DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DELANO YANES, an individual, Plaintiff/Appellee, v. MARICOPA COUNTY, a political subdivision of the State of Arizona; JOSEPH ARPAIO, in his official capacity as Sheriff of Maricopa County; OFFICER ADAM HERNANDEZ, #A7980, in his individual and official capacities as a detention officer with the Maricopa County Sheriff's Office; JOHN NOBLE, #A8013, in his individual and official capacities as a detention officer with the Maricopa County Sheriff's Office, Defendants/Appellants.	1 CA-CV 11-0274 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication- Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-017937

The Honorable Donald L. Daughton, Judge, Retired

AFFIRMED IN PART, REVERSED IN PART, REMANDED

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G O U L D, Judge

¶1 Maricopa County, Sheriff Joe Arpaio, Detention Officer Adam Hernandez, and Detention Officer John Noble (collectively "Defendants") appeal a jury verdict finding them liable for malicious prosecution, abuse of process, and intentional infliction of emotional distress.[1] For the following reasons, we affirm the judgment to the extent it finds Defendants liable for malicious prosecution. However, we reverse the judgment to the extent it imposes liability for abuse of process and intentional infliction of emotional distress.

[1] Defendants were also found liable on Appellee's claim for malicious prosecution pursuant to 42 U.S.C. § 1983. We address this claim in a separately filed opinion.

Facts and Procedural Background[2]

¶2 On September 25, 2003, Appellee Delano Yanes ("Yanes") was arrested and accused of molesting and murdering his 11-month-old son. During the early morning hours of September 27, Yanes was processed into the jail. After being given his bed linens and a book of rules and regulations, Yanes was directed by two detention officers, Noble and Hernandez, to step inside the bathroom to get a roll of toilet paper. Shortly after Yanes entered the bathroom, he turned around and saw "a black glove coming towards [his] face." The black glove belonged to Noble.

¶3 After the assault, Yanes recalled waking up on the floor lying in a pool of blood. Eventually, Yanes realized he was bleeding from a cut above his eye. The jail's medical staff sent Yanes to the hospital for some sutures. No other injuries are listed in the record.

¶4 Yanes argues that Noble's unprovoked attack was a form of "jailhouse justice." When Yanes was admitted into the jail, Noble recognized Yanes from a news story about his son's case. Yanes asserts that based on this news story, Noble believed he was guilty of molesting and murdering his son, and that it was incumbent on Noble to "punish" Yanes for his crime.

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[2] "We view the evidence and all reasonable inferences in the light most favorable to upholding the jury's verdict." *Romero v. Sw. Ambulance*, 211 Ariz. 200, 202, ¶ 2, 119 P.3d 467, 469 (App. 2005).

¶5 Noble and Hernandez both prepared written reports concerning the incident. In their reports, they claimed that Yanes attacked Noble. For example, Hernandez later wrote in his report that after Noble followed Yanes into the bathroom, "Yanes turned around and pushed Noble in the chest with both hands, causing him [Noble] to fall back, and hit the right side of his head on the wall near the staff bathroom."[3] In nearly identical language, Noble stated in his report, "Yanes pushed me in the chest with both hands and I fell back and hit the right side of my head up against the wall near the door of the staff bathroom." However, based on the verdicts in this case, the jury necessarily disbelieved the detention officers and determined that Noble and Hernandez prepared false reports of the incident.

¶6 In his report, Noble recommended that Yanes receive 30 days of disciplinary segregation and 30 days of full restriction. The parties disagree whether Yanes was subsequently transferred to "disciplinary segregation" based on Noble's report or whether Yanes was placed in "administrative segregation" for his own protection due to his high profile status. The jury verdicts do not necessarily decide this issue. In any event, while Yanes was in segregation, for ten days he

[3] When counsel asked Hernandez at trial whether he actually remembered "seeing Yanes push" Noble, Hernandez replied, "yes."

was not allowed to shower, was forced to wear nothing but underwear, and was not given a blanket or sheet, any reading material, or allowed to watch TV. The only thing he was given to eat was nutriloaf, an unappetizing concoction meant to satisfy nutritional requirements. After ten days, Yanes was given his uniform, bedding, and a towel. Yanes asserts that he remained in disciplinary segregation for fourteen days before returning to administrative segregation.

¶7 Once Noble and Hernandez finished their reports, the reports were reviewed by their supervisors to determine if there were grounds to conduct a criminal investigation. The reports were eventually forwarded to the jail crimes unit for an investigation. Hernandez testified at trial that he knew submitting the reports could lead to the filing of criminal charges against Yanes. At some point, either prior to or during the investigation, Noble was asked if he was requesting that Yanes be prosecuted for the assault. In response, Noble stated that he did want Yanes to be prosecuted.

¶8 After finishing the investigation, the jail crimes unit recommended that aggravated assault charges be filed against Yanes, and the case was forwarded to the County Attorney's office for review. The County Attorney's office subsequently decided to file aggravated assault charges against Yanes.

¶9 On October 30, approximately one month after the assault, Yanes' lawyer advised him that he was being charged with aggravated assault based on the reports of Noble and Hernandez. He also told Yanes that he could face prison time of three to five years if convicted of the aggravated assault charge.

¶10 On March 3, 2004, Yanes posted bond on the pending murder/molestation charges and was released from custody. Yanes was also restricted from leaving the "24/7" supervision of his grandfather while he was out on bail on the murder/molestation charges. The record is unclear, however, as to what, if any, release conditions were placed on Yanes with respect to the aggravated assault charge.[4]

¶11 Trial on the murder/molestation charges began in January 2005. On February 3, 2005, Yanes was acquitted of all charges relating to his son. However, after his acquittal, Yanes still faced the aggravated assault charge. Yanes explained that although he was very happy to be acquitted for the charges relating to his son, "it [was] kind of hard to explain how [he] felt[:]"

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[4] It is not clear whether any of the pretrial release conditions that were imposed on Yanes as to the murder/molestation charges remained in place for the aggravated assault charge after Yanes was acquitted of the murder/molestation charges. The record does show that Yanes' bond was not exonerated until October 10, 2006, the date the state dismissed the aggravated assault charge against Yanes.

> I mean, I am sitting here just got done getting over this huge trial, and then now I am being charged with something else that I didn't commit again.
>
> I mean, it is – it is just like when is it going to end? I mean, I just spent three years trying to go over one trial. Do I have to go another three years over another trial?

Prior to being jailed, Yanes had been "happy go-lucky," "good natured," and would "walk right up and give you a hug," according to his "surrogate grandfather." Yanes easily "let [negative] things roll away from him" and "let [them] go." While Yanes temporarily went back to his old "happy go-lucky self" after he was acquitted of the charges related to his son, he became "negative" and "desponden[t,]" "quiet," "reserved," "not talking to a lot of people," and "keeping pretty much to himself" when he learned that he would still face the pending aggravated assault charges. As a further result of the aggravated assault charges, Yanes also refused to "go into a dark place by himself without really looking first," avoided any possible exposure to the police, and remained "reserved."

¶12 On October 10, 2006, the County Attorney dismissed the aggravated assault charge against Yanes. Approximately one year after the dismissal, Yanes sued Noble and Hernandez[5] for

[5] Yanes alleged that Hernandez aided and abetted Noble, and therefore was liable for Noble's tortious conduct.

malicious prosecution, abuse of process, and intentional infliction of emotional distress. Yanes also sued Sheriff Arpaio and Maricopa County, alleging both were vicariously liable for the detention officers' tortious conduct.[6]

¶13 At trial, the jury found against Defendants on all counts and awarded Yanes $650,000 in general compensatory damages.[7] Defendants subsequently moved for a new trial, to alter or amend the judgment, or for judgment as a matter of law. The trial court denied these motions, and Defendants timely appealed.

Discussion

I. Standard of Review

¶14 Defendants argue the applicable standard of review is the standard applied to a Rule 50 motion for judgment as a matter of law. Yanes contends, however, that Defendants did not make a Rule 50 motion concerning his state law claims, and as a result the court's review is limited to the standard of review applicable to their motion for new trial. The record is

[6] At trial, Sheriff Arpaio and Maricopa County stipulated that they were vicariously liable for any alleged tortious conduct by Noble and Hernandez.

[7] The jury also awarded Yanes $205,000 in punitive damages against Noble based on Yanes' § 1983 federal civil rights claim.

confusing on this issue;[8] however, as set forth below, under either standard of review we reach the same result. Therefore, in analyzing Defendants' arguments, we will apply the standard of review for both a Rule 50 motion and a motion for new trial.

¶15 We analyze Defendants' Rule 50 motion de novo. *Acuna v. Kroack*, 212 Ariz. 104, 110 n.8, ¶ 23, 128 P.3d 221, 227 n.8 (App. 2006) (denial of motion for judgment as a matter of law is reviewed de novo). At the same time, "we 'review the evidence in a light most favorable to upholding the jury verdict' and will affirm 'if any substantial evidence exists permitting reasonable persons to reach such a result.'" *Id.* at 110-111, ¶ 24, 128 P.3d at 227-228 (internal citation omitted). Moreover, we view the evidence and all reasonable inferences from it in a light most favorable to the nonmoving party. *See*

[8] At the close of Yanes' case, Defendants made an oral Rule 50 motion. The motion primarily addressed Yanes' § 1983 claim. The Rule 50 motion also addressed whether Yanes, as a matter of law, proved "severe" emotional distress. Defendants' Rule 50 motion made no reference to Yanes' claims for malicious prosecution or abuse of process. After the trial, Defendants filed a motion entitled, "Defendants' Renewed Motion for New Trial, To Alter or Amend the Judgment, and Renewed Rule 50(b) Motion." The first section of this motion, entitled "Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a matter of Law," only addressed Yanes' § 1983 claim. The second section, entitled "Motion for New Trial," addressed Yanes' state law tort claims. However, to make matters more confusing, Defendants phrased their arguments in the "Motion for New Trial" section using the "judgment as a matter of law" standard of Rule 50(b).

Warne Invs. Ltd. V. Higgins, 219 Ariz. 186, 194, ¶ 15, 195 P.3d 645, 653 (App. 2008).

¶16 We review the trial court's denial of Defendants' motion for a new trial for an abuse of discretion. *See Dawson v. Withycombe*, 216 Ariz. 84, 95, ¶ 25, 163 P.3d 1034, 1045 (App. 2007). We will reverse the trial court's denial of Defendants' motion for a new trial only if the court abused its discretion given the record and circumstances of the case. *See Warne Invs.*, 219 Ariz. at 191, ¶ 33, 195 P.3d 654, 657; *see also Hutcherson v. City of Phoenix,* 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (explaining that we review a trial court's decision to deny post-trial motions for an abuse of discretion).

¶17 We analyze questions of law de novo. *See League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559, ¶ 7, 146 P.3d 58, 60 (2006). When reviewing the jury's verdict, we view the evidence and all reasonable inferences in the light most favorable to upholding the jury's verdict. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 255, ¶ 3, 92 P.3d 882, 885 (App. 2004). We will uphold a general jury verdict if evidence on any one count, issue, or theory sustains the verdict. *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, 580, ¶ 11, 65 P.3d 956, 961 (App. 2003) (citing *Murcott v. Best Western Int'l, Inc.,* 198 Ariz. 349, 361, ¶ 64, 9 P.3d 1088, 1100 (App. 2000)).

¶18 We note at the outset of our analysis that Yanes' claims are not based on Noble's use of excessive force during the assault, nor are they based on his arrest and prosecution for the murder/molestation of his son. Yanes' claims are based solely upon the damages he suffered as a result of the false reports prepared by the detention officers and the subsequent aggravated assault charge filed against him.

II. Intentional Infliction of Emotional Distress

¶19 Defendants initially argue Yanes' emotional distress was caused by the accusation that he molested and murdered his son, and was not caused by the detention officers' false reports and the ensuing aggravated assault prosecution. However, while there may have been conflicting evidence on this issue, we conclude there was sufficient evidence of emotional distress stemming from the false reports/charge to submit this matter to the jury and support the jury's verdict. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998) (explaining the weight to give conflicting evidence and witness credibility is factual, warranting deferral to the trial court).

¶20 Defendants also contend that Yanes failed, as a matter of law, to demonstrate he suffered from severe emotional distress. To prove his claim for intentional infliction of emotional distress, Yanes was required to prove not only that he

suffered emotional distress; he was required to prove the emotional distress he suffered was *severe*. *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 199, 650 P.2d 496, 501 (App. 1982)("[A] line of demarcation should be drawn between conduct likely to cause mere 'emotional distress' and that causing 'severe emotional distress.'")(internal citations omitted); Restatement (Second) of Torts § 46, comment j (West 2012) ("[T]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."). It is the duty of a court to determine "whether the defendant's conduct may reasonably be regarded as so extreme and outrageous" as to permit the issue to be submitted to the jury. Rest. 2d Torts § 46, cmt. h; *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980).

¶21 Severe emotional distress is evaluated on a case-by-case basis, and it includes a wide variety of mental suffering such as fear, humiliation, anxiety, anger and grief. *See Midas*, 133 Ariz. at 197, 650 P.2d at 499 (case-by-case analysis); *Skousen v. Nidy*, 90 Ariz. 215, 219, 367 P.2d 248, 250 (1962) (mental suffering considered an injury that is compensable); Rest. 2d Torts § 46, cmt. j (discussing wide variety of emotional distress that qualifies as "severe"). To evaluate whether emotional distress is severe, both the intensity and the duration of the distress should be considered. Rest. 2d Torts

§ 46, cmt. j. There is no requirement that physical injury need occur to recover for severe emotional distress. *Duke v. Cochise County*, 189 Ariz. 35, 38, 938 P.2d 84, 87 (App. 1996).

¶22 Although the distress must be "reasonable and justified under the circumstances," when an individual is unusually susceptible to severe emotional reaction, and the Defendants knew about this susceptibility, liability for inflicting severe distress may result.[9] Rest. 2d Torts § 46, cmt. j. ("[T]here is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.").

¶23 While severe distress must be proved, "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." Rest. 2d Torts § 46, cmt. j. Thus, the outrageousness of the conduct itself is a key aspect of analyzing the severity of the emotional distress. *Id; Pankratz v. Willis*, 155 Ariz. 8, 17, 744 P.2d 1182, 1191 (App. 1987). Moreover, the "extreme and

[9] Defendants argue that applying the "eggshell plaintiff" rule in this case is misguided; we disagree. Stated concisely, the "eggshell plaintiff" rule means that "an accident victim's predisposing susceptibility does not relieve a negligent actor of responsibility for whatever injuries his negligence precipitates." *Gasiorowski v. Hose*, 182 Ariz. 376, 897 P.2d 678 (App. 1994). The Restatement clearly recognizes the application of the eggshell plaintiff rule to claims for intentional infliction of emotional distress. Rest. 2d Torts § 46, cmt. j.

outrageous character of the conduct may arise from an abuse of a position . . . [of] actual or apparent authority over another," such as a police officer. Rest. 2d Torts § 46, cmt. e.

¶24 We conclude there was insufficient evidence to permit Yanes' claim to go to the jury and/or support the jury's finding of liability against the Defendants. The record does not show Yanes suffered the type of *severe* emotional distress necessary to prove a claim for intentional infliction of emotional distress. Yanes testified that after he learned of the false report/charges, he became "negative" and "desponden[t,]" "quiet," "reserved," and "[keeps] pretty much to himself." After the false reports/charges were filed, Yanes remained fearful of going "into a dark place by himself without really looking first," and avoided any possible exposure to the police. These feelings of moodiness and anxiety experienced by Yanes do not rise to the level of severe emotional distress. *See Midas*, 133 Ariz. at 199, 650 P.2d at 501 (crying and inability to sleep based on six harassing phone calls from a debt collector do not qualify as "severe" emotional distress); *Spratt v. N. Auto Corp.*, 958 F. Supp. 456, 461 (D. Ariz. 1996) (applying Arizona law and holding plaintiff's termination from employment that caused "crying, being distressed and upset, and having headaches...is not sufficient to submit this claim to a jury"); *Bodett v. CoxCom Inc.*, 366 F.3d 736, 747 (9th Cir. 2004)

(applying Arizona law and holding that termination from employment which caused shock, stress, moodiness, and estrangement from friends does not constitute severe emotional distress). We therefore reverse the judgment to the extent it imposes liability on Defendants for intentional infliction of emotional distress.

III. Abuse of Process

¶25 Yanes asserts that Defendants were liable for abuse of process based on the detention officers' false reports. We disagree. For purposes of an abuse of process claim, the term "process" is limited to "an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose." *Crackel*, 208 Ariz. at 271, ¶ 69, 92 P.3d at 901 (internal citation and quotation omitted). Although Arizona does not restrict abuse of process claims "to the narrowest sense of that term," and broadly interprets such claims to "encompass the entire range of procedures incident to the litigation process," the filing of the false reports still does not qualify as "an act done under the authority of the court." *Nienstedt v. Wetzel*, 133 Ariz. 348, 352, 651 P.2d 876, 880 (App. 1982). As a result, Yanes' abuse of process claim fails as a matter of law.

IV. Malicious Prosecution (State Claim)

¶26 Defendants argue they cannot be liable for malicious prosecution because they are not "complaining witnesses"; specifically, they did not initiate the prosecution against Yanes. Under Arizona law, to prove a malicious prosecution claim, a plaintiff must prove that a defendant initiated or took an active part in the criminal prosecution against him. *Bearup v. Bearup*, 122 Ariz. 509, 510, 596 P.2d 35, 36 (App. 1979); *Lantay v. McLean*, 2 Ariz. App. 22, 23, 406 P.2d 224, 225 (1965); Rest. 2d Torts § 653.

¶27 In support of their argument, Defendants claim the detention officers were required to file their reports. Defendants also contend they are insulated from any liability because the detention officers' supervisors, the jail crimes unit and the prosecutor all exercised their independent discretion in deciding whether to investigate/file aggravated assault charges against Yanes.

¶28 When a person provides false, material information to a criminal investigative agency or a prosecutor, an intelligent exercise of the officer/prosecutor's discretion is impossible. Rest. 2d Torts § 653, cmt. g (West 2012)("If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the

false information."). As explained by the Seventh Circuit, "a man [is] responsible for the natural consequences of his actions"; thus, "a prosecutor's decision to charge, a grand jury's decision to indict, . . . none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." *Jones v. City of* Chicago, 856 F.2d 985, 994 (7th Cir. 1988).

¶29 In *Pierce*, a former criminal defendant filed a claim for malicious prosecution against a forensic chemist. The chemist's false reports were instrumental in inducing the prosecutor to file criminal charges, which were ultimately determined to be baseless. *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004). In finding that the defendant had a viable claim for malicious prosecution, the court stated that the chemist could not "hide behind the fact she neither initiated nor filed the charges," and further stated that:

> [T]he actions of a police forensic analyst who prevaricates and distorts evidence to convince the prosecuting authorities to press charges is no less reprehensible than an officer who, through false statements, prevails upon a magistrate to issue a warrant. In each case the government official abuses a position of trust to induce the criminal justice system to confine and then prosecute an innocent defendant.

Id. at 1293.

¶30 Defendants Noble and Hernandez are not shielded from liability based on the actions of the jail supervisors, the jail

crimes unit, or the prosecutor. The jury could have reasonably concluded that Noble initiated the prosecution by preparing a false report and then, based on the report, requesting that Yanes be prosecuted for aggravated assault. In addition, the jury could have concluded that Hernandez aided and abetted Noble's efforts to initiate a prosecution. The jury's verdict reflects it found that Hernandez, the only eyewitness to the incident, intentionally prepared a false report fully supporting Noble's assault claim against Yanes. Moreover, Hernandez admitted knowing his report could be reviewed by a prosecutor and lead to criminal charges against Yanes. *See Wells Fargo Bank v. Arizona Laborers*, 201 Ariz. 474, 485, ¶ 34, 38 P.3d 12, 23 (2002) (stating that liability for aiding and abetting tortious conduct requires proof the defendant provided substantial assistance to the primary tortfeasor). Finally, the jury could have reasonably inferred that while the jail supervisors and the jail crimes unit investigated the matter, both Noble and Hernandez maintained their false accounts of the assault. As the matter continued down a path towards review by a prosecutor, it is reasonable to conclude that both men were aware their persistence in supporting their false allegations – the only evidence of who instigated the physical conflict – would lead to charges against Yanes.

¶31 These actions are sufficient to establish that the detention officers induced their supervisors and the prosecutor to file charges against Yanes. The fact the detention officers did not directly complain to the prosecutor does not change this analysis. We therefore decide that the trial court did not err in sending this claim to the jury, and sufficient evidence exists to support the jury's liability verdict against Defendants.

V. Sufficiency of the Evidence

¶32 In their motion for new trial, Defendants argue that the record does not support a verdict of $650,000 in compensatory damages. Defendants claim the jury improperly found in favor of Yanes based on sympathy for Yanes' experiences in the jail and the suffering Yanes endured over the death of his son and subsequently being accused of murdering his son.

¶33 We find no error. "[I]t is 'well settled in Arizona that the amount of an award for damages is a question peculiarly within the province of the jury, and such award will not be overturned or tampered with unless the verdict was the result of passion and prejudice.'" *In re Hanscome*, 227 Ariz. 158, 162, ¶ 12, 254 P.3d 397, 401 (App. 2011). The verdict is not unfair, unreasonable, outrageous, or "so manifestly unfair, unreasonable and outrageous as to shock the conscience." *Id.*

VI. Combination of Errors

¶34 Given that we have found the trial court's only error was in sending the abuse of process, intentional infliction of emotional distress, and § 1983 claims to the jury, we reject Defendants' request for a new trial based on their claim "the combination of errors," like "holes in a damn," denied Defendants a fair trial.

¶35 In addition, because the malicious prosecution claim independently sustains the verdict, Defendants are not entitled to a new trial. We will uphold a general verdict if evidence on any one count, issue, or theory sustains the verdict. *Mullin v. Brown*, 210 Ariz. 545, 551, ¶ 24, 115 P.3d 139, 145 (App. 2005). A defendant who does not ask for special verdicts may not challenge the validity of a general verdict if the jury was presented with sufficient evidence to sustain the award of damages on at least one count. *Id.* at 551, ¶ 25, 115 P.3d at 145. It does not appear that Defendants objected to the verdict form, which distinguished only between compensatory and punitive damages,[10] and did not assign a specific damage amount to any single claim for compensatory damages.[11] Defendants have not

[10] The verdict form separately lists the Defendants and the claims made against them. The jury found each Defendant liable for all claims listed.

[11] The form did, however, separately list punitive damages, which only applied to the § 1983 claim. Because the

argued that the trial court erred by refusing to submit to the jury special interrogatories on liability.

Conclusion

¶36 For the foregoing reasons and the reasons set forth in our companion opinion, we affirm the judgment to the extent it imposes liability against Defendants Noble and Hernandez for malicious prosecution in the amount of $650,000. We reverse the remainder of the judgment and remand for the trial court to amend the judgment in accordance with our decision.

/S/
ANDREW W. GOULD, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
ANN A. SCOTT TIMMER, Judge

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punitive damages claim was based upon the § 1983 claim, we address Yanes' punitive damages award in our separately filed opinion.