SC92984

IN THE SUPREME COURT OF MISSOURI

PHILLIP H. MARCH,

Respondent,

vs.

MIDWEST ST. LOUIS, LLC,

Appellant.

On Appeal from the Circuit Court of the City of St. Louis
Honorable Edward W. Sweeney, Jr., Circuit Judge
Case No. 0722-CC07146

SUBSTITUTE BRIEF OF THE RESPONDENT

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Preliminary Statement

Phillip March sued Midwest St. Louis, LLC, for negligent failure to keep the premises of its convenience store safe, resulting in Mr. March's stabbing. The central issue at trial was whether the stabbing occurred on Midwest's property. The only direct evidence it did not occur there was the testimony of Louis Akin, Midwest's "blood spatter" expert who, when recounting his qualifications, also stated the U.S. Government had hired him to perform blood spatter analysis in the notorious Fort Hood shooting.

After nine jurors found for Midwest, Mr. March moved for a new trial, explaining a newly-discovered article by Mr. Akin and materials from counsel in the Fort Hood case showed Mr. Akin had testified falsely, as he actually had been retained by the Fort Hood defense and had not performed blood spatter analysis. The trial court granted a new trial, finding Mr. Akin had testified falsely, resulting in an improper verdict. Alternatively, it granted a new trial due to the newly discovered evidence. Midwest appeals.

Couched almost entirely in terms of *de novo* review, Midwest argues granting a new trial was error because Mr. Akin did not "commit perjury" and the newly-discovered materials could not legally be "newly discovered evidence." Midwest's arguments are without merit. For over 120 years, the law of Missouri consistently has been that a grant of new trial due such as this is reviewed for heightened abuse of discretion, not in any way *de novo*. The trial court cannot be said to have abused its discretion in finding Mr. Akin testified falsely, resulting in an improper verdict (which is not the same as the crime of perjury), or that Mr. Akin's article, discovered only after trial, constituted newly discovered evidence. This Court should affirm the trial court's order granting a new trial.

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Jurisdictional Statement

This is an appeal from a judgment granting a new trial for the plaintiff, Respondent Phillip March, in a jury-tried personal injury case due to false testimony by the expert witness for the defendant, Appellant Midwest St. Louis, LLC.

As this case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3, Appellant timely appealed to the Missouri Court of Appeals, Eastern District. This case arose in the City of St. Louis. Under § 477.050, R.S.Mo., venue lay within that district of the Court of Appeals. The Court of Appeals designated this case as No. ED96722.

On October 2, 2012, a two-judge majority of the Court of Appeals issued an opinion reversing the trial court's judgment. Respondent filed a timely motion for rehearing and application for transfer in the Court of Appeals, both of which were denied. Respondent then filed a timely application for transfer in this Court pursuant to Rule 83.04. On January 31, 2013, the Court sustained that application and transferred this case.

Therefore, pursuant to Mo. Const. art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. Stabbing of Phillip March

Appellant Midwest St. Louis, LLC, owns a filling station and convenience store named "Gas Mart," located at 5728 West Florissant in the City of St. Louis (Legal File 30). 15 police reports showed prior crimes on Midwest's property (Transcript 224-25). Employees at Gas Mart also had been caught trying to sell illegal weapons to undercover FBI informants (Tr. 224-25). Midwest promised city officials it would hire off-duty police to patrol the property, but then did not do so (Tr. 684-90). At trial, Midwest did not dispute any of this; indeed, its counsel told the jury, "That's not in dispute" (Tr. 225).

Respondent Phillip March and his brother, Andre, spent the evening of April 23, 2007, at a bar in the City of St. Louis, celebrating Mr. March's opening of a new business (Tr. 755-57). As Andre began driving the two of them home in the early hours of the next morning, April 24, 2007 (Mr. March was intoxicated), they missed their highway onramp (Tr. 756). Instead, they kept driving and stopped at Gas Mart so Andre could buy cigarettes and Mr. March could buy potato chips (Tr. 753-56).

After the two made their purchases, Mr. March decided he was not yet ready to go home; he told Andre to leave him at Gas Mart and he would get another ride (Tr. 757-59). Andre did so and left, and Mr. March began attempting to call friends on the store's outdoor payphone; he accidentally had left his cell phone in Andre's car (Tr. 757-62). Shortly after 2:00 a.m., a neighborhood resident, Columbus Jones, came to Gas Mart and allowed Mr. March, whom he did not know, to use his own cell phone so Mr. March

could call a friend, Anthony Cleaves (Tr. 766). Cell phone records showed the call lasted from 2:09 a.m. to 2:13 a.m. (Tr. 766).

Mr. March testified that, after Mr. Jones left, he sat down in front of the Gas Mart store next to its payphones, eating his chips, and then walked across the front of the store to a dumpster on the east side of the building to urinate (Tr. 769-73). He said that, while standing between the dumpster and the Gas Mart store building, someone came up behind him and said, "Give me everything" (Tr. 774-75).

At this, Mr. March turned around to see a man standing over him, reached in his pocket to take out his money and other property, and then saw the man bear an object that Mr. March later suspected was a screwdriver (Tr. 776). The man stabbed Mr. March's face with the weapon (Tr. 776). The stabbing broke Mr. March's jaw, internally pierced his carotid artery, caused massive internal and external blood loss, and required three surgeries and many days of severe pain and hospitalization to treat; this included placing plates inside his face, one of which later became infected, as well as cutting newly over-regrown bone in his throat (L.F. 270; Tr. 788-89, 791-92; Aplt. Appx. A9). The pain continued throughout the time between the incident in April 2007 and trial in January 2011, requiring Mr. March to take pain medications (Tr. 792-94). The parties stipulated Mr. March's medical bills amounted to about $225,000 (L.F. 21; Tr. 793).

Immediately upon the stabbing, Mr. March's memory blacked out; the next thing he remembered was being in an ambulance with attendants saying he was losing blood pressure, and then later waking up in Barnes-Jewish Hospital (Tr. 776, 778). Mr. March did not know his assailant, who never was apprehended (L.F. 30). Abdekarin Warsame,

the Gas Mart clerk on duty at the time Mr. March was stabbed, saw Mr. March stagger into the store bleeding; he took some t-shirts from the store racks, covered Mr. March's wounds with them, and then called 911 (Tr. 240). 911 records show the call was received at 2:16 a.m. (Tr. 833). Therefore, Mr. March was stabbed in the three minutes between 2:13 a.m., when his call to Mr. Cleaves ended, and 2:16 a.m., when 911 received Mr. Warsame's call.

Midwest contends Mr. March was not stabbed next to the dumpster, but instead that the stabbing "occurred in the alley behind the gas station," which was not on Midwest's property (Substitute Appellant's Brief ("Aplt. Br.") 7).

B. Investigation

Officers from the St. Louis Police Department responded to the Gas Mart (Tr. 251-52), whereupon Mr. March was transported to the hospital (Tr. 778). Detective Tonya Tanksley was one of the first to respond (Tr. 327). She found Mr. March lying on the ground near the front of the Gas Mart store (Tr. 327, 332). She said she and the other officers searched the scene for physical evidence and that her investigation revealed a single trail of blood (Tr. 334-35, 338-39).

Detective Tanksley said she followed the blood trail from where she found Mr. March around the building and into the alley behind the store, where she discovered a pool of blood (Tr. 335). She said she did not recall seeing blood near the dumpster (Tr. 338-39). In her report, she stated a struggle had occurred in the alley (Tr. 346-48).

Officer George Weindel, an evidence technician, also responded to the scene and wrote a report regarding the stabbing (Tr. 251-52). He said he examined the pool of

blood at the entrance to the Gas Mart store and followed a blood trail around the building to the place where it began in the alley (Tr. 253-55). He said he then took eight photographs of the blood trail (Tr. 253).

At the beginning of the blood trail, Officer Weindel said he saw no sign of a struggle (Tr. 258). He did not remember having looked by the dumpster for blood (Tr. 258). Using his 35 years of experience, however, he saw nothing in his investigation that would rule out Mr. March's recollection of having been stabbed by the dumpster on Midwest's premises (Tr. 258-59).

Sergeant Thomas Majda was the responding crime scene supervisor (Tr. 326). On direct examination, he testified he remembered seeing blood by the dumpster and in the grass near the dumpster (Tr. 44, 45, 215, 216). He stated one of the other officers found "some blood on a fence or something near the dumpster. And then it tracked back into the alley where there was evidence of some sort of a struggle and a small pool of blood, like at one point [Mr. March] was on the ground bleeding from the face" (Tr. 540). On cross-examination, however, he equivocated that, if there were no photographs of blood by the dumpster, it would tell him "there probably wasn't any" (Tr. 541).

Mr. March said no police officers ever contacted him to ask him what happened in the stabbing incident, either at the scene, in the hospital, or anytime thereafter (Tr. 779-80). He said no one "officially asked [him] what happened" until his deposition was taken in this case in September 2008 (Tr. 780).

C. Proceedings Below

1. Pretrial Proceedings and Trial

On July 2, 2007, Mr. March filed a petition in the Circuit Court of the City of St. Louis against Midwest, as well as Mamoun Abdeljabbar and Adam Abdeljabbar, brothers who are Midwest's principal members (L.F. 1, 27-29).

In his second amended petition, Mr. March stated five counts: (1) negligence against Midwest for failing to exercise reasonable and ordinary care in keeping its premises safe (L.F. 33-45); (2) negligence *per se* against Midwest for failing to refrain from being a public nuisance, in violation of the St. Louis Code of Ordinances (L.F. 45-46); (3) negligence *per se* against Midwest for failing to keep its back fence in good repair, in violation of the St. Louis Code of Ordinances (L.F. 46-47); (4) negligence against Midwest and the Abdeljabbars for taking part in crimes on Midwest's property and, thus, failing to have adequate security, such as off-duty police officers, to keep its premises safe (L.F. 47-50); and (5) punitive damages against Midwest, due to complete indifference or a conscious disregard for the safety of others on its premises (L.F. 50-51).

The case was tried to a jury over four days in January 2011 (L.F. 22-24). Immediately before trial, Mr. March dismissed counts 3, 4, and 5 without prejudice (L.F. 21). As the trial court later recounted,

> The single issue that dominated the trial was the question of where [Mr. March] was at the time he was injured … – whether the assault took place on [Midwest's] premises, as [Mr. March] alleged; or in the alley behind the premises, as [Midwest] contended. (Because the alley was not [Midwest's]

property, [Midwest] could not be held liable if the assault occurred there, and the jury was so instructed.)

(L.F. 262; Appendix to Substitute Appellant's Brief ("Aplt. Appx.") A1).

Thus, the parties engaged respective expert witnesses to testify to the issue of where Mr. March was stabbed (L.F. 262; Aplt. Appx. A1). Mr. March's expert was Iris Dalley, a blood spatter analyst from Oklahoma who also served as President of the International Association of Bloodstain Pattern Analysts; she "testified that there was not sufficient information available to give an expert opinion as to where the stabbing occurred," either where Mr. March said it occurred or where Midwest argued it occurred (L.F. 262, 272; Aplt. Appx. A1, A10).[1] She said that, in order to show from bloodstain patterns the location of Mr. March's stabbing, then rather than the eight photographs there were in this case, there would have to be some 200 photographs, as is commonplace "nowadays" in a case like this (Tr. 910, 1062-63).

[1] Ms. Dalley's testimony, which was heard via playing her videotaped deposition lasting an hour and a half, is missing from the trial transcript (Tr. 398-99, 485-87, 1058). Neither the video deposition nor the transcript of that deposition were deposited as exhibits in the Court of Appeals. The absence of Ms. Dalley's testimony should be held against Midwest: when materials are "omitted from the transcript and not filed with the appellate court, the intendment and content of [the materials] will be taken as favorable to the trial court's ruling and as unfavorable to the appellant." *LeKander v. Estate of LeKander*, 345 S.W.3d 282, 285 (Mo. App. 2011) (citation omitted).

Midwest's expert, Louis Akin, testified he could tell unequivocally from the blood trail shown in the eight police photographs that Mr. March was stabbed in the alley, off Midwest's premises (Tr. 888, 907). As the trial court later pointed out, Mr. "Akin was the only person who offered an expert opinion as to where the stabbing occurred" (L.F. 262; Aplt. Appx. A1). Mr. Akin did admit that, if there were blood by the dumpster, as Sergeant Majda originally had recalled, he would have to reevaluate his opinion that the stabbing had occurred in the alley (Tr. 917).

At the outset of his testimony, after Midwest's counsel had asked Mr. Akin about his training and experience, the following interrogation occurred between Mr. Akin and Midwest's counsel:

> Q. Now, can you give -- just to give the jury an example of who you work for and what you do, are you currently involved in any major investigation where you've been retained by the U.S. Government?
>
> A. I just recently finished reconstructing the Fort Hood shooting by Major Malik Hasan.
>
> Q. And that was the massacre in Texas that we've all read about?
>
> A. The massive killing in Texas at the -- at Fort Hood.
>
> Q. And what was your --
>
> A. On base.
>
> Q. What was your function in that regard?
>
> A. Blood spatter and crime scene reconstruction.

(Tr. 861-62; Appendix A1).

> The trial court later stated the description of the Fort Hood case as involv[ing] a "massacre," a "massive killing in Texas" … emphasized the compelling significance of that case. The deadly incident was covered extensively by the news media at the time it occurred, and there has been continuing news coverage of the investigation and the charges brought against Hasan as the perpetrator and subsequent developments in the case, such that one would be shocked if most or all of the jurors had not heard of the case.

(L.F. 264; Aplt. Appx. A3). The trial court also noted the effect of Mr. Akin's answers related to the Fort Hood case on the jury: his "answer that he was working for the U.S. government in connection with such an important case gave him an impressive credential;" it "made an immediate and favorable impression on the Court, and it no doubt also made a similar impression on the jury" (L.F. 264; Aplt. Appx. A3).

At the conclusion of the trial, nine jurors returned a verdict in favor of Midwest (L.F. 78). Accordingly, on January 26, 2011, the trial court entered judgment for Midwest (L.F. 79).

2. Post-trial Proceedings

Counsel for Mr. March had scoured Mr. Akin's C.V. and website before taking Mr. Akin's pretrial deposition on February 16, 2010, and found no reference to any Fort Hood investigation (Supplemental Transcript 4, 15-16). In the deposition, Mr. Akin did not mention anything related to Fort Hood (Supp. Tr. 5, 16). Not remembering anything about any Fort Hood investigation, counsel scoured the C.V. and website again

immediately after Mr. Akin's testimony, still finding no mention of the Fort Hood investigation (Supp. Tr. 4, 15-16).

After the nine jurors announced their verdict for Midwest, Mr. March's counsel asked his expert, Ms. Dalley, whether she had any idea about Mr. Akin's involvement in the Fort Hood investigation (Supp. Tr. 7). On February 11, 2011, Ms. Dalley responded in an e-mail, attaching an article Mr. Akin wrote that she previously had found on his website but never had disclosed to Mr. March's counsel (L.F. 97, 181; Appx. A3, A9). In the article, dated January 15, 2010, and titled "Trying a Fellow American: Major Nidal Malik Hasan," Mr. Akin extolled Major Hasan's religious dedication and declared, "I have been chosen as a defense expert and I vow that I will use all of my experience and expertise to see that the facts presented by the prosecution at the trial of Major Hasan are true and accurate" (L.F. 97; Appx. A3).

Midwest had disclosed Mr. Akin as its expert on blood spatter and crime scene reconstruction on December 30, 2009 (L.F. 173). After counsel for Mr. March looked at Mr. Akin's website in early January 2010, seeing no such article, on January 18, 2010, Ms. Dalley looked at it, saw the article, and copied it to her computer; when she checked several days later, the article had been taken down (L.F. 181; Supp. Tr. 4, 15; Appx. A9). At the time, Ms. Dalley had thought this unimportant; as it was "not in the area of material" about which Mr. March's counsel was asking Ms. Dalley, she did not think to send it to counsel (L.F. 181; Supp. Tr. 7; Appx. A9). Thus as, the article was not on Mr. Akin's website at any time Mr. March's counsel accessed it, Midwest's counsel's inquiry

on direct examination to Mr. Akin about Fort Hood came as a surprise to Mr. March's counsel (Supp. Tr. 4-6).

After receiving the article from Ms. Dalley, counsel for Mr. March investigated further and discovered, as the article indicated, that Mr. Akin actually had been hired by the chief defense counsel in the Fort Hood case, a civilian, not to perform blood spatter analysis, but rather to chart the source and certain gunshots to determine from where and from which guns they had been fired (L.F. 108-09; Supp. Tr. 8, 36; Appx. A4-5). At the hearing over Mr. March's new trial motion, Midwest did not contest any of this (Supp. Tr. 25-32, 37-40, 49-50, 52-53).

On February 14, 2011, Mr. March filed a motion for new trial, arguing both (1) that Mr. Akin's testimony that he was "retained by the U.S. government" to conduct "blood spatter and crime scene reconstruction" in "the Fort Hood shooting" was false and resulted in an improper verdict, and (2) Mr. March's counsel's post-trial discovery of this was newly discovered evidence (L.F. 82-97). He attached to the motion an excerpt from the trial transcript, an affidavit from a California attorney who had spoken with Mr. Akin about the Fort Hood case, and the article from Mr. Akin's website (L.F. 89-97; Appx. A1-3). On March 3, 2011, Mr. March supplemented his motion for new trial with additional arguments and authorities in support of it (L.F. 172-86). He attached to the supplement an affidavit from Ms. Dalley and excerpts from discovery (L.F. 181-86; Appx. A9-10).

Midwest responded, attaching an affidavit from one of Major Hasan's lawyers in the Fort Hood case attesting Mr. Akin had been hired by Major Hasan's defense as a

"crime scene analyst," as well as an affidavit from Mr. Akin, himself, attesting to the same (L.F. 108-12; Appx. A4-8). The affidavits state Mr. Akin was paid for his services for the defense of Major Hasan by the "United States Army Trial Defense Service" (L.F. 108, 111; Appx. A4, A7).

On February 25, 2011, the trial court held a hearing on Mr. March's motion for new trial (Supp. Tr. 2). On May 4, 2011, it issued an 11-page order granting the motion (L.F. 262-73; Aplt. Appx. A1-11).

3. Order Granting a New Trial

In the order, the court found Mr. Akin "willfully and deliberately testified falsely; the matter about which the witness testified was material; and it is likely that it resulted in an improper verdict" (L.F. 262, 264; Aplt. Appx. A1, A3). Mr. Akin's testimony that he had "been retained by the U.S. Government" to "reconstruct[t] the Ford Hood Shooting by Major Malik Hasan"

> was false because witness Akin does not work for the U.S. Government in connection with the investigation of the Fort Hood killings. … Akin was not retained by the U.S. Government to do blood spatter and crime scene reconstruction of the Fort Hood shooting; Akin was retained by the attorneys appointed to represent the person accused of those shootings, Major Malik Hasan.

(L.F. 264; Aplt. Appx. A3) (emphasis in the original).

Further, "the primacy given to" the question whether Mr. Akin was

> working for currently 'in any major investigation where you've been retained by the U.S. Government' … in the sequence of questions about Akin's qualifications demonstrates the importance of the answer to that question, and underscores why Akin's false testimony related to a material fact, and made it likely that the false testimony resulted in an improper verdict.

(L.F. 267; Aplt. Appx. A6). The court found the falsity, willfulness, and deliberateness of Mr. Akin's answer was shown by the article from Mr. Akin's own website, the timeline of the article's disappearance from the website, and the timeline of Mr. Akin's involvement in this case (L.F. 265-66; Aplt. Appx. A4-5). While "Clearly, Akin knew that he had been chosen by Hasan's defense attorneys to work as an expert witness for the defense on the Fort Hood case," he "knew that to answer that he was 'working for' the U.S. Government in that case was misleading and false" (L.F. 265; Aplt. Appx. A4).

The court held "Akin's false answer that he was working for the U.S. Government in connection with such an important case gave him an impressive credential," which "obviously was something that would be expected to be considered significant by the jurors as they evaluated Akin's qualifications to give his expert opinion in the case, and the weight to be given to this testimony," and his answer "made an immediate and favorable impression on the Court, and it no doubt made a similar impression on the jury" (L.F. 264; Aplt. Appx. A3). "That Akin falsely portrayed himself as having been selected by the U.S. Government to do the exact same kind of analysis in such a major and significant case as the analysis" in this case "made Akin's qualifications to state his

opinion in this case seem much more reliable" (L.F. 265; Aplt. Appx. A4). His "false testimony in this case made it much more likely that the jury would give his opinion a weight and value that it did not deserve" (L.F. 265; Aplt. Appx. A4).

Further, the court held Midwest's argument "that Akin's testimony was 'true'" was without merit and "simply does not pass the smell test" (L.F. 267-70; Aplt. Appx. A6-9). Midwest's own evidence showed Mr. Akin worked for the Fort Hood defense; it had argued that, because he was paid by the United States Army Trial Defense Service, he was "retained by the U.S. Government" (L.F. 267-68; Aplt. Appx. A6-7). But although that evidence "uses the word 'retained,' the word is used in a completely different context than the context in which the word was used in the question that was asked of witness Akin during the trial" (L.F. 268; Aplt. Appx. A7). The court held it did not find this explanation – or Mr. Akin's response vis-à-vis this explanation – credible:

> This Court finds that it strains credulity past the breaking point to suggest that when Akin heard the question at trial whether he was retained by the U.S. Government, he thought he was being truthful by giving his answer without any clarification that he was working for the defense of Major Hasan, and not on behalf of the U.S. Government.

(L.F. 268; Aplt. Appx. A7). "Clearly, in the context of the question, Akin's answer gave the Court and the jury the distinct idea that Akin was working for the U.S. Government in connection with the prosecution of Maj. Hasan for the Fort Hood shootings," which "turned out to be false" (L.F. 269; Aplt. Appx. A8).

The court further observed,

> Before testimony is given, every witness in every case must swear or affirm "to tell the truth, the whole truth, and nothing but the truth." It is a cynical day and age, and many concepts of honor and integrity seem to have evaporated like the mist at dawn. This Court believes, however, that there is a difference between truth and falsehood. In this case, the Court has no doubt that witness Akin knew at the time he was asked the question by defense counsel … that when he gave his answer he was prevaricating, he was deviating from the truth, he was deceiving the Court and the jury. Therefore, this Court finds that his answer was perjury.

(L.F. 269-70; Aplt. Appx. A8-9).

As well, "the perjury was material" and "likely resulted in an improper verdict," because Mr. Akin's answer "formed a major part of what the jury knew about Akin's qualifications, which the jury had to evaluate in order to determine how much weight and value they should give to Akin's proffered opinion" (L.F. 270; Aplt. Appx. A9). Thus, because the testimony was "false," was "willfully and deliberately" so, and concerned "a material fact, and likely occasioned an improper verdict," the court granted Mr. March's motion and ordered a new trial (L.F. 270; Aplt. Appx. A9).

The court also addressed the separate ground for a new trial of whether the discovery of the posting on Mr. Akin's website constituted "newly discovered evidence" (L.F. 272; Aplt. Appx. A10). Although determining "that issue" was "not necessary in the light of the … determination that Akin's testimony was perjured," because it was a separate question, the court nonetheless found "that Plaintiff's discovery of the posting

does meet the test for newly discovered evidence …, and that Plaintiff would be entitled to a new trial on that ground as well" (L.F. 272-73; Aplt. Appx. A10-11).

After the trial court redenominated its order as a "Judgment," Midwest timely appealed to the Missouri Court of Appeals, Eastern District (L.F. 259-62, 274). On October 2, 2012, a two-judge majority of the Court of Appeals reversed the trial court's order; Judge Glenn Norton dissented.[2]

On January 31, 2013, this Court sustained Mr. March's application for transfer and transferred this case.

[2] Midwest includes a copy of the Court of Appeals' earlier opinion in this case in the Appendix to its brief (Aplt. Appx. A15-22). Of course, as this Court decides appeals post-transfer "as though on original appeal," *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. banc 1985), the "decision of the court of appeals in a case subsequently transferred is of no precedential effect," *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. 1993), and is "necessarily vacated and set aside and may be referred to as *functus officio*." *State v. Norman*, 380 S.W.2d 406, 407 (Mo. banc 1964). Thus, whatever the lower court decided in this case simply no longer exists.

Response to Appellants' Points Relied On

I. The trial court did not err in granting Mr. March's motion for new trial *because* its discretionary determination that Midwest's expert, Louis Akin, had testified falsely at trial and that an improper verdict resulted therefrom was not clearly against the logic of the circumstances then before the court and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration *in that* evidence was presented that Mr. Akin actually was hired by the defense in the Fort Hood case, not the prosecution, as the trial court could and did believe he deceptively meant when he testified that the "U.S. Government" had hired him to conduct crime scene investigations in that case, and the trial court could and did believe this false statement resulted in an improper verdict.

(Response to Appellant's Point Relied On I)

Hancock v. Shook, 100 S.W.3d 786 (Mo. banc 2003)

Donati v. Gualdoni, 216 S.W.2d 519 (Mo. 1949)

Hoodco of Poplar Bluff, Inc. v. Bosoluke, 9 S.W.3d 701 (Mo. App. 1999)

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. banc 2010)

II. The trial court did not err in granting Mr. March's motion for new trial *because* its discretionary determination that the article Midwest's expert, Louis Akin, briefly had posted on his website constituted "newly discovered evidence" was not clearly against the logic of the circumstances then before the court and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration *in that* evidence was presented that Mr. March's counsel did not learn of the article until after trial, this failure was not because of a lack of due diligence, and it resulted in the production of an affidavit from Mr. Akin, the evidence in the article went to Mr. Akin's qualifications, and the trial court could and did determine the article was not cumulative evidence and would have produced a different result upon a new trial.

(Response to Appellant's Point Relied On II)

Young v. St. Louis Pub. Serv. Co., 326 S.W.2d 107 (Mo. 1959)

Anderson v. Anderson, 854 S.W.2d 32 (Mo. App. 1993)

Lowdermilk v. Vescovo Bldg. & Realty Co., 91 S.W.3d 617 (Mo. App. 2002)

Kent v. Goodyear Tire & Rubber Co., 147 S.W.3d 865 (Mo. App. 2004)

Argument

I. The trial court did not err in granting Mr. March's motion for new trial *because* its discretionary determination that Midwest's expert, Louis Akin, had testified falsely at trial and that an improper verdict resulted therefrom was not clearly against the logic of the circumstances then before the court and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration *in that* evidence was presented that Mr. Akin actually was hired by the defense in the Fort Hood case, not the prosecution, as the trial court could and did believe he deceptively meant when he testified that the "U.S. Government" had hired him to conduct crime scene investigations in that case, and the trial court could and did believe this false statement resulted in an improper verdict.

(Response to Appellant's Point Relied On I)

The law of Missouri is that a trial court has discretion to determine whether a witness testified falsely at trial and whether an improper verdict resulted and, therefore, to order a new trial. A court only abuses this discretion when its decision is clearly against the logic of the circumstances and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration. In this case, after hearing evidence that Appellant's expert falsely testified the U.S. Government retained him to investigate the Fort Hood Shooting, it ordered a new trial, explaining why in detail, largely on grounds of witness credibility and trial intangibles not apparent from the cold record. Was this an abuse of the court's discretion?

A. This Court reviews the judgment granting Mr. March a new trial for heightened abuse of discretion, not in any way *de novo*.

Appellant Midwest St. Louis, LLC ("Midwest"), states that, "[t]ypically, a trial court's grant of a new trial" due to a determination that "perjury occurred … and an improper verdict resulted therefrom" "is reviewed for an abuse [*sic*] of discretion" (Appellant's Substitute Brief ("Aplt. Br.") 17). Nonetheless, asserting that "the record makes clear there is no dispute as to the relevant facts" and attempting to analogize an order granting a new trial due to false testimony to a reversal due to juror nondisclosure, Midwest argues the Court should "employ" "a *de novo* standard" in reviewing the trial court's new trial order in this case (Aplt. Br. 18).

Midwest's argument is untenable. Over a century of Missouri precedent is plain that appellate review of an order granting a new trial due to false testimony is for heightened abuse of discretion, the most deferential standard of review known in Missouri law. Midwest's invocation of the 180-degree polar opposite standard, *de novo*, has no support in existing law and ignores the centrality of deference to fact-finding.

1. Review of any order granting a new trial is for heightened abuse of discretion.

It is well-established that it "is within the sound discretion of the trial court to determine whether perjury occurred [at trial] and whether an improper verdict resulted therefrom" and, as in all decisions on motions for new trial, whether a new trial is warranted on this ground. *Hancock v. Shook*, 100 S.W.3d 786, 801 (Mo. banc 2003). Only if "the trial court has abused its discretion" will "an appellate court … interfere with the judgment" granting or denying a new trial on this ground. *Id.*

Abuse of discretion is "[t]he most deferential standard of review," which "severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court." *In re Marriage of Stephens*, 954 S.W.2d 672, 678 (Mo. App. 1997). An abuse of discretion only occurs when a court's "ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock*, 100 S.W.3d. at 795. "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.* at 795.

Additionally, this Court "will be more liberal in upholding a trial court's decision to grant a new trial than it will be if the trial court denies a new trial." *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 219 (Mo. banc 2012) (citation omitted). Thus, when, as here, the trial court has *granted* a new trial, the stringently deferential "abuse of discretion standard" becomes even *more* deferential; this standard may be re-dubbed "*heightened* abuse of discretion."

2. Where, as here, an order granting a new trial due to false testimony involves a credibility determination, that finding is not reviewable on appeal.

In the context of an order granting a new trial due to false testimony, the overarching reason for this deference is that, primarily, questions whether a witness testified falsely and an improper verdict resulted therefrom go to a hindsight determination of the witness's credibility (whether the testimony was false) and the false testimony's effect on the jury (whether an improper verdict resulted therefrom). The "purpose of … cloth[ing] the trial judge with [this] wide discretion" is "because he

enjoys the advantage of seeing and observing the witnesses while testifying, and is in a much better position to judge of their credibility than is an appellate court, which merely reads the cold record." *Calvin v. Lane*, 297 S.W.2d 572, 575 (Mo. App. 1957); *Hoodco of Poplar Bluff, Inc. v. Bosoluke*, 9 S.W.3d 701, 704 (Mo. App. 1999).

For, in this context, the "primary responsibility of determining who is worthy of belief rests first upon the jury and secondly upon the trial court in passing upon a motion for new trial." *Calvin*, 297 S.W.2d at 575. In passing upon a motion for a new trial alleging false testimony in a jury trial, the trial court becomes the fact-finder: "With respect to [this as the] ground for a new trial … the trial judge is vested with the functions of a trier of the fact and his discretion is limited only by the rule that his discretion must not be arbitrarily exercised." *Donati v. Gualdoni*, 216 S.W.2d 519, 522 (Mo. 1949).

The centrality of this credibility determination to "heightened abuse of discretion" review cannot be overstated. When a court, sitting as the fact-finder, determines a witness was credible or not credible, "it is not [an appellate court's] province to interfere." *Byrd v. Vanderburgh*, 151 S.W. 184, 186 (Mo. App. 1912). This is

> because the trial judge participated in the trial and knew what took place, much of which cannot be preserved in the record. It is recognized that the trial judge has a favorable position which enables him to know matters calculated to affect the result of the trial, but which matters may be of such character that they cannot be preserved in the record and thus brought to the attention of an appellate court.

Donati, 216 S.W.2d at 674.

In more recent times, this Court has referred to these other "matters" as "trial intangibles." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308-09 (Mo. banc 2010). When, as in the post-trial proceedings in this case, the court is sitting as the trier of fact,

> Appellate courts defer to the trial court on factual issues "because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." The appellate court's role is not to re-evaluate testimony through its own perspective.

Id. (internal citations omitted).[3]

Accordingly, in every single one of the only eight reported Missouri decisions reviewing a grant of a new trial due to false testimony, the appellate court reviewed the judgment for heightened abuse of discretion with total deference to credibility determinations. *Lee v. Rudolph-Brady*, 236 S.W.3d 658, 659 (Mo. App. 2007); *Hoodco*,

[3] Midwest might have mitigated its bold request for *de novo* review – the opposite end of the deference spectrum from "heightened abuse of discretion" – by arguing that, as the trial court was sitting as a fact-finder in passing on Respondent Phillip March's motion for new trial, a more middle-of-the road review as in a bench-tried decision under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), is warranted. Of course, even under the all-encompassing *Murphy* standard, credibility determinations are never second-guessable on appeal. *White*, 321 S.W.3d at 308-09. The "trial court is free to disbelieve any, all, or none of th[e contested] evidence." *Id.* at 308.

9 S.W.3d at 704-05; *Loveless v. Locke Distributing Co.*, 313 S.W.2d 24, 31-33 (Mo. 1958); *Donati*, 216 S.W.2d at 521-22; *Pitzman's Co. of Surveyors & Engineers v. Bixby & Smith, Inc.* 93 S.W.2d 920, 921-22 (Mo. 1936); *Thompson v. B. Nugent & Bro. Dry Goods Co.*, 17 S.W.2d 596, 597 (Mo. App. 1929); *Ridge v. Johnson*, 107 S.W. 1103, 1103-04 (Mo. App. 1908); *Rickroad v. Martin*, 43 Mo. App. 597, 603 (1891).

For this reason, it is unsurprising that, in only one of these cases, *Loveless*, 313 S.W.2d at 31-33, was the grant of a new trial reversed – and, there, only because the supposed "perjury" actually was merely prior inconsistent estimations of distance and, thus, no new, different evidence could have been presented on retrial. *See also Hoodco*, 9 S.W.3d at 704 (citing *Loveless* as example of extraordinarily deferential standard); *infra* at 40. Similarly, only once in Missouri history has a trial court's equally discretionary *denial* of a new trial due to perjured testimony been reversed. *See M.E.S. v. Daughters of Charity Servs. of St. Louis*, 975 S.W.2d 477, 482-83 (Mo. App. 1998).

That, in deciding both that Midwest's expert, Louis Akin, testified falsely, and that an improper verdict resulted therefrom, the trial court was making a credibility determination based largely on trial intangibles is plain from the face of the court's detailed, 11-page order granting Mr. March's motion for new trial. The court found "it *strains credulity* past the breaking point to suggest that when Akin heard the question at trial whether he was retained by the U.S. Government, he thought he was being truthful by giving his answer without any clarification that he was working for the defense of Major Hasan, and not on behalf of the U.S. Government" (Legal File 264; Appendix to Substitute Appellant's Brief ("Aplt. Appx.") A3) (emphasis added).

Moreover, the court expressly recounted the intangible that Mr. Akin's answer "made an immediate and favorable impression on the Court, and it no doubt made a similar impression on the jury" (L.F. 264; Aplt. Appx. A3). Based on having sat through the entire trial and reviewed the post-trial evidence, the court observed, "Clearly, Akin knew that he had been chosen by Hasan's defense attorneys to work as an expert witness for the defense on the Fort Hood case," and he "knew that to answer that he was 'working for' the U.S. Government in that case was misleading and false" (L.F. 265; Aplt. Appx. A4). Even Midwest is forced to acknowledge the trial court "concluded that Mr. Akin had … improperly bolstered his credibility in the eyes of the jurors" (Aplt. Br. 13). It further admits the post-trial evidence, as well as the trial court's ultimate determination, "concern[ed] Mr. Akin's character and credibility" (Aplt. Br. 13).

In insisting the standard of review should be *de novo*, however, Midwest downplays the central part fact-finding credibility determinations played in the trial court's discretionary determination that Mr. Akin testified falsely and an improper verdict resulted therefrom. Indeed, not once in its five-page standard of review argument does Midwest even mention "credibility" (Aplt. Br. 17-21). This failure is fatal to Midwest's desire that the Court engage in *de novo* review of a decision based largely on the trial court's plain assessment of witness credibility including trial intangibles.

3. Review of juror non-disclosure bears no relation to the review in this case.

Further ignoring the hindsight credibility aspect of the inquiry in this case, Midwest insists that, to review the trial court's decision, "the Court must first determine whether the question presented – have you been retained by the U.S. Government for a

major investigation – required [Mr. Akin] to volunteer that, while he ***was***, in fact, retained by the U.S. Government for a major investigation, he was retained on behalf of the defense" (Aplt. Br. 20). Citing the law related to *voir dire* in cases of alleged juror non-disclosure, Midwest argues "clarity of language" in the question asked to elicit a response is the main question, which is reviewed *de novo* in those cases (Aplt. Br. 19-20).

But the analysis of alleged juror non-disclosure is patently different. There, as in all *voir dire* issues, the law is that "Information likely to disclose a general bias against a party must be developed by questions designed to clearly establish the existence of such a sweeping bias." *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 722 (Mo. App. 2001) (citing *Hale v. Am. Family Mut. Ins. Co.*, 927 S.W.2d 522, 527 (Mo. App. 1996)). "Failing to ask a question on *voir dire* waives the right to challenge the juror on any grounds." *Id.* Thus, analysis of juror non-disclosure is prospective, focusing on the question: was there a clear question and, if so, did the venireperson answer fully and fairly? *Id.* at 722-24.

This is not so in review of an order, as in this case, granting a new trial due to a witness's testimony later found to be false and resulting in an improper verdict. This analysis is retrospective: based largely on character, credibility, and trial intangibles, (1) did the witness testify falsely? and (2) if so, did an improper verdict result therefrom? Juror non-disclosure cases are about foresight, concentrating on the attorneys' questions asked, whereas false testimony impacting the jury's decision is about hindsight, concentrating on the witness's answer, specifically its falsity and effect.

While Mr. Akin's false testimony, within the trial court's heightened discretion, was enough to warrant a new civil trial, no reported Missouri opinion analyzing the grant

of a new trial due to false testimony has required proof sufficient to rise to the level of that required to prove *criminal* perjury beyond a reasonable doubt, nor does Midwest cite any.[4] Indeed, this Court has affirmed a trial court's *sua sponte* grant of a new trial due to false testimony even without any additional evidence presented. *Donati*, 216 S.W.2d at 522. Doubtless, a bench-tried criminal perjury prosecution culminating in a *sua sponte* guilty verdict without presentation of any evidence would not fare as well on appeal.

Additionally, the juror non-disclosure analysis is grounded in both parties' constitutional right to a fair and impartial jury. *Keltner*, 42 S.W.3d at 721 (citing Mo. Const. art. I, § 22(a)). A witness's false testimony is not related to such a right. Moreover, Mr. Akin was Midwest's expert, and Midwest's counsel asked him the question on direct examination. Midwest cannot be allowed to thread the needle with its own purposefully-crafted question (undoubtedly rehearsed in advance) and then claim it was unclear when the answer given was false and deceptive.

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[4] Midwest cites *Atlas Corp. v. Mardi Gras Corp.*, 962 S.W.2d 927, 930 (Mo. App. 1998), and *Butts v. Express Personnel Services*, 73 S.W.3d. 825 (Mo. App. 2002), for the proposition that "a jury verdict should not be overturned unless there is a [criminal] conviction of perjury" (Aplt. Br. 22). But those cases reviewed the *denial* of a new trial due to perjury. No Missouri case reviewing a *grant* of new trial due to perjury, all of which are cited *supra* at 23-24, mention such a holding. As *Atlas*, itself, points out, "In view of the wide discretion allowed the trial judge, [such inapposite cases are] of little value to [a party appealing the contrary decision] as precedent." 962 S.W.2d at 930.

Midwest's characterization of the evidence as "undisputed" (Aplt. Br. 18) is equally without merit. For, "It is only when the evidence is *uncontested* that no deference is given to the trial court's findings." *White*, 321 S.W.3d at 308. When a court is sitting as finder of fact, this occurs only "when the issue before the trial court involves … stipulated facts …." *Id.* Here, there was no stipulation. Mr. March presented his post-trial evidence of Mr. Akin's false testimony. Midwest presented its own evidence.

Thus, the facts were contested: "To contest evidence, a party need not present contradictory or contrary evidence. [A] party can contest evidence by … pointing out internal inconsistencies in the evidence." *Id.* (internal citations omitted). This is especially true where a party argues "to the trial court that the witness is not credible as apparent from the witness's demeanor, or because of the witness's bias or the witness's incentive to lie." *Id.* (internal citations omitted). Mr. March argued Mr. Akin's lack of credibility, which Midwest contested. The trial court resolved the contest by agreeing, based largely on trial intangibles, that Mr. Akin was not credible. Accordingly, "this Court defers to the trial court's determination of credibility." *Id.*

The Court should reject Midwest's novel invitation to depart 180 degrees from the deferential standard of review consistently applied throughout Missouri history in cases such as this. Midwest's ignoring the central role of credibility determinations and trial intangibles inherent in the trial court's judgment is without merit. Review is and must be for abuse of discretion with a stricter eye than usual toward upholding the trial court's judgment. If a reasonable mind (such as the trial court) could come to the same conclusion as the trial court, then the court cannot be said to have abused its discretion.

B. The trial court did not abuse its discretion in determining Mr. Akin deliberately testified falsely that the "U.S. Government" "retained" him to perform "blood spatter" analysis in the Fort Hood shooting case.

Couched in terms of *de novo* review, Midwest argues "the trial court erred in granting Mr. March's new trial motion" because "Mr. Akin's testimony that he was retained by the U.S. Government was true, and, consequently, cannot be deemed perjury" (Aplt. Br. 23). It then argues that, even if Mr. Akin's testimony were false, the falsehood was not "committed willfully, intentionally, or deliberately, as required for a new trial on this ground" (Aplt. Br. 24).

Midwest's arguments are without merit. The trial court could and did determine that, when Mr. Akin testified the "U.S. Government" had hired him to perform "blood spatter" analysis in the Fort Hood case, he was willfully, intentionally, and deliberately testifying falsely – "prevaricating" – as he actually had been hired by the Fort Hood *defense*, not the "Government," to perform *gunshot trajectory analysis*, not "blood spatter" analysis. The court did not abuse its discretion in finding he testified falsely.

"The granting of a new trial on the ground of perjury requires a showing that the witness willfully and deliberately testified falsely." *Hoodco*, 9 S.W.3d at 704. Mr. Akin's testimony at issue is this:

> Q. Now, can you give -- just to give the jury an example of who you work for and what you do, are you currently involved in any major investigation *where you've been retained by the U.S. Government*?

A. I just recently finished reconstructing the Fort Hood shooting by Major Malik Hasan.

Q. And that was the massacre in Texas that we've all read about?

A. The massive killing in Texas at the – at Fort Hood.

Q. And what was your --

A. On base.

Q. What was your function in that regard?

A. *Blood spatter* and crime scene reconstruction.

(Transcript 861-62; Appendix A1) (emphasis added).

This included two separate instances of false testimony: (1) that Mr. Akin was retained by the U.S. Government in the Fort Hood case; and (2) that Mr. Akin performed blood spatter analysis during that assignment. While Midwest's argument concentrates on the first aspect, it does not mention the second at all (Aplt. Br. 21-25).

Regarding the first false statement[5] – that Mr. Akin was retained by the U.S. Government in the Fort Hood case – the trial court found this

[5] The second statement also was false, as evidence at the hearing on Mr. March's motion for new trial explained: Major Hasan's attorney, John Galligan, "made it clear to [Mr. March's] counsel that he chose Louis Akin as a consultant. And it was about the direction of the bullets, and where the guns came from, and all that kind of thing. It was nothing to do with blood spatter analysis" (Supp. Tr. 23). As Midwest did not object to this statement, it waived the right to challenge its truth on appeal. *Infra* at 33, n.6.

> was false because witness Akin does not work for the U.S. Government in connection with the investigation of the Fort Hood killings … Akin was not retained by the U.S. Government to do blood spatter and crime scene reconstruction of the Fort Hood shooting. Akin was retained by the attorneys appointed to represent the person accused of those shootings, Major Malik Hasan.

(L.F. 264; Aplt. Appx. A3) (emphasis in the original).

On appeal, as it did in the trial court, Midwest argues this finding is wrong because Mr. Akin's testimony was "true," and thus "cannot be deemed perjury" (Aplt. Br. 23; L.F. 267-70; Aplt. Appx. A6-9). As it did below, it argues this is because Mr. Akin *technically* "was retained on behalf of the U.S. Government – specifically, the III Corps and Fort Hood for the United States Army Trial Defense Service – to provide crime scene analyst services for the defense of Major Hasan," and Mr. Akin "was compensated by the U.S. Government" (Aplt. Br. 23) (citing L.F. 108-110).

Midwest's repeated assertion that Mr. Akin's answer was "true" has two glaring problems. First, Midwest fails to take into account that the trial court was making a credibility determination of what Mr. Akin's *meant* in the context of the trial, a determination based largely on trial intangibles. The court held Midwest's argument "that Akin's testimony was 'true'" "simply does not pass the smell test" (L.F. 267-70; Aplt. Appx. A6-9). As it noted, "perjury" does not require an "outright lie," but rather knowingly testifying "falsely" (L.F. 269; Aplt. Appx. A9). A "false" statement is one that "is not true;" "prevarication" is "to deviate from the truth" (L.F. 269; Aplt. Appx.

A9). This is why witnesses must "tell the truth, *the whole truth*, and nothing but the truth" (L.F. 269; Appx. A9) (emphasis added). If a witness has not told the whole truth, a trial court may determine he was not credible and testified falsely. Here, the trial court did not abuse its discretion in determining Mr. Akin had not told the whole truth, but instead had prevaricated, had testified falsely.

The affidavit Midwest presented from an Army lawyer (and now cites on appeal (Aplt. Br. 23)) used the word "retained" "in a completely different context than the context in which the word was used in the question that was asked of witness Akin during the trial" (L.F. 268; Aplt. Appx. A7; *cf.* Appx. A1 *with* Appx. A4). As such, "These affidavits, rather than showing as [Midwest] contends that Akin was being truthful, actually underscore the falsehood of his answer" (L.F. 268; Aplt. Appx. A7).

For, the affidavits, which were "obtained by [Midwest's counsel] in this case," "make it clear that Akin was appointed by the Convening Authority [in the Fort Hood case] at the request of Defense Counsel, that he was working for the defense, and that payment for his services would be based on submissions by the defense" (L.F. 268; Aplt. Appx. A7). Thus,

> Whether it was [the affiant's] choice of wording or the choice of [Midwest's counsel] in seeking [the] affidavit is not important. *This Court finds that* ***it strains credulity past the breaking point*** to suggest that when Akin heard the question at trial whether he was retained by the U.S. Government, he thought he was being truthful by giving his answer *without*

> *any clarification* that he was working for the defense of Major Hasan, and not on behalf of the U.S. Government.

(L.F. 268; Aplt. Appx. A7) (emphasis added). Instead, based on the demeanor during the trial, "Clearly, Akin knew that he had been chosen by Hasan's defense attorneys to work as an expert witness for the defense on the Fort Hood case," and "Akin knew that to answer that he was 'working for' the U.S. Government in that case was misleading and false" (L.F. 265; Aplt. Appx. A4).

Second, there was evidence presented at the hearing over the motion for new trial that Mr. Akin was hired – "retained" – in the Fort Hood case not by the Government, but by Major Hasan's chief defense counsel, John Galligan, a private, civilian lawyer (Supplemental Transcript 36). "John Galligan is the one who retained [Akin]. He is not a government employee. I'm sure he was paid by the government as well, same as any public defender is" (Supp. Tr. 36).[6]

[6] This statement was made by Mr. March's counsel after he spoke with Mr. Galligan via phone just days before the hearing (Supp. Tr. 36). Counsel for Midwest did not object to Mr. March's counsel's recounting of this conversation (Supp. Tr. 36). Thus, Midwest has waived the right to assert the truth of this recounting on appeal. *Blevins v. Cushman Motors*, 551 S.W.2d 602, 615-16 (Mo. banc 1977); *Helmig v. State*, 42 S.W.3d 658, 679 (Mo. App. 2001). Had Midwest taken issue with the statements, a short recess could have been taken to obtain an affidavit or live telephone testimony from Mr. Galligan.

Moreover, that Mr. Akin's falsehood was deliberate was supported not only by this evidence and these trial intangibles, but also by the sequence of events in which Mr. Akin: (1) was endorsed as an expert in this case (December 30, 2009); (2) was hired by the Fort Hood defense (January 15, 2010); (3) posted the article proclaiming his work for the Fort Hood defense on his website (between January 15 and 18, 2010); (4) removed the article from his website (a few days before February 16, 2010); and (5) was deposed in this case (February 16, 2010) (L.F. 264-66; Aplt. Appx. A3-5).

Given all this, the trial court cannot be said to have abused its discretion in determining "that witness Akin knew at the time he was asked the question by defense counsel … that when he gave his answer he was prevaricating, he was deviating from the truth, he was deceiving the Court and the jury," and "[t]herefore, … his answer was perjury" (L.F. 269-70; Aplt. Appx. A8-9).

If the Missouri State Public Defender's office retained Mr. Akin to perform expert defense work in a criminal case, it would be equally deceiving for him to testify that he had been "retained by the State of Missouri." While, *technically*, an arm of the state government would have paid him for his services, it would not be an abuse of discretion to conclude that the common meaning of being "retained by the State of Missouri" would be that the *prosecution* – "the State" – had retained him, not the public defender. This deception would be further compounded if, as in the Fort Hood case, he had been hired by a private attorney doing contract work for the Public Defender's office.

So, too, was Mr. Akin's deception in answering that the "U.S. Government" had "retained" him to perform expert work in the Fort Hood case. As any attorney who has

ever worked in federal (or military) criminal cases (or any layperson who has watched a television or film drama about such a case) knows, the prosecution in such cases always is referred to as the "Government." Doubtless, attorneys for the Federal Public Defender's office – the civilian version in federal district court of Major Hasan's Army-hired defense before a military court martial – would take issue with their being described as the "Government."

The trial court plainly understood this, too, again based largely on trial intangibles: "Clearly, in the context of the question, Akin's answer gave the Court and the jury the distinct idea that Akin was working for the U.S. Government in connection with the prosecution of Maj. Hasan for the Fort Hood shootings - and that idea or fact turned out to be false" (L.F. 269; Aplt. Appx. A8). The trial court did not abuse its discretion in determining Mr. Akin had testified falsely that he had been retained by the U.S. Government to perform an investigation in the Fort Hood case, when in fact he was retained by the defense, principally by a civilian, regardless of who paid him.

C. The trial court did not err in determining Mr. Akin's false testimony likely resulted in an improper verdict.

Couched again in terms of purely *de novo* review, Midwest argues that, even if Mr. Akin's testimony was false, it "did not justify … a new trial" because it "did not concern a material fact resulting in an improper verdict" (Aplt. Br. 25). It argues his false "testimony merely went to the experience of Mr. Akin in his work as a crime scene analyst and did not concern a material issue at trial" (Aplt. Br. 26). This argument is without merit. As Midwest recognizes later in its brief, Mr. Akin's false testimony

concerned his "character and credibility" (Aplt. Br. 33) or, as the trial court put it, "Akin's qualifications to give his expert opinion in the case, and the weight to be given to this testimony" (L.F. 264; Aplt. Appx. A3). As a result, the law of Missouri is that the trial court did not err in finding his false testimony likely resulted in an improper verdict.

1. **Whether false testimony resulted in an improper verdict is a mixed question of law and fact, reviewed primarily for abuse of discretion.**

Midwest argues the trial court's finding that Mr. Akin's false testimony likely resulted in an improper verdict should be reviewed *de novo* (Aplt. Br. 21). This is not entirely true. Whether an improper verdict resulted actually is a mixed question of law and fact. The limited, initial question of whether the false testimony legally *could* result in an improper verdict may well be a matter of law reviewed *de novo*. If it *could* do so, however, then the law of Missouri is whether it *did* do so is a determination of fact based largely on trial intangibles and reviewed for abuse of discretion.

As discussed above, *supra* at 20-21, the determination whether to grant a new trial due to false testimony involves two inquiries: (1) whether false testimony occurred; and (2) whether an improper verdict resulted therefrom. Determining both inquiries is within the trial court's discretion: "It is within the sound discretion of the trial court to determine whether perjury occurred *and* whether an improper verdict resulted therefrom." *Hancock*, 100 S.W.3d at 801 (emphasis added).

Some cases, nearly all reviewing the *denial* of a new trial due to alleged false testimony rather than a *grant* of a new trial, refer to this second inquiry as "materiality," borrowing from the statute creating the crime of perjury, § 575.040, R.S.Mo. *See, e.g.*,

Hancock, 100 S.W.3d at 801 (quoting *Loveless*, 313 S.W.3d at 31). Under that statute, "A person *commits the crime* of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding." § 575.040.1 (emphasis added). It then states, "A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the … proceeding." § 575.040.2.

Again relying solely on decisions reviewing the denial of a new trial due to alleged false testimony, Midwest, too, relies on this statute (Aplt. Br. 25-26), to which the trial court also referred (L.F. 270; Aplt. Appx. A9). But the actual standard for a new trial due to false testimony does not require proof of the specific elements of the crime of perjury. While most cases on this issue call such a ground "perjury," it is a common law doctrine that more properly should be called simply "false testimony that resulted in an improper verdict." None of the eight Missouri cases reviewing the grant of a new trial due to false testimony specifically have found that, to meet this ground, the exact elements of the statute creating the *crime* of perjury must be proven. *See* cases cited *supra* at 23-24.

Rather, as the first Missouri case to review a grant of new trial due to false testimony discusses, the genesis of the rule giving a trial court discretion to grant a new trial for this reason stems not from the crime of perjury, but instead from a trial court's discretionary power (and duty) to assess whether a trial was fair:

> "It is a general rule that all disingenuous attempts to stifle evidence, or to thwart the proceedings, or to attain an unconscionable advantage, or to mislead the court and jury, will be defeated by setting aside the verdict."

> "There is one rule of universal application and controlling efficacy. It is that, where substantive justice has been done, no new trial will be granted. The discretion of courts consists in deciding this fundamental question. A judge, then, should never deny a motion of this kind (new trial) unless he is satisfied that the merits of the case have been fully and fairly tested and determined. If he has a reasonable doubt on the subject, he should decide in favor of the application."

Rickroad, 43 Mo. App. at 603 (citations omitted).

Indeed, although "materiality" has been in the criminal perjury statute since even before *Rickroad* in 1891, *see, e.g.*, § 1424, R.S.Mo. (1879), the earlier decisions reviewing the grant of a new trial due to false testimony do not include the same legal "materiality" required to prove the crime of perjury as a prerequisite. *See Rickroad*, 43 Mo. App. at 603-04 (no mention of "material"); *Ridge*, 107 S.W. at 1104 (stressing that the standard is whether "an improper verdict or finding was occasioned by" the false testimony, and a trial court has discretion to determine this); *Thompson*, 17 S.W.2d at 597 (equating the "improper verdict" prong to "materiality," but reiterating that finding this remains within the trial court's discretion).[7]

[7] It appears the first case to equate the "improper verdict resulted" standard with the required element of "materiality" in the criminal perjury statute was *Loveless*, which relied almost exclusively on cases deciding appeals from *convictions* for the *crime* of perjury. 313 S.W.2d at 31 (citing *State v. Swisher*, 260 S.W.2d 6 (Mo. banc 1953);

Even later cases reviewing the grant of a new trial due to false testimony treat "materiality" in these non-criminal circumstances as part of the trial court's discretion. Although the party against whom a new trial is granted almost always argues "the discrepancy in this testimony does not involve a material, disputed fact relevant to the issues at trial," no reviewing court actually has reviewed "materiality" *de novo* to require the same proof as § 575.040.2. *Hoodco*, 9 S.W.3d at 704-05; *see also Lee*, 236 S.W.3d at 659; *Donati*, 216 S.W.2d at 673-74 (it was enough that trial court was "satisfied the verdict was occasioned by false testimony").

Plainly, having discretionarily determined that testimony was false, a trial court equally has discretion to determine whether that false testimony resulted in an improper verdict. This is because this second factor, like the first factor, depends largely on an assessment of trial intangibles: "the trial judge has a favorable position which enables him to know matters *calculated to affect the result of the trial*, but which matters may be of such character that they cannot be preserved in the record and thus brought to the attention of an appellate court." *Id.* at 674 (emphasis added).

Instead, it appears that, what is meant by *de novo* review of "materiality" in this context is whether the false testimony is *legally capable* of improperly influencing the

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Dolan v. United States, 218 F.2d 454 (8th Cir. 1955); *State v. Carter*, 285 S.W. 971 (Mo. 1926)). At the same time, *Loveless* recognized that this strict standard does not necessary apply to decisions over a motion for new trial due to false testimony in civil cases. *Id.* at 32 (citing *Sly v. Union Depot Ry. Co.*, 36 S.W. 235 (Mo. 1896)).

verdict or even constitutes "facts" testified to in the first place. *See Loveless*, 313 S.W.2d at 31-32. *Loveless*, the only one of the eight prior Missouri cases reviewing a grant of new trial due to false testimony to *reverse* the order, exemplifies this. There, witness Vaughn informally estimated the plaintiff had stopped his car by the side of a road with two wheels "about 18 inches" off the roadbed, where it remained when a collision occurred. *Id.* at 27.

After a verdict for the plaintiff, the defendant sought a new trial on the basis that Vaughn's "about 18 inches" estimation was "perjury," because Vaughn previously had equivocated about this amount in his deposition, the defendant and his highway patrolman witness had given different measurements, and thus Vaughn's testimony was contrary to a conclusively established "physical fact." *Id.* at 27-28. The trial court granted the defendant's motion and ordered a new trial. *Id.* at 26-27.

This Court reversed the new trial order, holding Vaughn's estimations, even if incorrect, were not legally capable of constituting false testimony that resulted in an improper verdict. "The rule is well established that estimates of distance or the position of an automobile … are not conclusively binding on a party, and we can see no reason why a witness should be held to greater accountability." *Id.* at 32. Vaughn merely had expressed his opinion, and a new trial due to false testimony "cannot be predicated upon a mere expression of opinion." *Id.* Moreover, the parties knew of Vaughn's deposition statements during trial and provided them to the jury, which could evaluate the two competing statements itself. *Id.* Thus, as no "additional or different evidence could be adduced … at another trial," the Court had "to expedite and terminate the litigation." *Id.*

These cases show plainly that the second prong of the new trial due to false testimony analysis is actually two separate questions with two standards of review. First, is the false testimony *legally capable* of resulting in an improper verdict? *Loveless*, 313 S.W.2d at 31-32. It appears this limited question may well be reviewed *de novo*. *Hancock*, 100 S.W.3d at 801 (quoting *Loveless*, 313 S.W.3d at 31). Second, if it is so capable, *did* it result in an improper verdict? *Donati*, 216 S.W.2d at 673-74. Due to the trial court's more "favorable position which enables him to know matters calculated to affect the result of the trial," this broader question is reviewed for abuse of discretion. *Donati*, 216 S.W.2d at 674; *Hancock*, 100 S.W.3d at 801; *Hoodco*, 9 S.W.3d at 704.

In this case, Mr. Akin's false testimony that he was retained by the U.S. Government to perform blood spatter analysis in the Fort Hood case certainly was legally capable of resulting in an improper verdict. The trial court did not abuse its discretion in finding it did so.

2. As Mr. Akin's false testimony went to his qualifications, and thus his credibility and the weight and value for the jury to give to his testimony, it was legally capable of resulting in an improper verdict.

Midwest argues Mr. Akin's false "testimony simply was not so decisive or conclusive as to influence the outcome of the trial" because it was merely "testimony regarding his qualifications" and "concerning [his] credentials" (Aplt. Br. 26-28). This argument is without merit. As Mr. Akin's false testimony as to his qualifications went both to his credibility and the weight and value the jury was to give to his testimony, it was legally capable of affecting the verdict. Even under the higher "materiality" for

criminal perjury, false statements affecting credibility (and even false testimony by experts merely as to their qualifications) are and have been enough both in Missouri and elsewhere to sustain criminal convictions for perjury.

Midwest cites no authority for its proposition that an expert's false testimony as to his qualifications is immaterial. This is because no authority supports it. Rather, it is well-established that "an expert's qualifications are relevant in the process of weighing the credibility and admissibility of expert evidence." *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 872 (Mo. App. 2004). And Missouri "cases broadly define materiality to include statements affecting credibility." *Mitchell v. Kardesch*, 313 S.W.3d 667, 676 (Mo. banc 2010).

For example, as Missouri "permits cross-examination where the witness's testimony at trial is inconsistent with a prior statement, but … generally require[s] the prior statement to be about a material issue," in *Mitchell* this Court reversed a trial court's judgment when the court had refused to allow a physician to be cross-examined as to a prior false interrogatory answer concerning his qualifications. *Id.* at 681-82. The question is whether the false testimony is on a "relevant issue," of which "character for truth and veracity" is an important one. *Id.*

As a person's falsehood as to his qualifications "reflects on the credibility of his testimony at trial … and whether his testimony was accurate," it is material and, standing alone, can be enough to affect the outcome of the trial. *Id.* at 682. Simply put, a "witness's credibility is not a collateral issue" to the materiality of his testimony, but rather is a central part of it. *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 128 (Mo.

banc 2010). For this reason, this Court also has held evidence affecting credibility is enough under *Brady v. Maryland*, 373 U.S. 83 (1963), to warrant a new trial for a criminal defendant if kept from him previously. *Engel*, 304 S.W.3d at 128-29. As it allowed the prosecution to "claim much greater credibility" of its witness "than the true facts would have warranted," it legally could have affected the outcome of the trial. *Id.* at 129 (quoting *Taylor v. State*, 262 S.W.3d 231, 245 (Mo. banc 2008)).

As a result, it is unsurprising that, both in Missouri and elsewhere, false statements affecting only credibility and weight to be given to testimony have been enough to sustain *criminal* convictions for perjury. *See, e.g.*, *State v. Barkwell*, 600 S.W.2d 497, 500 (Mo. App. 1979); *Swisher*, 260 S.W.2d at 10-11; *State v. Moran*, 115 S.W. 1126, 1129 (Mo. 1909). Such evidence "is material on the issue of credibility and therefore can serve as a basis for a perjury conviction," as it deprives the trier of fact "of material information in judging the credibility of the witness and hence the validity of" his testimony. *Barkwell*, 600 S.W.2d at 500. Such evidence legally can affect the outcome of the proceeding because "the truth … would have been pertinent impeachment to [the witness's] testimony." *Id.*

For this reason, an expert's false testimony as to his qualifications has been held enough to sustain his criminal conviction for perjury. *See Kline v. State*, 444 So.2d 1102, 1104-05 (Fla. App. 1984). "Misrepresentations which tend to bolster the credibility of a witness, whether successful or not, are regarded as material for purposes of supporting a perjury conviction." *Id.* Thus, an expert who falsely claimed he had obtained a particular doctoral degree had committed perjury, even though his testimony only went to his

"qualifications as an expert." *Id.* at 1104. Simply put, false statements affecting the "criteria by which the qualifications of an expert witness may be determined and his testimony evaluated" are material for the purposes of criminal perjury. *Id.* at 1104-05.

As Midwest acknowledges, Mr. Akin's false testimony regarding his alleged involvement in the Fort Hood shooting case "went to the experience of Mr. Akin," "constituted … a portion of Mr. Akin's … credentials and experience," and thus was "a portion of his testimony regarding his qualifications" (Aplt. Br. 25-28). As such, the law of Missouri is and must be that it was capable of affecting the outcome of the trial.

This evidence as to Mr. Akin's qualifications was "relevant in the process of weighing the credibility and admissibility of [his] expert evidence." *Kent*, 147 S.W.3d at 872. Hence, "materiality" included his "statements affecting credibility." *Mitchell*, 313 S.W.3d at 676. His false testimony concerned his "character for truth and veracity," an important and "relevant issue." *Id.* The falsehood as to his qualifications "reflect[ed] on the credibility of his testimony at trial … and whether his testimony was accurate," and thus, standing alone, legally was enough to affect the outcome of the trial. *Id.* at 682.

Mr. Akin's "credibility [was] not a collateral issue" to the materiality of his testimony. *Engel*, 304 S.W.3d at 128. His false statement that he was "retained" by the "U.S. Government" in the Fort Hood case allowed Midwest to "claim much greater credibility" of Mr. Akin "than the true facts would have warranted." *Id.* at 129 (quoting *Taylor*, 262 S.W.3d at 245). It deprived the jury "of material information in judging [his] credibility … and hence the validity of" his testimony. *Barkwell*, 600 S.W.2d at 500. "[T]he truth" – that Mr. Akin actually was hired by the Fort Hood defense and did not

perform blood spatter analysis in that investigation – "would have been pertinent impeachment to his testimony." *Id.*

Midwest's argument that Mr. Akin's false statement, which it admits went to his qualifications and training, was not legally capable of affecting the outcome of the trial is untenable. The plain law of Missouri is to the contrary.

3. The trial court did not abuse its discretion in holding Mr. Akin's false testimony resulted in an improper verdict.

Still couched in *de novo* review, though this broader question is reviewed for abuse of discretion, *supra* at 35-41, Midwest argues the trial court erred in concluding Mr. Akin's false testimony resulted in an improper verdict, primarily because other witnesses supported the jury's finding that Mr. March was not stabbed on Midwest's premises (Aplt. Br. 27-28). It cites the testimony of several witnesses who made equivocating statements as to the location of the stabbing (Aplt. Br. 27-28).

As the trial court understood, however, none of the testimony besides that from Mr. March and Mr. Akin directly supported either location, on or off Midwest's premises (L.F. 262; Aplt. Appx. A1). There were no witnesses to the stabbing besides Mr. March and his unknown assailant (L.F. 262; Aplt. Appx. A1). Under these circumstances, and with superior knowledge of the trial intangibles, the trial court did not abuse its discretion in finding Mr. Akin's false testimony likely resulted in an improper verdict.

At the outset, the court took into account that the "single issue that dominated the trial was the question of where [Mr. March] was at the time he was injured in an assault – whether the assault took place on [Midwest]'s premises, as [Mr. March] alleged; or in the

alley behind the premises, as [Midwest] contended" (L.F. 262; Aplt. Appx. A1). Mr. Akin "was the only expert presented by the defense related to that issue" (L.F. 262; Aplt. Appx. A1). His "testimony was significant in several ways, foremost among which was that this testimony directly contradicted the testimony of [Mr. March] as to where the stabbing occurred. … Akin was the only person who offered an expert opinion as to where the stabbing occurred" (L.F. 262; Aplt. Appx. A1).

Thus, the "jury's evaluation as to how much weight and value should be given to Akin's testimony depended on the jury's evaluation of Akin's qualifications and background. It was in this area that Akin testified falsely" (L.F. 262; Aplt. Appx. A1). The court noted that "the primacy given to" the question whether Mr. Akin was

> working for currently 'in any major investigation where you've been retained by the U.S. Government' … in the sequence of questions about Akin's qualifications demonstrates the importance of the answer to that question, and underscores why Akin's false testimony … made it likely that [it] resulted in an improper verdict.

(L.F. 267; Aplt. Appx. A6).

In this context, Mr. "Akin's false answer that he was working for the U.S. Government in connection with such an important case gave him an impressive credential," which "obviously was something that would be expected to be considered significant by the jurors as they evaluated Akin's qualifications to give his expert opinion … and the weight to be given to this testimony," and his answer "made an immediate and

favorable impression on the Court, and it no doubt made a similar impression on the jury" (L.F. 264; Aplt. Appx. A3).

"That Akin falsely portrayed himself as having been selected by the U.S. Government to do the exact same kind of analysis in such a major and significant case as the analysis" in this case "made Akin's qualifications to state his opinion in this case seem much more reliable" (L.F. 265; Aplt. Appx. A4). His "false testimony in this case made it much more likely that the jury would give his opinion a weight and value that it did not deserve" (L.F. 265; Aplt. Appx. A4).

Thus, Mr. Akin's false answer "likely resulted in an improper verdict," because it "formed a major part of what the jury knew about Akin's qualifications, which the jury had to evaluate in order to determine how much weight and value they should give to Akin's proffered opinion" (L.F. 270; Aplt. Appx. A9).

Given the importance of Mr. Akin's testimony as the *only* evidence directly contradicting Mr. March as to where he was stabbed, the primacy of the question Mr. Akin answered falsely, and the favorable impression it had on the jury and the trial court, it cannot be said that the trial court's finding that Mr. Akin's false testimony likely resulted in an improper verdict was an abuse of discretion. It is not clearly against the logic of the circumstances and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration. Rather, the court's consideration was very careful and not at all shocking.

The Court should affirm the trial court's judgment granting a new trial.

II. The trial court did not err in granting Mr. March's motion for new trial *because* its discretionary determination that the article Midwest's expert, Louis Akin, briefly had posted on his website constituted "newly discovered evidence" was not clearly against the logic of the circumstances then before the court and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration *in that* evidence was presented that Mr. March's counsel did not learn of the article until after trial, this failure was not because of a lack of due diligence, and it resulted in the production of an affidavit from Mr. Akin, the evidence in the article went to Mr. Akin's qualifications, and the trial court could and did determine the article was not cumulative evidence and would have produced a different result upon a new trial.

(Response to Appellant's Point Relied On II)

Standard of Review

"Granting … a new trial for newly-discovered evidence rests … within the sound discretion of the trial judge [and] will not be disturbed except for clear abuse of discretion." *Anderson v. Anderson*, 854 S.W.2d 32, 38 (Mo. App. 1993). A trial court abuses its discretion only "when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008). "[I]f reasonable persons may differ as to the propriety of an action taken by the trial court, then it cannot be held that the trial court has abused its discretion." *Id.*

This Court "will be more liberal in upholding a trial court's decision to grant a new trial than it will be if the trial court denies a new trial." *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 219 (Mo. banc 2012) (citation omitted).

* * *

The law of Missouri is that a trial court has discretion to grant a new trial when the movant produces newly-discovered, material evidence. A court only abuses this discretion when its decision is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. In this case, after hearing evidence that, after trial, Respondent's counsel was made aware of an article Appellant's expert posted on his website but then deleted shortly before his deposition, which showed the expert testified falsely regarding his experience, the court granted Respondent a new trial. Was this an abuse of discretion?

As a separate and alternative ground for its order granting an new trial, the trial court held Respondent Phillip March's counsel's post-trial discovery of an article Appellant Midwest's expert, Louis Akin, had posted on the website but removed shortly before he gave his deposition in this case constituted "newly discovered evidence" warranting a new trial (Legal File 272; Appendix to Substitute Appellant's Brief ("Aplt. Appx.") A10; Appendix A3). The article showed Mr. Akin was retained by the Fort Hood defense, not the Government, as he had testified at trial (L.F. 97; Transcript 863-64; Appx. A1, A3). The trial court held this newly discovered evidence satisfied the six-factor test from *Young v. St. Louis Pub. Serv. Co.*, 326 S.W.2d 107, 111 (Mo. 1959).

The *Young* test is this:

> a party who seeks a new trial on [the ground of newly discovered evidence] should (to obtain such relief) be required to show: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would probably produce a different result if the new trial were granted; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be produced, or its absence accounted for; and (6) that the object of the testimony is not merely to impeach the character or credit of a witness.

Id.

Not once mentioning the standard of review (heightened abuse of discretion) and citing only cases involving the *denial* of a motion for new trial due to newly discovered evidence, rather than cases *granting* such a motion, Midwest argues the trial court's discretionary finding that Mr. Akin's article satisfied the *Young* factors was error (Substitute Appellant's Brief ("Aplt. Br.") 30-36). It insists this is because: (1) the "object of the evidence [was] to impeach Mr. Akin's character or credit;" (2) the "evidence did not come to light after the trial and could have been discovered through due diligence;" and (3) the new "evidence was not so material that it would probably present a different result at a new trial" (Aplt. Br. 32-33, 35).

Midwest's argument is without merit. First, as the trial court found (largely based on trial intangibles), the new evidence went much further than regarding merely character or credit: it affected the jury's knowledge of Mr. Akin's true qualifications and, thus, the

weight to be given to his testimony (L.F. 264-65, 270, 273; Aplt. Appx. A3-4, A9, A11). Second, while Mr. March's expert witness, Iris Dalley, saw the article in the brief period in 2010 when it was posted on Mr. Akin's website, its subject matter was not part of the scope of her testimony, and she did not inform Mr. March's counsel of the article until after trial, when he inquired about Mr. Akin and Fort Hood due to Mr. Akin's testimony (L.F. 265-66, 272-73; Aplt. Appx. A4-5, A10-11). Finally, the trial court's determination that the new evidence would produce a different result at a new trial was entirely within its discretion, based largely on trial intangibles, as explained above in the Response to Appellant's Point I, *supra* at 36-47.

A. Whether a new trial should be granted due to "newly discovered evidence" is an entirely different and separate ground than whether a new trial is warranted due to false testimony that likely resulted in an improper verdict.

Midwest seeks to conflate into one the two separate grounds the trial court found for granting a new trial: (1) false testimony likely resulting in an improper verdict and (2) newly discovered evidence. Citing *Atlas Corp. v. Mardi Gras Corp.*, 962 S.W.2d 927 (Mo. App. 1998), *Butts v. Express Personnel Servs.*, 73 S.W.3d 825 (Mo. App. 2002), and *M.E.S. v. Daughters of Charity Servs. of St. Louis*, 975 S.W.2d 477 (Mo. App. 1998), it argues "Mr. March was required to show that each [of the six *Young* factors] for a new trial based on newly discovered evidence was satisfied in order to be entitled to a new trial based on the discovery of … perjury" (Aplt. Br. 31-32).

This is untrue. First, in all three of these cases, the appellate court was analyzing a trial court's *denial* of a new trial, not a *grant* of a new trial. Given the abuse of discretion

standard of review, cases reviewing the denial of a new trial are entirely inapposite to those reviewing the grant of a new trial. As *Atlas*, itself, points out, "In view of the wide discretion allowed the trial judge, [such inapposite cases are] of little value to [a party appealing the contrary decision] as precedent." 962 S.W.2d at 930.

This is unsurprising. Appellate courts "are more liberal in upholding the grant of a new trial than the denial of a new trial." *Lowdermilk v. Vescovo Bldg. & Realty Co.*, 91 S.W.3d 617, 625 (Mo. App. 2002). In reviewing an order granting a new trial, the Court "must allow every reasonable inference that favors the trial court's ruling, and we may not reverse unless there has been a clear abuse of discretion." *Id.*

Moreover, the cases Midwest cites for the proposition that the standards for a new trial due to false testimony and for a new trial due to newly discovered evidence are actually one standard hold the opposite. In all three cases, the court analyzed the two arguments *separately*. *Atlas*, 962 S.W.2d at 930-31 (setting out the two arguments under different headings and discussing their separate standards); *Butts*, 73 S.W.3d at 841 (holding the two arguments are two separate grounds, that the "perjury" argument was not preserved for appellate review, and reviewing only the "newly discovered evidence" argument); *M.E.S.*, 975 S.W.2d at 482-83 (acknowledging the two separate grounds are separate arguments with separate standards and granting relief based on both).

Plainly, no authority supports Midwest's attempt to conflate the two standards into one. The trial court correctly observed that "the requirements for 'newly discovered evidence' do not apply to evidence adduced to show perjury at a hearing on a motion for a new trial" (L.F. 272; Aplt. Appx. A10).

B. The newly discovered evidence went to the admissibility of Mr. Akin's testimony, not merely to impeaching Mr. Akin's character or credit.

Midwest argues the object of the newly discovered evidence regarding Mr. Akin's actual role in the Fort Hood investigation "would serve only to impeach Mr. Akin's character or credit," negating the sixth *Young* factor (Aplt. Br. 32). But the trial court did not abuse its discretion in holding this was not so.

The trial court disagreed with this argument, holding, "The posting [on the website] was evidence about Akin's background and experience, which was a necessary part of establishing the proper foundation for him to be qualified to testify as an expert witness in the case and for the jury to evaluate whether his opinion that the assault on [Mr. March] took place off [Midwest]'s premises was reliable or not" (L.F. 273; Aplt. Appx. A11).

This was not an abuse of discretion. Essentially, the removal of Mr. Akin's article (attached to this brief's appendix at A3) from his website conspicuously shortly before his deposition below, compounded by the questions Midwest's counsel posed to Mr. Akin (attached to this brief's appendix at A1), make it clear that Mr. Akin was attempting to show deceptively that he had been "retained" by the "U.S. Government" in the *prosecution* of Major Hasan in the fort Hood case (L.F. 269; Aplt. Appx. A8). Based largely on trial intangibles, the trial court saw the object of his false testimony that he had been "retained" by the "U.S. Government" to perform blood spatter analysis in the Fort Hood Case was to mislead the jury into thinking he was working to "put away" the suspect in the most heinous acts of terrorism perpetrated on American soil since

September 11, 2001, and thus was more "trustworthy" to give a definitive answer in this case – the only definitive answer given by any expert and anyone except for Mr. March.

This deception went far beyond merely "character or credit." While "an expert's qualifications are relevant in the process of weighing [his] credibility," they also are equally relevant in the process of weighing "the admissibility of expert evidence." *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 872 (Mo. App. 2004). This is exactly what the trial court found vis-à-vis Mr. Akin's testimony: it was "a necessary part of establishing the proper foundation for him to be qualified to testify as an expert witness in the case and for the jury to evaluation whether his opinion that the assault on [Mr. March] took place off [Midwest]'s premises was reliable or not" (L.F. 273; Aplt. Appx. A11). This was not an abuse of discretion. The sixth *Young* factor is not negated.

C. The newly discovered evidence came to Mr. March's light only after the trial and could not have been discovered through due diligence.

Citing no authority, Midwest argues that, because Mr. Akin's article removed from his website shortly before his deposition in this case "was in the possession of [Mr. March's] retained expert witness," Iris Dalley, it "was available to Mr. March before the trial," negating the first and second *Young* factors (Aplt. Br. 33).

Again, the trial court did not abuse its discretion in holding this was not so. It held this "argument is without merit. The fact that Ms. Dalley was aware of the posting, and that she was retained as an expert by [Mr. March], does not add up to impute to [Mr. March]'s counsel knowledge of everything Ms. Dalley knew (L.F. 273; Aplt. Appx. A11). Rather, "Ms. Dalley acknowledge[d] she copied the posting in January 2010, but

that she did not mention it to [Mr. March]'s counsel until a conversation after the trial" (L.F. 272; Aplt. Appx. A10). Instead, "Because there was nothing in Akin's C.V. about the Fort Hood case or Maj. Hasan, [Mr. March]'s counsel had absolutely no reason to ask Ms. Dalley any question about whether or not she ahd seen a posting on Akin's website about that case" (L.F. 273; Aplt. Appx. A11).

This was not an abuse of discretion. Mr. March's counsel explained that he scoured Mr. Akin's website shortly after he was disclosed as an expert witness on December 30, 2009, and then again shortly before taking Mr. Akin's deposition on February 16, 2010 (Supplemental Transcript 4). At none of those times was the article on Mr. Akin's website (Supp. Tr. 4). Ms. Dalley attested she saw the article on January 18, 2009, which was conspicuously removed a few days later (L.F. 181-82; Appx. A9-10). It is a logical conclusion that Mr. Akin posted the article on his website no earlier than January 15, 2009, as that was the date of its byline (L.F. 97; Appx. A3).

Mr. March's counsel further testified he studied Mr. Akin's C.V. repeatedly, which made no mention of any Fort Hood investigation (Supp. Tr. 15-16, 18-19). When counsel was given a full copy of Mr. Akin's file on this case at his deposition, there also was no mention of any Fort Hood investigation (Supp. Tr. 32-33).

The trial court fully and carefully examined Midwest's contention that there had not been due diligence on Mr. March's counsel's part. It did not abuse its discretion in rejecting Midwest's argument, believing Mr. March's counsel and Ms. Dalley, and holding instead that Mr. March had met the first and second *Young* factors.

D. The trial court was entitled to its determination, based largely on trial intangibles, that the newly discovered evidence probably would present a different result at a new trial.

Midwest argues Mr. Akin's article discovered only after trial "does not concern a material issue" at trial because it "does not affect [his] qualifications," and thus the new evidence "is not so material that a different result would be likely" (Aplt. Br. 35). Midwest points the Court back to its argument over the second prong of its Point I, "whether an improper verdict likely resulted" from Mr. Akin's false testimony (Aplt. Br. 35). As a result, it argues Mr. March failed to meet the third *Young* factor.

While Midwest is wholly incorrect that the respective standards for a new trial due to false testimony and a new trial due to newly discovered evidence are anything but separate standards grounded in different law, *supra* at 51-52, as to this sub-issue it is correct to liken this sub-issue to the similar one in its first Point Relied On. Mr. March addressed the propriety of the trial court's finding that the false testimony (shown equally by the newly discovered evidence) likely resulted in an improper verdict in detail above, in his Response to Midwest's Point I. *Supra* at 36-47. There was no abuse of discretion.

In short, as the trial court found, Mr. Akin's answer, which the new evidence showed was false, "likely resulted in an improper verdict" because it "formed a major part of what the jury knew about Akin's qualifications, which the jury had to evaluate in order to determine how much weight and value they should give to Akin's proffered opinion" (L.F. 270; Aplt. Appx. A9).

As Mr. Akin's testimony was the *only* expert testimony directly contradicting Mr. March's testimony as to where he was stabbed, the primacy of the question the new evidence shows Mr. Akin answered falsely, and the false answer had a favorable impression on the jury and the trial court, it cannot be said that the trial court abused its discretion in finding that a different result would be likely if this evidence showing Mr. Akin's testimony was false were brought to the jury's attention. The trial court's finding is not clearly against the logic of the circumstances and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful consideration.

The trial court did not abuse its discretion in granting Mr. March a new trial due to the newly discovered evidence of the article Mr. Akin posted on his website but removed shortly before his deposition in this case, showing he was hired by the defense, not the Government, in the Fort Hood case. This Court should affirm the trial court's judgment granting Mr. March a new trial.

Conclusion

The Court should affirm the trial court's judgment granting Respondent Phillip March a new trial.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 17,283 words.

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Certificate of Service

I hereby certify that, on March 18, 2013, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Respondents and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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