Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED August 8, 2024 11:52 AM
Plaintiff: RUBY JOHNSON, Appellee v. Defendants: GARY STAAB and GREGORY BUSCHY Appellants	⮝ FOR COURT USE ⮝
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APPELLANT GREGORY BUSCHY'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with the applicable word limits set forth in C.A.R. 28(g) because it has 9,480 words.

The brief also complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) or C.A.R. 28(b). For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ David Murphy

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GLOSSARY OF ABBREVIATED TERMS

Affidavit means the affidavit submitted in support of a search warrant to search the House.

App means Apple's Find My iPhone application.

Art. II means Article II of the Colorado Constitution.

Art. II, 7 means Article II, section 7 of the Colorado Constitution.

CGIA means the Colorado Governmental Immunity Act.

DDA means Deputy District Attorney Ashley Beck.

DPD means the Denver Police Department.

Detective means Defendant-Appellant Detective Gary Staab.

House means the house owned by Plaintiff on January 3, 2022 located at to 5380 Worchester St., Denver, Colorado.

Image means the image Owner sent to the police showing the iPhone's location at 11:25 a.m. on January 3, 2022.

iPhone means the iPhone belonging to Owner that was stolen from the Hyatt Regency Hotel in downtown Denver on January 3, 2022.

Owner means the owner of a truck, firearms, ammunition, drones, cash, and iPhone stolen from the Hyatt Regency Hotel in downtown Denver on January 3, 2022.

Plaintiff means Plaintiff Ruby Johnson.

Section 111.5 means Colorado Revised Statutes § 13-21-111.5.

Section 131 means Colorado Revised Statutes § 13-21-131.

Sergeant means Defendant-Appellant Gregory Buschy.

Supervisor means DDA's supervisor, Victoria Sharp.

Truck means the truck belonging to Owner that was stolen from the Hyatt Regency Hotel in downtown Denver on January 3, 2022.

ISSUES PRESENTED

A jury awarded Ruby Johnson ("Plaintiff") $3,760,000 after officers searched her home under a warrant for 35 minutes, caused minimal property damage, and moved some of her things without putting them back. Before the search, Detective Gary Staab ("Detective") and his supervisor Sergeant Gregory Buschy ("Sergeant") received information that stolen property was at Plaintiff's home. Both had concerns about whether there was probable cause to obtain a warrant to search it. So, they talked to a deputy district attorney, who spoke with her supervisor. The deputy district attorney and her supervisor both believed there was probable cause. Detective, with Sergeant's approval, applied for a warrant, and a neutral judge issued one.

Plaintiff sued Detective and Sergeant under C.R.S. § 13-21-131 ("Section 131") for illegally searching her home. Section 131 creates a cause of action against peace officers—and no one else—for violating Article II of the Colorado Constitution ("Art. II"). She argued Detective and Sergeant made misstatements in and omissions from the affidavit supporting the warrant. There wasn't evidence Sergeant intentionally or recklessly made the alleged misstatements and omissions or acted willfully and wantonly. But the trial court did not instruct the jury it needed to find Sergeant intentionally or recklessly made the alleged misstatements or

omissions and allowed the jury to award exemplary damages against him. It also held Sergeant could be held jointly and severally liable with Detective.

Issue 1: Did the trial court err by not instructing the jury it needed to find Sergeant intentionally or recklessly made misstatements or omissions before it could find against him?

Issue 2: Does sufficient evidence support the jury's verdict?

Issue 3: Are the damages the jury awarded excessive, thus requiring a new trial?

Issue 4: Did the trial court err by holding Sergeant can be jointly and severally liable with Detective?

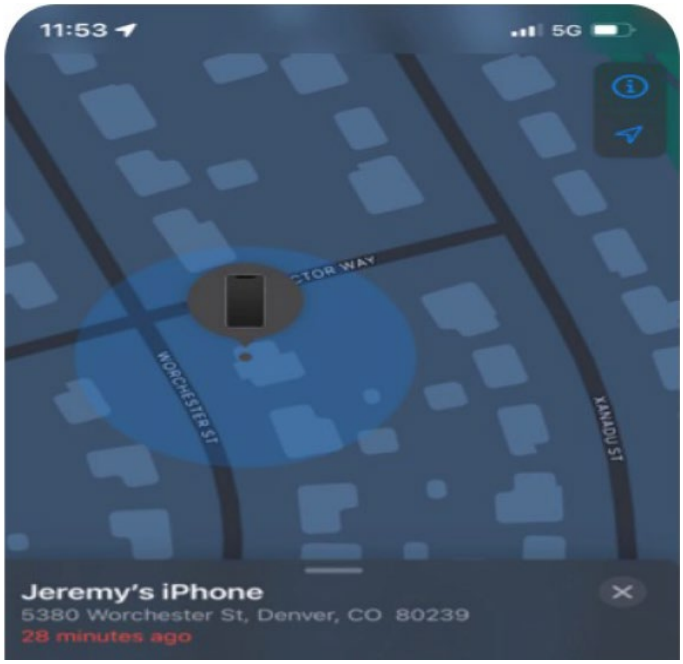
Issue 5: Does Section 131 violate Sergeant's equal protection rights?

STATEMENT OF THE CASE

Trial Evidence

Early on January 3, 2022, someone stole a truck ("Truck") containing 6 firearms, ammunition, drones, cash, and an iPhone ("iPhone") from the Hyatt Regency Hotel in downtown Denver. TR 2/27/2024, 90-98, 116, 126. Within hours, the Truck's owner ("Owner") reported the theft to the Denver Police Department ("DPD"). *Id*. at 157-59. Owner used Apple's Find My iPhone application ("App") on a separate cellphone to track the iPhone. *Id*. at 160-67. The App showed the

iPhone traveling in the Denver metro area, and Owner reported its movements to DPD. *Id*. Owner sent the following image ("Image") showing the iPhone's location at 11:25 a.m.:



EX, 24.

At 11:30 a.m., a dispatcher recorded information from a DPD officer (as relayed by Owner) that the Truck was near Falcon Park, which is "right around the corner" from the location in the Image. TR 2/27/2024, 109-11; TR 2/29/2024, 72-73. Owner also told DPD someone tried to use his wife's debit card online. TR 2/27/2024, 261. He later reported the App showed the iPhone was still at the location shown in the Image at 3:55 p.m. *Id*. at 305. But the iPhone then stopped transmitting its location. *Id*.

Owner drove a rented vehicle to 5380 Worchester St., Denver, Colorado ("House"). *Id*. at 307. He did not see the Truck but observed a garage there that could store it. *Id*. DPD also sent officers to the House. *Id*. at 256-57. They did not see the Truck, observed an elderly woman, and did not observe suspicious activity. TR 2/27/2024, 256-57; EX, 141.

The next day, Sergeant learned about the Truck's theft and assigned the case to Detective. TR 2/27/2024, 218. Sergeant and Detective believed the Image's red dot showed the iPhone was at the House. TR 2/27/2024, 315; TR 2/28/2024, 70-73. But they both lacked experience with the App and did not know—or investigate whether—the Image's blue circle indicated the iPhone could be anywhere within it and not necessarily in the House. TR 2/27/2024, 250-52; TR 2/28/2024, 70-73, 92-93. Detective investigated the House and identified Plaintiff as its owner. TR 2/27/2024, 259. He did not consider Plaintiff a suspect. *Id*. at 281.

Sergeant and Detective discussed whether to apply for a warrant to search the House. *Id*. at 283, 316. Detective did not believe there was probable cause because of staleness (too much time passed since the iPhone last transmitted its location). *Id*. at 241, 283, 316. Sergeant also had staleness concerns and spoke with other officers about them. TR 2/28/2024, 66-68. Sergeant told Detective to speak with the Denver District Attorney's Office about whether staleness undermined probable cause to

search the House. TR 2/27/2024, 236.

Detective spoke with Deputy District Attorney Ashley Beck ("DDA"). *Id*. DDA had experience using the App to find her own devices and believed it was very reliable. 2/29/2024, 125-27, 131-33. She did not believe staleness undermined probable cause. *Id*. At 134. Sergeant also called DDA, and she asked him about Owner's experience with the App. TR 2/28/2024, 84. Sergeant called Owner, and Owner reported the App had been used to find a lost phone "within feet[.]" *Id*. Detective also called Owner, and Owner confirmed the App had previously been used to find his wife's lost phone. TR 2/27/2024, 265-66.

After speaking with DDA, Owner, and Sergeant, Detective prepared an affidavit ("Affidavit") in support of a warrant to search the House and sent it to DDA for review. *Id*. At 268. DDA reviewed it, made changes, discussed it with her supervisor, Victoria Sharp ("Supervisor"), and had Supervisor review it. TR 2/29/2024, 113-19. After communicating with Supervisor, DDA approved the Affidavit. EX, 261.

The Affidavit states Detective had reason to believe the Truck, firearms, drones, and iPhone were in the House. EX, 258-59. It summarized Detective's experience and described the Truck's theft "[o]n 01-03-2022 at approximately 0645" and explained the Truck "had 6 firearms, 2 drones, $4000.00 cash[.]" *Id*. At 259-60.

It also described efforts to locate the Truck with the App:

> "[T]he [iPhone] pinged to a house, 5380 N. Worchester St. Denver, CO 80239. [Owner] reported the first ping occurred on 01/03/2021 [sic], at 1124 hours, and the last ping was on 01/03/2021 [sic], at 1555 hours. During this time the phone had not moved. The phone has not pinged at the location since and [Owner] believes the phone might have died. [Owner] added he had rented a car and drove by the address and did not see his truck at the location but stated it could be in the garage. The phone was pinging at the address when [Owner] drove by. [Owner] has used this iPhone app on other occasions, where he found his wife's phone in the middle of a field, with an accuracy of five feet. A photo of the app shows a red dot, signifying the phone being inside the [H]ouse, …

Id. At 260.

The Affidavit also states, in Detective's experience, "individuals who steal motor vehicles often use those vehicles to perpetuate other crimes and/or frequently abandon recently stolen vehicles after a short period of time" and "retain the valuable property" within the vehicles. *Id*. It then states "[f]irearms, drones, and cellular telephones are easily transportable and can be hidden in a home or garage." *Id*. But it doesn't state that there were "pings" at other locations before 11:24 a.m., that around 11:30 a.m., a DPD officer reported the iPhone had pinged near Falcon Park, that Sergeant and Detective lacked experience, training, and knowledge about the App, that Plaintiff owned the House, was elderly, and wasn't a suspect, that officers did not see the Truck or suspicious activity at the House, or that someone tried to use Owner's wife's debit card online. *Id*. At 258-61.

Sergeant proofread and reviewed the Affidavit. TR 2/28/2024, 98-99. Believing it established probable cause, he approved it. *Id*. Detective submitted it with a proposed warrant for judicial approval. EX, 258-62. And Judge Beth A. Faragher issued the warrant. *Id*. At 262.

Sergeant, Detective, and other officers executed the warrant shortly after it issued. EX, 97, 121. Because firearms were involved, SWAT assisted. TR 2/27/2024, 320. Sergeant and Detective told SWAT officers about Plaintiff's age and asked them to treat her carefully. *Id*. At 282. At the House, SWAT ordered Plaintiff to exit. *Id*. At 19-20. She complied and saw officers with their guns trained on her. *Id*. She was taken to a patrol vehicle, and an officer drove a short distance away for her safety. TR 2/29/2024, 31-38, 46. While in the vehicle, she did not express any discomfort and was calm. *Id*. At 37-38. During the search, officers searched through Plaintiff's belongings without returning them to their proper places and damaged a ceiling tile, a door, and possibly a custom-made doll. TR 2/27/2024, 35-43, 204-09; TR 2/28/2024, 235-39. After about 35 minutes, the officers stopped searching and left. TR 2/27/2024, 32-33.

Plaintiff and her children testified she was upset when the officers left. TR 2/26/2024, 199-203; TR 2/27/2024, 37-43; TR 2/28/2024, 236-38. According to them, she called her children and was crying and shaking. *Id*. They also testified she

did not feel safe at the House and stayed with her daughter for several days. TR 2/26/2024, 210-11; TR 2/27/2024, 44-45, 217. They testified she experienced anxiousness, depression, a lack of appetite, and sleeplessness after the search, too. TR 2/26/2024, 210-15; TR 2/27/2024, 47-48; 2/28/2024, 241. She began seeing a therapist more than one year after the search and after filing this lawsuit but did not present any records from her visits. TR 2/26/2024, 225, 240; TR 2/27/2024, 48-49; EX 1-379. About 18 months after the search, she sold the House, where she had lived for decades. TR 2/26/2024, 261; TR 2/27/2024, 71. Plaintiff and her children testified she hasn't been the same mentally or emotionally since the search. 2/26/2024, 210; 2/28/2024, 243-44; 2/29/2024, 86-87. She did not suffer any physical injuries. *See* TR 2/28/2024, 244-45; CF, 4201.

Procedural History

Plaintiff brought claims against Defendants under Section 131 for an unlawful search under Article II, section 7 of the Colorado Constitution ("Art. II, 7"). CF, 181-97. The district court held a jury trial. *Id*. at 6341-43. The court concluded negligent and good faith misstatements and omissions in warrant affidavits may violate Art. II, 7 and instructed the jury it could find against Defendants if Plaintiff proved (1) Defendants made false statements or omissions that created a falsehood; and (2) those false statements or omissions were material, or necessary, to the

probable cause finding for the search warrant. TR 3/1/2024, 39-42; CF, 4196. It did not instruct the jury about a scienter requirement. *Id*. It also concluded, if the jury found against both Defendants, Defendants were jointly and severally liable for Plaintiff's compensatory damages. TR 3/1/2024, 32-33. The jury found for Plaintiff and awarded Plaintiff $1,250,000 in noneconomic damages and $10,000 in economic damages, jointly and severally, against Defendants, $1,250,000 in exemplary damages against Detective, and $1,250,000 in exemplary damages against Sergeant. CF, 4225-28. The court later reduced Plaintiff's economic damages to $200. CF, 6179, 6208-09.

SUMMARY OF THE ARGUMENT

Issue 1: The district court should have instructed the jury it could not find against Sergeant unless he intentionally or recklessly made material misstatements or omissions in the Affidavit. Colorado caselaw doesn't address when misstatements or omissions in warrant affidavits create civil liability for violating Art. II, 7. But federal caselaw addresses when they create civil liability under the Fourth Amendment. And in the criminal context, the Colorado Supreme Court has addressed when they violate Art. II, 7. The standard for determining whether they violate the Fourth Amendment and Art. II, 7 is the same. They cannot violate Art. II, 7 unless an officer made them intentionally or recklessly. The court erroneously

failed to instruct the jury it must determine whether Sergeant intentionally or recklessly made misstatements or omissions in the Affidavit when determining whether he violated Art. II, 7.

Issue 2: Plaintiff did not prove her claims against Sergeant. Sergeant did not draft the Affidavit or direct Detective how to draft it. Even if he did, Plaintiff did not meet her burden to prove he intentionally or recklessly made material misstatements in the Affidavit that created a falsehood necessary to establish probable cause. Most of the alleged misstatements aren't misstatements. The alleged misstatements and omissions aren't material. It wasn't Sergeant's conscious objective to create a falsehood, nor was he highly aware misstatements and/or omissions in the Affidavit probably created a falsehood. And there was no evidence Sergeant willfully and wantonly injured Plaintiff.

Issue 3: The jury awarded excessive damages. Thirty-five minutes of inconvenience and minor property damage aren't worth $3,760,000. Damages in cases like Plaintiff's usually don't exceed $30,000. Plaintiff didn't produce evidence sufficient to prove she suffered extreme emotional distress, and this case doesn't involve prolonged conduct. Sergeant's alleged conduct isn't reprehensible. The exemplary damages award is shockingly greater than the maximum actual harm Plaintiff could have suffered. And cases like Plaintiff's don't implicate exemplary

damages.

Issue 4: Sergeant isn't jointly and severally liable with Detective. Section 131 doesn't abrogate Colorado's pro rata liability statute. Section 131 removes statutory immunities and statutory limitations on liability, damages, and attorney fees for claims brought under it. The pro rata liability statute doesn't confer immunity or limit liability, damages, or attorney fees.

Issue 5: Section 131 violates Sergeant's equal protection rights. Equal protection prohibits treating similarly situated individuals differently without an appropriate justification. Section 131 treats peace officers differently than similarly situated individuals, including non-peace officer government agents and other defendants in civil cases. Although non-peace officer government agents may violate Art. II, only peace officers can be held civilly liable for those violations. Other defendants in civil cases also enjoy statutory immunities and limitations on liability, damages, and attorney fees that peace officers do not. There's no rational basis for this disparate treatment.

ARGUMENT

Issue 1. The court did not properly instruct the jury on the elements of Plaintiff's claims.

A. Preservation and Standard of Review

This issue was preserved at TR 2/29/2024 (Instruction Conference), 9-13, TR

3/1/2024, 39-49, and CF, 4256-59. Whether a jury instruction correctly states the law is reviewed de novo. *Vititoe v. Rocky Mountain Pavement Maint., Inc*., 2015 COA 82, ¶67, 412 P.3d 767.

B. Discussion

The court did not properly instruct the jury about the elements of Plaintiff's Section 131 unlawful search claims. Section 131 created a cause of action against peace officers who violate rights guaranteed under Art. II. C.R.S. § 13-21-131(1). Art. II, 7—like the Fourth Amendment of the United States Constitution—protects against unreasonable searches. *Compare* Colo. Const. Art. II, § 7 & U.S. Const. amend. IV. Officers who search residences under a warrant "issue[d] … [with] probable cause, supported by … [sworn affidavits]" don't violate either provision. *See id*. But factual misstatements or omissions in an affidavit may cause a warrant to issue without probable cause, and if the warrant lacks probable cause, any search under it is unconstitutional. *See People v. McKnight*, 2019 CO 36, ¶¶28-30, 446 P.3d 397; *People v. Cox*, 2018 CO 88, ¶¶7-10, 429 P.3d 75; *People v. Dailey*, 639 P.2d 1068, 1074-76 (Colo. 1982).

There is no case addressing when misstatements or omissions in warrant affidavits violate Art. II, 7 and create civil liability. But because Art. II, 7 and the Fourth Amendment are practically identical, this Court looks to Fourth Amendment

precedent for guidance when determining civil liability standards under Art. II., 7 and Section 131. *See Woodall v. Godfrey*, 2024 COA 42, ¶13. Under the Fourth Amendment, only intentional and reckless factual misstatements can create civil liability. *Kapinski v. City of Albuquerque*, 964 F.3d 900, 905 (10th Cir. 2020); *Stonecipher v. Valles*, 759 F.3d 1134, 1142 (10th Cir. 2014). So, officers who merely make negligent or good faith factual misstatements or omissions in warrant affidavits aren't civilly liable under the Fourth Amendment. *See id*. The Fourth Amendment's requirement that officers must intentionally or recklessly make factual misstatements or omissions from warrant affidavits before they can be held civilly liable, strongly supports the conclusion that Art. II, 7 requires officers intentionally or recklessly make misstatements or omissions in warrant affidavits before they can be held civilly liable under it.

Further, there isn't a civil case addressing the standard for determining whether misstatements or omissions violate Art. II, 7, but the Colorado Supreme Court addressed it in the criminal context and adopted the Fourth Amendment standard. *See McKnight*, 2019 CO 36, ¶¶28-30; *Cox*, 2018 CO 88, ¶¶7-10; *Dailey*, 639 P.2d at 1074-76. So, the standards for determining whether misstatements or omissions in affidavits violate an individual's constitutional rights are the same under the Fourth Amendment and Art. II, 7.

Misstatements and omissions in affidavits don't automatically prevent the affidavits from establishing probable cause in violation of Art. II, 7. An affidavit containing misstatements and/or omissions doesn't violate the Fourth Amendment if it nevertheless establishes probable cause. *Kapinski*, 964 F.3d at 905 (10th Cir. 2020); *Stonecipher*, 759 F.3d at 1142 (10th Cir. 2014). Therefore, because the standards of Art. II, 7 and the Fourth Amendment are identical, an affidavit containing misstatements and/or omissions doesn't violate Art. II, 7 if it nevertheless establishes probable cause. *Cox*, 2018 CO 88, ¶9; *People v. Kerst*, 181 P.3d 1167, 1171 (Colo. 2008); *Dailey*, 639 P.2d at 1074-76.

Determining whether an affidavit containing misstatements and/or omissions nevertheless establishes probable cause requires a four-step analysis. *Kapinski*, 964 F.3d at 905; *Stonecipher*, 759 F.3d at 1142; *Cox*, 2018 CO 88, ¶9; *Kerst*, 181 P.3d at 1171; *Dailey*, 639 P.2d at 1074-76. First, a plaintiff must identify factual misstatements and/or omissions in the affidavit. *See id*. Second, a fact finder must determine whether the affiant made the misstatements and/or omissions intentionally, with reckless disregard for the truth, negligently, or in good faith. *Id*. Third, intentional and reckless misstatements must be stricken from and intentionally or recklessly omitted facts included in the affidavit. *Id*. But negligent and good faith misstatements may remain, and negligent or good faith omissions

need not be included. *Id*. Fourth, it must be determined whether the affidavit without the intentional and reckless misstatements and/or with the intentional and reckless omissions establishes probable cause. *Id*.

Here, the court did not require the jury to follow this four-step analysis. It instructed that Sergeant was liable to Plaintiff if the Affidavit contained misstatements and/or omissions that were "necessary to the probable cause finding for the search warrant." That is, its instructions omitted the analysis' second and third steps. So, the jury, following the court's instructions, automatically struck any misstatements in and automatically included any omissions from the Affidavit that it determined existed without regard to Sergeant's mental state. By failing to require the jury to follow the four-step analysis, the court misstated the law and did not properly instruct the jury.

The court relied on *People v. Reed*, 56 P.3d 96 (Colo. 2002) when it decided the jury need not follow the four-step analysis. TR 2/29/2024 (Instruction Conference), 10-12. But *Reed* doesn't create a civil cause of action for money damages. *Reed* is a criminal case, and the issue on appeal was whether evidence obtained under a warrant containing false statements must be suppressed, not whether the defendant was entitled to money damages. *Id*. at 98. In it, the Colorado Supreme Court opined that criminal courts can—but aren't required to—impose

sanctions for negligent and good faith misstatements and omissions if fairness and justice require. *Id*. at 99. So, negligent and good faith misstatements and omissions may or may not justify sanctions in a criminal case. Because negligent and good faith conduct may not justify sanctions in the criminal context, it doesn't follow that the same conduct *automatically* constitutes a constitutional violation creating civil liability.

Indeed, under *Reed*, negligent and good faith misstatements aren't constitutional violations. The *Reed* trial court struck negligent misstatements from an affidavit before finding the affidavit did not establish probable cause and suppressing evidence obtained under the warrant it supported. *Id*. at 98-99. On appeal, the Court held striking the negligent statements was error. *Id*. Next, the Court reviewed the affidavit *including the negligent misstatements*, concluded it established probable cause, and said "Because we find probable cause exists within the four corners of the affidavit, we need not address the good faith exception to the exclusionary rule." *Id*. at 100-02. That is, the exclusionary rule (which applies in criminal cases *only* when officers violate criminal defendants' constitutional rights) did not apply. *See Reed*, 56 P.3d at 102; *see also People v. Diaz*, 53 P.3d 1171, 1175 (Colo. 2002). Because the exclusionary rule did not apply, the affidavit containing negligent misstatements did not violate the defendant's constitutional rights. *See* 56

P.3d at 102. Therefore, *Reed* clearly shows negligent and good faith misstatements and omissions—although potentially sanctionable—don't violate Art. II, 7, even if they are necessary to establish probable cause.

Additionally, the court's conclusion isn't in harmony with legislative intent. While discussing the bill enacting Section 131, Senator Foote of the Colorado General Assembly said, "But … any time that there's an effort … to prove that a law enforcement officer violated somebody's civil rights part of that proof has to be a mental state and the mental state would be some level of intent." Colo. Senate 2020 Legislative Day 78, 9 (attached in Appendix). He and Senator Gardner also explained officers acting in good faith would not violate Section 131. *Id*. at 5, 9. Therefore, the General Assembly did not intend negligent and good faith misstatements and omissions to establish liability under Section 131.

Because negligent and good faith misstatements and omissions don't violate Art. II, 7 and cannot create liability under Section 131, the district court did not properly instruct the jury. Plaintiff bore the burden under Section 131 to prove Sergeant violated her rights under Art. II, 7. Regarding unlawful searches under warrants, officers violate Art. II, 7 only if they intentionally or recklessly make misstatements in and/or omissions from warrant affidavits that are necessary for affidavits to establish probable cause. Because the court's instructions did not

require it, the jury never considered whether Sergeant intentionally or recklessly made misstatements or omissions. Thus, the jury's finding he violated Plaintiff's Art. II, 7 rights is invalid and must be set aside.

Issue 2. Insufficient evidence supports Plaintiff's claims against Sergeant.

A. Preservation

This issue was preserved at TR 2/29/2024, 12-14, TR 2/29/2024 (Instruction Conference), 12, 17, TR 3/1/2014, 92-108, and CF, 4251-52. Whether evidence is sufficient to support a verdict is reviewed de novo. *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1092 (Colo. 2011).

B. Discussion

Plaintiff presented insufficient evidence at trial. Evidence is insufficient when, considered in light most favorable to the verdict, it is so overwhelmingly in the defendant's favor as to support no other reasonable conclusion. *Voight v. Colo. Mountain Club*, 819 P.2d 1088, 1090 (Colo. App. 1991). There isn't sufficient evidence to support Plaintiff's unlawful search claim or the exemplary damages awarded against Sergeant.

1. Plaintiff did not prove her unlawful search claim.

Plaintiff did not prove Sergeant violated Art. II, 7. As explained, Plaintiff was required to prove Sergeant intentionally or recklessly misstated or omitted material

information in or from the Affidavit. *Supra Issue 1.A.2*. She did not.

Sergeant undisputedly did not make any misstatements or omissions. He did not draft or change the Affidavit. He also did not tell Detective what to include in or exclude from it. He merely proofread it and determined it established probable cause. Because Sergeant did not make any statements whatsoever, he did not make misstatements and could not have omitted any information that could have created a falsehood within the Affidavit. It also begs the question how a falsehood could even be proven without instructing the jury about Sergeant's requisite state of mind. Thus, there's no evidence supporting Plaintiff's claim against him.

But even if Sergeant had drafted the Affidavit, Plaintiff did not prove her claim. Plaintiff argued the Affidavit contained multiple misstatements: The Image "shows a red dot, signifying the [iPhone] being inside the [H]ouse[;]" "the first ping occurred … at 1124 hours, and the last ping was … at 1555 hours. During this time the [iPhone] had not moved[;]" Detective had "reason to believe" the Truck and firearms were at the House, and Owner "has used [the App] on other occasions, where he found his wife's phone in the middle of a field, with an accuracy of five feet." TR. 3/1/2024, 54-62.

Plaintiff also argued the Affidavit had multiple omissions: Detective did not believe—and Sergeant had concerns about whether—there was probable cause to

search the House; the iPhone pinged in other locations; neither Detective nor Sergeant had experience, training, or knowledge about the App; officers did not see the Truck at the House; Plaintiff was elderly and wasn't a suspect; officers did not see any suspicious activity at the House; someone tried to use Owner's wife's debit card online; and Detective did not list $4,000 and a silencer as evidence that would be sought during the search. *Id*. at 63-68.

But most of the foregoing aren't even misstatements. Any misstatements or omissions aren't material. And there's no evidence Sergeant intentionally or recklessly made any statements in or omissions from the Affidavit.

a. Most of the claimed misstatements are not misstatements.

Of Plaintiff's claimed misstatements, the jury could have only found two were false: (1) the Image's red dot signified the iPhone was in the House, and (2) the iPhone did not move between 11:24 a.m. and 3:55 p.m. Evidence showed the iPhone wasn't found in the House, and the iPhone might have pinged at a park near the House at 11:30 a.m. Nevertheless, as discussed below, these statements are immaterial.

The remaining "misstatements" aren't actually misstatements. Regarding the "first ping" and "last ping" statements, the Affidavit doesn't say the iPhone did not start pinging until 11:24 a.m. Immediately preceding this statement, the Affidavit

states, "the [iPhone] pinged to [the House]." EX, 260. So, in context, "the first ping" obviously means the first ping at the House was at 11:24 a.m. Also, the "last ping" statement, regardless of the context, is true. After the iPhone pinged at 3:55 p.m., it stopped pinging, probably because its battery died. Indeed, Plaintiff presented no evidence it pinged after 3:55 p.m.

Detective's statement there was reason to believe Owner's stolen property was in the House wasn't a factual statement. Saying there was "reason to believe" is tantamount to saying there was "probable cause." *See People v. Hill*, 929 P.2d 735, 739 (Colo. 1996). Probable cause is a legal conclusion. *People v. Morse*, 2023 COA 27, ¶28, 531 P.3d 1059. So, the statement was a legal assertion, not a factual statement. *See Terwilliger v. Reyna*, 4 F.th 270, 286 n.1 (5th Cir. 2021) (Higginson, J. concurring in part and dissenting in part).

The statements about Owner's prior App use to find his wife's phone are also not misstatements. Identified victims are presumed reliable, and officers and judges are entitled to rely on them when determining whether probable cause exists. *People v. Valencia*, 257 P.3d 1203, 1208 (Colo. App. 2011). Owner was an identified victim and, therefore, presumed reliable. Plaintiff presented no evidence showing Sergeant or Detective had information undermining that presumption. So, Owner's statements are reliable as a matter of law, not misstatements.

b. Plaintiff did not prove materiality.

Plaintiff did not prove the Affidavit contained material misstatements or omissions. Misstatements are material only if they are necessary to establish probable cause. *People v. Flores*, 766 P.2d 114, 120 (Colo. 1988) (citations omitted). Omissions are material only if they render affidavits "substantially misleading[.]" *Kerst*, 181 P.3d at 1170-71. Affidavits need not "fully describe all steps taken, all information obtained and all statements made during the course of an investigation." *Id*. at 1075. They need only contain relevant adverse facts that could "cast doubt on the existence of probable cause." *Id*.

Officers have probable cause to search "if they have a reasonable basis for believing that the area being searched contains contraband or evidence of criminal activity." *Hill*, 929 P.2d at 739. "[P]robable cause deals with probabilities, not certainties." *People v. Altman*, 960 P.2d 1164, 1171 (Colo. 1998) (quotations omitted). It cannot be quantified mathematically [and] … is based on factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act." *People v. Smith*, 2022 CO 38, ¶30, 511 P.3d 647 (quotations omitted).

i. The Affidavit's two "misstatements" are immaterial.

Plaintiff did not prove the Affidavit's two "misstatements" are material. The

statements that the Image's red dot signified the iPhone was in the House and that the iPhone did not move between 11:24 a.m. and 3:55 p.m. aren't necessary to establish probable cause. To establish probable cause, the Affidavit needed to show a reasonable basis to believe the House contained Owner's property. It wasn't necessary to show all the stolen property was there. The iPhone was stolen. Even if the iPhone was the only thing in the House, the House contained Owner's property, which was sufficient to search it.

The following statements supported a reasonable belief the iPhone was in the House: The Image's red dot signified the iPhone was within the House; the iPhone did not move between 11:24 a.m. and 3:55 p.m.; the iPhone was pinging at the House when Owner drove by; the iPhone pinged at the House at 3:55 p.m.; and Owner previously used the App to find another lost phone.

Removing the first two statements, the remaining three support a reasonable belief the iPhone was within the House. Even if the red dot did not signify the iPhone was within the House and if the iPhone pinged at the nearby park at 11:30 a.m., the Affidavit's other statements showed the iPhone pinged at the House two different times (when Owner drove by and at 3:55 p.m.) without pinging at a different location. So, the Affidavit contained information the iPhone remained at the House for multiple hours without moving. This information is enough to establish a

reasonable probability officers would find it in the House. Thus, the first two statements aren't necessary to establish probable cause.

ii. The claimed omissions are immaterial.

The omissions Plaintiff identified are also immaterial. Detective's and Sergeant's concerns about whether staleness undermined probable cause are irrelevant. Probable cause is an objective standard, and an officer's subjective belief is irrelevant to whether it exists. *People v. Cherry*, 119 P.3d 1081, 1083 (Colo. 2005); *People v. Campbell*, 2018 COA 5, ¶10, 425 P.3d 1163; *see also U.S. v. DeGasso*, 369 F.3d 1139, 1143 (10th Cir. 2004). So, Sergeant's and Detective's subjective staleness concerns are irrelevant, and not including them doesn't cast doubt on probable cause.

Omitting information about Detective's and Sergeant's lack of experience, training, and knowledge about the App doesn't cast doubt on probable cause, either. What mattered was whether the App was a sufficiently reliable indicator of the phone's location. Owner's experience with the App showed it was. Even though Detective and Sergeant had not used the App, they were entitled to rely on Owner's experience with it. Thus, their lack of experience, training, and knowledge is immaterial.

Officers not seeing the Truck at the House is also immaterial. The Affidavit

expressly states Owner did not see the Truck outside the House. Stating officers likewise did not see it outside doesn't undermine probable cause. The Affidavit told the reviewing judge the Truck wasn't outside, and there was also a garage where the Truck could have been stored. That's enough to prevent the Affidavit from being misleading.

The fact Plaintiff wasn't a suspect also doesn't render the Affidavit misleading. Probable cause to search a residence may exist if the resident isn't a suspect. *People v. Gutierrez*, 222 P.3d 925, 937 (Colo. 2009). Thus, her non-suspect status doesn't cast doubt on probable cause.

The lack of suspicious behavior doesn't cast doubt on probable cause, either. Facts consistent with innocent behavior may establish probable cause. *Campbell*, 2018 COA 5, ¶31. So, not observing suspicious behavior doesn't undermine probable cause. Further, notwithstanding the lack of observable suspicious behavior, there was reliable evidence the iPhone—and by inference, other stolen property—was at the House. Thus, this omission doesn't render the Affidavit substantially misleading.

Omitting that someone tried to use Owner's wife's debit card online and not including $4,000 and a silencer as evidence that would be sought during the search also don't render the Affidavit substantially misleading. It is unclear how they could

be misleading when the theft isn't disputed. The internet is accessible everywhere, including from the House. So, discussion about someone using the card online is immaterial. And although it doesn't list the money and silencer, the Affidavit listed the other stolen items, including guns and the iPhone. Again, the mere fact there was a reasonable belief the iPhone was within the House was sufficient to search the House, and as explained, the Affidavit established such a belief. Thus, neither this nor any other omission rendered the Affidavit substantially misleading, and Plaintiff did not meet her materiality burden.

iii. Sergeant did not intentionally or recklessly make misstatements or omissions.

Plaintiff also did not prove Sergeant intentionally or recklessly made misstatements or omissions. "Intentionally" means a person's conscious objective is to create a falsehood. *See Reed*, 56 P.3d at 99; *Dailey*, 639 P.2d at 1075; C.R.S. § 18-1-501(5). "Recklessly" means the person acted with "reckless disregard for the truth", *id*., that is, "act[ing] with a high degree of awareness" he is probably creating a falsehood. *See Rosenblum v. Budd*, 2023 COA 72, ¶39, 538 P.3d 354.

Plaintiff presented no evidence Sergeant's conscious objective was to create a falsehood or that he was highly aware he was probably creating a falsehood. His participation in the Truck theft investigation was limited. He called Owner about his experience with the App. He also approved the warrant after confirming the

Affidavit established probable cause, which DDA, the DDA Supervisor, and a judge also concluded. And he did not know the Image's red dot did not necessarily mean the iPhone was in the House.

There's also no evidence Sergeant knew the iPhone pinged before arriving at the House, Owner's wife's card was used, Detective was unfamiliar with the App, the Truck wasn't at the House, or what officers observed at the House. Therefore, Plaintiff did not prove he acted intentionally or recklessly.

Thus, considering the evidence in a light most favorable to the verdict, reasonable persons could not reach the same conclusion as the jury.

2. Plaintiff did not prove her exemplary damages claim.

No reasonable jury could have awarded exemplary damages against Sergeant. Exemplary damages require the jury to find beyond a reasonable doubt that Sergeant's conduct was willful and wanton. CF, 4205; *see also* C.R.S. § 13-21-102(1)(a); *Blood*, 252 P.3d at 1080. "'[W]illful and wanton conduct' means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." C.R.S. § 13-21-102(1)(b).

Plaintiff presented no evidence Sergeant acted willfully and wantonly. He did not investigate the theft of Owner's property or direct Detective's investigation. He

never had problems with Detective's work and had no reason to believe Detective wasn't properly performing his duties. When concerns arose about staleness, he spoke with other officers and the DDA. He did not intentionally or recklessly make any misstatements or omissions in or from the Affidavit. And like two prosecutors and an independent judge, he reviewed the Affidavit and determined it established probable cause. He also took added steps to ensure SWAT officers knew Plaintiff's age and asked them to be careful with her. When it was clear the stolen weapons and items were not in her home, the search was ended, and he tried to minimize Plaintiff's inconvenience. There's simply no evidence he could have recognized his conduct was dangerous or acted heedlessly or recklessly, without regard to consequences or Plaintiff's rights and safety. Thus, Plaintiff did not prove her exemplary damages claim beyond a reasonable doubt.

Issue 3. The jury awarded excessive damages.

A. Preservation and Standard of Review

This issue was preserved at CF, 4252-56. Whether evidence is sufficient to support a verdict is reviewed de novo. *See Blood*, 252 P.3d at 1092. Whether a trial court should have granted a new trial based on excessive damages is reviewed for abuse of discretion. *See Schuessler v. Wolter*, 2012 COA 86, ¶47, 310 P.3d 151.

B. Discussion

The jury awarded excessive damages. Excessive jury verdicts require a new trial on all issues if they "shock the judicial conscience and … raise an irresistible inference that passion, prejudice, corruption or other improper cause [such as bias] invaded the trial[.]" *Higgs v. Dist. Ct.*, 713 P.2d 840, 861 (Colo. 1985) (quotations omitted). Damages raise an irresistible inference of an improper cause if they are "so outrageous as to strike everyone with the enormity and injustice of them." *Higgs*, 713 P.2d at 861. If damages aren't sufficiently shocking but nevertheless lack evidentiary support, courts may grant a new trial on damages or, if the plaintiff agrees, remittitur. C.R.C.P. 59(d)(5); *Jagow v. E-470 Pub. Highway Auth.*, 49 P.3d 1151, 1157 (Colo. 2002); *Higgs*, 713 P.2d at 861.

Awarding $3,760,000 for an illegal search is unprecedented. Based on available information known to Sergeant's counsel on jury verdicts involving residence searches since 2000, the largest damages award to a single plaintiff for an illegal search not involving an arrest, physical injury or other significant injury is $125,000. CF, 4267-75. But this award is an anomaly: Most awards to individual plaintiffs in similar cases don't exceed $30,000. *See id*. And not even awards to single plaintiffs for illegal searches involving arrests, physical injuries, or other significant injuries approach $3,760,000. *Id*. The largest damages award to a single

plaintiff for an illegal search is $1 million, including $250,000 in exemplary damages, after officers obtained a warrant with an affidavit containing false and misleading language and shot the plaintiff, causing the plaintiff to lose a finger and suffer permanent nerve damage. *Id*. at 4270. The largest damages award in Colorado is $779,590, including $429,340 in exemplary damages, after officers entered a completely disabled, 67-year-old combat veteran's home without a warrant or probable cause and assaulted, tased, and arrested him. *Id*. at 4267.

Considering these cases, Plaintiff's damages award is shocking. Plaintiff's alleged injuries aren't 3.76 times more severe than being shot, losing a finger, and suffering permanent nerve damage. They aren't almost 5 times more severe than being assaulted, tased, and arrested. And they aren't 125 times more severe than harms suffered by most plaintiffs in situations like hers. Any reasonable judge would recognize the injustice inherent in this award. Thus, the damages award shocks the judicial conscience and raises an irresistible inference that passion, prejudice, corruption, or other improper cause, such as bias, invaded the trial, and Sergeant is entitled to a new trial.

The damages award also lacks evidentiary support. Plaintiffs may recover damages for civil rights violations. *Eason v. Bd. of Cnty. Comm'rs*, 70 P.3d 600, 610 (Colo. App. 2003). But compensatory damage awards require actual injuries. *Id*. If

plaintiffs fail to prove actual injuries, they may only receive nominal damages. *Id*. Plaintiff did not prove she suffered $1,250,000 in actual injuries. Her damages were based on two alleged injuries: property damage and emotional distress. The jury awarded $10,000 in economic damages, which was reduced to $200; and, $1,250,000 for emotional distress.

Plaintiff did not prove she suffered $1,250,000 in emotional distress damages. Large emotional distress damages are inappropriate unless the distress is caused by "shocking, prolonged … conduct" and is proved by objective—typically medical or psychological—evidence; it must also be significant, long-term, or involve permanent physical injury. *See Sooroojbaillie v. Port Auth. of N.Y. & N.J.*, 816 Fed. Appx. 536, 547 (2d Cir. 2020) (unpublished); *Towns v. Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978); *see e.g. Small v. City of N.Y.*, 09-cv-1912, 2022 U.S. Dist. LEXIS 77603 at *45-51 (S.D.N.Y. Apr. 28, 2022) (unpublished) (upholding $1.5 million compensatory damages based on three, in-custody assaults because plaintiff presented a PTSD diagnosis); *Chopra v. GE*, 527 F.Supp.2d 230, 247 (D. Conn. 2007) (upholding $500,000 emotional distress damages based on specific evidence about defendant's actions' impact on plaintiff's health); *Watson v. E.S. Sutton, Inc.*, 02 Civ. 2739, 2005 U.S. Dist. LEXIS 31578, at *44 (S.D.N.Y. Sept. 6, 2005) (unpublished) (rejecting damages award because plaintiff did not suffer permanent

psychological damage, disability, PTSD, medication, or lost work). A plaintiff's unsupported emotional distress testimony has limited value. *See Price v. City of Charlotte*, 93 F.3d 1241, 1250-57 (4th Cir. 1996). So, courts evaluating emotional distress damage awards must focus on the plaintiff's specific testimony, whether the plaintiff sought medical or other healthcare assistance, and corroborating, objective evidence supporting the plaintiff's testimony. *See Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416-17 (10th Cir. 1997); *Wulf v. City of Wichita*, 883 F.2d 842, 874-75 (10th Cir. 1989).

This case doesn't involve prolonged conduct. Searching the House took about 35 minutes. When officers recognized they could not find the items listed in the warrant, they stopped. Because the search was brief, a large emotional distress award isn't justified.

Also, Plaintiff only offered emotional distress evidence through her and her children's uncorroborated testimony. She did not present corroborating expert testimony through a medical provider about how the search impacted her. She also did not produce any medical bills, even though she purportedly went to therapy regularly. Because her emotional distress claim is based solely on uncorroborated testimony, Plaintiff did not prove she suffered $1,250,000 in emotional distress damages.

Regarding exemplary damages, the $1,250,000 award against Sergeant is unconstitutional. Excessive exemplary damages awards violate due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). "[I]n practice, few awards exceeding a single-digit ratio between exemplary and compensatory damages, to a significant degree, will satisfy due process." *Id*. at 425. And although exemplary damages awards exceeding the 1:1 ratio may comply with due process, "[s]ingle digit multipliers are more likely to comply with due process[.]" *Id*. To determine whether exemplary damages violate due process, courts should consider: (1) the defendant's misconduct's "degree of reprehensibility", (2) the "disparity" between the plaintiff's actual or potential harm and exemplary damages, and (3) the exemplary damages award compared to available civil penalties in similar cases. *Id*. at 418.

The exemplary damages award against Sergeant is unsupported by any evidence and is clearly excessive. As discussed above, Sergeant's alleged conduct isn't reprehensible. Further, the exemplary damages award is 125 times greater than the maximum actual harm Plaintiff could have possibly suffered of $30,000. As to the third factor, cases awarding damages for similar situations don't involve exemplary damages. CF, 4267-75. Therefore, the exemplary damages award is manifestly excessive. This is especially true where, as established above, there's no

evidence Sergeant made or was aware of any false or misleading statements in the Affidavit. So, there's no evidence showing the $1,250,000 exemplary damages award complies with due process.

Issue 4. Joint and several liability does not apply.

A. Preservation and Standard of Review

This issue was preserved at TR 2/29/2024 (Instruction Conference), 27-32, TR 3/1/2024, 12-14, 30-32, and CF, 4259-61. Whether joint and several liability applies is a question of law, and questions of law are reviewed de novo. *See People v. Ojeda*, 2022 CO 7, ¶30, 503 P.3d 856.

B. Discussion

Contrary to the trial court's conclusion, joint and several liability isn't applicable. The Court reasoned that the following language vitiates pro-rata liability established by C.R.S. § 13-21-111.5 ("Section 111.5") for claims arising under Section 131: "Statutory immunities and statutory limitations on liability, damages, or attorney fees do not apply to claims brought pursuant to this section." C.R.S. § 13-21-131(2)(a). Ultimately, it concluded common law joint and several liability applies to Section 131 claims.

But Section 131 doesn't abolish pro-rata liability. The purpose of interpreting statutes is "to ascertain and give effect to the legislature's intent." *Young v. Brighton*

Sch. Dist. 27J, 2014 CO 32, ¶11, 325 P.3d 571. The best evidence of legislative intent is the statute's plain language. *See People v. Iannicelli*, 2019 CO 80, ¶19, 449 P.3d 387; *Young*, 2014 CO 32, ¶11. Statutory language—unless statutorily defined—must be given its plain and ordinary meaning, must be read in context, and must be read in harmony with related statutory provisions. *See Iannicelli*, 2019 CO 80, ¶¶19-20; *Farmers Ins. Exch. v. Bill Boom, Inc*., 961 P.2d 465, 470 (Colo. 1998). If the language is unambiguous, it controls. *See Iannicelli*, 2019 CO 80, ¶19; *Young*, 2014 CO 32, ¶11.

Whether the General Assembly intended to abrogate pro-rata liability when it enacted Section 131 turns on whether Section 111.5 is a "statutory limitation[] on liability [or] damages[.]" It is not. An example of a limitation on liability is C.R.S. § 24-10-106, which limits types of claims which may be brought against a governmental entity. Similarly, an example of a damages limitation is C.R.S. § 24-10-114(1), which places a sum certain cap on damages a plaintiff may recover against a governmental entity. Thus, a limitation on liability circumscribes what claims may be asserted against an individual or entity, and a damages limitation places a specific dollar limit on what damages may be recovered.

Section 111.5, in contrast, doesn't circumscribe what claims may be brought against a defendant and doesn't place a specific dollar limit on what damages may

be recovered. Section 111.5 abrogates joint and several liability and replaces it with pro-rata liability, which requires defendants to pay judgments only according to "the percentage of negligence or fault attributable to [them]." C.R.S. § 13-21-111.5. It doesn't enumerate or limit what claims plaintiffs may bring and doesn't establish a sum certain cap on damages. Therefore, Section 111.5 isn't a statutory limitation on liability or damages, and it was improper to impose joint and several liability on Sergeant.

By applying joint and several liability, the trial court held Sergeant fully responsible for the entire compensatory damage award, rather than only those damages, if any, his alleged conduct directly caused. Applying joint and several liability also makes it impossible for Sergeant to appeal from the damage award entered against him separate and apart from any judgment entered against Detective. For these reasons, it was error for the trial court to apply joint and several liability to Plaintiff's claims. Because there's no way to apportion the jury's compensatory damage award, the jury's verdict cannot stand.

Issue 5. Section 131 violates Sergeant's equal protection rights.

A. Preservation and Standard of Review

This issue was preserved at CF, 4262-65; *see also Kinsey v. Preeson*, 746 P.2d 542, 545 (Colo. 1987). This Court reviews the constitutionality of a statute de novo.

Woo v. El Paso Cnty. Sheriff's Off., 2022 CO 56, ¶20, 528 P.3d 899.

B. Discussion

The judgment entered against Sergeant must be vacated because Section 131 violates his equal protection rights. The United States Constitution's Fourteenth Amendment and the Colorado Constitution's Article II, section 25 guarantee equal protection of the law. *Lujan v. Colo. State Bd. of Educ*., 649 P.2d 1005, 1014-15 (Colo. 1982). Equal protection ensures similarly situated persons will receive similar treatment. *Harris v. The Ark*, 810 P.2d 226, 229 (Colo.1991). Different standards control whether statutes violate equal protection. *Id*. at 229-30. When statutes don't affect fundamental rights, suspect classes, or quasi-suspect classes, the rational basis standard controls. *Id*. at 230. Section 131 doesn't affect fundamental rights, suspect classes, or quasi-suspect classes. So, the rational basis standard controls.

Statutes lack a rational basis if they "treat[] classes of [similarly situated] persons differently … based on differences that are … illusory [or in a manner not] reasonably related to a legitimate governmental interest." *Id*. at 230. Section 131 applies only to peace officers. Peace officers include only people "employed by a political subdivision of the state required to be certified by the P.O.S.T. board … Colorado state patrol officer[s] … and any noncertified deputy sheriff as described in section 16-2.5-103(2)." C.R.S. § 24-31-901(3). Because it only applies to peace

officers, Section 131 violates equal protection unless there's a rational basis for treating peace officers differently than others who are similarly situated.

Section 131 creates at least three classes of similarly situated persons. The first is peace officers. The second is non-peace-officer government agents. The third is defendants in civil cases arising from allegedly tortious conduct. And there's no reasonable basis for treating peace officers differently than the other two classes.

1. Peace officers v. non-peace officer government agents

Peace officers are government agents, and they are similarly situated to non-peace officer government agents under Art. II. Art. II is Colorado's Bill of Rights. It secures specific rights to Colorado's citizens and prohibits all government agents from infringing on them. *See* Colo. Const. Art. II, §§ 1, *et seq*. Indeed, its provisions make no distinction between peace officer government agents and non-peace officer government agents.

But Section 131 treats peace officers differently than non-peace officer government agents. Previously, government agents were not civilly liable for violating Art. II. *Bd. of Cnty. Comm'rs v. Sundheim*, 926 P.2d 545, 549 (Colo. 1996); *Young v. Larimer Cnty. Sheriff's Off.*, 2014 COA 119, ¶¶25-27, 356 P.3d 939. But that changed in 2020 when the General Assembly enacted Section 131. Now, under Section 131, peace officers who violate Art. II are liable for up to $25,000, costs,

and attorney fees, and they may also lose their POST certification, which will prevent them from serving as peace officers. C.R.S. §§ 13-12-131, 24-31-904. But under Section 131, non-peace officer government agents who violate Art. II aren't civilly liable and won't be disciplined in any way that could affect their ability to keep their jobs. Therefore, Section 131 treats peace officers differently than other government agents.

There's no reasonable basis for enforcing Art. II only against peace officers. Certainly, Colorado has a legitimate interest in protecting the rights Art. II secures. But peace officers aren't the only government agents who may violate Art. II's provisions, and only enforcing Art. II violations against peace officers doesn't reasonably relate to protecting Art. II rights.

For example, the prohibition on illegally entering a person's home doesn't apply exclusively to peace officers. *See People v. Dyer*, 2019 COA 161, ¶¶15-25, 457 P.3d 783. It applies to all government agents. *Id*. at ¶21. So, in addition to peace officers, it applies to government agents such as social workers, animal control, code enforcement, elder protection workers, and tax assessors, among others. In fact, in 2019, this Court held government social workers violated the right to be free from unreasonable searches by entering a person's home without a warrant, consent, or other exception to the warrant requirement. *Id*. at ¶¶18-25.

But Section 131 doesn't impose civil liability on social workers, animal control, code enforcement, elder protection workers, and tax assessors for illegally entering a person's home. It only does against peace officers. Because it only imposes civil liability on peace officers, the General Assembly must have a rational basis for treating peace officers differently than social workers (and all other government agents) who illegally enter a person's home. It does not.

Further, if negligence is sufficient to violate Section 131, peace officers face additional liability that non-peace officer government agents do not. Before Section 131, liability for civil rights violations "[could not] be predicated upon negligence." *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992); *see also Jones v. Bd. of Educ.*, 854 P.2d 1386, 1388 (Colo. App. 1993). Plaintiffs asserting peace officers negligently violated their rights were required to bring their claims under the CGIA. *See Collier v. City & Cnty. of Denver*, 697 P.2d 396, 399 (Colo. App. 1984). But now, if negligence is enough, plaintiffs can circumvent the CGIA.

Consider plaintiffs injured in car accidents with peace officers. If negligence is sufficient, they can allege due process violations because car accidents implicate protected life (if fatal), liberty (bodily integrity), and property interests. *See* Colo. Const. Art. II, § 25; *Williams v. Berney*, 519 F.3d 1216, 1220 (10th Cir. 2008) (discussing right to bodily integrity); *People v. Medina*, 705 P.2d 961, 967-68 (Colo.

1985) (same). Instead of bringing tort claims subject to the CGIA, plaintiffs could bring Section 131 claims, and under Section 131, the CGIA's immunity provisions, notice requirements, and damages cap would not apply. C.R.S. § 13-21-131(2)(a). So, peace officers face substantially greater potential liability than non-peace officer government agents involved in car accidents.

There's no rational basis to expose peace officers to greater liability than non-peace officer government agents for the same conduct. Colorado has an interest in compensating individuals injured in car accidents involving government agents. But those injured in accidents involving peace officers don't suffer special injuries. Conversely, Colorado has an interest in not bankrupting state and local governments, but allowing negligence actions under Section 131 cuts against that interest. And there's no evidence the legislature intended to vitiate the CGIA when enacting Section 131.

Section 131 clearly treats peace officers differently than non-peace officer government agents. Only peace officers face paying damages, costs, and attorney fees and losing their certification or professional license for violating Art. II. And allowing negligence claims under Section 131, exposes peace officers—but not non-peace officer government agents—to uncapped liability. There's no rational basis for treating them differently. Therefore, Section 131 violates Sergeant's equal

protection rights.

2. Peace officers v. other defendants in civil lawsuits

Section 131 also treats peace officers differently than other defendants in civil lawsuits in a manner not reasonably related to legitimate governmental interests. Civil rights violations are constitutional torts. *See Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *see also French v. City of Cortez*, 361 F. Supp. 3d 1011, 1041-42 (D. Colo. 2019). Peace officers defending against constitutional torts under Section 131 are similarly situated to other individuals defending against non-constitutional tort claims. There are no procedural differences between a lawsuit involving constitutional torts and a lawsuit involving non-constitutional torts. And both classes of defendants may be held liable for economic, non-economic, and exemplary damages.

But non-peace officer defendants in non-constitutional tort cases enjoy protections unavailable to peace officers in Section 131 cases. Non-peace officer defendants cannot be required to pay damages exceeding the percentage of negligence or fault attributable to them. C.R.S. § 13-12-111.5. But the trial court held peace officers are jointly and severally liable under Section 131 for all compensatory damages awarded to plaintiffs. There's also a statutory limitation on non-economic damages that may be awarded against non-peace officers. C.R.S. §

13-21-102.5. But Section 131 expressly states such statutory damages limitations are inapplicable. *Id*. at 13-12-131(2)(a).

There's no reasonable basis for abrogating the non-economic damages cap applicable to other tort claims. The General Assembly enacted the non-economic damages cap because "awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state." C.R.S. § 13-21-102.5(1). So, by abrogating the non-economic damages cap, Section 131 imposes the undue economic, commercial, and personal burdens the General Assembly sought to remedy when it enacted the non-economic damages cap. Again, the government doesn't have a legitimate interest in imposing disparate burdens and inequities on peace officers. Thus, no rationale can justify depriving peace officers of protections created by the non-economic damages cap, and doing so violates Sergeant's equal protection rights.

There's also no reasonable basis for imposing joint and several liability on peace officers. "The General Assembly abolished joint and several liability to reduce unfair burdens placed on defendants." *Slack v. Farmers Ins. Exch*., 5 P.3d 280, 286 (Colo. 2000) (quotations omitted). In its place, it enacted pro-rata liability "to cure the perceived inequity … whereby wrongdoers could be held fully responsible for a plaintiff's entire loss, despite the fact that another wrongdoer, who was not held

accountable, contributed to the result." *Id*. So, by imposing joint and several liability, Section 131 imposes the unfair burdens and inequities the General Assembly sought to remedy when it enacted pro-rata liability. The government has no legitimate interest in imposing unequal burdens and inequities on peace officers. Thus, no rationale can justify imposing joint and several liability on peace officers, and doing so violates Sergeant's equal protection rights.

CONCLUSION

This Court must reverse the trial court's orders. The trial court erroneously failed to instruct the jury that it needed to find Sergeant intentionally or recklessly made misstatements or omissions in the Affidavit. Plaintiff failed to present sufficient evidence to prove her unlawful search claim or exemplary damages. Thirty-five minutes of inconvenience and minor property damage aren't worth $3,760,000. Joint and several liability is not applicable. And Section 131 violates Sergeant's equal protection rights.

WHEREFORE, Sergeant Gregory Buschy respectfully asks the Court to vacate the judgment against him and render judgment in his favor. Alternatively, he asks the Court to vacate the judgment and order a new trial.

Dated this 8th day of August 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

Senate Legislative - June 8, 2020

Recording Name:
[Colorado_Senate_2020_Legislative_Day078_f]

Transcript Prepared By:

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DUNS Number: 037801851
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Tax ID #: 27-2983097

(Start 0:28:36)

(Recess)

Male: Mr. Carpenter, please call the roll.

Carpenter: Senators Bridges.

Bridges: Here.

Carpenter: Cooke.

Cooke: Here.

Carpenter: Coram.

Coram: Here.

Carpenter: Crowder. Danielson.

Danielson: Good morning.

Carpenter: Donovan.

Donovan: Here.

Carpenter: Fenberg.

Fenberg: Here.

Carpenter: Fields.

Fields: Here.

Carpenter: Foot.

Foote: Present.

Carpenter: Gardner. Gardner. Ginal.

Ginal: Present.

Carpenter: Gonzalez. Hansen.

Hansen: Here.

Carpenter: Hill.

Hill: Yes. Present.

Carpenter: Hisey.
Hisey: Here.
Carpenter: Holbert.
Holbert: Here.
Carpenter: Lee.
Lee: Here.
Carpenter: Lundeen. Marbel (ph)?
Marbel: Here.
Carpenter: Moreno.
Moreno: Here.
Carpenter: Patterson.
Patterson: Here.
Carpenter: Priola.
Priola: (Inaudible - 0:30:06).
Carpenter: Rankin.
Rankin: Here.
Carpenter: Rodriguez.
Rodriguez: Here.
Carpenter: Scott. Scott.
(Inaudible - 0:30:17)
Carpenter: Smallwood. Sonnenberg. Story. Tate. Thaud (ph). Williams.
Williams: Present.
Carpenter: Winter.
Winter: Here.

Carpenter: Woodward.

Woodward: Here.

Carpenter: Zenzinger.

Zenzinger: Here.

Carpenter: Mr. President.

Garcia: Here. With 35 present, zero absence, zero excused. We have a quorum. Members and guests, please rise in joining me in the Pledge of Allegiance.

Collective: I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God indivisible with liberty and justice for all.

Garcia: Approval of the journal. Mr. Majority Leader.

Fenberg: Thank you, Mr. President. I move that the reading of the journal of Saturday, June 6th, be dispensed with and that the journal be approved as corrected by the secretary.

Garcia: You have heard the motion. All those in favor, say aye.

Collective: Aye.

Garcia: All those opposed, no. The ayes have it and the motion is adopted. Senate Services.

Carpenter: (Inaudible - 0:31:58) printed Senate Bill 220, Kirkland and Gross, Senate Bill 28, 207, 210, 211, 214 and 219 (inaudible - 0:32:02), Senate Bill 007, 55,

and 200 correctly (ph) revised, Senate Bill 1206 correctly revised, House Bill 1024, 1061, 1360, 1361, 1362, 1364, 1365, 1366, 1367, 1368, 1369, 1371, 1372, 1375, 1377, 1378, 1379, 1380, 1381, 1382, 1384, 1385, 1386, 1387, 1391, 1392, 1397, 198, 1399, 1400 and 1401.

Garcia: Committee reports.

Carpenter: June 6th, 2020, Committee on Finance, after considerations of merits recommended as following: Senate Bill 218 be admitted as follows as submitted and be referred to the Committee on Appropriations with favorable recommendation. June 6th, 2020, Committee on Finance, after consideration of merits recommended as following: House Bill 1343 be referred to Committee of Old with a favorable recommendation. June 6th, 2020, Committee on Finance, after consideration of merits recommended as following: Senate Bill 213 be amended as follows and be referred to --

(End 0:32:52)

(Start 3:19:19)

(Recess)

(End 3:19:39)

(Start 4:18:25)

Chair: Seeing no further discussion, the motion for the body

is the adoption of Amendment L091. All those in favor say aye.

Collection: Aye.

Chair: Those opposed, no. The ayes have it and the amendment is adopted. There is an amendment making its way to the desk. Will the clerk please read Amendment L089?

Carpenter: Amendment L089 --

Chair: Senator Gardner.

Gardner: Thank you, Madam Chair. Drumroll. I move L089, Madam Chair.

Chair: Thank you. To the amendment.

Gardner: Thank you. Members, one of the largest issues in this bill of the most discussion and the most concern for law enforcement has to do with the creation of a new cause of action for depravation of civil rights. Um, and, and frankly, that cause of action exists in federal law with, um, significant immunities and defenses, and in order for it to be effective I think from the standpoint of the proponents of this bill they did not want so-called qualified immunity to be operative. Um, currently the bill as introduced reads, "Neither qualified immunity nor a defendant's good faith but erroneous belief in the lawfulness of his or her conduct is a defense to liability pursuant to this section." Now for those of you in the know

about qualified immunity, which might be three of us, um, qualified immunity is kind of a creature of federal law, and it is a creature of federal law that is currently the subject of the Supreme Court case or set of cases that everyone expects from both sides of the spectrum on the court to be severely, um, curtailed. But the good faith defense is and has been part of juris prudence for some time. And so I heard testimony from those affected by this that the qualified immunity defense was not something that we needed or should spend a great deal of time trying to preserve. Now there's a lot of discussion about whether the good faith defense is about good faith but erroneous belief which means you're acting in good faith but you're completely and severely mistaken versus good faith and reasonable belief. And I believe that proponents of this bill wish to continue to allow a good faith but reasonable belief defense because that is part of the Fourth Amendment Juris Prudence as it exists today. But they had objections to the idea of a good faith and erroneous belief standing as a defense. And for those of you who are wondering, this is for purposes of the record with regard to this discussion and amendment for those who might look later from the courthouse. So the

discussion was well if you're removing in the original bill the good faith but erroneous belief but the argument one of the proponents was that good faith but reasonable belief defense would remain because that is part of the juris prudence, why is law enforcement so concerned? Why is law enforcement so bothered? And the answer is because if you address good faith at all, then you need to say that good faith on the so-called objective test needs to remain. The other end of the spectrum is in arguing about this language is well if the good faith and reasonable belief test is part of the juris prudence and it remains, then are we best and is it better to only remove qualified immunity leaving whatever, whatever good faith defense exists in the Fourth Amendment Juris Prudence intact. Amendment L089 reads -- it, it strikes that paragraph about good faith and reasonable erroneous and simply says, "Qualified immunity is not a defense to liability pursuant to this section." If this amendment is adopted, it is my belief that whatever good faith defense exists in the Fourth Amendment Juris Prudence to this civil cause of action and liability on depravation of constitutional rights will continue to be as it is, the good faith defense as it exists in current Fourth Amendment Juris Prudence will

remain. The only thing that will be removed is the qualified immunity defense. This is a good approach to preserve a defense on the part of our law enforcement officers who are on the street every day and every night making really tough decisions and acting in good faith that if they do so reasonably they will have a defense and it will remain. I ask for an aye vote on L089.

(End 4:24:47)

(Start 4:25:09)

Chair: Senator Foote.

Foote: Well thank you, Madam Chair. I want to address a little bit about this qualified immunity and good faith defense, uh, to the best that I can verbalize it and hopefully non-lawyer speak. Sometimes that's difficult for those of us that are used to speaking lawyer speak. But really I think that the -- this issue became an issue because it was spelled out specifically in the bill as the good faith defense. Now the most important part about this bill that will remain in this section is that still qualified immunity cannot be used. So qualified immunity as the doctrine has expanded continuously for years is being taken out of consideration, and it can't be used in, uh, in these particular civil cases if this bill were

to pass, even with this amendment on it. But, um, any time that there is an effort to, uh, to prove that a law enforcement officer violated somebody's civil rights part of that proof has to be a mental state and the mental state would be some level of intent. You know, if for example the officer intentionally deprived or intent -- meant to deprive that person of their civil rights. So during the course of that, uh, civil case the officer's defense can always be well I didn't know what I was doing was wrong or it was an honest mistake or whatever they want to say which could be theoretically lumped into something like a good faith defense. But the point I want to make is that that's available anyway under, um, current juris prudence, and I think just the fact that this was originally spelled out the way it was in the bill drew some attention to it that really shouldn't have because it, it made it out to be something that's completely separate from the qualified immunity, um, discussion. So what I think is most important and, and what will be preserved in the bill is the fact that there won't be this, um, ability to use qualified immunity in these types of cases anymore because the qualified immunity doctrine has been something that has been expanded to the extent that it pretty much is

immunity to virtually any type of action. It's very difficult to bring a civil action against an officer because of qualified immunity. Under this amendment the exclusion of qualified immunity remains. And so I think that's just important to, to put out there, um, and it's -- and I think it's important to keep the qualified immunity part out. The U.S. Supreme Court is currently deciding the scope of qualified immunity, but over the last few decades, uh, the, uh, concept of qualified immunity has expanded to, uh, to a level that is, um, probably is unrecognizable to those that first wanted to bring it up. I mean really what the practical matter is is if there is not some scenario that's exactly the same, then it's not settled law and therefore qualified immunity attaches. So if you have an officer that pulls over a vehicle that has two people in the vehicle as opposed to a previous case where it was three people in the vehicle, then qualified immunity attaches and that's just not how it should be. Officers that commit, um, uh, violations of constitutional rights should be held accountable civilly and criminally if applicable, and, um, the exclusion of qualified immunity certainly brings us a big step towards making sure that they're civilly liable for that conduct. So it's a, it's a good

amendment and, um, uh, ask for an aye vote.

(End 4:28:31)

TRANSCRIBER'S CERTIFICATE

I, Michelle Eaves, do hereby certify that I have listened to the recording of the foregoing; further that the foregoing transcript, Pages 1 through 11, was reduced to typewritten form from a digital recording of the proceedings held June 8, 2020, in this matter; and that the foregoing is an accurate record of the proceedings as above transcribed in this matter on the date set forth.

DATED this 21st day of June, 2023.

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