arriving at the scene, witnesses told the officer that the shouting in the house had ended right before his arrival. *Id.* at 197-98. Given what the officer knew, the 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.*

Buccilli's search is far removed from the search approved in *Tierney*. The officers in *Tierney*—just like the officers in *Brigham* and *Ryburn*—had a report of a potentially dangerous situation, and received additional, credible, corroborating information when they arrived at the scene. Buccilli, on the other hand, knew little going in, received information that contradicted the report, and had no concern for his personal safety (Pl.56.U.F. ¶¶ 45, 48-49, 71-72, 76, 78; Pl.56.O.S. ¶¶ 10, 14, 20, 51-52, 77-83). *Tierney* offers no support to Buccilli.

Defendant's Memorandum of Law cites *Montanez v. Sharoh*, 444 Fed.Appx. 484 (2d Cir. 2011) (UNPUBLISHED) for the proposition that "officers are permitted to enter a dwelling

without a warrant to render emergency aid or assistance to a person whom they reasonably believe to be in distress and in need of their assistance." Def. Mem. S.J. at 7, *citing Montanez*, 444 Fed.Appx. at 486. A close analysis of the underlying facts, however, demonstrates that Defendant's reliance on *Montanez* is misplaced. The Second Circuit relied on the facts in the district court's opinion. 444 Fed.Appx. at 485. Officers of the Milford Police Department (MPD) executed a search-and-seizure warrant at Montanez's home, seized drugs and drug paraphernalia, and found "three loaded 30-round magazines, two empty 30-round magazines, one handgun holster, and two boxes of ammunition (.22 and .380 caliber)," but only "one Uzi 9mm pistol" which did not fit the holster. *Montanez v. City of Milford*, 706 F.Supp.2d 222, 225 (D. Conn. 2010). The police called Montanez, who said he would return home in about an hour. When Montanez did not return, the officers left, obtained an arrest warrant, and put out an APB for Montanez, believing him to be armed and dangerous. *Id.* at 225-6; 444 Fed.Appx. at 487.

A police officer then reported to the Connecticut Department of Children and Families (DCF) that he had seen "young children" living in a home with drugs and guns, and that these "dangerous items" had been "easily accessible to young children," 706 F.Supp.2d at 226, and was told that there was a history of DCF involvement with the occupants of Montanez's home. 444 Fed.Appx. at 487 n. 1. MTD then provided a police escort to a social worker who feared for the safety of the child because of the earlier "seizure of guns and drugs that were easily accessible to children." *Id*. at 487. Once at the residence, the police saw that the lights were on at 1:00 a.m., knocked and announced their presence, placed an unanswered phone call to the residence, entered through a door that was either open or unlocked, conducted a brief sweep of the residence, determined that no one was home, and left the residence. *Id*.

The Second Circuit held that the entry did not violate the Fourth Amendment. "It 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.*

Once again, viewing the search properly in its context and the totality of its circumstances, *Montanez* is inapplicable to the facts of this case. Buccilli did not know the basis for the report to begin with, and even if he had, there was nothing in the allegations that suggested imminent danger to Fred (Pl.56.U.F. ¶¶ 45, 48-49, 71-72, 76, 78; Pl.56.O.S. ¶¶ 10, 14, 20, 51-52, 77-81). APS had received no prior calls of concern about Fred Puntoriero, and there was no "prior history of [APS] involvement" in the Batt home. *Id*. at 487; (Pl.56.U.F. ¶ 12; Pl.56.O.S. ¶ 38). Instead of learning that the residents of the home were at-large felons who were armed and dangerous, Buccilli learned Fred was "fine," LuAnn was a "nurse," and that a nurse's aide had been there just hours before (Pl.56.U.F. ¶¶ 48-49; Pl.56.O.S. ¶¶ 20, 82-83). The circumstances in this case are nothing like what the Second Circuit addressed in *Montanez*.

Buccilli's argument is further undermined by *Kerman v. City of New York*, 261 F.3d 229 (2d Cir. 2001), also not discussed in his memorandum. In 1995, police responded to a 911 call claiming that "a mentally ill man at this location was off his medication and acting crazy and possibly had a gun." 261 F.3d at 232. The 911 operator was provided with Kerman's phone number, but was not told the identity of the caller. *Id.* Armed with only this information, police and an ambulance arrived at Kerman's apartment, rang the doorbell, knocked on the door, and announced their presence for several minutes. *Id.* Kerman, who had been showering, opened the door a crack, at which point, according to Kerman, the officers forced the door open, slamming Kerman's head on the door and sending him flying to the floor as officers grabbed and hand-

cuffed him, while brandishing a weapon. *Id.* at 232-3. After the fact, the officers learned that the caller was Kerman's girlfriend, and that Kerman had called his girlfriend earlier to say that he was "drunk and intended to buy a gun and kill himself or his psychiatrist." *Id.*

The Second Circuit examined whether the police's entry into Kerman's apartment fell within the "emergency-aid exception," given that the police's sole basis for concluding that exigent circumstances existed was the anonymous 911 call. *Id.* at 235. The court held that the anonymous call, standing alone, lacked sufficient "indicia of reliability" to justify a warrantless entry, relying in part on *Florida v. J.L.*, 529 U.S. 266 (2000), while also recognizing that the privacy interests at stake in Kerman's case—the privacy of the home—were far greater than the privacy interests at issue in *J.L.*—a "stop and frisk" of a man standing at a bus stop. 261 F.3d at 235-6. Even though the anonymous call "may have presented a clearer and more imminent threat of harm" than the call in *J.L.*, the court held that "the absence of evidence in the record to corroborate the 911 call," coupled with the fact that the police "did not conduct any investigation to confirm the call" prior to entering a private home, meant that the search clearly violated the Fourth Amendment. The Court nevertheless granted the officer qualified immunity because the law regarding reliance on anonymous tips was not clearly established in 1995. *Id.* at 235-7.

A reasonable jury could easily find that Buccilli had even less "indicia of reliability" than the officers in *Kerman*, because he knew neither the identity of the caller, nor the substance of the allegations (Pl.56.U.F. ¶¶ 71-72; Pl.56.O.S. ¶¶ 10, 14, 51-52, 77-81). Just like the officers in *Kerman*, Buccilli failed to "conduct any investigation to confirm the call" prior to entering the Batts' home, even though he was provided with additional information which strongly suggested that the report was false. (Pl.56.U.F. ¶¶ 48-49; Pl.56.O.S. ¶¶ 20, 82-83).

In *Harris v. O'Hare*, 770 F.3d 224 (2d Cir. 2014) (discussing the state of the emergency-aid exception as it existed in 2006), police received a tip from a parolee—whom they had just arrested on drug charges—that two guns were stashed in an abandoned car parked in the back yard of a residence. The officers did not ask how the parolee knew this, and had never used this parolee as an informant before. Without obtaining a warrant, they went to the residence. They did not drive around the house to see if a car matching the description was present. Instead, they opened a gate and entered the fenced yard without knocking on the front door or announcing their presence. They walked down the side of the house with their guns drawn. *Id.* at 227-8. They saw the family's dog, and one of the officers shot it at point-blank range three times. *Id.* at 228. A child who had brought the dog outside to play came around the house as the officer fired the third shot. *Id.* No vehicle matching the description in the tip was ever found on or near the premises, and no guns were ever recovered. *Id.*

The Second Circuit held that the police were not "confronted by an urgent need to render aid or take action" because there was "simply insufficient evidence to warrant the application of the exigent circumstances exception." *Id.* at 233-4. "The core question" was "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." *Id.* at 235, *citing Simmons*, 661 F.3d at 157 (emphasis in *Harris*). The court found that the officers failed to take steps to corroborate the tip they received, such as looking into the backyard or driving down a parallel street, before entering the premises. *Id.* at 235-6. Additionally, the fact that the officers did not see a vehicle matching the tip's description when they arrived meant that "a reasonable, experienced officer would not have perceived sufficient evidence giving rise to an urgent need to take action at the moment of the warrantless entry." *Id.* at 236. Absent such evidence, the "mere suspicion or prob-

able cause for belief of the presence of a firearm does not, on its own, *create* urgency," nor does "the fact that it may have been more tedious to secure the property . . . while a warrant was obtained." *Id.* at 236, 238 (emphasis in original). Finally, the court held that the Fourth Amendment violation was clearly established when the search was conducted in 2006. *Id.* at 239-41.

Whatever Buccilli may have discovered after the events of the search took place, a reasonable jury could find that the facts that Buccilli knew "at the moment of entry" would not have "led a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." *Id.* at 235. Buccilli knew only that APS had requested a welfare check because there was a potential concern about someone's welfare in the Batt home (Pl.56.U.F. ¶¶ 71-72; Pl.56.O.S. ¶¶ 10, 14, 51-52, 77-81). When Buccilli was informed outside the Batt home of additional facts which suggested that there was no immediate need for him to enter the home (Pl.56.U.F. ¶¶ 48-49; Pl.56.O.S. ¶¶ 20, 82-83), a reasonable officer in his position would have known that his "mere suspicion" could "not, on its own, *create* urgency" sufficient to enter the home. *Harris*, 770 F.3d at 236. On April 17, 2012, it was clearly established in the Second Circuit that Buccilli's actions violated the Batts' Fourth Amendment rights.

3. <u>The Western District Court of New York and the "emergency aid" exception.</u>

In *United States v. Paige*, 493 F.Supp.2d 641 (W.D. N.Y. 2007) (not cited by Defendant), police entered a private residence without a warrant after receiving a tip from an informant that an unknown participant, who lived at a particular residence, had been throwing bicycles against the side of a building in a "frantic manner," and where the officers also learned that bicycles had been found at a location matching the informant's description, and that a stabbing had occurred there earlier that evening. *Id*. at 643-4. When the officers saw that the residence was dark except for the light of a television inside, they concluded that "another seriously injured victim might be

inside the apartment," knocked on the door, announced their presence, and entered the residence, where they discovered a firearm. *Id.*

Similarly, in *United States v. Sikut*, 488 F.Supp.2d 291, 297 (W.D. N.Y. 2007) (not cited by Defendant), police received an anonymous 911 call alleging that noise that sounded like a "physical fight" was coming from Sikut's apartment. The officers arrived at the apartment and spent about 15 minutes trying to open doors and windows before finding that the patio door was unlocked. The officers entered, announced their presence, and found no sign of a physical struggle or domestic disturbance on the first floor of the apartment, but proceeded to the second floor, where they found Sikut, asleep. *Id*. at 299.

In both cases, this District Court suppressed the physical evidence seized by the officers. In *Paige*, the court found that there was no evidence connecting the defendant to the stabbing, and no evidence that any potential victim had entered the apartment. 493 F.Supp.2d at 647. This, combined with the fact that there was no blood on the street or sidewalk outside, led the court to conclude that the officers' entry was "based on mere surmise, not objective facts reasonably suggesting that an actual emergency involving human safety then existed in Defendant's apartment." *Id*. Likewise, in *Sikut*, the court found that, at the time of entry, the officers were not aware of "specific and articulable facts" which would "cause a person of 'reasonable caution' to believe that the intrusion was necessary." 448 F.Supp.2d at 307. Instead, the officers relied on a vague, anonymous call, and the officers' follow-up conversation with the reporter "did not produce any additional information" suggesting an immediate need to enter the apartment. *Id.* at 308.

In this case, the initial allegation—a vague concern about somebody's welfare—was far less serious than the allegations in *Paige* and *Sikut*—a stabbing and a "combustible" domestic dispute. Defendant Buccilli knew next to nothing when he arrived at the scene to suggest that

there was a true emergency and failed to follow-up with witnesses even after being told of their existence (Pl.56.U.F. ¶¶ 71-72; Pl.56.O.S. ¶¶ 10, 14, 51-52, 77-83). The facts known at entry could not justify his warrantless entry into the Batt home.

4. Remaining "emergency-aid" cases cited by the Defendant.

Defendant also argues that, "Just as in *Georgia v. Randolph*, it is 'silly' to suggest that Mr. Buccilli should be suggested [sic] to a tort for carrying out his duty to ensure the health and welfare of Mr. Puntoriero. When the underlining [sic] facts are viewed objectively, there is no doubt that exigent circumstances existed necessitating a warrantless entry." Def Mem SJ at 8. Defendant's statement is a reference to page 6 of his memorandum, where he cites to *Georgia v. Randolph*, 547 U.S. 103 (2006), which he quotes as saying: "[I]t would be silly to suggest that the police would commit a tort by entering ... to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur." Def. Mem. S.J. at 6.

As an initial matter, because the issue in *Randolf,* was whether evidence seized with the permission of one occupant is admissible against a co-occupant who is present at the scene and expressly refuses to consent (not whether a warrantless home entry falls within the Fourth Amendment's "emergency-aid" exception), the quote Defendant references is dictum. Moreover, eliminating the Defendant's alterations to that dictum is revealing. The full, unaltered sentence in *Randolph* says:

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; ***so long as they have good reason to believe such a threat exists***, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

Id. at 118 (emphasis added). "So long as they have good reason to believe such a threat exists" is too important a concept to be left on the cutting room floor. The information available to Buccilli when he entered the Batts' home simply did not give him "good reason to believe" that Fred was in immediate need of assistance (Pl.56.U.F. ¶¶ 71-72; Pl.56.O.S. ¶¶ 10, 14, 51-52, 77-83).

Defendant also cites an unpublished case from the Eastern District of California, *Wolf v. City of Stockton*, 2010 U.S. Lexis 24755 (ED Calf. 2010), affd 2011 U.S. App. Lexis 13484 (9th Cir. 2011), in which the officer searched a van. Def. Mem SJ at 8. Even if an unpublished decision in the Eastern District of California could "clearly establish" the law in this case, "[t]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Payton*, 455 U.S. at 585, rendering unpublished cases about vans inapposite. *See, e.g., Cady v. Dombrowski*, 413 U.S. 433, 447-48 (1973) (holding that the search of a car was not held to the same high standard as a nonconsensual entry into a home).

IV. THE BATTS ARE ENTITLED TO SUMMARY JUDGMENT ON LIABILITY

A. Summary of Additional Facts Favorable to Defendant.

The factual context of this case does not change significantly, even if a reasonable jury were to view all of the disputed evidence in this case in the light most favorable to Defendant Buccilli. It is undisputed that Defendant Buccilli knowingly entered the Batts' home without permission (Pl.56.U.F. ¶¶ 50-52, 57-62), that he put his foot between the Batts' front door and the doorframe (Pl.56.U.F. ¶¶ 57-61), that Joseph Batt did not lay hands on Defendant Buccilli or use threatening words (Pl.56.U.F. ¶¶ 76-78), that Ms. Sullivan was able to speak to a Hospice nurse who quickly and unequivocally confirmed that Fred was well-cared for in the Batts' home (Pl.56.U.F. ¶ 94), and that Defendant Buccilli's statements made in the video recording were true and accurate (Pl.56.U.F. ¶¶ 65-70).

The most important factual issue in this case is what Defendant Buccilli knew at the time of entry. The jury could find that Buccilli knew that another family member had been denied access to the Batts' home on the previous day (Pl.56.O.S. ¶ 12), that Joseph Batt did not tell Buccilli that LuAnn was a nurse, that a nurse's aide had been at the home only hours before, or that Fred was fine (Pl.56.O.S. ¶ 20), and that Joseph Batt did not tell Buccilli that he was going inside to make a private phone call (Pl.56.O.S. ¶ 22). The jury could also find that Ms. Locicero informed the dispatcher that Fred "had been dehydrated in the past and lethargic," and that the dispatcher told Officer Kadi that Fred "had suffered from dementia and dehydration and may be in poor health," that Officer Kadi conveyed this information to Defendant Buccilli prior to the entry into the Batts' home (Pl.56.O.S. ¶¶ 12, 14), even though Defendant Buccilli's testimony, the affidavit of the dispatcher, and the audio recording of the 911 call between Ms. Locicero and the dispatcher—none of which mention anything about dehydration or dementia—strongly suggest that this favorable testimony has been colored by facts discovered and disclosed subsequent to April 17, 2012. *See Plumhoff*, 134 S.Ct. at 2020 (noting that the proper Fourth Amendment inquiry is what was known by "a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight") (emphasis added).[1]

Additionally, the jury could also find that Defendant Buccilli knew that the report came from Fred's daughter-in-law (Pl.56.O.S. ¶ 12), that Defendant Buccilli did not tell Joseph Batt that the call was anonymous (Pl.56.O.S. ¶ 19), that Joseph Batt attempted to "slam" the door on Defendant Buccilli as he followed Joseph into the Batts' home (Pl.56.O.S. ¶ 22), that Defendant

[1] Additionally, it is an uncontested fact that the words spoken by Defendant Buccilli on the video recording made on April 17, 2012, are true and accurate (Pl.56.U.F. ¶¶ 65-70), and that in that recording, Defendant Buccilli states, "I don't know the basis or the allegations of what the welfare concerns are," and "All I know is a county agency called. And based on their request, I have a right to enter the house" (Pl.56.U.F. ¶¶ 71-72). For purposes of discussing Plaintiffs' Cross-motion for Summary Judgment, we assume that the jury refuses to credit these uncontested facts.

Buccilli put his foot between the Batts' door and doorframe to avoid being hit by the slamming door (Pl.56.O.S. ¶ 23), that Ms. Locicero believed that Annette's allegations amounted to an "urgent concern" (Pl.56.O.S. ¶ 9), and that Defendant Buccilli's reason for entering the Batts' home was not solely because APS had requested that he conduct a welfare check (Pl.56.O.S. ¶ 10).

B. Even when viewing the facts in the light most favorable to Defendant Buccilli, the Batts are entitled to judgment as a matter of law on the issue of liability.

Even if all disputed facts are resolved in the Defendant's favor, the core presumptions of the Fourth Amendment still apply: warrantless entry into a home, without prior authorization from an impartial magistrate, is presumptively and *per se* unreasonable. *Payton,* 445 U.S. at 585; *Coolidge*, 403 U.S. at 454-55; *Simmons*, 661 F.3d 151 at 156. Thus, unless Buccilli's entry falls within the "jealously and carefully drawn" emergency-aid exception, he is liable for that entry.

Buccilli cannot meet this "heavy burden." *Harris*, 770 F.3d at 234. At best, he went to the Batts' home with the knowledge that APS had received a report from Fred's daughter-in-law, alleging that Fred "had suffered from dementia and dehydration and may be in poor health," and that a family member had been denied access to the Batts' home the day before. Even if Buccilli discovered no additional information that would have called into question the accuracy of this report, *c.f. Tierney*, 133 F.3d at 192, 197, nothing Defendant Buccilli saw at the scene even remotely suggested that there was an observable, ongoing, and escalating situation in the Batts' home that required immediate intervention. *C.f. Brigham*, 547 U.S. at 405.

Instead, Defendant Buccilli entered the Batts' home without "conduct[ing] any investigation to confirm the call," *Kerman*, 261 F.3d at 237, and the facts that he was aware of at the time of entry amounted to no more than a "mere suspicion," which "does not, on its own, *create* urgency." *Harris*, 770 F.3d at 236, 238 (emphasis in original). Nor was Buccilli entitled to rely on the generalized nature of the allegation itself—an elderly adult in potential need of aid—because,

"[t]aken to its logical end," this argument would "swallow the rule" that warrantless searches of a private home are presumptively and *per se* unreasonable, unless they fall within a "jealously and carefully drawn" exception. *Id.* at 237.

Defendant attempts to "couple[]" the allegation itself with "Joseph Batt's refusal of entry and belligerent behavior,"—even though it is undisputed that Defendant Buccilli did not feel threatened—in an attempt to clear the threshold of exigency. Def. Mem. S.J. at 7. But even if the jury were to find that Joseph Batt was "belligerent," which Buccilli described merely as using a raised voice (Pl.56.O.S. ¶ 20), nothing in Joseph Batt's demeanor or conduct *outside* the home suggested that there was an exigency *inside* the home. Absent that belief, officers may not enter a private home without a warrant. *Paige*, 493 F.Supp.2d at 647; *Sikut*, 488 F.Supp.2d at 298-9. All of this was clearly established on April 17, 2012.

Finally, all of the other facts potentially beneficial to the Defendant are not relevant to the core issue in this case: what did Defendant Buccilli know, *prior to entering the Batts' home*. Defendants try to make much of the fact that Joseph "slammed" the door on Defendant's foot, yet the undisputed fact is that whatever occurred at the door only occurred after Defendant followed Joseph Batt into the doorway of the Batts' home, after being clearly and repeatedly told that he did not have permission to enter. An event that occurs *during* an entry simply does not inform whether the officer had sufficient cause *prior to* the entry. *Plumhoff*, 134 S.Ct. at 2020.

Given "the totality of the circumstances confronting law enforcement agents in [this] particular case," *Klump*, 536 F.3d at 117, Buccilli cannot meet the "heavy burden" of demonstrating an urgent need to enter the Batts' home, *Harris*, 770 F.3d at 234, even if every material evidentiary dispute is resolved in his favor.

CONCLUSION

A reasonable jury could conclude on this record that Defendant Buccilli wrongly believed that he needed no other information other than that APS had requested a welfare check. That belief is contrary to the clearly established law of the Supreme Court, the Second Circuit, and this Court, where an officer invokes the emergency-aid exception.

Lt. Buccilli never considered seeking a court order, even though New York statutes provide an expedited process to obtain an "access order" where adults are concerned, if supported by independent investigation and sworn affidavits. N.Y. [Social Services] Law § 473-c(1) – c(2) (2014). Had Buccilli followed this procedure, he would have discovered that Fred had been seen earlier that day by a nurse's aide, and more importantly, that Annette's report was unreliable.

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied, and this court should grant Plaintiffs' Cross-Motion for Summary Judgment against Defendant Buccilli on the issue of liability.

DATED: January 30, 2015

Submitted on behalf of

TIMOTHY BATT, LUANN BATT, and JOSEPH BATT, *Plaintiffs*,

/s/ Peter K. Kamakawiwoole, Jr.
Peter K. Kamakawiwoole, Jr.
James R. Mason III
Darren A. Jones
HOME SCHOOL LEGAL DEFENSE ASSOCIATION
One Patrick Henry Circle
Purcellville, VA 20132
Phone: (540) 338-5600
Fax: (540) 338-1952
E-mail: peterk@hslda.org
Lead Counsel for Plaintiffs

Kevin T. Saunders
NIXON PEABODY LLP
1300 Clinton Square
Rochester, New York 14604
Phone: (585) 263-1087
E-mail: ksaunders@nixonpeabody.com
Local Counsel for Plaintiffs