

COLORADO COURT OF APPEALS
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Appeal from the District Court of Denver County,
Honorable Stephanie Lindquist Scoville
Case No. 2022CV033434

PLAINTIFF/APPELLEE: RUBY JOHNSON
v.

DEFENDANTS/APPELLANTS: GARY STAAB,
an officer of the Denver Police Department, in his
individual capacity, and GREGORY BUSCHY, an
officer of the Denver Police Department, in his
individual capacity.

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Court of Appeals
Case No. 2024CA000683

DEFENDANT-APPELLANT GARY STAAB'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 **1,988** 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/ William T. O'Connell, III
William T. O'Connell, III, #34127

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ISSUES PRESENTED

A jury awarded Ruby Johnson (“Plaintiff”) \$3,760,000 stemming from a search of her residence on January 4, 2022. Prior to the search, Detective Gary Staab prepared an Affidavit in Support of Search Warrant (“Affidavit”) that was reviewed and approved by Sergeant Gregory Buschy and Denver Deputy District Attorney Ashley Beck. Denver County Court Judge Beth Faragher subsequently signed the Search Warrant and the search was conducted that same day.

Plaintiff brought a single claim for relief (Unlawful Search pursuant to C.R.S. § 13-21-131 and the Colorado Constitution) against Detective Staab and Sergeant Buschy alleging misstatements in and omissions from the Affidavit. The evidence at trial did not demonstrate that Detective Staab intentionally or recklessly included any false statements in the Affidavit, nor did the evidence at trial demonstrate that Detective Staab intentionally or recklessly omitted any material facts from the Affidavit. However, the trial court failed to instruct the jury it needed to find Detective Staab intentionally or recklessly included false statements in the Affidavit and/or omitted material facts from the Affidavit. The evidence at trial did not demonstrate that Detective Staab acted in a willful and wanton manner sufficient for an award of exemplary damages. The trial court also erroneously concluded that if the jury found against both Detective Staab and Sergeant Buschy, they were jointly

and severally liable for Plaintiff's compensatory damages.

Issue 1: Did the trial court err by not instructing the jury it needed to find Detective Staab intentionally or recklessly made misstatements or omissions in the Affidavit 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 ruling Detective Staab can be jointly and severally liable with Sergeant Buschy?

Issue 5: Does C.R.S. § 13-21-131 violate Detective Staab's equal protection rights?

STATEMENT OF THE CASE

A. Trial Evidence

Detective Staab joins, adopts and incorporates by reference the Trial Evidence section of Sergeant Buschy's Statement of the Case.

B. Procedural History

Detective Staab joins, adopts and incorporates by reference the Procedural History section of Sergeant Buschy's Statement of the Case.

SUMMARY OF THE ARGUMENT

Issue 1: The trial court should have instructed the jury that it needed to find

Detective Staab intentionally or recklessly included false statements in the Affidavit and/or omitted material facts from the Affidavit before it could find against him.

Issue 2: The evidence at trial did not demonstrate that Detective Staab intentionally or recklessly included any false statements in the Affidavit, nor did the evidence at trial demonstrate that Detective Staab intentionally or recklessly omitted any material facts from the Affidavit. The evidence at trial did not demonstrate beyond a reasonable doubt that Detective Staab acted in a willful and wanton manner.

Issue 3: The jury awarded excessive damages. Plaintiff failed to prove she suffered \$1,250,000 in emotional distress damages. The exemplary damages award against Detective Staab is excessive and not supported by the evidence.

Issue 4: Joint and several liability does not apply. C.R.S. § 13-21-131 does not abolish pro-rata liability. Application of joint and several liability makes it impossible for Detective Staab to know the amount of compensatory damages attributable to his conduct.

Issue 5: C.R.S. § 13-21-131 violates Detective Staab's equal protection rights. The statute treats peace officers differently than non-peace officer government agents. The statute also treats peace officers differently than other defendants in civil lawsuits in a manner not reasonably related to legitimate governmental interests.

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, 4615-21. 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

Detective Staab joins, adopts and incorporates by reference the Discussion portion of Sergeant Buschy's Argument.

Issue 2. Insufficient evidence supports Plaintiff's claims against Detective Staab.

A. Preservation

This issue was preserved at TR 2/29/2024, 6 - 11, TR 2/29/2024 (Instruction Conference), 12, 17, TR 3/1/2024, 74 – 92, and CF, 4251-52, 4615-21. 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 to support her unlawful search

claim against Detective Staab or the exemplary damages awarded against Detective Staab.

1. Plaintiff did not prove her unlawful search claim.

Plaintiff did not prove that Detective Staab intentionally or recklessly included any false statements in the Affidavit, nor did she prove that he intentionally or recklessly omitted any material facts from the Affidavit. To the extent the Affidavit included any alleged misstatements or omissions, they were not material to probable cause.

a. Most of the claimed misstatements are not misstatements.

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument.

b. Plaintiff did not prove materiality.

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument.

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

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument.

ii. The claimed omissions are immaterial.

Detective Staab joins, adopts and incorporates by reference this portion of

Sergeant Buschy's Argument.

iii. Detective Staab did not intentionally or recklessly make misstatements or omissions.

Plaintiff was required to prove the following by a preponderance of the evidence with respect to Detective Staab, 1) Detective Staab made false statements, or omissions that created a falsehood in the Affidavit and 2) those false statements or omissions were material, or necessary, to the finding of probable cause for the arrest warrant. CF, 4135. The evidence at trial did not demonstrate that Detective Staab intentionally or recklessly included any false statements in the Affidavit, nor did the evidence demonstrate that Staab intentionally or recklessly omitted any material facts from the Affidavit.

Detective Staab testified extensively to his multiple communications with the victim, the information the victim conveyed regarding the multiple iPhone pings at Plaintiff's residence over an extended period on the date of the search, the fact that the victim found his wife's iPhone in a field within five feet using the Find My iPhone app, the iPhone screenshot the victim provided Sergeant Buschy and his understanding of the screenshot's meaning, his conversation and email communications with Deputy District Attorney Ashley Beck and the fact that Ms. Beck advised that he was good with the information he had. TR 2/27/2024, 224 – 242, 263 – 279, 284 – 285, 303 – 305, 316 – 319. Detective Staab further testified at

length to the reasons certain facts were not material to the Affidavit, including homeowner information, and the iPhone pings from the phone earlier that day. TR 2/28/2024, 16 – 21. In sum, there was no evidence that Detective Staab intentionally or recklessly included any false statements in the Affidavit and no evidence that Staab intentionally or recklessly omitted any material facts from the Affidavit.

Ms. Beck’s testimony corroborated Detective Staab’s testimony in all respects. Ms. Beck testified to her extensive personal and professional experience with the Find My iPhone app, her confidence in the app in prior cases and this case, and the significance of the multiple iPhone pings over an extended period at Plaintiff’s residence to her probable cause analysis. TR 2/29/2024, 125 - 133. Ms. Beck further testified she would have still signed the affidavit had the alleged missing material facts been included. TR 2/29/2024, 146 - 152.

In sum, the evidence did not support Plaintiff’s verdict on her unlawful search claim against Detective Staab and no rational, reasonable, and unbiased jury could find otherwise.

2. Plaintiff did not prove her exemplary damages claim.

Plaintiff was required to prove beyond a reasonable doubt that the Detective Staab acted in a willful and wanton manner in causing Plaintiff’s injuries or damages. CF, 4143. Willful and wanton conduct was defined as “an act or omission

purposefully committed by a person who must have realized that the conduct was dangerous, and which conduct was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the plaintiff.” CF, 4145.

The evidence at trial did not demonstrate that Detective Staab acted in a willful and wanton manner. As described in Section b.iii, Detective Staab communicated with the victim on multiple occasions regarding the victim’s stolen iPhone and prior experience with the Find My iPhone app, the iPhone screenshot, his communications with Ms. Beck and his rationale for not including certain facts in the affidavit. Even if there were evidence that Detective Staab engaged in any conduct that could remotely be described as willful and wanton, Plaintiff did not meet her burden to prove beyond a reasonable doubt that he acted in such a manner. Reasonable doubt was defined in pertinent part as “a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case.” CF, 4144. No rational, reasonable, and unbiased jury could possibly find beyond a reasonable doubt that Staab acted in a willful and wanton manner.

Issue 3. The jury awarded excessive damages.

A. Preservation and Standard of Review

This issue was preserved at CF, 4252-56, 4615-21. 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

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument. Additionally, with respect to the exemplary damages award against Detective Staab, the evidence at trial did not support such an award for the reasons described at pages 7 & 8, and the award was plainly excessive for the reasons described in Sergeant Buschy's Opening Brief at Issue 3.B.

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, 4615-21. 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

Detective Staab joins, adopts and incorporates by reference this portion of

Sergeant Buschy's Argument.

Issue 5. Section 131 violates Detective Staab's equal protection rights.

A. Preservation and Standard of Review

This issue was preserved at CF, 4262-65, 4615-21; *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

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument.

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

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument.

2. Peace officers v. other defendants in civil lawsuits

Detective Staab joins, adopts and incorporates by reference this portion of Sergeant Buschy's Argument.

CONCLUSION

The trial court failed to properly instruct the jury that it needed to find Detective Staab intentionally or recklessly made misstatements or omissions in the Affidavit. Plaintiff failed to prove her unlawful search and exemplary damages

claims. The jury awarded excessive emotional distress damages and exemplary damages. Joint and several liability does not apply and C.R.S. § 13-21-131 violates Detective Staab's equal protection rights.

WHEREFORE, Detective Gary Staab respectfully requests that this Court vacate the judgment against him and render judgment in his favor or alternatively to vacate the judgement and order a new trial.

Dated this 8th day of August 2024.

Respectfully submitted,

WELLS, ANDERSON & RACE, LLC

s/ William T. O'Connell, III

William T. O'Connell, III, #34127

Saugat K. Thapa, #51256

**ATTORNEYS FOR DEFENDANT -
APPELLANT GARY STAAB**

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2024, a true and correct copy of the foregoing **DEFENDANT-APPELLANT GARY STAAB'S OPENING BRIEF** was filed with the Clerk of the Court via CCE system which will send notification of such filing to the following:

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