On day three of the trial, the Court Deputy . . . approached Attorney Dylan Hastings and asked if Attorney 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. (Donna)Mr. 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 the hearings aids were only partially charged....

Mr. Frost's hearing disability was an issue the day of the pre- trial conference, June 22, 2021.. . . (DOC 234, 3:16-25, 4:1-21) After the Court gave detailed instructions on how it wanted evidence submitted, Mr. Frost said:

> "Sorry to interrupt you. I have a hard time hearing. And pretty much what you said, I'm sorry, I could not hear." (DOC 234, 3:18-20) 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. "(DOC 234, 4:4-6) "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." (DOC 234, 4: 10-13)
>
> The court assisted hearing aid devices were not offered to Frost the first day of trial. Nor were these devices offered to Frost at any time during the first two and one half days of trial. . . . On day three, Frost wore the hearing devices which appeared to improve his performance, although not perfectly.
>
> . . . .
>
> This hearing disability had the effect of robbing Davis 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 in Court.
>
> The Court's lack of an accommodation limited counsel's ability to represent Davis, created communication issues and prejudiced how her case was presented to the jury. The Court assisted hearing device would have been more useful on day 1 of trial. Counsel was deprived of an accommodation and Davis was deprived of counsel and a fair trial.
>
> (Doc. 278 at 28-29.)

Plaintiff's attempt to place the blame on the Court misrepresents the facts and is without merit. Following the pretrial conference dialog quoted above, the undersigned said that "[i]n the event that you aren't able to get the hearing aid and you think that there's some accommodation that can be made that would help you, . . . I'll be glad to do that." (P.C. Tr. 4:14-17, Doc 264.) Mr. Frost replied "thank you" to the offer *(id.* 4:18) and Plaintiff was present when the offer was made. Despite this offer of assistance, the Court did not receive a request for accommodation. Therefore, blame for any hearing related issue is appropriately placed on Plaintiff and her trial counsel.[4]

The same is true of any other matter for which Plaintiff now seeks to place blame on someone other than herself for Mr. Frost's trial conduct. Clearly her current filing shows that Plaintiff was aware of Mr. Frost's hearing issue and undesirable conduct early in the case yet she chose to do nothing about them. As discussed previously, at any point in time during the trial Plaintiff could have terminated his representation yet she chose not to do so. Thus, Plaintiff's extreme dissatisfaction with Mr. Frost's performance is not a basis for the relief requested.

C. Jury Conduct

Plaintiff's allegation of jury misconduct stems from conduct she claims to have observed on the part of jurors during Mr. Hastings' closing argument. Jurors are distracted for any number of reasons and momentary distractions during trial, which is what is alleged here *(see* Doc. 278 at 26-27) do not provide, or contribute to, a basis for a new trial.

D. Court Error

1. Notebooks

Plaintiff asserts that the Court did not provide the jury with notebooks until the second day of trial thereby denying Plaintiff "the opportunity to have the jury record her testimony during her direct and cross examination." (Doc. 278 at 32.) Plaintiff concludes this deprived her of a fair trial. *(Id.* at 33.) No requests or objection related to this issue were raised at trial, and Plaintiff has not shown that, even if she is correct that notebooks were not handed out until the second day, this would be highly prejudicial such that an exception to the waiver rule would apply.

> This is particularly so given the Court's instruction about the use of notes:
> If you wish, you may take notes during the presentation of evidence, during the summations of attorneys and at the conclusion of the evidence and during my instructions to you on the law. My courtroom deputy will arrange for pens and paper.
>
> Remember that your notes are for your own personal use, they are not to be given to or read by anyone else. You should not consider the notes that you or fellow jurors may take as a kind of written transcript.
>
> Instead, as you listen to the testimony, keep in mind that you'll be relying on your recollection of that testimony during deliberations. Here are some other specific points to keep in mind about note-taking:

1. Note-taking is permitted, it is not required. Each of you may take notes but no one is required to take notes.
2. If you do take notes, be brief. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities and relationships. You must determine the credibility of witnesses, so you must observe the demeanor and appearance of each person on the witness stand. Note-taking must not distract you from that task.
3. Do not use your notes or any other juror's notes as authority to persuade fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror, just because that juror did or did not take notes.

A juror's notes are not evidence and should not be used in place of evidence, and they are, by no means, a complete outline of the proceedings or a list of the highlights in the trial.

Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case. Do not use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

(T. Tr. Day 1 62:29-63:18, Doc. 260.)

The foregoing instructions indicate that jury members were told that the courtroom

deputy would arrange for pens and paper. Therefore, if Plaintiff is correct that they were not handed out until the second day of trial, jurors were on notice that they could have asked for them and the courtroom deputy would provide them. Moreover, the jury was instructed about the limitations associated with note-taking and their responsibility to rely on their memories when deliberating and reaching a verdict. Thus, the harm associated with the possible lack of pen and paper at the beginning of the trial is minimal at most.

2. Jury Selection

Plaintiff contends that it was highly prejudicial that Mr. Frost did not object to Mr. Bufalino's use of peremptory challenges to strike two women from the jury. (Doc. 278 at 33.) It is Plaintiff's burden to show that an exception to the waiver rule applies and she has not done so here. Plaintiff states that two female jurors were struck for cause, one of them should not have been, and Mr. Frost should have objected to the Mr. Bufalino's use of his peremptory challenges. *(Id.)* She further asserts that this Court should find that Mr. Bufalino's intent was to deprive her of "a jury with an adequate representation of those of her peers of the same sex." *(Id.)*

Plaintiff provides no basis for the Court to make such a finding and no finding can be made on this record. While it is true that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the relevant inquiry cannot be conducted

post-trial when no objection was lodged at trial. The Court explained in J.E.B.,

> [a]s with race-based *Batson [v. Kentucky,* 476 U.S. 79 (1986)] claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. *Batson,* 476 U.S., at 97, 106 S.Ct., at 1723. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. See *Hernandez v. New York,* 500 U.S. 352,111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

J.E.B. , 511 U.S. at 144-45; see a/so *Harden by Harden v. Allstate Ins.* Co., Civ. A. No. 930513-SLR, 1996 WL 190013, at *3 (D. Del. April 16, 1996) (District Court applying *J.E.B.* in civil context).

Here the requisite inquiry did not take place because Plaintiff's counsel did not object to Mr. Bufalino's peremptory challenges. The Court cannot not now determine that Plaintiff satisfies the first element of the inquiry and Defendants do not satisfy the second. Therefore, Plaintiff does not have a basis to show that the alleged error is highly prejudicial and the Court can find no basis for an exception to the waiver rule.

3. Shelby Watchilla Testimony

Plaintiff alleges that "the Court erred in allowing the testimony of Shelby Watchilla." (Doc. 278 at 34.) Plaintiff adds that "Bufalino excused Shelby Watchilla from appearing and wanted to produce her testimony by zoom over Davis' objection. The Court overruled the objection, but later realized there were issues with this Zoom appearance which denied Davis a fair trial." *(Id.* (citing T. Tr. Day 4 44:9-19, Doc. 263).)

This assertion is a misrepresentation of the record. The Trial Transcript shows that Plaintiff's counsel lodged an objection to Ms. Watchilla's Zoom testimony after previously agreeing to the testimony if she could not be present. (T. Tr. Day 3 129:21-135:17.) The record shows that, upon receipt of Plaintiff's motion to continue the trial (Doc. 231) on June 24, 2021, the Court convened a telephone conference *(see* Doc. 242) and a new trial date was set by agreement of the parties (Doc. 232). During the telephone conference, Mr. Bufalino expressed concern about Ms. Watchilla's availability to testify if the trial commenced on July 6, 2021. (Tel. Conf. Tr. 3:16-4:3, Doc. 242.) Mr. Hastings agreed to allow Ms. Watchilla to appear virtually if necessary. *(Id.* 4:7-9.) After lodging his objection at trial, Mr. Hastings' recollection was refreshed with the reading of the telephone conference transcript to the parties by the court reporter who was the stenographer for the June 24, 2021, telephone conference. (T. Tr. Day 3135:3-135:19, Doc. 262.) Thereafter, Mr. Hastings again agreed to the Zoom testimony if necessary. *(Id.* 136:24-137:1.)

Plaintiff is incorrect when she states that the Court "later realized there were issues with this Zoom appearance which denied Davis a fair trial"

(Doc. 278 at 34 (citing T. Tr. Day 444:9-19, Doc. 263)). In the cited Trial Transcript dialog, it became apparent during Mr. Hastings' cross-examination that Ms. Watchilla did not have her deposition testimony in front of her. *(Id.* 44:9-19.) However, the problem was immediately resolved, and Mr. Hastings continued his cross-examination by representing to Ms. Watchilla, as needed, what she had said in the relevant portion of her deposition and then questioning her about what he had represented. *(Id.* 44:21-52:1, Doc. 263.) Ms. Watchilla did not disagree with any representation made by Mr. Hastings. *(Id.)* Therefore, no technical or procedural problem arose in conjunction with Ms. Watchilla's virtual testimony that was not satisfactorily resolved.

Regarding use of the word "toxic," Plaintiff's counsel did not object to Ms. Watchilla's testimony on the use of the word "toxic" in describing her work-environment on direct examination. (T. Tr. Day 4 42:15-43:5, Doc. 263.) Mr. Hastings adequately cross-examined her on the use of the term, and Ms. Watchilla confirmed that she had not used the term during her deposition. *(Id.* 45: 1-14.) Mr. Bufalino's use of the word earlier in the case is not prejudicial because, contrary to Plaintiff's assertion (Doc. 278 at 35), he did not identify Ms. Watchilla as the source of the adjective. He first used the word in his opening statement when he said, referring to Plaintiff, that "[s]he created this toxic environment between the management and the union. " (T. Tr. Day 1 86:6-7, Doc. 260.) Other uses of the word in the opening statement are similarly general and related to the relationship between management and the unions. (T. Tr. Day 186:11-12, 87:12-13, 88:14-

15, 90:8-9, Doc. 260.) Notably, "toxic" was not an adjective used only by Mr. Bufalino. David Pedri, who the Chief County Solicitor for Luzerne County at the relevant time, testified that after Plaintiff became the H.R. manager, "[i]t became an extremely toxic environment with Ms. Davis. Every single issue was continually discussed, every single grievance was a fight, and that's not only within the union but also with management." (T. Tr. Day 2 100:17-20, Doc. 261.)

Given this record evidence, Plaintiff's assertion that she was denied a fair trial based in whole or in part by the Court's allowing Ms. Watchilla to testify is without merit.

4. Court's Evidentiary Rulings

Plaintiff says three of the Court's evidentiary rulings were "highly prejudicial." (Doc. 278 at 1.) The Court will review each claimed error in turn.

a. *Plaintiff's Testimony*

The first of these alleged errors is that the Court sustained an objection made by Mr. Bufalino while Plaintiff was testifying about an exhibit related to an Unfair Labor Practice charge. (See T. Tr. Day 1123:10-11, Doc. 260.) Referring to the document she was reviewing, Plaintiff said "[t]his 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." (T. Tr. Day 1 124:25-125:4, Doc. 260.) The following dialog then occurred:

> 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.

(T. Tr. Day 1 125:5-15, Doc. 260.)

Plaintiff now says this was error because she was laying the foundation-she was in the meeting and she "should have been allowed to testify on what happened at the meeting that was not reflected in the notes." (Doc. 278 at 36.) Mr. Hastings did not make this or any similar argument while the Court was considering the objection.

Assessing whether this alleged error was highly prejudicial, Plaintiff clearly got her point across that she did not engage in the conduct that was attributed to her in the document under review and that information contained in the document was altered.[5] (T. Tr. Day 1 124:19-125:3, Doc. 260.) Plaintiff's denial of Mr. Bufalino's recitation of the allegedly fabricated incidents set out in the document under review were not stricken and, therefore, remained of record. (*Id.*125:13-15.)

Moreover, the asserted "critical" nature of this ruling is belied by testimony about the negative aspects of Plaintiff's relationship with the unions, including the Pedri testimony set out above. *See*

supra p. 39. Therefore, even if the Court erred in ruling to strike Plaintiff's statement as to "someone having altered the document" (T. Tr. Day 1 125:13-14), 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, e.g, Goodman,* 293 F.3d at 667.

b. Scope of Cross-Examination

Plaintiff identifies two instances where the Court's allowance of testimony on cross- examination went beyond the scope of direct examination. (Doc. 278 at 37.) In the first instance, Defendant David Parsnik, the Director of Administrative Services for Luzerne County, had been called to testify by Plaintiff and was being cross-examined by Mr. Bufalino when Mr. Frost objected to testimony on the basis of it being beyond the scope of direct. {T. Tr. Day 2 140:25, Doc. 261.) Mr. Bufalino responded to the objection: "Your Honor, I'm attempting to save the Court some time. I agree that it probably is, but I'm clearly going to call Mr. Parsnik in our case in chief, to the extent we get there, so I just figured why not do it now." *(Id.* 141:1-4.) The Court then stated: "All right, go ahead. I understand the point of trying to have some economy here."[6] *(Id.* at 141:5-6.)

Plaintiff now argues that "[t]his ruling denied Plaintiff the opportunity to present rebuttal, since Bufalino did not put his witnesses back on the stand in his case in chief. Allowing the jury to hear negative testimony in Plaintiff's case diminished [sic] effect of the Plaintiff's case in chief." (Doc. 278 at 37.)

The Court does not find that the ruling constitutes error. Plaintiff cites no authority to support the proposition that the Court erred in

allowing testimony beyond the scope of direct in the circumstances presented here. The Federal Rules of Evidence address the scope of cross-examination: "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination." Fed. R. Evid. 611(b). Here, Mr. Bufalino provided a reason to go beyond the scope of cross and the Court allowed it. Mr. Frost's redirect examination addressed topics raised for the first time during cross-examination *(see* T. Tr. Day 2 148:12-152:22, Doc. 261) so Plaintiff was not deprived of the opportunity to present rebuttal. On the third day of trial, the Court asked Mr. Bufalino about his intended witnesses and he responded:

> my thought was to request of Your Honor, so as to not duplicate the testimony and put the jurors through what would be essentially be repetition, would ask Your Honor to incorporate into our case in chief the testimony that has been of record in the Plaintiffs case in chief, with the exception to those additional witnesses.
>
> THE COURT: I think it's your right to stand on the testimony that they have given, if that's what you're telling me.
>
> MR. BUFALINO: That's what I'm saying, Judge. I don't think it would be of any economy or efficacy for the jurors to sit through four more days of listening to what they've already heard, is what I'm really saying. I just wanted, from the record standpoint, from our case in chief

> and whatever burden or proofs we have in this case, I just don't want to get procedurally hung up.
> THE COURT: Do you have any comment on that, Mr. Hastings?
> MR. HASTINGS: Your Honor, we have no objection to that.

(T. Tr. Day 3 132:10-133:2, Day 262.)

Further, the following day when Plaintiff presented rebuttal argument, counsel did not seek further testimony from any witness who had previously testified in Plaintiff's case in chief. Finally, the ruling to allow questions on cross beyond the scope of direct could not be harmful error because the testimony would have otherwise come in during Defendants' case in chief. There is no basis to conclude that the altered sequence of the testimony made it less probable that the jury would have reached the same verdict. *Goodman*, 29 F.3d at 667.

In the second instance cited by Plaintiff, the Court made a similar ruling as to testimony beyond the scope of direct related to Defendant Lawton, and Plaintiff presumably finds it objectionable for the reasons stated above. (See Doc. 278 at 37.) In response to Mr. Frost's objection regarding the scope of Mr. Lawton's direct, the Court questioned why Mr. Lawton's testimony should be cut off if Mr. Bufalino was going to call him in his case in chief. (T. Tr. Day 3 53:15-17, Doc. 262.) Mr. Frost responded: "If Mr. Bufalino will be calling him in this case, you're right." *(Id.* 53:18-19.) As with Mr. Parsnik, Mr. Frost conducted an extensive redirect examination of Mr. Lawton. *(Id.* 57-63.) Therefore, the same analysis applies to this claimed error as that applied above.

Finally, Plaintiff's statement that "[t]he Judge held Plaintiff's counsel to objections raised by Bufalino challenging questions beyond the scope of direct" (Doc. 278 at 38 (citing T. Tr. Day 3 56: 10-11, 14-15, 57:11-12, 14-15, 58:1-6, 59:1-12, 60:1-8)) is irrelevant to the Court's determination on evidentiary rulings related to Mr. Parsnik and Mr. Lawton. The basis for the rulings as to these Defendants was that they would later be called to testify in Defendants' case. This was not the situation as to Ms. Schnelly's testimony during which the citations to rulings referenced by Plaintiff took place.

With this determination, Plaintiff's alleged errors related to evidentiary rulings provide no basis for the requested relief.

V. CONCLUSION

The foregoing analysis shows that Plaintiff has not provided a basis to conclude that she is entitled to relief on any of the grounds asserted.

Plaintiff has not shown that she is entitled to a new trial under Rule 59(a) because she has not provided any basis for the court to conclude that there was error on a question of law, that there is a need to correct previous error, or that the jury's decision was against the weight of the evidence. *See supra* p. 5 (citing *Klein v. Hollings*, 992 F.2d at 1289-90).

Plaintiff has not shown that she is entitled to alteration or amendment of the judgment pursuant to Rule 59(e) because she has not shown that there has been an intervening change in controlling law, that new evidence is available, or that there is a need to correct clear error of law or prevent manifest

injustice." *See supra* p. 6 (citing *Wiest,* 710 F.3d at 128).

Plaintiff has not shown that she is entitled to relief from final judgment under Rule 60(b)(6) because she has provided no exceptional circumstances to justify such extraordinary relief. *See supra* p. 8 (citing Coltec, 280 F.3d at 273)

As discussed at length above, the Court finds that errors alleged are completely without merit. Notwithstanding this determination, the Court has engaged in harmless error analysis under Federal Rule of Civil Procedure 61 and concluded that, to the extent any error occurred, it was harmless. Thus, Plaintiffs alleged errors, considered singly or collectively, do not affect Plaintiffs substantial rights in that it is highly probable that the jury would have reached the same verdict absent the alleged errors. *See supra* pp. 8-9 (citing *Goodman,* 293 F.3d at 667).

Plaintiff's summary conclusions that she is entitled to relief because the great weight of the evident warrants a new trial and a new trial is necessary to prevent a miscarriage of justice (Doc. 278 at 38) are unavailing. Plaintiff asserts that the decision of the jury is clearly unsupported and unreasonable and the jurors were influenced by the errors identified in her brief. *(Id.* at 38-39.) Insofar as Plaintiff recites her alleged errors as the basis for her conclusion that the verdict was against the weight of the evidence *(see id.),* the Court's determination that they are without merit or harmless leaves her argument unsupported. Plaintiff fares no better with her additional argument that

> [n]o reasonable jury could conclude that: Davis failed to prove by the preponderance of the evidence that the

> multiple speeches by Davis were the motivating factor in her termination; the testimony for Keezer and Paul meetings was produced by Paula Schnelly without the assistance of a recording device; the DA requested the AG investigate the wiretap before Davis sent her the letter of December 2015; that Davis did not have a reasonable belief that she was the subject of an illegal wiretap.

(Doc. 278 at 39.)

Plaintiff is mistaken as to what the jury was asked to decide in this case. Here, the question before the jury, set out in Question 1of the Special Verdict Questions which Plaintiff approved, was whether Plaintiff had proven by a preponderance of the evidence that "Plaintiff's report of being illegally recorded and her follow-up on the status of the investigation into that alleged crime was a motivating factor in the decision to terminate Plaintiff's employment." (Doc. 251 at 2.) The jury answered "no" to Question 1 and, therefore, ended their deliberations. (Doc. 251 at 2, 8.) What the jury could have reasonably found as to how meeting testimony was produced, when the DA requested that the AG investigate, and whether Plaintiff's belief that she was the subject of an illegal wiretap was reasonable were not the issues that the jury was called upon to decide and are not relevant to the inquiry into whether Plaintiff is entitled to a new trial.

Review of the trial transcripts shows that Defendants provided ample evidence from which the jury could reasonably believe Plaintiff had not proven by a preponderance of the

Evidence that "Plaintiff's report of being illegally recorded and her follow-up on the status of the investigation into that alleged crime was a motivating factor in the decision to terminate Plaintiff's employment." (Doc. 251 at 2.)

Having no basis to conclude that the jury's verdict resulted in a miscarriage of justice, *see, e.g., Williamson, 926* F.2d 1352, Plaintiff's Motion (Doc. 265) is properly denied. A separate Order will be entered.

ıtered.

Robert D. Mariani
Jnited States District Judge

[1] Plaintiff's former counsel, Joseph E. Welsh and Philip D. Lauer, filed their withdrawals of appearance on March 18, 2020, (Docs. 158, 159) after the Court granted their motion to do so *(see* Docs. 146, 157).

[2] In response to Defendants' waiver arguments, Plaintiff states that she covered the waiver issue in paragraph 113 of her Motion which asserts that "Plaintiff reserves the right to supplement this Motion to Alter or Amend Judgment after review of the entire trial transcript and charging conference transcript." (Doc. 285 at 7 (quoting Doc. 265 ¶ 113).) No right reserved in the Motion applies to matters raised in Plaintiff's reply brief.

[3] Assessing the data presented by Plaintiff regarding objections, it is noteworthy that, viewed from a percentage

perspective, the Court more often found that Defendants' counsel's objections were meritorious and Plaintiff's counsel's objections lacked merit. Defendants' objections were sustained 44% of the time and Plaintiff's objections were sustained 29% of the time; Plaintiffs' objections were overruled 63% of the time and Defendants' objections were overruled 38% of the time. Further, any prejudice stemming from frequent objections could just as easily run against the party who lodges the greater number of objections as that party could be perceived to be culpable for the "constant interruption" and the source of the "[j]ury ... becoming annoyed." (Doc. 279 at 23).

[4] The Court notes that Plaintiff's assertion regarding the importance of Mr. Frost's hearing issues and need to guide Mr. Hastings is belied by the fact that Mr. Hastings had represented on June 24, 2021, that Mr. Frost would be "unable . . . to attend the upcoming trial" and "Plaintiff has agreed to have me serve as her lead trial counsel." (Doc.231 ¶¶ 2,5.) Thus, Plaintiff apparently had assessed Mr. Hastings able to handle the trial himself.

The Court further notes that Plaintiff's characterization of the undersigned 's demeanor during closing argument is inappropriate and inaccurate. It is inaccurate in that the undersigned was watching Mr. Hastings rather than Mr. Frost during closing argument and there was no "disapproval and disgust during Hastings's closing argument" (Doc. 278 at 30). It is inappropriate in that Plaintiff's mental impression of another's expression is without legal significance in the current context. Further, Plaintiff's related assertion that, during Mr. Hasting's closing argument, the undersigned attempted to get someone's attention, "perhaps the Marshalls stationed in the Courtroom" is factually inaccurate and, to the extent it speculates that the perceived attempt related to Mr. Frost sleeping, it is baseless. At no time did the undersigned seek to get someone's attention about Mr. Frost sleeping.

Plaintiff also criticizes Mr. Frost's representation based on his repeated violations of a written pretrial ruling *(see* Docs. 211, 212.) precluding reference during trial to the previously dismissed due process claim. (Doc. 278 at 24-25.) Plaintiff speculates that the undersigned's response to Mr. Frost's

conduct prejudiced the jury. *(Id.)* The Court disagrees. Upon Mr. Bufalino's objection and request for a sidebar conference in response to Mr. Frost's improper reference to the due process claim during his cross- examination of Defendants' economics expert on the fourth day of trial, the Court instructed that the jury be taken out of the courtroom. (T. Tr. Day 4 21:1-8, Doc. 263.) After the jury left the courtroom, Mr. Bufalino expressed his frustration with the repeated violation of the Court's pretrial order and the Court firmly addressed Mr. Frost's repeated misconduct on this issue. *(Id.* 21:20-23:12.) If jurors heard the rebuke of Mr. Frost's conduct after they left the courtroom, they would know that it had nothing to do with Plaintiff or the merits of her case and everything to do with Mr. Frost's conduct and violation of Court orders both before and during trial. Frost was admonished for his repeated violation of these rulings and nothing more. Plaintiff's speculation as to prejudice derived from juror's possible inference related to steps taken by the Court to curb further misconduct by Mr. Frost (Doc. 278 at 25) is similarly attenuated and unavailing. Plaintiff correctly notes that no curative instruction was offered when the jury returned to the courtroom. Due to the subject matter of Mr. Frost's infractions, such an instruction could easily have been more harmful to Plaintiffs case than helpful. *(See* T. Tr. Day 4 21 :20-24, 22:1-3, 23:3-7, Doc. 263.) Further, Plaintiff's counsel did not request a curative instruction.

Any prejudice possibly attributable to the undersigned's perceived reaction or response to anything that occurred at trial would have been alleviated by the Court's instructions to the jury. In the preliminary instructions, the Court informed the jury:

> You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give to you. You and only you will be the judges of the facts. You will have to decide what happened. I play no role in judging the facts.
>
> You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be.

(T. Tr. Day 153:8-14, Doc. 260.)

During the jury charge following closing arguments, the Court stated: "do not assume from anything I may have done or said during the trial that I have any opinion about the issues of this case or about what your verdict should be." (T. Tr. Day 4 124:9-11, Doc. 263.)

[5] The following incidents were recorded in the document under review and denied by Plaintiff:

> "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--"
> . . . .
> "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?"

(T. Tr. Day 1 124:16-24, Doc. 260.)

[6] Federal Rule of Evidence 611 addresses the "Mode and Order of Examining Witnesses and Presenting Evidence" and provides in part as follows:

> **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> **(1)** make those procedures effective for determining the truth;
> **(2)** avoid wasting time; and
> **(3)** protect witnesses from harassment or undue embarrassment.
> Fed. R. Evid. 611(a)

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 4TH DAY OF AUGUST 2022, upon consideration of Plaintiff's Motion to Vacate Judgment Entered July 12, 2021 (Doc. 287) and all relevant documents, **IT IS HEREBY ORDERED THAT** Plaintiff's Motion is **DENIED**.

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

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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.

MEMORANDUM OPINION

I. INTRODUCTION

Here the Court considers Plaintiff's Motion to Vacate Judgment Entered July 12, 2021 (Doc. 287). 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 Motion based on her assertion that she became aware of material evidence that would have changed the verdict several months after judgment was entered. (Doc. 287 at 3.) Specifically, Plaintiff alleges that the fraud in this case is based on the testimony of Defendant's witness, Shelby Watchilla, and Defendant's attorneys' failure to disclose that Ms. Watchilla had defamation litigation pending in state court against Luzerne County which she and the County planned to settle after she testified in this case. *(Id.)* For the reasons that follow, the Court will deny Plaintiff's Motion.

I. 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 Plaintiffs 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 Plaintiffs Fourteenth Amendment due process claim and First Amendment retaliation claim. (Doc. 109 ¶¶ 2, 3.) The Court also dismissed Plaintiffs state law claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *(Id.* ¶ 4.)

After the Court denied Plaintiffs 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 on 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 Circuit decision, the only claim before the Court was Plaintiff's First Amendment retaliation claim.

Trial commenced on July 6, 2021, and ended on July 9, 2021. Attorneys Hastings and Frost represented Plaintiff. Attorney Bufalino represented Defendants. Plaintiff testified on the first day of trial. (*See* Doc. 260.) On the second day of trial, Plaintiff's testimony continued, and the following other witnesses appeared: C. David Pedri, Chief County.

Solicitor for Luzerne County at the relevant time, testified as on cross; David Parsnik, Division Head for Administrative Services for Luzerne County at all relevant times; and Paula Schnelly, who previously worked for the Luzerne County District Attorney's office as an administrative assistant and was president of the local AFSME union, testified as on cross. On the third day of trial, the following witnesses appeared: Andrew Verzilli, Plaintiffs economic expert; Robert Lawton, County Manager for Luzerne County at all relevant times; and Stefanie Salavantis, Luzerne County District Attorney at all relevant times.

Plaintiff rested at the end of the third day and Defendants made a Motion for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. (Trial Transcript ("T. Tr.") Day 3 125:1-14, Doc. 262.) The Court heard oral argument on the motion and denied it from the bench, explaining the reasons for the decision. (*Id.* 17-129:8.) Mr. Bufalino then spoke about his case in chief and indicated that his economic expert would be testifying and he had not decided whether he would call Shelby Watchilla, an employee in Luzerne County's HR Department at the relevant time. (*Id.*,

129:16-23.) As to others on Defendants' witness list Court questioned Mr. Bufalino about who else might testify since most on the list had already testified.[1] *(Id.* 132:4-8.) The parties and the Court agreed that it would not be necessary to recall Defendants' witnesses in their case in chief who had previously testified. *(Id.* 132:9-133:2.)

On the fourth day of trial the following witnesses testified: James Stavros, Defendants' economic expert; Shelby Watchilla who worked in the HR office when Plaintiff was the HR director; and Necia Gazdziak, a Luzerne County HR coordinator who worked with Ms. Watchilla and Plaintiff, testified on rebuttal. Ms. Watchilla and Ms. Gazdziak testified via Zoom.

Ms. Watchilla's testimony and the circumstances surrounding it are at issue in this Motion. As noted above, Ms. Watchilla testified on the last day of trial. She was Mr. Bufalino's last witness and only Ms. Gazdziak, Plaintiff's rebuttal witness, followed.

Ms. Watchilla's direct examination began at 11:27 a.m. and ended at 11:30 a.m. (T. Tr. Day 4 41:25-42:16, Doc. 263.) Relevant to the current Motion, the following dialog occurred:

> Q. Can you tell the members of the jury your impression of the environment in that office, in working for Donna Davis Javitz?
>
> A. The environment was very uncomfortable, it was not a place I enjoyed going every day. I would describe it as being toxic.

(Id. 42:12-16.)

[1] Defendants listed the following witnesses: Robert Lawton, David Parsnik, Shelby Watchilla, Stefanie Salavantis, David Pedri, Paula Schnelly, and James Stavros. (Doc. 219 at 10.) Defendants reserved the right to supplement the witness list, call rebuttal witnesses, and call witnesses identified by Plaintiff. *(Id.)*

Because Mr. Hastings expressed some difficulty hearing after this exchange, Mr. Bufalino asked Ms. Watchilla to repeat her answer and she responded: "Sure, It was a very uncomfortable environment, I would say, toxic, not a place I wanted to go in to work every day." *(Id.* 43:4-5.) These were Ms. Watchilla's only remarks about her work environment on direct examination.

On cross-examination, which lasted for approximately ten minutes *(id.* 43:21-50:2), Mr. Hastings followed up on Plaintiff's description of her work environment and the following dialog took place:

> Q. You never said, during your deposition, when given the opportunity, that the work life or the workplace with Donna was toxic, did you?
> A. I said it was very uncomfortable. I don't know if I used the word, toxic, or not, but that would definitely be a description that I would elaborate on from uncomfortable, but it was definitely in there that I did not say it was a good working environment, at all.
> Q. I'll represent to you that you never said it was toxic, okay? And going forward, you mentioned that it was uncomfortable, and you testified it was only uncomfortable for you and no one else, you didn't know how anyone else felt; isn't that correct?
> A. I can only speak for myself.

(Id. 45:1-14.)

> Q. You testified in your deposition that lasted over four hours that you never once told anyone that Donna made you feel uncomfortable; isn't that correct?
> A. Yes.
> Q. Did you voluntarily offer to testify in this case?
> A. I was subpoenaed.
> Q. You were subpoenaed by who?
> A. Luzerne County, my former employer.

Q. Prior to you receiving the subpoena, did you have conversations with Luzerne County regarding this case? Yes or no?
A. No.

(Id. 46:15-47:1.)

Q. You testified that you don't ever recall any employees making complaints about Donna; isn't that correct?
A. Correct.
Q. When asked at your deposition to describe the relationship between Donna and the employees of Luzerne County, you responded or you answered that you did not see much interaction. Isn't that correct?
A. Yes.

(Id. 49:3-11)

On redirect examination, Mr. Bufalino again questioned Ms. Watchilla about the work environment:

Q. Did any of the questions Mr. Hastings asked you change your testimony,
with regards to the environment that existed in the office?
A. I would just reiterate that the environment was not good, and I would equate it to being a toxic work environment.
Q. Did you say, toxic workplace?
A. Yes.
Q. To whom do you attribute that to?
A. Ms. Javitz.

(Id. 51:1-9.)

On recross, the following exchange occurred:

Q. Ma'am, just to follow-up and wrap this up. You still agree with me that, at your deposition, you never testified that the workplace was toxic; right?
A. I believe I said, uncomfortable.
Q. But you never testified it was toxic; right?
MR. BUFALINO: Judge, I think we have covered this.

THE WITNESS: No, I did not.
BY MR. HASTINGS:
Q. You never told anyone about your feelings being uncomfortable in the workplace; right?
A. No. I was afraid she would let me go.
Q. And you didn't voluntarily appear in this matter; correct?
MR. BUFALINO: Judge, that's been asked and answered.
THE COURT: That's true.

(Id. 51:15:21:3.)

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.)

On August 9, 2021, Plaintiff filed the "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). The Court denied the motion by Order of July 22, 2022, (Doc. 294) for the reasons set out in the Memorandum Opinion of the same date (Doc. 293).

Plaintiffs Motion to Vacate Judgment Entered on July 12, 2021 (Doc. 287) was filed on June 21, 2022. Her supporting brief was filed on July 5, 2022. (Doc. 288.) Defendants filed their opposition brief on July 19, 2022. (Doc. 291.) With the filing of Plaintiffs reply brief (Doc. 295) on August 2, 2022, this matter became ripe for disposition.

The following additional facts are relevant to Plaintiffs pending motion. Ms.Watchilla's deposition took place on November 16, 2016. (*See* Doc. 69-15.) At the time of the deposition, Ms. Watchilla was working for Luzerne County in the Office of Human Services. (Watchilla Dep. Tr. 44-18-45:6, Doc. 69-15.)

In October 2020, Ms. Watchilla filed a Complaint in the Luzerne County Court of Common Pleas against Luzerne

County and Walter Griffith, a member of the Luzerne County Council at the time, in his individual capacity. (Luz. Co. Compl., Doc. 292-1.) Plaintiff was represented by Attorney William Vinsko. Attorney John Dean represented Luzerne County, and Attorney Lawrence Kansky represented Mr. Griffith.[2] (See Doc. 287-1 at 8, 13.) According to the Complaint, Ms. Watchilla had been appointed Luzerne County Director of Elections on December 5, 2019, by David Pedri who was then the Luzerne County Manager. (Doc. 292-1 ¶ 13.) She retained that position at the time she filed her Complaint in Luzerne County in October 2020. *(Id.* ¶14.) In the Complaint, Plaintiff avers that Griffith "shared posts and made intentionally-defamatory statements against Watchilla and her handling of the Board of Elections" despite having been reprimanded for improper activity on his Facebook page in August 2020 in that the activity violated "Rules and Procedures of Operation for the Luzerne County Council at Article III." *(Id.* ¶¶ 29-31.) Count 1 of Plaintiff's Complaint is lodged against Mr. Griffith for defamation and Count 2 is for declaratory relief against both defendants. *(Id.* at 10-14.)

On July 28, 2021, Mr. Dean wrote to the presiding judge, the Honorable Carmen Minora, informing him that the parties had agreed to mediate the matter with Attorney Daniel Cummins serving as mediator. (Doc. 287-1 at 8.) The mediation was scheduled for September 7, 2021. *(Id.* at 10.) According to September 9, 2021, e-mails from Attorneys Kansky and Dean, a non-binding and tentative settlement was reached at the September 7th mediation with plans to meet again in November for a final mediation. *(Id.* at 17, 19.) Recipients included Attorneys Cummins and Vinsko. *(Id.)* A

2 Based on the exhibit attached to Plaintiff's pending motion, it appears that Attorney Bufalino was also counsel of record for Luzerne County in Ms. Watchilla's state case until December 31, 2020, when he filed his withdrawal of appearance for Luzerne County in that matter. (seeDoc.287-1 at 22)

A Motion to Enforce the Settlement Agreement was filed by Mr. Vinsko on November 12, 2021. (Doc.287-1 at 1-6, 20). The Motion avers that, following he September 9, 2021, e-mail "[w}hen Attorney Kansky was informed that the mediation was complete, he then stated that Walter Griffith does not agree to the settlement any longer." (Id. at 4)

The record does not show that the dispute has been resolved. Rather, the Minutes of the April 26, 2022, Luzerne County Council meeting indicate that a motion was made "to adopt resolution Approving the Settlement of Pending Litigation in the Matter of Shelby Watchilla v. Luzerne County and Walter L. Griffith, Jr." and the motion failed 9-0. (Doc. 292-2 at 5.) Mr. Bufalino states in his opposition brief filed on July 19, 2022, that Ms. Watchilla's case "has not settled." (Doc. 291 at 7.)

Ill. ANALYSIS

Plaintiff argues that "[t]he verdict in this case should be vacated where Defendants' counsel committed fraud on this Court by introducing the fraudulent, immaterial, irrelevant, bought testimony of Defendants' sole witness Shelby Watchilla." (Doc. 288 at 7.) Plaintiff maintains that the fraud is based on "the intentional presentation of manufactured testimony offered by Shelby Watchilla" and the "intentional omission of Defendants' attorneys to disclose [certain matters] to the Court." *(Id.* at 8.) In her supporting brief, Plaintiff identifies the following three disclosure failures:

> a.Shelby Watchilla and the County entered into an agreement to settle her defamation litigation filed at Shelby Watchilla v. Luzerne County and Walter Griffith, in his individual capacity, No. 2020-9178, October 6, 2020, after she testified in this case;
> b.shortly after this trial concluded, Atty. Jack Dean, counsel for the County in the Watchilla litigation and counsel for Defendants in this case, asked the Watchilla Court to hold *off* deciding on the County's Preliminary

> Objections because the parties agreed to go to mediation (Exhibit 1, Motion to Enforce Settlement) (Exhibit A, July 28, 2021 letter from Atty. Jack Dean to Judge Minora;3
> c.that mediation resulted in an agreement to settle Watchilla's defamation case for $60,000.00 all of which would be paid by the County (Exhibit 1) (See also Exhibit 2, Griffith's Brief in Response to Watchilla Motion)[.]4

(Doc. 288 at 8.)

Plaintiff contends that her Motion should be decided under the framework established for fraud on the court which is distinct from a motion under Federal Rule of Civil Procedure 60(b) and can be brought "even years after the judgment was entered." (Id. at 7

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3 Although Mr. Dean remains of record in this case, he did not participate in the trial or actively participate in the filing of any document of record since April 19, 2017. (See Doc. 59 and Docket generally.)

4 In her reply brief, Plaintiff raises two additional instances of allegedly fraudulent conduct:

> Atty. Bufalino deceived the Court by intentionally failing to tell the Court that he knew Shelby Watchilla never complained to Parsnik about Davis during her employment with the County or after but proceeded to offer her testimony in the trial of this case as if it was a reason for Davis' termination; [and]
> [ ] Atty. Bufalino, during the deposition of David Parsnik, stated on the record that Watchilla never complained to Parsnik about Davis.

(Doc. 295 at 8.) The Court need not address these assertions in that arguments or issues raised for the first time in Plaintiff's reply brief are properly deemed waived. *See, e.g., Loving v. FedEx Freight, Inc.*, Civ. No. 3:18-CV-508, 2020 WL 2306901, at *14 (M.D. Pa. May 8, 2020) (citation omitted).

Further, if the Court were to address the merits of these allegations of fraud, they would not entitle Plaintiff to the relief requested. This is so for several reasons, including the following:

- Mr. Bufalino did not present Ms. Watchilla's testimony "as if it was a reason for Davis' termination" and the Court clearly told the jury the reasons which Defendants had proffered for Plaintiff's termination (T. Tr. Day 1 54:1-5, Doc. 260);
- Neither the Court nor the jury could possibly have been deceived about whether Ms. Watchilia had reported her complaints about her work environment to her superiors given that Mr. Hastings made it very clear that she had not done so in his examination of Ms. Watchilla (T. Tr. Day 4 46:15-18, 51:15-25, Doc. 263);
- No relevance objection was made to Ms. Watchilla's testimony, *see infra* pp. 18-19 & n.7, -- Mr. Hastings' objection was only to her testifying by Zoom rather than in person (T. Tr. Day 3 130:11- 20, Doc. 262)-and, therefore, Mr. Bufalino was not asked to offer a reason to justify Ms. Watchilla's testimony;
- As Mr. Hastings' acknowledged, Ms. Watchilla's testimony was relevant to Plaintiff's character (T. Tr. Day 3 130:11-17, Doc. 262) which Plaintiff's counsel, Mr. Frost, had raised when he called Mr. Lawton in Plaintiff's case in chief *(see id.* 45:19-47-6)

(citing *Hazel-Atlas* Glass Co. *v. Hartford-Empire* Co., 322 U.S. 238, 244 (1944); *Herring v United States,* 424 F.3d 384, 389 (3d Cir. 1987)).) Plaintiff also avers that

> [a] Court must set aside a judgment based upon its finding of fraud on the court when an officer of the court has engaged in "egregious conduct." Such a finding must be supported by clear unequivocal and convincing evidence of (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself. In addition, fraud on the Court may be found where the misconduct at issue has successfully deceived the Court.

(*Id.* at 8-9 (citing *In re Bressman,* 874 F.3d 142, 150.(3d Cir. 2017)).)

> Notably, *Bressman* advised that
> [t]he Supreme Court has warned that fraud on the court actions must be "reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." Taking heed of this instruction, we held in *Herring* that only "'egregious misconduct ... such as bribery of a judge or jury or fabrication of evidence by counsel'" can be characterized as the kind of fraud that warrants relief from a judgment.

874 F.3d at 152-53.[5]

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[5] Plaintiff cites a portion of this quotation in her supporting brief but replaces the word "fabrication" with "falsification." (*See* Doc. 288 at 10.)

Plaintiff asserts that Mr. Bufalino committed this "type of fraud on the court and the jury by eliciting manufactured evidence from Shelby Watchilla . . . and [he] knew he was admitting manufactured testimony ... [because] during the deposition ... Parsnik saidWatchiila never complained to him about Donna Davis." (Doc. 288 at 10.) Plaintiff also maintains that "Atty. Bufalino was not honest in conducting this litigation by presenting manufactured evidence from a witness who would be paid for her testimony, post trial, through a settlement with the County in her own litigation against the County." *(Id.* at 11.)

The record in this case clearly shows that Plaintiff has not, and cannot, satisfy the requisite standard. Plaintiff has presented no "clear, unequivocal and convincing evidence" of an intentional fraud by Mr. Bufalino or any officer of the court which is directed at the court itself. *Bressman,* 874 F.3d at 150. Plaintiff presents no evidence which suggests that Ms. Watchilla's testimony was manufactured, and there has been no "fabrication of evidence" by counsel. 874 F.3d at 153. As her trial testimony shows, Ms. Watchilla testified at her 2016 deposition (which occurred long before her state court case was filed or the events at issue in the case took place), that the working environment was "uncomfortable" and she additionally characterized it as "toxic" at every phase of her examination at trial.*See supra* pp. 6-9. She acknowledged that she may not have used the word toxic in her deposition: "I said it was very uncomfortable. I don't know if I used the word, toxic, or not, but that would definitely be a description that I would elaborate on from uncomfortable, but it was definitely in there that I did not say it was a good working environment, at all." (T. Tr. · Day 4 45:4-8, Doc. 263.) Ms. Watchilla also confirmed that she did not know how anyone else felt, stating "I can only speak for myself." *(Id.* 45:14.) Thus, Ms. Watchilla testified about the evolution of her use of the word toxic, and she did so in a

manner that does not suggest inconsistency with her deposition. With this finding, the Court has no basis to consider her testimony manufactured, fabricated, or fraudulent. Viewed in this context, Plaintiffs allegation that "the presentation of manufactured testimony from Shelby Watchilla constituted fraudulent conduct (Doc. 288 at 8) is without merit and does not support a basis for the Court to grant the relief requested.

Plaintiffs allegation that fraud in this case is based on "the intentional omission of Defendants' attorneys to disclose [certain matters] to the Court" *(id.)* also fails. First, the allegation that it was fraud for Defendants' attorneys not to disclose to the Court that "Shelby Watchilla and the County entered into an agreement to settle her defamation litigation filed at Shelby Watchilla v. Luzerne County and Walter Griffith, in his individual capacity, No. 2020-9178, October 6, 2020, after she testified in this case" (Doc. 288 at 8) is without merit. Plaintiff presents no evidence that an agreement to settle the defamation litigation preceded Ms. Watchilla's testimony. Mr. Dean wrote to Judge Minora about the parties' agreement to go to mediation *after* final judgment in this case was entered. *See supra* p. 11.

Any allegation or implication that there was a pretrial agreement is belied by the fact that the defamation case had not settled at the time Mr. Bufalino filed his opposition brief on July 19, 2022.[6] *See supra* pp. 11-12.

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[6] The Affidavit of Donna Davis Javitz (Doc. 295-1) attached to her reply brief addresses how the settlement was to be funded and does not support an implication that there was a pretrial agreement.

Any allegation or implication that there was a pretrial agreement is also illogical. If there had been a scheme whereby Ms. Watchilla's testimony would lead to a favorable resolution of her state court defamation lawsuit, it could reasonably be inferred that she would have testified voluntarily, yet Ms. Watchilla testified under oath at trial that she did not testify willingly. *See supra* p. 7. It could also reasonably be inferred that she would have spoken with Luzerne County personnel about such an arrangement before the subpoena was issued, yet she testified that this did not happen. *Id.* Plaintiffs sworn testimony that she did not testify willingly and that she had no conversations with Luzerne County personnel before she received the subpoena strongly support a conclusion that no scheme related to her state court case was afoot. If Plaintiff seeks to imply that the ruse was orchestrated by counsel (rather than Luzerne County personnel), this too would be illogical in that the Court would have to find that an officer of the court risked his career and reputation to secure the testimony of a minor witness.

Further, the historical recognition of Ms. Watchilla as a potential witness in this case undermines the assertion that her testimony was "bought" at the eleventh hour because she got a deal with Luzerne County on her state court defamation action. In the March 2, 2016, Case Management Plan, the list of "each person whose identity has been disclosed" included Ms. Watchilla. (Doc. 22 at 4.) Plaintiff took Ms. Watchilla's deposition on November 16, 2016. (Doc. 69-15.) Defendants identified Ms. Watchilla as a witness in their February 19, 2021, Pretrial Memorandum (Doc. 197 at 10) and identified her deposition in Defendants' List of Exhibits (Doc. 197-1 at 2). Therefore, Plaintiffs testimony at trial was long expected and the fact that she was called as a witness does not implicate an improper motive.

Plaintiff cannot base her fraud claim on the mere fact that counsel in this case failed to alert this Court to Mr. Dean's correspondence informing Judge Minora that the parties agreed to go to mediation on July 28, 2021. (Doc. 288 at 8.) This case had closed at the time and there was no reason to inform this Court that unrelated state court litigation would proceed to mediation.

Plaintiff fares no better with her allegation that Defendants' attorneys failed to disclose that mediation "resulted in an agreement to settle Watchilla's defamation case for $60,000.00 all of which would be paid by the County." (Doc. 288 at 8.) Even if the agreement had ended in Ms. Watchilla's receipt of settlement funds, Defendants' counsel was under no obligation to inform this Court of such activity in the state court case when final judgment in this case had been entered long before any settlement was allegedly reached. As stated above, Plaintiffs assumption that a settlement deal had been reached in the defamation litigation before Ms. Watchilla testified in this case has no support in the record and no inference of impropriety can be drawn from the evidence of record. Such an inference would be improper based on Plaintiff's burden to produce evidence to support her Motion and would be illogical for the reasons previously discussed. *See supra* pp. 16-17.

Plaintiffs assertions regarding the relevance of Ms. Watchilla's testimony (see, *e.g.*, Doc. 288 at 8, 13) do nothing to support allegations of fraud. Ms. Watchilla's testimony about her perception of the work environment was relevant given allegations contained in Plaintiffs Second Amended Complaint and assertions made at trial about Plaintiff handling

"all issues professionally and competently" (Doc. 58 ¶ 45), and about Plaintiff being an outstanding and exemplary employee *(id.* ¶ 52; T. Tr. Day 3 46:7-47:5, Doc. 262). As discussed at length in the Court's Memorandum Opinion addressing Plaintiffs "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), no error occurred with the admission of Ms. Watchilla's testimony and Plaintiff was not denied a fair trial based, in whole or in part, by the Court's allowing her to testify. (Doc. 293 at 37-39.) Nothing in the filings related to Plaintiffs current Motion alter that determination.[7]

Plaintiff's averment that the outcome of the trial would have been different if Plaintiff had been aware of evidence about the pending case in the Luzerne County Court of Common Pleas at the time of the trial (Doc. 288 at 6) is unsubstantiated and without merit. Although Plaintiff states that "[s]everal months after the verdict, Plaintiff became aware of material evidence, that if known at the time of trial would have changed the result of the trial" *(id.),* she does not invoke Federal Rule of Civil Procedure 60(b)(2) which allows for relief from a final judgment based on "newly discovered evidence that, with reasonable

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[7] Plaintiff's argument that waiver based on her counsels' failure to object at trial does not apply to the failure to object to Ms. Watchilla's testimony *(see* Doc. 295 at 13), raised for the first time in her reply brief, is waived. See *supra* p. 13 n.4. For the reasons discussed in the text of this Memorandum Opinion, there is also no basis to conclude that waiver does not apply here because counsel has committed a fraud on the Court. (Doc. 295 at 13 (citing *Baxter v. Bressman,* 874, F.3d 142 (3d Cir. 2017)).)

diligence, could not have been discovered in time to move for a new trial under Rule 59(b). However, even if Plaintiff had done so, the provision cannot provide the relief requested.

The standard for relief pursuant to Rule 60(b)(2) requires that

> the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial *(Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir.1991)). Any party requesting such relief "bears a heavy burden[11] *(id.*, quoting P/isco *v. Union R.* Co., 379 F.2d 15, 17 (3d Cir.1967)).

Compass *Tech., Inc. v. Tseng Lab'ys, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995).

Plaintiff would not be entitled to relief pursuant to Rule 60(b)(2) because she cannot satisfy the second and third requirements. As to the second requirement, evidence concerning Ms. Watchilla[1]s state court litigation was a matter of public record and could have been discovered with reasonable diligence before trial in this case. It follows that Plaintiff could have known of the Watchilla litigation through the exercise of reasonable diligence and questions related to its existence, status, and settlement negotiations could have been raised at trial.

As to the third requirement, Plaintiff has presented no evidence to support a conclusion that the newly discovered evidence would probably have changed the outcome of the trial. First, had the fact been known to the jury that Ms. Watchilla had litigation pending in state court against Luzerne County and a member of the County Council, the outcome would not have changed because the individually named defendant in the state court litigation, Walter Griffith, has nothing to do with this

case, and the factual basis for the state court litigation is unrelated to the facts of this case. At the time of trial, no mediation had been planned or scheduled, so the mere fact of the litigation related to Ms. Watchilla would have been the extent of the evidence before the jury. Speculation about whether the fact that a witness had a pending defamation lawsuit against Defendant Luzerne County could have affected the jury is too tangential to satisfy Plaintiffs heavy burden on this issue.

Second, if somehow the fact of the litigation undermined Ms. Watchilla's credibility, the outcome of the trial would not likely have changed. 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 Plaintiffs work performance set out during Plaintiffs 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. Importantly, others testified more broadly about Plaintiffs negative interaction with the unions which was one of the reasons given for her termination. For example, David Pedri, the Chief County Solicitor for Luzerne County at the relevant time, testified that, after Plaintiff assumed the H.R. director position, "[i]t became an extremely toxic environment with Ms. Davis. Every single issue was continually discussed, every single grievance was a fight, and that's not only within the union but also with management." (T. Tr. Day 2 100:17-20, Doc. 261.) By way of further example, Paula Schnelly, an AFSME local union official, provided testimony about Plaintiffs demeanor with the unions. Ms.Schnelly 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.) She also testified that she was present at a meeting with Mr. Lawton, the County Manager:

> 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 2 207:22-208:2, Doc. 262.) Mr. Parsnik confirmed that issues existed with Plaintiffs handling of union matters. *(See, e.g.,* T. Tr. Day 2 142:11-23, Doc. 261.)

Nothing about the state court defamation litigation concerned Mr. Pedri, Ms.Schnelly, or Mr. Parsnik. Therefore, any negative impact on Ms. Watchilla's credibility related to the state court defamation litigation would not have similarly affected Mr. Pedri, Ms. Schnelly, and Mr. Parsnik.Further, both the duration and subject matter of Ms. Watchilla's testimony compared with other witnesses who testified for Defendants show that Ms. Watchilla was a minor witness.

Notably, Ms. Watchilla's credibility did not go unchallenged at trial. Mr. Hastings thoroughly and adequately cross-examined Ms. Watchilla. (T. Tr. Day 4 43:21-50:1, 51:15-50, Doc. 263.) Also, the impact of Ms. Watchilla's direct

testimony was diminished by the testimony of Necia Gazdziak, Plaintiff's rebuttal witness who worked in the HR Department and testified immediately following Ms. Watchilla. Ms. Gazdziak, the last witness in the case, did not share Ms. Watchilla's assessment that Plaintiff made the work environment uncomfortable and the HR office was "a place she did not want to go to." (T. Tr. Day 4 58:8- 13, Doc. 263.) Rather, Ms. Gazdziak testified that the drama in the HR Department was caused by Ms. Watchilla. *(Id.* 58:14-18.) Ms. Gazdziak acknowledged that she had said in her deposition that Plaintiff sometimes made her uncomfortable *(id.* 62:11) and that it sometimes seemed that Plaintiff tried "to play Shelby and I against each other" *(id.* 64:5-6). However, Ms. Gazdziak confirmed on redirect examination that it was Shelby Watchilla who created a hostile work environment in the HR Department rather than Plaintiff. Ms.
Gazdziak followed this testimony with a recitation of numerous positive aspects of her relationship with Plaintiff:

> Q. When you ever had an issue with Donna, were you able to speak to her about your concerns?
> A. Yes.
> Q. Was Donna receptive?
> A. Yes.
> Q. Did you resolve any issue between the two of you?

A. All the time.
Q. And did you feel comfortable working with Donna?
A. Yes.
Q. Did you learn from Donna?
A. Yes, I did.
Q. Was Donna a good teacher?
A. Absolutely.
Q. Was Donna a good boss?
A. Yes.

(T. Tr. Day 4 65:2-16, Doc. 263.)

Given what came before Ms. Watchilla's testimony and what came after, the foregoing dialog shows that Ms. Watchilla arguably opened the door to allowing the last word heard from trial witnesses to be about positive aspects of Plaintiffs tenure as HR Director. This contextual and sequential evaluation of trial testimony cannot support a conclusion that the outcome of the trial would have been different if Ms. Watchilla had been questioned about her state court defamation case.

If evidence related to the state court litigation somehow resulted in Ms. Watchilla not testifying at trial, there is no basis to conclude the outcome of the trial would have been different. For the reasons discussed regarding the relative insignificance of Ms. Watchilla's

testimony compared with that of other witnesses, the total absence of her testimony could not have altered the jury's assessment of the case.

Finally, were Plaintiff to seek relief pursuant to Federal Rule of Civil Procedure 60(b)(3) which allows for relief from final judgment for fraud or misrepresentation, her Motion would also fail. To show fraud under Rule 60(b)(3), a "movant must establish that the adverse party engaged in fraud or other misconduct, and that this conduct prevented the moving party from fully and fairly presenting his case." *Stridiron v. Stridiron,* 698 F.2d 204, 206-07 (3d Cir.1983). As discussed above, Plaintiff has not shown that the adverse party engaged in fraud. Nor has she presented evidence from which the Court could conclude that Defendants engaged in misconduct.

IV. CONCLUSION

For the reasons set forth above, the Court concludes that Plaintiff has not provided a basis for the Court to conduct a hearing in this matter and Plaintiffs Motion to Vacate Judgment (Doc. 287) is properly denied. Plaintiff made a request for a hearing for the first time in her reply brief. (Doc. 295 at 3 (citing *Hazel-Atlas Glass* Co. *v. Hartford-Empire* Co., 322 U.S. 238 (1944)).) As discussed in the preceding section of this Memorandum Opinion, Plaintiff has presented no basis to conclude that, at the time of trial, there was an "agreement between witness Shelby Watchilla and Defendants' counsel in this case to settle her own case against the County" (Doc. 295 at 2) let alone an agreement to settle her case in return for favorable testimony in Plaintiffs trial such that a hearing to

determine "disputed facts" *(id.* at 3) and credibility is warranted.[8] Plaintiff has not made the slightest showing that an agreement was made between the County and Ms. Watchilla to provide testimony in this case favorable to the County in return for a settlement in her defamation action. As previously discussed, Ms. Watchilla was first identified in the March 2, 2016, Case Management Plan, her deposition took place on November 16, 2016, she was identified as a trial witness in Defendants' February 19, 2019, Pretrial Memorandum, and her deposition was identified in Defendants' list of trial exhibits. *See supra* p. 17. The Case Management Plan was filed and the deposition was taken long before Ms. Watchilla filed her defamation lawsuit in October 2020, see *supra* p. 10. Thus, the identification of Ms. Watchilla as a witness at trial was expected well before she filed the state court lawsuit against Luzerne County and Walter Griffith. Both this expectation and the fact that her trial testimony did not materially deviate from her 2016 deposition testimony demonstrate that Ms. Watchilla's appearance as a witness at trial does not implicate an improper motive on the part of Defendants' counsel.

A separate Order will be entered.

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

[8] In *Hazel-Atlas*, the Circuit Court held a hearing regarding the alleged fraud where the allegations were supported with affidavits and exhibits. 322 U.S. at 239. Plaintiff has not provided any such support here. As discussed in the text, Plaintiff's allegations are merely speculative and the exhibits attached to her Motion (Docs. 287-1, 287-2, 287-3, 295-1) do not provide the asserted support.