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

DANIEL SABAN, an individual, and DONNA SABAN, an individual, and as husband and wife,	1 CA-CV 08-0607
	DEPARTMENT E
Plaintiffs-Appellants,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
MARICOPA COUNTY, a political subdivision of the State of Arizona; JOSEPH M. ARPAIO and AVA ARPAIO, husband and wife; DAVID HENDERSHOTT and JANE DOE HENDERSHOTT, husband and wife; STEVE BAILEY and JANE DOE BAILEY, husband and wife; RAY JONES and JANE DOE JONES, husband and wife,	
Defendants-Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-007294

The Honorable Robert C. Houser, Judge

AFFIRMED

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H A L L, Judge

¶1 Plaintiffs-Appellants Daniel and Donna Saban[1] appeal from a jury verdict in favor of Defendants-Appellees David Hendershott and Joseph M. Arpaio on Saban's claim for defamation. Saban argues the trial court made erroneous evidentiary rulings at trial, improperly instructed the jury regarding the elements of defamation, and improperly limited his damage claim. He also challenges the trial court's summary judgment prior to trial on his false light invasion of privacy and statutory claims, and its judgment as a matter of law in favor of Defendant-Appellee Steve Bailey and Arpaio in his capacity as supervisor of Detective Jeff Gentry. For the reasons discussed below, we affirm.

[1] For ease of reference, and except as otherwise noted, we refer to Daniel and Donna Saban collectively, and in the singular, as "Saban."

FACTUAL AND PROCEDURAL BACKGROUND[2]

¶2 In 2004, Dan Saban was a candidate for the office of Maricopa County Sheriff in the Republican party primary election. Saban was opposed by incumbent Sheriff Joseph Arpaio.

¶3 On April 7, 2004, the Maricopa County Sheriff's Office (MCSO) received an e-mail addressed to Sheriff Arpaio from Saban's adopted mother, Ruby Norman, in which she stated:

> I need to talk to you about a matter that would be of great interest to you. I am the mother of one of your running mates that[']s not so honorable. I do not want to see him make sheriff for the simple reason of things he has done. Please contact me, Ruby Norman . . . .

¶4 On April 27, 2004, Sheriff Arpaio's Chief Deputy David Hendershott telephoned Norman in response to the e-mail. During the call, Norman told Hendershott that Saban sexually assaulted her years earlier. She told Hendershott that she had already contacted the press regarding her allegations, and, in

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[2] Saban moves to strike any references in defendants' answering brief to deposition testimony that he contends is outside the record. This court's review is limited to the record before the trial court and we do not consider documents that were not considered by the trial court. *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (stating appellate court's review is limited to the record before the trial court and reviewing court cannot consider any evidence that was not part of the record before the trial court at the time it entered the decision that is the subject of the appeal). We view the evidence in the light most favorable to upholding the jury's verdict. *Larsen v. Nissan Motor Corp.*, 194 Ariz. 142, 144, ¶ 2, 978 P.2d 119, 121 (App. 1998).

fact, Norman had contacted both KNXV (Channel 15) reporter Robert Koebel and The East Valley Tribune. Hendershott recorded the telephone call on a personal handheld cassette tape recorder he used to assist his hearing impairment.[3]

¶5 Later that day, Hendershott spoke to Koebel and played the tape recording. Norman had already left a voicemail message for Koebel in which she asked him to call her regarding allegations of rape against a man running for Sheriff. Koebel testified at trial that the cassette contained the same allegations Norman had previously made in her voicemail message to him. Koebel asked Hendershott whether Norman had filed a report with MCSO. Hendershott told Koebel that there was not yet a report, and if he wanted any further information, he would need to submit a public records request to MCSO. After speaking to Hendershott, Koebel telephoned Norman and later interviewed her regarding her allegations against Saban.

¶6 On April 28, 2004, Hendershott asked Lieutenant Ray Jones to have deputies take an initial report from Norman. Sergeant Steve Bailey and Detective Jeff Gentry interviewed Norman. Bailey and Gentry met with Norman on April 28, 2004 and tape-recorded their interview. Norman alleged Saban had

[3] Hendershott determined the tape did not contain any evidentiary substance and therefore did not preserve it; instead, he recorded over it consistent with his usual practice.

sexually assaulted her in 1973, when he lived in her home as her adopted son. Bailey and Gentry found Norman to be credible, but noted that the statute of limitations applicable to her allegations may have expired. Bailey also believed MCSO would have a conflict of interest in conducting an investigation of Norman's allegations. In accordance with MCSO's usual practice, Bailey and Gentry returned to MCSO's headquarters and prepared an Incident Report that evening. Ultimately, the Sheriff decided to refer the matter to the Pima County Sheriff's Office for further review and disposition.

¶7 Both before and after Bailey interviewed Norman, he spoke with Koebel, with whom he had a professional relationship arising out of Koebel's coverage of other MCSO cases. Bailey told Koebel that the allegations were not a "set-up" by Hendershott and that, in his opinion, Norman was a credible witness. On April 30, 2004, in response to Koebel's public records request, MCSO Public Information Officer Lisa Allen McPherson provided Koebel with a copy of the Incident Report.

¶8 On April 29, 2004, Koebel conducted a videotaped interview of Norman regarding her allegations. The next day, on April 30, 2004, Koebel attended a Saban campaign event and afterward conducted a videotaped interview with Saban in which he questioned him about Norman's claims. Saban denied the allegations. That evening, Channel 15 broadcast a story

regarding Norman's accusations and featuring Koebel's interviews with Norman and Saban.

¶9 Saban filed a complaint against Koebel and Scripps Howard Broadcasting Company in which he alleged claims for false light invasion of privacy, wrongful intrusion upon private affairs, intentional infliction of emotional distress, and aiding and abetting tortious conduct, but later agreed to dismiss those claims with prejudice.[4] Saban's complaint also alleged claims against Maricopa County, Arpaio, Hendershott, Bailey, and Jones for abuse of process, false light invasion of privacy, wrongful intrusion upon private affairs, intentional infliction of emotional distress, and negligence. Saban later amended his complaint to plead additional claims for defamation, violation of the right to privacy guaranteed by the Arizona constitution, violation of Arizona Revised Statutes (A.R.S.) section 11-410 (2001), and public disclosure of private facts. The Maricopa County defendants moved for summary judgment on all claims, and argued that neither Maricopa County nor Sheriff Arpaio could be held vicariously liable for the conduct of MCSO's employees. The trial court granted the motion with respect to the abuse of process, negligence, intentional

[4] Saban also named MCSO employee Todd Whitney as a defendant. Whitney moved for summary judgment on the grounds that he had been erroneously named and was not involved in the Norman investigation. Saban did not oppose the motion, which the court granted, and he does not appeal that ruling.

infliction of emotional distress, and statutory claims, but denied it with respect to the defamation, false light, and wrongful public disclosure claims. The court also ruled that Maricopa County could not be held vicariously liable and granted it summary judgment, but denied the motion with respect to Arpaio.

¶10 The remaining defendants then moved for summary judgment on the surviving claims, arguing that Saban had not suffered any quantifiable damages and, even if Saban could show damage, the defendants were not the proximate cause of any compensable or special damage. The court granted summary judgment for the defendants on Saban's claim for invasion of privacy because it determined that no reasonable jury could find that the defendants, rather than Channel 15, gave publicity to false information or private facts about Saban. The court denied the motion insofar as it related to Saban's defamation claim, but limited the damages Saban could recover for that claim to those arising out of the defendants' republication of Norman's alleged defamatory statements to Koebel, and not Channel 15's subsequent broadcast of the statements.

¶11 The trial court conducted a ten-day jury trial on Saban's defamation claim. After Saban rested his case, the court granted Bailey's and Jones' motions for judgment as a matter of law, and granted Arpaio's motion to the extent the

defamation claim arose out of Gentry's conduct.[5] Thus, the only issues submitted to the jury were whether Hendershott defamed Saban and whether Arpaio was vicariously liable for any such defamation. The jury returned a general verdict for Hendershott and Arpaio.

¶12 Saban moved for new trial on the basis that the court had made prejudicial evidentiary rulings and legal errors during the trial, and that a new trial was warranted by defendants' misconduct. The trial court denied Saban's motion and entered judgment for defendants.

¶13 Saban timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

ISSUES

¶14 Saban argues the court erred by granting defendants summary judgment on his claims for false light invasion of privacy and violation of A.R.S. § 11-410 and A.R.S. § 38-503 (2001), and challenges the court's judgment as a matter of law.

¶15 He contends the court improperly instructed the jury by failing to give his requested instruction regarding defamation and by limiting the damages Saban could recover to those resulting from publication to Koebel. Saban also challenges the court's evidentiary rulings allowing admission of

[5] The court denied Hendershott's motion for judgment as a matter of law.

evidence regarding the City of Mesa's investigation of Saban, Saban's Town of Buckeye employment application, and Hendershott's testimony concerning Norman's stroke.

¶16 Finally, Saban argues the court erred by ordering him to return documents produced by the Accounting Office of John A. Hasslacher.[6]

DISCUSSION

A. Summary Judgment

¶17 Saban challenges the trial court's summary judgment for defendants on his invasion of privacy and statutory claims.

¶18 A court shall grant summary judgment when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). Summary judgment should be granted, "if 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). If the evidence would allow a jury to resolve a material issue in favor of

[6] Saban also argues in his opening brief that the court erred in failing to impose sanctions for defendants' alleged disclosure violations relating to the anticipated testimony of Norman's sister, Marlene Fitch. He concedes in his reply brief, however, that the issue was not preserved for appeal. Accordingly, we do not consider it.

either party, summary judgment is improper. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶19 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, 12-13, 864 P.2d 1042, 1044-45 (1993), and 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).

¶20 Saban urges us to view all summary judgment issues "in light of" defendants' alleged spoliation of evidence; namely, Hendershott's failure to preserve the audiotape of his telephone call with Norman. Spoliation is defined as "[t]he intentional destruction of evidence . . . . The destruction, or the significant and meaningful alteration of a document or instrument." *Smyser v. City of Peoria*, 215 Ariz. 428, 438-39 n.11, 160 P.3d 1186, 1196-97 n.11 (App. 2007) (quoting Black's Law Dictionary 1257 (6th ed. 1990)). Under Arizona law, a trial court has discretion to impose sanctions when a party destroys

potentially relevant evidence, *Souza v. Fred Carries Contracts, Inc*., 191 Ariz. 247, 249-50, 955 P.2d 3, 5-6 (App. 1997), including instructing the jury that it may infer that destroyed evidence would have been unfavorable to the position of the offending party. *See Smyser*, 215 Ariz. at 440, ¶ 38, 160 P.3d at 1198 (App. 2007) (holding trial court did not err by refusing to give the jury an adverse inference instruction). In this case, however, instructing the jury that it could draw an adverse inference against defendants based upon Hendershott's destruction of the audio recording of his telephone call with Norman would have been an abuse of discretion because Saban presented no evidence upon which a reasonable fact finder could conclude that Hendershott erased the tape in order to destroy evidence. Hendershott testified that he believed the tape had no evidentiary value and erased it in accordance with his usual practice, and the only evidence regarding the contents of the tape demonstrates that it was consistent with Norman's statements to Bailey and Gentry that were memorialized in the Incident Report. An adverse inference instruction would not be warranted by Saban's mere assertion that he may have been able to establish that defendants acted inappropriately if he could have inspected the audiotape. *See Strawberry Water Co. v. Paulson*, 220 Ariz. 401, 411, ¶ 30, 207 P.3d 654, 664 (App. 2008) (holding trial court did not abuse its discretion by refusing to

instruct the jury that it could infer that evidence destroyed by the plaintiff would have been adverse to it; defendants were able to challenge the credibility of missing evidence to the jury). Accordingly, we do not apply a spoliation inference to our summary judgment analysis.

1. False Light Invasion of Privacy

¶21 The trial court granted summary judgment for defendants on Saban's claim for false light invasion of privacy on the grounds that, as a matter of law, defendants were not the cause of Saban's alleged damages.

¶22 To establish a claim for false light invasion of privacy, a plaintiff is required to show that the defendant knowingly or recklessly gave publicity to a matter that places the plaintiff in a false light that a reasonable person would find highly offensive. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 340, 783 P.2d 781, 786 (1989); Restatement (Second) of Torts § 652E (1977).

> "Publicity," as [applicable to a claim for false light invasion of privacy], differs from "publication," as that term is used . . . in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any

> other means. It is one of a communication that reaches, or is sure to reach, the public.

Restatement § 652E, cmt. a.

¶23 The trial court ruled that because defendants only communicated Norman's allegations to Koebel, it was Koebel and Channel 15, not defendants, that gave publicity to the allegations and were the cause of any damages Saban suffered. Saban argues that the court interpreted the tort of false light too narrowly, and notes that the Restatement provides that a person may give publicity to a matter through a communication that is sure to reach the public. Restatement § 652E, cmt. a (incorporating comment a to § 652D). He contends the court's summary judgment was erroneous because defendants brought publicity to the Incident Report by releasing it to Koebel.[7]

¶24 Under Arizona law, the preparation and release of a police report pursuant to a public records request will not support a defamation claim against the law enforcement agency unless it involved malice or intentional defamation. *Carlson v. Pima County*, 141 Ariz. 517, 519, 687 P.2d 1272, 1274 (App. 1983)

[7] Saban argues for the first time in his reply brief that Hendershott's playing of the tape recording of his conversation with Norman to Koebel gave publicity to Norman's allegations and supports Saban's claim for false light. Saban waived this argument by failing to raise it in his opening brief and we do not consider it. *Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 357, ¶ 9, 45 P.3d 352, 354 (App. 2002) (stating appellate court generally will not consider arguments raised for the first time in reply brief).

(holding sheriff had a duty to make offense report containing inmate's assault complaint and to release it pursuant to a public records request).[8] Saban argues, however, that defendants may be held liable for false light invasion of privacy because they acted with malice and ill-will toward Saban by releasing the Incident Report despite the fact that the investigation had been referred to the Pima County Sheriff's Office and because they excluded matters from the Incident Report in order to cast Saban in a false light. He asserts that because MCSO had referred the investigation of Norman's allegations to the Pima County Sheriff's Office, defendants no longer had the authority to release the Incident Report to Koebel pursuant to his public records request.

¶25 In support of his argument, Saban relies on evidence presented at trial. We consider only the evidence before the trial court at the time it ruled on defendants' summary judgment motion. *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 472, 702 P.2d 696, 701 (App. 1984) (stating appellate court is limited to the evidence before the trial court when a motion for summary judgment was heard and may not consider evidence presented at the subsequent trial). Our

[8] *Carlson* involved a claim for defamation, not false light invasion of privacy. However, we apply the same analysis regarding the nature of a police report and response to a public records request in this case.

review of the summary judgment pleadings shows Saban did not raise a material question of fact regarding whether defendants acted with malice in preparing the Incident Report or releasing it to Koebel.[9]

¶26 Thus, assuming without deciding that the trial court erred by ruling as a matter of law that defendants did not give publicity to Norman's allegations, we nonetheless affirm summary judgment for defendants because there is no evidence that they acted with malice in preparing the Incident Report or releasing it to Koebel.

2. A.R.S. § 11-410

¶27 Saban argues the trial court improperly granted summary judgment on his claim that defendants violated A.R.S. § 11-410, which prohibits the use of county resources or employees to influence an election. Although the statute does not expressly grant a private right of action, Saban asserts the trial court nonetheless should have allowed his action in order

[9] In any event, there was no evidence adduced at trial that at the time defendants gave the report to Koebel the matter had been referred to the Pima County Sheriff's Office, and MCSO Public Information Officer Lisa Allen McPherson and Deputy Chief Jack McIntyre testified that MCSO policy did not prohibit the release, pursuant to a public records request, of an incident report generated by MCSO even if a matter is subsequently referred to another agency. Further, the evidence showed that conducting the follow-up interviews that Saban argues were necessary would have constituted investigating Norman's claims, which the Sheriff's office determined it would not do because of a conflict of interest.

to protect the right of free and equal elections guaranteed in the Arizona constitution. In support of his position, Saban cites the Restatement (Second) of Torts § 874(A) (1979), which gives the court discretion to allow a civil remedy when one is not provided by statute if the court determines the remedy is appropriate to further the purpose of the statute and needed to assure its effectiveness.

¶28 In deciding whether a private right of action exists, a court must consider "the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." *Napier v. Bertram*, 191 Ariz. 238, 240, ¶ 9, 954 P.2d 1389, 1391 (1998) (adopting Restatement § 874(A)). Section 11-410 is contained among several statutes that generally prescribe the qualifications and conduct of county officers and establish how county business must be conducted. *See* A.R.S. §§ 11-401 to -424.02 (2001 & Supp. 2009). As the trial court recognized, A.R.S. § 11-410 does not proscribe specific acts and does not purport to protect any person or class of persons, but simply prohibits a broad category of conduct, namely, the use of county resources to influence the outcome of an election. There is no indication that the legislature intended to create a private right of action or that its purpose in implementing A.R.S. § 11-410 would be impaired if such a right were not allowed.

¶29 Given the purpose of the statute, its language and context, we find no error in the trial court's refusal to recognize a private right of action in A.R.S. § 11-410 and affirm the summary judgment.

3. A.R.S. § 38-503

¶30 Saban asserts the trial court improperly granted summary judgment on his claim that Arpaio and Hendershott violated A.R.S. § 38-503(B), which requires a public officer or employee to refrain from participating in any decision by a public agency in which he or she has a substantial interest. He argues that because Arpaio and Hendershott had a substantial interest in continuing their employment with MCSO, and Saban's candidacy threatened those interests, they were therefore prohibited from participating in any manner in decisions regarding Saban. Thus, he contends their decision to authorize MCSO deputies to interview Norman and prepare an incident report in response to her complaint was a violation of A.R.S. § 38-503(B).

¶31 Arizona's conflict of interest statute provides:

> Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

A.R.S. § 38-503(B). A substantial interest is "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11) (2001).

¶32 "[T]o violate the conflict of interest statute, a public official must have a non-speculative, non-remote pecuniary or proprietary interest in the decision at issue." *Hughes v. Jorgenson*, 203 Ariz. 71, 74, ¶ 16, 50 P.3d 821, 824 (2002). Saban contends Arpaio and Hendershott had such an interest in MCSO's decision to prepare the Incident Report in response to Norman's complaint because taking the report helped to ensure that Arpaio would win the 2004 Republican primary election against Saban, and that Arpaio and Hendershott would continue their employment with MCSO.

¶33 Defendants argue this case is analogous to *Hughes*, in which the Arizona Supreme Court held that a county sheriff's interest in an investigation of possible criminal activities by his sister did not fall within the scope of A.R.S. § 38-503(B). *Id*. at 75, ¶ 21, 50 P.3d at 825. The court ruled that, although the sheriff might have a remote or contingent interest in the investigation, he did not have a substantial interest, as required by the statute, because he did not have a non-speculative, non-remote pecuniary or proprietary interest in the decision. *Id*. at 73-75, ¶¶ 9, 16, 20, 50 P.3d at 823-25. Saban argues the facts in this case compel a different result from

that in *Hughes* because here, he suggests, defendants made specific decisions and took specific actions with the intent of impacting a specific election and candidate.

¶34 We agree with defendants that *Hughes* controls the result in this case. Saban offered no evidence that either Arpaio or Hendershott had any pecuniary or proprietary interest in the decision to interview Norman and prepare an incident report regarding her complaint. *See id*. at 74, ¶ 14, 50 P.3d at 824 ("[P]ecuniary means money and proprietary means ownership.") (citation omitted). Rather, Saban asserts that Arpaio's and Hendershott's alleged "substantial interest" was in the fact that Norman's report might impugn Saban and help Arpaio's 2004 Republican primary campaign such that Arpaio and Hendershott could continue their employment with MCSO. At best, any such interest was remote or contingent and not within the purview of the conflict of interest statute.

¶35 We affirm the summary judgment.

B. Judgment as a Matter of Law

¶36 After Saban completed his case-in-chief, the trial court granted Bailey's and Jones' motions for judgment as a matter of law, and granted Arpaio's motion to the extent the defamation claim arose out of Gentry's conduct. It ruled that Saban failed to present evidence of separate publication of defamatory statements by those defendants and that even if Saban

had adduced such proof, he had not proved by clear and convincing evidence that those defendants acted with malice. Saban argues the court erred in granting judgment as a matter of law for Bailey and Arpaio at the conclusion of Saban's presentation at trial because, he contends, he offered evidence that Bailey and Gentry maliciously made defamatory statements.[10] We review the grant of a motion for judgment as a matter of law de novo and consider the evidence in the light most favorable to the non-moving party. *Johnson v. Pankratz*, 196 Ariz. 621, 623, ¶ 4, 2 P.3d 1266, 1268 (App. 2000).

¶37 Saban argues there was sufficient evidence of defamation against Bailey and Gentry based on their statements in the Incident Report that Norman's sons were "receptive" to her allegation that Saban raped her and that Saban only told one person that Norman molested him. The transcript of Bailey's and Gentry's recorded interview with Norman reflects that she had told both of her sons that Saban raped her and that neither son believed her. The transcript also shows that Norman stated that Saban had told both of her sons that Norman had molested him. Even assuming these statements were not properly recorded or characterized by Bailey and Gentry in the Incident Report, as Saban alleges, Bailey and Gentry attached the transcript of

[10] Because Saban does not challenge the court's ruling granting judgment for Jones, we do not consider the propriety of that ruling.

their interview with Norman to the Incident Report. Thus, the Incident Report, as a whole, did not constitute a false statement or create a false impression concerning the validity of Norman's allegations against Saban. *Kinsey v. Real Detective Pub. Co.*, 52 Ariz. 353, 358, 80 P.2d 964, 967 (1938) (stating that in determining whether a statement is defamatory, "it must be construed as a whole, not only with reference to its exact language, but in accordance with its sense and meaning under all the circumstances surrounding the publication . . . ."). The trial court correctly ruled as a matter of law that the Incident Report did not contain defamatory statements.

¶38 Saban next contends his claim against Bailey should have been submitted to the jury because he offered sufficient evidence to demonstrate that Bailey's statements to Koebel were defamatory. In particular, Saban cites Bailey's statements that the investigation of Norman's complaint was not a "set-up" and that she was a credible reporter.

¶39 Bailey's statement regarding Norman's credibility is an obvious statement of opinion, which may nonetheless constitute actionable defamation if it implied a false assertion of fact. *Yetman v. English*, 168 Ariz. 71, 75, 811 P.2d 323, 327 (1991) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). A statement of opinion is protected only if: (1) it could not reasonably be interpreted as stating actual fact; or

(2) it is not provable as false. *Yetman*, 168 Ariz. at 76, 811 P.2d at 328. "The key inquiry is *whether the challenged expression*, however labeled by defendant, *would reasonably appear to state or imply false assertions of objective fact*." *Id*. at 76, 811 P.2d at 328 (citation omitted) (emphasis in original). The court must "*consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person*." *Id*. (citation omitted) (emphasis in original). *See also Burns v. Davis*, 196 Ariz. 155, 165, ¶ 39, 993 P.2d 1119, 1129 (App. 1999) (stating that generally the jury determines whether an ordinary listener would believe a statement to be a factual assertion or mere opinion).

¶40 Applying this test, we determine that Bailey's statement to Koebel regarding Norman's credibility could not constitute actionable defamation, as it could not reasonably be interpreted as an endorsement of Norman's claims or other factual assertion. Accordingly, the court's ruling that Saban failed to present legally sufficient evidence that this statement was defamatory was correct.

¶41 Moreover, even assuming both of Bailey's statements to Koebel were actionable defamatory statements, Saban failed to prove by clear and convincing evidence that Bailey acted with malice. In defamation cases in which the plaintiff is a public

figure, the actual malice standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), applies. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 485, 724 P.2d 562, 571 (1986). Actual malice occurs when the defendant makes a statement knowing its falsity or with reckless disregard for whether it was true or false, *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 517, ¶ 15 n.2, 115 P.3d 107, 111 n.11 (2005) (citing *New York Times*), and it may not be inferred from evidence that the defendant had a wrongful motive, did not exercise proper caution, or lacked good faith. *Phoenix Newspapers, Inc. v. Church*, 103 Ariz. 582, 597, 447 P.2d 840, 855 (1986) (holding trial court erroneously instructed the jury that actual malice could be inferred from a wrongful motive, the absence of proper caution, want of proper justification, or lack of good faith).

¶42 Saban does not cite any evidence he produced in the trial court to show that Bailey had actual knowledge that his statements to Koebel were false or that he acted with reckless disregard for their truth or falsity. Indeed, Bailey testified that he did not know whether Norman's allegations were true or false, but that he believed her story was credible. Nonetheless, Saban contends Bailey did not believe Norman's allegations because he "walked out of the meeting where Ruby Norman's tape was played based upon his feeling that the County had a conflict." In fact, Bailey testified that he did not

leave the meeting because he believed there was a conflict. More importantly, Bailey's belief that MCSO might have a conflict of interest in investigating Norman's claims would not establish that he had actual knowledge that her claims were false or recklessly disregarded whether they were false.[11]

¶43 We affirm the court's judgment as a matter of law.

C. Trial

¶44 Saban challenges several of the court's legal and evidentiary rulings at trial.

1. Defamation Jury Instruction

¶45 Saban argues the court incorrectly instructed the jury regarding the elements of his defamation claim because the instruction stated that Saban must prove that defendants "made" a false and defamatory statement about him. He argues the instruction should have stated that he was required to prove that defendants "made or published" a false and defamatory statement.[12]

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[11] Saban also complains that Bailey talked to Koebel in violation of Maricopa County policy regarding communications with the media. However, Hendershott and Jones testified MCSO does not prohibit such communications and that Bailey's conversations with Koebel were appropriate.

[12] We reject defendants' argument that Saban's objection to the instruction was untimely because it was first raised after the instructions were read to the jury. *See* Ariz. R. Civ. P. 51(a) ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict . . . ."). Although

¶46 We review jury instructions as a whole to determine whether the jury was properly guided in its deliberations. *Pima County v. Gonzalez*, 193 Ariz. 18, 20, ¶ 7, 969 P.2d 183, 185 (App. 1998). An instruction will only warrant reversal if it was both harmful to the complaining party and directly contrary to the rule of law. *Amerco v. Shoen*, 184 Ariz. 150, 156-57, 907 P.2d 536, 542-43 (App. 1995) (finding no error with instructions that, viewed as a whole, gave the jury the proper rules to be applied and did not suggest a conclusion contrary to law). We will not overturn a jury verdict on the basis of an improper instruction unless there is substantial doubt regarding whether the jury was properly guided in its deliberations. *Barnes v. Outlaw*, 188 Ariz. 401, 405, 937 P.2d 323, 327 (App. 1996), *aff'd in part and rev'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

¶47 The jury instruction Saban challenges addressed the elements of his defamation claim:

> Plaintiffs claim that Defendants defamed Plaintiffs. Defendants deny the claim. On Plaintiffs' claim of defamation, Plaintiffs have the burden of proving:
>
> 1. The Defendants made a false and defamatory statement of fact about the Plaintiffs;
>
> 2. The statement was made to a third person;

Saban raised his objection after the instruction was given to the jury, he did so before the jury began its deliberations.

3. The Defendants knew the statement was false when made or acted in reckless disregard of whether the statement was true or false;

4. The Defendants' statement caused damage to Plaintiffs, and;

5. The Plaintiffs' damages.

Plaintiffs have the burden of establishing elements 1, 2, 4, and 5 by a preponderance of the evidence. Plaintiffs have the burden of establishing element 3 by clear and convincing evidence.

¶48 Saban contends the instruction was incorrect as a matter of law because it stated only that defendants could be liable if Saban proved they "made" a false statement and did not state that defendants could be liable if Saban proved they "made or published" a false statement. He argues the distinction between "made" and "published" is critical because "published" is a broader term that includes acts other than directly making a statement and, as a result, one may publish a statement that he has not made. Saban claims that by including only the term "made" in the instruction, the court defined defamation to exclude Hendershott's actual conduct, that is, playing the audiotape of his telephone call with Norman to Koebel and thereby communicating Norman's false statement to Koebel.[13]

[13] In his proposed instructions, Saban requested that the court instruct the jury that he must prove defendants had "(made or published)" a false and defamatory statement and that the statement was "(made or published)" to a third person. The format of Saban's request shows that he regarded the words "made" and "published" as interchangeable and desired that the

¶49 Although "publication" is often used as a term of art in defamation cases, *see* Restatement (Second) of Torts § 577 ("Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."), the Arizona Supreme Court has not recognized a formal distinction between the words "made" and "published" in the context of defamation. *See, e.g., Phoenix Newspapers, Inc.*, 103 Ariz. at 592, 447 P.2d at 850 (using both the words "made" and "published" to describe defendants' conduct); *Dube v. Likins*, 216 Ariz. 406, 417, ¶ 36, 167 P.3d 93, 104 (App. 2007) ("Publication for defamation purposes is communication to a third party."). Thus, the trial court was not bound to include the word "publish" in the instruction to create a correct statement of law.

¶50 Moreover, even assuming the instruction was incorrect, we discern no prejudice to Saban that would warrant overturning the jury verdict. In rejecting Saban's request to include the word "publish" in the defamation instruction, the court reasoned: "[I]t seems to me that the word 'published' in the law of defamation is a term of art. Without some considerable discussion with the jury about just what the word 'publish' means in the law of defamation, you may [well] be creating more

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court select one to include in the instruction. Further, Saban included only the term "made" in his requested instruction regarding falsity.

confusion than clarity on the part of the jury by departing from the usual word 'made.'"[14] It ruled that the inclusion of the word "publish" would create confusion, not clarity, and allowed Saban to argue to the jury that defendants' conduct constituted making a defamatory statement to Koebel. The critical issue for the jury to determine was whether defendants communicated a false statement to a third party, and that concept is clear from the instructions. Given the overall instructions and the parties' arguments, it is improbable that the jury did not understand that defendants could be liable for communicating Norman's allegedly defamatory statement to Koebel. Indeed, Saban argued during his closing that the term "made" encompassed Hendershott's conduct of playing the Norman audiotape for Koebel because, he claimed, by playing the tape Hendershott sponsored Norman's statement and made it his statement.

¶51 We find no error in the defamation instruction and, in any event, no prejudice to Saban.

2. Damages Limitation

¶52 Saban complains the court erred by ruling as a matter of law that his damages were limited to the harm caused by

[14] Saban did not request that the court instruct the jury that defendants could be liable for the republication of Norman's allegedly defamatory statements. *See* Restatement (Second) of Torts § 578 (providing that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it").

defendants' publication of the allegedly defamatory statements to Koebel, and not Channel 15's subsequent broadcast of the statements. However, because the jury returned a verdict in favor of defendants, it did not reach the issue of the amount of damages to award Saban. As a result, even if the trial court incorrectly limited Saban's damages, Saban did not suffer any prejudice and we will not reverse the jury's verdict.

3. Evidentiary Rulings

¶53 Saban challenges several of the trial court's evidentiary rulings. Generally, we review challenges to the court's admission or exclusion of evidence for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000). If the evidentiary ruling is predicated on a question of law, we review that ruling de novo. *Id*.

a. City of Mesa Investigation

¶54 Before trial, Saban moved in limine to exclude evidence that he had been the subject of a City of Mesa investigation in 2004 involving allegations that he had exposed himself to a minor child. The trial court denied the motion. Saban claims this ruling was erroneous because the Mesa investigation was irrelevant and any probative value was outweighed by its prejudicial effect on Saban. Defendants argue the court did not abuse its discretion in denying the motion

because the Mesa investigation was relevant to Saban's claims that defendants acted with malice because it was handled in a similar manner as MCSO's investigation of Norman's claims. They also assert Saban waived any error by directly questioning Hendershott regarding the Mesa investigation at trial.

¶55 Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or show that he or she had acted in conformity therewith. Ariz. R. Evid. 404(b); *Lee v. Hodge*, 180 Ariz. 97, 102, 882 P.2d 408, 413 (1994) (holding trial court did not abuse its discretion by excluding evidence of dissimilar past acts because such evidence may have violated Rule 404(b) prohibition against using prior bad acts to prove character and conformity therewith). However, such evidence may be admissible for other purposes. Ariz. R. Evid. 404(b).

¶56 In this case, Saban was required to show by clear and convincing evidence that defendants knew their alleged defamatory statements were false or acted in reckless disregard of whether the statements were true or false. Saban attempted to prove this element of his claim with evidence that defendants took an initial statement from Norman despite knowing that she was Saban's mother and therefore that a potential conflict existed, and despite knowing that the alleged crime occurred many years earlier. He also relied on evidence that Bailey and

Gentry prepared the report the same evening they interviewed Norman and defendants produced it to Channel 15 before the investigation of Norman's complaint was completed. Defendants argued that their interview of Norman, preparation of the Incident Report, and release of that report pursuant to a public records request were proper and pointed out that the City of Mesa handled its investigation of Saban similarly.

¶57 We agree with defendants that evidence of the Mesa investigation was relevant to Saban's defamation claim. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. The fact that defendants' acts were similar to those in the Mesa investigation tends to undermine Saban's claim that defendants acted with malice. Accordingly, the trial court did not abuse its discretion by admitting such evidence at trial. *State v. Smith*, 136 Ariz. 273, 276, 665 P.2d 995, 998 (1983) (stating trial judge has considerable discretion in determining the relevance and admissibility of evidence).

¶58 Further, we reject Saban's claim that the prejudicial impact of the evidence outweighed its probative value. The balancing of factors under Arizona Rule of Civil Procedure 403 is peculiarly a function of trial, not appellate, courts.

Yauch, 198 Ariz. at 403, ¶ 26, 10 P.3d at 1190. "The balancing process under Rule 403 . . . is left to the trial judge, who must determine whether the probativeness of the offered evidence is substantially outweighed by its unfair prejudice, confusion of the issues, etc." *English-Clark v. City of Tucson*, 142 Ariz. 522, 526, 690 P.2d 1235, 1239 (App. 1984).

¶59 We find no abuse of discretion in the trial court's admission of evidence regarding the City of Mesa's investigation of Saban.[15]

b. Town of Buckeye Employment Application

¶60 Saban also complains that the court allowed defendants to question him regarding his prior inconsistent statements on a collateral matter, namely, whether he was truthful in his Town of Buckeye employment application. However, because Saban does not cite any particular questions in the record to which he assigns error, we will not consider his argument. *See* ARCAP 13(a)(b) (requiring appellant's opening brief to contain "citations to the authorities, statutes and parts of the record relied on"); *Gillard v. Estrella Dells I Improvement Dist.*, 25 Ariz.App. 141, 148, 541 P.2d 932, 939 (1975) (explaining that a "casual reference" to the entire record was insufficient to

[15] We therefore do not consider defendants' argument that Saban waived any objection to the introduction of this evidence by questioning Hendershott in detail about the Mesa investigation.

satisfy appellate rule requiring points of fact and law to be presented); *Hubbs v. Costello*, 22 Ariz.App. 498, 501, 528 P.2d 1257, 1260 (1974) (stating appellate court has no obligation to search the record to determine if evidence supports an appellant's position).

c. Hendershott Testimony Regarding Norman's Stroke

¶61 Saban complains the trial court improperly refused to declare a mistrial, sanction defendants, or otherwise allow Saban to ameliorate defendants' purported attempt to mislead the jury regarding Norman's availability to testify at trial.

¶62 Defendants did not identify Norman as a witness they intended to call at trial. However, during Hendershott's testimony the following discussion occurred:

> Q: Do you know that Ruby Norman was unclear in her deposition about recollecting whether she had, in fact, talked to you or even your name?
>
> A: What I remember she didn't even remember who I was or whether she had talked to me at all.
>
> Q: Were you aware that Ruby Norman has since had a stroke? Were you aware of that?
>
> MR. ROBBINS: Objection; foundation.
>
> THE WITNESS: I heard something about her health.
>
> MR. ROBBINS: Objection; foundation. This hadn't even been disclosed.
>
> THE COURT: Sustained as to foundation.

MR. ROBBINS: It's improper. I'd ask the jury be instructed.

MR. WILENCHIK: It's a true statement, you Honor.

MR. ROBBINS: Your Honor, it's testifying to evidence.

MR. WILENCHIK: Counsel knows that.

MR. ROBBINS: Let me approach.

(An off-the-record discussion was held out of the hearing of the jury)

THE COURT: Sustained.

¶63 Saban argued to the trial court that this was an attempt by defendants to improperly suggest to the jury that Norman was unavailable for trial despite their knowledge that Norman was willing and able to testify. He asked the court to allow him to read to the jury an affidavit he obtained from Norman in which she avowed that, although she had a mini-stroke in March 2007, she was able to testify at trial and had, in fact, contacted defendants' counsel's office to communicate her willingness to appear at trial. The court denied the request, but granted Saban leave to call Norman to refute the alleged misrepresentation in his rebuttal case. Saban chose not to call Norman to testify.

¶64 Saban contends defendants misled the jury about Norman's availability for trial and argues the court's refusal to allow him to read Norman's affidavit to the jury to cure the

misimpression was an abuse of discretion. We find no abuse of discretion in the court's exclusion of Norman's affidavit, which was hearsay evidence. "Hearsay evidence is a statement, oral or written, made at a time when there was not opportunity to cross-examine the declarant and offered to prove the truth of the words spoken or written." *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 258-59, 603 P.2d 513, 529-30 (App. 1979) (finding trial court did not abuse its discretion by excluding hearsay statements). The Norman affidavit offered by Saban meets the hearsay definition, as it was an out-of-court statement that Saban sought to introduce for the truth of its contents; that is, to show that Norman was available for trial. Accordingly, the trial court properly excluded the affidavit.

¶65 In addition, we reject Saban's argument that the court erred by refusing to grant a mistrial or sanction defendants, as we find no such request from Saban in the record.

D. Hasslacher Subpoena

¶66 Finally, Saban complains the trial court erred in ordering him to return documents he obtained from the Accounting Office of John A. Hasslacher pursuant to a subpoena duces tecum.

¶67 The Sheriff's Posse Foundation was dissolved in 1999, and its financial records were assigned to the Accounting Office of John A. Hasslacher for destruction on or after November 15,

2006. Before trial, Saban subpoenaed all records of the Sheriff's Posse Foundation that were in the possession of the Accounting Office of John A. Hasslacher. Defendants moved to quash the subpoena on the grounds that it had not been properly served, did not provide adequate time for compliance, and that the requested records were irrelevant. They also complained Saban had harassed Hasslacher's employees to provide the documents immediately and obtained the documents before defendants were served with the subpoena. Saban disputed defendants' standing to challenge the subpoena and argued the documents sought by the subpoena would lead to evidence of defendants' prior financial malfeasance and demonstrate that defendants had a motive to influence the Republican primary election in order to ensure that Sheriff Arpaio remained in office so these financial improprieties would not be revealed. In addition, he argued the documents could lead to the discovery of evidence demonstrating the "true motivations" for Hendershott's behaviors.

¶68 Following an evidentiary hearing, the court determined the information sought by Saban could not reasonably lead to the discovery of admissible evidence with respect to a claim or defense in the case. It granted the motion to quash the subpoena and ordered Saban to return the documents to Hasslacher. Saban complains the ruling was in error because the

documents were reasonably calculated to lead to discoverable evidence and defendants had no standing to object to the subpoena, and asks us to reverse and remand this matter for additional discovery regarding the Hasslacher records. We review the trial court's decision regarding a motion to quash a subpoena duces tecum for an abuse of discretion. *Schwartz v. Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996).

¶69 Saban has failed to provide us with the necessary transcript of the evidentiary hearing on defendants' motion to quash the subpoena. *See* ARCAP 11(b)(1) (placing responsibility on appellant to include necessary transcripts in the record on appeal). Therefore, we must assume the evidence was sufficient to support the trial court's findings and conclusions. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). Given this presumption and the record before us, we cannot say the court abused its discretion.

CONCLUSION

¶70 For the foregoing reasons, we affirm. We award defendants their taxable costs upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge