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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 08/04/09  
PHILIP G. URRY, CLERK  
BY: DN

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DERRICK ALLEN, a single person, ) Nos. 1 CA-CV 07-0242  
) 1 CA-CV 08-0397  
Plaintiff/Appellant, ) (Consolidated)  
)  
v. ) DEPARTMENT E  
)  
ARIZONA DEPARTMENT OF CORRECTIONS; ) **MEMORANDUM DECISION**  
STATE OF ARIZONA; TERRY STEWART; )  
CHARLES RYAN; DARRELL SMITH; JANET ) (Not for Publication -  
NAPOLITANO; TERRY GODDARD; WILLIAM ) Rule 28, Arizona Rules of  
GASPER; MARY HENNESSEY; CHERYL ) Civil Appellate Procedure)  
ANDRE, )  
)  
Defendants/Appellees. )  
\_\_\_\_\_)  
)  
DERRICK ALLEN, a single person, )  
)  
Plaintiff/Appellee/ )  
Cross-Appellant, )  
)  
v. )  
)  
DARRELL SMITH, individually and in )  
his capacity as a Criminal )  
Investigator with the State of )  
Arizona, )  
)  
Defendant/Appellant/ )  
Cross-Appellee. )  
\_\_\_\_\_)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV 2003-009311 and CV 2004-006660

The Honorable Robert C. Houser, Judge

**AFFIRMED**

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**K E S S L E R**, Judge

¶1 These consolidated appeals concern Defendant Darrell Smith's ("Smith") appeal from the superior court's denial of his motions for summary judgment and judgment as a matter of law ("JMOL") on Plaintiff Derrick Allen's ("Allen") claim for violation of his constitutional rights pursuant to 42 United States Code ("U.S.C.") section 1983 (2003), the subsequent jury verdict on that claim, and Allen's cross-appeal from the judgment. Allen also appeals the court's dismissal of his § 1983 claim against Smith in an earlier action, its summary judgment for the State of Arizona on his claims of malicious prosecution, intentional infliction of emotional distress, defamation and false imprisonment, and its summary judgment for Terry Stewart, Charles Ryan, William Gaspar, Mary Hennessey and

Cheryl Andre on his § 1983 claims. For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶12 Allen worked as a Correctional Officer for the Arizona Department of Corrections ("DOC") at the Perryville Prison Facility. In the fall of 2001, Smith, a criminal inspector employed by DOC, investigated allegations that Allen had engaged in sexual acts with a female prisoner, Kimberly Thomas, and brought Thomas marijuana in the prison, felony acts under Arizona law.

¶13 In conducting his investigation, Smith repeatedly interviewed Thomas and requested that a polygraph test be administered on her, which indicated no deception when she answered questions regarding her allegations. Smith also obtained Thomas's medical records and had her examined by a doctor. Additionally, Smith interviewed Allen, other inmates and officers who might have had knowledge of the situation, and checked Allen's duty assignments on the relevant dates.

¶14 In response to Thomas's claim that Allen had identifying marks on his upper thigh and her description of his genitalia, Smith petitioned to obtain a search warrant to photograph Allen's genitalia and upper thighs. Smith offered his affidavit stating reasonable cause existed for the issuance of a search warrant because Thomas had alleged sexual contact

with Allen from which she had become pregnant and that she had terminated her pregnancy with pills provided to her by Allen. Smith averred that Thomas had passed a polygraph examination and that her allegations against Allen appeared to be truthful. He also stated that after she reported this conduct, Thomas was "[e]xamined by and treated for complications resulting from a drug induced pregnancy termination . . .," by a DOC physician. The court issued the search warrant, and on January 3, 2002, Smith photographed Allen's genitalia and upper thighs.

¶15 Smith completed a report documenting his findings. The DOC sent the report and supporting evidence to the Arizona Attorney General's Office for a determination regarding whether the office would bring criminal charges against Smith. Thereafter, Assistant Attorneys General Mary Harriss and Peggy LeMoine visited the prison and interviewed Thomas.

¶16 On April 16, 2002, Harriss and LeMoine presented the evidence against Allen to a grand jury. Smith described in detail to the grand jury Thomas's allegations. Smith explained that Thomas's account contained certain inconsistencies; for example, she had described in a letter to her aunt written in July 2001 sexual contact with a corrections officer and a miscarriage caused by two pills given to her by Allen, yet she told Smith the miscarriage occurred in September 2001. Smith testified he had reviewed the officer assignment and inmate

records and that Allen was able to be in the locations described by Thomas in her allegations. The grand jury indicted Allen on eight charges of unlawful sexual conduct and two charges of taking contraband into a correctional facility. Allen was arrested and held on house arrest for several months.

¶7 Allen moved to remand the case to the grand jury to allow it to consider additional evidence, specifically a note between Thomas and another inmate which Allen contended was exculpatory ("the Lumley letter"). Harriss and LeMoine asserted they were not in possession of the Lumley letter at the time of the April 2002 grand jury proceeding and agreed the matter should be remanded to allow the grand jurors to consider the new evidence in their probable cause determination.<sup>1</sup> The grand jury did not return a second indictment against Allen.

¶8 Allen then filed a complaint against the DOC, DOC Director Terry Stewart, acting DOC Director Charles Ryan, DOC Warden William Gaspar, DOC Warden Mary Hennessey, DOC Deputy Warden Cheryl Andre,<sup>2</sup> the State of Arizona, former Attorney General Janet Napolitano, Attorney General Terry Goddard, Harriss, LeMoine, and Smith ("the First Action"). Allen alleged

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<sup>1</sup> Smith disputed Harriss's and LeMoine's assertion and claimed he provided the Lumley letter to the Attorney General's Office with his report in January 2002.

<sup>2</sup> We refer to Stewart, Ryan, Gaspar, Hennessey, and Andre collectively as "the Prison Employees."

the State, DOC, Napolitano, and Goddard violated 42 U.S.C. § 1983 by failing to properly hire, train, supervise, discipline or control their employees and by failing to enact policies to prevent their employees from depriving Allen of his constitutional rights. He alleged Smith, Harriss, LeMoine, and the Prison Employees subjected him to unreasonable search and seizure and deprived him of substantive and procedural due process. He also alleged claims against all defendants for malicious prosecution resulting from the institution of the criminal proceedings against him, tortious interference with his DOC employment contract, defamation arising out of the publication of a press release regarding his indictment and other statements, false imprisonment resulting from his confinement to police vehicles, a jail cell, and his home, and intentional infliction of emotional distress.

¶19 Smith moved to dismiss the complaint on the grounds that Arizona law prohibited Allen from suing him individually and because Allen had not filed a notice of claim as required by A.R.S. § 12-821.01 (2003). The superior court granted Smith's motion on the grounds that Allen had failed to file a notice of claim. Allen moved for reconsideration, arguing that the notice of claim statute was inapplicable to a § 1983 claim. Smith responded that Allen had not asserted a § 1983 claim against him in the complaint. Allen then identified Count II of his

complaint as setting forth his § 1983 claim against Smith; he did not seek leave to amend the complaint to plead a § 1983 claim. The court denied the motion for reconsideration, finding that Allen had not asserted a § 1983 claim against Smith in his complaint.

¶10 Allen filed a second complaint against Smith alleging a § 1983 claim arising out of his investigation of Allen ("the Second Action"). Allen alleged that Smith caused unwarranted charges to be brought against him, lied to obtain a search warrant, lied to the grand jury to obtain an indictment, and purposefully failed to follow procedures to ensure Allen's constitutional rights were protected. Allen later amended the complaint to add Harriss, LeMoine, and the Prison Employees as defendants. He alleged Harriss and LeMoine failed to conduct a proper investigation before assembling the grand jury and that the Prison Employees failed to properly supervise Smith in his investigation and failed to ensure there was a credible basis for Smith's conclusions in violation of § 1983. The superior court consolidated the First and Second Actions.

¶11 Smith moved for summary judgment on Allen's § 1983 claim, arguing Allen had produced no evidence that Allen was deprived of a constitutional right. Smith also contended he was entitled to qualified immunity for the claim. The superior court denied the motion.

¶12 The Prison Employees moved for summary judgment on Allen's § 1983 claim, arguing it failed as a matter of law because they were not affirmatively involved in denying any of Allen's constitutional rights and had properly supervised and trained Smith. The State moved for summary judgment on Allen's state law claims, arguing that the claims failed as a matter of law and were barred because Allen had not timely filed a notice of claim. The court granted the motions, finding no genuine dispute as to any material question of fact. Allen timely appealed.<sup>3</sup>

¶13 The case then proceeded to trial on the sole remaining claim: Allen's § 1983 claim against Smith. During trial, the court granted Smith's motion for JMOL on Allen's claim that Smith deprived him of his rights under the Fifth Amendment of the United States Constitution and on the issue of punitive damages. The jury found Smith liable to Allen and awarded Allen \$750,000 in damages.

¶14 Smith moved for a new trial, arguing that the verdict was excessive, the result of passion or prejudice, contrary to law and not justified by the evidence, or the result of

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<sup>3</sup> The court also granted Harriss's and LeMoine's motion for partial summary judgment on Allen's state law claims, and later granted their motion for summary judgment on the remaining § 1983 claims. In addition, the court dismissed Allen's § 1983 claims against Goddard, Napolitano, and the State. Allen does not challenge these rulings on appeal.

erroneous and irregular evidentiary rulings and instructions at trial. Smith also renewed his motion for JMOL and asked, in the alternative, for a remittitur. The trial court denied the motion.

¶15 Smith appealed the judgment on the jury verdict and the order denying his motion for new trial. Allen cross-appealed from the superior court's previous dismissal of Smith in the First Action and the court's grant of Smith's motion for JMOL concerning the issue of punitive damages.<sup>4</sup> Those appeals were consolidated with Allen's earlier appeal from the judgments for the State and the Prison Employees in the First Action.

¶16 We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

#### ISSUES

¶17 On appeal, Allen challenges the superior court's summary judgment for the Prison Employees and the State. He also challenges the court's dismissal of his § 1983 claim against Smith in the First Action.

¶18 Smith appeals the judgment on the jury verdict in the Second Action and the court's denial of his motion for new

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<sup>4</sup> Allen also appealed the court's grant of Smith's motion for JMOL on his claim for violation of his Fifth Amendment rights. As Allen has not advanced that argument on appeal, we deem it abandoned. *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived.").

trial. Allen cross-appeals from the judgment, challenging the court's JMOL for Smith on the issue of punitive damages.

## DISCUSSION

### A. State Law Claims

¶19 Allen challenges the court's summary judgment for the State in the First Action on Allen's claims under state law. In reviewing a summary judgment, our task is to determine *de novo* whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We review the facts in the light most favorable to the party against whom summary judgment was entered. *Riley, Hoggatt & Suagee v. English*, 177 Ariz. 10, 12, 864 P.2d 1042, 1044-45 (1993). Summary judgment is appropriate "[i]f the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

## 1. False Imprisonment

¶20 To prove a false imprisonment claim, a plaintiff must allege and prove: "(1) the defendant acted with intent to confine another person within boundaries fixed by the defendant; (2) the defendant's act resulted in such confinement, either directly or indirectly; and (3) the other person was conscious of the confinement or was harmed by it." *Hart v. Seven Resorts, Inc.*, 190 Ariz. 272, 281, 947 P.2d 846, 855 (App. 1997); Restatement (Second) of Torts ("Restatement") § 35 (1965). A detention pursuant to legal authority, such as a valid warrant, is lawful. *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 542 P.2d 550, 553 (1975). This is true even if the warrant was procured without probable cause. *Id.*

¶21 In this case, Allen alleged the State confined him to police vehicles, a jail cell, and his home. The State argued that any restriction of Allen's movements was done with lawful authority. The undisputed evidence established that after the grand jury found probable cause to indict Allen, the court issued a warrant for his arrest and later released him to house arrest. Allen's house arrest was terminated when the indictment was remanded. Accordingly, there is no dispute that Allen was arrested and held pursuant to legal authority, and therefore no evidence of the essential element of false imprisonment, unlawful detention, and his claim fails as a matter of law.

## 2. Intentional Infliction of Emotional Distress

¶22 Arizona has adopted the Restatement § 46 (1965), which sets forth the elements of an intentional infliction of emotional distress claim:

[F]irst, the conduct by the defendant must be "extreme" and "outrageous"; second, the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and third, severe emotional distress must indeed occur as a result of defendant's conduct.

*Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (emphasis in original). The superior court ruled that Allen's claim for intentional infliction of emotional distress failed as a matter of law. Allen challenges this ruling on appeal, apparently contending that a reasonable jury could find that the State acted outrageously.

¶23 To prove a claim for intentional infliction of emotional distress, "[a] plaintiff must show that the defendant's acts were 'so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995) (citations omitted). The conduct must fall "[a]t the very extreme edge of the spectrum of possible conduct." *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P.2d 1032, 1035

(1980). Whether a defendant's conduct may be regarded as extreme and outrageous is initially examined by the court as a matter of law. Restatement § 46 cmt. h.

¶24 As discussed, the undisputed evidence shows that after the grand jury found probable cause to indict Allen, the court issued a warrant for his arrest and later released him to house arrest. The State's arrest of Allen and his confinement to house arrest pursuant to a grand jury indictment and arrest warrant does not "go beyond all possible bounds of decency" and therefore does not state a claim for intentional infliction of emotional distress. *Mintz*, 183 Ariz. at 554, 905 P.2d at 563. As Allen's claim fails as a matter of law on the first of the three required elements for his intentional infliction of emotional distress claim, the superior court properly granted summary judgment for the State on this claim.

### **3. Malicious Prosecution**

¶25 The essential elements of an action for malicious prosecution are: "(1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4) actuated by malice, (5) without probable cause and (6) causing damages." *Cullison v. City of Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978) (citations omitted). This claim plainly fails against the State, as it did not prosecute Allen, but acted through its employees, Harriss and LeMoine. Moreover,

even if we assume, as Allen contends, that the State is vicariously responsible for the conduct of Harriss and LeMoine, the State cannot be held liable in this case because the trial court granted Harriss and LeMoine summary judgment on Allen's malicious prosecution claim. *De Graff v. Smith*, 62 Ariz. 261, 265-70, 157 P.2d 342, 343-45 (1945) (stating release of employee from personal liability also releases employer); *Ford*, 153 Ariz. at 42, 734 P.2d at 584 ("[W]hen the master's liability is based solely on the negligence of his servant, a judgment in favor of the servant is a judgment in favor of the master.").<sup>5</sup> The superior court properly granted summary judgment for the State on this claim.<sup>6</sup>

#### 4. Defamation

¶26 A viable defamation claim exists when the plaintiff proves by a preponderance of the evidence that (1) the defendant

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<sup>5</sup> Allen argues on appeal that he did not assert any state tort claims against Harriss and LeMoine and that if he had asserted such claims, he would have opposed their dismissal in the trial court. Our review of the record reveals that Allen did assert state law claims against Harriss and LeMoine, and opposed their motion for summary judgment on those claims, which the court granted over his objection. Allen has not challenged that ruling on appeal.

<sup>6</sup> We therefore need not determine whether the charges against Allen were brought with malice and without probable cause. We also do not consider Allen's argument on appeal that Smith could be subject to a malicious prosecution claim, as Allen's state law claims against Smith were dismissed and he does not challenge the dismissal of those claims on appeal.

made a false statement concerning the plaintiff, (2) the statement was published without privilege to a third party, and (3) the defendant knowingly, recklessly, or negligently disregarded the falsity of the statement. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1997); *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 1, 3 n.1, 730 P.2d 178, 180 n.1 (App. 1985). A plaintiff may prove defamation per se by showing that the statements fell into at least one category of statements presumed to cause damage, and therefore need not offer evidence of actual damage. See *Boswell*, 152 Ariz. at 6 n.4, 730 P.2d at 183 n.4.<sup>7</sup>

¶127 Allen's defamation claim is based upon the April 18, 2002 press release issued by the Attorney General's Office concerning the grand jury's indictment of Allen and his subsequent arrest. The superior court properly granted the State's motion for summary judgment on Allen's claim because substantial truth is an absolute defense to a defamation claim. *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 355, 819 P.2d 939, 941 (1991).<sup>8</sup> Here, the press release stated that the grand

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<sup>7</sup> Two such categories that might be relevant to this case are statements that injure a person in his or her profession, trade, or business, and statements accusing a person of a crime involving moral turpitude. *Id.*

<sup>8</sup> The determination of substantial truth is a matter for the court when the underlying facts are not in dispute. *Id.*

jury had indicted Allen for “[a]llegedly smuggling drugs into an Arizona State Prison facility and having a sexual relationship with a female inmate,” that Allen had been taken into custody, and faced up to ten years in prison.<sup>9</sup> As Allen did not dispute the truth of these statements, the trial court properly determined that no question of material fact precluded summary judgment for the State on this claim.

¶28 Nevertheless, Allen argued in the superior court, and now asserts on appeal, that the press release constituted defamation per se because it portrayed him in a false light. False light invasion of privacy is a tort separate from defamation under Arizona law. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989). Allen did not plead a cause of action for false light invasion of privacy in his complaint, thus we will not address the merits of his claim on appeal. *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992) (stating one appealing summary judgment may not advance new theories or raise new issues to secure a reversal).

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<sup>9</sup> The press release concluded: “An indictment is a criminal charge only. All defendants are presumed innocent unless and until proven guilty.”

¶29 The superior court did not err in granting summary judgment for the State on Allen's defamation per se claim.<sup>10</sup>

**B. Section 1983 Claims**

¶30 Section 1983 allows a plaintiff to assert a cause of action against any person who, under color of state law or authority, deprives another person of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. We look to federal law for guidance in reviewing Allen's § 1983 claims. *Baker v. Rolnick*, 210 Ariz. 321, 325, ¶ 18, 110 P.3d 1284, 1288 (App. 2005).

**1. Dismissal of § 1983 Claim Against Smith in First Action**

¶31 Allen challenges the court's dismissal of his § 1983 claim against Smith in the First Action.

¶32 Smith pled in Count I of his complaint in the First Action a § 1983 claim against the State and DOC<sup>11</sup> arising out of their alleged deprivation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. He alleged in Count II of the complaint a claim for "Deprivation of

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<sup>10</sup> As we affirm the superior court's summary judgment for the State on all of Allen's common law claims, we do not consider the State's argument that the false imprisonment, intentional infliction of emotional distress, and defamation claims were time-barred.

<sup>11</sup> Allen also asserted this claim against the Arizona Attorney General's Office, which was not named as a defendant in the complaint.

the Plaintiff's Right to be Secure in his Person Against Unreasonable Search and Seizure and Right to Substantive [and] Procedural Due Process of Law Against Defendants Smith, LeMoine, Harriss, Stewart, Ryan, Gaspar, Hennessey, and Andre." As relevant to Smith, Count II alleged he had, with intent to cause harm to Allen, caused unfounded charges to be brought against Allen, lied to obtain a search warrant against Allen, lied to Harriss and LeMoine, lied to the grand jury, and purposefully failed to follow procedures to ensure the protection of Allen's constitutional rights.<sup>12</sup> Count II did not refer to § 1983 or otherwise indicate that Allen was relying on that statute as a basis for the claim.

¶133 Smith moved to dismiss the complaint, asserting, as relevant, that Allen's claims were barred because he had not filed a notice of claim. The superior court granted Smith's motion on that ground in an unsigned minute entry dated January 12, 2004. Allen moved for reconsideration, arguing that the notice of claim statute was not applicable to a § 1983 claim. Smith responded that Allen had not pled a § 1983 claim against him in the complaint. Allen identified Count II of his complaint as setting forth his § 1983 claim against Smith, and did not seek leave to amend the complaint to add a § 1983 claim.

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<sup>12</sup> Count II contained similar allegations directed at Harriss, LeMoine, and the Prison Employees.

The court denied the motion for reconsideration, finding that Allen had not asserted a § 1983 claim against Smith in his complaint. Allen argues on appeal that this ruling was erroneous because he properly pled a § 1983 claim against Smith and because the court was required to allow him leave to amend before dismissing his complaint.

¶134 We address this issue only because it affects whether Allen's Second Action asserting a § 1983 claim against Smith was timely. We hold that we have jurisdiction to review the dismissal of the § 1983 claim against Smith and that such dismissal was improper. Remand on this issue is moot, however, because Allen's § 1983 claim against Smith in the Second Action resulted in a jury verdict for Allen.

**a. Jurisdiction**

¶135 As an initial matter, we address Smith's argument that this Court lacks jurisdiction to consider this issue. Smith argues that because the superior court dismissed Allen's complaint against him in the First Action, Allen's appeal from that order in conjunction with his cross-appeal from the judgment in the Second Action is inappropriate and untimely.

¶136 As discussed, after the superior court dismissed Allen's complaint against Smith in the First Action on January 12, 2004, Allen filed the Second Action alleging a § 1983 claim

against Smith arising out of his investigation of Allen.<sup>13</sup> The court consolidated the First and Second Actions, and the case ultimately proceeded to trial on Allen's § 1983 claim against Smith. The court entered judgment on the jury's verdict and issued a signed order denying Smith's motion for new trial. Smith appealed from the judgment and the order, and Allen then cross-appealed from the judgment and from the court's earlier January 12, 2004 dismissal of his complaint against Smith in the First Action.

¶137 The January 12, 2004 order dismissing Smith was not a final, appealable order because it was not signed, Arizona Rule of Civil Procedure ("Ariz. R. Civ. P.") 58(a); *Focal Point Inc. v. Court of Appeals*, 149 Ariz. 128, 129-30, 717 P.2d 432, 433-34 (1986), did not dispose of all claims against all parties, and did not contain Ariz. R. Civ. P. Rule 54(b) language. *Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980). Allen was therefore unable to appeal that ruling until the court entered a final judgment. *Id.* Smith argues that when Allen appealed the January 12, 2004 order, the time for doing so had expired. In addition, he contends Allen may not appeal the January 12, 2004 order issued in the First Action as part of his cross-appeal from the judgment in the Second Action because the

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<sup>13</sup> Allen later amended the complaint to add Harriss, LeMoine, and the Prison Employees as defendants.

cases were consolidated only for purposes of judicial economy and were not "joined."

¶138 Although Arizona courts have not addressed this issue directly, there is some authority regarding the nature of consolidation and the effect of consolidation on the individual cases involved. The Arizona Supreme Court, in *Torosian v. Paulos*, 82 Ariz. 304, 315, 313 P.2d 382, 390 (1957), held that the superior court may order consolidation for limited purposes or for the trial of certain issues only, without effecting a merger of the cases consolidated. The court quoted with approval the pronouncement of the United States Supreme Court in *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933), that, "[c]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Torosian*, 82 Ariz. at 316, 313 P.2d at 390.

¶139 The Arizona Court of Appeals examined this ruling several years later in *Yavapai County v. Superior Court*, 13 Ariz. App. 368, 476 P.2d 889 (1970). In that case, the trial court consolidated for trial two substantially identical lawsuits against the same defendants. *Id.* at 369, 476 P.2d at 890. After consolidation, the plaintiffs in one of the actions moved for transfer of venue; the plaintiffs in the other lawsuit

did not desire to change venue. *Id.* The trial court "de-consolidated" the actions in order to grant the motion for transfer of venue. *Id.* The Arizona Court of Appeals held that the plaintiffs who sought to transfer venue had waived their right to a forum change by failing to assert it prior to consolidation. Addressing the language of *Torosian*, the court stated that the rights referred to as preserved after consolidation were, "(1) substantive rights and (2) those procedural rights which are not antithetical to the concept of a consolidation of actions for trial." *Id.* at 370, 476 P.2d at 891. The court ruled that a retained right to change of venue was incompatible with the purpose of consolidation and therefore a waiver of that right was inherent in the plaintiff's failure to assert it prior to consolidation. *Id.* at 370, 476 P.2d at 891.

¶140 Some federal jurisdictions have held that all consolidated cases remain separate actions, *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003), or focused on the type of consolidation and the relationship between the actions to determine whether they may be appealed separately absent Rule 54(b) language. *Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992); *Road Sprinkler Fitters Local Union v. Cont'l*

*Sprinkler Co.*, 967 F.2d 145, 149-51 (5th Cir. 1992); *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991). The Ninth, Tenth and Federal Circuits, however, hold that a judgment that disposes of only one of two or more consolidated cases is not appealable absent Rule 54(b) certification. *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987); *Spraytex, Inc. v. DJS & T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996).

¶141 Rejecting the approach of the “case-by-case” jurisdictions, the Ninth Circuit has declined to examine the extent and purpose of consolidation, and the relationship of the consolidated actions, to determine whether Rule 54(b) language is needed. *Huene*, 743 F.2d at 704. The court describes this approach as insufficiently definite, and reasons that the trial court is, “[b]est able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose.” *Huene*, 743 F.2d at 705. The Ninth Circuit thus leaves it to the trial court to consider the effect of an interim appeal on the resolution of the entire action. *Id.* In the absence of Rule 54(b) language, a judgment that disposes of less than all consolidated actions is not appealable. *Id.*

¶142 We adopt the Ninth Circuit’s bright-line rule that a judgment in a consolidated case that does not dispose of all claims among the parties in the consolidated action is not

appealable absent Rule 54(b) language. The Ninth Circuit's approach is uniform and avoids the conflicts that may arise when one consolidated case, which by virtue of its consolidation must share some question of fact or law with the other consolidated cases, is appealed before resolution of the remaining cases. Moreover, this approach does not conflict with Arizona law that holds that although consolidated cases retain their separate character, there are circumstances under which the procedural rights of the parties may conflict with the concept of consolidation and must be evaluated in this context. *Torosian*, 82 Ariz. at 315, 313 P.2d at 390; *Yavapai*, 13 Ariz. App. at 370, 476 P.2d at 891. The trial court will almost always be in a better position than this court to evaluate whether immediate consideration of an appeal would adversely affect the remaining consolidated cases or whether the judgment should be certified for immediate appeal.

¶143 As the order dismissing Smith did not contain a Rule 54(b) certification, it was not a final, appealable order until the court disposed of the last claim in both the First and Second Actions. Accordingly, Allen's cross-appeal from the final judgment in the Second Action, including an appeal from the January 12, 2004 order, was timely and we have jurisdiction to consider that appeal.

**b. The Dismissal was Improper**

¶44 We turn to the merits of the dismissal. Arizona is a notice pleading state, and a complaint need only set forth a short and plain statement showing the plaintiff is entitled to relief in order to survive a motion to dismiss. Ariz. R. Civ. P. 8(a); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 111, ¶ 23, 170 P.3d 712, 720 (App. 2007). The pleading must do no more than “[g]ive the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved.” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6, 189 P.3d 344, 346 (2008) (citations omitted).

¶45 Allen alleged in his complaint that Smith had deprived him of his right to be secure in his person against unreasonable search and seizure and had deprived him of his right to substantive and procedural due process of law by intentionally causing unfounded charges to be brought against him, lying to obtain a search warrant against him, lying to Harriss and LeMoine, lying to the grand jury, and purposefully failing to follow procedures to ensure the protection of Allen’s constitutional rights. Although Count II did not refer to § 1983 or otherwise indicate that Allen was relying on that statute as a basis for his claim, the complaint plainly gave notice that Allen was alleging Smith had deprived him of his constitutional rights and he was seeking damages for that

violation.<sup>14</sup> A cause of action for deprivation of a constitutional right is derived from § 1983. See *Wilkie v. State*, 161 Ariz. 541, 546, 779 P.2d 1280, 1285 (App. 1989) ("Section 1983 is essentially a procedural or remedial device through which a party may seek relief for the deprivation of a constitutional . . . right. . . . Although the Fourteenth Amendment establishes binding standards of conduct for state and local government, it does not authorize remedies when its provisions are breached. Section 1983 fills this vital gap.") (citations and internal quotations omitted); see also *Rondelli v. Pima County*, 120 Ariz. 483, 486, 586 P.2d 1295, 1298 (App. 1978) (stating § 1983 creates rights and imposes obligations different from any that would exist at common law in the absence of statute). Given Allen's clear allegations that Smith had deprived him of his constitutional rights, and the fact that a § 1983 claim is the vehicle through which a party may seek damages for such deprivations, Smith has no factual or equitable basis upon which to contend he did not have fair notice as to the nature and extent of Allen's claim.

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<sup>14</sup> In addition, paragraph 53 of the complaint, which was incorporated and re-alleged in Count II, stated that the action was "[b]rought pursuant to 42 U.S.C. Section[s] 1983 and 1988 and the United States Constitution, particularly under the provisions of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States . . . ."

¶146 The superior court's dismissal of Allen's § 1983 claim against Smith in the First Action was improper.<sup>15</sup>

**2. Summary judgment for the Prison Employees on § 1983 Claims**

¶147 Allen challenges the superior court's summary judgment for the Prison Employees in the First Action. We find no error.

¶148 The Prison Employees moved for summary judgment on the grounds that they did not affirmatively participate in depriving Allen of any constitutional rights, they properly trained and supervised Smith, and that Allen had no evidence that he had been subjected to unreasonable search or seizure or that his rights to substantive and procedural due process were violated. They also argued that as government officials they were entitled to qualified immunity from monetary damages. Allen opposed the motion, arguing that each of the Prison Employees was directly involved in the violation of his civil rights, his arrest, and his indictment.

¶149 The Prison Employees may not be held liable under § 1983 simply by virtue of their supervisory positions. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978) (the right to control an employee without the right having been exercised is insufficient to impose § 1983 liability); *Tripati v. State*,

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<sup>15</sup> We therefore do not consider Allen's alternative argument that the superior court should have granted him leave to amend his complaint to add a § 1983 claim despite his failure to request leave to amend.

199 Ariz. 222, 225-26, ¶ 11, 16 P.3d 783, 786-87 (App. 2000). Rather, “[a] supervisor is liable for constitutional violations of subordinates only if the supervisor participated in or directed the violations, or knew of the violations and with deliberate indifference failed to act to prevent them.” *Tripati*, 199 Ariz. at 226, ¶ 13, 16 P.3d at 787. (Emphasis in original omitted). Allen contends the Prison Employees allowed a series of acts by Smith that violated Allen’s constitutional rights or, with deliberate indifference, failed to act to prevent them. He argues in the alternative that the record contains evidence of the Prison Employees’ “significant direct involvement and knowledge of” Smith’s investigation such that they may be held liable under § 1983 for affirmative involvement in an alleged constitutional deprivation.<sup>16</sup>

¶150 Our review of the record reveals no material dispute of fact. The Prison Employees offered undisputed evidence that they did not direct or supervise Smith’s investigation, did not participate in the prosecution of Allen, and that Andre and Gaspar were not involved in the termination of Allen’s employment. Stewart, Ryan and Hennessey offered evidence that they followed appropriate procedures to terminate Allen after the grand jury returned its indictment. The Prison Employees

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<sup>16</sup> Allen does not cite the evidence in the record to which he refers, as required by Arizona Rule of Civil Appellate Procedure (“ARCAP”) 13(a)(6).

also offered evidence that Smith was properly trained and experienced to conduct the investigation.

¶151 Allen did not dispute this evidence, but instead presented evidence that the Prison Employees were the decision-makers regarding whether to initiate administrative termination proceedings against him. Yet, because it is undisputed that the Prison Employees followed the proper procedures to terminate Allen, there is no material dispute of fact regarding whether the Prison Employees' termination of Allen violated his constitutional rights.

¶152 Allen also claimed the Prison Employees had actual or constructive knowledge that Thomas's allegations were false but ignored that information and did not appropriately direct Smith's investigation. The evidence shows, however, that the Prison Employees were not permitted to supervise, direct, or interfere with Smith's investigation.

¶153 The superior court properly granted summary judgment for the Prison Employees on Allen's § 1983 claims.<sup>17</sup>

### **3. § 1983 Claim in the Second Action**

¶154 We next address Smith's appeal from the superior court's denial of his motions for summary judgment and JMOL. Smith also appeals the jury verdict and the court's denial of

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<sup>17</sup> We therefore do not decide whether the Prison Employees were entitled to qualified immunity on these claims.

his motion for new trial. Allen cross-appeals from the court's order granting Smith's motion for JMOL on that portion of Allen's § 1983 claim based upon an alleged deprivation of his Fifth Amendment rights and on his request for punitive damages.

**a. Summary judgment/JMOL**

¶155 Smith argues the court should have granted him JMOL because Allen did not identify the particular constitutional right that he alleged Smith had violated. Allen stated in paragraph 60 of his complaint in the Second Action that the action was "[b]rought pursuant to 42 U.S.C. Section[s] 1983 and 1988 and the United States Constitution, particularly under the provisions of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States . . . ." <sup>18</sup> He further stated that his § 1983 claim against Smith was for "[d]eprivation of [his] right to be secure in his person against unreasonable search and seizure, and [his] right to substantive and procedural due process of law . . . ." Thus, Allen properly identified the constitutional rights he alleged Smith had violated and the court correctly denied Smith's motion for summary judgment and motion for JMOL on that issue.

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<sup>18</sup> The complaint in the First Action also stated that it was "[b]rought pursuant to 42 U.S.C. Section[s] 1983 and 1988 and the United States Constitution, particularly under the provisions of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States . . . ."

¶156 Smith nevertheless argues that he was entitled to JMOL on the issue of whether he violated Allen's constitutional right against unreasonable search and seizure by obtaining a search warrant to photograph Allen's upper thighs and genitalia. He contends that because the search was conducted pursuant to a warrant issued by a magistrate judge who found probable cause, as a matter of law there can be no violation of Allen's constitutional right against unreasonable search and seizure.<sup>19</sup>

¶157 Section 1983 allows a plaintiff to assert a cause of action against any person who, under color of state law or authority, deprives another person of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. "Government officials performing discretionary functions . . . receive qualified immunity from § 1983 actions unless their conduct violated a clearly established constitutional or federal statutory right of which a reasonable person would have known." *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 531-32, ¶ 5, 81 P.3d

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<sup>19</sup> Smith also contends that the applicable two-year statute of limitations bars Allen's claim arising out of the December 20, 2001 search warrant or the January 3, 2002 search of Allen because the complaint in the Second Action was not filed until April 7, 2004, more than two years later. As discussed, the superior court erred in dismissing Allen's § 1983 claim against Smith in the First Action, which was filed within the two-year limitations period. The allegations in the Second Action therefore relate back to the complaint in the First Action and the statute of limitations argument is moot.

320, 322-23 (2003).<sup>20</sup> Qualified immunity thus protects “[a]ll but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

¶158 Here, Allen failed to raise a material question of fact regarding whether Smith violated a constitutional right. Smith averred in his affidavit and petition in support of the search warrant that reasonable cause existed for the issuance of the warrant because Thomas had alleged sexual contact with Allen, her account appeared to be truthful, and she had identified unique marks on Allen’s upper thigh that were visible during her sexual contact with Allen. Allen does not dispute that Thomas made these allegations and that a polygraph test indicated she responded truthfully when asked about the allegations. The execution of a valid search warrant was not a violation of Allen’s constitutional rights and Smith cannot be held liable under § 1983 for obtaining and executing a valid search warrant.

¶159 Allen asserts, however, that the search warrant was not valid because it contained additional, false information. In particular, Allen cites Smith’s statement in the affidavit that Thomas was “[e]xamined [] and treated for complications

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<sup>20</sup> A clearly established right is one that is so clear that a reasonable government official would understand that his actions violate the right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

resulting from a drug induced pregnancy termination . . .," by a DOC physician. Smith later testified that the physician could neither confirm nor disprove that Thomas had been pregnant or undergone a drug-induced termination. Even assuming Smith's statement in the affidavit was untrue, it would not have affected the probable cause supporting the search warrant. *State v. Poland*, 132 Ariz. 269, 279, 645 P.2d 784, 794 (1982) (stating that even if an affidavit contains untruthful statements, probable cause can still be established by the remainder of the affidavit).

¶160 Allen also challenges the validity of the warrant on the grounds that Smith failed to include information about the Lumley letter, in his affidavit.<sup>21</sup> The fact that Smith did not include information that Allen regards as exculpatory does not mean that Smith acted unreasonably or in reckless disregard for the truth in obtaining the search warrant. *Id.* (stating affiant acts in reckless disregard for the truth of statement supporting a search warrant only if he, in fact, entertained serious doubts as to the truth of the statements, which could be "[s]hown by actual deliberation or by 'obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" ) (citations

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<sup>21</sup> Allen also states that Smith should have included "other materials" in his petition to obtain the search warrant, but does not identify these purported materials. Accordingly, we do not consider this argument.

omitted). Moreover, the probable cause supporting the search warrant (Thomas's statement that she had sexual contact with Allen and that he had identifying scars on his upper thigh) would not have been undermined had the Lumley letter been added to the search warrant affidavit. "Probable cause is a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused is guilty of the offense." *Slade v. City of Phoenix*, 112 Ariz. 298, 301, 541 P.2d 550, 553 (1975) (holding in a malicious prosecution case that it was reasonable for a police officer to believe the accused committed an assault based on information solely from the victim without conducting an independent investigation); *State v. Robinson*, 127 Ariz. 324, 328, 620 P.2d 703, 707 (App. 1980) ("Informant reliability need not be proved by additional facts when the informant is the victim."); *State v. Grant*, 944 A.2d 947, 964 (2008) ("[T]here is no constitutional requirement that all potentially exculpatory evidence must be included in a search warrant affidavit."). Thomas's account of her sexual activity with Allen and her claim that she could identify unique marks on Allen's upper thigh were sufficient to constitute probable cause for the search warrant. Accordingly, Smith was entitled to JMOL on that portion of Allen's § 1983 claim arising out of Smith's procurement and execution of the search warrant.

¶161 Smith also contends the superior court erred in denying his motions for summary judgment and JMOL on that portion of Allen's § 1983 claim arising out of his indictment by the grand jury. However, Allen offered evidence to create material questions of fact regarding whether Smith properly conducted his investigation, whether he was truthful when he testified before the grand jury, and whether he withheld potentially exculpatory evidence such that the grand jury proceedings were materially misleading. We affirm the court's denial of Smith's motions for summary judgment and JMOL on Allen's § 1983 claim insofar as it arose out of his conduct in testifying before the grand jury.

**b. Smith's Appeal from the Verdict**

¶162 We turn, then, to Smith's challenge to the judgment on the jury verdict. We review the evidence in the light most favorable to sustaining the verdict and will affirm if any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998).

¶163 Allen argued and presented evidence at trial that Smith knowingly and intentionally pursued an unfair investigation and course of conduct designed to incriminate Allen and result in his unlawful arrest. For example, Allen

offered evidence that Smith did not fully investigate Thomas's allegations, did not talk to other guards and prison officials with knowledge of Allen's whereabouts on the relevant dates, refused to talk to Allen, and withheld exculpatory evidence from Harriss and LeMoine and the grand jury. Viewed in the light most favorable to upholding the jury's verdict, the evidence arguably supported an inference that Smith deliberately conducted an incomplete and biased investigation and testified falsely before the grand jury for the purpose of securing Allen's arrest, which resulted in a deprivation of Allen's constitutional rights. Such conduct would not be protected under the doctrine of qualified immunity, as it would have been designed to deprive Allen of a clearly established constitutional right - the right to be free from unreasonable seizure. *Weatherford*, 206 Ariz. at 531-32, ¶ 5, 81 P.3d at 322-23. Accordingly, we cannot say the record lacks substantial evidence to support the jury's verdict.

¶164 As discussed, the superior court erred by failing to grant Smith JMOL on that portion of the § 1983 claim arising out the search warrant. This does not require a reversal of the judgment. Generally, "[w]here several issues of fact are tried, and any one of them is erroneously submitted to the jury over the objection of a defendant, and a general verdict is rendered against him, he is entitled to have the verdict set aside and to

have a new trial." *Kaman Aerospace v. Ariz. Bd. of Regents*, 217 Ariz. 148, 158, 171 P.3d 599, 609 (App. 2007) (Brammer, J. Supp. Opinion) (citation omitted). However, this rule does not apply when, as here, the defendant did not request special interrogatories or object to the verdict form. *Id.* During trial, counsel for Allen and Smith discussed whether to include special interrogatories. Smith's counsel declined to have special interrogatories, stating they would "[r]aise potential problems for all of us" and he was "[n]ot going to advocate [for] it."

**c. Smith's Appeal from the Order Denying his Motion for New Trial/Remittitur**

¶165 Smith argues that the superior court abused its discretion in denying his motion for new trial or remittitur, which was based on alleged erroneous evidentiary rulings, an alleged instructional error, and Smith's argument that the verdict was excessive and the result of passion or prejudice. The court has substantial discretion in deciding whether to upset a verdict and grant a motion for new trial, and we review its decision only for an abuse of discretion. *Hutcherson*, 192 Ariz. at 53, ¶ 12, 961 P.2d at 451.

**1. Evidentiary rulings**

¶166 Smith argues he was entitled to a new trial because the superior court erroneously, and through irregular

proceedings, excluded evidence of Allen's "other crimes, wrongs, or acts," and because it erroneously precluded evidence that Allen invoked his Fifth Amendment right against self-incrimination in the administrative termination proceedings. We review a trial court's evidentiary rulings for an abuse of discretion and will not reverse unless we find a clear abuse of discretion and resulting prejudice. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996).

¶167 Smith asked the court to allow him to introduce evidence that Allen had previously been accused of crimes, criminally investigated, arrested, strip searched, incarcerated, and handcuffed.<sup>22</sup> Smith argued that this evidence was relevant to Allen's damages claim, which were based, in part, on emotional distress he suffered as a result of being arrested and jailed. Smith sought to introduce this evidence to show that Allen's arrest could not have been as traumatic as he claimed because he had previously experienced that type of encounter.

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<sup>22</sup> These activities were apparently in connection with accusations of domestic violence against Allen, allegations arising from his employment at the Alabama Juvenile Detention Center, an investigation arising out of a fight in a Michigan prison during Allen's employment, an altercation with an employer in Michigan, multiple bar fights, and unpaid speeding tickets.

In response, Allen argued that the evidence was irrelevant and highly prejudicial. The court excluded this evidence at trial.<sup>23</sup>

¶168 Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person. Ariz. R. Evid. 404(b). Smith points out, however, that such evidence may be admissible for other purposes, *id.*, and contends the court erred by excluding it in this case because he sought to use the evidence of Allen's past criminal charges to refute Allen's damage claim. Even if the evidence was properly admissible for this purpose, the court was still required to determine whether the probative value of the evidence was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Ariz. R. Evid. 403. The balancing of these factors is a function of trial courts, not appellate courts. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 403, ¶ 26, 10 P.3d 1181, 1190 (App. 2000).

¶169 We cannot tell from this record why the court denied Smith's request to introduce evidence of Allen's past crimes or whether the court conducted balancing pursuant to Ariz. R. Evid. 403. The court's statements were transcribed as "indiscernible" during the argument on this issue and the minute entry memorializing the proceedings also lacks the court's reasoning.

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<sup>23</sup> Although the transcript of the proceedings does not contain the court's ruling, the evidence was not admitted, and the parties do not dispute that the court excluded it.

Since Smith is appealing the court's evidentiary ruling, he is responsible for ensuring the relevant portions of the transcript are complete. ARCAP 11(b). If Smith wanted to preserve that record, he could have asked the superior court to correct or modify it. ARCAP 11(c),(e). He failed to do so. When parts of a transcript are missing or indiscernible, "[t]he missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). Thus, on this record we assume the court properly balanced Allen's past criminal charges pursuant to Ariz. R. Evid. 403, and hold the court did not abuse its discretion.<sup>24</sup>

¶170 Smith also argued to the superior court that he should be allowed to present evidence that Allen invoked his Fifth Amendment right against self-incrimination during DOC's

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<sup>24</sup> Further, we reject Smith's argument that the superior court made "irregular rulings" regarding this evidence that resulted in a deprivation of Smith's right to a fair trial. Allen moved *in limine* prior to trial to exclude evidence of his past arrests and investigations. The court denied the motion without prejudice on the grounds that it was untimely and failed to show that counsel had conferred as required by Ariz. R. Civ. P. 7.2(a). Although Smith claims the court later ruled that the evidence was admissible on the issue of damages, we do not find any such ruling in the record on appeal. However, even if the court did initially rule that the evidence would be admissible for a limited purpose but later reconsidered its ruling, we would not find an abuse of discretion. See *State v. King*, 180 Ariz. 268, 279-80, 883 P.2d 1024, 1035-36 (1994) (trial court may reconsider prior, non-final evidentiary rulings and such reconsiderations are reviewed for an abuse of discretion).

administrative termination process. Smith argued such evidence showed that Allen refused to cooperate during Smith's investigation and refuted Allen's claim that Smith would not speak to him regarding Thomas's allegations. Allen opposed the admission of the evidence on the grounds that it was irrelevant because he invoked his Fifth Amendment right after Smith concluded his investigation and testified before the grand jury.<sup>25</sup> The court ruled in Allen's favor apparently during an in chambers conference without a court reporter. While Smith placed in the record that he objected to the court's ruling, he failed to preserve the record on the reasons why the court ruled the way it did. We presume the court's reasons support its decision to rule in Allen's favor. *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996); *Zuck*, 134 Ariz. at 513, 658 P.2d at 166. Therefore, we hold the court did not abuse its discretion by excluding this evidence.

## **2. Nominal damages instruction**

¶171 Smith argues he was entitled to a new trial because the court erroneously refused to instruct the jury regarding nominal damages. Nominal damages must be awarded as a matter of law in a § 1983 case when the plaintiff proves a constitutional violation. *Schneider v. County of San Diego*, 285 F.3d 784, 794

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<sup>25</sup> Allen conceded Smith could testify that Allen refused to cooperate with the investigation.

(9th Cir. 2002). The purpose of this rule is to benefit a plaintiff who has suffered a constitutional violation, but cannot prove actual damages. *Barcik v. Kubiacyk*, 895 P.2d 765, 779 (Or. 1995). In this case, however, as the jury found Allen had suffered actual damages in the amount of \$750,000, neither party was prejudiced by the lack of a nominal damage instruction. We find no error.

### 3. Excessive award/passion and prejudice

¶72 Smith argues the jury's award was excessive and was the result of passion and prejudice. We will not disturb a jury's damage award unless it is "[s]o unreasonable and outrageous as to shock the conscience of this court." *Hutcherson*, 192 Ariz. at 57, ¶ 36, 961 P.2d at 455 (internal quotations omitted).

¶73 The jury heard evidence that as a result of Smith's investigation of Allen and his subsequent confinement to house arrest while facing charges for which a 30-year prison sentence could be imposed, Allen suffered emotional damage, including embarrassment and depression, and that he contemplated suicide. He testified that he felt people would always view him with suspicion and consider him a sexual predator because he had been arrested for a sexual offense. During closing argument, his counsel suggested the jury award compensatory damages of \$400,000, \$800,000, or \$1,000,000. The fact and severity of

Allen's emotional damages and the amount to award as compensation for those damages were for the jury to weigh. Based on the record, we cannot say that the evidence was insufficient to support the jury's damage award or that the verdict was so excessive as to shock the conscience or suggest passion or prejudice. *Id.*; *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 136, 907 P.2d 506, 522 (App. 1995) (stating that when the trial court has refused to interfere with the jury's damage determination, appellate court may only do so if convinced the verdict was based on passion or prejudice).<sup>26</sup>

**d. Allen's Appeal from the Order Granting Smith's Rule 50 Motion on Punitive Damages**

¶74 Finally, Allen challenges the court's JMOL for Smith on the issue of punitive damages. Allen contends that a jury question existed as to whether Smith acted with reckless indifference or callous disregard for Allen's constitutionally protected right to be free from unreasonable seizure.<sup>27</sup>

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<sup>26</sup> Smith has not argued that the verdict clearly would have been less if the trial court had granted Smith JMOL regarding the search warrant. We therefore do not consider that issue. See *Acuna v. Kroack*, 212 Ariz. 104, 114 n.13, ¶ 39, 128 P.3d 221, 231 n.13 (App. 2006).

<sup>27</sup> Smith did not respond to this issue on appeal, which we may regard as a confession of error. *In re 1996 Nissan Sentra*, 201 Ariz. 114, 117, ¶ 7, 32 P.3d 39, 42 (App. 2001). We decline to do so on this record.

¶175 We review *de novo* the granting of a motion for JMOL. *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 498, ¶ 83, 200 P.3d 977, 995 (App. 2008). To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant was “[g]uided by evil motives or willful or wanton disregard of the interests of others.” *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, 182, ¶ 10, 24 P.3d 1274, 1277 (App. 2001) (citations omitted). Thus, a plaintiff must show that the defendant’s conduct was “[o]utwardly aggravated, outrageous, malicious, or fraudulent . . .,” such that the defendant could be said to have had an “‘evil mind.’” *Id.* at 182, ¶ 11, 24 P.3d at 1277 (citations omitted).

¶176 We hold that the superior court did not err in granting Smith a JMOL on punitive damages for two reasons. First, Allen failed to preserve the record on the reasons the court granted that motion and we must presume that whatever occurred in the missing proceedings supports the superior court’s judgment. *Ashton-Blair*, 187 Ariz. at 317, 928 P.2d at 1246. In the superior court, Allen had proposed a jury instruction for punitive damages based on the Arizona Revised Jury Instructions (Civil), at 112 (4th ed. 2005) (“RAJI 4”), but did not include the language of the instruction he wanted. RAJI 4 permits the court, in its discretion, to include language that the jury in awarding punitive damages should consider the

defendant's financial wealth. Smith orally moved for a JMOL on punitive damages while the parties were settling jury instructions with the court. Smith argued that there was not sufficient evidence of conduct to support a punitive damages award. The court and Smith also addressed the concern that there was no evidence showing Smith's financial situation to guide the jury on a punitive damages award. The court took the matter under advisement. In chambers the following day of trial, the court granted Smith's motion. Allen has not provided us with a transcript from that chambers conference. While Allen attempted to make a record in open court, he only cited to cases which state that there must be sufficient evidence of a defendant's punitive damages liability before discovery of his or her wealth is permitted.<sup>28</sup> That did not preserve the record. We have no idea what reasons the court gave to grant the motion and we assume whatever occurred in chambers supports the court's decision.<sup>29</sup>

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<sup>28</sup> The transcript shows Allen cited to "Paul v. Prentice 162 Arizona 150 and {indiscernible} versus Montejo 143 Arizona 123." We assume he intended to cite *Ball v. Prentice*, 162 Ariz. 150, 153, 781 P.2d 628, 631 (App. 1989) and *Larriva v. Montiel*, 143 Ariz. 23, 25, 691 P.2d 735, 736 (App. 1984).

<sup>29</sup> Indeed, for all we know Allen might have argued that his proposed instruction authorized the jury to consider the defendant's wealth as one factor, but conceded there was no evidence showing such wealth. See *State v. Mincey*, 130 Ariz. 389, 411, 636 P.2d 637, 659 (1981) (court need not give

¶177 Second, we could assume that the court granted Smith's motion for the reason argued by Smith, that there was no evidence of Smith's wealth and punitive damages could not be awarded without such evidence. *State v. Bay*, 150 Ariz. 112, 115, 722 P.2d 280, 283 (1986). This was not error.

¶178 Punitive damages awards are not meant to financially ruin a defendant, rather to "[p]unish the wrongdoer and deter future harmful conduct." *Hudgins v. Sw. Airlines, Co.*, 1 CA-CV 07-0366, 2009 WL 73251, at \*13, ¶ 50 (Ariz. App. Jan. 13, 2009). To that end, courts are prohibited by the Due Process Clause of the Fourteenth Amendment from imposing grossly excessive punitive damages on a defendant. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *Hudgins*, 2009 WL 73251, at \*13, ¶ 50; *Sec. Title Agency*, 219 Ariz. at 501, ¶ 93, 200 P.3d at 998 (citations omitted). To avoid a grossly excessive award but also to ensure a defendant is punished, juries should consider a defendant's financial condition among other factors when determining the amount of an award. See *Larriva*, 143 Ariz. at 24, 691 P.2d at 736 ("[t]he wealth of a defendant is relevant and subject to discovery in a proper punitive damages case"); *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (Utah 1991); *Adams v. Murakami*, 813 P.2d 1348, 1351 (Cal. 1991); *Bullock v.*

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instruction which is legally incorrect or not supported by evidence).

*Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 695 (2008); RAJI 4.

¶179 Since due process considerations require courts to avoid grossly excessive punitive damages awards, *Gore*, 517 U.S. at 562, and since a defendant's wealth is relevant to the determination of a proper award, *Larriva*, 143 Ariz. at 24, 691 P.2d at 736, we hold the court did not err by granting Smith's motion.<sup>30</sup>

¶180 Nor do we think that our conclusion conflicts with *Ahmed v. Collins*, 23 Ariz. App. 54, 530 P.2d 900 (1975). There, the court held that "[t]he wealth of a defendant is only One [sic] factor which a jury may consider in assessing punitive damages." *Id.* at 58, 530 P.2d at 904. That does not mean that a court should not instruct a jury on a defendant's wealth, but that wealth is one factor the jury should consider. Moreover, the trend of cases shows courts lean toward ensuring due process is met by providing the jury with evidence of a defendant's wealth and instructing on wealth. *E.g.*, *Crookston*, 817 P.2d at 808; *Adams*, 813 P.2d at 1351; *Bullock*, 159 Cal. App. 4th at 695; *cf. Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073, 1080 (1987) (purpose of punitive damages is to punish and deter defendant's conduct, not to ruin him or her financially).

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<sup>30</sup> We assume the court properly applied the law concerning whether Smith acted with an "evil mind." *Fuentes v. Fuentes*, 209 Ariz. 51, 58, ¶ 32, 97 P.3d 876, 883 (App. 2004).

We agree with the trend of cases; otherwise it may be difficult for a jury to reach an award that comports with due process.

**CONCLUSION**

¶81 For the foregoing reasons, we affirm the superior court's summary judgments for the State and the Prison Employees. We hold the court's order erred in dismissing Allen's § 1983 claim against Smith in the First Action, but hold that any recovery on that claim is now moot. We affirm the judgment on the jury's verdict and the court's denial of Smith's motion for new trial, renewed JMOL, and remittitur. Finally, we affirm the court's order granting Smith's JMOL on Allen's punitive damages claim. We award taxable costs on appeal to Allen upon timely compliance with ARCAP 21.

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DONN KESSLER, Presiding Judge

CONCURRING:

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LAWRENCE F. WINTHROP, Judge

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SHELDON H. WEISBERG, Judge