IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 18-13902-E

VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR.,

Plaintiff/Appellant,

vs.

SHERIFF KEN MASCARA, in his Official Capacity as Sheriff of St. Lucie County, Florida and Christopher Newman,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 2:16-cv-14072

ANSWER BRIEF OF APPELLEES SHERIFF KEN MASCARA and CHRISTOPHER NEWMAN

SUMMER M. BARRANCO
Florida Bar No. 984663
GREGORY J. JOLLY
Florida Bar No. 118287
PURDY, JOLLY, GIUFFREDA, BARRANCO & JISA, P.A.
2455 East Sunrise Boulevard, Suite 1216
Fort Lauderdale, Florida 33304
Telephone: (954) 462-3200
Telecopier: (954) 462-3861
Attorneys for Appellees Sheriff Mascara and Newman

CERTIFICATE OF INTERESTED PERSONS/CORPORATE DISCLOSURE STATEMENT

Counsel for Appellees/Defendants Sheriff Mascara and Christopher Newman certify that the following persons and/or entities have or may have an interest in the outcome of this case:

1. Barranco, Summer M., Esq., Counsel for Defendants/Appellees

2. Bryant, Viola, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr., Plaintiff/Appellant

3. Johnson, Kirby W., Esq., Counsel for Plaintiff/Appellant

4. Jolly, Bruce W., Esq., Counsel for Defendants/Appellees

5. Jolly, Gregory J., Esq., Counsel for Defendants/Appellees

6. Law Office of John M. Phillips, LLC

7. Mascara, Ken, in his Official Capacity as Sheriff of St. Lucie County, FL, Defendant/Appellee

8. Newman, Christopher, Defendant/Appellee

9. Purdy, Jolly, Giuffreda, Barranco, & Jisa, P.A.

10. The Honorable Bruce E. Reinhart, Magistrate Judge for the United States District Court, Southern District of Florida

11. The Honorable Robin L. Rosenberg, United States District Judge for the United States District Court, Southern District of Florida

STATEMENT REGARDING ORAL ARGUMENT

The Appellees, Sheriff Mascara and Christopher Newman, suggest that oral argument would not be beneficial to this Court in deciding whether the lower court abused its discretion by making the various pretrial and trial rulings at issue in this appeal.

TABLE OF CONTENTS

TABLE OF CITATIONS

U.S. CASE LAW

F.2d/F.3d CASE LAW

OTHER CASE LAW

STATUTES

STATEMENT OF JURISDICTION

This case arises under 42 U.S.C. § 1983. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §1367. Plaintiff appeals from a final decision of the district court, and therefore this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

Reference to pleadings and other court papers in this Answer Brief will be made by referring to the document number, and page number within the document, or by line number and page number as appropriate. [R__,pg. __, ln., __].

Viola Bryant was the Plaintiff below and will be referred to in this brief as "Bryant" or "Plaintiff." Sheriff Ken Mascara and Christopher Newman were the Defendants below and will be referred to as "Defendant" or "Sheriff" or "Newman."

STATEMENT OF THE ISSUES

A. The Course of Proceedings and Disposition in the Court below

Defendants largely are satisfied with Plaintiff's statement regarding the course of proceedings with the exception of the following assertions on the part of the Plaintiff which require clarification and/or elaboration. While the issues elaborated below are not particularly relevant to this Court's review based on the errors asserted by the Plaintiff, Defendants believe it necessary to provide this Court with more context to rebut the implicit suggestion of prejudice suffered by the Plaintiff.

Plaintiff asserts that she requested the deposition of Sheriff Mascara and other witnesses to the incident and those requests were denied by the trial court. (See Appellant's brief at pg. 3). As an initial matter, Plaintiff does not appeal the trial court's ruling in that regard. As to the Plaintiff's assertion that the trial court denied her requests to depose the Sheriff and other witnesses, that is not exactly what happened. Early in the litigation, the trial court granted a protective order [R 34] at the Sheriff's request [R 30] to prevent the deposition of the Sheriff which had been noticed by the Plaintiff. At the time the Magistrate entered the protective order, the Magistrate stated that unless the Plaintiff could provide some evidence of the Sheriff having some special knowledge that was needed in the case, he was

granting the protective order. [R 34][1] Plaintiff never offered new argument in that regard.

As to the suggestion that the trial court denied the Plaintiff's requests to depose other witnesses, Plaintiff is referring to her attempt to re-open discovery after the discovery cutoff (which had already been extended) to permit the Plaintiff to depose a number of witnesses listed in the Defendants initial Rule 26 disclosures who had not yet been deposed by the Plaintiff. Plaintiff blamed the failure to depose those witnesses within the time for discovery on the fact that the lawyer who had been doing the lion's share of the depositions had recently left his firm, a recent death in his family, and an extended vacation. [R 105, pg.2-3, ¶ 9].

The trial court ultimately declined to re-open discovery with the exception of granting the Plaintiff 45 days to depose Earl Ritzline, an employee of the Indian River Crime Lab, who was listed by the Defendants after learning that their original crime lab witness, Daniel C. Nippes, was deceased. [R 118, R 119]. Despite getting permission to do so, Plaintiff never deposed Earl Ritzline.

Further, Plaintiff correctly notes that the jury found that Mr. Hill was under the influence of alcoholic beverages to the extent that his normal faculties were impaired and that as a result of the influence of such alcoholic beverage, Mr. Hill was more than 50% at fault for this incident and his resulting injuries. [R 223, pg.

1There is no transcript from the hearing on the Defendants' Motion for Protective Order.

4]. As a result, the trial court entered judgment in favor of the Sheriff pursuant to F.S. §768.36 (2014). [R 229].

Finally, Plaintiff's allusion to the circumstances of a documentary which purportedly involved an interview of a member of the jury is not relevant to this appeal. After both parties filed memoranda on the issue, [R 253,R 256], the trial court properly denied the Plaintiff's request to conduct jury interviews since the Plaintiff failed to show good cause to justify the extraordinary request. [R 258]. Plaintiff does not challenge the trial court's decision in that regard.

B. STATEMENT OF THE MATERIAL FACTS

Like Plaintiff's statement regarding the course of proceedings, the Defendants are largely satisfied with Plaintiff's Statement of the Facts[2] with the exception of Plaintiff's contention in paragraph 5 that the garage door was opened to waist height. Both Defendant Newman and Deputy Lopez testified that they could see Mr. Hill's head [R 239, pg. 222, lns. 10-12; R 241, pg. 143/ln. 23-pg. 144/ln. 5] and Deputy Lopez gave an accurate physical description of Mr. Hill on the radio immediately after first encountering him. [R 239, pg. 221/ln. 24-pg. 222/ ln. 2]. That being said, the following additional facts are worthy of highlighting for this Court's consideration.

2Although the Defendants largely do not take issue with the factual assertions put forth in Plaintiff's Statement of the Facts section of her Initial Brief, Defendants do take issue with Plaintiff's usage of the parties' Joint Pretrial Stipulation as record reference for her assertions rather than the trial transcript.

The jury heard testimony during trial that Mr. Hill's blood alcohol content was as high as .390 around the time of the subject incident. [R 241, pg. 69, lns.8-10]. The jury heard testimony that Mr. Hill was holding a firearm when first confronted by law enforcement. [R 239, pg. 208, lns. 22-25; R 241, pg. 136, lns. 17-19]. The jury also heard that Mr. Hill was on probation at the time of the subject incident and that the terms of his probation prohibited him from consuming alcohol and the possession of a firearm. [R 240, pg. 129, lns. 1-23]. Finally, the jury heard testimony that Mr. Hill was ordered to drop his firearm, but instead of complying, he manually brought his garage door down while raising the firearm causing Defendant Newman to fear for his life and the life of his fellow deputy. [R 241, pg. 136/ln.15-137/lns 10; pg 156, lns. 6-13].

C. STANDARD OF REVIEW

Although Plaintiff notes seven separate issues on appeal, Plaintiff only identifies the standard of review for the district court's evidentiary rulings which arguably only relates to issues 1, 2, and 3.

A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. Cummings v. Dep't of Corr., 757 F.3d 1228, 1235 (11th Cir. 2014). That being said, when the asserted errors relate to how the trial was conducted, the trial court's authority is afforded great latitude on appeal since the trial court is in the best position to evaluate prejudicial impact. Cruthirds v. RCI, Inc., 624 F.2d 632,

635 (5th Cir. 1980). Further, in situations like the one presented here, "[d]eference to the district court is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed." McGinnis v. American Home Mtge. Servicing, Inc., 817 F.3d 1241, 1255 (11th Cir. 2016).

The appellate court conducts a *de novo* review of jury instructions to determine whether they misstate the law or mislead the jury. Conroy v. Abraham Chevrolet–Tampa, Inc., 375 F.3d 1228, 1233 (11th Cir.2004).

SUMMARY OF THE ARGUMENT

The majority of the issues raised in Plaintiff's Initial Brief are reviewed for an abuse of discretion. That standard recognizes a trial court's wide latitude in conducting trial proceedings. The trial court did not abuse its discretion in permitting the Defendants to introduce evidence of the decedent's probation status since it helped explain the decedent's actions on the day of the subject incident and added credibility to the deputies' description of the subject incident. Further, the trial court's instruction to the jury limiting the jury's consideration of the decedent's probation status to the purpose permitted by Rule 404(b) cured any potential prejudice of the testimony.

As to the issue of Sgt. Kyle King, the Plaintiff failed to challenge his expert qualifications and methodology at trial limiting this Court's review of that issue. Since Sgt. King's expert qualifications were not challenged at trial, this Court should decline to consider the issue. Further, Plaintiff's criticisms of Sgt. King's substantive testimony, i.e. that it was based on flawed factual assumptions, goes to the weight of his testimony not its admissibility.

The trial court properly permitted the Defendants to exhibit the decedent's firearm and shorts from the day of the subject incident as a demonstrative aid since the Plaintiff was on notice that the Sheriff's Office had collected those items as evidence during the investigation of the shooting. The Defendants had made

multiple discovery disclosures indicating that the Sheriff was in possession of this evidence. The trial court correctly held that the Defendants' failure to explicitly list this evidence was harmless.

Plaintiff suggests the following errors regarding how the district court conducted trial in this matter: (1) permitting the Defendants to conduct a demonstration regarding the decedent's firearm and shorts; (2) permitting Defendant Newman to change his testimony; and (3) permitting Defense expert Christopher Lawrence's "contumacious testimony." The district court is entitled to wide latitude in how it conducts trial proceedings and is in the best position to weight the prejudicial impact of certain aspects of trial. The district court's denial of Plaintiff's Motion for New Trial based on alleged defects in how the trial was conducted was not an abuse of discretion.

Although Plaintiff asserts that the trial court failed to read the title of each jury instruction prior to its deliberation, the Plaintiff failed to raise that issue contemporaneously with the alleged error. Further, there was no prejudice caused by the trial court's failure to read the title of each instruction since the jury had copies of the jury instructions during its deliberation which contained the title to each instruction.

Additionally, Plaintiff has failed to demonstrate that the jury's verdict was against the great weight of the evidence. Instead, Plaintiff simply cherry picks

certain evidence favorable to her while ignoring the substantial evidence supporting the jury's verdict. The trial court, in the best position to view the evidence and evaluate impact and credibility of each witness, correctly held that the jury's verdict was not against the great weight of the evidence. The trial court did not abuse its discretion in so ruling.

Finally, Plaintiff's assertion that the cumulative effect of the errors asserted entitles her to a new trial is contrary to law. As an initial matter, the cumulative effect doctrine is rarely applied in civil cases. More importantly, Plaintiff has not demonstrated that the trial court committed any errors let alone that her substantial rights were affected.

ARGUMENT AND AUTHORITY

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING TESTIMONY REGARDING THE DECEDENT'S PROBATION STATUS

Plaintiff contends that the trial court erred in permitting the Defendants to elicit testimony regarding the decedent's probation status since it was unknown by both Defendant Newman and Deputy Lopez on the day of the subject incident.

"In a case...where what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible." Boyd v. City and Cnty. of San Francisco, 576 F.3d 938, 948-949 (9th Cir. 2009). In Boyd, the Ninth Circuit approved a trial court's ruling allowing evidence that the decedent had been on drugs at the time of a police shooting because the evidence "was highly probative of the decedent's conduct, particularly in light of [the decedent's] alleged erratic behavior..." Id.at 949. This type of evidence is routinely permitted to explain unusual behavior or to support a law enforcement officer's version of how a decedent acted. See Turner v. White, 980 F.2d 1180, 1182-1183 (8th Cir. 1992) ("it was incumbent upon the jury to consider [the defendant officer's] actions in relation to all the circumstances of the situation that confronted him. We therefore believe the evidence of alcohol consumption is relevant to the jury's assessment of that situation...").

In her Brief, Plaintiff relies on Sherrod v. Berry, 856 F.2d 802, 805 (7th Cir.

1988) for the proposition that facts unknown to an officer at the time force is used should not be presented to the jury. (See Appellant's Brief at pgs. 9-12). However, the Seventh Circuit later clarified its ruling in Sherrod and cautioned against an overly broad interpretation of Sherrod before holding that "evidence unknown to officers at the time force was used is also admissible to add credibility to an officer's claim that a suspect acted in the manner described by the officer." See Est. of Escobedo v. Martin, 702 F.3d 388, 400 (7th Cir. 2012).

Plaintiff contends that the "Defendants cited to no authority which allowed Defendants to introduce evidence of Mr. Hill's probationary status at the time he was shot because of some possible or speculative relevance to motive or intent." (See Appellant's Brief at pg. 20). This assertion is demonstrably false. In response to Plaintiff's pretrial bench brief regarding the probation issue, DE 186, Defendants filed a memorandum, R 191, citing to Knight through Kerr v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017) to support the admissibility of Mr. Hill's probation status which was cited to by the trial court in its Order Denying Plaintiff's Motion for New Trial. [R 259, pg. 12-13].

In Knight supra, the Plaintiffs brought federal and state claims arising out of an incident which involved a police chase that ultimately culminated in a police shooting. Two of the passengers of the car were killed and the other was injured. Id. at 803-805. Prior to trial, the Plaintiffs in Knight moved to exclude evidence of

the driver's previous felony convictions. The trial court permitted the driver's most recent conviction because the court found "it was material to the defense theory that his earlier conviction and his probation status caused him to initiate, and refuse to cease flight when confronted by the officers." Id, at 815-816. In evaluating the propriety of the trial court's ruling, this Court first noted Rule 404(b)'s exception regarding evidence of a crime, wrong or other act when the evidence is used to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Id, at 816. In ratifying the trial court's decision to allow evidence of the driver's probation status, this Court concluded that the evidence was plainly admissible under Rule 404(b) to establish the driver's motive in fleeing since if he had simply pulled over, "he would have been caught associating with other people on probation, which might have jeopardized his probationary status." Id. at 816-817.

Plaintiff attempts to distinguish this case from Knight by suggesting that Mr. Hill's probation status was only relevant to his actions in closing the garage door quickly and his placing the gun in his back pocket. Plaintiff argues that since the issue of Mr. Hill closing the garage door quickly was undisputed and because she would have been entitled to a directed verdict had Mr. Hill indeed been observed placing a gun in his back pocket, Knight's holding is inapplicable. Plaintiff cherry picks two lines of the trial court's Order denying Plaintiff's Motion for New Trial

to support this contention. Despite Plaintiff's attempt to suggest otherwise, the trial court exhaustively laid out the circumstances that warranted the introduction of this evidence as follows:

> During trial, the parties fiercely disputed whether or not Mr. Hill had a gun in his hand when he opened the garage door. Plaintiff argued that Mr. Hill did not have the gun in his hand, *see, e.g*, Trial Tr. May 17, 2018 at 214:2-10, but that it was in Mr. Hill's back pocket, which is where it was found by law enforcement, Trial Tr. May 23, 2018, at 109:12-13 ("[T]he evidence is entirely inconsistent with it being out of Mr. Hill's pocket."). To support her argument, Plaintiff offered the testimony of Earl Ritzline, a DNA expert who testified that the gun had a low level mixture of at least three individual's DNA, *id.* at 109:2-11; the testimony of Dr. Robert Anderson, a medical examiner who testified that the shot to Mr. Hill's brain would have rendered him incapable of any motor function, Trial Tr., May 21, 2018, at 36:1-15; and the testimony of Mr. Hill's daughter, Destiny, who testified that her [sic] Mr. Hill was not holding a gun, *id*. at 109:2-5.
>
> Defendants' theory of the case was that Mr. Hill opened the garage door with the gun in his hand. According to Defendants, when Mr. Hill saw that it was law enforcement knocking on his door, he knew he was in violation of two terms of his probation by being intoxicated and possessing a firearm. *See* Trial Tr., May 23, 2018, at 155:5-24. Accordingly, Mr. Hill closed the garage door in order to avoid being found in violation of his probation. *Id*. ("[B]ecause Mr. Hill knew he was on probation, had no business having a gun and being under the influence of alcohol, his main concern was getting that gun out of view, get it in his pocket, put it away, and it was found in his back pocket. He was able to put it there on his own.") Defendants relied on the testimony of Deputy Lopez that Mr. Hill was holding a gun when he opened the garage door, Trial Tr., May 18, 2018, at 208:22-25; Defendant Newman's testimony that he saw Mr. Hill holding a gun when Mr. Hill opened the garage door, Trial Tr., May 22, 2018, at 136:17-19; and the testimony of Niles Graben that Mr. Hill was on probation and that his probation prohibited the consumption of alcohol or the possession of a firearm, Trial Tr. May 21, 2018, at 129:1-23. Because of the dispute regarding whether Mr. Hill had the

> gun in his hand when he answered the door, Mr. Hill's probationary status was relevant in order to add credibility to Defendant Newman's version of the events.

[R 259, pgs. 11-12].

On the day of the subject incident, Mr. Hill was at least four times over the legal limit of intoxication to drive [R 241, pg. 69, lns.8-10], opened his garage door holding a firearm [R 239, pg. 208, lns. 22-25; R-241, pg. 136, lns. 17-19], and quickly closed the garage door manually [R 241, pg./ln.15-pg. 137/ln./10; pg 156, lns. 6-13]. Defendant Newman testified that while the decedent manually brought his garage door down the decedent raised his firearm causing Defendant Newman to fear for his life and the life of his fellow deputy. [R 241, pg. 136/ln.15-137/ln 10; pg 156, lns. 6-13]. The salient issue the jury was tasked to resolve, and ultimately did resolve in Defendant Newman's favor, was whether Defendant Newman's perception was reasonable. It is easy to imagine that a man as intoxicated as Mr. Hill with the motivation to quickly conceal the fact that he was holding a firearm by manually closing a garage door, might unintentionally raise the gun in a way that is reasonably perceived as a threat to anyone close by. That being said, whether Mr. Hill actually intended to harm Defendant Newman as opposed to whether the actions Defendant Newman perceived as a threat were due to some innocent explanation (for instance his level of intoxication caused him to clumsily close the garage door) is beside the point since the jury was tasked to

evaluate the reasonableness of Defendant Newman's actions from the perspective of a reasonable officer on the scene. Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002).

The trial court properly permitted the Defendants to elicit testimony regarding Mr. Hill's probation status pursuant to Federal Rule of Evidence 404(b) which is a "rule of inclusion rather than exclusion." United States v. Bowie, 232 F.3d 923, 929 (D.C.Cir. 2000); see also United States v. Ellisor, 522 F.3d 1255, 1267 (11th Cir. 2008) (noting that Rule 404(b) is "one of inclusion which allows [extrinsic] evidence unless it tends to prove **only** criminal propensity") (emphasis added). While strict standards of admissibility pursuant to Rule 404 apply to protect criminal defendants, in other contexts, like where the evidence is offered by a criminal defendant or in a civil case, the standard for admission is relaxed. United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989).

As noted above, the trial court's ruling permitting the Defendants to introduce evidence regarding Mr. Hill's probation status is reviewed for an abuse of discretion. The trial court's decisions under that standard of review arrive at this Court with a high level of deference to the trial court's judgment and should not be disturbed absent a "clear error in judgment." United States v. Frazier, 387 F.3d 1244, 1258-59 (11th Cir. 2004) (en banc). As demonstrated above, the trial court meticulously documented the circumstances at trial that supported its decision to

permit the introduction of Mr. Hill's probation status in its Order Denying Plaintiff's Motion for New Trial. [R 259, pgs. 11-12]. Plaintiff has failed to meet her burden of demonstrating that the trial court abused its discretion in permitting the complained of evidence.

Further, as conceded in Plaintiff's Brief, the trial court gave the following limiting instruction regarding Mr. Hill's probationary status:

> ladies and gentlemen, as you have heard, Mr. Hill was on probation. This evidence is only admissible to the extent you think it is relevant to Mr. Hill's actions on the date of the subject incident. It is not to be considered for any other purpose.

[R 239, pg. 150, lns. 10-14]. The jury was specifically instructed to consider the evidence of Mr. Hill's probation only in the context permitted by Rule 404. Thus any speculative prejudice complained of by the Plaintiff was cured. See Knight supra 856 F.3d at 817 (noting that trial court's limiting instruction mitigated any prejudice that evidence at issue may have caused).

The jury was entitled to consider the full picture of the subject incident including Mr. Hill's probation status which added credibility to the Defendants' theory that Mr. Hill's actions of manually closing his garage door while raising a firearm in the direction of one of the deputies in a state of heavy intoxication reasonably caused Defendant Newman to fear for his life and the life of his fellow deputy. The trial court did not abuse its discretion in allowing this evidence.

II. THE ISSUE OF SGT. KYLE KING'S QUALIFICATIONS AND METHODOLOGY IS NOT PROPERLY BEFORE THIS COURT AND ANY CRITICISMS OF HIS TESTIMONY GO TO THE WEIGHT OF HIS TESTIMONY NOT ITS ADMISSIBILITY

A. Background Information Regarding Sgt. Kyle King.

Before addressing the substantive arguments related to Sgt. Kyle King's testimony, it is necessary for the Defendants to provide this Court with the background information regarding the circumstances leading up to the Defendants' disclosure of Sgt. King as a non-retained expert and the subsequent issues related to Sgt. King raised by the Plaintiff both prior to as well as during the trial.

Sgt. Kyle King of the Indian River Sheriff's Office, was listed by the Defendants as a non-retained expert in this case in connection with his involvement in reconstructing the subject incident at the request of the State Attorney's Office for presentation to the grand jury. Defendants properly disclosed Sgt. King pursuant to the non-retained expert disclosure requirements of Federal Rule of Civil Procedure 26(A)(2)(C). [R 195-2, pg. 3]. Plaintiff never deposed Sgt. King prior to trial.

Just prior to trial, on May 14, 2018, Plaintiff filed her Bench Memorandum asserting her objection to Defendants' Exhibit 30, a PowerPoint created by Sgt. King as part of his work up of the subject incident. [R 188]. In that Memorandum, Plaintiff argued that the Defendants failed to properly disclose Sgt. King and that Sgt. King's testimony failed to meet the requirements of Daubert and its progeny.

[R 188]. The following day, Defendants filed their response asserting that the Defendants' disclosure satisfied their obligations under the rules and that to the extent Plaintiff challenged Sgt. King's qualifications, the Court should permit the Plaintiff to voir dire Sgt. King outside the presence of the jury. [R 195, pgs. 7-8].

On the first day of trial, the Court addressed multiple evidentiary issues including Plaintiff's objection to Sgt. King's testimony. [R 238, pgs. 279-283]. Outside the presence of the jury, Plaintiff stated that her main objection regarding Sgt. King was to the hearsay statements contained in the PowerPoint created by Sgt. King. [R 238, pg. 281, lns. 8-22]. In response to the Court's inquiry regarding what specifically Plaintiff objected to, Plaintiff indicated that she would file a supplemental memorandum specifically identifying her objections to Sgt. King's testimony. [R 238, pg. 282, lns. 15-21].

On May 18, 2018, Plaintiff filed her Supplemental Memorandum In Support of Plaintiff's Objection to Defendants' Introduction of Exhibit Number 30. [R 211]. In that Memorandum, Plaintiff indicated that her objections were directed to the text contained in exhibit 30 which the Plaintiff argued contained inadmissible hearsay. [R 211, pg. 2.]. Plaintiff's supplement continues, "assuming Defendants lay the proper foundation, Plaintiff is agreeable that Sgt. King be permitted to use the animated slides as a demonstrative aid." [R 211, pg. 2]. On May 20, 2018, Defendants filed their Response to Plaintiff's supplement in which they agreed not

to utilize any of the text portions of Exhibit 30. [R 212].

The following day, the third day of trial, prior to the jury's arrival the Court took up the issue of Sgt. King's testimony. [R 240, pgs. 6-7]. The parties were asked to confirm whether the issue of Sgt. King's testimony was moot consistent with the filings discussed above which both parties agreed it was. [R 240, pg. 6, line 4-pg.7, line 4].

On the fourth day of trial, Sgt. King testified as part of the Defendants' case in chief. [R 241, pg. 26, lines 2-3]. Sgt. King testified regarding his qualifications, [R 241, pg. 27, lines 19-pg. 28, line 7], his opinions regarding the sequence of shots fired by Defendant Newman, [R 241, pg. 32, lines 9-22], and other opinions formulated as part of his work up as an expert in shooting reconstructions. Plaintiff's counsel never once objected to any of the testimony offered by Sgt. King during his direct examination. Likewise, Plaintiff never attempted to challenge Sgt. King's credentials to offer such testimony.

Post trial, Plaintiff moved for a new trial asserting, as it related to Sgt. King's testimony, that "[t]he entirety of Sgt. King's testimony was predicated on materially false facts"which the Plaintiff asserted warranted a new trial. [R 237, pg. 17]. Again, the Plaintiff did not raise the issue of Sgt. King's qualifications or methodology in her Motion for New Trial.

B. This Court should not consider the issue of Sgt. King's qualifications and methodology since these issues were not raised in the district court.

This Court has "repeatedly held that 'an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.'" Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994) (quoting Depree v. Thomas, 946 F.2d 784, 793 (11th Cir. 1991)). This prohibition harmonizes with the purpose of the appellate process which is designed to review claims of judicial error, often times regarding fact intensive issues. Access Now. Inc. v. S.W. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004). However, Plaintiff's failure to raise the issue of Sgt. King's qualifications and methodology is not dispositive. This Court has permitted an issue to be raised for the first time on appeal under the following five circumstances: (1) where the issue involves a pure question of law; (2) where the appellant raises an objection to an order which he had no opportunity to raise at the district court level; (3) where the interest of substantial justice is at stake; (4) where the proper resolution is beyond any doubt; and (5) where the issue presents significant questions of general impact or of great public concern. Wright v. Hanna Steel Corp., 270 F.3d 1336, 1342 (11th Cir. 2001).

Defendants submit that the issue raised for the first time on appeal here regarding Sgt. King's qualifications and methodology as an expert does not satisfy any of the above mentioned circumstances that would warrant this Court in

considering it for the first time on appeal. Instead, the issue presents a common scenario that is not of great public concern. Indeed, had the Plaintiff properly raised the issue at trial and had Sgt. King been permitted to testify over Plaintiff's objection, the trial court's decision would have been entitled to a high level of deference. McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1257 (11th Cir. 2002) ("[O]ur review of evidentiary rulings by trial courts on the admission of expert testimony is 'very limited.'" (quoting Maiz v. Virani, 253 F.3d 641, 662 (11th Cir. 2001)).

Because the Plaintiff failed to challenge Sgt. King's qualifications and methodology below and because the issue is not one of the limited circumstances this Court has allowed to be reviewed for the first time on appeal, Plaintiff is not entitled to a new trial based on Sgt. King's testimony.

C. Plaintiff's criticisms of Sgt. King's opinions go to the weight of the testimony not its admissibility.

Plaintiff's main point of contention regarding the propriety of Sgt. King's testimony is based on her assertion that "[t]he entirety of Sgt. King's testimony was predicated on materially false facts." (See Appellant's brief at pg 32). Plaintiff never clearly identifies which facts were supposedly false. In any event, weaknesses in the factual underpinnings of an expert's opinion go to the weight of the testimony rather than its admissibility. Jones v. Otis Elevator Co., 861 F.2d 655, 662-63 (11th Cir. 1988); Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408,

414 (3rd Cir. 2002) ("Rule 705, together with Rule 703, places the burden of exploring the facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination."); Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 (8th Cir. 2001) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.").

As the trial court properly noted in its Order Denying Plaintiff's Motion for New Trial, "Plaintiff raised her concern with the weight the jury should give Sergeant King's testimony and made clear, as Sergeant King had on the stand, that his conclusions were based solely on the evidence that was given to him from the St. Lucie County Sheriff's Office." [R 259, pg. 16]. The Plaintiff has failed to meet her burden of demonstrating that the trial court abused its discretion in denying Plaintiff's Motion for New Trial based on Sgt. King's testimony.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE DEFENDANTS TO DISPLAY THE DECEDENT'S FIREARM AND THE PANTS HE WAS WEARING

Plaintiff, both before trial and now on appeal, has complained that the Defendants failed to sufficiently disclose that they were in possession of the firearm which was in Mr. Hill's possession at the time of the subject incident.

The fact that following the shooting the Sheriff's Office seized the Kel-Tec firearm that was in the possession of the decedent, as well as his clothing, is well documented and was known to Plaintiff's counsel throughout this litigation.

The Defendants served an initial Rule 26 disclosure dated May 20, 2016, which listed, among other things, all of the reports, inventory returns and criminal investigative materials associated with this shooting investigation. [R 205-1]. On that same date, the Plaintiff served, through counsel T.C. Roberts, the Plaintiff's Rule 26 Disclosure dated May 20, 2016 [R 15], wherein the Plaintiff listed, among other things, St. Lucie County Sheriff's Office Investigation Book regarding this shooting incident, which is approximately 300 pages in length, along with numerous St. Lucie County Sheriff's Office investigative reports, including the report of Deputy John Wise. [R 205-2]. The first page of Deputy Wise's report contains a description of some of the property that was seized by the Sheriff's Office at the time, including the Kel-Tec pistol. [R 205-3].

Additionally, the Defendants filed an exhibit and witness list in this matter [R 89-2], listing at the time, exhibits 17 and 18, described as "Evidence Lists (dated 2/13/14 10:15:52 am) (1 page)" and "Evidence List (dated 2/13/14) (2 pages)." Plaintiff did not object to Defendants' exhibits 17 and 18 at that time and made no further inquiry regarding what was in evidence. [R 205-4]. Those lists of evidence clearly reflect the existence of numerous items of physical evidence

seized by the Sheriff's Office at the time as well as their location within the Sheriff's Office, including the Kel-Tec firearm and Decedent's clothes.

Defendants also filed an Amended Exhibit and Witness List [R 160-2] on May 4, 2018, listing as exhibit 548, any items of physical evidence concerning the subject incident. Plaintiff did not object to this exhibit or make any inquiries regarding what the items of physical evidence consisted of. [R 205-7]. Furthermore, the decedent's then girlfriend, Terrica Monique Davis, was provided with a copy of the Inventory and Return regarding the execution of a search warrant, which reflects the seizure of the Kel-Tec handgun back in January of 2014. [R 205-8]. When Plaintiff disclosed Ms. Davis in her initial Rule 26 disclosures, the address provided for Ms. Davis was Plaintiff's counsel's law firm. [R 15, pgs. 1-2].

Furthermore, Plaintiff's expert, Roy Bedard, listed amongst the materials that he reviewed in preparation of his expert report, the 300 page St. Lucie County case file, which includes numerous reports and records reflecting that the Sheriff's Office seized the Kel-Tec firearm and several items of the Plaintiff's clothing, including his shorts. Plaintiff's expert made no inquiry or request to inspect any of the items of physical evidence that were seized at the time of the shooting incident or to inquire whether those items were still in the possession of the Sheriff's Office. In that regard, there is no evidence of record that counsel for the

Defendants are aware of, which would suggest to Plaintiff's counsel that any of the evidence seized as the result of this shooting incident was destroyed or lost, and further, the Sheriff's Office would retain such items of evidence as a matter of course, particularly in light of the fact that civil litigation was expected to follow and so as to avoid any issue of spoliation.

It is disingenuous to suggest, as Plaintiff's counsel has and does, that the Plaintiff or her counsel had no reason to believe that these items of evidence were still in the possession of the Sheriff's Office. In fact, in that regard, Plaintiff's counsel, almost a year and a half before trial, took the deposition of Sgt. Edgar Lebeau, the lead detective in the investigation of the subject shooting, on December 6, 2016. During that deposition, Plaintiff's counsel made inquiry of the Sergeant regarding the existence of the Sheriff's Office evidence room and who was in charge of that evidence room, including questions regarding whether the evidence in this case might still exist. The Sergeant advised that the Plaintiff's attorney would have to speak with the Sheriff's Office evidence personnel, and identified that person as Dawn Radke. [R 205-9]. Plaintiff's counsel made no attempt to follow up regarding this line of questioning and made no attempt to depose Ms. Radke.

Under these circumstances, the trial court held that whatever harm was caused by the Defendants' failure to explicitly list the firearm at issue as a separate

exhibit was harmless since the Plaintiff was "clearly put on notice that Defendants collected the gun and shorts following the incident and there was no indication to Plaintiff that the gun and shorts ever left Defendants' possession." [R 259, pg. 9]. It bears repeating that the Court's decision in this regard is reviewed for an abuse of discretion, a standard which "allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." Frazier supra 387 F.3d at 1259, see also Ledford v. Peeples, 605 F.3d 871, 922 (11th Cir. 2010) ("[T]he relevant question [when reviewing for abuse of discretion] is not whether we would have come to the same decision if deciding the issue in the first instance. The relevant inquiry, rather, is whether the district court's decision was tenable, or, we might say, 'in the ballpark' of permissible outcomes.").

The Plaintiff has failed to demonstrate that the district court abused its discretion in permitting the Defendants to show the jury the decedent's shorts and the firearm found in his possession as demonstrative aids.

IV. THE TRIAL COURT ENJOYS WIDE LATITUDE IN HOW IT CONDUCTS TRIAL AND THE PLAINTIFF HAS FAILED TO MEET HER BURDEN TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION BASED ON THE CONDUCT OF THE TRIAL

Plaintiff asserts the following three issues which all relate to the way the district court conducted trial in this matter as entitling her to a new trial: (1) permitting the defendants to conduct a demonstration to the jury regarding the

relative ease the decedent's firearm fit in his shorts; (2) permitting the Defendant Newman to materially change his testimony during trial; (3) and permitting defense expert's "contumacious testimony." (See Appellant's Brief at pg. 32).

Although it is not entirely clear, to the extent Plaintiff's appeal on these points is based on the trial court's denial of her Motion for New Trial, this Court reviews the trial court's decision for an abuse of discretion. That being said, when the errors claimed relate to "pernicious error in the conduct of the trial," the trial court enjoys great latitude, Cruthirds v. RCI, Inc., 624 F.2d 632, 635 (5th Cir. 1980), since the trial court is in the best position to determine the prejudicial impact of the error on the jury. O'Neil v. W.R. Grace & Co., 410 F.2d 908, 914 (5th Cir. 1969).

Federal Rule of Evidence 611(a) provides that:

> [t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611(a), Fed.R.Evid. As the Advisory Committee notes to Rule 611 explain, the judge is to employ "common sense and fairness in view of the particular circumstances" in ensuring the use of "procedures effective for determining the truth." Fed.R.Evid. 611(a) advisory committee's notes to 1972 amendment.

With that in mind, Defendants will address each of Plaintiff's contentions in

turn.

A. Firearm Demonstration

Plaintiff, at varying times during her case-in-chief, attempted to highlight what she perceived as the implausibility of Defendant Newman and Deputy Lopez's account of the incident specifically as it related to Mr. Hill's ability to have a gun in his hand when first confronted by the deputies and then for the gun to be found in Mr. Hill's pocket after being shot multiple times, including one shot which immediately incapacitated Mr. Hill. For example, Roy Bedard, Plaintiff's law enforcement expert, found it "curious" that the gun was found "clean" in Mr. Hill's back pocket and went so far as to describe it as a paradox. [R 181, pg. 135, lns. 14-19; pg. 181, ln. 15-pg. 183, ln. 2]. Plaintiff was clearly attempting to imply that Mr. Hill never held the gun at any point during his interaction with the deputies because he would not have had the time nor the opportunity to place the gun in his back pocket before being fatally wounded. In order to rebut this suggestion, it was appropriate for this Court to permit the Defendants to demonstrate to the jury how easily the gun fell into the relatively large back pocket of the shorts where the firearm was eventually found. This was especially true where the jury would not have had an opportunity to have the gun during jury deliberations for obvious reasons of safety and security or the shorts because they were contaminated with biohazardous material (blood).

In its Order denying Plaintiff's Motion for New Trial [DE 259], the trial noted that "[t]hroughout the trial, Plaintiff argued that Mr. Hill never had the gun in his hand but rather the gun remained in his pocket throughout the interaction with the deputies. *See, e.g.*, Trial Tr., May 17, 2018, at 214:2-10." [DE 259, pg. 10]. The trial court, in the best position to determine procedures effective for the truth, permitted the Defendants to rebut the suggestion on the part of the Plaintiff that the decedent could not have placed the firearm in his pocket by conducting a demonstration showing how easily the firearm dropped into the back pocket of the decedent's shorts, where the firearm was discovered. "Generally, a trial court has broad discretion regarding experiments it will allow in the presence of the jury." United States v. Rackley, 742 F.2d 1266, 1272 (11th Cir. 1984). The demonstration at issue involved the actual firearm involved in the subject incident and the actual shorts where the firearm was eventually discovered. Permitting the Defendants to conduct the demonstration was in accordance with the very nature of a trial as a search for the truth. Nix v. Whiteside, 475 U.S. 157, 158 (1986).

The trial court did not abuse its discretion by allowing the Defendants to conduct the demonstration. Nor did it do so by denying Plaintiff's Motion for New Trial based on its decision in that regard.

B. Defendant Newman's Testimony

Plaintiff contends she is entitled to a new trial based on her allegation that

Defendant Newman allegedly materially changed his testimony at trial from his previous deposition testimony specifically as it relates to Defendant Newman's perception as to how high Mr. Hill had raised his firearm. (See Appellant's brief at pg. 36). Even assuming that this were true (which it is not), a witness changing his testimony at trial is not grounds for a new trial. Rather, the appropriate remedy for when a witness changes his testimony is to impeach him on that inconsistency. Plaintiff cites to Traylor v. Pickering, 324 F.2d 655 (5th Cir. 1963) as support for her proposition. However in that case, where the Fifth Circuit reviewed a trial court's denial of a motion for new trial based on allegations that a witness had perjured himself, the reviewing court found that in cases where the testimony is merely different, a new trial is not warranted. Id. at 658. The Fifth Circuit further held that even assuming that the opposing party was surprised by the change in testimony, the objection should have been raised contemporaneously with the testimony and the failure to do so effectively waived the right to raise it post-trial as a trial error. Id. Here Plaintiff's counsel made no such objection during trial and therefore such an argument was waived.

As the trial court properly held in its Order denying Plaintiff's Motion for New Trial, "[i]f Defendant Newman had previously stated that Mr. Hill had raised the gun higher than he demonstrated during the trial, Plaintiff should have impeached him with his prior inconsistent statements. Certainly every change in a

witness's testimony cannot lead to a new trial." [R 259, pg. 15]. The district court did not abuse its discretion in so holding.

C. Defense Expert Christopher Lawrence

Plaintiff contends the trial court abused its discretion by denying her Motion for New Trial based on the alleged misconduct of the Defendants' police practices expert, Christopher Lawrence. Plaintiff supports these assertions by noting that Mr. Lawrence was able to hear defense counsel Bruce Jolly's questions on direct examination, but expressed difficulty in hearing Plaintiff's Attorney John Phillips during his cross-examination.

As an initial matter, Plaintiff has repeatedly misrepresented the issue of Mr. Lawrence's hearing issues. Both in her Motion for New Trial as well as in her Brief, Plaintiff asserts that Mr. Lawrence's "self-proclaimed hearing impairment...had never before been a problem at any stage in the proceedings." (See Appellant's Brief at pg. 40). This assertion is both wrong and easily disproved. In the Defendants' Response to Plaintiff's Motion for New Trial as well as in the Order Denying Plaintiff's Motion for New Trial, it was pointed out that Mr. Lawrence specifically informed Plaintiff's counsel of his hearing limitations at the very beginning of his deposition. [R 247, pg. 3; R 259, pg. 4]. The trial court also noted that Mr. Lawrence specifically cautioned Plaintiff's counsel about his hearing limitations before cross-examination began. [R 259, pg. 4].

The trial court also noted that it was not surprising that a witness would have some difficulty hearing one counsel but not another for a variety of reasons. [R 259-4]. Citing to the trial transcript, the Court also observed that Plaintiff's counsel only sought assistance from the Court once for non-responsiveness during Mr. Lawrence's cross examination, never moved to strike Mr. Lawrence's testimony or made any argument to the Court that the Plaintiff did not have a full opportunity to cross-examine Mr. Lawrence. [R 259, pgs. 4-6]. It bears repeating that the trial court is in the best position to evaluate whether Mr. Lawrence's actions prejudiced the Plaintiff. The Plaintiff has not demonstrated that the trial court abused its discretion in holding that "there was no impairment of her substantial rights" based on the conduct of Mr. Lawrence. [R 259, pg. 6].

V. THE COURT'S INSTRUCTIONS TO THE JURY ACCURATELY STATED THE LAW AND THE PLAINTIFF'S FAILURE TO OBJECT TO THE INSTRUCTION READ TO THE JURY LIMITS THIS COURT'S REVIEW OF THE ISSUE

Plaintiff next seeks reversal based on an alleged failure by the trial court to read the title to each of the instructions to the jury prior to deliberation. It is well settled that a trial court has broad discretion in formulating jury instructions. Christopher v. Cutter Laboratories, 53 F.3d 1184, 1190 (11th Cir. 1995)(internal citations omitted). Moreover, in determining the sufficiency of jury instructions, the instructions must be considered as a whole. "So long as the instructions accurately reflect the law, the trial court judge is given wide discretion as to the

style and wording employed in the instructions." Palmer v. Bd. of Regents of the University System of Georgia, 208 F.3d 969, 973 (11th Cir. 2000).

As the trial court noted in its Order Denying Plaintiff's Motion for New Trial, immediately following the Court's reading of the instructions, both parties were asked if the Court had read the instructions as discussed during the charge conference. [R 259, pg. 17]. Both parties agreed that the trial court had read the proper instructions. Next, the Court specifically asked if all objections to the instructions had been made on the record. [R 259, pg. 17]. Plaintiff raised no objection at that time as to the Court's failure to read the title of each instruction. [R-242, pg. 96, ln. 23-pg. 97, ln.3].

Pursuant to Federal Rule of Civil Procedure 51(c)(1), "[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Courts are required to interpret Rule 51's provisions strictly to ensure that a trial judge has an opportunity to correct any errors prior to jury deliberations. Landsman Packing Co. v. Continental Can Co., 864 F.2d 721, 726 (11th Cir. 1989). A party who fails to raise an objection to a verdict form interrogatory or jury instruction prior to jury deliberations waives the right to challenge the instruction post trial. Wood v. Pres. and Trustees of Spring Hill College in City of Mobile, 978 F.2d 1214, 1221 (11th Cir. 1992). The time to make her objection to the trial court's failure to read the title

of the jury instruction was during trial which would have allowed the trial court to correct the error if necessary. Further, as the trial court also noted, the title of each instruction was provided to the jury during its deliberations mitigating any prejudice which may have been caused by the trial court's failure to read each title page. [R 259, pg. 17].

Plaintiff has not met her burden of demonstrating that the trial court abused its discretion by denying Plaintiff's Motion for New Trial based on the trial court's reading of the jury instructions.

VI. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S VERDICT

Plaintiff challenges the trial court's denial of her Motion for New Trial based on her assertion that the jury's verdict was against the greater weight of the evidence. As Plaintiff correctly concedes, a new trial is not proper simply because the moving party believes her evidence is stronger than her opponents. Despite this concession, Plaintiff engages in a recitation of her experts' testimony as well as an inaccurate description of eyewitness testimony[3] before declaring that no rational jury could have found as they did.

Plaintiff's misrepresentation of certain testimony and cherry picking other evidence the jury heard which was favorable to her while suggesting that the jury

---

[3]The trial court rejected Plaintiff's description of eyewitness testimony regarding whether or not Mr. Hill had the gun in his hand. See R-259, pg. 22 for an accurate description of eyewitness testimony in that regard.

ignored it does not entitle her to a new trial. Indeed, the jury was entitled to reject Plaintiff's evidence even if it were un-rebutted if it chose to. See Murphy v. City of Flagler Beach, 846 F.2d 1306, 1310 (11th Cir. 1988) ("[t]he jury was not bound to accept the plaintiff's evidence...even if it was not controverted."); Gregg v. U.S. Industries, Inc., 887 F.2d 1462, 1470 (11th Cir. 1989) ("Even uncontradicted expert opinion testimony is not conclusive, and the jury has every right not to accept it.").

The jury heard testimony that Mr. Hill's blood alcohol content was over four times the legal limit to operate a vehicle in Florida at the time of the incident [R 241, pg. 69, lns.8-10]; that Mr. Hill was playing music at an extremely loud volume which would have inhibited his ability to hear verbal commands especially in light of Mr. Hill's intoxication [R 241, pg. 143, lns.10-22]; that Mr. Hill was holding a gun when he opened his garage door [R 239, pg. 208, lns. 22-25; R 241, pg. 136, lns. 17-19]; that Deputies Newman and Lopez, who were dressed in Sheriff's Office uniforms, ordered Mr. Hill to drop his gun; that rather than dropping his gun, Mr. Hill closed the garage door while simultaneously raising the gun in the direction of Deputy Lopez [R 241, pg. 136/ln. 15- pg. 137/ln. 10; pg 156, lns. 6-13].

It is not enough, as Plaintiff has attempted to do here, for an appellant to claim that much of the evidence was disputed and that some of the evidence supported the appellant's position. Ramirez v. E.I.DuPont de Nemours & Co., 579 F. App'x 878, 884 (11th Cir. 2014). As this Court has noted, "[a]n appellate court is

particularly ill-suited to the task of judging the credibility of a witness because, unlike the district court, we do not have the benefit of observing the witness while he testifies and assessing his demeanor." Amegy Bank Nat'l Ass'n v. Deutsche Bank Alex.Brown, 619 Fed. Appx. 923, 927 (11th Cir. 2015).

The trial court properly found that the jury's verdict was not against the great weight of the evidence [R 259, pg. 23] and the Plaintiff has not demonstrated that the trial court abused its discretion in so ruling.

VII. THE CUMULATIVE ERROR DOCTRINE DOES NOT SUPPORT REVERSAL

In Plaintiff's final section, Plaintiff asserts, in general and conclusory fashion with minimal argument, that the cumulative effect of the errors asserted in her brief deprived her of a fair trial and entitles her to a new trial under the cumulative error doctrine. As an initial matter, the cumulative error doctrine has historically operated to the benefit of criminal defendants and has been rarely applied in civil cases. See Grieg v. Botros, 525 F. App'x 781, 795 (10th Cir. 2013). Further, a threshold requirement of the cumulative error doctrine is a demonstration that multiple errors in fact occurred. United States v. Waldon, 363 F.3d 1103, 1109 (11th Cir. 2004) ("The flaw in [the movant's] argument, however, is that none of these 'factors,' taken on their own, are legal errors. Therefore, these factors taken together do not 'cumulatively' become errors merely because they occurred contemporaneously.").

As argued above, the Plaintiff has not demonstrated that any errors occurred

at all and she certainly has not met her burden of demonstrating her substantial rights were affected that would justify disturbing the jury's verdict in this case. See United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005) ("The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error-courts look to see whether the [movant's] substantial rights were affected.").

CONCLUSION

For the reasons outlined above, the district court's Order granting final judgment in favor of the Defendants should be affirmed.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to FRAP 32(a)(7)(B) and 11th Cir.R.32-4 regarding type volume limitations, according to the word processor program used to create the foregoing, this Initial Brief contains 8836 words.

/s/ Summer M. Barranco
SUMMER M. BARRANCO, Esq.
Florida Bar No.: 984663
GREGORY J. JOLLY, Esq.
Florida Bar No.:118287
PURDY, JOLLY, GIUFFREDA, BARRANCO & JISA, P.A.
2455 East Sunrise Boulevard, Suite 1216
Fort Lauderdale, Florida 33304
Telephone: (954) 462-3200
Telecopier: (954) 462-3861
Attorneys for Defendants-Appellees Sheriff Ken J. Mascara, in his Official Capacity as Sheriff of St. Lucie County, Florida and Christopher Newman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of March, 2019, a true and correct copy of the foregoing has been e-filed via CM/ECF, and copies sent by Federal Express, U.S. Mail, or by email to:

By Federal Express, seven (7) copies to:
Clerk of the United Stated Circuit Court
US Courts of Appeals, Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

By US mail to:
Law Office of John M. Phillips, LLC
John M. Phillips, Esq., and
Kirby W. Johnson, Esq.
4230 Ortega Boulevard
Jacksonville, FL 32210

/s/ Summer M. Barranco
SUMMER M. BARRANCO, Esq.
Florida Bar No.: 984663
GREGORY J. JOLLY
Florida Bar No.:118287
PURDY, JOLLY, GIUFFREDA, BARRANCO & JISA, P.A.
2455 East Sunrise Boulevard, Suite 1216
Fort Lauderdale, Florida 33304
Telephone: (954) 462-3200
Telecopier: (954) 462-3861
Attorneys for Defendants-Appellees Sheriff Ken J. Mascara, in his Official Capacity as Sheriff of St. Lucie County, Florida and Christopher Newman