In the Missouri Court of Appeals
Eastern District

DIVISION ONE

PHILLIP H. MARCH,	)	No. ED96722
	)	
Plaintiff/Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	
MIDWEST ST. LOUIS, L.L.C.,	)	Hon. Edward W. Sweeney, Jr.
	)	
Defendant/Appellant.	)	Filed: October 2, 2012

Introduction

Midwest St. Louis, L.L.C. (Appellant) appeals from the judgment entered by the trial court granting the motion of Phillip H. March (Respondent) for new trial after a jury returned a verdict in favor of Appellant. The trial court entered a judgment granting Respondent's motion for new trial because it found Appellant's expert witness committed perjury when testifying about his qualifications in crime scene reconstruction. The trial court also found newly discovered evidence revealing this alleged perjury in the form of a brief article written by the expert witness and posted on his website also merited a new trial. We reverse.

Factual and Procedural Background

The proceedings below in the instant civil case involved claims of premises liability arising from a stabbing that occurred at approximately 2:00 a.m. on April 24, 2007, in the vicinity of a gas station and convenience store owned and operated by

Appellant. Respondent was the victim of the assault. Other than Respondent, there were no eyewitnesses to the crime. At the scene of the crime, Respondent was unable to speak to tell police what happened because of the extensive injuries to his face. Respondent later stated that the assault occurred at the trash dumpster located on the premises of Appellant's gas station and convenience store. There was no other evidence presented at trial that the stabbing occurred at the trash dumpster. Appellant's position was that the crime occurred in the alley behind and off its property, thereby negating any liability it may have had for the assault. Appellant's theory was supported by the presence of a large amount of blood in the alley behind the gas station, trailing from the alley through a gap in the fence separating the alley and gas station, around the opposite side of the convenience store from where the trash dumpster was located, and up to the front of the convenience store, where Respondent ultimately sought and obtained help. Two of the police officers who responded to the scene, Officer Tonya Porter (Officer Porter) and crime scene supervisor Sergeant Thomas Majda (Sgt. Majda),[1] testified that they did not recall seeing blood by the dumpster. Officer Porter said she searched the whole area; and she recalled Sgt. Majda inspecting the area around the dumpster and the grass in that area, and finding no physical evidence whatsoever. Officer George Weindel (Officer Weindel), who had 35 years of experience with the St. Louis police department and 19 years of experience as an evidence technician, also testified he did not see blood at the dumpster. Officer Weindel stated if there had been blood by the dumpster, he would

[1] Sgt. Majda testified via videotaped deposition that "I believe an officer found maybe 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 he was on the ground bleeding from the face." Appellant's counsel asked Sgt. Majda at trial whether "If George Weindel, the evidence technician who was there that evening, gave us his photographs and there were no photographs of blood over by the dumpster area, would that change your recollection?" Sgt. Majda replied, "That would tell me there probably wasn't any."

have photographed it. Officer Weindel took eight photographs of the scene including the blood trail tracked by Officer Porter which ran, backward, from the front of the convenience store where Respondent had been laying when Officer Porter arrived, around the side of the store opposite the trash dumpster, around a payphone through a gate around the rear of the store then through a broken fence and into the alley, ending in the puddle of blood resulting from the initial stabbings to Respondent's face, neck and head. The stabbings punctured Respondent's carotid artery, which resulted in a substantial blood flow indicating the route taken by Respondent from the moment he was first attacked to the time when assistance helped staunch the flow of blood. Officer Weindel wrote the evidence technician report regarding the stabbing.

To further support its contention that Respondent was stabbed in the alley, and not by the dumpster, Appellant hired crime scene analyst Louis Akin (Akin) as its expert witness to give his opinion as to where the assault took place. Prior to Akin testifying to his opinion as to the location of the assault, Appellant's counsel directed questions to him in order to establish for the judge and jury Akin's qualifications and skill to render such an opinion, as follows:

> Q. Would you please state your full name for the record, sir?
> A. My name is Louis L. Akin.
> Q. And how old a man are you?
> A. Pardon?
> Q. How old a man are you?
> A. Sixty-seven.
> Q. And I understand you're originally from St. Louis; is that correct?
> A. Yes.
> Q. And since moved to Texas?
> A. Right.
> Q. Okay. And can you tell me what you do for a living?
> A. I'm a crime scene reconstructionist.
> ...
> Q. Okay, now what I want to do is get a little bit about your background. Can you give us a little bit about your educational background, please?

A. My experience in crime scene reconstruction is based mainly on training that I've attended for the past ten years. I've been through a variety of courses in blood spatter analysis, crime scene reconstruction, and so on.
Q. And how many total hours of training have you had in that area?
A. It's in the area of about 3,000 hours.
Q. Now, as part of your training in crime scene reconstruction, did you also have training with a pathologist or a medical examiner's office? And if so, can you explain what that is, please?
A. Yes, I'm also a certified medical legal death investigator. And in that capacity I took a lot of anatomy and physiology and so on in college. And then I completed a series of tasks with -- I believe there's 352 tasks that have to be accomplished, as well as studying courses and taking tests to become certified. And work with a pathologist for a total of about six months. Actually going to death scenes, collecting evidence at the scene, bringing that evidence back to the medical examiner's office, the evidence being collected to decide whether the -- decide on the cause and the manner of death. And then I also cross trained as a forensic assistant to a pathologist's assistant to actually help performing the autopsies. I would be the person who would do the Y-incision and eviscerate the deceased, and then remove the calderion (sic), top of the skull cap, take out the brain, and so on.
...
Q. (by [Appellant's counsel]) Did you also work with the Attorneys General's Office of the State of Texas?
A. Yes, I did.
Q. And in what capacity, what did you do there?
A. In that, I was an investigator for the Consumer Protection Division.
Q. And are you a member of any societies in your field?
A. Yes. I'm a member of the American Association of Forensic Science, the Homicide Research Working Group, and a couple others.
Q. Okay. And have you been involved in training sessions, numerous training sessions, throughout your career? And if so, just give us some examples of those.
A. I have, I think, eight pages of training sessions that I have attended. Most of them are for the armed forces. They cover everything from basic blood spatter analysis, intermediate blood spatter analysis, advanced blood spatter analysis, crime scene reconstruction, death investigation, medical-legal death investigation, and so on.
Q. It looks like you've had about 20 or more actual presentations where you actually gave presentations in your field of expertise?
A. Yes.
Q. And most of that has to do with blood pattern and blood spatter; is that correct?
A. That's correct.
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.
Q. Now, would you tell the jury a little bit about blood spatter analysis, and what it is, and what it involves?

(Emphasis added.)

Akin then testified at length and in great detail about the nature of blood spatter analysis, and detailed for the jury his analysis of the scene of the stabbing. Akin noted that in doing his analysis he relied on the reports made by the officers who responded to the scene as well as their depositions; the photographs the officers took of the scene, including the blood trail from the alley to the store; Respondent's account of the incident; the medical records detailing the nature of Respondent's injuries and how they would have bled at the scene; and Akin's own knowledge and experience in examining crime scenes. With regard to the ultimate issue of where the assault of Respondent occurred, Akin's conclusion for the jury was, "My opinion is that he was stabbed in the alley."

After the trial concluded and the jury entered its verdict for Appellant, Respondent filed a motion for new trial, alleging that Akin had committed perjury while testifying about his credentials and experience. Respondent also asked for a new trial based on newly discovered evidence, in the form of an article sent to Respondent's counsel by his own expert witness, Iris Dalley, that Akin had written and posted on his website on January 15, 2010, regarding his appointment to do crime scene analysis on behalf of the defense team for Army Major Nidal M. Hasan in United States v. Maj. Nidal M. Hasan, the criminal case which resulted from the November 5, 2009 mass shooting at the Fort Hood, Texas, army base.

After both sides briefed the issue, a hearing on the motion for new trial was held. Respondent submitted the one-paragraph article Akin had written and posted to his website on January 15, 2010, the day his retention to perform crime scene analysis work in the Fort Hood case on behalf of the defense was approved by the United States Department of the Army. Respondent maintained that this article showed Akin committed perjury at trial in his affirmative answer to defense counsel's question as to whether he was involved in any major investigation where he had been retained by the United States Government. Respondent also contended he did not have the opportunity to bring this issue up during trial because the article was newly discovered evidence in that it was just revealed to him by his own expert witness and he could not have discovered its existence through due diligence before the conclusion of trial despite its being in the possession of his expert the entire time because Akin had taken it down from his website several days after posting it. Respondent insinuated that the taking down of the article prior to his deposition in the case demonstrated nefarious intent on the part of Akin and defense counsel to misrepresent to the jury whose side Akin worked for in the case of the United States v. Hasan. Respondent also attempted to present hearsay evidence with regard to whether or not Akin actually specifically did blood spatter analysis at the Fort Hood site.

In response, Appellant provided evidence in the form of affidavit, correspondence and official documentation that Akin was, in fact, retained by the United States Government to perform crime scene analysis at the Fort Hood shooting site, and that his statement at trial was not false, and did not constitute perjury. Appellant also maintained that because the one-paragraph announcement of Akin's appointment and retention was in the possession of Respondent's expert ever since approximately January 18, 2010,

when she printed it off from Akin's website, three days after it was first posted, and because it did not prove perjury nor did its contents touch on any material issue in the case, it did not constitute newly discovered evidence.

After the hearing, the trial court held that "[Appellant]'s expert witness, Louis Akin, willfully and deliberately testified falsely; the matter about which the witness testified was material; and the testimony likely resulted in an improper verdict." The testimony found by the trial court to be perjurious was Akin's statement, "I recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan," in response to the question posed by defense counsel, "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?" The trial court found Akin's statement in response to the question was perjurious because Akin did not in fact work for the United States Government and was not retained by the United States Government to do blood spatter and crime scene reconstruction at the Fort Hood crime scene. In its judgment, the trial court further established that although its finding of perjury was enough to merit a new trial, it also found the article written by Akin and posted on his website to be newly discovered evidence also meriting a new trial. This appeal follows.

Points on Appeal

In its first point, Appellant claims the trial court erred in granting a new trial based on perjury because Akin did not willfully or deliberately testify falsely regarding his involvement as a crime scene analyst for the Fort Hood case and even if his testimony created a false impression concerning his role, it was not material to the issues at trial.

In its second point, Appellant maintains that the trial court erred in granting a new trial based on newly discovered evidence in that the article written by Akin about his work for the defense team in the Fort Hood case that Respondent claims to have discovered after trial does not constitute newly discovered evidence justifying a new trial.

Standard of Review

Motions for new trial are regarded with disfavor. Executive Jet Management & Pilot Serv., Inc. v. Scott, 629 S.W.2d 598, 610 (Mo.App. W.D. 1981). Granting a new trial on the ground of perjury requires a showing that the witness willfully and deliberately testified falsely. M.E.S. v. Daughters of Charity Services of St. Louis, 975 S.W.2d 477, 482 (Mo.App. E.D. 1998); Hoodco of Poplar Bluff, Inc. v. Bosoluke, 9 S.W.3d 701, 704 (Mo.App. S.D. 1999). While it may be within the discretion of the trial court to determine whether perjury occurred and whether an improper verdict resulted, we will reverse such a decision on the basis of perjury if the trial judge abused his discretion. Id.

A motion for new trial based on newly discovered evidence is left to the sound discretion of the trial judge, viewed with disfavor, and is granted only in exceptional circumstances. M.E.S., 975 S.W.2d at 482. Motions for new trial on grounds of 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). Such motions must be supported by evidence that only recently came into the movant's knowledge and which due diligence would not have uncovered sooner. M.E.S., 975 S.W.2d at 482. The evidence must be so material that it would probably produce a different result. Id. It may not be cumulative; nor be evidence offered to impeach the character or credibility of a witness; and the testimony of the witness must be produced,

or in its absence, accounted for. Id., see also State v. Terry, 304 S.W.3d 105, 109 (Mo.banc 2010). "Courts are, and should be, reluctant to order a new trial unless the after-trial facts are of such *decisive and conclusive character* as to render a different result reasonably certain." Hancock v. Shook, 100 S.W.3d 786, 801 (Mo.banc 2003), quoting Loveless v. Locke Distrib. Co., 313 S.W.2d 24, 32 (Mo. 1958) (Emphasis in original).

Point I - Perjury

Section 575.040[2] sets forth the elements of the crime of perjury:

> 1. 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 before any court, public body, notary public or other officer authorized to administer oaths.
>
> 2. 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 cause, matter or proceeding.
> ...

Perjury committed in any proceeding not involving a felony charge is a class D felony. Section 575.040.6.

> The essence of the crime of perjury is the willful false swearing to a substantial definite material fact, and it is incumbent upon the State to not only allege but also to prove beyond a reasonable doubt that the defendant has sworn falsely to a material fact for the reason that false testimony to an immaterial fact is not perjury. 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. However, the materiality of the testimony on which perjury is assigned must be established by evidence and cannot be left to presumption or inference.

State v. Roberson, 543 S.W.2d 817, 820 (Mo.App. 1976).

[2] All statutory references are to RSMo 2006, unless otherwise indicated.

In the instant case, Akin's testimonial statement, in and of itself, that "I recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan," was not shown to be false, which is one of the requirements for a perjury charge. Akin did in fact do crime scene reconstruction work at the Fort Hood shooting site, as was demonstrated by documentation in the record. As such, Akin did not testify falsely via this statement and therefore did not commit the crime of perjury. See Section 575.040.1.

Akin's statement when considered in conjunction with the question that occasioned it, "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" was not demonstrated to be false. Akin was in fact retained by the United States Government to do crime scene reconstruction at the Fort Hood site, in that he was paid by and his appointment was approved by the United States Government, Department of the Army. This retention is a fact provable by evidence in the record the truth of which remains unaffected by the fact that Akin did not work for the prosecution, but for the defense, a distinction that is irrelevant in terms of whether or not he was in fact retained by the United States Government to do his work.

"Retain" means "to keep in one's pay or service; *specifically*: to employ by paying a retainer."[3] The record contains the sworn affidavit of Lieutenant Colonel Poppe, Judge Advocate with the United States Army Trial Defense Service at Fort Hood, Texas, and defense counsel for Major Hasan in United States v. Hasan, that the Special Court-Martial Convening Authority, Colonel Morgan M. Lamb, approved Lieutenant Colonel Poppe's request to appoint Akin as a Crime Scene Analyst for Major Hasan's defense team on January 15, 2010. This affidavit in the record is accompanied by a

[3] Definition of retain, *available at* http://www.merriam-webster.com/dictionary/retain.

document memorializing the written approval and confirmation of such appointment by the United States Department of the Army and documentation of payment by the United States Defense Finance and Accounting Service. Akin was appointed by the United States Army Trial Defense Service and Akin's appointment was explicitly approved and memorialized by the United States Department of the Army.

Akin's testimonial statement was not perjury for the additional reason that it did not go to a material fact. Section 575.040.1. A fact is material if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding. Section 575.040.2. Here, Akin's testimony was with regard to one facet of his background and experience in crime scene investigation. It had no bearing on the location where Respondent was stabbed, which was the central and deciding issue of this case. For testimony to be perjured, it must not only be false, but must relate to a "material fact" in the case. State v. Albanese, 9 S.W.3d 39, 50 (Mo.App. W.D. 1999). The materiality of the testimony on which perjury is assigned must be established by evidence and cannot be left to presumption or inference. Roberson, 543 S.W.2d at 820.

The foregoing analysis demonstrates that the testimonial statement made by Akin was not only immaterial to the central issue at trial, but true. To have a truthful statement serve as the basis for the grant of a new trial based on perjury is clearly against the logic of the circumstances and is so unreasonable that it shocks the sense of justice. For this reason, we find the trial court abused its discretion in granting a new trial on this basis. Point I is granted.

Point II – Newly Discovered Evidence

Respondent also asked for a new trial based on his discovery of the one-paragraph article that Akin had written and posted on his website on January 15, 2010, announcing

the approval of his appointment that day by the government to do crime scene analysis on behalf of the defense team in the Fort Hood case.

Newly discovered evidence, in order to merit a new trial, must be so material that it would probably produce a different verdict. M.E.S., 975 S.W.2d at 482. A fact is material if it could substantially affect the outcome of a case or proceeding. State v. Fletcher, 948 S.W.2d 436, 438 (Mo.App. W.D. 1997); Harris v. Quincy, O. & K.C.R. Co., 57 S.W. 893, 896 (1913). Six elements must be proven in order for a new trial to be granted: (1) the evidence must have come to the knowledge of the movant since the trial; (2) due diligence would not have discovered the evidence sooner; (3) the newly found evidence must be so material that it would probably produce a different result; (4) the evidence must not be cumulative; (5) an affidavit of the witness must be produced or the absence of such an affidavit accounted for; and (6) the object of the evidence is not impeachment of the character or credit of the witness. Higgins v. Star Elec., Inc., 908 S.W.2d 897, 903 (Mo.App. W.D. 1995).

In the instant case, the import of the newly discovered evidence, according to Respondent, is that it revealed that Akin worked for the defense in the Fort Hood case, not the prosecution, and therefore he lied on the stand about being retained by the United States Government. For the reasons already set forth in our analysis of Point I, Akin did not lie on the stand with regard to his role in the crime scene analysis at Fort Hood. Respondent also contends that had the jury known that Akin worked for the defense at Fort Hood, it likely would have returned a verdict in favor of Respondent. This contention is without merit because Akin's work for the defense and not the prosecution in the Fort Hood case is not material to the central issue at trial, which was where Respondent was stabbed. The information's only usefulness would be to impeach Akin's

character or credibility as an expert witness to give his opinion in this case. Such a use negates its potential to be newly discovered evidence. See M.E.S., 975 S.W.2d at 482 (newly discovered evidence may not be evidence offered to impeach the character or credibility of a witness).

Due to the large majority of the factual and testimonial evidence presented at trial supporting the conclusion that Respondent was in the alley when he was stabbed, the jury's verdict would not likely have been different if a new trial was granted for the purpose of introducing the article into evidence. This is a required element of granting a new trial based on newly discovered evidence that was absent here. Higgins, 908 S.W.2d at 903. Accordingly, the characterization of the article as newly discovered evidence meriting a new trial was unreasonable and against the logic of the circumstances in this case. Point II is granted.

Conclusion

The judgment of the trial court is reversed.

Sherri B. Sullivan, J.

Clifford H. Ahrens, P.J., concurs.
Glenn A. Norton, J., dissents in separate opinion.

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DISSENTING OPINION

I respectfully dissent. The majority reverses the trial court's decision to grant a new trial on the basis of perjury by Defendant's expert Louis Akin because they find that Akin did not testify falsely and that his allegedly false testimony was immaterial. In light of our standard of review, whether a witness committed perjury is a decision more properly made by the trial court, not the Court of Appeals.

After virtually all jury-tried cases, the losing party files a motion for new trial. Because it is so extremely rare for a trial court to grant a new trial, our Court is more liberal in affirming the grant of a motion for new trial than the denial of a motion for new trial. *Lowdermilk v. Vescovo Building and Realty Co., Inc.*, 91 S.W.3d 617, 625 (Mo. App. E.D. 2002). We may not reverse a trial court's decision granting a motion for new trial unless there has been a clear abuse of discretion. *Id.* An abuse of discretion occurs only where the trial court's decision is clearly against the logic of the circumstances before the trial court and is so arbitrary and unreasonable

that it shocks the sense of justice and indicates a lack of careful consideration by the trial court. *Id.*

Granting a new trial on the basis that a witness committed perjury requires a showing that the witness willfully and deliberately testified falsely to a material fact. *Hoodco of Poplar Bluff, Inc. v. Bosoluke*, 9 S.W.3d 701, 704 (Mo. App. S.D. 1999); *McC. v. McC.*, 501 S.W.2d 539, 541 (Mo. App. 1973). The determination of whether perjury occurred and whether an improper verdict likely resulted therefrom rests largely within the discretion of the trial court, and we will not reverse the trial court's ruling unless there has been an abuse of discretion. *Hoodco*, 9 S.W.3d at 704.

In this case, the trial court found that Akin committed perjury by willfully and deliberately testifying falsely about his qualifications and background and that an improper verdict likely resulted from Akin's false testimony. The trial court also found that Akin's false testimony related to a material fact. Those findings must be viewed in light of the facts of this case. As noted by the trial court, "the critical issue" in determining whether Defendant was liable for premises liability arising from Plaintiff being stabbed in the vicinity of Defendant's property was "where the stabbing took place." Akin opined that the stabbing did not occur on Defendant's property. Akin was the *only person* who offered an expert opinion as to where the stabbing occurred and there were no witnesses to the stabbing. In its judgment granting Plaintiff a new trial on the grounds that Akin committed perjury, the trial court specifically found that the jury's evaluation as to how much weight and value should be given to Akin's testimony regarding "the critical issue of where the stabbing took place" depended on the jury's evaluation of Akin's qualifications and background, an area in which he testified falsely. The trial court found that Akin willfully and deliberately testified falsely about his qualifications and background:

> *. . . [I]t 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 [that he 'recently just finished reconstructing the Fort Hood shooting by Major Malik Hasan'] without any clarification that he was working for the defense of Major Hasan*, and not on behalf of the U.S. Government. [and]
> . . .
> *. . . Akin's answer gave the [c]ourt 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*. [and]
> . . .
> *. . . [T]his [c]ourt has no doubt that witness Akin knew at the time he was asked the question by defense counsel* who he was working for and if he was currently involved in any major investigation where he had been retained by the U.S. Government *that when he gave his answer he was prevaricating, he was deviating from the truth, he was deceiving the [c]ourt and the jury*.

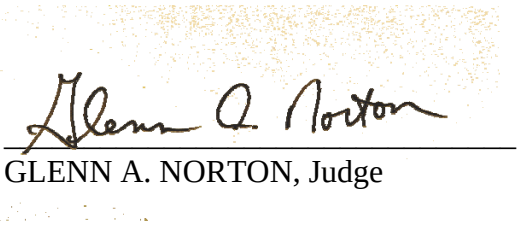
(emphasis added).

The trial court was in the best position to determine whether Akin willfully and deliberately testified falsely because a trial court has the superior advantage of seeing and observing the witness and is in a much better position to judge the witness's credibility than our Court which merely reads the cold record. *Hoodco*, 9 S.W.3d at 704. Moreover, I disagree with the majority's conclusion that Akin's testimony did not relate to a material fact. The false impression created by Akin's deceiving testimony (that he had worked for the U.S. Government in connection with the prosecution of Major Hasan) could have substantially affected the outcome of this case.[1] As found by the trial court, the jury's evaluation as to how much weight and value should be given to Akin's testimony regarding "the critical issue of where the stabbing took place" depended on the jury's evaluation of Akin's qualifications and background, an area in which he testified falsely. Had the jury not been misled regarding Akin's qualifications and

[1] Although the elements of the crime of perjury and criminal cases interpreting those elements are *instructive*, there is no compelling authority for the proposition that they should be strictly applied in a civil case such as this. Therefore, I would find that false testimony relates to a material fact in a civil proceeding when it could substantially affect the outcome of the case.

background, the jury may not have given as much weight and value to Akin's testimony and a verdict in Plaintiff's favor could have resulted.

Based upon the facts of this case and the trial court's findings set out above, the trial court's decision that Akin committed perjury and that an improper verdict likely resulted from his false testimony was not clearly against the logic of the circumstances and was not so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. Therefore, I would find that the trial court did not clearly abuse its discretion in granting Plaintiff a new trial on the basis that Akin committed perjury.



GLENN A. NORTON, Judge