No. 18-1104

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

McCLURE MANAGEMENT, LLC, and
CINDY KAY ADAMS,

Defendants Below, Petitioner,

vs.

ERIK TAYLOR, and
JAMES TURNER,

Plaintiffs Below, Respondent.

On Appeal from the Circuit Court of
Marshall County, West Virginia
Civil Action No. 18-C-151

REPLY BRIEF OF PETITIONERS McCLURE MANAGEMENT, LLC And CINDY KAY ADAMS

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What comes through in the Respondents Counter Statement of Facts is that the Respondents ascribe a racial animus to any action of the Petitioners. What the Respondents do not cite to in their brief is any actual disparaging racial remark by an employee of the McClure Hotel and still cannot point to a single white employee of Price Gregory being placed in a long term hotel room before either of them. It is worth noting that Respondents filed their Complaint on August 6, 2012. (A-0738). The trial of this matter took place in July 2018. (A-0399). In the intervening almost six years neither Respondent could provide the jury with the name of a single white co-worker who was moved into a long term room before they were. This assertion of being passed over by multiple white co-workers was the sine qua non of the Respondent's case against the Petitioners, but they could not name multiple co-workers; they could not even name one. Their claims of discrimination, consequently, come off lacking all credibility.

Respondents offered no evidence that they were denied accommodations at the McClure Hotel. Rather, the evidence was unequivocal that both Respondents were provided regular sleeper rooms at the hotel immediately upon their arrival. Moreover, the evidence was that both Respondents Taylor and Turner were provided long term apartments after a brief period of time. Despite all the protestations of discrimination by the Respondents, the evidence at trial was clearly that both Respondents spent every night in the Petitioner's hotel that each Respondent desired.

In addition to their claims of delay in being placed in a long term apartment, Respondents in their brief claim four other discriminatory acts by the hotel. Respondent Taylor claims he was treated differently by requiring and copying a photo ID of him different than the normal policy of the hotel. This claim is a complete red herring. The testimony cited by the Respondents (A-0581-82) explained the procedure for renting a long term apartment at the hotel; the cited testimony

provided no indication that a photo ID is not copied or required for daily sleeper rooms. The purpose for which the Respondents cited this testimony is not accurate.

Second, Respondents claim that the hotel tried to justify its treatment of them on the basis of a nonexistent waiting list. The testimony procured at trial made it clear that Petitioner Adams used the term "waiting list" as a figure of speech. (A-0570-71). This "waiting list" was developed using phone message slips, and Adams prioritized those individuals as best she could in light of the unchallenged testimony that she had a "very limited amount of apartments." (A-0571). Keep in mind that Respondent Taylor had a wait of twelve days from daily sleeper room to long term apartment, and Respondent Turner had a wait of twenty-nine days, all the while both remained guests of the hotel, neither allege that the hotel denied either of them anything or accommodation, service, privilege, etc.

Third, Respondent Taylor claims that the hotel's attitude toward him changed when he arrived at the hotel, and the staff saw that he was black. The testimony offered (A-506-507) makes it clear that the hotel employee with whom Taylor spoke on the phone was different than Petitioner Adams who was in charge of the long-term apartments. Respondents ask this Court to make the extreme leap that for some unknown reason that once employees at the hotel saw that Taylor was black, he would be delayed, not denied, a long term apartment but would immediately be given a hotel room. Taylor does not complain that he was denied accommodations but that he was not given the accommodations for which he asked when he wanted them, and Taylor cannot offer any proof that that his twelve day wait to move into an apartment was racially motivated in any way.

Fourth, Respondent Taylor claims he was given the "run around" when he made objections to what he considered discriminatory treatment. Respondents make this claim and then offer no

evidence of racial discrimination in their brief. Once again, any negative experience of the Respondents at the hotel is blamed on racism despite an absence of any actual evidence.

REPLY TO RESPONDENTS' ARGUMENT

I. THE LOWER COURT ERRED AS A MATTER OF LAW IN DENYING THE MOTIONS OF THE PETITIONERS FOR JUDGMENT AS A MATTER OF LAW.

Despite the fact that there exists an opinion of the West Virginia Supreme Court of Appeals directly on point regarding the elements of proof required to prove a violation of the West Virginia Human Rights Act, i.e. Syl. Pt. 1, *K-Mart Corp. v. W. Virginia Human Rights Comm'n*, 181 W. Va. 473, 383 S.E.2d 277 (W. Va. 1989), Respondents go to great lengths to assert the applicability of the United States Supreme Court decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* sets forth the elements of proof for a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964. This federal framework and the West Virginia employment law discrimination cases cited by the Respondents in their brief are inapplicable to this case which solely involved a claim of denial of public accommodations under the West Virginia Human Rights Act. Moreover, Respondents fail to meet the prima facie standard of *McDonnell Douglas* because they were never "rejected" by the hotel. See 411 U.S. at 802.

Respondents argue that *K-Mart Corp. v. W. Virginia Human Rights Comm'n*, supra, is not applicable to this case. However, Syllabus Point 1 of *K-Mart Corp.* specifically provides:

> 1. In order to make a prima facie case of discrimination in a place of public accommodation, the complainant must prove the following elements:
>
> (a) that the complainant is a member of a protected class;
>
> (b) that the complainant attempted to avail himself of the "accommodations, advantages, privileges or services" of a place of public accommodation; and
>
> (c) that the "accommodations, advantages, privileges or services" were withheld, denied or refused to the complainant.

181 W. Va. 473, 383 S.E.2d 277. It is nearly impossible to find a more on point case than one that provides the prima facie elements of a claim for discrimination in a place of public accommodation in a case involving a claim for discrimination in a place of public accommodation.

Petitioners assert in this appeal that the Respondents failed to meet the third prong of the prima facie case that accommodations, advantages, privileges or services were withheld, denied or refused. As to a denial the *K-Mart Corp.* decisions states:

> The appellant cites as proof of discrimination the fact that the police were summoned shortly after the family group headed toward the store. He further points to his wife's traditional loose fitting dress and the darker skin color of some members of the group as the basis for suspicion. Those facts alone, however, are insufficient to persuade us there was a nexus between the Barams' national origin and the police summons where no services were denied or refused. In fact, nowhere in the record do we find that the appellant and his family were actually denied, refused, or withheld any services or amenities as required by W.Va. Code § 5-11-9 (1987) and the last element of our test. The complainant, who entered the store and shopped without hindrance, left without attempting to buy any items offered by K-Mart. No one approached the Barams while shopping nor asked them to leave. Consequently, we do not believe that a violation of W.Va. Code § 5-11-9 (1987) occurred on September 19, 1981.

181 W. Va. at 477-78, 383 S.E.2d 277 at 280-81. The *K-Mart Corp.* decision makes it clear that establishing the third prong is very fact specific and an actual denial of something tangible is required. Respondents failed at trial to establish any denial of accommodations, advantages, privileges or services, and petitioners were entitled to a granting of their motion for judgment as a matter of law at trial.

II. THE TRIAL COURT ERRED WHEN IT DENIED PETITIONERS' MOTION FOR A NEW TRIAL ON THE ISSUE OF ALLOWING RESPONDENTS TO CALL THEIR ATTORNEY AS A REBUTTAL WITNESS.

The Respondents' brief continues to perpetuate the fiction that Attorney McCamic was a proper rebuttal witness. The Respondents, however, do admit on page thirty of their brief that it was their counsel who brought up Attorney McCamic again during the cross-examination of

Petitioner Adams. A reading of the testimony cited by the Respondents (A-0677-0680) demonstrates that the subject of Attorney McCamic was not addressed or implicated during the direct examination of Petitioner Adams. Petitioner Adams was asked directly whether she called Respondents Taylor or Turner the names which they testified that she said directly to them. Her alleged conversation with Attorney McCamic almost two years after the Respondents checked out of the hotel was never implicated by the direct examination. It was only on cross-examination that counsel for the Respondents mentioned Attorney McCamic again after asking about him when questioning Petitioner Adams during their case in chief.

Recall that the trial court made the following statement at trial after the Petitioners objected to Attorney McCamic being called as a rebuttal witness.

> Let me just say briefly on the issue of this rebuttal witness, Pat called her in his case and chief and he asked her that question specifically, did you tell Mr. McCamic X, Y and Z, and she denied it. He had every opportunity in his case in chief at that point to rebut that testimony. He chose not to. He closed his case in chief. You called her, she did it again. This is in direct rebuttal to that. Had she not testified in your case in chief there would be nothing else to rebut and he would not have been able to call Mr. McCamic.

(A-0686). Respondents in their brief do not address the issue that it was they who opened the door, and that the trial court's statement is not accurate. Counsel for Petitioner Adams only asked her questions about conversations she would have had with the Respondents while they were staying at the hotel and did not inquire about an alleged two year after the fact conversation with Attorney McCamic.

The asking about Attorney McCamic for a second time in cross-examination by Respondent's counsel is exactly the situation discussed in *Belcher v. Charleston Area Med. Ctr.*, 188 W. Va. 105, 109, 422 S.E.2d 827, 831 (1992) where a plaintiff is "merely requesting an opportunity to do in rebuttal what should have been done in the case in chief." Respondents found

themselves in a situation where they had failed to list Attorney McCamic as a potential trial witness (A-0245, A-0287) and only could call McCamic as a witness if they could spring him as a rebuttal witness. Counsel for Respondent by his own questioning attempted to create the rebuttal witness situation, and the allowing of this circumstance by the trial court was error entitling the Petitioners to a new trial.

III. THE TRIAL COURT ERRED WHEN IT DENIED PETITIONERS' MOTION FOR A NEW TRIAL ON THE ISSUE OF THE EXCESSIVENESS OF THE VERDICT.

In their brief the Respondents justify the outrageousness of the $950,000.00 verdict by pointing to the poor performance of Petitioner Adams on the witness stand and rely on factors associated with alleged emotional distress of the Respondents which had nothing to do with a denial of accommodations at the hotel. These elements cannot be used to support a jury verdict which in West Virginia may be set aside when it "is so large that the amount thereof indicates that the jury was influenced by passion, partiality, prejudice, or corruption, or entertained a mistaken view of the case." Syl. Pt. 1, *Earl T. Browder, Inc. v. Cty. Court*, 145 W. Va. 696, 116 S.E.2d 867 (1960). There should be no question that the jury's verdict here reflected a mistaken view of the case. The Respondent's own brief makes this very point.

The Respondents brief at page thirty-five certainly indicates that the size of the verdict was due in part to "how bad the Hotel's witness performed," referring to Petitioner Adams. However, the performance of Petitioner Adams as a witness in her demeanor, in her inability to stay on point, and in her inability to follow the instructions of the trial judge is not a proper method for the jury to measure the damages of the Respondents. The jury's clear dislike of Petitioner Adams demonstrates that the size of the verdict, which bore no relationship to the actual damages of either Taylor or Turner, was clearly influenced by improper passion and partiality.

The Respondents on page thirty-six of their brief point to Turner's testimony about his job and by implication Petitioner Adams' calling of the Respondents' employer as justification for the damage award. The reliance on this evidence points to, again, an award of damages based on a mistaken view of the case. Petitioner Adams made one phone call to the employer of Respondent Taylor for what was admittedly past due rent. (A-0552-0553). Respondents made no claim in the case for any compensation from the hotel for any interference with their employment (See A-0285), but the Respondents rely heavily on the phone call to the employer to justify the size of the verdict. There was nothing about this phone call which violated the West Virginia Human Rights Act, and using the phone call as a basis to justify the size of the verdict is in contradiction to West Virginia law. See, Syl. Pt. 1, *Earl T. Browder, Inc. v. Cty. Court*, 145 W. Va. 696, 116 S.E.2d 867 (1960).

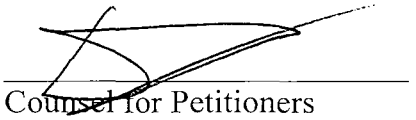
For these reasons and the reasons cited in the Petitioners' appeal brief, the lower court erred by denying Petitioners' motion for a new trial on the basis of the excessiveness of the verdict, and this Court should reverse the lower court's decision and order a that the lower court enter a remittitur or grant the Petitioners a new trial.

CONCLUSION

The lower court erred by denying the Petitioner's motion for judgment as a matter of law and, in the alternative, motion for new trial. The brief of the Respondents does nothing to demonstrate that the Petitioners violated the West Virginia Human Rights Act. The trial court erred in not granting Petitioners' motion at trial for judgment as a matter of law, and this Court should reverse the lower court in this regard. In the alternative, the Petitioners are entitled to a new trial as a result of the lower court's error in permitting the attorney of the Respondents to testify as a rebuttal witness and/or for the excessiveness of the verdict, which

was outrageous on its face and not supported by the evidence.

Respectfully Submitted:



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