RHANDA P. DORMEUS, *et al*	*	IN THE CIRCUIT COURT
Plaintiffs	*	FOR BALTIMORE COUNTY
v.	*	Case Number: 03-C-16-009435
BALTIMORE COUNTY, *et al*	*	
Defendants	*	

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.

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' 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 for funeral expenses and the Estate of Korryn Gaines was awarded economic damages of $50,000.00 and $250,000.00 in non-

[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 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."

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, *et al.* * **BALTIMORE 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_____

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)

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.*").

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 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]

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.

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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.

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 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

[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', Consolidated Opposition to Defendant's [sic] Motion for Judgment notwithstanding the verdict, Remittitur of the Verdict, New Trial, and/or Revise. pgs. 2, 8.

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 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 Plaintiff's *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 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.

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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.

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, but 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

[10] Provocation Rule abrogated in *County of Los Angeles, CA v. Mendez*, 137 S.Ct. 1539 (2017).

entirety of the trial evidence."); *See* also, *Greenidge v. Ruffin*, 927 F.2d at 792 (4th Cir. 1991).

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 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

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[11] Sigman's parents also brought a wrongful death action (count 2) under a North Carolina Statute.

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 in 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

[12] Doctor Soutall, the medical examiner testified that Gaines had black with blonde [hair] braids up to twenty-five inches long.

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 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]

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 did not locate Gonzales. However,

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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 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).

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]

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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).

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."

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 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*

[15] Raina Connor was the Administratrix of the Estate of Adam Wade Carter.

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]

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.

[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.

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, 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*

[18] *Pl. Memo. pg. 28.*

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 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 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*,

[19] N.Y. C.P.L.R. 5501(c).
[20] U.S.C.A. Const. Amend. VII.

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 rights.

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 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

[21] The jury rendered four separate findings of malice against Jackson.

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]

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

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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.

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

[23] The correct cite for *Beall v. Holloway–Johnson* is 446 Md. 48, 130 A.3d 406 (2016).

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 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 reach 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 pre-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). Wilner, 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. 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

[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.

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.

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

[25] Plaintiffs' Motion to Dismiss claims against Officer Donald Croteau was granted. Count 1, alleging battery against Bentley was also dismissed. *Essex*, 17 Fed.Appx. at 112.

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

[26] In *Essex*, (in Westlaw) the third of the three citations to *Atlas Food Systems and Services, Inc.* is incorrectly cited as 995 3d at 599, *Essex* at 117. The correct citation is 99 F.3d 587.

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 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. Dukes 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.

Mickey J. Norman, Associate Judge
Circuit Court for Baltimore County
Date: February 14, 2019

Clerk, please docket only. Copies have been provided to:

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Court File

RHANDA P. DORMEUS, *et al*	*	IN THE CIRCUIT COURT
Plaintiffs	*	FOR BALTIMORE COUNTY
v.	*	Case Number: 03-C-16-009435
BALTIMORE COUNTY, *et al*	*	
Defendants	*	

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.

Mickey J. Norman, Associate Judge
Circuit Court for Baltimore County

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