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 REPLY BRIEF OF APPELLANT MIDWEST ST. LOUIS, L.L.C.

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ABBREVIATIONS

"A.B." – Appellant's Brief

"R.B." – Respondent's Brief

"L.F." – Legal File

"T.T." – Trial Transcript

"S.T." – Supplemental Transcript

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.

To his credit, Mr. March acknowledges in his brief that "[t]he granting of a new trial on the ground of perjury requires a showing that the witness willfully and deliberately testified ***falsely***." (R.B. 29, citing *Hoodco of Poplar Bluff v. Bosoluke,* 9 S.W.3d 701, 704 (Mo. App. S.D. 1999) (emphasis added). His argument misses the mark, however, in confusing whose burden it was to show that Midwest's expert, Louis Aikin, committed perjury. (R.B. 28). As the movant, it was Mr. March's burden to make the requisite "showing" that Mr. Akin testified falsely—it was not Midwest's burden to prove that he was telling the truth.

This was not a credibility determination to be left to the discretion of the trial court. There was simply ***no competent evidence***—no affidavit, no witness testimony, no document, not anything—showing that Mr. Akin testified falsely. All Mr. March presented to the court as alleged "evidence" of Mr. Akin's perjury was a copy of an article his expert stated she obtained from Mr. Akin's website over a year before trial, which was silent as to who retained Mr. Akin in

the Fort Hood shooting case, and a wholly unsubstantiated affidavit from a California lawyer that claims he had a conversation with Mr. Akin about the case—an affidavit so devoid of any semblance of evidence that Mr. March scarcely mentions it in his brief and his counsel admitted at the hearing on the motion for new trial that it "[d]oesn't help much at all." (S.T. 41; L.F. 96-97). Surely this is insufficient to make the requisite showing that Mr. Akin committed perjury.

On the other hand, Midwest produced affidavits of Mr. Aiken and Col. Kris R. Poppe (one of the detailed defense attorneys for Major Hasan in the Fort Hood shooting case) corroborating Mr. Akin's testimony that he was, in fact, retained by the United States Government to provide crime scene analysis services on behalf of the defense in the Fort Hood shooting case. Although Midwest maintains that the proper standard of review for the threshold question of whether the question asked of Mr. Akin at trial in this matter required him to disclose on whose behalf he was retained is *de novo*, under ***any*** standard of review, there was no evidence to support a claim that Mr. Akin "willfully and deliberately testified falsely."

Given that he had no evidence to support his claim, Mr. March's arguments to the trial court and to this Court that Mr. Akin testified falsely about who retained him and for what purpose he was retained center on the unsupported hearsay statements of Mr. March's counsel. (S.T. 8, 16-17, 34, 36). Mr. March's counsel, however, was not a witness, was not sworn to tell the truth, and he was not basing his "testimony" on any personal knowledge. As this Court has stated,

"unsworn remarks of counsel in opening statements, during the course of trials or in arguments are not evidence of the facts asserted." *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. 2006). More was required, and the trial court clearly erred—under any standard of review—in finding that Mr. Akin committed perjury and granting a new trial on that basis.

A. A *de novo* standard of review is proper as to the threshold issue of whether Mr. Akin was required to disclose that his retention by the government was on behalf of the defense.

As set forth in detail in Midwest's opening brief, the question of whether Mr. Akin committed perjury at trial boils down to a very narrow issue: did Midwest's counsel's inquiry at trial as to whether Mr. Akin had been retained by the United States government in a major investigation require him to volunteer that he had been retained by the government *on behalf of the defense*? There is no dispute as to the question asked or the response given, nor is there a genuine dispute as to the nature of Mr. Akin's involvement in the Fort Hood investigation. The only dispute is whether Mr. Akin was required to volunteer that he was retained by the government on behalf of the defense in response to counsel's question. This narrow issue should be reviewed *de novo*.

Although Respondent accuses Midwest of being "bold" and "novel" (R.B. 23, 28) in seeking a *de novo* standard of review, Midwest suggests that perhaps it is Respondent that is being bold in asking for a "heightened abuse of discretion" standard of review—a standard of review never before recognized by Missouri

courts in any type of case. (R.B. 20-22). Midwest stands by the authority cited in its opening brief. The threshold issue of whether the question asked of Mr. Akin required him to volunteer that his retention by the U.S. government was on behalf of the defense is quite similar to the inquiry discussed by the Missouri Court of Appeals in *Keltner v. K-Mart Corp*, 42 S.W.3d 716, 723-24 (Mo. App. E.D. 2001). In that case, the Court held, as a matter of first impression, that the issue of whether a question asked in voir dire required a juror to disclose information he or she is later accused of intentionally withholding should be reviewed *de novo*. *Id.* The Court based its decision in large part on the fact that the federal courts determine "whether a question is sufficiently clear to support a finding of perjury," a "similar" inquiry, *de novo*. *Id.*

Mr. March contends this analysis is inapplicable because juror nondisclosure cases are prospective in nature, whereas issues of perjury or retrospective. (R.B. 26). Midwest fails to see the distinction. After all, how is it any less retrospective when a trial court decides to grant a new trial because a juror intentionally withheld information than it is when a trial court grants the same relief because a witness committed perjury?

Mr. March also claims that juror nondisclosure cases are distinguishable because they relate to a constitutional right to a fair and impartial jury. However, contrary to his contention, the constitutional right to a fair and impartial jury does not drive the *de novo* standard for reviewing claims of juror non-disclosure. Rather, *de novo* review is appropriate because the issue concerns the

interpretation of the language of the question posed, rather than a factual dispute as to the response given. As the *Keltner* Court noted, "[w]hen appellate courts are called upon to determine the clarity of language, their review is generally *de novo*." *Id.* Thus, Mr. March's contention that the right to a fair and impartial jury is the driving force behind *de novo* review is mistaken. A *de novo* standard of review is proper where the court is called upon to review the language of the question posed to determine whether it invoked a duty to disclose particular information. As the primary issue on appeal is whether it was perjury for Mr. Akin to fail to disclose he was retained on behalf of the defense in the Fort Hood investigation in response to counsel's question, a *de novo* standard of review is proper.

B. Mr. March's accusation that Midwest's counsel was complicit in deceiving the court and the jury is offensive and baseless.

Quite incredibly, Mr. March claims in his brief in this Court that Midwest's counsel and Mr. Akin conspired to deceive the court and the jury. This, like his allegation that Mr. Akin committed perjury, has no support in the record. Mr. March boldly claims:

> 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.

(R.B. 27). This outrageous allegation that Midwest's counsel "coached" Mr. Akin to give a response with the intent of being "false and deceptive" is wholly contrary to the record.

Midwest's trial counsel unequivocally stated at the hearing on the motion for new trial that he "didn't even know the answer to that question when I asked it. Because that's all he told me: I've been retained by the U.S. government to do the investigations. So that's what I did, that's what I asked him." (S.T. 32). The trial court did not question the veracity of this statement and even Mr. March's trial counsel did not question this. (S.T. 32-36). There is no evidence that Midwest's counsel knew on whose behalf Mr. Akin was retained, much less that counsel and Mr. Akin "rehearsed" an answer that would be "false and deceptive." Rather, the record is clear that counsel asked Mr. Akin a legitimate question, and Mr. Akin answered that question truthfully.[1]

[1] Indeed, it has at all times been Midwest's position that it is irrelevant on whose behalf Mr. Akin was retained as the very fact that he was approved and retained by the government to work on the case in any capacity speaks very highly of his qualifications.

C. Mr. March has presented no evidence establishing that Mr. Akin testified falsely, as required for perjury.

Mr. March claims that Mr. Akin could have committed perjury warranting a new trial even though his testimony was absolutely true. (R.B. 31-32). As set forth above, it is undisputed that a new trial based on perjury requires a showing that the witness willfully, intentionally, and deliberately testified ***falsely***. *See Hancock v. Shook,* 100 S.W.3d 786, 801 (Mo. banc 2003) (citing *Hoodco,* 9 S.W.3d at 704, which was cited by Mr. March at R.B. 29 for the same principle). This Court's statement of this well-settled principle in *Hancock* is dispositive of the issue.

Further, other courts have addressed the issue more directly. The Washington Supreme Court has summed up the law on the long-standing law on this issue quite aptly:

> It is the general rule that a perjury charge cannot be maintained where the testimony of the accused was literally, technically, or legally true. The cases are collected in 69 A.L.R.3d 993 (1976). This has long been the rule, where the answer given by the accused is responsive to the question asked him. United States v. Wall, 371 F.2d 398 (6th Cir. 1967); Galanos v. United States, 49 F.2d 898 (6th Cir. 1931); Smith v. State, 66 Ga.App. 669, 19 S.E.2d 168 (1942); People v. Criscuoli, 164 App.Div. 119, 32 N.Y.Crim.Rep. 172, 149 N.Y.S. 819 (1914); People v. Pearson, 98 Ill.App.2d 203, 240 N.E.2d 337

> (1968); In re Rosoto, 10 Cal.3d 939, 112 Cal.Rptr. 641, 519 P.2d 1065, 69 A.L.R.3d 980 (1974).
>
> The United States Supreme Court has held that under the federal perjury statute, even an evasive answer, if literally true, even though intended to be misleading, cannot constitute perjury. Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). We note that the federal statute is more severe than our present Washington statute, since it punishes one who willfully makes false statements which he does not believe to be true (18 U.S.C. s 1621), whereas RCW 9A.72.020 requires proof that the speaker knew his statement to be false.

State v. Olson, 594 P.2d 1337, 1339 (Wash. 1979).

Mr. March has implied that cases such as *Olson*, which discuss criminal perjury, are inapposite to the case at bar. (R.B. 26-27). Yet, Missouri's criminal perjury law, set forth in section 575.040, RSMo 2000, states that one is guilty of perjury if he "knowingly testifies falsely to any material fact" with the purpose to deceive. This is nearly indistinguishable from the test this Court has cited in determining whether a new trial is warranted on perjury grounds. *See Hancock*, 100 S.W.3d at 802 (requiring "a showing that the witness willfully and deliberately testified falsely" and that the alleged false testimony be "material").

Mr. Akin testified he was retained by the United States government to investigate the Fort Hood shooting. The only evidence presented by either party

concerning Mr. Akin's retention was the affidavit of Lieutenant Colonel Poppe – evidence that unequivocally showed that Mr. Akin testified truthfully. (L.F. 108-110). As such, he did not commit perjury and the trial court erred ***and*** abused its discretion in granting a new trial based on perjury.

In an attempt to create a credibility dispute to support the trial court's grant of a new trial, Mr. March relies solely on his counsel's unsworn contentions at the hearing on the motion for new trial that Mr. Akin was not retained by the United States government. (R.B. 22-23; S.T. 8, 16-17, 34). As set forth above, counsel's bare assertions do not constitute evidence. *Forrest*, 183 S.W.3d at 226; *see also Anderson v. Osmon,* 217 S.W.3d 375, 377 (Mo. App. W.D. 2007) (reversing trial court's grant of a new trial based on unsupported statements of counsel); *CACV of Colorado, LLC v. Muhlhausen,* 345 S.W.3d 258, 260 (Mo. App. S.D. 2011); *Mack v. Mack,* 349 S.W.3d 475, 477-78 (Mo. App. S.D. 2011); *State v. Dowell,* 25 S.W.3d 594, 609 (Mo. App. W.D. 2000)). Counsel's mere contention that Mr. Akin was not hired by the government simply is not evidence.

In *Anderson,* for instance, the Court of Appeals held counsel's unsubstantiated claims of juror bias at a hearing on a motion for new trial were not evidence and did not support the court's grant of a new trial. 217 S.W.3d at 381. Counsel offered his personal observations from the trial in support of his contention that two of the jurors were biased in favor of the opposing party. *Id.* Finding these observations insufficient on appeal, the Court stated, "[b]are assertions by counsel do not prove themselves and are not evidence of the facts

presented." *Id.* (citing *State v. Smith,* 996 S.W.2d 518, 523 (Mo. App. W.D. 1999)). Because counsel's statements did not constitute evidence of juror bias justifying a new trial, the Court reversed the grant of a new trial. *Id.*

Similarly, Mr. March has presented no evidence to support his contention that Mr. Akin testified falsely at trial when he responded that he had recently been retained by the U.S. government to investigate the Fort Hood shooting. Again, Mr. March relies solely on counsel's arguments at the post-trial hearing in his attempt to show Mr. Akin's statements were false. At the hearing on the motion for new trial, counsel for Mr. March stated he spoke with retired Colonel John Galligan, who he claims hired Mr. Akin as a consultant in the Fort Hood investigation. (S.T. 8, 16-17, 34). He offered no affidavit or testimony of Colonel Galligan as evidence to support these contentions. Counsel merely stated that Colonel Galligan claimed to have retained Mr. Akin. Yet, as the Court stated in *Anderson,* such bare assertions do not constitute evidence and do not prove themselves.

As a secondary argument, Mr. March contends that Mr. Akin committed perjury at trial by stating he performed blood spatter and crime scene reconstruction for the Fort Hood investigation. Yet, once again, Mr. March relies upon nothing more than his counsel's statements that this is not true. (R.B. 30; S.T. 8, 16-17, 34). Furthermore, the trial court was not persuaded by this argument and did not even address this contention in its Order granting the motion for new trial.

Again, the only evidence concerning Mr. Akin's role in the Fort Hood investigation before the trial court was the affidavit of Col. Poppe. In his affidavit, Col. Poppe states that Mr. Akin was retained by the U.S. Government "to provide crime scene analyst services for the defense." (L.F. 109). As blood spatter analysis is merely a specific type of general crime scene analysis, there is no evidence that Mr. Akin testified falsely in this regard.[2] There was certainly no evidence presented that Mr. Akin did ***not*** conduct a blood spatter analysis as he stated.

Counsel's assertions to the contrary were based solely upon an alleged off-the-record conversation with Colonel Galligan. Even if Colonel Galligan's statements were inconsistent with Mr. Akin's testimony, which it does not appear they were, counsel's representations as to the conversation were simply not evidence. Mr. March offered no evidence to support these assertions and, therefore, no evidence to support his contention that Mr. Akin testified falsely

[2] Mr. Akin testified at trial that blood spatter analysis concerned "looking at blood patterns at crime scenes in order to determine what happened and how it happened." (T.T. 862). This Court has previously approved the qualifications of a blood spatter expert witness who "received training in crime scene processing and reconstruction, which included training in bloodstain recognition . . . ." *State v. Barton*, 240 S.W.3d 693, 704 (Mo. 2007).

Remarkably, Mr. March claims that Midwest did not object to counsel's "testimony" at the hearing on the motion for new trial and has "waived the right to challenge its truth on appeal." (R.B. 30, 33). In support of this argument, Mr. March cites cases that have nothing to do with this one but, rather, involve the failure to object to statements made in closing argument ***in front of the jury*** at trial. *See, e.g., Blevins v. Cushman Motors*, 551 S.W.2d 602, 615-16 (Mo. 1977) (holding that a party waived an objection to an inflammatory statement in closing argument by not objecting). As this Court has stated, the reason why objections to statements of counsel during closing argument must be made at trial or be waived is because "if the objection is not timely, the trial court has no opportunity to take corrective action at the time the remarks were made." *Howard v. City of Kansas City*, 332 S.W.3d 772, 791 (Mo. 2011).

There was no such concern here, where counsel's statements to which Mr. March wishes to bind Midwest were made in the course of his argument for his motion for new trial. (S.T. 8, 16-17, 34). Further, counsel for Midwest made clear that Midwest was not conceding this was "evidence." Counsel stated unequivocally that there was no perjury because "Mr. Akin was hired by the U.S. government. The lawyer that hired him testified to as much in [an] affidavit. There are no other affidavits in front of the Court now to indicate otherwise." (S.T. 37; *see also* S.T. 30-32). Midwest did not waive its argument that Mr. March's counsel's statements at the hearing on the motion for new trial were not evidence of Mr. Akin's alleged perjury.

D. Even if counsel's assertions at the hearing on the motion for new trial could be considered evidence, they do not satisfy the requisite showing for perjury.

The significance of Mr. March's counsel's statements that Colonel Galligan retained Mr. Akin in the Fort Hood matter—even if they could constitute evidence—is, at best, questionable. The self-serving statements have no clear impact on the truth of Mr. Akin's testimony. Indeed, the very same U.S. statute provides for appointment of counsel for both the prosecution and the defense for every court-martial. *See* 10 U.S.C.§ 832 (2000) (stating that both "[t]rial counsel *and defense counsel* shall be detailed for each general and special court-martial."). (Emphasis added).

Further, Counsel acknowledged at the hearing that while Colonel Galligan was lead defense counsel for Major Hasan in the Fort Hood matter, he was one of three attorneys comprising Major Hasan's defense team. (S.T. 34-35). Another member of this defense team was Lieutenant Colonel Poppe. (S.T. 34-35). Again, it was Col. Poppe that submitted an uncontroverted affidavit stating unequivocally that Mr. Akin was retained by the United States government. (L.F. 108-109).

Even if Colonel Galligan was the one to seek out Mr. Akin to retain him to investigate the shooting, Mr. March has still failed to produce evidence that Mr. Akin was not actually "retained by the U.S. government." That Mr. Akin was retained on behalf of the defense in the Fort Hood shooting does not negate the

fact that he was retained by the U.S. government. The two are not mutually exclusive. As counsel for Mr. March conceded at the hearing, Mr. Akin was retained by the defense team to investigate the shooting and was compensated by the government. (S.T. 8). Even taking as true that Colonel Galligan was the person to find Mr. Akin and retain him as a consultant, there was still no counterevidence calling into question that Mr. Akin was, in fact, "retained" by the government, albeit on behalf of the defense.

E. This Court's decision in *Donati v. Gualdoni* does not render the trial court's determination that Mr. Akin committed perjury unassailable.

Mr. March notes that in a 1949 decision, a division of this Court affirmed the grant of a new trial based on perjury even though the party seeking a new trial did not present evidence to support its contention that the witness had committed perjury. *See Donati v. Gualdoni,* 216 S.W.2d 519 (Mo. 1949). Yet, *Donati* differs substantially from the present matter because, in that case, the parties did not include the memorandum of the trial judge setting forth his views regarding the reliability of the expert testimony at issue, and discussing the conflicting testimony in the case. *Id.* at 520. Thus, there was no evidence to either support ***or*** contradict the truth of the testimony at issue. *Id.* Without any evidence to support or contradict the trial court's ruling, the Court of Appeals deferred to the trial court's judgment, as the trial judge had witnessed the testimony first-hand. *Id.* at 522.

In this case, however, Midwest presented uncontroverted evidence to show that Mr. Akin's testimony was absolutely true. Unlike *Donati,* and even though it was not its burden to do so, Midwest adduced evidence concerning the truth of Mr. Akin's testimony. To prove Mr. Akin committed perjury, Mr. March needed to present evidence to refute the affidavit of Lieutenant Colonel Poppe, which unequivocally established that Mr. Akin's testimony was true. (L.F. 108-10). As the party seeking a new trial based on perjury, Mr. March was obligated to prove perjury occurred. *Hancock*, 100 S.W.3d at 801. He failed to do so. Thus, he was not entitled to a new trial.

F. The alleged perjury did not concern a material fact at trial.

Even if Mr. Akin had willfully testified falsely at trial—which Appellant strongly disputes—his involvement in the Fort Hood shooting was not a material fact at issue in the trial between Mr. March and Midwest. His role in the unrelated investigation was not relevant to any issue at trial, much less a material issue. Therefore, Mr. March was not entitled to a new trial on this basis, and the trial court's judgment should be reversed.

Contrary to Mr. March's assertions to the contrary, this Court has clearly held that whether allegedly false testimony was material "is a question of law for the determination of the court." *Hancock*, 100 S.W.3d at 801 (citing *Loveless*, 313 S.W.2d at 31). A material fact is one that "could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding." Section 575.040, RSMo 2000. Mr. Akin's involvement in the Fort Hood incident

was not a material fact at issue in this case. It was merely one component of his experience and qualifications as a crime scene reconstructionist. In addition to this testimony, Mr. Akin testified as to his education, training, community involvement, and other experience as a crime scene analyst. (Tr. 858-64). This one facet of his experience as a crime scene analyst was not so important as to affect the outcome at trial.

While Mr. Akin testified regarding a material issue at trial—the location of the stabbing—his involvement in the Fort Hood shooting was merely incidental to his testimony as an expert witness. At best, the nature of his involvement in the investigation could have been used to impeach his credibility and such evidence is almost never sufficient to warrant a new trial. *See Loveless v. Locke Distributing Co.*, 313 S.W.2d 24, 32 (Mo.1958) (noting that a charge of perjury as to evidence that may be used solely to impeach a witness is rarely ever sufficient to warrant a new trial).

Mr. March seems to suggest that the very fact that Mr. Akin was retained on behalf of the defense renders him somehow less credible. (R.B. 44-45). Yet, it is an affront on the fundamental fairness of the military justice system to suggest that an expert retained by the government on behalf of the prosecution is ***necessarily*** more prestigious or more qualified than an expert retained by the government on behalf of the defense. Mr. March offered no evidence to support such a claim. Indeed, the very premise flies in the face of the Sixth Amendment and should be flatly rejected by this Court. *See U.S. v. Wiechmann*, 67 M.J. 456,

458 (U.S. Armed Forces 2009) (noting that the accused before a general or special court-martial is entitled to detailed counsel under the Sixth Amendment and 10 U.S.C.§ 832 (2000).

Because there was no willful, intentional perjury as to a material fact at trial, the trial court erred in granting a new trial based on Mr. Akin's alleged perjury and its judgment should be reversed.

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 for granting a new trial on the basis of newly discovered evidence.

As set forth in Midwest's opening brief, Mr. March did not satisfy the elements for granting a new trial based on newly discovered evidence. Although the cases relied on by Midwest happen to arise from the denial of a new trial motion, the standards nevertheless must be satisfied in order for a new trial to be granted based on newly discovered evidence of perjury. *See Atlas Corp. v. Mardi Gras Corp.,* 962 S.W.2d 927, 930-31 (Mo. App. W.D. 1998); *Butts v. Express Personnel Services,* 73 S.W.3d 825, 842-43; *M.E.S. v. Daughters of Charity Servs. Of St. Louis,* 975 S.W.2d 477, 482-83 (Mo. App. E.D. 1998). To hold otherwise would open every case up to attack based upon groundless claims of perjury at trial when a party obtained an adverse result. The high threshold for a new trial based upon newly discovered evidence is meant to prevent interference with a jury's verdict after a full trial on the merits without compelling evidence that would clearly and substantially affect the outcome of the case.

A. The article Mr. March claims to be newly discovered evidence does not impact the merits of Mr. Akin's opinion testimony, but only addresses, at best, collateral matters that Mr. March would purportedly have used for impeachment purposes only.

The standards set forth by this Court for a new trial based on newly discovered evidence have not been satisfied by the article Mr. March claims to have discovered after trial. *See Young v. St. Louis Public Service Co.,* 326 S.W.2d 107, 111 (Mo. 1959); A.B. 30 (setting forth the six requirements). Most significantly, Mr. March's contention that the nature of Mr. Akin's role in the Fort Hood investigation serves any purpose other than to impeach Mr. Akin's credit or character is not credible. The sole purpose of Midwest's counsel's inquiry into Mr. Akin's experience on the Fort Hood shooting was clearly to illustrate Mr. Akin's experience in crime scene reconstruction to further strengthen his credentials for the jury.

Mr. March claimed he would have "crucified" Mr. Akin with this knowledge had he been aware that Mr. Akin was retained on behalf of the defense (L.F. 197), further illustrating that he would have used this article solely to impeach Mr. Akin at trial. Regardless of the effect Mr. March claims this testimony would have had at trial, the article would have been used solely to impeach Mr. Akin's credit or character. Mr. March does not dispute this. Rather, he again relies on the trial court's determination that the newly discovered evidence standard has

been satisfied as support for his position on appeal. However, the trial court's determination in this regard is being challenged in this appeal and Mr. March fails to state any reason why the article he claims is "newly discovered evidence" is relevant to any issue in this case other than to impeach Mr. Akin's credibility. *See Young v. St. Louis Public Service Co.,* 326 S.W.2d 107, 111 (Mo. 1959) (noting that a new trial may not be granted based on newly discovered evidence, where the evidence is "merely to impeach the character or credit of a witness"). Therefore, this standard for newly discovered evidence has not been satisfied.

For essentially this same reason, the requirement that the evidence be so material as to result in a different outcome at trial has also not been satisfied. The article describing Mr. Akin's role in the Fort Hood investigation is relevant only to Mr. Akin's qualifications as an expert witness. It bears no relevance to the issues at trial. Indeed, even Mr. March's expert, Iris Dalley, did not deem the article to be relevant to Mr. Akin's qualifications. Moreover, it is relevant only to a small part of Mr. Akin's qualifications in this capacity.

As set forth more fully in Midwest's opening brief, the standards for a new trial based on newly discovered evidence have not been satisfied. Thus, the trial court erred in granting a new trial.[3]

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[3] Mr. March also claims that Midwest "conflates" the standards for a motion for new trial based upon perjury and the standards for a new trial based on newly discovered evidence. (A.B. 51-52). It does not. Nonetheless, some of the

B. Mr. March has waived any claim that the article he claims to have "newly discovered" affected the admissibility of Mr. Akin's testimony.

Mr. March claims in his brief filed in this Court that the article stating that Mr. Akin was selected on behalf of the defense in the Fort Hood shooting case affected the admissibility of Mr. Akin's testimony. Mr. March did not make any such claim before the trial court or at any time before filing his brief in this Court. Rather, he simply claimed that he would have used the article to "crucify" Mr. Akin, implying that he would use it to impeach or discredit his testimony. (L.F. 197). He never argued that Mr. Akin's testimony should have been excluded because he was not qualified as an expert. Mr. March also did not argue after discovering the article that he was entitled to a new trial because Mr. Akin was not qualified as an expert. Indeed, to do so would imply that an expert witness selected in a military court-martial proceeding on behalf of the defense is ***necessarily*** unqualified. He cannot make such an argument now for the first time on appeal. This argument should be flatly rejected.

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analysis, including whether the alleged perjury or newly discovered evidence was "material" naturally overlaps.

C. The article did not come to light after trial and could have been discovered through due diligence.

Contrary to Mr. March's contentions, the article discussing Mr. Akin's role in the Fort Hood investigation came to light long before trial and could have been discovered by counsel for Mr. March through due diligence because the article was in the hands of his expert witness nearly a year before trial. Regardless of when the article was published or removed from Mr. Akin's website, Mr. March's expert witness had a copy of the article approximately one month before Mr. Akin was even deposed in this matter. (L.F. 181-182). Iris Dalley, expert for Mr. March, had this article in her possession before Mr. Akin's deposition and nearly a year before trial. (L.F. 181-182).

Ms. Dalley provided Mr. March's counsel with other documents and publications from Mr. Akin's website in preparation for his deposition. (L.F. 181). However, as she stated in her affidavit, she did not provide a copy to counsel because she only provided the articles she found that were relevant to Mr. Akin's qualifications as an expert. (L.F. 181). Nonetheless, the article was in the possession of Mr. March's expert witness long before Mr. Akin's deposition and the trial. Counsel's purported failure to obtain a copy of the article until after trial does not entitle him to a new trial based on this evidence.

The article discussing Mr. Akin's role in the Fort Hood incident does not constitute newly discovered evidence because it was not "newly discovered" after trial. Moreover, counsel could have obtained a copy of the article from his own

expert witness long before the trial. As such, the requirements for newly discovered evidence have not been satisfied. Mr. March was not entitled to a new trial based on the purported "discovery" of this article, and the trial court's grant of a new trial on this ground should be reversed.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in Midwest's opening brief, this Court should reverse the trial courts order and judgment granting a new trial and enter judgment on the jury's verdict.

Respectfully submitted,

BROWN & JAMES, P.C.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on the 28th day of March, 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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CERTIFICATE OF COMPLIANCE

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

1. The Substitute Reply Brief includes the information required by Rule 55.03.

2. The Substitute Reply Brief complies with the limitations contained in Rule 84.06;

3. The Substitute Reply Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service contains 5,548 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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