

No. 23-1256

In the
Supreme Court of the United States

DONNA DAVIS JAVITZ,
Petitioner,

v.

LUZERNE COUNTY, ROBERT LAWTON
and DAVID PARSNIK,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Third Circuit

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Mark W. Bufalino
15 Public Square
Suite 210
Wilkes-Barre, PA 18701
(570) 814-7377
bufalinolaw@gmail.com
Attorney for Respondents
Luzerne County, Robert C. Lawton
and David Parsnik

Dated: June 24, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. COUNTER-STATEMENT OF THE CASE.	1
A. Factual Background.....	1
B. Procedural Background	2
II. REASONS FOR DENYING CERTIORARI....	4
A. Mrs. Javitz Was Not Denied Her Constitutional Right To A Fair Trial	4
1. The District Court's Striking Mrs. Javitz's Testimony Regarding The Alleged Altering Of The ULP Did Not Invade The Jury's Province And Was Proper.....	4
2. Mrs. Javitz Was Not Denied Any Alleged Right Of Confrontation Because The District Court Properly Conducted A Rule 43 Analysis In Permitting The Virtual Testimony of Shelby Watchilla.....	9
3. Mrs. Javitz Failed To Raise The District Court's Alleged Failure To Instruct The Jury On Character Evidence At Trial, At The Close Of The Evidence Or In Any Post-Trial Motion	

And, Therefore, Any Such Issue Is Waived On Appeal.....	13
4. The District Court Did Not Fail To Accommodate Attorney Frost's Hearing Impairment	13
5. The District Court Did Not Err In Allowing Trial To Continue In Light Of Attorney Frost's Repeated Violations Of The District Court's Pre-Trial Evidentiary Rulings	16
 B. Mrs. Javitz Was Not Denied Due Process.....	18
1. The Testimony Of Mrs. Watchilla Was Neither Manufactured Nor Fraudulent.....	18
 III. CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Apex Fin. Options, LLC v. Gilbertson</i> , No. 19-0046, 2022 U.S. DIST. LEXIS 36685 (D.C. Del. March 1, 2022)	11-12
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S. Ct. 1246, 11 L. Ed. 2d 302 (1991)	14
<i>Bailey v. Systems Innovation, Inc.</i> , 852 F.2d 93 (3d Cir. 1988)	4
<i>Baxter v. Baxter (In Re Bressman)</i> , 874 F.3d 142 (3d Cir. 2017)	21
<i>Blancha v. Raymark Indus.</i> , 972 F.2d 507 (3d Cir. 1992)	7-8
<i>Carden v. Westinghouse Elec. Corp.</i> , 850 F.2d 996 (3d Cir. 1988)	5
<i>Compass Tech, Inc. v. Tseng Lab'ys, Inc.</i> , 71 F.3d 1125 (3d Cir. 1995)	20
<i>Dilliplaine v. Lehigh Valley Trust Co.</i> , 457 Pa. 255, 322 A.2d 114 (1974)	14, 18
<i>Estes v. Texas</i> , 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)	5

<i>Gonzalez v. Pennsylvania</i> , No. 06-CV-5471, 2007 U.S. Dist. LEXIS 41374 (E.D. Pa. June 7, 2007)	15
<i>Goodman v. Pennsylvania Tpk. Comm'n</i> , 293 F.3d 655 (3d Cir. 2002)	6
<i>Hannah v. Larche</i> , 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960)	10
<i>Hirst v. Inverness Hotel Corp.</i> , 544 F.3d 221 (3d Cir. 2008)	8
<i>Hurley v. Atl. City Police Dep't</i> , 174 F.3d 95 (3d Cir. 1999)	6-7
<i>Hussey v. Chase Manhattan Bank</i> , No. 02-7099, 2005 U.S. Dist. LEXIS 15012 (E.D. Pa. 2005).....	12
<i>In Re Snyder</i> , 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985)	21-22
<i>Kushner v. Winterthur Swiss Ins. Co.</i> , 620 F.2d 404 (3d Cir. 1980)	14, 18
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)	4
<i>Slocum v. New York Life Ins. Co.</i> , 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 2d 879 (1913)	5, 8

<i>Tennessee v. Lane</i> , 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)	15
<i>Turner v. Rogers</i> , 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011)	14
<i>United States v. Robinson</i> , 635 F.2d 981 (2d Cir. 1980)	5
<i>United States v. Wilensky</i> , 757 F.2d 594 (3d Cir. 1985)	5
<i>Van Harken v. City of Chicago</i> , 103 F.2d 1346 (7th Cir. 1997).....	10

Constitutional Provisions

U.S. Const. amend. I.....	2-3
U.S. Const. amend. VI	9, 10, 14
U.S. Const. amend. VII	4-8

Rules

Fed.R.Civ.P. 43(a)	10
Fed.R.Civ.P. 59.....	3
Fed.R.Civ.P. 60(b)	18, 20
Fed.R.E. 401	7
Fed.R.E. 701	8

I. COUNTER-STATEMENT OF THE CASE.

A. Factual Background.

Petitioner Donna Davis Javitz (“Mrs. Javitz”) began her employment with Respondent Luzerne County (“the County”) as Director of Human Resources on August 4, 2014. App. to Pet. for Cert. 17, July 22, 2022 Memorandum Opinion of the United States District Court for the Middle District of Pennsylvania (“the District Court’s July 22, 2022 Opinion”). On or about March 3, 2015, the American Federation of State, County and Municipal Employees (“AFSCME”) filed an unfair labor practice charge (the “ULP”) against the County with the Pennsylvania Labor Relations Board. *Id.* 18. Based upon attachments to the ULP, Mrs. Javitz reported to Respondent David Parsnik (“Mr. Parsnik”) that she believed that she was audiotaped without her permission during a meeting with the President of AFSCME, Paula Schnelly (“Ms. Schnelly”), regarding the ULP. *Id.* 18-19. Mrs. Javitz and Mr. Parsnik presented the ULP charge at a meeting with Luzerne County District Attorney Stefanie Salavantis (the “District Attorney” or “District Attorney Salavantis”) and Luzerne County Detective Michael Dessoye (“Mr. Dessoye”) in March 2015. *Id.* 19.

The County terminated Mrs. Javitz’s employment on October 26, 2015. *Id.* 19. Mrs. Javitz alleged that she was terminated for Mrs. Javitz’s reporting of the suspected wiretap to the District Attorney. *Id.* 17. The County, Mr. Parsnik and Respondent Robert Lawton (“Mr. Lawton”)

(collectively, “the County Defendants”) asserted that Mrs. Javitz’s termination occurred because of Mrs. Javitz’s conduct towards the unions, her refusal to follow through with hiring a Human Resources Business Partner (a vacant position in the Human Resources Department during Mrs. Javitz’s County employment), her failure to initiate policies, procedures and initiatives as directed and Mrs. Javitz’s handling of issues with the employment application for a candidate for an assistant public defender position. *Id.* 20.

B. Procedural Background.

Mrs. Javitz instituted this action on December 21, 2015. *Id.* 17. On May 15, 2017, the County Defendants filed their motion for summary judgment (“the County Defendants’ motion”). *Id.* On March 29, 2018, the United States District Court for the Middle District of Pennsylvania (“the District Court”) issued its Memorandum Opinion and Order granting the County Defendants’ motion as to Mrs. Javitz’s procedural due process and First Amendment retaliation claims against all of the County Defendants (“the District Court’s summary judgment Order and Opinion”). *Id.*

On June 20, 2018, Mrs. Javitz filed her notice of appeal to the United States Court of Appeals for the Third Circuit Court (“the Third Circuit”). *Id.* 17-18, 20. On October 10, 2019, the Third Circuit affirmed the District Court’s dismissal of Mrs. Javitz’s procedural due process claim but reversed and remanded the grant of summary judgment as to Mrs. Javitz’s First Amendment retaliation claim. *Id.* In

addition, with regard to Mrs. Javitz's First Amendment Claim, the Third Circuit found that Mr. Javitz's speech was that of a citizen speaking to a matter of public concern and remanded the case back to the District Court for trial. *Id.*

Trial in this matter was held on July 6, 2021 through July 9, 2021. *Id.* 21. On July 9, 2021, the jury returned a unanimous verdict in favor of the County Defendants. *Id.* On July 12, 2021, judgment was entered by the Clerk of the District Court in favor of the County Defendants. *Id.* 14. On August 9, 2021, Mrs. Javitz filed her first motion for a new trial pursuant to Fed.R.Civ.P. 59 and 60. *Id.* 16. On June 21, 2022, nearly one (1) year after judgment was entered in favor of the County Defendants, Mrs. Javitz filed her motion to vacate the District Court's judgment. *Id.* On July 22, 2022, the District Court issued its Memorandum Opinion and Order denying Mrs. Javitz's first post-trial motions. *Id.* 15-69. On August 4, 2022, the District Court issued its Memorandum Opinion and Order denying Mrs. Javitz's motion to vacate the District Court's judgment. *Id.* 70.

On September 11, 2023, the Third Circuit affirmed the denial of Mrs. Javitz's post-trial motions. App. to Pet. for Cert. 1-11, September 11, 2023 Opinion of the Third Circuit. On September 26, 2023, Mrs. Javitz filed her petition for rehearing in the Third Circuit. *Id.* 13. On October 24, 2023, the Third Circuit denied Mrs. Javitz's request for a panel rehearing. *Id.* Mrs. Javitz's petition for a writ of certiorari was subsequently filed with this Court.

II. REASONS FOR DENYING CERTIORARI.

A. Mrs. Javitz Was Not Denied Her Constitutional Right To A Fair Trial

1. The District Court's Striking Mrs. Javitz's Testimony Regarding The Alleged Altering Of The ULP Did Not Invade The Jury's Province And Was Proper.

The 7th Amendment to the Constitution of the United States, declares:

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

U.S. Const. amend. VII.

"[F]airness in a jury trial, whether criminal or civil in nature, is a vital constitutional right". *See Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988) (*citing Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)) (Brennan, J., concurring) ("So basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms.' ")

(quoting *Estes v. Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543 (1965)). However, the right to a fair trial does not translate into the right to a perfect trial. *United States v. Wilensky*, 757 F.2d 594, 599 (3d Cir. 1985) (citing *United States v. Robinson*, 635 F.2d 981 (2d Cir.1980)).

Inexorably linked to ensuring the right to trial by jury, is the role of the trial judge. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 382, 33 S. Ct. 523, 57 L. Ed. 2d 879 (1913). “[B]oth the court and the jury are essential factors”. *Id.* A trial judge is committed with a power of direction and superintendence. *Id.* The jury is committed with the power to determine the issues of fact. *Id.* “Only through the cooperation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. To dispense with either or to permit one to disregard the province of the other, is to impinge on that right”. *Id.*

Findings of facts are solely within the province of the jury. *Slocum*, 228 U.S. at 382. Evidentiary rulings, however, are within the sole province of the trial judge. In that regard, a district court judge is granted broad discretion in determining what is admissible under the Federal Rules of Evidence. *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1001 (3d Cir. 1988). In the matter *sub judice*, Mrs. Javitz improperly attempted during trial to testify that notes attached to the ULP were altered by “someone”. App. to Pet. for Cert. 58-60, the District Court’s July 22, 2022 Opinion. The District Court properly granted the County Defendants’ objection and motion to strike since -- contrary to Mrs. Javitz’s assertions -- Mrs. Javitz had no personal knowledge

that the document was altered or changed and clearly could not identify the “someone” that allegedly altered the notes. *Id.* Thus, the District Court’s ruling in this regard was firmly within the province of the District Court -- not the jury’s -- and was not in error. *Id.* Thus, the District Court’s striking of Mrs. Javitz’s testimony regarding the ULP did not deny Mrs. Javitz of her right to a fair trial. *Id.*

Furthermore, even if the striking of such testimony was error, it is highly probable that Mrs. Javitz’s testimony regarding the alleged altering of the notes would not have led to a different outcome in the case. *Id.* 60. *See also Goodman v. Pennsylvania Tpk. Comm’n*, 293 F.3d 655, 667 (3d Cir. 2002). Whether or not the ULP was altered is not dispositive of the ultimate issue in this case -- whether Mrs. Javitz’s termination was in retaliation for her reporting of her suspected belief of being recorded without her knowledge and permission. App. to Pet. for Cert., the District Court’s July 22, 2022 Opinion, 60. *See also Goodman*, 293 F.3d at 667. Moreover, Mrs. Javitz was permitted to testify regarding her belief of being recorded without her knowledge and permission as well as her disagreement with the accuracy of the allegations of the ULP. App. to Pet. for Cert. 59, the District Court’s July 22, 2022 Opinion.

The cases relied upon by Mrs. Javitz in support of her claim of a denial of her right to a fair trial are inapposite to the matter *sub judice*. Pet. for Cert. 6-13. *Hurley v. Atl. City Police Dep’t*, 174 F.3d 95, 109-112 (3d Cir. 1999) did not involve the striking of the plaintiff’s testimony or any alleged usurpation of the

jury's function. On the contrary, the essence of *Hurley* is the trial judge's contemplation of the jury's separate role as fact-finder. *Id.* Specifically, the circuit court affirmed the district court's ruling which permitted evidence of past harassment committed against employees other than the plaintiff pursuant to Fed.R.E. 401. *Id.* The court concluded that such evidence was crucial to the jury's evaluation of the employer's work environment. *Id.*¹

Mrs. Javitz's reliance upon *Blancha v. Raymark Indus.*, 972 F.2d 507, 514 (3d Cir. 1992), is equally unavailing to Mrs. Javitz. Pet. for Cert. 11. In *Blancha*, the circuit court held that the trial court erred in granting a motion for a new trial. *Blancha*, 972 F.2d at 510. Specifically, the trial court initially permitted the testimony of a medical expert to testify that chrysotile asbestos does not cause mesothelioma. *Id.* The jury rendered a verdict in favor of a defendant on the basis that the defendant's products were not a substantial contributing factor in bringing about the plaintiff's illness. *Id.* The trial court ultimately concluded that it had erred in permitting that testimony because the defendant had not presented any evidence that its products contained chrysotile asbestos. *Id.* at 515. The trial court concluded that the witness' testimony likely misled the jury into believing that the defendant's products did not contain chrysotile asbestos and, therefore, could not have caused the plaintiff's illness. *Id.* In reversing

¹ Although the court in *Hurley* did hold that the district court's admission of evidence of derogatory comments occurring prior to the plaintiff's employment was error, the court concluded that such was harmless error. *Id.*

the grant of a new trial, the Third Circuit held that the testimony was relevant and that the defendant was not obligated to present affirmative evidence regarding the contents of its product. *Id.* at 518. Thus, *Blancha*, like this matter, involved evidentiary rulings within the province of the trial judge -- not fact-finding by the trial court. *Id.*

Mrs. Javitz also mistakenly relies upon *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 228-229 (3d Cir. 2008). Pet. for Cert. 11. The Seventh Amendment's civil jury trial guarantee was not at issue in *Hirst*. See *Hirst*, 544 F.3d at 228-229. Equally absent in *Hirst* was any issue regarding the striking of testimony that arguably invaded the jury's fact-finding function. *Id.* In *Hirst*, the Third Circuit held that the trial court committed reversible error by allowing one of the defendant's Presidents to testify pursuant to Fed.R.E. 701 regarding proximate causation -- testimony which the court concluded could have affected the jury's verdict. *Id.*

The matter *sub judice* is also distinguishable from *Slocum*. See *Slocum*, 228 U.S. at 376. In *Slocum*, unlike here, the circuit court of appeals, did not order a new trial, but "assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly". *Id.* Here, the District Court played no role in the jury's fact-finding process or the judgment the jury rendered in favor of the County Defendants.

2. Mrs. Javitz Was Not Denied Any Alleged Right Of Confrontation Because The District Court Properly Conducted A Rule 43 Analysis In Permitting The Virtual Testimony of Shelby Watchilla.

In her petition, Mrs. Javitz claims that she was denied her right to a fair trial and to confrontation of Shelby Watchilla (“Mrs. Watchilla”). Pet. for Cert. 13-18. The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

First, any claims that the District Court erred when it permitted Mrs. Watchilla’s virtual testimony were forfeited by Mrs. Javitz by not raising them in the District Court. App. to Pet. For Cert. 7,

September 11, 2023 Opinion of the Third Circuit. Further, even if not waived, the Sixth Amendment’s confrontation guarantee does not apply to civil proceedings. *See U.S. Cont. amend. VI; see also Hannah v. Larche*, 363 U.S. 420, 440, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); *Van Harken v. City of Chicago*, 103 F.2d 1346, 1352 (7th Cir. 1997).

Additionally, the District Court properly permitted Mrs. Watchilla’s testimony pursuant to Fed.R.Civ.P. 43(a). Fed.R.Civ.P. 43(a) provides:

At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

See Fed.R.Civ.P. 43(a).

Prior to trial, Mrs. Javitz’s requested a continuance based upon the health of one of Mrs. Javitz’s attorneys, Attorney Mark Frost (“Attorney Frost”), and his need for additional time to prepare for trial. App. to Pet. for Cert. 56, the District Court’s July 22, 2022 Opinion. At that same time, the County Defendants’ undersigned counsel expressed concern during a pre-trial conference that, although moving the trial date would obviate the need for Attorney David Pedri (“Attorney Pedri”), the County’s then-

Chief County Solicitor, to testify virtually², changing the trial date would jeopardize the County Defendants' ability to call Mrs. Watchilla as a witness. *Id.* During a pretrial conference with the District Court, Attorney Dylan Hastings ("Attorney Hastings"), Mrs. Javitz's other attorney, agreed to allow the presentation of Mrs. Watchilla's testimony virtually. *Id.* Contrary to the assertions of Attorney Hastings at trial and Mrs. Javitz here, the transcript of the June 24, 2021 pre-trial conference with the District Court readily confirmed Mrs. Javitz's consent to the presentation of Mrs. Watchilla's testimony virtually. *Id.* Thus, good cause and compelling circumstances existed for the virtual presentation of Mrs. Watchilla's testimony. *Id.*³

Appropriate safeguards also existed for the presentation of Mrs. Watchilla's testimony. *Id.* As the court aptly noted in *Apex Fin. Options, LLC v. Gilbertson*, No. 19-0046, 2022 U.S. DIST. LEX IS 36685, **13-15 (D.C. Del. March 1, 2022), the current advancements in videoconferencing technology allows much more seamless two-way communication than in the past and permits real-time testimony, direct

² Due to a previously scheduled family vacation, the parties initially agreed to present the testimony of Attorney Pedri virtually. *Id.* 56. Given Mrs. Javitz's request to continue the trial date, it was not necessary to present Attorney Pedri's testimony virtually.

³ Contrary to Mrs. Javitz's bald assertions, she, through her trial counsel, exercised her right of confrontation relative to Mrs. Watchilla's testimony. *Id.* 55-58. As evidenced by the trial transcripts, Attorney Hastings cross-examined Mrs. Watchilla relative to Mrs. Watchilla's testimony. *Id.*

inquiry from the court and the ability of the fact-finder to observe demeanor and assess credibility. *Id.*

In her petition for certiorari, Mrs. Javitz cites *Hussey v. Chase Manhattan Bank*, No. 02-7099, 2005 U.S. Dist. LEXIS 15012, *12 (E.D. Pa. 2005). *Hussey* is distinguishable from the matter *sub judice*. In *Hussey*, prior to trial, the plaintiff "unambiguously represented that he will be unable to withstand the rigors of testifying and being cross-examined." *Id.* Based upon that representation, the defendants, believing that he would not be available as a trial witness, reasonably elected not to depose the plaintiff. *Id.* at *19. The court, therefore, concluded, *inter alia*, that permitting the plaintiff to testify at trial would unfairly deprive the defendants of the opportunity to depose the plaintiff and to prepare for his trial testimony. *Id.* Here, unlike *Hussey*, Mrs. Watchilla was deposed by Mrs. Javitz more than three (3) years prior to the trial in this matter. App. to Pet. for Cert. 56-57, the District Court's July 22, 2022 Opinion. Moreover, Mrs. Watchilla testified at her deposition consistently with her testimony at the time of trial. *Id.*

3. **Mrs. Javitz Failed To Raise The District Court’s Alleged Failure To Instruct The Jury On Character Evidence At Trial, At The Close Of The Evidence Or In Any Post-Trial Motion And, Therefore, Any Such Issue Is Waived On Appeal.**

The District Court’s alleged failure to instruct the jury on character evidence in connection with the testimony of Mrs. Watchilla was raised for the first time by Mrs. Javitz on appeal to the Third Circuit. Pet. for Cert. 18-20. Although Mrs. Javitz did challenge the District Court’s ruling to permit Mrs. Watchilla’s testimony in her brief in support of her first pre-trial motion, Mrs. Javitz did not preserve any claim regarding the District Court’s alleged failure to instruct the jury on character evidence in connection with the testimony of Mrs. Watchilla. App. to Pet. for Cert., September 11, 2023 Opinion of the Third Circuit, 7; *see also, id.* 25-26, the District Court’s July 22, 2022 Opinion. Thus, any such issue is waived here on appeal.

4. **The District Court Did Not Fail To Accommodate Attorney Frost’s Hearing Impairment.**

In her petition for certiorari, Mr. Javitz claims that there was a structural error in the trial in this matter and that she was denied the effective assistance of counsel because one of her trial

attorneys had hearing difficulties. Pet. for Cert. 20-25. In support of her assertions, Mrs. Javitz cites *Arizona v. Fulminante*, 499 U.S. 279, 386, 309-310, 111 S. Ct. 1246, 11 L. Ed. 2d 302 (1991). *Fulminante* is, however, inapposite to the matter *sub judice*. *Id.* In *Fulminante*, this Court held that a criminal defendant's confession was coerced and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. *Id.* at 286. Moreover, the "structural errors" discussed by this Court in *Fulminante* do not apply here. Unfortunately for Mrs. Javitz, the Sixth Amendment right to effective assistance of counsel is inapplicable in civil matters. See *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 408 (3d Cir. 1980) (quoting *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 260, 322 A.2d 114, 117-18 (1974)); see also *Turner v. Rogers*, 564 U.S. 431, 441, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).

Moreover, Mr. Javitz had the effective assistance of counsel. As the district Court properly stated:

Plaintiffs 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.

App. to Pet. for Cert. 51, the District Court's July 22, 2022 Opinion.

Additionally, Attorney Frost did attend and participate in the trial. Attorney Hastings gave Mrs. Javitz's opening statement and closing argument and conducted the examinations of all but four witnesses -- two of whom were damages experts whose testimony were ultimately immaterial in light of the jury's verdict. Id. 28-29, 47-48. Thus, Mrs. Javitz had the assistance of Attorney Hastings and Attorney Frost throughout the trial. The facts and circumstances of this matter are also a far cry from a state court's refusal to accommodate two paraplegic plaintiffs' access to the second-floor courtroom which was at issue in *Tennessee v. Lane*, 541 U.S. 509, 513-514, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), or the denial of sign language interpreters at issue in *Gonzalez v. Pennsylvania*, No. 06-CV-5471, 2007 U.S. Dist. LEXIS 41374 (E.D. Pa. June 7, 2007).

Further, the importance of Mr. Frost's hearing issues and need to guide Mr. Hastings is belied by the fact that, prior to the start of trial, Mrs. Javitz's counsel filed a motion for a continuance asserting, *inter alia*, Attorney Frost was purportedly not physically capable of preparing for and attending trial and that Mrs. Javitz agreed to have Attorney

Hastings serve as lead counsel. App. to Pet. for Cert. 28-29, 51, 56, the District Court's July 22, 2022 Opinion. Mrs. Javitz was, therefore, fully aware of Attorney Frost's physical issues prior to the start of trial and consented to proceeding to trial despite knowledge of those issues. *Id.*

5. The District Court Did Not Err In Allowing Trial To Continue In Light Of Attorney Frost's Repeated Violations Of The District Court's Pre-Trial Evidentiary Rulings.

Plaintiff also criticizes Attorney Frost's representation based on his repeated violations of a written pretrial ruling precluding reference during trial to the previously dismissed due process claim. *Id.* 46-48. Mrs. Javitz speculates that the District Court's response to Attorney Frost's conduct prejudiced the jury. *Id.* 67, n. 4. Upon the request of undersigned counsel, the District Court held a sidebar conference in response to Mr. Frost's improper reference to the due process claim during his cross-examination of the County Defendants' economics expert. *Id.* 68, n. 4. The District Court instructed that the jury be taken out of the courtroom. *Id.* It was only after the jury left the courtroom, that undersigned counsel expressed his frustration with the repeated violation of the District Court's pretrial order. *Id.* The jury was also not present when the District Court firmly addressed Attorney Frost's repeated misconduct. *Id.* As the District Court aptly stated:

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.

Id.

Further, any prejudice possibly attributable to the District Court's perceived reaction or response to anything that occurred at trial was alleviated by the District Court's instructions to the jury. *Id.* 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.

Id.

Also, during the jury charge following closing arguments, the District Court stated:

[D]o 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.

Id. 69, n. 4.

Further, if Mrs. Javitz believes that the representation provided by Attorney Frost or Attorney Hastings was inadequate, Mrs. Javitz has separate civil remedies to address those issues. *See Kushner*, 620 F.2d at 408 (*quoting Dilliplaine*, 457 Pa. at 260). “The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice”, not retrial. *Id.*

B. Mrs. Javitz Was Not Denied Due Process

1. The Testimony Of Mrs. Watchilla Was Neither Manufactured Nor Fraudulent.

Mrs. Javitz also seeks to vacate the judgment entered in this matter pursuant to Rule 60(b) of the Federal Rules of Civil Procedure based upon Mrs. Javitz’s unsubstantiated allegations that the County Defendants’ counsel “intentionally acted with intent to deceive” the District Court. Pet. for Cert. 28-30.

Specifically, Mrs. Javitz asserts that the County Defendants' counsel presented allegedly manufactured and untruthful testimony of Mrs. Watchilla regarding the environment of the County's Human Resources Office which Mrs. Javitz asserts was not relevant to the County Defendants' proffered reasons for termination. *Id.*

In a desperate attempt to salvage doomed claims, Mrs. Javitz attempts to manufacture "newly discovered evidence" to provide a purported basis for this Court to vacate the jury's verdict. *Id.* Specifically, Mrs. Javitz attempts to suggest that the County purchased Mrs. Watchilla's testimony by settling Mrs. Watchilla's unrelated lawsuit against the County and a Luzerne County Council member, Walter Griffith ("Mr. Griffith"). *Id.* First, Mrs. Watchilla's case had not settled. App. to Pet. for Cert. 86-88, the District Court's July 22, 2022 Opinion. Further, the desperate, false and reckless nature of Mrs. Javitz's argument in this regard is easily revealed by a simple reading of Mrs. Watchilla's complaint in that unrelated matter as well as a calendar. *Id.* 87. Specifically, the acts alleged against Mr. Griffith and the County in Mrs. Watchilla's unrelated civil action -- defamatory statements allegedly made by Mr. Griffith about Mrs. Watchilla -- did not occur until September 25, 2020. *Id.* Those alleged statements made by Mr. Griffith regarding Mrs. Watchilla, therefore, occurred nearly four (4) years after Mrs. Watchilla's deposition testimony in this matter in which she described the environment in the County Human Relations Office as she did at trial -- "uncomfortable". *Id.* Moreover, as Mrs. Javitz admits, any discussions about settlement of Mrs.

Watchilla's civil case against the County and Mr. Griffith did not occur until after the trial of this matter. *Id.* 88.

Further, in the context of Fed.R.Civ.P. 60(b), Mrs. Javitz is not entitled to relief. *Compass Tech, Inc. v. Tseng Lab'ys, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995). The standard for relief pursuant to Fed.R.Civ.P. 60(b) requires that new evidence (1) be material and not merely cumulative; (2) could not have been discovered through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial. *Id.* In the matter *sub judice*, Mrs. Watchilla's state court litigation was a matter of public record and readily discoverable through reasonable diligence. App. to Pet. for Cert. 90, the District Court's July 22, 2022 Opinion. Further, the outcome of the trial in this matter would not have been different. *Id.* 90-91. Mr. Griffith "had nothing to do with this case, and the factual basis for the state court litigation is unrelated to the facts of this case". *Id.* Moreover, Mrs. Watchilla's testimony regarding Mrs. Javitz was corroborative of the testimony of other witnesses, like Attorney Pedri, who testified about, *inter alia*, Mrs. Javitz's negative interactions with union officials. *Id.* 91.

Additionally, the County Defendants did not present Mrs. Watchilla's testimony as a reason for termination. *Id.* 83. Mrs. Watchilla's testimony about her perception of the work environment was relevant given the allegations of Mrs. Javitz's Second Amended Complaint and Mrs. Javitz's assertions at trial about handling "all issues professionally and competently" and about being an outstanding and

exemplary employee. *Id.* 88-89. Mrs. Watchilla's testimony was also directly relevant to rebut the testimony of Mrs. Javitz in that Mrs. Watchilla confirmed the office environment created by Mrs. Javitz was very uncomfortable, that it was a place Mrs. Watchilla did not enjoy going and that it was "toxic". *Id.* 76. Further, as the District Court aptly held, Mrs. Watchilla's testimony at trial did not suggest inconsistency with her testimony in her pre-trial deposition and, therefore, Mrs. Javitz's allegation of manufactured testimony is without merit. *Id.* 85-86.

In Mrs. Javitz's petition, Mrs. Javitz mistakenly cites and relies upon several legal authorities which are inapposite or distinguishable from the denial of Mrs. Javitz's post-trial motions. Pet. for Cert. 29. In *Baxter v. Baxter (In Re Bressman)*, 874 F.3d 142, 145-153 (3d Cir. 2017), the plaintiffs were victims of securities fraud and brought a civil action against multiple defendants. *Id.* at 145-148. One of the defendants filed bankruptcy while the claims against co-defendants were settled. *Id.* In finding a fraud upon the court, the court held that the attorney's affidavit to the court containing material misrepresentations concerning the amount of judgment owed was filed with intent to deceive the court where the attorney failed to disclose to the court that the claims against the co-defendants had settled. *Id.* at 153. Here, no such facts exist. App. to Pet. for Cert. 88-96, the District Court's July 22, 2022 Opinion.

In Re Snyder, 472 U.S. 634, 644-645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985) is also distinguishable.

In *Snyder*, this Court reversed the suspension of an attorney who criticized the administration of the Criminal Justice Act (“Act”) and criticized the inequities in assignments under the Act. Specifically, this Court held that it did not consider a lawyer's criticism of the administration of the Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. *In Re Snyder* is, therefore, inapposite to the matter *sub judice*. *Id.* See also App. to Pet. for Cert. 88-96, the District Court's July 22, 2022 Opinion.

III. CONCLUSION

For any or all of the foregoing reasons, Mrs. Javitz's petition for writ of certiorari should be denied, the District Court's denial of Mrs. Javitz's post-trial motions should be affirmed and the jury's verdict upheld.

Respectfully submitted,

/s/Mark W. Bufalino
Mark W. Bufalino, Esquire
15 Public Square
Suite 210
Wilkes-Barre, PA 18701
(570) 814-7377
bufalinolaw@gmail.com

Attorney for Respondents
Luzerne County, Robert C.
Lawton and David Parsnik

DATED: June 24, 2024