

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

JASON C. TURK,

Plaintiffs,

v.

Case No. 8:14-cv-01940-MSS-AEP

**OFFICER TIMOTHY J. BERGMAN,
individually; and
CITY OF TAMPA, FLORIDA,**

Defendants.

PLAINTIFF'S MOTION FOR NEW TRIAL

The Plaintiff, Jason Turk, moves for a new trial pursuant to Federal Rule of Civil Procedure 59(a) and 60 and as grounds states as follows.

1. The Jury Trial began on November 5, 2018. The jury was instructed that they would have to determine whether Officer Bergman violated Jason Turk's Constitutional Right to be free from excessive force and whether the City of Tampa violated the Constitution by failing to train its officers in Crisis Intervention.

2. On Jury Trial Day 4, the Court heard oral arguments on the City of Tampa's renewed motion for Judgment as a matter of law as to Count IV of the complaint for failure to train. The Court granted the Motion. (Doc. 110)

3. Prior to Jury Deliberation, the Court advised the Jury that Count IV alleging that the City of Tampa's policies and procedures contributed to the shooting no longer needed to be decided in this case and that the Jury was not to speculate about or consider in any way why they no longer needed to decide that count.

4. On November 13, 2018, the Jury returned a Verdict in favor of Defendant, Officer Bergman finding no constitutional violation. (Doc. 109)

MEMORANDUM OF LAW

Under Rule 59(a), "[a] new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted" under the common law. Fed. R. Civ. Pro. 59(a). A new trial may be granted on the ground that a witness willfully testified falsely to a material fact, especially where the 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, 658 (5th Cir. 1963) citing *Hunter v. Thomas*, 10 Cir., 1949, 173 F.2d 810, 812. Rule 60(b) provides: on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party "To prevail, the movant must establish that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case." *Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1503 (11th Cir. 1985), opinion vacated in part on reconsideration, 866 F.2d 1303 (11th Cir. 1989) citing *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir.1983); *See also Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir.1978).

Prior to trial, the Parties' stipulated that the City had not mandated any crisis intervention training for its officers as of the date of the subject incident in this case. (Id. at 13 (citing Doc. 46, p. 4 para. 4)) However to Plaintiff's surprise, during the jury trial, the Chief of Police, Jane Castor, testified that at the time of the incident in question, the City did, in fact, mandate crisis intervention training for its officers. (Exhibit 1; Trans. of Castor Trial Testimony; p. 43, lines 12-

18) When Plaintiff's Counsel attempted to impeach Chief Castor on this inconsistent statement, the Court sustained the Defense's objection of improper impeachment. (Exhibit A, p. 45-46, lines 7-8)

Contrary to Chief Castor's testimony, three of the Officers who were involved in the incident testified that they had not received the crisis intervention training as allegedly mandated.

On November 8, 2018, in the middle of trial, but after the surprising testimony of Chief Castor, Plaintiff's Counsel contacted the training division at the Tampa Police Department to confirm whether such training was in fact mandatory. Plaintiff's Counsel was advised CIT training was mandatory and therefore decided not to subpoena the training personnel to testify at trial.

However, pursuant to a public records request conducted after the trial on this new issue of mandatory crisis intervention training, Joanne M. Burgess, the City of Tampa's Police Public Records Technician advised via e-mail that she has not been able to locate any specific document stating that CIT training is/was mandatory. She did however provide the attached Crisis Intervention Team SOP instituted in January 2016 well after Mr. Turk's shooting by Officer Bergman. (Exhibit B; SOP 651.2 Crisis Intervention Team) This SOP's purpose is to establish operational guidelines of the use of the CIT Team. (Exhibit B, p. 1) In no way does this SOP mandate CIT training. In fact, upon reading the SOP a reasonable inference can be made that CIT was in fact not mandatory. The SOP states upon receiving a call for service involving a mentally disturbed person, the dispatcher would ideally dispatch a nearby CIT officer. (Exhibit B, p. 2) A reasonable inference therefore is that not all City of Tampa Officers are CIT trained. This newly discovered evidence could have been used to cross examine the Chief on her false testimony.

In *United States v. Espinosa-Hernandez*, this Court reversed the denial of a motion for new trial when “discovery or an evidentiary hearing could [have] reveal[ed] that [a witness] committed perjury in [a] trial or a related proceeding.” 918 F.2d 911, 913-14 (11th Cir. 1990). Simply put, unlike newly discovered impeachment evidence, newly discovered evidence of perjury is special. *See id.* As such, particularly when it pertains to a star witness who had “tremendous impact” on a case’s outcome, newly discovered evidence of perjury goes “beyond that of mere impeachment” and requires a new trial. *Id.* at 914. Other cases are in accord.¹

As a result of the changed testimony of Chief Castor, the Court granted a Directed Verdict, and found the City could not be liable for a policy violation. The change in the Chief’s testimony would satisfy the “other misconduct” standard. The dismissal demonstrated an inaccurate perception of the facts which then left the jury an inaccurate perception. The dismissal of the claim against the City served as an endorsement of the Chief’s claim that CIT was mandatory and bolstered the credibility of the agency and in turn the officers who work for it. This bolstering effect caused irreparable harm to Plaintiff’s case against Officer Bergman which hinged on the determination of the credibility of multiple officer witnesses including Officer LaFramboise, Officer Fillipone and Officer Vazquez.

CONCLUSION

For the reasons set forth in this Motion, the Plaintiff respectfully requests that this Court grant a new trial for Plaintiff, Jason Turk, on all issues triable in this case, or in the alternative grant an evidentiary hearing regarding Chief Castors testimony on the mandatory nature of the

¹ See, e.g., *Nat’l Labor Relations Bd. v. Jacob E. Decker & Sons*, 569 F.2d 357, 365 (5th Cir. 1978) (acknowledging exception to general rule when “a key witness committed perjury in relating a material fact”); *Traylor v. Pickering*, 324 F.2d 655, 658 (5th Cir. 1963) (“[a] new trial may be granted on the ground that a witness willfully testified falsely to a material fact, especially where the perjured testimony was induced by the opposite party or the false testimony was that of the opposite party”).

CIT training.

Respectfully Submitted,

s/Michael P. Maddux
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LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to the mandates of Local Rule 3.01(g), Rules of the U.S. District Court for the Middle District of Florida, the undersigned counsel has conferred with Opposing Counsel, Ursula Richardson, Esq., who objects to the relief sought.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2019, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system.

MICHAEL P. MADDUX, P.A.

s/Michael P. Maddux
Michael P. Maddux, Esquire