No. 17-13073

In the United States Court of Appeals for the Eleventh Circuit

JENNIFER JENKINS,

Plaintiff-Appellant,

v.

S. DAVID ANTON, P.A. and S. DAVID ANTON,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:15-cv-283, Hon. James S. Moody, Jr.

APPELLANT'S BRIEF OF JENNIFER JENKINS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Anton, S. David – Defendant-Appellee and trial counsel for Defendants-Appellees;
2. Burns, P.A. – Appellate counsel for Plaintiff-Appellant;
3. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant;
4. Everhart, Yvette Denise – Trial counsel for Plaintiff-Appellant;
5. Hopkinson, Kathryn C. – Counsel for Defendants-Appellees;
6. Jenkins, Jennifer – Plaintiff-Appellant;
7. Law Offices of Phyllis J. Towzey – Trial counsel for Plaintiff-Appellant;
8. Moody, Jr., Hon. James S. – United States District Judge;
9. Porcelli, Hon. Anthony E. – United States Magistrate Judge;
10. S. David Anton, P.A. d/b/a Anton Legal Group – Defendant-Appellee and trial counsel for Defendants-Appellees;
11. Sass Law Firm – Trial counsel for Plaintiff-Appellant;
12. Sass, Cynthia N. – Trial counsel for Plaintiff-Appellant;
13. Thompson Legal Center, LLC – Counsel for Defendants-Appellees;
14. Thompson, James M. – Counsel for Defendants-Appellees;
15. Towzey, Phyllis J. – Trial counsel for Plaintiff-Appellant.

No publicly traded company or corporation has an interest in the outcome of this appeal.

December 15, 2017

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Jennifer Jenkins requests oral argument. The record of the five-day bench trial is somewhat extensive: over 125 docket entries, over 700 pages of trial transcripts, and over 700 pages of trial exhibits. Additionally, the appeal raises a novel question about how to define a workweek under the Fair Labor Standards Act and the failure to apply the Supreme Court's 70-year-old burden-shifting framework when an employer fails to keep statutorily required records of its employee's hours. Oral argument will assist the Court.

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STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the complaint (Doc. 1) raised a federal claim for unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because, following a bench trial, the District Court entered an order making findings of fact and conclusions of law (Doc. 98), after which it entered judgment on April 4, 2017 (Doc. 100). On May 2, 2017 (*i.e.*, 28 days later), Plaintiff-Appellant Jennifer Jenkins timely moved to amend or alter the judgment or for new trial. Doc. 106. The District Court entered an order denying that motion on June 8, 2017. Doc. 116. On July 7, 2017 (*i.e.*, 29 days later), Ms. Jenkins timely appealed. Doc. 120.

STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion when, without an evidentiary hearing, it denied a post-trial motion based on (a) newly discovered evidence from an unavailable witness who suggested a star witness perjured himself, (b) a newly discovered email suggesting potential spoliation of evidence, false testimony, and misconduct, or (c) manifest errors of law or fact regarding whether the workweek ran from Sunday to Saturday instead of Monday to Sunday and whether lunches during work qualified for overtime? *See* Docs. 98; 116.

2. Did the District Court abuse its discretion when it declined to recuse itself *sua sponte* despite a possible conflict? *See* Doc. 69.

3. Did the District Court commit clear error or misinterpret the law when it concluded Mr. Anton's testimony was more credible than Ms. Jenkins's testimony and entered judgment in Anton Legal Group's favor notwithstanding its failure to maintain statutorily required time-keeping records? *See* Docs. 98; 116.

STATEMENT OF THE CASE

This employment dispute involves a law firm's failure to pay 711 hours of overtime wages to a salaried paralegal. After a bench trial, the District Court ruled in favor of the law firm. The paralegal appeals.

Course Of Proceedings

A paralegal, Plaintiff-Appellant Jennifer Jenkins sued the law firm that had employed her, Defendants-Appellees S. David Anton, P.A. and S. David Anton (collectively, "Anton Legal Group"), for unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. Doc. 1. Anton Legal Group answered and asserted affirmative defenses. Doc. 5.

After discovery, Anton Legal Group moved for summary judgment. Doc. 41. Ms. Jenkins opposed. Doc. 51. It was denied. Doc. 58.

About two weeks after the parties stipulated to a bench trial (Doc. 60), Ms. Jenkins filed a notice of disclosure (Doc. 69). That notice stated Anton Legal Group's counsel had informed her counsel one day earlier that Mr. Anton had "previously represented" the District Judge's ex-wife "in the matter *In Re: The Marriage of Moody vs. Moody*, Hillsborough Case No. 90-14416, Division D." Doc. 69 at 1. Hillsborough

County's publicly available docket report for that case indicates it was a contested divorce and that Mr. Anton deposed the District Judge twice.[1]

At the five-day bench trial, the parties presented their cases. *See* Docs. 82; 85; 88; 89; 93; 127; 128; 129; 130; 131. Anton Legal Group moved for judgment as a matter of law at the close of Ms. Jenkins's case and renewed its motion at the close of its own case. Doc. 89 at 1; 93 at 1; 130 at 122-127; 131 at 63. Initially, the District Court reserved ruling. Doc. 89 at 1; 93 at 1; 130 at 127; 131 at 63. A few days later, the District Court denied the motions for judgment as a matter of law. Doc. 98 at 10.

Nevertheless, in the same order, the District Court rendered findings of fact and conclusions of law in Anton Legal Group's favor on the basis that Ms. Jenkins never proved she worked overtime. Doc. 98. Thereafter, the District Court entered judgment. Doc. 100.

Ms. Jenkins timely moved to amend or alter the judgment or for new trial. Doc. 106. Anton Legal Group opposed. Doc. 111. It was de-

[1] This Court may take judicial notice of public records, such as state court dockets. *See* Fed. R. Evid. 201(b)(2) (courts "may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *In re Delta Resources*, 54 F.3d 722, 725 (11th Cir. 1995) (appellate courts may take judicial notice of facts).

nied. Doc. 116. After some skirmishing (*see* Docs. 101; 102; 103; 104; 105), the District Court also taxed costs against Ms. Jenkins. Doc. 117.

This timely appeal followed. Doc. 120.

Statement Of Facts

A. The Trial

During opening statements, the parties explained they disputed two issues: whether Ms. Jenkins engaged in sufficient interstate commerce to fall within the Fair Labor Standards Act's purview[2] and whether she worked any overtime hours. *Compare* Doc. 127 at 11-16, *with* Doc. 127 at 19-21. Specifically, for 32 of her 38 weeks of work, Ms. Jenkins claimed she worked approximately 70 hours per week for 711 hours of unpaid overtime. Doc. 130 at 60-61.[3] In contrast, Anton Legal Group claimed Ms. Jenkins worked only 30 to 40 hours per week. *See* Doc. 131 at 73-74.

To that end, the parties agreed on several other things, including but not limited to the following:

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[2] Because the District Court found Ms. Jenkins did not work any overtime, it never reached the interstate commerce issue. Doc. 98 at 2.

[3] That calculation was based in part on the timing and GPS location of calls and text messages. Docs. 130 at 60-61; 131 at 71-72. Those GPS records, however, were not introduced into evidence at trial. *See* Docs. 96 at 1; 98 at 7 n.4.

- Mr. Anton did not keep time records. Docs. 127 at 78, 109-110; 129 at 39; 130 at 27.

- Although Mr. Anton used billing software called TimeSlips, it did not keep track of Mr. Anton's after-the-fact time reductions or administrative time. Docs. 127 at 174-175; 130 at 37-38.

- Although Ms. Jenkins's work schedule was 8:30 a.m. to 5:15 p.m., she was allowed to work remotely. Doc. 127 at 110.

- Ms. Jenkins was "[o]ne of the hardest working people I know." Doc. 127 at 105.

- Ms. Jenkins worked for Anton Legal Group from February 11, 2013 to November 4, 2013. Doc. 127 at 132.[4]

- A securities arbitration the parties referred to as the "APP case" or "APP trial" was one of the "biggest" cases Mr. Anton had ever handled, perhaps top 25 in his career, and definitely "the biggest trial at the time." Doc. 129 at 8-9.

- The APP case was a four-day arbitration, which involved six hours per day of actual proceedings with a 90-minute lunch in the middle. Doc. 129 at 125.

- Mr. Anton testified that one of his previous paralegals, Yvette Rodriguez, "never worked over 40 hours a week" and "[n]ever even came close." Doc. 127 at 56.

On the other hand, the parties disagreed about many things, including but not limited to the following:

[4] Ms. Jenkins's son suffered severe injuries in a catastrophic accident in the early morning hours of November 5, 2013, which left him severely disabled, blind, and in need of 24-hour care. Doc. 130 at 44, 114.

- Whether the office was busy and understaffed or slow and overstaffed. Doc. 130 at 15-16.

- During the interview, Ms. Jenkins testified she told Mr. Anton she could not work overtime because of her other time commitments, including attending college and taking care of her children as a single mother. *See* Docs. 129 at 171-172; 130 at 16, 51-52. Mr. Anton, however, denied this. Doc. 127 at 73.

- Ms. Jenkins also testified Mr. Anton told her the position was salaried without overtime (Doc. 129 at 171-174), whereas Mr. Anton testified he told her he would pay overtime notwithstanding his written employment policies that said he would not (Docs. 127 at 77, 84-85; 129 at 71).[5]

- Mr. Anton claimed he terminated Ms. Jenkins in September, whereas Ms. Jenkins claimed she told Mr. Anton she would be resigning and interviewing for new jobs without leaving him in the lurch. *Compare* Docs. 129 at 163-165; 130 at 167-169, *with* Doc. 130 at 57.

- Mr. Anton claimed Ms. Jenkins's predecessor, Yvette Rodriguez, "never worked over 40 hours a week" and "[n]ever even came close," whereas Ms. Jenkins believed Ms. Rodriguez had worked many hours of overtime. *Compare* Doc. 127 at 56-57, *with* Doc. 130 at 62.

- During each day of the APP case, Ms. Jenkins testified they were "at the facility" for nine hours from 8:00 a.m. to 5:00 p.m. and discussed the case "the entire time" during lunch. Doc. 130 at 55. She claimed she worked 70 hours that week. Doc. 130 at 56. Mr. Anton said there were two sessions of three hours each, but they did not really work during lunch. Doc. 129 at 124-125.

[5] Ms. Jenkins did not learn salaried paralegals were entitled to overtime pay until she was separating from Anton Law Group's employment and interviewing with another law firm. Doc. 130 at 17-18.

Notably, Mr. Anton testified he was "not sure" whether Anton Legal Group had "a regularly recurring period of seven days, which would be a workweek" that was Monday to Sunday or Sunday to Saturday. Doc. 129 at 39.

B. The Order Makings Findings Of Fact And Conclusions Of Law

Without addressing the GPS locations of text messages and calls, the District Court found Mr. Anton's testimony "more credible" because "it better matches the other evidence in the case, particularly the testimony of other employees." Doc. 98 at 1. With respect to the APP case, the District Court explained as follows:

> The closest Jenkins came to proving overtime hours was the week of May 20, 2013. A securities case, the "APP case," involved an arbitration hearing from Tuesday, May 21, through Friday, May 24, 2013. Jenkins asked if she could attend the hearings and Anton agreed. Jenkins claims that she worked on the Saturday before the hearing, long hours on the Monday prior to the hearing, attended each arbitration session, and worked at home each night: Monday through Thursday. The arbitration hearing was three hours in the morning and three hours in the afternoon. In between sessions, they had lunch together with the attending expert. She considered these "working lunches" because they generally would discuss what happened during the morning session.
>
> But the evidence does not support the claimed overtime, even for that week. Jenkins took off a day and a half

> the prior week to plan for her daughter's graduation. The time she worked Saturday did not make up for the previously taken time off. The following Monday, her claim that she worked late was conclusory. She did not identify any work that she actually performed. And the hearings that took place Tuesday through Friday of that week were six hours of work each day. Her contention that lunch each day was a "working lunch" is unsupported. She does not identify any work that was performed. She only testified that during lunch they talked about the events of the morning. General lunch conversation touching upon the only topic in common with the attending expert does not constitute "work." Her claim for working Tuesday, Wednesday and Thursday nights fails for the same reason as the claim for Monday night: she identified no particular work that was performed.

Doc. 98 at 5-6.

C. The Order Denying The Motion To Amend Or Alter The Judgment Or For New Trial

Pursuant to Rules 59 and 60, Ms. Jenkins moved to amend or alter the judgment or for a new trial based on the unavailability of a witness, newly discovered evidence (*i.e.*, an email about deletion of Anton Legal Group emails) that suggested potential spoliation of evidence, and a manifest error of fact or law regarding hours worked on the APP case and the definition of the workweek. Doc. 106. The District Court denied the motion. Doc. 116.

1. The Rule 59 Arguments

The District Court denied the Rule 59 arguments. Doc. 116 at 2-6.

With respect to the unavailability of Ms. Rodriguez, the District Court noted Ms. Jenkins "did not list Ms. Rodriguez as a possible witness in her pretrial statement, notify the Court that she wanted Ms. Rodriguez to testify, or seek a continuance due to Ms. Rodriguez's unavailability." Doc. 116 at 2. Construing Ms. Rodriguez as an impeachment witness, the District Court rejected Ms. Jenkins's argument. Doc. 116 at 2. Instead, the District Court said the "inability to present Ms. Rodriguez's testimony was due to Plaintiff's strategic choices" because she failed to take Ms. Rodriguez's deposition and enter it into evidence. Doc. 116 at 2 & n.1 (citing Fed. R. Civ. P. 32(a)(4)).

The District Court also rejected the newly discovered evidence for two reasons. Doc. 116 at 4-5. First, the District Court said she was not entitled to a new trial to the extent she would have used it to impeach Mr. Anton. Doc. 116 at 4. Second, the District Court said, to the extent it would have established spoliation, it would not changed the result at trial because any deleted emails (the potential existence of which the District Court was "already aware") "would simply have been cumulative of the similar emails introduced by Plaintiff at trial." Doc. 116 at 5.

Finally, the District Court agreed it had made a manifest error of fact when it previously found Ms. Jenkins had worked only the Saturday before the APP trial instead of both Saturday and Sunday. Doc. 116 at 6. Nevertheless, the District Court ruled its "oversight" did not change its ultimate conclusion that Ms. Jenkins did not work overtime that week. Doc. 116 at 6. That was because the District Court found it was "more reasonable to conclude that the workweek started on Monday, given that the Parties described Plaintiff's weekly work schedule as starting on Monday mornings." Doc. 116 at 6.

2. The Rule 60 Arguments

The District Court also denied the Rule 60 arguments. Doc. 116 at 6-9.

First, the District Court rejected the assertion that the email was newly discovered evidence within the meaning of Rule 60 because she "discovered it during the timeframe in which she could move for a new trial pursuant to Rule 59." Doc. 116 at 7. Relatedly, the District Court also reiterated its ruling that it was impeachment evidence that would not have produced a different result at trial. Doc. 116 at 7.

Second, the District Court found that Ms. Jenkins had failed to prove her assertion that the email demonstrated Mr. Anton had engaged in misconduct by clear and convincing evidence, including how it "made a substantive difference in how she approached the case." Doc. 116 at 7. Instead, the way Ms. Jenkins would have used the email before and during trial would have been "fundamentally similar" to the litigation strategy she actually employed. Doc. 116 at 8. In that regard, the District Court distinguished Ms. Jenkins's reliance on *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978),[6] which involved Ford's failure to produce a report requested in discovery regarding the cost of alternate fuel tank locations. Doc. 116 at 8. Unlike Ms. Jenkins, the District Court explained, if that plaintiff had the report, she "could have argued a failure to warn theory instead of just a negligent design theory." Doc. 116 at 8 & n.3.

Standard Of Review

1. The denial of a Rule 59 motion or a Rule 60 motion is reviewed for abuse of discretion. *Arthur* v. *King*, 500 F.3d 1335, 1343

[6] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

(11th Cir. 2007) (Rule 59); *Rice* v. *Ford Motor Co.*, 88 F.3d 914, 918 (11th Cir. 1996) (Rule 60).

2. A district court's failure to recuse *sua sponte* despite a potential conflict of interest is reviewed for abuse of discretion. *United States* v. *Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

3. A district court's findings of fact after a bench trial are reviewed for clear error, whereas its conclusions of law are reviewed de novo. *Renteria-Marin* v. *Ag-Mart Produce, Inc.*, 537 F.3d 1321, 1324 (11th Cir. 2008).

SUMMARY OF THE ARGUMENT

1. The District Court abused its discretion when it denied Ms. Jenkins's post-trial motion under Rule 59 and Rule 60. *See* Doc. 116. Instead, the District Court should have convened an evidentiary hearing to hear Ms. Rodriguez's testimony and determine whether Mr. Anton had perjured himself, convened an evidentiary hearing to consider the veracity and importance of the newly discovered spoliation email, and concluded the workweek ran from Sunday to Saturday instead of Monday to Sunday and that working lunches counted toward overtime.

2. The District Court abused its discretion when it failed to recuse *sua sponte* despite a potential conflict of interest. *See* Doc. 69. The purpose of the recusal statute is to promote confidence in the judiciary by avoiding even the appearance of impropriety. To that end, a district judge is under an affirmative, self-enforcing obligation to recuse *sua sponte* whenever proper grounds exist. Here, the fact that Mr. Anton had represented the District Judge's ex-wife in their contested divorce created the appearance of impropriety, so it was an abuse of discretion to fail to recuse *sua sponte*.

3. The District Court committed clear error or an error of law when it concluded Mr. Anton's testimony was more credible than Ms. Jenkins's testimony and entered judgment in Anton Legal Group's favor notwithstanding Anton Legal Group's failure to maintain time records. *See* Docs. 98; 116. That is, the District Court failed to acknowledge and apply the burden-shifting scheme in favor of an employee's claim for overtime wages when the employer failed to maintain time records. That failure undermines the District Court's findings of fact and conclusions of law.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION TO AMEND OR ALTER THE JUDGMENT OR FOR NEW TRIAL

It was an abuse of discretion when the District Court denied Ms. Jenkins's motion to amend or alter the judgment or for new trial.

A. The District Court Should Have Held An Evidentiary Hearing Before Denying A New Trial Based On Newly Discovered Evidence Regarding An Unavailable Witness Who Suggested Mr. Anton Perjured Himself

At trial, Mr. Anton testified that Ms. Rodriguez never worked overtime. Doc. 127 at 56-57. Indeed, he claimed the assertion that she worked "at least 20 hours of overtime a week" and earned an additional $25,000 in overtime pay above and beyond her $45,000 salary was "grossly incorrect." Doc. 127 at 56. Instead, Mr. Anton testified she "worked way under an average of 40 hours per week." Doc. 127 at 56.

To rebut this testimony, Ms. Jenkins planned to call Ms. Rodriguez as a witness. Doc. 106 at 2-4. Alas, unbeknownst to Ms. Jenkins, Ms. Rodriguez became unavailable to testify, and despite several attempts, Ms. Jenkins could not reach her. Doc. 106 at 2.

In ruling in favor of Anton Legal Group, the District Court relied on Mr. Anton's testimony about Ms. Rodriguez's lack of overtime. *See* Doc. 98 at 3 & n.1.

But in an affidavit submitted along with Ms. Jenkins's post-trial motion, Ms. Rodriguez averred she regularly worked at least 20 hours of overtime each week. Doc. 106.1 at 2-7. To provide documentary support for her affidavit, Ms. Rodriguez submitted a payroll record that showed payment for 31 hours of overtime from February 1 to 15, 2013. Doc. 106.1 at 9.

In her affidavit, Ms. Rodriguez also explained she had "agreed and planned" to give rebuttal testimony via videoconference before the trial was continued due to a medical emergency. Doc. 106.1 at 2-3. When the trial started again, however, Ms. Rodriguez was unexpectedly hospitalized for a rare blood disorder. Doc. 106.1 at 3. During that hospitalization, Ms. Rodriguez explained she was unable to be contacted and did not have access to her mobile phone or email. Doc. 106.1 at 3.

While denying the post-trial motion, the District Court correctly observed that newly discovered evidence generally does not warrant Rule 59 relief if it merely impeaches other testimony or evidence. *See*

Doc. 116 at 3 (citing cases). But that general rule does not apply where, as here (*compare* Doc. 127 at 56-57 (denying Ms. Rodriguez worked overtime), *with* Doc. 106.1 at 2-7 (asserting Ms. Rodriguez regularly worked overtime, *and* 106.1 at 9 (payroll record)), the newly discovered evidence potentially demonstrates perjury.

For instance, 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.[7]

[7] *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

The District Court therefore should have convened an evidentiary hearing, made findings of fact whether Mr. Anton had perjured himself, and made an appropriate legal ruling on the Rule 59 motion based on that factual finding. *See id.* at 913-914. Its denial of the motion without an evidentiary hearing was, therefore, "premature" at best, which alone constitutes an abuse of discretion. *Id.* at 913. The Court should vacate the post-trial order (Doc. 116) and remand with instructions to convene an evidentiary hearing regarding Mr. Anton's testimony and Ms. Rodriguez's affidavit and payroll record.

B. The District Court Should Have Taken Evidence Before Denying A New Trial Or Relief From Judgment Based On A Newly Discovered Email Suggesting Spoliation Of Evidence, False Testimony, And Misconduct

After trial, Ms. Jenkins received an envelope from an anonymous source containing a new email; it suggested Anton Legal Group may have destroyed relevant evidence. *See* Doc. 106.2 at 1-5. That email was dated two months after Ms. Jenkins filed suit and two weeks after Anton Legal Group filed its answer and affirmative defenses. Doc. 106.2 at 5. In it, Mr. Anton instructed Shane Ragland, his information technolo-

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induced by the opposite party or the false testimony was that of the opposite party").

gy specialist, to permanently delete from his firm's server "all emails from 2014 and earlier" from the "thousands of emails" that were "just deleted." Doc. 106.2 at 5.

At his deposition and at trial, Mr. Anton testified that any email deletions occurred before this litigation commenced, not after. Docs. 54.3 at 10; 129 at 142. Based on the new email, however, that testimony appears to be untrue. Relatedly, Mr. Ragland's testimony that he too was unaware of any deletions of emails or data from Anton Legal Group's servers other than those done by Samantha Neides. *See* Docs. 54.7 at 37-38; 127 at 40-43. That testimony now also appears untrue.

Moreover, despite Ms. Jenkins's discovery requests for this type of evidence (Doc. 106.4 at 4), Anton Legal Group failed to produce this document in discovery. In fact, Anton Legal Group represented to Ms. Jenkins in a response to that discovery request that no documents related to deletion of "emails" existed (Doc. 106.5 at 3), which now appears to be untrue.

The District Court refused to grant a new trial or provide relief from judgment because it believed the deleted emails would have been cumulative of other emails and would not have changed the result at

trial because they "could not overcome the significant testimony of Lynn Hayes, Samantha Neides, and Kay Schnake." Doc. 116 at 5. Had Anton Legal Group properly disclosed and produced this email in discovery, however, Ms. Jenkins would have had the opportunity to further to investigate the issue, take a different approach to the case and/or trial, and address it with the District Court.

On its face, and assuming its authenticity were verified, the email appears to be a deliberate attempt by Anton Legal Group to destroy material information to Ms. Jenkins's claim. If so, those actions prevented Ms. Jenkins from exploring whether Anton Legal Group deliberately spoliated evidence or seeking sanctions.

C. The District Court Should Have Held An Evidentiary Hearing Before Denying Relief From Judgment Based On A Newly Discovered Email That Suggested Spoliation Of Evidence, False Testimony, And Misconduct

Relying on the newly discovered email, Ms. Jenkins sought relief under Rule 60(b)(3). Doc. 106 at 9-16. Rule 60(b)(3) permits a district court to relieve a litigant from a final judgment based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To make that showing, a moving party must make this showing by clear and convinc-

ing evidence. *Waddell* v. *Hemerson*, 329 F.3d 1300, 1309 (11th Cir. 2003). "Additionally, 'the moving party must ... show that the conduct prevented the losing party from fully and fairly presenting his case or defense.'" *Cox Nuclear Pharmacy, Inc.* v. *CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007). Without an evidentiary hearing, the District Court denied relief under Rule 60(b)(3) because it concluded Ms. Jenkins had not "proven [her] assertion by clear and convincing evidence." Doc. 116 at 7.

Again, the District Court abused its discretion when it failed to convene an evidentiary hearing before issuing this ruling. *Cf. Espinosa-Hernandez*, 918 F.2d at 913-14; *Nat'l Labor Relations Bd.*, 569 F.2d at 365; *Traylor*, 324 F.2d at 658. And its effort to distinguish *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978),[8] falls short. Whether or not Ms. Jenkins could have argued an alternative theory of liability based on the email—and even if "[i]t cannot be stated with certainty" that Anton Legal Group's compliance with its discovery obligations "would have changed the result of the case"—a "litigant who has engaged in misconduct is not entitled to the benefit of calculation, which

[8] *See supra* note 6.

can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'" *Id.* (citations omitted).

D. The District Court Committed A Manifest Error Of Law Or Fact When It Found The Workweek Ran Monday To Sunday Instead Of Sunday To Saturday And That Lunches During The APP Trial Were Not Work

In its post-trial order (Doc. 116 at 6), the District Court acknowledged the undisputed testimony and documentary evidence that Ms. Jenkins worked six hours on Sunday, May 19, 2013 to prepare for the APP trial. *See, e.g.*, Joint Tr. Ex. 16 at 66; Pl.'s Tr. Ex. 3B at 37. But the District Court refused to acknowledge Ms. Jenkins's extensive work hours on Monday, May 20, 2013 and during her attendance at each day's all-day hearings from Tuesday, May 21, 2013 through Friday, May 24, 2013. This was a manifest error of law or fact.

When evaluating whether a plaintiff worked overtime, it must be evaluated on a workweek basis. 29 C.F.R. § 778.103. "An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods." 29 C.F.R. § 778.105. "It *need not coincide with the calendar week* but may begin on any day and at any hour of the day" of the employer's choosing. 29 C.F.R. § 778.105 (emphasis added). Although "an employer's set pay period is prima facie evidence of the

employer's established workweek," the Fair Labor Standards Act "does not specifically require that a pay period and the workweek for FLSA overtime purposes must coincide." *Johnson* v. *Phoenix Group, LLC*, 2013 WL 1345799, at *3 (S.D. Ohio Apr. 2, 2013).

The Court should have concluded Ms. worked overtime for the workweek of Sunday, May 19, 2013 through Saturday, May 25, 2013. Instead, the District Court declined to construe the workweek as such because "the Parties described Plaintiff's weekly work schedule as starting on Monday mornings." Doc. 116 at 6.

That ruling, however, did not accurately describe the testimony and evidence. First, Mr. Anton had testified he was "not sure" whether Anton Legal Group had "a regularly recurring period of seven days, which would be a workweek" that was Monday to Sunday or Sunday to Saturday. Doc. 129 at 39. Second, Ms. Jenkins's pay stubs indicated Anton Legal Group ran payroll twice per month on the 16th and 30th (not biweekly, so that did not provide prima facie evidence of the workweek either). *See* Docs. 95.20-95.35 (pay stubs); 129 at 39 ("for payroll purposes, [we] paid twice a month").

As such, it was actually more reasonable to find that the work-week began on Sundays, like a calendar, as many other employers define it. *E.g.*, *Jones* v. *Gainesville Hotel Mgmt. LLC*, 2015 WL 12669921, at *1 (N.D. Fla. July 7, 2015) (employer's "workweek began on Sunday and ended on Saturday"); *Obertein* v. *Assured & Assocs. Personal Care of Ga., Inc.*, 2017 WL 3469526, at *2 (N.D. Ga. Mar. 31, 2017) (employer "utilized a seven-day work week which began each Sunday and ended each Saturday"). That is, after all, the baseline presumption under 29 C.F.R. § 778.105 (clarifying that workweek "need not coincide with the calendar week" so long as the employer establishes it).

As such, the failure to consider Ms. Jenkins's work on Sunday, May 19, 2013 toward her overtime and the application of the wrong workweek standard was a manifest error of law or fact. For these reasons, it was an abuse of discretion to refuse to alter or amend the judgment or grant a new trial under Rule 59(a) or (e). This Court should vacate the post-trial order (Doc. 116) and remand for the District Court to calculate the overtime wages to which Ms. Jenkins is entitled for working on the APP case.

Additionally, the District Court's ruling, without citation to any authority, that the working lunches during the APP trial did not count as overtime (Doc. 98 at 6) was another manifest error of law or fact. Any lunch during work counts toward overtime unless the employee is "completely relieved from duty" during the meal. 29 C.F.R. § 785.19(a). An employee is "is not relieved if [s]he is required to perform any duties, whether active or inactive while eating." *Id.* In other words, the lunch counts as work whenever the employee is "unable to use the time effectively for [her] own purposes." 29 C.F.R. § 785.15; *see also Kohlheim* v. *Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) ("firefighters were not relieved from duty during their mealtimes, so the FLSA requires that the county provide compensation for such periods").

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO *SUA SPONTE* RECUSE ITSELF DESPITE A POTENTIAL CONFLICT OF INTEREST

It was an abuse of discretion when the District Court failed to *sua sponte* recuse itself despite a potential conflict of interest.

"Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Unlike 28 U.S.C. § 144,

which provides for recusal upon submission of a party's good-faith affidavit averring that a judge is biased, § 455(a) exists "for the specific purpose of 'broaden[ing] and clarify[ing] the grounds for judicial disqualification.'" *United States* v. *Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (quoting *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 849 (1988)). It imposes "an affirmative, self-enforcing obligation" upon a district judge "to recuse himself *sua sponte* whenever the proper grounds exist," and it "requires judges to resolve any doubts they may have in favor of disqualification." *Id.*

§ 455(a)'s purpose is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. "Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section." *Kelly*, 888 F.2d at 744. Instead, the duty to recuse applies "whenever disqualifying circumstances become known to the judge." *Id.* To that end, a district judge must recuse whenever "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the

judge's impartiality." *United States* v. *Torkington*, 874 F.2d 1441, 1446 (11th Cir.1989).

Torkington's standard is met here. After the parties stipulated to a bench trial (Doc. 60), Mr. Anton for the first time disclosed to Ms. Jenkins that he had previously represented the District Judge's ex-wife in her divorce (Doc. 69). A review of the state court's divorce docket reveals it was a contested divorce. Moreover, that docket also indicates that counsel for the District Judge's ex-wife twice deposed the District Judge. Divorce, of course, is one of the most emotionally fraught types of litigation there is. And notwithstanding the District Judge's very fine reputation as a jurist, based on those facts in which his ex-wife's ex-lawyer is appearing before him, an objective, disinterested lay observer would entertain significant doubt about his impartiality. For that reason, the failure to *sua sponte* recuse was an abuse of discretion. *See Kelly*, 888 F.2d at 744-47 (reversing convictions due to district judge's failure to recuse *sua sponte*).

III. The District Court Committed Clear Error And Misinterpreted The Law When It Rendered Findings Of Fact And Conclusions Of Law In Anton Legal Group's Favor

Finally, it was clear error and a misinterpretation of the law when the District Court rendered findings of fact and conclusions of law in Anton Legal Group's favor. The starting point for the analysis is Anton Legal Group's failure to maintain appropriate timekeeping records for its employees. *E.g.*, Docs. 127 at 14 ("He didn't keep any time records."), 78 (same), 80 (same), 109-110 (same); 129 at 54 ("I thought if she worked scheduled—as was indicated in our bullet—unsigned bullet point, that I didn't have to keep records. That was my understanding, even if it was incorrect."), 167 ("I was not [required to keep time records]"). Based on that failure, under the burden-shifting scheme of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), Ms. Jenkins's burden of proof was relaxed.

Under the Fair Labor Standards Act, it is an employer's obligation to maintain accurate timekeeping records. *See* 29 C.F.R. § 516.2(a)(7), (a)(8), (a)(9), (c); *accord Anderson* 328 U.S. at 687. "When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records." *Ander-*

son 328 U.S. at 687. “But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises.” *Id.* Instead of penalizing an employee “on the ground that he is unable to prove the precise extent of uncompensated work,” however, *Anderson* set forth a burden-shifting scheme. *Id.*

To wit, an “employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Id.* Then, the burden “shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.” *Id.* Absent such evidence, a court “may then award damages to the employee, even though the result be only approximate.” *Id.*

Instead of applying this burden-shifting scheme, however, the District Court committed precisely the error the Supreme Court forbade in *Anderson*: it penalized the employee (Ms. Jenkins) for the failure of her employer (Anton Legal Group) to maintain the statutorily required timekeeping records. This was a misinterpretation of the law that led

the District Court to commit a clear error of fact in finding the testimony of Mr. Anton and other individuals more credible than that of Ms. Jenkins.

Moreover, this error was far from harmless. Although the District Court ultimately rejected her narrative, Ms. Jenkins did have a persuasive story to tell. Specifically, in her view, Anton Legal Group had historically employed two full-time paralegals, with one assuming more administrative responsibilities than the other. Under that business model, the two full-time paralegals required little to no overtime. In mid-2012, however, Anton Legal Group eliminated one of those positions and consolidated the responsibilities of two paralegals into one.

When that proved unworkable with Ms. Rodriguez, Anton Legal Group then hired a part-time (eight hours per week) bookkeeper and replaced Ms. Rodriguez with Ms. Jenkins. At that point, due to Ms. Rodriguez's illness and overburdened responsibilities, a backlog existed that required Ms. Jenkins to log substantial overtime. Because Anton Legal Group did not maintain timekeeping records, Ms. Jenkins gave her best estimate of her overtime by resorting to cell phone records and bank records. Instead of applying *Anderson*'s burden-shifting scheme—

indeed, the District Court did not cite *Anderson* at all—the District Court appears to have given short shrift to Ms. Jenkins's narrative.

The Court should vacate the District Court's findings of fact and conclusions of law (Doc. 98) and remand for application of the *Anderson* burden-shifting scheme to the testimony and evidence.

CONCLUSION

The Court should reverse the judgment or vacate it and remand for further proceedings.[9]

Respectfully submitted,

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[9] If the Court reverses or vacates the judgment, it should also vacate the taxation of costs (Doc. 117).

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 6,187 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

December 15, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 15th day of December, 2017, to:

David J. Smith, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 15th day of December, 2017, to:

Defendants-Appellees

James M. Thompson
Kathryn C. Hopkinson

December 15, 2017

/s/ Thomas Burns
Thomas A. Burns