Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED October 18, 2024 4:00 PM
Plaintiff: RUBY JOHNSON, Appellee v. Defendants: GARY STAAB and GREGORY BUSCHY Appellants	⮝ FOR COURT USE ⮝
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APPELLANT GREGORY BUSCHY'S REPLY 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 5,670 words.

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.

Answer Brief means Appellee Ruby Johnson's Answer Brief.

App means Apple's Find My iPhone application.

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

DDA means Deputy District Attorney Ashley Beck.

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.

Opening Brief means Appellant Gregory Buschy's Opening Brief.

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.

ARGUMENT[1]

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

The trial court should have required the jury to follow the four-step analysis articulated in *People v. Dailey*, 639 P.2d 1068 (Colo. 1982) and applied in *People v. Reed*, 56 P.3d 96 (Colo. 2002), which criminal courts use when determining whether an affidavit with misstatements and/or omissions establishes probable cause. *See Appellant Gregory Buschy's Opening Brief* ("*Opening Brief*"), 11-18. Plaintiff argues the four-step analysis isn't proper, and if it is, she would've prevailed because the jury found Sergeant acted willfully and wantonly. But the four-step analysis is proper, and the jury's willful and wanton finding doesn't render the trial court's improper jury instruction harmless.

A. The jury should have been instructed on the *People v. Dailey* and *People v. Reed* four-step analysis.

Plaintiff argues the four-step analysis isn't proper because it's a federal standard that doesn't control and would add qualified immunity and a good faith exception to Section 131. Although federal law doesn't control, the four-step analysis doesn't create qualified immunity or a good faith exception.

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[1] This Reply Brief only addresses Plaintiff's arguments not fully addressed in Appellant Gregory Buschy's Opening Brief. Not addressing an argument herein is not to be construed as a waiver.

Federal law doesn't control, and Sergeant never argued otherwise. However, because the Fourth Amendment and Art. II, 7 are identical, federal law is the starting point when determining whether Art. II, 7 was violated. *See Woodall v. Godfrey*, 2024 COA 42, ¶13. Indeed, in *People v. Dailey* and *People v. Reed*, the Colorado Supreme Court adopted and applied the Fourth Amendment standard when determining whether an affidavit with misstatements and/or omissions violates Art. II, 7. *Reed*, 56 P.3d at 99-102; *Dailey*, 639 P.2d 1068, 1074-76. Sergeant merely asks this Court to hold the four-step analysis from *People v. Dailey* and *People v. Reed*—a standard under Colorado law, also routinely applied by federal courts in civil rights cases—must be followed in Section 131 civil rights cases.

Further, the four-step analysis doesn't create qualified immunity. Qualified immunity bars federal claims against government officials who do not violate clearly established rights. *Toevs v. Reid*, 685 F.3d 903, 909 (10th Cir. 2012). When a defendant raises qualified immunity, a plaintiff must prove (1) the defendant violated her civil rights and (2) her civil rights were clearly established. *Pearson v. Callahan*, 555 U.S. 223, 232-33 (2009). The two prongs are entirely separate. *See e.g. Kapinski v. City of Albuquerque*, 964 F.3d 900 (10th Cir. 2020)(analyzing under the qualified immunity standard whether an officer violated the Fourth Amendment by omitting exculpatory evidence from a search warrant affidavit and whether it was clearly

established he violated the constitution).

The first qualified immunity requirement merely asks if the law was violated. This is exactly what Section 131 requires: a plaintiff must prove her civil rights were violated. C.R.S. § 13-21-131(1). Section 131 doesn't change this requirement. The four-step analysis is still the standard under Colorado law for determining whether searching a home under a warrant violated Art. II, 7, nothing more, nothing less. So, requiring the jury to follow the four-step analysis is proper.

The qualified immunity "clearly established" requirement isn't part of the four-step analysis. A right is clearly established if "at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)(quotations omitted). To prove a right is clearly established, "the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cnty.*, 806 F.3d 1022, 1027 (10th Cir. 2015). Clearly established law isn't defined "at a high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). Rather, plaintiffs must produce caselaw with facts like those in their cases. *Id*.

Neither Section 131 nor the four-step analysis require plaintiffs to produce on

point caselaw with similar facts to prove officers illegally searched their property. C.R.S. § 13-21-131; *People v. Cox*, 2018 CO 88, ¶9, 429 P.3d 75; *Dailey*, 639 P.2d at 1074-76. Because it doesn't require plaintiffs to produce on point caselaw to prove their claims, Section 131 eliminated qualified immunity by removing the second, "clearly established" prong. Conduct sufficient to satisfy the first prong is sufficient to show a rights violation under Colorado law. This is consistent with the four-step analysis, which doesn't require plaintiffs to prove their rights were clearly established. Therefore, it doesn't create qualified immunity for Section 131 claims.

The four-step analysis doesn't create a good faith exception to Section 131 claims, either. A good faith exception already exists under Colorado law. C.R.S. § 16-3-308. It's an exception to the exclusionary rule. *People v. Leftwich*, 869 P.2d 1260, 1271 (Colo. 1994). The exclusionary rule only applies when officers obtain evidence in violation of a person's constitutional rights. *See Casillas v. People*, 2018 CO 78M, ¶19, 427 P.3d 804. So, before the good faith exception even comes into play, there must first be a constitutional violation.

The four-step analysis' purpose is to determine whether a search under a warrant violated Art. II, 7. *See Cox*, 2018 CO 88, ¶¶7-10; *Dailey*, 639 P.2d at 1074-76. If—and only if—the analysis shows the search violated Art. II, 7, then a separate analysis must be conducted to determine whether the evidence must be excluded at

a criminal trial. *See People v. McKnight*, 2019 CO 36, ¶61, 446 P.3d 397. The good faith exception is part of the separate analysis. *See id*.

Neither exclusion nor the good faith exception are at issue here. Plaintiff seeks damages, not the exclusion of evidence. Neither Sergeant nor Detective raised a good faith exception defense. Rather, they seek to hold Plaintiff to her burden to prove an Art. II, 7 violation. And she hasn't met that burden because the trial court failed to require the jury to follow the four-step analysis. Therefore, the good faith exception isn't at issue.

B. The failure to properly instruct the jury is harmful.

The trial court's failure to properly instruct the jury is harmful, notwithstanding the jury's willful and wanton finding. There's no evidence Sergeant acted willfully and wantonly. *Opening Brief*, 27-28. Thus, the finding doesn't render the trial court's error harmless.

Also, Plaintiff undermines her own argument. The four-step analysis' scienter requirement requires a plaintiff to prove a defendant intentionally or recklessly created a falsehood in a warrant affidavit. *Reed*, 56 P.3d at 99; *Dailey*, 639 P.2d at 1075; *Rosenblum v. Budd*, 2023 COA 72, ¶39, 538 P.3d 354. But, according to Plaintiff, the jury could have found Sergeant acted willfully and wantonly because he "push[ed] forward with the warrant" even though he was concerned about

whether probable cause supported it. *Appellee Ruby Johnson's Answer Brief* ("*Answer Brief*"), 27-28. Sergeant's probable cause concerns aren't tantamount to him intentionally or recklessly creating falsehoods in the affidavit. Thus, according to Plaintiff's own argument, the conduct didn't violate the law and the trial court's failure to properly instruct the jury isn't harmless.

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

Plaintiff didn't prove Sergeant intentionally or recklessly made any material misstatements or omissions in the Affidavit. *Opening Brief*, 18-27. Nor did she prove he acted willfully and wantonly. *Id*. at 27-28. Plaintiff argues she did because the jury was properly instructed; Sergeant admitted there are false statements in the Affidavit; the red dot is the only evidence supporting a belief the iPhone was inside the House; Detective falsely said the iPhone didn't ping until 11:24 a.m.; the statement Owner used the App multiple times is false; there wasn't "reason to believe" the iPhone was in the House; the identified omissions were material, and Sergeant acted willfully and wantonly because he pressed forward with obtaining the warrant despite his probable cause concerns. *Answer Brief*, 19-29. *Opening Brief*, 24-26 explains how no omission was material, and that argument will not be repeated. Plaintiff's other arguments will be addressed in turn.

As explained above and in *Opening Brief*, 11-18, the jury wasn't properly

instructed. Therefore, it never considered whether Sergeant acted with the necessary scienter. And Plaintiff made no attempt to prove he did.

Sergeant hasn't admitted the Affidavit has false statements. He simply acknowledged the jury could've found it has two false statements. *Opening Brief*, 20. And as previously explained, those statements are immaterial. *Id*. at 22-24.

Additionally, the Image's red dot isn't the only evidence the iPhone was inside the House. Other evidence indicating the same includes: the iPhone was pinging at the House when Owner drove by, the iPhone pinged at the House at 3:55 p.m., and Owner told police he previously used the App to successfully find another lost phone.

Plaintiff argues the jury was entitled to reject this additional evidence but fails to explain how. A jury's conclusions must be supported by a "logical and convincing connection between the facts established and the conclusion[s] inferred[;] … guessing, speculation, conjecture, or a mere modicum of relevant evidence" are insufficient. *People v. Perez*, 2016 CO 12, ¶25, 367 P.3d 695. The evidence depends on Owner's credibility. As an identified victim, he is presumed reliable, and Detective and Sergeant were entitled to rely on his statements. *See People v. Valencia*, 257 P.3d 1203, 1208 (Colo. App. 2011). And nothing rebuts that presumption. Owner didn't testify, and Plaintiff presented absolutely no evidence

that Detective and Sergeant knew or had any reason to believe Owner wasn't telling the truth. Indeed, there was no evidence undermining Owner's credibility or Detective's and Sergeant's reasonable reliance on his statements. Because there isn't evidence Owner wasn't telling the truth, the jury had no basis to reject his statements.

There's also no evidence Detective falsely said the iPhone didn't ping until 11:24 a.m. Juries aren't entitled to ignore basic grammar. *See Perez*, 2016 CO 12, ¶25. No reasonable person reading the Affidavit could possibly conclude Detective said the iPhone didn't ping before it pinged at the House.

Also, whether Owner used the App multiple times or a single time is immaterial. What matters is whether Owner's experience suggested the App is reliable. The fact Owner used it once, with success, shows that it is.

Further, there was reason to believe the iPhone was in the House. Again, "reason to believe" means probable cause. As explained in *Opening Brief*, 18-26, there was probable cause the iPhone was in the House.

Plaintiff also failed to show Sergeant acted willfully and wantonly. Willful and wanton conduct is purposeful conduct engaged in without regard to the rights of others. C.R.S. § 13-21-102(1)(b). Sergeant didn't act without regard to Plaintiff's rights. His probable cause concerns were about staleness, not whether the iPhone was in the House. TR 2/27/2024, 241, 283, 316. And he didn't merely press forward

without regard to Plaintiff's rights. *See* TR 2/27/2024, 236, 265-68; TR 2/28/2024, 84; TR 2/29/2024, 113-19. He and Detective both sought and obtained legal advice from DDA and Supervisor and verified with Owner that the App was reliable. *Id*. Plaintiff doesn't dispute this evidence. *Answer Brief*, 19-29. And it shows Sergeant did not act without regard to Plaintiff's rights.

Therefore, Plaintiff's arguments fail. She didn't prove Sergeant violated Art. II, 7 or acted willfully and wantonly. The judgment against Sergeant must be vacated.

Issue 3. The jury awarded excessive noneconomic[2] damages.

Awarding Plaintiff $1,250,000 for 35 minutes of inconvenience and uncorroborated emotional distress is excessive. She argues the damages aren't excessive because the jury has discretion to award noneconomic damages and received evidence about how the search impacted her. She also argues the Court shouldn't consider verdicts from other cases, and if it does, the verdicts from two additional cases show the noneconomic damages award is appropriate. But competent evidence doesn't support the jury's verdict. Comparable cases show the jury's verdict is excessive. And Plaintiff's cases aren't analogous.

[2] As explained in *Opening Brief*, 33-34, the jury also awarded excessive exemplary damages.

A. Substantial evidence does not support the jury's verdict.

Juries don't have unfettered discretion to award damages. *Palmer v. Diaz*, 214 P.3d 546, 552 (Colo. App. 2009). Their damages determinations must be based on "substantial evidence," not speculation or conjecture. *Id*. "Substantial evidence is that which is probative, credible, and competent." *Id*. If substantial evidence doesn't support a damages award, the award must be set aside. *Id*.

Plaintiff didn't produce substantial evidence to support her noneconomic damages award. Large emotional distress damages awards require—among other things—objective, corroborating evidence to support a finding that a plaintiff suffered substantial emotional distress. *See Towns v. Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978); *Sooroojbaillie v. Port Auth. of N.Y. & N.J.*, 816 Fed. Appx. 536, 547 (2d Cir. 2020)(unpublished). Objective, corroborating evidence is especially necessary when a plaintiff who suffered no physical injury seeks to recover emotional distress damages. *See Towns*, 579 P.2d at 1164. In fact, previously, emotional distress damages weren't recoverable unless a plaintiff also suffered a physical injury because, without physical injury, emotional distress damages were "too speculative, and the possibility of fraudulent claims [was] too high[.]" *Id*.

But in 1978, the Colorado Supreme Court authorized juries to award

emotional distress damages even if a plaintiff didn't suffer physical injury, and the rationale underlying this authorization underscores the need for objective, corroborating evidence. *Id*. The Court explained "advances in diagnosing and evaluating emotional and mental injuries" could enable juries to discern between meritless and real claims. *Id*. It also anticipated juries would receive psychiatric and psychological evidence "concerning causation and treatment of psychic injuries to provide [them] with an intelligent basis for evaluating a particular claim." *Id*. That is, the Court specifically identified psychiatric and psychological evidence as the evidence necessary to support a substantial emotional distress damages verdict. *See id*.

The Court's later decisions also require psychiatric and/or psychological evidence to obtain a substantial emotional distress damages verdict. *See Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 863-64 (Colo. 2004); *Johnson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999). In *Hoffman* and *Johnson*, plaintiffs sought emotional distress damages. The defendants tried to discover the plaintiffs' mental health medical records. The Court prohibited the defendants in each case from discovering the records because each plaintiff only sought "garden variety" damages—damages that "do[] not exceed the suffering and loss an ordinary person would experience in similar circumstances." *Id*. But it indicated the plaintiffs'

mental health records would be discoverable if they claimed severe or unusual emotional distress. *See id*. So, if the plaintiffs claimed they suffered severe or unusual emotional distress, their mental health records would have been discoverable because they would have needed to present psychiatric and/or psychological evidence to prove their claims.

Here, a $1,250,000 award grossly exceeds any garden variety emotional distress damages recoverable for a 35-minute search during which Plaintiff was treated respectfully and sustained only $200 in property damage. Because Plaintiff claimed emotional distress damages exceeding garden variety damages, she needed to present objective, corroborating psychiatric and/or psychological evidence to support her heightened damage claim. She didn't. Without it, the jury lacked an intelligent basis for evaluating her claim. Instead, they had to speculate about the extent of her emotional distress. Thus, substantial evidence doesn't support the jury's emotional distress damages award, and it must be set aside.

B. Comparable cases show the jury's verdict is excessive.

Plaintiff incorrectly argues the Court should not consider verdicts from similar home search cases. The Colorado Supreme Court has considered damages in similar cases when determining whether damages were excessive. *Tunnel Min. & Leasing Co. v. Cooper*, 115 P. 901, 904 (Colo. 1911). Also, although similar verdicts alone

may not be dispositive, the Tenth Circuit compares similar cases when considering the excessiveness of a verdict, especially where a previous case is "similar enough to serve as a meaningful benchmark." *See Osterhout v. Bd. of Cnty. Commissioners of LeFlore Cnty.*, 10 F.4th 978, 999 (10th Cir. 2021); *see also Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989). In *Wulf*, a police officer was fired after he wrote a letter requesting that the state attorney general investigate his police department. He sued and sought emotional distress damages. At trial, he presented evidence that losing his job was "very stressful", caused him to be "'angry,' 'depressed,' scared,' and frustrated[,]'" put him "under a tremendous emotional strain[,]" and caused "tremendous financial difficulty." *Wulf*, 883 F.2d at 855. The jury awarded $250,000 in emotional distress damages. *Id*. at 856. On appeal, the Tenth Circuit held the damages were excessive. *Id*. at 875. It then compared his damages to those of other officers who received emotional distress damages after being fired and concluded the officer could not have suffered more than $50,000 in emotional distress. *Id*.

Because, as *Wulf* illustrates, it is appropriate to consider comparable cases, this Court should consider verdicts in similar cases here. There are at least seventeen cases from 2005-2022 involving officers searching homes without arresting or injuring the homes' residents, just like Sergeant and Detective. CF, 4267-75. At least four involved allegations that the officers included false or misleading information

in search warrants. *Bonner v. Police Officer O'Toole*, JVR No. 1810290002, 2018WL5404936; *Cooper v. Officer Daily et al.*, JVR No. 1311070022, 2012WL9500661; *McNelis v. Police Officer Craig*, JVR No. 1508030028, 2015WL4624001; *Escochea v. Valdiva*, JVR No. 1706050025, 2017WL2458262. The awards to the plaintiffs in those cases were $25,001, $125,000, $45,000, $1, and $12,500. *Id*.

Each of these cases is sufficiently like Plaintiff's case to serve as a meaningful benchmark. Like Plaintiff's case, none involves physical injuries or arrests, and all four involve allegations of falsified affidavits. Because they serve as meaningful benchmarks, they show the $1,250,000 noneconomic damages award is grossly excessive.

The remaining cases also show Plaintiff's damages are grossly excessive. None of them have seven-figure noneconomic damages awards. CF, 4267-75. Three have six-figure noneconomic damages awards to individual plaintiffs, $372,500, $300,000, and $500,000. *Ali v. City of N.Y.*, JVR No. 2007160035, 2012 WL 13207469; *Gonzalez et al. v. Cnty. of Fresno et al.*, 2023WL3478196; *Jenkins v. Brooks et al.*, JVR No. 1207170013, 2012WL2930093. But the trial court vacated the $372,500 award and ordered a new trial on damages, indicating the judge concluded the award was excessive. *Ali*, JVR No. 2007160035. The other cases

involved officers killing the plaintiffs' dogs, and the $500,000 award included trebled damages under California law. *Id*. These cases involved greater harms, more extreme conduct, and trebled damages but, nevertheless, involve damage awards substantially lower than what Plaintiff received. Thus, this shows Plaintiff's noneconomic damages award is grossly excessive.

The remaining noneconomic damages verdicts were for $1, $17,000, $2, less than $100,000 (includes economic and noneconomic damages), $50,000, $10,000, $15,000, $25,000, $50,000, $53,000 (reporter doesn't differentiate economic from noneconomic damages), and $1. *Karash v. Trooper Machacek, et al.*, JVR No. 1804250019, 2018WL1947208; *Ulitchney v. Ruzicki*, JVR No. 2009WL6873005, *Van Allen v. Baltimore Cnty.*, 2006WL1976055; *Ellison v. Balinski*, 2009WL6016522; *Letcher v. Town of Merrillville*, JVR No. 519794, 2009WL6705419; *Rosen v. Wentworth*, JVR 1505210011, 2014WL9887641; *Finley v. City of Rogers*, JVR No. 444899, 2005WL4034842; *Barajas v. City of Rohnert Park*, JVR No. 1901290017, 2018WL7139022; *Fassoth v. City of Los Angeles*, 30 Trials Digest 16th 4, 2012WL8718254; *Pace v. Barrett*, 2005WL6725650. The conduct in these cases involved conduct less and more extreme than Sergeant's and Detective's conduct. *See id*. Yet the highest damages awards were less than $100,000 for damaging computers and $53,000 for killing prize chickens. *Ellison*,

2009WL6016522; *Fassoth*, 30 Trials Digest 16th 4. These cases involved more extreme conduct but nevertheless involve damages substantially less than what Plaintiff received and show Plaintiff's noneconomic damages award is grossly excessive. Thus, the trial court erred by failing to grant a new trial or reduce the award.

C. Plaintiff's cited cases are not analogous.

Plaintiff argues *Franco v. City of Boulder*, No. 19-cv-02634, 2022WL474699 (D. Colo. Feb. 16, 2022)(unpublished) and *Loggervale v. Holland*, 677 F. Supp. 3d 1026, 1061 (N.D. Cal. 2023) show the jury's verdict isn't excessive. But each case is distinguishable.

Franco involved a false arrest, not a home search. The plaintiff, on probation for assaulting a police officer, believed officers were harassing him and became despondent. His acquaintances called the police to perform a welfare check. Sixteen officers responded to the call, and within moments, surrounded plaintiff, handcuffed him, cut off his backpack, got in his face and barraged him with questions, and arrested him for a probation violation because he had been drinking. They searched his backpack, found contraband, and arrested him. After twelve days in jail, he bonded out, and all charges against him were ultimately dropped. He sued, and a jury awarded him $3,410,000. Reviewing whether the award was excessive, the trial

court considered the circumstances of his arrest and the twelve days he spent in jail to conclude it was and reduce the award to $2,100,000. *Franco*, 2022WL474699 at *10-11.

Plaintiff's case is different and involves a home search. Officers didn't surround her, handcuff her, arrest her, or get in her face to barrage her with questions. She also wasn't jailed. Thus, *Franco* is not remotely similar and cannot serve as a benchmark for Plaintiff's damages.

Neither can *Loggervale*. In *Loggervale*, a California officer racially profiled an African American mother and her two teenage daughters. Without evidence, the officer suspected them of burglarizing vehicles. The officer removed them from their vehicle, handcuffed them, and forced them to sit in the back of his vehicle for 91 minutes. More officers arrived, and they searched the mother's car. During the search, one of the daughters needed to use the restroom but was not allowed to. The three were released after a supervisor arrived and spoke with them. The three sued, and a jury awarded them a combined $8,250,000. Post trial, the officers argued the jury's awards were excessive. The trial court rejected their argument because the damages compensated the mother and daughters for the "emotional distress, indignity, shame, or humiliation" of being investigated, handcuffed, and detained solely based on their race. *Loggervale*, 677 F. Supp. 3d at 1061. Additionally, the

damages award was so large because it included treble damages (actual damages plus three-times actual damages) under California law for civil rights violations. *Id*. at 1060.

Plaintiff's case is nothing like *Loggervale*. Again, *Loggervale* didn't involve a home search. Plaintiff wasn't investigated, handcuffed, or detained. More importantly, as her attorney said during closing argument, she never claimed race was a factor in this case. TR. 3/2/3024, 114:7-11. And unlike California, Colorado doesn't allow jurors to add treble damages to actual damages in civil rights cases. Thus, *Loggervale* is inapposite.

Issue 4. Joint and several liability does not apply.

The trial court erred by imposing joint and several liability on Sergeant and Detective. Plaintiff argues Section 111.5 is a limitation on damages and is, therefore, vitiated by C.R.S. § 13-21-131. She also argues that even if Section 111.5 isn't a limitation on damages, joint and several liability is proper because she suffered an indivisible injury. Plaintiff is wrong.

Despite Plaintiff's arguments, as explained in *Opening Brief*, 34-36, Section 111.5 is not a limitation on liability or damages. Section 111.5 does not actually place any statutory cap or limitations on damages that plaintiffs can receive. It similarly does not limit what types of claims can be brought. It only requires

factfinders to apportion the percentage of fault attributable to each party. Because Section 111.5 does not enumerate or limit which claims plaintiffs may bring, and it does not establish a sum certain cap on damages, Section 111.5 is not vitiated by C.R.S. § 13-21-131.

And this Court already rejected Plaintiff's alternative argument. "[I]ndivisibility of an injury is not an obstacle to applying [Section 111.5]." *Blakeland Drive Invs., LLP IV v. Taghavi*, 2023 COA 30M, ¶58, 532 P.3d 369. Unless there's a finding two or more defendants "consciously conspire[d] and deliberately pursue[d] a common plan or design to commit a tortious act[,]" juries must apportion liability among all defendants. C.R.S. § 13-12-111.5(4). Here, the jury never considered whether Sergeant and Detective consciously conspired and deliberately pursued a common plan or design because this is the first time Plaintiff raised this argument. Thus, Section 111.5 required the jury to apportion fault between Sergeant and Detective, and because it didn't, the judgment against Sergeant must be reversed.

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

A. This issue was preserved.

The trial court should've decided whether Section 131 violates Sergeant's equal protection rights, and this issue is preserved for appellate review. A trial court

can consider issues of constitutional proportions when raised in a motion for new trial. *See Kinsey v. Preeson,* 746 P.2d 542, 545 (Colo. 1987). In *Kinsey,* plaintiff obtained a judgment for compensatory damages, exemplary damages, and an order to incarcerate the defendant for one year or until damages were paid. In his motion for new trial, the defendant argued for the first time that the statute authorizing his incarceration violated his equal protection rights. The plaintiff asserted the argument was not properly before the court. The Colorado Supreme Court nevertheless considered the equal protection argument because the defendant raised it in a motion for new trial, and even if he had not, the Court would have considered it for the first time on appeal. *Kinsey*, 746 P.2d at 545.

If the Colorado Supreme Court considered the *Kinsey* defendant's equal protection argument, the trial court should've considered Sergeant's equal protection argument. Like the *Kinsey* defendant, Sergeant raised his equal protection argument in a motion for new trial. The *Kinsey* defendant properly raised his equal protection challenge. Therefore, Sergeant properly raised his equal protection challenge, and the trial court should've considered it.

The trial court should also have considered Sergeant's equal protection challenge because it wasn't fully ripe until after trial. Constitutional challenges to damages awards aren't ripe until after damages are awarded, and such challenges

may be raised under C.R.C.P. 59. *See Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.*, 117 P.3d 60, 74 (Colo. App. 2004); *see also Local Union 38 v. Pelella*, 350 F.3d 73, 89 (2d Cir. 2003). In *Vista Resorts*, the defendant challenged the constitutionality of a statute authorizing treble damages against it. It first raised the issue in its motion for new trial. On appeal, the plaintiff argued the defendant didn't preserve the challenge. This Court concluded it preserved the challenge because the issue of the treble damage statute's constitutionality wasn't ripe until treble damages were awarded. *Vista Resorts*, 117 P.3d at 74.

Like the issue of the treble damages statute's constitutionality in *Vista Resorts*, the issue of whether Section 131 violates Sergeant's equal protection rights wasn't fully ripe until after trial. As explained in *Opening Brief*, 36-44. Section 131 violates equal protection in four ways: (1) it creates a cause of action against peace officers but not similarly situated non-peace officer government agents; (2) according to the trial court, it removes the Colorado Governmental Immunity Act damages cap on peace-officer negligent conduct but not on non-peace officer government agent negligent conduct; (3) also according to the trial court, it imposes joint and several liability on peace officers but not on non-peace officers, and (4) it removes the cap on non-economic damages awarded against peace officers but not against non-peace officers.

Three of these challenges are to the constitutionality of the damages awarded against Sergeant. Sergeant couldn't raise them until after trial. Before trial, it was uncertain whether the jury would award damages exceeding the damages caps or whether he would be held jointly and severally liable. If the jury had awarded damages not exceeding the caps or if he hadn't been held jointly and severally liable, it would have been a waste of time for Sergeant to argue or the Court to resolve these issues before trial.

But once the jury awarded damages exceeding the caps and held him jointly and severally liable, it was no longer a waste of time, and Sergeant's challenges to the damages became ripe, like the challenge to the treble damages statute in *Vista Resorts*. In fact, those challenges are expressly permitted under C.R.C.P. 59(d)(5) because they assert the awarded damages are excessive. So, because most of Sergeant's equal protection challenges didn't ripen until after trial and the crux of those challenges is that the jury awarded excessive damages, the trial court should've considered them, and they are preserved for appellate review.

B. No rational basis supports treating peace officers differently under Section 131.

Plaintiff's arguments fail to show a rational basis for treating peace officers differently under Section 131. She asserts peace officers aren't similarly situated to other government agents and private citizens because peace officers "have the

authority to detain, arrest, imprison, and even kill … under certain conditions." *Answer Brief*, pp. 40-41. She also argues examples of police violence and Section 131's indemnification provisions establish a rational basis for Section 131. *Id*.

Plaintiff's argument that only peace officers have authority to detain, arrest, imprison, and kill under certain conditions, thus making them dissimilar to government agents and private citizens, is wrong. Private citizens have authority to arrest others for crimes committed in their presence. C.R.S. § 16-3-201. They may also use reasonable force, including deadly force when effecting arrests. C.R.S. § 18-1-707(7). Non peace officer government agents, even if they don't have statutory authority to arrest, "do[] not have less authority to arrest than a person who is a private citizen." *See People v. Wolf*, 635 P.2d 213, 216 (Colo. 1981). Further, with the proper legal authority or justification, anyone, including private citizens can detain and imprison others. *See* C.R.S. § 18-3-303(1); *Goodboe v. Gabriella*, 663 P.2d 1051, 1055 (Colo. App. 1983). Therefore, because non peace officer government agents and private citizens also have authority to detain, arrest, imprison, and kill under certain conditions, they and peace officers are similarly situated.

Plaintiff's argument that Section 131 is rationally related to legitimate government interests is also wrong. She asserts the General Assembly had a rational

basis for holding only peace officers accountable for violating rights guaranteed under the Colorado Bill of Rights because it "might have" looked to several excessive force cases including those of Elijah McClain, D'Von Bailey, or George Floyd. *Answer Brief*, pp. 41-42. Plaintiff also argues other excessive force statistics, including police shootings, justify holding only peace officers liable under Section 131. *Id*.

Plaintiff's samples and statistics in the excessive force context do not create a rational basis for Section 131's sweeping scope. Critically, the General Assembly did not limit the application of Section 131 to claims for excessive force. Section 131 is far broader and holds peace officers liable for the deprivation of "any individual rights" in the Colorado Constitution's bill of rights. C.R.S. § 13-21-131(1). Such rights include the rights to govern and defend oneself, to defend one's property, to seek and obtain happiness, to freely exercise one's religion, to not practice religion, to have free elections, to have open courts, to be free from unreasonable searches and seizures, to have prosecutions initiated by indictment or information, to receive certain process if one is accused of treason, to freely speak, to be free from ex post facto laws, to not be imprisoned for debt, to bear arms, to not have private property for public use without just compensation, to receive certain protections during criminal prosecutions, to assemble and petition, to due process,

to be free from slavery, and to equality. Colo. Const. art. II. The right to be free from excessive force is only one part of the right to be free from unreasonable seizures. So, Plaintiff's examples and statistics pertain only to one of dozens of rights that peace officers may now be held financially liable for violating, and they fail to justify treating peace officers disparately as to violations of the other rights.

Further, this is not an excessive force case. Plaintiff never claimed Detective, Sergeant, or any other officer used force, let alone excessive force, on her. She only alleged they unlawfully searched her home, a wholly distinct cause of action. Pointing to excessive force examples and statistics doesn't provide any rational basis for treating peace officers differently than social workers (and all other government agents) who illegally search a person's home.

Finally, Section 131's requirement that peace officers' employers indemnify peace officers doesn't prevent Section 131 from violating Sergeant's equal protection rights. Indemnification doesn't change that Sergeant was sued individually or that a substantial judgment entered against him. Judgments have collateral consequences. They affect Sergeant's reputation, may have negative employment effects, and may affect his ability to get a loan. Also, Sergeant isn't required to prove every provision in Section 131 is unconstitutional. *See* C.R.S. § 2-4-204. The indemnification provision also doesn't change the fact that other

provisions in Section 131, as already explained, treat peace officers disparately than other similarly situated individuals without a rational basis.

Opposition to Plaintiff's Fee Request

Plaintiff's request is insufficient under C.A.R. 39.1. "Mere citation to this rule or to a statute, without more, does not satisfy the legal basis requirement." C.A.R. 39.1. Plaintiff fails to explain the legal and factual basis for an award of attorney fees. Thus, the Court should reject her fee request.

CONCLUSION

The judgment entered against Sergeant cannot stand. The trial court failed to properly instruct the jury. Plaintiff failed to prove Sergeant intentionally or recklessly made material misstatements or omissions in the Affidavit. The jury wasn't entitled to disregard Owner's statements and basic grammatical principles when it found against Sergeant. The damages awarded against Sergeant are excessive. Joint and several liability doesn't apply. Sergeant properly preserved his equal protection challenge, and Section 131 violates his 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 18th day of October 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2024, I electronically filed the foregoing **Appellant Gregory Buschy's Reply Brief** using the court's CM/ECF system which will send notification of such filing to the following:

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