CASE NO. 18-13902-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiff-Appellant,

v.

SHERIFF KEN MASCARA, in his Official Capacity as Sheriff of St. Lucie County and CHRISTOPHER NEWMAN,

Defendants/Appellees.

On Appeal from the United States District Court for the Southern District of Florida Fort Pierce Division
Case No. 2:16-cv-14072

INITIAL BRIEF OF APPELLANT VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR.

JOHN M. PHILLIPS, ESQUIRE
Florida Bar Number: 0477575
KIRBY W. JOHNSON, ESQUIRE
Florida Bar Number: 113323
LAW OFFICES OF JOHN M. PHILLIPS
4230 Ortega Boulevard
Jacksonville, FL 32210
(904) 444-4444
(904) 508-0683 (facsimile)
Attorneys for Appellant Viola Bryant

Viola Bryant as Personal Representative of the Estate of Gregory Vaughn Hill, Jr.
Case No. 18-13902-E

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff/Appellant, VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR., by and through her undersigned counsel, hereby discloses the following Interested Persons pursuant to FRAP 26.1:

1. Barranco, Summer M., Esquire, Counsel for Defendants/Appellees Christopher Newman and Sheriff Ken Mascara
2. Bryant, Viola, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr., Plaintiff/Appellant
3. Johnson, Kirby W., Esquire, Counsel for Plaintiff/Appellant
4. Jolly, Bruce W., Esquire, Counsel for Defendants
5. Jolly, Gregory J., Esquire, Counsel for Defendants
6. Law Office of John M. Phillips, LLC
7. Mascara, Sheriff Ken, in his official Capacity as Sheriff of St. Lucie County, Defendant/Appellee
8. Newman, Christopher, Defendant/Appellee
9. Phillips, John M., Esquire, Counsel for Plaintiff/Appellant
10. Purdy, Jolly, Giuffreda, Barranco & Jisa, P.A.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Viola Bryant, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr., request oral argument. The Final Judgment on appeal deals with questions of law regarding the admissibility of certain evidence and testimony. Oral argument will aid this Court in resolving these legal questions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to Title 28 U.S.C. § 1331 and 28 U.S. Code § 1291.

This Court has jurisdiction over this appeal of the Final Judgment from the district court trial in which it was ordered and adjudged that Plaintiff, Viola Bryant, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr., take nothing by this action and that Defendants, Sheriff Ken Mascara in his official capacity as Sheriff of St. Lucie County, and Christopher Newman, an individual, shall go hence without delay. This appeal was timely filed on September 11, 2018. [R-263]

PRELIMINARY STATEMENT

Reference to pleadings and other court papers in this Initial Brief will be made by referring to the document number, and page number within the document, or by document number, exhibit to that document, page number and line number as appropriate. [R-__-pg.____/lines___].

Viola Bryant, as the Personal Representative of the Estate of Gregory Vaughn Hill, Jr. was the Plaintiff below and will be referred to as "Appellant" or "Plaintiff". Christopher Newman was a Defendant below and he will be referred to in this brief as "Appellee" or "Defendant Newman." Sheriff Ken Mascara, in his Official Capacity as Sheriff of St. Lucie County was a Defendant below and he will be referred to in this brief as "Appellee" or "Defendant Mascara."

STATEMENT OF THE ISSUE

The district court erred by admitting certain evidence and testimony throughout the trial. Specifically, the District Court erred in the following ways 1) by allowing the Defendants to introduce evidence of Mr. Hill's probationary status at the time of the incident; 2) by allowing the Defendants to introduce the admittedly inaccurate expert testimony of defense expert Sergeant Kyle King; 3) by permitting the defense to use an undisclosed firearm as a demonstrative aid, 4) by permitting Defendant Christopher Newman to materially change his testimony; 5) by allowing Defense expert witness Christopher Lawrence to provide improper testimony; 6) by failing to accurately inform the jury of all jury instructions; 7) by issuing a final verdict that is against the clear weight of the evidence; and 8) by depriving Plaintiff of her right to a fair trial.

STATEMENT OF THE CASE

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

On or about January 8, 2016, Plaintiff Viola Bryant filed in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida a Complaint which named as defendants St. Lucie County Sheriff Ken J. Mascara and Christopher Newman [R-1]. On March 9, 2016, this matter was removed to the U.S. District Court, Southern District of Florida (Ft. Pierce) Division. [R-1].

In the Complaint, Plaintiff brought 4th and 14th Amendment claims pursuant to Title 42 U.S.C. § 1983 against Defendant Deputy Christopher Newman, a deputy in the employ of the St. Lucie County Sheriff's Office, in his individual capacity and the Sheriff of St. Lucie County as well as two state law claims of negligence and a state law claim for Battery. [R-1] The Defendants filed their Answers and Defenses, wherein they generally denied the material allegations and raised various affirmative defenses. [R-6 and R-7].

During the discovery phase, Plaintiff requested the deposition of Defendant Ken Mascara and other witnesses to the incident. The trial court denied Plaintiff's request for these depositions. [R-34, R-119]

Trial was held on May 17, 2018 thru May 24, 2018. Following this six day trial, the jury rendered a verdict in favor of the Defendants. [R-223] The jury determined that Defendant Christopher Newman did not intentionally commit acts

that violated Gregory Vaughn Hill, Jr.'s right to be free from excessive force. [R-223-pg.1].

In addition, the jury determined that Sheriff Ken Mascara in his Official Capacity as Sheriff of St. Lucie County, through his deputy Christopher Newman, was a legal cause of Gregory Vaughn Hill Jr.'s injuries. [R-223-pg.4] However, the jury also determined that Mr. Hill was 99% comparatively negligent for his injuries and 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, Gregory Vaughn Hill, Jr. was more than 50% at fault for this incident and his resulting injuries. [R-223-pg.4]

In addition, the jury held that the total amount of damages sustained by the Estate of Gregory Vaughn Hill, Jr. was one dollar for funeral expenses; despite undisputed evidence that funeral expenses were $11,352.00. [R-238-pg.260/lines 2-8] Furthermore, the jury awarded a single dollar for each of Mr. Hill's three young children. [R-223-pg.4]

Following the verdict, a documentary crew received the following statements by one juror: "And then there's two stubborn people in there that pissed me off (laughs) that they said they had their minds made up from the beginning and that's what irritated me"; "And then they're just – they weren't going to budge whatsoever no matter what I – I tried explaining everything and they just…two of

them just wouldn't budge."; "I'm not going to be partial for any party and some of the jurors were like that right from the bat."; "They were con- considered under oath but they said they weren't going to be that way and they were once we got in the jury."; "(Mr. Phillips) didn't have them sold because they already had their minds made up."; "Because we brought it up and we're in the middle of negotiating, um, someone had brought up, was like well did- did it- do you guys already have your minds made up before you've seen any like…before you even deliberate, before you seen any evidence, and it was like yeah they are al- they were basically- they were like, "Yeah we already had our minds made up who's side we were on." I was like you guys just took partial sides, and just right off red, and the judge asked you guys not to make sure you guys are going to be fair and you guys weren't." [R-253]

After receiving this information, Plaintiff moved to interview the jury. [R-253] Plaintiff's request was denied. [R-258]. Plaintiff also moved for a New Trial and Plaintiff's request was denied. [R-259]

II. Statement of the Facts

1. On January 14, 2014, at approximately 3:00 p.m., Gregory Vaughn Hill Jr. was shot and killed in his home by St. Lucie County Sheriff's Deputy Christopher Newman, at approximately 3:15-3:20. [R-177-pg. 1/¶2] Earlier that day, Mr. Hill was at his residence in his garage listening to music. [R-177-pg. 1/¶2]

2. Responding to a noise complaint from a parent at the elementary school across the street, Deputy Christopher Newman and Deputy Edward Lopez arrived at Mr. Hill's residence. [R-177-pg. 1/¶2]

3. Upon arriving at Mr. Hill's home, Deputies Newman and Lopez attempted to make contact with any occupants of the home where the music was emanating from [R-177-pg.3]

4. Deputy Lopez knocked on the garage door to the home while Deputy Newman knocked on the front door. [R-177-pg.3] Neither deputy knew that Mr. Hill was the resident owner of the home. [R-177-pg.3]

5. Mr. Hill opened the garage door to approximately waist height and then quickly closed the door. [R-177-pg.3] Just seconds later, Deputy Newman fired several shots into the garage door, killing Mr. Hill. [R-177- pg.3]

6. Deputy Newman and Deputy Lopez claimed that Mr. Hill was holding a gun when he raised the garage door and raised the gun in the direction of Deputy Lopez while manually closing the garage door. [R-177-pg.3]

7. Deputy Newman claimed that because Mr. Hill was raising the gun in the direction of Deputy Lopez, he feared for both his and Deputy Lopez's safety. [R-177-pg.3] As a result, Deputy Newman fired four rounds of forty-caliber bullets through the closing/closed garage door. [R-177-pg. 2]

8. The shots fired by Deputy Newman killed Mr. Hill. [R-177 pg. 2]

9. Responding officers who entered Mr. Hill's home after the shooting documented a black handgun tucked in Mr. Hill's back pocket of his loose fitting jeans. [R-177-pg.2] As to the gun found in Mr. Hill's pocket, there was no blood or brain splatter found on the gun despite allegedly being near the area Mr. Hill was shot. [R-177 – pg.2].

10. The Plaintiff, Viola Bryant, as Personal Representative for the Estate of Gregory Vaughn Hill, Jr., brought a claim against Defendant Newman pursuant to 42 U.S.C. Section 1983, alleging that Gregory Hill was subjected to the use of excessive force when he was shot multiple times by Defendant Newman. [R-1-pg. 5/¶23] The Plaintiff also brought a state law wrongful death claim against Defendant Sheriff. The Defendants' denied the Plaintiff's allegations and affirmatively asserted that only a reasonable and necessary amount of force was used upon him. [R-6]

III. Standard of Review

Abuse of discretion is the proper standard of review of district court's evidentiary rulings. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 142, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)

SUMMARY OF THE ARGUMENT

The district court erred by admitting certain evidence and testimony throughout the trial. Specifically, the District Court erred in the following ways: 1) by allowing the Defendants to introduce evidence of Mr. Hill's probationary status at the time of the incident; 2) by allowing the Defendants to introduce the admittedly inaccurate expert testimony of defense expert Sergeant Kyle King; 3) by permitting the defense to use an undisclosed firearm as a demonstrative aid, 4) by permitting Defendant Christopher Newman to materially change his testimony; 5) by allowing Defense expert witness Christopher Lawrence to provide improper testimony; 6) by failing to accurately inform the jury of all jury instructions; 7) by issuing a final verdict that is against the clear weight of the evidence; and 8) by depriving Plaintiff of her right to a fair trial.

ARGUMENT AND CITATIONS TO AUTHORITY

I. THE DISTRICT COUR ERRED IN ADMITTING EVIDENCE OF MR. HILL' S PROBATIONARY STATUS

The United States Supreme Court has set forth the standard by which a jury is to judge Defendant Newman's actions at the time he fired the fatal shot. The question the jury was asked to answer is whether or not Defendant Newman acted objectively reasonable in light of the facts and circumstances confronting him. *See Graham v. Connor*, 490 U.S. 386 (1989).

Defendant Newman was responding to a noise complaint and was admittedly unaware of Mr. Hill's probationary status at the time he fired the fatal shot. [R-241-pg.191/lines 7-16] As such, Mr. Hill's probation status was not a known fact or circumstance confronting Defendant Newman.

Prior to trial, Plaintiff moved to exclude evidence of Mr. Hill's probationary status. [R-186] Immediately prior to jury selection, the trial court held a brief hearing on the matter. Plaintiff argued that evidence of Mr. Hill's probationary status at the time of shooting was irrelevant, unfairly prejudicial, and constituted inadmissible character evidence. As discussed below, Plaintiff relied upon the Seventh Circuit opinion in *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) in support of her motion.

Defendants argued that evidence of Mr. Hill's probationary status was admissible because it was relevant to Mr. Hill's motive to quickly close the garage

door and further supported the defense theory of the case. In support of their argument, Defendants relied on the Seventh Circuit's later decision in *Escobedo v. Martin*, 728 F.3d 388 (7th Cir. 2012). Minutes before the hearing, Defense counsel provided a copy of the nineteen page *Escobedo* opinion to Plaintiff. Plaintiff was not given an opportunity to read the *Escobedo* opinion prior to oral arguments and Defendants did not bring forth the negative aspects of Escobedo to their case.

Defendants' grossly misstated the holding of *Escobedo* and argued that evidence of Mr. Hill's probationary status is admissible under *Escobedo* because it was potentially relevant to Mr. Hill's motive and/or intent. As discussed below, this Trial Court's reliance on Defendants' argument and *Escobedo* was misplaced under the facts of this case.

The Sherrod Case

As stated previously, Plaintiff relied on *Sherrod* in support of their motion to exclude evidence of Mr. Hill's probationary status because it was admittedly unknown by Defendant Newman at the time of the shooting. *Sherrod*, a 42 U.S.C §1983 excessive force civil rights case, states the general rule concerning the admissibility of evidence outside of the shooting officer's knowledge at the time he fires. *Sherrod* held in pertinent part:

> "Knowledge of facts and circumstances gained after the fact… has no place in the trial court's or jury's proper post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise… the jury would possess more information than the officer possessed

> when he made the crucial decision. Thus, we are convinced that **the objective reasonableness standard…requires that Officer Berry's liability be determined exclusively upon an examination and weighing of the information Officer Berry possessed immediately prior to and at the very moment he fired the fatal shot**. The reception of evidence or any information beyond that which Officer Berry had and reasonably believed at the time he fired his revolver is improper, irrelevant and prejudicial to the determination of whether Officer Berry acted reasonably "under the circumstances." *Sherrod* at 804. *(emphasis added)*

In addition to this general rule, the *Sherrod* opinion also enumerated two exceptions.

> "Our holding today should not be interpreted as establishing a black-letter rule precluding the admission of evidence which would establish whether the individual alleging a § 1983 violation was unarmed at the time of the incident. Clearly, the **credibility of the witness** "can always be attacked by showing that his capacity to observe, remember or narrate is impaired." 3 Weinstein's Evidence ¶ 607[04] p. 607–55. Further, "**impeachment by contradiction** is a technique well recognized in the federal courts by which specific errors in the witness's testimony are brought to the attention of the trier of fact." *Id.* at 806 *(emphasis added)*

The Escobedo Case

In *Escobedo*, the Seventh Circuit applied the *Sherrod* rule and exceptions when tasked with determining if the trial court committed reversible error in admitting evidence of the decedent Plaintiff's then-upcoming court date and potential five-year prison sentence for his recent substance abuse violations. The defendant officer was admittedly unaware of the decedents' pending trial date at the time of the shooting. The court properly admitted the evidence, even though it

was unknown by the officer at the time of the shooting, because Plaintiff's estate "opened the door" and the evidence was used to impeach and attack the credibility of a testifying witness. *Escobedo* at 398.

On appeal, the Seventh Circuit held that because one of Plaintiff's witnesses opened the door "to [the decedents] demeanor and state of mind, the defense has an opportunity to now examine it on cross to determine whether or not this witness was aware that [the decedent] had these other events and situations in his life at the same approximate time." *Escobedo*, at 400. Significantly, it was only after the Plaintiff opened the door to Plaintiff's state of mind that the contested evidence fell within one of the exceptions to the *Sherrod* rule and was admitted.

The court went on to explain,

> "[W]hen a party opens the door to evidence that would be otherwise inadmissible, that party cannot complain on appeal about the admission of that evidence." *Griffin v. Foley*, 542 F.3d 209, 219 (7th Cir. 2008) (quotations omitted). And when a party puts evidence at issue that party must "accept the consequence[s]" of opening the door to that evidence. S.E.C. v. Koenig, 557 F.3d 736, 740-41 (7th Cir. 2009). The Estate opened the door to evidence concerning Escobedo's state of mind when it questioned [the sister] about it." *Id. (emphasis added)*

Unlike the present case, evidence unknown to the shooting officer was admitted in *Escobedo* because it fell within one of the two enumerated exceptions to the *Sherrod* rule. The evidence was used to impeach and challenge the credibility of Escobedo's sister who testified and opened the door regarding "her

brother's demeanor and state of mind." *Escobedo* at 398. The *Escobedo* court did not admit evidence of decedent Plaintiff's then upcoming court date and potential five-year prison sentence because it was potentially relevant to the decedent's motive or intent.

Here, Defendants' reliance on *Escobedo* is wholly inapplicable because Plaintiff never opened the door to evidence of Mr. Hill's state of mind. At the time evidence of Mr. Hill's probation was deemed admissible, no witness had even taken the stand. [R-238 p.272/lines 14-18] As such, neither of the two exceptions enumerated in *Sherrod* and *Escobedo* applied.

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. Evidence of Mr. Hill's probationary status was clearly admitted in error, over objection, and convicted Mr. Hill's character.

The Knight Case

After the verdict was rendered in the underlying action, Plaintiff filed a Motion for New Trial. As grounds for warranting a new trial, Plaintiff again asserted that evidence of Mr. Hill's probationary status should not have been admitted because it was unknown by Defendant Newman at the time he fired his

fatal shot and was irrelevant, unfairly prejudicial, and constituted inadmissible character evidence.

To justify the decision to allow the introduction of evidence regarding Mr. Hill's probationary status at the time of the incident, the Court cited *Knight through Kerr v. Miami-Dade Cnty.*, 856 F.3d 795 (11th Cir. 2017). *Knight* was, in part, a 42 U.S.C. § 1983 claim brought by the decedent's estate against the Miami-Dade police department after the decedent was shot by an officer while in his vehicle. The Defendant Officer's version of events was that the decedent's vehicle "accelerated backward, causing the car to swing toward the officer standing by the driver's side window. The officer quickly moved to avoid being struck by the car, and then both officers began firing into the moving vehicle." *Id*. at 804.

The Plaintiff argued a second version of events. The Plaintiff argued that "after [the officer] shot, [the driver's] body slumped forward and to the right; the car then began to accelerate in reverse. The path of the reversing car forced the officer who had fired on the driver to quickly move to avoid being struck by the car." *Id* at 804.

In an effort to bolster and add credibility to the Defendant Officer's version of events, the Defendants in *Knight* introduced evidence of the decedent's most recent felony conviction and probation restrictions. *Id. at 816* The Eleventh Circuit ultimately upheld the trial court's decision to introduce this evidence because 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 816*. As such, evidence of the decedents past criminal history was relevant to his motive to instigate the incident and thus supported the Defense theory of the case.

During the *Knight* analysis, the Eleventh Circuit held that two rules of evidence specifically relate to criminal-history evidence. The first, Rule 404(b) govern evidence of prior crimes, wrongs, or acts, and it provides that "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, this evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2).

The Eleventh Circuit ultimately held that the decedent's most recent felony conviction was admissible in *Knight* because it "established [the decedents] motive to flee from the Officers." Id. at 816. In other words, evidence of the decedent's most recent criminal conviction provided a motive to flee from the officers and was therefore probative because it supported the Defendant's version of events, i.e. the decedent instigated the incident.

In the present case, in its order denying Plaintiff's motion for new trial, the trial court asserted that "evidence of Mr. Hill's probationary status was probative of his motive to close the garage door and put the gun in his back pocket, in order to avoid jeopardizing his probationary status." [R-259-pg. 13] The Court went on to hold that "Evidence of Mr. Hill's probationary status was probative of the defense theory of the case – that Mr. Hill answered the garage door with a gun in his hand and then placed it in his back pocket." [R-259-pg. 13]

The Trial Court misapplied the holding in *Knight* to the facts of this case. In the present case it was an undisputed fact that Mr. Hill quickly closed the garage door. [R-177] Because this fact is undisputed, evidence of Mr. Hill's motive behind why he closed the garage door is of no probative value to any issue of the case. Unlike *Knight*, the fact that Mr. Hill was on probation at the time and thus potentially had a motive to close the garage door does not, in any way, bolster the credibility of the Defense witnesses or theory of the case. The fact that Mr. Hill closed the garage door quickly is undisputed. [R-177]

In addition, the Trial Court misapplied the holding in *Knight* to the facts of this case because the Trial Court misinterpreted the Defense's theory of the case. The Defense's theory of the case, since day one, has been that Mr. Hill opened the garage door, and quickly slammed the garage door. [R-177] As Mr. Hill was slamming the garage door, he was simultaneously raising a gun in the direction of

Deputy Lopez. Thus, Officer Newman's actions of firing four rounds of forty caliber bullets through a closed garage door was justified because Mr. Hill was raising a gun in the direction of Deputy Lopez, not placing the gun in his back pocket. [R-68-Exhibit "A" – pg.46/lines 15-20; Exhibit "C"-pg. 37/lines 13-21, pg. 40/lines 11-16].

The Defense's theory of the case was not, and has never been, that Mr. Hill closed the garage door quickly and put the gun in his back pocket. [R-241 pg. 137/lines4-7; pg. 143/lines 4-9; pg. 148/lines 13-16; pg. 156/lines 5-13]. Had the defense theory truly been that Mr. Hill closed the garage door quickly and put the gun in his back pocket, then Plaintiff would have moved for a directed verdict on liability because it is objectively unreasonable for a police officer to shoot and kill someone through a closed garage door because they were putting a gun in their back pocket.

The only probative value that arises from the introduction of Mr. Hill's probation status would support the argument that Mr. Hill closed the garage door and placed the gun in his back pocket in an effort to avoid detection from the police. However, in this case, evidence of Mr. Hill's probation was not admitted for that purpose because that was not the defenses theory. The defense's theory was that Mr. Hill quickly shut the garage door while simultaneously raising the gun in the direction of Deputy Lopez, thus justifying Deputy Newman's decision

to use lethal force and kill Gregory Vaughn Hill, Jr. [R-68-Exhibit "A" – pg.46/lines 15-20; Exhibit "C"-pg. 37/lines 13-21, pg. 40/lines 11-16; R-241 pg. 137/lines4-7; pg. 143/lines 4-9; pg. 148/lines 13-16; pg. 156/lines 5-13]. Unlike *Knight*, evidence of Mr. Hill's probationary status does not support the defenses theory and thus has no probative value.

Substantial Prejudicial Impact

Not every evidentiary error, of course, requires reversal. The eleventh circuit has held that a new trial is warranted where the error has caused substantial prejudice to the affected party (or, stated somewhat differently, affected the party's "substantial rights" or resulted in "substantial injustice"). *See, e.g. Hall v. United Ins. Co. of America*, 367 F.3d 1255, 1258–59 (11th Cir.2004) ("substantial prejudice"). Notwithstanding the difference in terminology, the inquiry is always directed to the same central question—how much of an effect did the improperly admitted or excluded evidence have on the verdict? *See*, *Peat Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154-62 (11th Cir. 2004).

To answer this question, the court weighs a number of factors, including the closeness of the factual disputes, the prejudicial effect of the evidence, whether counsel intentionally elicited the evidence, whether counsel focused on the evidence during the trial, and whether any cautionary or limiting instructions were given. *Id.*

Evidence that Mr. Hill was on probation at the time of his death is extremely prejudicial because it informed the jury that Mr. Hill was a past criminal. *See U.S. v. Beck*, 625 F.3d 410, 416 (7th Cir. 2010) ("Here, while there was not an explicit statement that [plaintiff] was previously convicted of a crime, most jurors would likely understand that a person on probation has previously been convicted of a crime.") Significantly, in thirty years of life, Mr. Hill was never convicted of a felony. Mr. Hill was on probation for a crime where he pled nolo contendere and adjudication of guilt was withheld. *See* Florida Statute 90.410 (Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charge or any other crime is inadmissible in any civil or criminal proceeding.)

Nevertheless, by introducing evidence that Mr. Hill was on probation, Defendants prejudicially informed the jury that Mr. Hill was a past criminal. Making matters worse, in their case in chief, Defendants' could not actually prove Mr. Hill was on probation as there was evidence of a prior automatic termination.

In addition to informing the jury that Mr. Hill was a past criminal, Defendants submitted evidence that at the time of the shooting Mr. Hill was actively committing the separate and unrelated crime of violating the terms of his probation. Defense witness Niles Graben testified that as a condition of Mr. Hill's probation, he was prohibited from consuming alcohol and possessing a firearm. [R-

240-pg.129/lines 4-11] Over Plaintiff's objection, Defendants' introduced evidence that Mr. Hill's blood alcohol level was over three times the legal limit to drive. [R-241-pg. 68/lines 5-9] Also, numerous defense witnesses testified that a gun was recovered in Mr. Hill's back pocket. [R-240-pg.217/Lines 16-20] By allowing evidence of Mr. Hill's probation restrictions in effect at the time of the incident (no alcohol and no firearm), the jury was plainly aware that, according to law enforcement officials, Mr. Hill was actively committing the crime of violating the terms of his probation at the time of the shooting.

Defendant Newman was investigating a loud noise complaint, not a probation violation. Mr. Hill was shot and killed before he was arrested, charged or convicted of violating the terms of his probation. [R-241-pg. 191/lines 7-12] Nevertheless, the jury was allowed to hear testimony from law enforcement officers that Mr. Hill was actively committing the completely unrelated crime of violating his probation at the time of the shooting. [R-240-pg.129/lines1-14] This evidence was unknown by Defendant Newman at the time he made the decision to use lethal force. Informing the jury of Mr. Hill's probationary status amounts to nothing short of a substantial injustice.

In addition, Mr. Graben's testimony made Mr. Hill's probationary status a central issue of the trial. The prejudicial impact of admitting such evidence is that it confuses the jury as to the issues of the present 42 U.S.C. § 1983 and the

Negligence case. The issue of the trial is whether or not Defendant Newman violated Mr. Hill's constitution rights and/or was negligent, not whether Mr. Hill violated the terms of his probation. Courts have prohibited evidence of probation restrictions for this very purpose. *See U.S. v. Becker*, 490 F. Supp.2d 1029 (N.D. Iowa 2007) ("Ultimately, the court concludes that evidence of [litigants] probation status should be excluded, because the serious potential prejudice arising from the possibility that the jurors might convict [litigant] of the charged offenses for the unrelated reason that he violated the terms of his probation, rather than on the basis of evidence of charged wrongdoing, exceeds the relatively limited probative value of such evidence, if any.")

The jury verdict itself is evidence that the precise pitfall cautioned in *Becker* happened here. The jury ultimately determined that Mr. Hill's constitutional rights were not violated and that he himself was 99% comparatively negligent. [R-223] While Mr. Hill may have been 99% responsible for violating the terms of his probation (if he was even on probation), the clear weight of the evidence demonstrates that he was not 99% responsible for being shot three times through a closed garage door.

In an effort to reduce the prejudicial impact of this probation evidence, the court offered a limiting instruction which stated: "Ladies and gentlemen, as you have heard, Mr. Hill was on probation. This evidence is only admissible to the

extent that you think it is relevant to Mr. Hill's actions on the date of the incident. It is not to be considered for any other purpose. What Mr. Hill was on probation for is irrelevant and should not be considered by you." [R-239 pg. 150/lines 10-14]

The courts limiting instruction did nothing to quell the prejudicial impact of informing the jury that Mr. Hill was a criminal. It also did not delineate the relative inadmissibility probation had in the federal versus state law claim. The jury was informed that Mr. Hill was a criminal, but they were not aware as to what crime he committed. In addition, the jury was allowed to consider Mr. Hill's probationary status as it related to "Mr. Hill's actions on the date of the incident." Based on the admissibility of the probation restrictions in effect, the jury was allowed to consider that Mr. Hill's actions of drinking and possessing a handgun equates to actively committing the unrelated crime of violating the terms of his probation. The introduction of probation evidence substantially deprived Mr. Hill of a fair trial and turned a 42 U.S.C. § 1983 and negligence trial, into a probation violation trial. It improperly devalued Mr. Hill's life which lead to a jury holding that Mr. Hill's children's pain and suffering from losing that life was merely $1.00 per child. [R-223]

II. THE DISTRICT COURT ERRED IN ADMITTING THE EXPERT WITNESS TESTIMONY OF SERGEANT KYLE KING

At trial, Defendants called Sergeant Kyle King of the Indian River Sheriff's office to testify as an expert witness. According to Defendants expert witness disclosure, Sgt. King's testimony was limited to "his knowledge regarding reconstruction of the subject incident." [R-227] At trial, Sgt. King testified that he reconstructed the incident in the form of a PowerPoint presentation. R-240-pg. 41/line 2]

The PowerPoint consisted of several animated images depicting the garage door open with the gun aimed in the direction of Deputy Lopez and parallel to the ground. When asked how he determined the gun was pointed at Deputy Lopez, Sgt. King testified that he relied on Defendant Newman's statements made to other SLCSO officers. [R-241-pg. 28/lines 12-17]

Rule 702 of the Federal Rules of Evidence, which controls the admission of expert testimony states in pertinent part:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702; *see also Daubert v. Merrell*

> *Dow Pharm., Inc*., 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In the present case, the accident reconstruction prepared by Sgt. Kyle King was not based upon Sgt. King's expert scientific, technical or other specialized knowledge. Rather, Sgt. King's opinions were formed from looking at the work product of the Defendants. Sergeant Kyle King never went to the crime scene. [R214-pg.28/lines 12-14]

In addition, Sgt. King's testimony was not based on sufficient facts or data. The entirety of Sgt. King's opinions was based upon a single version of the events provided to him by the Defendants. [R214-pg.28/lines 12-14]

Critically, Sgt. Kyle King did not reliably apply the principles and methods to the facts of this case when he was reconstructing the incident. The Defendants themselves even admitted, at trial, that Sgt. Kyle King's PowerPoint "wasn't an accurate depiction or what happened here and it was a concern it could be misleading to the jury." [R-243- pg.7/lines 7-11] Nevertheless, the Defendants confirmed that Sgt. Kyle King opinions, predicated upon inaccurate facts, misled the jury, with the following exchange during re-direct examination.

> Q: And based on what has transpired here today, do you believe that the spirit of what you were trying to demonstrate in the Powerpoint has been conveyed to this jury?
>
> A: I believe so. [R-241-pg. 47/lines 1-4]

After trial, Plaintiff moved for a new trial on the grounds that the Defendants knowingly poisoned the jury with Sgt. King's admittedly inaccurate expert witness testimony regarding his reconstruction of the subject incident. The entirety of Sgt. King's testimony was predicated on materially false facts.

The trial court decision of allowing Sgt. King to testify as an expert witness about admittedly inaccurate facts greatly prejudiced the Plaintiff. Sgt. King was the only law enforcement officer from a differing jurisdiction to testify. Sgt. King testified that "all of the physical evidence and documents that I reviewed made it appear that it happened just as described by the deputies on the scene. I didn't find any inconsistencies." [R-241-pg.29/lines19-23]

In denying Plaintiff's Motion for New Trial, the trial court found that Plaintiff was not prejudiced by allowing Sgt. King's testimony by holding, "The jury was able to consider what weight to give Sergeant King's testimony and, if the jury believed it conflicted with other testimony they heard, the jurors were free to reject it. There was nothing in Sergeant King or Defendant Newman's testimony that prejudiced Plaintiff's rights." [R-259 pg. 15]

The trial court's analysis overlooks the prejudicial impact of having to rebut erroneous expert witness testimony provided by a law enforcement official. Such substantial prejudice warrants a new trial.

III. THE DISTRICT COURT ERRED IN PERMITTING THE UNDISCLOSED FIREARM AND SHORTS TO BE USED AS A DEMONSTRATIVE AID

One of the central issues of this trial was whether or not Mr. Hill raised a handgun in the direction of Deputy Lopez. Less than forty-eight hours prior to trial, Defendants disclosed to Plaintiff for the first time that they were in possession of, and intended to use as evidence, the gun allegedly raised by Mr. Hill. [R-198]

Over Plaintiff's written and spoken objections, Defendants were granted permission to display the Kel-Tec handgun to the jury. [R-203] In addition, Defendants witness Sergeant Lebeau was permitted to testify about the handgun and perform an impromptu demonstration of placing the handgun into the back-right pocket of Mr. Hill's jean shorts. [R240-p.163/lines5-25] Significantly, Sergeant Lebeau was not disclosed as an expert witness and was testifying as a lay witness. [R-227]

Allowing a lay witness to perform an in-court recreation of an event that they themselves did not witness is erroneous. To do so by surprise is worse. This lay witness's recreation not only constituted unfair surprise, but created a significant substantive disadvantage because Plaintiff's actual expert witnesses were not provided opportunity to perform similar testing or recreations.

Defendants are prohibited from engaging in such deceptive practices. Pursuant to Federal Rule of Civil Procedure 26(a)(ii), Defendants' initial disclosure

must include "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment" (emphasis added) Fed. R. Civ. Pro. 26(a)(1)(A)(ii).

Over the course of this litigation, Defendants filed six separate Rule 26(a) disclosures. [R-198] The Kel-Tec gun the Defendants presented to the jury was not disclosed in any of them. Defendants were in possession, custody, or control of the Kel-Tec gun from the day Mr. Hill died through trial even though the criminal investigation was concluded years before.

Fed. R. Civ. Pro. 37(c)(1) states the sanctions for Defendants failure to timely disclose their possession of the Kel-Tec. It states in pertinent part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. Fed. R. Civ. Pro. 37(c)(1)

As discussed above, Defendants failed to disclose their possession of the handgun pursuant to Rule 26(a). Therefore, pursuant to Fed. R. Civ. Pro. 37(c)(1), Defendants should have been prohibited from introducing this evidence at trial, unless their failure to disclose was substantially justified or harmless. As discussed below, Defendants actions were neither.

"In determining whether a failure to disclose evidence is substantially justified or harmless, courts are guided by the following factors: the unfair prejudice or surprise of the opposing party; the opposing party's ability to cure the surprise; the likelihood and extent of disruption to the trial; the importance of the evidence; and the offering party's explanation for its failure to timely disclose the evidence." (emphasis added) *Mobile Shelter Sys. USA, Inc. v. Grate Pallet Sols., LLC*, 845 F. Supp. 2d 1241, 1250–51 (M.D. Fla. 2012).

Plaintiffs are not required to guess or assume in federal court. Sergeant Lebeau's in-court demonstration with the Kel-Tec came as a surprise to Plaintiff. Plaintiff had no ability to cure this late surprise disclosure because she was never afforded the opportunity to review the evidence nor have her expert witnesses, whom had already formulated their opinions based upon the properly disclosed evidence, examine the gun.

In addition, Defendants' failure to disclose is far from harmless. "A harmless error is one where one party made an honest mistake and the other had sufficient knowledge of it." *Two Men & a Truck Int'l, Inc. v. Residential & Commercial Transp. Co., LLC*, No. 4:08-CV67-WS/WCS, 2008 WL 5235115, at *2 (N.D. Fla. Oct. 20, 2008).

As stated above, Defendants' failed to disclose the handgun in all six of their Rule 26(a) disclosures. It was also not disclosed on a single exhibit list despite

Defendants' sandbagging Plaintiff with over 500 separate items on said exhibit lists. [R-227] Defendants' failure to disclose the handgun was not the result of several separate honest mistakes. In addition, as stated above, Plaintiff had absolutely no knowledge that Defendants' possessed or controlled said gun. Let alone, *sufficient knowledge* that Defendants' were in possession, custody, or control of the gun.

The cumulative effect of repeatedly failing to disclose the handgun in all six of their Rule 26(a) disclosures, their exhibit disclosures, and then compounding this non-disclosure by surprising the Plaintiff on the eve of trial, allowing a lay-witness to perform a reconstruction demonstration of an event the lay-witness never actually saw, and denying the Plaintiff the opportunity to have her expert witness perform testing on the handgun, amounts to the trial court abusing its discretion and warrants a new trial.

IV. MATERIAL CHANGES IN DEFENDANT NEWMAN'S TESTIMONY

A new trial may be granted on grounds that a witness willfully testified falsely to material facts, especially where perjured testimony was induced by the opposite party or the false testimony was that of the opposite party. *Traylor v. Pickering*, 324 F.2d 655 (5th Cir. 1963).

Prior to trial, Defendant Newman testified at his deposition that Mr. Hill, "did, like, a simultaneous bringing the gun up as he was bringing the garage door

down." [R-80-Exhibit 16-pg. 46/lines 22-47]. Further, Defendant Newman testified that he "lost sight of the gun as it was coming up around his hip area, I believe, is where I last saw it, and, yeah." (R-80-Exhibit 16-pg. 47/lines 6-20). Defendant Newman also testified "the muzzle would have been aiming towards Deputy Lopez' thigh area." [R- 80-Exhibit 16-pg. 69/lines19-20] At all times prior to trial, Mr. Hill's gun was aimed at or in the direction of Deputy Lopez when Defendant Newman last saw it. Just not, "center mass", said Newman. *Id.*

Throughout the course of trial, Defendant Newman was present for all witness testimony, including that of Plaintiff expert Dr. William Anderson. Dr. Anderson testified that it is highly unlikely that Mr. Hill raised a gun "anywhere near" Deputy Lopez based upon the positioning of the hand relative to Mr. Hill's abdomen wound. [R-240-pg.36/lines19-24] Dr. Anderson testified that if the gun was raised in the direction of Deputy Lopez, the bullet would have had to gone through Mr. Hill's arm, which clearly did not happen. Roy Bedard, Plaintiff's police expert also testified about the "paradox" caused by the location Newman claimed the gun was in, as it couldn't get back in Hill's pocket if it was in the location. [R-239-pg.181/lines19 – pg.182/line16]

After hearing this testimony, Defendant Newman materially changed his testimony. In fact, Defendant Newman was asked to perform a demonstration in the courtroom wherein he raised his arm, ever so slightly, in an upward direction.

Defendant Newman's trial testimony, given after all of Plaintiff's expert witnesses had testified, in no way indicated that the Mr. Hill ever pointed the gun up, or at Deputy Lopez' thigh area. [R-241-Pg. 200/lines21-25] It was pointed at the ground to now compensate for Mr. Bedard and Mr. Anderson's testimony. The late material change in testimony prejudiced the Plaintiff and warrants a new trial.

V. IMPROPER AND INCONSISTENT TESTIMONY FROM DEFENSE EXPERT CHRISTOPHER LAWRENCE

A new trial is properly granted where a party can prove by clear and convincing evidence that verdict was obtained through fraud, misrepresentation, or other misconduct, and that conduct complained of prevented the losing party from fully and fairly presenting his case or defense. Fed. R. Civ. P. 59 and 60.The rule applies to misconduct in withholding information called for by discovery and it does not require that the information withheld be of such a nature as to alter the result in the case. The rule is addressed to judgments that are unfairly obtained and not at those which are factually incorrect. *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir. 1978).

Expert testimony falls squarely within the purview of Rule 59 and Rule 60; and is particularly important in assisting the trier of fact in cases involving allegations of constitutional violations arising under 42 U.S.C. §1983. Federal Rule of Evidence 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Of course, each party is permitted to retain an expert to offer such testimony. The party retaining the expert may not, however, control the expert witness. Fed. R. Evid. 702. Expert witnesses, as all other witnesses, are bound to testify truthfully. **An expert witness should never become one party's expert advocate**. An expert witness should be an advocate of the truth with testimony to help the court and the jury reach the ultimate truth in a case, which should be the basis of any verdict. *See Selvidge v. U.S.,* 160 F.R.D. 153 D. Kansas January 19, 1995; *Van Blargan v. Williams Hospitality Corporation,* 754 F.Supp. 246, 248 (D.P.R.1991).

Defendants' retained expert witness, Christopher Lawrence's contumacious testimony created severe prejudice on the proceedings. Defense counsel questioned Defendant's expert witness on the stand for over an hour. Defense counsel was never asked to speak up, move or alter his voice or diction in any way. Prior to Mr. Lawrence's testimony, Plaintiff's counsel, a board certified civil trial attorney, was never asked throughout trial to "raise his voice" or otherwise repeat any questions based on volume or diction.

From the instant Plaintiff's counsel, John Phillips, began cross examination, Defendant's expert, Mr. Chris Lawrence displayed bias and attempted to advocate, or obfuscate, to the benefit of the Defendant. Mr. Lawrence sought sympathy for a

self-proclaimed hearing impairment, which had never before been a problem at any stage in the proceedings. [R-242 pg. 50/lines 18-20, May 26, 2018]. He constantly claimed he could not hear Plaintiff's counsel, made him move all around, raise and lower his voice and otherwise garnered sympathy from the jury while heaping prejudice upon Plaintiff.

Mr. Lawrence's misconduct and bias worsened. On question number five, Plaintiff's counsel simply asked Mr. Lawrence for an accounting of costs of his services. [R-242 pg. 51/lines 3-17] He refused to answer this question as his pre-trial deposition. Mr. Lawrence bellowed out his father had recently passed away a "couple weeks" prior and this and other questions would be difficult to answer. [R-242-pg. 51/lines 3-17]. It was severely unfair and improper.

As the selective hearing and excuses mounted (his 3 AM flight, exhaustion, prior travel to the jurisdiction to testify, but not being called), Mr. Lawrence repeatedly refused to answer questions. He then began to vomit non-responsive answers, including testifying that a car may have struck a piece of evidence, damaging it. There was zero evidence of this fact, which was repeated twice and completely non-responsive. Plaintiff sought the courts intervention at that point.

Furthermore, Mr. Lawrence's non-responsive commentary, repeated sudden and selective hearing loss, exhaustion, and blaming of Plaintiff after a completely

problem free direct examination was not only a violation of Fed. R. Evid. 702, but created such irreversible prejudice that it warrants a new trial.

VI. JUROR CONFUSION OVER JURY INSTRUCTIONS

The inconsistent and legally improper verdict indicates juror confusion over the jury instructions and verdict form. In particular, there appeared to be confusion over the jury instructions' explanation of awardable damages and how those damages are apportioned on the verdict form. A new trial is required only if the trial judge's instructions taken as a whole give a **misleading impression or inadequate understanding** of the law and the issues to be resolved. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062 (5th Cir.1980).

Prior to deliberations, the trial court read the jury instructions to the jury. Significantly, the trial court did not read the title to each instruction [R-242-pg. 83/lines 1-11]. The practical impact of failing to read the title of each jury instruction confused the jury - or they otherwise sought to be punitive. In either scenario, a new trial is warranted.

The written jury instruction at issue, titled **Civil Rights – 42 U.S.C. § 1983 Claims – Damages**, states as follows, "You may award $1.00 in nominal damages…" As a matter of law, nominal damages only apply to Plaintiff's 42 U.S.C. § 1983 claim. [R-224 p. 13] Significantly, the only part of the jury instruction that limited nominal damages to the 42 U.S.C. § 1983 claim, was the

title. By failing to read the complete instruction to the jury (including the title), combined with an omission of instructions within the verdict form, the jury was confused and the Plaintiff was prejudiced. This confusion is confirmed by a question posed by the jury themselves immediately prior to rendering this erroneous verdict.

On the negligence claim, the jury awarded $1.00 in damages to the Estate of Gregory Vaughn Hill, Jr. and each of his surviving minor children (for a total of $4.00). Thus, the jury purported to make a finding that only nominal damages were appropriate or sought to punish the Plaintiff and awarded an amount unsupported by evidence. The issue here is that nominal damages only pertained to the federal civil rights claim, *not* the negligence claim.

During deliberations the jury asked for help by submitting the following question: "If we find minimal negligence, can the courts over rule monetary amounts presented by the jury." [R- 225 p. 3] The Court and the parties struggled to fully understand the jury's question. The Court sent back a request for clarification, and instead of explaining their question, the jury rendered its verdict. The verdict rendered was improper due to the jury's confusion over the instructions and verdict form.

VII. VERDICT AGAINST CLEAR WEIGHT OF THE EVIDENCE

A jury's verdict is not contrary to the great weight of the evidence simply because the party moving for a new trial believes that his evidence is more persuasive than his opponent's; rather, a new trial should only be granted on evidentiary grounds where the moving party points to an error in admitting or excluding evidence that was so harmful as to sway the jury in its consideration of the matter. *Noel v. Terrace of St. Cloud, LLC*., 212 F.Supp.3d 1193 (M.D. Fla. April 5, 2016).

The jury disregarded the expert testimony of Roy Bedard, Dr. William Anderson, the DNA lab test results and testimony of Earl Ritzline, and the multitude of eye and ear witness testimony from independent witnesses in finding completely for the Defendant, Christopher Newman on the federal civil rights violation claim (42 U.S.C. §1983), and apportioning fault at 1% for the SLCSO and 99% for the decedent, Gregory Vaughn Hill, Jr., on the state law negligence claim. The jury's disregard of the testimony and evidence presented resulted in a miscarriage of justice.

Roy Bedard, an expert on police practices, testified extensively on proper police protocol when a subject is behind an opaque surface. He also testified specifically about the troubling paradox created by discrepancies between Defendant Christopher Newman's testimony and the physical evidence presented. [R-239, pg. 181/lines 19 – pg. 182/line 16] Dr. William Anderson, a trained

Medical Examiner, gave testimony regarding Mr. Hill's gunshot wounds and the order in which they were likely sustained. [R-240 pg. 24/line 17 – pg. 26/line 2] Dr. Anderson's testimony supported that of Earl Ritzline of the Indian River Crime Lab who testified about the DNA results which revealed that none of Mr. Hill's DNA was conclusively found on the KelTec firearm recovered from his back pocket. [R-239-Pg. 109/lines13-17] Furthermore, several independent eye witnesses located directly across the street from where the shooting occurred testified that they never saw Mr. Hill holding a gun in his hand. [R-238 Pg. 231/lines 3-4] [R-238 Pg. 240/lines 6-7]

No rational jury could have found that Defendant Christopher Newman's use of deadly force against Mr. Hill was not excessive as set forth in 42 U.S.C. §1983. Likewise, no rational jury could have found Mr. Hill 99% at fault for his own death after being shot by Defendant Deputy Newman through a closed garage door.

VIII. THE CUMULATIVE EFFECT OF THE ERRORS AND EVIDENTIARY RULINGS COMBINED TO AFFECT PLAINTIFF'S SUBSTANTIAL RIGHTS AND DEPRIVED HER OF THE RIGHT TO A FAIR TRIAL

Erroneous evidentiary rulings by a trial court can be treated as harmless only if the error does not affect the substantial rights of a party. *Dartez v. Fibreboard Corp*., 765 F.2d 456, 569 (5th

Cir. 1985). The errors identified throughout this appeal undeniably affected the substantial rights of the Plaintiff (cumulative effect of the errors in evidentiary rulings rendered the verdict unreliable) *Frymire-Brianti v. Marwick*, 2 F.3d 183 (7th Cir. 1993). As such, a new trial should be granted.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to FRAP 32(g)(1) 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 **9,430** words.

Respectfully Submitted,

Law Office of John M. Phillips, LLC

/s/ John M. Phillips
JOHN M. PHILLIPS, ESQUIRE
Florida Bar Number: 0477575
KIRBY W. JOHNSON, ESQUIRE
Florida Bar Number: 113323
4230 Ortega Boulevard
Jacksonville, FL 32210
(904) 444-4444
(904) 508-0683 (facsimile)
Attorney for Plaintiff/Appellant
Viola Bryant
jphillips@floridajustice.com
michele@floridajustice.com
Kirby@floridajustice.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF and a copy hereof has been furnished to Summer M. Barranco, Esquire, Purdy, Jolly, Giuffreda & Barranco, P.A., 2455 East Sunrise Boulevard, Suite 1216, Fort Lauderdale, FL 33304, by email to summer@purdylaw.com, and melissa@purdylaw.com, this **22nd** day of January, 2019.

Law Office of John M. Phillips, LLC

s/ John M. Phillips
JOHN M. PHILLIPS, ESQUIRE
Florida Bar Number: 0477575
KIRBY W. JOHNSON, ESQUIRE
Florida Bar Number: 113323
4230 Ortega Boulevard
Jacksonville, FL 32210
(904) 444-4444
(904) 508-0683 (facsimile)
Attorney for Plaintiff/Appellant
jphillips@floridajustice.com
michele@floridajustice.com
Kirby@floridajustice.com