No.

IN THE

Supreme Court of the United States

COREY CUNNINGHAM, ON BEHALF OF KODI GAINES, A MINOR,

Petitioner,

v.

BALTIMORE COUNTY, MARYLAND; CORPORAL ROYCE RUBY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Maryland

PETITION FOR A WRIT OF CERTIORARI

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NOVEMBER 22, 2024

QUESTIONS PRESENTED

This case presents important issues relating to the inquiry for determining whether a police officer is entitled to qualified immunity. The following questions are presented:

(1) Whether conduct that is sufficiently egregious to shock the conscience, in violation of the Fourteenth Amendment, necessarily is so obviously unlawful as to preclude a qualified immunity defense to liability?

(2) This Court has repeatedly held that qualified immunity does not protect officers from liability for obvious constitutional violations. Here, an officer shot a woman during a standoff, where she posed no imminent threat, because he was hot and frustrated. The bullet went through the woman and hit the Petitioner, a five-year-old child, who the officer knew was present and might be hit by the shot. A jury has determined that the officer's calculated decision to shoot was not objectively reasonable. Did the Maryland Supreme Court violate this Court's precedents by holding that the officer is entitled to qualified immunity because it could find no prior decision involving similar facts?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Cunningham v. Baltimore County*, No. 9, Supreme Court of Maryland. Judgment entered June 25, 2024.

- *Cunningham v. Baltimore County*, No. 378, Appellate Court of Maryland. Judgment entered April 6, 2023.

- *Dormeus, et al. v. Baltimore County*, No. 03-C-16-009435, Maryland Circuit Court, Baltimore County. Judgment entered April 26, 2022.

- *Cunningham v. Baltimore County*, No. 3461, Appellate Court of Maryland.[1] Judgment entered July 1, 2020.

- *Dormeus, et al. v. Baltimore County*, No. 03-C-16-009435, Maryland Circuit Court, Baltimore County. Judgment entered February 14, 2019.

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[1] Before December 14, 2022, the Appellate Court of Maryland was named the Court of Special Appeals of Maryland. This petition uses the current name for both proceedings held in that court.

TABLE OF CONTENTS

Page

Questions Presented i

Related Proceedings ii

Table Of Authorities.. v

Opinions Below.. 1

Jurisdiction... 1

Constitutional And Statutory Provisions 1

Statement 2

A. Legal Background 2

B. Factual Background 3

C. Procedural History 6

Reasons For Granting The Petition...................... 10

I. The lower court's decision conflicts with this Court's precedents. 10

A. Under this Court's precedents, obviously unlawful conduct alone clearly establishes the law such that qualified immunity does not apply. 11

B. Conduct that is so egregious and obviously unlawful as to shock the conscience necessarily forecloses qualified immunity. 14

II. Allowing the decision below to stand will needlessly confuse the qualified immunity doctrine.. 20

A. The decision below deepens an existing conflict among the lower courts. 20

B. This case is a good vehicle to provide badly needed clarity and to prevent immunization of outrageous official conduct. 23

Conclusion 26

Table of Appendices..(i)

Appendix A – Opinion, *Cunningham v. Baltimore County*, No. 9, Supreme Court of Maryland. Filed June 25, 2024.. 1a

Appendix B – Opinion, *Cunningham v. Baltimore County*, No. 378, Appellate Court of Maryland. Filed April 6, 2023.. .... 89a

Appendix C – Memorandum Opinion, *Dormeus, et al. v. Baltimore County*, No. 03-C-16-009435, Maryland Circuit Court, Baltimore County. Filed April 26, 2022... .... 145a

Appendix D – Opinion, *Cunningham v. Baltimore County*, No. 3461, Appellate Court of Maryland. Filed July 1, 2020... 185a

Appendix E – Memorandum Opinion, *Dormeus, et al. v. Baltimore County*, No. 03-C-16-009435, Maryland Circuit Court, Baltimore County. Filed February 14, 2019................................ 281a

TABLE OF AUTHORITIES

Cases **Page(s)**

Brosseau v. Haugen,
543 U.S. 194 (2004) 13

Browder v. City of Albuquerque,
787 F.3d 1076 (10th Cir. 2015) 24

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 3, 14, 15, 16, 17, 18, 24

Edrei v. Maguire,
892 F.3d 525 (2d Cir. 2018) 20, 21

Dean ex rel. Harkness v. McKinney,
976 F.3d 407 (4th Cir. 2020) 21

Hope v. Pelzer,
536 U.S. 730 (2002) 3, 11, 12, 13, 23, 24, 25

Kisela v. Hughes,
584 U.S. 100 (2018) 13

Pearson v. Callahan,
555 U.S. 223 (2009) 3

Pierson v. Ray,
386 U.S. 547 (1967) 2

Rochin v. California,
342 U.S. 165 (1952) 15, 16, 24

Rosales-Mireles v. United States,
585 U.S. 129 (2018) 15

Safford Unified School District No. 1 v. Redding,
557 U.S. 364 (2009)....................24

Sauers v. Borough of Nesquehoning,
905 F.3d 711 (3d Cir. 2018)....................22

Scott v. Smith,
109 F.4th 1215 (9th Cir. 2024)....................23

Taylor v. Riojas,
592 U.S. 7 (2020)....................13, 14, 19

Tolan v. Cotton,
572 U.S. 650 (2014)....................2, 3

Tyson v. Sabine,
42 F.4th 508 (5th Cir. 2022)....................21, 22

White v. Pauly,
580 U.S. 73 (2017)....................13

Statutes

42 U.S.C. § 1983....................2

Civil Rights Act of 1871....................2

Constitutional Provisions

U.S. Const. amend XIV, § 1....................2

OPINIONS BELOW

The opinion of the Supreme Court of Maryland (Pet. App. 1a–88a) is reported at 487 Md. 282 (2024). The 2023 opinion of the Appellate Court of Maryland (Pet App. 89a–144a) is unreported but available at 2023 WL 2806063. The 2022 memorandum opinion of the Maryland Circuit Court for Baltimore County (Pet. App. 145a–184a) is unreported. The 2020 opinion of the Appellate Court of Maryland (Pet. App. 185a–280a) is reported at 246 Md. App. 630 (2020). The 2019 memorandum opinion of the Maryland Circuit Court for Baltimore County (Pet. App. 281a–381a) is unreported but available at 2019 WL 2482684.

JURISDICTION

The Supreme Court of Maryland entered judgment on June 25, 2024. Pet. App. 1a. On September 9, 2024, Chief Justice Roberts extended until November 22, 2024, the time to file a petition for certiorari. *See* No. 24A226. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

STATEMENT

A. Legal Background

Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, authorizes individuals to sue state or local officials who violate their constitutional rights. *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. In Section 1983 suits against a police officer, the officer may claim a qualified "immunity" if he can show that he "acted in good faith." *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967).

Courts must apply "a two-pronged inquiry" to "resolv[e] questions of qualified immunity." *Tolan v.*

Cotton, 572 U.S. 650, 655 (2014) (per curiam). The first prong is whether "the officer's conduct violated a [federal] right." *Id.* at 655–56 (alteration in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). In Fourteenth Amendment cases, an officer violates the right to due process when he engages in an "abuse of power . . . which shocks the conscience." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

The second prong is "whether the right in question was 'clearly established' at the time of the violation." *Tolan*, 572 U.S. at 656 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). Under this prong, the question is whether the officer had "fair warning that [his] conduct violated the Constitution." *Hope*, 536 U.S. at 741.

Courts may exercise "sound discretion" to resolve qualified immunity questions under either prong. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). However, starting with the first prong is "often beneficial" and is "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.*

B. Factual Background[1]

On August 1, 2016, two Baltimore County police officers arrived at the apartment of Korryn Gaines and her fiancé, Kareem Courtney, to serve misdemeanor arrest warrants for Ms. Gaines's failure to appear in court for alleged traffic violations and for

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[1] Consistent with Maryland law, the facts are depicted in the light most favorable to Kodi. Pet. App. 7a n.7.

Mr. Courtney's charge of assault. Pet. App. 7a–8a, 194a, 317a. The officers knocked on the apartment door, announced their presence, and heard people moving inside, but no one answered the door. Pet. App. 8a, 195a–96a. The officers then kicked the door open. Pet. App. 8a.

Upon entering the apartment, the officers saw Ms. Gaines sitting on the floor with a shotgun in her lap. *Id.* The officers immediately left the apartment and called for backup. *Id.* Once the backup officers arrived, Mr. Courtney left the apartment peacefully with his daughter. Pet. App. 8a n.8. Ms. Gaines remained in the apartment with her five-year-old son, Kodi. Pet. App. 8a–9a, 194a. Around this time, the officers learned Ms. Gaines had a history of mental illness but had not been taking her medication. Pet. App. 8a.

"More than 30 armed officers and 'counter snipers' took up positions in and around the apartment building." Pet. App. 199a–200a. The officers held their positions for the next six hours while Ms. Gaines sat on the living room floor with Kodi. Pet. App. 8a–9a.

During this time, Corporal Royce Ruby stood guard just outside Ms. Gaines's apartment door and behind a brick wall. Pet. App. 203a, 293a.

At some point, the police cut power to Ms. Gaines's apartment building. Pet. App. 202a. Without power, the apartment building's air conditioning turned off on a very hot and humid August day, resulting in sweltering hot conditions in and around the apartment. *See id.*; *see also* Trial Tr., Feb. 2, 2018,

72:18–76:25 (incident commander testifying he was "concerned" about the way the "heat" and officer "fatigue" would "affect decision making"). As the ordeal approached the six-hour mark, a supervising officer began to arrange for a cooling truck because of the oppressive conditions in the building. Pet. App. 203a n.11. Forty-five minutes later, for the first time, Ms. Gaines left the living room and went to the kitchen to make Kodi a sandwich. Pet. App. 9a n.9, 204a. Ms. Gaines brought her shotgun into the kitchen but did not direct the gun at Corporal Ruby or any other officer. Pet. App. 9a.

At that point, Corporal Ruby, who testified that he could see only the barrel of Ms. Gaines's weapon and her braided hair through the scope of his rifle, took a "head shot" at Ms. Gaines through the kitchen drywall. Pet. App. 9a–10a, 206–07a. Corporal Ruby knew Kodi was with Ms. Gaines in the kitchen, but he could not see Kodi because his view of the kitchen was obstructed by an interior wall. Pet. App. 9a–10a, 92a. Corporal Ruby admitted that he knew it was possible the bullet would strike Kodi. *See* Pet. App. 92a; *see also* Trial Tr., Feb. 12, 2018, 184:9–16 (testifying that he knew "there's a possibility" that Kodi could be shot).

The bullet traveled from Corporal Ruby's position in the doorway of the neighboring apartment, through the open door of Ms. Gaines's apartment, then through the kitchen drywall, where it struck Ms. Gaines in the back, ricocheted off the refrigerator, and hit Kodi's cheek. Pet. App. 10a, 206a–08a.

A witness testified that "he spoke with Corporal Ruby right after the incident," and "Ruby told him his

justification for the shot was because he was 'hot' and 'frustrated.'" Pet. App. 214a.[2] At the time of the shooting, Ms. Gaines posed no "imminent threat of death or serious bodily injury." Pet. App. 213a. Corporal Ruby then entered the apartment and shot Ms. Gaines three more times, killing her, and striking Kodi's elbow with another bullet in the process. Pet. App. 10a, 146a.

Kodi was rushed to the hospital, where he "underwent multiple surgeries to remove bullet fragments from his face" and "required multiple reconstructive surgeries on his elbow." Pet. App. 10a, 146a–47a.

C. Procedural History

As the Maryland Supreme Court noted, this case has "a long and tortured procedural history." Pet. App. 2a. However, for purposes of this petition, the procedural posture is simple and straightforward, cleanly presenting a significant issue of federal law.

All plaintiffs except Kodi have settled, and all state law claims have been resolved. The only issue remaining is whether Corporal Ruby is entitled to qualified immunity as to Kodi's Section 1983 claim, which encompasses two questions: whether, construing the facts in the light most favorable to Kodi

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[2] Although Corporal Ruby told a different story, the Maryland Supreme Court, as required at this stage of the proceedings, accepted as true that Ms. Gaines went to the kitchen to make a sandwich for Kodi, Pet. App. 9a n.9, and did not aim the shotgun at Corporal Ruby or any other officer, Pet. App. 9a. A jury also rejected Corporal Ruby's version of the facts by finding that his first shot was not objectively reasonable. Pet. App. 18a.

as Maryland law requires, (i) Corporal Ruby's conduct in firing the first shot that hit Kodi shocks the conscience and thus violated his Fourteenth Amendment rights; and (ii) whether Corporal Ruby's conduct violated clearly established law. The Maryland Supreme Court held that Kodi adequately pled his Fourteenth Amendment due process claim and never abandoned or waived it. Pet. App. 35a n.20, 36a.

Along with other plaintiffs, Kodi filed a complaint in the Maryland Circuit Court for Baltimore County asserting a Section 1983 claim against Corporal Ruby for violating his Fourteenth Amendment substantive due process rights. Pet. App. 10a; *see also* Third Am. Compl. ¶¶ 117–40 (Count X). Kodi also asserted a Fourth Amendment claim. Pet. App. 10a–11a. The trial court denied Corporal Ruby's pre-trial motion for summary judgment based on qualified immunity, and the case proceeded to trial. Pet. App. 13a–14a.

At trial, the jury "returned a plaintiffs' verdict on all counts." Pet. App. 18a. On Kodi's Section 1983 federal constitutional claim, the trial court instructed the jury to determine whether Corporal Ruby's decision to fire the first shot was "objectively reasonable" but did not separately ask the jury to determine whether Corporal Ruby's action shocked the conscience. *Id.* The jury found that Corporal Ruby had violated Kodi's constitutional rights and awarded $23,542.29 for past medical expenses and $32.85 million in non-economic damages. Pet. App. 218a–19a.

One year later, the trial court reversed the jury's verdict, granting judgment notwithstanding the

verdict ("JNOV") on the ground that Corporal Ruby was entitled to qualified immunity. Pet. App. 21a. Kodi appealed, and the Appellate Court of Maryland reversed the trial court's JNOV. Pet. App. 22a–23a. The Appellate Court held that the trial court erred when it found "that there was no testimony contradicting Corporal Ruby's testimony that Ms. Gaines raised the shotgun to a firing position." Pet. App. 262a. Because Kodi had presented testimony contradicting Corporal Ruby's account, "it was for the jury here to determine, based on the evidence, what occurred, and whether, in light of its finding, Corporal Ruby acted reasonably in firing that first shot." Pet. App. 263a. The jury found that "Corporal Ruby's first shot, on the facts presented, was not reasonable." *Id*. The Appellate Court remanded "for consideration of remaining issues relating to damages." Pet. App. 24a.

On remand, the trial court again granted a JNOV, this time not addressing the qualified immunity issue, but instead concluding that Kodi did not have a viable Section 1983 claim under either the Fourth or Fourteenth Amendment as a matter of law. Pet. App. 25a–28a. Kodi appealed the trial court's ruling on his Fourteenth Amendment claim, and the Appellate Court affirmed on different grounds. Pet. App. 28a–29a. It concluded that Kodi had waived his Fourteenth Amendment claim, Pet. App. 29a–31a, and, in the alternative, that Corporal Ruby was entitled to qualified immunity on that claim, Pet. App. 31a–33a.

In a split decision, the Maryland Supreme Court affirmed. Pet. App. 3a. The court rejected the Appellate Court's holding that Kodi had waived his Fourteenth Amendment claim. Pet. App. 33a–36a. It

held, however, that Corporal Ruby was entitled to qualified immunity on that claim. Pet. App. 37a.

The court first explained that because Kodi was not the intended target of Corporal Ruby's shot, his claim sounded in the Fourteenth Amendment's Due Process Clause, not the Fourth Amendment. Pet. App. 41a.

In assessing the Fourteenth Amendment claim, the court did not decide whether Corporal Ruby's decision to shoot shocked the conscience in violation of the Fourteenth Amendment. Instead, the court addressed only whether Corporal Ruby's conduct violated clearly established law that would have put him on notice that his "decision to shoot at Ms. Gaines was a brutal and inhumane abuse of official power *with respect to Kodi* that shocks the conscience." Pet. App. 42a. To do so, the court examined "relevant cases" and found none with similar fact patterns; accordingly, it held that "none of [the cases] would put an officer in Corporal Ruby's position on notice that their conduct would violate Kodi's Fourteenth Amendment rights." Pet. App. 42a–43a; *see also* Pet. App. 48a (concluding that "there was no controlling authority or robust consensus of authority putting Corporal Ruby on notice"). The court therefore held that it was "not well settled" law that an innocent bystander has a right to be free from injury resulting from "a shot intended for someone else," and it concluded that Corporal Ruby was entitled to qualified immunity. Pet. App. 49a–50a.

Justices Watts and Hotten filed separate opinions dissenting as to the qualified immunity holding. Justice Watts concluded that it "would have been

clear to any reasonable officer that, in these circumstances, taking a head shot at an adult with a child behind a wall (where the child could not be seen) would have violated the child's clearly established right to be free of arbitrary and unlawful police conduct." Pet. App. 66a (Watts, J., dissenting). She stated that "[a] reasonable officer would have realized this obvious principle" that "an officer can violate an innocent bystander's right to substantive due process where, as here, the officer injures the bystander in a manner so outrageous that it is completely arbitrary and shocking to the conscience." Pet. App. 71a.

Similarly, Justice Hotten concluded that "the decision by an officer to shoot through a wall, at a target he could not see, when he knew a child was on the other side of that wall and could be injured or killed, is patently offensive to a 'universal sense of justice.'" Pet. App. 84a (Hotten, J., concurring in part and dissenting in part). On that basis, Justice Hotten asserted that "the shooting of Kodi is . . . an obvious case, and a violation of Kodi's Substantive Due Process right." Pet. App. 83a. That was "especially" true, Justice Hotten reasoned, "considering the motivation for the shooting was not the protection of life or the enforcement of law, but instead was an officer's feeling that he was 'hot' and 'frustrated' by the siege he and his colleagues began." Pet. App. 84a.

REASONS FOR GRANTING THE PETITION

I. The lower court's decision conflicts with this Court's precedents.

The Maryland Supreme Court's decision conflicts with decisions of this Court recognizing that qualified

immunity does not protect officers from liability for obvious constitutional violations, even where there are no prior decisions finding similar conduct unlawful.

The Maryland Supreme Court held that Corporal Ruby was entitled to qualified immunity because it could find no prior case involving similar conduct holding that a police officer had violated a bystander victim's Fourteenth Amendment rights. Pet. App. 42a–48a. It did not consider whether Corporal Ruby's calculated decision to shoot Ms. Gaines, knowing Kodi was present and that his shot might hit Kodi, with no reason to shoot other than that he was "hot" and "frustrated," was so obviously unconstitutional that reasonable officers would have known that firing the shot was unlawful. The Maryland court thus wrongly concluded that finding a prior case with similar facts was essential to its ability to hold that Corporal Ruby was not entitled to qualified immunity. As a result, the Maryland court erroneously held that it was "not clearly established" that Corporal Ruby's action "would violate Kodi's Fourteenth Amendment rights," and it ruled that qualified immunity applied. Pet. App. 50a.

A. Under this Court's precedents, obviously unlawful conduct alone clearly establishes the law such that qualified immunity does not apply.

Qualified immunity does not shield public officials from suit when their actions violate "clearly established . . . constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982)). This Court has repeatedly held that obvious constitutional violations satisfy this prong of the qualified immunity test, without need for any precedent involving similar facts on point.

For example, in *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court held that qualified immunity does not shield officers who commit constitutional violations that are "so obvious" and "clear" that officials have "fair warning" of their illegality, even in the absence of factually similar precedent. *Id.* at 741; *see also id.* at 753 (Thomas, J., dissenting) (agreeing with the majority that "[c]ertain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct"). The Court ruled that the relevant test is whether the "contours" of the constitutional right in question are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The *Hope* Court explained that "a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id.* at 741 (alteration in original) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Under this rule, the existence of an "earlier case" that is "'fundamentally similar'" to the plaintiff's "factual situation" is not required for obvious constitutional violations. *Id.* at 740 (quoting *Lanier*, 520 U.S. at 263). Rather, "officials can still be on notice that their conduct violates established law even in novel factual

circumstances." *Id.* at 741.

Since *Hope*, this Court has reiterated that qualified immunity does not protect government officials from liability for obvious constitutional violations, even if no prior case has declared similar conduct to be unlawful. For example, in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), the Court explained that "in an obvious case," rights are clearly established "even without a body of relevant case law." *Id.* at 199. Similarly, in *White v. Pauly*, 580 U.S. 73 (2017) (per curiam), the Court again made clear that general legal principles constitute "clearly established law" in "an obvious case." *Id.* at 80 (quoting *Brosseau*, 543 U.S. at 199). And in *Kisela v. Hughes*, 584 U.S. 100 (2018) (per curiam), the Court confirmed that "general rules" establish a violation in "an 'obvious case.'" *Id.* at 105 (quoting *White*, 580 U.S. at 80).

Four years ago, in *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam), this Court relied on this well-established principle to deny qualified immunity to officers for egregious violations of constitutional rights. *Id.* at 8. In that case, the Court reaffirmed that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 9 (quoting *Hope*, 536 U.S. at 741). The Court accordingly held that the officers in that case were not entitled to qualified immunity because "no reasonable correctional officer could have concluded" that the conduct in question was "constitutionally permissible." *Id.* at 8. The Court rejected the claim that qualified immunity was appropriate because of "ambiguity in the caselaw," reasoning that any such

imprecision could not cast "doubt about the obviousness of [the constitutional] right." *Id.* at 9 n.2.

Under these precedents, the Maryland Supreme Court majority should have analyzed whether Corporal Ruby's conduct was so obviously unlawful as to preclude a qualified immunity defense, as the two dissenting Justices explained. But the Maryland court never asked that question. Instead, it considered *only* whether the "relevant cases" "would put an officer in Corporal Ruby's position on notice that their conduct would violate Kodi's Fourteenth Amendment rights." Pet. App. 42a–43a. It then proceeded to examine whether markedly dissimilar cases involving high speed chases, shootouts with suspects, and shootings in armed-assailant and hostage situations clearly establish the right of an innocent bystander to be free from injury caused "by a shot intended for someone else." Pet. App. 43a–49a. Finding no case with similar facts, the Maryland court held that Corporal Ruby was entitled to qualified immunity, without ever assessing whether a shooting in the circumstances presented here is obviously unlawful. Pet. App. 48a. That analysis fails to honor this Court's obviousness principle.

B. Conduct that is so egregious and obviously unlawful as to shock the conscience necessarily forecloses qualified immunity.

"[T]he touchstone of due process is protection of the individual against arbitrary action of government[.]" *Lewis*, 523 U.S. at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). This right against arbitrary action not only requires the government to provide

fair procedures, but also prohibits "egregious official conduct" that "shocks the conscience." *Id.* at 846–47.

This "shock the conscience" standard is met when conduct is "brutal" or "offensive" in a way that is contrary to the "decencies of civilized conduct." *Id.* The prohibition rests on the conclusion that the Constitution does not "afford brutality the cloak of law." *Rochin v. California*, 342 U.S. 165, 173 (1952). As this Court has explained, "the 'shock the conscience' standard is satisfied" not only "where the conduct was 'intended to injure in some way unjustifiable by any government interest,'" but also where, as here, an officer who is not forced with the pressure to make an urgent decision is "deliberate[ly] indifferen[t]."[3] *Rosales-Mireles v. United States*, 585 U.S. 129, 138 (2018) (quoting *Lewis*, 523 U.S. at 849–50).

It follows directly from these precedents that

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[3] As this Court has explained, the "deliberate indifference" standard is appropriate for substantive due process claims when an officer is not faced with the pressure to make an urgent decision. *Lewis*, 523 U.S. at 853 ("[L]iability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations."). A higher standard of intent to harm applies for "split-second" decisions made "in haste, under pressure, and frequently without the luxury of a second chance." *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989), then quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). Here, the deliberate indifference standard applies because Corporal Ruby had many hours to deliberate, and he shot not because Ms. Gaines posed an immediate threat demanding an urgent response, but because he was "hot" and "frustrated." Pet. App. 214a.

qualified immunity does not shield an officer from liability for conduct that is so shocking that it violates the Fourteenth Amendment. The standard for a substantive due process violation is sufficiently high that any such violation will also be obviously unlawful so as to preclude a qualified immunity defense.

1. The Court has set a high bar for when conduct shocks the conscience in violation of the Fourteenth Amendment.

Most illegal conduct does not violate due process, even if that conduct results in injury or death. Instead, conduct shocks the conscience only when it is so "brutal" or "offensive" that it is an affront to the "decencies of civilized conduct." *Lewis*, 523 U.S. at 846–47. The conduct must be so repugnant to basic moral standards that it offends "even hardened sensibilities." *Rochin*, 342 U.S. at 172.

This stringent standard limits liability to only the worst kinds of behavior—behavior that is so inexcusable the Constitution refuses to tolerate it even if it does not fall within a specific constitutional prohibition. Qualified immunity does not protect this sort of behavior. No reasonable officer could think that conscience-shocking behavior is consistent with the Constitution. Conduct that shocks the conscience is, by definition, so obviously unlawful that no reasonable officer could think it permissible.

2. Corporal Ruby was on notice that his conduct, on its face, violated Kodi's due process right to be free from harm resulting from arbitrary police action.

When he fired, Corporal Ruby knew that Kodi was

in the kitchen with Ms. Gaines, but his view of the kitchen was obstructed, so he could not see where Kodi was and knew that his shot might hit Kodi. Pet. App. 9a–10a, 92a. He also had no justification for shooting. At the time, Ms. Gaines posed "no immediate threat." Pet. App. 262a; *accord* Pet. App. 8a–9a. Instead, Corporal Ruby, who had been watching Ms. Gaines for more than five hours, fired because he was "hot" and "frustrated." Pet. App. 214a.

No reasonable officer could have thought that taking the shot was justified, even if Kodi were not present. Indeed, a jury has already determined that Corporal Ruby's decision to take the shot was not objectively reasonable. Pet. App. 18a. But with Kodi present, firing the shot became patently outrageous. Any reasonable officer would have understood that taking a chance of hitting Kodi, an innocent child bystander, where there was no reasonable basis for firing the shot at all, constitutes the sort of shocking conduct the Due Process Clause prohibits. *See Lewis*, 523 U.S. at 845–55 (discussing this Court's application of the "shocks the conscience" standard to injuries arising from intentional and deliberately indifferent conduct).

3. The Maryland Supreme Court erred by not recognizing that conduct that is sufficiently egregious to shock the conscience, in violation of the Fourteenth Amendment, is also obviously unlawful.

If the Maryland court had asked the right qualified immunity question—whether Corporal Ruby's conduct in firing the shot that hit Kodi was obviously unlawful—the answer would have had to be yes for the same reason the conduct violates the Fourteenth

Amendment. No similar case on point is required to clearly establish that the Due Process Clause confers upon bystanders a right to be free from entirely unnecessary and egregiously wrongful police violence.[4]

It is not surprising that the Maryland court did not find a prior case with similar facts. One would not expect it to be a common event for a police officer to shoot a person who posed no threat to anyone because the officer was hot and frustrated, all the more so when the officer knew an innocent child was present and at risk if a shot were fired. None of the cases cited by the Maryland Supreme Court support its reasoning. All of those cases involved situations in which officers unintentionally killed or injured bystanders during "high-speed police chases" or "shootouts," or while facing "armed assailants [with] hostages" where there was a need for the officers to

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[4] As this Court has recognized, the Due Process Clause provides innocent people with protections that are at least as great as those afforded by more specific constitutional protections to convicted prisoners. *See Lewis*, 523 U.S. at 849–50 ("[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.") (alteration in original) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)). But under the Maryland Supreme Court's reasoning, Corporal Ruby has a stronger claim to immunity for shooting an innocent bystander than for shooting a suspect. Indeed, as the Maryland court acknowledged, accepting its reasoning means accepting that an officer who "fire[s] into a crowd" full of "innocent bystanders" to take down a nonthreatening suspect may well not violate those bystanders' "clearly established" rights. Pet. App. 45a n.24. That is not the law.

fire their weapons.[5] Pet. App. 43a–47a. In those cases, the officers' actions were not obviously unlawful, and, as a result, bystanders hurt in the process struggled to show violations of their Fourteenth Amendment rights.

The critical ways in which those cases are dissimilar from the situation Corporal Ruby faced are precisely why qualified immunity is not available here. *See Taylor*, 592 U.S. at 9 n.2 (explaining that existence of dissimilar caselaw will not cast doubt on the obviousness of a right). Unlike in the cited cases, Ms. Gaines was not being chased, she was not a flight risk, and she posed "no immediate threat" to Corporal Ruby or anyone else. Pet. App. 262a; *accord* Pet. App. 8a–9a. Corporal Ruby did not have to make a split-second decision. Rather, he made a deliberate, calculated decision to shoot Ms. Gaines, and thereby also shoot Kodi, whom he knew was present and at risk, for no reason other than that he was "hot" and

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[5] In each case cited by the Maryland Supreme Court, the officer in question was forced to make a nearly instantaneous, high-pressure decision without the luxury of time to deliberate or appropriately weigh the potential consequences of their decision. *See* Pet. App. 43a–47a (describing cases involving high-speed chases, shootouts, and cases where a hostage taker posed a violent threat to their hostages and had absconded in a vehicle). Here, in sharp contrast, Ms. Gaines posed no imminent threat to Kodi's safety, and her apartment was surrounded with police officers, leaving her trapped inside and not a flight risk. Pet. App. 199a, 292a. Justice Hotten's dissent described the situation well: "[g]iven the time Cpl. Ruby had to move, to talk with his team, for his team to talk with Ms. Gaines, and for Ms. Gaines to respond, Cpl. Ruby had time to deliberate and reconsider his actions." Pet. App. 80a n.11 (Hotten, J., concurring in part and dissenting in part).

"frustrated." Pet. App. 9a–10a.

There is no prior case with similar facts precisely because the facts are so outrageous; one would not expect it to be a common event for a police officer to shoot a person who posed no threat to anyone when it was unnecessary to shoot and when the officer knew a child was present and at risk if a shot were fired because he was hot and frustrated.

Even in the absence of similar cases, the Maryland court was obligated by this Court's precedents to ask whether it was obvious that Corporal Ruby's conduct in firing the shot, on its face, was so egregious as to be clearly unlawful. By focusing exclusively on whether there were prior cases with similar facts, the Maryland court departed from this Court's controlling precedents.

II. Allowing the decision below to stand will needlessly confuse the qualified immunity doctrine.

A. The decision below deepens an existing conflict among the lower courts.

The Maryland Supreme Court's decision exacerbates a deep divide among lower courts about how to apply the obviousness principle in due process cases. Some, like the Second, Fourth, and Fifth Circuits, have rightly concluded that an officer's conduct that shocks the conscience also violates clearly established law. For example, in *Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018), the Second Circuit rejected police officers' claims of qualified immunity where they used a sound gun to clear

protestors in violation of the protestors' right to due process. *Id.* at 544. In holding that the protestors had a clearly established right not to be subjected to that action, the court rejected the officers' reliance on the lack of factually similar precedent. *Id.* at 540. It explained that such an approach "is like saying police officers who run over people crossing the street illegally can claim immunity simply because [the court] ha[s] never addressed a Fourteenth Amendment claim involving jaywalkers." *Id.* The court rejected the invitation to "convert the fair notice requirement into a presumption against the existence of basic constitutional rights." *Id.*

The Fourth Circuit has taken a similar approach. In *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407 (4th Cir. 2020), the court rejected an officer's claim of qualified immunity where he injured an innocent victim by driving his cruiser in a reckless manner. *Id.* at 416–20. The court held that "a reasonable officer" would have known that reckless driving in a non-emergency situation "may be subject to a claim under the Fourteenth Amendment." *Id.* at 419. The lack of similar precedent did not change its conclusion because the conduct was "so obviously unlawful" that the officer did "not need a detailed explanation" to enable him to understand he had violated the victim's clearly established rights. *Id.*

Similarly, in *Tyson v. Sabine*, 42 F.4th 508 (5th Cir. 2022), the Fifth Circuit held that a police officer's conduct in committing a sexual assault "shock[ed] the conscience and violated [the victim]'s right to bodily integrity." *Id.* at 518–19. The court held that the victim easily met her burden, as the court had "little trouble finding that the constitutional offense was

obvious." *Id.* at 520. The court reiterated that "[b]y their nature, cases addressing the most flagrant forms of unconstitutional conduct seldom rise to the court of appeals." *Id.* at 521. But "[w]hen they do, the obviousness exception 'plays an important role in . . . ensur[ing] vindication of the most egregious constitutional violations.'" *Id.* (quoting *McCoy v. Alamu*, 950 F.3d 226, 236 (2020) (Costa, J., dissenting in part) (alterations in original)).

Other courts, by contrast, have failed to follow this Court's precedents regarding obvious constitutional violations. In particular, like the Maryland Supreme Court, the Third and Ninth Circuits have granted qualified immunity for conscience-shocking violations, where they could not find a prior case with substantially similar facts.

In *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), the Third Circuit held that a police officer's reckless driving in a non-emergency situation was "conscience-shocking." *Id.* at 718. The court nevertheless held that the officer was entitled to qualified immunity because there was no analogous precedent adequate to clearly establish the right at issue. *Id.* at 719 ("[T]o assess whether the right to be free of the risk associated with a non-emergency but reckless police pursuit was clearly established in May 2014, we must ask whether Supreme Court precedent, our own precedent, or a consensus of authority among the courts of appeals placed that right beyond debate."). In dissent, Judge Vanaskie argued that "the obviousness of [the officer]'s violation of the plaintiffs' rights to life and bodily integrity" should have "defeat[ed] the defense of qualified immunity even in the absence of materially similar cases." *Id.*

at 728 n.3.

The Ninth Circuit employed similar reasoning in *Scott v. Smith*, 109 F.4th 1215 (9th Cir. 2024). There, the court held that police officers violated a child's "right to a familial relationship free from unwarranted state interference" when the officers killed the child's father, who was unarmed and in mental distress. *Id.* at 1227–29. Despite holding that the conduct shocked the conscience, the court concluded that the officers were entitled to qualified immunity because it could not locate any prior "analogous case." *Id.* at 1229.

The decision below deepens the existing conflict between these two circuits and the Second, Fourth, and Fifth Circuits.

This conflict results in differing liabilities for some of the most distressing official conduct. The officer who engaged in reckless driving and received qualified immunity in the Third Circuit would be denied that immunity in the Fourth Circuit. And the officer who was denied qualified immunity for assault in the Fifth Circuit may have been entitled to immunity in the Ninth Circuit. The lower courts need express guidance from this Court concerning the application of the obviousness principle in Fourteenth Amendment cases.

B. This case is a good vehicle to provide badly needed clarity and to prevent immunization of outrageous official conduct.

Twenty-two years ago, this Court warned of the

"danger of a rigid, overreliance on factual similarity" in determining whether a constitutional right has been clearly established. *Hope*, 536 U.S. at 742. The decision of the Maryland Supreme Court below—as well as the cited decisions from the Third and Ninth Circuits—shows that lower courts have repeatedly failed to heed this warning.

Hope's application here is clear-cut. If a governmental officer's conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," *Lewis*, 523 U.S. at 847 n.8, a clear Fourteenth Amendment violation has occurred. As explained above, this is not an easy standard to meet. It requires conduct that does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically." *Rochin*, 342 U.S. at 172. The conduct must instead "offend even hardened sensibilities." *Id.*

Qualified immunity doctrine was never intended to protect an officer in such circumstances, regardless of the presence or absence of a prior case involving similar outrageous behavior. Often there is no factually similar prior case because "the easiest cases"—those involving "outrageous conduct"—typically "don't even arise." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (original alterations and internal quotations omitted). Permitting a qualified immunity defense in cases involving egregiously wrongful conduct because there is no prior decision addressing similar facts distorts the qualified immunity doctrine by, in effect, providing the strongest protection for the most egregious conduct. As then-Judge Gorsuch put it when writing for the Tenth Circuit, "it would be

remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015).

Decisions like the one on review here bring into disrepute the Court's qualified immunity doctrine and feed calls to abolish it. Police officers have a difficult, dangerous, and often thankless job. Most officers are good and decent people who do their best to serve and protect. The qualified immunity doctrine shields them (and other government officials) from personal liability if they make an honest mistake, including where they must make a split-second decision. But officials who flagrantly violate rights through outrageous conduct deserve no such protection. As this Court has long recognized, they should be held accountable despite the absence of a prior case with similar facts. *See Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

This case presents a particularly good vehicle for the Court to clarify the law in this area. A jury has already determined that Corporal Ruby's conduct was unlawful. That conduct was so extreme as to be utterly indefensible. Corporal Ruby did not have to make a split-second decision; he had time to deliberate. He did not need to shoot to protect himself or anyone else, and he did not need to shoot to prevent a suspect from escaping. Corporal Ruby deliberately shot another human being because he was hot and frustrated, knowing full well that an innocent child was present and at risk of being hit if he fired the shot.

No reasonable officer could think firing the shot under those circumstances was lawful.

Although this case has a complicated procedural history, its current posture is simple and straightforward. The only claim remaining in the case is Kodi's substantive due process claim. As to that claim, the only issue presented is whether Corporal Ruby is entitled to qualified immunity, which encompasses both whether the facts support a Fourteenth Amendment claim and, if so, whether Corporal Ruby violated clearly established law. Those two issues collapse in this context because the unlawfulness of conscience-shocking conduct, by definition, is clearly established. This case thus raises the Questions Presented cleanly for the Court's review, with no alternative claims or issues to muddy the waters.

Because this Court's message about obvious constitutional violations has not sunk in, and to clarify that the qualified immunity doctrine does not protect conduct so obviously unconstitutional that there is no prior case with similar facts, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION, *CUNNINGHAM V. BALTIMORE COUNTY*, NO. 9, SUPREME COURT OF MARYLAND. FILED JUNE 25, 2024 . . . . 1a

APPENDIX B — OPINION, *CUNNINGHAM V. BALTIMORE COUNTY*, NO. 378, APPELLATE COURT OF MARYLAND. FILED APRIL 6, 2023 . . . . 89a

APPENDIX C — MEMORANDUM OPINION, *DORMEUS, ET AL. V. BALTIMORE COUNTY*, NO. 03-C-16-009435, MARYLAND CIRCUIT COURT, BALTIMORE COUNTY. FILED APRIL 26, 2022 . . . . 145a

APPENDIX D — OPINION, *CUNNINGHAM V. BALTIMORE COUNTY*, NO. 3461, APPELLATE COURT OF MARYLAND. FILED JULY 1, 2020. . . . . 185a

APPENDIX E — MEMORANDUM OPINION, *DORMEUS, ET AL. V. BALTIMORE COUNTY*, NO. 03-C-16-009435, MARYLAND CIRCUIT COURT, BALTIMORE COUNTY. FILED FEBRUARY 14, 2019. . . . . 281a

APPENDIX A — OPINION, *CUNNINGHAM V. BALTIMORE COUNTY,* NO. 9, SUPREME COURT OF MARYLAND. FILED JUNE 25, 2024

IN THE SUPREME COURT OF MARYLAND

No. 9
September Term, 2023

COREY CUNNINGHAM, ON BEHALF OF
KODI GAINES, A MINOR

v.

BALTIMORE COUNTY, MARYLAND, *et al.*

Circuit Court for Baltimore County
Case No. 03-C-16-009435

December 4, 2023, Argued
June 25, 2024, Filed

Fader, C.J., Watts, Hotten,*
Booth, Biran, Gould, Eaves, JJ.

Watts, J., dissents.
Hotten, J., concurs and dissents.

PER CURIAM

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* Hotten, J., participated in the hearing of the case and in the conference in regard to its decision as an active judge. She participated in the adoption of the opinion as a senior judge, specially assigned.

This appeal comes to us in a challenging posture with a long and tortured procedural history. At the center of the current appeal is petitioner Corey Cunningham's claim on behalf of his minor child, Kodi Gaines,[1] for a violation of Kodi's right to substantive due process under the Fourteenth Amendment to the United States Constitution, brought pursuant to 42 U.S.C. § 1983 (the "Substantive Due Process Claim"[2]). Although central now, the parties and the trial court treated that claim as something ranging between a side issue and a non-issue in the lead-up to trial, during the trial itself, and in post-trial motions practice. As a result, Kodi's Substantive Due Process Claim was not identified to the jury, the jury was not instructed on the standards applicable to that claim, the jury was not specifically asked to reach a verdict on that claim (as distinct from Kodi's claims under the Fourth Amendment to the United States Constitution), and the claim was addressed only briefly and partially in motions for judgment at and following trial. That treatment continued in the first appeal, in which the parties—and, as a result, the Appellate Court of Maryland—treated Kodi's Substantive Due Process Claim as a non-issue. Along the way, the parties' statements and arguments about Kodi's Substantive Due Process Claim have often appeared as ships passing in the night, failing to engage

1. For clarity and ease of reference, we will refer to Mr. Cunningham, acting on behalf of his son Kodi Gaines, as "Kodi," and to his arguments and positions in this case as those of Kodi.

2. For clarity and ease of reference, we will refer to Kodi's Substantive Due Process Claim in the singular. Although the claim is made in Counts VII and X of the complaint, it is treated as a single excessive force claim.

on the same terms and resulting in substantial confusion, even in hindsight.

The circuit court rendered the judgment currently on review in favor of the respondents, Baltimore County and Corporal Royce Ruby, the defendants below (the "Defendants"). The court found that the evidence at trial could not sustain a verdict on Kodi's Substantive Due Process Claim. Without ruling on sufficiency, the Appellate Court affirmed on two different, independent grounds: (1) that Kodi had waived his Substantive Due Process Claim by not pursuing that claim during the first round of appellate proceedings; and (2) that qualified immunity barred Kodi's Substantive Due Process Claim. We disagree with the Appellate Court's decision on waiver but agree that under the standard established by the United States Supreme Court, qualified immunity precludes Kodi's Substantive Due Process Claim. Accordingly, we will affirm.

BACKGROUND

A. Legal Framework

We begin by identifying the basic legal framework applicable to excessive force claims as they pertain to innocent bystanders. We do so because the seeming failure of all parties to understand that framework at the trial stage—or if they understood it, the failure to articulate it—is behind much of the confusion that has ensued.

As explained in *Graham v. Connor*, "claim[s] that law enforcement officials used excessive force in the course of

making an arrest, investigatory stop, or other 'seizure' of [the] person . . . are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Thus, any claim of excessive force by the subject of a seizure—including a seizure by a shooting—is analyzed as a Fourth Amendment claim.[3] *Id.* And although the Fourth Amendment originally applied only to the United States government, the protections of that amendment were subsequently incorporated as against the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 654-56, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961).

The protections of the Fourth Amendment—either independently or through the Fourteenth Amendment's Due Process Clause—do not, however, extend to bystanders who claim harm from the use of excessive force by a law enforcement officer that was intended for someone else. That is because a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). In other words, a Fourth Amendment excessive force claim is available

3. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

only to a person who an officer intentionally seizes. *Id.* at 596-97.

However, some courts have recognized that a bystander who lacks the ability to bring a claim under the Fourth Amendment *may* be able to pursue an excessive force claim directly under the substantive component of the Fourteenth Amendment's Due Process Clause.[4] *See Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991) ("the substantive protections of the due process clause may" "extend to unintentionally injured bystanders" (internal quotations omitted)). Such claims, if recognized, would not be subject to the "objectively reasonable" test applied to Fourth Amendment excessive force claims, but to the more demanding "shocks the conscience" standard

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4. The Due Process Clause contains both procedural and substantive protections. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "Procedural due process ensures that individuals are not subject to arbitrary governmental deprivation of their liberty and property interests by requiring that litigants 'receive notice, and an opportunity to be heard.'" *Johnson v. Md. Dep't of Health*, 470 Md. 648, 686, 236 A.3d 574 (2020) (quoting *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 81, 775 A.2d 1218 (2001)). Substantive due process, by contrast, refers "to the principle that there are certain liberties protected by the due process clauses [of Article 24 and the United States Constitution] from legislative restrictions, regardless of the procedures provided, unless those restrictions are narrowly tailored to satisfy an important government interest." *Id.* (alteration in original) (quoting *Allmond v. Dep't of Health & Mental Hygiene*, 448 Md. 592, 609-10, 141 A.3d 57 (2016)).

applicable to substantive due process claims. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (recognizing the shocks the conscience standard).

The Due Process Clause of the Fourteenth Amendment thus plays a different role in each type of excessive force claim. For claims brought by the object of a seizure under the substantive protections of the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment is the vehicle by which such protections are applied to the states. *Graham*, 490 U.S. at 388, 394-95. Such claims against state actors are still subject to the Fourth Amendment substantive standard, even though they flow through the vehicle of the Fourteenth Amendment. In contrast, with respect to claims brought by innocent bystanders, the Due Process Clause of the Fourteenth Amendment is the source of whatever substantive protections may exist under the federal Constitution.[5] Such claims are pure Fourteenth Amendment claims, subject to the Fourteenth Amendment standard.

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5. Although Kodi brought claims under both the federal and state constitutions, his current appeal focuses solely on his claims under the United States Constitution. We presume that is because his Maryland constitutional claims, unlike his federal claims, are subject to the monetary limit on the State's waiver of sovereign immunity under the Maryland Tort Claims Act, *Lee v. Cline,* 384 Md. 245, 266 n.4, 863 A.2d 297 (2004), and he is already entitled to recover the maximum available pursuant to that waiver because he prevailed on his battery claim, which is not before us. As a result, we do not have occasion to consider here either: (1) the proper standard for a bystander liability excessive force claim under the Maryland Constitution and Declaration of Rights; or (2) whether any form of immunity would apply to such a claim.

Section 1983 of Article 42 of the United States Code is the statutory vehicle that enables plaintiffs to pursue federal constitutional claims against state actors in certain circumstances.[6] Thus, excessive force claims brought against state officials pursuant to the United States Constitution are brought as § 1983 claims whether brought by the object of a seizure under the Fourth Amendment (through the Fourteenth Amendment) or by a bystander under the Fourteenth Amendment itself.

B. Factual Background[7]

The factual background to this appeal comes from the tragic events of August 16, 2016, when a six-hour standoff between Baltimore County police officers and Korryn Gaines ended with Corporal Royce Ruby shooting and killing Ms. Gaines. Two of the bullets that struck Ms. Gaines subsequently hit and injured Kodi Gaines, Ms. Gaines's son who was then five years old.

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6. 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

7. We set forth the facts in the light most favorable to Kodi. *See Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016).

On the morning of the shooting, officers attempted to serve arrest warrants on Ms. Gaines and Kareem Courtney at Ms. Gaines's residence in Baltimore County. *Cunningham v. Baltimore Cnty.*, 246 Md. App. 630, 640, 232 A.3d 278 (2020) ("*Cunningham I*"). The warrant for Ms. Gaines was for a misdemeanor offense. The officers heard movement inside the apartment, but nobody opened the door when they knocked. *Id.* at 641. After kicking the apartment door open, officers entered the apartment and saw Ms. Gaines seated on the floor with a pistol grip shotgun in her hands. *Id.* The officers left the apartment and called for back-up. *Id.* A hostage negotiation team and a SWAT unit, including Corporal Ruby, were called in, and they took protected positions outside the apartment. A six-hour standoff between Ms. Gaines and the officers ensued. *Id.*

During the standoff, officers were told that Ms. Gaines had a history of mental illness and that she had been off her medication. *Id.* at 646-47. Officers testified that Ms. Gaines acted erratically, sometimes negotiating with officers, at other times threatening them and cutting off contact. *Id.* at 648-49, 690 n.41. Ms. Gaines's boyfriend attempted to persuade her to allow Kodi to leave the apartment during the standoff, but Ms. Gaines did not respond, and instead instructed Kodi to stay close to her, which he did.[8] *Id.* at 646-49.

8. When the officers arrived, there were at least four people in the apartment: Ms. Gaines, Kodi, Mr. Courtney, and a daughter of Mr. Courtney and Ms. Gaines. *Cunningham I*, 246 Md. App. at 641. Upon the arrival of the back-up officers, Mr. Courtney left the apartment with the daughter. *Id.*

Through most of the standoff, Ms. Gaines remained in the same location within the apartment, occasionally standing up to stretch her legs while keeping the shotgun pointed at the door. *Id.* at 650. Approximately six hours after the standoff began, Ms. Gaines moved to the kitchen, within sight of Corporal Ruby and still in possession of the shotgun.[9] *Id.* According to Corporal Ruby, he observed Ms. Gaines raise her shotgun into a firing position and aim toward the hinge side of the front door, from which she could have hit officers stationed on the other side. *Id.* at 650-52. Kodi contends that other evidence contradicts that claim. Among other things, he points out that Corporal Ruby testified that all he could see through his scope were Ms. Gaines's braids and the barrel of the gun, and that other witnesses testified that more of her body would have been visible had she been aiming the gun as Corporal Ruby contended. *Id.* at 692-93. Resolving this discrepancy in Kodi's favor, although Ms. Gaines may have raised her shotgun, she was not aiming it directly toward officers stationed on the other side of the front door.

Corporal Ruby, who was by that time "hot" and "frustrated[,]" testified that he fired "a head shot," aiming high to avoid hitting Kodi, who he knew was somewhere in

9. The record does not disclose why Ms. Gaines went into the kitchen. At trial, Mr. Cunningham, Kodi's father, testified that Kodi had told a therapist that Ms. Gaines was shot when she went to make him a sandwich in the kitchen. *Cunningham I*, 246 Md. App. at 650. The record does not otherwise provide support for that or any other specific theory about why Ms. Gaines was in the kitchen. For purposes of our qualified immunity analysis, we accept Mr. Cunningham's testimony as true.

the kitchen. *Id.* at 652. The shot passed through the corner of the kitchen drywall, struck Ms. Gaines in her upper back, ricocheted off the refrigerator, and hit Kodi across the cheek. *Id.* at 652-53. At some point between one and 30 seconds later, Ms. Gaines fired her shotgun. *Id.* at 653 n.12. Corporal Ruby led a team of officers into the apartment, when he heard the shotgun go off and being reloaded. *Id.* at 653. When he came into the kitchen and saw Ms. Gaines begin to turn the shotgun toward him, Corporal Ruby fired three more rounds into Ms. Gaines. *Id.* Ms. Gaines died from the gunshot wounds. *Id.* Kodi underwent multiple surgeries to remove bullet fragments from his face, *id.* at 653-54, and required multiple reconstructive surgeries on his elbow, *id.* at 654 n.14.

C. Procedural Background

As our resolution of the first issue in this appeal turns on the procedural background of the case, we discuss that background in some detail.

1. The Complaint

Although the only dispute remaining in this case concerns Kodi's Substantive Due Process Claim against Corporal Ruby, it originally involved many other parties and claims. In their third amended complaint, plaintiffs Rhanda Dormeus, individually and as personal representative of the estate of Ms. Gaines; Ryan Gaines, Sr., as father of Ms. Gaines; Mr. Courtney, individually and as next of kin to his minor child; and Mr. Cunningham, as father, guardian, and next friend of Kodi (collectively,

“Plaintiffs”), filed suit against defendants Baltimore County, Corporal Ruby, and four other officers. Among the twelve counts asserted were wrongful death and a survival action (Counts I and II); claims under Articles 10, 24, 26, and 40 of the Maryland Declaration of Rights based on violations of the Plaintiffs’ rights to freedom of speech and press, freedom from unreasonable searches and seizures, freedom from excessive force, and equal protection of the law (Counts III, IV, V, and VI); claims under 42 U.S.C. § 1983 for violations of the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution based on violations of the Plaintiffs’ rights to freedom of speech and press, freedom from unreasonable searches and seizures, freedom from excessive force, and equal protection of the law (Counts VII, VIII, IX, and X); and claims for common law battery (Count XI) and negligence (Count XII).

Of particular relevance here are Counts VII and X, both of which alleged § 1983 claims for violating the Plaintiffs’ federal civil rights. In Count VII, the Plaintiffs sued the Defendants for violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments due to “force that was clearly excessive to the need, and [that] was objectively and subjectively unreasonable.” The count further alleged that the Plaintiffs’ rights were violated because the Defendants acted “in a way that was so reckless and/or irresponsible as to be shocking to the consci[ence].” Notably, Count VII referenced the Fourteenth Amendment in two ways, as among the amendments providing “rights, privileges, and immunities” to the Plaintiffs and as the mechanism through which the substantive protections of other

amendments are incorporated against the states. In Count X, Ms. Gaines's estate and Kodi sued the Defendants for violating the First, Fourth, and Fourteenth Amendments, including their "right under the Fourth Amendment to be secure in their person from unreasonable seizure through excessive force" and their "right under the Fourteenth Amendment to bodily integrity and to be free from excessive force by law enforcement." The Plaintiffs averred that the Defendants' use of force was "objectively unreasonable," was "malicious and/or involved reckless, callous, and deliberate indifference," and was accomplished "by means of objectively unreasonable, excessive and consci[ence-]shocking physical force[.]"

2. Motion for Summary Judgment

Before trial, the Defendants filed a motion for summary judgment in which they argued that there was no dispute as to the facts and they were entitled to judgment as a matter of law. Notably, the Defendants argued that under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), all excessive force claims must be analyzed under the Fourth Amendment's "reasonableness" standard, rather than the Fourteenth Amendment's substantive due process standard. Applying the Fourth Amendment standard, the Defendants argued that Corporal Ruby's actions were objectively reasonable and that he was entitled to judgment as a matter of law.

Alternatively, the Defendants argued that Corporal Ruby was entitled to qualified immunity on the excessive force claims "because his actions did not violate a clearly

established constitutional right." The Defendants also argued that Corporal Ruby was entitled to judgment with respect to Kodi's claims because Fourth Amendment excessive force claims may be made only by the person intended to be seized and so Kodi, who was not the intended object of the shooting, had no claim for excessive force against Corporal Ruby.

In opposing the Defendants' motion, Kodi argued, among other things, that the motion was necessarily only for partial summary judgment, even though it purported to address all of the Plaintiffs' claims, because the "Defendants have set forth no law or relevant facts related to any of Plaintiffs' Fourteenth Amendment Claims." Kodi argued that the Defendants' failure to address his Fourteenth Amendment claims at all meant that the court could not rule on them, and they would necessarily survive summary judgment. Although Kodi did not use the phrase "substantive due process" in his summary judgment filings, these arguments plainly referred to his Substantive Due Process Claim. Kodi further argued that "the use of deadly force against Korryn Gaines and excessive force against Kodi Gaines violated their federal constitutional rights under the Fourth and Fourteenth Amendments," and that the officers were not entitled to qualified immunity.[10]

After a hearing, the circuit court granted in part and denied in part the Defendants' motion. Siding with

10. Although Kodi stated in his summary judgment brief that the Fourteenth Amendment's Due Process Clause "includes both procedural and substantive components," he identified only the components of a claim for procedural due process.

the Defendants' view of the applicable legal framework, the court determined that Corporal Ruby's actions would be addressed under the Fourth Amendment's objective reasonableness standard and, therefore, the Defendants' failure to separately address the Fourteenth Amendment was not "persuasive." On the merits, as relevant here, the court denied the Defendants' motion as to Counts VII and X. In its ruling, the court mentioned neither substantive due process nor the Defendants' argument that Kodi lacked a Fourth Amendment claim because he was not the object of a seizure. The case proceeded to trial.

3. Motions for Judgment at Trial and Jury Instructions

At the close of the Plaintiffs' case, the Defendants moved for judgment. Addressing the Plaintiffs' excessive force claims as Fourth Amendment claims, the Defendants argued: (1) that Corporal Ruby was entitled to qualified immunity "because he was acting as an officer in his position under the law making a decision which he is allowed to make"; and (2) that Kodi was not the intended object of the seizure and that the Defendants could not be liable to Kodi as a bystander.

In response, Kodi argued that it was up to the jury to decide whether the officers were in danger when Corporal Ruby acted and whether his actions were objectively reasonable. Alternatively, Kodi argued that Corporal Ruby was not entitled to qualified immunity because the officer used excessive force in violation of both the Fourth and Fourteenth Amendments. Kodi contended that he

could proceed under both constitutional provisions. He argued that "under the [Fourteenth] Amendment and the [Fourth] Amendment, Kodi can proceed because the law is clear that anyone who is injured by the police if the force was excessive can proceed under the [Fourth] Amendment, and if not, the [Fourteenth] Amendment."

The court denied the motion for judgment as to the § 1983 claims, stating that whether the officers were in danger from Corporal Ruby's perspective was a fact to be left up to the jury.

At the close of all the evidence, the Defendants renewed their motion for judgment. The Defendants continued to argue that the Fourth Amendment's objectively reasonable test applied to Corporal Ruby's actions and that Corporal Ruby was entitled to qualified immunity on any Fourth Amendment excessive force claim. The court again denied the Defendants' motion.

When discussing the § 1983 jury instructions, the circuit court stated that it would include an instruction on the Fourth Amendment. Kodi requested that the court reference both the Fourth and Fourteenth Amendments. When the court refused and articulated its view that the Fourteenth Amendment was just the vehicle by which the Fourth Amendment's protections applied in this case rather than an independent source of protection, Kodi pressed the issue and again asked that the instruction also mention the Fourteenth Amendment. When the court refused again, Kodi asked the court to replace the specific reference to the Fourth Amendment with a generic

reference to the "U.S. Constitution." The court ultimately agreed to reference just "the amendments to the United States Constitution," without identifying either the Fourth or the Fourteenth Amendments. Relatedly, Kodi initially argued that the verdict sheet should reference both amendments. When Kodi subsequently requested that the court modify the sheet to remove references to either amendment, the court agreed.

Without referencing any federal constitutional amendment by number, the jury instructions discussed only the Fourth Amendment's objectively reasonable standard for the excessive force claims.[11] The jury

11. As relevant here, the jury instructions on excessive force read:

> The Maryland Declaration of Rights and the Fourth Amendment to the United States Constitution protect persons from being subjected to excessive force. Every person has the right not to be subjected to excessive or unreasonable force.
>
> In determining whether the force used was excessive, you should consider: the need for application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; and whether a reasonable officer on the scene, without the benefit of hindsight, would have used that much force under similar circumstances. You must decide whether the officer's actions were reasonable in light of the facts and circumstances confronting the officer. The reasonableness of [the] police officer's actions must be judged objectively from the perspective of a reasonable police officer in the position of the police officer at the time.

instructions did not identify the "shocks the conscience" standard applicable to Fourteenth Amendment substantive

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> Factors that should be considered in determining reasonableness include what the officer believed at the time of the incident. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are uncertain. Therefore, in examining Plaintiff's claims, you should look at the situation from the perspective of the police officer on the scene, taking into consideration all the circumstances that you find to have existed at the time as the police officer knew them. However, you do not have to determine whether the police officer had less intrusive alternatives available, for the police officer Defendant need only to have acted within that range of conduct identified as reasonable.
>
> As the finders of fact in this case, when considering whether the actions of the police officer were reasonable or unreasonable and excessive, you should consider all of the testimony and evidence in the case, and it is your task to decide the facts of the case where there are competing or disputed renditions of the facts.

The court further instructed the jury that the three elements required to establish a § 1983 claim were: (1) that the acts were committed under color of state law; (2) that the law enforcement officer who committed the acts "intentionally or recklessly deprived the Plaintiff of a federal right"; and (3) "that the Defendant's acts were a proximate cause of injuries sustained by the Plaintiff." With respect to the second element, the court further explained that "[a]n act is intentional if it is done voluntarily and deliberately and not because of mistake, accident, negligence, or other innocent reason," and that "[a]n act is reckless if done in conscious disregard of its known probable consequences."

due process claims, nor did any party or the court suggest that they should.

The jury returned a plaintiffs' verdict on all counts. The first question on the verdict sheet asked whether Corporal Ruby's first shot was "objectively reasonable"—i.e., the Fourth Amendment standard for excessive force—to which the jury answered no.[12] The jury then answered yes to each of a series of questions asking whether the Defendants violated the rights of Ms. Gaines and Kodi under the Maryland Declaration of Rights and 42 U.S.C. § 1983 (without specifying any particular constitutional amendment), and whether they committed a battery against Ms. Gaines and Kodi. The jury awarded Kodi more than $23,000 in past medical expenses and nearly $33 million in non-economic damages. The jury made separate awards of damages to each of the other four plaintiffs, ranging from $307,000 to over $4.5 million. The jury declined to award punitive damages against the Defendants under either the Maryland Declaration of Rights or § 1983. The verdict sheet did not ask the jury whether Corporal Ruby's conduct shocked the conscience of the jurors, nor did any party or the court suggest that it should.

4. Post-Trial Motions

The Defendants filed post-trial motions, including motions for judgment notwithstanding the verdict

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12. The verdict sheet instructed the jury to stop and not proceed further if the jurors found that Corporal Ruby's first shot was objectively reasonable.

("JNOV"), for a new trial, for remittitur, and for the court to exercise revisory power over the judgment. The Defendants argued, among other things, that Corporal Ruby's first shot was objectively reasonable and, therefore, that he was entitled to judgment as a matter of law on any excessive force claim. Alternatively, the Defendants argued that Corporal Ruby was entitled to qualified immunity because he did not violate clearly established law. In addition, the Defendants argued that there was no violation of Kodi's rights under § 1983 because there can be no Fourth Amendment claim by an innocent bystander who is not the intended object of a seizure and it was "undisputed that Kodi was not the intended target of the shooting[.]"

In his opposition, in addition to defending his verdict under the Fourth Amendment, Kodi contended that he had properly pled and proceeded on his Substantive Due Process Claim, which the Defendants had again ignored. Kodi asserted that he had "consistently maintained that [he] can proceed and was proceeding on his § 1983 claims under the Fourteenth Amendment as an independent basis from the Fourth Amendment at the time of trial." Kodi further argued that under the decision of the United States Court of Appeals for the Fourth Circuit in *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991), an innocent bystander can bring a substantive due process claim under the Fourteenth Amendment if the person was physically injured, regardless of whether the injury was intended. Kodi claimed that his reliance on the Fourteenth Amendment was proper and that the court properly instructed the jury on what Kodi needed

to prove to prevail on his § 1983 claim under both the Fourth and Fourteenth Amendments. He noted that the Defendants had failed to object to the jury instructions regarding the § 1983 claim, and, regardless, caselaw required a finding only that Corporal Ruby had acted recklessly or irresponsibly to support Kodi's Substantive Due Process Claim, which he argued was covered by the jury instructions. Because evidence presented at trial supported a finding that Corporal Ruby's actions were reckless, Kodi argued that the evidence was sufficient to sustain the verdict based on the Fourteenth Amendment.

In argument on the post-trial motions, the Defendants addressed Kodi's contention that he had presented a Fourteenth Amendment claim in addition to a Fourth Amendment claim in three ways. First, the Defendants repeated their prior argument that the exclusive analytical framework applicable to an excessive force claim is the objectively reasonable standard under the Fourth Amendment, not the Fourteenth Amendment "shocks the conscience" standard. Second, the Defendants argued that Kodi did not have a Substantive Due Process Claim regardless "because substantive due process protects against agents of the State acting irrationally and arbitrarily," and there was "no evidence in this case that the actions of Corporal Ruby in any way would amount to being so brutal and inhumane as to shock the conscience of the judicial court." Third, the Defendants contended that Kodi's Substantive Due Process Claim "just do[es]n't appear" in the complaint.

In an opinion that exclusively employed a Fourth Amendment framework to review the Plaintiffs' § 1983

claims, the circuit court granted the Defendants' JNOV motion on the basis that Corporal Ruby was entitled to qualified immunity.[13] The circuit court did not address either: (1) Kodi's Substantive Due Process Claim, including the Defendants' contention that it was not supported by the evidence; or (2) the Defendants' contention that Kodi had no Fourth Amendment claim because he was not the intended object of the seizure. The Plaintiffs appealed.

At this point, it is worth pausing to summarize a few important points as of the time the first appeal was taken. First, for our purposes here, the operative complaint adequately provided notice that Kodi was proceeding on a substantive due process claim. Counts VII and X of the complaint plainly identified the Due Process Clause of the Fourteenth Amendment as a substantive basis for the Plaintiffs' claims and alleged that the Defendants' conduct shocked the conscience. Any complaints about the adequacy of the allegations to support Kodi's Substantive Due Process Claim should have been addressed in motions practice before trial.

Second, although adequately pled, none of the parties focused to any great extent on the Substantive Due Process Claim before the first appeal. The Defendants consistently took, and the court consistently accepted, the position that Kodi did not have a Substantive Due Process Claim. Kodi raised the claim several times—

13. The circuit court also found that if the JNOV ruling were reversed on appeal, a new trial was necessary due to a defective verdict. In *Cunningham I*, the Appellate Court reversed on that issue. 246 Md. App. 630, 700-02, 232 A.3d 278 (2020).

including in opposing summary judgment, in opposing the Defendants' motion for judgment at trial, and in opposing the Defendants' JNOV motion—although never in great detail. Perhaps believing that he had a viable Fourth Amendment claim that was subject to a more permissive legal standard, it seems that Kodi was content to focus primarily on the Fourth Amendment.

Third, as a result, the jury was never presented with the appropriate standard applicable to Kodi's Substantive Due Process Claim—whether the conduct "shocks the conscience," *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)—and was never asked whether Corporal Ruby's conduct met that standard. Thus, the jury never found that Corporal Ruby violated Kodi's substantive due process rights.

Fourth, although the circuit court never analyzed or ruled expressly on the viability of Kodi's Substantive Due Process Claim, it entered judgment for the Defendants on all counts, including the § 1983 count. That necessarily had the effect of resolving Kodi's Substantive Due Process Claim in favor of the Defendants. This last point will be particularly critical to our waiver analysis.

5. *Cunningham I*

Before the Appellate Court, the Plaintiffs argued, among other things, that the circuit court erred in granting the Defendants' motion for JNOV based on qualified immunity. *Cunningham I*, 246 Md. App. at 679. The Appellate Court affirmed in part, reversed/

vacated in part, and remanded for further proceedings. *Id.* at 706. In relevant part, the parties' arguments and the Appellate Court's opinion focused exclusively on the Fourth Amendment standard applicable to excessive force claims.

As relevant here, the Appellate Court held "that the [circuit] court erred in granting the motion for JNOV, with the exception of its ruling dismissing the § 1983 claims against the County." *Id.* The Appellate Court rejected the circuit court's conclusion that Corporal Ruby did not violate clearly established Fourth Amendment law and so was entitled to qualified immunity. *Id.* at 694. Instead, the court held that there were material factual disputes concerning whether Corporal Ruby acted in an objectively reasonable manner in firing the first shot. *Id.* Consequently, the Appellate Court held that the circuit court erred in invalidating the jury's finding that Corporal Ruby did not act reasonably. *Id.* The Appellate Court therefore reversed the grant of JNOV with respect to the claims against Corporal Ruby and remanded for further proceedings. *Id.* at 706.

Two other aspects of the Appellate Court's decision in *Cunningham I* are particularly notable for our purposes. First, the court stated in a footnote that Kodi argued "that the Fourth and Fourteenth Amendment claims regarding Kodi are not properly before this Court because they were not addressed in the circuit court's opinion." *Id.* at 689 n.38. Because no one else raised Kodi's Substantive Due Process Claim, and Kodi expressly told the Appellate Court that the claim was not before it on appeal, that court quite reasonably never addressed or considered that claim.

Second, the Appellate Court pointed out in another footnote that it was confining its entire Fourth Amendment analysis—the only federal constitutional analysis in which it engaged—to the claims related to Ms. Gaines "because . . . Fourth Amendment rights are personal and cannot be vicariously asserted by the family." *Id.* at 690 n.39. Thus, the court observed, the Defendants were correct that Kodi "was an innocent bystander who was not 'seized' within the meaning of the Fourth Amendment" and had no claim under that amendment. *Id.* Other than in those two footnotes and in relaying the procedural background of the case, the Appellate Court's opinion did not address Kodi's § 1983 claims.

6. Proceedings on Remand

The Appellate Court remanded the case "to the circuit court for consideration of remaining issues relating to damages. Those issues include, but are not limited to, the damages cap and remittitur." *Id.* at 706. In explaining the scope of its remand, the intermediate appellate court stated that the circuit court could "address the applicability of the damages cap, and if it determines that the verdict remains as it is, an amount that the court found to be excessive, it can address the issue whether a remittitur or new trial is warranted." *Id.* at 704. On remand, the circuit court treated the Appellate Court's use of the phrase "if it determines that the verdict remains as it is" as a recognition that other issues relevant to whether the verdict should remain as it was could still be addressed.

One of those issues turned out to be whether the Defendants had a right to argue that Kodi had no Fourth or Fourteenth Amendment claims under § 1983.[14] The Defendants continued to argue that Kodi lacked a viable Substantive Due Process Claim. They also argued that (1) even if Kodi had such a claim, Corporal Ruby would be entitled to qualified immunity, and (2) any Substantive Due Process Claim would fail because the facts of this case were not "a brutal and inhumane abuse of power shocking the consci[ence]." Among other things, the Defendants argued that Corporal Ruby was entitled to qualified immunity on the Substantive Due Process Claim because the law was not clearly established that he violated Kodi's substantive due process rights. Further, addressing the absence of an objection on their part to the jury instructions for failing to adequately cover a substantive due process claim, they argued that there was never any such claim on which such an instruction was needed.

In response, Kodi eventually acquiesced to the fact that he did not have a Fourth Amendment claim. However,

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14. On remand, Kodi initially argued that the Appellate Court's decision, which had focused only on the claims related to Ms. Gaines, had not undermined the validity of his judgment, which he argued should stand under both the Fourth and Fourteenth Amendments notwithstanding the deficiency the Appellate Court had identified in his Fourth Amendment claim. Kodi based that argument on his contention that the Appellate Court had completely reinstated his entire § 1983 claim, which was premised on the Fourth and Fourteenth Amendments, and that the Defendants had waived any argument distinguishing between those amendments. As discussed below, Kodi eventually retreated from that position.

he contended that he pled and argued a Fourteenth Amendment Substantive Due Process Claim. Indeed, Kodi argued that the Appellate Court's ruling had the necessary effect of upholding the jury's verdict on his Substantive Due Process Claim. Kodi reasoned that because the Appellate Court did not disturb the jury's verdict in his favor on his § 1983 claim, while simultaneously observing that he could not rely on the Fourth Amendment, the court must have found that claim supported by the Fourteenth Amendment.

To the extent there was any error in proceeding at trial applying only the Fourth Amendment standard, Kodi argued the error was invited because the Defendants had argued, and the court had accepted over Kodi's objection, that only the Fourth Amendment standard applied to Kodi's claims. Kodi acknowledged that the verdict sheet did not differentiate between the amendments and that the jury instructions referenced only the Fourth Amendment's objective reasonableness standard, but argued that it was the Defendants' obligation to ask for a different instruction if they thought one was required. He claimed the Defendants had waived that issue by not challenging the adequacy of the jury instructions at trial. Finally, Kodi argued that the Defendants had waived a qualified immunity defense with respect to the Substantive Due Process Claim by failing to raise it previously.[15]

15. Kodi pointed out that the Defendants had "raised qualified immunity arguments five (5) times previously . . . . However, Defendants never raised a qualified immunity argument against Kodi Gaines' Fourteenth Amendment claim." Kodi acknowledged that this failure was likely attributable to the Defendants' "false

After a hearing, the circuit court issued a written opinion again entering judgment for the Defendants.[16] The court explained that, in its initial JNOV ruling, its determination that Corporal Ruby was entitled to qualified immunity obviated the need to decide whether Kodi might otherwise have a claim under either the Fourth Amendment or the Fourteenth Amendment. The circuit court interpreted the Appellate Court's decision in *Cunningham I* as taking qualified immunity entirely off the table,[17] thus requiring it to decide, for the first time, the nature and viability of Kodi's claim.

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impression that Kodi Gaines' 42 U.S.C. § 1983 claim had to be decided under the Fourth Amendment objectively reasonable standard," but argued that it was nonetheless waived. Although Kodi made this waiver argument before the circuit court, he has abandoned it on appeal by not raising it in either the Appellate Court of Maryland or in this Court.

16. By the time the court ruled on remand, all plaintiffs other than Kodi had settled with the Defendants.

17. As discussed below, the Appellate Court did not understand its opinion in *Cunningham I* to have resolved any issues concerning Kodi's claims, which it understood had not been adjudicated in the circuit court's original JNOV decision. *See Cunningham I*, 246 Md. App. at 689 n.38. The circuit court, believing its initial JNOV decision had adjudicated Kodi's claims as well as those of Ms. Gaines—at least in part because it treated those claims as being subject to the same standard and so resolved under the same qualified immunity analysis—treated the Appellate Court's decision as definitively resolving the qualified immunity analysis as to Kodi as well as Ms. Gaines. In our view, although the circuit court's analysis in its original JNOV decision focused exclusively on the claims related to Ms. Gaines, it applied that analysis to Kodi's claims as well, and the judgment the circuit court entered necessarily encompassed Kodi's claims.

The court concluded as a matter of law that Kodi did not have a viable § 1983 claim under either amendment. First, consistent with the Appellate Court's decision, and as Kodi had by then conceded, the circuit court held that Kodi had no Fourth Amendment claim because he was not the intended object of the seizure. Second, the court held that Kodi had no Substantive Due Process Claim because (1) his injuries were unintentional, (2) mere negligence cannot support a Fourteenth Amendment claim, and (3) the facts elicited at trial did not meet the shocks the conscience standard. Kodi appealed once more.

7. *Cunningham II*

Before the Appellate Court for a second time, Kodi argued that the circuit court erred in entering judgment for the Defendants on his Substantive Due Process Claim. Among other things, he argued that in concluding that the evidence presented at trial did not meet the Fourteenth Amendment's shocks the conscience standard, the court improperly relied on Corporal Ruby's testimony about the shooting and did not recognize competing evidence that created a dispute of fact that was for the jury to resolve. *Cunningham v. Baltimore Cnty.*, No. 378, Sept. Term, 2022, 2023 Md. App. LEXIS 234, 2023 WL 2806063, at *12 (Md. App. Ct. April 6, 2023) ("*Cunningham II*").

The Defendants argued that Kodi had waived his Substantive Due Process Claim for two reasons: (1) because he had not raised that claim in *Cunningham I*; and (2) because the jury instructions covered § 1983 claims only under the Fourth Amendment, and there was no jury

finding of a violation of Kodi's Fourteenth Amendment rights. *Id.* The Defendants further argued that even if the substantive due process arguments were not waived: (1) the circuit court correctly determined that the evidence presented at trial did not meet the shocks the conscience standard as a matter of law; and (2) Corporal Ruby would have qualified immunity against any claim for excessive force. *Id.*

With respect to the Defendants' reliance on the jury instructions, the Appellate Court agreed with the Defendants that the instruction on excessive force discussed only the Fourth Amendment's reasonableness standard and did not cover the Fourteenth Amendment's shocks the conscience standard. 2023 Md. App. LEXIS 234, [WL] at *12-15. But the Appellate Court agreed with Kodi that the Defendants had waived their right to argue that the jury was improperly instructed by not objecting to the instructions at trial. 2023 Md. App. LEXIS 234, [WL] at *16.

The Appellate Court agreed with the Defendants, however, that Kodi had waived his Substantive Due Process Claim. 2023 Md. App. LEXIS 234, [WL] at *16. As a preliminary matter, the Appellate Court observed that the issue presented in *Cunningham I* was "whether Corporal Ruby was entitled to qualified immunity with respect to a violation of Ms. Gaines' and Kodi's Fourth Amendment rights."[18] 2023 Md. App. LEXIS 234, [WL] at

18. In footnote 38 of *Cunningham I*, the Appellate Court stated that Kodi had argued that neither his Fourth nor Fourteenth Amendment claims were properly before that court

*11. The Appellate Court explained that the circuit court had treated all of the § 1983 claims as excessive force claims under the Fourth Amendment and that all parties had presented the claims that way on appeal, with Kodi expressly stating that his Substantive Due Process Claim was not part of that appeal. *Id.* Therefore, according to the Appellate Court, the limited issue in *Cunningham I* was whether the circuit court erred in finding that Corporal Ruby was entitled to qualified immunity on the Fourth Amendment claims. 2023 Md. App. LEXIS 234, [WL] at *11-12.

The problem for Kodi, according to the Appellate Court, was that although the circuit court's JNOV ruling was based exclusively on a Fourth Amendment analysis,

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"because they were not addressed in the circuit court's opinion." 246 Md. App. at 689 n.38. That may have been a reference to Kodi's reply brief in *Cunningham I*, in which he took the position that neither the Defendants nor the circuit court had acknowledged the distinction between his Fourth and Fourteenth Amendment claims at any point and, therefore, any "discussion . . . concerning the distinction between the Fourth and Fourteenth Amendment claims of Kodi Gaines . . . is not before th[e Appellate] Court." Although Kodi argued there that the *distinction* between his Fourth and Fourteenth Amendment claims was not properly before the Appellate Court, we have not found anywhere in which he took the position that his Fourth Amendment claim itself was not before the Appellate Court in *Cunningham I*.

Regardless, before the Appellate Court in *Cunningham II*, Kodi took the position that although his Fourth Amendment claim had been before that court in *Cunningham I*, his Substantive Due Process Claim had not been. The Appellate Court agreed. *See Cunningham II*, 2023 Md. App. LEXIS 234, 2023 WL 2806063, at *11.

the court entered judgment for the Defendants with respect to the entirety of Kodi's § 1983 claims. 2023 Md. App. LEXIS 234, [WL] at *17. The result of the JNOV ruling was therefore to dismiss *all* claims against the Defendants, including the Substantive Due Process Claim. *Id.* As a result, to preserve that claim, it was incumbent on Kodi to challenge the circuit court's entry of judgment on it during the first appeal. 2023 Md. App. LEXIS 234, [WL] at *17-18. By failing to do so, Kodi waived the claim and was not entitled to "a second bite at the apple to raise [the Substantive Due Process C]laim in the present appeal." 2023 Md. App. LEXIS 234, [WL] at *18.

The Appellate Court held, in the alternative, that even if Kodi had not waived his Substantive Due Process Claim, Corporal Ruby would be entitled to qualified immunity on that claim because Kodi had not shown that, at the time of the shooting, "there was clearly established law that Corporal Ruby's conduct violated Kodi's substantive due process right as a bystander."[19] 2023 Md. App. LEXIS 234,

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19. The Appellate Court observed in its opinion that Kodi, "even now, . . . is not vigorously pursuing a substantive due process claim on the merits." *Cunningham II*, 2023 Md. App. LEXIS 234, 2023 WL 2806063, at *18. As proof of that, the Appellate Court discussed Kodi's lack of engagement with the Defendants' argument for qualified immunity. *Id.* The Appellate Court noted particularly that when qualified immunity was raised at oral argument in that court, Kodi's counsel "stated 'that ship has sailed,' arguing that this Court addressed this issue in *Cunningham I*." *Id.* To the contrary, the Appellate Court stated, it had not addressed the Substantive Due Process Claim at all in *Cunningham I*, including with respect to qualified immunity. *Id.*

[WL] at *19. The Appellate Court found no precedent from any relevant court "establishing that a police officer, who

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In light of the different understandings of the parties, the circuit court, and the Appellate Court concerning what was resolved in *Cunningham I* and what was before the circuit court on remand after that decision, we interpret Kodi's appellate arguments on this issue differently. As we previously discussed, the circuit court believed that its initial ruling on qualified immunity addressed the entirety of Kodi's § 1983 claim, without regard to the particular constitutional provision(s) underlying that claim, and that the Appellate Court's opinion in *Cunningham I* had rejected qualified immunity as to the entirety of Kodi's § 1983 claim. As a result, the circuit court's ruling on remand did not address qualified immunity at all. That ruling did, however, address Kodi's Substantive Due Process Claim, ruling that the evidence at trial was insufficient to support that claim. In his appellate briefing in *Cunningham II*, Kodi addressed the circuit court's ruling on the sufficiency of the evidence for his Substantive Due Process Claim on the merits, arguing at some length that the court erred in focusing only on certain evidence and ignoring other evidence that, according to Kodi, supported his claim. The Defendants also focused their appellate briefing primarily on the circuit court's ruling on the merits, although they did argue in the alternative that the Appellate Court should find that Corporal Ruby was entitled to qualified immunity. It was in that context that Kodi answered that the "ship ha[d] sailed" on the Defendants' qualified immunity claim. *Cunningham II*, 2023 Md. App. LEXIS 234, 2023 WL 2806063, at *18.

As it turns out, of course, the Appellate Court believed that qualified immunity on the Fourteenth Amendment claim was still a live issue that had not been resolved by its opinion in *Cunningham I*. In sum, although we agree that Kodi failed to engage on the issue of qualified immunity before the Appellate Court, based on his position that the issue had already been definitively resolved in his favor, we do not agree that he failed to engage in arguments about the merits of his Substantive Due Process Claim.

unintentionally shoots and injures an innocent bystander under circumstances similar to this case violates the bystander's Fourteenth Amendment substantive due process rights." *Id.* Accordingly, the Appellate Court determined that even if Kodi had not waived his Substantive Due Process Claim, the court would have rejected that claim based on qualified immunity. *Id.*

DISCUSSION

I. Waiver

Although we agree with most of the Appellate Court's waiver analysis, we disagree with the final step of that analysis and its outcome. First, we agree with the Appellate Court that even though the circuit court's ruling on the JNOV motion did not mention Kodi's Substantive Due Process Claim, or provide any reason for rejecting it, the necessary effect of the circuit court's entry of judgment for the Defendants on Kodi's § 1983 claims was to enter judgment on the entirety of those counts, including his Substantive Due Process Claim.

Second, we agree with the Appellate Court that if Kodi wanted to preserve his Substantive Due Process Claim, it was incumbent upon him to challenge the circuit court's entry of judgment encompassing that claim as part of the first appeal. *See Offutt v. Montgomery Cnty. Bd. of Ed.*, 285 Md. 557, 564 n.4, 404 A.2d 281 (1979) (explaining that a party aggrieved by the trial court's judgment may take an appeal). Had the Appellate Court affirmed the circuit court in *Cunningham I*, with or without any discussion of

the Substantive Due Process Claim, it is beyond question that the affirmance would have applied to the entire § 1983 claim. And had the Appellate Court reversed the circuit court in *Cunningham I* only with respect to Kodi's claim against Corporal Ruby under the Fourth Amendment, it is similarly beyond question that Kodi would not have been able to resurrect his Substantive Due Process Claim.

Third, we agree with the Appellate Court that Kodi's failure to argue that the circuit court erred in entering judgment against him on his Substantive Due Process Claim in briefing in the first appeal waived his right to have the Appellate Court address that claim and precludes him from arguing in any subsequent appeal that the court's original JNOV ruling on that claim was incorrect. *See Fidelity-Baltimore Nat'l Bank & Tr. Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 371-72, 142 A.2d 796 (1958) (stating that it "is the well-established law of this state that litigants cannot try their cases piecemeal. . . . [T]hey cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction."). Had the Appellate Court's judgment in *Cunningham I* failed to revive the Substantive Due Process Claim or failed to reject the reasoning on which the circuit court had resolved that claim against Kodi in the original JNOV ruling, Kodi would have had no right to object and no legitimate contention that the claim survived.

Nevertheless, we do not find Kodi's current claims to be precluded by waiver for two reasons. First, the

Appellate Court's judgment in *Cunningham I* revived Kodi's Substantive Due Process Claim. The Appellate Court's decision, much like the circuit court's decision before it, did not discuss the Substantive Due Process Claim in any way. Nonetheless, in "revers[ing] the grant of JNOV with respect to the claims against Corporal Ruby," without identifying any carveout, the Appellate Court necessarily included the Substantive Due Process Claim in its judgment. *Cunningham I*, 246 Md. at 706. The Appellate Court's opinion in *Cunningham I*, by its plain terms, revived *all* of the claims against Corporal Ruby that had been rejected by the circuit court's grant of the JNOV motion. Thus, in the same way and to the same extent that the circuit court's grant of the JNOV motion necessarily rejected Kodi's Substantive Due Process Claim, the Appellate Court's blanket reversal of the grant of that JNOV motion (with respect to the claims against Corporal Ruby) necessarily revived Kodi's Substantive Due Process Claim. Kodi did not have a right to have the Appellate Court revive his Substantive Due Process Claim, but the court did so anyway.[20]

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20. As we have discussed, Kodi adequately pled his Substantive Due Process Claim in the complaint, and although that claim was not a primary focus of his arguments until remand, he never abandoned it. However, Kodi failed to request that the jury be instructed on the law applicable to his Substantive Due Process Claim. As a result, when the jury was asked to rule on whether the Defendants violated Kodi's rights under 42 U.S.C. § 1983, the jury was never informed of the standard required to make such a finding with respect to a substantive due process claim. Before the Appellate Court in *Cunningham II*, one of the grounds on which the Defendants challenged the verdict was the failure of the circuit court to instruct the jury on the standard

Second, the argument Kodi failed to make in the first appeal, and so forever waived the right to make in subsequent appeals, is not the same argument he is pursuing here. In the first appeal, the circuit court had entered judgment on Kodi's Substantive Due Process Claim based on a Fourth Amendment-centered qualified immunity analysis, without testing the evidentiary sufficiency of that claim. Kodi lost the right to challenge that qualified immunity decision by failing to argue against it. Then, on remand, the circuit court ruled, for the first time, on whether the evidence was sufficient to support the verdict, finding that it was not. Because the circuit court did not rule on the sufficiency of the evidence to support Kodi's Substantive Due Process Claim until its decision on remand from *Cunningham I*, Kodi was not barred from challenging that decision before the Appellate Court in *Cunningham II*. Accordingly, based on the unique and convoluted procedural history of this case, the Appellate Court erred in *Cunningham II* in holding that Kodi was precluded from pursuing his Substantive Due Process Claim on remand and in this appeal.

II. Qualified Immunity

The alternative ground on which the Appellate Court affirmed the circuit court on remand was that

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applicable to Kodi's Substantive Due Process Claim. But the Appellate Court ruled against the Defendants on that issue, and the Defendants have abandoned it before this Court. As a result, we do not have occasion here to determine the effect of Kodi's failure to ask the circuit court to instruct the jury on the standard for the Substantive Due Process Claim and the resulting lack of a jury determination that Kodi satisfied that standard.

Corporal Ruby was entitled to qualified immunity on Kodi's Substantive Due Process Claim. *Cunningham II*, 2023 Md. App. LEXIS 234, 2023 WL 2806063, at *19. We agree with the Appellate Court that under the governing standard provided by the United States Supreme Court, Corporal Ruby is entitled to qualified immunity on Kodi's Substantive Due Process Claim.[21] The facts of the

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21. Our dissenting colleagues contend that the Defendants waived and/or failed to preserve for appellate review their argument that Corporal Ruby is entitled to qualified immunity with respect to Kodi's Substantive Due Process Claim. *See* Dissenting Op. of Watts, J. at 4-8; Dissenting Op. of Hotten, J. at 2-3 n.2. However, Kodi himself has waived any argument that the Defendants waived or failed to preserve their argument concerning qualified immunity. As noted above, *see* footnote 15 *supra*, on remand in the circuit court Kodi argued that the Defendants had waived a challenge to the Substantive Due Process Claim based on qualified immunity. However, in the Appellate Court of Maryland in *Cunningham II*, Kodi abandoned that claim of waiver. Nor did Kodi raise any issue concerning waiver or preservation in his petition for *certiorari* or make any such arguments in his briefing or in oral argument to this Court. We conclude that Kodi made the strategic decision not to raise any threshold claim of waiver or lack of preservation on the part of the Defendants in this Court. In these circumstances, we decline to consider on our own initiative whether the Defendants waived or failed to preserve for appellate review their argument that Corporal Ruby is entitled to qualified immunity on Kodi's Substantive Due Process Claim. *See*, *e.g.*, *Madrid v. State*, 474 Md. 273, 322, 254 A.3d 468 (2021) (declining State's invitation to consider non-preservation issues because the State did not file a cross-petition for certiorari and did not raise the issues in the Appellate Court); *State v. Williams*, 392 Md. 194, 227 n.11, 896 A.2d 973 (2006) ("By not himself contesting the issue and its waiver . . . in a cross-petition, the respondent has not preserved the issue of waiver[.]").

accidental shooting of Kodi are tragic and heartbreaking. However, at the time of the shooting, no decision from any appellate court in the country—much less a controlling decision or "a robust consensus of persuasive authority," *District of Columbia v. Wesby*, 583 U.S. 48, 63, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018)—had held that an officer who took action similar to that of Corporal Ruby violated the Fourteenth Amendment. Accordingly, we cannot conclude that the law at the time "clearly established" that Corporal Ruby violated Kodi's Fourteenth Amendment rights when he ended an armed standoff with Ms. Gaines at her apartment by shooting Ms. Gaines with Kodi present.

A full qualified immunity analysis would normally proceed in two steps. First, we would assess Kodi's underlying argument that the shooting violated his substantive right to due process under the Fourteenth Amendment, taking the evidence at trial in the light most favorable to him. *Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016). Second, if we determined that there was a violation, we would then assess whether qualified immunity was nevertheless warranted because it was not "clearly established" at the time that the shot violated Kodi's rights. *See Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The two steps need not be taken in order, although doing so is "sometimes beneficial[.]" *Camreta v. Greene*, 563 U.S. 692, 707, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011). Rather, courts have discretion to invert the order and to address only one step or the other, depending on the circumstances. *Pearson*, 555 U.S. at 236. There are also times when it can be better to proceed out of order, such as when "it is

plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Rivera-Corraliza v. Morales*, 794 F.3d 208, 215 (1st Cir. 2015) (providing examples). Here, we will only undertake the second step of the analysis. We hold that it was not clearly established that Corporal Ruby would violate Kodi's right to substantive due process under the Fourteenth Amendment when Corporal Ruby shot Ms. Gaines. Accordingly, Corporal Ruby is entitled to qualified immunity.[22]

Qualified immunity protects officers who operate in "the sometimes hazy border between excessive and acceptable force"—shielding officers from suit in this gray area, even when their use of force is later held to violate a constitutional protection. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (cleaned up). Thus, officers are entitled to qualified immunity unless the unlawfulness of their conduct as to a particular constitutional right was "clearly established" at the time. *Wesby*, 583 U.S. at 63. To satisfy this standard, the law must have been "sufficiently clear" such that "every

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22. Admittedly, it is sometimes difficult to separate the two-step process. For instance, it "may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). Additionally, "[i]n some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all." *Pearson*, 555 U.S. at 236. To be clear, however, we do not attempt to analyze the first part of the test for qualified immunity here.

reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (cleaned up). This is a high bar, and it typically requires either controlling authority or "a robust consensus . . . of persuasive authority" that gives officers sufficiently specific notice that their conduct violated a particular right. *Wesby*, 583 U.S. at 63 (internal quotations omitted). Accordingly, the Supreme Court concluded that officers were entitled to qualified immunity where there was only a "hazy legal backdrop[,]" *Mullenix v. Luna*, 577 U.S. 7, 14, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015), as well as where there was no specific precedent finding a violation under similar circumstances and a violation was not otherwise "obvious." *Wesby*, 583 U.S. at 65.

"Clearly established" does not mean that there must be a case with precisely matching facts or that found a violation in the same specific context. *Yates v. Terry*, 817 F.3d 877, 887 (4th Cir. 2016); *see also Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019) ("In some cases, government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two."). Nevertheless, the robust consensus of authority at least must have "placed the . . . constitutional question beyond debate" in the circumstances confronted by the officer. *Kisela v. Hughes*, 584 U.S. 100, 104, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018). Mere general guidance in the law is not enough because it does not help officials answer the "crucial question" of whether they "acted reasonably in the particular circumstances[.]" *Plumhoff v. Rickard*, 572 U.S. 765, 779, 134 S. Ct. 2012,

188 L. Ed. 2d 1056 (2014). Indeed, specificity in the law is "especially important" in circumstances where police officers—as opposed to other officials—must confront and apply "relevant legal doctrine" in the field. *See Mullenix*, 577 U.S. at 12 (explaining, in the Fourth Amendment context, the particular importance of specificity because "it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation").

Under these principles, to determine whether Corporal Ruby's conduct was "clearly established" as unlawful under the Fourteenth Amendment, it is also necessary to consider the requirements of that constitutional standard. As previously explained, bystanders like Kodi, who are not the intended targets of police action, are not protected by the Fourth Amendment and its "objective reasonableness" standard when they are harmed by allegedly excessive police force. *See Brower v. Cnty. of Inyo*, 489 U.S. 593, 596-97, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989); *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991). Instead, their constitutional protection stems from the due process protections of the Fourteenth Amendment—a different source with a higher threshold. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). In a constitutional sense, these protections are only "residual[.]" *Rucker*, 946 F.2d at 281. That is, these safeguards serve as a safety net, affording protection only where no other constitutional amendment supplies the analysis. *See Lewis*, 523 U.S. at 842-43. The Supreme Court has "always been reluctant to expand the concept of substantive due process," resulting in these residual

protections redressing "only the most egregious official conduct[.]" *Id.* at 842, 846 (internal quotation marks and citations omitted).

Police action that injures a bystander will not violate substantive due process rights under the Fourteenth Amendment unless it "amount[s] to a brutal and inhumane abuse of official power literally shocking to the conscience." *Rucker*, 946 F.2d at 281 (internal quotation marks and citation omitted). Conduct that is merely "disturbing and lacking in judgment" will fall short, *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991), as will conduct that is merely negligent, *Rucker*, 946 F.2d at 282. Indeed, although it is "possible" that sufficiently "reckless and irresponsible" actions like "shooting into a crowd at close range" could rise to the level of a Fourteenth Amendment violation, *see Rucker*, 946 F.2d at 282 (speculating about the possibility in dicta), the parties have cited no case decided by the time of the shooting here that had reached such a conclusion.

Thus, put in the correct Fourteenth Amendment terms, the relevant inquiry here is whether it was clearly established that Corporal Ruby's decision to shoot at Ms. Gaines was a brutal and inhumane abuse of official power *with respect to Kodi* that shocks the conscience. *See Mullenix*, 577 U.S. at 13; *Rucker*, 946 F.2d at 281. The difficulty of that standard—and the differences between it and Fourth Amendment "objective reasonableness" cases—forecasts the qualified immunity result here. The relevant cases generally fall into a few different categories, none of which would put an officer in Corporal

Ruby's position on notice that their conduct would violate Kodi's Fourteenth Amendment rights.[23]

First, several cases involved traffic accidents and high-speed police chases, often determining that officers did not violate bystanders' Fourteenth Amendment rights. *See*, *e.g.*, *Lewis*, 523 U.S. at 855 (no violation when officer in pursuit of a motorcycle drove approximately 100 miles per hour in a residential neighborhood and accidentally crashed into the passenger on the motorcycle); *Temkin*, 945 F.2d at 718, 723 (no violation when officer in pursuit drove approximately 60 miles per hour down a narrow road and crashed into a bystander's car); *Rucker*, 946 F.2d at 281-82 (no violation where officers in pursuit fired upon the tires of a vehicle driven by a fleeing suspect and accidentally shot a bystander when, among other things, officers did not know the bystander was in the line of fire). Because the circumstances in these cases were so different from the situation facing Corporal Ruby, these cases would have provided little practical guidance to Corporal Ruby about whether his shot would violate Kodi's rights. Simply put, it would be difficult for officers in Corporal Ruby's position

23. There are also cases that do not fall neatly into distinct categories, but that nevertheless emphasize the difficulty of making out a violation of substantive due process. For instance, in one extreme example, an officer did not violate a bystander's Fourteenth Amendment rights when he instructed the bystander to assist with a suspect who was struggling with the officer over the officer's firearm—even when the officer subsequently fled into the bushes, leaving the bystander behind to be shot by the suspect. This was the case because the officer did not "inten[d] to harm" the bystander. *Radecki v. Barela*, 146 F.3d 1227, 1228, 1232 (10th Cir. 1998).

to glean any guiding standards from these cases, except possibly in the most general sense. High-speed pursuits present different considerations from armed standoffs and hostage situations, and, moreover, these cases found no Fourteenth Amendment violations. Indeed, the facts of one case did not even "approach" such a violation. *Rucker*, 946 F.2d at 281. Thus, these cases would not put Corporal Ruby on sufficient notice that shooting at Ms. Gaines would violate Kodi's substantive due process rights.

Second, several cases involved shootouts with suspects. These cases are a somewhat better fit for Corporal Ruby's situation, because officers involved in shootouts have little or "no opportunity to ponder or debate their reaction" to armed suspects. *See Claybrook v. Birchwell*, 199 F.3d 350, 359-60 (6th Cir. 2000) (noting that such situations can be "rapidly evolving, fluid, and dangerous predicament[s] [that] preclude[] the luxury of calm and reflective pre-response deliberation"). In this context, courts have concluded that police generally do not violate substantive due process protections when they fire their weapons without "malice or sadism" toward bystanders—even when bystanders are accidentally shot. *Id.* at 361. Indeed, some courts have concluded that bystanders' Fourteenth Amendment rights are not violated in this context unless officers acted either with "intent to harm" the *bystander*, or if officers (1) had a moment of reflection, (2) knew a bystander was in "the line of fire[,]" and (3) consciously disregarded the risk that the bystander would be shot. *See Simpson v. City of Fort Smith*, 389 Fed. Appx. 568, 570 (8th Cir. 2010) (holding that a bystander's Fourteenth Amendment rights were

not violated, but reasoning that there could be situations where that would not be the case).[24]

This group of cases also would not have put Corporal Ruby on sufficient notice that his conduct would violate Kodi's substantive due process rights. These cases generally found no Fourteenth Amendment violations, and they further noted that police did not know bystanders were present or in the line of fire. *E.g.*, *Claybrook*, 199 F.3d at 360-61; *Simpson*, 389 Fed. Appx. at 570-71. Even though unawareness of a bystander's presence can preclude a constitutional violation, it does not necessarily follow that awareness of a bystander's presence can create a violation. Thus, at the very least, these cases do not "clearly establish" that Corporal Ruby's knowledge of Kodi's presence in the kitchen, somewhere outside the direct line of fire to Ms. Gaines, at the time he fired his shot meant that he violated Kodi's due process rights.

Third, several cases involve police faced with armed assailants and hostages. In this context, sometimes, "the hostage is hit by a bullet intended for the hostage-taker[.]" *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir. 1998).

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24. Likewise, dicta from another case supports this same analysis. The Fourth Circuit has speculated that firing into a crowd could "possibly" violate an innocent bystander's Fourteenth Amendment rights if the bystander is shot. *See Rucker*, 946 F.2d at 282. This is because when officers fire into a crowd in hopes of shooting a suspect, innocent bystanders are necessarily also in the line of fire. Of course, an acknowledgment in one case of a possibility in dicta generally does not render a proposition "clearly established."

Such was the case in *Medeiros*, where officers fired upon a hostage-taker in a van who had been shooting at officers, and accidentally shot the hostage (who was also in the line of fire) in the process. *Id.* at 166-67. The court held that the officers did not violate the hostage's Fourteenth Amendment rights, reasoning that the officers' attempt to rescue the hostage was "admirable" and so did not shock the conscience as a matter of law—even though the hostage could have been in the line of fire and officers knew it. *Id.* at 170. In these situations, courts have generally held that officers do *not* violate hostages' Fourteenth Amendment rights when they fire upon the hostages' captors and accidentally hit the hostages, so long as they did not intend to harm the hostages or have actual knowledge that the hostages would be harmed. *See Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 797 (1st Cir. 1990) ("To hold that shooting in such circumstances violates the constitutional rights of a hostage whom the officers are trying to free would be to hamstring seriously law enforcement officers. . . . It is inevitable that the police response to violent crime will at times create some risk of injury to others, including innocent bystanders. We decline to hold that the mere presence of risk reflects a callous indifference to the constitutional rights of those individuals[.]"); *see also Childress v. City of Arapaho*, 210 F.3d 1154, 1158 (10th Cir. 2000) (officers did not violate hostages' Fourteenth Amendment rights as a matter of law when they fired 21 shots at their captors' van and hit the hostages, regardless whether the officers were "grossly negligent, reckless and even deliberately indifferent to [the hostages'] plight[,]" because the hostages did not allege that the officers "harbored an intent to harm

them"). These cases suggest that it is generally difficult to make out a Fourteenth Amendment substantive due process claim in hostage situations because of the limited protection afforded by substantive due process.

Here, there is no evidence that Corporal Ruby intended to harm Kodi or that he knew that Kodi would be harmed, and indeed he aimed high to avoid hitting Kodi. It was only after Corporal Ruby's bullet hit and passed through Ms. Gaines's upper back, hit a refrigerator, and ricocheted that Kodi was harmed. In other words, it is undisputed that, in fact, Kodi was not in the direct line of fire of the shot that Corporal Ruby took.[25] There appears to be no case at the time of the shooting that held an officer liable under the Fourteenth Amendment for a ricochet shot, and several cases in the hostage context that did not hold officers liable in an even more serious context: accidentally shooting a hostage when the officer had reason to believe that the hostage was in the line of fire.

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25. Justice Watts states that, taking the evidence in the light most favorable to Kodi, leads "to the conclusion that Corporal Ruby saw neither Ms. Gaines's braids nor the barrel of her gun." Dissenting Op. of Watts, J. at 14. The import of Justice Watts's reading of the record is that Corporal Ruby did not know Ms. Gaines's location in the kitchen at the time he fired, and that he randomly fired toward the kitchen with no reason to believe that his shot would hit Ms. Gaines. In our view, it is not reasonable to conclude that the jury found Corporal Ruby fired randomly into the kitchen. Corporal Ruby's shot, in fact, hit Ms. Gaines. Moreover, had the jury believed that Corporal Ruby was aiming blindly when he fired, it is difficult to imagine that the jury would not have awarded punitive damages.

Ms. Gaines was Kodi's mother and undoubtedly loved him dearly. Still, it is undisputed that Ms. Gaines, armed with a shotgun, declined an opportunity to let Kodi exit the standoff. In addition, the officers were told that Ms. Gaines had a history of mental illness and that she had been off her medication. At the time this shooting occurred, there was no controlling authority or robust consensus of authority putting Corporal Ruby on notice that, under these circumstances, it would violate Kodi's substantive due process rights to end the six-hour standoff by shooting at Ms. Gaines's upper body. Qualified immunity attaches unless the law and the circumstances clearly show that the question of a constitutional violation is "beyond debate." *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (internal quotation marks and citation omitted). Because the law at the time of the shooting left the matter at least debatable, we hold that Corporal Ruby is entitled to qualified immunity on Kodi's Substantive Due Process Claim.[26]

In reaching this conclusion, it is worth reiterating that the jury never determined that Corporal Ruby's conduct toward Kodi was shocking to the conscience and,

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26. *Amici* assert that "[t]he 'clearly established law' standard has proven unworkable, with the question of whether conduct has violated 'clearly established' law presenting 'a mare's nest of complexity and confusion.'" Brief of *Amici Curiae* National Action Network and Rainbow/PUSH Coalition at 14 (quoting John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851, 852 (2010)). However, this Court is duty bound to follow the precedents of the United States Supreme Court regarding qualified immunity, including the "clearly established law" requirement. We have no discretion to do otherwise.

therefore, in violation of Kodi's rights to substantive due process under the Fourteenth Amendment. As discussed above, the jury was not instructed on the proper standard for a substantive due process claim, and therefore never determined that Corporal Ruby's conduct met that high standard. The only verdict the jury ever reached with respect to Kodi's constitutional rights was based on the Fourth Amendment's objective reasonableness standard, which all parties now agree was inapplicable to Kodi.

In addition, our determination on qualified immunity with respect to *Kodi*'s Substantive Due Process Claim is an entirely separate issue from whether Corporal Ruby acted reasonably with respect to *Ms. Gaines*. The jury decided that Corporal Ruby violated Ms. Gaines's right to be free from excessive force based on well-settled Fourth Amendment principles and awarded damages based on that verdict. Corporal Ruby was held to account for what the jury determined was an excessive use of force and nothing in our decision today implicates that decision or in any way gives license to officers to use unreasonable or excessive force. The question we have decided in this case relates to whether someone a law enforcement officer did not intend to harm has rights under the Fourteenth Amendment when they are injured by a shot intended for someone else, despite not being in the direct line of fire.[27] As discussed above, the law relating to that issue

27. Justice Watts asserts that "[i]t would be an unsound premise to dispose of Kodi's §1983 Fourteenth Amendment substantive due process claims as if they were brought only on the ground that he was a bystander subject to injury during the attempted seizure of his mother." Dissenting Op. of Watts, J. at

(unlike the law concerning Ms. Gaines's excessive force claim) is not well settled. To the contrary, it is largely unsettled. Under governing precedent from the United States Supreme Court, because the law was not clearly established that shooting at Ms. Gaines where Kodi was not in the direct line of fire would violate Kodi's Fourteenth Amendment rights, Corporal Ruby is entitled to qualified immunity.

CONCLUSION

We hold:

1. Because the Appellate Court's judgment in *Cunningham I* reversed in full the circuit court's JNOV grant with respect to claims against Corporal Ruby, Kodi Gaines was not precluded from pursuing his Substantive Due Process Claim on remand and was not precluded from pursuing that claim in this appeal; and

2. Corporal Ruby was entitled to qualified immunity with respect to Kodi Gaines's Substantive Due Process Claim. Accordingly, the Appellate Court properly affirmed the circuit court's judgment on that basis.

JUDGMENT OF THE APPELLATE COURT OF MARYLAND AFFIRMED. COSTS TO BE PAID BY PETITIONERS.

12. But the harm to Kodi, in fact, occurred during the attempted seizure of Ms. Gaines. There was no other application of force by Corporal Ruby that led to Kodi's injuries, nor has Kodi suggested otherwise.

APPENDIX A — DISSENTING OPINION OF THE SUPREME COURT OF MARYLAND, FILED JUNE 25, 2024

IN THE SUPREME COURT OF MARYLAND

No. 9
September Term, 2023

COREY CUNNINGHAM, ON BEHALF OF KODI GAINES, A MINOR,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*

Circuit Court for Baltimore County
Case No. 03-C-16-009435

December 4, 2023, Argued
June 25, 2024, Filed

Fader, C.J., Watts, Hotten,*
Booth, Biran, Gould, Eaves, JJ.

Dissenting Opinion by Watts, J.

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* Hotten, J., participated in the hearing of the case and in the conference in regard to its decision as an active judge. She participated in the adoption of the opinion as a senior judge, specially assigned.

Respectfully, I dissent. The majority opinion[1] in this case is disappointing. The opinion lets down the parties and the citizens of Maryland in that it reaches an incorrect result with respect to the application of the doctrine of qualified immunity and sets precedent that makes it next to impossible in this State for a Fourteenth Amendment substantive due process claim alleging excessive force to avoid a determination that a law enforcement officer is entitled to qualified immunity. In reaching this result, the majority opinion engages in first-level factfinding (which is improper for appellate courts to do) and appears to fault the minor child's deceased mother for his injuries. Most importantly, the Majority reaches the incorrect result by misapplying case law on qualified immunity.

I would conclude that Corporal Royce Ruby, Jr., is not entitled to qualified immunity from Kodi's substantive due process claims for three reasons.[2] First, Respondents Baltimore County and Corporal Ruby failed to preserve for appellate review the issue of whether qualified immunity applies to the claims under 42 U.S.C. § 1983 asserted by Petitioner Corey Cunningham, on behalf of his minor child, Kodi Gaines, based on Kodi's right to substantive due process under the Fourteenth

1. Although the opinion that the Majority has joined is labeled "PER CURIAM[,]" I refer to it as a majority opinion.

2. I agree with the Majority's determination that the Appellate Court erred "in holding that Kodi was precluded from pursuing his Substantive Due Process Claim on remand and in this appeal." Maj. Slip Op. at 31.

Amendment.[3] Second, because the ruling of the Circuit Court for Baltimore County on remand was not based on qualified immunity, but rather the conclusion that Kodi lacked a claim under the Fourteenth Amendment due to insufficiency of the evidence, this Court cannot affirm the circuit court's judgment based on qualified immunity. Third, in addition to the issue not being preserved or a valid ground for affirmance, Corporal Ruby is not entitled to qualified immunity from Kodi's Fourteenth Amendment substantive due process claims because he violated a clearly established right. For these reasons, I would reverse the judgment of the Appellate Court of Maryland, which affirmed the circuit court's judgment (on an entirely different ground) and remand the case to the Appellate Court with instruction for it to reverse the circuit court's judgment and remand the case to that court with instruction to award damages plus post-judgment interest for the verdict in Kodi's favor as to the claims under 42 U.S.C. § 1983.

Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

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3. Like the Majority, I will refer to Mr. Cunningham's contentions on behalf his son Kodi as those of Kodi.

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first section of the Fourteenth Amendment is made up of several clauses, one of which is the due process clause. It is well settled that the protections of the Fourth Amendment are applied to the States through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 656, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). Independent of incorporating the Fourth Amendment and other amendments contained in the Bill of Rights, though, the language of the Due Process Clause of the Fourteenth Amendment makes clear that a State may not deprive a citizen of life, liberty, or property without fair procedures. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994). In other words, the Due Process Clause acts as a safeguard from arbitrary denial of life, liberty, or property by a State outside of the sanction of law. *See id.* The Supreme Court of the United States has described due process as "the protection of the individual against arbitrary action." *Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937).

In this case, in Counts VII and X of a Third Amended Complaint, Kodi brought claims under 42 U.S.C. § 1983 and sued Respondents for violations of the Fourteenth Amendment and other Amendments of the United States Constitution. In paragraph 88 of Count VII, Kodi alleged that Respondents violated the Fourth Amendment

by illegally searching his home without "reasonable articulable facts" to believe that Ms. Gaines was inside and violated "those rights, privileges, and immunities secured by the Fourteenth, Fifth and/or Eighth Amendments to the Constitution as incorporated and applied to the states through the Fourteenth Amendment." In paragraph 90(A) of Count VII, Kodi alleged that Respondents used excessive force while attempting to seize Ms. Gaines "in violation of the Fourth, Fifth, Eighth and Fourteenth Amendments and their reasonableness standard and all other applicable standards."

In Count X, Kodi alleged both a violation of the Fourteenth Amendment based on his right under the Fourth Amendment to be free of unreasonable seizure through excessive force and a violation of the Fourteenth Amendment based on his right to "bodily integrity" and "to be free from excessive force by law enforcement." In other words, in Count X, Kodi alleged a violation of the Fourteenth Amendment separate from the allegation that excessive force was used in connection with the seizure of Ms. Gaines in violation of the Fourth Amendment. In Paragraphs 120 and 121 of Count X , Kodi alleged:

> 120. At the time of the complained events, Plaintiffs Korryn Gaines and Kodi Gaines had a clearly established constitutional right under the Fourth Amendment to be secure in their person from unreasonable seizure through excessive force.

> 121. Plaintiffs Korryn Gaines and Kodi Gaines also had the clearly established Constitutional right under the Fourteenth Amendment to bodily integrity and to be free from excessive force by law enforcement.

In addition, in Count X, Kodi alleged that his right to be free of such conduct was clearly established, that Respondents used "conscience shocking force," and that Respondents were not entitled to qualified immunity. In Paragraphs 123, 129, and 135 Kodi averred:

> 123. Any reasonable police officer knew or should have known of these rights at the time of the complained of conduct as they were clearly established.

* * *

> 129. None of the Defendant officers took reasonable steps to protect five-year-old Plaintiff Kodi Gaines from the objectively unreasonable, malicious, grossly negligent, reckless and irresponsible and excessive force of other Defendant officers or from the reckless and irresponsible and excessive force of later responding officers despite being in a position to do so. They are each therefore liable for the injuries and damages resulting from the objectively unreasonable, reckless and irresponsible and conscience shocking force of each other officer.

* * *

> 135. These individual Defendants are not entitled to qualified immunity for the complained of conducts.

The issue of whether Corporal Ruby is entitled to qualified immunity is not preserved for appellate review because, at trial, Respondents did not contend in their motions for judgment or their motion for judgment notwithstanding the verdict ("JNOV") that qualified immunity applies to the claims under 42 U.S.C. § 1983 based on Kodi's right to substantive due process under the Fourteenth Amendment.[4] Under Maryland Rule 2-532(a), "[i]n a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion." When making the motion for judgment at the conclusion of the plaintiffs' case, without mentioning Kodi's substantive due process claims, Respondents' counsel argued that Corporal Ruby was entitled to judgment on

4. The Majority does not purport to conclude that Respondents preserved for appellate review the issue of whether Corporal Ruby is entitled to qualified immunity. Rather, after concluding that Kodi waived the issue of non-preservation, the Majority states: "[W]e decline to consider on our own initiative whether [Respondent]s waived or failed to preserve for appellate review their argument that Corporal Ruby is entitled to qualified immunity on Kodi's Substantive Due Process Claim." Maj. Slip Op. at 32 n.21 (citations omitted). In essence, the Majority gives Respondents a pass for not preserving the issue, but does not give Kodi a pass for what it deems to be Kodi's failure to raise Respondents' lack of preservation.

the Fourth Amendment excessive force claims and that "[q]ualified immunity applies here[.]" At the close of all of the evidence in the case, Respondents renewed the motion for judgment, arguing that Corporal Ruby was entitled to judgment on the Fourth Amendment excessive force claims and reiterating that qualified immunity applies. Respondents did not seek judgment with respect to Kodi's Fourteenth Amendment claims. In an initial memorandum and supplemental memorandum in support of the motion for JNOV, without mentioning Kodi's substantive due process claims, Respondents asserted that Corporal Ruby was entitled to qualified immunity as to the claims under 42 U.S.C. § 1983.

These general assertions by Respondents were insufficient to preserve the question of whether qualified immunity applies to the claims under 42 U.S.C. § 1983 based on Kodi's right to substantive due process under the Fourteenth Amendment. Different standards apply to the right to substantive due process under the Fourteenth Amendment and the right to be free from excessive force under the Fourth Amendment, and Respondents addressed only the Fourth Amendment right in the motions for judgment and JNOV.

Significantly, after Respondents filed the initial memorandum in support of their motion for JNOV and before they filed the supplemental memorandum, Kodi filed a memorandum in opposition to the motion for JNOV, specifically contending that Kodi's right to substantive due process under the Fourteenth Amendment provided an independent basis for the claims under 42 U.S.C. § 1983.

Yet, Respondents failed to address Kodi's contention in the supplemental memorandum. When granting JNOV on the ground that Corporal Ruby was entitled to qualified immunity, the circuit court did not address Kodi's substantive due process claims. It was not until after the Appellate Court remanded this case to the circuit court in *Cunningham v. Balt. Cnty.*, 246 Md. App. 630, 232 A.3d 278 (2020) ("*Cunningham I*"), that Respondents filed a Motion to Clarify Judgment and Motion for Other Appropriate Relief and a memorandum in support thereof in which Respondents argued that Corporal Ruby was entitled to qualified immunity as to any claim under 42 U.S.C. § 1983 based on substantive due process.

Respondents' failure to raise the argument that qualified immunity applied to Kodi's substantive due process claim in the motion for judgment and motion for JNOV was fatal to preservation of the issue. To preserve for appellate review a contention that JNOV was warranted on a given ground, a party must have raised that ground in support of both a motion for judgment and a motion for JNOV. "[A]n argument not raised in the motion for judgment is waived in the motion for JNOV." *Town of Riverdale Park v. Ashkar*, 474 Md. 581, 626, 255 A.3d 140, 166 (2021) (citation omitted).

When not raised in a motion for JNOV, a contention in support of JNOV is not preserved for appellate review. In *AXE Props. & Mgmt., LLC v. Merriman*, 261 Md. App. 1, 52, 311 A.3d 376, 406 (2024), the Appellate Court held that the defendant "failed to preserve" an issue where "neither motion for JNOV . . . actually raised" that issue. In a motion

for judgment, a renewed motion for judgment, a motion for JNOV, and a renewed motion for JNOV, the defendant made various arguments, including the assertion that the plaintiff "failed to meet his burden of proof on the issue of damages." *Id.* at 14-16, 20-21, 311 A.3d at 383-84, 387-88. None of the motions, however, discussed "the one recovery rule," a case in which we addressed that rule, "or the general issue that the combined compensatory award included duplicative damages." *Id.* at 14-16, 49-50, 311 A.3d at 383-84, 404-05 (footnote omitted). In the motions for JNOV, although the defendant "argued that the combined compensatory award must be reduced, it did not argue that the award must be modified *for these reasons*." *Id.* at 50, 311 A.3d at 405 (emphasis in original). The Appellate Court concluded that the issue was unpreserved because the defendant "waited until the instant appeal to complain that the combined compensatory award ran afoul of . . . the one recovery rule[.]" *Id.* at 52, 311 A.3d at 406.

The same result is required here. Just as the defendant in *AXE Props. & Mgmt.* failed to contend in motions for judgment and motions for JNOV that the one recovery rule had been violated, Respondents failed to argue in motions for judgment at the conclusion of the plaintiff's case and at the conclusion of all of the evidence and in the motion for JNOV that qualified immunity applies to the claims under 42 U.S.C. § 1983 based on Kodi's right to substantive due process under the Fourteenth Amendment. As in *AXE Props. & Mgmt.*, the issue that was not raised in support of the motions for judgment and JNOV is unpreserved for appellate review. The issue of whether Corporal Ruby is entitled to qualified immunity

to Kodi's Fourteenth Amendment substantive due process claim was not properly before the Appellate Court in the first or second appeal and is not properly before us now.

In addition to being unpreserved, qualified immunity is not a valid ground for affirming the circuit court's ruling on remand because that ruling was not based on qualified immunity. The circuit court's ruling on remand was based on its reasoning that Kodi lacked a valid claim under the Fourteenth Amendment because the evidence did not satisfy the shocks the conscience standard. The circuit court mentioned qualified immunity only when referring to its prior ruling on the motion for JNOV and the contentions of Kodi and the other appellants in the first appeal.

The basis of the circuit court's ruling is crucial because an appellate court may affirm the grant of JNOV only on the grounds that the trial court relied on. "Ordinarily, we may affirm the trial court only on the grounds upon which the trial court relied in granting summary judgment." *Gambrill v. Bd. of Educ. of Dorchester Cnty.*, 481 Md. 274, 297, 281 A.3d 876, 889 (2022) (cleaned up). There is no valid reason not to apply the same principle to affirming the grant of JNOV, especially given that there does not appear to be any case in which we have affirmed a JNOV ruling on a ground different than the one that the trial court relied on. Just as we cannot affirm the grant of JNOV based on an unpreserved issue, we should not affirm the grant of JNOV on an issue that the trial court did not rely on.

One reason for not affirming the grant of JNOV on grounds other than those relied by the trial court is that doing so would sandbag parties, as this case demonstrates. On remand, even though Respondents and the circuit court had never addressed qualified immunity in the context of the substantive due process claim, Kodi was forced to deal with Respondents' contention that Corporal Ruby was entitled to qualified immunity as to any claim under 42 U.S.C. § 1983 based on substantive due process when the argument was first raised in the Respondents' memorandum in support of the Motion to Clarify Judgment and Motion for Other Appropriate Relief. It would be improper and inequitable to reward Respondents for effectively coming up with a new ground for affirming the grant of JNOV that they had not previously raised and that the circuit court had not relied on when granting JNOV.

Putting aside that the issue of qualified immunity as to Kodi's substantive due process claims is unpreserved and not a valid ground for affirmance, it can readily be seen that Corporal Ruby is not entitled to qualified immunity, *i.e.*, the doctrine does not apply here. The Supreme Court has held that the doctrine of qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, 574 U.S. 13, 17, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (per curiam) (cleaned up) . "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established

at the time." *District of Columbia v. Wesby*, 583 U.S. 48, 62-63, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (cleaned up). "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Id.* at 63 (cleaned up). Stated otherwise, "existing law must have placed the constitutionality of the officer's conduct beyond debate." *Id.* (cleaned up). The rule must be so well established "that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (cleaned up). The United States Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the circumstances that he or she faced." *District of Columbia v. Wesby*, 583 U.S. 48, 63-64, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (cleaned up).

Caselaw makes clear that the way to proceed in determining whether an officer is entitled to qualified immunity is to first determine whether there has been a constitutional violation and what the nature of that violation is—only then can a court determine whether the officer violated a right that is clearly established. *See id.* at 62-63. This makes sense because it would not be necessary to reach the issue of qualified immunity if there has been no constitutional violation in the first place. In other words, an officer could not have violated a clearly established constitutional right if there has been no constitutional violation in the first place. The nature of the violation found informs the analysis as to whether an officer has violated a right that was clearly established. *See id.* at 64.

In *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the Supreme Court of the United States held that claims that law enforcement officials used excessive force during an arrest, investigatory stop, or other "seizure" of a citizen "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." In *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), the Supreme Court explained that if a constitutional claim is covered by a more specific constitutional provision the claim must be analyzed under the standard for that provision, not under the substantive due process standard. In other words, where a claim is not covered by a more specific standard, it would be handled under the substantive due process standard. *See id.* Police misconduct violates the substantive due process standard where it shocks the conscience or outrages a sense of decency. *See id.* at 846. In *Lewis, id.* at 836, the Supreme Court held that "a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." So, while the "shocking to the conscience" standard is a higher standard for establishing liability than the "objective reasonableness" standard, if established, it points toward the absence of qualified immunity because the conduct is so arbitrary and so shocking that the rule against it would be clearly established, even in the absence of identifiable case law on the point.

Kodi pled §1983 claims alleging not just that he was injured as a result of excessive force used during the

seizure of Ms. Gaines but also that he had a right under the Fourteenth Amendment to be free from excessive force, *i.e.*, conduct against him that was arbitrary and shocking to the conscience.[5] It would be an unsound premise to dispose of Kodi's §1983 Fourteenth Amendment substantive due process claims as if they were brought only on the ground that he was a bystander subject to injury during the attempted seizure of his mother.[6]

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5. The Majority states: "[T]he harm to Kodi, in fact, occurred during the attempted seizure of Ms. Gaines. There was no other application of force by Corporal Ruby that led to Kodi's injuries, nor has Kodi suggested otherwise." Maj. Slip Op. at 43 n.27. It goes without saying that the same conduct may violate multiple constitutional provisions, just as the same conduct may violate multiple criminal statutes (although the sentences may merge). Here, Kodi has alleged that the excessive force used by Corporal Ruby constituted an independent violation of the Fourth Amendment, the Fourteenth Amendment, and other amendments.

6. In *Chavez v. Martinez*, 538 U.S. 760, 773 n.5, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003), the Supreme Court of the United States explained: "*Graham* foreclosed the use of substantive due process analysis in claims involving the use of excessive force in effecting an arrest and held that such claims are governed *solely* by the Fourth Amendment's prohibitions against 'unreasonable' seizures, because the Fourth Amendment provided the explicit source of constitutional protection against such conduct." (Citing *Graham*, 490 U.S. at 394-95) (emphasis in original). In paragraph 121 of the complaint, Kodi alleges that he and his mother had "the clearly established Constitutional right under the Fourteenth Amendment to bodily integrity and to be free from excessive force by law enforcement." In this paragraph, unlike in paragraph 120 of the complaint, Kodi's Fourteenth Amendment claim is not limited to excessive force used in an unreasonable seizure.

That the case is unusual does not make the violation of a clearly established right any less identifiable. It would have been clear to any reasonable officer that, in these circumstances, taking a head shot at an adult with a child behind a wall (where the child could not be seen) would have violated the child's clearly established right to be free of arbitrary and unlawful police conduct. Indeed, under these circumstances, that right was clearly established—*i.e.*, any reasonable officer would have known that Corporal Ruby's conduct violated the right.

The tragic circumstances of this case make inescapably clear that Corporal Ruby blindly fired his gun into a room that, as he knew, contained both Korryn Gaines and Kodi, her five-year-old child, and that he could not see where Kodi was. For all Corporal Ruby knew, Kodi could have been in Ms. Gaines's arms and directly in his line of fire. At trial, Corporal Ruby acknowledged that, when he fired his first shot, he knew that Kodi was in the kitchen behind drywall, he knew that drywall would not stop bullets from his gun, and he knew that, if he fired his gun, it was possible that he would shoot Kodi. And, that is exactly what happened—Corporal Ruby fatally shot Ms. Gaines, shot Kodi in the face and arm, and caused him to suffer serious physical injuries in addition to the traumatic loss of his mother.

The verdicts and the testimony of Respondents' own expert establish that the jury did not believe Corporal Ruby's self-serving testimony that the reason why he fired his first shot was that he saw Ms. Gaines raise her gun into a firing position and that he became concerned

that she had gained a tactical advantage, in that she was able to shoot the officers outside the front door. Other witnesses—including Charles Key, Respondents' expert in use of force and other fields—indicated that, had Ms. Gaines been able to shoot the officers outside the front door, then she would have been pointing her gun at the side of the front door with hinges, and Corporal Ruby would have been able to see her hands and other parts of her body. Yet, according to Corporal Ruby, he could see the barrel of Ms. Gaines's gun and the braids in her hair.

That Corporal Ruby could see Ms. Gaines's braids is not a fact that has been found by the trier of fact, *i.e.*, the jury. It was simply Corporal Ruby's self-serving testimony. Taking the evidence in the light most favorable to Kodi would lead to the conclusion that Corporal Ruby saw neither Ms. Gaines's braids nor the barrel of her gun. As the Appellate Court explained in *Cunningham I*, 246 Md. App. at 657, 232 A.3d at 294:

> Mr. Key[] testified that, if [Ms. Gaines] had been pointing the gun at the hinge side of the door, her hands and another part of her body would have been exposed. Accordingly, based on Corporal Ruby's testimony, that meant that Ms. Gaines could not have been pointing the gun at the hinge side of the door, and therefore, no one was subject to an imminent threat of death or serious bodily injury when the shot was taken.[7]

7. In addition, the Appellate Court pointed out that, at trial, in closing argument, Petitioners' counsel argued:

Yet, the Majority finds as a fact that "there is no evidence that Corporal Ruby intended to harm Kodi or that he knew that Kodi would be harmed[.]" Maj. Slip Op. at 41. The Majority's finding is inconsistent with the testimony of multiple witnesses and with Corporal Ruby's own testimony that he knew that, if he fired his gun, it was possible that he would shoot Kodi. Taking the evidence in the light most favorable to Kodi would result in a conclusion that Corporal Ruby fired a M6 rifle through a kitchen wall when there was no imminent threat and he knew that five-year-old Kodi was in the kitchen but he did not know where.[8]

> Corporal Ruby testified that he saw only the ends of Ms. Gaines' hair braids and the barrel of the muzzle of the gun protruding from the kitchen, but several witnesses, including Corporal Ruby's expert, Mr. Key, and a fellow officer, Officer Callahan, testified that, if Ms. Gaines had been pointing her weapon at the door, her hands, arms, and "potentially a slight shoulder," would have to be exposed outside the kitchen wall. Additionally, the evidence showed that the first fatal shot entered Ms. Gaines' back on the left side, which Dr. Powers said was consistent with Ms. Gaines being behind the wall and not pointing the weapon toward the hinge side of the door.

Cunningham I, 246 Md. App. at 693, 232 A.3d at 316.

8. Perplexingly, the Majority states that, "had the jury believed that Corporal Ruby was aiming blindly when he fired, it is difficult to imagine that the jury would not have awarded punitive damages." Maj. Slip Op. at 41 n.25. The jury awarded damages to Kodi as follows: $23,542.29 for past medical expenses and $32,850,000.00 in noneconomic damages. Enough said.

By answering "No" to the question on the verdict sheet of whether the first shot that Corporal Ruby fired was objectively reasonable, the jury demonstrated that it did not believe his version of events. It is evident that the jury instead credited Ms. Gaines's cousin's testimony that, right after the shootings, Corporal Ruby told him that he fired his first shot because he was "hot" and "frustrated."[9]

Reasoning that Corporal Ruby is entitled to qualified immunity leads to the perverse result that the federal constitution protected Kodi less than it did Ms. Gaines simply because she was the suspect, and he was an innocent bystander. The jury found that Respondents violated the rights of both Ms. Gaines and Kodi under 42 U.S.C. § 1983. Given that Respondents and Ms. Gaines's estate reached a settlement before the hearing in the circuit court on remand, no court has conclusively determined the basis of the verdict in Ms. Gaines's estate's favor as to the claim under 42 U.S.C. § 1983. Kodi has acknowledged that the Fourth Amendment cannot properly be a basis for the verdict in his favor as to the claim under 42 U.S.C. § 1983 because he was a bystander and thus, unlike Ms.

9. The Majority's observations that "Ms. Gaines's boyfriend attempted to convince her to allow Kodi to leave the apartment during the standoff, but Ms. Gaines did not respond, and instead instructed Kodi to stay close to her, which he did[,]" and "it is undisputed that Ms. Gaines, armed with a shotgun, declined an opportunity to let Kodi exit the standoff" add no value to the analysis. Maj. Slip Op. at 6-7, 41 (cleaned up). These statements appear intended to give the impression that, because Ms. Gaines was a mother with mental health issues who did not respond to requests to send her child to safety, this somehow made Corporal Ruby's conduct in shooting her through a wall and injuring her child more reasonable or less shocking.

Gaines, was not seized by Corporal Ruby. It would strain logic, basic notions of fairness, and our veneration of the liberties safeguarded by the federal constitution to reason that, although the Fourth Amendment protected Ms. Gaines as a suspect, the Fourteenth Amendment did not protect Kodi either as a completely innocent bystander to a seizure or as a five-year-old child with a separate due process right.

I would conclude that Corporal Ruby violated Kodi's Fourteenth Amendment substantive due process right and that Kodi's right not to be shot by Corporal Ruby was clearly established—*i.e.*, any reasonable officer would have known that blindly firing a gun into a room that contained a five-year-old child when he could not see the child and there was no visible imminent threat to the officer would violate the child's right to substantive due process. Even if Kodi had only pled a substantive due process claim based solely on excessive force being used in the seizure of Ms. Gaines (which, the complaint demonstrates, was not his sole substantive due process claim claim), the Fourth Circuit has repeatedly "conclude[d] that [] the due process clause provides substantive protection to [] a bystander against the infliction of personal injury by police conduct sufficiently outrageous to constitute completely arbitrary state action[.]" *Rucker v. Harford Cnty., Md.*, 946 F.2d 278, 279 (4th Cir. 1991). In *Rucker, id.* at 280, one of the defendant officers repeatedly fired a gun at the tires of a vehicle in which a suspect was fleeing, and one of the bullets hit a bystander—namely, the plaintiff's son. The Fourth Circuit determined that, although the circumstances of the case did not shock the conscience, "in appropriate circumstances, substantive due process

protections might extend to an 'innocent bystander' such as" the plaintiff's son. *Id.* at 281. The Fourth Circuit observed that, in *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716 (4th Cir. 1991), it had "held in a case of first impression in this circuit" that an "innocent 'bystander' injured in [a] high speed auto chase by police may have [a] substantive due process claim[,]" though that was "not established on [the] facts of" *Temkin. Rucker*, 946 F.2d at 281. *Rucker* and *Temkin* clearly establish that an officer can violate an innocent bystander's right to substantive due process where, as here, the officer injures the bystander in a manner so outrageous that it is completely arbitrary and shocking to the conscience.

A reasonable officer would have realized this obvious principle even without the benefit of *Rucker* and *Temkin*. As the Fourth Circuit has observed, "[s]ome things are so obviously unlawful that they don't require detailed explanation[,] and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Dean for & on behalf of Harkness v. McKinney*, 976 F.3d 407, 417-18 (4th Cir. 2020) (citation omitted). "Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Id.* at 418 (citation omitted). Respondents should not be absolved where Corporal Ruby violated the federal constitution by firing a gun through a wall into a room with a kindergarten-age child in it simply because this is apparently the first case in which such shocking conduct has come up.

For the above reasons, respectfully, I dissent.

APPENDIX A — CONCURRING AND DISSENTING OPINION OF THE SUPREME COURT OF MARYLAND, FILED JUNE 25, 2024

IN THE SUPREME COURT OF MARYLAND

No. 9
September Term, 2023

COREY CUNNINGHAM, ON BEHALF OF
KODI GAINES, A MINOR

v.

BALTIMORE COUNTY, MARYLAND, *et al.*

Circuit Court for Baltimore County
Case No. 03-C-16-009435

December 4, 2023, Argued
June 25, 2024, Filed

Fader, C.J., Watts, Hotten,*
Booth, Biran, Gould, Eaves, JJ.

Concurring and Dissenting Opinion by Hotten, J.

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* Hotten, J., now a Senior Justice, participated in the hearing and conference of this case while an active member of this Court. Prior to the filing of the opinion, she was recalled pursuant to Maryland Constitution, Article IV.

I concur in part and dissent in part to the *per curiam*. The facts surrounding the killing of Ms. Korryn Gaines ("Ms. Gaines") and the shooting of her minor son must not be abstracted or diminished. In 2016, Kodi Gaines ("Kodi"),[1] then only five years old, suffered an unimaginable tragedy: witnessing first-hand the violent death of his mother at the hands of the police. Equally tragic, young Kodi's trauma exponentially expanded when the bullet which fatally wounded his mother continued its path and struck his face. This case is a catastrophic example of poor decision-making and the overzealous exercise of state-sanctioned force.

I concur with the Majority that the Appellate Court of Maryland erred in concluding that Kodi waived his Fourteenth Amendment Substantive Due Process claim. Slip Op. at 28-31. The effect of *Cunningham v. Baltimore County* ("*Cunningham I*"), 246 Md. App. 630, 232 A.3d 278 (2020), was to revive Kodi's Fourteenth Amendment claim, which was then addressed substantively for the first time on remand. Respondents' argument that Kodi's Substantive Due Process claim was precluded by the law of the case doctrine is unfounded. As the Majority recognizes, because Kodi's Fourteenth Amendment claim was only substantively dealt with on remand, the question Kodi brought before the Appellate Court in the second appeal is not the same as what was raised in *Cunningham I*.[2] Slip Op. 31.

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1. Petitioner, Corey Cunningham, filed suit on behalf of Kodi, his minor son. Like the Majority, I will refer to Petitioner as "Kodi."

2. In my view, Respondents waived their claim for qualified

However, I dissent to the Majority's decision on the merits of the Respondents' qualified immunity claim. In my view, Respondents are not entitled to qualified immunity for the actions of Corporal Ruby ("Cpl. Ruby"). As made clear by the facts, the shooting of Ms. Gaines and the injury to Kodi were unnecessary, avoidable, and legally unjustifiable. At best, this decision joins an ever-increasing line of cases in which few, if any, abusive exercises of state power are deemed violative of a person's Substantive Due Process rights. At worst, this case serves to justify future shootings by police, taken in frustration and in disregard to the risk posed to known bystanders.

The Facts in the Light Most Favorable to Kodi

As recognized by the Majority, Slip Op. 32-33, the first step of the qualified immunity analysis is to "determine

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immunity related to Kodi's Substantive Due Process claim. Respondents and the circuit court erroneously believed that Kodi's adequately pled Fourteenth Amendment Substantive Due Process claim was non-existent. Despite Kodi's insistence at several stages of trial that he had a viable claim under the Fourteenth Amendment, Respondents chose to ignore that claim in their pre- and post-trial motions. As a result, Respondents failed to raise a defense of qualified immunity both in their motion for judgment and their motion for judgment notwithstanding the verdict ("JNOV"). Further, Maryland Rule 2-532 precludes the filing of JNOV on grounds not risen previously in a motion for judgment. Had Respondents' motion for JNOV argued that they were entitled to qualified immunity of Kodi's Substantive Due Process claim, Respondents' failure to raise such a defense earlier would have precluded judgment on those grounds. Given this, I would hold that Respondents' failure to raise the defense of qualified immunity relative to Kodi's Substantive Due Process claim constitutes waiver on their part.

whether the facts, taken in the light most favorable to the non-movant, establish that the officer violated a constitutional right." *Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016) (citation omitted). "At the second step, courts determine whether that right was clearly established." *Id.* The Majority purports to take the facts in the light most favorable to Kodi for the *per curiam*. Slip Op. 6 n.7. I agree this is appropriate here, but disagree with its execution. In their recitation of the facts, the Majority accepts assertions which are more favorable to Cpl. Ruby, thereby justifying the outcome of the *per curiam*. I will present the facts in the light *most* favorable to Kodi.

On August 1, 2016, officers from the Baltimore County Police Department went to the apartment of Ms. Gaines to serve her a bench warrant for failing to appear for a *misdemeanor* trial.[3] *Cunningham I*, 246 Md. App. at 643, 232 A.3d at 286. When police forcibly entered the apartment with their guns drawn, they encountered Ms. Gaines holding a shotgun. *Id.* at 644-45, 232 A.3d at 287. Ms. Gaines was not pointing the firearm at officers,[4] instead holding it in what the officers called a "low ready[]"

3. The record did not appear to reflect Ms. Gaines' alleged crimes, but court records reveal that Ms. Gaines was charged with disorderly conduct, littering, failing to obey a lawful order, resisting arrest, and driving without car insurance. *State of Maryland v. Korryn Shandawn Gaines*, Complaint Number 160701716; *State of Maryland v. Korryn Shandawn Gaines*, Citation Number 00000004R0FKS.

4. An officer testified that Ms. Gaines was pointing the firearm at him, *Cunningham I*, 246 Md. App. at 645, 232 A.3d at 287, however, I resolve this inconsistency in the light most favorable to Kodi.

position.[5] *Id.* at 645, 232 A.3d at 287. The officers retreated outside, holding the door closed to prevent anyone from leaving the apartment. *Id.*, 232 A.3d at 287. Ms. Gaines expressed that she "just wanted [the police] to leave," that she believed the warrant was fraudulent, and that the police were there to harm her family. *Id.*, 232 A.3d at 287-88. The police ordered Ms. Gaines' partner and their children to leave the apartment, to which they complied. *Id.* at 646, 232 A.3d at 288. However, when confronted with the armed officers, five-year-old Kodi fled back to his mother. *Id.*, 232 A.3d at 288.

Instead of leaving with Ms. Gaines' partner and returning later, officers called in an army of reinforcements and laid siege to the apartment. "More than *30 armed*[6] *officers* and 'counter snipers'[7] took up positions in and

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5. "In its simplest form, low ready means your gun is in your hands, your finger is off the trigger, and the muzzle of your gun is pointing below the target." Kevin Creighton, *Working from Low Ready*, Ammoman School of Guns (April 20, 2021), *archived at* https://perma.cc/RA2Q-53YN (depicting an image of the "low ready" position reflecting the firearm being held in front of the wielder but pointed down).

6. The officers were equipped with "a ballistic helmet, ballistic vest, gloves, [and] front and back rifle plates[.]" *Cunningham I*, 246 Md. App. at 649, 232 A.3d at 290. This also included throat and groin protectors. This armor was sufficient to block fire from a shotgun. *Id.* at 651, 232 A.3d at 291.

7. One struggles to comprehend the utility of "counter snipers" when there are no snipers to be countered. This decision is indicative of the type of overreactive and poor judgment which led to the shooting of Ms. Gaines and Kodi.

around the apartment building[,]" including Cpl. Ruby. *Id.* at 647-48, 232 A.3d at 288-89 (emphasis added). The officers soon learned that Ms. Gaines had a history of mental illness, but never sought the intervention of a mental health specialist or social worker. *Id.* at 647, 232 A.3d at 288. This history of mental illness, coupled with a possible lapse in her medication, *id.* at 649, 232 A.3d at 290, may explain some of her behavior. Ms. Gaines purported to "laugh[] back and forth at certain points[]" with officers, while at other times accusing officers of being "devils" and threatening to harm them. *Id.* at 648-49, 232 A.3d at 289. However, consistent with her earlier statements, Ms. Gaines asserted that she did not want to harm anyone, the implied exception being if police attempted to apprehend her or harm her family. *Id.* at 648, 232 A.3d at 289.

The siege of Ms. Gaines' apartment continued for approximately six hours. *Id.* at 649, 232 A.3d at 289. That day in August was reportedly very hot, so much so that the police turned off the air conditioning in the apartment to increase pressure on Ms. Gaines to surrender. *Id.*, 232 A.3d at 289. Cpl. Ruby later told witnesses he had been "hot" and "frustrated" prior to shooting Ms. Gaines and Kodi.[8] *Id.* at 647, 232 A.3d at 294-95. In this state, Cpl.

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8. Cpl. Ruby testified to having stood at the entrance to Ms. Gaines' apartment, in full tactical armor, for nearly the entire siege, taking only a "20-minute break for 'water and a pack of crackers.'" *Cunningham I*, 246 Md. App. at 650, 232 A.3d at 290 (footnote omitted). A supervisory officer on the scene testified that, after around six hours, "officer fatigue can become a concern[,]" but that he had only begun to coordinate relief for the officers when Cpl. Ruby decided to shoot Ms. Gaines. *Id.* at 650 n.11, 232 A.3d at 290 n.11.

Ruby decided he wanted to end the siege. *Id.*, 232 A.3d at 294-95.

As the siege continued, Ms. Gaines went into her kitchen with Kodi. *Id.* at 650, 232 A.3d at 290. Cpl. Ruby moved from his long-held position to get a better sightline into the kitchen, ordering other officers to move back from the door as he moved. *Id.* at 651, 232 A.3d at 291. During this time, Cpl. Ruby was able to relay Ms. Gaines' movements to other officers. Those officers were able to implore Ms. Gaines to lower her weapon, and Ms. Gaines was able to yell back. *Id.* at 652, 232 A.3d at 291. After moving to a new position, Cpl. Ruby claimed he could see Ms. Gaines' braids and her firearm.[9] *Id.*, 232 A.3d at 291. Cpl. Ruby knew Kodi was in the kitchen, but not sure where. *Id.*, 232 A.3d at 291-92. Hoping to shoot Ms. Gaines in the head, but without confirming the location of either Ms. Gaines or Kodi, Cpl. Ruby shot through the drywall of the kitchen wall. *Id.* at 652-53, 232 A.3d at 291-92. The bullet struck Ms. Gaines in the upper left back before ricocheting off the refrigerator and lodging fragments of itself in Kodi's face. *Id.*, 232 A.3d at 292.

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9. Cpl. Ruby testified that he could see the barrel of Ms. Gaines' firearm, and that she was raising it toward him just before he fired. *Cunningham I*, 246 Md. App. at 652, 232 A.3d at 291. Cpl. Ruby acknowledged that Ms. Gaines entered the kitchen while maintaining her weapon at a "low ready[]" position, but claims she began to raise it "in a 'staggered or incremented' fashion[.]" *Id.*, 232 A.3d at 291. Conveniently, Cpl. Ruby was the only officer to have seen this and he relayed his claimed observations to fellow officers. *Id.*, 232 A.3d at 291. Given that Ms. Gaines was shot in the back, *id.* at 653, 232 A.3d at 292, Cpl. Ruby's observations of Ms. Gaines were obviously false. It is unclear whether this inaccuracy was a result of Cpl. Ruby being "hot" and "frustrated" or done intentionally.

Appendix A

Qualified Immunity and Substantive Due Process

In my view, Respondents are not entitled to qualified immunity for actions which magnified the obvious abuse of their power.[10] The doctrine of qualified immunity is not a creature of any constitutional provision or statute. *See Pierson v. Ray*, 386 U.S. 547, 555, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967) (deriving the doctrine from the Restatement, Second of Torts, "Harper & James, The Law of Torts[,]" and *State of Missouri ex rel., and to Use of Ward v. Fidelity & Deposit Co. of Maryland*, 179 F.2d 327 (8th Cir. 1950)). To advance it, Cpl. Ruby must assert that his actions did not violate the constitutional rights of Kodi that existed in light of the "clearly established law" at that time.[11] *Mullenix v. Luna*, 577 U.S. 7, 11, 136

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10. The mere fact that Kodi's Substantive Due Process claim made it to trial should be dispositive. *See Pearson v. Callahan*, 555 U.S. 223, 231-32, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) ("[Q]ualified immunity . . . is effectively lost if a case is erroneously permitted to go to trial[,] . . . [and] we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." (quotation marks and citations omitted)).

11. The Majority recognizes that this is a two-part test consisting of (1) determining whether a constitutional right was violated, and (2) whether that right was clearly established at the time. Slip Op. 32-33. *Pearson* recognized that this first prong of the qualified immunity step may also be resolved by examining "the facts that a plaintiff has *alleged*[.]" 555 U.S. at 232, 129 S. Ct. at 815-16 (emphasis added). This is because the Supreme Court of the United States has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.*, 129 S. Ct. at 815; *see also Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001) (same); *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589 (1991) (*per*

S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015). "The doctrine of qualified immunity protects government officials from

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curiam) (same). I agree with the Majority that Kodi adequately pled a violation of his Substantive Due Process rights. Slip Op. 30 n.20. While the Majority elects not to analyze the first prong of the qualified immunity test, Slip Op. 33 n.22, Kodi's third amended complaint sufficiently articulated the events of the shooting through the lens of Substantive Due Process as to allow resolution of this prong in his favor.

Alternatively, examining the facts developed at trial also demonstrates that Kodi satisfied this first prong. Under the Substantive Due Process "shocks the conscience" standard, discussed below, there are two main avenues of legal culpability: "intent to harm" and "deliberate indifference[.]" *Dean for & on behalf of Harkness v. McKinney*, 976 F.3d 407, 414 (4th Cir. 2020); *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848-50, 118 S. Ct. 1708, 1717-18, 140 L. Ed. 2d 1043 (1998). "[U]nder *Lewis*, the intent-to-harm culpability standard applies to officers responding to an emergency call[]" and, as the name suggests, requires an intent to harm the bystander to be conscience shocking. *McKinney*, 976 F.3d at 415 (citations omitted). In contrast, "liability for deliberate indifference rests upon the luxury of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id.* (quotation marks and citations omitted). Given the time Cpl. Ruby had to move, to talk with his team, for his team to talk with Ms. Gaines, and for Ms. Gaines to respond, Cpl. Ruby had time to deliberate and reconsider his actions. *Cf. McKinney*, 976 F.3d 411-12, 419 (holding that a deputy continuing to speed for two minutes after an emergency call was rescinded fell under the deliberate indifference standard). Knowing Kodi was in the line of fire, Cpl. Ruby fired when he did not need to with deliberate indifference to Kodi's safety and in violation of Kodi's Substantive Due Process rights.

liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 555 U.S. at 231, 129 S. Ct. at 815 (quotation marks and citation omitted).

At issue before this Court is Kodi's Substantive Due Process right to be free from harm resulting from an abuse of state power. As the Majority recognizes, where a person is injured through police action, but was not the intended object of that action, they may pursue recourse under the Fourteenth Amendment's Due Process Clause.[12] Slip Op. 3-4 (citing *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991)). At its core, the Substantive Due Process doctrine is designed to further the promise of protecting citizens from an abusive government, and fill the "gaps" left open between the guarantees of the Bill of Rights. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010 (1967) (holding that a statute barring interracial marriage "deprive[s] . . . [one] of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.").

The intent of the Substantive Due Process doctrine, is important to recognize:

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12. Section One of the Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . *deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added).

> Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action: The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson: . . . As to the words from Magna [Carta], . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: *that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice*.

Lewis, 523 U.S. at 845, 118 S. Ct. at 1716 (quotation marks and citations omitted) (emphasis added); *see also Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986) (holding that the Substantive Due Process doctrine, which, "like its forebear in the Magna Carta, . . . was intended to secure the individual from the arbitrary exercise of the powers of government[.]") (quotation marks and citations omitted)). The Supreme Court of the United States has held "that only the most egregious official conduct . . . which shocks the conscience[]" violates Substantive Due Process. *Lewis*, 523 U.S. at 846, 118 S. Ct. at 1716-17 (citations omitted). *Lewis* adopted language from *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), which characterized a conscience shocking breach of Substantive Due Process as "a denial of fundamental fairness, shocking to the universal sense of justice[.]" *Lewis*, 523 U.S. at 850, 118 S. Ct. at 1719.

It is accepted that whether a right is "clearly established" for purposes of qualified immunity, represents a high hurdle. *See generally Pearson*, 555 U.S. 223, 129 S. Ct. 808; *Mullenix*, 577 U.S. 7, 136 S. Ct. 305; *see also D.C. v. Wesby*, 583 U.S. 48, 63, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018) ("This demanding standard protects all but the plainly incompetent or those who knowingly violate the law." (quotation marks and citations omitted)). However, there still exists "the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 585 U.S. at 64, 138 S. Ct. at 590. In my view, the shooting of Kodi is such an obvious case, and a violation of Kodi's Substantive Due Process right was "clearly established" at the time of the shooting.

The shooting of Ms. Gaines and Kodi is an obvious case of abusive state action.

The record reveals that the shooting which killed Ms. Gaines and injured her son, Kodi, was egregious. Immediately prior to the shooting, Ms. Gaines was not an imminent threat to the officers. Officers were in covered positions outside of the apartment and wearing armor designed to protect from the type of weapon Ms. Gaines carried. *See Cunningham I*, 246 Md. App. at 651, 232 A.3d at 291 ("All officers in the brick-lined hallway were armed and wearing body armor designed to stop projectiles such as shotgun rounds."). In fact, as recounted above, Ms. Gaines was not facing officers at all when she was shot and at no point raised her weapon to fire at officers. Similarly, there is nothing in the record to support that Ms. Gaines was a threat to Kodi. *See generally Id.*, 232 A.3d 278.

By the time Ms. Gaines moved to the kitchen, the record reflects that Cpl. Ruby was "hot" and "frustrated[.]" *Id.* at 657, 232 A.3d at 295. When viewing the record in the light most favorable to Kodi, it becomes apparent that Cpl. Ruby wanted to bring the approximately six-hour siege to an end, despite the lack of an immediate threat from Ms. Gaines. Fully cognizant that young Kodi was in close proximity to the line of fire, Cpl. Ruby chose to fire through a wall at Ms. Gaines, hoping to hit her in the head. What followed was foreseeable: Cpl. Ruby missed the mark and shot Ms. Gaines through the back. The bullet ripped through her body, ricocheted off the refrigerator, and struck Kodi in the face.

Lewis sets forth that what shocks the conscience is that which is "shocking to the universal sense of justice[.]" 523 U.S. at 850, 118 S. Ct. at 1719. In my view, the decision by an officer to shoot through a wall, at a target he could not see, when he knew a child was on the other side of that wall and could be injured or killed, is patently offensive to a "universal sense of justice." This should be an obvious case, especially when considering the motivation for the shooting was not the protection of life or the enforcement of law, but instead was an officer's feeling that he was "hot" and "frustrated" by the siege he and his colleagues began.

Kodi's Substantive Due Process Right Was Clearly Established

In large part, the Majority is correct in their recitation of the "clearly established" standard. Slip Op. 34-35. Indeed, the clearly established standard is usually a

high one, requiring "a robust consensus" of authority, *Wesby*, 583 U.S. at 63, 138 S. Ct. at 589, placing it "beyond debate[,]" *Kisela v. Hughes*, 584 U.S. 100, 104, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018), that "every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). The Majority acknowledges "'[c]learly established' does not mean that there must be a case with precisely matching facts or that found a violation in the same specific context.'" Slip Op. 34 (citing *Terry*, 817 F.3d 887). Following a review of several cases, most of which did not find a violation of Substantive Due Process, the Majority concluded that "it would be difficult for officers in Corporal Ruby's position to glean any guiding standards from these cases, except possibly in the most general sense." Slip Op. 37-41. I disagree.

The question faced by Cpl. Ruby, or another officer facing a similar situation, was whether to shoot Ms. Gaines despite the known risk to Kodi. Several of the cases cited by the Majority provide "practical advice" in making that determination: collectively standing for the proposition that, as a threshold for firing, an emergency situation must be present.[13] *See, e.g., Lewis*, 523 U.S. at 855, 118

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13. Whether a right is "clearly established" is a separate test from whether a right was violated. *Pearson*, 555 U.S. at 232, 129 S. Ct. at 815-16. However, for cases to "clearly establish" a right, they often must have held that the right was violated, which is in line with the first prong outlined in *Pearson*. As I discuss above, determining whether one's Substantive Due Process right was violated necessitates the use of one out of two culpability standards.

S. Ct. at 1721 (no violation of Substantive Due Process where "[officer] Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to . . . encourage [the suspect] to race through traffic at breakneck speed forcing other drivers out of their travel lanes. [The suspect]'s outrageous behavior was practically instantaneous, and so was [officer] Smith's instinctive response."); *Rucker*, 946 F.2d at 279-82 (no violation of Substantive Due Process where officers in pursuit fired upon a fleeing suspect who had driven "wildly, weaving in and out of traffic[,] . . . southbound in the northbound lanes of I-95[,]" and at officers multiple times); *Medeiros v. O'Connell*, 150 F.3d 164, 166, 169-70 (2d Cir. 1998) (holding that a police shooting of a hostage was not violative of Substantive Due Process where the suspect was wildly shooting at police during a car chase). An example not cited by the Majority is *Ewolski v. City of Brunswick*, 287 F.3d 492, 497-99 (6th Cir. 2002), which held that a police shooting of a hostage was not violative of Substantive Due Process where police tried non-lethal interventions and the suspect responded by shooting several officers.

In their review of cases, the Majority often cites to cases which have adopted the "intent to harm" standard or its functional equivalent. As I have expressed, I do not believe that this is the appropriate standard here given the lack of an immediate threat posed by Ms. Gaines and Cpl. Ruby's time to reconsider his actions. An immediate, ongoing, or increasing threat often undergirds the precedents which have held there was no violation of Substantive Due Process. *Compare Rucker*, 946 F.2d at 279-82 (no violation where suspect was driving the wrong direction in traffic and at officers), *with McKinney*, 976 F.3d at 411-12, 419 (violation where deputy continued to speed after an emergency call was rescinded).

Admittedly, there is no case which held, under the exact factual scenario before us, there was a violation of a clearly established constitutional right. However, the guidance is clear: absent an imminent threat to life, i.e. an emergency, there is little justification for a police shooting. While this may be considered "[m]ere general guidance[,]" Slip Op. 34, which runs counter to the guidance from the Supreme Court of the United States, at core, the relevant consideration is whether an officer, faced with a similar situation would act as Cpl. Ruby had. In my view, the law has set forth a sufficient threshold consideration for choosing whether to fire on a suspect when innocent bystanders are in the line of fire: whether there is an imminent risk.[14] Cpl. Ruby chose to ignore this threshold exigency requirement when he was admittedly "hot" and "frustrated."

Conclusion

In my view, this shooting was an abusive act of misconduct, fueled by personal frustration, which violated Kodi's constitutional rights under the Fourteenth Amendment. Respondents are not owed qualified

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14. The Supreme Court of the United States has also outlined a more forgiving "fair warning" standard. *See United States v. Lanier*, 520 U.S. 259, 266, 270, 117 S. Ct. 1219, 1225, 1227, 137 L. Ed. 2d 432 (1997) (equating the "clearly established" standard with the "fair warning" test used to gauge the vagueness of criminal statutes); *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002) (utilizing the "fair warning" standard). Thus far, the "fair warning" standard is still applicable. Here, Cpl. Ruby undoubtedly had "fair warning" that, absent an emergency, his shot would violate Kodi's rights if he were to be injured.

immunity for the actions of Cpl. Ruby. In my view, law enforcement officers do not have carte blanche to end the life of a suspect and injure innocent bystanders when they feel frustrated. This is the type of bad faith abuse of state power which the Substantive Due Process doctrine was designed to protect. I am concerned that this case will join an ever-lengthening body of law which consistently holds that no rights are clearly established under the Substantive Due Process doctrine. Justice is more than a concept. It must be applied equally if it is to achieve any meaning of legitimacy. To deprive Kodi of a meaningful opportunity to pursue his Substantive Due Process claim will place him on the precipice of yet another injustice. Kodi suffered an immeasurable harm[15] from the excessive actions of law enforcement. To protect both him and the public from similar abuse, Kodi's harm should not go unrecognized.

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15. It has been suggested that Kodi was made sufficiently whole through a monetary judgment on his battery claim. This contention misses the mark. At issue is whether the exercise of violence by the state against an innocent minor bystander was justified under the law. The power of a verdict, laid down by one's peers, recognizing the extent of the pain and the significance of the claim, cannot be undersold. Justice is not always equitable when equated with monetary compensation.

APPENDIX B — OPINION, *CUNNINGHAM V. BALTIMORE COUNTY,* NO. 378, APPELLATE COURT OF MARYLAND. FILED APRIL 6, 2023

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 378

September Term, 2022

COREY CUNNINGHAM

v.

BALTIMORE COUNTY, MARYLAND, *et al.*

Graeff,
Beachley,
McDonald, Robert N.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Graeff, J.

Filed April 6, 2023

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

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* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appendix B

This case comes before this Court for a second time. It involves the shooting of Korryn Gaines and her five-year-old son, Kodi Gaines ("Kodi"),[1] by a Baltimore County police officer, and it requires us to apply concepts of preservation and waiver.

After a Baltimore County jury returned a verdict in favor of Kodi against appellees, Baltimore County and Corporal Royce Ruby, the circuit court granted appellees' motion for judgment notwithstanding the verdict ("JNOV"), or in the alternative, motion for new trial. On appeal, we affirmed, in part, and reversed/vacated, in part, and remanded for further proceedings. *See Cunningham v. Baltimore County* ("*Cunningham I*"), 246 Md. App. 630, 232 A.3d 278 (2020).

On remand, the circuit court addressed the claims relating to Kodi.[2] The court dismissed the 42 U.S.C. § 1983 claim and the state constitutional claims, but it affirmed the verdict against appellees on the battery count. The court found that there was a cap on the damages awarded under Md. Code Ann., Cts. & Jud. Proc. Art. ("CJ") § 5-303 (2020 Repl. Vol.), and after applying that cap, it ordered Baltimore County to pay appellant, Corey

1. For clarity, we shall refer to Kodi Gaines by his first name because he has the same surname as Korryn Gaines and her father, Ryan Gaines.

2. Prior to the hearing on remand, the estate of Korryn Gaines and all other appellants from the first appeal settled with appellees, leaving only the claims of Corey Cunningham brought on behalf of Kodi.

Cunningham, Kodi's father, in the amount of $400,000, plus post-judgment interest of $160,000.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err by acting outside the scope of remand and in violation of this Court's opinion in *Cunningham I*?

2. Did the circuit court err in dismissing Kodi's § 1983 Fourteenth Amendment substantive due process claim against Corporal Ruby?

3. Did appellees waive their right to remittitur and a new trial?

4. Did the circuit court err in hearing and failing to grant appellant's motion to recuse?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts and proceedings have been detailed fully in *Cunningham I, see* 243 Md. App. at 643-59. We set forth here only the facts needed to address the issues on appeal.

On August 1, 2016, two Baltimore County police officers entered Ms. Gaines' apartment, attempting to

serve arrest warrants on her and Kareem Courtney. When they entered, they found Ms. Gaines sitting on the floor holding a pistol-grip shotgun pointed at the front door. Officers retreated and called for back-up. Shortly after the police established a perimeter, Mr. Courtney and his daughter, Karsyn Courtney, voluntarily exited the apartment. Mr. Courtney was arrested on an outstanding warrant. Ms. Gaines and Kodi remained in the apartment.

After a six-hour stand-off, Ms. Gaines retreated to the kitchen with Kodi.[3] From the kitchen, Ms. Gaines was partially concealed from officers' view behind an interior wall. At trial, Corporal Ruby testified that he observed Ms. Gaines raise the shotgun to a firing position, and he was worried that she had taken a tactical advantage, which put her in a position to shoot at officers positioned outside the door. Corporal Ruby testified that, fearing for officer safety and not wanting to risk injuring Kodi, he aimed high and fired a "head shot." This bullet hit Ms. Gaines in the upper left back, exited through her body, ricocheted off the refrigerator, and struck Kodi's cheek.[4] Ms. Gaines discharged a few shots, and Corporal Rudy fired an additional three shots into Ms. Gaines before she slumped to the floor. Ms. Gaines died from her injuries. Kodi ran from the kitchen where an officer grabbed him and brought him outside for medical attention. Kodi underwent numerous surgeries, and his wound later became infected.

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3. The stand-off lasted from approximately 9:30 a.m. to 3:30 p.m.

4. A subsequent shot by Corporal Rudy struck Kodi in the elbow, but only the first shot is at issue.

Appellant disputed Corporal Ruby's testimony. He alleged that Ms. Gaines did not raise the shotgun into firing position, did not aim her shotgun at the officers, and even if she did, the officers were not in danger because they were protected by brick walls and protective equipment.

I.

Complaint

On September 13, 2016, a civil complaint was filed in the Circuit Court for Baltimore County. Rhanda Dormeus (on behalf of Ms. Gaines' estate, and in her individual capacity as Ms. Gaines' mother), Mr. Cunningham (on behalf of Kodi), Mr. Courtney (on behalf of the minor child Karsyn), and Ryan Gaines (Ms. Gaines' father) brought numerous claims against appellees.[5] These claims included, among other things, claims under § 1983, violations of the Maryland Declaration of Rights, battery, and other related claims.[6] Because one of the issues on

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5. The complaint also named other members of the Baltimore County Police Department ("Department"), but they subsequently were dismissed from the case.

6. The third amended complaint, which is the operative complaint, asserted claims for: wrongful death (Count I); survival action (Count II); violations of Articles 10, 24, 26 and 40 of the Maryland Declaration of Rights (Count III); violation of the Maryland Constitution deprivation of medical treatment (Count IV); violation of the Maryland Constitution bystander liability (Count V); violation of the Maryland Constitution illegal entry (Count VI); civil rights claim pursuant to 42 U.S.C. § 1983 searching Ms. Gaines' apartment, excessive force as to Kodi and Ms. Gaines, and failing to provide medical attention (Count VII); peace officer liability pursuant

appeal relates to the extent to which a § 1983 claim based on a Fourteenth Amendment substantive due process claim was asserted, we will discuss in more detail how that claim was addressed below.

With respect to Count VII, plaintiffs alleged a § 1983 claim for violations of plaintiffs' civil rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The complaint alleged that appellees violated plaintiffs' Fourth and Fourteenth Amendment rights by using force "excessive to the need," which was "objectively and subjectively unreasonable," and that appellees violated the plaintiffs' rights "[b]y acting in a way that was so reckless and/or irresponsible as to be shocking to the conscious."

In Count X, plaintiffs alleged a § 1983 claim for excessive force, asserting that appellees' use of force was "malicious and/or involved reckless, callous, and deliberate indifference" to plaintiffs' federally protected rights under the First, Fourth, and Fourteenth Amendments. This count alleged that the force was done with "willful indifference" and was "conscience shocking."

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to § 1983 (Count VIII); municipal liability pursuant to § 1983 (Count IX); excessive force and violation of freedom of speech under the First, Fourth, and Fourteenth Amendments to the United States Constitution (Count X); battery (Count XI); and negligence (Count XII).

II.

Motion for Summary Judgment

Appellees filed a motion for summary judgment, arguing that there was no dispute as to the facts, and they were entitled to judgment as a matter of law. Citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), appellees argued that all claims alleging that officers used excessive force, deadly or not, should be analyzed under the Fourth Amendment and the "reasonableness" standard, rather than under a "substantive due process" approach. They asserted that Corporal Ruby's actions were objectively reasonable, and all claims for excessive force should be dismissed. With respect to Kodi, they argued that, because Kodi was not the intended object of the shooting, any Fourth Amendment claim on his behalf was "directly foreclosed by *Brower v. County of Inyo*, 489 U.S. 593[, 596, 109 S. Ct. 1378, 103 L. Ed. 2d 628] (1989), which held that one is 'seized' within the Fourth Amendment's meaning only when one is the intended object of a physical restraint." Accordingly, they argued that Kodi's claims against Corporal Ruby should be dismissed.

Appellant filed an opposition to the motion for summary judgment. As relevant to this appeal, he argued that summary judgment could not be granted on his Fourteenth Amendment claims because appellees failed to make any arguments on the issue in their memorandum. He argued that appellees' motion was a *partial* motion for summary judgment because they set forth no law

or relevant facts related to the Fourteenth Amendment claims, and therefore, summary judgment should be denied for Counts VII, VIII, and X. He alleged "that the use of deadly force against [Ms.] Gaines and excessive force against Kodi Gaines violated their federal constitutional rights under the Fourth and Fourteenth Amendments," and there were "multiple disputes of material fact" as to whether Corporal Ruby acted reasonably under the circumstances.

On January 26, 2018, the court held a hearing on the motion. Counsel for appellant reiterated that appellees failed to set forth any facts or law related to Kodi's Fourteenth Amendment substantive due process claim. He stated that the law was clear that Kodi could "proceed under the 14th Amendment for [a] substantive due process violation, for excessive force."

Appellees argued that the Fourteenth Amendment is the vehicle by which the Fourth Amendment applies to the States, and therefore, the analysis would be the same as under the Fourth Amendment. They stated that "excessive force claims are not substantive due process. They are the objectively reasonable analysis." "That is what the substantive due process argument means."

On January 29, 2018, the court ruled on the motion for summary judgment. As an initial matter, the court stated that the arguments related to the reasonableness of Corporal Ruby's actions would be dealt with by the Fourth Amendment, so the failure of appellees to address the Fourteenth Amendment was not persuasive. The court

granted the motion in some respects, but as relevant to this appeal, it denied appellees' motion relating to the issue of excessive force.

III.

Trial

Trial began on January 30, 2018. More than 25 witness were called, including the parties, medical professionals, ballistic and crime scene experts, family members, and other law enforcement officers.

Dr. Tyrone Powers, appellant's expert in the use of force, testified that Corporal Ruby's use of force was "excessive and unnecessary" and in violation of the Department's policy. He stated that there was no immediate threat of death or serious bodily injury at the time Corporal Ruby took the first shot.

Charles Key, appellees' expert in the use of force, police training, policy and procedures, firearms, incident reconstruction, crime scene analysis, and ballistics, testified that Corporal Ruby's use of force was objectively reasonable and consistent with accepted standards of police policy and training. He testified that the raised shotgun presented an immediate deadly threat and Corporal Ruby would have had "no choice but to use lethal force to resolve it." Kodi's injury did not change the analysis of whether the shot was reasonable because Corporal Ruby made reasonable efforts to prevent injury to Kodi. Mr. Key also testified that, based on the trajectory

of the bullet, Ms. Gaines could have been aiming the shotgun at the door.

Corporal Ruby testified that he fired the shot "because there was no choice anymore," and Ms. Gaines' "shotgun was raised up into a firing position." He was concerned that, from her new position in the kitchen, Ms. Gaines would shoot through the apartment doorway and potentially injure the officers positioned there.

At the end of appellant's case, appellees made a motion for judgment. Appellees argued that Corporal Ruby was entitled to qualified immunity "because he was acting as an officer in his position under the law making a decision which he is allowed to make." With respect to Kodi, appellees argued that he was not the intended object of the seizure, and although this was an unfortunate event, appellees were not liable to Kodi as a bystander.

Appellant argued that the jury must decide whether the officers were actually in danger when Corporal Ruby decided to act and whether that act was reasonable. With respect to Kodi's claims, appellant argued that, "under the 14th Amendment and the 4th Amendment, Kodi can proceed because the law is clear that anyone who is injured by the police if the force was excessive can proceed under the 4th Amendment, and if not, the 14th Amendment." The circuit court denied the motion, stating that whether the officers were "in danger from Corporal Ruby's perspective is a fact that has to be left to the jury."

On February 14, 2018, the parties discussed the jury instructions. Because the issue of the adequacy of the

instruction regarding a substantive due process claim is a disputed issue, we set forth the discussion in detail.

After looking at the parties' proposed instructions regarding excessive force, the court stated that it was including the Fourth Amendment. The following discussion took place:

> [COUNSEL FOR KODI]: Your Honor, **shouldn't it be the 14th and the 4th Amendment**.
>
> We're asking to add that. **Add that, because it['s] applied to the State[s] to the 14th**.
>
> * * *
>
> THE COURT: **Well, it's applied by the 14th Amendment**, so I think where the Federal Pattern Jury Instruction got it right was to simply say the 4th Amendment of the United States protects, which I incorporated. I'm gonna leave it the way it is. Anything else on that instruction?
>
> * * *
>
> [COUNSEL FOR KODI]: [Y]ou're saying that you're just not gonna tell the jury that it's the 4th and 14th—
>
> THE COURT: No, I'm gonna tell them it's the 4th. Your request on page 45 was the excessive

force instruction in the Federal Pattern Instruction. . . .

It starts with, "The 4th Amendment to the United States Constitution protects persons from being subjected to excessive force while being arrested." If you look at the instruction, I incorporated that first sentence, and then go into the Maryland Pattern Jury Instruction.

[COUNSEL FOR KODI]: I understand. We were asking you to include the 14th, and make sure I understand you said **you're not gonna do it even though you recognize that's how it's interpreted through the 14th**, and we're just asking that it be there so it clearly meets what the law says. I don't see the harm in having the 14th there as well, you're just adding the 14th . . .

I mean, the jury isn't gonna understand the 4th anymore than they would understand 14th. So, to add 4th without the 14th, you know, I don't see how they are prejudiced, and it's certainly——

THE COURT: It's not a question of prejudice, it's **making sure the jury understands what the instruction is, that the fact that the 4th Amendment of the United States Constitution applies to the states through the 14th Amendment is not an issue in this case**. I'm not gonna complicate it.

> [COUNSEL FOR KODI]: Can you just say the U.S. Constitution without saying 4th or 14th then? . . .
>
> THE COURT: **How about if I say the amendments to the United States Constitution**.
>
> [COUNSEL FOR KODI]: **That would be fine**.

(Emphasis added).

The next day, prior to the court giving the jury instructions, the parties discussed the verdict sheet with the court. The court repeatedly referred to the claims before the court as a Fourth Amendment § 1983 claim, a Maryland Declaration of Rights claim, and a battery claim. Counsel for appellant argued that the question on the verdict sheet for Kodi's § 1983 claim only said the Fourth Amendment and as they discussed before, their position was that it should say the Fourteenth and Fourth Amendments. Appellant requested the court to modify the question to say: "[U]nder the United States Constitution or Amendments to the United States Constitution." The court agreed to refer only to § 1983 claims. Counsel agreed to this modification, and the verdict sheet, with separate questions as to Kodi and Ms. Gaines, asked whether the jury found that appellees violated their "rights under 42 U.S.C. § 1983."

The court then instructed the jury, in pertinent part, as follows:

Because both the Maryland Declaration of Rights and the Amendments to the United States Constitution protect persons from being subjected to excessive force every person has the right not to be subjected to excessive or unreasonable force. In determining whether the force used was excessive you should consider the need for application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted and whether a reasonable officer on the scene without the benefit of hindsight would have used that much force under similar circumstances.

You must decide whether the officer's actions were reasonable in light of the facts and circumstances confronting the officer. The reasonableness of police officer's actions must be judged objectively from the perspective of a reasonable police officer in the position of the police officer at the time.

* * *

Section 1983 creates a federal remedy for persons who have been deprived by state officials or any person acting under the color of state law or rights, privilege and immunities secured by the United States Constitution and federal statutes.

* * *

To establish a claim under Section 1983, the Plaintiff must establish by a preponderance of the evidence each of the following three elements: First, that the acts complained of were committed by the Defendant acting under color of state law. The parties in this case stipulate that Corporal Royce Ruby was acting under color of law. So you are instructed that the Plaintiffs have proven that first element.

The second element of Plaintiffs' claim is that the Defendant in committing the acts complained of intentionally or recklessly deprived the Plaintiff of a federal right. In order for the Plaintiff to establish this second element, he must show that those acts that you have found the Defendant took under the color of law caused the Plaintiff to suffer the loss of a federal right, and that the Defendant performed these acts intentionally or recklessly.

An act is intentional if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reasons. Intent can be proved directly or it can be proved by reasonable inferences from circumstantial evidence. An act is reckless if done in conscious disregard of its [known] probable consequences. In other words, even if a Defendant did not intentionally seek to deprive the Plaintiff of the Plaintiff's rights, if nevertheless he purposely disregarded the high probability

> that his actions would deprive the Plaintiff of the Plaintiff's rights, then the second essential element would be satisfied.

The parties then gave closing arguments. Counsel for Kodi argued that Corporal Ruby's actions were unreasonable, and he did not make any distinction between the standard applicable to Ms. Gaines as opposed to that applicable to Kodi for the § 1983 claims.

On February 16, 2018, at the conclusion of the three-week trial, the jury returned a verdict in favor of the plaintiffs. It found that the shooting of Ms. Gaines by Corporal Ruby was not objectively reasonable. The jury also found that the appellees committed a battery on Ms. Gaines and Kodi and that appellees violated Ms. Gaines' and Kodi's rights under the Maryland Declaration of Rights and § 1983. The jury awarded Kodi a total of $32,873,542.29, including $23,542.29 for past medical expenses and $32,850,000 for non-economic damages. The jury declined to award punitive damages under the Maryland Declaration of Rights or § 1983.

IV.

Post-Trial Motions

On March 12, 2018, appellees filed several post-trial motions for JNOV, for a new trial, for remittitur of the verdict, and for the court to exercise revisory power over the judgment. Appellees first addressed the claims related to Ms. Gaines, and they argued, among other things, that Corporal Ruby's first shot was reasonable, and he was

entitled to qualified immunity. Appellees then addressed the claims related to Kodi's rights. They argued that there was no violation of Kodi's rights under § 1983 because it was "undisputed that Kodi was not the intended target of the shooting," and when an innocent bystander is hit by a ricochet bullet, there is no Fourth Amendment claim, and the case should be viewed as an action for negligence. The motion stated that, in *Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097, 112 S. Ct. 1175, 117 L. Ed. 2d 420 (1992), the Fourth Circuit Court of Appeals held that, in an innocent bystander case, "[w]hether it was *negligent* is not before us; on a claim of constitutional violation of substantive due process it would in any event not suffice even if proven." Appellees also argued that Corporal Ruby did not commit a battery on Kodi because there was no intent by Corporal Ruby to touch Kodi, and in any event, as indicated, Corporal Ruby's conduct was not unlawful.

Appellant filed an opposition to the post-trial motions, arguing that the jury conclusively found, based on the overwhelming evidence, that Corporal Ruby's shot was not objectively reasonable, and appellees had not set forth new evidence in their motion to upset this finding. Additionally, appellant contended that Kodi "properly pled and proceeded on" his § 1983 Fourteenth Amendment substantive due process claim. He argued that appellees only addressed whether Kodi could proceed on his § 1983 claim under the Fourth Amendment and wholly ignored that he could, and did, plead and proceed as an innocent bystander. Appellant asserted that he had "consistently maintained that Kodi can proceed and was proceeding on his § 1983 claims under the Fourteenth Amendment

as an independent basis from the Fourth Amendment at the time of trial." He argued that, pursuant to *Rucker*, an innocent bystander can bring a substantive due process claim under the Fourteenth Amendment if the person was physically injured, regardless if the injury was intended. "Accordingly, Kodi properly relied on the Fourteenth Amendment to bring his § 1983 claim, and the [c]ourt properly instructed the jury from the pattern jury instructions, as proposed by both parties, on what Kodi needed to prove to prevail on his § 1983 claim." Appellant also argued that Corporal Ruby committed a battery on Kodi because, even though Corporal Ruby did not intend to hit Kodi, he was liable under the doctrine of transferred intent.

On July 2, 2018, the court held a hearing on the motions. Appellees argued that "the analysis of an excessive force claim is made under the objective reasonable standard . . . [and] not [] under the Fourteenth Amendment substantive due process" standard. They asserted that Kodi's Fourteenth Amendment claim would not apply here "because substantive due process protects against agents of the State acting irrationally and arbitrarily," and there was "no evidence in this case that the actions of Corporal Ruby in any way would amount to being so brutal and inhumane as to shock the conscience of the judicial court." Additionally, they argued that the substantive due process claims that appellant was arguing "just don't appear in this pleading."[7]

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7. Appellees subsequently stated that they made no argument with respect to the jury instructions given on this issue because appellees did not believe that Kodi had a substantive due process claim, and therefore, they did not argue the jury instruction erroneously failed to instruct in that regard.

Appellant argued that he made clear in his third amended complaint that "Kodi was proceeding under a 14th Amendment substantive due process claim." He stated that "[t]he Fourth and the 14th Amendment are two vehicles . . . upon which to bring a [§] 1983 claim," and once properly pleaded, the question is then whether appellant can "prove that the officer violated Section 1983, the use of excessive force." He noted that appellees failed to object to the jury instructions regarding this claim, and in any event, case law required a finding that Corporal Ruby acted recklessly or irresponsibly, and the instructions told the jury that it had to be intentional or reckless. Pointing to the evidence at trial, appellant argued that the jury could fairly decide Corporal Ruby's actions were reckless, and therefore he could maintain a claim under the Fourteenth Amendment.

On February 14, 2019, the circuit court, in a 75-page opinion, granted the motion for JNOV on the basis that Corporal Ruby was entitled to qualified immunity as a matter of law. Accordingly, it rendered judgment in favor of appellees on all claims. The circuit court then ruled that, if the JNOV ruling was reversed on appeal, a new trial was necessary due to a defective verdict. The court found that there was a defective verdict because the jury found for Kodi and Ms. Gaines on both the Maryland Declaration of Rights claims and the Fourth Amendment violations under § 1983, but it did not apportion the award between the two claims. It also found that the non-economic damages awarded were excessive and shocked the conscience, and but for its rulings, it would remit the jury's awards.

V.

Appeal Proceedings

Appellants appealed to this Court, arguing, among other things, that the circuit court erred in granting appellees' motion for JNOV on the basis of qualified immunity. *Cunningham I*, 246 Md. App. at 679. In a lengthy opinion addressing the many issues presented in the appeal, this Court affirmed, in part, and reversed/vacated, in part, the court's ruling and remanded for further proceedings. *Id.* at 706. As relevant to this appeal, we held "that the court erred in granting the motion for JNOV, with the exception of its ruling dismissing the § 1983 claims against the County." *Id.* In doing so, we addressed, as did the parties, the basis for the circuit court's grant of JNOV, i.e., that Corporal Ruby was entitled to qualified immunity because his conduct did not violate clearly established Fourth Amendment law. We held that, because there was a dispute of fact regarding what happened during the stand-off and whether Corporal Ruby acted reasonably in firing the first shot, the court erred in invalidating the jury's finding that Corporal Ruby did not act reasonably and in granting JNOV. Accordingly, we reversed the grant of JNOV with respect to the claims against Corporal Ruby. *Id.* With respect to Baltimore County, we affirmed the grant of JNOV on the § 1983 claims and vacated the grant of JNOV on the state constitutional claims, remanding for further proceedings. *Id.* With respect to the court's conditional ruling granting the motion for new trial based on an irreconcilably inconsistent verdict, we concluded that the court abused its discretion in that regard. Although the verdict sheet did

not apportion damages between the state claims, subject to the statutory damages cap, and the federal claims, not subject to the statutory cap, we concluded that the verdict was not irreconcilably inconsistent. *Id.* at 702. Therefore, we reversed that ruling. *Id.* at 706.

We next addressed the contention that the court erred in its ruling on the motion for remittitur. The circuit court stated:

> This [c]ourt finds that the non-economic damages awarded to the various Plaintiffs are excessive and shock[] the conscience, and but for this [c]ourt dismissing the matter for grant of qualified immunity, or in the alternative granting a new trial because of the defective verdict, the [c]ourt would remit the [jury's] awards.

Id. at 702. We noted that the court did not actually grant a remittitur and stated that, on remand, "the circuit court [could] address the applicability of the damages cap, and if it determined that the verdict remains as it is, an amount that the court found to be excessive, it could address the issue whether a remittitur or new trial is warranted." *Id.* at 704. We remanded for the court to consider remaining issues related to damages, which included, "but was not limited to, the damages cap and remittitur." *Id.* at 706.

Appellant subsequently filed a motion for partial reconsideration regarding the issue of remittitur. On August 26, 2020, this Court denied the motion.

Appellant then filed a Petition for Writ of Certiorari raising questions regarding the remittitur issue. On November 20, 2020, the Supreme Court of Maryland, then known as the Court of Appeals, denied the petition.[8] *See Cunningham v. Baltimore County*, 471 Md. 268, 241 A.3d 862 (2020).

VI.

Proceedings on Remand

In a series of filings following remand, the circuit court and the parties addressed what issues the court should consider on remand. After hearing the parties' proposed issues, the court asked the parties to brief multiple issues, including, as relevant to this appeal: (1) whether, based on this Court's opinion, appellees were permitted to argue that Kodi had no Fourth Amendment and Fourteenth Amendment claims under § 1983; (2) whether Kodi's state constitutional claims were governed by the same principles as his federal claims; and (3) whether there was a maximum allowable recovery to Kodi under the Local Government Tort Claims Act ("LGTCA") CJ §§ 5-01 to 5-527, and if so, what was the maximum allowable amount.[9] The court also asked counsel to brief several issues regarding the issue of remittitur and whether there were claims that were waived by failing to pursue them in *Cunningham I*.

8. On December 14, 2022, the name of the Court of Appeals was changed to the Supreme Court of Maryland.

9. These issues were all listed by appellees as issues that needed to be considered.

On August 31, 2021, appellees filed a motion in the circuit court to clarify judgment and for other appropriate relief. Appellees advised that all plaintiffs other than Mr. Cunningham, on behalf of Kodi, had settled their claims. With respect to Kodi, appellees argued, among other things, that he did not have a viable Fourteenth Amendment substantive due process claim for loss of consortium because "the Fourth Circuit has not expressly recognized a § 1983 substantive due process claim for loss of consortium." They argued that it was not "clearly established" that "Kodi had any substantive due process rights in loss of consortium with his mother," and therefore, Corporal Ruby was "entitled to qualified immunity on any such claim." With respect to Kodi's § 1983 excessive force claim, appellees continued to argue that this claim was governed by "the Fourth Amendment, not the Fourteenth Amendment." They argued that, even if Kodi had a Fourteenth Amendment substantive due process claim for excessive force, this "would [] fail because the facts of this case [were] far from 'a brutal and inhumane abuse of power shocking the conscious,' and [Corporal] Ruby would enjoy qualified immunity against such a claim." They stated that "the jury verdict is clear that [Corporal] Ruby could not have engaged in conduct that 'shocks the conscience'" because the "jury declined to award punitive damages," which meant that "there was not sufficient evidence of malice." Although the jury may have disagreed that Corporal Ruby's first shot was reasonable, it never found that he acted with malice or gross negligence.

In any event, appellees asserted that Corporal Ruby was entitled to qualified immunity on a § 1983 substantive

due process claim for excessive force because the law was not "clearly established" at the time he accidently shot Kodi that he was violating Kodi's substantive due process rights. Specifically, "the law would not have informed [Corporal] Ruby that by accidentally shooting Kodi during a six-hour standoff with Ms. Gaines, [Corporal] Ruby would be violating Kodi's constitutional rights."

Appellees also argued that "Kodi's Article 24 and 26 Maryland Constitutional claims are governed by the same principles governing his Fourth Amendment claims," and that the state constitutional claims would fail for the same reasons that his Fourth Amendment claims failed. They asserted that CJ § 5-303 automatically capped the maximum allowable recovery on Kodi's only remaining claim of battery, regardless of any other legal theories for the underlying state claims.

Appellant filed a response, arguing, among other things, that this Court, in *Cunningham I*, decided only that the circuit court was incorrect in finding that Corporal Ruby was entitled to qualified immunity on the § 1983 claim because he did not apply excessive force under the Fourth Amendment. He argued that the § 1983 Fourteenth Amendment substantive due process claim was reinstated. He did not, however, address appellees' argument that the evidence did not rise to the level of a substantive due process claim.

With respect to qualified immunity, appellant argued that this was the first time appellees raised the issue with respect to Kodi's Fourteenth Amendment claim.

Although noting that this was because appellees thought Kodi's § 1983 claim had to be raised under the Fourth Amendment, appellant asserted that the qualified immunity argument with respect to the Fourteenth Amendment was waived.

At the remand hearing on November 19, 2021, the parties and the circuit court addressed the status of Kodi's § 1983 claim after *Cunningham I*. Appellant argued that, by reversing the circuit court's grant of JNOV, this Court reinstated all of the claims against Corporal Ruby. Although this Court specifically said that Kodi had no Fourth Amendment claim, it did not address the § 1983 Fourteenth Amendment claim because it was not a part of the circuit court's JNOV ruling.[10] Counsel for appellant conceded at this hearing that Kodi had no Fourth Amendment claim, but he stated that they pled and argued a Fourteenth Amendment claim, which this Court reinstated. Counsel acknowledged that the verdict sheet did not differentiate between a Fourth Amendment and a Fourteenth Amendment claim. He further acknowledged that the instruction given to the jury "dealt with reasonableness only," but he argued that, if appellees thought a different instruction was needed for

10. Counsel for appellant stated at the remand hearing that the circuit court found that Corporal Ruby was "entitled to qualified immunity under the Fourth Amendment," and "[a]ll [this Court in *Cunningham I*] had to decide was whether [the circuit court was] right or wrong on that." Appellees disagreed, stating that, in granting JNOV the court dismissed all claims, which necessarily included "any so called Fourteenth Amendment claims" under substantive due process.

a substantive due process finding, they needed to object when the instruction was given. He asserted that appellees did not object, however, because they thought, and the circuit court agreed, that Kodi had to proceed under the Fourth Amendment. Counsel asserted that appellees' suggestion that the jury was not properly instructed was too late. He further argued that, "if there was any error and Kodi had somehow proceeded with the Fourth Amendment only, it's waived or the error was invited because [appellees] argued that Kodi had to proceed under the Fourth Amendment." Counsel also clarified that the § 1983 Fourteenth Amendment claim was not based on loss of consortium because Kodi "was actually injured."

Appellees argued, consistent with their argument below, that pursuant to *Graham*, 490 U.S. at 388, 395, an excessive force claim must be "analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard," and Kodi did not have a Fourteenth Amendment claim. Appellees did not object to the instructions on the objective reasonableness standard because "there was no viable Fourteenth Amendment claim ever." Appellees further argued that the facts of this case did not rise to the level of egregious conduct that shocks the conscience, which is the standard for a substantive due process claim. They noted that the jury did not find malice, and in the absence of such a finding, the case could not rise to the high constitutional standard required under the Fourteenth Amendment. Appellees asserted that the only viable claim for Kodi was battery, which was subject to a damages cap of $400,000. Appellees did not address the issue of qualified immunity at the hearing.

With respect to remittitur, appellant stated that the court should not remit the damages award. Appellees asked the court only to remit the damages awarded on the state claims, to apply the statutory cap, and to find that the § 1983 claim was not viable. Counsel stated that there was no request for remittitur other than as a matter of law.

On April 26, 2022, the circuit court issued its ruling. As indicated, only Kodi's claims were presented to the court. The court began by addressing Kodi's § 1983 claim. The court noted that it initially granted JNOV on the ground that Corporal Ruby was entitled to qualified immunity, and therefore, it dismissed all claims against all appellees. Accordingly, "there was no need to separately address whether Kodi had either a Fourth Amendment or Fourteenth Amendment claim," and it was unnecessary to address appellees' request to revise the judgment. The court then concluded, as a matter of law, that Kodi did not have a § 1983 claim under either the Fourth or Fourteenth Amendments. The court found that there was no Fourth Amendment claim because Kodi was not the intended object of the seizure, and there was no Fourteenth Amendment substantive due process claim because (1) "Kodi's injuries were unintended," (2) "[a]t best, Kodi's injuries could be attributed to negligence," (3) "mere negligence is insufficient to support a Fourteenth Amendment substantive due process claim," and (4) the facts elicited at trial did "not meet the shock the conscience standard." The court then dismissed Kodi's § 1983 claim.

With respect to the constitutional claims under Articles 24 and 26 of the Maryland Declaration of Rights,

the court found that they were subject to the same standards as a § 1983 claim under the Fourth Amendment. Accordingly, the court found that Kodi had "no excessive force claim under either Article 24 or 26 of the Maryland Declaration of Rights," and it dismissed those claims. The court nevertheless noted that the jury rendered a verdict in Kodi's favor on the battery claim, which was affirmed in *Cunningham I*, and "even if Kodi were to prevail on his [s]tate constitutional claims, he is only entitled to one recovery, which is limited under the Maryland LGTCA."

On the battery claim, the court found that, pursuant to the liability limitations of CJ § 5-303, the liability of a local government may not exceed $400,000 per an individual claim.[11] It found "that the cumulative award for both past medical expenses and non-economic damages must be reduced to $400,000 plus post judgment interest, which [appellees] calculate[] to be $160,000.00." It ordered that, under the doctrine of respondeat superior,

11. Md. Code Ann., Cts. & Jud. Proc. Art. ("CJ") § 5-303 (2020 Repl. Vol.) provides, in relevant part:

> (a)(1) Except as provided in paragraphs (2) and (3) of this subsection, the liability of a local government may not exceed $400,000 per an individual claim, and $800,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions. . . .
>
> (b)(1) Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.

Baltimore County was responsible to pay that amount to Mr. Cunningham on Kodi's behalf.

This appeal followed.

DISCUSSION

Appellant contends that the circuit court erred for several reasons. Before addressing the specific contentions, we note that we are faced with a situation in this appeal where the primary issue, i.e., whether Kodi adequately made a showing to support a § 1983 substantive due process claim, is one that appellant alluded to below, but he did not clearly present to the jury or to this Court in *Cunningham I*. Each side argues that, at this point, the other side has waived the right to make the arguments that are made in this appeal.

We have set out in detail what occurred in the circuit court and this Court because there has been confusion and inconsistent claims as to what issues were before the courts and what was decided, and the parties' arguments are important to the ultimate resolution of this case at this point. It is particularly important as it relates to the concepts of preservation and waiver.

I.

Scope on Remand

Appellant initially contends that the circuit court violated this Court's mandate in *Cunningham I* and acted outside the scope of the limited remand. He argues that

this Court remanded the case solely on issues related to damages, and it gave the circuit court no authority to revisit liability issues. Appellant asserts that the circuit court erroneously "made new and unauthorized factual and legal findings" regarding liability, which the court was without power to make, and which violated the law of the case doctrine.

In *Cunningham I*, this Court addressed, with respect to the § 1983 and state constitutional claims, the issue that both the circuit court decided and the parties addressed in their written and oral arguments, i.e., whether Corporal Ruby was entitled to qualified immunity with respect to a violation of Ms. Gaines' and Kodi's Fourth Amendment rights. We held that the court erred in granting the motion for JNOV on that ground.

The parties now extensively brief the issue whether Kodi had a viable § 1983 claim under the Fourteenth Amendment. The circuit court, however, treated the § 1983 claims alleged by Ms. Gaines and Kodi as excessive force claims under the Fourth Amendment's reasonableness standard, and that is how the case was presented on appeal. *See* Brief of Ryan Gaines at 9-11, *Cunningham I*, 246 Md. App. 630 (2020); Brief of Appellant at 1, *Cunningham I*, 246 Md. App. 630, 232 A.3d 278 (2020) (incorporating this argument). Despite multiple briefs filed, containing more than 200 pages, there was only brief mention of substantive due process under the Fourteenth Amendment, and it was appellees that made that reference.

Appellant not only failed to address any substantive due process analysis in his initial brief, but he stated in his reply brief that "[a]ppellees' discussion in their brief concerning the distinction between the Fourth and Fourteenth Amendment claims of Kodi Gaines . . . is not before this Court because it was not addressed in the circuit court's opinion. Reply Brief of Appellant at 16, *Cunningham I*, 246 Md. App. 630, 232 A.3d 278 (2020). Counsel for Kodi stated that the issue of Kodi's substantive due process claim was "not before this Court." *Id.* at 16-17. Based on that assertion, we did not address the propriety of a § 1983 Fourteenth Amendment substantive due process claim. Indeed, as indicated in the facts *supra*, counsel for appellant stated at the hearing on remand that the limited issue before this Court in *Cunningham I* was whether the circuit court erred in finding that Corporal Ruby was entitled to qualified immunity on the Fourth Amendment claims.

To the extent that appellant asserts that this Court made "conclusive" findings regarding Kodi's § 1983 substantive due process claims in *Cunningham I*, he is wrong. This Court did not rule on the issue of a § 1983 claim based on substantive due process under the Fourteenth Amendment. Where that leaves us, and what is properly before us at this point, however, will take much more analysis.

II.

Dismissal of Kodi's § 1983 Claims[12]

Appellant contends that the court erred on remand in dismissing Kodi's § 1983 substantive due process claim because the court's analysis was "factually and legally incorrect." He argues that the court "egregiously conflated the jury's decision not to award punitive damages with the viability of [his] Fourteenth Amendment claims." Appellant further asserts that the circuit court improperly relied on the testimony of Corporal Ruby, despite that there was a dispute of fact regarding what happened during the stand-off, and it erred in finding that the evidence did not meet the Fourteenth Amendment's "shocks the conscience" standard. Finally, appellant contends that, to the extent that appellees argue that the jury instructions did not properly instruct on a Fourteenth Amendment substantive due process claim, appellees waived that argument by failing to object and agreeing to the court's instruction.

Appellees contend that appellant has waived his § 1983 Fourteenth Amendment claim for two reasons. First, because the circuit court entered JNOV in appellees' favor on all claims, if Kodi thought he had a substantive due process claim that the court erroneously dismissed, he needed to make that argument in *Cunningham I*. Appellant did not address a § 1983 Fourteenth Amendment claim in

12. Appellant contends that the arguments he makes related to the § 1983 claims also apply to Kodi's state constitutional claims.

that appeal, however, and therefore, appellees argue that appellant "waived and abandoned" this claim. Second, appellees assert that appellant waived any substantive due process claim because the jury instructions covered § 1983 claims only under the Fourth Amendment, and therefore, there was no jury finding of a violation of Kodi's substantive due process rights. Appellees argue that the substantive due process claim is waived because appellant had the responsibility to make sure the instructions adequately reflected the elements of the substantive due process claim, and they failed to do so.

Appellees next argue that, even if the substantive due process issue is not waived, this Court should affirm the circuit court's ruling. They assert that Kodi does not have a viable Fourteenth Amendment excessive force claim "because the undisputed facts of this case are far from 'a brutal and inhumane abuse of power shocking the conscious.'" Finally, appellees contend that Corporal Ruby "would enjoy qualified immunity against any § 1983 Fourteenth Amendment claim for excessive force."

A.

Jury Instructions

We address first the jury instructions and the parties' competing claims that deficiencies in the instructions resulted in a waiver of appellate arguments regarding the substantive due process claim. As indicated, appellees contend that appellant waived his substantive due process claim because the jury instructions addressed

only a Fourth Amendment claim and did not address a substantive due process claim, which resulted in no jury finding of a violation of Kodi's substantive due process rights. Appellant contends that, to the extent that there was not a proper instruction, appellees waived their right to challenge the jury's award for Kodi's § 1983 claim on this ground because they did not object to the instruction given. Indeed, appellant argues that appellees invited any error by arguing that Kodi could proceed on his § 1983 claim only under the Fourth Amendment, not the Fourteenth Amendment, an argument that the circuit court accepted. Appellant contends that, to the extent the instruction to the jury did not adequately instruct on the elements of a substantive due process claim, appellees invited any error that might have occurred. He argues, however, that the instruction was proper.

Before looking at the instructions given here, we discuss the nature of a § 1983 Fourteenth Amendment substantive due process claim. Section 1983 establishes a cause of action to redress violations of federal rights committed by persons acting under color of state law. *Vega v. Tekoh*, 142 S. Ct. 2095, 2101, 213 L. Ed. 2d 479 (2022). *Accord Keller v. Prince George's County*, 827 F.2d 952, 955 (4th Cir. 1987). It provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

> any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983. Section 1983 is not a source for substantive rights; it merely allows an aggrieved person to sue for violations of rights secured by federal law. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979). *Accord Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999).

Here, there was no question that Corporal Ruby acted as a state agent. The issue here was whether Corporal Ruby deprived Kodi of any constitutional right. Thus, for the claim under § 1983, the court must identify "the specific constitutional right allegedly infringed by the challenged application of force." *Graham*, 490 U.S. at 394. In the third amended complaint, appellant relied on the Fourth and Fourteenth Amendments.

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. As appellees noted in the circuit court, where there is a § 1983 claim that a police officer used excessive force in the course of a seizure, the case should be analyzed under the Fourth Amendment's reasonableness standard, rather than a Fourteenth Amendment substantive due process analysis. *Graham*, 490 U.S. at 395. Thus, Ms. Gaines, who was shot by Corporal Ruby, had a § 1983 Fourth Amendment excessive force claim.

Appellant argued at trial that he also had a § 1983 Fourth Amendment claim. He continued to argue liability in *Cunningham I* on the basis of a Fourth Amendment violation. He now concedes, however, appropriately, that because Kodi was not the intended object of the seizure, but rather, was an innocent bystander, he has no Fourth Amendment claim under § 1983. *See Rucker*, 946 F.2d at 281 (an innocent bystander who is unintentionally injured by a police officer has no Fourth Amendment claim because the bystander has not been "seized").

In the situation where a plaintiff's claim is not covered by a specific constitutional provision, as is the case here, the plaintiff may still have a Fourteenth Amendment substantive due process claim under § 1983. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). *Accord Petta v. Rivera*, 143 F.3d 895, 901 (5th Cir. 1998); *Slusarchuk v. Hoff*, 346 F.3d 1178, 1181 (8th Cir. 2003), *cert. denied*, 541 U.S. 988, 124 S. Ct. 2018, 158 L. Ed. 2d 492 (2004). This is a "more demanding standard than the 'reasonableness' test that governs excessive-force claims under the Fourth Amendment." *Peck v. Montoya*, 51 F.4th 877, 893 (9th Cir. 2022).

The United States Supreme Court has made clear that substantive due process claims are reserved for only the "most egregious" governmental conduct. *Lewis*, 523 U.S. at 846 ("Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"). To establish a substantive due process violation based on alleged police misconduct,

a plaintiff must show that the officer's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407, 413 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2800, 210 L. Ed. 2d 930 (2021). *Accord Waybright v. Frederick County*, 528 F.3d 199, 205 (4th Cir. 2008) (a due process violation involves "conduct that 'shocks the conscience,' and nothing less") (quoting *Lewis*, 523 U.S. at 846); *Rucker*, 946 F.2d at 281 (Protections of substantive due process against arbitrary and irrational state action generally requires conduct amounting to "'a brutal and inhumane abuse of official power literally shocking to the conscience.'") (quoting *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716 (4th Cir. 1991)).

In evaluating a substantive due process claim, courts have noted that § 1983 does not displace state tort law. *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006). Thus, negligence is insufficient to meet the shocks-the-conscience standard for a substantive due process violation. *Lewis*, 523 U.S. at 848-49.

Other levels of culpability, however, may support a substantive due process claim. As the Fourth Circuit Court of Appeals has explained:

> Conduct intended to injure that is in some way unjustifiable by any government interest is most likely to rise to the conscience-shocking level. Closer calls, however, are presented by conduct that is something more than negligence but less than intentional. A determination as to

> which of these standards of culpability—"intent to harm" or "deliberate indifference"—applies requires an exact analysis of context and circumstances before any abuse of power is condemned as conscience shocking.

Dean, 976 F.3d at 414 (quoting *Lewis*, 523 U.S. at 848-50) (cleaned up).

The degree of culpability required to meet the shocks-the-conscience standard varies with the circumstances of each case and "the time pressure under which the government actor had to respond." *Haberle v. Troxell*, 885 F.3d 170, 177 (3d Cir. 2018) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 240 (3d Cir. 2008)) (cleaned up). As the court in *Haberle* explained:

> Split-second decisions taking place in a "hyperpressurized environment," usually do not shock the conscience unless they are done with "an intent to cause harm." *Sanford* [*v. Stiles*], 456 F.3d [298,] 309 [(3d Cir. 2006)]. At the other end of the continuum, actions taken after time for "unhurried judgments" and careful deliberation may shock the conscience if done with deliberate indifference. *Id.* (quoting *Lewis*, 523 U.S. at 853). In the middle are actions taken under "hurried deliberation." *Id.* at 310. Such situations involve decisions that need to be made "in a matter of hours or minutes." *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 65 (3d Cir. 2002). If that standard

> applies, then an officer's actions may shock the conscience if they reveal a conscious disregard of "a great risk of serious harm rather than a substantial risk." *Sanford*, 456 F.3d at 310.

Id. Accord Braun v. Burke, 983 F.3d 999, 1002 (8th Cir. 2020) ("Deliberate indifference makes sense 'only when actual deliberation is practical.'. . . But, typically—and especially in 'rapidly evolving, fluid, and dangerous situations'—the plaintiff must show an intent to harm.") (quoting *Lewis*, 523 U.S. at 851), *cert. denied*, 142 S. Ct. 215, 211 L. Ed. 2d 93 (2021); *Lee v. Williams*, 138 F. Supp. 2d 748, 760-61 (E.D. Va. 2001) (where officers are called upon to make split-second decisions, there must be a showing that they "applied force maliciously and sadistically for the very purpose of causing harm" in order to meet the shock the conscience standard).

With that discussion of a § 1983 substantive due process claim, it is clear that the jury instructions given here, listed in the facts *supra*, discussed only reasonableness under the Fourth Amendment, and they did not instruct the jury on the different standard of substantive due process as it related to Kodi.[13] At the recent oral argument in this

13. We note that appellant's argument on the merits of whether the jury was instructed on substantive due process has shifted during the proceedings. In his argument to the circuit court on remand, counsel for appellant conceded that the instruction on § 1983 did not address substantive due process, noting that the instruction "dealt with reasonableness only." Counsel argued, however, that the fault for this error should be attributed to appellees because they failed to object to the instruction. He stated: "[I]f there was an error, it was

Court, appellant argued that the jury was instructed on substantive due process because the instruction described the claim as an intentional or reckless deprivation of a federal right. For an action to violate substantive due process, however, the conduct "must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. . . . [I]t must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Green v. Post*, 574 F.3d 1294, 1302-03 (10th Cir. 2009) (quoting *Livsey v. Salt Lake County*, 275 F.3d 952, 957-58 (10th Cir. 2001)). *Accord Lewis*, 523 U.S. at 847 n.8 (To prevail "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.").

As appellant notes, however, appellees did not object to the instructions given. Indeed, not only did they not object on the ground that the instructions did not properly instruct on a substantive due process claim, they argued

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an invited error because it was the Defendants who . . . argued [that] Kodi had to proceed under the Fourth Amendment, and you agreed with that even while we argued it was the Fourteenth Amendment." Similarly, in his initial brief, appellant argued that appellees waived their right to challenge the § 1983 award because they "advocated a plainly incorrect position regarding the Fourth and Fourteenth Amendment substantive due process claims," and the court "accepted [this] incorrect argument." In appellant's reply brief and at oral argument, however, counsel for appellant argued that the jury was fairly instructed on a § 1983 substantive due process claim under the Fourteenth Amendment.

that the § 1983 claim should not be analyzed based on substantive due process. Under these circumstances, appellees have waived their right to argue now that the jury was improperly instructed.

"The general rule is that the failure to object to a jury instruction at trial results in a waiver of any defects in the instruction, and normally precludes further review of any claim of error relating to the instruction." *State v. Rose*, 345 Md. 238, 245, 691 A.2d 1314 (1997). The purpose of the rule is "to enable the trial court to correct any inadvertent error or omission in the oral [or written] charge, as well as to limit the review on appeal to those errors which are brought to the trial court's attention." *Hoffman v. Stamper*, 385 Md. 1, 40, 867 A.2d 276 (2005) (quoting *Fisher v. Balt. Transit Co.*, 184 Md. 399, 402, 41 A.2d 297 (1945)) (alterations in original). *Accord Robson v. State*, Md. App. , , No. 764, Sept. Term, 2022, 2023 Md. App. LEXIS 177, *52 (filed March 8, 2023) (the primary purpose for the preservation requirement is to avoid error at trial and preclude the necessity for appellate review).

Here, the record reflects that appellees believed that Kodi's § 1983 claim was limited to a violation of the Fourth Amendment, and the court understood the Fourteenth Amendment claim as merely incorporating the Fourth Amendment rights to the states. *See Jones v. State*, 194 Md. App. 110, 128 n.11, 3 A.3d 465 ("The protections of the Fourth Amendment are binding on Maryland by incorporation through the Due Process Clause of the Fourteenth Amendment."), *cert. denied*, 417 Md. 385, 10 A.3d 200 (2010). Counsel for appellant did not clearly

explain prior to the instructions, as he does now, that the basis of the Fourteenth Amendment claim was a separate substantive due process claim, which as we have indicated, had its own requirements, including a showing of outrageous behavior that "shocks the conscience."[14]

A review of the record as a whole shows that appellant did make some reference, albeit limited and not well defined, regarding a separate Fourteenth Amendment substantive due process claim, and such a claim was alleged in the third amended complaint. Under these circumstances, we conclude that, to the extent that there was error in the instructions, appellees were required to object. They did not do so, and therefore, the argument that the jury instructions did not sufficiently cover a Fourteenth Amendment substantive due process claim is waived for this Court's review. This does not, however, contrary to appellant's contention, waive appellees' right to challenge the substantive due process claim on other grounds.

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14. The amended complaint asserted a violation of Kodi's substantive due process rights, and consistent with that assertion, alleged police conduct that was "conscience shocking." At the pretrial hearing on summary judgment motions, Kodi's counsel distinguished that claim from the alleged violation of the Fourth Amendment rights. However, at the trial itself, Kodi's counsel apparently had acquiesced in the notion that any reference to the Fourteenth Amendment was part of the alleged violation of Fourth Amendment rights and did not suggest that a different standard of proof or analysis of the appellees' qualified immunity defense would pertain.

B.

Substantive Due Process/Qualified Immunity

Appellant contends that the circuit court's decision that he did not have a viable substantive due process claim was "factually and legally incorrect." Appellees contend that appellant has waived any argument regarding a § 1983 substantive due process claim because the circuit court, in initially granting JNOV in favor of appellees, dismissed all claims, and appellant failed to challenge in *Cunningham I* the court's ruling on the ground that it improperly dismissed a substantive due process claim. Alternatively, appellees contend that the circuit court properly dismissed Kodi's substantive due process claim for excessive force because: (1) Corporal Ruby's conduct was not, as a matter of law, so arbitrary that it was "shocking to the conscience"; and (2) even if it was, Corporal Ruby was entitled to qualified immunity on this claim.[15] They assert that Corporal Ruby "did not violate any clearly established constitutional right belonging to Kodi," and he would not have known that accidently shooting Kodi would violate Kodi's substantive due process rights.

15. Appellees also argue that Corporal Ruby was entitled to qualified immunity on a Fourteenth Amendment claim for loss of consortium, but appellant has stated that he is not making such a claim; his claim is based on his injury. We note, however, that in closing argument at trial, counsel for appellant stated, in asking for a "big number" for damages, that Kodi had lost his mother because of Corporal Ruby.

Before addressing the parties' specific questions, we briefly discuss qualified immunity and the arguments up to this point. The United States Supreme Court has stated that qualified immunity shields government officials performing discretionary functions from civil liability, "so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)). Qualified immunity protects actions in the "'hazy border between excessive and acceptable force.'" *Id.* at 18 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)).

Courts generally have employed a two-part test to determine whether an official is entitled to qualified immunity. *Pearson*, 555 U.S. at 232. To resolve a qualified immunity issue, a court must determine whether: (1) facts alleged or shown by the plaintiff "make out a violation of a constitutional right"; and (2) the right was "'clearly established' at the time of the defendant's alleged misconduct." *Id. Accord District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018). The officer is entitled to qualified immunity if there is no constitutional violation, or if the conduct did not violate clearly established law.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix*, 577

U.S. at 11 (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)). Whether the law was clearly established at the time of the violation is a pure question of law. *DiMeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995).

In *Cunningham I*, as explained, we addressed the circuit court's grant of JNOV on the ground that Corporal Ruby was entitled to qualified immunity from a § 1983 Fourth Amendment excessive force claim. In that context, the second step was satisfied because there was clearly established law that, under the Fourth Amendment, an officer may employ deadly force to effect a seizure only where the officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). *Accord Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019). Thus, the issue in *Cunningham I* involved the first step, i.e., whether Corporal Ruby violated the Fourth Amendment by employing deadly force and shooting Ms. Gaines. We concluded that, given the dispute of fact generated by the evidence, that was an issue for the jury to resolve.

As indicated, appellees made a brief argument in *Cunningham I* regarding Kodi's Fourteenth Amendment substantive due process claim, but appellant did not address substantive due process at all in his initial brief and stated in his reply brief that the issue was not before us. We did not address it.

In addressing the parties' claims at this point regarding a Fourteenth Amendment substantive due process claim and qualified immunity in this appeal, the issue of waiver again factors heavily in our analysis.[16] The circuit court, in addressing the issue of qualified immunity in a § 1983 action in its initial opinion granting JNOV, noted that there must be a showing of a deprivation of a constitutional right, which was clearly established. The court addressed this issue with respect to Ms. Gaines and found that Corporal Ruby did not violate her Fourth Amendment right against unreasonable seizures because his actions were objectively reasonable, and therefore, he was entitled to qualified immunity. The court dismissed the entire complaint against Corporal Ruby, without discussing a substantive due process claim for Kodi. The court then addressed appellees' arguments regarding an inconsistent verdict, and it discussed the battery claims. It noted that, based on its finding that the intentional shooting of Ms. Gaines was not unlawful, Corporal Ruby was entitled to qualified immunity, and the court vacated the finding of battery of Ms. Gaines. With respect to Kodi, the court found that Corporal Ruby did not intend to commit a battery on Kodi, it was an unforeseen consequence of Corporal Ruby's lawful act, and therefore,

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16. Although the circuit court resolved the issue by finding that the evidence did not support a Fourteenth Amendment substantive due process claim, and it did not address qualified immunity, the issue was raised by appellees, so it is preserved for this Court's review. *See Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 525 n.16, 16 A.3d 159 (2011) (An issue which plainly appears to have been raised in, but not decided by, the circuit court, is nonetheless properly preserved for our review, "despite the circuit court's avoidance of that issue.").

the court vacated the jury's finding that Corporal Ruby perpetrated a battery on Kodi.

The result of the grant of JNOV was to dismiss all claims against appellees. Although the circuit court did not address the argument regarding a separate Fourteenth Amendment claim for Kodi based on a substantive due process violation, the effect of the ruling dismissing all claims was to reject liability on that claim.

On appeal in *Cunningham I*, although the circuit court granted judgment on all claims against appellees, which would include any substantive due process claim that Kodi may have had, there was no argument that the court improperly dismissed Kodi's separate substantive due process claim. Rather, appellant challenged the circuit court's conclusion that Corporal Ruby was entitled to qualified immunity because the shooting was reasonable, and therefore, not a violation of Ms. Gaines' Fourth Amendment rights.[17] That is the issue that we addressed, and we agreed that the court should not have granted the motion for JNOV by revisiting the jury's findings of reasonableness, given the dispute of fact regarding what occurred. Accordingly, we reversed the grant of JNOV. Although, in the conclusion to *Cunningham I*, we stated that we reversed the grant of JNOV, which seemingly included the substantive due process claim, a review of this Court's analysis makes clear that we were treating the issue before the Court, based on the circuit court's

17. All of the appellants proceeded in this regard in *Cunningham I*, but we address only Kodi's claim in the instant appeal because he is the only appellant involved at this point.

opinion, the briefs, and argument of appellant's counsel, solely as a Fourth Amendment excessive force claim.

The question now is whether appellant gets a second bite at the apple to raise this new claim in the present appeal. The case law is clear that he is not entitled to raise this issue at this point.

In *Fidelity-Baltimore National Bank & Trust Co. v. John Hancock Mutual Life Insurance Co.*, 217 Md. 367, 371-72, 142 A.2d 796 (1958), the Supreme Court of Maryland explained:

> It is the well-established law of this state that litigants cannot try their cases piecemeal. They cannot . . . on [a] subsequent appeal of the same case raise any question that could have been presented in the previous appeal on the then state of the record, as it existed in the court of original jurisdiction. If this were not so, any party to a suit could institute as many successive appeals as the fiction of his imagination could produce new reasons to assign as to why his side of the case should prevail, and the litigation would never terminate. Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as aforesaid, such a ruling becomes the 'law of the case' and is binding on the litigants and courts alike, unless changed or modified

> after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.

Accord Schisler v. State, 177 Md. App. 731, 745, 938 A.2d 57 (2007) (law of the case doctrine prevents litigants from raising new claims after appeal if claims arise from facts in existence before appeal).

The viability of Kodi's § 1983 claim based on Fourteenth Amendment substantive due process rights was available to raise in *Cunningham I*. Appellant, however, not only failed to raise it there, he expressly stated that the issue was not before us. Allowing appellant to raise this new issue at this time would be inconsistent with the policy of preventing piecemeal appeals and providing finality to litigants. The argument that Kodi had a valid Fourteenth Amendment substantive due process claim, which the circuit court improperly dismissed, is not properly before us.

Although that disposes of the issue, we note that, even now, appellant is not vigorously pursuing a substantive due process claim on the merits. In response to appellees' argument that Corporal Ruby was entitled to qualified immunity because there was no clearly established law that his conduct violated Kodi's substantive due process rights, appellant responded with one sentence in his reply brief. He argued that the viability of appellees' claim of qualified immunity was not before the circuit court on remand. When asked about the issue at the recent oral

argument in this Court, counsel for appellant stated "that ship has sailed," arguing that this Court addressed this issue in *Cunningham I*. As indicated, we did not address a Fourteenth Amendment substantive due process claim or the application of qualified immunity to such a claim in that appeal.[18]

Consequently, appellant has not shown that, at the time of the stand-off, there was clearly established law that Corporal Ruby's conduct violated Kodi's substantive due process right as a bystander. Appellant points to no precedent from the United States Supreme Court, Fourth Circuit Court of Appeals, Maryland Supreme Court, or this Court establishing that a police officer, who unintentionally shoots and injures an innocent bystander under circumstances similar to this case violates the bystander's Fourteenth Amendment substantive due process rights.[19] Thus, even if the issue was properly

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18. Counsel's statement during oral argument in this Court is contrary to that made by counsel for Kodi to the circuit court on remand, during which, as indicated, he said that the limited issue before us in *Cunningham I* was whether the circuit court erred in finding that Corporal Ruby was entitled to qualified immunity under the Fourth Amendment. Counsel argued on remand that the issue of qualified immunity under the Fourteenth Amendment had been waived because appellees had not previously raised this issue. Counsel did not address the merits of whether Corporal Ruby was entitled to qualified immunity on this claim.

19. Appellee stated at oral argument that there was only one case that addresses a substantive due process based on an accidental shooting, i.e. *Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097, 112 S. Ct. 1175, 117 L. Ed. 2d 420 (1992). In that case, the court stated that an innocent bystander

before us, we would conclude that appellant has not established grounds for reversing the circuit court's ruling dismissing the substantive due process claim. *See Selective Way Ins. Co. v. Fireman's Fund Ins. Co.*, ___ Md. App. ___, ___, No. 753, Sept. Term, 2021, 2023 Md. App. LEXIS 82, slip op. at 50 (filed Feb. 2, 2023) (appellant must adequately brief arguments in support of his position and this Court will not seek out law to sustain that position); *HNS Dev., LLC v. People's Couns. for Balt. Cnty.*, 425 Md. 436, 458, 42 A.3d 12 (2012) ("A necessary part of any argument are case, statutory, and/or constitutional authorities to support it."); *Klauenberg v. State*, 355 Md. 528, 552, 735 A.2d 1061 (1999) (Maryland appellate courts have made clear that "arguments not presented in a brief or not presented with particularity will not be considered on appeal."). *Accord Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 933 (8th Cir. 2016) (affirming summary judgment on plaintiff's excessive force claim where plaintiff "cite[d] no authority showing that the agents violated its clearly established rights"); *Loftus*

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injured by the police **may** have a substantive due process claim "in appropriate circumstances." *Id.* at 281. It stated that it is **possible** to think of accidental shootings by police as so reckless as to shock the conscience, such as "shooting into a crowd at close range." *Id.* at 282. Appellant pointed to that language in oral argument in this Court. In *Rucker*, however, the court ultimately held that that the police action, in accidently shooting and killing Rucker, an innocent bystander, while engaged in a high-speed chase, did not rise to the level of a Fourteenth Amendment substantive due process claim. *Id.* at 281. A case holding that there is no substantive due process claim is a far cry from clearly established law showing what constitutes a substantive due process violation or that the conduct here would amount to such a violation.

v. Clark-Moore, 690 F.3d 1200, 1206 (11th Cir. 2012) (in § 1983 action, affirming dismissal of plaintiff's due process claim where plaintiff "cite[d] no decision of our Court, the Supreme Court, or the Florida Supreme Court to support his argument that [state agent's] conduct violated his and his children's clearly established constitutional rights"); *Porter v. Jameson*, 889 F. Supp. 1484, 1493 (M.D. Ala. 1995) (where plaintiffs' arguments to defeat defendant's qualified immunity defense were "anemic and ineffective," and did not provide authority in the controlling jurisdiction that defendant's conduct violated their substantive due process rights, plaintiffs did not carry their burden of showing that conduct violated clearly established law).

Kodi suffered a tragedy in August 2016, and he has established a right to recover from appellees on his battery claim, which is not challenged on appeal. He has not, however, sufficiently pursued a Fourteenth Amendment substantive due process claim or shown error in the circuit court's ruling. Accordingly, we affirm the circuit court's dismissal of Kodi's § 1983 claim.[20]

III.

Right to Remittitur

Appellant contends that appellees waived their right to remittitur on the § 1983 claim on grounds that the verdict was excessive because they did not argue

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20. As indicated, appellant says that the arguments regarding the § 1983 claim apply equally to the state constitutional claims, and our analysis, therefore, does as well.

that at the remand hearing. We need not address that claim because we are upholding the dismissal of Kodi's § 1983 claim and that leaves the circuit court's judgment ordering Baltimore County to remit payment to appellant in the amount of $400,000, plus post-judgment interest of $160,000. No issues have been raised with respect to that judgment, so we turn to the final issue of recusal.

IV.

Motion to Recuse

Appellant's final contention is that the circuit court "erred in hearing the [m]otion to [r]ecuse and in not recusing himself." He contends that the judge's statements and actions during trial, after trial, and in his rulings show that the judge "has a personal animus to Kodi's claims," and that his "personal beliefs unmistakably cloud[ed] his legal conclusions." He asserts that the judge's behavior in this case has been "outrageous, unprovoked, unprofessional, and indicates bias" towards Kodi's claims. Appellant argues that the judge should be recused from continuing to preside over this case if it is remanded for further proceedings.

Appellees contend that the judge's rulings were legally correct, and appellant has failed to show personal misconduct. They maintain that the judge did not abuse his discretion in denying the motion to recuse.

A judge generally "is required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant

facts would question the judge's impartiality." *Matter of Russell*, 464 Md. 390, 402, 211 A.3d 426 (2019). A party attempting to demonstrate that a judge is not impartial faces a high burden because there is a strong presumption in Maryland "'that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified.'" *Nathans Assocs. v. Mayor & Cnty. Council of Ocean City*, 239 Md. App. 638, 659-60, 198 A.3d 863 (2018) (quoting *Jefferson-El v. State*, 330 Md. 99, 107, 622 A.2d 737 (1993), *cert. denied*, 463 Md. 539, 206 A.3d 322 (2019)). We have explained:

> To overcome the presumption of impartiality, the party requesting recusal must prove that the trial judge has "a personal bias or prejudice" concerning him or "personal knowledge of disputed evidentiary facts concerning the proceedings." *Boyd* [*v. State*, 321 Md. 69, 80, 581 A.2d 1 (1990)]. Only bias, prejudice, or knowledge derived from an extrajudicial source is "personal." Where knowledge is acquired in a judicial setting, or an opinion arguably expressing bias is formed on the basis of information "acquired from evidence presented in the course of judicial proceedings before him," neither that knowledge nor that opinion qualifies as "personal." *Boyd*, 321 Md. at 77 (quoting *Craven v. U.S.*, 22 F.2d 605, 607-08 (1st Cir. 1927); [*Doering v. Fader*, 316 Md. 351, 356, 558 A.2d 733 (1989)].

Nathans Assocs., 239 Md. App. at 659 (quoting *Jefferson-El*, 330 Md. at 107). When bias, prejudice, or lack of impartiality is alleged, this Court reviews a trial judge's decision on a motion to recuse for abuse of discretion. *See Scott v. State*, 175 Md. App. 130, 150, 926 A.2d 792 (2007); *Surratt v. Prince George's County*, 320 Md. 439, 465, 578 A.2d 745 (1990).

Typically, the question of recusal "is decided, in the first instance, by the judge whose recusal is sought." *Surratt*, 320 Md. at 464. *Accord Doering*, 316 Md. at 358. There are, however, "some circumstances in which the judge whose impartiality is questioned should not himself or herself decide the merits of a recusal request." *Surratt*, 320 Md. at 465. When the "asserted basis for recusal is personal conduct of the trial judge that generates issues about his or her personal misconduct, then the trial judge must permit another judge to decide the motion for recusal." *Id.* at 466. "[T]he recusal motion must set forth facts in reasonable detail sufficient to show the purported personal misconduct; mere conclusions as to lack of impartiality will not suffice. And it should be supported by affidavit or testimony or both." *Id.* at 467. This type of situation is rare. *Id.* at 466.

Here, after reviewing the record, including the judge's detailed discussion addressing appellant's allegations and the reason why he denied the motion to recuse himself from the proceedings on remand, we conclude that the trial judge did not abuse his discretion in considering and denying the motion to recuse. The judge found that

appellant had not set forth information to show personal misconduct, explained the rationale for some of his statements, noted that, on some occasions, the "motion fail[ed] to specifically identify transcript passages to support [the] allegations," and pointed to statements in the trial transcripts where defense counsel disagreed with appellant's allegations. With respect to allegations that the judge yelled at appellant's counsel, the judge said: "If I've raised my voice, it was to be heard. Let's face it, this is a big courtroom, but I will be mindful of that." Viewing the record in light of the well-established case law, we conclude that the trial judge did not abuse his discretion is denying the motion to recuse.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX C — MEMORANDUM OPINION, *DORMEUS, ET AL. V. BALTIMORE COUNTY,* NO. 03-C-16-009435, MARYLAND CIRCUIT COURT, BALTIMORE COUNTY. FILED APRIL 26, 2022

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

Case No. 03-C-16-009435

RHANDA L. DORMEUS, *et al.*,

Plaintiffs,

v.

BALTIMORE COUNTY, *et al.*,

Defendants.

Filed April 26, 2022

MEMORANDUM OPINION

I. Factual background

On August 1, 2016, two Baltimore County police officers lawfully entered the apartment of Korryn Gaines attempting to serve arrest warrants on her and Kareem Courtney. When they entered the apartment, Ms. Gaines, who had been alerted to their presence and stated purpose of warrant service, was sitting on the living room floor holding a pistol grip shotgun. The officers, perceiving a threat, immediately retreated from the apartment,

established a perimeter, and called for assistance. Members of the Baltimore County Police Tactical Unit responded, secured the area, and attempted communication with Ms. Gaines, which led to a six-hour standoff between Ms. Gaines and law enforcement. Kareem Courtney, Ms. Gaines' fiancé, and Karsyn Courtney, their minor daughter, were present when the police first entered the apartment. During the standoff, Mr. Courtney voluntarily left the apartment with the minor child Karsyn. Ms. Gaines remained in the apartment with her 5-year-old son, Kodi Gaines.

Corporal ("Cpl.") Royce Ruby, who was part of the tactical team, which responded, testified that after hours of requests for Ms. Gaines to put down the shotgun, she moved from plain sight in the living room to a place of cover in the kitchen. Partially obscured by a kitchen wall, Ms. Gaines raised her shotgun to firing position. Cpl. Ruby further testified that Ms. Gaines was aiming toward the open apartment door leading to the common hallway where he and other police officers were stationed. After Ms. Gaines did not respond to the instructions to lower her weapon, Cpl. Ruby fired a shot at Ms. Gaines. That first shot, which passed through a wall, struck Ms. Gaines. A small bullet fragment from that first shot struck Kodi Gaines on his cheek. When the police entered the apartment after the first shot, Cpl. Ruby testified that Ms. Gaines was attempting to shoot the shotgun at which time Cpl. Ruby shot Ms. Gaines again. It is undisputed that the second shot taken by Cpl. Ruby struck Ms. Gaines and a ricochet from that shot, struck Kodi Gaines in his elbow. Ms. Gaines died at the scene. Kodi was immediately

removed and taken to the hospital where his wounds were treated.

The Medical Examiner, Pamela Southall, MD, testified that after the first shot Ms. Gaines could have lived "seconds to minutes" but that injury would have been "rapidly fatal."

As a result of the death of Ms. Gaines, multiple Plaintiffs filed suit in the Circuit Court for Baltimore County. The Plaintiffs: Rhanda Dormeus (mother of Ms. Gaines), individually and as personal representative of Ms. Gaines' estate, Mr. Courtney, on behalf of Ms. Gaines' minor child, Karsyn Courtney, Corey Cunningham (father of Kodi Gaines), on behalf of Ms. Gaines' minor child, Kodi Gaines, and Ryan Gaines (father of Ms. Gaines), sued Baltimore County, Cpl. Ruby, and other law enforcement officers on numerous grounds related to Ms. Gaines' death.

II. Procedural History.

A. Trial and verdict

The trial proceeded on the Plaintiffs' Third Amended Complaint listing the following claims against the various Defendants:

> Count I - Wrongful Death pursuant to Md. Code Ann. Cts. & Jud. Pro. § 3-904(a) (Against all Defendants)
>
> Count II - Survival Action (Against all Defendants)

Count III - Violation of Maryland Declaration of Rights, Articles 10, 24, 26 and 40 (Against all Defendants)

Count IV - Maryland Constitution-Deprivation of Medical Treatment (Against Baltimore County and Cpl. Royce Ruby)

Count V - Violation of Maryland Constitution-Bystander Liability (Against all Defendants)[1]

Count VI - Violation of Maryland Constitution-Illegal Entry (Against Officers Griffin and Dowell)[2]

Count VII - Civil Rights Claim pursuant to 42 U.S.C. § 1983 alleging search of Ms. Gaines' apartment, excessive force as to Kodi Gaines and Korryn Gaines, and failing to provide medical attention (Against all Defendants personally and individually).[3]

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1. The Circuit Court dismissed the bystander liability (Count V) because, after dismissing the County as a Defendant, Cpl. Ruby was the sole Defendant, and therefore, there was "no other bystander potentially liable." Appellants do not challenge this finding on appeal. *Cunningham* footnote at 47.

2. "[T]he circuit court properly . . .granted summary judgment on the claims based on the initial entry (Count VI. . .)." *Cunningham* at 679.

3. As to Count VII, the Court of Special Appeals rules that the Circuit Court "properly granted summary judgment on the

Count VIII - Peace Officer Liability pursuant 42 U.S.C. § 1983 (Against Cpl. Royce Ruby)

Count IX - Municipal Liability pursuant to 42 U.S.C. § 1983 (Against Cpl. Royce Ruby and Baltimore County) (*Monell* claim).[4]

Count X - Excessive Force and Violation of Freedom of Speech in Violation of the First, Fourth and Fourteenth Amendments (Against all Defendants personally and individually)

Count XI - Battery (Against Cpl. Royce Ruby)

Count XII - Negligence (Kodi Gaines against All Defendants)

On January 29, 2018, the Circuit Court granted the Motion as it pertained to all Defendants for Counts IV, VI and IX, and it dismissed the Counts against all Defendants, except Cpl. Ruby and Baltimore County, for Counts I, II, III, V, VII, X, and XII. The Motion for Summary Judgment was denied as to Counts

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claims based on the initial entry (Count VI and paragraph 88 of Count VII)." *Cunningham* at 679.

4. As to Count IX, the Court of Special Appeals affirmed "the grant of JNOV on the § 1983 claims against the County." However, "Because the circuit court did not specifically address [State Constitutions claims], we vacate the JNOV of the state claims against the County and remand for the circuit court to consider and make any necessary factual findings." *Cunningham* at 695.

VIII and XI, brought against only Cpl. Ruby. The Court of Special Appeals found that the Circuit Court properly granted summary judgment on Count VI and paragraph 88 of Count VII. *Cunningham* at 679.

B. Verdict

On February 16, 2018, after a three-week trial, a jury returned a verdict in favor of all Plaintiffs awarding more than $38 million in combined economic and non-economic damages. The first question of the verdict sheet was: "Do you find by a preponderance of the evidence that the first shot taken by Cpl. Royce Ruby on August 1, 2016, was objectively reasonable?" to which the jury unanimously found, "No," thus finding in favor of all Plaintiffs. Thereafter, on the verdict sheet, the jury entered monetary awards for each Plaintiff. The jury was instructed on punitive damages and was instructed that in order to award punitive damages they had "to find that Cpl. Ruby acted with actual malice when he first shot Ms. Gaines, the Plaintiff must prove actual malice by clear and convincing, evidence." (Jury instruction on Punitive damages). The jury found no punitive damages under the Maryland Declaration of Rights (Jury question 12),[5] nor under 42 USC 1983 (Jury question 13). Failure to

5. Count III of the Third Amended Complaint alleged a "Violation of Maryland Declaration of Rights Article 10,24, 26 and 40 (Against all Defendants)". The Court of Special Appeals pointed out that 10 and 40 "establish certain freedom of speech rights, Article 24, establishes due process rights, and Article 26 addresses warrantless searches and seizures." *See footnote* 16, *Cunningham* at 656.

find malice and the failure to award punitive damages is an important factor in considering whether Cpl. Ruby is personally liable for damages, should the verdict remain the same.

The Defendants timely filed a Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial, Motion for Remittitur and Motion to Revise the Judgment. On February 14, 2019, the Circuit Court issued a 75-page Memorandum Opinion, along with an Order, granting Defendants' Motion for Judgment Notwithstanding the Verdict (JNOV). In the alternative, the Court granted the Defendants' Motion for a New Trial citing a defective verdict. Finally, the trial court found that the non-economic damages awarded were excessive and shocked the conscience, and that but for granting JNOV, or, in the alternative, the Motion for New Trial, the Circuit Court would have remitted the jury's award. Having made those findings, the Circuit Court did not address any further arguments in the Motion to Revise Judgment.

C. Appeal

The Plaintiffs appealed and, in a reported opinion, the Court of Special Appeals affirmed in part, reversed/vacated in part, and remanded the matter for further proceedings, *Cunningham v. Baltimore County,* 246 Md. App. 630 (2018). In making its findings, the Court of Special Appeals acknowledges that Officer Ruby's first shot is the only shot at issue. *Cunningham* at 653.

The Court of Special Appeals denied the Appellant's Request for Reconsideration on August 26, 2020.

Thereafter, the Court of Appeals denied the Appellant's Petition for Writ of Certiorari. *Cunningham v. Baltimore County,* 471 Md. 268 (2020).

The Conclusion of the appellate opinion stated:

> With respect to the post-trial motions, we hold that the court erred in granting the motion for JNOV, with the exception of its ruling dismissing the § 1983 claims against the County. Therefore, we: (1) reverse the grant of JNOV with respect to the claims against Cpl. Ruby; (2) affirm the grant of JNOV with respect to the § 1983 claims against the County; and (3) we vacate the ruling granting JNOV to the County on the other claims and remand for **further proceedings** [emphasis added]. We also reverse the court's ruling granting appellees' motion to set aside the funeral expenses award. *Cunningham* at 706.
>
> With respect to the Court's conditional ruling granting the Motion for New Trial based on an irreconcilably inconsistent verdict, we conclude that the Court abused its discretion in that regard. Therefore, we reverse that ruling.
>
> We remand to the Circuit Court for consideration of remaining issues relating to damages. Those issues include, but are not limited to, the damages cap and remittitur.

Cunningham at 706.

The Appellate Court remanded the matter to the Circuit Court, "for consideration of remaining issues relating to damages. Those issues include, but are not limited to, the damages cap and remittitur." *Cunningham,* at 706; "Plaintiff's State Constitutional claims, if any, against the Defendant Baltimore County." *Cunningham,* at 695; " . . .the applicability of the damages cap, and if it determines that the verdict remains as it is, an amount that the court found to be excessive, it can address the issue whether a remittitur or new trial is warranted." *Cunningham,* at 704; and "the economic and/or non-economic damages, if any, suffered by Rhanda Dormeus, Ryan Gaines, Karsyn Courtney, and the estate of Korryn Gaines." *Cunningham* at 705.

D. Remand

Following the remand, on June 30, 2021, the Court had an on the record scheduling conference with all Parties. On July 14, 2021, by written correspondence, the Circuit Court invited the Parties to submit and identify any other issues they believed the Circuit Court is required to consider based on the remand.

On August 31, 2021, the Defendants filed a Motion to Clarify Judgment and Motion for Other Appropriate Relief, along with a supporting Memorandum ("Defendants' Motion"). On September 15, 2021, Kodi Gaines, through counsel, filed a Response to the Circuit Court's July 14, 2021, correspondence inviting comments on pending issues ("Plaintiffs' Response"). Thereafter, the Circuit Court set the matter for a hearing for November 19, 2021.

Pending the November 19th hearing, Rhanda Dormeus, individually and as personal representative of Ms. Gaines' estate, Mr. Courtney, on behalf of minor child, Karsyn Courtney, and Ryan Gaines all reached a settlement with the Defendants.[6] Corey Cunningham, on behalf of minor child, Kodi Gaines, (hereafter "Plaintiff" or "Kodi") remained the sole Plaintiff in the matter. Because Kodi is the only remaining Plaintiff, this Court will limit the discussion to his claims.

The jury unanimously found that: "the Defendants violated Kodi Gaines' rights under the Maryland Declaration of Rights" (Jury question 5); "that the Defendants violated Kodi Gaines' rights under 42 USC 1983" (Jury question 6); and, "the Defendants committed a battery on Kodi Gaines" (Jury question 7). As to Kodi Gaines, the jury awarded $23,542.29 for past medical expenses and $32,850,000.00 for non-economic damages. The jury was not asked to, nor did the jury specify, under which count/s/ the award was granted. As stated previously, the jury also found no punitive damages under the Maryland Declaration of Rights, nor under 42 USC 1983 (hereafter "§ 1983").

At the hearing on November 19, 2021, both the Plaintiff's counsel and Defendants' counsel presented

6. On remand, the Court of Special Appeals directed the Circuit Court to consider "the economic and/or non-economic damages, if any, suffered by Rhanda Dormeus, Ryan Gaines, Karsyn Courtney, and the estate of Korryn Gaines." *Cunningham,* at 705. Because those claims have been resolved, the Appellate Court's directive to consider those matters is moot.

arguments. The Court held the matters sub curia to consider Defendants' Motion and Plaintiff's Response, along with the arguments of counsel and the cases cited in their papers. Following the hearing, presumably to further clarify his argument, on December 16, 2021, counsel for Kodi Gaines filed Response to Questions Raised by the Court During Oral Argument on November 19, 2021. On December 1, 2021, the Defendants filed a Motion and Memorandum of Law in Response to Plaintiff's "November 21, 2021, Correspondence to the Court." That Motion objected to the Plaintiff's December 1, 2021 Motion citing Rule 2-311 explaining that, absent leave of Court, sur-replies are not permitted. The Plaintiff did not seek leave of Court to file such a Motion. However, the arguments contained in the Response to Questions Raised by the Court During Oral Argument are repetitive of that which has been previously filed or presented in their papers and during the November 19, 2021, oral argument.

III. Discussion

The Court of Special Appeals remanded the matter to the Circuit Court:

a. "for consideration of remaining issues relating to damages. Those issues include, **but are not limited to** [emphasis added], the damages cap and remittitur." *Cunningham* at 706;

b. "Plaintiff's State Constitutional claims, if any, against the Defendant Baltimore County." *Cunningham* at 695;

c. .“ . . .the applicability of the damages cap, and **if it determines that the verdict remains as it is** [emphasis added], an amount that the court found to be excessive, it can address the issue whether a remittitur or new trial is warranted.” *Cunningham* at 704.

The Court of Special Appeals summarized its conclusions stating:

> Given the numerous rulings addressed, we will briefly summarize our resolution of the issues presented. Initially, we hold that the circuit court properly granted the motion for summary judgment with respect to the claims regarding the initial entry by Officer Dowell and Officer Griffin. Therefore, we affirm the court’s ruling in this regard.
>
> With respect to the post-trial motions, we hold that the court erred in granting the motion for JNOV, with the exception of its ruling dismissing the § 1983 claims against the County. Therefore, we: (1) reverse the grant of JNOV with respect to the claims against Cpl. Ruby; (2) affirm the grant of JNOV with respect to the § 1983 claims against the County; and (3) we vacate the ruling granting JNOV to the County on the other claims and remand for further proceedings. We also reverse the court’s ruling granting appellees’ motion to set aside the funeral expenses award.

> With respect to the court's conditional ruling granting the Motion for New Trial based on an irreconcilably inconsistent verdict, we conclude that the court abused its discretion in that regard. Therefore, we reverse that ruling.
>
> We remand to the circuit court for consideration of remaining issues relating to damages. Those issues include, but are not limited to, the damages cap and remittitur. *Cunningham* at 706.

Md. Ann., Cts. & Jud. Proc, § 5-303, often referred to as the Local Government Tort Claims Act (LGTCA) sets forth liability limits for tortious acts or omissions perpetrated by government employees, during the course of their employment. This limitation is often referred to as "damages cap."

Both Parties agree that any monetary award to the Plaintiff under Maryland Declaration of Rights and/or the Battery counts is subject to damages cap under the LGTCA. The Parties also agree that an award under § 1983 is not subject to the damages cap.

The Court of Special Appeals "reversed the grant of JNOV with respect to the claims against Cpl. Ruby." *Cunningham* at 706. The appellate court's reversal of the trial court's granting JNOV was as to all Plaintiffs. In his papers, and at oral argument, Kodi maintained that when the appellate reversed the grant of JNOV, it reinstated all claims plead by Kodi which included that, "the Defendants violated Kodi Gaines' rights under

the Maryland Declaration of Rights" (Jury question 5); "that the Defendants violated Kodi Gaines' rights under 42 USC 1983" (Jury question 6); and, "the Defendants committed a battery on Kodi Gaines" (Jury question 7).

The Plaintiff alleges that under both a Fourth Amendment analysis and Fourteenth Amendment analysis of the § 1983 claim the juries monetary award to Kodi is reinstated and is not subject to limitations set forth in Md. Ann., Cts. & Jud. Proc, § 5-303.

Speaking for the Defendants, Mr. Marrow argued that reversing the Circuit Court's granting JNOV, "The court [Court of Special Appeals] left open, as in any case with remitter is how the ultimate judgment is to be formed." The defense argued, "that the judgment with regard to 42 USC § 1983, and under the Maryland Declaration of Rights has to be remitted as a matter of law." (Oral argument 11-19-21).

A. Revisory Power

In pertinent part, Maryland Rule 2-535 provides that: "On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment. . . " As previously noted, the Defendant timely filed post-trial motions including a Motion to Revise Judgment. Because the Circuit Court granted JNOV based on qualified immunity, and in the alternative granted a new trial, the Circuit Court did not need to, nor did it address, the Defendants' request to revise judgment. The Court of Special Appeals remanded the

matter to the Circuit Court "for consideration of remaining issues relating to damages. Those issues include, **but are not limited to** [emphasis added], the damages cap and remittitur." *Cunningham* at 706. That court also directed that the circuit court to consider; ". . .the applicability of the damages cap, and **if it determines that the verdict remains as it is** [emphasis added],. . ." *Cunningham* at 704. The Court of Special Appeals clearly indicated that the Circuit Court could consider whether the verdict should remain as is. While a trial court must give due regard for a jury's verdict, a court may revise a jury verdict on legal issues. *Turner v. Hastings,* 432 Md. 499, 512, 69 A.3d 1015, 1022 (2013) ("A judge has substantially broader discretion when revising a non-jury verdict or when revising a jury verdict based purely on a legal issue. . ."). As noted, the Defendants argue "that the judgment with regard to 42 USC § 1983, and under the Maryland Declaration of Rights has to be remitted as a matter of law." (Defendant Motion at 23).

B. 42 USC § 1983 Claims.

1. Kodi's Fourth Amendment claim.

Much of the initial discussion at oral argument on remand focused on footnote 39 of the appellate opinion, which states:

> Our analysis of the excessive force claim is confined to Ms. Gaines because, as noted *supra,* Fourth Amendment rights are personal and cannot be vicariously asserted by the family. *Alderman v. United States,* 394 U.S. 165, 172,

> 89 S.Ct. 961, 22 L.Ed.2d 176, *reh'g denied,* 394 U.S. 939, 89 S.Ct. 1177, 22 L.Ed.2d 475 (1969). With respect to Kodi, appellees correctly note that he was an innocent bystander who was not "seized" within the meaning of the Fourth Amendment. *Schultz v. Braga,* 455 F.3d 470, 480-81 (4th Cir. 2006).

Cunningham at 690.

It is undisputed that Ms. Gaines, and not Kodi, was the subject of the alleged illegal seizure by Cpl. Ruby. "[O]ne is "seized" within the Fourth Amendment's meaning only when one is the intended object of a physical restraint by an agent of the state." *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989).

In *Moreland v. Las Vegas Metro. Police Dep't.,* 159 F.3d 365, 369 (1998), the Court explained. "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted" (quoting *Alderman v. United States* 394 U.S. 165 at 174). At oral argument, the Circuit Court posed the question to each Party: "Are Fourth Amendment rights personal and cannot be vicariously asserted by a family member?"

The Defendant responded that Kodi could not assert Ms. Gaines' Fourth Amendment Rights and agreed "that the Fourth Amendment is a personal right, and it cannot be one that Kodi can proceed under." However, the Plaintiff emphasized that the Court of Special Appeals

did not specifically address the issue of whether Kodi had a Fourth Amendment claim independent of Ms. Gaines. The Plaintiff surmises that the court [Court of Special Appeals] "could have found that there is an invited error, that there is waiver, was not preserved, so it is not before them to make the distinctions between the Fourth and Fourteenth Amendment." (Oral argument 11-19-21). The Plaintiff further argued that "Defendants are not permitted, based on the Opinion of the Court of Special Appeals, to argue that Kodi Gaines has no such [§ 1983] claim. Plaintiff's Response, at 6.

The Plaintiff maintains that he has § 1983 claims under both a Fourth Amendment analysis and a Fourteenth Amendment analysis. He asserts that the Court of Special Appeals reinstated his § 1983 claim under the Fourth Amendment. He suggests, without authority, that although the Court of Special Appeals did not specifically address it, they could have found the Defendants invited error by incorrectly arguing that Kodi could only proceed under the Fourth Amendment. "Defendants made an incorrect legal argument regarding the Fourth and Fourteenth Amendments to this Court, which this Court, over Plaintiff's objection, accepted and, as such, Defendants invited any error regarding the Fourth and Fourteenth Amendments." (Plaintiff's Response at 13, (*footnote omitted*)).

Kodi maintains that the Defendants' argument is incorrect because they limited their argument to the Fourth Amendment, when, according to the Plaintiff, he also has a Fourteenth Amendment claim. In support

thereof, the Plaintiff relies heavily on statements made by the Defendants at the Motion for Summary Judgment the day before trial. Mr. Ruckle, for the Defendants, stated:

> The courts have said the excessive force claims are not substantive due process. They are the objectively reasonable analysis not substantive due process analysis which requires you actually get into the state of mind of the **actor** [emphasis added]. . . . So, we have to look at Kodi's actions with the objective reasonableness.

(Plaintiff's Response at 13).

The Plaintiff emphasizes that the Defendant invited error by making an incorrect legal argument regarding the Fourth and Fourteenth Amendments, when the Defendant stated: "So we have to look at **Kodi's** [emphasis added] actions with the objective reasonableness." (Plaintiff's Response, *Id.*).

The Plaintiff's argument is without support. Examining the Defendants' Motion for Summary Judgment in context, it is clear that the Defendants argument concerning excessive force claims, are not evaluated from Kodi's viewpoint but rather the objective reasonable standard from the perspective of the Cpl. Ruby.

> As in other Fourth Amendment contexts, however, the "'reasonableness'" inquiry in an excessive force case is an objective one: the

> question is whether the officers' actions are "'objectively reasonable'" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

See Graham v. Connor, Id. 397. (Citing *Scott v. United States,* 436 U.S. 128, 137-139, 98 S.Ct. 1717, 1723-1724, 56 L.Ed.2d 168 (1978); see also *Terry v. Ohio, supra,* 392 U.S., at 21, 88 S.Ct., at 1879).

In addressing the Motion for Summary Judgment, the trial court stated:

> So, the Plaintiffs' opposition to the Defendants' motion for summary judgment suggesting that the Defendants' motion should fail because it doesn't address the Fourteenth Amendment is not persuasive. Clearly the arguments in this case are going to be—dealt with the—the Fourth Amendment, the reasonableness of what was done by Corporal Ruby. So, with regard to the argument that the Plaintiff—the Defendants have not addressed the Fourteenth Amendment issue, this Court does not find that persuasive. Trial Tr. 3:23-5:5 (Jan. 29, 2018).

Plaintiff's Response *footnote* 6.

This court finds that in relying on *Graham v. Connor* the Defendants have not invited error when they argued

excessive force claims are properly analyzed under the Fourth Amendment's objective reasonableness standard.

Mr. Ravenell also argued that Kodi has a Fourth Amendment claim because the Defendant waived the Fourth Amendment analysis since "it was not raised in the lower court and was not part of your [trial court's] opinion, so it was not before the Court of Special Appeals to resolve the Fourteenth or Fourth Amendment issue." (Oral argument 11-19-21). He went on to state that, "What they [Court of Special Appeals] had to make was the determination of whether you were incorrect by granting a JNOV based on Fourth Amendment." *Id.*

That assertion is incorrect. On appeal, the collective appellants "contend[ed] that the circuit court erred in granting JNOV on the basis of qualified immunity *Cunningham* at 687. The Court of Special Appeals, "reverse[ed] the court's grant of JNOV in this regard [qualified immunity]." *Cunningham* at 694. It was unnecessary for the appellate court to specifically address whether Kodi had a Fourth Amendment claim because, as shall be explained further, as a matter of law, he did not.

Citing *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the defense argued that the judgment with regard to § 1983, and under the Maryland Declaration of Rights, must be remitted as a matter of law. The Plaintiff's counter argument is that the Court of Special Appeals did not eliminate Kodi Gaines' § 1983 claim in footnote 39, explaining that,

"it would ***not*** have done so ***in a footnote*** of a 76-page opinion" (Plaintiff's Response at 6).

The Plaintiff further argued that footnote 39 was silent on whether the Defendant waived Fourth Amendment versus Fourteenth Amendment issues. (Plaintiff's Response at 11). At oral argument, counsel for the Plaintiff, stated: "Kodi had properly pled and proceeded on his § 1983 claim regarding bystander liability pursuant to the Fourteenth Amendment, **even if he could not bring it pursuant to the Fourth Amendment** [Emphasis added]." Indeed, when the court asked: "If you concede that Kodi cannot proceed under the Fourth Amendment, why would you plead the Fourth Amendment? To which the counsel responded: "We did it to cover our bases by putting the Fourth and the Fourteen [sic] but we made sure we plead the Fourteenth Amendment." (Oral argument 11-19-21).

The Plaintiff correctly stated that footnote 39 was silent as to any claim Kodi might have under the Fourth Amendment or Fourteenth Amendment. Clearly, there would be no need for the appellate court to comment on Kodi's Fourth Amendment right, since under the circumstances of the facts of this case, he has no such right. As pointed out by the appellate court, the discussion concerning excessive force was limited to Ms. Gaines because "Fourth Amendment rights are personal and cannot be vicariously asserted by the family." *Cunningham* footnote 39.

Never-the-less, the Plaintiff surmises that appellate court could have reinstated Kodi's Fourth Amendment

claims because the Defendant waived the Fourth Amendment argument. The record does not support that argument. The Defendants did not waive the Fourth Amendment argument and in fact the appellate court did consider the Fourth Amendment issue but limited that discussion to the only Claimant who could assert that claim, to wit; the estate of Ms. Gaines. The failure by the Court of Special Appeals to specifically address whether Kodi and other Plaintiffs had Fourth Amendment claims, except the estate of Ms. Gaines, is not an implicit affirmation that any of the Plaintiffs, except the estate of Ms. Gaines, had such claims. Kodi seems to interpret the Court of Special Appeals' failure to comment on whether he has a Fourth Amendment claim, as a clear indication that he has such a claim. The Plaintiff offers no support for that assertion, and tacitly concedes that Kodi has no such Fourth Amendment claim when he stated: "even if he could not bring it pursuant to the Fourth Amendment." *Id.*

Throughout these proceedings the Defendants have asserted that the seminal case concerning what constitutional standard governing a free citizen's claim that law enforcement officials used excessive force is *Graham v. Connor supra*. Which held that "such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard." *Id.* 490 U.S. at 397. The Defendants have stressed that, as a matter of law, Kodi cannot assert a § 1983 claim under a Fourth Amendment analysis. Therefore, contrary to the Plaintiff's assertion, the Defendants have not waived their right to argue that Kodi has no Fourth Amendment claim.

The Plaintiff offers no authority in support his belief that the Court of Special Appeals could have found, ". . . that there is an invited error, that there is waiver, [or] was not preserved. . ." *Id.* Kodi concedes that he cannot vicariously asset Ms. Gaines Fourth Amendment rights. Kodi has failed to demonstrate that he has a Fourth Amendment claim independent of Ms. Gaines or her estate. Therefore, the court finds that, while the jury found that Defendants violated Kodi Gaines' rights under 42 USC 1983, as a matter of law, the jury award cannot pertain to a § 1983 Fourth Amendment claim.

2. Kodi's Fourteenth Amendment claim

Citing *Rucker v. Harford County,* 946 F.2d 278 (1991) Kodi also argued that he has Fourteenth Amendment substantive due process protections. The Defendants reiterate that an excessive force claim must be analyzed under the Fourth Amendment's "objective reasonableness" standard. However, the Defendants also argue that any such Fourteenth Amendment claim was waived before the Court of Special Appeals. Alternatively, they argue even if Kodi had a substantive due process claim the facts do not support such a claim.

Kodi suggests, without authority, that because the Defendants addressed Kodi's Fourteenth Amendment claim in their Motion to Clarify Judgment and during oral argument, that the Defendants have agreed that Kodi has such a claim. In responding for the Defendants, Mr. Marrow stated:

> [L]et me be crystal clear on this point, [Kodi's assertion of a Fourteenth Amendment claim] the Supreme Court in Graham v. Connor the seminal case on excess force said the following "This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard. (Oral argument 11-19-21).

It is clear that the Defendant contested Kodi's Fourteenth Amendment claim.

Kodi properly pled and proceeded on his § 1983 claim regarding bystander liability pursuant to the Fourteenth Amendment. *Cunningham* at 681. The Defendants briefed that issue. Appellee's (Defendants) Brief pp. 36-38.

Citing, *Harmon v. State Roads Comm'n*, 242 Md. 24, 32 (1966), the Defendants claim that the Plaintiff has waived his right to argue a substantive due process claim for failing to press those claims before the Court of Special Appeals. The Plaintiff counters asserting that since the Circuit Court did not specifically address the Fourteenth Amendment claim in its ruling, it was unnecessary for the Plaintiff to vigorously pursue the matter. The Plaintiff

also suggests that because the Defendant did not cross appeal, they have waived their right to challenge the Plaintiff's Fourteenth Amendment argument on appeal.

The Plaintiff correctly states that the Circuit Court did not address the Plaintiff's Fourteenth Amendment claim in the court's written ruling. The Circuit Court granted JNOV reasoning that Cpl. Ruby was entitled to qualified immunity. That dismissed all remaining claims by all Plaintiffs against all Defendants, thus, there was no need to separately address whether Kodi had either a Fourth Amendment or Fourteenth Amendment claim. By comparison, appellate courts often follow a similar procedure.

When appealing a trial court's decision, the Party or Parties may present multiple issues. It is not unusual for an appellate court to decline to address some issues if one issue is dispositive of the appeal. Here the Circuit Court followed the same methodology, that is, since the Circuit Court granted JNOV, based on qualified immunity, there was no need to address whether Kodi, or any other Plaintiff, had a justiciable Fourth or Fourteenth Amendment claim. For the reasons stated herein, had the Court not granted JNOV and thereafter addressed the Fourth and Fourteenth Amendment claims, the Circuit Court would have found that the Kodi did not have either a Fourth or Fourteenth amendment claim. Although the trial court did not address the Fourth and Fourteenth Amendment claims in its post-trial ruling, Defendant correctly states that they had no obligation to cross appeal on those issues.

Before the appellate court, the Defendants argued that the Circuit Court's ruling was correct and implored the Court of Special Appeals to affirm the trial court's ruling. Maryland appellate courts have held that as a general principle that "only a party aggrieved by a court's judgment may take an appeal and that one may not appeal or cross-appeal from a judgment wholly in his favor." *Offutt v. Montgomery County Bd. of Ed.* 285 Md. 557 (1979). The Defendant was not aggrieved by the Circuit Court's granting JNOV or the granting a new trial and, in fact, urged the Court of Special Appeals to affirm the Circuit Court's ruling. Thus, the Defendant was not required to file a cross appeal.

Although, the Defendants argue that Kodi does not have a Fourteenth Amendment claim, in the alternative they argue that even if he has such a claim, the facts adduced at trial do not support such a claim.

C. *Rucker v. Harford County*

The Plaintiff cites as authority, *Rucker v. Harford County,* 946 F.2d 278 (1991), to support his Fourteenth Amendment substantive due process claim. Citing *Johnson v. Baltimore Police Dep't.* 452 F. Supp. 3d. 283 (2020), the Defendants respond that *Rucker* does not confer upon Kodi's substantive due process relief. They also argue that, even if Kodi had a Fourteenth Amendment substantive due process claim, the facts adduced at trial do not support such a claim.

In *Rucker,* the police were trying to apprehend Jerry Mace who, while under the influence of PCP, stole a car and led the police on an extended motor vehicle pursuit. Mace, whose actions endangered the public throughout the chase, eventually drove into a corn field. Police officers ordered him to stop and get out of the stolen car. Thereafter, Mace accelerated from the field onto an adjacent private driveway heading toward a public road. He was again ordered to stop. When he did not, Officer Vernon and other officers shot at the tires attempting to disable the stolen vehicle. David Rucker, an innocent bystander, was struck and killed by one of the shots. Rucker's father, individually and as next friend of Rucker, filed suit alleging claims against the various Harford County police officers involved in the incident and Harford County.

The primary claim, "was that Rucker's shooting by one of the police officers involved in the chase (presumably Officer Vernon) violated his fourth amendment, via fourteenth amendment, right not to be 'unreasonably seized,' and his fourteenth amendment right to 'substantive due process.'" *Rucker* at 946 F.2d 278, 280. The court held that:

> [T]he fourth amendment provides no protection to such a bystander because under the circumstances he is not being "seized" by the police officers. We further conclude that though the due process clause provides substantive protection to such a bystander against the infliction of personal injury by police conduct sufficiently outrageous to constitute completely

> arbitrary state action, the police conduct indisputably established on this record did not violate that substantive due process right. Finally, we conclude that if there be any constitutional right in one other than a person so injured arising from their intimate familial relationship, the one alleged here could only be a derivative right which fails with failure of the primary claim.

Rucker at 279.

There is no dispute that Ms. Gaines, and not Kodi, was the intended subject of what the collective Plaintiffs asserted were violations of Ms. Gaines' Fourth and Fourteenth Amendment rights. Cpl. Ruby's first shot struck Ms. Gaines. Unfortunately, Kodi was injured when a small fragment from that bullet struck his cheek. A ricochet from Cpl. Ruby's second shot struck Kodi's elbow. In making its findings, the Court of Special Appeals acknowledged, and the Parties do not dispute, that Cpl. Ruby's first shot is the only shot at issue. *Cunningham* at 653. Nevertheless, Kodi, who was injured, was an innocent bystander and not the intended objective of Cpl. Ruby's actions. At best, Kodi's injuries could be attributed to negligence.

The Supreme Court has held that mere negligence is insufficient to support a Fourteenth Amendment substantive due process claim. *Daniels v. Williams,* 474 U.S. 327, 334, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986). In order for a claimant to sustain a Fourteenth Amendment substantive due process claim, the conduct

alleged must "amount[s] to a brutal and inhumane abuse of official power literally shocking to the conscience. . ." *Temkin v. Frederick Cty. Comm'rs,* 945 F.2d 716, 720 (4th Cir. 1991), (quoting *Hall v. Tawney,* 621 F.2d 607,613 (4th Cir. 1980)).

In 2020, the Fourth Circuit, again, had an opportunity to consider a Fourteenth Amendment due process claim in *Johnson v. Baltimore Police Dep't.* 452 F. Supp. 3d. 283 (2020). That court found that: "the Supreme Court in *Lewis* reaffirmed that only official conduct that "shocks the conscience" will give rise to a substantive due process violation." Citing County *of Sacramento v. Lewis,* 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). *Johnson* at 300.

The facts in *Johnson* might cause most law-abiding citizens to lose faith in law enforcement officials. The Defendants in *Johnson* were plainclothes Baltimore City Police officers assigned to the Violent Crime Impact Section (VCIS). The members of that unit were involved in "widespread, persistent pattern and practice of unconstitutional police conduct, including illegal stops without probable cause or reasonable suspicion, illegal pursuits and arrests, and falsification of evidence by plainclothes officers regularly employed within the BPD." *Johnson* at 290.

On April 28, 2010, Uma Burley and Brent Matthews were sitting in Burley's vehicle. Two plain clothes police officers of the VCIS, approached Burley's vehicle with guns drawn. The officers were in plain clothes, and neither

identified himself as a police officer. Believing they were about to be robbed, Burley fled in his vehicle, and sped away. The officer gave chase. The high-speed chase went through at least five stop signs. The officer did not activate their vehicles' emergency equipment. Meanwhile, Elbert Davis (driver) and Phosa Cain (passenger) were traveling in a vehicle unaware of the chase. Davis approached the four-way intersection, which was controlled by stop signs in each direction of travel. After coming to a complete stop, he entered the intersection. Burley, still traveling at a high rate of speed, ran the stop sign controlling his direction of travel, and collided into the driver's side door of Davis' vehicle. Davis was killed and Phosa Cain sustained severe physical injuries. Thereafter, one of the officers planted a quantity of illegal drugs in Burley's disabled vehicle, as a means of providing a lawful justification for the otherwise unlawful pursuit of Burley. Officers Jenkins, Guinn, Gladstone, and Willard gave false statements to the investigating officer, and Officer Jenkins also authored a false probable cause statement in support of criminal charges against Burley and Matthews.

Because of numerous complaints, in April 2015, then Baltimore City Mayor, Stephanie Rawlings-Blake, asked the United States Department of Justice ("DOJ") to investigate the BPD's policies, patterns, and practices. As a result of that investigation, in August 2016, the DOJ issued a report detailing several instances of unconstitutional BPD police practices particularly by members of the VCIS. That investigation resulted in criminal charges. On February 23, 2017, a federal grand jury indicted eight BPD officers in

connection with their illegal activities. On January 5, 2018, one of those officers, Wayne Jenkins, pleaded guilty to several offenses. Pursuant to a plea agreement Jenkins, admitted that he:

> [K]nowingly concealed, covered up[,] and falsified entries in an official Statement of Probable Cause in the District Court of Maryland for Baltimore City reflecting his actions, and actions of his fellow BPD officers, in relation to the seizure of heroin from Mr. Burley's vehicle on April 28, 2010, with the intent to impede, obstruct[,] and influence the investigation of the events which [led] to the fatal car crash on April 28, 2010, . . .

Johnson at 293.

On August 2, 2018, eight years after the high-speed chase and collision, resulting in the death of Davis and injury of Cain, the Plaintiffs filed suit against the Baltimore City Police Department and certain members of the VCIS.[7] At the time, the Third Amended Complaint was filed, Phosa Cain was deceased. In considering the Defendants' Motion to Dismiss the Complaint, the

7. In considering the various pretrial Motions to Dismiss filed by the Defendants, the Fourth Circuit addressed the Defendant's statute of limitations argument finding that: "[O]n the current record, Plaintiffs have plausibly alleged that their § 1983 claims, including their supervisory liability and *Monell* claims, did not accrue until Jenkins' indictment on February 23, 2017." *Johnson,* at 314.

Court noted two groups of Plaintiffs. Shirley Johnson, as Personal Representative of the Estates of Davis and Cain, ("Estates"). The second group, including Shirley Johnson, in her individual capacity, is comprised entirely of the adult children of Davis and Cain ("Children"). Of interest to the matter sub judice is Count I of the Third Amended Complaint, in which the Plaintiffs sought recovery of damages from specifically named police officers for violating all Plaintiffs' "Fourteenth Amendment right to due process, in violation of 42 U.S.C. § 1983." *Johnson* at 294.

That Court declined to dismiss the action filed by the Estates holding that, because it was the officers ". . .conscience-shocking conduct that caused [Davis] and Cain to suffer serious physical injury and death, in violation of the substantive due process rights the Fourteenth Amendment guarantees." *Johnson* at 299. However, the court noted that: "the Supreme Court has never extended the constitutionally protected liberty interest incorporated by the Fourteenth Amendment due process clause to encompass deprivations resulting from governmental actions affecting the family only incidentally." *Shaw v. Stroud,* 13 F.3d 791 (4th Cir. 1994), *Johnson* at 303. The court dismissed the Fourteenth Amendment substantive due process claim alleged by the Children. Thus, it is clear that Kodi cannot vicariously assert a Fourteenth Amendment substantive due process claim that the estate of his mother, Ms. Gaines, might have otherwise had.

Alternatively, it is worth noting that even if Kodi, personally, had a Fourteenth Amendment substantive due process claim, the facts elicited during the trial do not meet the shock the conscience standard. It is undisputed that Kodi's injuries were unintentional. The jury unanimously found that Cpl. Ruby committed a battery on Kodi Gaines, (Jury question 7). However, mere negligence is insufficient to support a Fourteenth Amendment substantive due process claim. *Daniels v. Williams,* 474 U.S. 327, 334, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986). "Malice is necessary to support an award of punitive damages and must arise out of tortious conduct that is intentional and not out of a tort based on negligence, even gross negligence." *Scott v. Jenkins,* 345 Md. 21, 29-34, 690 A.2d 1000 (1997). The jury was instructed on punitive damages for both the Maryland Declaration of Right claim (Jury question 12) and the § 1983 claim (Jury question 13). The jury was instructed that in order to award punitive damages, they had "to find that Cpl. Ruby acted with actual malice when he first shot Ms. Gaines, the Plaintiff must prove actual malice by clear and convincing, evidence." (Jury instruction on Punitive damages). Because the Plaintiff failed to prove that Cpl. Ruby acted with actual malice, the jury unanimously declined to award punitive damages. Implicit in the jury's verdict to decline to award punitive damages is a finding that Cpl. Ruby's conduct did not constitute actual malice and therefore, his actions could not have amounted to the shock the conscience standard.

As previously noted, Kodi cannot vicariously assert Ms. Gaines' Fourth Amendment rights. Similarly,

Kodi cannot vicariously assert Ms. Gaines' Fourteenth Amendment rights. Finally, Cpl. Ruby's conduct did not reach the level of shock the conscious standard as set forth in *Johnson,* thus Kodi does not have a separate and independent Fourteenth Amendment substantive due process claim.

For the reasons set forth, this Court finds, that as a matter of law Kodi has neither a Fourth Amendment, nor Fourteenth Amendment claim. Consequently, any compensation awarded by the jury cannot pertain to a § 1983 claim and therefore, must be related to Jury question 5, wherein the jury unanimously found that Cpl. Ruby violated Kodi Gaines' rights under the Maryland Declaration of Rights, and/or Question 7 wherein the jury unanimously found that Cpl. Ruby committed a battery on Kodi Gaines.

D. Claims Against Baltimore County

The Court of Special Appeals vacated "the JNOV of state claims against the County and remand[ed] for the circuit court to consider and make any necessary factual findings." "Related to the Plaintiff's State Constitutional claims, if any, against the Defendant Baltimore County." *Cunningham* at 695.

Courts and Judicial Proceeding Article 5-303(b)(1) provides that: "Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the

employee within the scope of employment with the local government." Thus, if Cpl. Ruby is deemed to be an employee of Baltimore County, then Baltimore County may be liable for his tortious acts. Battery is a tortious act. Additionally, that Rule provides:

> A local government may not be liable for punitive damages.
>
> Subject to subsection (a) of this section and except as provided in subparagraph (ii) of this paragraph, a local government may indemnify an employee for a judgment for punitive damages entered against the employee.
>
> A local government may not indemnify a law enforcement officer for a judgment for punitive damages if the law enforcement officer has been found guilty under § 3-108 of the Public Safety Article as a result of the act or omission giving rise to the judgment, if the act or omission would constitute a felony under the laws of this State.

Cts. & Jud. Proc 5-303(c).

In addition to possibly being held liable for acts of their employees, the Maryland appellate courts have held that: ". . .local governmental entities do, indeed, have respondeat superior liability for civil damages resulting from State Constitutional violations committed by their agents and employees within the scope of the

employment." *Prince Georges County v. Longtin,* 419 Md. 450, 493 (2011), citing *DiPino v. Davis,* 354 Md. 18, 51 (1999).

There is no dispute that, at the time of the shooting, Cpl. Ruby, was employed as a police officer by the Baltimore County Police Department. Indeed, "the County was not seeking to avoid indemnification [of Cpl. Ruby] but it was asking only to be dismissed as a named defendant." *Cunningham* at 695. Therefore, this court finds that Cpl. Ruby was an employee of the Defendant, Baltimore County. Thus, in the context of the facts of this case, under the principles of respondeat superior, Baltimore County may be liable for State Constitutional violations, if any, and also liable for the battery committed upon Kodi by Cpl. Ruby.

Count III the Third Amended Complaint alleged a Violation of Maryland Declaration of Rights Articles 10, 24, 26 and 40 (Against all Defendants). Articles 10 and 40 "establish certain freedom of speech rights." *Cunningham* at 655, (footnote 16). The Plaintiffs did not present any evidence that would support a claim under either Articles 10 or 40 of the Maryland Declaration of Rights.

As to Articles 24 and 26 of the Maryland Declaration of Rights, the determination of "[w]hether a police officer has used excessive force in violation of the Maryland Declaration of Rights is judged under the standard of objective reasonableness established by the United States Supreme Court to analyze analogous claims made under the Fourth Amendment to the federal Constitution." *Estate of Blair v. Austin 469* Md. 1, 22 (2020),

(citing *Richardson v. McGriff,* 361 Md. 437, 452, 762 A.2d 48, 56 (2000) applying *Graham v. Connor,* (citation omitted)).

Excessive force claims brought under Article 24 are analyzed in the same manner as if the claim were brought under Article 26. *Randall v. Peaco,* 175 Md. App. 320, 330 (2007), 927 A.2d 83. 89 (2007). (*Okwa v. Harper,* 360 Md. 161, 203-04, 757 A.2d 118 (2000); *Williams,* 112 Md.App. at 547, 685 A.2d 884.) In both instances, the claim is assessed under Fourth Amendment jurisprudence rather than substantive due process analysis. *Richardson v. McGriff,* 361 Md. 437, 452.

Thus, Kodi's claim that the Defendant violated his Maryland Declaration of Rights under Article 24 and 26, must be examined using the same standards as used to analyze § 1983 claim under the Fourth Amendment. This court has found that Kodi has no § 1983 claim under a Fourth Amendment analysis. Correspondingly, Kodi has no excessive force claim under either Article 24 or 26 of the Maryland Declaration of Rights. Therefore, the jury's award of damages cannot pertain to a violation of Article 24 and 26 of the Maryland Declaration of Rights. Consequently, the jury's award to Kodi must refer to the Battery count. However, as pointed out by the Defendants, even if Kodi were to prevail on his State constitutional claims, he is only entitled to one recovery, which is limited under the Maryland LGTCA § 5-303. (Defendant Motion at 30).

E. Battery

The jury unanimously found that: "the Defendants committed a battery on Kodi Gaines" (Jury question 7). In the Defendants' Motion, and at oral argument, the Defendants did not challenge the jury's verdict of Battery but argued that as a matter of law it must be remitted.

F. Remittitur

This court has found, as a matter of law, that the jury's award to Kodi could not relate to § 1983 either under a Fourth Amendment or Fourteenth Amendment analysis (Third Amended Complaint, Counts VII, VIII, IX (as to Cpl. Ruby)). Similarly, this court has found that the jury's award could not relate to any alleged violation of the Maryland Declaration of Rights (Third Amended Complaint, Counts III, IV, V). Thus, the jury award must relate to battery (Count XI).

However, the liability of a local government may not exceed $400,000 per an individual claim, and $800,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions. Cts. & Jud. Proc 5-303(a)(1). Thus, this court finds that the cumulative award for both past medical expenses and non-economic damages must be reduced to $400,000 plus post judgment interest, which the Defendant calculates to be $160,000.00. (Defendant Motion, at 5).

As previously noted, the jury was instructed on punitive damages. They were instructed that in order to award punitive damages they had to find that Cpl. Ruby acted with actual malice. The Plaintiff failed to prove that Cpl. Ruby acted with actual malice, and the jury unanimously declined to award punitive damages. Thus, absent evidence of malice, Kodi cannot collect any judgment against Cpl. Ruby. See Md. Code. Ann., Cts. & Jud. Proc. § 5-302(b)(1)-(2) (stating that a party may not execute a judgment against an employee covered by the LGTCA so long as the torts committed are within the scope of employment and are committed without malice). *See Beall v. Holloway-Johnson*, 446 Md. 48, 77, 130 A.3d 406, 419 (2016).

Cpl. Ruby was an employee of Baltimore County at the time of the incident. Under respondeat superior, Baltimore County is liable for civil damages caused by Cpl. Ruby. Therefore, Baltimore County, and not Cpl. Ruby, is responsible to pay to Kodi $400,000, plus post judgment interest of $160,000.00.

G. New Trial

The Court of Special Appeals directed the circuit to address ". . . the issue whether a remittitur or new trial is warranted." *Cunningham* at 704. As this court has remitted the verdict as set forth herein and neither party has requested a new trial, the court shall not order a new trial.

CONCLUSION

For the reasons set forth herein, this court finds that the jury's award to Kodi Gaines relates solely to the Count XI battery. Further, limitations to that award as set forth in the LGTCA are applicable and shall be set forth in a separate order.

/s/____________________________
Mickey J. Norman, Associate Judge
Circuit Court for Baltimore County
April 26, 2022

APPENDIX D — OPINION, *CUNNINGHAM V. BALTIMORE COUNTY*, NO. 3461, APPELLATE COURT OF MARYLAND. FILED JULY 1, 2020

Cunningham, et al. v. Baltimore County, et al., No. 3461, September Term, 2018, Opinion by Graeff, J.

COLLATERAL ESTOPPEL – FINAL JUDGMENT – SUPPRESSION RULING

Collateral estoppel bars the re-litigation of an issue decided in a prior adjudication if, in addition to other requirements, "there was a final judgment on the merits in the prior adjudication[,]" and "the party against whom the doctrine is asserted had a fair opportunity to be heard on the issue in the prior adjudication." *Clark v. Prince George's County*, 211 Md. App. 548, 581, *cert. denied*, 434 Md. 312 (2013).

In a prior criminal case against appellant, the circuit court denied his motion to suppress evidence on the basis that the entry into the home to serve an arrest warrant was lawful. Appellant was later acquitted of the criminal charges. In the subsequent civil litigation regarding the same entry, the court found that appellants were collaterally estopped from relitigating the constitutionality of the entry because the issue had been litigated and decided by the criminal court. Under these circumstances, however, when a defendant is acquitted of criminal charges and there is no ability to seek appellate review of a pretrial suppression ruling, there is no final judgment for collateral estoppel purposes. Accordingly, because appellant had no opportunity to appeal the denial of his motion to suppress

in his criminal case, he was not collaterally estopped from challenging the entry in the civil case.

Additionally, the other appellants who were not parties to the criminal case did not have a full opportunity to be heard on the issue, and therefore, collateral estoppel did not preclude them from litigating the constitutionality of the initial entry either.

42 U.S.C. § 1983 – MARYLAND DECLARATION OF RIGHTS ARTICLE 26 – SEARCH AND SEIZURE – ENTRY INTO HOME TO SERVE ARREST WARRANT – REASONABLE BELIEF

Law enforcement may enter a private home to serve an arrest warrant only when (1) an officer has reason to believe that "the location is the defendant's residence"; and (2) the police have a reasonable belief that the subject of the warrant is inside the residence. *United States v. Hill*, 649 F.3d 258, 262 (4th Cir. 2011). In this context, the "reason to believe" standard does not rise to the level of probable cause, but instead is akin to reasonable suspicion.

Here, the officers had previously confirmed that the warrant subject was the lessee at that address on the warrant and that she had two small children. Police knocked on the door and heard noises indicating that someone was coming up to the door and moving things, a brief baby cry, and the sound of someone coughing inside. In the absence of information to the contrary, it was reasonable for the officers to believe that the warrant

subject was inside the residence at the time under these circumstances. Accordingly, the entry was lawful.

42 U.S.C. § 1983 – MARYLAND DECLARATION OF RIGHTS ARTICLES 24 AND 26 – EXCESSIVE FORCE – QUALIFIED IMMUNITY – DISPUTES OF FACT

In determining whether a police officer has used excessive force in violation of 42 U.S.C. § 1983 or Articles 24 and 26 of the Maryland Declaration of Rights, we look to "whether the officers' actions were 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Estate of Blair by Blair v. Austin*, No. 35, Sept. Term, 2019, 2020 WL 2847516, at *8 (Md. June 2, 2020) (plurality opinion). When the issue of reasonableness of a police officer's action or the applicability of qualified immunity "turns upon which version of facts one accepts, the jury, not the judge, must determine liability." *King v. State of California*, 242 Cal. App. 4th 265, 289 (2015).

In this case, where there was a dispute of fact regarding what happened in the moments leading up to when the officer fired the fatal shot, it was for the jury to determine, based on the evidence, what occurred, and whether, in light of its finding, the officer acted reasonably. Because the jury decided that the officer's actions were not reasonable in this case, the circuit court erred in usurping the jury's finding and granting appellees' judgment notwithstanding the verdict.

APPEALBILITY – FINAL JUDGMENT – CONDITIONAL GRANT OF MOTION FOR NEW TRIAL

On appellees' post-trial motion for judgment notwithstanding the verdict, for a new trial and for remittitur of judgment, the circuit court granted judgment to appellees notwithstanding the verdict, and, should that decision not withstand appellate scrutiny, it conditionally granted a new trial because it found the verdict was inconsistent.

Under normal circumstances, "an order granting a new trial is not immediately appealable because it is an interlocutory order" that is not "ultimately reviewable" until "appeal is taken from the final judgment." *Buck v. Cam's Broadloom Rugs, Inc*., 328 Md. 51, 57 (1992). In contrast, when the order for a new trial is conditioned on the reversal of the grant of judgment notwithstanding the verdict, the judgment is appealable.

JURY VERDICTS – IRRECONCILABLY INCONSISENT VERDICT – MOTION FOR NEW TRIAL

The circuit court conditionally granted appellees' motion for a new of trial on the basis that the verdict sheet was irreconcilably inconsistent because the jury did not apportion the damage award between the state law claims, which were subject to a damages cap pursuant to the Local Government Tort Claims Act ("LGTCA"), and the federal § 1983 claims, which were not subject to any damages

cap. As a result, the court concluded that appellees were entitled to a new trial.

A jury verdict is irreconcilably inconsistent "[w]here the answer to one of the questions in a special verdict form would require a verdict in favor of the plaintiff and an answer to another would require a verdict in favor of the defendant[.]" *S. Mgmt. Corp. v. Taha*, 378 Md. 461, 488 (2003) (quoting *S&R Inc. v. Nails*, 85 Md. App. 570, 590 (1991)). Under these circumstances, the verdict sheet was not irreconcilably inconsistent, and circuit court abused its discretion in granting a conditional new trial on this basis.

Appendix D

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND, CIRCUIT COURT
FOR BALTIMORE COUNTY

Case No. 03-C-16-009435
No. 3461
September Term, 2018

COREY CUNNINGHAM, et al.,

v.

BALTIMORE COUNTY, MARYLAND, et al.,

Filed July 1, 2020

Meredith, Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned), J.

OPINION

By Graeff, J.

Chief Judge Matthew J. Fader did not participate in the Court's decision to designate this opinion for publication pursuant Md. Rule 8-605.1.

On August 1, 2016, two Baltimore County police officers attempted to serve arrest warrants on Korryn Gaines and Kareem Courtney at Ms. Gaines' apartment. The warrant for Ms. Gaines was for failure to appear for a misdemeanor trial, and the warrant for Mr. Courtney was for second-degree assault. The officers testified that

they repeatedly knocked on the door, and although they heard movement inside, no one opened the door. They ultimately kicked the door open, and when they entered the apartment, they saw Ms. Gaines siting on the floor with a pistol grip shotgun.

The officers retreated and called for back-up. This led to a six-hour stand-off between Ms. Gaines, positioned in the apartment with her five-year-old son Kodi, and multiple law enforcement officers stationed outside the apartment. Kareem Courtney, Ms. Gaines' fiancé and Karsyn Courtney, the daughter of Mr. Courtney and Ms. Gaines, left when the police arrived.

Corporal Royce Ruby testified that, after hours of requests for Ms. Gaines to put down the gun, she moved to the kitchen, raised her shotgun to firing position, and pointed it toward the officers positioned by the doorway. At that point, Corporal Ruby fired a shot that killed Ms. Gaines, and a bullet exited her body and injured Kodi.

A lawsuit in the Circuit Court for Baltimore County ensued. Rhanda Dormeus (mother of Ms. Gaines), individually and as personal representative of Ms. Gaines' estate, Mr. Courtney, individually and on behalf of minor child Karsyn Courtney, Corey Cunningham (father of Kodi Gaines), on behalf of minor child Kodi Gaines, and Ryan Gaines (father of Ms. Gaines), appellants, sued Baltimore County, Corporal Ruby, and other law enforcement officers on numerous grounds related to Ms. Gaines' death. On January 29, 2018, the court granted a motion for summary judgment and dismissed the claims against all defendants except Baltimore County and Corporal Ruby, appellees.

On February 16, 2018, after a three-week trial, a jury returned a verdict in favor of appellants, awarding more than $38 million in combined economic and non-economic damages. Appellees filed a Motion for Judgment Notwithstanding the Verdict, for a New Trial and for Remittitur of Judgment. On February 14, 2019, the circuit court issued an Order and a 75-page Memorandum Opinion that, among other things, granted appellees' motion for judgment notwithstanding the verdict. In the alternative, the court granted the defendants' motion for a new trial on the ground that the verdict was defective because it "did not specify the apportionment, if any, of the total jury award between the [s]tate and [f]ederal [c]laims." The court further found that the non-economic damages awarded were "excessive and shocked the conscience," and "but for" the other rulings, it "would remit the [jury's] award."

On appeal, appellants present multiple questions for this Court's review,[1] which we have consolidated and rephrased as follows:

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1. Appellants filed three separate opening briefs, as follows: (1) Ryan Gaines (father of victim Korryn Gaines); (2) Corey Cunningham, on behalf of Kodi Gaines; and (3) the Estate of Korryn Gaines, Rhanda Dormeus (mother of Korryn Gaines), and Kareem Courtney (fiancé of Korryn Gaines) in his personal capacity and as next of kin of Karsyn Courtney. All three briefs adopt and incorporate the facts, arguments, and requests for relief asserted by the other two. The briefs present a total of eight separate questions presented, which we have consolidated as set forth above.

1. Did the circuit court err in granting the motion for summary judgment on the ground that the initial entry into the apartment by the police officers was constitutional?

2. Did the circuit court err in finding that appellees' post-trial motions were timely filed?

3. Did the circuit court err in granting appellees' Motion for Judgment Notwithstanding the Verdict ("JNOV") and vacating the damage awards for appellants on the basis that Corporal Ruby was entitled to qualified immunity?

4. Did the circuit court err in finding that the jury verdict was irreconcilably inconsistent, requiring a new trial if the grant of JNOV was reversed?

5. Did the circuit court err in finding, in the alternative, that remittitur was an appropriate remedy?

For the reasons set forth below, we conclude that the court properly granted the motion for summary judgment regarding the initial entry, but it improperly granted the motion for JNOV and, in the alternative, the motion for new trial based on an inconsistent verdict. Accordingly, we shall affirm, in part, and reverse/vacate, in part, the judgments of the circuit court and remand for further proceedings.

Appendix D

FACTUAL AND PROCEDURAL BACKGROUND

I.

AUGUST 1, 2016

A.

INITIAL ENTRY

The evidence elicited at trial established that, on August 1, 2016, at approximately 9:00 a.m., Officer John Dowell and Officer Allen Griffin, members of the Baltimore County Police Department, traveled to the Carriage Hill Apartments, 4 Sulky Court, Apartment T-4 to execute arrest warrants for Korryn Gaines and Kareem Courtney. The officers had a bench warrant for Ms. Gaines, age 23, for failing to appear for a misdemeanor trial, and an arrest warrant for Mr. Courtney, her fiancé, age 40, for a second-degree assault resulting from an alleged domestic incident involving Ms. Gaines.

Ms. Gaines' apartment was the address listed on both arrest warrants, although Mr. Courtney did not permanently reside there. Officer Griffin testified that, as part of the normal background check procedure, he had visited the rental office the prior week and discovered that Ms. Gaines was the sole lease holder of the apartment. He also conducted an MVA records check on Mr. Courtney, which showed that Mr. Courtney resided at a different address.

When the officers went to serve the arrest warrants, they were not dressed in uniform, but they had badges on lanyards around their necks that were plainly visible.[2] They arrived at the address listed on the warrants and located apartment T-4 on the lower-level of the building. Officer Griffin positioned himself on the knob side of the door, and Officer Dowell positioned himself on the hinge side.[3] They briefly listened to determine if they could hear anyone inside.

Officer Griffin testified that he knocked on the door. At first, the officers did not identify themselves as police officers. They heard a cough inside the apartment, but no one answered the door. Officer Griffin remained on the knob side of the door while Officer Dowell exited the building and went out front to the patio to ensure that no one left the apartment through the sliding glass door.

Officer Griffin continued to knock on the door at a volume that Officer Dowell could hear from his position outside. Officer Griffin heard movement inside that sounded like someone coming up to the door, looking out the peep hole, and then walking away. He also heard other movement, such as "things being picked up and moved around." After hearing this movement, he identified

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2. Officer Griffin testified that he was wearing a blue button-down shirt with "blue jeans, boots, my gun, and a ballistic vest on underneath."

3. When positioned in the hallway, the "knob side" of the door was the right side of the door and the hinge side was the left. The door opened inwards.

himself as Baltimore County Police and directed the occupants to open the door. He did not state the police purpose.

Officer Griffin then instructed Officer Dowell to get the key to the apartment from the rental office. Officer Dowell did not want to leave the patio door unattended, so he radioed for a nearby patrolman, Officer Kemmerer, to retrieve the key. While Officer Griffin was waiting for the key, he continued to knock and could hear a child crying inside. Officer Kemmerer then arrived and gave the key to Officer Dowell, who returned to the apartment door to give the key to Officer Griffin.

Officer Griffin unlocked and opened the door, but it only opened approximately four inches because a security chain was fastened on the inside of the door. Through the gap, Officer Griffin could see inside the apartment, and he saw a female sitting on the dining room floor. He testified that he recognized her as the subject of the warrant based on a photo they had of Ms. Gaines. He again identified himself as Baltimore County Police and asked her to open the door. She did not move or respond to his directions.

Officer Griffin then attempted to "put his shoulder into the door" to try to break the chain, but it did not move. Officer Dowell asked Officer Griffin to stand aside so he could kick the door open. Officer Dowell kicked the metal door and the chain sprung open. Officer Griffin entered the apartment with his handgun drawn but held "low ready," and Officers Dowell and Kemmerer remained in the hallway. Officer Griffin observed Ms. Gaines seated on the floor pointing a shotgun towards him "[l]ike she was gonna shoot." She told him to "[g]et out."

Officer Griffin, realizing that he had no good cover in the apartment, retreated back to the hallway yelling "[g]un, gun, gun" and "[t]ake cover" to the other officers. Officers Griffin and Dowell positioned themselves on the knob side of the door and Officer Kemmerer moved to the hinge side of the door. They radioed for back-up from additional law enforcement and "held the door" to make sure Ms. Gaines did not attempt to leave while they waited for reinforcements to arrive. While Officer Griffin was calling for help, Officer Dowell asked Ms. Gaines to put the gun down. She asked to speak to a supervisor. Officer Dowell testified that Ms. Gaines told him that she "just wanted [them] to leave," and the warrant was fraudulent. Additional law enforcement arrived shortly thereafter and relieved the officers.

Mr. Courtney testified that he was lying in bed that morning with Ms. Gaines, their daughter Karsyn (age 2), and Ms. Gaines' son Kodi from a previous relationship. Ms. Gaines got out of bed and went to the bathroom.

A few minutes after Ms. Gaines left the bedroom, Mr. Courtney heard the apartment door being kicked in. He testified that he did not hear any knocking, and the officers did not announce themselves as police prior to entering. In reaction to the "boom" of the door being kicked opened, he jumped out of bed, and went into the hallway. He saw the officers in the doorway, and Ms. Gaines standing by the bathroom. He grabbed his clothing, told the children to remain in the bedroom, and went down the hallway to find out what was going on. When the officers saw him, they told him to put his hands up. He testified that there

were two or three officers in the apartment, two in plain clothes and one in uniform, and they had their guns drawn and pointed at him. Mr. Courtney knew they were police officers and told them not to shoot because there were children in the apartment.

The officers directed him and the children, who had followed Mr. Courtney down the hallway, out the apartment door, but Kodi broke away and ran back toward his mother, who was still standing outside the bathroom. When Mr. Courtney turned back to try to grab Kodi, he saw that Ms. Gaines was holding a pistol grip shotgun at her side.[4]

Mr. Courtney tried to convince Ms. Gaines to let Kodi go with him, but Ms. Gaines did not respond to his request. When Mr. Courtney tried to tell Ms. Gaines that it was the police and "nothing was going to happen to [her]," she told him "they're going to kill your dumb ass." He stated that her behavior was abnormal. Unable to convince Ms. Gaines to leave with Kodi, Mr. Courtney voluntarily exited the apartment with Karsyn as directed by police. Mr. Courtney was handcuffed, placed in a squad car, and later transported to the police station.[5]

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4. Mr. Courtney testified that Ms. Gaines had lawfully purchased the shotgun for safety reasons after a break-in occurred at a previous apartment. He stated, however, that he did not have prior knowledge that it was in the house.

5. Mr. Courtney testified that he was released on his own recognizance at approximately 12:30 a.m. the following morning. The second-degree assault charge was nolle prossed, but he subsequently was indicted on charges relating to CDS found in

B.

THE STAND-OFF

Officer Flaherty, a member of the Baltimore County Police Community Action Team ("CAT"), was the first to arrive on the scene in response to Officer Griffin's call for assistance. At approximately 9:25 a.m., clad in body armor and armed with his rifle, he went to the apartment door and took up position on the knob side of the door, using the brick wall outside of the apartment as cover.[6] Officer Kemmerer also was in the hallway with him. Officer Flaherty was instructed by his sergeant not to shoot unless Ms. Gaines charged.

From that position, Officer Flaherty could see Ms. Gaines seated cross-legged with the shotgun pointed towards the door, but not raised. He remained in that position to watch Ms. Gaines for approximately 45 minutes while waiting for the tactical team to arrive. The officers tried to talk with Ms. Gaines during this period of time, but she refused to leave.

The Tactical Team ("TacTeam") arrived at 9:41 a.m. More than 30 armed officers and "counter snipers" took

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the apartment. (*State v. Kareem Courtney*, Case No. 03K16004299). As discussed in more detail, *infra*, Mr. Courtney filed a motion to suppress in the CDS case, challenging the initial entry by Officers Dowell and Griffin. The court denied the motion, and he was acquitted of the drug charges.

6. The hallway area had brick walls that Corporal Ruby testified could not be penetrated by a shotgun round.

up positions in and around the apartment building. Ms. Gaines' mother, Rhanda Dormeus, who arrived on the scene between 9:30 and 10:00 a.m., informed law enforcement that Ms. Gaines had a history of mental illness. The TacTeam was aware that Kodi was still with Ms. Gaines in the apartment. By 10:30 a.m., at least four armed TacTeam members were positioned in the small hallway area outside of Ms. Gaines' doorway.[7] The TacTeam parked a large command truck outside the building and set up a command post in a nearby church.[8]

The TacTeam also occupied the neighboring apartment unit, T-3, which shared a wall with the dining room in T-4. The occupants of apartment T-3 remained in the apartment throughout the encounter despite the officers advising them to leave. The team used this apartment as a "staging area" to sit down or use the bathroom while still remaining in close proximity to Ms. Gaines' apartment. There were concerns, however, about shots being fired through the joint wall. The TacTeam members attempted

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7. The hallway outside Ms. Gaines' door was a small L-shaped landing area (estimated 32 square feet) with entrances to apartments T-2, T-3, and T-4. The doors to T-3 and T-4 are along the same wall on the right as you enter the area by going down a short set of stairs, while the entrance to T-2 is on a perpendicular wall, i.e., straight ahead as you enter the space. The walls in the hallway area are predominantly made of brick.

8. Members of Ms. Gaines' family, including her parents, Rhanda Dormeus and Ryan Gaines, arrived on the scene, but they were confined to this make-shift command station for questioning. They cooperated with law enforcement and were not permitted to speak with Ms. Gaines at any time.

to drill holes in the shared wall to insert a fiberoptic scope to see into Ms. Gaines' apartment or to create an entry port for explosives to breach the wall if necessary, but the wall was too thick.

The Hostage Negotiation Team ("HNT"), which arrived shortly after the TacTeam, was able to establish a "good rapport" with Ms. Gaines, and she and HNT team leader Detective Stagi spoke frequently throughout the day, even laughing back and forth at certain points. HNT member Sergeant O'Neil testified, however, that Ms. Gaines' behavior became increasingly irrational and paranoid throughout the day. There were times when she would cut off communications but then start talking again.[9] At times she stated that she did not want to hurt anyone, but officers testified that, at other times, she threatened to kill them, making statements like: "I have a gun, you have a gun. The only difference between you and me is I'm ready to die, and you're not[.]" Ms. Gaines referred to the officers as "devils" and said that, if they entered the apartment, she would "ha[ve] no problem shooting them and killing them." Despite repeated attempts at negotiations, she remained barricaded inside with Kodi and refused to put down the shotgun for approximately six hours.

The stand-off lasted from approximately 9:30 a.m. to 3:30 p.m. At 1:30 p.m., Major Wilson, the incident commander located in the mobile unit, ordered the power

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9. Ms. Gaines cut off contact with the HNT for the final time 15 minutes before Corporal Ruby's shot.

be shut off. On this very hot August day, the power was cut at 2:45 p.m., which turned off the air conditioning.

Corporal Royce Ruby, a 10-year member of the TacTeam, arrived on the scene mid-morning. His sergeant informed him on the drive over that the situation had arisen from officers attempting to serve a warrant, that a female was barricaded inside with a shotgun and a child, and that TacTeam members were already stationed at the two exits (the apartment door and the patio door).

Corporal Ruby's initial role was to organize the TacTeam officers to ensure they could safely set up staging areas and operations and to provide information regarding Ms. Gaines' movement to other specialized teams on the scene. When he arrived, he "suited up" and entered the apartment building. His gear included a ballistic helmet, ballistic vest, gloves, front and back rifle plates, a Glock 35, and an M6 rifle. He was met on the landing by Sergeant Neral, who informed him that Ms. Gaines was suffering from mental illness and had not been taking her medication for "possibly a year."

Corporal Ruby approached the apartment door. When he looked inside, he "could see Ms. Gaines in the hallway area between the opening to the kitchen and the dining room area." She was seated with her legs folded underneath her, "where her butt would be on her feet," with the shotgun "across her legs pointed at the doorway" where the officers were positioned. She remained in this position "throughout the entire event" and "always kept her hand on [the] shotgun." Although the weapon was not

raised to a firing position, it was always pointed at the door. Corporal Ruby testified that, from his position, Ms. Gaines could have fired through the apartment door within a second.[10]

Additional tactical officers arrived shortly thereafter and took over the role of door. He testified that he held that position "pretty much all day," i.e., approximately five hours, with the exception of a 20-minute break for "water and a pack of crackers."[11]

Corporal Ruby testified that, although Ms. Gaines was in the same location throughout the incident, she occasionally would stand up to stretch her legs, but she kept the shotgun pointed at the door when she stood. He was aware that Ms. Gaines was messaging and live-streaming on Facebook throughout the day using her cell phone. On multiple occasions, she would give the phone to Kodi, who would then come closer to the door, but Corporal Ruby was unable to grab him without making any sudden movements. Within approximately 30 seconds, Ms. Gaines would yell for Kodi to come back to her side. Other than these occasions, Kodi was positioned in front of his mother or slightly to her left throughout the day.

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10. Corporal Ruby testified that, according to the Baltimore County use of force policy, he could have used deadly force "the entire time" he was there.

11. Major Wilson, a superior officer located in the command truck during the stand-off, testified that normal barricades tend to last four to six hours, and after that time, officer fatigue can become a concern. He stated that, because they were approaching the six-hour mark, he had begun to coordinate relief for the officers (including a cooling truck) when the shot was fired.

The stand-off continued until approximately 3:30 p.m., when Ms. Gaines moved to the kitchen. Mr. Cunningham testified that Kodi told a therapist that his mother was shot when she went to fix him a peanut butter and jelly sandwich in the kitchen. Corporal Ruby testified that Ms. Gaines suddenly moved to the kitchen and raised the shotgun to a firing position pointed towards the officers on the hinge side of the doorway.

Corporal Ruby described what happened as follows:

> [I]t's right toward the end, almost at the end, and Kodi went into the kitchen. I hadn't observed it all day. In my head I'm thinking, 30 seconds, a minute. I said to the team, I said, "This is different, she's not calling him back. She's not calling him back. All day 30 seconds to a minute and he is called back in front of her, this time nothing." A minute, two minutes, three minutes.
>
> Also, I'm getting more movement from her now in this one small period of time than I have all day. She's standing up, she's going right back to that seated position, standing up again. Her feet are moving a lot. I told them, "Something is about to happen. This is different." Then all at once she moved from the position in the hallway into the entrance to the kitchen from the hallway. Now, when she moved, the barrel stayed pointed at the open door, the barrel never went into the kitchen.

Just prior to Ms. Gaines' move into the kitchen, Corporal Ruby was still on the knob side of the door, Officer Callahan was on the hinge side, Sergeant Stephan, Officer Artson, and Sergeant O'Neil were on or at the top of the nearby hallway steps, and Officer McCampbell, Officer Pierce, and Detective Stagi were just inside the doorway of apartment T-3. All officers in the brick-lined hallway were armed and wearing body armor designed to stop projectiles such as shotgun rounds.

In response to Ms. Gaines' relocation, Corporal Ruby moved from his long-held position at the knob side of the T-4 apartment door to the opening of apartment T-2, which provided additional stability for his M6 rifle and a direct line of sight to the kitchen. He testified that Ms. Gaines' change of position into the kitchen gave her a better angle on the officers on the hinge side of the door, so he told those officers to "[t]uck in." Officer Callahan took a "very, very small step backwards" from the hinge side of the door toward the door of apartment T-3, where the others were located, and he tucked his arms in closer to minimize his profile. The officers in the doorway of apartment T-3, which was only a few feet from the hinge side of Ms. Gaines' door, also stepped back slightly further inside the foyer of T-3.

Officer Callahan testified that he still felt exposed in this revised position but moving any further back would cause him to lose sight of the section of the apartment he was responsible for covering. Corporal Ruby testified that, although Ms. Gaines would not have a direct shot at Officer Callahan in his new position, his concern was that a bullet

would come through the open door, ricochet off the brick walls, and harm officers on the hinge-side of the doorway.

Corporal Ruby testified that, when Ms. Gaines moved into the kitchen, her shotgun was "low ready." Subsequently, however, in a "staggered or incremented" fashion, she raised the shotgun up to the firing position toward the open door where the hinge side officers were positioned. Although Corporal Ruby was the only officer who could see Ms. Gaines, he alerted the other officers that she was aiming the gun at the hallway. Corporal Ruby testified that he told Detective Stagi: "She's got to put that gun down because I'm seeing it come up." Detective Stagi then began yelling at her and "begging her" to put the gun down. Sergeant O'Neil testified that he heard Corporal Ruby say: "She's raising the gun." Sergeant Stephan and Officer Callahan also testified that, just prior to the shot, Corporal Ruby announced that Ms. Gaines' weapon was pointed in the direction of the hallway. Law enforcement notes from the mobile command unit described her behavior in the kitchen as "[h]ighly aggitated" [sic] and that she was "screaming" at the officers that she would shoot.

Corporal Ruby testified that, through the scope of his M6 rifle, from his position in the doorway of apartment T-2, he could see only the barrel of the shotgun and the long braids of Ms. Gaines' hair. Fearing for officer safety, he fired "a head shot," aiming high to avoid hitting Kodi, who he knew was in the kitchen, although he did not know exactly where. The shot was taken from Corporal Ruby's position in the doorway of apartment T-2, through the open apartment doorway of T-4, through the corner of the

kitchen drywall, and it struck Ms. Gaines in the kitchen. After he fired his shot, Corporal Ruby saw Ms. Gaines' shotgun move and discharge once.[12]

The team, led by Corporal Ruby, entered the apartment. Corporal Ruby went toward the left entrance of the galley kitchen, the one from the dining room where Ms. Gaines had been throughout the day. Officer Callahan moved to cover the right kitchen entrance, which was next to the living room. Corporal Ruby testified that he was "about one or two steps" into the room when he heard the sound of the shotgun being reloaded, saw the blast go off, and heard the shotgun being reloaded a second time.[13] Corporal Ruby stated that he was then able to see Ms. Gaines, who saw him too and "[brought the] shotgun around," so he "fired three rounds center mass into Ms. Gaines." Ms. Gaines then spun around and slumped in a seated position against the cabinet with her hands off the shotgun. Corporal Ruby grabbed the weapon and placed it outside the kitchen doorway on the floor. Meanwhile, Kodi had run from the kitchen toward the living room area,

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12. There was conflicting testimony about whether Ms. Gaines' first shot was immediate or if there was a pause. Corporal Ruby and Officer McCampbell both testified that Ms. Gaines immediately fired a round after Corporal Ruby's shot (implying that her hand had been on the trigger with the safety off), but other officers testified that there was a pause of approximately 30 seconds, the team entered the apartment, and then Ms. Gaines fired for the first time.

13. The galley kitchen area had two entrances, one from the dining room (where Ms. Gaines was positioned throughout the day) and a second from the living room.

where Officer Callahan grabbed him, sat him down in the living room, and then brought him outside for medical attention.

Corporal Ruby's first shot mortally wounded Ms. Gaines, and it is the only shot at issue on appeal. The bullet entered her back on the left upper side, perforated the left side of her rib cage, her left lung, the thoracic spine, the right lung, the right side of her rib cage, and then exited the right side of her chest. After the bullet struck Ms. Gaines, it ricocheted off the refrigerator and hit Kodi across the cheek. Kodi underwent multiple surgeries to have the bullet fragments removed, and the wound later became infected.[14]

II.

PROCEDURAL HISTORY

On September 13, 2016, Rhanda Dormeus (on behalf of Ms. Gaines' estate, and in her individual capacity as Ms. Gaines' mother), Kareem Courtney (on behalf of his minor child Karsyn Courtney), Corey Cunningham (on behalf of his minor child Kodi Gaines), and Ryan Gaines (Ms. Gaines' father) filed a complaint in the Circuit Court for Baltimore County against Corporal Ruby and Baltimore

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14. One of Corporal Ruby's subsequent rounds also ricocheted and hit Kodi in the back of his elbow, which also required multiple reconstructive surgeries. There was extensive trial testimony about the physical and mental trauma that Kodi suffered as a result of this incident.

County alleging wrongful death, a survival action, and violation of rights under the Maryland Declaration of Rights. The complaint was amended on September 21, 2016, to add two additional claims. It was amended a second time on October 11, 2016, to add Officers Dowell and Griffin as defendants. On November 14, 2016, it was amended a third time to add two more defendants (Captain Latchaw and Major Wilson), to include additional claims, and to add Mr. Courtney as a plaintiff in his individual capacity.[15]

The third amended complaint listed the following claims against the various defendants:

Count I	Wrongful Death pursuant to Md. Code Ann. Cts. & Jud. Pro. § 3-904(a) (Against all Defendants)
Count II	Survival Action (Against all Defendants)
Count III	Violation of Maryland Declaration of Rights Articles

15. Major Wilson and Captain Latchaw, superior officers at the scene of the stand- off, were added for their role in the alleged suppression of speech after they ordered a request for Facebook to shut down Ms. Gaines' social media account during the stand-off because she was live-streaming the incident. This claim was dismissed at the summary judgment stage and is not an issue on appeal.

	10, 24, 26 and 40 (Against all Defendants)[16]
Count IV	Maryland Constitution—Deprivation of Medical Treatment (Against Baltimore County and Corporal Royce Ruby)
Count V	Violation of Maryland Constitution—Bystander Liability (Against all Defendants)
Count VI	Violation of Maryland Constitution—Illegal Entry (Against Officers Griffin and Dowell)
Count VII	Civil Rights Claim pursuant to 42 U.S.C. § 1983 alleging search of Ms. Gaines apartment, excessive force as to Kodi Gaines and Korryn Gaines, and failing to provide medical attention (Against all Defendants personally and individually)[17]

16. The Maryland Declaration of Rights Articles 10 and 40 establish certain freedom of speech rights, Article 24 establishes due process rights, and Article 26 addresses warrantless searches and seizures. Md. Const. Decl. of Rights, art. 10, 24, 26, 40.

17. 42 U.S.C § 1983 states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

Count VIII	Peace Officer Liability pursuant 42 U.S.C. § 1983 (Against Corporal Royce Ruby)
Count IX	Municipal Liability pursuant to 42 U.S.C. § 1983 (Against Corporal Royce Ruby and Baltimore County) (Monell[18] claim)
Count X	Excessive Force and Violation of Freedom of Speech in Violation of the First, Fourth and Fourteenth Amendments (Against all Defendants personally and individually)
Count XI	Battery (Against Corporal Royce Ruby)

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or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

Count XII Negligence (Kodi Gaines against All Defendants)

On December 22, 2017, as discussed in further detail, *infra*, the defendants filed a motion for summary judgment arguing that there was no dispute as to the facts and that they were entitled to judgment as a matter of law. On January 29, 2018, the circuit court granted the motion as it pertained to all defendants for counts IV, VI and IX, and it dismissed the counts against all defendants except Corporal Ruby and Baltimore County for counts I, II, III, V, VII, X, and XII. The motion for summary judgment was denied as to counts VIII and XI, which had been brought against only Corporal Ruby.

The trial against Corporal Ruby and Baltimore County began on January 30, 2018, and it lasted for three weeks. More than 25 witnesses testified regarding the events that occurred on August 1, 2016, including the parties, medical professionals, ballistics and crime scene experts, family of Ms. Gaines, and other law enforcement officers on the scene.

Dr. Tyrone Powers, appellants' use of force expert, testified that Corporal Ruby's use of force was "excessive and unnecessary," and in violation of the department's policy because there was not an immediate threat of death or serious bodily injury at the time Corporal Ruby took the first shot. In support, Dr. Powers noted that Corporal Ruby did not state in his initial report that he was in imminent danger, but instead, he wrote that he was concerned for the officers on the hinge side of the door.

Other officers, however, indicated that no one was at the hinge side of the door.

Dr. Powers also noted that Corporal Ruby said that all he saw was the shotgun barrel and braids from Ms. Gaines' hair, but other witnesses, including appellees' expert, Mr. Key, testified that, if she had been pointing the gun at the hinge side of the door, her hands and another part of her body would have been exposed. Accordingly, based on Corporal Ruby's testimony, that meant that Ms. Gaines could not have been pointing the gun at the hinge side of the door, and therefore, no one was subject to an imminent threat of death or serious bodily injury when the shot was taken. Dr. Powers testified that there was no rush to bring this situation to an immediate end, and based on his conclusion that there was no threat of death or serious bodily injury to the officers, the situation was "inconsistent" with the use of deadly force.

Dr. Powers also relied on the autopsy report to support his conclusion that Ms. Gaines was behind the wall and not pointing the shotgun toward the hinge side of the door. He stated that the fact that Ms. Gaines was shot in the back was consistent with the theory that she was not pointing the shotgun at the door.

Dr. Powers disputed Corporal Ruby's testimony that he saw her raise the shotgun toward the hinge. He initially stated that he was not commenting on Corporal Ruby's credibility, and Corporal Ruby may have seen the shotgun raise up, but he subsequently stated that it was not his belief that Ms. Gaines was raising her weapon. In any

event, he testified that the shotgun was not pointed toward the hinge "nor was it putting any officer in immediate threat of danger or serious bodily harm."

Creo Brady, Ms. Gaines' cousin, testified that he spoke with Corporal Ruby right after the incident. He testified that Corporal Ruby told him his justification for the shot was because he was "hot" and "frustrated."

Charles Key, appellees' expert in the use of force, police training, policy and procedures, firearms, incident reconstruction, crime scene analysis and ballistics, testified that Corporal Ruby's use of force was objectively reasonable and consistent with accepted standards of police policy and training because the raised shotgun presented an immediate deadly threat given the circumstances. He testified that, if Corporal Ruby reasonably believed that Ms. Gaines was raising the shotgun, he would have had "no choice but to use lethal force to resolve it." That Kodi was injured did not change the analysis of whether the shot was reasonable because Corporal Ruby made reasonable efforts to prevent injury to Kodi.

Mr. Key testified that, for Ms. Gaines to have been pointing the shotgun at the hinge side of the door, her hands would have been exposed beyond the kitchen wall. Counsel suggested that this was inconsistent with Corporal Ruby's testimony that he could only see Ms. Gaines' braids and the barrel of the shotgun. Mr. Key stated, however, that an officer in Corporal Ruby's situation would be trained to look at the weapon and not at her hands when she was holding the weapon. Mr. Key also testified that, based on

the trajectory of the bullet as it entered and exited her body, she could have been aiming the shotgun at the door.

With respect to the fatal shot, Corporal Ruby testified that he fired "because there was no choice anymore," and Ms. Gaines' "shotgun was raised up into a firing position." He stated that the new angle she achieved from the kitchen to the officers in the hallway would have been "devastating to those officers in the entire inside area and myself." His concern was that Ms. Gaines would shoot through the apartment doorway and the bullet would ricochet in the brick hallway, potentially harming any of the officers positioned there.

On cross-examination, counsel noted that Corporal Ruby had not mentioned a concern for ricocheting rounds in his initial statements or deposition. Corporal Ruby agreed that he did not mention potential ricocheting in these statements. Counsel stated that, despite Corporal Ruby's testimony that he took the shot because he feared for officer safety, Officer Artson, Sergeant Stephan, Officer O'Neil, and others testified during their depositions that they were safe in their positions just prior to Corporal Ruby's shot.[19] Corporal Ruby responded that the officers

19. Officer Artson testified at his deposition that he was not in danger on the staircase. At trial, however, he clarified that he was referring to danger from direct line of fire, and that he felt he was in danger from potential ricocheting bullets. Sergeant Stephan testified at his deposition that he did not move from his location when Corporal Ruby directed the officers to "get back" because he felt he was "safe." At trial, he testified that he did not move because he felt he was "protected from direct fire." Officer

in the hallway area were not safe, and they were all in danger of serious injury or death.

At the end of appellants' case, appellees made a motion for judgment, arguing, *inter alia*, that Corporal Ruby was entitled to qualified immunity because it was objectively reasonable for him to fire the initial shot. The circuit court denied the motion, in part because "whether Officer Callahan was in danger from Corporal Ruby's perspective is a fact that has to be left to the jury."

At the close of all the evidence, appellees renewed their motion for judgment. After hearing argument, the court again denied the motion, stating as follows:

> The Court is not persuaded that qualified immunity applies for this reason, it's an issue of fact. As pointed out in the Plaintiffs'—the Defense seems to suggest that the trier of fact, the jury, is duty bound to accept what Officer Ruby testified to, and that's just not the way it is. There's been evidence in this case that the Plaintiff could argue that in spite of Officer

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O'Neil testified at his deposition that that the hallway outside the apartment was a "safe location." At trial, however, he testified that it was the "safest possible" location. Officer Callahan's deposition testimony was that he felt safe after he "tucked in" by the door. In response to being confronted with this testimony at trial, he stated that the question was asked within the context of whether he was standing, sitting, or kneeling, and he answered that he felt safe standing. He testified at trial that he "absolutely" did not feel safe from Ms. Gaines in his position at the time the shot was fired.

> Ruby's testimony—Corporal Ruby's testimony, that she was not aiming the gun at the hinge side of the door. So that is a question of fact that must be determined by this jury.

On February 16, 2018, after three hours of deliberation, the jury returned a verdict in favor of appellants and awarded more than $38 million in combined economic and non-economic damages. The completed verdict sheet provided as follows:

> 1. Do you find by a preponderance of the evidence that the first shot taken by Corporal Royce Ruby on August 1, 2016 was objectively reasonable?
>
> Yes _____ No __X__
>
> * * *
>
> 2. Do you find by a preponderance of the evidence that the Defendants violated Korryn Gaines' rights under the Maryland Declaration of Rights?
>
> Yes __X__ No _____
>
> 3. Do you find by a preponderance of the evidence that the Defendants violated Korryn Gaines' rights under 42 USC 1983?
>
> Yes __X__ No _____

4. Do you find by a preponderance of the evidence that the Defendants committed a battery on Korryn Gaines?

Yes __X__ No _____

5. Do you find by a preponderance of the evidence that the Defendants violated Kodi Gaines' rights under the Maryland Declaration of Rights?

Yes __X__ No _____

6. Do you find by a preponderance of the evidence that the Defendants violated Kodi Gaines' rights under 42 USC 1983?

Yes __X__ No _____

7. Do you find by a preponderance of the evidence that the Defendants committed a battery on Kodi Gaines?

Yes __X__ No _____

(If you answered yes any of questions 2, 3, 4, 5, 6, or 7, proceed to determine the monetary damage if any you reward to)

Kodi Gaines

A. For past medical expenses $23,542.29

B. Non-economic damages $32,850,000.00

8. In what amount, if any, do you award monetary damages to:

Ryan Gaines

A. Non-economic Damages $300,000.00

9. In what amount, if any, do you award monetary damages to:

Karsyn Courtney

A. Non-economic Damages $4,525,216.32

10. In what amount do you award monetary damages to:

Rhanda Dormeus

A. Economic Damages $7,000 (funeral expenses)

B. Non-economic Damages $300,000.00

11. In what amount, if any, do you award monetary damages to:

Estate of Korryn Gaines

A. Economic Damages $50,000.00

B. Non-economic Damages $250,000.00

12. Do you award punitive damages under the Maryland Declaration of Rights?

Yes _____ No __X__

13. Do you award punitive damages under 42 USC 1983?

Yes _____ No __X__

On March 12, 2018, as discussed in further detail, *infra*, appellees filed post-trial motions, including a motion for judgment notwithstanding the verdict, remittitur of the verdict, new trial, and a request for the court to exercise revisory power over the judgment. Appellants filed opposition motions on the merits and moved to strike them as untimely. At a hearing held on July 2, 2018, the circuit court rejected appellants' motion to strike, and following arguments by counsel, it held the post-trial motions *sub curia*.

On February 14, 2019, the circuit court issued a Memorandum Opinion and Order ("Opinion" or "Order") granting appellees' motion for judgment notwithstanding the verdict ("JNOV") on the basis that Corporal Ruby was entitled to qualified immunity as a matter of law. Accordingly, the complaint against Corporal Ruby was dismissed. The court also dismissed all counts against Baltimore County, dismissed Count V (bystander liability), and vacated the funeral costs awarded to Ms. Dormeus.

In the alternative, the court ruled that, if the JNOV ruling was reversed on appeal to this Court, a new trial was necessary due to a defective verdict. The court made several additional rulings, which will be discussed, *infra*, as relevant to this appeal.

This appeal followed.

DISCUSSION

I.

MOTION FOR SUMMARY JUDGMENT

Appellants' first contention is that the circuit court erred in granting summary judgment on the counts against Officers Dowell and Griffin relating to the initial entry into Ms. Gaines' apartment. Appellees contend that the circuit court properly granted the motion for summary judgment.

A.

PROCEEDINGS BELOW

On December 22, 2017, Officers Dowell and Griffin filed a motion for summary judgment asserting, among other things, that they were entitled to judgment as a matter of law on the claims relating to their initial entry into Ms. Gaines' apartment. Specifically, they argued that Counts VI, alleging a violation of the Maryland Constitution based on an illegal entry, and Court VII, alleging a civil rights violation pursuant to 42 U.S.C. § 1983 on the same ground, were barred by collateral estoppel because Mr. Courtney had unsuccessfully challenged the legality of the search at the suppression hearing in the criminal case against him.

In support of this argument, the officers attached to their motion a transcript of the suppression hearing in the prior criminal case. *See Imbraguglio v. Great Atlantic & Pacific Tea Co., Inc.*, 358 Md. 194, 207–08 (2000) (In ruling on a motion for summary judgment, court may consider transcript of former testimony.).[20] The criminal case was based on evidence found during the execution of a search warrant of the apartment after Ms. Gaines' death, based on Ms. Gaines' assault of the police officers. During the course of the search, the officers saw heroin capsules in plain view, and Mr. Courtney was charged with, among other things, possession and distribution of narcotics. Mr. Courtney filed a motion to suppress this evidence, arguing that the search warrant was tainted by the initial illegal entry.

20. There is no challenge here to the propriety of attaching this transcript or the court's consideration of it.

At the hearing on the motion, Officer Griffin testified that he had arrest warrants for Ms. Gaines and Mr. Courtney.[21] Officer Griffin confirmed that Ms. Gaines was the sole lessee of the apartment. When he and Officer Dowell went to serve the warrants, he repeatedly knocked on the door, identified himself as the police, and heard someone coughing inside. Both Officers Dowell and Griffin testified that, when serving arrest warrants, they usually do not immediately announce that they have a warrant because people will not answer the door. Officer Griffin testified that he did tell Ms. Gaines and Mr. Courtney that he was there to serve arrest warrants at some point, but he said "it wasn't at the beginning" when he was knocking, and it may have been after the door was breached.

As Officer Griffin continued to knock, he heard "movement inside the apartment," such as "shuffling of feet" and someone "walking to the door and then walking away." He also stated that he heard a baby cry, a short cry that lasted only a few seconds. He knew from the warrant that Ms. Gaines had two small children, and he expected that someone would be in the house with the baby. Officer Griffin testified that he believed that Ms. Gaines and/or Mr. Courtney were inside the apartment.

The circuit court denied the motion to suppress, noting that an arrest warrant authorizes entry into the home of

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21. Officer Griffin testified, as indicated, that the warrant for Ms. Gaines was due to a failure to appear for trial, and the warrant for Mr. Courtney was for a second-degree assault on Ms. Gaines, who advised the police that Mr. Courtney lived with her. Counsel for Mr. Courtney did not, for the purposes of the motion, dispute that he lived at the apartment.

the subject of the warrant if the officers have reasonable suspicion that the subject of the warrant is in the home. The court noted that there was no dispute that the parties resided together in the home with their child. After the police knocked on the door, they heard shuffling of feet, indicating that someone was there, and they heard a cough and a child cry out. There was no reason to believe that whoever was there was not one of the subjects of the warrant. Based on the totality of the circumstances, the court found that the police had reasonable suspicion that one or both of the subjects of the arrest warrants were in the home.

The officers argued in their motion for summary judgment that, based on the ruling in the criminal case finding that the initial entry was constitutional, appellants were estopped from contesting the constitutionality of the initial entry a second time. Appellants argued that collateral estoppel was inapplicable with respect to the initial entry by Officers Griffin and Dowell for two reasons. First, they asserted that the denial of Mr. Courtney's suppression motion was not essential to the judgment in his criminal case, where he ultimately was acquitted of the drug charges.[22] Second, they argued that, with respect to the appellants other than Mr. Courtney, they were not parties to the criminal case, and therefore, the initial entry had not previously been litigated with respect to Korryn Gaines, Kodi Gaines, and Karsyn Courtney.

22. The State also charged Mr. Courtney in connection with the gun in the apartment, but it nolle prossed those charges.

Appellants further argued that, although the officers had not discussed the merits of the initial entry in their motion for summary judgment, their position was that the initial entry was illegal. They relied on *United States v. Hill*, 649 F.3d 258, 266–67 (4th Cir. 2011), which they asserted stood for the proposition that, to have a reason to believe a suspect is in the home to enter a home to execute an arrest warrant, the police cannot rely solely on an unidentified noise coming from the apartment. Appellants argued that the entry was illegal because the police entered the apartment without (a) a search warrant, (b) knocking and announcing their presence, or (c) a reasonable belief that Ms. Gaines and Mr. Courtney were home.[23]

On January 29, 2018, the day before trial was scheduled to begin, the circuit court granted the motion for summary judgment. The court stated that the legality of the entry into Ms. Gaines' apartment was fully litigated in Mr. Courtney's criminal case, and that court found it was lawful. Although Ms. Gaines was not a party to that litigation, the court stated that the legality of the entry was addressed by the court in the criminal case.

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23. In the motion, appellants asserted that they disputed the facts set forth in the officers' motion, specifically, that Officer Griffin repeatedly knocked on the door and identified himself as police prior to kicking in the door. Appellants stated that Mr. Courtney asserted in his deposition, which was attached to the motion, that he was woken up by a loud "boom" of the front door being kicked open, and that Ms. Gaines "had just come from the bathroom when she had heard it."

The circuit court in this case agreed that, under the circumstances here, where the officers had an address on the warrant and verified the warrant with the apartment rental office, they had more than "just mere noises" inside the house, and the officers had a reasonable belief that the subjects of the warrant were home. As a result, the court granted the motion with respect to the entry, stating:

> Count 6, Maryland constitutional unlawful search and seizure, that's granted. This Court does not find that there was an unlawful search and seizure. That matter has been litigated as — as previously explained.
>
> Count 7, civil rights under 42 [USC] 1983 as to all Defendants, including the search and seizure of the apartment, excessive force as to Ms. Gaines, as well as Kodi Gaines, failing to provide medical attention, it's granted to everyone except Corporal Ruby and Baltimore County as to the excessive force.
>
> As to the suggestion that there's no legal search and seizure of the apartment, that is granted.[24]

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24. The court then granted summary judgment on the other claims, with the exception of Counts I, II, III, V, VII, VIII, X, XI, XII relating to Corporal Ruby and Baltimore County. The court subsequently dismissed the County on Counts VII and X.

B.

PARTIES' CONTENTIONS

Appellants contend that the court erred in granting the motion for summary judgment in favor of Officers Griffin and Dowell. They assert that their claim that the entry was unconstitutional was not barred by collateral estoppel based on the contrary finding in Mr. Courtney's state criminal prosecution. They also argue that, based on *Hill*, 649 F.3d at 266–67, the entry was unlawful, asserting that "the fact that Griffin knocked on the door and heard 'people moving closer to the door, like people moving around inside' is of no consequence and does not establish an objectively reasonable belief that the targets of his arrest warrants were present inside." (Internal citation omitted.) Appellants request that this Court reverse the order granting summary judgment with respect to Officers Griffin and Dowell and remand that issue for a trial on the merits.[25]

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25. Appellants state that Mr. Courtney disputed the officers' testimony that they knocked and announced their presence, presumably relying on Mr. Courtney's deposition testimony that the police did not knock and announce and that he was not aware they were at the door until he heard the sound of the door being kicked in from the back bedroom. They do not, however, specifically argue, or cite any cases to support an argument, that the court erred in granting summary judgment on this ground. *See James v. City of Detroit*, 430 F.Supp.3d 285, 293 (E.D. Mich. 2019) (Defendants correctly asserted that "an occupant's inability to hear a knock does not create a fact question as to whether one occurred."). Rather, appellants focus their argument on the assertion that the entry was unlawful because the police did not

Appellees contend that the circuit court properly granted the motion for summary judgment. They do not address the issue of collateral estoppel, but they assert that, under the circumstances, the officers reasonably could have concluded that Ms. Gaines and/or Mr. Courtney were in the apartment. In any event, they argue that, because it was not "clearly established" under Fourth Amendment case law that Officers Griffin and Dowell could not enter Ms. Gaines' apartment to serve the arrest warrants, they are entitled to qualified immunity for the entry. Additionally, they assert that the sounds of the child crying within the apartment provided exigent circumstances, which allowed the officers to enter the apartment.

C.

STANDARD OF REVIEW

Md. Rule 2-501(f) addresses summary judgment, and it provides, in pertinent part:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

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have a reasonable belief that Ms. Gaines and Mr. Courtney were inside. Our focus will be limited to that issue as well.

The Court of Appeals has described the standard of review for a grant of summary judgment, as follows:

> On review of an order granting summary judgment, our analysis "begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law." *D'Aoust v. Diamond*, 424 Md. 549, 574, 36 A.3d 941, 955 (2012) (quoting *Appiah v. Hall*, 416 Md. 533, 546, 7 A.3d 536, 544 (2010)); *O'Connor v. Balt. Cnty.*, 382 Md. 102, 110, 854 A.2d 1191, 1196 (2004). If no genuine dispute of material fact exists, this Court determines "whether the Circuit Court correctly entered summary judgment as a matter of law." *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560, 571, 948 A.2d 11, 18 (2008) (citations omitted). Thus, "[t]he standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is, whether the trial court's legal conclusions were legally correct." *D'Aoust*, 424 Md. at 574, 36 A.3d at 955.

Koste v. Town of Oxford, 431 Md. 14, 24–25 (2013). This Court's review is limited to the factual record that was before the court pre-trial, when summary judgment was granted. *Miller v. Bay City Prop. Owners Ass'n, Inc.*, 393 Md. 620, 623 (2006) (quoting *PaineWebber Inc. v. East*, 363 Md. 408, 413 (2001)) ("An appellate court reviewing a summary judgment examines the same information from the record and determines the same issues of law as the trial court.").

D.

ANALYSIS

1.

COLLATERAL ESTOPPEL

The circuit court found that appellants were collaterally estopped from relitigating the issue relating to the constitutionality of the initial entry based on the finding of the court in Mr. Courtney's criminal case. As explained below, we disagree.

Collateral estoppel, also known as issue preclusion, bars the re-litigation of an issue decided in a prior adjudication if that issue was (1) "identical to the issue to be decided in the present action"; (2) "there was a final judgment on the merits in the prior adjudication"; (3) "the party against whom the doctrine is asserted was a party to the prior adjudication or was in privity with a party to the prior adjudication"; and (4) "the party against whom the doctrine is asserted had a fair opportunity to be heard on the issue in the prior adjudication." *Clark v. Prince George's County*, 211 Md. App. 548, 581, *cert. denied*, 434 Md. 312 (2013). Collateral estoppel applies in both criminal and civil cases. *Cook v. State*, 281 Md. 665, 668, *cert. denied*, 439 U.S. 839 (1978).

Here, there is no dispute that the first and third requirements were satisfied with respect to Mr. Courtney. The challenge to the initial entry by Officers Griffin and

Dowell was identical in both Mr. Courtney's criminal case and the present case, and Mr. Courtney was a party in the prior criminal case.

Appellants argue, however, that collateral estoppel does not bar relitigation of the issue relating to the constitutionality of the initial entry because they did not have a fair opportunity to litigate the claim, relying solely on *Prosise v. Haring*, 667 F.2d 1133 (4th Cir. 1981), *aff'd*, 462 U.S. 306 (1983). In *Prosise*, 667 F.2d at 1137, the court noted the general proposition that collateral estoppel might apply to defeat a § 1983 constitutional claim because the dispositive issue had previously been decided in a prior criminal action. The court held, however, that Prosise's state court guilty plea regarding controlled dangerous substances ("CDS") found in his home did not have preclusive effect on his subsequent § 1983 claim alleging an illegal search and seizure because his Fourth Amendment claim was not actually litigated in the criminal action. *Id*. at 1138, 1140–41. The United States Supreme Court affirmed this ruling, noting that the legality of the search was not actually litigated in the criminal proceeding, and indeed, no issue was "actually litigated" because Prosise declined to contest his guilt. *Prosise*, 462 U.S. at 316.

Here, by contrast, Mr. Courtney's contention regarding the initial entry into the apartment was actually litigated, and the criminal court found that it was lawful. In this situation, where the issue of the entry was actually litigated, appellants' reliance on *Prosise* is misplaced.

Mr. Courtney's criminal case, however, resulted in an acquittal of the CDS charges. Because Mr. Courtney was acquitted, he could not seek appellate review of the suppression ruling. When a defendant is acquitted of criminal charges and there is no ability to seek appellate review of a pretrial suppression ruling, the suppression ruling is not sufficiently final to be used against the defendant for collateral estoppel purposes. *See Johnson v. Watkins*, 101 F.3d 792, 795–96 (2d Cir. 1996) ("[F]acts determined in pretrial suppression hearing cannot be given preclusive effect against a defendant subsequently acquitted of charges" because the defendant lacks "an opportunity to obtain review of an issue decided against him.");[26] *People v. Howard*, 152 A.D.2d 325, 329 (N.Y. App. Div. 1989) (Suppression ruling is not sufficiently final for collateral estoppel purposes when the defendant is acquitted and cannot seek appellate review of the ruling.); *see also Cook*, 281 Md. at 674–75 (Order suppressing evidence at trial terminating in mistrial was not sufficiently final to preclude State from litigating issue at subsequent trial based on collateral estoppel, noting that a ruling should not be treated as final where the party against whom preclusion is sought did not have the opportunity to have the issue decided by an appellate court.); *Glover v. Hunsicker*, 604 F.Supp. 665, 666 (E.D. Pa. 1985) (quoting *Jones v. Saunders*, 422 F.Supp. 1054, 1055 (E.D. Pa. 1976)) (An acquitted defendant is not barred from litigating a violation of constitutional rights based on a prior order

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26. As indicated, other charges involving the gun were nolle prossed. A nolle pros does not result in a final judgment with regard to collateral estoppel. *Butler v. State*, 91 Md. App. 515, 538 (1992), *aff'd*, 335 Md. 238 (1994).

denying a motion to suppress because that "would deprive a plaintiff of an opportunity for a definitive determination of important federal rights for the vindication of which the Civil Rights Act [was] specifically designed[.]").

Because Mr. Courtney did not have the opportunity to appeal the denial of the motion to suppress based on the entry to the home, there was no judgment sufficiently final to preclude him from relitigating the issue in his civil suit. Moreover, appellants other than Mr. Courtney were not parties to the criminal case that the State brought against Mr. Courtney, and for that additional reason, they did not have a full opportunity to be heard on the issue. Accordingly, the circuit court erred in finding that collateral estoppel precluded appellants from litigating the constitutionality of the initial entry.

2.

PROPRIETY OF THE ENTRY

On the merits, appellants contend that the circuit court erred in granting the motion for summary judgment filed by Officers Griffin and Dowell. They assert that the initial entry was unconstitutional under the Fourth Amendment and the Maryland Constitution "because the officers neither established an objectively reasonable belief nor probable cause that either [Ms.] Gaines or [Mr.] Courtney were present inside when they obtained the keys from the rental office and warrantlessly kicked in the front door."[27]

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27. The entry occurred when the officers first opened the door using the key to unlock it.

They argue that the officers' testimony regarding "signs of life" in the apartment may have established that someone was in the apartment, but it did not establish a reasonable belief that Ms. Gaines or Mr. Courtney was inside.[28]

Appellees contend that the circuit court properly granted the motion for summary judgment. They assert that the entry was constitutional because the officers had a reasonable belief that Ms. Gaines or Mr. Courtney was in the apartment.[29] They also argue that the officers had qualified immunity with respect to the § 1983 claim under the Fourth and Fourteenth Amendments because there was no clearly established law that they could not forcibly enter the apartment to serve the arrest warrants.

In assessing the constitutionality of the initial entry, based on the complaint filed, we must determine if the entry was constitutional pursuant to the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Constitution. The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, provides, in relevant part, that "the right of the people to

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28. Although appellants assert that there were disputes of fact preventing summary judgment, none of those facts are relevant to the issue on appeal, i.e., whether the officers possessed a reasonable belief that the couple was home prior to the entry. Appellants did not contest at the summary judgment motion that the police heard noises emanating from the apartment.

29. Alternatively, they assert that, because they heard a child cry and no adult responded to the door, they reasonably concluded that a child needed assistance, and the entry was reasonable under the community caretaking exception.

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. With respect to the Maryland Constitution, Maryland courts generally have construed Article 26 to provide protection consistent with that given by the Fourth Amendment. *King v. State*, 434 Md. 472, 485 (2013) (Although the court has stated "that Article 26 may have a meaning independent of the Fourth Amendment, we have not held, to date, that it provides greater protection against state searches than its federal kin.").[30] Qualified immunity does not apply to Maryland state constitutional claims, i.e., Count VI. *See Williams v. Prince George's County*, 112 Md. App. 526, 546 (1996).

We begin with the argument that the officers had qualified immunity for the § 1983 claims. The Supreme Court has stated that qualified immunity shields government officials performing discretionary functions from civil damages liability "so long as their conduct does not violate clearly established statutory or constitutional

30. Article 26 provides

> [t]hat all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

Md. Const. Decl. of Rts. art. 26.

rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). *Accord Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action."). The Supreme Court has held that a defense of qualified immunity provides protection to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). *Accord Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005). The Court of Appeals has explained that qualified immunity results from a balancing of competing interests. "The need to provide a legal means to vindicate a citizen's federally recognized rights when they are transgressed by government actors is measured against the costs of necessarily inhibiting government officials in the discharge of their occupational duties, including the time spent defending unfounded claims." *Okwa v. Harper*, 360 Md. 161, 198 (2000).

Courts generally have employed a two-part test to determine whether an official is entitled to qualified immunity. *Pearson*, 555. U.S. at 232. To overcome a qualified immunity defense, the plaintiff must show that (1) the facts alleged or shown by the plaintiff "make out a violation of a constitutional right"; and (2) the right was "'clearly established' at the time of the defendant's alleged misconduct." *Id.* at 232, 236.

We address first whether there was a violation of a constitutional right, i.e., whether the police violated Ms. Gaines' and Mr. Courtney's Fourth Amendment rights when they entered the apartment pursuant to the arrest warrants. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980). Entering a home to conduct a search or seizure without a warrant, therefore, is presumptively unreasonable. *Id.* at 586.

When the police have an arrest warrant, however, entry into a residence may be permitted. An arrest warrant "founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.* at 603. To determine whether the police reasonably entered a residence based on an arrest warrant, there is a two-part test. First, an officer must have reason to believe that "the location is the defendant's residence." *Hill*, 649 F.3d at 262. Second, the police must have a reasonable belief that the subject of the warrant is inside the residence. *Id.*

Here, the first step in the analysis was easily satisfied. It was undisputed that the address listed on the warrant was Ms. Gaines' primary residence, and Officer Griffin testified that he went to the rental office for the apartment complex a week earlier and confirmed that she was the lessee. He testified that Ms. Gaines had advised that Mr. Courtney lived at the residence.

We thus turn to the second step, whether the officers had an objectively reasonable belief that Ms. Gaines was home at the time.[31] *Id.* In reviewing this question, our review is *de novo*. *See United States v. Bohannon*, 824 F.3d 242, 248 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 628 (2017).

This question is a closer one, so we must address the scope of the "reason to believe" standard. Is it equivalent to probable cause, reasonable suspicion, or something else?

The federal circuits are split on what the standard "reasonable belief" or "reason to believe" encompasses in this context. *Hill*, 649 F.3d at 262–63. The Fifth, Sixth, Seventh, and Ninth Circuits have indicated that reasonable belief is equivalent to probable cause. *United States v. Jackson*, 576 F.3d 465, 469 (7th Cir.), *cert. denied*, 558 U.S. 1062 (2009); *United States v. Hardin*, 539 F.3d 404, 416 n.6 (6th Cir. 2008); *United States v. Barrera*, 464 F.3d 496, 501 n.5 (5th Cir. 2006); *United States v. Gorman*, 314 F.3d 1105, 1114 (9th Cir. 2002). The First, Second, Tenth, and D.C. Circuits, by contrast, have indicated that "the requirements of reasonable belief are something less than probable cause." *Hill*, 649 F.3d at 263. *Accord Bohannon*, 824 F.3d at 255 ("[R]eason to believe is not a particularly high standard" and requires "more than a hunch as to presence, but less than a probability."); *United States v. Werra*, 638 F.3d 326, 337 (1st Cir. 2011); *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) ("[T]he Supreme Court in *Payton* used a phrase

31. "Reasonable belief" is generally synonymous with "reason to believe." *See United States v. Hardin*, 539 F.3d 404, 410 (6th Cir. 2008); *United States v. Gorman*, 314 F.3d 1105, 1111 (9th Cir. 2002).

other than 'probable cause' because it meant something other than 'probable cause.'"), *cert. denied*, 549 U.S. 1055 (2006); *Valdez v. McPheters,* 172 F.3d 1220, 1227 n.5 (10th Cir. 1999).

Many state courts, on the other hand, have held that reasonable belief, in the context of entering a suspect's dwelling to execute an arrest warrant, does not rise of the level of probable cause. *See*, *e.g.*, *People v. Downey*, 130 Cal.Rptr.3d 402, 408–09 (Cal. Ct. App. 4th 2011); *Barrett v. Commonwealth*, 470 S.W.3d 337, 342 (Ky. 2015) (Entry requires only reasonable belief that suspect is home.), *cert. denied*, 136 S. Ct. 1208 (2016); *Commonwealth v. Silva*, 802 N.E.2d 535, 541 (Mass. 2004) (Reasonable belief, and not probable cause, is the proper standard.); *State v. Paige*, 77 A.D.3d 1193, 1194 (N.Y. App. Div. 2010) ("The reasonable belief standard is less stringent than the probable cause standard[.]"), *aff'd*, 16 N.Y.3d 816 (2011); *State v. Turpin*, 96 N.E.3d 1171, 1179 (Ohio Ct. App. 2017) (quoting *State v. Cooks*, 2017 WL 275790, ¶ 10 (Ohio Ct. App. Sept. 1, 2017)) ("[P]olice officers do not need probable cause to enter a residence to execute an arrest warrant provided they have a reasonable belief" the suspect resides there and is present.). *But see State v. Smith*, 90 P.3d 221, 224 (Ariz. Ct. App. 2004) ("[R]eason-to-believe standard requires a level of reasonable belief similar to that required to support probable cause.").

In *Taylor v. State*, 448 Md. 242 (2016), *cert. denied*, 137 S. Ct. 1373 (2017), the Court of Appeals addressed the reason to believe standard in a different context. In that case, the court addressed the authority of the police

to search a car incident to arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 248 (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)). In addressing what the term "reason to believe" meant, the Court stated:

> We conclude that the "reasonable to believe" standard is the equivalent of reasonable articulable suspicion because we cannot discern any logical difference between the two. If a police officer has a reasonable suspicion that he or she can articulate that something is so, then perforce it is reasonable for the officer to believe that it may be so and *vice versa.* But that suspicion, to be reasonable, must have some basis in fact.

Id. at 250.

Based on our review of the case law, we are persuaded, consistent with the majority of state courts addressing the reasonable belief standard in the context of an entry into the home pursuant to an arrest warrant, that the "reason to believe" standard does not rise to the level of probable cause. Rather, we hold, consistent with the decision in *Taylor*, that the term "reason to believe" in the context of the execution of an arrest warrant is akin to reasonable suspicion. The standard requires "more than a hunch as to presence, but less than a probability." *Bohannon*, 824 F.3d at 255. "Reasonable belief is established by looking at common sense factors and evaluating the totality of the circumstances." *United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007).

In assessing whether the officers here had a reasonable belief that Ms. Gaines was in the residence, we note that Officers Griffin and Dowell had confirmed that Ms. Gaines resided at the apartment, and when they knocked on the door, they heard noises indicating that someone was coming up to the door and moving things, a brief baby cry, and the sound of someone coughing inside. These circumstances, in the absence of facts indicating that Ms. Gaines would not be home, provided a reasonable belief that Ms. Gaines or Mr. Courtney, who the police knew had children, was inside the residence. *See United States v. Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001) (Reasonable belief that suspect would be home when police knocked and heard a "thud" inside, suggesting that "a person was inside the duplex at the time."), *cert. denied*, 533 U.S. 939 (2001); *United States v. Route*, 104 F.3d 59, 62–63 (5th Cir.) (Using mail and bills, police confirmed that suspect lived at the house and had a reasonable belief he was home because police could hear television on inside and a car was in the driveway.), *cert. denied*, 521 U.S. 1109 (1997). *See also Barrett*, 470 S.W.3d at 343 (Police had reasonable belief suspect was home because they knew he resided there, and when they arrived, they heard sounds of voices and movement inside that changed when the officers knocked.).

Appellants argue that the unlawfulness of the initial entry "is controlled by" *Hill*, 649 F.3d at 264–65, particularly the court's statement that the "police cannot solely rely on an unidentified and unresponsive noise coming from within the home to enter for purposes of executing an arrest warrant." The facts in *Hill*, however, are significantly different from those in this case.

In *Hill*, 649 F.3d at 261, the police had a warrant for Hill's arrest with an address unknown. They went to his girlfriend's residence, but based on a prior conversation with the girlfriend, the officer who went to the residence testified that he thought there was an 80% chance that Hill would not be at the residence. *Id.* The police went there to communicate with Hill's girlfriend about "Hill's whereabouts." *Id.* The officers knocked on the door and heard "unresponsive noises" that could have been the television or voices. *Id.* They called the girlfriend, who stated that the only person who could be in the home at the time was her sister. *Id.* at 263–64. They entered the residence and found Hill. *Id.*

Under these facts, the court held that the police did not have a reasonable belief that Hill was inside the residence. *Id.* at 263. The court stated that, "at best, the police had reason to believe that someone was present and the individual inside was [the girlfriend's] sister." *Id.* at 264.

The facts in *Hill*, where the police testified that, when they went to the house, they did not think Hill would be there, and when they heard noises, they were advised in a call to the person who lived there that Hill was not there, are not at all similar to the facts in this case. *See also V.P.S. v. State*, 816 So.2d 801, 803 (Fla. Dist. Ct. App. 2002) (No reasonable belief in part because officers were told the suspect was not there.). Contrary to appellants' arguments, the reasoning in *Hill* does not control this case.

Here, the police were advised that Ms. Gaines and Mr. Courtney lived at the residence. They heard people

moving in the apartment and the sounds of a child crying inside. Under these circumstances, in the absence of information to the contrary, it was reasonable to believe that Ms. Gaines and/or Mr. Courtney were present inside the residence. Accordingly, the circuit court properly found that the entry was constitutional, and it properly granted summary judgment on the claims based on the initial entry (Count VI and paragraph 88 of Count VII).

Our resolution in this regard addresses both the state constitutional claims and the first part of the qualified immunity test for the § 1983 claims. We further hold that, even if the initial entry was a violation of the Fourth Amendment, such a violation was not "clearly established" at the time of the entry. Thus, summary judgment was appropriate on the § 1983 claims for this additional reason.

II.

POST-TRIAL MOTIONS

Appellants contend that the circuit court erred in granting appellees' motion for judgment notwithstanding the verdict, or in the alternative, a new trial. Appellees, not surprisingly, disagree.

A.

CIRCUIT COURT PROCEEDINGS

On March 12, 2018, after the jury rendered its verdict finding that the first shot taken by Corporal Ruby was

objectively unreasonable, appellees filed motions for judgment notwithstanding the verdict, remittitur of the verdict, new trial, and for the court to exercise revisory power over the judgment. Appellees argued that Corporal Ruby's first shot was objectively reasonable as a matter of law, and therefore, he was entitled to judgment. They asserted that there was no violation of the rights of Ms. Gaines or her son, an innocent bystander, under § 1983 or the Maryland Declaration of Rights, nor was any battery committed against them. Additionally, they argued that Corporal Ruby was entitled to qualified immunity because he did not violate any statutory or constitutional right of which a reasonable officer would have known.

Appellees also argued that Ms. Dormeus, Mr. Gaines, and Karsyn could not recover under a wrongful death claim because the reasonableness of the shot meant that Ms. Gaines' death was not wrongful. They further asserted that Md. Code (2013 Repl. Vol.), § 3-904(c)(2) of the Courts and Judicial Proceedings Article permits beneficiaries under a wrongful death claim to receive damages only when directed by the verdict, and the jury in this case was never asked to make a finding regarding wrongful death or to apportion those damages.

Appellees next argued that a new trial was warranted for two reasons. First, they asserted that the verdict sheet was deficient and resulted in an irreconcilably inconsistent verdict because it did not separate out the damages for the state law claims, which are capped under

the Local Government Tort Claims Act ("LGTCA"),[32] from the federal law claims, which are not subject to a cap.[33] Second, appellees argued that the damages awarded were excessive and against the weight of the evidence, and therefore, a new trial or a remittitur was warranted.

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32. The LGTCA [Local Government Tort Claims Act] is a defense and indemnification statute, *Hines v. French*, 157 Md. App. 536, 571, 852 A.2d 1047 (2004), the purpose of which in part is "to limit the liability of local governments and require them to provide a defense to their employees under certain circumstances." *Williams v. Prince George's County*, 112 Md. App. 526, 553, 685 A.2d 884 (1996). Section 5-302(a) of the LGTCA states that a local government must provide a legal defense for its employees in tort actions alleging tortious conduct "within the scope of employment with the local government." Section 5-303(b)(1) then provides that, except for punitive damages, a local government is liable for any judgment against its employee for damages from tortious conduct "committed by the employee within the scope of employment with the local government." Under the LGTCA, the local government also may not assert governmental or sovereign immunity to avoid its duty to defend or indemnify its employees. LGTCA § 5-303(b)(2).

Edwards v. Mayor & City Counsel of Balt., 176 Md. App. 446, 457–58 (2007)

33. Md. Code Ann. (2013 Repl. Vol.), § 5-303 of the Courts and Judicial Proceedings Article ("CJP") provides that "the liability of a local government may not exceed $400,000 per an individual claim, and $800,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions[.]" *See Espina v. Prince George's County*, 442 Md. 311, 323 (2015).

Appellants filed oppositions to these post-trial motions, arguing that the motion for JNOV must be denied because the jury properly found that Corporal Ruby's shot was objectively unreasonable. They argued that Kodi had properly pled and proceeded on his § 1983 claim regarding bystander liability pursuant to the Fourteenth Amendment, even if he could not bring it pursuant to the Fourth Amendment. They asserted that Corporal Ruby committed battery against Kodi, arguing that the transferred intent doctrine applied because Corporal Ruby intended to shoot Ms. Gaines and that action was unlawful. They further argued that Ms. Dormeus, Karsyn, and Mr. Gaines could recover for wrongful death because there was ample evidence to show that the first shot was fatal.

Appellants disputed appellees' argument that a new trial or a remittitur was warranted because the jury verdict was inconsistent. They noted that they had proposed a verdict sheet that listed separate damages for each count, but appellees objected, and the parties then agreed to a new verdict sheet drafted by the court. Appellants argued that the court "should simply apply the damage cap where appropriate, and leave the damages intact[.]" They also asserted that the non-economic damage awards were not excessive and were supported by the record, and therefore, a remittitur or new trial on this ground was not appropriate.

In addition to their opposition to appellees' post-trial motions on the merits, appellants filed a motion to strike the motions as untimely. They argued that judgment was entered by the circuit court on February 22, 2018, and

therefore, the deadline to file post-trial motions was March 5, 2018, i.e., 10 days after judgment was entered. Because appellees filed the motions on March 12, 2018, appellants argued that the motions were untimely.

Appellees filed an opposition to appellants' motion to strike, asserting that the post-trial motions were timely filed. They argued that judgment was not entered on February 22, 2018, but rather, the judgment was entered on March 2, 2018, the date the judgment was signed, indexed, issued, and entered into the court's case management system docket.[34] The circuit court held a hearing on the motions on July 2, 2018. The parties began with the timeliness issue. Appellees noted that the docket entries stated that the judgment was indexed on March 2, 2018, and this entry contained a note that stated: "UCS automatic generated docket entry pulled the Judgment entry date of 2/22/18 for the description in error; the corrected date is the Judgment indexed on 3/2/18."

The circuit court found that the post-trial motions were timely filed, stating as follows:

> The Motion to Strike the Motion for Failure to Timely File is denied. I can't explain it. The clerk of the Court made an error. This Court did not sign the judgment until March 2nd. That is the effective date. The clerk of the Court has

34. On May 29, 2018, the circuit court granted appellees' motion to stay enforcement of judgment, and the matter was held *sub curia* pending the consideration of the post-trial motions at the July hearing.

> no authority to send out a notice of judgment until the judge signs the judgment. That is the Court's ruling on that issue.

The court then heard arguments by counsel on the merits.

B.

CIRCUIT COURT MEMORANDUM AND ORDER

On February 14, 2019, the circuit court issued a 75-page Memorandum Opinion and Order granting the motion for JNOV. In the alternative, the court ordered that, if the JNOV was not upheld on appeal, the court granted appellees' request for a new trial based on an inconsistent verdict.

The court began its discussion with the motion for JNOV and appellees' request that Baltimore County be dismissed from the action. As discussed in more detail, *infra*, the court dismissed the claims against the County.

The court then found that Corporal Ruby was entitled to qualified immunity because he did not violate Ms. Gaines' constitutional right, and even if he did, there was no "'clearly established' prohibition at the time he shot Ms. Gaines." The court summarized the situation confronting Corporal Ruby as follows:

> Corporal Ruby was faced with Gaines who was armed with a shotgun; had threatened police officers with that shotgun, who had an

> outstanding arrest warrant; who was suspected of having undisclosed mental health issues, for which she had not taken medication for a year; who refused to surrender herself to lawful arrest, even after one of her children, Karsyn Courtney, and that child's father, Kareem Courtney, had surrendered; who for hours resisted arrest and then abruptly moves to a place of cover and concealment and raises her shotgun in the direction of the police officers.

In determining that Corporal Ruby's shot was reasonable, and therefore, not a violation of Ms. Gaines' Fourth Amendment right against unlawful seizure, the court stated that there was no evidence contradicting Corporal Ruby's testimony that Ms. Gaines raised the shotgun to a firing position or that he believed her actions endangered others. Moreover, the court found "as a fact" that Ms. Gaines discharged the shotgun immediately after Corporal Ruby's first shot, which supported Corporal Ruby's testimony that "the immediacy of that response indicated that the shotgun was loaded ready to fire." The court stated that, even if Corporal Ruby was "wrong about her pointing the shotgun at the officers on the hinge side of the door, the physical evidence [was] that she was raising her shotgun." Accordingly, the court found that Corporal Ruby's actions were objectively reasonable and did not violate Ms. Gaines' Fourth Amendment rights against unlawful seizure. Additionally, based on the court's finding that the shooting of Ms. Gaines, although tragic, was not unlawful, the court vacated the findings of battery on Ms. Gaines and Kodi. And, because there was "no other

bystander potentially liable," the court granted judgment on Count V.

Turning to the second prong of the qualified immunity test for the § 1983 claims, the court found that Corporal Ruby's actions did not violate clearly established constitutional prohibitions at the time of the seizure. Quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012), the court stated that "[a] clearly established right is one that is 'sufficiently clear that every reasonable officer would have understood that what he is doing violates that right.'" The court rejected the argument that the cases relied on by appellants: *Pena v. Porter*, 316 Fed.Appx. 303 (4th Cir. 2009); *Connor v. Thompson*, 647 Fed.Appx. 231 (4th Cir. 2016); and *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) presented sufficiently similar factual scenarios to create a clearly established prohibition to Corporal Ruby's actions.

The court found that Corporal Ruby was entitled to qualified immunity because his conduct did not violate "clearly established" constitutional rights. Accordingly, the court granted the motion for judgment notwithstanding the verdict and dismissed the complaint against Corporal Ruby.

In the event that its ruling granting JNOV did not withstand appellate scrutiny, the court's opinion next addressed appellees' motion for new trial based on an "irreconcilably inconsistent" jury verdict. Initially, the court rejected appellants' argument that appellees waived their right to challenge the verdict sheet because, although they agreed to the form of the verdict sheet, they presented the issue in the post-trial motions.

The court then granted the motion for a new trial on the ground that the verdict was inconsistent. Although acknowledging that the verdict was not logically inconsistent, the court stated that the verdict was defective because the jury did not apportion the award between the state law claims (battery and violation of the Maryland Declaration of Rights), which were subject to a damages cap, and the federal § 1983 claims, which were not subject to any damages cap. Accordingly, the court concluded that appellees were entitled to a new trial.

Finally, the court discussed appellees' request that it remit the verdict. The court found "that the non-economic damages awarded to the various Plaintiffs [were] excessive and shock[] the conscience, and but for this [c]ourt dismissing the matter for grant of qualified immunity, or in the alternative granting a new trial because of the defective verdict, the [c]ourt would remit the [jury's] awards."

The Order accompanying the Memorandum Opinion, provided as follows:

> **ORDERED**, that the Third Amended Complaint is dismissed against Baltimore County, Maryland. It is further
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> **ORDERED**, that Count V of the Third Amended Complaint, Bystander Liability, is dismissed in its entirety. It is further

ORDERED, that the economic damages of $7,000.00 awarded to Rhanda Dormeus is vacated. It is further

ORDERED, that the Defendants['] request for Judgment Notwithstanding the Verdict is Granted and the Complaint against Defendant Royce Ruby is dismissed. It is further

ORDERED that should the Court's ruling granting JNOV not withstand appellate scrutiny, for the reasons stated in the Memorandum Opinion, the Court grants the Defendants a new trial.

C.

TIMELINESS OF POST-TRIAL MOTIONS

Appellants contend that the circuit court erred in finding that appellees' post-trial motions were timely filed pursuant to Md. Rules 2-532 and 2-533.[35] Rule 2-532(b) provides that a motion for judgment notwithstanding the verdict "shall be filed within ten days after entry of judgment on the verdict," and Rule 2-533(a) provides that a motion for new trial may be filed "within ten days after entry of judgment." The jury rendered its verdict on February 16, 2018.

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35. The circuit court did not rule on the Rule 2-535 motion to revise, and therefore, that motion is not before us on appeal.

Appellants argue that the clerk entered the judgment on February 22, 2018. Appellees did not file their motions until March 12, 2018, which appellants argue was 17 days after the entry of judgment, in violation of the 10-day deadline.

Appellees argue that the circuit court properly found that their post-trial motions were timely filed. They assert that the judgment was not final until it was signed by the judge on March 2, 2018, noting that the docket entry for February 22, 2018, states "Judgment to be entered."

We agree that judgment was entered on March 2, 2018, and therefore, appellees' post-trial motions filed on March 12, 2018, were timely filed. Rule 2-601(a) provides that "[e]ach judgment shall be set forth on a separate document" and be signed by a judge or the clerk of the court. Subsection (a) also provides that "[u]pon a verdict of a jury or a decision by the court allowing recovery only of costs or a specified amount of money or denying all relief, the clerk shall forthwith prepare, sign, and enter the judgment, unless the court orders otherwise." *See Hiob v. Progressive American Ins. Co.*, 440 Md. 466, 479 (2014) (In cases denying all relief, the clerk may prepare and sign the judgment, but in more complex judgments, a judge's signature is required.). Rule 2-601(b) provides that the "clerk shall enter a judgment by making an entry of it on the docket of the electronic case management system."

Here, the circuit court stated that the clerk made an error in initially entering the judgment on February 22, 2018. It stated that it did not sign the judgment until

March, and the clerk had no authority to enter judgment before that time. The docket entries support the court's statement. The docket entry for March 2, 2018, says "automatic generated docket entry pulled the Judgment entry date of 2/22/18 for the description in error; the correct date is the Judgment indexed on 3/2/18." Based on this docket entry, stating that the entry date of February 22, 2018, was "in error" and the "correct date" was March 2, 2018, in light of the goal of Rule 2-601 to make the date of entry of judgment clear, *see Won Bok Lee v. Won Sun Lee*, 466 Md. 601, 635 (2020), the date of entry of judgment was March 2, 2018. Accordingly, the circuit court properly found that appellees' motions filed on March 12, 2018, were timely filed pursuant to Md. Rule 2-532 and 2-533.

We now turn to the merits of the post-trial motions.

D.

JUDGMENT NOTWITHSTANDING THE VERDICT

1.

PARTIES' CONTENTIONS

Appellants contend that the circuit court erred in granting JNOV on the basis of qualified immunity. They argue that the court "ignored facts supporting [a]ppellants, made unauthorized factual findings, and did not consider the evidence in the light most favorable to [a]ppellants as [the court] was required to do." Appellants note that, on three separate occasions prior to the verdict, the court

declined to grant judgment to appellees, stating that the reasonableness of Corporal Ruby's shot was a question for the jury.

Although Corporal Ruby testified that he fired the first shot because Ms. Gaines raised her shotgun into a firing position that made him fear for officer safety, appellants contend that the jury could have concluded, based on the evidence, that Corporal Ruby was not being truthful. They assert that there were two issues for the jury to address in deciding whether Corporal Ruby's first shot was objectively reasonable: (1) whether Ms. Gaines raised her gun and was pointing it at the door when Corporal Ruby fired the first shot; and (2) whether the officers in the hallway were in danger of death or serious bodily harm at the time. Appellants argue there was significant evidence to contradict Corporal Ruby's testimony that she raised her shotgun, and the circuit court, in granting JNOV, "created [its] own findings from [its] trial notes or memory, ignored evidence favoring [a]ppellants, or simply accepted Ruby's testimony [as true]."

Appellees argue that the circuit court properly granted JNOV in their favor. They assert that Corporal Ruby was entitled to qualified immunity on all the § 1983 claims, that the shooting of Ms. Gaines was constitutional under Article 24 and 26 of the Maryland Declaration of Rights because it was reasonable, and, because the shooting was lawful, the court correctly dismissed the battery claims of Ms. Gaines and Kodi.[36]

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36. Appellees also argue that the court properly granted JNOV on the state constitutional claims for Kodi, Karsyn, Mr.

Appellees assert that police use of deadly force is authorized under the Fourth Amendment where the officer has probable cause to believe that the suspect poses a threat of harm to the officer or others. They note that the only witness to the shooting to testify was Corporal Ruby. They argue that his testimony that Ms. Gaines raised her shotgun to a firing position, which he believed threatened his safety and that of others, was undisputed. Appellees assert that, given these undisputed facts, any reasonable officer would have concluded that Ms. Gaines posed an imminent deadly threat, and therefore, his shot was reasonable under the Fourth Amendment. Additionally, they argue that Corporal Ruby "is entitled to qualified immunity because his actions at the time he took them did not violate clearly established statutory or constitutional rights, of which *every* reasonable officer would have known."[37] (Emphasis in original.)

With respect to the injury to Kodi, appellees argue that a "Fourth Amendment violation *does not* occur for an innocent bystander who *is not* the intended target of

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Courtney, or the Gaines family relating to the shooting because they were not the intended target of the shooting, and therefore, they were not seized. Appellants did not respond to this argument in their reply briefs.

37. Appellees argue that the § 1983 claims should not have even reached the jury because the court should have granted summary judgment in their favor on the basis of qualified immunity. They assert that the court "rectified [its] earlier mistake" when it granted the JNOV, and this Court should affirm the dismissal of these federal claims.

a seizure."[38] (Emphasis in original.) Here, they argue, it was clear that Kodi was not the intended target, and Fourth Amendment rights cannot be asserted vicariously.

2.

STANDARD OF REVIEW

This Court reviews a circuit court's order granting a motion for judgment notwithstanding the verdict under a *de novo* standard of review. *Marrick Homes LLC v. Rutkowski*, 232 Md. App. 689, 697 (2017). As we have explained:

> [W]e focus on whether the [appellants] presented evidence that, taken in the light most favorable to the nonmoving party, legally supported their claim. *Elste v. ISG Sparrows Point, LLC,* 188 Md. App. 634, 645–46, 982 A.2d 938 (2009). The evidence legally supports a claim if any reasonable fact finder could find the existence of the cause of action by a preponderance of the evidence. *Hoffman v. Stamper,* 385 Md. 1, 16, 867 A.2d 276 (2005). In a jury trial, the amount of legally sufficient evidence needed to create a jury question is slight. *Id.* Thus, if the nonmoving party offers competent evidence that rises above speculation, hypothesis,

38. Mr. Cunningham argues in his reply brief that the Fourth and Fourteenth Amendment claims regarding Kodi are not properly before this Court because they were not addressed in the circuit court's opinion.

> and conjecture, the JNOV should be denied. *Aronson & Co. v. Fetridge,* 181 Md. App. 650, 664, 957 A.2d 125 (2008) (Internal quotation marks omitted). In determining the sufficiency of the evidence, the court must resolve all conflicts in favor of the nonmoving party. *Baltimore & O. R. Co. v. Plews,* 262 Md. 442, 449, 278 A.2d 287 (1971). Also, the court will assume the truth of all the nonmoving party's evidence and inferences that may naturally and legitimately be deduced from the evidence. *Id.*

Barnes v. Greater Baltimore Med. Ctr., Inc., 210 Md. App. 457, 480 (2013). An appeal from a decision to grant qualified immunity is reviewed *de novo. Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020).

3.

ANALYSIS

a.

EXCESSIVE FORCE

In determining whether a police officer has used excessive force in violation of 42 U.S.C. § 1983 or Articles 24 and 26 of the Maryland Declaration of Rights, we look to "whether the officers' actions were 'objectively reasonable' in light of the facts and circumstances confronting them."[39]

39. Our analysis of the excessive force claim is confined to Ms. Gaines because, as noted *supra*, Fourth Amendment rights

Graham v. Connor, 490 U.S. 386, 397 (1989); *Estate of Blair by Blair v. Austin*, No. 35, Sept. Term, 2019, 2020 WL 2847516, at *8 (Md. June 2, 2020) (plurality opinion). *See Randall v. Peaco*, 175 Md. App. 320, 330 (Claims of excessive force brought under Article 24 are analyzed in the "same manner as if the claim were brought under Article 26[,]" i.e., "under Fourth Amendment jurisprudence, rather than notions of substantive due process."), *cert. denied*, 401 Md. 174 (2007). *See also* Dan Friedman, *The Maryland State Constitution: A Reference Guide* 62–63 (Oxford ed. 2011).

In an excessive force case, the plaintiff must prove, "by a preponderance of the evidence that the officer exceeded the level of force an objectively reasonable officer would use under the same or similar situation." *Blair*, 2020 WL 2847516, at *7 (plurality opinion). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). The test of reasonableness requires careful attention to "the facts and circumstances of each particular case, including

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are personal and cannot be vicariously asserted by the family. *Alderman v. United States*, 394 U.S. 165, 172, *reh'g denied*, 394 U.S. 939 (1969). With respect to Kodi, appellees correctly note that he was an innocent bystander who was not "seized" within the meaning of the Fourth Amendment. *Schultz v. Braga*, 455 F.3d 470, 480–81 (4th Cir. 2006).

the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[40] *Id.* at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

The use of deadly force by a police officer is reasonable when the officer has "probable cause to believe that the suspect poses a threat of serious physical harm to the officer or to others." *Garner*, 471 U.S. at 11. *See Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) ("[T]he question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force."), *cert. denied*, 521 U.S. 1120 (1997). "Where [a] suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11.

Here, we have no trouble concluding that if, as Corporal Ruby testified, Ms. Gaines suddenly raised her

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40. We note that the crime motivating the initial entry was minor, i.e., failure to appear for a misdemeanor trial, but the crime which caused the deadly stand-off, pointing a shotgun in the direction of the police, an assault, was not minor.

shotgun into firing position and aimed it in the direction of the officers near the door, a reasonable officer could have concluded, under the facts of this case, that there was a significant threat of death or serious physical injury to the officers.[41] This testimony, if undisputed, could have supported the grant of JNOV. *See Roy v. Inhabitants of City of Lewistown*, 42 F.3d 691, 694 (1st Cir. 1994) (Although "[j]udgments about reasonableness are usually made by juries in arguable cases, even if there is no dispute about what happened, . . . the facts might point so clearly toward reasonableness that no reasonable jury could decide for the plaintiff."). *Accord Blair*, 2020 WL 2847516, at *19 (Getty, J., dissenting).

In this case, however, viewing the evidence in the light most favorable to the appellants, there was a dispute of fact regarding the veracity of that version of events. Indeed, the court noted that appellants alleged that "Ms. Gaines did not raise the shotgun into firing position," did not "aim her shotgun" at the officers, and even if she did, the officers were not in danger "because they were protected by brick walls and . . . protective equipment."

In closing argument, counsel for appellants challenged the truthfulness of Corporal Ruby's account. In support,

41. In addition to the testimony that Ms. Gaines abruptly raised her gun into firing position in the direction of the officers, the testimony was undisputed that Ms. Gaines had resisted arrest for six hours, threatened police multiple times throughout the day, failed to obey police directives to put down her weapon, had a known history of mental illness and was off her medication, and was behaving irrationally and aggressively at times.

appellant relied on evidence that they asserted showed that Ms. Gaines was not raising her gun in a firing position in the direction of the officers near the door. For example, they noted that Corporal Ruby testified that he saw only the ends of Ms. Gaines' hair braids and the barrel of the muzzle of the gun protruding from the kitchen, but several witnesses, including Corporal Ruby's expert, Mr. Key, and a fellow officer, Officer Callahan, testified that, if Ms. Gaines had been pointing her weapon at the door, her hands, arms, and "potentially a slight shoulder," would have to be exposed outside the kitchen wall. Additionally, the evidence showed that the first fatal shot entered Ms. Gaines' back on the left side, which Dr. Powers said was consistent with Ms. Gaines being behind the wall and not pointing the weapon toward the hinge side of the door.

Dr. Powers also testified that it was not his belief that Ms. Gaines raised her weapon or pointed it toward the hinge side of the door. He stated, therefore, that there was no immediate threat of death or serious bodily injury at the time Corporal Ruby took the first shot.[42]

In granting the motion for JNOV, however, the court stated that there was no testimony contradicting Corporal Ruby's testimony that Ms. Gaines raised the shotgun to a firing position, and it found as a fact that Ms. Gaines, who had been resisting arrest for hours, "abruptly move[d] to

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42. Although there were attempts at trial to impeach this testimony with Dr. Powers' prior deposition testimony, there was no argument below, or on appeal, challenging the admissibility of Dr. Powers' specific testimony in this regard.

a place of cover and concealment and raise[d] her shotgun in the direction of the police officers."[43]

When the issue of reasonableness of a police officer's action or the applicability of qualified immunity "turns upon which version of facts one accepts, the jury, not the judge, must determine liability." *King v. State of California*, 242 Cal. App. 4th 265, 289 (2015). *Accord Blair*, 2020 WL 2847516, at *5 (plurality opinion) (The jury decides the weight of evidence, and when it presents more than one inference, the issue is for the jury to decide.); *Nathan v. Dep't of Human Servs.*, 407 P.3d 857, 866 (Or. Ct. App. 2017) ("Whether qualified immunity is established is a matter of law for the court to decide, but, if the availability of the defense depends on facts that are in dispute, the jury must determine those facts.").

Here, where there was a dispute of fact regarding what happened on August 1, 2016, it was for the jury here to determine, based on the evidence, what occurred, and whether, in light of its finding, Corporal Ruby acted reasonably in firing that first shot. The jury decided that Corporal Ruby's first shot, on the facts presented, was not reasonable. The circuit court erred in usurping the jury's finding and granting JNOV. Accordingly, we reverse the court's grant of JNOV in this regard.

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43. The court also stated that, even if Corporal Ruby was wrong, qualified immunity applied where an officer makes a mistake of fact.

b.

DISMISSAL OF CLAIMS AGAINST BALTIMORE COUNTY

As indicated, the circuit court dismissed all claims against the County. In so doing, the court noted that, under *Espina v. Jackson*, 442 Md. 311 (2015), there is a distinction between being sued as a defendant and a local government's duty to indemnify its employees under the LGTCA. Here, the County was not seeking to avoid indemnification, but it was asking only to be dismissed as a named defendant. The court stated that, because appellants had failed to prove the *Monell* claim (Count IX), i.e., that the County had an official municipal policy that caused injury, Baltimore County should be dismissed as a defendant.

Appellants, despite filing briefs totaling more than 170 pages challenging the court's rulings, address this ruling with only one sentence, asserting: "Additionally, Baltimore County is a proper Defendant," citing *Prince George's County v. Longtin*, 419 Md. 450, 493 (2011). Given this sparse treatment of the issue, we could decline to consider it. We will, however, address the ruling.

The County similarly spends little time on this issue, stating merely that the circuit court properly dismissed "the § 1983 *Monell* claims against the County."[44] At oral

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44. In *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978), the Supreme Court held that municipalities were liable under § 1983

argument, counsel for appellants stated that they were not challenging the circuit court's ruling on the *Monell* claims. Accordingly, we affirm the grant of JNOV on the § 1983 claims against the County.

As appellants point out, though, however briefly, the Court of Appeals has held that "local governmental entities do, indeed, have respondeat superior liability for civil damages resulting from State Constitutional violations committed by their agents and employees within the scope of the employment." *Longtin,* 419 Md. at 493 (quoting *DiPino v. Davis*, 354 Md. 18, 51–52 (1999)). Because the circuit court did not specifically address this, we vacate the JNOV of the state claims against the County and remand for the circuit court to consider and make any necessary factual findings.

E.

MOTION FOR NEW TRIAL

As indicated, the circuit court made an alternate ruling, stating that, should the JNOV ruling be reversed on appeal, it granted appellees' motion for a new trial on the ground that the verdict sheet was "irreconcilably inconsistent" because it failed to apportion damages between the state claims, which are subject to the LGTCA damage cap, and federal claims, which are not subjected to the cap. The court, after discussing cases holding

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for constitutional violations of its employees only when the violation was "caused" by the municipality.

that inconsistent verdicts are not permitted in civil cases, stated that the verdict was not logically inconsistent, but it was defective because the jury did not specify the apportionment, if any, of the total award between the state and federal claims, and therefore, the court "would be left to speculate what, if any figure, is subject to" the damages cap.

1.

PARTIES' CONTENTIONS

Appellants contend that the circuit court erred in conditionally granting appellees' motion for a new trial. They argue that appellees waived their right to complain that the verdict sheet was irreconcilably inconsistent, and "invited" the error, because: (1) they objected to appellants' proposed verdict sheet containing separate damage lines for each cause of action and advocated for a single line for each claim with no separation of damage; and (2) after the jury returned its verdict, they did not object before the jury was discharged.

On the merits, appellants argue that the circuit court erred in finding that the verdict was inconsistent because the verdict was consistent on all counts, in favor of appellants, consistent with the weight of the evidence. They assert that, although the verdict is "indeterminant" regarding how damages should be apportioned, appellants anticipated this result and requested a verdict sheet to address it, but the circuit court and appellees rejected the proposed verdict sheet. They argue that, in light of this

background, it is "astounding" that the court granted a new trial on liability and damages. In their view, apportionment of the award is "separate and apart from the clear finding of liability or damages," and a new trial "would unjustly eliminate the jury's clear finding of liability when there is no legal basis for doing so."

Appellees argue that the circuit court properly granted a conditional new trial because the verdict sheet was "inherently flawed and legally deficient." They assert that it was an irreconcilably inconsistent verdict because it did not contain separate lines for damages for the state and federal claims, and therefore, the court was "unable to determine, absent guesswork and pure speculation," what portion of the $32,873,543 damages awarded to Kodi was subject to the LGTCA cap and the portion for the federal claims that were not subject to the cap. They also argue that the damages awarded to Karsyn Courtney ($4,525,216.32), Ryan Gaines ($300,000), and Rhanda Dormeus ($300,000) were irreconcilably inconsistent because their wrongful death claim was not submitted to the jury, and therefore, that there was no legal basis to award damages to these individuals. Finally, appellees contend that the issue of an inconsistent verdict was not waived because they raised it by post-trial motion.

2.

APPEALABILITY

In *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 57 (1992), the Court of Appeals explained that "an

order granting a new trial is not immediately appealable because it is an interlocutory order" that is not "ultimately reviewable" until "appeal is taken from the final judgment." In other words, the proper procedure is for the case to return to the trial court for retrial, and if a final judgment ultimately is issued, the aggrieved party can then challenge the initial grant of the new trial on appeal. *Id.*

The ruling in *Buck*, at first blush, appears to preclude an appeal of the court's grant of the motion for new trial in this case. The procedural posture of *Buck*, however, is distinguishable from this case.

In *Buck*, 328 Md. at 53, the jury awarded the plaintiff minimal damages based on negligence resulting in an automobile accident, but it declined to award him damages for loss of consortium. The plaintiff filed a motion for new trial based on damages, arguing the verdict was "grossly inadequate" and likely the result of improper comments made by the defense attorney at trial. *Id.* The circuit court granted the motion for new trial and the defendant appealed. *Id.* at 54. The Court of Appeals held that the appeal was properly dismissed "because it was not taken from a final judgment." *Id.* Upon retrial, the plaintiff was awarded a more substantial damage award, and the defendant appealed on the basis that the trial court had abused its discretion by granting the new trial. *Id.* The Court of Appeals ultimately held that the circuit court did not abuse its discretion in granting the new trial because a jury verdict that is against the weight of the evidence is within the purview of the trial court to overturn. *Id.* at

60. Thus, in *Buck*, there was no appealable final judgment at the time the new trial was granted.

Here, by contrast, the circuit court issued a final judgment when it granted appellees' motion for JNOV and dismissed all claims. *See Kusens v. Pascal Co., Inc.*, 448 F.3d 349, 358 (6th Cir. 2006) (When a trial court "grants a motion for JNOV, that order is the final judgment of the court."). The court then made a conditional ruling on the motion for new trial in accordance with Md. Rule 2-533(c), which provides:

> When a motion for new trial is joined with a motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial if the judgment is thereafter reversed on appeal.

In *Franklin v. Gupta*, 81 Md. App. 345, 350, 362, *cert. denied*, 319 Md. 303 (1990), this Court stated, without addressing the general rule of non-appealability of new trial orders, that when a new trial is conditioned upon the reversal of a JNOV, "the grant of a new trial is appealable." It noted that, "because of the broad range of discretion accorded the trial judge, the decision is reviewable, on an abuse of discretion standard, only under extraordinary circumstances."

Other courts have specifically addressed the distinction from the general rule of non-appealabilty and held that, "if an appeal is properly taken from a judgment

notwithstanding the verdict, the appellate court, on holding that the J.N.O.V. was erroneous, has the power to review a conditional order of the trial court granting a new trial." *Anderson v. City of Atlanta*, 778 F.2d 678, 689 n.15 (11th Cir. 1985). *Accord Murphy v. City of Long Beach*, 914 F.2d 183, 185 n.2 (9th Cir. 1990) (Although the grant of a new trial is normally an unappealable interlocutory order, because the new trial was conditioned upon the reversal of the JNOV, "the court's judgment [was] final and reviewable."); *Jackson v. Condor Mgmt. Group, Inc.*, 587 A.2d 222, 226 n.4 (D.C. 1991) ("This court has recognized an exception to the general rule of non-appealability of new trial orders before final judgment when the trial court has entered a conditional new trial order, in tandem with a judgment n.o.v."); *Mairose v. Federal Exp. Corp.*, 86 S.W.3d 502, 513 (Tenn. Ct. App. 2001) (Appellate court, upon reversing a trial court's grant of a motion for JNOV, may remand for a new trial or reinstate the verdict when there are "exceptional circumstances and when the interest of justice so requires."). These courts have based these holdings on rules that provide that, if a JNOV with a conditionally granted new trial is reversed on appeal, "the new trial must proceed unless the appellate court orders otherwise." Fed. R. Civ. P. 50(c). *Accord* Tenn. R. Civ. P. 50.03 ("If the motion for a new trial is thus conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered.").

Maryland Rule 2-532(f)(1) similarly provides:

> If a motion for judgment notwithstanding the verdict is granted and the appellate court

> reverses, it may (A) enter judgment on the original verdict, (B) remand the case for a new trial in accordance with a conditional order of the trial court, or (C) itself order a new trial. If the trial court has conditionally denied a motion for new trial, the appellee may assert error in that denial and, if the judgment notwithstanding the verdict is reversed, subsequent proceedings shall be in accordance with the order of the appellate court.

Based on this authority, we hold that, although the grant of a new trial is typically an unappealable interlocutory order, when the order for a new trial is conditioned on the reversal of the grant of JNOV, the judgment is appealable. We thus turn to the merits of the grant of the motion for new trial.

3.

ANALYSIS

The decision whether to grant a motion for a new trial is a matter within the discretion of the trial court. *Exxon Mobile Corp. v. Albright*, 433 Md. 303, 349, *cert. denied*, 571 U.S. 1045 (2013). The court's decision in this regard will be reversed only upon a showing that the court abused its discretion. *Franklin*, 81 Md. App. at 362. An abuse of discretion will be found when a court bases a decision on an incorrect legal standard. *Rodriguez v. Cooper*, 458 Md. 425, 437 n.9 (2018).

Initially, we are troubled by the grant of a new trial based on the verdict sheet given the proceedings that occurred prior to the jury rendering its verdict. To be sure, a trial court has discretion whether to address an unpreserved issue in considering a motion for new trial. *See Isley v.* State, 129 Md. App. 611, 619 (2000) (Non-preservation is an "unassailable reason" for the trial judge to deny a motion for new trial, if the court, in its discretion, chooses to do so.). There was more, though, in this case than a mere failure to preserve the issue.

Counsel for Mr. Cunningham clearly advised the court that it was his position that the jury could render separate damages amounts for each cause of action, i.e., the § 1983 claim, violation of the Maryland Declaration of Rights, and battery. The court disagreed, and counsel then highlighted the problem at issue with the verdict sheet the court prepared. Counsel questioned what the court would do if the jury came back with damages in an amount more than $400,000 and they argued it was all for the § 1983 claim and appellees argued it was all under the State claims, subject to the cap. The court responded: "I will deal with that when it comes."[45] The County then concurred with the court that the verdict sheet merely needed to set out a line for liability and then go to damages. And when the jury came back with its verdict, the County did not object to the verdict as inconsistent.

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45. Counsel for the other appellants argued that if they jury found a violation of both the State claims and the § 1983 claims, "anything above the cap is to be attributed to 1983."

Under these circumstances, it is troubling that, after a three-week trial, when the exact scenario that counsel was trying to prevent occurred, the court ordered a new trial based on a defective verdict. We also note that the alleged inconsistency dealt with the damages awarded, not liability, yet the court simply ordered a new trial

Despite our concern with the court's order under these circumstances, we need not address whether this alone would have amounted to an abuse of discretion. *See King*, 242 Cal. App. 4th at 296 (If no party requests clarification of an inconsistency in the verdict, trial court must interpret the verdict in light of the instructions and evidence and attempt to resolve any inconsistency.). Rather, we reverse the court's ruling granting the motion for new trial on the basis of an irreconcilably inconsistent verdict on the merits. The verdict was not irreconcilably inconsistent.

In *S. Mgmt. Corp. v. Taha*, 378 Md. 461, 488 (2003), the Court of Appeals explained what constitutes an irreconcilably inconsistent verdict: "Where the answer to one of the questions in a special verdict form would require a verdict in favor of the plaintiff and an answer to another would require a verdict in favor of the defendant[.]" (quoting *S&R Inc. v. Nails*, 85 Md. App. 570, 590 (1991)).[46] In that case, a terminated employee brought a malicious prosecution action against two co-workers and his former employer, based on respondeat superior. *Id.* at 469–70.

46. This also applies to general verdicts that produce inconsistent results between various parties. *See S. Mgmt. Corp. v. Taha*, 378 Md. 461, 490 (2003).

The verdict sheet contained three general questions regarding liability, one for each defendant. *Id.* at 473. The jury returned a verdict in favor of the two co-workers but against the employer. *Id.* The Court of Appeals agreed that this result was "irrevocably inconsistent," noting that the employer could not be liable under respondeat superior if its employees were not liable. *Id.* at 467, 479.

Here, the verdict sheet was not irreconcilably inconsistent. As appellants note, the jury verdict was completely consistent, finding that Corporal Ruby's action was unreasonable and awarding damages. The circuit court abused its discretion in granting a conditional new trial on this basis.

F.

REMITTITUR

We next address appellees' post-trial motion to remit the damages as exceeding "any rational appraisal or estimate of the damages that could be based on the evidence before the Jury." In that regard, the court stated:

> This Court finds that the non-economic damages awarded to the various Plaintiffs are excessive and shock[] the conscience, and but for this Court dismissing the matter for grant of qualified immunity, or in the alternative granting a new trial because of the defective verdict, the Court would remit the [jury's] awards.

Appellees contend the court did not abuse its discretion by granting a new trial because it properly found that the non-economic damages were excessive and shock the conscience. They assert that appellants failed to substantively address this argument.

Appellants argue in their reply brief that the question of remittitur is not before this Court. They assert that the court's statement in this regard was *dicta* because the court never gave them an opportunity to accept a reduced figure. Moreover, appellants argue that there was no basis for such a request below because appellees did not present any evidence pertaining to damages to refute the expert testimony concerning Kodi's physical and psychological injuries.

A trial court, upon finding that a verdict is excessive may order a new trial unless the plaintiff agrees to accept a lesser amount fixed by the Court. *Conklin v. Schillinger*, 255 Md. 50, 64 (1969). In determining whether a new trial should be granted on the ground of excessiveness of the verdict, the standard is "grossly excessive" or "shocks the conscience of the court." *Id.* at 69. A trial court is not required, however, to provide for remittitur when there is an excessive verdict, but it may, in its discretion, grant a new trial. *Id.* at 66.

With respect to remittitur, this Court has explained:

> Historically, a remittitur was the voluntary submission by a plaintiff to pressure brought on him by a trial judge. When, in response to

> a defendant's motion for a new trial and/or remittitur, the trial judge agreed that a jury's award of damages had been excessive, the trial judge could threaten to order a new trial unless the plaintiff agreed to "remit" that portion of the award that the judge deemed to be excessive. The reduction itself, however, could not occur unless the plaintiff agreed to it. The modality of reduction was the plaintiff's "voluntary" remission.

Darcars Motors of Silver Spring, Inc. v. Borzym, 150 Md. App. 18, 60–64 (2003), *aff'd*, 379 Md. 249 (2004).

The Court then explained that the doctrine has shifted over the years because Maryland courts had called into question whether voluntary submission by the plaintiff, as an alternative to a new trial, was required. *Id.* at 62. In *Bowden v. Caldor*, 350 Md. 4, 46 (1998), the Court of Appeals acknowledged that, "under normal Maryland *practice,* a court's reduction of a compensatory damages award as excessive is ordinarily accompanied by a new trial option," it had never explicitly held that the new trial option was required for either compensatory or punitive damages. The Court assumed that a trial court could not reduce a compensatory damages award on the ground of excessiveness without offering a new trial option. *Id.* at 46. *See*, *e.g.*, *Owens-Illinois, Inc. v. Hunter*, 162 Md. App. 385, 390–91 (Plaintiff agreed to remit $1 million of a $2 million jury award to avoid a new trial.), *cert. denied*, 388 Md. 674 (2005); *Hebron Volunteer Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 627 (2006) (The Court granted the

department's motion for a new trial on damages unless the plaintiff agreed to a remittitur of $225,000.). It drew a distinction between punitive damages, however, which, unlike compensatory damages, do not involve a question of fact, but rather, principles of law, and it held that when a court reduces a punitive damages award for excessiveness, the court is not required to give the plaintiff the option of a new trial. *Bowden*, 350 Md. at 46–47. A reduction in a punitive damages award by a trial judge does not interfere with a plaintiff's right to a trial by jury. *Darcars*, 150 Md. App. at 68.

With this background, we turn to the trial court's ruling in this case. The court stated that, but for its other rulings, it "would remit the jury's awards." It did not actually do so, however, so there is no ruling in this regard for the Court to review. On remand, the circuit court can address the applicability of the damages cap, and if it determines that the verdict remains as it is, an amount that the court found to be excessive, it can address the issue whether a remittitur or new trial is warranted.

G.

OTHER ISSUES REGARDING DAMAGES

1

FUNERAL EXPENSES

The circuit court granted appellees' motion to set aside the judgment granting Ms. Dormeus economic

damages in the amount of $7,000 for funeral expenses. The court stated: "The only evidence that Dormeus paid the funeral expenses was her testimony. If indeed she paid those expenses, she may request to recover those expenses from the personal representative of the estate."

Appellants contend that the circuit court erred by vacating the jury's award in this regard. Appellees do not respond to this argument.

The circuit court vacated this award on the basis that Ms. Dormeus "may request to recover those expenses from the personal representative of the estate" pursuant to Md. Code Ann. (2017), § 8-106 of the Estates & Trusts Article ("ET"). The circuit court, however, failed to consider ET § 7-401(y)(1)(ii), which provides that "[i]n an action instituted by the personal representative against a tort-feasor for a wrong which resulted in the death of the decedent, the personal representative may recover the funeral expenses of the decedent up to the amount allowed under § 8-106(c) of this article," i.e., $15,000. Accordingly, we reverse the circuit court's grant of appellees' motion to set aside the funeral expenses award.

2.

ECONOMIC & NON-ECONOMIC DAMAGES

Appellees argued in their post-trial motion that there was no support for the non-economic damages awarded to Ms. Dormeus, Ryan Gaines, and Karsyn Courtney because the wrongful death claim (count I) was never submitted to

the jury, and therefore, there was no legal basis to award damages to those parties. The court stated that it was not necessary to address that issue because it had granted JNOV in appellees' favor.

Appellees also requested that the court vacate the economic damages awarded to Ms. Gaines' estate, asserting that there was not sufficient evidence of economic loss attributed to Korryn Gaines. The court granted that request based on its findings that Corporal Ruby's actions were not lawful, and he was entitled to qualified immunity.

Given our reversal of the JNOV on appeal, *supra*, the circuit court should address the arguments related to these damage awards on remand.[47]

CONCLUSION

Given the numerous rulings addressed, we will briefly summarize our resolution of the issues presented. Initially, we hold that the circuit court properly granted the motion for summary judgment with respect to the claims regarding the initial entry by Officer Dowell and Officer Griffin. Therefore, we affirm the court's ruling in this regard.

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47. The circuit court also dismissed the bystander liability (count V) because, after dismissing the County as a defendant, Corporal Ruby was the sole defendant, and therefore, there was "no other bystander potentially liable." Appellants do not challenge this finding on appeal.

With respect to the post-trial motions, we hold that the court erred in granting the motion for JNOV, with the exception of its ruling dismissing the § 1983 claims against the County. Therefore, we: (1) reverse the grant of JNOV with respect to the claims against Corporal Ruby; (2) affirm the grant of JNOV with respect to the § 1983 claims against the County; and (3) we vacate the ruling granting JNOV to the County on the other claims and remand for further proceedings. We also reverse the court's ruling granting appellees' motion to set aside the funeral expenses award.

With respect to the court's conditional ruling granting the motion for new trial based on an irreconcilably inconsistent verdict, we conclude that the court abused its discretion in that regard. Therefore, we reverse that ruling.

We remand to the circuit court for consideration of remaining issues relating to damages. Those issues include, but are not limited to, the damages cap and remittitur.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED, IN PART, AND REVERSED/VACATED, IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANTS AND APPELLEES.

APPENDIX E — MEMORANDUM OPINION, *DORMEUS, ET AL. V. BALTIMORE COUNTY*, NO. 03-C-16-009435, MARYLAND CIRCUIT COURT, BALTIMORE COUNTY. FILED FEBRUARY 14, 2019

CIRCUIT COURT OF MARYLAND,
BALTIMORE COUNTY

Case Number: 03-C-16-009435

RHANDA P. DORMEUS, *et al.*,

Plaintiffs,

v.

BALTIMORE COUNTY, *et al.*,

Defendants.

Filed February 14, 2019

MEMORANDUM OPINION

The matter is before the Court to consider the Defendants' post-trial motions and the Plaintiffs' responses thereto. This case arises from a fatal police involved shooting. On August 1, 2016, Baltimore County Police Officers, Alan A. Griffin and John Dowell, were attempting to serve arrest warrants for Korryn Gaines ("Gaines") and Kareem Courtney. The tragic events resulting in Gaines' death involve her resisting arrest and wielding a shotgun. The facts will be detailed as particular issues are discussed.

Appendix E

PROCEDURAL HISTORY

As a result of the incident, the Plaintiffs; Estate of Korryn Gaines; Corey Cunningham on behalf of the minor child, Kodi Gaines ("Kodi"), Kareem Courtney on behalf of the minor child, Karsyn Courtney; Ryan Gaines (father of Korryn Gaines) and Rhanda Dormeus (mother of Korryn Gaines), brought actions against Corporal Royce Ruby, other named members of the Baltimore County Police Department and Baltimore County, Maryland.

The Plaintiffs proceeded on the Third Amended Complaint.

Count I	Wrongful Death pursuant to Md. Code Ann., Cts. & Jud. Proc. § 3-904(a) (Against all Defendants)
Count II	Survival Action (Against all Defendants)
Count III	Violation of Maryland Constitution Articles 10, 24, 26 and 40 (Against all Defendants)
Count IV	Maryland Constitution-Deprivation of Medical Treatment (Against Baltimore County and Corporal Royce Ruby)
Count V	Violation of Maryland Constitution-Bystander Liability (Against all Defendants)
Count VI	Violation of Maryland Constitution-Illegal Entry (Against Officers Griffin and Dowell)

Count VII	Civil Rights Claim pursuant to 42 U.S.C. 1983 alleging search of Ms. Gaines' apartment, excessive force as to Kodi Gaines and Korryn Gaines, and failing to provide medical attention (Against all Defendants, personally and individually)
Count VIII	Peace Officer Liability pursuant to 42 U.S.C. 1983 (Against Corporal Royce Ruby)
Count IX	Municipal Liability pursuant to 42 U.S.C. 1983 (Against Corporal Royce Ruby and Baltimore County (Monel claim)
Count X	Excessive Force and Violation of Freedom of Speech (Against all Defendants)
Count XI	Battery against Corporal Royce Ruby
Count XII	Negligence

Prior to trial, the Court granted the Defendants' Motion to Dismiss as to Counts IV and VI and IX. As to Counts I, II, III, V, VII, and XII, the Court granted the Defendants' Motions to Dismiss against other named law enforcement personnel, except Corporal Royce Ruby and Baltimore County.[1] The Court denied the Defendants'

1. As to Count III, the Court granted the Defendants' Motion to Dismiss against other law enforcement officers. The Court also granted the Motion to Dismiss as it relates to allegations of illegal search and seizure and suppression of free speech, but denied

Motion to Dismiss as to Counts VIII and XI. On Count X, the Court granted the Defendants' Motion to Dismiss as to an allegation of violating Gaines' freedom of speech but denies the Defendants' Motion to Dismiss as to excessive force by Corporal Royce Ruby and Baltimore County. At the close of the Plaintiff's case, the Court granted the Defendants' Motion for Judgment as to Count XII.

Trial commenced on January 30, 2018. On February 16, 2018, the jury returned a verdict in favor of the Plaintiffs, finding by a preponderance of the evidence that the shooting of Korryn Gaines by Baltimore County Police Officer, Corporal Royce Ruby, was not objectively reasonable.[2] The jury also found that the Defendants committed a battery on Korryn Gaines and Kodi Gaines. In addition, the jury found that the Defendants violated Korryn and Kodi Gaines' rights under the Maryland Declaration of Rights, and Korryn and Kodi Gaines' civil rights under 42 U.S.C. § 1983. For Kodi Gaines, the jury awarded $23,542.29 for past medical expenses and $32,850,000.00 for non-economic damages. The jury awarded non-economic damages to Karsyn Courtney in the amount of $4,525,216.32. Ryan Gaines and Rhanda Dormeus were each awarded $300,000.00 in non-economic damages. Rhanda Dormeus was also awarded $7,000.00

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the Motion to Dismiss relating to Corporal Ruby and Baltimore County's use of unreasonable force.

2. Question 1 of the verdict sheet read, "Do you find by a preponderance of the evidence that the first shot taken by Corporal Royce Ruby on August 1, 2016 was objectively reasonable?" to which the jury responded "No."

for funeral expenses and the Estate of Korryn Gaines was awarded economic damages of $50,000.00 and $250,000.00 in non-economic damages. The jury declined to award punitive damages either under the Maryland Declaration of Right or 42 U.S.C. § 1983.[3]

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3. GAINES, *et al.*	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
BALTIMORE COUNTY,	*	BALTIMORE
et al.	*	COUNTY
Defendants.	*	

Case No. 03-C-16-009435

* * * * * * * * *

VERDICT SHEET

1. Do you find by a preponderance of the evidence that the first shot taken by Corporal Royce Ruby on August 1, 2016 was objectively reasonable?

   Yes ___ No _X_

   (If you answer yes, please do not proceed further, you are finished with your deliberations, notify the clerk. If you answer no, continue to answer the remaining questions)

2. Do you find by a preponderance of the evidence that the Defendants violated Korryn Gaines' rights under the Maryland Declaration of Rights?

   Yes _X_ No ___

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3. Do you find by a preponderance of the evidence that the Defendants violated Korryn Gaines' rights under 42 USC 1983?

   Yes _X_ No __

4. Do you find by a preponderance of the evidence that the Defendants committed a battery on Korryn Gaines?

   Yes _X_ No __

5. Do you find by a preponderance of the evidence that the Defendants violated Kodi Gaines' rights under the Maryland Declaration of Rights?

   Yes _X_ No __

6. Do you find by a preponderance of the evidence that the Defendants violated Kodi Gaines' rights under 42 USC 1983?

   Yes _X_ No __

7. Do you find by a preponderance of the evidence that the Defendants committed a battery on Kodi Gaines?

   Yes _X_ No __

   (If you answered yes any of questions 2, 3, 4, 5, 6, or, 7, proceed to determine the monetary damages if any you reward to)

Kodi Gaines

A. For past medical expenses $ 23,542.29

B. Non-economic damages $ 32,850,000.00

8 In what amount, if any, do you award monetary damages to:

Ryan Gaines

A. Non-economic damages $ 300,000.00

9. In what amount, if any, do you award monetary damages to:

Karsyn Courtney

A. Non-economic damages $ 4,525,216.32

10. In what amount do you award monetary damages to:

Rhanda Dormeus

A. Economic Damages $ 7,000 (funeral expenses)

B. Non-economic Damages $ 300,000.00

Appendix E

On March 12, 2018, Defendants, through counsel, filed a Motion for a New Trial, along with other post-trial motions, which included a Motion for Judgment Notwithstanding the Verdict, Remittitur of the Verdict, a request that the Court Exercise Revisory Power Over the Judgments and a Motion to Alter or Amend Judgment. The Defendants filed Memorandum of Law in Support of Motions for Judgment Notwithstanding the Verdict, Remittitur of the Verdict, New Trial, and for the Court to Exercise Revisory Power Over the Judgments ("*Def. Memo.*").

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11 In what amount, if any, do you award monetary damages to:

Estate of Korryn Gaines

A. Economic Damages $ 50,000.00

B. Non-economic Damages $ 250, 000.00

12. Do you award punitive damages under the Maryland Declaration of Right?

Yes ___ No _X_

13. Do you award punitive damages under 42 USC 1983?

Yes ___ No _X_

_______________________ _______________________
Jury Foreperson Date

The Plaintiffs filed responses to the Defendants' Motions, along with supporting Memorandum. Kodi Gaines, filed a Consolidated Response in Opposition to Defendants' Motions for Judgment Notwithstanding the Verdict, For New Trial, for Remittitur or the Judgements Pursuant to Maryland Rules 2-532 and 2-535, and Motion to Exercise Revisory Power Pursuant to Rule 2-535, or for Remittitur of the Judgements and Request for Hearing. ("*Pl. Memo.*").

The Defendants also filed a Supplemental Memorandum of Law in Support of Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, Motion for Remittitur and Motion for the Court Exercise Revisory Power. ("*Def. Supp. Memo.*"). Kodi Gaines, filed a Response in Opposition to Defendants' Supplemental Memorandum of Law in Support of Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, Motion for Remittitur and Motion for the Court to Exercise Revisory Power. ("*Pl's. Supp. Memo.*").

The Estate of Korryn Gaines, along with Karsyn Courtney and Rhanda Dormeus, filed a Consolidated Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict, Remittitur of the Verdict, New Trial, and/or to Revise. ("*Estate Memo.*").

For the purpose of the post-trial motions, the Plaintiffs collectively adopt the argument of individual Plaintiffs. Among other responses, the Plaintiffs argue that the motions filed on March 12, 2018 were untimely. On March 19, 2018, the Defendants filed a Notice of Appeal

to the Maryland Court of Special Appeals. In an Order dated October 23, 2018, the Court of Special Appeals granted the Defendants/Appellants' Motion to Stay Appeal pending the trial court's "disposition of the Appellant's post-judgment motions. . ." (Paper 146000).

On July 2, 2018 Counsel for the Parties appeared before the Court and presented argument. The Court ruled from the bench that the Defendants' post-trial motions were timely filed. The Court held the remaining matters *sub curia* to consider the various post-trial motions, memorandums and arguments of counsel. In the interim, between the hearing on post-trial motions and this ruling, the Court had reviewed every case cited by the Parties in their post-trial motions, memorandum or cited in argument.

For the reasons set forth herein, the Court grants the Defendants' Motion for Judgment Notwithstanding the Verdict. In the alternative, the Court shall grant the Defendants' Request for New Trial.

FACTUAL BACKGOUND

For the purposes of evaluating the Fourth Amendment reasonableness of Corporal Ruby's actions, the Court finds as true the following facts, which are largely undisputed. The Court will also address the alleged material facts, which the Plaintiffs suggest are in dispute.

Officer Griffin was assigned to the Warrant Unit at the Woodlawn Precinct. He received warrants for the arrest

of Kareem Courtney and Korryn Gaines with an address of 4 Sulky Court, Apartment T-4, in Baltimore County. Approximately a week prior to attempting to serve the warrants, he went to the rental office for the Carriage Hill Apartments and confirmed that Gaines was the leasee of that apartment, which was at terrace level. On August 1, 2016, he and Officer John Dowell ("Officer Dowell") went to 4 Sulky Court, to serve both warrants. Officer Griffin knocked on the door of apartment T-4. There was no response, but he heard sounds within. At some point he heard a baby crying in the apartment. Officer Griffin kept knocking on the door and could hear feet shuffling, items being moved and the sound of footsteps of someone inside the apartment walking to the front door and then walking away. Realizing that someone was in the apartment, Officer Dowell went outside to monitor the ground level patio door. Each time he heard a noise from inside the apartment, Officer Griffin knocked again announcing that he was a Baltimore County Police Officer and requested that the occupants open the door. At some point, Officer Griffin announced to the yet unidentified occupants of the apartment, that he had an arrest warrant. It was later learned the occupants of the apartment at that time were; Korryn Gaines, her two children, five-year-old Kodi Gaines[4], and Karsyn Courtney and her father, Kareem Courtney ("Courtney").[5]

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4. Kodi's father is Corey Cunningham.

5. Karsyn Courtney was approximately eighteen (18) months old at the time of the incident.

Officer Kemmerer was sent to the rental office to obtain a key for the Gaines' apartment and Officer Griffin kept knocking. When Officer Kemmerer, returned with a key, Officer Griffin continued to knock even after receiving the key. Getting no answer, he put the key in the door unlocked it, and pushed the door open. The door opened only a few inches until further movement was hindered by a security chain. Through the partially opened door, Officer Griffin announced that he was a Baltimore County Police Officer and requested that the door be opened. With the door partially open, Officer Griffin could see portions of Gaines seated on the living room floor. He saw enough of Gaines' features to know she fit the description of the person for whom he had an arrest warrant. Officer Griffin pushed with his shoulder attempting to force the door open further, but he was unsuccessful. Officer Dowell defeated the security chain by kicking the door and the chain broke free. Officer Griffin cautiously entered the apartment with his service weapon drawn but held at the low ready position. Once inside, the officers encountered Gaines seated on the living room floor armed with a pistol grip shotgun. Clearly Gaines had retrieved the shotgun prior to the police officers entering the apartment. Both officers retreated to the common hallway and notified supervisors. A SWAT unit and the Hostage Negotiation Team came to the location. The SWAT unit took up positions of containment surrounding the apartment and in the hallway by the apartment door. The hostage negotiator, Detective Stagi, began a dialogue with the occupants of the apartment, trying to peacefully resolve the situation. Very shortly after the police established a perimeter, Karsyn Courtney, a minor, and her father

Kareem Courtney, voluntarily left the apartment. Kareem Courtney was arrested on the outstanding warrant and removed by Officer Griffin, Gaines remained in the apartment with Kodi.

Corporal Ruby and several members of the SWAT team were stationed in the common hallway outside of Gaines' apartment. That hallway was a very small space. Gaines' apartment door was propped open so that the officers could see inside. Facing the door from outside in the common hallway, the door opened inward from right to left with the hinge being to the left side of the door and the knob to the right side of the door.[6] Throughout most of the day Corporal Ruby was stationed at the knob side of the door, partially obscured by a masonry (brick) wall. Kodi Gaines would approach Corporal Ruby's position at the front door of the apartment. Corporal Ruby encouraged Kodi to come closer hoping to grab him and remove him to safety. Whenever Kodi got close to the front door Gaines would call him back. Gaines remained in the living room area of the apartment, seated but sometimes standing as if to stretch her legs. Whenever she was seated or standing Gaines kept the shotgun pointed towards the front door of the apartment. Moments before the shooting, Gaines moved from the living room area to the kitchen.[7] Once

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6. Throughout the testimony, the left side of the door was referred to as the hinge side, with the right side of the apartment door being referred to as the knob side.

7. Plaintiffs' assertion that Gaines was in the kitchen fixing Kodi a peanut butter and jelly sandwich is not supported by the credible evidence. *See* Plaintiff, Estate of Korryn Gaines',

in the kitchen, Gaines was partially concealed behind an interior wall. Corporal Ruby testified that he believed that when Gaines relocated behind the kitchen wall she had a tactical advantage putting her in a position to shoot at officers positioned in the hallway on the hinge side of the door. The Plaintiffs' expert, Tyrone Powers, agreed that any movement by an armed suspect would be just cause for police concern.

Corporal Ruby had seen Kodi throughout the day and knew his height. Prior to shooting Gaines the first time, he aimed high in hopes of avoiding causing injury to Kodi whom he knew to be in the kitchen with Gaines. Almost immediately upon shooting Gaines, her shotgun discharged. Corporal Ruby testified he heard the pump action to the shotgun "rack", and Gaines discharged the shotgun a second time. After a few moments, Corporal Ruby and his team entered the apartment going to opposite ends of the kitchen. Corporal Ruby testified that as he entered the side of the kitchen where Gaines was located, she was still in possession of the shotgun, he perceived that she was about to shoot again and he shot her a second time. Officer Callahan went to the opposite side of the kitchen, scooped up Kodi and took him for medical treatment.

There was no dispute that after the first shot Gaines was still capable of movement. The Medical Examiner, Pamela Southall, MD, described the various gunshot

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Consolidated Opposition to Defendant's [sic] Motion for Judgment notwithstanding the verdict, Remittitur of the Verdict, New Trial, and/or Revise, pgs. 2, 8.

wounds sustained by Gaines. Based on the totality of the evidence, the wound she labeled as B, was most likely the first shot taken by Corporal Ruby. Dr. Southall testified that as a result of wound B, Gaines could have lived "seconds to minutes" but that injury would have been "rapidly fatal." The evidence is, and this Court finds as a fact that, after Corporal Ruby's first shot, Gaines lived long enough to operate the pump action of the shotgun, ejecting the spent cartridge, reloading another live round and the discharging the shotgun a second time. It was after the discharge of the second shotgun blast that the police entered the apartment. It is undisputed that a small metal fragment from Corporal Ruby's first shot ricocheted and struck Kodi causing a superficial wound to his cheek. It is further undisputed that a ricochet from a subsequent shot by Corporal Ruby struck Kodi in his elbow. Kodi was taken to the hospital and treated for his injuries. The wound to Kodi's elbow was more serious and required reconstructive surgery. The Parties agree that the first shot taken by Corporal Ruby is the only shot at issue. Therefore, in considering Fourth Amendment reasonableness, this Court need not concern itself with the subsequent second shot(s) taken by Corporal Ruby.

DISCUSSION

I. Judgment Notwithstanding the Verdict

In pertinent part, Maryland Rule 2-519(a) provides that:

> A party may move for judgment on any or all of the issues in any action at the close of the

> evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted.

Maryland Rule 2-532(a) provides that

> In a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion.

Prior to the commencement of trial, the Court denied the Defendants' Motion for Summary Judgment. At the conclusion of the Plaintiffs' case and at the conclusion of all the evidence the Court denied the Defendants' Motions for Judgment. Following the Court's entry of Judgment based upon the jury's verdict, the Defendant filed a timely Motion for Judgment Notwithstanding the Verdict ("JNOV").

In determining if JNOV is appropriate, the court must "consider all the evidence, including inferences reasonably and logically drawn therefrom, in a light most favorable to the non-moving party." *Gross v. Estate of Jennings*, 207 Md.App. 151, 164 (2012) *citing Romero v. Brenes*, 189 Md.App. 284, 290 (2009). "[A] party is entitled to a directed verdict or Judgment Notwithstanding the Verdict when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense." *Bartholomee v. Casey*, 103 Md.App. 34, 51 (1994) *citing*

I.O.A. Leasing Corp. v. Merle Thomas Corp., 260 Md. 243, 248-49 (1971); *Smith v. Bernfeld*, 226 Md. 400,405 (1961). With those principles in mind, the Court first turns to the Defendants' request that Baltimore County be dismissed from the action. *Def. Memo. pg. 36*.

A. The claim against Baltimore County should be dismissed

The Defendants once again ask this Court to dismiss Baltimore County as a Defendant "because the Court dismissed the Plaintiffs *Monell* action and all § 1983 claims brought by the Plaintiff against the County." *See Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978); *Williams v. Montgomery County*, 123 Md. App. 119, 127 (1998); *Def. Memo. pg. 36*. The Plaintiffs respond that Baltimore County should not be dismissed, correctly asserting that *Williams* is inapplicable, as it dealt with the notice provisions under the LGTCA. *Pl. Memo. pg. 41*.

Plaintiffs brought a municipal liability claim under 42 U.S.C. § 1983 against Corporal Ruby and Baltimore County. Plaintiffs alleged that Baltimore County sanctioned certain tortious acts by its employees as part of municipal custom, practice and policy. (Plaintiffs' Third Amended Complaint ¶ 113.). A municipality cannot be held liable unless an injury inflicted by a government employee or agent is undertaken pursuant to the government's official custom or policy. A local government cannot be held liable under 42 U.S.C. § 1983 on a *respondeat superior* theory. *Monell*, 436 U.S. at 659. "There must at the very least be an affirmative link between the municipality's

policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 809 (1985).

The Plaintiffs oppose Baltimore County's request for dismissal citing *Espina v. Prince George's County*, 215 Md.App. 611 (2013). *Pl. Memo. pg. 41.* In that matter, among the allegations in the suit brought against Officer Jackson and Prince George's County, the Plaintiffs allege that the Defendants violated Manuel Espina's rights under Article 24 of the Maryland Declaration of Rights.[8] One of the nine issues prosecuted by Prince George's County on cross appeal was that that Espina's Article 24 claim was improper and, if at all, should have been asserted pursuant to Article 26 of the Maryland Declaration of Rights.[9] *Espina*, 215 Md.App. at 653. The Court of Special Appeals disagreed, ruling that:

> [A] claim of excessive force brought under Article 24 is analyzed in the same manner as if the claim were brought under Article 26. In

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8. *Espina* will be discussed in greater detail in the Verdict portion of the Court's Ruling.

9. Article 26 of the Maryland Declaration of Rights reads: Warrants for search and seizure

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

> both instances, the claim is assessed under Fourth Amendment jurisprudence, rather than notions of substantive due process, precisely like the analysis employed for claims brought under 42 U.S.C. § 1983.

Id. at 654 *citing Randall v. Peaco*, 175 Md.App. 320, 330 (2007).

Plaintiffs' reliance on *Espina* is misplaced. There is a distinction between being a named Defendant and being responsible for damages. That distinction was addressed, at least inferentially, when the Court of Appeals granted certiorari in *Espina* and affirmed the lower court.

The Court of Appeals drew a distinction between a local government's duty to defend and indemnify under the LGTCA. In *Espina*, the jury was asked to consider, and did find, that Officer Jackson acted with malice. In that matter, the Petitioners seemed to suggest that Prince George's County's liability was dependent upon the employee's malice or lack thereof. *Espina v. Jackson*, 442 Md. 311, 347 (2015). The Court explained that, regardless of malice or lack thereof, under the LGTCA, a local government is required to defend and indemnify, up to certain limits, its employees acting within the scope of employment. An employee may be fully liable for all damages awarded in an action in which the employee acted with actual malice. In such circumstances, the judgment may be executed against the employee and the local government may seek indemnification for any sums it is required to pay. *See* CJP § 5-302.

There is no allegation that Corporal Ruby acted with malice, nor was the jury called upon to render a separate verdict. Baltimore County does not contest that if Corporal Ruby is found liable, that Baltimore County is responsible to indemnify him for any damages awarded. Baltimore County does not seek to shirk responsibility under the LGTCA, but rather seeks to be dismissed as a named Defendant. A Plaintiff who seek to impose liability on local governments under § 1983 must prove that "action pursuant to official municipal policy" caused their injury. *Monell*, 436 U.S. at 691. Having considered the entirety of the evidence in this matter, the Court finds that the Plaintiffs have failed to meet their burden and therefore, Baltimore County is dismissed.

B. Qualified Immunity

In the request for Judgment Notwithstanding the Verdict, the Defendants once again argue that Corporal Ruby is entitled to Qualified Immunity. *Def. Memo. pg. 4*. The Plaintiffs correctly point out that on several occasions, including after considering the Defendants' Motion for Summary Judgment, the trial court rejected the Defendants' claim of qualified immunity. *Pl. Memo. pgs. 2-3*. In denying the Defendants' Motion for Summary Judgment, the court relied upon the Plaintiff's argument that there were genuine disputes of material facts. However, the facts were fully fleshed out at trial, thus, affording the trial court more thorough understanding of the evidence.

Courts, post-trial, have entertained whether qualified immunity should have been granted. *See County of*

Los Angeles v. Mendez, 137 S.Ct. 1539 (2017). In that case, Angel Mendez sued Los Angeles County Deputy sheriffs alleging 42 U.S.C. § 1983 for violation of Fourth Amendment violations, including excessive force. Following a bench trial, the United States District Court ruled that deputies had probable cause to believe that a wanted parolee was hiding in a shack, bur denied deputies' request for qualified immunity finding, inter alia, that deputies were liable for excessive, force pursuant to the Ninth Circuit's provocation rule. Parties cross-appealed. The Court of Appeals held that the officers were entitled to qualified immunity on the knock-and-announce claim, but concluded that the warrantless entry violated clearly established law and was attributable to both deputies and affirmed the application of the provocation rule and vacated and remanded directing the court to revisit the question whether proximate cause permits respondents to recover damages for their injuries based on the deputies' failure to secure a warrant at the outset. *Id.* at 1543.[10] *See also Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) (Following jury verdict for Plaintiff, the Court of Appeals affirmed United States District Court for the District of Maryland, granting officer's Motion for Judgment as to qualified immunity.); *Bah v. City of New York*, 319 F.Supp.3d 698, 702 (S.D. N.Y. 2018) ("Because the totality of circumstances are relevant to a claim of excessive force, the Court has considered the entirety of the trial evidence."); *See* also*, Greenidge v. Ruffin*, 927 F.2d at 792 (4th Cir. 1991).

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10. Provocation Rule abrogated in *County of Los Angeles, CA v. Mendez*, 137 S.Ct. 1539 (2017).

To prevail in a 42 U.S.C.A. § 1983 action for civil damages from a government official performing discretionary functions, the complainant must show deprivation of an actual constitutional right and must also show the actions complained of violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999) *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would not have known. *Harlow*, 457 U.S. at 818. First, a court must decide whether the facts alleged or shown by the Plaintiff make out a violation of a constitutional right. If the Plaintiff meets that burden, then the court must determine whether that right was "clearly established" at the time of the Defendant's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194 (2001). The Supreme Court has since held that the two-step sequence in *Saucier* is no longer mandatory but is often beneficial in analyzing whether a Defendant is entitled to qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). For analyzing qualified immunity in the matter *sub judice*, the *Saucier* two step analysis is helpful.

Based on the totality of circumstances, and for the reasons set forth herein, the court finds that Corporal Ruby is entitled to qualified immunity because he did not violate Gaines' Constitutional Rights and even if he did, the circumstances presented to Corporal Ruby, and the actions he took, did not constitute a "clearly established"

prohibition at the time he first shot Gaines. *Saucier v. Katz*, 533 U.S. 194 (2001).

1. Fourth Amendment Violation

The Plaintiffs charge that the first shot taken by Corporal Ruby was unreasonable, thus, violating Gaines' Fourth Amendment right against unlawful seizure. Corporal Ruby testified that he first shot Gaines because he believed that she was preparing to discharge her shotgun in the direction of police officers who were standing outside of the apartment in the common hallway and that would pose a threat to police officer team members.

The Plaintiffs allege that Gaines did not raise the shotgun into firing position, nor did she aim her shotgun in the direction where police officers were located. In the alternative, the Plaintiffs allege, that even if she had fired her shotgun in the direction of the front door, the officers in the hallway were not in danger of imminent death or serious bodily harm because they were protected by brick walls and they were wearing protective equipment. However, in their argument that Corporal Ruby is not entitled to qualified immunity, the Plaintiffs misstate the jury findings. The Plaintiffs state:

> The Jury, as the trier of facts, decided the following "competing or disputed renditions" of the following facts based on the weight, quality and quantity of the evidence:
>
> - Whether Ruby *reasonably* feared that 'something was going to happen,' when

and if Korryn Gaines raised her gun in the kitchen;

- Whether Korryn Gaines raised her gun, and, if she raised her gun, was it raised into the firing position, and if it was raised into a firing position, was it positioned or pointed such that she could strike any officer if she discharged the weapon;

- Whether from Ruby's firing position he *reasonably* believed that Korryn Gaines could see the hinge side team or Officer Callahan;

- Where Officer Callahan was in the hallway before Ruby fired the first shot;

- Whether Officer Callahan was behind a brick wall before Ruby fired the first shot;

- Whether Officer Ruby knew and/or believed that a brick wall would stop a round fired from a shotgun;

- Where Officer Callahan was in the hallway when Ruby fired the first shot;

- Whether Officer Callahan was in imminent danger of death or serious bodily injury when Ruby fired the first shot;

- Whether Ruby and the other officers were safe in the hallway based on the evidence;

- Whether Ruby fired for his safety or the safety of others;

- What Ruby's belief was when he fired from behind a brick wall, wearing body armor and a ballistics helmet, and whether his belief was *reasonable*; and

- Whether an objective reasonable officer knowing the facts that Ruby knew, including the risk of injury to Kodi, would have fired the first shot.

Pl. Memo. pg. 11.

Contrary to the Plaintiffs' assertions, the jury did not find that "no officer was in reasonable apprehension of serious physical injury." *Pl. Memo. pg. 15.*

The jury did not, nor were they asked to, decide any of those poignant questions. However, those questions are the proper subject for the Court's consideration of whether qualified immunity is applicable.

Question One of the verdict sheet read: "Do you find by a preponderance of the evidence that the first shot taken by Corporal Royce Ruby on August 1, 2016 was objectively reasonable?" to which the jury unanimously responded "No." The jury was not asked to decide if Ruby reasonably feared that 'something was going to happen,'

when and if Korryn Gaines raised her gun while standing in the kitchen. In fact, Plaintiffs presented no evidence contradicting Corporal Ruby's belief that Gaines' actions endangered others.

The jury was not asked to make factual findings whether Gaines raised the shotgun, nor, if it was raised into the firing position, and if raised into a firing position, whether it was positioned or pointed such that she could strike any officer if she discharged the weapon. Corporal Ruby testified that Gaines slowly raised the shotgun into a firing position. The Plaintiffs dispute his assertion that Gaines raised the shotgun to a firing position, but presented no testimony contradicting Corporal Ruby's testimony. The physical evidence elicited by the Plaintiffs corroborates Corporal Ruby's testimony that Gaines did raise and fire the shotgun.

The jury was not asked to determine whether from Ruby's firing position he reasonably believed that Gaines could see the hinge side team or Officer Callahan. The jury was not asked to determine where Officer Callahan was in the hallway or if he was behind a brick wall. There is no dispute that Officer Callahan was in the hallway and, at some point, behind a brick wall in the hallway. The Plaintiffs called several police officers who testified that Callahan was in the hallway outside the Gaines' apartment. Officer Mark Pierce, called by the Plaintiffs, testified that Officer Callahan was in the hallway outside Gaines' apartment. Officer Artson, called by the Plaintiffs, testified that Officer Callahan was close to the Gaines' apartment and was told to move back. Officer Artson

testified that he heard Corporal Ruby tell Officer Callahan that "she [Gaines] can see you." The jury was not asked to determine whether Officer Callahan was in imminent danger of death or serious bodily injury.

The jury was not asked to determine whether Officer Ruby knew and/or believed that a brick wall would stop a round fired from a shotgun. The jury was not asked to determine whether Ruby and the other officers were safe in the hallway. The jury was not asked to speculate about what Corporal Ruby believed when he fired the first shot. The jury was not asked whether Ruby fired for his safety or the safety of others. Indeed, the uncontroverted testimony is that Corporal Ruby fired out of his concern for the safety of others. The jury did not, nor was it asked to, decide that "no person was in imminent threat of death or serious bodily harm. . . ." *Pl. Memo. pg. 5*.

While the jury was not asked to make specific findings of fact, as suggested by the Plaintiffs, the facts, more fully developed at trial, were closely scrutinized in reconsidering the question of whether Corporal Ruby is entitled to qualified immunity. The test of reasonableness, in determining whether qualified immunity is applicable, requires careful attention to the facts and circumstances of each particular case. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) *citing Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

The Court, must view the facts in a light most favorable to the non-moving party. In so doing, the Court concludes that the alleged "material" facts upon which the Plaintiffs

so heavily relied in the opposition to granting qualified immunity, are not material and even if material, qualified immunity applies "regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) *quoting Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) *quoting Butz v. Economou*, 438 U.S. 478, 507 (1978). Qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *See Mullenix v. Luna*, 136 S.Ct. 305, 310 (2015) *citing Malley v. Briggs*, 475 U.S. 335, 341 (1986). Additionally, even if Corporal Ruby violated Gaines' Fourth Amendment rights against unlawful seizure, there was no "clearly established" similar facts that would have put him on notice that his contemplated actions were prohibited.

A. Corporal Ruby did not violate Gaines' Fourth Amendment rights.

The shooting of Gaines is a seizure under the Fourth Amendment. The initial question is whether the seizure was reasonable under the totality of circumstances. If it was lawful, Corporal Ruby is entitled to qualified immunity. In their renewed argument that Corporal Ruby is entitled to qualified immunity, the Defendants once again assert that "[t]he basic issue of qualified immunity is simple. Law enforcement officers are entitled to immunity from suit whenever their use of deadly force is objectively reasonable." *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 791 (4th Cir. 1998) *citing Graham v. Connor*, 490 U.S. 386, 394-97 (1989). The test of whether a law enforcement

official used excessive force during an arrest, or seizure of a person is analyzed under Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 394-97. That court explained that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The test of reasonableness requires careful attention to the facts and circumstances of each case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." *Garner*, 471 U.S. at 8-9.

Citing *Richardson v. McGriff*, the Defendants assert that the reasonableness standard must be determined exclusively upon an examination and weighing of the information the officer **possessed** [emphasis added] immediately prior to and at the moment the officer fires the shot. 361 Md. 437 (2000). *Def. Memo. pg. 5*. Further stating that, "[t]he consensus among the various courts is that the reasonableness inquiry is confined to a very narrow point in time, immediately prior to and when the force is used." *Def. Memo. pg. 6*. The Plaintiffs argue that the Defendants misinterpret *Richardson*. The Plaintiffs suggest that the facts cannot be limited to what Ruby "*learned*" immediately before he took the first shot *Pl. Mot. pg. 12*.

In evaluating excessive force claims, the facts must be examined from the perspective of the officer. *Graham*, 490 U.S. at 396-97. Additionally, for the purposes of Fourth Amendment's objective reasonableness inquiry, the court should not define clearly established law at too high a level of generality. *See Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004); *Ashcroft v. Al-Kidd*, 563 U.S. 731, 735 (2011); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018).

Turning to, and without addressing every fact, at the time Corporal Ruby took his first shot, in addition to facts found by this Court in the Factual Background set forth herein, Corporal Ruby knew the following:

- He and members of the Baltimore County police SWAT Unit and the Hostage Negotiation Team were called to Gaines' residence because she refused to surrender to a lawful arrest, was armed with, and had pointed, a shotgun at officers attempting to effectuate a lawful arrest.

- Gaines would not surrender despite the negotiator begging her to do so.

- Gaines called Kodi back from the apartment door when he got close enough for Corporal Ruby to remove him from potential harm.

- Gaines' disallowing Kodi to leave the apartment, potentially put him in jeopardy.

- Corporal Ruby learned from Sgt. Nero that Gaines suffered from undisclosed mental health issues and had not taken her medications "for possibly a year."

- After over six hours of the impasse, and for no apparent reason, Gaines abruptly changed positions and moved from the open living room area to the kitchen and took cover.

- Corporal Ruby testified, and there is no evidence to the contrary, that he believed that Gaines' movement to the position she took in the kitchen gave her a tactical advantage, causing Corporal Ruby to relocate for better cover.

- Corporal Ruby testified that he saw Gaines raise the shotgun in the direction of the hinge side of the apartment front door. The Plaintiffs disputed that testimony. However, as shall be explained considering the totality of the circumstances presented to Corporal Ruby, whether Gaines pointed the shotgun at the hinge side of the door is not a material fact for Fourth Amendment reasonableness analysis.

- Corporal Ruby, concerned that Officer Callahan, who was in the hallway and possibly exposed, told him to tuck in. The Plaintiffs do not dispute that Officer Callahan was in the hallway in the general

vicinity of the open apartment door but argue that because of his location and because he and other members of the police team were wearing protective equipment, no one was in immediate peril. Again, for Fourth Amendment reasonableness analysis whether Officer Callahan would have been injured is not a material fact.

- Gaines did not comply with the repeated instruction to put the shotgun down. Including instruction for her to lower the shotgun immediately prior to the shooting.

- At the time of his first shot, Corporal Ruby, having seen Kodi throughout the day, knew his approximate height aimed high hoping to avoid injuring Kodi.

These facts Corporal Ruby knew "immediately prior to and at the moment . . . " he fired his first shot. *See McGriff*, 361 Md. at 456. *Def. Memo. pg. 5*. While Corporal Ruby may have had all that information and perhaps more, he cannot be expected to coolly engage in a protracted analysis of all the information known to him in a rapidly changing circumstance, putting the officer in the position of having to make an immediate choice. The critical reality is that officers do not have even a moment to pause and ponder many conflicting factors. "[T]he reasonableness of the officer's actions . . . [must be] determined based on the information possessed by the officer at the moment that force is employed." *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) (citations omitted).

> [T]he "reasonableness" of an officer's particular use of force "must be judged from the perspective of a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight." Most significantly, the Court further elaborated that "reasonableness" meant the "standard of reasonableness *at the moment*," and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

Greenridge v. Ruffin, 927 F.2d at 792 (4th Cir. 1991), citing *Graham v. Connor* 490 U.S. at 396.

Gaines movement to the kitchen changed the circumstances presented to Corporal Ruby. Among the circumstances Corporal Ruby was faced with was that after, more than six (6) hours of conditions remaining static, with Gaines in plain sight in the living room, she abruptly moves to a place of cover in the kitchen. Gaines, who was suspected of having undetermined mental health issues, was armed with a loaded shotgun and kept her son, Kodi, near her while wielding that shotgun. Once in the kitchen, Gaines took partial cover behind a wall and began to raise the shotgun to a firing position. Gaines altered the status quo resulting in a rapidly changing fluid situation requiring Corporal Ruby to have to make a split-second decision, resulting in unfortunate and tragic consequences.

The Plaintiffs dispute that Gaines raised her shotgun. Even if Corporal Ruby is wrong or misperceived that she was raising the shotgun in the direction of the officers, qualified immunity applies where officers make a mistake of fact. *Pearson v. Callahan*, 555 U.S. at. 231. "A reviewing court must make 'allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'" *Anderson v. Russel*, 247 F.3d 125, 129 (4th Cir. 2001) *quoting Graham*, 490 U.S. at 397. "The court's focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection." *Anderson v. Russel*, 247 F.3d at 129 *citing Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) (citations omitted). In *Schulz v. Long* the court stated: "The Court's use of the phrases 'at the moment' and 'split-second judgment' are strong indicia that the reasonableness inquiry extends only to those facts known to the officer at the precise moment the officers effectuate the seizure." 44 F.3d 643, 648 (8th Cir. 1995) *citing Graham*, 490 U.S. at 396-97.

In determining reasonableness under a Fourth Amendment analysis, the court is required to carefully consider the facts and circumstances of each case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest. *Graham*, 490 U.S. at 396 *citing Tennessee v. Garner*, 471 U.S. at 8-9.

The Defendants' evidence is that the officers attempting to serve the warrants knocked on the door

several times, and knew at least one person was in the apartment, and whomever was in the apartment was not answering the door. The Defendants' evidence is that they announced that they were Baltimore County Police Officers.

The Plaintiffs called Kareem Courtney as a witness. Courtney testified that he, Gaines and the two minor children had been in bed together. When Gaines had gone to the bathroom, he heard the door being kicked in. He denied hearing the officers announce themselves prior to entering but admitted he knew "they were police, . . . I saw their badges." He testified that while he was in the apartment, he did not see Gaines point the shotgun at anyone, but upon leaving the apartment with his daughter Karsyn very shortly after the encounter began, he saw Gaines standing by the bathroom with the shotgun in her hand. He also testified that Gaines "took small situations and blowing them up to bigger situations."

There is no dispute that Officers Griffin and Dowell made lawful entry into Gaines' apartment. The difference between the Defendants' and Plaintiffs' version of the police entry into the apartment is not a material dispute of fact but at best "a difference of opinion as to what. . .witnesses observed." *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786. In *Sigman*, the Court of Appeals affirmed the District Court's granting of summary judgment based on police officer's qualified immunity.

Mark Sigman approached Police Officer Stephen Riddle threatening him with a knife. Sigman who was

probably intoxicated, was instructed to drop the knife and stop approaching. A crowd had gathered cheering Sigman on. Sigman continued to walk toward Officer Riddle, holding his knife in a threatening manner. As Sigman continued to approach, and was 10 to 15 feet away from Officer Riddle, Riddle shot Sigman twice. Officer Riddle stated that, at the time of the shooting, he believed that Sigman presented a danger to his life and safety and to the life and safety of others. Sigman died of his wounds.

Sigman's parents brought a 42 U.S.C. § 1983 action against Officer Riddle, the town of Chapel Hill, its police department, and its police chief, alleging violations of Sigman's Fourth, Eighth, and Fourteenth Amendment rights based on the claim that Officer Riddle acted unreasonably when he shot Sigman while he was about 15 feet away.[11]

The Defendants filed a Motion for Summary Judgment, contending that the officers are protected from liability in their individual capacity by qualified immunity, that the officers did not use unreasonable force. In opposition to the Defendants' Motion for Summary Judgment, the Plaintiff produced affidavits from three witnesses, who were among the cheering crowd, who would testify that "Sigman came out of the house, with his hands raised"; that they "could clearly see Mark Sigman's hands and that he had nothing in them"; that Sigman was intoxicated; that the officers shot Sigman three steps from the front door; and that

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11. Sigman's parents also brought a wrongful death action (count 2) under a North Carolina Statute.

based on their observations, "Mark Sigman represented no threat of any kind to officer and that the officer shot him for no reason." *Sigman*, 161 F.3d at 786. In granting the Defendants' Motion for Summary Judgment, the District Court stated that the affidavits of those witnesses were not sufficient to create a material issue of fact.

In the matter *sub judice*, Courtney's testimony, even viewed in light most favorable to the Plaintiffs, is not a "material" dispute of fact. His description of how the police entered the apartment is of no consequence since the officers were lawfully on the premises to serve arrest warrants for he and Gaines. Additionally, Courtney had been gone from the apartment for hours when the events surrounding Gaines' shooting unfolded. As such, he had no personal knowledge of the events leading up to the shooting.

In evaluating whether Corporal Ruby is entitled to qualified immunity, the Court must examine the severity of the crime and whether Gaines resisted arrest. *Graham*, 490 U.S. at 396. The Plaintiffs argue that the severity of the crime is minor, incorrectly focusing on the warrant the officers sought to serve on Gaines. Officers Griffin and Dowell were attempting to serve an arrest warrant on Gaines for her failure to appear in the District Court for an alleged traffic violation. Admittedly, the arrest warrant, for failure to appear in court for a traffic offense, could well be considered minor. However, it was Gaines who turned a mole hill into a mountain by assaulting police officers with her shotgun and resisting arrest. Courtney testified that "her [Gaines] reaction to that [being arrested] was not something I had seen, that was normal."

In considering Fourth Amendment reasonableness, the crime at issue is not the failure to appear warrant sought to be served on Gaines but rather her armed assault upon Officers Griffin and Dowell who were attempting a lawful arrest. While we may never know explicitly whether Gaines actually intended to harm the police officers lawfully performing their duties, at the very least it is clear that she committed a second-degree assault (intent to frighten) on the police officers by pointing her shotgun at them. Also, Officer Callahan's uncontradicted testimony is that Gaines said: "I have a gun you have a gun the only difference between you and me is that I'm ready to die and you're not." For the purposes of Fourth Amendment reasonable analysis, assaulting police officers with a loaded shotgun and suggesting that she is ready for a shootout is a serious offense.

Gaines knew that the Baltimore County Police were there to serve arrest warrants. There is no evidence contradicting Officer Griffin's testimony, that at some point when trying to get the occupants to open the door, he announced that he had arrest warrants. Courtney testified that while he was still in the apartment before he voluntarily surrendered, he knew "they were police, . . . I saw their badges." Courtney also testified that Gaines' reaction to being arrested was not normal. Knowing that the police were there with arrest warrants, Gaines armed herself with a shotgun and, for hours, engaged the police a standoff, putting herself, her son Kodi and police officers in jeopardy. Courtney testified that as he was leaving the apartment with his daughter, he saw Gaines standing by the bathroom with the shotgun in her hand.

Although he testified that he never saw Gaines point the shotgun at police, he left the apartment very shortly after the standoff commenced and has no first-hand knowledge of Gaines' actions after he left. Based on the undisputed credible evidence, there is no doubt that Gaines assaulted officers with a loaded shotgun and for many hours actively resisted arrest.

Next, examining whether Gaines posed an immediate threat to the safety of the officers or others, the Plaintiffs suggest that Gaines did not possess the shotgun. Further the Plaintiffs argue that even if she possessed the shotgun she did not point it in the direction of the apartment front door. Further arguing that even if she had done so and fired, the officers were not in danger of death or imminent serious bodily injury because they were fully or partially concealed behind brick walls and at least partially clad in protective equipment.

The Plaintiffs' suggestion that Gaines did not possess the shotgun is not substantiated by the evidence. Shortly after the police established a perimeter around the Gaines apartment, Courtney and his daughter vacated the building. The undisputed evidence is that only Kodi and Gaines remained in the apartment. Ryan Gaines, Korryn Gaines' father, testified that he had worked for the housing authority police and professed familiarity with firearms. He testified that Gaines wanted to purchase a firearm for home defense, and he recommended a pistol grip shotgun. He helped her obtain such a firearm and further recommended that she load it with buckshot because "it's hard to miss with buckshot." He testified that he knew Gaines used buckshot in her shotgun.

During their case in chief, the Plaintiffs called the Baltimore County Police Lab Technician Jun Su who recovered a 12-gauge pistol grip pump action shotgun, loaded with 4 live double "00" buckshot cartridges, two fired shell casing of double "00" buckshot located near where Gaines finally came to rest. Although, no shotgun pellets were recovered, holes consistent with shotgun blast were found in a dining room wall adjacent to where Gaines was standing when she first fired the shotgun. Also, holes were found in utility door outside the apartment, which were in line with holes inside the apartment. The Plaintiffs presented no credible evidence to suggest that the holes in the walls came from any other source but Gaines' discharge of the shotgun she was wielding.

The undisputed evidence is that for hours, Gaines remained in the living room, in full view of Corporal Ruby, with the shotgun pointed at the open apartment door. Police officers remained in the hallway during the entirety of the standoff. There is no dispute that at some point Gaines moved from the living room to the kitchen area and hid, at least partially, behind a wall. The undisputed testimony is that she discharged her shotgun twice, shooting through the drywall while she was standing in the kitchen area. There is no dispute that while in the kitchen Gaines was in possession of the shotgun. The suggestion that Gaines was in the kitchen making Kodi a peanut butter and jelly sandwich is unsupported by credible evidence. There is no suggestion that five-year-old Kodi, the only other person in the apartment, was wielding the shotgun.

The Plaintiffs claim that Corporal Ruby's action in shooting Gaines was unreasonable arguing that, even

if Gaines were to fire in the direction of the officers in the hallway, the officers were not in danger of death or imminent serious bodily injury because they were fully or partially concealed behind brick walls and at least partially clad in protective equipment.

Police officers, fulfilling their oath to protect the public, are often called upon to put themselves in harm's way. However, in doing so, they are not expected to graciously accept the probability of injury. Police officers, in less danger situations than posed by Gaines, have been afforded qualified immunity.

In *Elliott v. Leavitt*, Archie Elliott III was arrested for driving while intoxicated. He was handcuffed, placed in a police car with a seat belt fastened on him and the windows up. Moments later, the officer noticed that Elliott, still handcuffed, had released the seat belt and twisted his arms to the right side of his body and was manipulating a small handgun. Elliot failed to comply with the officer's commands to drop the gun. The officers shot and killed Elliot. The parents of Elliott sued under 42 U.S.C.A. § 1983 alleging that the police officers used excessive force. They argued that Elliott did not pose a real threat to the officers, noting that his hands were handcuffed behind his back, that he was placed in the front passenger seat with the seatbelt fastened and the window up, and that the officers were outside the car at the time of the shooting. The Court commented that "[t]he car window was no guarantee of safety when the pointed gun and the officers at whom it was aimed were in such close proximity." 99 F.3d 640 at 642 (4th Cir. 1996).

The Court of Appeals ruled that the officers use of deadly force was reasonable and granted the officers judgment base on qualified immunity. Further explaining, "[n]o citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life." *Id.* at 644 *citing Greenridge*, 927 F.2d 789.

The Plaintiffs claim that the officers in the hallway outside of Gaines' apartment were not in danger is not supported by the evidence. The undisputed testimony is that the shotgun Gaines wielded and fired was loaded with double "00" buckshot ("buckshot"). The uncontradicted evidence is that buckshot is the most dangerous type of shotgun round, containing nine (9) .32 caliber pellets which, when shot, spread out in a pattern initially traveling at 1300 feet per second. Defendants' expert, Charles Key's uncontradicted testimony is that a ricochet from a fired projectile is potentially deadly.

The Plaintiffs present no evidence that explicitly contradicts Corporal Ruby's testimony that Gaines pointed her shotgun towards the hinge side of the apartment door. However, the Plaintiffs seek to draw a favorable inference from the testimony of Charles Key, the Defendant's expert. Key testified that, even if partially obscured by the kitchen wall, if Gaines were pointing the shotgun at the front door of the apartment, her hands would have been visible. The Plaintiffs seek to build upon Key's testimony by implying that since Corporal Ruby failed to mention seeing Gaines' hands, she could not have been pointing the shotgun in

the direction of the officers in the hallway. Corporal Ruby testified that as Gaines raised the shotgun he focused on the barrel of he shotgun and her [hair] braids.[12] That Corporal Ruby did not see Gaines' hands is not dispositive of his testimony that she was pointing the shotgun in the direction of the front door. He testified that his attention was on the barrel of the shotgun, Gaines' braids and the front sight of his firearm. In the tense, rapidly evolving circumstances in which Corporal Ruby was called upon to make a split-second decision, that Corporal Ruby did not focus on Gaines' hands is not a material fact for Fourth Amendment reasonableness analysis.

There is no dispute, and this Court finds as a fact, that Gaines discharged the shotgun twice. Gaines discharged the shotgun, the first time, immediately after Corporal Ruby's first shot. Corporal Ruby testified, without contradiction, that the immediacy of that response indicated that the shotgun was loaded ready to fire, with the safety off and her finger was on the trigger. From her location in the kitchen, the physical evidence is that the shotgun blast damaging the dining room wall was above the floor, in the general direction of the apartment front door. The shotgun blast damaging the dining room wall clearly shows that the shotgun was not pointed down at the floor but was raised, at least to some angle, above floor level. However, even if Corporal Ruby was incorrect and Gaines was not pointing the shotgun at the front door of the apartment, under the circumstances of this case he

12. Doctor Soutall, the medical examiner testified that Gaines had black with blonde [hair] braids up to twenty-five inches long.

entitled to qualified immunity. *See Anderson v. Russell*, 247 F.3d 125; *Pearson v. Callahan*, 555 U.S. 223, 231.

In *Anderson v. Russell*, Major Maurice Anderson sued Officer David Russell, and other Prince George's County Police Officers, alleging excessive force, claiming violations of 42 U.S.C.A. § 1983 and various state laws. Summary judgment was granted to all the other officers. The jury found in favor of Anderson as to his § 1983 claim. The District Court granted Russell's motion for judgment as a matter of law with respect to his qualified immunity defense, but it denied his motion with respect to the jury's finding of excessive force. The Court of Appeals held that Russell was entitled to entry of judgment as a matter of law regarding the excessive force claim.

On December 28, 1991, Russell, a Prince George's County Police Officer was providing part time security services at Prince George's Plaza Mall. Anderson, who had been drinking wine during the day, arrived at the mall at approximately 4:30 in the evening. Once there, he purchased another bottle of wine at a store in the mall and drank it while walking around the mall. He later admitted to being intoxicated. Anderson had a shoe polish container tucked inside an eye-glasses case on his left side by his belt. He was also wearing earphones, listening to a portable Walkman radio he was carrying in his back pocket. A mall patron told Russell that he thought that Anderson appeared to have a gun under his sweater. Russell observed Anderson for twenty minutes and saw a bulge under Anderson's clothing on his left side near his waist band. Russell believed that the bulge was consistent

with a handgun. When Anderson exited the mall, Russell and David Pearson, another Prince George's County Police Officer approached Anderson with their guns drawn. The officers told Anderson to raise his hands and get down on his knees. Anderson initially complied with the order to raise his hands, but then later lowered them, without explanation to the officers. He later testified that he was attempting to reach into his left rear pocket to turn off his Walkman radio. Believing Anderson was reaching for the reported weapon, Russell shot Anderson three times. Anderson sustained permanent injuries, but survived. A search of Anderson's person and his belongings revealed the radio and confirmed that he was unarmed.

Anderson argues the precise positioning of his hands and the speed at which he was lowering his hands at the time he was shot is a triable fact for the jury. Citing *Graham v. Connor*, the Court reasoned that minor discrepancies in testimony do not create a material issue of fact in an excessive force claim. *See Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998). However, the Court found that:

> Russell's split-second decision to use deadly force against Anderson was reasonable in light of Russell's well-founded, though mistaken, belief that Anderson was reaching for a handgun. Thus, Russell's use of force does not constitute a Fourth Amendment violation.

Anderson v. Russell, 247 F.3d at 132.

At the precise moment that Russell used deadly force, he reasonably believed that Anderson posed a deadly threat to himself and others. Russell ultimately was mistaken as to the nature and extent of the threat posed by Anderson, which resulted in a tragic consequence to Anderson.

Nevertheless, as stated in *Anderson*, "the Fourth Amendment does not require omniscience. . . . Officers need not be absolutely sure . . . of the nature of the threat or the suspect's intent to cause them harm-the Constitution does not require that certitude precede the act of self protection." 247 F.3d at 132 *citing Elliott v. Leavitt*, 99 F.3d 640, 642. A policer officer's "liability be determined *exclusively* upon an examination and weighing of the information [the officers] possessed *immediately prior to and at the very moment [they] fired the fatal shot[s]. Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988) *quoting Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988).

Gaines was armed with a loaded shotgun. She assaulted police officers with that shotgun. Despite the hostage negotiator begging Gaines to surrender the shotgun and come out, Gaines refused to capitulate and actively resisted lawful arrest. Gaines was thought to have unspecified mental health issues. Gaines prevented her son, Kodi, from being rescued by Corporal Ruby who could have taken him to safety. Gaines, stated, "I have a gun you have a gun the only difference between you and me is that I'm ready to die and you're not." During the entirety of the standoff, created by Gaines, she remained in the living room in full view of police officers. For no apparent reason, Gaines, who had been in full view of

police, abruptly retreated to the kitchen and took cover behind a wall. Corporal Ruby testified that she raised her shotgun and pointed it at the hinge side of the door where officers were located in the hallway. Even if he is wrong about her pointing the shotgun at the officers on the hinge side of the door, the physical evidence is that she was raising her shotgun.

The police officers in *Anderson, Elliott* and *Sigman*, were entitled to qualified immunity in circumstances less antagonistic or hostile than those presented to Corporal Ruby.

Gaines did not have a right to resist a lawful arrest. Her actions were far more flagrant and deliberate than those in *Anderson, Elliott* and *Sigman*. For hours, Gaines refused to relinquish the shotgun and surrender. She abruptly moved from a place plainly visible in the living room to partial concealment behind a kitchen wall. The physical evidence is that she began to raise the shotgun, Corporal Ruby believed she was about to fire the shotgun, which the blast from which could have possible injured members of his team stationed in the hallway. Corporal Ruby was not required to be absolutely sure of the nature and extent of the threat Gaines posed. *Anderson v. Russell*, 247 F.3d at 132, citing *Elliott v. Leavitt*, 99 F.3d 640, 642.

Considering the facts and circumstances confronting Corporal Ruby, his actions were "objectively reasonable" and did not violate Gaines's Fourth Amendment right against unlawful seizure. Therefore, Corporal Ruby is entitled to qualified immunity.

B. Corporal Ruby's actions did not violate clearly established prohibitions.

Assuming arguendo that Corporal Ruby's first shot was an unlawful seizure of Gaines, his actions did not violate "clearly established" prohibition at the time of the seizure. Qualified immunity attaches when an official's conduct "does not violate clearly established statutory or constitutional rights of which, a reasonable person would have known." *Mullenix v. Luna*, 136 S.Ct. 305, 308 citing *Pearson v. Callahan*, 555 U.S. 223, 231. The court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741. A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). To determine whether a right is clearly established, a court must assess whether the law has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *See Wilson v. Prince George's County, Md.*, 893 F.3d 213 (4th Cir. 2018) *citing Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (citation omitted). However, the Supreme Court has emphasized that courts are "not to define clearly established law at a high level of generality," and that "[s]pecificity is especially important in the Fourth Amendment context." *See Kisela v. Hughes*, 138 S.Ct. 1148 (2018).[13]

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13. In "Plaintiff's, Kodi Gaines', Response in Opposition to Defendants' Supplemental Memorandum of Law in Support of Motion for Judgment Notwithstanding the Verdict, Motion for New

In support of their argument that Corporal Ruby is not entitled to qualified immunity, the Plaintiffs cite *Pena v. Porter*, 316 Fed.Appx. 303 (4th Cir. 2009). The Court is required to closely examine the particular facts of each case. In doing so, contrary to the Plaintiffs' assertions, the analysis in *Pena* supports the Defendants' claim that Corporal Ruby is entitled to qualified immunity.

In *Pena*, Rudolpho Gonzales had been arrested by two probation agents, but escaped. Police officers were called and began searching for Gonzales. They looked in a variety of places near Gonzales' home, but were unsuccessful. Because of inclement weather, the officers thought that Gonzales might hide in any number of out buildings on the property owned by Hector Pena. Manuel Pena (hereinafter "Pena"), Hector Pena's father, lived in a trailer that was located behind Hector Pena's house. The officers knocked on Pena's trailer, but when they got no answer they began walking around the area, shining their flashlights and searching for Gonzales. The officers checked vehicles, outbuildings, and along the chicken coops to see if Gonzales might be hiding anywhere. The officers

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Trial, Motion for Remittitur and Motion for the Court to Exercise Revisory Power," the Plaintiffs urge this Court to disregard the ruling in *Kisela* citing that the ruling in that case took place after the event in the matter *sub judice* and therefore, Corporal Ruby could not have relied upon those facts when he took his action. However, that Courts and the Ninth Circuit "particularly" are not to define clearly established law at a high level of generality was quoted in *City and Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1776 (2015) *citing Ashcroft v. Al-Kidd*, 131 S.Ct. 2074, 2083 (2011).

did not locate Gonzales. However, before leaving, Officer Porter decided to return to the porch of Pena's trailer. He shined his flashlight through the window next to the door and observed Pena asleep on his bed. Officer Barbour then knocked on the door of Pena's trailer a second time, while Officers Barnes and Porter stood off the porch on either side of the door. Shortly thereafter, Pena came to the door. The description of events thereafter varied.

When Pena opened the door, he was holding a rifle. Upon observing this, Officer Porter shouted that Pena had a gun, and Officer Barbour jumped from the porch. At the same time, or shortly thereafter, Officer Porter fired two shots that struck Pena in the upper torso and right arm. Subsequently, Officer Porter and Officer Barbour fired an additional fourteen shots into the trailer.

Pena, who survived, admitted that he drank at least eight beers while having a cookout with friends earlier in the evening and then fell asleep. He claims that he was not aroused by the knocking on the door and window but rather by the sound of his dogs and chickens. Pena admits that he grabbed his rifle fearing that a fox or other predator was raiding his chicken coops. However, he claims that the rifle was lowered and in his right hand as he opened the door with his left hand. Officer Porter claims that upon coming to the door, Pena began to look around and that Pena's eyes then appeared to lock onto him. According to Officer Porter, at that point, Pena began to shoulder his gun. It was then that two shots were fired at Pena. Pena states that he observed the officers and their badges, but that the officers never identified themselves

as police, either before or after he came to the door. Pena also contends that the officers immediately opened fire on him, without giving any warning or instructions. By contrast, the officers contend that Pena was ordered to drop the gun and to put his hands up.

After being struck by the first two bullets, Pena asserts that he fell back inside and that the spring-hinged door closed automatically. As the door began to close, Pena alleges that Officers Porter and Barbour fired the subsequent fourteen shots into the trailer and through the trailer door. Pena says that he avoided the subsequent fourteen shots only because the first two shots had knocked him to the floor. Pena did not recall opening the door and threatening the officers again.

The officers claim that after the first two shots were fired, Pena stumbled back inside, and the door closed, but after a few seconds Pena reopened the door and was still holding the gun in a threatening manner. The officers assert that they again ordered Pena to drop the gun and that Pena again locked his eyes onto Officer Porter. Officers Porter and Barbour then directed a total of fourteen subsequent shots at Pena, all of which missed Pena. After the officers radioed for assistance, they stated that Pena opened the door a third time, stepped out unarmed onto the trailer's small front porch, placed his hands on the porch railing, and collapsed.

Pena brought claims alleging violations of 42 U.S.C. § 1981, which alleged that the officers' search of Pena's property and the officers' use of force against Pena were

racially motivated and thus, discriminatory. His claims also included violations of the Federal and North Carolina Constitutions for use of excessive force and illegal search and seizure, as well as state common law claims of invasion of privacy, trespass, assault, battery, gross negligence, and damage to property. The officers moved for summary judgment as to all claims, and Pena moved for summary judgment on his claims regarding the search of his curtilage and his bedroom. The District Court granted both motions in part and denied both motions in part. The officers filed a timely appeal challenging the denial of qualified immunity. Pena filed a cross-appeal.

The Appellate Court affirmed the District Court's finding that there were genuine issues of material fact precluding summary judgment on Pena's excessive force claim regarding the first two shots fired by Officer Porter. *See Pena*, 316 Fed.Appx. at 312. Further explaining that the reasonableness of deadly force must always be adjudged in light of all the circumstances surrounding the use of force. "Although the presence of a weapon (or the reasonable belief that the victim possesses a weapon) is an important factor when determining reasonableness, it is not the only factor." *Id.*

In asserting that they were entitled to qualified immunity, the officers argue that the initial use of force was reasonable simply because Pena was carrying a gun and therefore, any disputed facts are irrelevant when deciding the issue of qualified immunity. In support of their argument, the officers cited several cases holding that deadly force was justified in part because the shooting

victim was armed. The Court commented on those cases explaining that they are distinguishable because in each case, other circumstances, in addition to the fact that the suspect was armed, were present which gave police probable cause to believe that the suspect posed a threat of physical harm, either to the officer or others.

> In *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), the suspect was stopped as part of a narcotics sting and refused to follow the officer's directions to place his hands where they could be seen. Similarly, in *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001), the officers ordered a man suspected of carrying a gun inside a shopping mall to get on his hands and knees. The man initially complied, but he was shot by a police officer after he lowered his hands and reached behind his back towards a bulge under his clothing.[6] *Id.* at 128. In *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994), the victim was shot as he was running towards a police officer in the confusing moments immediately after the officer had been warned that an arrestee was loose and had gained access to a magistrate's firearm. Finally, in *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998), the police knew at the time of the shooting that the victim was drunk and enraged, had just lost his job, had been cutting himself, and had previously threatened - with a large chef's knife - his own

> life, his girlfriend's life, and the police present on the scene.

Pena, 316 Fed.Appx at 311.[14]

In *Pena*, the police were looking for a suspect unrelated to Pena. In the matter before this Court, the police were attempting to serve arrest warrants on Gaines. The police had no authority to enter Pena's property without permission and Pena said the police never identified themselves as police officers. Pena armed himself believing that varmints may be attacking his chickens. By contrast, the police lawfully entered Gaines' apartment to serve arrest warrants. There is no dispute that the police identified themselves to Gaines. Gaines, knowing that the police were present at her door, intentionally did not answer but instead preemptively armed herself with a shotgun. Pena testified that the police began firing at him without giving any warning or instructions. In Gaines, there is no question that for hours the Baltimore County Police Negotiator attempted to have Gaines put down her shotgun and end the standoff peacefully, but she refused to do so. The uncontroverted evidence is that, prior to taking the initial shot, Corporal Ruby told the negotiator, Officer Stagi, to instruct Gaines to put the shotgun down. Corporal Ruby testified that "Stagi was begging her [Gaines] to put the gun down."

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14. *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996); *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991); *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001); *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998).

The facts and circumstances presented to Corporal Ruby by Gaines were substantially different than the events described in *Pena*. The facts in *Pena*, when compared to the events Corporal Ruby faced, do not represent a clearly established prohibition to the actions taken by Corporal Ruby.

The Plaintiff also cites *Connor v. Thompson*, 647 Fed.Appx 231 (4th Cir. 2016). In that case, the estate of Adam Carter brought 42 U.S.C.A. § 1983 action against sheriff's deputy, and the Wake County Sheriff, alleging use of excessive force, inadequate training and supervision, and *Monell* liability. Plaintiffs also allege assault and battery pursuant to North Carolina law. Defendants moved for summary judgment, which was denied.[15] The Defendants filed an interlocutory appeal. The Court of Appeals affirmed the lower court's holding that the deputy lacked probable cause to use deadly force and the use of such force violated Adam Carter's Fourth Amendment right against unlawful seizure. The Court of Appeals dismissed the supervisory liability claim citing a lack of subject jurisdiction.

In *Connor v. Thompson*, Adam Carter threatened to kill himself. His uncle, Todd McElfresh, called 911 requesting help transporting Carter to a local psychiatric hospital. Deputy Tavares Thompson arrived and encountered Carter, who appeared to be holding a paring knife. When Carter failed to comply with Thompson's

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15. Raina Connor was the Administratrix of the Estate of Adam Wade Carter.

instructions to drop the knife, Thompson fired his gun twice, both shots striking Carter, resulting in his death. In denying Thompson's motion for summary judgment, the Court noted substantial disputes of material facts.

The Court of Appeals engaged in a balancing "of the nature and quality of the intrusion of the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *See Connor*, 647 Fed. Appx at 236 *citing Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015) (quoting *Graham*, 490 U.S. at 396). The Court further stated:

> To perform this balancing, we look to "the facts and circumstances of each particular case," with an eye toward three factors: "the severity of the crime as issue, whether the suspect poses and immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

Connor, 647 Fed.Appx at 237 *citing Graham*, 490 U.S. 396.

When considering those factors, the Court first noted that Carter's uncle called the police for help because Carter was suicidal. Carter had committed no crime. "When the subject of a seizure 'ha[s] not committed any crime, this factor weighs heavily in [the subject's] favor." *Connor*, 647 Fed.Appx at 237 *citing Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 899 (4th Cir. 2015) (quoting *Bailey v. Kennedy*, 349 F.3d 731,

743-44 (4th Cir. 2003)). Also, there was no evidence that Carter intended to flee or was actively resisting arrest. In Gaines, the police had an arrest warrant for Gaines. They were lawfully at her place of residence attempting to serve that warrant. Gaines assaulted the police with a shotgun and, for hours, actively resisted arrest.

As to the third factor, whether the suspect presented and immediate threat to the safety of the officers, must be evaluated, "from the perspective of a reasonable officer on the scene, and the use of hindsight must be avoided. Additionally, the reasonableness of the officer's actions . . . [must be] determined based on the information possessed by the officer at the moment that force is employed." *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) *citing Graham*, 490 U.S. at 397.

In *Connor*, the Court of Appeals stated that:

> Thompson confronted a suicidal and obviously impaired but non-aggressive man who refused to drop a knife held in a non-threatening manner while "slowly stagger[ing]" down stairs. . . .the front door remained open behind Thompson at all times. We think the unconstitutionality of using deadly force in that specific context was apparent.

Connor v. Thompson, 647 Fed.Appx. at 239.

By contrast, Corporal Ruby was faced with Gaines who was armed with a shotgun; had threatened police

officers with that shotgun, who had an outstanding arrest warrant; who was suspected of having undisclosed mental health issues, for which she had not taken medication for a year; who refused to surrender herself to lawful arrest, even after one of her children, Karsyn Courtney, and that child's father, Kareem Courtney, had surrendered; who for hours resisted arrest and then abruptly moves to a place of cover and concealment and raises her shotgun in the direction of the police officers. *Connor* was distinguished by *Wilson v. Prince George's County, Md.*, No. WGC-16-425, 2017 WL 2719370 (M.D. Jun. 23, 2017). Wilson who failed to comply with officer's instructions to drop his knife, cut his own throat and then stabbed himself in the chest, stumbling forward toward the officer, at which time the officer shot Wilson, who lived and filed *inter alia* a 42 U.S.C. § 1983 action against police officer. As the § 1983 action was pending, the Court of Appeals affirmed the District Court's granting summary judgment finding that the officer was entitled to qualified immunity because the constitutional violation was not clearly established when the incident occurred. However, the Court of Appeals remanded the matter to the District Court for further consideration of the state law claims.

The Plaintiffs also rely on *Cooper v. Sheehan*, which in turn "relied heavily" on *Pena. See Cooper v. Sheehan*, 735 F.3d 153, 157 (4th Cir. 2013).

Around 11:30 p.m. on the date of the incident, Officers James Sheehan and Brian Carlisle arrived at George Cooper's residence in response to a report of disturbance. The officers arrived in separate police vehicles, one marked

and the other unmarked but neither had engaged their emergency equipment (lights or sirens). They approached the property on foot. Carlisle "could hear screaming . . . coming from the property" and persons walking around inside. *Id.* at 155. They both heard what they described as a heated argument. Officer Sheehan tapped on the window with his flashlight, but neither of the officers announced his presence or identified himself as a deputy sheriff. In response to the sound at his window, Cooper uttered some obscenities, which the officers heard. Cooper then peered out the back door but saw nothing. Cooper called out for anyone in the yard to identify himself, but no one responded. Intent on investigating the noise, Cooper opened the back door and took two or three steps on to his darkened porch while carrying his twenty-gauge shotgun with the butt of the firearm in his right hand and its muzzle pointed toward the ground. The officers, seeing Cooper with his shotgun, drew their service weapons and commenced firing without warning. The officers discharged between eleven and fourteen rounds, and Cooper was hit five or six times, but survived to testify.

On January 29, 2010, Cooper filed his lawsuit, naming as Defendants the Brunswick County Sheriff's Department, the current and former Sheriffs, plus several deputies, including the officers. Eventually, the claims against the Sheriff's Department were dismissed. The only claims reserved for trial against the officers were Cooper's excessive force claims (42 U.S.C. § 1983) and his state law assault, battery, negligence, and gross negligence claims. The District Court denied the officers' assertions of qualified and public officers' immunity

from, respectively, Cooper's federal and state excessive force claims. The officers sought appellate relief from the immunity aspects of the Court's decision. The Court of Appeals affirmed the trial court's denial of qualified immunity.

In ruling against the officers, the Court relied heavily on the unpublished opinion in *Pena*. The Court accepted Cooper's evidence that he was holding his shotgun down, asked who was on his property and got no response, and was unaware that police officers where the source of the noise he was investigating. As in *Pena*, the Court of Appeals concluded that Cooper had a perfectly reasonable rationale for holding the rifle, which should have been apparent to the officers at the time of the shooting. *See Pena*, 316 Fed.Appx. at 312. However, further finding that "[a]bsent any additional factors which would give the [officers] probable cause to fear for their safety or the safety of others, the mere presence of a weapon is not sufficient to justify the use of deadly force." *Id.* However, the Court of Appeals noted that it was critical to the Court's determination that "no reasonable officer could have believed that [Cooper] was aware that two sheriff deputies were outside" when he stepped onto the porch. The Court acknowledged that "if [Cooper] had . . . stepped onto a dark porch armed despite knowing law enforcement officers were approaching his door, that certainly could affect a reasonable officer's apprehension of dangerousness." *See Cooper*, 735 F.3d at 157.

Unlike *Cooper*, Gaines was not simply pointing her shotgun at the floor. During the day, she kept it pointed at

persons she knew to be police officers. Moments before she was shot, she moved to cover, began raising her shotgun in the direction of where the officers were located. Critically, unlike Cooper, the undisputed testimony is that before Corporal Ruby shot Gaines, she was instructed to lower her weapon and she did not comply. The circumstances in Gaines gave rise to probable cause that her actions posed a threat to the safety of the police personnel in the area.

The facts in *Pena, Connor* and *Cooper* are not so closely factually related to the circumstance posed by Gaines as to present to Corporal Ruby clearly establish prohibition to his actions.

The Plaintiffs suggest that Corporal Ruby is not entitled to qualified immunity because he was not trained for the circumstances presented. Particularly, Corporal Ruby was not trained to shoot through a wall. "Even if an officer acts contrary to [their] training, however. . . that does not itself negate qualified immunity where it would otherwise be warranted." *City and County of San Francisco, CA v. Sheehan*, 135 S.Ct. 1765, 1777, (2015) (Justices Scalia and Kagan concurred in part and dissented in part. Justice Breyer took no part in consideration or decision.).

Teresa Sheehan lived in a group home for individuals with mental illnesses. On the day in question, she began acting erratically and threatened to kill her social worker. San Francisco Police Officers Reynolds and Holder were sent to help escort Sheehan to a facility for temporary evaluation and treatment. When the officers first entered Sheehan's room, she grabbed a knife and threatened to

kill them. They retreated from the room and closed the door. Concerned about what Sheehan might do behind the closed door, and without considering if they could accommodate her disability, the officers reentered her room. Sheehan again confronted them with the knife. After pepper spray proved ineffective, the officers shot Sheehan multiple times. Sheehan later sued the City and County of San Francisco for violating Title II of the Americans with Disabilities Act of 1990 ("ADA") by arresting her without accommodating her disability. *See* 42 U.S.C. § 12132. She also sued officers Reynolds and Holder in their personal capacities under 42 U.S.C. § 1983, claiming that they violated her Fourth Amendment Rights. The District Court granted summary judgment because it concluded that officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others, further finding officers Reynolds and Holder did not use excessive force in violation of 42 U.S.C. § 1983. Vacating in part, the Ninth Circuit held that the ADA applied and that a jury must decide whether San Francisco should have accommodated Sheehan. The Court also held that Reynolds and Holder are not entitled to qualified immunity reasoning that "that a jury could find that the officers "provoked" Sheehan by needlessly forcing that second confrontation." *See Sheehan*, 135 S.Ct. at 1772. The Supreme Court granted certiorari and reversed the Court of Appeals' Ninth Circuit ruling that the officers were entitled to qualified immunity.[16]

16. For reasons that are not relevant to the matter *sub judice*, the Supreme Court declined to address whether certain language in the ADA would apply to arrests.

Sheehan's expert testified that the conduct of the police officers did not conform to their training regarding dealing with mentally ill individuals. *Sheehan*, 135 S.Ct. at 1777. The Supreme Court held that even if an officer acts contrary to training, that does not itself negate qualified immunity.

> [S]o long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.

Id. citing Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002).

In the matter *sub judice*, the Plaintiffs fail to produce any expert testimony that Corporal Ruby violated his training. Rather, the Plaintiffs merely rely on testimony that members of the tactical team are not specifically trained to shoot through walls. However, the Plaintiffs called Sergeant Chris Stephan, who testified that members of the tactical team are trained to shoot though barriers. As made clear in *Sheehan*, a law enforcement officer is entitled to qualified immunity if a reasonable officer believed his conduct was justified. The Plaintiffs' expert did not render an opinion as to whether Corporal Ruby was a reasonable officer, but rather his opinion was, given the totality of the circumstances, Corporal Ruby's first shot was unreasonable. One may argue that the foregoing statement is a distinction without a difference

but, in tense, uncertain, and rapidly evolving situations, an officer's assessment must be given great deference. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *See Graham*, 490 U.S. at 396 *citing Terry v. Ohio*, 392 U.S. 1, 20-22 (1968).

In *Mullenix v. Luna*, a Texas trooper attempted to shoot at an engine compartment of a moving automobile to disable that vehicle which had lead police officers on an 18 minute high speed chase at speeds up to 110 miles per hour. 136 S.Ct. 305. Trooper Chadrin Mullenix had never been trained in that tactic, and when he shot to disable the vehicle, he killed the driver Israel Leija, Jr. The Estate of Leija brought a 42 U.S.C.A. § 1983 action against the Trooper. The Supreme Court, Justice Sotomayor dissenting, found that Trooper Mullenix was entitled to qualified immunity.[17]

Although Corporal Ruby may not have been trained specifically to shoot through drywall, he had been trained to shoot through barriers. Given the totality of the specific circumstances confronting Corporal Ruby, this Court finds that he is entitled to qualified immunity because his conduct did not violate clearly established statutory or constitutional rights of which he would have known.

17. Justice Scalia concurring with the majority "would not describe what occurred here as the application of deadly force in effecting an arrest." *Mullenix*, 136 S.Ct. at 312.

II. Verdict

The Defendants argue that a new trial is warranted because the jury verdict is irreconcilably inconsistent. *Def. Memo. pg. 19*. The Plaintiffs respond arguing that the Defendants have waived their right to challenge the verdict. "Defendant agreed to both the form and content of the verdict sheet. . . " *Pl. Memo. pg. 28*. Additionally, the Plaintiffs argue that: "To the extent that damages cap under the Local Government Tort Claims Act ("LGTCA") applies to any of the claims, the Court will apply the damage cap." *Pl. Memo. pg. 29*.

A. Waiver

Prior to jury instructions, the Parties and the Court had an "on the record" discussion concerning the verdict sheet. Accusing the Defendants of verdict sheet schizophrenia[18], the Plaintiffs charge that the Defendant "consented to and agreed to" the verdict sheet and thus, have waived any error. *Pl. Memo. pg. 30*. The Plaintiffs also agreed to the form of the verdict.

Md. Rule: 2-522(b)(2)(A) provides:

> The court may require a jury to return a verdict in the form of written findings upon specific issues. For that purpose, the court may use any method of submitting the issues and requiring written findings as it deems appropriate,

18. *Pl. Memo. pg. 28*.

> including the submission of written questions susceptible of brief answers or of written forms of the several special findings that might properly be made under the pleadings and evidence. The court shall instruct the jury as may be necessary to enable it to make its findings upon each issue.

The decision to use a particular verdict sheet "will not be reversed absent abuse of discretion." *Espina v. Prince George's County*, 215 Md.App. 611, 658 *quoting Applied Indus. Techs. v. Ludemann*, 148 Md.App. 272, 287 (2002). In *Francis v. Johnson*, the Court had the occasion to consider the form of the verdict sheet as related to punitive damages. 219 Md.App. 531 (2014).

Michael Brian Johnson, Jr. a minor, through his parents, filed an action against three Baltimore City Police Officers, alleging a violation of the Maryland Declaration of Rights, false imprisonment, battery, and assault. Johnson did not pursue a 42 U.S.C. § 1983 claim. Following a jury award of $465,000 in compensatory damages and $35,000 in punitive damages, the Circuit Court for Baltimore City, Charles J. Peters, J., granted in part, the officers' Motion for Judgment Notwithstanding the Verdict (JNOV), striking the jury's award of $1,000 in punitive damages against one officer and finding the award of compensatory damages to be excessive. Mr. Johnson agreed to remittitur, and the officers appealed. The Court of Special Appeals affirmed in part, reversed in part, and remanded.

Among the allegations of error, the appellant police officers alleged that the damages should have been reduced because they were duplicative, including that multiple awards of punitive damages were improper because "the incident in question constituted a continuous, single occurrence." *Francis v. Johnson*, 219 Md.App. at 557. At trial, during discussions regarding the verdict sheet, appellants did not make any argument as to multiple awards of punitive damages for the single incident. The appellee, Mr. Johnson, argued that the suggestion that there should have been only one award of punitive damages was not preserved for review because appellants made no objection to the form of the verdict sheet regarding the "alleged duplication of the punitive damages," and had not been raised in post-trial motions. Because the issue regarding punitive damages was neither raised prior to submission to the jury, nor in any post-trial motions, the Court of Special Appeals refused to consider the argument. *Id.* at 558.

In the matter before this Court, there is no dispute that the Defendants did not object to the verdict sheet that was submitted to the jury. However, unlike *Johnson*, the Defendants presented the issue in post-trial motions, and thus, this Court will consider their argument.

B. Inconsistent verdict

The jury found in favor of Korryn Gaines and Kodi Gaines under both the Maryland Declaration of Rights ("State claim") and the Fourth Amendment violation under 43 U.S.C. § 1983 ("Federal claim"). The juries did not, nor

were they requested to, distinguish which if any portion of the total damage awarded was attributable to the State claim or the Federal claim. Damages awarded pursuant to the State claim are subject to limitations ("damage cap") under the LGTCA. Damages awarded for violation of the Federal claim are not subject to the damage cap. The thrust of the Defendants' argument is that since the jury did not apportion the damages between the State and Federal claims, "the Court cannot determine which part of Kodi's award . . . for non-economic damages is subject to the LGTCA cap." "Without the proper apportionment, the Court cannot properly perform its function to assess the reasonableness and constitutionality of verdicts on the state and federal claims." *Def. Mot. pg. 20*.

In support of their argument that the verdict is irreconcilably inconsistent, the Defendants cite *Cline v. Wal-Mart Stores, Inc.* and *Gasperini v. Center for Humanities, Inc.*, neither of which aid the Defendants' argument. 144 F.3d 294 (4th Cir. 1998); 518 U.S 415 (1996).

Gasperini involves a state statute that empowers a court to review the amount of jury verdicts. Under New York law, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation."[19] Under the Seventh Amendment, which governs proceedings in Federal Court, but not in State Court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined

19. N.Y. C.P.L.R. 5501(c).

in any Court of the United States, than according to the rules of the common law."[20] The issue in *Gasperini* was the compatibility of those provisions, in an action based on New York law but tried in Federal Court based on the Parties' diverse citizenship. In that case, the United States District Court for the Southern District of New York entered judgment on jury award of $450,000 to William Gasperini, a journalist, for damages relating to the loss of 300 photographic transparencies. On appeal, the Court of Appeals reversed. *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995). That Court, guided by New York Appellate Division decisions, held that the $450,000 materially deviates from what is reasonable compensation. The Court vacated the judgment entered on the jury verdict and ordered a new trial, unless Gasperini agreed to an award of $100,000. Gasperini's request for certiorari was granted. Writing for the majority, Justice Ginsburg "held that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to Seventh Amendment's reexamination clause, if review standard set out in New York statute is applied by Federal trial court judge, with appellate control of the trial court's ruling limited to review for 'abuse of discretion.'" *See Gasperini*, 518 U.S 415.

Cline v. Wal-Mart Stores, Inc., also cited by the Defendants, has little if anything to do with the Defendants' inconsistent verdict claim. 144 F.3d 294. The

20. U.S.C.A. Const. Amend. VII.

Defendant also cites *Cline* in support of their request for remittitur.

More closely related to their argument that the verdict is irreconcilably inconsistent, the Defendants' cite *Southern Management Corp. v. Taha*, 378 Md. 461 (2003), *Espina v. Prince George's County*, 215 Md.App. 611 (2013), and *Espina v. Jackson*, 442 Md. 311 (2015). The Holding in *Southern Management* centered on an inconsistent verdict related to *respondeat superior*.

Southern Management Corporation (hereinafter "SMC") managed several apartment complexes and employed Mukhtar Taha as a maintenance technician at one of those apartment complexes. Taha was discharged from his employment for poor work performance, insubordination, and abusive behavior. Close in time to when Taha was discharged, employees McGovern and Martinez notified Wylie—Forth, ("the property manager"), that several items were missing from a locked maintenance tool and supply area. Martinez informed the property manager that he had witnessed Taha shaking and pulling on the lock to the maintenance area on a day that Taha was not assigned to work at the apartment complex. Anya Udit, a leasing consultant at the apartment complex reported to the property manager that she spotted Taha in the property manager's locked office on a day when Taha was supposed to be on disability leave. Thereafter, the property manager contacted the Montgomery County Police Department to report the missing items. The property manager informed the investigating officer, Robert Grims, that she did not know who had broken

into the storage area and told Officer Grims that he could talk to anyone on staff at Silver Spring Towers "because at that point in time, everyone was a suspect." The only time the property manager mentioned Taha's name was in response to Officer Grims' question asking whether any employees had been terminated recently.

Based on Officer Grims' investigation, Taha was charged with burglary in the second degree, and the lesser included offense of attempted burglary, and burglary in the fourth degree for breaking and entering a dwelling or storehouse. The State's Attorneys dismissed the charges when Taha produced an alibi witness.

Based on *respondeat superior* liability, Taha filed a civil complaint against McGovern and the property manager, and SMC. The jury returned a verdict in favor the property manager and McGovern, finding that Taha had not been the victim of malicious prosecution by either employee, but found against SMC. The jury awarded Taha $25,000 in economic damages and $75,000 in non-economic damages. The jury rendered a verdict in which it found that the two named employee Defendants were not liable; however, the jury also found in favor of Taha against SMC. SMC appealed.

Writing for the majority, J. Battaglia held that the jury's verdict finding the employer liable for malicious prosecution, under the theory of *respondeat superior*, was irreconcilably inconsistent with the verdict exonerating coworkers. Taha's complaint against SMC was predicated upon the allegations of malicious prosecution

of its employees, the property manager and McGovern. Reasoning that if the employees, were not liable, and the claim against SMC was based solely on the conduct of the employees, then SMC could not be liable. The judgment of the Circuit Court was reversed with instructions to enter judgment in favor of SMC.

"The Court of Appeals has explained that irreconcilable inconsistent jury verdicts cannot be allowed to stand in civil cases." *See Espina*, 215 Md.App. at 657 *citing Southern Management Corp.*, 378 Md. at 487-89. However, the Court of Special Appeals explained that the verdict in *Espina* was not irreconcilably inconsistent because:

> The jury could have reasonably determined that Manuel's rights under Article 24 of the Maryland Declaration of Rights were violated when he was required to cease providing CPR to his father, and when he was arrested, imprisoned, and charged with a crime for which the jury could have reasonably concluded there was no basis.

Espina, 215 Md. App at 657.

In *Espina*, the primary issue before the appellate courts was the extent to which the LGTCA limits recovery for state constitutional violations.

Manuel Espina ("Espina") was shot and killed by Steven Jackson, an off-duty Prince George's County Police Officer working secondary employment. Espina's

estate, along with his wife, Estela and his son, Manuel, filed a wrongful death suit against the County and Officer Jackson. The jury found that Jackson acted with actual malice and did not act in self-defense.[21] The jury returned a verdict in favor of the Plaintiffs and awarded damages totaling $11,505,000 as follows:

- $5 million in non-economic damages for violation of Espina's Article 24 rights;
- $5,000 in economic damages for violation of Espina's Article 24 rights;
- $0 for assault and battery of Espina;
- $5 million in non-economic damages for the wrongful death of Espina to be divided 95% to Estela and 5% to Manuel); and
- $1.5 million in non-economic damages for violation of Manuel's Article 24 lights.

Applying the LGTCA damage cap, the Circuit Court reduced the $11,505,000 verdict against Prince George's County to $405,000. The original verdict against Jackson was not reduced.

The Circuit Court ruled that the violation of Espina's constitutional right and the wrongful death of Espina

21. The jury rendered four separate findings of malice against Jackson.

constituted one occurrence and that Estela and Manuel's wrongful death claims were derivative. The Circuit Court also found that Manuel's constitutional claim constituted an individual claim arising out of the same occurrence. The Court reduced the wrongful death award to $200,000 as to Prince George's County. The Circuit Court further reduced Manuel's award for violation of his constitutional rights to $200,000. The Circuit Court left the $5,000 award for economic damages unchanged, resulting in a total award of $405,000.

Both Parties sought review claiming that the Circuit Court improperly reduced the verdicts under CJP § 5-303(a). The Espina's argued that the assault and shooting of Espina constitute a separate occurrence from the constitutional violation against Manuel. Further arguing that a separate $200,000 cap should have applied for each of the wrongful death claim beneficiaries. The County argued that the verdicts should have been reduced to $200,000, because the Espinas' claims are based upon the same set of facts. After undertaking a thorough analysis, the Court of Special Appeals found that the LGTCA damages cap applies and limits recovery for State Constitutional violations. The Court went on to hold that the LGTCA damages cap, as applied to State Constitutional claims, does not violate the Espinas' rights under Article 19 of the Maryland Declaration of Rights.[22]

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22. Article 19 of the Maryland Declaration of Rights provides: That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

The Court of Special Appeals held that the total award should have been reduced to $400,000, rather than $405,000. J. Berger explained that the Circuit Court erred by awarding $5,000 for economic damages. "Unlike the § 11-108 cap, the LGTCA damages cap does not differentiate between economic and noneconomic damages. . . Rather, the LGTCA's $200,000 per claim and $500,000 per occurrence damages cap applies to both economic and noneconomic damages." *See Espina*, 215 Md.App. at 647. The Court of Special Appeals affirmed judgment in part and reduced the award entered against the County to $400,000. *Id.* The Estate and family filed a Petition for Certiorari, which was granted. *Espina v. Jackson*, 438 Md. 142. Writing for a unanimous Court, J. Greene affirmed the findings of the Court of Special Appeals. *Espina v. Jackson*, 442 Md. 311 (2015).

The Plaintiffs and the Defendants agree, as they must, that any jury award to Korryn Gaines and Kodi Gaines under the State Claim is subject to a damage cap. Equally true is that a violation of the Federal Claim is not subject to a cap. The Defendants argues that the verdict sheet did not apportion the damages between the State and Federal Claims and thus, without apportionment, the Court is unable to ascertain which part of the noneconomic damages awarded to Kodi is subject to the cap.

In response to the Defendants' assertions that the verdict is irreconcilably inconsistent, the Plaintiffs argue that, "The Court should simply apply the damages cap where appropriate and leave the damages intact with regard to Plaintiffs' claims under 42 U.S.C. 1983." *Pl. Memo. pg. 31*. However, it is unclear what the Plaintiffs mean by "where appropriate."

Citing, *Beall v. Holloway-Johnson* as "446. Md. 48, 130 A.3d 406 (2015)", the Plaintiffs state: "Maryland courts have made clear that there can be only one recovery of damages for one wrong or injury." *Pl. Memo. pg. 30*.[23] That ruling does not aid this Court to "simply apply the damages cap where appropriate."

In *Beall*, Connie Holloway-Johnson on her own behalf, and as the personal representative of the estate of her deceased son, Haines E. Holloway-Lilliston, initiated a wrongful death suit against, among others, Timothy Beall, a Baltimore City Police Officer. The Complaint, filed in the Circuit Court for Baltimore City, alleged negligence, gross negligence, battery, and a violation of Article 24 of the Maryland Declaration of Rights. Beall made a Motion for Judgment at the close of the Plaintiffs' case-in-chief. Except as to negligence, the Circuit Court granted the motion. On the claim of negligence, the jury found for the Plaintiffs and awarded $3.505 million dollars, which the trial court reduced to $200,000 to comply with the damage's "cap" of the LGTCA. Respondent appealed to the Court of Special Appeals, which reversed and remanded for a new trial. *Holloway-Johnson v. Beall*, 220 Md.App. 195 (2014). Officer Beall petitioned for Writ of Certiorari, which was granted.

Officer Beall, while on duty in a marked police vehicle, was involved in a high-speed chase of a motorcycle driven by Haines E. Holloway-Lilliston ("motorcyclist"). The chase started in Baltimore City but continued into

23. The correct cite for *Beall v. Holloway-Johnson* is 446 Md. 48, 130 A.3d 406 (2016).

Baltimore County. Beall's shift commander instructed Beall to disengage from the pursuit, which Beall acknowledged. Officer Beall called the State Police from his cell phone to inform them of his position and that he had followed a motorcycle from Baltimore City into Baltimore County heading east onto I-695. Officer Beall followed the motorcycle onto an exit ramp. The motorcyclist reduced speed to between 31 and 33 m.p.h. and Officer Beall was traveling at about 40 m.p.h. Officer Beall's patrol vehicle struck the motorcycle. The motorcyclist, was ejected from the bike, striking the hood of Officer Beall's car. He died upon hitting the pavement. At trial, State Police Sergeant Jon McGee, an expert witness in accident reconstruction, opined that Officer Beall failed to maintain a safe and proper following distance when he collided with the rear of the motorcycle.

The Circuit Court, Judge Shar, allowed the jury to consider only the negligence count. He dismissed gross negligence, battery, and violation of the Maryland Declaration of Rights. The Court of Special Appeals disagreed, finding that there was sufficient evidence for all of Ms. Holloway-Johnson's counts to teach the jury, as well as her request for punitive damages.

On appeal, among other arguments, Officer Beall relied on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In that case, the Supreme Court determined that "a police officer [does not violate] the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at

apprehending a suspected offender." *Id.* at 836. The Court of Appeals commented that *County of Sacramento* may have supported Officer Beall's argument that he did not violate Article 24 of the Maryland Declaration of Rights, but the jury was never given a chance to consider that claim. The Court of Appeals affirmed the ruling that issues of gross negligence, battery, and violation of the Maryland Declaration of Rights should be submitted to the jury, and remanded.

In its ruling, the Court of Appeals discussed damages explaining:

> The compensatory damages verdict Respondent received from the jury on her negligence claim represents all of the compensatory relief due under any or all of the causes of action advanced. Moreover, none of the withheld claims would support submitting the punitive damage request to the jury. Accordingly, a new trial is not warranted. *See Beall*, 446 Md. at 69.

The Court found that the gross negligence, battery, and Article 24 violation claims were different legal theories under which a jury could have awarded compensatory damages. Consequentially, Ms. Holloway–Johnson received compensatory damages award for the negligence claim. The Court went on to explain that "[b]ecause this case implicates clearly the LGTCA, Respondent is entitled only to collect up to the damages cap of $200,000 (footnote omitted)." *Id.* at 78.

Beall did not involve a claim for damages under 42 U.S.C. § 1983, and therefore, the Court was not called upon to attempt to allocate a damage award between State Claims and Federal Claims.

Next, the Plaintiffs assert that: “Duplicative or overlapping recoveries in a tort action are not permissible.” *Smallwood v. Bradford*, 352 Md. 8, 24 (1998).

In *Smallwood*, William Todd was killed instantly in an automobile accident. Todd’s sister, Brenda Smallwood, Personal Representative of Todd’s estate brought a survival action alleging negligence against Hilton Bradford.

The Circuit Court for Worcester County granted Defendant’s motion for judgment as to recoverability of damages for pro-impact fright, mental anguish, and loss of enjoyment of life, but denied the motion with respect to liability, and entered judgment on jury verdict finding Defendant negligent and awarding damages only for funeral expenses. Plaintiff appealed. The Court of Appeals granted the Petition prior to the Court of Special Appeals’ consideration of the case. *Smallwood v. Bradford*, 347 Md. 155 (1997).

Writing for a divided Court, Chief Judge Bell held that: (1) damages for pre-impact fright was an issue for jury; (2) that plaintiff could not recover any “post-impact” or “post-death” damages; and (3) determination that evidence of pecuniary status of decedent’s estate was not relevant was not an abuse of discretion. Chasanow and

Raker, JJ. Concurred in parts (2) and (3) of the majority opinion but dissented as to Part (1). Willer, J. dissented from the conclusions reached in Part (1) and from the judgment. *Smallwood*, 352 Md. 8.

The *Smallwood* decision primarily dealt with pre-impact fright, which relied heavily upon *Beynon v. Montgomery Cablevision*, which, as a matter of first impression, held that in survival actions, where a decedent experiences great fear and apprehension of imminent death before the fatal physical impact, the decedent's estate may recover for such emotional distress and mental anguish as are capable of objective determination. 347 Md. 683 (1997). *Beynon* was authored by Bell, C.J., with, Chasanow, Raker, and Wilner, JJ., dissenting.

In *Smallwood*, the Court noted that the action was brought under the Maryland survivorship statute, Maryland Code (1974, 1991 Repl.Vol.) § 7-401(x) of the Estates and Trust Article. *See Smallwood*, 352 Md. at 25. Therefore, recovery, is limited to damages that the decedent could have recovered himself, had he survived and brought the action. "Because the decedent did not survive the fatal impact with the appellee's vehicle, he suffered no 'post-impact' or 'post death' loss of enjoyment of life and, thus, is not entitled to any 'post-impact,' or 'post-death' damages. (footnote omitted). *Id.* at 26.

Nothing in *Smallwood* aids this Court in reconciling the State Claim and the limitations imposed upon damages required by the LGTCA, with the Federal Claim for which there are not limitations on damages.

Finally, the Plaintiffs assert that they "would not have been permitted to recover twice for the same tort merely because the wrong gave rise to alternative theories of recovery." *Shapiro v. Chapman*, 70 Md.App. 307, 315 (1987) *Pl. Memo. pg. 30*. The Plaintiffs present that statement out of context, yet *Shapiro* is instructive as it does discuss a "substantial difference between recovery in a § 1983 action and recovery in a common law tort action." *Shapiro*, 70 Md.App. at 316.

Appellants, Stephen Shapiro, Norman Wotring, and John Dignan, profoundly mentally challenged adults, were involuntarily committed to, and were in the care of, the Rosewood Center, a State operated facility for the care of the mentally ill. Richard Rowland, a direct care aide reported that he witnessed several violent incidents involving appellants and Chapman. Rowland stated that he had seen Chapman strike, kick, drag and otherwise assault appellants on more than one occasion. The director investigated and reported the matter to the Maryland Advocacy Unit for the Developmentally Disabled ("MAUDD").[24] MAUDD, on behalf of appellants, filed a complaint against Chapman. The Complaint asserted three causes of action for each complainant, based on alternative theories of recovery: (1) Chapman's conduct deprived appellants of their Fourteenth Amendment due process right to be free from physical abuse, made actionable through 42 U.S.C. § 1983; (2) Chapman violated rights guaranteed appellants under Md. Health-Gen.

24. MAUDD is a private non-profit corporation designated by Executive Order as the state agency for the protection and advocacy of the rights of developmentally disabled persons.

Code Ann., section 7-601; and (3) common law assault and battery. The appellants did not allege a violation under the Maryland Declaration of Rights. The Circuit Court granted Chapman's motion for judgment as to the first two counts, reasoning that; the appellants could obtain relief for Chapman's abuse through an action for common law assault, that they had not been deprived of any constitutional right, thus, an action under § 1983 did not lie. The Court also ruled that Md. Health-Gen. Code § 7-601 did not provide for a separate cause of action. The jury returned a verdict in favor of appellants on the common law assault and battery and awarded each appellant $1.00 in compensatory damages and $1.00 in punitive damages. The appellants appealed after the Circuit Court denied the appellants' motion for new trial. The appellants charge that the trial court erred for refusing to permit the alleged violation of 42 U.S.C. § 1983, to go to the jury.

There is no dispute that Chapman was an employee of the State charged with the duty of providing for appellants' care and safety. Therefore, the appellate court's inquiry focused on whether appellants were deprived of a constitutionally secured right. The Court of Special Appeals ruled that: "Because appellants asserted a violation of their substantive due process . . . at the hands of one acting under color of state authority, the court erred in holding that the availability of an action for assault and battery negated any violation of appellants' constitutional rights." *Id.* at 313.

The Court ruled that the error was not harmless and then considered whether the appellants were entitled to

any greater relief than that which they received from the jury under the count of assault and battery. The Court stated:

> We see no significant difference between the interests protected by the substantive due process right to be free from physical abuse and the interests protectable by an action for the common law tort of assault and battery. The elements of damages recoverable in an action under § 1983 are identical to those recoverable in a common law action for assault and battery. Appellants would have been entitled to no greater measure of damages as a result of the violation of § 1983 than that afforded them by the jury under the third count in their complaint. They would not have been permitted to recover twice for the same tort merely because the wrong gave rise to alternative theories of recovery.

Id. at 315.

However, the Court went on to explain:

> There is, however, one substantial difference between recovery in a § 1983 action and recovery in a common law tort action. As the prevailing parties to a civil rights action, appellants would be entitled, under § 1988, to attorneys' fees. . . (footnote omitted). . .

> Since an award of attorneys' fees is not permitted in an action for assault and battery, the court's rejection of appellants' § 1983 count caused appellants legally cognizable harm.

Id. at 316.

The Court vacated the Circuit Court's judgment but affirmed the verdict. Notably, the case was remanded the Circuit Court with instructions to award appellants attorneys' fees in such amounts as the Court deems appropriate. In considering attorney's fees, the Court suggested that the trial court be guided by *Rahmey v. Blum*, 95 A.D.2d 294, 300-306 (1983).

Shapiro is instructive because it explains, that in an action alleging a 42 U.S.C. § 1983 violation, based on facts that also give rise to a common law tort—assault and battery—recovery under the common law tort may not be sufficient to cover damages that might be awarded for a violation of 42 U.S.C. § 1983. In *Shapiro*, the Court explained that attorney's fees would not be covered in a successful action for a common law tort alone. The Court remanded the matter to the trial court to consider awarding attorney's fees. The award of attorney's fees would not have been a jury consideration. In the matter *sub judice*, the award of damages whether for a violation of the Maryland Declaration of Rights and or 42 U.S.C. § 1983 is a jury question. Any jury award for a violation of the Maryland Declaration of Rights is subject to a damage cap. Any jury award for a violation of 42 U.S.C. § 1983 is

not subject to a damage cap. However, without knowing what amount, if any, the jury wished to award for either or both violations, the Court would be left to speculate what, if any figure, is subject to the damage cap.

The Plaintiffs state that "[t]he Court should simply apply the damages cap where appropriate and leave the damages intact with regard to Plaintiffs' claims under 42 U.S.C. 1983." *Pl. Memo. pg. 31*. At oral argument, to consider the post-trial motions, the Plaintiffs, citing *Essex v. Prince George's County Maryland*, argued that the trial court must attempt to harmonize seemingly inconsistent verdicts. 17 Fed.Appx. 107 (2001).

Plaintiffs, Paul Essex ("Essex") and David Maslousky ("Maslousky") brought actions against Prince George's County, Prince George's County Police Officer Keith Washington ("Washington"), and Prince George's County Department of Corrections (DOC) Corporal, Antonio Bentley ("Bentley"). The Plaintiffs sued the Defendants alleging Maryland Constitutional Claims and State-law battery Claims and Federal Claims under 42 U.S.C. § 1983.[25] In that case, the Court of Appeals held that: (1) evidence did not establish probable cause to make an arrest for Maryland offense of hindering; (2) evidence established battery, under Maryland law; (3) jury's inconsistent verdicts regarding battery claims and constitutional claims of illegal search and seizure warranted new trial; and (4) police corporal did not waive the right to new trial.

25. Plaintiffs' Motion to Dismiss claims against Officer Donald Crotean was granted. Count 1, alleging battery against Bentley was also dismissed. *Essex*, 17 Fed.Appx. at 112.

Maslousky and Essex were good friends. On the date that gave rise to their respective complaints, Essex had visited Maslousky at his residence. After leaving his residence, Essex was involved in a two-car traffic accident that occurred approximately a half-mile from Maslousky's residence. Mr. and Mrs. Wang were the occupants of the other vehicle involved in the collision. A person not involved in the collision called 911 on his cell phone requesting an ambulance and police. Essex borrowed the cell phone and called Maslousky and asked him to come to the scene of the accident because his vehicle appeared to be inoperable. Maslousky, who is an automobile mechanic, drove to the scene, inspected the damage to Essex's Chrysler and then drove off to borrow a tow truck. Officer Washington was dispatched to investigate the collision. At trial, the Parties presented conflicting evidence regarding the events that occurred when the officers arrived at the scene of the accident.

Essex testified that when Washington first approached him, the officer's demeanor was hostile. Washington asked Essex why he caused the accident. Essex told him he did not know if he had caused the collision but he had not seen the traffic light. Washington told Essex that he could be arrested for an accident that causes serious personal injury. Essex replied: "Well, just do what you have to do." *See Essex*, 17 Fed.Appx. at 113. Anne Marie Curtis and Maniram Tiwari, witnesses to the accident, observed Essex's interaction with Washington, and both testified at trial. Ms. Curtis testified that Washington "was very rude and short" when he spoke to Essex. Mr. Tiwari testified that Washington was pompous, and that he exhibited a

"lack of patience [and] a lack of tolerance," and acted as if he had a chip on his shoulder. *Id.*

After Maslousky returned to the scene with a tow truck, Washington handed Essex two traffic citations. After Essex signed the citations, Washington handed Essex the traffic citations, stating: "I know you caused this accident," Essex replied: "I thought that such a decision was for a court to make." Washington responded: "Out here, I am the court." Washington then stated: "I ought to arrest you. I ought to take you in." Essex replied: "You do whatever you have to do." Essex then turned and started to walk away when Washington grabbed his arm and pulled him to the driver's side of the police car. He pushed Essex down on the car, pulled his feet apart with his foot and said: "Spread your legs, put your hands on the hood of the car." *Id.* at 114.

Washington conducted a pat-down search. At this point, Essex took one hand off the hood of the police car, turned around, and asked Washington for an explanation. Washington then grabbed Essex and threw him over the front of the car. Essex saw Mr. Wang standing ten feet away. Essex stated: "Mr. Wang, please don't go, I need a witness." Washington told Mr. Wang that he could go. Sometime thereafter, Washington told Mr. Wang: "I thought I told you to go." Mr. Wang got into his car and drove away. *Id.*

Washington also advised Maslousky that he could leave. Maslousky told Washington that he was there to tow Essex's car and needed the keys to the Chrysler.

Someone handed the keys to Maslousky. He returned to the sidewalk, approximately fifteen feet away from Washington. Essex then stated to Maslousky: “Please don’t leave.” Washington again told Maslousky to leave. Maslousky replied: “Okay. But you need to start treating him like an adult and not a child.” Washington replied: “You know, I could arrest you. I could put you in jail with your buddy.” Maslousky responded: “Look, I’m not trying to go to jail. I’m just saying you’re not treating him fairly.” Washington replied: “That’s it. You’re under arrest for hindrance.” He proceeded to grab Maslousky’s wrist and handcuff him. *Id.*

Washington called for backup. When other officers arrived, Maslousky was placed in a police car. Essex was left at the scene after the officers left. When Officer Atkinson asked Washington what they should do with Essex, Washington replied: “Fuck him, let him walk.” *Id.*

Maslousky testified that Washington taunted him en route to the jail. Maslousky was so frightened by Washington’s demeanor that he began to pray out loud. Washington then stated: “Who’s that God you’re praying to? Who is your God? Let’s see your God get you out of jail.” Washington also asked Maslousky if he had ever been in jail before and stated: “You know, Bubba’s in jail and Bubba’s going to have his way with you.” As they arrived at the jail, Washington told Maslousky that he would spend the whole weekend in jail, and if and when he was released from jail, Maslousky would not be able “to get a job picking cotton.” *Id.*

At the jail, Maslousky was placed in the custody of corrections officers including Bentley. Bentley subjected Maslousky to a strip search in violation of the County's Correctional Center policy. Maslousky was released on his own recognizance. The charges against Maslousky were subsequently *nolle prossed*.

The jury returned a verdict in favor of Essex and against Washington on Count One (battery) and awarded nominal damages in the amount of $1.00. The jury also found in favor of Maslousky and against Washington on Count One and awarded $200,000.00 in compensatory damages and $10,000.000 in punitive damages. The jury returned its verdict in favor of Maslousky and against Bentley on Count Two (violation of 42 U.S.C. § 1983) and in favor of Maslousky against Bentley and the County on Count Three (violation of the Maryland Constitution). The jury awarded Maslousky compensatory damages in the amount of $50,000.00. The Court entered judgment consistent with the jury verdict but dismissed Count one, battery, against Bentley. The Defendants filed post-trial motions. On July 11, 2000, the Court entered an Order granting judgment as a matter of law with respect to the battery claim against Washington. It amended the judgment and vacated the award of $210,000.00 in damages against Washington. It also denied the Defendants' motion to amend the judgment as to the award of damages in the amount of $50,000.00 in favor of Maslousky against Bentley and the County. Thereafter, the Court stated that it would amend its Order granting the motion for judgment as a matter of law to clarify the Court's intent that its judgment in favor of Essex on the battery count should

not be disturbed. In addition, the Court also informed the Parties that it would conditionally grant Washington's motion for a new trial should the judgment as a matter of law be reversed on appeal. The Court denied Maslousky's motion for a new trial, and his motion for reinstatement of the judgment against Washington. The Court entered judgment in favor of Essex against Washington for $1.00, and in favor of Maslousky against Corporal Bentley and the County for the sum of $50,000.00. The Court also granted Washington's motion for judgment as a matter of law on Maslousky's battery claim. The Plaintiffs appealed and the Defendants, Washington and Bentley, cross-appealed.

The jury found that Washington was not liable to Essex and Maslousky for depriving them of their rights to be free from an illegal arrest or an unreasonable search and seizure under the Fourth Amendment of the United States Constitution and the Maryland Constitution. However, the jury also concluded, that Washington was liable to Essex and Maslousky for battery. The jury's verdicts regarding the tort of battery and the constitutional claims were irreconcilable. The Plaintiffs' battery and constitutional claims against Washington hinged on the same underlying facts that Washington searched Essex and arrested Maslousky without probable cause. Yet, the jury found in favor of the Plaintiffs on the battery claims and in favor of the Defendants on the Constitutional claims.

The appellate court citing *Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors, Inc.*, recognizes that an appellate court must "harmonize seemingly

inconsistent verdicts if there is any reasonable way to do so." 99 F.3d 587, 599.[26] However, after reviewing the verdicts, the Court was unable to harmonize the verdicts without speculating regarding the jury's determination of the issue of probable cause. *See Essex*, 17 Fed.Appx. 117 (footnote omitted). Because the jury was not asked to decide, in a special verdict, whether Washington had probable cause to search Essex and arrest Maslousky, it is impossible for the appellate court, or the trial court for that matter, to determine the basis for the jury's inconsistent verdicts. The appellate court affirmed the District Court's decision to grant a new trial because the jury's verdicts on the constitutional claims were logically inconsistent with its findings on the battery count in favor of Maslousky.

In the matter *sub judice*, the jury found that the Defendants committed a battery on both Korryn Gaines and Kodi Gaines. The jury also found that the Defendants violated the Maryland Declaration of Rights and 42 U.S.C. § 1983 as to each Kodi and Korryn Gaines. While the findings of battery, along with violations of Maryland Declaration of Rights and 42 U.S.C. § 1983 are not logically inconsistent as in *Essex*, this Court is still left to speculate what, if any, portion of the total award the jury intended to compensate the Plaintiffs is for a violation of Maryland Declaration of Rights and 42 U.S.C. § 1983 or both. If the jury intended that the award or any portion thereof is for a violation of Maryland Declaration of Rights, then

26. In *Essex*, (in Westlaw) the third of the three citations to *Alias Food Systems and Services, Inc.* is incorrectly cited as 995 3d at 599, *Essex* at 117. The correct citation is 99 F.3d 587.

the damage cap applies. The damage cap would not apply to any portion of the award pursuant to a violation of 42 U.S.C. § 1983.

In *Shapiro*, the appellate court remanded the matter for the trial court to consider attorney's fees. In so doing, the appellate court suggested that the trial court seek guidance from *Rahmey v. Blum*. 95 A.D.2d 294; *Shapiro*, 70 Md.App. at 317. The Plaintiffs urge this Court to harmonize the jury's verdict. Other than to suggest that anything above the damage cap be attributable to the Federal Claim, the Plaintiff offers no authority to suggest how this Court might differentiate the jury's intent to allocate an award for a violation of either or both of the Maryland Declaration of Rights, or 42 U.S.C. § 1983.

After delivering the verdict, neither the Plaintiffs nor the Defendants asked this Court to submit a supplemental verdict sheet to differentiate what if any amount the jury intended to award for a violation of Maryland Declaration of Rights, 42 U.S.C. § 1983 or both. "In a civil case, after a jury has rendered an initial verdict, the trial judge ordinarily may ask the jury to amend, clarify or supplement the verdict in order to resolve an ambiguity, inconsistency, incompleteness, or similar problem with the initial verdict, up until the jury has been discharged and has left the court room." *Bacon & Assoc, Inc. v. Rolly Tasker Sails (Thailand) Co.*, 154 Md.App. 617, 629 (2004) *citing Nails v. S & R, Inc.*, 334 Md. 398, 412 (1994).

The jury found in favor of Korryn Gaines and Kodi Gaines under both the Maryland Declaration of Rights

("State claim") and the Fourth Amendment violation under 43 U.S.C. § 1983 ("Federal Claim"). Those verdicts are defective because the jury did not specify the apportionment, if any, of the total jury award between the State and Federal Claims. For the Court to attempt to ascertain what the jury intended would be mere speculation. For the reasons stated herein, as to the Defendants' claim that the jury verdict is inconsistent, the Defendants are entitled to a new trial.

III. Battery

The Defendants assert that because Corporal Ruby is entitled to qualified immunity, that he had not committed a battery on either Korryn Gaines or Kodi Gaines. *Def. Memo. pg. 13*.

In 1996, the Maryland General Assembly enacted a statutory assault scheme currently codified in Annotated Code of Maryland, Criminal Law § 3-201 et. seq. That enactment abrogated offenses of common law assault and battery. *See Robinson v. State*, 353 Md. 683 (1999). "Assault" means the crime of assault, battery, and assault and battery, which retain their judicially determined meanings. CL § 3-201(b). "[B]attery is generally defined as the 'unlawful application of force to the person of another.'" *Epps v. State*, 333 Md. 121, 127 (1993) *citing Snowden v. State*, 321 Md. 612, 617 (1991). The Plaintiffs allege that the first shot taken by Corporal Ruby was a battery because it was an unlawful application of force. This Court has ruled that the shooting of Gaines, though tragic, was not unlawful and therefore, the jury's finding of battery on Gaines is vacated.

In support of their claim that the battery count listing Kodi Gaines as the victim should not be vacated, the Plaintiffs cite *Nelson v. Carroll*, 355 Md. 593 (1999) and *Hendrix v. Burns*, 205 Md.App. 1 (2012). *Pl. Memo. pg. 24. Hendrix* held "that the doctrine of transferred intent may be applied in a civil claim for battery on legally sufficient facts." *Hendrix*, 205 Md.App. at 25.

Nelson dealt with the extent to which a claim of accident may provide a defense to a civil action for battery arising out of a gunshot wound. In *Nelson*, Albert Carroll had a dispute over a debt with Charles Nelson.

> There were only two witnesses who described how the shooting came about, Nelson and Prestley Dukes (Dukes), a witness called by Carroll. Dulces testified that when Nelson did not give Carroll his money Carroll hit Nelson on the side of the head with the handgun and that, when Nelson did not 'respond,' Carroll 'went to hit him again, and when [Carroll] drawed back, the gun went off.' Nelson, in substance, testified that he tendered $2,300 to Carroll, that Carroll pulled out his pistol and said that he wanted all of his money, and that the next thing that Nelson knew, he heard a shot and saw that he was bleeding.

Nelson, 355 Md. at 596.

> The intent element of battery requires not a specific desire to bring about a certain result,

> but rather a general intent to **unlawfully** [emphasis added] invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact.

Id. at 602.

However, "a purely accidental touching, or one caused by mere inadvertence, is not enough to establish the intent requirement for battery." *Id.* at 602 *citing Steinman v. Laundry Co.*, 109 Md. 62, 66 (1908).

The evidence is clear that Corporal Ruby's shooting of Gaines was intentional. This Court has found that Corporal Ruby is entitled to qualified immunity and therefore, his shooting of Gaines was not unlawful. It is equally clear that Corporal Ruby did not intend to commit a battery on Kodi. A partial bullet fragment from Corporal Ruby's first shot, struck, but did not penetrate Kodi's cheek. That injury was unintentional and was the unforeseen consequences of Corporal Ruby's lawful act. Therefore, the jury's finding that Corporal Ruby perpetrated a battery on Kodi, is vacated.

IV. Bystander liability

The Defendant asks this Court to reconsider the Court's denial of judgment as to Count V, bystander liability. *Def. Memo. pg. 18*. The Court had previously partially granted the Defendants' request for judgment as to Count V, dismissing the Plaintiffs' Complaint as to all other named police officers except Corporal Ruby and

Baltimore County. For the reason stated herein, Baltimore County has been dismissed as a Defendant, leaving only Corporal Ruby as the named Defendant. As there is no other bystander potentially liable, the Court grants the Defendants' request to reconsider its ruling and grants judgment for the Defendants as to Count V.

V. Economic and Non-Economic Damages

The Defendants assert that there is no support for the non-economic damages awarded to Rhanda Dormeus, Ryan Gaines, Karsyn Courtney and the Estate of Korryn Gaines. *Def. Memo. pg. 27.* The Court has granted Judgment Notwithstanding the Verdict, or in the alternative, a new trial because of the defective jury verdict, and therefore, it is unnecessary to address these issues.

The Defendants further argue that the Estate of Korryn Gaines is not entitled to the jury award of $50,000.00 for economic damages or $250,000.00 for non-economic loss. *Def. Memo. pg. 32*. Because the Court found that Corporal Ruby's actions were not unlawful, and that he is entitled to qualified immunity, the Court grants the Defendants' request to vacate the awards to the Estate of Korryn Gaines.

VI. Funeral Expenses

The Defendants request that the Court set aside and vacate the $7,000.00 for funeral expenses awarded to Rhanda Dormeus. *Def. Memo. pg. 32*. Plaintiff,

Dormeus, states: "Defendants seek to deny Rhanda Dormeus reimbursement of funeral expenses she paid out of pocket to bury her daughter after Defendants killed her. There is nothing in the law nor morality that countenances such an argument." *Estate Memo. pg. 14*. Both the Plaintiff, Dormeus, and Defendant cite *Estate & Trusts* § 8-106, which states in pertinent part: [T]he personal representative shall pay the funeral expenses of the decedent within six months of the first appointment of a personal representative."

> The order for the funeral . . . was given by a near relative, not by the executors. That, of course, is proper; the executors are bound under an implied promise to pay for the funeral, and, by statute, the undertaker is entitled 'to a reasonable extent' to a 'preferred charge upon the estate, because of the indispensable necessity for proper burial.' (citation omitted) The allowance of funeral expenses is within the jurisdiction of the Orphans' Court and is not a proper subject for issues to be sent to a court of law for trial.

Zito v. Wm. J. Tickner & Sons, 210 Md. 25 (1956) *citing Maynadier v. Armstrong*, 98 Md. 175 (1903).

The only evidence that Dormeus paid the funeral expenses was her testimony. If indeed she paid those expenses, she may request to recover those expenses from the personal representative of the estate. The Court grants the Defendants' Motion to set aside the judgment granting Dormeus $7,000.00 in economic damages.

VII. Remittitur

The Defendants request that the Court remit the jury verdicts as exceeding "any rational appraisal or estimate of the damages that could be based on the evidence before the Jury" citing *Davignon v. Clemmey*, 322 F.3d 1, 11 (1st Cir. 2003). *Def. Memo. pg. 21.* The Plaintiffs by contrast, citing no authority, merely state that the "Defendants' Request for Remittitur Must be Denied." *Pl. Memo. pgs. 31-34*.

> A remittitur classically refers to "[a]n order awarding a new trial, or a damages amount lower than that awarded by the jury, and requiring the plaintiff to choose between those alternatives." Black's Law Dictionary (9th ed. 2009) at 1409. It is employed by a trial court when the court believes that the jury's verdict is excessive in relation to the evidence presented at trial.

Rodriguez v. Cooper, 458 Md. 425, 460 n.8 (2018) *citing* John A. Lynch & Richard W. Bourne, Modern Maryland Civil Procedure (3d ed. 2016) at § 10.3(c).

> [T]he practices of ordering a remittitur is as much an incident and corrective of jury trial as the right of a trial court to set aside a verdict on the ground that it is against the evidence, or against the weight of the evidence.

Safeway Trails, Inc. v. Smith, 222 Md. 206 (1960) *citing* *Turner v. Washington Suburban Sanitary Commission*, 158 A.2d 125, 130 (1960).

This Court finds that the non-economic damages awarded to the various Plaintiffs are excessive and shocks the conscience, and but for this Court dismissing the matter for grant of qualified immunity, or in the alternative granting a new trial because of the defective verdict, the Court would remit the juries awards. *See Conklin v. Schillinger*, 255 Md. 50, 69 (1969) *citing Dagnello v. Long Island Railroad Co.*, 289 F.2d 797 (2d Cir. 1961).

CONCLUSION

For the reasons set forth herein, the Court finds that Corporal Royce Ruby is entitled to qualified immunity and grants judgment for the Defendants. In the alternative the Court grants a new trial.

/s/ Mickey J. Norman
Mickey J. Norman, Associate Judge
Circuit Court for Baltimore County
Date: February 14, 2019

Appendix E

RULING

On August 1, 2016, Baltimore County Police Officer, Corporal Royce Ruby, shot and killed Korryn Gaines. Thereafter, the Plaintiffs; Estate of Korryn Gaines; Corey Cunningham on behalf of the minor child Kodi Gaines, Kareem Courtney on behalf of the minor child Karsyn Courtney; Ryan Gaines and Rhanda Dormeus brought actions against Corporal Royce Ruby, other named members of the Baltimore County Police Department and Baltimore County. On February 16, 2018, after a three week trial the jury returned verdicts in favor of the Plaintiffs. On March 12, 2018, Defendants, through counsel, filed post judgment motions to which the Plaintiffs filed timely responses.

On March 19, 2018 the Defendants filed a Notice of Appeal to the Maryland Court of Special Appeals. On July 2, 2018 the Parties appeared before the Court to consider the post judgment motions and responses. The Court ruled from the bench that the Defendants' post judgment motions were timely filed. The remaining matters were held sub curia to consider the memorandums and arguments of counsel. In an Order of October 23, 2018, the Court of Special Appeals granted the Defendants/Appellants' Motion to Stay Appeal pending the trial courts "disposition of the Appellant's post-judgment motions . . . " (Paper 146000).

For the reasons set forth in the February 14, 2019 Memorandum Opinion it is this 14th day of February 2019, by the Circuit Court for Baltimore County hereby:

ORDERED, that the Third Amended Complaint is dismissed against Baltimore County, Maryland. It is further

ORDERED, that Count V of the Third Amended Complaint, Bystander Liability, is dismissed in its entirety. It is further

ORDERED, that the economic damages of $7,000.00 awarded to Rhanda Dormeus is vacated. It is further

ORDERED, that the Defendants request for Judgment Notwithstanding the Verdict is Granted and the Complaint against Defendant Royce Ruby is dismissed. It is further

ORDERED, that should the Court's ruling granting JNOV not withstand appellate scrutiny, for the reasons stated in the Memorandum Opinion, the Court grants the Defendants a new trial.

/s/ Mickey J. Norman
Mickey J. Norman, Associate Judge
Circuit Court for Baltimore County
Date: February 14, 2019