DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: May 23, 2024 3:14 PM CASE NUMBER: 2022CV33434
Plaintiff: RUBY JOHNSON v. **Defendants: GARY STAAB**, in his individual capacity; and **GREGORY BUSCHY**, in his individual capacity	▲ **COURT USE ONLY** ▲ Case Number: 2022CV33434 Courtroom: 269

ORDER ON DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL AND REMITTITUR

This matter is before the Court on Defendant Gregory Buschy's motion for judgment notwithstanding the verdict, and in the alternative, motion for new trial or remittitur. Defendant Gary Staab joined in the motion. Having received a response, replies, and exhibits, including portions of the rough trial transcripts, the Court finds and orders as follows:

I. Procedural History

Defendant Gary Staab is a detective with the Denver Police Department. Defendant Gregory Buschy is a sergeant with the Denver Police Department and supervised Staab. Plaintiff Ruby Johnson brought this action against Defendants asserting that they obtained a search warrant for her home in violation of article II, section 7 of the Colorado Constitution. Plaintiff filed suit under § 13-21-131, C.R.S.

The case was tried to a jury, which returned a verdict for Plaintiff on March 1, 2024. The jury awarded Plaintiff $1.26 million in compensatory damages,

representing $10,000 in economic damages and $1.25 million in non-economic damages. The jury also awarded punitive damages of $1.25 million against Staab and $1.25 million against Buschy. The Court calculated prejudgment interest and entered judgment for Plaintiff and against Defendants on March 11, 2024 in the total amount of $4,018,822.07.

Defendants now file for post-judgment relief under Colorado Rule of Civil Procedure 59. Defendants also filed a notice of appeal on April 19, 2024.

II. Legal Standards

Rule 59(a) provides that a party may move for a new trial or judgment notwithstanding the verdict. On a motion for post-trial relief following a jury trial, a court may order a new trial or direct entry of judgment. C.R.C.P. 59(g).

A. Motion for judgment notwithstanding the verdict

Under Rule 59(e), judgment notwithstanding the verdict (JNOV) may be granted for "insufficiency of the evidence as a matter of law."

A motion for JNOV gives the trial court a final opportunity to examine, as a matter of law, the sufficiency of the evidence that the jury considered. *Ross v. Arrow Mfg. Co.*, 134 Colo. 530, 534, 307 P.2d 196, 199 (1957). In doing so, a court must view the facts in the light most favorable to the nonmoving party, and the motion must be denied unless no reasonable jury could have arrived at the result it reached. *Durdin v. Cheyenne Mountain Bank*, 98 P.3d 899, 903 (Colo. App. 2004); *see also M.G. Dyess, Inc. v. MarkWest Liberty Midstream & Res., L.L.C.*, 2022 COA 108, ¶ 27 ("Motions for JNOV should only be granted when, from the standpoint of a reasonable juror,

there was no evidence, or inference therefrom, upon which a verdict against the movant could be sustained."), *cert denied*, 22SC815, 2023 WL 4568485 (Colo. July 17, 2023). The court, in considering the evidence, must indulge every reasonable inference in favor of the non-moving party. *Nelson v. Hammon*, 802 P.2d 452, 454 (Colo.1990). A court "cannot consider the weight of the evidence or the credibility of the witnesses." *Durdin*, 98 P.3d at 903.

B. Motion for new trial

Rule 59(d) provides that a court may grant a new trial for: "(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial; . . . (5) excessive or inadequate damages; or (6) error in law."

The primary purpose of a motion for a new trial is to give the court an opportunity to correct any errors that it may have made. *Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 25. "Considerable discretion is vested in the trial court in ruling on a motion for a new trial, and its ruling will not be disturbed in the absence of a clear showing of an abuse of discretion." *Aspen Skiing Co. v. Peer*, 804 P.2d 166, 172 (Colo. 1991).

On a motion for a new trial, the trial judge "is not required to view the evidence in the light most favorable to the nonmoving party and has discretion to grant a new trial even where some trial evidence supports the jury's verdict." *Steele v. Law*, 78 P.3d 1124, 1126 (Colo. App. 2003). A trial court may grant a new trial if the verdict is contrary to the weight of the evidence, but it should let the verdict stand unless doing so would result in a miscarriage of justice. *Id.* at 1127.

C. Remittitur

Colorado recognizes an alternative remedy of remittitur, by which the trial court denies a new trial on the condition that the plaintiff agrees to a remittitur of the amount of the damages found by the court to be excessive. *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1356 (Colo. 1983); *see also Belfor USA Grp., Inc. v. Rocky Mountain Caulking & Waterproofing, LLC*, 159 P.3d 672, 676 (Colo. App. 2006) ("[J]udicial remittitur is the process by which a court reduces or proposes to reduce the damages awarded in a jury verdict."). "The option of remittitur or new trial is permissible in cases where the trial court considers the damages manifestly excessive, but cannot conclude that the damages were a product of bias, prejudice, or passion." *Burns,* 659 P.2d at 1356 (internal citation omitted). If the plaintiff does not agree to a remittitur, the trial court must order a new trial on damages. *Higgs v. Dist. Ct.*, 713 P.2d 840, 861 (Colo. 1985).

III. ANALYSIS

Defendants move for a judgment notwithstanding the verdict, new trial, or remittitur on multiple grounds.

A. Procedural posture

At the outset, the Court must satisfy itself that it retains jurisdiction to resolve this dispute given that Defendants filed a notice of appeal, which typically divests a trial court of jurisdiction. But Colorado Appellate Rule 4 provides that the trial court retains jurisdiction to resolve motions under Rule 59 even after a notice of appeal is filed. C.A.R. 4 ("The lower court continues to have jurisdiction to hear and decide a

motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and is timely ruled on or is deemed denied under operation of C.R.C.P. 59(j). All proceedings in the appellate court are stayed while the motion is pending in the lower court.").

The Court also finds that Defendants timely sought post-trial relief. The jury rendered its verdict on March 1, 2024. The Court entered judgment on March 11, 2024. In the judgment, the Court calculated the prejudgment interest due on the judgment and entered final judgment nunc pro tunc to March 1, 2024. Plaintiff argues that Defendants' motion was untimely because Defendants were required to file their motion within fourteen days of March 1.

The doctrine of nunc pro tunc "permits a court to enter an order, such as an order of final judgment, with an effective date earlier than the actual date of entry" and is appropriate "when the cause was ripe for judgment on that earlier date." *Guar. Tr. Life Ins. Co. v. Est. of Casper ex rel. Casper*, 2018 CO 43, ¶ 27. However, the designation of an order nunc pro tunc "cannot serve to time-bar one of the parties from filing a motion for a new trial." *In re Est. of Becker*, 32 P.3d 557, 559 (Colo. App. 2000), *aff'd sub nom*, *In re Est. of DeWitt*, 54 P.3d 849 (Colo. 2002); *see also Dill v. Cnty. Ct.*, 541 P.2d 1272, 1273 (Colo. App. 1975) ("[A] [n]unc pro tunc judgment [cannot] be used to circumvent the time requirements of the rules of procedure . . . .").

Here, Defendants filed their Rule 59 motion within fourteen days of the Court's entry of judgment. The nunc pro tunc designation cannot serve to time bar or

otherwise circumvent Defendants' right to bring their motion. Therefore, the Court accepts Defendants' motion as timely.

B. Defendants' motion for JNOV due to insufficient evidence

Defendants move for JNOV asserting that (1) insufficient evidence supported the jury's determination of liability; and (2) insufficient evidence supported the awards of exemplary damages.

1. Lack of evidence that Staab and Buschy violated Plaintiff's constitutional rights

Buschy moves for JNOV arguing that insufficient evidence supported the verdict against him because he did not draft the search warrant affidavit and there was no evidence that he possessed information that was omitted. Staab similarly moves for JNOV arguing that the evidence did not establish that he intentionally or recklessly included false statements in the search warrant affidavit or that he intentionally or recklessly omitted material facts from the search warrant affidavit. Defendants recite the evidence they believe was in their favor. Plaintiff responds with the evidence presented in her favor.

Considering the totality of the evidence in the light most favorable to Plaintiff and taking all inferences in Plaintiff's favor, the Court cannot find that the verdicts were based on legally insufficient evidence.[1] The Court need not recite all the evidence that could have supported a verdict in Plaintiff's favor. It suffices that the

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[1] The Court addresses the standard applied to Defendants' conduct in section III.C.2.a.

jury could have concluded with evidentiary support that the search warrant affidavit contained false statements. Similarly, the evidence could have supported a finding that the search warrant affidavit contained material omissions. Staab's testimony provided support for the verdicts against each Defendant, as he said that he did not initially believe that the affidavit supported probable cause and that he submitted the search warrant at Buschy's direction. Buschy testified that he signed and approved the affidavit, also providing sufficient evidentiary support for the entry of a verdict against him.

To be sure, contrary evidence was presented from which the jury could have found in Defendants' favor. But where the evidence could support more than one conclusion, the Court may not substitute its own judgment and select the inference not chosen by the jury. *See Thorpe v. Durango Sch. Dist. No. 9-R*, 591 P.2d 1329, 1331 (Colo. App. 1978), *aff'd*, 200 Colo. 268, 614 P.2d 880 (1980).

The Court denies Defendants' motion on this basis.

2. Lack of evidence that Defendants acted in a willful and wanton manner to warrant punitive damages

Defendants similarly assert that the evidence was insufficient to establish that they each engaged in willful and wanton conduct beyond a reasonable doubt. Plaintiff responds that the evidence at trial "overwhelming[ly]" supported the jury verdict. The Court rejects Plaintiff's characterization, as each side presented evidence from which the jury could have concluded in their favor.

Viewing all the evidence in the light most favorable to Plaintiff and drawing all inferences in her favor, the Court finds competent and sufficient evidence to support the verdict. Again, the Court need not recite all the evidence on which the jury could have based its conclusions; a sufficient factual basis was presented from which the jury could have concluded, even by clear and convincing evidence, that Defendants acted with willful disregard of her constitutional rights.

Defendants presented contrary evidence, including that they relied on advice from a Deputy District Attorney that the warrant was sufficiently supported by probable cause. But the evidence could have supported a verdict in either side's favor, and in such circumstances, the Court will not disturb the jury verdict.

C. New Trial

Defendants move for a new trial asserting (1) the damages were excessive, (2) the Court committed errors of law, and (3) irregularities in the proceedings require a new trial. Defendants alternatively request a remittitur of the damages.

1. Excessive damages

Determining the amount of damages is within the jury's discretion. *Palmer v. Diaz*, 214 P.3d 546, 552 (Colo. App. 2009). However, a damage award may not be based on speculation or conjecture. *Logixx Automation, Inc. v. Lawrence Michaels Fam. Tr.*, 56 P.3d 1224, 1227 (Colo. App. 2002). One claiming damages must submit "substantial evidence, which together with reasonable inferences to be drawn therefrom provides a reasonable basis for computation of the damage. Substantial evidence is that which is probative, credible, and competent. It is evidence of a

character that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradicting testimony or contradictory inferences." *Palmer*, 214 P.3d at 552. (internal quotations and citations omitted).

A trial court may grant a new trial because of excessive damages. C.R.C.P. 59(d)(5). A new trial for excessive damages should be granted sparingly and invoked only when the verdict is grossly excessive, unsupported by the true evidence of the case, or indicative of passion, prejudice, or other improper considerations. *Black v. Waterman*, 83 P.3d 1130, 1135 (Colo. App. 2003); *Brooks v. Reiser*, 483 P.2d 389, 391 (Colo. App. 1971). "Absent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate. A verdict may not be set aside on grounds of passion, prejudice, or corruption unless the damages are so outrageous as to strike everyone with the enormity and injustice of them." *Higgs*, 713 P.2d at 860-61 (internal citations and quotations omitted).

Whether to grant a new trial because of inadequate damages "is left to the sole discretion of the trial judge, whose presence and observation at the trial better equip it to make the determination." *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 462 (Colo. 2011). "Despite this discretion, the amount of damages is within the sole province of the jury, and an award will not be disturbed unless it is completely

unsupported by the record or if it is so excessive as to indicate that the jury acted out of passion, prejudice, or corruption." *Id.*

a. Economic damages

In closing argument, Plaintiff requested economic damages of $10,000, which the jury awarded. Defendants contest the award, contending that the evidence at trial demonstrated only $250 in property damage during the execution of the search warrant, representing $200 for a broken door and $50 for a damaged attic tile.

The Court first evaluates whether the jury's economic damages award of $10,000 was indicative of passion or prejudice. It was not. The Court nonetheless finds that the evidence did not support an award of economic damages for $10,000.

Plaintiff's daughter, Gwendolyn Brunson, testified that a family friend fixed a broken door to the garage for "roughly a couple of hundred dollars."[2] Plaintiff also testified that "we paid for the door to be fixed" by a friend. Plaintiff said that her son may have used her credit card to repair the door, but did not identify the cost.

Plaintiff testified that her son, Rodney Brunson, also paid to fix a damaged attic tile, but neither Plaintiff nor Rodney[3] testified to the actual cost.

And although testimony was presented about a broken doll, no witness testified as to the monetary value of the doll, only that the doll had sentimental value.

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[2] Using the dictionary definition of "couple", the Court understands the testimony to be that it cost $200. *See Couple*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/couple (last visited May 23, 2024).

[3] Because the evidence was presented by witnesses sharing a surname, the Court refers to them by their given names to avoid confusion.

The remainder of the economic damages award appears to be based on brief testimony by Plaintiff's son, Gregory Brunson, that after this incident, Plaintiff felt compelled to sell her home; that she initially had an offer to sell her home for the list price of $449,000, but that Plaintiff ultimately sold the home for $440,000 because she wanted to cut her losses and leave the home. Plaintiff similarly testified that the list price was $449,000 and she sold the home "because I wanted to go on and move."[4] Notably, Plaintiff never testified to the value of her home. The Court finds this evidence to be insufficient to support an award for loss of value of the home, as Plaintiff did not prove that the home was actually worth $449,000 or that it would have sold for $449,000 or any number other than the offer that Plaintiff ultimately accepted.

Because there was no other evidence of economic damages, the Court follows the process for remittitur. The evidence at trial supported no more than $200 in economic losses for damage to Plaintiff's property. Plaintiff may accept this remittitur or elect to proceed to a new trial on damages.

b. Noneconomic damages

In evaluating whether the noneconomic damages awarded by the jury were excessive, the Court begins with the principle that its review "should not substitute its opinion of what damages are appropriate for that of the jury, except under special

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[4] Contrary testimony was elicited on cross-examination that Plaintiff was not forced to sell the home and the buyer did not connect the sale price to this incident.

circumstances. . . . Mere disagreement with the amount of damages awarded is not a sufficient ground to overturn an award of damages which is supported by competent evidence in the record. It is the sole province of the jury to fix fair and just damages. Only upon a showing of arbitrary or capricious jury action, or that the jury was swayed by passion or prejudice, should [a] . . . court overturn a jury verdict." *Lee's Mobile Wash v. Campbell*, 853 P.2d 1140, 1143 (Colo. 1993). "[A] reviewing court should not disregard the jury's verdict, which has support in the evidence, in favor of its own view of the evidence. Rather, the court's duty is to reconcile the verdict with the evidence if at all possible." *Id.*

The Court also considered the nature of the injury at issue. As the Colorado Supreme Court recognized in *Higgs*, violations of constitutional rights are not easily quantified and "[i]t is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the [constitutional] right." 713 P.2d at 862 (internal quotation omitted). Damages should be in "at least an amount which will assure the plaintiff that personal rights are not lightly to be disregarded and that they can be truly vindicated in the courts." *Id.* (internal quotations omitted).

Defendants contest the jury's award of $1.25 million for noneconomic damages as excessive. Defendants emphasize that the length of the search was brief, did not result in any physical injury, and Plaintiff did not produce evidence from a mental health professional about the treatment she received. Plaintiff characterizes Defendants' motion as specious, but the Court firmly rejects that characterization.

The Court gives serious consideration to Defendants' arguments given the size of the award and the strength of the evidence presented.

Here, Plaintiff presented evidence of non-economic losses. Gregory testified that Plaintiff suffered fear, confusion, and distress immediately after execution of the search warrant; she suffered emotional distress from the disarray in which officers left the home after execution of the warrant, including from a broken doll which had sentimental value; the incident caused Plaintiff to have trouble sleeping; Plaintiff suffered embarrassment from questions posed to her about the incident; and Plaintiff suffered from paranoia and was not able to live as independently as before the incident. Gwendolyn confirmed this testimony. Rodney testified that his mom was a different person and had a broken spirit after this incident.

Plaintiff testified to the same symptoms of emotional distress, emphasizing that she had trouble eating and sleeping after the incident, and that longer term, she suffered from depression and anxiety. Plaintiff and her family testified that the emotional distress caused Plaintiff to not feel safe in her home, prompted her to temporarily live with her children, and prompted her to sell a home that she loved. Plaintiff and her family testified that she received counseling, which continues every other week. Plaintiff and her family testified that Plaintiff's anxiety, mood swings, stress, and paranoia continue to the present.

Defendants elicited contrary testimony through cross-examination, including that Plaintiff did not seek some counseling until approximately a year after the incident and until after she filed suit; Plaintiff's son actively solicited media attention;

Plaintiff's concerns for safety in her home stemmed from other causes; and Plaintiff reacted calmly and joked with officers during execution of the warrant.

First, the Court considers whether the award of noneconomic damages reflects passion or prejudice, rather than a considered decision based on the evidence. Other than the magnitude of the sum, Defendants do not articulate how the verdict is the product of improper considerations.

The Court reviewed the evidence presented. The damages are exceptionally high for the conduct at issue, the nature of Plaintiff's injuries, and the strength of the evidence presented. But the Court cannot say that the sum awarded by the jury creates the sole inference that the verdict was the product of passion or bias. Moreover, the jury was instructed that it was not to "be influenced by sympathy, bias, or prejudice for or against any party in this case," and absent evidence to the contrary, the Court presumes the jury followed the instructions. *See Garcia v. Mekonnen,* 156 P.3d 1171, 1178 (Colo. App. 2006).

Defendants present a considerable list of verdicts and decisions in other cases in which the noneconomic damages awarded did not approach the magnitude of this verdict. Plaintiff cites limited authorities demonstrating awards of this size. The Court acknowledges Defendants' authorities, but also notes that they demonstrate a wide range of outcomes. The widely disparate jury awards illustrate that the determinations juries make in these cases are highly fact specific. The Court also notes that some cases were 20 or more years ago, and the Court must allow that

community sensibilities about law enforcement conduct may have shifted in that time.

Ultimately, the Court concludes that with the passage of § 13-21-131, the General Assembly created claims for circumstances such as these and declined to impose guardrails such as limitations on liabilities or the application of immunities. The law thus creates the possibility that individual officers, and by extension, municipalities, be exposed to exceptionally high verdicts for relatively circumscribed injuries. The statute allowed for this result.

Second, the Court considers whether the damages should be subject to a remittitur because they were excessive, even if they were not the product of passion or prejudice. Defendants request remittitur to no more than $30,000 based on amounts awarded in other cases.

The Court declines to issue a remittitur as evidence was submitted to demonstrate noneconomic damages. Seven individuals from the community heard the evidence and reached a unanimous decision on how to value the damages. Other factfinders may have reached a different result. Unlike the economic damages, the evidence supplies no guideposts from which the Court could set an amount for a remittitur; the Court could only substitute its judgment for that of the jury, which the Court may not do.

For these reasons, the Court declines to impose a new trial.

c. Punitive damages

Defendants move for remittitur, contending that the punitive damages are grossly excessive and violate due process, and that once the award for noneconomic damages is reformed, a punitive damages award of $1.25 million is excessive.

Exemplary damages must bear a reasonable relationship to compensatory damages. *Higgs*, 713 P.2d at 862. "The reasonableness of the award can be determined by examining the facts of the case to discover if the jury was impermissibly motivated by prejudice or properly guided by the purposes for exemplary damages. The factors that guide the determination are: (1) the nature of the act that caused the injury; (2) the deterrent effect of the award on others; and (3) the economic status of the defendant." *Id.* (internal quotation and citation omitted).

In *Higgs*, the Colorado Supreme Court upheld the jury's award of exemplary damages for a false arrest, finding that there was ample evidence to support a determination that the defendants acted in reckless disregard of the plaintiff's rights and that there was nothing demonstrating "that the jury acted out of passion or prejudice or that it was not properly guided by the purposes of an exemplary damages award." *Id.* at 863. As a result, the *Higgs* court concluded that the exemplary damages award reflected a "conscientious decision of a jury to punish a wrongdoer with a penalty commensurate with the seriousness of the misconduct and the financial ability of the offender to pay, and, concomitantly, to deter [defendants] and others from similar acts of misconduct in the future." *Id.* (internal quotation omitted).

The Court again gives strong consideration to this argument given the size of the award and the strength of the evidence presented, but applies the analysis above to reach the same conclusion. The exemplary damages were equal to the noneconomic damages, and therefore, bore a reasonable relationship to the compensatory damages. While the sums awarded were significant, the Court nonetheless credits the jury's verdict. As detailed above, evidence was presented from which the jury could find that Staab and Buschy each engaged in willful and wanton conduct. The amount of the award will undoubtedly deter future violations of civil rights. And in this instance, Defendants will be entitled to some indemnification as a matter of law. *See* § 13-21-131(4).

2. Errors of law

a. Error in instructing the jury on the standard to be applied to Defendants' conduct

During trial, Defendants advocated that the jury should be instructed that officers may not be found liable unless they acted intentionally or recklessly. Defendants argued that the Court should apply the standard used in federal courts for claims asserting violations of the Fourth Amendment to claims under article II, section 7 of the Colorado Constitution. Defendants now argue that the Court erred in rejecting that standard in the jury instructions.

As the Court observed during the jury instruction conference, the contours of the Colorado Constitution and its bill of rights stand independently of the same rights guaranteed under the federal constitution. In interpreting the Colorado Constitution,

state courts "do not stand on the federal floor; we are in our own house." *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 36. Colorado courts have "demonstrated a willingness to interpret the state constitution to afford broader protections than its federal counterpart," notwithstanding that courts have at times "moved away from this interpretive independence." *People v. McKnight*, 2019 CO 36, ¶ 28. In *McKnight*, the court "opined that, despite the substantial similarity between article II, section 7 and the Fourth Amendment, [the court is] not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections," *id.* ¶ 38, and indeed, departed from federal jurisprudence in finding that a sniff from a drug-detecting dog constituted a search under article II, section 7 for purposes of a motion to suppress, *id.* ¶ 43. Therefore, the relevant inquiry is what conduct may violate the Colorado Constitution, not its federal counterpart. Little Colorado authority guides the Court on this issue.

As stated in the Court's summary judgment ruling, article II, section 7, like its federal counterpart, prohibits "the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and objects to be seized." *People v. Leftwich*, 869 P.2d 1260, 1265 (Colo. 1994). An affidavit submitted in support of a search warrant "must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation." *People v. Kerst*, 181 P.3d 1167, 1171 (Colo. 2008).

An affidavit may be challenged "on the ground that the statements of the affiant are false." *People v. Reed*, 56 P.3d 96, 99 (Colo. 2002). In determining whether a search warrant lacked probable cause based on false statements, courts consider three issues in sequence: (1) whether the warrant affidavit contains false statements; (2) whether the false statements must be excised; and (3) if the statements are excised, whether the remaining statements establish probable cause to authorize the search. *People v. Young*, 785 P.2d 1306, 1308 (Colo. 1990).

In the exclusionary rule context, Colorado courts follow federal precedent by striking false statements in affidavits "if the source of error is intentional falsehood or reckless disregard for the truth" by the affiant. *People v. Winden*, 689 P.2d 578, 582 (Colo. 1984) (internal quotations omitted) (relying on *Franks v. Delaware*, 438 U.S. 154 (1978)). However, some state law authority further holds that false statements in affidavits may be struck "[i]f the error resulted from some other source, such as negligence or a good-faith mistake." *Reed*, 56 P.3d at 99.

In the absence of other guiding authorities, the Court instructed the jury in accordance with these principles. In neither dispositive motion briefing nor the jury instruction conference did the parties present authorities to the Court about the extent to which considerations underlying the exclusionary rule should apply in this context. Even now, the parties do not grapple with how exclusionary rule standards should apply when a jury is required to decide whether law enforcement officers are liable under § 13-21-131.

Having reviewed this issue again, the Court does not find that it clearly erred given the lack of authorities on claims under § 13-21-131 and, more importantly, the lack of authorities describing the contours of article II, section 7. As a result, Defendants do not demonstrate a clear error of law that warrants a new trial.

b. Error in the structure of the verdict form

The Court issued a verdict form that directed the jury to determine the liability of each Defendant and then determine the amount of damages, if any, suffered by Plaintiff. The jury verdict form did not ask the jury to apportion fault among Defendants, and thus, made Defendants jointly and severally liable for any judgment. Defendants contend that the Court erred in using a verdict form that did not require apportionment of fault.

Colorado has adopted a comparative fault scheme for tort claims, under which "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury." § 13-21-111.5(1), C.R.S. Colorado's pro rata liability statute abrogated the common law doctrine of joint and several liability among tortfeasors. *See Harvey v. Farmers Ins. Exch.*, 983 P.2d 34, 37 (Colo. App. 1998), *aff'd and remanded sub nom., Slack v. Farmers Ins. Exch.*, 5 P.3d 280 (Colo. 2000). The pro rata liability statute applies to claims asserting either negligent or intentional conduct, *id.* at 38, and joint and several liability is available only in the event of a conspiracy to commit a tortious act, § 13-21-111.5(4). "The General Assembly abolished joint and several liability in Colorado to reduce unfair burdens placed on

defendants. The adoption of the pro-rata division of liability was intended to cure the perceived inequity under the common law concept of joint and several liability 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." *Slack*, 5 P.3d at 286 (internal citations and quotations omitted); *see also Vickery v. Evans*, 266 P.3d 390, 392 (Colo. 2011) (describing § 13-21-111.5 as "limit[ing] an individual defendant's liability for damages to the injury or damage actually resulting from his own fault").

Civil rights actions pursuant to § 13-21-131, however, are not subject to limitations on liability. In creating these causes of action, the General Assembly expressly stated, "[s]tatutory immunities and statutory limitations on liability, damages, or attorney fees do not apply to claims brought pursuant to this section." § 13-21-131(2)(a) (also specifically identifying that claims under § 13-21-131 are not subject to the Colorado Governmental Immunity Act). No Colorado authorities have yet addressed whether pro rata liability applies to civil rights claims brought under the Colorado Constitution.

Defendants contend that Colorado's pro rata liability statute is not a statutory limitation on liability because it does not limit what claims may be brought against a defendant and does not set any dollar limit on damages.

On this issue, the Court employs standard principles of statutory interpretation. When reviewing statutes, courts must give effect to the legislature's intent by "look[ing] first to the statutory language itself, giving words and phrases

their commonly accepted and understood meaning." *Spracklin v. Indus. Claim Appeals Off.*, 66 P.3d 176, 177 (Colo. App. 2002). Courts must "give effect to every word, phrase, clause, sentence, and section." *McMillin v. State*, 158 Colo. 183, 188, 405 P.2d 672, 674 (1965) (internal quotations omitted). "[I]n the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose, and to have intended that every part of a statute should be carried into effect." *Id.* (internal quotations omitted); *see also Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 10 ("The legislative choice of language may be concluded to be a deliberate one calculated to obtain the result dictated by the plain meaning of the words." (internal quotations omitted)).

During the jury instruction conferences, the Court ruled that the plain language of § 13-21-111.5 is a statutory limitation on liability because comparative fault serves to limit the liability of a tortfeasor to only the harm that tortfeasor caused. The plain language of § 13-21-131 exempts civil rights actions from statutory limitations on liability, and thus, returns these actions to the common law of joint and several liability.

Having considered this issue again post-trial, the Court perceives no error in the jury verdict form. This Court may not consider whether § 13-21-131 creates a fair result; the Court must endeavor to apply the law as written. The General Assembly removed all statutory limitations on liability, and in doing so, made each law enforcement officer jointly and severally liable for all damages.

3. Irregularity in the proceedings

Defendants assert irregularity in the proceedings due to misconduct by Plaintiff's counsel and the staff who assisted Plaintiff's counsel with trial technology. Defendants contend that Plaintiff's counsel advised technology staff to disconnect a power cord to defense counsel's table, resulting in the defense's inability to utilize all the monitors in the courtroom to electronically display evidence. The parties submit competing affidavits from staff members about their discussions about sharing technology resources and each side's conduct.

A new trial may be granted for misconduct of counsel, not "as a disciplinary measure, but to prevent a miscarriage of justice." *Park Stations, Inc. v. Hamilton*, 554 P.2d 311, 313 (Colo. App. 1976). A new trial due to irregularities in the proceedings is warranted when improper occurrences at trial "either affected or likely affected the outcome." *Rains v. Barber*, 2018 CO 61, ¶ 14. In determining whether irregularities warrant a new trial, the trial court has "broad discretionary powers." *Park Stations*, 554 P.2d at 313.

The parties elected to present exhibits and demonstrative aids at trial in an electronic format, using a large screen for jurors, and monitors for the witness stand, judicial officer, and counsel. This division supplies a large television screen, and parties are responsible for supplying any additional technology. Defense counsel raised issues with the technology on the third morning of trial. As the Court noted on the record at that time, it was apparent that defense counsel experienced significant

issues from the start of trial in utilizing the courtroom technology, and it was apparent that the issues were a surprise to defense counsel and their staff.

When defense counsel raised the issue, Defendants requested that the Court instruct the jury about Defendants' inability to utilize the courtroom technology. The Court denied the request for a jury instruction but stated that it would entertain a request from Defendants to re-present some evidence, which was material and which could not have been presented effectively without the use of technology. Defendants did not make such a request during the trial, and the Court did not take further action.

Defendants contend that their ability to present electronic evidence "undoubtedly had the capacity to affect the trial result." But having observed the presentation of all the evidence at trial, it is not apparent that Defendants' technological difficulties impacted the substance of the witnesses' testimony or the evidence. Defendants do not establish that they were unable to present any exhibits or ask any particular questions of witnesses due to a lack of full access to the technology. Indeed, Defendants did present some evidence electronically, such as body camera footage to the jury during the first two days of trial using the large television screen. While Defendants' presentation of some evidence may have been smoother and more efficient with full access to the courtroom technology, the Court can say with fair assurance that the issues with the trial technology did not substantially influence the verdict or impair the overall fairness of the trial.

As a result, the Court declines to grant a new trial on this basis.

D. JNOV or new trial based on the unconstitutionality of § 13-21-131

Defendants argue that § 13-21-131 violates the equal protection guarantees found in the Fourteenth Amendment to the U.S. Constitution and article II, § 7 of the Colorado Constitution. Defendants argue that the Act does not have a rational basis for its differential treatment of peace officers and public employees who are not peace officers; that the Act does not have a rational basis for its differential treatment of peace officers who are defendants in tort lawsuits and other citizens who are defendants in tort lawsuits; and that the Act does not have a rational basis for its suspension of the presumptive cap on non-economic damages.

This is a new issue. Defendants did not raise it in any pretrial pleadings or proceedings, including in the trial management order, or at trial. And this is an issue that plainly could have been raised before or during trial. Because Defendants did not raise this issue until post-judgment, the Court will not address it for the first time now. *See Bowlen v. Fed. Dep. Ins. Corp.*, 815 P.2d 1013, 1015 (Colo. App. 1991) (finding no abuse of discretion in declining to consider new theories asserted for the first time in Rule 59 motion for a new trial); *see also Landmark Towers Ass'n, Inc. by EWG-GV, LLC v. UMB Bank, N.A.*, 2018 COA 100, ¶¶ 44-45 (affirming trial court decision denying new argument raised for the first time post-judgment, holding "[t]hat was too late"); *Entrup v. State*, 30 F.3d 141, 1994 WL 396048, at *2 (10th Cir. 1994) (table) (noting under Colorado law that a court may deny a motion for a new trial "if it attempts to introduce new issues into the case").

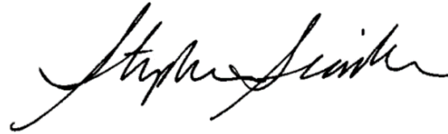
IV. Conclusion

For the reasons previously stated, Defendants' motion is GRANTED IN PART and DENIED IN PART.

Plaintiff must elect the remittitur or a new trial on damages within 21 days of this order.

SO ORDERED this 23rd Day of May, 2024.

BY THE COURT



STEPHANIE L. SCOVILLE
Denver District Court Judge