SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 000845-17T3

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| HILDA T. KENNEDY and JOHN F. KENNEDY, wife and husband | CIVIL ACTION |
| *Plaintiffs-Appellants,* | ON APPEAL FROM: |
| v. | |
| FREDERIC A. POLLOCK; THE ESTATE OF FREDERIC A. POLLOCK | SUPERIOR COURT, LAW DIVISION ATLANTIC COUNTY |
| *Defendant-Respondent.* | Honorable J.S.C. Mary C. Siracusa |

# APPELLANTS HILDA & JOHN KENNEDY's REPLY BRIEF

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## TABLE OF CONTENT

## TABLE OF CITATION OF CASES

**CASES**

**PRELIMINARY STATEMENT:**

Plaintiff(s) and Appellants Hilda T. Kennedy and John F. Kennedy (Appellants) respectfully submit this brief in reply to the brief in Opposition submitted by the Estate of Frederick A Pollack (Respondent), un the case entitled:

*Hilda T. Kennedy and John F. Kennedy vs. The Estate of Fredrick* A. Pollock (this case or the case on appeal)

**POINT I**

**THE COURT'S CHARGE ON PROXIMATE CAUSE CONFUSED AND MISLED THE JURY AND REQUIRES REVERSAL**

Initially, Appellants wish to thank Respondent for correcting them on the one case they miscited. Neither Respondent, both of whom are *pro se*, is an attorney, and both Respondents would like to apologize for their error.

Respondent's sketchy argument on the issue of the jury charge, to the extent that it makes any cogent argument, tends to support Respondents' argument. Respondent, on this issue, cites to a grand total of four cases. One of the cases is *Jacobs v. Jersey Central Power Light*, 452 N.J. Super, 494(App.Div.2017). *Jacobs, infra*, is a case about expert witnesses. The jury charge in the case is so unimportant that the decision "omits the discussion" of this issue "[a]t the direction of the court[.]"

*Gaido v. Weiser*, 227 N.J. Super. 175 (App.Div.1988) is another case cited favorably on this issue by Respondent. Respondent cites from this lengthy and well-reasoned decision of this Court. But, again, this case is wildly off point as it doesn't even involve a jury charge. "First, plaintiff contends that the following

preliminary instructions of the trial court were incorrect and prejudicial[.](emphasis added)" *Gaido, infra.*[1]

Not only is that case not about a dubious jury charge, as is the case on appeal, but the trial court in *Gaido* gave a lengthy curative instruction. The court corrected itself. In the case at bar, no such curative instructions were given, and for both of these reasons both *Gaido, infra,* and Jacobs, *supra* may have no bearing, whatsoever, in the discussion on the issue of the defective jury charge.

A third case cited by Respondent, *Willner v. Vertical Realty, Inc,* 235 N.J. 65 (2018) deals with a jury charge, but it, too, winds up far off the mark.

*Willner, infra,* dealt not with the heart of the jury charge, as this case does, but rather was about a limiting instruction. The New Jersey Supreme Court stated: "We agree with the Appellate Division that a limiting instruction would have been appropriate at that time." This case is not about a limiting instruction, but it's the Court's charge on a proximate cause, undoubtedly the most significant charge in the entire case. What could be more important than the issue proximate cause? It is the cause of action.

[1] Your *Pro Se* appellants are not attorneys. They do not have access to law citations like attorneys do, and their copies of the cases are limited, obtained from the Internet. As such, they apologize for not including page references in the citations.

Respondents minimizes the charge at issue, describing it as: "only one sentence," "single sentence []," "a few words," and "one sentence." Primarily, if the court had stated: "Defendant is not responsible for any of Plaintiff's damages," clearly that would be an erroneous and prejudicial charge. It is also only one sentence, and a few words. But that is, effectively, the third clause of the most significant part of the charge: "and he is *not* responsible for any of her damages." [emphasis added] T3, 120.

Respondent admits: "*Reading* the charge as transcribed does not bear out the Kennedy's claim." [emphasis added] This is clearly why Respondent fought like the dickens to avoid having the court hear the charge. The jury did not read the charge; it heard it. There is a sense of for finality at the end of the third clause. The pitch of the judge's voice drops, and there's a pause before the next sentence. It is more of an instruction then a charge. It is an instruction to the jury for a non-liability verdict.

Let's look at the charge at issue in *Willner, infra*:

> "Plaintiff has made manufacturing defect allegation against defendant, Numatics, alleging that the cast retainer that was on the cylinder at the time of the accident contained a void and was weaker and therefor rendered it defective." *Willner, infra*.

It is clear in that disputed charge that plaintiff's claims are just that: claims. A form of the word "allege" is repeated in this single sentence and the final "therefore" refers back to the uses of "allege." This is clear.

Now, look at the charge in this case:

"Frederick Pollock asserts that he was not negligent in causing the incident and that his conduct was not a proximate cause of any injury suffered by Mrs. Kennedy, and he is not responsible for any of her damages." T3, 120

Initially, this is hardly a "*few*" words. "Few" is defined as: "a small number." Unattributed online dictionary retrieved February 16, 2019.

There are 38 words into disputed charge. Thirty-eight is not a small number, and this must cause this Court pause. Why the hyperbole if Respondent has a strong argument?

Respondent refers to this Court to the two preceding sentences which, it claims: "convey the same information about the Kennedys' claim...." OK, so let's look at these two sentences. They are:

> "Mrs. Kennedy alleges that Mr. Pollock was negligent in the operation of his jitney and his negligence caused her personal physical injury. Mr. Kennedy alleges that as a result of the injuries sustained by his wife, he has also been cost to suffer damages." T2, 120

There is nothing in the above which is even remotely close to the syllogistic logic in the disputed charge in which the first two clauses are the premises and the third is a logical conclusion: And he is not responsible for any of her damages. This is so confusing to the average jury of lay persons that it easily meets the standard which this very Court set out when the question is one of "plain error." "In deciding that issue, we must review the charge as a whole and determine whether the jury was confused or misled. [citations omitted]" *Bradford v. Kupper* 283 N.J. Super. 556, 573 (App.Div.1995).

The next question which comes to mind is: Why was this "single sentence" or "few words" in a rather lengthy jury instruction able to mislead and confuse the jury so easily? The answer is simple and straightforward. The reason is that they came so early in the charge when the jury was paying full attention to how the judge was charging them and giving their full attention to the words she was using; each word.

The charge begins in earnest on the top of the page 118 when the judge states: "All right. So now I'm going to tell you about the principles of law governing this case." T3, 118

Two pages later, on page 120, *in the first substantive charge*, the Court states, unequivocally: "[A]nd he [the defendant] is not responsible for *any* of her [Mrs. Kennedy's] damages."

So, for the next 23 pages of the jury charges and instructions, pages 121 through 143, what does the jury have implanted in its minds? "[A]nd he is not responsible for any of her damages." That's what.

Even Appellant Hilda Kennedy, whose English skills are poor, turned to Appellant John Kennedy and asked why the judge was telling the jury that the jitney driver was not responsible for her devastating injuries.

This is how the Appellant meets the "plain error" standard if that is what this Court requires. However, a strong argument may be made that the Court's major and material deviation from what the attorneys and the Court agreed to at the charging conference allows this Court to use the "harmful/ harmless error" standard as well.

Please bear in mind that neither party objected to anything in the 25 pages of the Court's charges and instructions. Perhaps Appellants' counsel did not want to interrupt the flow of the Court's charge. Perhaps he thought with such a major deviation from what was agreed to no objection was required. Perhaps he did not want to appear to be a human jack-in-the-box as he stood to object to the charge. He certainly did not agree to this deviation, as Respondent's counsel claims, nor was he happy with the Model charges. "I've given up on model jury charges a long time ago," he states. T3, 70.

The Court's original charge on proximate cause was follows: "[...] Mrs. Kennedy alleges Mr. Pollock was negligent in the operation of the jitney and his negligent caused her physical injuries. Frederick Pollock asserts that he was not negligent in causing the incident." T3, 66

This is materially and substantially different than the actual charge on Respondent's liability, the disputed charge.

This is a very significant case as neither side has found a case on this question: Is an objection required, when a court departs materially and substantially in a charge from what the parties have agreed to, for the harmless error standard to apply on appeal? It could be precedential.

A similar case was reported recently in the newspaper, in which a jury charge was found to be misleading to the jury. The case is *State of New Jersey v. Richard Harold*, Press of Atlantic City, November 24th, 2018, page A6. In that case, a conviction for murder was reversed and the case was remanded for new trial due to a defective jury charge.

> In the jury charge, instructions were given for the panel to determine whether Harold fled when he drove away from the plainclothes officers three days after this shooting.
> "The flight charge did not explain that the alleged flight in question occurred three days after the crime took place, rather than directly from the scene of the crime," according to the decision. "This unfortunate *phraseology* increase the potential to confuse the jury (emphasis added)." Column 5

It is respectfully submitted that the confusion caused by the mistaken jury instructions in the Howard case is a great deal less than the confusion to the jury in this case. Specifically, and directly from newspaper article, the jury was charged on the issue of flight. Flight, as we as all know, can indicate a consciousness of guilt. Apparent, in the criminal case, Harold fled from the police. The judge did not say that the flight occurred after the incident. The judge, however, did not state that the flight was three days after the incident. It was, at worse ambiguous; the jury could believe that either scenario was the case. However, this standing alone was enough for a reversal of a jury verdict.

In the case on appeal, phrasing is also key to the error. In the 38-word sentence, which is at the heart of the issue on this part of the appeal, the word "asserts" is the third word. There is no other indication in either of the next two clauses:
"his conduct was not a proximate cause of any injury suffered by Mrs. Kennedy" and "he is not responsible for any of her damages" that these are mere allegations made by the Respondent.

In fact, the third clause, the most troublesome one, is totally superfluous. It adds nothing, save confusion, to the charge on proximate cause. This is much worse than ambiguity in the criminal case. This is a direction of the judge in how to determine the issue of proximate cause and liability.

"Phraseology" is defined: choice and pattern of words; way of speaking or writing; diction. **1.** the manner in which words or phrases are used **2.** a set of phrases used by a particular group of people. Collins online dictionary retrieved February 20th, 2019. It was an incorrect phrasing which reversed the murder conviction, and it is poor phrasing which caused this hideous miscarriage of justice, and which only this Court may correct and make right, so that the Appellants may have their day in court.

**POINT II**

**RESPONDENT'S LACK OF REMORSE OVER ITS COUNSEL'S TREATMENT OF THE SENIOR, SEVERLY INJURED APPELLANT SHOCKS THE CONSCIENCE.**

Respondent case counsel presented absolutely no case at trial. In Respondent Brief to this Court, Respondent shows neither concern nor care about its counsel's treatment of the 85-year-old, injured and frail Respondent about whom there is no question that it crushed her under its 15,000-pound bus while she was shopping for Thanksgiving dinner with her husband using a disabled reduced fare bus ticket. The fact that counsel lacked the humanity to realize that this woman had suffered grievous injuries and often, in such situations, science shows cognitive ability slows and shuts down to spare individual some of the horror of the situation, but used this to gain a tactical edge for the jury cannot be excused, somehow, as a proper "cross-examination." It is improper and must not be tolerated in an advanced society such as ours.

Once again Respondent finds no solace in its cited cases.

*State v Silva*, 131 N.J. 438 (1993) has nothing at all to do with abusive treatment of witnesses by counsel on purported cross-examination. Rather, *Silva. infra*, is about prior, inconstant statements. "This case involves impeachment of an alibi witness through prior inconsistent statements" at 444. The case at bar

involves neither alibi witness nor prior inconsistent statements. Indeed, on the very same page Respondent cites, our Supreme Court states: "The law places limits on cross-examination for reasons of particularity and logic." *Id.*

Similarly, *Perna v. Pirozzi*, 92 N.J. 446 (1983), is a medical malpractice case concerning informed consent and inconsistent prior statements. The only connection, possibly, between *Perna* and the case on appeal is the hope dancing in Respondent's counsel's heart that maybe, just maybe, if he could ask the same question of the injured Appellant enough times he could create inconsistent statements by his harassment.

This is hardly the purpose of cross examination.

Respondent's claim that its counsel's atrocity of a defense cross-examination was "necessary" is not borne out by the facts. First, let's look at the question of whether Mrs. Kennedy was able to reach the sidewalk.

Q: I understand that, ma'am. I understand you were fine. I'm really asking about exiting the jitney. You stepped into the stairwell. Then you were able to step into the roadway with your husband's help.

A: Yes

Q: Were are you then able to step up onto the sidewalk with your husbands help.

A: Yes. T3, 49

Where is inconsistent statement which "permits" counsel to ask the same question of this witness 16 more times? Respondent simply isn't telling the truth: Counsel was not looking to clean up this matter of street or sidewalk, he had his answer, Mrs. Kennedy reached the curb. This was tactical assault: counsel sought to sow confusion among the jurors, not create clarification of the fact. If it were the latter, he would have stepped at the first iteration of the question and not continued for another 16 reiterations.

Counsel saw a second opportunity to assault this frail witness with his questions of how many steps she had to take to reach the sidewalk and took it since he had nothing else.

Q: Okay. Can you estimate in your head how far it was in terms of feet.

A: Maybe 3. I didn't know about feet but- - - T3, 55

So, counsel here, too, had his answer; Mrs. Kennedy had to take three steps to reach the curb, but she could not estimate the distance in feet. Why, then, ask the same question over and over and over and over again? Same answer: this is not truth-seeking, but an assault on this poor, frail witness.

Respondent claims the purpose of this abusive "cross-examination" was to help discern if Mrs. Kennedy was on the sidewalk when the jitney began to move. But this question he did not ask. Not one single time.

Counsel is a disgrace and should be brought up on disciplinary charges. He certainly should not be rewarded for this conduct.

Respondent cites to *State v. Gaikwad*, 349 N.J. Super.62, 86 (App. Div. 2002), but this Court must surely know that Gaikwad, infra, stands for exactly the opposite proposition that Respondent cites it for.

> While we recognize that "[a] paramount purpose of cross-examination is the impeachment of the credibility of the witness," *Cavanaugh v. Skil Corp.*, 331 N.J.Super. 134, 174, 751 A.2d 564 (App.Div.1999), aff'd, 164 N.J. 1, 751 A.2d 518 (2000), (quoting *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983)), "a cross-examiner does not have a license to roam at will under the guise of impeaching credibility." *State v. Engel*, 249 N.J.Super. 336, 375, 592 A.2d 572 (App.Div.), certif. denied, 130 N.J. 393, 614 A.2d 616 (1991). The record demonstrates that the judge properly exercised his discretion in limiting the scope of Gaikwad's cross-examination to the relevant issues in the case. The judge limited Gaikwad's cross-examination of Romano on two occasions, and this was solely because Gaikwad's questioning of Romano focused on the quality of Gaikwad's work and the reason why he was terminated from AT & T, issues which were clearly irrelevant to whether he committed the charged offenses.
>
> *Gaikwad, infra.*

Once again, nobody expects perfection from our courts, or anywhere else for that matter. But we can and must strive to do better than was done here.

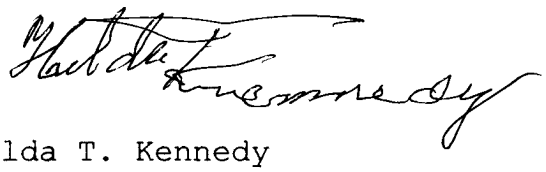
**CONCLUSION**

The combination of the confusing and misleading jury charge with counsel's abusive examination served to furnish enough error to create plain error, thus depriving Appellants of the due process rights to a fair trial. This case belongs among the small set of cases in which a jury verdict must be reversed and the case remanded for a new trial.

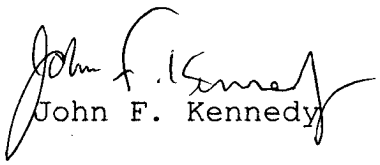
Respectfully Submitted,

Atlantic City, New Jersey

Dated: April 4, 2019



Hilda T. Kennedy



John F. Kennedy