

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

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 378

September Term, 2022

COREY CUNNINGHAM

v.

BALTIMORE COUNTY, MARYLAND, ET
AL.

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

JJ.

Opinion by Graeff, J.

Filed: April 6, 2023

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

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

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

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

On remand, the circuit court addressed the claims relating to Kodi.² The court dismissed the 42 U.S.C. § 1983 claim and the state constitutional claims, but it affirmed the verdict against appellees on the battery count. The court found that there was a cap on the damages awarded under Md. Code Ann., Cts. & Jud. Proc. Art. (“CJ”) § 5-303 (2020 Repl. Vol.), and after applying that cap, it ordered Baltimore County to pay appellant, Corey Cunningham, Kodi’s father, in the amount of \$400,000, plus post-judgment interest of \$160,000.

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

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

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

1. Did the circuit court err by acting outside the scope of remand and in violation of this Court’s opinion in *Cunningham I*?
2. Did the circuit court err in dismissing Kodi’s § 1983 Fourteenth Amendment substantive due process claim against Corporal Ruby?
3. Did appellees waive their right to remittitur and a new trial?
4. Did the circuit court err in hearing and failing to grant appellant’s motion to recuse?

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

FACTUAL AND PROCEDURAL BACKGROUND

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

On August 1, 2016, two Baltimore County police officers entered Ms. Gaines’ apartment, attempting to serve arrest warrants on her and Kareem Courtney. When they entered, they found Ms. Gaines sitting on the floor holding a pistol-grip shotgun pointed at the front door. Officers retreated and called for back-up. Shortly after the police established a perimeter, Mr. Courtney and his daughter, Karsyn Courtney, voluntarily exited the apartment. Mr. Courtney was arrested on an outstanding warrant. Ms. Gaines and Kodi remained in the apartment.

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

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

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

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

I.

Complaint

On September 13, 2016, a civil complaint was filed in the Circuit Court for Baltimore County. Rhanda Dormeus (on behalf of Ms. Gaines' estate, and in her individual capacity as Ms. Gaines' mother), Mr. Cunningham (on behalf of Kodi), Mr. Courtney (on behalf of the minor child Karsyn), and Ryan Gaines (Ms. Gaines' father) brought numerous claims against appellees.⁵ These claims included, among other things, claims under § 1983, violations of the Maryland Declaration of Rights, battery, and other related claims.⁶ Because one of the issues on appeal relates to the extent to which a § 1983 claim based on a Fourteenth Amendment substantive due process claim was asserted, we will discuss in more detail how that claim was addressed below.

With respect to Count VII, plaintiffs alleged a § 1983 claim for violations of plaintiffs' civil rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the

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

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

United States Constitution. The complaint alleged that appellees violated plaintiffs' Fourth and Fourteenth Amendment rights by using force "excessive to the need," which was "objectively and subjectively unreasonable," and that appellees violated the plaintiffs' rights "[b]y acting in a way that was so reckless and/or irresponsible as to be shocking to the conscious."

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

II.

Motion for Summary Judgment

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

held that one is ‘seized’ within the Fourth Amendment’s meaning only when one is the intended object of a physical restraint.” Accordingly, they argued that Kodi’s claims against Corporal Ruby should be dismissed.

Appellant filed an opposition to the motion for summary judgment. As relevant to this appeal, he argued that summary judgment could not be granted on his Fourteenth Amendment claims because appellees failed to make any arguments on the issue in their memorandum. He argued that appellees’ motion was a *partial* motion for summary judgment because they set forth no law or relevant facts related to the Fourteenth Amendment claims, and therefore, summary judgment should be denied for Counts VII, VIII, and X. He alleged “that the use of deadly force against [Ms.] Gaines and excessive force against Kodi Gaines violated their federal constitutional rights under the Fourth and Fourteenth Amendments,” and there were “multiple disputes of material fact” as to whether Corporal Ruby acted reasonably under the circumstances.

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

Appellees argued that the Fourteenth Amendment is the vehicle by which the Fourth Amendment applies to the States, and therefore, the analysis would be the same as under the Fourth Amendment. They stated that “excessive force claims are not substantive due

process. They are the objectively reasonable analysis.” “That is what the substantive due process argument means.”

On January 29, 2018, the court ruled on the motion for summary judgment. As an initial matter, the court stated that the arguments related to the reasonableness of Corporal Ruby’s actions would be dealt with by the Fourth Amendment, so the failure of appellees to address the Fourteenth Amendment was not persuasive. The court granted the motion in some respects, but as relevant to this appeal, it denied appellees’ motion relating to the issue of excessive force.

III.

Trial

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

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

Charles Key, appellees’ expert in the use of force, police training, policy and procedures, firearms, incident reconstruction, crime scene analysis, and ballistics, testified that Corporal Ruby’s use of force was objectively reasonable and consistent with accepted standards of police policy and training. He testified that the raised shotgun presented an

immediate deadly threat and Corporal Ruby would have had “no choice but to use lethal force to resolve it.” Kodi’s injury did not change the analysis of whether the shot was reasonable because Corporal Ruby made reasonable efforts to prevent injury to Kodi. Mr. Key also testified that, based on the trajectory of the bullet, Ms. Gaines could have been aiming the shotgun at the door.

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

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

Appellant argued that the jury must decide whether the officers were actually in danger when Corporal Ruby decided to act and whether that act was reasonable. With respect to Kodi’s claims, appellant argued that, “under the 14th Amendment and the 4th Amendment, Kodi can proceed because the law is clear that anyone who is injured by the police if the force was excessive can proceed under the 4th Amendment, and if not, the

14th Amendment.” The circuit court denied the motion, stating that whether the officers were “in danger from Corporal Ruby’s perspective is a fact that has to be left to the jury.”

On February 14, 2018, the parties discussed the jury instructions. Because the issue of the adequacy of the instruction regarding a substantive due process claim is a disputed issue, we set forth the discussion in detail.

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

[COUNSEL FOR KODI]: Your Honor, **shouldn’t it be the 14th and the 4th Amendment.**

We’re asking to add that. **Add that, because it[’s] applied to the State[s] to the 14th.**

* * *

THE COURT: **Well, it’s applied by the 14th Amendment**, so I think where the Federal Pattern Jury Instruction got it right was to simply say the 4th Amendment of the United States protects, which I incorporated. I’m gonna leave it the way it is. Anything else on that instruction?

* * *

[COUNSEL FOR KODI]: [Y]ou’re saying that you’re just not gonna tell the jury that it’s the 4th and 14th—

THE COURT: No, I’m gonna tell them it’s the 4th. Your request on page 45 was the excessive force instruction in the Federal Pattern Instruction. . . .

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

[COUNSEL FOR KODI]: I understand. We were asking you to include the 14th, and make sure I understand you said **you’re not gonna do it even though you recognize that’s how it’s interpreted through the 14th**, and

we’re just asking that it be there so it clearly meets what the law says. I don’t see the harm in having the 14th there as well, you’re just adding the 14th . . .

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

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

[COUNSEL FOR KODI]: Can you just say the U.S. Constitution without saying 4th or 14th then? . . .

THE COURT: **How about if I say the amendments to the United States Constitution.**

[COUNSEL FOR KODI]: **That would be fine.**

(Emphasis added).

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

as to Kodi and Ms. Gaines, asked whether the jury found that appellees violated their “rights under 42 U.S.C. § 1983.”

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

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

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

* * *

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

* * *

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

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

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

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

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

IV.

Post-Trial Motions

On March 12, 2018, appellees filed several post-trial motions for JNOV, for a new trial, for remittitur of the verdict, and for the court to exercise revisory power over the

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

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

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

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

⁷ Appellees subsequently stated that they made no argument with respect to the jury instructions given on this issue because appellees did not believe that Kodi had a

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

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

substantive due process claim, and therefore, they did not argue the jury instruction erroneously failed to instruct in that regard.

excessive and shocked the conscience, and but for its rulings, it would remit the jury’s awards.

V.

Appeal Proceedings

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

inconsistent verdict, we concluded that the court abused its discretion in that regard. Although the verdict sheet did not apportion damages between the state claims, subject to the statutory damages cap, and the federal claims, not subject to the statutory cap, we concluded that the verdict was not irreconcilably inconsistent. *Id.* at 702. Therefore, we reversed that ruling. *Id.* at 706.

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

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

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

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

Appellant then filed a Petition for Writ of Certiorari raising questions regarding the remittitur issue. On November 20, 2020, the Supreme Court of Maryland, then known as

the Court of Appeals, denied the petition.⁸ See *Cunningham v. Baltimore County*, 471 Md. 268 (2020).

VI.

Proceedings on Remand

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

On August 31, 2021, appellees filed a motion in the circuit court to clarify judgment and for other appropriate relief. Appellees advised that all plaintiffs other than Mr. Cunningham, on behalf of Kodi, had settled their claims. With respect to Kodi, appellees

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

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

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

In any event, appellees asserted that Corporal Ruby was entitled to qualified immunity on a § 1983 substantive due process claim for excessive force because the law was not “clearly established” at the time he accidentally shot Kodi that he was violating Kodi’s substantive due process rights. Specifically, “the law would not have informed

[Corporal] Ruby that by accidentally shooting Kodi during a six-hour standoff with Ms. Gaines, [Corporal] Ruby would be violating Kodi's constitutional rights."

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

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

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

At the remand hearing on November 19, 2021, the parties and the circuit court addressed the status of Kodi's § 1983 claim after *Cunningham I*. Appellant argued that, by reversing the circuit court's grant of JNOV, this Court reinstated all of the claims against Corporal Ruby. Although this Court specifically said that Kodi had no Fourth Amendment claim, it did not address the § 1983 Fourteenth Amendment claim because it was not a part of the circuit court's JNOV ruling.¹⁰ Counsel for appellant conceded at this hearing that Kodi had no Fourth Amendment claim, but he stated that they pled and argued a Fourteenth Amendment claim, which this Court reinstated. Counsel acknowledged that the verdict sheet did not differentiate between a Fourth Amendment and a Fourteenth Amendment claim. He further acknowledged that the instruction given to the jury "dealt with reasonableness only," but he argued that, if appellees thought a different instruction was needed for a substantive due process finding, they needed to object when the instruction was given. He asserted that appellees did not object, however, because they thought, and the circuit court agreed, that Kodi had to proceed under the Fourth Amendment. Counsel asserted that appellees' suggestion that the jury was not properly instructed was too late. He further argued that, "if there was any error and Kodi had somehow proceeded with the Fourth Amendment only, it's waived or the error was invited because [appellees] argued

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

that Kodi had to proceed under the Fourth Amendment.” Counsel also clarified that the § 1983 Fourteenth Amendment claim was not based on loss of consortium because Kodi “was actually injured.”

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

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

On April 26, 2022, the circuit court issued its ruling. As indicated, only Kodi’s claims were presented to the court. The court began by addressing Kodi’s § 1983 claim.

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

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

On the battery claim, the court found that, pursuant to the liability limitations of CJ § 5-303, the liability of a local government may not exceed \$400,000 per an individual claim.¹¹ It found “that the cumulative award for both past medical expenses and non-economic damages must be reduced to \$400,000 plus post judgment interest, which [appellees] calculate[] to be \$160,000.00.” It ordered that, under the doctrine of respondeat superior, Baltimore County was responsible to pay that amount to Mr. Cunningham on Kodi’s behalf.

This appeal followed.

DISCUSSION

Appellant contends that the circuit court erred for several reasons. Before addressing the specific contentions, we note that we are faced with a situation in this appeal where the primary issue, i.e., whether Kodi adequately made a showing to support a § 1983 substantive due process claim, is one that appellant alluded to below, but he did not clearly

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

(a)(1) Except as provided in paragraphs (2) and (3) of this subsection, the liability of a local government may not exceed \$400,000 per an individual claim, and \$800,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions. . . .

(b)(1) Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.

present to the jury or to this Court in *Cunningham I*. Each side argues that, at this point, the other side has waived the right to make the arguments that are made in this appeal.

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

I.

Scope on Remand

Appellant initially contends that the circuit court violated this Court's mandate in *Cunningham I* and acted outside the scope of the limited remand. He argues that this Court remanded the case solely on issues related to damages, and it gave the circuit court no authority to revisit liability issues. Appellant asserts that the circuit court erroneously "made new and unauthorized factual and legal findings" regarding liability, which the court was without power to make, and which violated the law of the case doctrine.

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

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

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

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

II.

Dismissal of Kodi’s § 1983 Claims¹²

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

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

Appellees contend that appellant has waived his § 1983 Fourteenth Amendment claim for two reasons. First, because the circuit court entered JNOV in appellees' favor on all claims, if Kodi thought he had a substantive due process claim that the court erroneously dismissed, he needed to make that argument in *Cunningham I*. Appellant did not address a § 1983 Fourteenth Amendment claim in that appeal, however, and therefore, appellees argue that appellant "waived and abandoned" this claim. Second, appellees assert that appellant waived any substantive due process claim because the jury instructions covered § 1983 claims only under the Fourth Amendment, and therefore, there was no jury finding of a violation of Kodi's substantive due process rights. Appellees argue that the substantive due process claim is waived because appellant had the responsibility to make sure the instructions adequately reflected the elements of the substantive due process claim, and they failed to do so.

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

A.

Jury Instructions

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

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

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

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

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

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

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

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

The United States Supreme Court has made clear that substantive due process claims are reserved for only the “most egregious” governmental conduct. *Lewis*, 523 U.S. at 846 (“Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”). To establish a substantive due process violation based on alleged police misconduct, a plaintiff must show that the officer’s behavior was “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Dean ex rel.*

Harkness v. McKinney, 976 F.3d 407, 413 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2800 (2021). *Accord Waybright v. Frederick County*, 528 F.3d 199, 205 (4th Cir. 2008) (a due process violation involves “conduct that ‘shocks the conscience,’ and nothing less”) (quoting *Lewis*, 523 U.S. at 846); *Rucker*, 946 F.2d at 281 (Protections of substantive due process against arbitrary and irrational state action generally requires conduct amounting to “a brutal and inhumane abuse of official power literally shocking to the conscience.”) (quoting *Temkin v. Frederick Cnty. Comm’rs*, 945 F.2d 716 (4th Cir. 1991)).

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

Other levels of culpability, however, may support a substantive due process claim.

As the Fourth Circuit Court of Appeals has explained:

Conduct intended to injure that is in some way unjustifiable by any government interest is most likely to rise to the conscience-shocking level. Closer calls, however, are presented by conduct that is something more than negligence but less than intentional. A determination as to which of these standards of culpability—“intent to harm” or “deliberate indifference”—applies requires an exact analysis of context and circumstances before any abuse of power is condemned as conscience shocking.

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

The degree of culpability required to meet the shocks-the-conscience standard varies with the circumstances of each case and “the time pressure under which the government actor had to respond.” *Haberle v. Troxell*, 885 F.3d 170, 177 (3d Cir. 2018)

(quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 240 (3d Cir. 2008)) (cleaned up).

As the court in *Haberle* explained:

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

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

With that discussion of a § 1983 substantive due process claim, it is clear that the jury instructions given here, listed in the facts *supra*, discussed only reasonableness under the Fourth Amendment, and they did not instruct the jury on the different standard of

substantive due process as it related to Kodi.¹³ At the recent oral argument in this Court, appellant argued that the jury was instructed on substantive due process because the instruction described the claim as an intentional or reckless deprivation of a federal right. For an action to violate substantive due process, however, the conduct “must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. . . . [I]t must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.” *Green v. Post*, 574 F.3d 1294, 1302–03 (10th Cir. 2009) (quoting *Livsey v. Salt Lake County*, 275 F.3d 952, 957–58 (10th Cir. 2001)). *Accord Lewis*, 523 U.S. at 847 n.8 (To prevail “in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”).

¹³ We note that appellant’s argument on the merits of whether the jury was instructed on substantive due process has shifted during the proceedings. In his argument to the circuit court on remand, counsel for appellant conceded that the instruction on § 1983 did not address substantive due process, noting that the instruction “dealt with reasonableness only.” Counsel argued, however, that the fault for this error should be attributed to appellees because they failed to object to the instruction. He stated: “[I]f there was an error, it was an invited error because it was the Defendants who . . . argued [that] Kodi had to proceed under the Fourth Amendment, and you agreed with that even while we argued it was the Fourteenth Amendment.” Similarly, in his initial brief, appellant argued that appellees waived their right to challenge the § 1983 award because they “advocated a plainly incorrect position regarding the Fourth and Fourteenth Amendment substantive due process claims,” and the court “accepted [this] incorrect argument.” In appellant’s reply brief and at oral argument, however, counsel for appellant argued that the jury was fairly instructed on a § 1983 substantive due process claim under the Fourteenth Amendment.

As appellant notes, however, appellees did not object to the instructions given. Indeed, not only did they not object on the ground that the instructions did not properly instruct on a substantive due process claim, they argued that the § 1983 claim should not be analyzed based on substantive due process. Under these circumstances, appellees have waived their right to argue now that the jury was improperly instructed.

“The general rule is that the failure to object to a jury instruction at trial results in a waiver of any defects in the instruction, and normally precludes further review of any claim of error relating to the instruction.” *State v. Rose*, 345 Md. 238, 245 (1997). The purpose of the rule is “to enable the trial court to correct any inadvertent error or omission in the oral [or written] charge, as well as to limit the review on appeal to those errors which are brought to the trial court’s attention.” *Hoffman v. Stamper*, 385 Md. 1, 40 (2005) (quoting *Fisher v. Balt. Transit Co.*, 184 Md. 399, 402 (1945)) (alterations in original). *Accord Robson v. State*, ___ Md. App. ___, ___, No. 764, Sept. Term, 2022, slip op. at 33–34 (filed March 8, 2023) (the primary purpose for the preservation requirement is to avoid error at trial and preclude the necessity for appellate review).

Here, the record reflects that appellees believed that Kodi’s § 1983 claim was limited to a violation of the Fourth Amendment, and the court understood the Fourteenth Amendment claim as merely incorporating the Fourth Amendment rights to the states. *See Jones v. State*, 194 Md. App. 110, 128 n.11 (“The protections of the Fourth Amendment are binding on Maryland by incorporation through the Due Process Clause of the Fourteenth Amendment.”), *cert. denied*, 417 Md. 385 (2010). Counsel for appellant did

not clearly explain prior to the instructions, as he does now, that the basis of the Fourteenth Amendment claim was a separate substantive due process claim, which as we have indicated, had its own requirements, including a showing of outrageous behavior that “shocks the conscience.”¹⁴

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

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

B.

Substantive Due Process/Qualified Immunity

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

Before addressing the parties' specific questions, we briefly discuss qualified immunity and the arguments up to this point. The United States Supreme Court has stated

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

that qualified immunity shields government officials performing discretionary functions from civil liability, “so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity protects actions in the “‘hazy border between excessive and acceptable force.’” *Id.* at 18 (quoting *Brosseau v. Haugen*, 543 U.S. 194 (2004)).

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

“A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’” *Mullenix*, 577 U.S. at 11 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). Whether the law was clearly established at the time of the violation is a pure question of law. *DiMeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995).

In *Cunningham I*, as explained, we addressed the circuit court’s grant of JNOV on the ground that Corporal Ruby was entitled to qualified immunity from a § 1983 Fourth Amendment excessive force claim. In that context, the second step was satisfied because

there was clearly established law that, under the Fourth Amendment, an officer may employ deadly force to effect a seizure only where the officer “has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). *Accord Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019). Thus, the issue in *Cunningham I* involved the first step, i.e., whether Corporal Ruby violated the Fourth Amendment by employing deadly force and shooting Ms. Gaines. We concluded that, given the dispute of fact generated by the evidence, that was an issue for the jury to resolve.

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

In addressing the parties’ claims at this point regarding a Fourteenth Amendment substantive due process claim and qualified immunity in this appeal, the issue of waiver again factors heavily in our analysis.¹⁶ The circuit court, in addressing the issue of qualified immunity in a § 1983 action in its initial opinion granting JNOV, noted that there must be a showing of a deprivation of a constitutional right, which was clearly established. The

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

court addressed this issue with respect to Ms. Gaines and found that Corporal Ruby did not violate her Fourth Amendment right against unreasonable seizures because his actions were objectively reasonable, and therefore, he was entitled to qualified immunity. The court dismissed the entire complaint against Corporal Ruby, without discussing a substantive due process claim for Kodi. The court then addressed appellees' arguments regarding an inconsistent verdict, and it discussed the battery claims. It noted that, based on its finding that the intentional shooting of Ms. Gaines was not unlawful, Corporal Ruby was entitled to qualified immunity, and the court vacated the finding of battery of Ms. Gaines. With respect to Kodi, the court found that Corporal Ruby did not intend to commit a battery on Kodi, it was an unforeseen consequence of Corporal Ruby's lawful act, and therefore, the court vacated the jury's finding that Corporal Ruby perpetrated a battery on Kodi.

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

On appeal in *Cunningham I*, although the circuit court granted judgment on all claims against appellees, which would include any substantive due process claim that Kodi may have had, there was no argument that the court improperly dismissed Kodi's separate substantive due process claim. Rather, appellant challenged the circuit court's conclusion that Corporal Ruby was entitled to qualified immunity because the shooting was

reasonable, and therefore, not a violation of Ms. Gaines’ Fourth Amendment rights.¹⁷ That is the issue that we addressed, and we agreed that the court should not have granted the motion for JNOV by revisiting the jury’s findings of reasonableness, given the dispute of fact regarding what occurred. Accordingly, we reversed the grant of JNOV. Although, in the conclusion to *Cunningham I*, we stated that we reversed the grant of JNOV, which seemingly included the substantive due process claim, a review of this Court’s analysis makes clear that we were treating the issue before the Court, based on the circuit court’s opinion, the briefs, and argument of appellant’s counsel, solely as a Fourth Amendment excessive force claim.

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

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

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

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

such a ruling becomes the ‘law of the case’ and is binding on the litigants and courts alike, unless changed or modified after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.

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

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

Although that disposes of the issue, we note that, even now, appellant is not vigorously pursuing a substantive due process claim on the merits. In response to appellees’ argument that Corporal Ruby was entitled to qualified immunity because there was no clearly established law that his conduct violated Kodi’s substantive due process rights, appellant responded with one sentence in his reply brief. He argued that the viability of appellees’ claim of qualified immunity was not before the circuit court on remand. When asked about the issue at the recent oral argument in this Court, counsel for appellant stated “that ship has sailed,” arguing that this Court addressed this issue in *Cunningham I*. As

indicated, we did not address a Fourteenth Amendment substantive due process claim or the application of qualified immunity to such a claim in that appeal.¹⁸

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

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

¹⁹ Appellee stated at oral argument that there was only one case that addresses a substantive due process based on an accidental shooting, i.e. *Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992). In that case, the court stated that an innocent bystander injured by the police **may** have a substantive due process claim "in appropriate circumstances." *Id.* at 281. It stated that it is **possible** to think of accidental shootings by police as so reckless as to shock the conscience, such as "shooting into a crowd at close range." *Id.* at 282. Appellant pointed to that language in oral argument in this Court. In *Rucker*, however, the court ultimately held that that the police action, in accidentally shooting and killing Rucker, an innocent bystander, while engaged in a high-speed chase, did not rise to the level of a Fourteenth Amendment substantive due process claim. *Id.* at 281. A case holding that there is no substantive due process claim is a far cry from clearly established law showing what constitutes a substantive due process violation or that the conduct here would amount to such a violation.

us, we would conclude that appellant has not established grounds for reversing the circuit court’s ruling dismissing the substantive due process claim. *See Selective Way Ins. Co. v. Fireman’s Fund Ins. Co.*, ___ Md. App. ___, ___, No. 753, Sept. Term, 2021, slip op. at 50 (filed Feb. 2, 2023) (appellant must adequately brief arguments in support of his position and this Court will not seek out law to sustain that position); *HNS Dev., LLC v. People’s Couns. for Balt. Cnty.*, 425 Md. 436, 458 (2012) (“A necessary part of any argument are case, statutory, and/or constitutional authorities to support it.”); *Klauenberg v. State*, 355 Md. 528, 552 (1999) (Maryland appellate courts have made clear that “arguments not presented in a brief or not presented with particularity will not be considered on appeal.”). *Accord Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 933 (8th Cir. 2016) (affirming summary judgment on plaintiff’s excessive force claim where plaintiff “cite[d] no authority showing that the agents violated its clearly established rights”); *Loftus v. Clark-Moore*, 690 F.3d 1200, 1206 (11th Cir. 2012) (in § 1983 action, affirming dismissal of plaintiff’s due process claim where plaintiff “cite[d] no decision of our Court, the Supreme Court, or the Florida Supreme Court to support his argument that [state agent’s] conduct violated his and his children’s clearly established constitutional rights”); *Porter v. Jameson*, 889 F. Supp. 1484, 1493 (M.D. Ala. 1995) (where plaintiffs’ arguments to defeat defendant’s qualified immunity defense were “anemic and ineffective,” and did not provide authority in the controlling jurisdiction that defendant’s conduct violated their substantive due process rights, plaintiffs did not carry their burden of showing that conduct violated clearly established law).

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

III.

Right to Remittitur

Appellant contends that appellees waived their right to remittitur on the § 1983 claim on grounds that the verdict was excessive because they did not argue that at the remand hearing. We need not address that claim because we are upholding the dismissal of Kodi’s § 1983 claim and that leaves the circuit court’s judgment ordering Baltimore County to remit payment to appellant in the amount of \$400,000, plus post-judgment interest of \$160,000. No issues have been raised with respect to that judgment, so we turn to the final issue of recusal.

IV.

Motion to Recuse

Appellant’s final contention is that the circuit court “erred in hearing the [m]otion to [r]ecuse and in not recusing himself.” He contends that the judge’s statements and actions during trial, after trial, and in his rulings show that the judge “has a personal animus

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

to Kodi’s claims,” and that his “personal beliefs unmistakably cloud[ed] his legal conclusions.” He asserts that the judge’s behavior in this case has been “outrageous, unprovoked, unprofessional, and indicates bias” towards Kodi’s claims. Appellant argues that the judge should be recused from continuing to preside over this case if it is remanded for further proceedings.

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

A judge generally “is required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judge’s impartiality.” *Matter of Russell*, 464 Md. 390, 402 (2019). A party attempting to demonstrate that a judge is not impartial faces a high burden because there is a strong presumption in Maryland “that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified.” *Nathans Assocs. v. Mayor & Cnty. Council of Ocean City*, 239 Md. App. 638, 659–60 (2018) (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993), *cert. denied*, 463 Md. 539 (2019)). We have explained:

To overcome the presumption of impartiality, the party requesting recusal must prove that the trial judge has “a personal bias or prejudice” concerning him or “personal knowledge of disputed evidentiary facts concerning the proceedings.” *Boyd [v. State]*, 321 Md. 69, 80 (1990)]. Only bias, prejudice, or knowledge derived from an extrajudicial source is “personal.” Where knowledge is acquired in a judicial setting, or an opinion arguably expressing bias is formed on the basis of information “acquired from evidence presented in the course of judicial proceedings before him,” neither that knowledge nor

that opinion qualifies as “personal.” *Boyd*, 321 Md. at 77 (quoting *Craven v. U.S.*, 22 F.2d 605, 607–08 (1st Cir. 1927); [*Doering v. Fader*, 316 Md. 351, 356, 558 A.2d 733 (1989)]).

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

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

Here, after reviewing the record, including the judge’s detailed discussion addressing appellant’s allegations and the reason why he denied the motion to recuse himself from the proceedings on remand, we conclude that the trial judge did not abuse his discretion in considering and denying the motion to recuse. The judge found that appellant had not set forth information to show personal misconduct, explained the rationale for some

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

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