No.

In The

Supreme Court of the United States

Donna Davis Javitz,

Petitioner

v.

Luzerne County, Robert Lawton, David Parsnik

Respondents

On Petition For Writ Of Certiorari
To The Third Circuit Of Appeals

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented

1.Whether the Petitioner was denied the constitutional right to a *fair trial* in a First Amendment retaliation case when the judge: (1) struck Petitioner's testimony on pretext and told the jury to disregard it denying Petitioner her Seventh Amendment right, (2) denied Petitioner the right of confrontation and allowed remote testimony of Respondent's witness without holding a Rule 43 (a) hearing, (3) withheld assistive hearing devices from Petitioner's counsel until day 3 ½ of trial thus denying Petitioner effective assistance of counsel who the Court knew had a significant hearing impairment which was clearly impacting his ability to represent Petitioner, (4) failed to declare a mistrial *sua sponte* after an enraged Court said " I have not had a lawyer be as contumacious as you have been, in the ten years I've been on the bench. And but for your age and your condition, I would hold you in contempt right now and you would spend time in prison" after Petitioner's attorney thrice violated an order of the Court precluding evidence of due process, thus elevating counsel above the Petitioner's constitutional right to a fair trial?

2.Whether the Petitioner was denied due process when the Court denied her Motion to Vacate Judgment without holding a hearing and allowing Petitioner to introduce testimony that opposing counsel introduced fraudulent testimony such that the court would have vacated the jury verdict and granted a new trial?

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Cases

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IV. Petition for Writ of Certiorari

Donna Davis Javitz respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Third Circuit Court of Appeals.

V. Opinions Below

The unreported decision of the Third Circuit of Appeals by Judge Thomas Hardiman, Judge Montgomery-Reeves and Chief Judge Chagares denying appeal on September 11, 2023, No. 22-2519.

The unreported decision of the same three judge panel denying the petition for rehearing on October 24, 2023, No.22-2519.

The unreported decision and Order of July 22, 2022 denying post trial Motion under Rule 59 (a), (e) and 60(b)(6), United District Court Middle District of Pennsylvania, No.3-15-CIV-2443 (R. Mariani, J.)

The unreported decision and Order of August 4, 2022 denying post trial Motion to Vacate Judgment , United District Court Middle District of Pennsylvania, No. 3-15-CIV-2443 (R. Mariani, J.)

VI. Jurisdiction

Petitioner's petition for rehearing was denied on October 24, 2023. Davis invoked this Court's jurisdiction under 28 U.S.C.§ 1254(1), having timely filed this petition for writ of certiorari within ninety days of the Third Circuit Court's judgment denying the rehearing.

VII. Constitutional Provisions Involved

United States Constitution, Amendment XIV

All person born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VIII. Statement of the Case

Prior to her termination, Petitioner, the Human Resources Director for Luzerne County, was a victim of an illegal wiretap, a felony of the third degree. Petitioner suspected the wiretap was committed by a county employee, Paula Schnelly,

when she was presented with an unfair labor practice charge with detailed notes of investigatory meetings Petitioner conducted, attached as exhibits. [1]

Petitioner reported her suspicions to her supervisor Respondent David Parsnik and the County Solicitor. Parsnik lacked any interest in iinvestigating and reporting the crime, Petitioner, therefore, arranged a meeting in March 2015 with the District Attorney (DA) to report the crime. The DA promised to send the matter to the Pennsylvania Attorney General for an investigation and told everyone to "keep a lid on it." Parsnik reported the meeting to Respondent County Manager Robert Lawton, but would not allow Petitioner into the meeting with Lawton.

A few days after the meeting with the DA, the County began retaliating against Petitioner for reporting the crime to the DA. Parsnik told Petitioner her HR offices were being located to another building a few blocks away. The County cut off the phones and computers and failed to provide her with assistance with the physical move of the equipment, offices, files and furniture. The former HR offices were never filled and Petitioner was never given a reason for the move. Parsnik continued the retaliation by: refusing to give her a key to the room where HR filing cabinets were

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[1] Petitioner received a copy of an Unfair Labor Practice(ULP) charge filed against the County in March 2015. The ULP contained detailed typrewritten notes of testimony (hereinafter transcripts) from investigations conducted by Petitioner of two employees. The Keezer transcript was altered to make it appear that Petitioner threw Schnelly out of this meeting and stood over a table yelling at Schnelly; these events never happened. A third transcript from a meeting about Ron Gorki was produced by Schnelly at her deposition. The Gorki notes were not attached to the ULP.

stored, removing her from meeting with HR Consultants, minimizing her role in contract negotiations from chief negotiator to note taker, ignoring Petitioner, treating her rudely in front of staff, bypassing her and assigning work to her subordinates, denying her access to the budget, forbidding her to hire a part time worker despite money being available in the budget, telling Petitioner to do filing herself, removing the applications for the open HRBP position from her office and making the candidate selections without her input. Parsnik insisted that the new HRBP position would have managerial duties to supervise Petitioner's staff when she was not available.

In June 2015, not hearing from the AG, Petitioner inquired of the DA about the status of the investigation. The DA told Petitioner that Lawton came to her after the March 2015 meeting and told her he did not want the matter investigated. Petitioner was never approached by anyone investigating the wiretap charge while she was employed by the County. Petitioner repeatedly asked orally and by email about the status of the investigation.

The ULP was settled on October 16, 2015. Within a few days, Parsnik invited himself to Petitioner's office and told her to resign or be terminated. Despite Petitioner's repeated requests for a reason for her firing, none was given to her at the time of her termination nor at any time thereafter despite repeated requests.

In November 2015, Davis contacted the AG, inquired into the wiretap investigation and learned it was never referred for an investigation.

At trial, Lawton testified he did not terminate Petitioner, did not know the reason she was terminated, and to that day does not know the reason she was terminated. Lawton admitted he called Petitioner "an outstanding county employee in a Times Leader newspaper article published in February 3, 2015.

The first time any reason for Petitioner's termination was provided was in the Answer to the Complaint filed on April 19, 2017. Those reasons were: her conduct towards the unions, her refusal to follow through with hiring a HR business partner, her failure to initiate policies, procedures and initiatives, as directed, and her handling of issues with the employment application for a candidate for an Assistant Public Defender position. During trial, Petitioner's testimony attempting to show pretext was stricken by the court and the jury was told to disregard it.

Petitioner contends she was terminated for reporting a crime committed by a county employee to the District Attorney and for repeatedly asking about the status of the investigation.

Attorney Mark Frost (Frost) who represented Petitioner suffered serious health issues before trial.

During the pretrial conference held on June 22, 2021, Frost told the Court he didn't hear one thing the judge just said since he didn't have his hearing aids; Frost also said he just had back surgery and was in pain. The following day, Frost asked for a continuance because of his health issues. Frost's associate Dylan Hastings then joined the case. Frost directed the trial strategy and conducted the direct examination of Respondents Lawton and Parsnik Petitioner's expert witness, as well as the cross exam

of Respondent's expert witness. Post verdict, Attorneys Frost and Hastings, withdrew as counsel at the request of Petitioner. Petitioner is representing herself in this petition.

The trial judge cut off Petitioner's testimony explaining pretext, ordered it stricken from the record and told the jury to disregard it. Post trial, the judge acknowledged even if it was error to strike this testimony, it was harmless.

The court despite knowing of Frost's hearing impairments at the pre-trial conference, didn't offer him assistive hearing devices until day 3 ½ of trial.

Frost thrice violated a motion in limine precluding reference to due process. The judge threatened to put Frost in jail and summoned the Marshalls to the courtroom.

Frost slept during critical parts of the trial including Petitioner's testimony and snored during Hastings' closing argument.

Respondents introduced one witness remotely who testified to extraneous evidence. The Court did not conduct a Rule 43(a) analysis before allowing this remote testimony and did not instruct the jury on the use of character evidence.

Petitioner was denied her substantive constitutional right to a fair trial.

IX Reasons for Granting the Writ

I.Petitioner was denied the constitutional right to a fair trial in this First Amendment retaliation case.

1. Petitioner was denied the constitutional right to a *fair trial* in a First Amendment retaliation case when the judge struck Petitioner's testimony on pretext and

told the jury to disregard it denying Petitioner her Seventh Amendment right.

Fairness in a jury trial, whether civil or criminal, is a vital constitutional right. [2] The trial court abused its discretion in striking Petitioner's testimony on pretext and directing the jury to disregard Petitioner's testimony. Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 110 (3d Cir.1999)

On direct examination, counsel presented Petitioner with an exhibit that was attached to the unfair labor practice charge filed by the union against the county, the exhibit appeared to be a typewritten notes of the dialogue that took place in an investigatory meeting Davis had with Paula Schnelly and employee Jason Keezer. These notes formed the basis of the First Amendment claim and Davis' claim of illegal wiretap. This colloquy followed:

Q: What were your thoughts, when you received and reviewed this exhibit?

A. Well I had several thoughts. The first thought was, this is question and answer, question and answer for Mr. K's meeting, however the document itself had more things in it that are not reflected here.

However, the question and answer continued on to page 2, and I thought, how could anybody possibly make this document word for word, and this was produced by the union, when no one in the meeting took notes?

And then on page 2, sixth line down, it says:

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[2] See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, at 586, 96 S.Ct. 2791, at 2816 (1976) ; Bailey v. Sys Innovation, Inc. 852 F.2D 93, 98 (3d Cir.1988)

Donna Davis (County) raises herself up on her chair, moving slightly over the top of the conference table and states, why don't you just shut__"

And I thought this never happened in that meeting, and I would never engage in behavior like this

And, then, two more lines down, it says:

Donna Davis (County) says, just get out of here. Get out. Where is Bombay, Bombay, the union steward at 911? Why isn't he here?

This was ---to me, it was as if the union presented this word for word document to mean that it represented the contents of our meeting, entire contents of our meeting, which it didn't, however, whoever created this document and published this changed testimony.

MR. BUFALINO: **Objection. Move to strike.**

THE WITNESS: These were not the statements that were made--

THE COURT: Just a moment. Your objection is and your move to strike is based on what--

MR. BUFALINO: **There is no foundation for what she just testified to.** She's putting herself in the mind of somebody unidentified.

THE COURT: Sustained. And the testimony as to someone having altered this document is stricken. You should disregard it.

The words reflected in this document inaccurately represented the meeting and were altered by its author. Davis was in the meeting, had first-hand knowledge of what occurred; she established the foundation for her statement. Federal

Rule of Evidence 602 permits a witness to "testify to a matter only if sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter." The Court erred in striking the testimony and in directing the jury to disregard it.

a. Fact finding is within the province of the jury, not the judge.

By striking Petitioner's testimony establishing pretext, the Court in effect was vouching for the credibility of the document, its words and its author, Paula Schnelly and impugning the integrity of Petitioner.

Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)(in a trial by jury, the right which is secured by U.S. Const. Amend. VII, both the court and the jury are essential factors. Only through cooperation of the two ... can the constitutional right be satisfied... to dispense with either or to permit one to disregard the province of the other is to impinge on that right.)

By striking testimony on pretext, an element essential for Petitioner to prove its First Amendment retaliation case, the Court impinged on Petitioner's Seventh Amendment right to a trial by jury which recognized the jury's role to find the facts in the trial process.

b.The stricken testimony concerned a central issue in the case – pretext.

This stricken testimony concerned a critical, central issue in this case, pretext. Long after Petitioner's termination, Respondents now represented by counsel, for the first time gave reasons

to justify the termination. Among the reasons offered was Petitioner's conduct towards the unions.

'Davis' conduct towards the unions,' became a central issue in the defense of this case; Davis had to show pretext. See Reilly v City of Atlantic City, 532 F.3d 216, 224 (3d Cir. 2008)(to prove a First Amendment retaliation claim, the plaintiff must demonstrate the speech was protected by the First Amendment because it addressed a matter of public concern and the protected speech was a substantial or motivating factor in the alleged retaliation against the Plaintiff. The burden then shifts to the employer to prove that the alleged retaliatory action would have occurred absent protected speech. The Plaintiff may then rebut the employer's rationale by arguing that the discipline imposed was a *pretext* for retaliation.) Davis was testifying to *pretext* when the Court cut her off, ordered her testimony stricken and told the jury to disregard it.

Fed.R.Evid.103(a) provides that an evidentiary ruling may not be reversible error "unless a substantial right of a party is affected." Petitioner had the right and the obligation to produce evidence that Respondent's reason for her firing was pretext. Clearly, the lower court's evidentiary ruling striking evidence of pretext and ordering the jury to disregard it affected Davis' substantial right to offer evidence to prove her First Amendment retaliation case and to defend against Respondents' proffered reasons for her termination.

c. The lower court violated Petitioner's Seventh Amendment right to determine facts and credibility; Petitioner's testimony was relevant, material and founded on personal knowledge.

The Court made a factual finding with its statement, "the testimony of someone having altered this document is stricken." Essentially, the Court told the jury do not believe what Davis has to say despite the fact that she was in the meeting with the union. The Judge interfered with the jury's function to determine facts and credibility and essentially violated Petitioner's Seventh Amendment right. By striking Davis' testimony on pretext, the Court eliminated this essential piece of evidence from which the jury could have returned a verdict in her favor. Petitioner's substantive rights were clearly violated. There is no reason the jury would consider or credit any testimony offered by Petitioner The Judge's statement is an attack on Petitioner's credibility which likely affected the jury's view of evidence going forward. It is reasonably probable that the verdict was influenced by the Judge's statements.

Petitioner was in the meeting and should have been allowed to testify to what she saw and heard and how certain words in that document did not reflect what truly happened in that meeting. Given the Judge's direction, the jury had no reason to believe the meeting notes were not true.

Under Fed. R. Evid. 401 ... the rule, while giving judges great freedom to admit evidence, diminishes substantially their authority to exclude evidence as irrelevant. (citations omitted) Blancha v. Raymark Indus., 972 F.2d 507, 514 (3d Cir 1992); Hirst v Inverness Hotel Corp., 544 F.3d 221 (3d Cir.2008)(the court vacated a trial court's judgment and remanded the case for a new trial, finding: (1) the company's president was improperly allowed to testify under Fed. R. Evid. 701 where his testimony

was not based on his own perceptions, and called for the president to offer an opinion as to the ultimate issue of causation and concluded that the error was not harmless as the verdict turned on the very issue as to which the president gave improper lay opinion testimony: proximate causation.)

Unlike Hirst, Petitioner's statements were based on her observations made in a meeting which formed the substance of the meeting notes attached to the ULP and were the basis for the wiretap charge. It was plain error for the Court to strike Petitioner's testimony, on the very issue she was challenged to prove, and order the jury to disregard it. The Court violated Petitioner's Seventh Amendment right to a jury trial by taking away from the jury its responsibility to find the facts and assess the credibility of witnesses.

d.The error was not harmless.

Once an error on an evidentiary issue is established, this Court must then review whether the error was harmless. Becker v ARCO Chemical Co., 207 F.3d 176, 205 (3d Cir. 2000).

> On review, the Hirst Court said "after thorough review of the trial record.., we are *not* convinced that the District Court's error was harmless... the jury.. verdict turned on the very issue as to which Bravo was permitted to give improper lay opinion testimony: proximate causation. The jury quite possibly could have believed that Bravo's opinion was evidence relevant to its inquiry and may have relied on the opinion in reaching its verdict. With the overall evidence as to causation presenting a close case, we simply cannot conclude that it is

highly probable that the error did not affect the jury's verdict. Id.

In this case, the verdict turned on the very issue which Petitioner was forbidden to testify: pretext. Petitioner was forbidden from refuting one of the reasons for her termination.

In response to post-trial motions, Judge Mariani even conceded his error finding that "even if the Court erred in ruling to strike Plaintiff's statement as to someone having altered the document, the error would not be cause for a new trial because it is highly probable that the error did not affect the outcome of the case. See Goodman, 293 F.3d at 667.

Since the judge removed critical evidence on pretext, it is highly probable that the error did affect the outcome of the case. One realistically looking at this case cannot say that the judge essentially called Petitioner a liar. The judge told the jury to disregard Petitioner's testimony. Why would the jury have any reason to believe whatever else Petitioner had to say.

The Judge's ruling on Day 1 of trial contaminated the entire proceeding going forward, took away Petitioner's right to a fair trial and negatively influenced the verdict.

The court's decision also violated Petitioner's Seventh Amendment right to a jury trial by removing from it, its fact finding role. You cannot say that, given nature of the testimony stricken, the judge's direction to ignore Petitioner' testimony was harmless error.

2. Petitioner was denied the constitutional right to a fair trial when the judge denied Petitioner the right of confrontation and allowed remote testimony of

Respondent's witness without holding a Rule 43 (a) hearing.

During the trial, Davis objected to Shelby Watchilla testifying via Zoom; the Court said he would have disallowed the Zoom testimony, but for the fact that Appellant's counsel agreed to allow her to testify via Zoom in a pre-trial phone conference.

a. The lower court did not engage in a balancing test required under Fed. R.Civ P. 43(a).

Rule 43(a) of the Federal Rules of Civil Procedure sets forth the general rule that witness testimony must be taken in open court, however, that "for good cause in compelling circumstances, and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed R Civil P 43(a). Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Fed. R. Civ. P. 77(b). Apex Fin. Options, LLC v. Gilbertson, 2022 U.S.Dist Lexis 36685 (D.C.Del 2022).

This issue was raised during trial and in post-trial motions. At no time during the phone conference or during the trial did the district court engage in a balancing test as required by Fed. R. Civ.P. 43 to determine whether compelling reasons existed to allow remote testimony, instead relying entirely on a stipulation of counsel. This was reversible error.

b.This Court should extend the protections of the confrontation clause to this Appellant a pubic servant who lost her livelihood and reputation on the public stage for exercising First Amendment speech by reporting the criminal activity of a fellow employee

where Davis was fighting to restore her reputation and livelihood for a trial that took six years to happen.

While courts have recognized the right of confrontation generally in criminal cases, at least one court of appeals has recognized that in particular civil cases, live testimony and cross examination might be so important as to be required by constitutional due process. Hussey v. Chase Manhattan Bank, 2005 U.S. Dist. LEXIS 15012 (E.D.Pa. 2005)(citing Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir 1997).

In Van Harken, appellant parking violators challenged the city's new system for adjudicating parking violations arguing it violated the due process clauses of the U.S. and Illinois constitutions and the police officer's absence because it prevented Appellants from cross examining the officers. On appeal, the Circuit Court acknowledged that "in particular cases, live testimony and cross-examination might be so important as to be required by constitutional due process" citing Goldberg v Kelly, 397 U.S. 254, 268 (1970) (the court granted the right to confrontation to persons denied welfare benefits) Van Harken, Id. at 1352.

Petitioner's loss is more critical than the loss in Goldberg or Van Harken. Petitioner lost her livelihood and her reputation on the public stage for exercising her First Amendment rights and was attempting to restore them in this trial. The rights guaranteed by the Confrontation Clause[3] should be

[3] The requirement that testimony be taken in open court was designed: (1) to ensure that the truthfulness of witness testimony be adequately tested by cross examination, and to (2) allow the trier of fact to observe the appearance and demeanor of the witness. Apex Fin Options, LLC v. Gilbertson, 2022 US Dist Lexis 36685, 2 (U.S.Dist.Del.2022)(cases omitted)

granted to this public servant. It is noteworthy Watchilla did not have her deposition in front of her on cross exam. The Court acknowledged it was a problem it needed to address. Id. See Coy v Iowa, 487 U.S.1012 (1988)(the Court reversed a conviction of a defendant who was denied the right of confrontation ...where there were no individualized findings that the witnesses needed special protection.)

Because this case involved the deprivation of Petitioner's First Amendment right and the resulting loss of her job, future employment and her reputation, losses greater than those suffered by Van Harken who received a parking ticket and Goldberg who lost welfare benefits, this Court should extend the right of confrontation to this public servant.

c. Relinquishment of the right of confrontation involves a knowing and voluntary waiver.

Petitioner did not give her voluntary and knowing consent to relinquish her right to be confronted with witnesses appearing against her. The right to agree to, or object to remote testimony belonged solely to Appellant, not to the Court, and not to substitute counsel. In U.S. v. Khattak, 273 F.3d 557, 560 (3d Cir.2001), the Third Circuit stated that a party may waive constitutional rights or any provision of a contract or a statute as long as it is done knowingly and voluntarily.

Absent a colloquy with Davis, there is no knowing and voluntary waiver of the right to confrontation; this is plain error.

d.Watchilla was"available"to testify since she was served with a subpoena making the stipulation of counsel moot.

Atty. Bufalino asked for the Zoom [4] option. Hastings responded:

> "To the extent that she is available, however, we will ask she appear in court. If she's unavailable we have no problems with her appearing via Zoom."

Judge Mariani concluded the June 24 phone conference with these remarks:

> "That's my understanding. If she's available I would want her factually present...."

Watchilla said she was served with a subpoena to appear; this should have made her available and counsel's stipulation moot because she was not unavailable. Bufalino had the option to enforce the subpoena; because he did not, Petitioner should not be forced to waive her right of confrontation and denied her right to a fair trial. See Tracfone Wireless, Inc. v. LaMarsh, 307 F.R.D. 173, 2015 U.S. Dist. LEXIS 49058 (W.D. Pa. 2015).Fed. R. Civ. P. Rule 45. (A motion requiring respondents to appear before court and show cause why they should not be held in contempt for failure to comply was granted because respondents were in contempt for failure to comply with properly issued and served subpoenas and for failure to comply with orders of court.)

A witness' convenience should not trump the right of a party to confront a witness testifying against her; a witness has no right of convenience.

The trial in this case took six years to happen. Petitioner's right to a fair trial included the right to be confronted with witnesses testifying against her; this right was just casually removed, not knowingly,

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[4] Remote testimony became a novelty during Covid. There is no claim of Covid unavailability here.

not voluntarily for the convenience of a witness and not for compelling reasons under Rule 43. No written motion by the County was presented on this issue and none was required by the Court. No written response was permitted or requested. Petitioner did not even know her rights were being taken away from her.

e.The Court committed plain error in not charging the jury on the permitted use of character evidence under United States v Logan, 717 F.2d 84 (3d Cir. 1983), and in allowing Watchilla's testimony as character evidence where: 1. the environment in the HR office was not a reason for Davis' termination, 2 it confused the issues and prejudiced Davis' case making the jury think Watchilla's testimony was a reason for Davis termination, 3. Watchilla never complained to anyone either before or after Davis' termination.

Where an objection is not raised during trial, the Court reviews for plain error. Collins v. Alco Parking 448 F.3d 652 (3d Cir. 2006).

It was reversible error for the district court to allow Shelby Watchilla to testify as to her thoughts and opinions about Petitioner. The whole purpose of Shelby's testimony was to give false testimony that Petitioner created an alleged toxic work environment for Shelby, to bolster the County's claims that Petitioner had a poor relationship with the unions, and to prejudice the jury against Petitioner.

There are several problems with this testimony. Shelby *only now decided* she was subjected to a toxic work environment; she even admitted she never told anyone about her feelings until the time of trial, which is the reason her testimony should never have been allowed in this case. The environment in

the HR office was not a reason the County raised for Petitioner' termination. Watchilla never complained to Parsnik during Petitioner' employment. No one in the HR office complained to Parsnik about Petitioner.

Shelby testified she didn't see Davis interact with employees and she never heard of any complaints by employees against Davis.

The relevancy of Watchilla's testimony was raised in post-trial motions which the court rejected:

> Ms. Watchilla's testimony about her perception of the work environment was relevant given allegations contained in Plaintiff's Second Amended Complaint and assertions made at trial about Plaintiff handling "all issues professionally and competently" and about Plaintiff being an outstanding and exemplary employee.
>
> The Court justified Watchilla's testimony:
>
> The defense in this case was not grounded in the work environment in the HR Department. Ms. Watchilla's description of that environment served to undermine the positive general information about Plaintiff's work performance set out during Plaintiff's counsel's opening statement and case in chief to the extent those positive comments could be construed to relate to the internal workings of the HR Department's office...

The Court's rationale contradicted the general rule that, in civil cases, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

The Third Circuit enunciated a four-prong test to determine the admissibility of Rule 404(b) evidence: (1) the evidence must have a proper purpose under Rule 404(b); (2) it must be relevant under Rule 402; (3) its probative value must outweigh its prejudicial effect under Rule 403; and (4) the [district] court must charge the jury to consider the evidence only for the limited purpose for which it was admitted. Becker v ARCO Chem. Co., 207 F.3d 176, 189 (3d Cir. 2000)(citing J&R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1268 (3d Cir. 1994)(emphasis supplied).

Judge Mariani did not charge the jury on character evidence. The failure to charge the jury on the permissible use of character evidence is fatal to a case. In United States v Logan, 717 F.2d 84 (3d Cir., 1983), this Court held that the district court's failure to provide the jurors with any guidance or direction for the proper consideration of character evidence during their deliberations constituted plain error. The judgment of conviction was reversed and the case remanded for a new trial.

It was plain error to allow Watchilla's testimony.

3. The Judge denied Petitioner the constitutional right to a fair trial when it withheld assistive hearing devices from Petitioner's counsel until day 3 ½ of trial thus denying Petitioner effective assistance of counsel who the Court knew had a significant hearing impairment which was clearly impacting his ability to represent Petitioner.

Petitioner suggests that the Court should review the lower Court's failure to accommodate a known disability of trial attorney as a constitutional

error, more specifically, as a structural error. A structural error is a defect in the trial mechanism itself, affecting the entire trial process, and is per se prejudicial. Arizona v. Fulminate, 499 U.S. 279, 309-310 (1991) This type of error is reversible error. The structural error doctrine should be equally applicable to civil cases where a party and counsel have been denied meaningful access to the court; this error affects the fundamental fairness of trial and a party's substantive rights.

On day three and one half of the trial, the Court Deputy Judy Mulave approached Atty. Dylan Hastings and asked if Atty. Mark Frost needed hearing aids, but said she didn't want to embarrass him by asking him; she showed Mr.Hastings where the hearing aids were kept in a closed cabinet between counsel tables. Frost accepted the hearing aid which looked like a stethoscope and wore it the remaining day and a half of the trial. The Deputy said that hearings aids were only partially charged.

Mr. Frost's hearing disability was known to the Court during the pre- trial Conference held on June 22, 2021.) After the Court gave detailed instructions on how it wanted evidence submitted, Mr. Frost made this statement:

> "**Sorry to interrupt you. I have a hard time hearing. And pretty much what you said, I'm sorry, I could not hear.**" The Court asks if Frost needed anything for trial. Frost responds, "**I'm not sure, Judge. I'm - - at this point in time I'm barely ambulatory and in and out of the hospital, operations on my lower back, left side.**" "It's just going to be hearing, and I can - - hearing aids from the hospital are finally in, but because of COVID

there was a big delay. So I'll try to get a hearing aid for the trial."

No court assistive hearing aid devices were offered to Frost until day 3 ½. Once offered the devices, Frost wore them and his hearing appeared to improve.

This failure of the Court, wittingly or unwittingly, to offer assistive hearing devices to Frost until day 3 ½ of trial, is a failure to accommodate a known hearing disability of Counsel and deprived Appellant and her counsel meaningful access to the Court. In its July 22, 2022 Opinion, the Court said "blame for any hearing related issue is appropriately placed on Plaintiff and her trial counsel."

The issue before this Court is not who was to blame for Frost not getting assistive hearing devices on Day 1, but whether Petitioner was denied a fair trial when her counsel, who had a serious hearing impairment known to the Court, was not presented with hearing devices on Day 1 so he could meaningfully participate in proceedings and represent Petitioner, an attorney who was denied hybrid representation. There doesn't appear to be an established procedure that addresses this situation. The Court was aware of Frost's hearing disability during the pre-trial conference, yet there is no mention in the record of the availability of court assistive hearing devices. This Court cannot state it is highly probable that if Frost had the hearing devices the verdict would not have been different.

Frost directed the examination of Lawton and Parsnik, who were Defendants and critical witnesses, without the use of the court assistive hearing devices. The record shows Frost was having difficulty understanding them. For example, the redirect of

Lawton on Day 3 turned into a debacle because of Frost's hearing problem. Frost asked Lawton if he was aware of a meeting with an individual whose name Frost couldn't recall, despite it being mentioned during the course of the trial. Frost turned to Plaintiff's table and asked the name of the person. Hastings responded, but Frost misunderstood what was said and called the individual Harry Gallagher even after the Court told Mr. Frost the name was Kerry Gallagher. The Judge threw up his hands.

Frost's hearing issue was critical to a fair trial. During the trial, Frost repeatedly asked witnesses to repeat themselves. There were times when Frost wasn't making sense in his questioning perhaps because he wasn't hearing accurately or had other issues related to his competency to handle the rigors of a trial, resulting in an unfair trial.

Frost's repetitious questioning on "just cause" likely resulted from him not hearing the Judge's instructions on due process claims during the pretrial conference.

This hearing disability had the effect of robbing Petitioner of counsel who could hear the testimony, object to evidence, know what evidence or testimony needed to be presented, guide his associate who was trying his first case, and meaningfully participate in the proceedings.

The Court was in control of and possession of the assistive hearing devices which were stored in a closed cabinet. Frost did not reject the devices, he accepted use of the devices when offered.

It is well accepted that employers under the ADA have an obligation to come forward and make accommodations to their employees without being asked if they are aware of their employee's disability.

[5] There is no question the Court was aware of Frost's disability. It should be incumbent upon the Court to offer whatever assistance it has available to allow counsel, jurors, parties the opportunity to meaningfully participate in the trial process. Since the Court was in possession and control of the assistive hearing devices, it was the Court who should have offered those devices for use on Day 1 or earlier. There was obviously no process in place during the pretrial conference held in June 2021 obliging the Court to make the parties aware of the availability of the court assistive hearing devices. The transcript of the pre-trial conference shows no communication on this point.

Regardless of whose fault it is that the hearing devices were not presented at the start of trial, had the devices been offered we might have had a different verdict. Because it is unclear how the trial would have proceeded had Frost had the court assistive hearing devices, this Court should find that Petitioner's substantive constitutional right to a fair trial was denied when the lower court failed to accommodate a known hearing disability of counsel from Day 1 of trial and award the only relief possible to cure this defect which is a new trial. See Tennessee v Lane, 541 U.S 509, 513-514 (2004)(the Supreme Court held that

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[5] While a request for accommodations does not need to be specific or contain magic words, the **employer must be aware of the employee's disability**, and an employee must show that his **employer** is **aware** that various accommodations offered are not satisfactory to give rise to an obligation on the part of the employer to explore additional reasonable accommodations. McGlone v. Philadelphia Gas Works, 733 F. App'x 606, 610-11 (3d Cir. 2018).

plaintiffs were unable to meaningfully participate in court proceedings because the Commonwealth failed to reasonably accommodate plaintiffs' disabilities in order to provide access to the courts where two paraplegic plaintiffs alleged that a court compelled their attendance at a court proceeding located on the upper floor of a courthouse that had no elevator and they refused to allow officers to carry them.)

This Court should extend the holding in Lane to this case where the lower court itself failed to reasonably accommodate counsel's disabilities which affected his representation of Plaintiff and in effect denied her right of access to the courts and left her unable to meaningfully participate. Gonzalez v Pennsylvania, 2007 U.S. Dist. Lexis 41374, 2007 WL 1655465 (E.D PA 2007), Plaintiffs, deaf individuals under the ADA, were unable to meaningfully participate in court proceedings because the Commonwealth refused their request for a qualified sign language interpreter.

Frost's behavior diminished Davis' case, making it appear irrelevant to the jury. Frost's hearing disability, his sleeping, his repetitive presentation of inadmissible evidence strongly suggest Davis was denied a fair trial. [6] Fairness in a jury trial, whether civil or criminal, is a vital constitutional right. [7] The outcome should be reversed and the case remanded.

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[6] Strickland v Washington, 466 U.S. 668 (1984)

[7] See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, at 586, 96 S.Ct. 2791, at 2816 (1976) ; Bailey v. Sys Innovation, Inc. 852 F.2D 93, 98 (3d Cir.1988)

4. Petitioner was denied a constitutional right to a fair trial when the court failed to declare a mistrial *sua sponte* after an enraged Court said "*I have not had a lawyer be as contumacious as you have been, in the ten years I've been on the bench. And but for your age and your condition, I would hold you in contempt right now and you would spend time in prison*" after Petitioner's attorney thrice violated an order of the Court precluding evidence of due process, thus elevating counsel above the Petitioner's constitutional right to a fair trial.

Court rulings on evidentiary matters are reviewed for an abuse of discretion. U.S. v. Daraio, 445 F.3d 253 (3d Cir.2006)

Despite pretrial rulings, Mark Frost, Davis' attorney, on several separate occasions raised questions about due process.

The Court admonished Attorney Frost and removed the jury. On the fourth day of trial during the cross examination of James Stavros, Frost raised due process again. The Court became so enraged, he made this remark:

> "I have not had a lawyer be as contumacious as you have been, in the ten years I've been on the bench. And but for your age and your condition, I would hold you in contempt right now and you would spend time in prison."

The judge knew *Frost's "condition" was in issue*; this condition affected Davis' right to a fair trial. The Court should have declared a mistrial. Although the jury was removed, the Judge was so loud in his admonishment, it likely was heard in the jury room: jurors knew why they were being removed. Plaintiff was shaken by the Judge's remarks, tone, tenor and demeanor.

After the jury returned to the Courtroom, no curative instruction was offered. Marshalls were summoned to the Courtroom and took their seats.

A brief recess was taken. Outside the courtroom, numerous U.S. Marshalls were present in the hallway through whom the jury had to pass.

These events were prejudicial, making it appear that Davis and/or her counsel were doing something inappropriate that required the presence of the Marshall Service in numbers with a presence in and out of the Courtroom.

At times, it appeared that Frost could not hear or was having trouble hearing what was being said in the courtroom. Frost did not understand why the Court was so angry about his line of questioning on just cause and due process.

Frost likely missed the due process instructions during the pre-trial conference when Frost did not have his hearing aids.

Frost raised due process at other points during the trial, to the Judge's remonstrations.

Davis unnecessarily was subjected to being discredited by Frost's repeated improper statements and the escalation of the Court's response. Davis was denied her right to a fair trial, a vital constitutional right. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, at 586, 96 S.Ct. 2791, at 2816 (1976) (Brennan,J., concurring)("So basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms.' "); Bailey v. Sys Innovation, Inc. 852 F.2D 93, 98 (3d Cir.1988)

The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is [the judge's] duty to set the verdict

aside..." Smith v. Lightning Bolt Products Inc., 861 F.2d 363, 370 (2d Cir.1988)

II Petitioner was denied due process when the Court denied Petitioner's Motion to Vacate without holding a hearing to determine whether opposing counsel introduced fraudulent testimony.

Bufalino called Shelby Watchilla as his only witness and asked her for her impression of the environment in the office working for Davis. Watchilla said "the environment was very uncomfortable, it was not a place I enjoyed going every day. I would describe it as being toxic." Watchilla admitted she never complained to anyone about her thoughts of feeling uncomfortable. This testimony was not one of the reasons for Petitioner's termination.

Post verdict, Davis requested a hearing on the Motion to Vacate for the introduction of fraudulent testimony from Watchilla. The Court denied the motion finding Watchilla's testimony relevant because Petitioner's *Counsel* told the jury that Petitioner was unanimously revered and respected by her peers and Petitioner presented evidence attempting to suggest she was an outstanding employee.

Under Fed. R. Evid. 403 this evidence should have been excluded as being prejudicial. Watchilla's testimony about the "toxic" work environment was manufactured intending to deceive the Court that it was relevant and material to their defense. The environment in the HR office was never a reason for Davis' termination.

Bufalino knew from Watchilla's 2016 deposition which did not mention the word toxic, that Watchilla never complained to Parsnik about Petitioner, but put this testimony on the record knowing the impression this would have on the jury. Parsnik admitted he never had any complaints from Watchilla about Petitioner.

A party cannot waive the right to object to evidence not previously objected to where counsel has committed a fraud on the Court. See Baxter v Bressman, 874 F.3d 142 (3d Cir.2017). Waiver does not apply "when counsel fails to object to a fundamental and highly prejudicial error resulting in a miscarriage of justice." Wilson v. Vermont Castings, Inc., 170 F.3d 391, 395-96 (3d Cir.1999).

The Court, however, denied the Motion to Vacate without granting Petitioner a hearing on the Motion and the opportunity to present evidence showing Respondent and Respondent's counsel committed a fraud upon the Court. The Court's denial of a hearing violated Petitioner due process right under the Fifth Amendment. The Court made findings of facts in violation of Petitioner's Seventh Amendment right to a jury trial.

Watchilla's testimony was not a reason for Davis' termination by Defendants' own admission.

As an officer of the Court, every attorney has a duty to be completely honest in conducting litigation. Baxter v Bressman (In re Bressman), 874 F.3d 142, 149 (3d Cir.2017) See In re Snyder, 472 U.S. 634, 644-45, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985). A Court may set aside a judgment based upon its finding of fraud on the court when an officer of the court has engaged in "egregious misconduct."

Shortly after Watchilla testified in this case, she entered into a settlement[8] of her own litigation against Luzerne County (seeking a declaratory judgment) and its Controller (defamation) growing out of her own mismanagement of the elections office. The County recommended going to Mediation shortly after Watchilla testified in this case and shortly after arguing its preliminary objections to the trial judge. [9]

The lower Court rejected the Motion to Vacate justifying Watchilla's testimony as a response to Petitioner's pleadings stating that Petitioner was professional and competently performed her job duties and as a response to Counsel's opening statement even though these are not evidence.

Bufalino presented this testimony knowing it was untrue, irrelevant and immaterial to the defense pled in this case and was at material variance with the pleadings and discovery which never made the environment in the HR office a reason for the termination. This court should reverse the motion to vacate and order a new tri

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[8] There was deceit even in the language of the Settlement Agreement that the settlement for $60,000.00 would be paid $10,000 by the County and $50,000.00 from Defendant Walter Griffith (Exhibit 1) In fact, the entire $60,000.00 would come from the County. No monies would be paid by Walter Griffith. (Exhibit 4, Affidavit). **A hearing on this Motion to Vacate was necessary to prove intent to deceive the Court.**

[9] The County fresh off of a filing of its Preliminary Objections in the Watchilla case did an about face and decided to explore mediation. It was not Walter Griffith who was exploring settlement, it came from the County Atty. Dean sent the letter to the Court asking the Court to hold up on deciding the preliminary objections it just filed and argued.

CONCLUSION

This Court should reverse the decision of the Third Circuit and find that Petitioner was denied the constitutional right to a *fair trial* where the judge: (1) struck Petitioner's testimony on pretext and told the jury to disregard it denying Petitioner her Seventh Amendment right, (2) denied Petitioner the right of confrontation and allowed remote testimony of Respondent's witness without holding a Rule 43 (a) hearing, (3) withheld assistive hearing devices from Petitioner's counsel until day 3 ½ of trial thus denying Petitioner effective assistance of counsel who the Court knew had a significant hearing impairment which was clearly impacting his ability to represent Petitioner, (4) failed to declare a mistrial *sua sponte* after an enraged Court said " I have not had a lawyer be as contumacious as you have been, in the ten years I've been on the bench. And but for your age and your condition, I would hold you in contempt right now and you would spend time in prison" after Petitioner's attorney thrice violated an order of the Court precluding evidence of due process, thus elevating counsel above the Petitioner's right to a fair trial.

The Court should reverse the decision affirming the denial of the Motion to Vacate Judgment since the lower court violated Petitioner's due process rights by not hold a hearing on the factual issue as to whether Respondent's counsel introduced fraudulent testimony at trial.

/s/Donna Davis, Esq.
Donna Davis, Esq.
LAW OFFICE DONNA DAVIS
651 Simpson St
Throop, PA 18512
570-489-2939

APPENDIX
EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2519

DONNA DAVIS JAVITZ,
Appellant

v.

LUZERNE COUNTY,
ROBERT LAWTON, Individually,
DAVID PARSNIK, Individually

On Appeal from the United States District
Court for the Middle District of Pennsylvania
(D.C. No. 3-15-cv-02443)
District Judge Hon. Robert D. Mariani

Submitted Under Third Circuit L.A.R. 34.1(a)
On September 8, 2023

Before: CHAGARES, *Chief Judge*, HARDIMAN
and MONTGOMERY-REEVES, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for

the Middle District of Pennsylvania and was submitted on September 8, 2023.

On consideration whereof, it is now ORDERED and ADJUDGED by this Court that the District Court's orders entered on July 22, 2022 and August 4, 2022 are hereby AFFRIMED. All of the above in accordance with the Opinion of this Court.

Costs shall be taxed against Appellant.

ATTEST
s/ Patricia S. Dodszuweit
Clerk

Dated: September 11, 2023

Certified as a true copy and issued in lieu of a formal mandate on November 1, 2023

Teste: *s/ Patricia S. Dodszuweit*
Clerk, U.S.Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2519

DONNA DAVIS JAVITZ,
Appellant
v.
LUZERNE COUNTY,
ROBERT LAWTON, Individually,
DAVID PARSNIK, Individually

On Appeal from the United States District
Court for the Middle District of Pennsylvania
(D.C. No. 3-15-cv-02443)
District Judge Hon. Robert D. Mariani

Submitted Under Third Circuit L.A.R. 34.1(a)
On September 8, 2023

Before: CHAGARES, *Chief Judge,* HARDIMAN
and MONTGOMERY-REEVES, *Circuit Judges*

(Filed: September 11, 2023)

OPINION*

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*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent

HARDIMAN, *Circuit Judge*

Donna Davis Javitz (Davis), an attorney representing herself, appeals two orders of the District Court upholding an adverse jury verdict. Davis raises a congeries of supposed errors. Finding none persuasive, we will affirm.

I

Davis worked as Director of Human Resources of Luzerne County for just fourteen months before she was fired. According to the County, Davis was fired because of her "conduct toward [county] unions, her refusal to follow through with hiring a Human Resources Business Partner...her failure to initiate policies, procedures and initiatives as directed[,] and [her handling of] issues with the employment application for a candidate for an assistant public defender position." *Javitz v. Cnty of Luzerne,* 940 F.3d 858, 862 (3d Cir. 2019) (cleaned up)

Davis sued the County, the County Manager, and her supervisor, David Parsnik. She alleged she was fired in retaliation for reporting to Parsnik and the District Attorney that she believed she had been illegally recorded by a union representative from the American Federation of State, County and Municipal Employees (AFSCME).

After a four-day trial, the jury returned a verdict for Defendants and judgment was entered in their favor. Davis then fired her attorneys and receded pro se. She filed in the District Court the following post trial motions under the Federal Rules of Civil Procedure: (1) a Rule 59 (a) motion

for a new trial; (2) a Rule 59 (e) motion to alter or amend judgment; and (3) a Rule 60(b)(6) motion for relief from the judgment. She later filed another motion to vacate judgment. The District Court denied all the motions. Davis appealed.

II

The District Court had jurisdiction under 28 U.S.C.§ 1331. We have jurisdiction under 28 U.S.C. § 1291. Davis made no arguments on appeal about her motions under Rule 59(e) or Rule 60(b)(6). So we do not address them. *See Barna v. Bd. Sch. Dirs. of Panther Valley Sch Dist.*, 877 F.3d 136, 145 (3d Cir.2017) (collecting cases affirming that issues not raised are generally forfeited). The only relief Davis seeks in her opening brief is to "reverse the [denial of the] motion to vacate and order a new trial." Davis Brf. 51. We review District Court's decisions on those motions for abuse of discretion. See Bressman, 874 F.3d, 142, 148 (3d Cir.2017) (motion to vacate)

III

A

We begin with Davis' arguments about the order denying her motion for a new trial. She raises two claims involving testimony. First, she contends the District Court erred in striking part of her testimony asserting that someone altered notes from an AFSCME union meeting to make her look bad. Though she failed to object at trial when this testimony was stricken, the District Court excused that failure because Davis had claimed there was "fundamental and highly

prejudicial error[] resulting in a miscarriage of justice."App.16 (citing *Wilson v. Vermont Castings, Inc.*, 170 F.3d 391, 395-96 (3d Cir. 1999). Our review of the record leads us to agree with the District Court that there was no miscarriage of justice here. Even had the Court erred in striking the testimony about someone altering the notes—which is not apparent—Davis's earlier denial of the incidents described in the notes was not stricken and remained part of the record. So it is "highly probable" that any error would not have affected the outcome of her case. *Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 667 (3d Cir. 2002)

Davis also claims the Court erred when it allowed Shelby Watchilla, a human resources employee who worked under Davis, to testify remotely. Davis contends that: (1) the Court violated Rule 43(a) of the Federal Rules of Civil Procedure, (2) the Court failed to instruct the jury on character evidence, and (3) we should recognize a constitutional right to confront witnesses in civil cases. We will not consider these arguments because Davis forfeited them by not raising the in the District Court. *See Simko v. United States Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021)

B

Davis next alleges multiple errors involving her former lawyer, Mark Frost. According to Davis, the District Court committed structural error by not accommodating Frost's hearing defect and allowing him to sleep during trial. These arguments are nonstarters because

the structural error doctrine applies only in a "very limited class" of criminal cases, *Greer v. United States*, 141 S. Ct. 2090, 2099 (2021), not in civil cases like this one.

In any event, the record belies Davis' argument. Frost told the Court about his hearing issues at the pretrial conference. The District Court responded by instructing Frost to disclose any necessary accommodations, and Frost thanked the Court for the offer. Yet Frost made no request for an accommodation during trial. Instead, he waited for the Court Deputy to approach him to offer hearing assistance on the third day of trial. So the District Court did not err relative to Frost's hearing.

Davis' related argument that Frost provided ineffective assistance of counsel fares no better. This is a civil case, so the constitutional right to effective assistance of counsel does not apply. *See Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 408 (3d Cir. 1980)("The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice," not a retrial.)

C

Davis' last four arguments involve statements and actions by opposing counsel, Mark Bufalino. Considering the arguments individually or as a whole, the record shows that the District Court did not abuse its discretion by holding that Bufalino's actions did not justify granting Davis a new trial. *See Fineman v. Armstrong World Indus., Inc*, 980 F.2d 171, 207 (3d Cir. 1992)

It's true that Bufalino objected often. But many of his objections were well- founded. *See generally* App.31 n.3. Even had they not been, the District Court prevented any prejudice by instructing the jury that it should not be influenced by the fact of objections.

Nor were Bufalino's opening and closing statements improper. Bufalino simply summarized the evidence presented at trial. And the District Court properly instructed the jury that statements by counsel were not evidence.

The renewed claim that Bufalino improperly ridiculed Davis was forfeited in the District Court because Davis raised it only in her reply brief in support of her first post-trial motion.

Finally, Bufalino's questions about Davis' 2019 wage information do not require a new trial. The information was referenced briefly in the context of identifying what an expert reviewed in preparing testimony. Such a cursory mention was not prejudicial.

In sum, none of Bufalino's alleged errors warrants a new trial. Nor do any of the other alleged errors. And Davis's last-ditch pitch argument that we apply the cumulative error doctrine fails because we have not applied that doctrine in civil suits. *Twp. of Bordentown New Jersey v. FERC*, 903 F.3d 234, 266 (3d Cir. 2018).

IV

She argues that Defendants' attorneys manufactured evidence with the intent to deceive the Court by settling Watchilla's unrelated defamation suit against the County in exchange for her testimony against Davis. At trial,

Watchilla testified that Davis created a toxic work environment.

But Davis presented no evidence that Watchilla and the County agreed to settle the defamation litigation before Watchilla testified in Davis's case. Discussions about settlement of Watchilla's lawsuit did not occur until after final judgment was entered against Davis here. Moreover, Watchilla's testimony that Davis created a "toxic" work environment resembled her deposition testimony that the environment was "uncomfortable." Besides, her deposition took place nearly four years before the incidents that gave rise to her defamation case against the County. The District Court did not abuse its discretion when it denied Davis' motion to vacate the judgment.

For these reasons, we will affirm the District Court's orders.

OFFICE OF THE CLERK
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790
Website:www.ca3.uscourts.gov
PATRICIA S. DODSZUWEIT, Clerk
Telephone 215-597-2995
November 1, 2023

Mr. Peter J. Welsh
United States District Court for the Middle District of Pennsylvania
William J. Nealon Federal Building & United States Courthouse
235 N. Washington Avenue
Scranton, PA 18503

RE: Donna Javitz v. Luzerne County, et al
Case Number: 22-2519
District Court Case Number:3-15-cv-02443

Dear Mr. Welsh:

Enclosed herewith is the certified judgment together with copy of the opinion in the above-captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also encosed showing costs taxed, if any.

Very truly yours,
Patricia S. Dodszuweit, Clerk
By: StephanieCase Manager
Direct Dial 267-299-4926
Cc: Mark Bufalino, Esq., Donna EM Davis, Esq.

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APPENDIX
EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 22-2519
DONNA DAVIS JAVITZ,
Appellant

v.

LUZERNE COUNTY,
ROBERT LAWTON, Individually,
DAVID PARSNIK, Individually

On Appeal from the United States District
Court for the Middle District of Pennsylvania
(D.C. No. 3-15-cv-02443)
District Judge Hon. Robert D. Mariani

SUR PETITION FOR PANEL REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN and MONTGOMERY-REEVES, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court., it is hereby ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT
s. Thomas M. Hardiman
Circuit Judge

Dated: October 24, 2023
Sb/cc: All Counsel of Record

CERTIFICATE OF COMPLIANCE

NO.

DONNA DAVIS JAVITZ,

Petitioner

v.

LUZERNE COUNTY, ROBERT LAWTON, DAVID PARSNIK,

Respondents

As required by Supreme Court Rule 33.1 (h), I certify that the parties for a writ of certiorari contains 8,048 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.
Executed January 22, 2024

Donna Davis, Esq.

DONNA DAVIS JAVITZ,
Petitioner,
v.
LUZERNE COUNTY; ROBERT LAWTON,
DAVID PARSNIK,
Respondents

CERTIFICATE OF SERVICE

I, DONNA DAVIS, Esquire hereby certify that I served three copies of the Petition for Writ of Certiorari and Appendix upon Mark Bufalino, Esq. on March 22, 2024 to this address of record:

Mark Bufalino, Esq.
Elliot Greenleaf
15 Public Square Suite 210
Wilkes Barre, PA 18701

/s/Donna Davis, Esq.
Donna Davis, Esq.
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