IN THE SUPREME COURT OF MISSOURI

PHILLIP H. MARCH, Plaintiff/Respondent, v. MIDWEST ST. LOUIS, L.L.C., Defendant/Appellant.	))))))))))	Appeal No.: SC92984

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI
THE HONORABLE EDWARD WILLIAM SWEENEY, JR.

SUBSTITUTE APPELLANT'S BRIEF OF MIDWEST ST. LOUIS, L.L.C.

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JURISDICTIONAL STATEMENT

This appeal stems from an action filed by Phillip A. March in St. Louis City, alleging negligence and negligence per se against Defendant Midwest St. Louis, LLC. After a jury returned a verdict for Defendant Midwest St. Louis, LLC, the trial court sustained Phillip A. March's Motion for New Trial. Midwest St. Louis, LLC filed a motion to designate the court's order granting a new trial as a judgment, which the court granted. Midwest St. Louis, LLC appeals from this judgment.

After a decision of the Missouri Court of Appeals, Eastern District, reversing the grant of a new trial, Mr. March filed an Application for Transfer in this Court under Rule 83.04, which this Court granted. This Court, therefore, has jurisdiction under Article V, Section 10 of the Missouri Constitution.

INTRODUCTION

A. Preliminary Statement

This is an appeal of a grant of a new trial after a jury verdict in favor of Defendant/Appellant Midwest St. Louis, LLC ("Midwest"). Plaintiff/Respondent Phillip March filed a motion for new trial, claiming that there was a newly discovered Internet article that contradicted the trial testimony of an expert witness for Midwest, Louis Akin, regarding Mr. Akin's work as a blood spatter analyst and crime scene reconstructionist in the much-publicized Fort Hood shooting case. Specifically, the motion challenged Mr. Akin's response after he was asked if he had been retained by the U.S. government in a major investigation. He was not asked whether he was retained by the U.S. government to perform this work on behalf of the prosecution or the defense. Nonetheless, Mr. March argued that Mr. Akin committed perjury because he did not volunteer for which party he was retained in his testimony about the Fort Hood shooting case, even though he was never asked. The trial court agreed and granted a new trial.

It was reversible error for the trial court to throw out the jury's verdict in this case because the undisputed evidence before the court was that Mr. Akin testified truthfully about his work on the Fort Hood shooting case. He was simply never asked on whose behalf he was retained. To the extent this Court wishes to examine whether the question asked of Mr. Akin at trial required him to disclose that the U.S. Government retained him on behalf of the defense, this

Court's review is *de novo*. Nonetheless, even if this Court agrees that Mr. Akin was required to disclose this information in response to the question he was asked, Mr. March was not prejudiced by the alleged perjury because it had nothing to do with any of the issues at trial—rather, it only had to do with Mr. Akin's qualifications, of which there was ample other evidence. Finally, Mr. March was not entitled to a new trial because his motion was filed based upon a claim of newly discovered evidence, and he did not meet the standard for granting a new trial on that basis because (1) the Internet article discussing Mr. Akin's work history was in the possession of his retained expert prior to trial and (2) the evidence could have only been used to impeach a witness.

B. Summary of the Case

The suit giving rise to this appeal arose from an incident that occurred after Mr. March had spent an evening drinking with his brother. He asked his brother to leave him at a gas station in St. Louis City at approximately two o'clock in the morning and was thereafter stabbed by an unknown assailant. He sued Midwest, the owner of the gas station.

Mr. Akin, expert crime scene reconstructionist, testified at trial on behalf of Midwest. In response to counsel's question as to whether he had ever been retained by the U.S. Government to work on a major investigation, Mr. Akin responded that he had been involved in the investigation of the Fort Hood shooting. This was the only mention of his involvement in the Fort Hood shooting case throughout the entire course of the trial.

Mr. Akin's testimony was undisputedly true. He was retained by the U.S. Government to investigate the Fort Hood shooting on behalf of the defense. The only evidence presented at trial and in the post-trial proceedings was that he was retained and paid by the U.S. Government. Yet, the trial court granted a new trial based upon Mr. March's argument that Mr. Akin committed perjury simply because he did not clarify that he was retained for the defense, rather than the prosecution. Mr. Akin did not make any false statement. Rather, he answered each question asked of him honestly and truthfully. As such, he simply did not commit perjury.

Moreover, the allegedly perjurious testimony was relevant only to Mr. Akin's past experience as a crime scene reconstructionist, not to a material issue at trial. In addition to this experience, Mr. Akin testified concerning his years of education, training and involvement in the professional community. This one statement concerning his involvement with the Fort Hood investigation was insufficient to prejudice Mr. March and warrant a new trial. To hold otherwise would be to find that an expert retained by the U.S. government on behalf of the defense is somehow less prestigious or reputable than a witness retained by the government on behalf of the prosecution.

Further, counsel for Mr. March claims to have learned that Mr. Akin was retained on behalf of the defense in the Fort Hood investigation through an article posted on Mr. Akin's website that he claims to have first seen after the jury returned its verdict for Midwest. This article does not satisfy the standards for a

new trial based on newly discovered evidence because it simply was not "newly discovered." The article was in the possession of Mr. March's expert crime scene reconstructionist before Mr. Akin was deposed in this matter, nearly a year before trial. Mr. March's expert did not provide his counsel with a copy of this article because she did not think it was relevant to the issues at trial or to Mr. Akin's credentials. Simply put, the article was not newly discovered and was not relevant to any material issues so as to affect the outcome of the trial.

Because the undisputed evidence presented to the trial court shows that Mr. Akin testified truthfully, that the allegedly false testimony was not relevant to any issue before the jury, and that Mr. March did not satisfy the burden for granting a new trial based upon newly discovered evidence, it was error for the trial court to grant a new trial. As such, the judgment of the trial court should be reversed with instructions to enter judgment on the jury's verdict.

STATEMENT OF FACTS

A. Summary of the Facts

On April 24, 2007, at approximately two o'clock in the morning, Respondent Phillip A. March was stabbed by an unknown assailant in the City of St. Louis, Missouri. (L.F. 30). Mr. March had spent his evening drinking at a bar. (T.T. 754). After the bar closed, Mr. March and his brother were driving home together, missed their exit, and stopped at a gas station for chips and cigarettes. (T.T. 757). Mr. March told his brother to leave him alone at the gas station in the early hours of the morning. (T.T. 754-756). Shortly thereafter, Mr. March was stabbed. (T.T. 833).

Appellant Midwest-St. Louis, LLC ("Midwest") owned the gas station and convenience store where Mr. March stopped prior to his stabbing. (L.F. 30). Mr. March brought claims of negligence and negligence per se against Midwest following this incident. (L.F. 33-50). Mr. March claimed that Midwest was negligent in failing to keep its premises safe, which he claims caused the stabbing. (L.F. 42-44). Following a trial, the jury returned a verdict for Midwest on January 26, 2011. (L.F.78). The trial court entered final judgment in Midwest's favor, consistent with the jury's verdict. (L.F. 79).

After the trial court entered final judgment in Midwest's favor, Mr. March filed a Motion for a New Trial, alleging that expert witness Louis Akin committed perjury in his testimony at trial. (L.F. 82-87). This allegation was based on evidence that Mr. March claims to have discovered after the conclusion of the

trial. (L.F. 83-85). Following a hearing, the trial court granted Mr. March's new trial motion. (L.F. 247-258). Appellant Midwest appeals the trial court's Judgment and Order granting Mr. March's Motion for New Trial. (L.F. 274-289).

B. The Incident

At approximately two o'clock in the morning on April 24, 2007, Mr. March and his brother were headed home from a bar. (T.T. 756). After they missed their exit, they stopped by Midwest's gas station and convenience mart to purchase chips and cigarettes. (T.T. 757). They went into the convenience mart, made their purchases, and returned to the parking lot. (T.T. 758). At this time, Mr. March told his brother that he would find a different ride because he was not ready to go home. (T.T. 759). Mr. March called his friends in an attempt to find a ride. (T.T. 759). The last call Mr. March made lasted from 2:09 a.m. to 2:13 a.m. (T.T. 767). The first 911 call in response to the stabbing occurred at 2:16 a.m. (T.T. 833).

Mr. March was stabbed by the unknown assailant between 2:13 a.m. and 2:16 a.m. (T.T. 767, 833). It is unclear exactly what transpired in this span of time, as Mr. March was intoxicated and no one witnessed the incident. (T.T. 756, 330). The dispositive issue at trial was the location of the stabbing, which Mr. March contended occurred in the parking lot and Midwest contended occurred in the alley behind the gas station. (L.F. 262).

Mr. March testified that he had to use the restroom after making the last of his phone calls that night. (T.T. 772). Instead of using the restroom inside the

convenience mart, he opted to urinate on the dumpster located on the parking lot of the convenience mart. (T.T. 772). He claimed that the assailant approached him at this time on the parking lot near the dumpster. (T.T. 776). Prior to and at the time of trial, Mr. March did not remember anything that happened from the time that he was stabbed until he awoke briefly in the ambulance and then later in the hospital. (T.T. 776).

Shortly after the 911 call, Detective Tonya Tanksley, known as Officer Tonya Porter at the time, arrived at the crime scene. (T.T. 327). Upon her arrival, she found Phillip March lying near the front of the convenience mart. (T.T. 327, 332). She and the other responding officers searched the scene for physical evidence. (T.T. 334). Detective Tanksley's investigation revealed a single trail of blood. (T.T. 335, 338-339).

She followed the blood trail from the spot where she found Mr. March around the building and into the alley behind the gas station. (T.T. 335). At no point did the blood trail lead her to the dumpster on the side of the building. (T.T. 335). In the alley, Detective Tanksley discovered a large pool of blood. (T.T. 341). Based on the blood trail and pool of blood in the alley, Detective Tanksley indicated in her report that a struggle occurred in the alley. (T.T. 346-348).

Neither Detective Tanksley nor the other responding officers discovered blood on the dumpster or in the area surrounding the dumpster. (T.T. 338, 342-343). Though Officer Thomas Majda testified at his deposition, which was read into the record at trial, that he believed an "officer found maybe some blood on a

fence or something near the dumpster," he further stated that the lack of photographs of the dumpster told him that no blood was found in that area. (T.T. 540-541). Officer Majda also stated that there was evidence of a struggle in the alley behind the gas station. (T.T. 539-540).

Officer Weindel, the responding officer from the evidence technician unit, photographed the blood trail and all of the physical evidence he found as part of his normal course of business. (T.T. 255, 265, 272). Officer Weindel did not take any photographs of the dumpster. (T.T. 258). He testified at trial that he would have photographed the dumpster if he had seen blood in that area. (T.T. 272, 276).

C. Louis Akin's Testimony

Louis Akin, a crime scene reconstructionist, testified as an expert witness and gave his opinion on the location of the stabbing based on his analysis of the blood spatter at the crime scene. (T.T. 865-902). Based on his review of Mr. March's injury, the results of the police investigation, and the photographs, Mr. Akin formed his opinion as to what happened. (T.T. 878). Mr. Akin testified that, in his opinion, the evidence indicated that the stabbing had occurred in the alley behind the gas station. (L.F. 288).

Before Mr. Akin gave his opinion on the location of the stabbing, he testified about his education, training, and relevant experience in this capacity. (T.T. 859-862). In this regard, Mr. Akin stated he had attended training courses in crime scene reconstruction for the past ten years at the time of the trial, which

included courses in blood spatter analysis. (T.T. 859). He had received approximately 3,000 hours of training in that subject. (T.T. 859).

Mr. Akin stated that he is a certified medical legal death investigator and has taken the requisite courses and tests to become certified in that regard. (T.T. 859). He has worked as a pathologist, which involved going to crime scenes involving deaths and collecting evidence in an effort to determine the cause and manner of death. (T.T. 860). He has additionally trained as a forensic assistant, which involved performing autopsies. (T.T. 860). Mr. Akin further testified that he has worked with the Texas Attorney General's Office as an investigator for the Consumer Protection Division. (T.T. 860). Additionally, he is involved in several professional business associations and has presented numerous times on varying levels of blood spatter analysis, crime scene reconstruction, death investigation, and medical-legal death investigation. (T.T. 861).

In addition to this training and experience, Mr. Akin testified concerning his prior work, including his involvement in the investigation of the Fort Hood, Texas shooting case without objection by counsel for Mr. March. (T.T. 861-862). The relevant testimony is as follows:

> 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 recently just 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.

(T.T. 861-862). This testimony is the subject of Mr. March's new trial motion and this appeal. (T.T. 82-87, 274-275).

D. Jury Verdict and Post-Trial Motions

Following the trial, the jury returned a verdict for Midwest. (L.F. 78). The jurors found that Midwest was zero percent (0%) at fault for the stabbing of Mr. March. (L.F. 78). Accordingly, the trial court entered judgment for Midwest on January 26, 2011. (L.F. 79).

On February 14, 2011, Mr. March filed a Motion for New Trial, alleging that Mr. Akin committed perjury by stating that he was retained by the U.S. Government to investigate the Fort Hood shooting. (L.F. 82-87). In support of his motion, Mr. March referenced an article that Mr. Akin authored discussing his involvement in the investigation on behalf of the defense. (L.F. 85). In his article, titled "Trying a Fellow American: Major Nidal Malik Hasan," Mr. Akin discussed his role in the investigation on behalf of the defense and his

determination to dedicate his "experience and expertise to see that the facts presented by the prosecution at the trial of Major Hasan are true and accurate." (LF. 97). Counsel contended that the article was published on Mr. Akin's website on approximately January 15, 2010, after he was retained as an expert for Midwest in December, 2009. (S.T. 15-16). Counsel for Mr. March deposed Mr. Akin on February 16, 2010, allegedly without knowledge that this article existed. (L.F. 84-85, 172-173, 176; S.T. 5). Counsel stated that if he had this article at trial, he would have "crucified" Mr. Akin during his testimony. (L.F. 197).

Iris Dalley, Mr. March's expert blood spatter analyst, downloaded this article from Mr. Akin's website on January 18, 2010. (S.T. 18). Ms. Dalley had the article in her possession at the time of Mr. Akin's deposition. (L.F. 181). She informed Mr. March's counsel that the article was removed from the website a few days after she downloaded it. (L.F. 181). She stated that she did not provide it to counsel because it was not relevant to Mr. Akin's qualifications as a bloodstain pattern analyst. (L.F. 181).

Lieutenant Colonel Kris R. Poppe, defense counsel for Major Hasan, stated in an affidavit that Mr. Akin was appointed as a crime scene analyst for Major Hasan's defense team on January 15, 2010. (L.F. 108). Lieutenant Colonel Poppe stated:

> Pursuant to his appointment, Mr. Akin has been retained by the United States Government, specifically III Corps and Fort Hood for

> the United States Army Trial Defense Service, under contract to provide crime scene analyst services for the defense.

(L.F. 109). Attached to Lieutenant Colonel Poppe's affidavit was the memorandum appointing Mr. Akin as a crime scene analyst for Major Hasan's defense. (L.F. 110). Mr. Akin also provided a voucher from the U.S. Government, specifically the Defense Finance Accounting Service, evidencing payment for his services in this regard. (L.F. 111, 113). This evidence was uncontested, as Mr. March presented no affidavit, no testimony, nor any other evidence to refute Lieutenant Colonel Poppe's sworn statement. (L.F. 172-186).

On April 25, 2011, the trial court issued an order granting Mr. March's new trial motion. (L.F. 247-258). The Honorable Edward Sweeney, the judge presiding at trial, concluded that Mr. Akin had committed perjury, which improperly bolstered his credibility in the eyes of the jurors. (L.F. 247-255). Additionally, though Judge Sweeney decided the issue on Mr. Akin's alleged perjury, he further considered the parties' arguments as to whether the article satisfied the requirements for granting a new trial based on newly discovered evidence. (L.F. 257). Judge Sweeney noted that, in his opinion, the standards for newly discovered evidence did not apply where the evidence is relevant to showing perjury at trial. (L.F. 257). Nonetheless, he stated that he believed the standards for granting a new trial on this basis had been satisfied. (L.F. 257-258). Midwest filed a motion to designate this order as a final, appealable judgment. (L.F. 259-260). The motion was granted, and this appeal followed.

(L.F. 261-277). After a decision of the Missouri Court of Appeals, Eastern District, reversing the judgment of the trial court (App. A15), this Court granted transfer.

POINTS RELIED ON

I. The trial court erred in granting Respondent's Motion for New Trial, because Appellant's expert Louis Akin did not commit perjury, in that he did not willfully or deliberately testify falsely regarding his involvement in the Fort Hood shooting and, even if such testimony created a false impression concerning his role, it was not material to the issues at trial.

Section 575.040, RSMo 2000

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

Keltner v. K-Mart Corp., 42 S.W.3d 716 (Mo. App. E.D. 2001)

Loveless v. Locke Distributing Co., 313 S.W.2d 24 (Mo. 1958)

M.E.S. v. Daughters of Charity Servs. of St. Louis, 975 S.W.2d 477 (Mo. App. E.D. 1998)

II. The trial court erred in granting Mr. March's Motion for New Trial, because the article that Mr. March claims to have discovered after trial does not constitute newly discovered evidence, in that it does not satisfy the requisite elements set forth by this Court, namely: (1) that the evidence came to light since the trial; (2) that it was not due to a lack of due diligence that it was not revealed 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 only cumulative evidence; (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.

Atlas Corp. v. Mardi Gras Corp., 962 S.W.2d 927 (Mo. App. W.D. 1998)

Butts v. Express Personnel Services, 73 S.W.3d. 825 (Mo. App. S.D. 2002)

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

ARGUMENT

I. The trial court erred in granting Respondent's Motion for New Trial, because Appellant's expert Louis Akin did not commit perjury, in that he did not willfully or deliberately testify falsely regarding his involvement in the Fort Hood shooting and, even if such testimony created a false impression concerning his role, it was not material to the issues at trial.

A. Standard of Review

Typically, a trial court's grant of a new trial under Rule 78.01 is reviewed for an abuse of discretion. *Bean v. Superior Bowen Asphalt Co., LLC,* 340 S.W.3d 275, 278 (Mo. App. W.D. 2011) (citing *Damon Pursell Constr. Co. v. Mo. Hwy. & Trans. Comm'n,* 192 S.W.3d 461, 469 (Mo. App. W.D. 2006)). Further, Missouri courts have stated that the trial court has discretion in determining "whether perjury occurred and whether an improper verdict resulted therefrom." *Bailey v. Cameron Mut. Ins. Co.,* 122 S.W.3d 599, 605 (Mo. App. E.D. 2003). However, "[s]uccessful motions for a new trial on the ground of perjury require a showing that the witness willfully and deliberately testified falsely." *State v. Terry*, 304 S.W.3d 105, 111 (Mo. banc 2010). Where the evidence discloses that the trial court abused its discretion in finding that perjury occurred, the appellate court must interfere with the judgment on this ground. *Hancock v. Shook,* 100 S.W.3d 786, 801 (Mo. banc 2003) (citing *Hoodco of Poplar Bluff v. Bosoluke,* 9 S.W.3d 701, 704 (Mo. App. S.D. 1999)).

Further, in this case, the record makes clear that there is no dispute as to the relevant facts, and a *de novo* standard of review should be employed on the narrow issue involved in this appeal. The trial court had before it the specific question asked, the answer given, and the full state of the facts at the time it ruled on the Motion for New Trial.

The testimony at issue involved the qualifications of an expert witness, Louis Akin, who was asked whether he had been retained by the U.S. government for a major investigation. He responded "I recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan." (T.T. 861-862). The undisputed facts before the trial court were that Mr. Akin was, in fact, retained by and paid by the U.S. Government to reconstruct the Fort Hood shooting, but that he was retained on behalf of the defense. (L.F. 85). Neither party's counsel asked on whose behalf he was retained in the Fort Hood case.

Thus, the threshold issue in this appeal is whether the question asked by Appellant's counsel—i.e., if Mr. Akin was involved in any major investigation in which he had been retained by the U.S. Government—required Mr. Akin to volunteer that he was retained by the U.S. Government to reconstruct the case on behalf of the ***defense***, rather than the prosecution. This inquiry is similar to the inquiry of whether a clear question has been asked by counsel in *voir dire* sufficient to support reversal on the grounds of juror nondisclosure, which is reviewed *de novo*. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 723-24 (Mo. App. E.D. 2001); *see also McHaffie by and through McHaffie v. Bunch,* 891 S.W.2d

822, 829 (Mo. banc 1995) (deciding, apparently as a matter of law, whether a *voir dire* question required a juror to disclose a claim and settlement resulting from her daughter's automobile accident).

Indeed, the standard of review used to examine *voir dire* questions in juror non-disclosure cases was adopted by the Missouri Court of Appeals, Eastern District, from the standard employed in federal perjury cases. In adopting a *de novo* standard of review in such cases, the Court of Appeals stated:

> While there are no criminal penalties assessed, juror non-disclosure is in other respects similar to perjury. Precise questioning is imperative as a predicate for the offense of perjury. The United States Supreme Court has identified three essential goals for this requirement in perjury cases: (1) to preclude convictions grounded on surmise or conjecture; (2) to prevent witnesses from unfairly bearing the risks of inadequate examination; and (3) to encourage witnesses to testify (or at least not discourage them from ding so).
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> ***
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> In reviewing a determination that intentional or unintentional non-disclosure has occurred we apply an abuse of discretion standard. But here we are addressing the threshold determination: Was the question clear? When appellate courts are called upon to determine the clarity of language, their review is generally *de novo*. **Missouri courts have never been called on to decide the type of**

> **review employed in deciding whether a question is sufficiently clear to support a finding of perjury, a determination similar to the one we make here, the federal courts have. They review the question of fundamental ambiguity in perjury cases *de novo*.** For these reasons we hold that our review of the clarity of questions on *voir dire* is *de novo*.

Id. at 723-24 (citing *United States v. Serafini*, 167 F.3d 812, 819–20 (3rd Cir. 1999); *United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991); *United States v. Lighte*, 782 F.2d 367, 375 (2nd Cir. 1986); emphasis added).

Based on the above, a *de novo* standard is appropriate. In deciding whether Mr. Akin committed perjury, the Court must first determine whether the question presented—have you been retained by the U.S. Government for a major investigation—required him 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. This is a question of law that this Court should review *de novo*. *Id*.; *Smith v. Shaw*, 159 S.W.3d 830, 832 (Mo. banc 2005) ("this Court gives de novo review to questions of law"); *see also Am. Family Mut. Ins. Co. v. Coke*, 358 S.W.3d 576, 579 (Mo. App. E.D. 2012) ("[q]uestions of law are reviewed *de novo*."); *McCrainey v. Kansas City Mo. School Dist.*, 337 S.W.3d 746, 751 (Mo. App. W.D. 2011) (noting that although a grant of a new trial is reviewed for abuse of discretion, "as to questions of law our review is *de novo*.").

Finally, even if Mr. Akin had committed perjury, "in order for the trial court to grant a motion for new trial, the error complained of as a basis for the motion must be prejudicial to the party seeking the new trial." *State v. Jackson*, 969 S.W.2d 773, 775 (Mo. App. W.D. 1998) (quoting *Wright v. Over-the-Road and City Transfer Drivers, Helpers, Dockmen, and Warehousemen*, 945 S.W.2d 481, 489-90 (Mo. App. W.D. 1997)). This issue should be reviewed *de novo* as well. "Where there is no dispute as to what the testimony of the party charged with perjury was upon a certain issue presented to a court of competent jurisdiction, then it is purely a question of law for the trial court to determine whether such testimony as given was material to the issue thus presented." *State v. Roberson*, 543 S.W.2d 817, 820 (Mo. App. 1976).

B. Mr. Akin did not commit perjury because he testified truthfully and certainly did not willfully or deliberately testify falsely at trial, which is the standard for perjury.

Granting a new trial on the basis of perjury requires a showing the witness willfully, intentionally, and deliberately testified falsely. *Hancock,* 100 S.W.3d at 801 (citing *Hoodco,* 9 S.W.3d at 704); *see also M.E.S. v. Daughters of Charity Servs. of St. Louis*, 975 S.W.2d 477, 482 (Mo. App. E.D. 1998). Moreover, courts should be reluctant to order a new trial on the ground of perjury in the absence of post-trial evidence that is so decisive and conclusive as to render a different result reasonably certain. *Hancock*, 100 S.W.3d at 801. To grant a new trial for perjury, the perjury must be prejudicial. *M.E.S.*, 975 S.W.2d at 482-83.

Further, *a jury verdict should not be overturned unless there is a* ***conviction*** *of perjury*, or unless the prosecution of perjury has been thwarted by the death of the declarant. *Atlas Corp. v. Mardi Gras Corp.*, 962 S.W.2d 927, 930 (Mo. App. W.D. 1998); *Butts v. Express Personnel Services*, 73 S.W.3d. 825, 842 (Mo. App. S.D. 2002). Here, Mr. Akin was not prosecuted for perjury, nor should he have been, because his testimony was truthful.

As the trial court stated in its order, Missouri statutes provide that a witness "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 before any court, public body, notary public or other officer authorized to administer oaths." Section 575.040.1, RSMo 2000 (emphasis added). Simply stated, to commit perjury, the witness must intentionally testify *falsely* to a material fact.

Guided by this standard, the trial court erred in granting Mr. March's new trial motion. Midwest presented the expert testimony of Mr. Akin concerning the location of the stabbing based on his analysis of the blood spatter at the scene. (T.T. 865-866, 871, 878-902). As is typical with an expert witness, counsel for Midwest inquired as to Mr. Akin's training and experience as a blood spatter analyst to establish his qualifications for the jury. (T.T. 859-862).

As part of this questioning about Mr. Akin's qualifications, counsel inquired, **"... are you currently involved in any major investigation where you've been retained by the U.S. Government?"** (T.T. 861). Mr.

Akin responded, **"I recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan."** (T.T. 862). It is this exchange that Mr. March claims constitutes perjury.

Mr. Akin's testimony that he was retained by the U.S. Government was true and, consequently, cannot be deemed perjury. Indeed, as he testified at trial, Mr. Akin was retained by the U.S. Government as a crime scene analyst in the case of *United States v. MAJ Nidal M. Hasan*. Mr. Akin 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. (L.F. 108-110). Mr. Akin was compensated by the U.S. Government. (L.F. 111). Mr. Akin's statement that he was retained by the U.S. Government was clearly and unequivocally a true statement; indeed, Mr. March did not and could not dispute that he was retained and paid by the U.S. Government. Nothing that Mr. Akin said at trial was false, as required for perjury.

While Mr. Akin did not specifically state that he was retained on behalf of the defense, he simply was not asked for which party he was retained. (T.T. 861-862). This testimony alone does not amount to a falsehood or even a deviation from the truth. Nothing that Mr. Akin stated at trial was false. Mr. Akin was retained by the U.S. Government to assist in the investigation of the Fort Hood shooting. The fact that he did not elaborate on the specific nature of his role in the investigation is simply because neither party's counsel inquired further as to

his involvement. Nothing in the question asked triggered a duty for Mr. March to state on whose behalf he was retained. "Precise questioning is imperative as a predicate for the offense of perjury." *Butts,* 73 S.W.3d at 842 (internal citations omitted). As Mr. Akin was not specifically asked the nature of his involvement in the Fort Hood investigation beyond his role as a crime scene analyst, his failure to elaborate on his own initiative does not amount to perjury.

Moreover, Mr. March has failed to demonstrate that this alleged perjury was committed willfully, intentionally, or deliberately, as required for a new trial on this ground. The only supposed evidence of this intent is the article that Mr. Akin published and the unsubstantiated claim that it was subsequently removed from his website after he was retained by counsel for Midwest. (L.F. 83, 85, 97). This "evidence" is insufficient to establish that Mr. Akin willfully, intentionally or deliberately testified falsely or that he had an intent to deceive. Mr. March has presented no evidence that the purported publication and retraction of this article was in any way related to his involvement in the present case. He has adduced no evidence to suggest that this was anything more than mere coincidence – assuming Mr. Akin did, in fact, publish and remove this article at the times claimed by Mr. March.

Mr. March's unsubstantiated claim that Mr. Akin perjured himself on the stand amounts to nothing more than speculation. The evidence regarding the article presented at the post-trial hearing on Mr. March's motion for new trial simply is not so decisive and conclusive as to render a different result reasonably

certain. *See Loveless v. Locke Distributing Co.,* 313 S.W.2d 24, 31 (Mo. 1958). Mr. Akin's alleged publication and removal of the article does not evidence an intent to testify falsely. Thus, this alleged testimony does not justify the grant of a new trial.

Under these circumstances, the trial court abused its discretion in granting Mr. March's new trial motion based on perjury. Mr. Akin's testimony was ***true,*** and, therefore, he could not have committed perjury. Moreover, there is simply no evidence to support a finding that Mr. Akin's allegedly false testimony was given willfully and deliberately with the intent to deceive. Accordingly, the trial court's order granting Mr. March's new trial motion should be reversed.

C. Mr. Akin's testimony did not concern a material fact resulting in an improper verdict and, therefore, did not justify the trial court's grant of a new trial.

In addition to showing that the alleged perjury was willfully and deliberately committed, the party alleging perjury must show that the false testimony concerns a material fact resulting in an improper verdict. *Hancock,* 100 S.W.3d at 801. Because Mr. Akin's involvement in the Fort Hood investigation was not material to the issues at trial, his allegedly false testimony did not affect the outcome of the case warranting a new trial.

A material fact is defined as a fact that "could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding." Section 575.040, RSMo 2000. Contrary to the trial court's determination, Mr.

Akin's testimony concerning his involvement with the Fort Hood investigation was not material to the issues at trial. This 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. A new trial is rarely granted based on the impeachment of a witness's credit or character. *Loveless,* 313 S.W.2d at 32. In this case, such a result is particularly unwarranted as this one sentence of testimony was the only reference to Mr. Akin's involvement in the investigation of the Fort Hood shooting throughout the course of the entire week-long trial. Standing alone, the testimony simply was not so decisive or conclusive as to influence the outcome of the trial.

Further, it is frankly an ***insult*** to the military justice system to suggest that jurors would necessarily find that an expert witness hired by the government on behalf of the prosecution would be more prestigious and qualified than one retained by the government on behalf of the defense. Mr. March's contention that at least one juror would have been swayed had this article been presented at trial is pure speculation. Arguments and conclusions grounded in speculation, conjecture, or suspicion do not establish prejudice. *Goltz v. Masten,* 333 S.W.3d 522, 525 (Mo. App. W.D. 2011) (citing *Winfield v. State,* 93 S.W.3d 732, 737 (Mo. banc 2002)).

Moreover, this testimony constituted only a portion of Mr. Akin's relevant credentials and experience. He testified that he was a Certified Medicolegal Death Investigator. (T.T. 859). He also testified about his extensive training in

crime scene reconstruction over a period of ten years, amounting to approximately 3,000 hours of training, and his experience in a medical examiner's office and working with a pathologist. (T.T. 859-60). In addition to his experience on the Fort Hood investigation, he testified about his work as an investigator for the Texas Attorney General's Office, about presentations he gave primarily for the armed forces on blood spatter analysis and crime scene reconstruction, and his membership in several professional societies relating to his field. (T.T. 860-861). Significantly, Mr. March's own expert blood spatter analyst stated she did not inform counsel for Mr. March that Mr. Akin was retained on behalf of the defense because it was not relevant to his qualifications. (L.F. 181).

Additionally, an improper verdict did not result from this testimony as the evidence presented at trial supported the jury's findings of fact. The testimony of the responding officers supported the jury's determination that Mr. March failed to prove that he was stabbed on the parking lot near the dumpster. Detective Tanksley and Officer Majda testified that the evidence indicated a struggle had taken place in the alley. (T.T. 346-348, 539-540). Detective Tanksley also testified that neither she nor the other responding officers found blood near the dumpster. (T.T. 338, 342-343). Officer Weindel testified that he would have taken photographs of the dumpster if he had seen blood in that area, but he did not. (T.T. 258, 272-276). Though Mr. March testified that he remembered being stabbed near the dumpster, he repeatedly told his medical providers and his

brother that he did not remember what happened for a period of months after this incident.

Though illustrative of Mr. Akin's work experience, his testimony concerning his involvement with the Fort Hood shooting was merely a portion of his testimony regarding his qualifications. Even if his testimony "deviated from the truth," as the trial court incorrectly stated it did in its Order granting a new trial, testimony concerning Mr. Akin's credentials did not involve a material fact. Therefore, Mr. Akin's alleged perjury did not result in an improper verdict and a new trial is not warranted. Accordingly, this Court should reverse the trial court's grant of a new trial.

II. The trial court erred in granting Mr. March's Motion for New Trial, because the article that Mr. March claims to have discovered after trial does not constitute newly discovered evidence, in that it does not satisfy the requisite elements set forth by this Court, namely: (1) that the evidence came to light since the trial; (2) that it was not due to a lack of due diligence that it was not revealed 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 only cumulative evidence; (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.

A. Standard of Review

A trial court's grant of a new trial under Rule 78.01 is generally reviewed for an abuse of discretion. *Bean v. Superior Bowen Asphalt Co., LLC,* 340 S.W.3d 275, 278 (Mo. App. W.D. 2011) (citing *Damon Pursell Constr. Co. v. Mo. Hwy. & Trans. Comm'n,* 192 S.W.3d 461, 469 (Mo. App. W.D. 2006)). However, as discussed more fully in Point I, above, any questions of law are reviewed *de novo*. *Smith v. Shaw*, 159 S.W.3d at 832.

New trial motions based on newly discovered evidence are "entertained reluctantly, examined cautiously and construed strictly." *Atlas Corp. v. Mardi Gras Corp.,* 962 S.W.2d 927, 931 (Mo. App. W.D. 1998) (citing *Exec. Jet*

Management & Pilot Serv., Inc. v. Scott, 629 S.W.2d 598, 610 (Mo. App. W.D. 1981)). New trials based on newly discovered evidence are disfavored by Missouri courts. *State v. Smith,* 181 S.W.3d 634, 638 (Mo. App. E.D. 2006). While the granting of such motions is within the trial court's discretion, new trial motions based on newly discovered evidence should be granted only in exceptional circumstances. *M.E.S.,* 975 S.W.2d at 482.

B. The standards governing newly discovered evidence apply when a party seeking a new trial attempts to use such evidence to show perjury.

For a moving party to be entitled to a new trial based on newly discovered evidence, the following six requirements must be satisfied: (1) that the evidence came to light since the trial; (2) that it was not due to a lack of due diligence that it was not revealed 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 only cumulative evidence; (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. *Young v. St. Louis Public Service Co.,* 326 S.W.2d 107, 111 (Mo. 1959). Mr. March has failed to satisfy these requirements based on his "discovery" of the article discussing Mr. Akin's investigation of the Fort Hood shooting on behalf of the defense. Thus, Mr. March is not entitled to a new trial based on this evidence.

Though the trial court stated the standards governing the grant of a new trial based on newly discovered evidence do not apply to evidence of perjury at trial, Missouri courts have routinely applied these standards in similar circumstances. *See, e.g., Atlas,* 962 S.W.2d at 930-31; *Butts,* 73 S.W.3d at 842-43; *M.E.S.,* 975 S.W.2d at 482-83. For instance, in *Atlas,* the plaintiff discovered evidence after trial that a witness for the defendant committed perjury at the trial. *Atlas,* 962 S.W.2d at 928. This evidence came to light through discovery in an unrelated lawsuit. *Id.* at 929. Plaintiff moved for a new trial based on the alleged perjury and the newly discovered evidence, but the trial court denied its motion. *Id.*

The Court of Appeals affirmed the denial of a new trial, finding that plaintiff was not entitled to a new trial on the grounds of perjury *or on the grounds of newly discovered evidence*. *Id.* at 930-31. In determining that the plaintiff was not entitled to a new trial based on newly discovered evidence, the Court examined the six requirements set forth above and concluded that plaintiff failed to demonstrate that the evidence could not have been discovered before trial through due diligence. *Id.* at 931.

Similarly, in *Butts,* the Missouri Court of Appeals for the Southern District applied the standards for newly discovered evidence in concluding that the alleged perjury at trial did not entitle defendants to a new trial. 73 S.W.3d at 842-43. Defendants discovered affidavits after trial suggesting plaintiff committed perjury at trial. *Id.* at 841. Applying the standards for newly

discovered evidence to the affidavits, the Court of Appeals concluded that defendants were not entitled to a new trial based on the alleged perjury at trial because not all of the requirements were satisfied by the affidavits being used to show perjury at trial. *Id.* at 842.

As in *Atlas* and *Butts,* Mr. March was required to show that each requirement 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 Mr. Akin's alleged perjury. However, he has failed to do so. Accordingly, Mr. March has failed to establish the "discovery" of the article tying Mr. Akin to the defense in the investigation of Major Hasan entitles him to a new trial.

C. The object of the evidence is to impeach Mr. Akin's character or credit.

The evidence that Mr. Akin was involved with the defense side of Major Hasan's investigation would serve only to impeach Mr. Akin's character or credibility. The sole purpose of this evidence would be to discredit him in the eyes of the jury. Therefore, this standard for a new trial based on newly discovered evidence – that the object of the evidence is not merely to impeach the character or credit of a witness – has not been satisfied.

Evidence revealed after trial that is relevant only in that it discredits a witness does not entitle a party to a new trial. *Butts,* 73 S.W.3d at 843. As in *Butts,* where evidence discovered after trial served only to discredit the plaintiff's trial testimony, Mr. March is not entitled to a new trial based solely on the

revelation that Mr. Akin was retained on behalf of the defense in the Fort Hood shooting. *Id.* This testimony would only serve to impeach Mr. Akin, discrediting his testimony to the jury. Indeed, counsel for Mr. March stated that this evidence would be used solely to "crucify" Mr. Akin at trial. (L.F. 197).

Mr. Akin's involvement in the Fort Hood investigation has no bearing on his opinions or qualifications as an expert witness. Indeed, Mr. March's own expert, Ms. Dalley, stated in her affidavit that the article did not impact Mr. Akin's qualifications as an expert. (L.F. 181). She also stated that she did not see the relevance between the article and the issues at trial. (L.F. 229). Because this evidence solely concerns Mr. Akin's character and credibility, this requirement for a new trial based on newly discovered evidence has not been satisfied.

D. The evidence did not come to light after the trial and could have been discovered through due diligence.

The evidence concerning the nature of Mr. Akin's involvement was available to Mr. March before the trial. In fact, ***this evidence was in the possession of his retained expert witness and available to Mr. March before Mr. Akin's deposition nearly a year before trial***. As such, this evidence is not "newly discovered" at all. Rather, Mr. March's counsel could have discovered this evidence through due diligence with his own trial team before deposing Mr. Akin and certainly before trial.

As counsel for Mr. March admitted in his supplement to his new trial motion and at the hearing on the new trial motion, Mr. March's own expert, Ms.

Dalley, downloaded a copy of the article from Mr. Akin's website on January 18, 2010. Indeed, she had the article in her possession approximately one month before Mr. Akin's deposition and approximately one year before trial. (L.F. 173; S.T. 18). Yet, Mr. March's counsel apparently did not get it from her until after trial. (L.F. 181). Nonetheless, the article was readily available to counsel long before trial. Counsel cannot now contend that the article first came to light only after trial.

Counsel received various documents from Ms. Dalley in preparation for the deposition and cross-examination of Mr. Akin. (L.F. 181, 205). Counsel exchanged emails with Ms. Dalley regarding publications on Mr. Akin's website. (L.F. 114-117). Counsel's own failure to inquire as to the nature of these publications or request copies of these publications does not mean that the article could not have been discovered before trial through due diligence. To hold otherwise would set a dangerous precedent that trial counsel could simply turn a blind eye to evidence in the possession of his or her client or a retained expert and then claim that it was newly discovered evidence after an adverse judgment.

Counsel's failure to exercise due diligence in preparing for Mr. Akin's deposition and cross-examining him at trial does not entitle Mr. March to a new trial. The article in question was in the possession of his own retained blood spatter expert long before trial. Thus, the requirements that the evidence come to light after trial and that the delayed discovery not be the result of a lack of due diligence have not been satisfied.

E. The evidence was not so material that it would probably present a different result at a new trial.

As discussed further in Point I, Mr. Akin's work on behalf of the defense in the Fort Hood case is not so material that a different outcome would be likely to result from a new trial. The evidence does not concern a material issue at trial. The evidence does not affect Mr. Akin's qualifications as an expert blood pattern analyst. The evidence simply is not so material that a different result would be likely. Therefore, this element for a new trial based on newly discovered evidence has also not been satisfied.

The nature of Mr. Akin's investigation in the Fort Hood shooting was not at issue at trial. Mr. Akin's work in this case was simply used to illustrate the nature of Mr. Akin's experience in his capacity as a blood pattern analyst. That he was retained on behalf of the defense does nothing to discredit his qualifications as an expert witness. Indeed, Mr. March's blood pattern expert, Ms. Dalley, stated that the reason she did not provide Mr. March's counsel with a copy of the article is the article did not concern his qualifications as an expert. (L.F. 181).

The purported "newly discovered" evidence did not concern a material issue likely to affect the outcome of the trial. Rather, as set forth above, the sole relevance of this evidence was to impeach Mr. Akin's character at trial. As such, the requirement that the evidence be so material so as to likely produce a different result at the new trial has not been satisfied.

Under the elements set forth above, Mr. March has failed to establish that he was entitled to a new trial based on newly discovered evidence. Because Mr. March was not entitled to a new trial based on the purported discovery of the article discussing Mr. Akin's work on the Fort Hood shooting case, the trial court's grant of a new trial should be reversed.

CONCLUSION

Missouri courts disfavor new trials. Where the grave accusation of perjury is alleged, the party seeking a new trial must show that the witness willfully, intentionally and deliberately testified falsely. Moreover, the evidence of perjury must be so decisive and so conclusive to render a different result at the new trial reasonably certain.

Guided by this high standard, Mr. March has failed to establish that Mr. Akin committed perjury at trial. Indeed, the uncontroverted evidence before the trial court at trial and in the post-trial proceedings makes clear that Mr. Akin responded truthfully when asked whether he was involved in any major investigations in which he had been retained by the U.S. Government. Mr. Akin ***was*** retained by the U.S. Government to investigate the Fort Hood shooting. He was asked nothing that would require him to disclose whether he was retained on behalf of the prosecution or the defense. Furthermore, even if this testimony created a false impression, no evidence suggests that it resulted in an improper verdict because it did not concern a material issue at trial. The testimony was relevant only to Mr. Akin's background and did not relate to his expert opinions or any issue in the case.

Additionally, Mr. March was not entitled to a new trial based on the allegedly newly discovered evidence of the Internet article stating that Mr. Akin was retained on behalf of the defense to investigate the Fort Hood shooting. This evidence was simply not newly discovered or material and did not satisfy the six

requirements for a new trial on this basis. Thus, Mr. March was not entitled to a new trial and the trial court committed reversible error in granting him one.

The trial court's order granting a new trial for Mr. March should be reversed, and judgment for Midwest should be reinstated in accordance with the jury's verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on the 25th day of February, 2013, the foregoing, as well as the Appendix hereto, was filed via the Court's electronic filing system upon, which served a true and correct copy upon the following: William Edward Taylor, Joseph M. Taylor, TAYLOR & TAYLOR, P.C., 1115 Locust Street, 4th Floor, St. Louis, Missouri 63101, and Jonathan Sternberg, 2345 Grand Boulevard, Suite 675, Kansas City, Missouri 64108, *Attorneys for Phillip H. March*.

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Patrick A. Bousquet, # 57729

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Substitute Appellant's Brief includes the information required by Rule 55.03.

2. The Substitute Appellant's Brief complies with the limitations contained in Rule 84.06;

3. The Substitute Appellant's Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service contains 8,662 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Respondent's Brief was prepared.

/s/ Patrick A. Bousquet
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