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

APPENDIX FILED BY APPELLANT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Donna Davis, Esq.
Counsel of Record
Law Office of
DONNA DAVIS
651 Simpson Street
Throop, PA 18512
570-489-2939

VOLUME I

TABLE OF CONTENTS

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*

---

*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.

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

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONNA DAVIS JAVITZ,
Plaintiff,

V.

3:15-CV-2443
JUDGE MARIANI)

LUZERNE COUNTY, ROBERT LAWTON, Individually, and DAVID PARSNIK, Individually,
Defendants.

JUDGMENT IN A CIVIL ACTION

The court has ordered that

X other: Judgment is entered in favor of Defendants, Luzerne County, Robert Lawton and David Parsnik, and against Plaintiff, Donna Davis Javitz

This action was:
X tried by a jury with Judge Robert D. Mariani presiding, and the jury has rendered a verdict

Date: July 12, 2021

CLERK OF COURT
/s/ Judith A. Malave,
Deputy Clerk

014

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONNA DAVIS JAVITZ,
Plaintiff,

V.

3:15-CV-2443
JUDGE MARIANI)

LUZERNE COUNTY, ROBERT LAWTON, Individually, and DAVID PARSNIK, Individually,
Defendants.

ORDER

AND NOW, THIS 22nd DAY OF JULY 2022, upon consideration of Plaintiff's "Motion for a New Trial Under Federal Rules of Civil Procedure, Rule 59(a) and Motion to Alter or Amend Judgment Under Federal Rules of Civil Procedure, Rule 59 e and Motion for Relief from Judgment Under Federal Rules of Civil Procedure, Rule 60 (b)(6)" (Doc.265) and all relevant documents, for the reasons set forth in the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED THAT** Plaintiff's Motion is **DENIED**.

/s/ Robert D. Mariani
Robert D. Mariani
United States District Judge

015

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONNA DAVIS JAVITZ,
Plaintiff,

V.

3:15-CV-244
(JUDGE MARIANI)

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

MEMORANDUM OPINION

I. INTRODUCTION

Here the Court considers Plaintiff's "Motion for a New Trial Under Federal Rules of Civil Procedure, Rule 59a *and* Motion to Alter or Amend Judgment Under Federal Rules of Civil Procedure, Rule 59e *and* Motion for Relief from Judgment Under Federal Rules of Civil Procedure, Rule 60(b)(6)" (Doc. 265). Plaintiff is now proceeding *pro se* but was represented at trial by Attorneys Mark Frost and Dylan Hastings with Mr. Hastings serving as lead counsel. (*See* Doc. 231 ¶ 5.) Plaintiff brings this combined Motion based on her assertion that she "was denied a fair trial as a result of counsels' misconduct, errors in evidentiary rulings, Attorney Frost's hearing impairment and the Court's lack of accommodation, procedural mistakes, bias of the jury, misconduct by jury members." (Doc. 278 at 3.) For the reasons that follow, the Court will deny Plaintiff's Motion.

II. BACKGROUND

On December 21, 2015, Plaintiff filed the above-captioned action after she was terminated from her position as the Director of Human Resources of Luzerne County, Pennsylvania. (Doc. 1.) Plaintiff was hired for the position on August 4, 2014, and was terminated on October 26, 2015. *(Id.* ¶¶ 39, 72, 78.) The operative Complaint is Plaintiff's Second Amended Complaint filed on April 5, 2017. (Doc. 58.) The Second Amended Complaint contains four counts: Fourteenth Amendment procedural due process claim pursuant to 42 U.S.C. § 1983; First Amendment retaliation claim pursuant to 42 U.S.C. § 1983; state law claim for Violation of PA Whistleblower Act and Wrongful Termination in Violation of Public Policy; and state law claim for Violation of Legislative Enactments. *(Id.)* Defendants in the action are Luzerne County, Robert Lawton, County Manager for Luzerne County at all relevant times, and David Parsnik, Division Head for Administrative Services for Luzerne County at all relevant times. *(Id.*¶¶ 2-4.)

In response to Defendants' Motion for Summary Judgment (Doc. 66), the Court issued a Memorandum Opinion (Doc. 108) and Order (Doc. 109) on March 29, 2018, granting Defendants' motion in part and directing the Clerk of Court to enter judgment in favor of Defendants on Plaintiff's Fourteenth Amendment due process claim and First Amendment retaliation claim. (Doc. 109 ¶¶ 2, 3.) The Court also dismissed Plaintiff's state law claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *(Id.* ¶ 4.)

After the Court denied Plaintiff's Motion for Reconsideration Under Federal Rule of Civil Procedure 59, Plaintiff appealed the Court's

determination regarding the First Amendment and Fourteenth Amendment claims. (Docs. 113, 117, 118.) The Circuit Court's decision on the appeal contained the following summary of the case:

> In July 2014, Javitz was offered a position with Luzerne County as the Director of Human Resources. Her offer letter contained the terms of her employment, and described the job as: "Management Level, Non Union, ***Exempt,*** Regular Full Time," and that her position was ***"at will."*** Javitz signed and accepted the offer, and began employment on August 4, 2014.
>
> As Director of Human Services, Javitz was responsible for-among other duties-commencing the hiring process for vacant positions, negotiating contracts, dealing with employee complaints, responding to grievances, conducting investigations, and attending meetings. Once she began work, Javitz participated in two investigatory meetings with the American Federation of State, County, and Municipal Employees ("AFSCME"), which eventually resulted in ASFSCME filing an unfair labor practices suit in March 2015.
>
> **A. Javitz's Allegations of Wiretapping**
>
> Javitz claimed that a document filed in the ASFSCME lawsuit was a transcript of the investigatory meetings in which she participated. She suspected

that a specific county employee, AFSCME union representative Paula Schnelly, had recorded the meeting without Javitz's consent-a crime under 18 Pa. Cons. Stat.§ 5703.

Javitz reported her concern to her supervisor, David Parsnik, who agreed that the meeting may have been recorded. The two met with the District Attorney, who indicated that she would refer the matter to the Office of the Attorney General due to a conflict of interest. Javitz claims that the County Manager, Robert Lawton, intervened and instructed the District Attorney to drop the matter, which Defendants deny.

After reporting the matter, Javitz followed up with Parsnik and the County Solicitor about the status of the investigation multiple times.

After making this report to the District Attorney, Javitz alleges that county employees retaliated against her. She claims that her supervisor assigned work directly to her subordinates and cut her out of those and other assignments for which Javitz would have otherwise been responsible. She also cites her office's relocation in May of 2015 as an example, but the move was planned prior to her hiring.

Finally, on October 26, 2015, Javitz was fired. She was given no reason for her termination. *Id.* She

requested a *Loudermill* hearing, but was denied. *Id.*

B. County's Response

The County maintains that Javitz was fired because of her "conduct toward [county] unions, her refusal to follow through with hiring a Human Resources Business Partner [(a vacant position in the Human Resources Department during Plaintiff's County employment)], 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. County of Luzerne, 940 F.3d 858, 861-62 (3d Cir. 2019) (internal citations omitted).

With its October 10, 2019, opinion, the Circuit Court affirmed the Court's ruling regarding the Fourteenth Amendment due process claim and remanded the matter for further proceedings regarding the First Amendment retaliation claim. As a result of the Third decision, the only claim before the Court was Plaintiff's First Amendment retaliation claim.

Trial was set to commence on the First Amendment retaliation claim on June 30, 2021. (See Doc. 198.) Plaintiff's Motion for Continuance of Trial was filed on June 24, 2021. (Doc. 231.) Plaintiff sought the motion based on the inability of Attorney Frost, who was lead counsel at the time, to attend the trial because of a sudden illness and hospitalization.

(Id. ¶¶ 2-3.) Plaintiff averred that Attorney Hastings would serve as lead counsel but that he needed more time to prepare for trial. *(Id.* ¶ 5.) The Court held a telephone conference on June 24, 2021, in which Attorney Hastings participated on behalf of Plaintiff and Attorney Mark Bufalino participated on behalf of Defendants. (*See* Doc. 242.) At the conference, the Court and counsel agreed that trial would commence on July 6, 2021.

Trial commenced on July 6, 2021, and ended on July 9, 2021. Attorneys Hastings and Frost represented Plaintiff. Attorney Bufalino represented Defendants. The jury returned a verdict for Defendants on July 9, 2021. (Doc. 251.) The Clerk of Court entered judgment in favor of Defendants on July 12, 2021. (Doc. 252.) Plaintiff filed the pending Motions on August 9, 2021. (Doc. 265.)

III. RELEVANT LEGAL STANDARDS

A. Federal Rule of Civil Procedure 59(a)

"The court may, on motion, grant a new trial on all or some of the issues-and to any party ... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). The Court may grant a new trial "purely on a question of law;" or to correct a previous ruling "on a matter that initially rested within the discretion of the court, e.g., evidentiary rulings or prejudicial statements made by counsel;" or "because [the Court] believes the jury's decision is against the weight of the evidence;" among other grounds. *Klein v. Hollings,* 992 F.2d 1285, 1289-90 (3d

Cir.1993) (internal citations omitted). While the Court has wide discretion to order a new trial to correct rulings that initially rested in its discretion, it has relatively narrow discretion to overturn a verdict on the grounds that the verdict is against the weight of the evidence. *Id.* This is because

> where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.

Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir. 1960).

> Accordingly, the district court ought to grant a new trial on the basis that the verdict was against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand. Where the subject matter of the litigation is simple and within a layman's understanding, the district court is given less freedom to scrutinize the jury's verdict than in a case that

deals with complex factual determinations.

Williamson v. Consol. Rail Corp., 926 F.2d 1344, 1352 (3d Cir.1991) (internal citations and quotations omitted).

B. Federal Rule of Civil Procedure 59(e)

Federal Rule of Civil Procedure 59(e) allows for a motion to alter or amend the judgment. "A proper Rule 59(e) motion must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Wiest v. Lynch*, 710 F.3d 121, 128 (3d Cir. 2013) (quotation marks omitted). Thus, when a jury errs as a matter of law, a Court may rectify this error through a Rule 59(e) motion. *Keifer v. Reinhart Foodservices, LLC. ("Keifer II")*, 563 Fed. Appx. 112, 115 (3d Cir. 2014); *see also United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) ("A motion under Rule 59(e) is a 'device to relitigate the original issue' decided by the district court, and used to allege legal error") (quoting *Smith v. Evans*, 853 F.2d 155, 158- 159 (3d Cir.1988)). However, "motions for reconsideration should not be used to put forward arguments which the movant ... could have made but neglected to make before judgment." *United States v. Jasin*, 292 F. Supp. 2d 670, 677 (E.D.Pa.2003) (internal quotation marks and alterations omitted) (quoting *Reich v. Compton*, 834 F. Supp. 2d 753, 755 (E.D.Pa.1993) *rev'd in part and aff'd in part on other grounds*, 57 F.3d 270 (3d Cir.1995)). Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should only be granted sparingly. *Continental Gas.* Co. *v. Diversified Indus.*, Inc., 884 F. Supp. 937,943 (E.D. Pa. 1995) (citing *Rottmund v.*

Continental Assurance Co., 813 F. Supp. 1104, 1107 (E.D. Pa.1992)).

C. Federal Rule of Civil Procedure 60(b)(6)

Federal Rule of Civil Procedure Rule 60(b) allows a court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for numerous reasons. Subsections (1) through (5) provide specific grounds for relief. Rule 60(b)(6) has been described as the "catch-all provision" of Rule 60(b) that permits a court to relieve a party from final judgment for "any other reason that justifies relief."

The Third Circuit has consistently admonished that "the Rule 60(b)(6) ground for relief from judgment provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances." *Coltec Indus., Inc. v. Hobgood,* 280 F.3d 262, 273 (3d Cir. 2002) (quoting *In re Fine Paper Antitrust Litig.,* 840 F.2d 188, 194 (3d Cir. 1988)). Relief under Rule 60(b)(6) should be granted only "where, without such relief, an extreme and unexpected hardship would occur." *Cox v. Horn,* 757 F.3d 113, 115 (3d Cir. 2014) (quoting *Sawka v. Healtheast, Inc.,* 989 F.2d 138, 140 (3d Cir. 1993)). "This is a difficult standard to meet." *Satterfield v. District Attorney Phila.,* 872 F.3d 152, 158 (3d Cir. 2017).

In addressing claims invoking Rule 60(b)(6), the Third Circuit employs a flexible case-by-case analysis that "takes into account all the particulars of a movant's case" before determining whether Rule 60(b)(6) relief should be granted. *Cox,* 757 F.3d at 122. The movant bears the burden of establishing entitlement to this extraordinary relief. *Id.*

D. Harmless Error

Federal Rule of Civil Procedure 61 governs such motions and provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61.

In *Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655 (3d Cir. 2002), the Circuit Court related "substantial rights" consideration in Rule 61 with the Court's previous determination that "[i]n reviewing evidentiary rulings, 'if we find nonconstitutional error in a civil suit, such error is harmless only if it is highly probable that the error did not affect the outcome of the case.'" *Id.* at 667 (quoting *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994)). *Goodman* summarized the appropriate inquiry to be "whether it is" highly probable" that the jury would have reached the same verdict absent the alleged error. *Id.*

IV. ANALYSIS

Plaintiff raises numerous grounds upon which she alleges she is entitled to the relief requested which the court has categorized as follows:

misconduct by opposing counsel; misconduct by Plaintiff's counsel; jury misconduct; and Court errors. (*See* Doc. 278 at 8-38.) Defendants respond generally that because Plaintiffs failed to raise issues raised in her Motion at trial or in a Federal Rule of Civil Procedure 50 motion, she has waived these issues and cannot challenge them with the pending Motion. (Doc. 280 at 7.) In her reply brief, Plaintiff contends that the Court should not consider the issues waived for two reasons:

> 1. Defendants who objected via a Motion in Limine (MIL) to Plaintiff's participation as counsel in her own case should be precluded from arguing that Plaintiff waived her right to object to several issues now raised by Plaintiff who is now acting as her own counsel in this Motion seeking a New Trial.
> 2. An exception to the waiver rule should be granted in this case where Plaintiff by virtue of the MIL was prohibited from acting as her own counsel and where counsel failed to object to fundamental and highly prejudicial errors resulting in a miscarriage of justice.

(Doc. 285 at 5.)

"A party who fails to object to errors at trial waives the right to complain about them following trial." *Waldor fv. Shuta,* 142 F.3d 601, 629 (3d Cir. 1998) (citing *Murray v. Fairbanks Morse,* 610 F.2d 149, 152 (3d Cir. 1979). The Third Circuit "has recognized an exception to waiver when 'counsel fail[s] 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) (quoting *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 116 (3d Cir. 1992)).

The Court rejects Plaintiff's first argument. Defendants timely filed their Motion in Limine to Preclude Hybrid Representation and supporting brief on March 13, 2020. (Docs. 147, 148.) With the Motion, Defendants sought to preclude Plaintiff from appearing both *pro se* and through counsel. (*See id.*) Defendants appropriately supported their request with relevant legal authority:

> It is well established that although an individual may appear before the court pro se, she cannot appear both pro se and through counsel. *Aluminum Shapes, Inc. v. Paul Frank Roofing & Waterproofing* Co., No. CIV. A. 9400202, 1994 WL 410507, at *2 (E.D. Pa. Aug. 5, 1994) (citing 28 U.S.C. § 1654) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein."); *see also Move Organization v. City of Philadelphia,* 89 F.R.D. 521 (E.D. Pa. 1981) (holding that civil rights plaintiff may either appear pro se or through counsel, but he has no right to "hybrid representation").

(Doc. 148 at 3.)

On March 23, 2020, Plaintiff, proceeding *pro se,* filed a "Motion to Allow Plaintiff to File Motions in Limine and Motion for Extension of Time to File Briefs in Response to Defendant's Motion in Limine" (Doc. 160).[1] In the Motion,

Plaintiff indicated that she intended to hire new counsel to represent her in this case and Defendants would not be prejudiced if the Court granted her motion which would allow time for new counsel to file motions in limine and respond to the then pending motions. (Doc. 160 ¶¶ 50-52.) The Court granted Plaintiff's Motion by Order of March 24, 2020, and allowed Plaintiff to file motions in limine and respond to Defendants' pending motions on or before May 22, 2020. (Doc. 161). Attorney Mark Frost entered his appearance on Plaintiff's behalf on April 13, 2020. (Doc. 166.) On May 20, 2020, Mr. Frost filed briefs in opposition to two pending motions in limine (Docs. 167, 168), but he did not respond to the Motion in Limine to Preclude Hybrid Representation (Doc. 147). Plaintiff did not seek any further extensions of time nor was there any motion to file a response *nunc pro tunc* after the extended filing period had elapsed. Therefore, pursuant to Local Rule 7.6 of the Local Rules of Court of the Middle District of Pennsylvania, Plaintiff was deemed not to oppose Defendants' Motion in Limine to Preclude Hybrid Representation (Doc. 147) and the Court granted the motion. (Docs. 202, 203.)

Given this procedural history and the substance of Defendants' Motion in Limine to Preclude Hybrid Representation (Doc. 147), the Court finds no basis to preclude Defendants' counsel from arguing that Plaintiff waived her right to object to several issues raised by Plaintiff who is now acting as her own counsel. First, Defendants' counsel did nothing improper in seeking to preclude hybrid representation-Mr. Bufalino did not, as Plaintiff assert, "ask[] the Court to preclude Plaintiff who is an attorney from representing herself during the

trial in this case." (Doc. 285 at 5.) Rather, he objected to her representing herself *at the same time* as she was being represented by counsel. (*See* Docs. 147, 148.) Plaintiff chose to be represented by counsel rather than proceed *prose,* a choice which was hers to make and change at any time. She cannot now blame another for a litigation path she chose, and her request to penalize Defendants' counsel for her choice is properly denied.

The Court also rejects Plaintiff's second argument in part given that she indirectly seeks to blame Defendants' counsel. Contrary to the assertion that "Plaintiff by virtue of the MIL was prohibited from acting as her own counsel" (Doc. 285 at 5), as discussed above, Plaintiff *chose* to hire counsel to represent her. The Court properly granted Defendants' motion and precluded hybrid representation-when the Court issued the Order granting Defendants' motion in limine, the Court concluded that "Plaintiff is properly precluded from acting as trial counsel in this matter because she is represented by counsel." (Doc. 202 at 5.) With this Order, the Court simply recognized Plaintiff's choice and proceeded accordingly. Therefore, any suggestion in Plaintiff's second argument that anyone else is responsible for her decision to be represented by counsel at trial rather than proceed *pro se* is rejected.

Notwithstanding this determination, Plaintiff's request for an exception to the waiver rule based on her "counsel's failure to object to fundamental and highly prejudicial errors resulting in a miscarriage of justice" (Doc. 285 at 5) invokes the recognized exception to the waiver rule set out above. *See Wilson,* 170 F.3d at 395-96; *Fleck,* 981

F.2d at 116. While Plaintiff asks the Court to apply the exception "to address all of the issues Atty. Bufalino is challenging under the rule" (Doc. 285 at 7), the Court declines to categorically apply the exception. Rather, the Court will assess whether Plaintiff has identified highly prejudicial errors which resulted in a miscarriage of justice. The Court will also assess whether the matters to which objection was made at trial *(see, e.g.,* Doc. 285 at 6) entitle Plaintiff to the relief requested.

Before doing so, the Court will address Defendants' second claimed basis for waiver, i.e., that Plaintiff has waived issues not raised in her Motion but raised for the first time in her supporting brief (which was filed over one month later *(see* Docs. 275, 278). (Doc. 280 at 15.) The Court rejects this basis for waiver because Plaintiff was granted an extension of time to file her supporting brief and she subsequently timely filed the supporting brief. (*See* Docs. 271, 275, 277, 278.) Therefore, any matters raised in her supporting brief have not been waived on the basis of Plaintiffs failure to raise them in the earlier-filed Motion. The Court will consider these matters to the extent appropriate as discussed in the preceding paragraph.

This conclusion does not apply to arguments or issues raised for the first time in Plaintiff's reply brief as these are properly deemed waived. *See, e.g., Loving v. FedEx Freight, Inc.,* Civ. A. No. 3:18-CV-508, 2020 WL 2306901, at *14 (M.D. Pa. May 8, 2020) (citation omitted). In her reply brief, Plaintiff for the first time raises the issue/argument that "Defendants' counsel engaged in misconduct when he violated the rules of professional conduct by denigrating, ridiculing Plaintiff numerous times

throughout the trial. " (Doc. 285.) This issue is deemed waived and will not be further considered by the Court.[2]

As set out above, Plaintiff has sought an all-inclusive exception to the waiver rule which the Court has rejected. Plaintiff recognized in her supporting brief that "an exception to the rule that a party is not entitled to receive a new trial for objections to evidence that he did not make at or prior to the initial trial exists when counsel fails to object to a fundamental and highly prejudicial error resulting in a miscarriage of justice." (Doc. 278 at 33 n.8.) This recognition shows that Plaintiff knew that, without a waiver exception for many of the issues raised in support of her claim for relief, she had to show that the claimed errors were "fundamental and highly prejudicial."

In seeking the exception for the first time in her reply brief, Plaintiff does not identify which claimed errors in the extensive list of claimed errors set out in her supporting brief are "highly prejudicial" and result in a miscarriage of justice. In her supporting brief, Plaintiff states that "[a]ny one error or the totality of all errors committed at trial was highly prejudicial warranting reversal of the verdict." (Doc. 278 at 8.) Despite this general averment, Plaintiff in fact identifies four errors as "highly prejudicial " and states that "[t]he Court erred in making rulings on evidentiary issues that were highly prejudicial to Plaintiff's case" in three instances. (See *id.* at 12, 18, 19, 33, 35.) As with Plaintiff's claimed entitlement to a blanket exception of the application of the waiver rule, the Court rejects Plaintiff's general averment that all claimed errors were highly prejudicial and focuses on those

specifically identified as such. Thus, in the following review of claimed errors, the Court will focus on those errors identified as "highly prejudicial" and those to which objection was made at trial.

A. Opposing Counsel Conduct

Plaintiff alleges the following misconduct by Defendant's counsel, Mark Bufalino, which allegedly denied her a fair trial:

> During his opening statement, Mark Bufalino made extraneous statements, improperly offered personal opinions, improperly testified as to his own credibility, repeatedly elicited improper testimony, made snide remarks about Plaintiff, repeatedly interrupted opposing parties' examination of witnesses, mischaracterized issues and evidence, engaged in improper impeachment, repeatedly exposed the jury to excluded evidence, [and] improperly referred to facts not in evidence.

(Doc. 278 at 8.)

In support of her assertion that she is entitled to a new trial, Plaintiff cites *Tesser v. Board of Educ. of City School Dist. of the City of New York,* 370 F.3d 314 (2d Cir. 2004), (Doc. 278 at 8) wherein the Second Circuit stated that "a party is entitled to a new trial when opposing counsel's conduct causes prejudice to that party ... thereby unfairly influencing its verdict." 370 F.3d at 321 (citing *Greenaway v. Buffalo Hilton Hotel,* 143 F.3d 47 (2d Cir.1998) (citing *Minneapolis, St. Paul & Sault Ste Marie Ry.* Co. *v. Moquin* , 238 U.S. 520 521 (1931))) .

> 580 F.2d at 95; *cf. Salas v. Wang,* 846 F.2d 897 (3d Cir. 1988) (an isolated improper remark will not support the grant of a new trial); *Anastasio v. Schering Corp.,* 838 F.2d 701 (3d Cir.1988) (same). Despite a curative instruction, which came a day after the offending summation, we concluded in *Draper* that "it was more than 'reasonably probable' that the verdict was influenced by the prejudicial statements." *Id.* at 97. This conclusion was compelled by the argument as a whole rather than a single instance or type of impropriety. *Id.*

Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 207-08 (3d Cir. 1992).

1. Opening and Closing Statements

No objection was made to Mr. Bufalino's opening or closing remarks. However, Plaintiff identifies several instances of claimed misconduct during opening and closing statements as "highly prejudicial." (*See* Doc. 278 at 12, 18, 19.) Thus, the Court will consider whether the cited instances provide an exception to waiver because Plaintiff's counsel "fail[ed] to object to a fundamental and highly prejudicial error resulting in a miscarriage of justice."' *Wilson,* 170 F.3d at 395-96.

a. Opening Statement

Plaintiff identifies the following statement Mr. Bufalino made during his opening statement as "highly prejudicial": "Mr. Hastings has told you that the evidence in this case is going to show that Mr. Parsnik bullied Ms. Javitz. The only bullying that you're going to hear about in this case is about **how**

Donna Davis Javitz bullied every single person that came across her path." (Doc. 278 at 11 (quoting Trial Transcript ("T. Tr.") Day 1 85:24-25, Doc. 260 (emphasis added by Plaintiff).) Plaintiff asserts that this is highly prejudicial because "[t]here was no evidence offered by any witness to support this statement that Davis 'bullied every single person that came across her path.' This goes beyond the four reasons [given for her termination]. To the contrary, Lawton said Davis was an outstanding employee. Gazdzick praised Davis. Parsnik praised Davis." (Doc. 278 at 12 (citing T. Tr. Day 2 119:20-27, Doc. 261).)

Before being used by Mr. Bufalino, the word "bullied" had been used by Mr. Hastings in his opening statement when describing actions at the time of Plaintiff's termination: "So Donna packed up her stuff and she was fired. Never knowing why she was fired, never got a reason, even though, she asked several times, over and over, they bullied her out of there, they just bullied her out of there." (T. Tr. Day 1 77:23-24, Doc. 260.) For Mr. Bufalino to pick up on Mr. Hastings statement and use the word "bullied" as he did in his opening statement cannot be considered highly prejudicial. Plaintiff cannot credibly argue that there was no negative testimony about her demeanor with others. (*See* Doc. 280 at 11-12 (citing Paula Schnelly, David Pedri, and Necia Gazdziak testimony)); *see also infra* pp. 22-23. In speaking about the change in relationship between the County and unions after Plaintiff became HR Director, Ms. Schnelly, an administrative assistant for the local AFSME at the relevant time, testified that

> [u]pon meeting Ms. Javitz, things had changed completely. There was no longer the ability to carry on a civil conversation.
>
> . . . .
>
> Most of the time, if it was involving -- especially, in disciplinary meetings, the employees -- the union wasn't allowed to speak, first off, the employees were berated, belittled, intimidated, **she bullied them,** it was a very hostile situation.

(T. Tr. Day 2 194:7-9, 11-15, Doc. 261 (emphasis added).) Thus, Mr. Bufalino's opening statement comment was realistically grounded in what he expected the evidence to show.

Even if "bullying" were not the most accurate description of other witnesses' negative testimony about Plaintiff's demeanor, the use of an imperfect descriptor in an opening statement is not highly prejudicial. Thus, this statement does not meet the test for an exception to the waiver rule.

This is the only opening statement excerpt identified as "highly prejudicial" in Plaintiff's supporting brief and the numerous other opening statement excerpts cited as error have therefore been waived. (*See* Doc. 278 at 8-18.) If the Court were to assume that some prejudice attached to the allegedly offending statements and that the waiver rule did not apply, the alleged errors do not meet the *Draper/Fineman* test that "the improper assertions made it reasonably probable that the verdict was influenced by prejudicial statements." *See supra* p. 16 (quoting *Fineman,* 980 F.2d at 207). This conclusion is based on the totality of the evidence

presented at trial as well as the Court's instructions to the jury and statements made by counsel during opening and closing statements.

The allegedly prejudicial statements made on the first day of trial were preceded by the Court's preliminary instructions on the same day which specifically informed the jury that "[s]tatements [and] arguments . . . of the lawyers are not evidence." (T. Tr. Day 1 58:19-20, Doc. 260.) On the subject of opening statements, the Court instructed that"[w]hat is said in the opening statements is not evidence but is simply an outline to help you understand what each party expects the evidence to show." *(Id.* 65:10-12.) Mr. Bufalino reinforced the Court's instructions at the beginning of his opening statement when he said

> [t]his is the portion of the case which is called the opening statement. And as Judge Mariani alluded to you, earlier, opening statements are not evidence. And there's a reason why that's the rule. Because, sometimes, much like what you just heard, people say, This is what the evidence is going to be, and it isn't."

(Id. 79:20-25.) He added that the opening statement is "our perception of what we hope the evidence in this case will show to you." *(Id.* 80:11-12.) In his closing argument, Mr. Bufalino stated

> [w]e talked a little bit about, when I first got the chance to address you, that the opening statement was sort of like a road map about where we expected the evidence to take us. The closing arguments, just like opening statements, as Judge Mariani will tell

> you, are not evidence, they are my recollection and Mr. Hastings' recollection of what the evidence showed. Ultimately, though, it is your recollections and only your recollections that matter.

(T. Tr. Day 4 107:18-108:1, Doc. 263.) After closing arguments, the Court reiterated that "statements [and] arguments of the lawyers for the parties" are not evidence from which the jury was to find facts. *(Id.* 122:9-11.) The Court also instructed the jury that "[t]he lawyers may have called your attention to facts or factual conclusions they thought were important. However, those arguments are not evidence and are not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case." *(Id.* 124:4-8.)

Given the nature of the allegedly improper statements and the fact that the jury was instructed by the Court and warned by Defendants' counsel numerous times before and after the statements were made that statements made by the lawyers were not evidence in the case, the Court concludes that Plaintiff has not shown that she is entitled to relief based on Mr. Bufalino's conduct during his opening statement.

b. Closing Statement

Plaintiff identifies two aspects of Mr. Bufalino's closing argument to be "highly prejudicial." (Doc. 278 at 18, 19.) She first points to the following statements made during closing argument:

> I respectfully submit, part of a desperate attempt to distract you from the realities in this case. (sic) (Doc 263, 113:9-11)

> Then we hear this **manufactured conversation,** between Lawton and Salavantis, that Lawton then goes to her and says, hey you know, I don't want that, I don't want that investigated. (Doc 263, 113: 12-15)
>
> **She (Salavantis) took an oath not only when she took her office,** but when she stood up on that stand. She going to perjure herself as the chief law enforcement officer of the county? two term DA. (Doc 263, 113:16-22) She's going to sit up there and perjure herself in the federal courthouse in Scranton, in front of His Honor and you? (Doc 263, 113:24-25)
>
> **I respectfully submit it doesn't. And it didn't happen.** (Doc 263, 114:1-2) (Doc. 278 at 18 (emphasis added by PlaintifD.) Plaintiff asserts that "Bufalino's personally verifying the credibility of a witness without testifying in his case is highly prejudicial. The argument that she took an oath when she was sworn in is irrelevant and was not part of the evidence in this case. It also improperly refers to facts not in evidence." *(Id.* at 18-19.)

The Court concludes that Plaintiff has not shown that the identified statements are highly prejudicial such that an exception to the waiver rule would apply. *Wilson,* 170 F.3d at 395-96. As to the alleged conversation between Ms. Salavantis and Mr. Lawton, trial testimony from both supports Mr. Bufalino's argument that the alleged conversation never took place. (T. Tr. Day 3 43:1-8, 114:12-20, Doc. 262.) Thus, it is not prejudicial for Mr. Bufalino to refer to the alleged conversation as a

"manufactured" conversation. Nor is it prejudicial for him to point to reasons the jury should find Ms. Salavantis's testimony credible.

Plaintiff next points to Mr. Bufalino's statement concerning Kerry Gallagher, an AFSME union official who did not testify at trial: "They've got .. **Kerry Gallagher** asking for a meeting with Bob Lawton, **saying,** like what's up with your HR Director? What's the Problem? We may not have always agreed, but like it's getting ridiculous." (Doc. 278 at 19 (quoting T. Tr. Day 4 114:20-22, Doc. 263 (emphasis added by Plaintiff)).) Plaintiff asserts that this statement is highly prejudicial because "Bufalino is testifying and is referring to facts not in evidence." (Doc. 278 at 19.)

As with the statement regarding Ms. Salavantis, Plaintiff has not shown highly prejudicial error related to the statement concerning Ms. Gallagher. Plaintiff is correct that Kerry Gallagher did not testify in the case. However, Mr. Lawton testified that he had a meeting with Kerry Gallagher about union issues, specifically that "they took issue with the notion that Ms. Javitz would criticize the manner in which the union was representing its employees and her interactions with employees in those venues." {T. Tr. Day 3 51:13-52:10, Doc. 262.) It was not improper for Mr. Lawton to testify about the subject of the meeting. As indicated above, see *supra* p. 4, and at trial (see, *e.g.*, T. Tr. Day 299:19-24, Doc. 261), problems with the unions was a reason provided for Plaintiff's termination and testimony about Plaintiff's relationship with the unions was deemed relevant (*id.* 99: 14-18, 24-25). Union issues were the subject of extensive testimony. (*See, e.g.*, T. Tr. Day 24:6-

5:16, 12:20-14:23, 94:22-95:2, 100:2-101:10; 142:8-23, Doc. 261.) Kerry Gallagher's involvement about complaints regarding Plaintiff's relationship with the unions was also the subject of testimony by witnesses in addition to Lawton. *(Id.* 156:21-24.) Paula Schnelly was present at the meeting with Gallagher and Lawton and testified about the subject of the meeting:

> Q. Tell me what was the subject matter of that meeting?
> A. The subject matter was Donna Davis.
> Q. In what particularity?
> A. That we could -- just the hostile environment, hostile situations every time we tried to meet, we could not resolve grievances, we could get nowhere.

(T. Tr. Day 3 207:22-208:2.)

The sum of this evidence shows that Mr. Bufalino's statement about "Kerry Gallagher asking for a meeting with Bob Lawton" is accurate. It also shows that Mr. Bufalino's characterization of Gallagher's reason for asking for the meeting ("what's up with your HR Director? What's the Problem? We may not have always agreed, but like it's getting ridiculous") is consistent with testimony regarding the relationship between Plaintiff and the unions. Thus, considering the statement in the context of the extensive evidence concerning Plaintiff's relationship with the unions, the statement about Kerry Gallagher cannot be seen as highly prejudicial.

These are the only closing argument excerpts identified as "highly prejudicial" in Plaintiff's supporting brief and the numerous other closing

argument excerpts cited as error have therefore been waived. *(See* Doc. 278 at 17-21.) If the Court were to assume that some prejudice attached to the allegedly offending statements and that the waiver rule did not apply, the alleged errors do not meet the *Draper/Fineman* test that "the improper assertions made it reasonably probable that the verdict was influenced by prejudicial statements." *See supra* p. 16 (quoting *Fineman,* 980 F.2d at 207). This conclusion is based on the totality of the evidence presented at trial as well as the Court's instructions to the jury and statements made by counsel during opening and closing statements. *See supra* pp. 19-20.

Therefore, just as the Court concluded about Mr. Bufalino's opening statement, based on the nature of the allegedly improper statements made during closing argument and the fact that it was made clear to the jury that statements made by the lawyers were not evidence, *see supra* p. 20, the Court concludes Plaintiff has not shown that she is entitled to relief based on Mr. Bufalino's conduct during his closing argument.

2. Other Matters

Plaintiff points to two additional matters related to Mr. Bufalino's trial conduct: he improperly raised questions about Plaintiff's 2019 wage information; and he frequently lodged objections that were not intended for proper purposes. (Doc. 278 at 21-23.)

a. 2019 Wage Information

Regarding 2019 wage information, Plaintiff asserts that Mr. Bufalino's questioning of her vocational expert about the 2019 tax returns was prejudicial because "(1) it made Davis look like she was hiding something by not producing her 2019 tax

returns, and (2) negatively reflected on her credibility when the scope of questioning was not fair because 2019 wage loss was not in issue." (Doc. 278 at 22.)

The subject of the 2019 wage information first arose when Mr. Frost asked what materials Plaintiff's economic expert, Andrew Verzilli, had reviewed.

> I had Ms. Davis' resume that had her education and background and experience, I had her tax return information from 2015 to 2018, a W-2 form from 2019. I had some information regarding her salary with Luzerne County, and then I do have various economic data that I rely on, but in terms of what was provided -- regarding Ms. Davis, that was the information.

(T. Tr. Day 3 9:25-10:5. Doc. 262.) On cross-examination, Mr. Bufalino asked about the information Mr. Verzilli had reviewed. After talking about the 2015 through 2018 tax returns, Mr. Bufalino stated "[a]s I understand, you also had her 2019 W-2 form[.]" *(Id.* 25:14.) The following dialog then took place:

> MR. FROST: Objection. We're not seeking any damages, Your Honor, as we stated yesterday, concerning 2019 going forward. So the fact that he had a W-2 for the 2019 from Ms. Davis, it would not be relevant.
> MR. BUFALINO: I'm just trying to find out what he reviewed, Judge.
> THE COURT: All right, I'll let you ask him what he reviewed. I do understand

> the Plaintiffs position here and I think you do, as well.
> MR. BUFALINO: Yes, sir.
> THE COURT: That their claim for pay, back pay, ends with 2018. Is that correct, Mr. Hastings?
> MR. HASTINGS: That is correct, Your Honor. MR. BUFALINO: Yes, Your Honor.
> BY MR. BUFALINO:
> Q. So you had the 2019 W-2?
> A. Yes,sir.

(T. Tr. Day 3 25:15-26:6.) 2019 wage information was not mentioned again in the examination of Mr. Verzilli.

Defendants' economic expert, James Stavros, mentioned 2019 wage information when asked what material he had reviewed for his report, and the issue was dealt with similarly to the way it had been during Mr. Verzilli's testimony. *(See* T. Tr. Day 4 12:7-13:3, Doc. 263.) The Court concludes that these limited non-substantive references to 2019 wage information are not prejudicial in that, based on this dialog, no reasonable juror could think that Plaintiff was "hiding something by not producing her 2019 tax returns, ... [or that it] negatively reflected on her credibility." (Doc. 278 at 22.)

b. Frequency of Objections

> Plaintiff next argues that
> Mr. Bufalino frequently raised objections without having a reason for the objection, or was anticipating a question, was disruptive of the process and unnecessarily interrupted opposing counsel without allowing counsel to first

> complete the question. Bufalino objected 153 times during the trial; 58 objections were overruled, 68 were sustained, 27 were rephrased or withdrawn or answered. Plaintiff's counsel on the other hand objected a total of 35 times during this trial, 22 objections were overruled, 10 objections were sustained 3 were rephrased. Bufalino obviously intended to disrupt the trial and prevent the introduction of evidence damaging to Defendants' case. Fifty-eight objections were overruled. This constant interruption had a prejudicial effect on the jury. Jury was becoming annoyed, one or two were dozing off. Constant objections are unnecessary in that they "could antagonize the jury." *Anheuser Busch, Inc. v. Natural Beverage Distributors,* 69 F.3D 337, 346 (9TH Cir. 1995).

(Doc. 278 at 23-24.)

The Court clearly instructed the jury about objections at the beginning of the trial and after closing arguments on the last day of trial. In the Court's preliminary instructions, the Court stated: "You should not be influenced by the fact that an objection is made. You should also not be influenced by my rulings on objections to evidence" (T. Tr. Day 1 59:15-17, Doc. 260). In the Court's jury charge following closing arguments, the Court advised the jury at length on the subject of objections, including the following:

> As I told you at the beginning of the trial, there are rules that control what can be

> received into evidence. You have heard a lawyer object when opposing counsel asked a question or offered an exhibit into evidence that the lawyer on the other side thought was not permitted by the Rules of Evidence or a prior ruling. This simply means that the lawyer was requesting that I make a decision on a particular Rule of Evidence.
>
> You should not be influenced by the fact that an objection was made. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections, when they believe that evidence being offered is improper, under the Rules of Evidence.
>
> You should not be influenced by the objection or by the Court's ruling on it.

(T. Tr. Day 4 122:25-123:13, Doc. 263.) Based on the foregoing, any prejudice possibly associated with objections lodged in this case would have been alleviated by the Court's instructions to the jury.[3]

Having previously found that Mr. Bufalino's opening and closing statements did not provide a basis for relief, the Court's findings regarding 2019 wage information and objection frequency end the analysis of alleged error related to Mr. Bufalino's trial conduct. With these alleged errors, viewed independently or together, Plaintiff has presented no basis to conclude that she is entitled to the post-trial relief requested based on Mr. Bufalino's trial conduct.

B. Plaintiff's Counsel's Conduct

Plaintiff maintains that she was prejudiced by Mr. Frost's conduct at trial such that she is entitled to a new trial. (Doc. 278 at 24-26, 27-32.) The Court rejects Mr. Frost's conduct as a basis for the relief requested.

Plaintiff does not cite any caselaw which supports the proposition that, in a civil context such as that presented here, a party is entitled to a new trial based on the conduct of her own counsel. The cases cited for the proposition that sleeping counsel in this case should support her request for a new trial do not provide the suggested support. (See Doc. 278 at 31 & n.6 (citing *Tippins v. Walker,* 889 F. Supp. 91 (S.D.N.Y. 1995); *Piskanin v. Cameron,* Civ. A. No. 11-CV-4698, 2014 WL 5316464 (E.D. Pa. Oct. 16, 2014); *Javor v. United States,* 724 F.2d 831 (9th Cir. 1984)).) *Tippins* is a 28 U.S.C. § 2254 habeas case considering trial counsel's sleeping during a substantial portion of a criminal trial which the criminal defendant alleged to be a *per se* violation of his Sixth Amendment rights. 889 F. Supp. at 91. *Piskanin* was decided in the habeas context and concluded that the petitioner had not provided any support for his allegation that he was prejudiced by his standby counsel who slept and snored during trial. 2014 WL 531 6464, at *14. *Javor* is a criminal case wherein the Ninth Circuit held that the conduct of defense counsel who slept through a substantial portion of the trial was inherently prejudicial under a Sixth Amendment ineffective assistance of counsel analysis because unconscious or sleeping counsel is equivalent to no counsel at all. The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel, *Holloway v. Arkansas,* 435 U.S. at 489, 98 S. Ct. at

1181, particularly when the client cannot consult with his or her attorney or receive informed guidance from him or her during the course of the trial. *Geders v. United States,* 425 U.S. 80, 88-89, 96 S.Ct. 1330, 1335-1336, 47 L.Ed.2d 592 (1976). *Javor,* 724 F.2d at 834.

The rationale upon which *Tippins* and *Javor* were decided has no application here. Beyond the obvious that there is no right to counsel in a civil case and therefore no claim for ineffective assistance of counsel, here Mr. Hastings represented that he would be lead counsel *(see* Doc. 231 ¶ 5) so sleeping counsel (Mr. Frost) was not equivalent to no counsel and Plaintiff was free to consult Mr. Hastings throughout the trial. If Plaintiff was dissatisfied with Mr. Frost's conduct, she was free to terminate his representation at any time. Thereafter, she could have proceeded with Mr. Hastings as her counsel (which had been the plan as of the June 24, 2021, motion to continue and telephone conference *(see* Docs. 231, 242)) or terminated the representation of both Mr. Frost and Mr. Hastings and proceeded *pro se.* Plaintiff chose to continue with both Attorneys Frost and Hastings although her complaints about Mr. Frost's conduct include hearing issues which were apparent pretrial when Mr. Frost's hearing problem was discussed *(see* Pretrial Conf. Transcript ("P.C. Tr.") 4:3-17, Doc. 264).

Plaintiff's suggestions/accusations that the Court is responsible for Mr. Frost's conduct are not supported by the record. She first contends that no accommodation was made for Mr. Frost's hearing impairment. (Doc. 278 at 28.)