

Summary of SC92984, *Phillip H. March v. Midwest St. Louis, L.L.C.*

Appeal from the St. Louis circuit court, Judge Edward W. Sweeney Jr.
Argued and submitted April 3, 2013; opinion issued January 14, 2014

Attorneys: Midwest was represented by Patrick A. Bousquet, Russell F. Watters and Brad R. Hansmann of Brown & James PC in St. Louis, (314) 421-3400. March was represented by Jonathan Sternberg of Jonathan Sternberg, Attorney, PC in Kansas City, (816) 292-7000; and William E. Taylor and Joseph M. Taylor of Taylor & Taylor, Attorneys at Law, PC in St. Louis, (314) 231-0930.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: In a case brought by a man claiming a company was liable for an attack that occurred on or near the company's property, the company – which won the jury's verdict – appeals the trial court's judgment granting a new trial after finding the company's expert witness willfully and deliberately testified falsely about his credentials and that the perjured testimony caused an improper verdict. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the trial court's judgment. The trial court did not abuse its discretion in finding that the witness testified falsely, that he did so willfully and deliberately, and that this false testimony materially affected the outcome of the case, resulting in an improper verdict.

Facts: Phillip March sued Midwest St. Louis LLC for premises liability after he was stabbed in April 2007 on or near the property of a gas station and convenience store owned by Midwest. No one witnessed the incident. March was intoxicated at the time of the assault and had no recollection of the incident immediately after it occurred due to his extensive injuries. Later, however, he stated and still contends that the assault occurred near a trash receptacle on Midwest's property, for which Midwest would be liable. Midwest disputes the location of the assault, contending it occurred in an alley behind Midwest's property, which would negate its liability. At trial, the police officers who responded to the incident and gathered evidence from the crime scene offered contradictory testimony about where they spotted blood. The only other testimony concerning the location of the stabbing was provided by experts retained by each party. March's expert was a blood-spatter analyst who testified there was not enough information to provide an expert opinion about where the stabbing occurred. Conversely, Midwest's expert, crime scene analyst Louis Akin, testified the stabbing occurred in the alley behind the gas station and not on property owned by Midwest. He said he based his opinion on the results of the police investigation and photographs the investigating officers took of the scene. During direct examination, before offering his opinion about the location of the stabbing, Midwest's counsel asked Akin whether he was involved in any investigation in which he was retained by the federal government. He responded: "I recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan." The jury returned a verdict in Midwest's favor. March filed a motion for a new trial, alleging that Akin committed perjury by falsely testifying about his credentials as an expert witness. March based his allegation on evidence he said he discovered after the trial regarding a post Akin had made to his website. Akin stated in the post that he had been retained in the Fort Hood shooting case as an expert on behalf of the defense, not the prosecution. The post was removed from Akin's website shortly after Midwest retained him as an expert. Following a hearing, the trial court sustained March's motion for a new trial. Midwest appeals.

AFFIRMED.

Court en banc holds: (1) Midwest did not demonstrate clearly that the trial court abused its discretion in finding that Akin testified falsely. That a reviewing court gives significant deference to the trial court's factual findings and determinations regarding witness credibility is evidenced by more than 30 Missouri decisions reviewing a trial court's grant or denial of a new trial based on perjury. In only two cases did the reviewing court reverse the trial court for circumstances different from those presented in this case. The testimony providing the trial court's basis for its grant of a new trial pertains to Akin's testimony regarding his credentials as a crime scene reconstructionist. Statements are "false" when they are not "in accordance with the actual state of affairs" and are not "void of deceit." Akin's reply indicating he was retained by the federal government to investigate the Fort Hood shooting cannot be accepted as "in accordance with the actual state of affairs." Although federal funds ultimately were used to pay for Akin's services, his response to a forthright question was inaccurate and not "void of deceit." Having worked four years for the Texas attorney general's office, it reasonably can be inferred that Akins knew the meaning of the word "retained" in the context of the government. The trial court found that Akin's response was false because he did not work for the federal government in connection with the investigation of the Fort Hood or any other case and was not retained by the federal government to do blood-spatter analysis or crime-scene reconstruction of the shootings; rather, he was retained by the attorneys appointed to represent the person accused of those shootings. The trial court further found that Akins knew at the time he was asked the question who he was working for and that when he gave his answer, he was deceiving the court and the jury. The record supports these findings.

(2) The evidence does not demonstrate clearly that the trial court abused its discretion in finding that Akin willfully and deliberately testified falsely. This determination was based on the facts that Akin made a website post stating he was hired on behalf of the defense in the Fort Hood shootings case, that he removed this post before his deposition in March's case, and that his involvement in the Fort Hood case never was mentioned during his deposition. Based on these facts, the court concluded Akin's failure to provide a response accurately conveying his role in the Fort Hood shooting case and who hired him was a deliberate deception.

(3) The trial court did not abuse its discretion in granting a new trial on the basis that Akin falsely testified about his credentials, which the court found led the jury to accept his opinion about where the assault occurred. To grant a new trial, there must be "good cause shown," and the trial court must be satisfied that an improper verdict or finding was occasioned by the perjured testimony, which must be material to the improper verdict. Here, Akins' testimony about his qualifications and credentials was material to the outcome of the case because the credibility of his expert opinion alone was crucial to proving the material (essential) issue in the case – whether the assault occurred near a trash receptacle on Midwest's property or in an alley outside its property. The police officers gave conflicting testimony about this issue, and March's expert testified there was not sufficient information available to give an expert opinion as to where the stabbing occurred. The jury must have concluded that her testimony was not as credible as that of Akin, who opined the blood spatters indicated the assault occurred in the alley.

(4) In light of this Court's decisions for more than 90 years, a perjury conviction is not required for a trial court to grant a new trial based on false testimony. Any holding to the contrary in two particular appeals court opinions is overruled.