**IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA**

**ERIK TAYLOR and JAMES TURNER,**

**Plaintiffs,** **JUDGE CUOMO**

**v.** **CIVIL ACTION NO. 12-C-287**

**MCCLURE MANAGEMENT, L.L.C., and CINDY KAY ADAMS, individually,**

**Defendants.**

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# ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

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On **August 30, 2018**, Defendants, by counsel, David L. Delk, Jr., Esq., filed *Defendants' Motion for Judgment as a Matter of Law, or in the alternative, for a New Trial.* On **September 10, 2018**, the Court entered an Order to Respond giving the Plaintiffs ten (10) days to file a Response and the Defendants time to file a Reply within five (5) days of receiving the Plaintiffs' Response. On **September 20, 2018**, Plaintiffs, by counsel Patrick S. Cassidy, Esq., filed their Response. On **October 1, 2018**, the Court received the Defendants' Reply.

On the **3rd day of October, 2018**, this Court entered an Order **FINDING** that the facts and legal arguments were not adequately presented by the parties, primarily because a trial transcript had yet to be produced and used by the parties in support of their arguments. Accordingly, the Court Ordered the Defendants to obtain the trial transcript, for the Plaintiffs to obtain a copy of the same, and for the parties to supplement their post-trial motion and response with specific Findings of Fact with page and line references to the transcript.

Thereafter, on **October 22, 2018**, the Defendants filed their *Supplemental Memorandum in Support of Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial Motion, and Supplemental Findings of Fact and Conclusions of Law.* On or about **November 7, 2018**, Plaintiffs filed their *Supplemental Response.*

Having thoroughly considered the parties' supplemental briefings and attachments, as well as the relevant record, the Court now **FINDS** the facts and legal arguments to have been adequately presented, and that the decisional process would not be significantly aided by oral argument. The issue is mature for consideration.

The Defendants raise several legal issues, including: (1) There was no legally sufficient basis for jury to find Defendants violated the WVHRA; (2) It was reversible error for the trial court to allow Plaintiffs to call their own attorney as a rebuttal witness; and (3) The jury's verdict was excessive. The Court addresses each issues in turn.

## I. BACKGROUND

Plaintiffs are African-Americans who allege that, in or about October of 2011, they sought and were prevented by the Defendants, because of Plaintiffs' race, from obtaining long-term rental apartments for a period of time while the Defendants favored similarly situated Caucasian co-workers of the Plaintiffs and calling Plaintiffs' employer to defame both of them. On August 6, 2012, Plaintiffs filed suit against the Defendants, alleging violations of the West Virginia Human Rights Act (Count I) and defamation (Count II).

The issues of liability and damages were tried before a duly empaneled jury on July 23 and July 24, 2018 and the jury returned the following verdict:

Please answer the following questions. Your answers must be unanimous.

1. Do you find by a preponderance of the evidence that McClure Management, LLC refused, withheld or denied plaintiff Erik Taylor because of his race any of the accommodations, facilities, privileges or services of the hotel in violation of West Virginia Code Section 5-11-9?

   Yes X No ____

   *Proceed to Question No. 2.*

2. Do you find by a preponderance of the evidence that Cindy Kay Adams refused, withheld or denied plaintiff Erik Taylor because of his race any of the accommodations, facilities, privileges or services of the hotel in violation of West Virginia Code Section 5-11-9?

   Yes X No ____

   *Proceed to Question No. 3.*

3. Do you find by a preponderance of the evidence that McClure Management, LLC refused, withheld or denied plaintiff James Turner because of his race any of the accommodations, facilities, privileges or services of the hotel in violation of West Virginia Code Section 5-11-9?

   Yes X No ____

   *Proceed to Question No. 4.*

4. Do you find by a preponderance of the evidence that Cindy Kay Adams refused, withheld or denied plaintiff James Turner because of his race any of the accommodations, facilities, privileges or services of the hotel in violation of West Virginia Code Section 5-11-9?

   Yes X No ____

   *If you answered "No" to Question Nos. 1, 2, 3 and 4, please have your Foreperson sign the verdict form and tell the bailiff you are ready to report. If you answered "Yes" to question Nos. 1, 2, 3 or 4, please proceed to Question No. 5.*

5. State the amount of compensatory damages you award to either plaintiff for the violation of West Virginia Code Section 5-11-9 by either defendant.

   Erik Taylor $475,000.00 (If you answered "Yes" to Question Nos. 1 or 2)
   James Turner $475,000.00 (If you answered "Yes" to Question Nos. 3 or 4)

*Have your Foreperson sign and date the Verdict Form and tell the bailiff you are ready to report.*

Dated: 7/24/18

/s/ Joseph Reggi
Jury Foreperson

Pursuant to an Order dated August 14, 2018, this Court entered Judgment for the Plaintiffs in the above amount, with post-judgment interest and costs against Defendants. Defendants timely filed their post-trial motions and Plaintiffs their responses.

The Court turns first to the appropriate standard of review.

## II. STANDARDS OF REVIEW

### A. RULE 50(a) MOTIONS

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. pt. 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984); see also Roberts v. Stevens Clinic Hosp., Inc., 176 W. Va. 492, 345 S.E.2d 791 (1986); and McClung v. Marion County Com'n, 178 W. Va. 444, 360 S.E.2d 221 (1987).

In a case where the evidence is such that the jury could have properly found for either party upon the factual issues, a post-verdict motion for judgment as a matter of law should not be granted. See syl. pt. 7, McClung v. Marion County Com'n, 178 W. Va. 444, 360 S.E.2d 221 (1987); see also Sias v. W-P Coal Co., 185 W. Va. 569, 408 S.E.2d 321 (1991).

### B. RULE 59(a) MOTIONS

A motion for a new trial is governed by a different standard than a motion for judgment as a matter of law. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59(a), the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. See LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, Fifth Edition, Louis J. Palmer, Jr., Robin Jean Davis (2017), p. 1352. If

the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. Id. (citing Toler v. Hager, 205 W. Va. 468, 519 S.E.2d 166 (1999); Gum v. Dudley, 202 W. Va. 477, 505 S.E.2d 391 (1997); Andrews v. Reynolds Memorial Hospital, Inc., 201 W. Va. 624, 499 S.E.2d 846 (1997); Maples v. West Virginia Dept. of Commerce, Div. of Parks and Recreation, 197 W. Va. 318, 475 S.E.2d 410 (1996); Coleman v. Sopher, 194 W. Va. 90, 459 S.E.2d 367 (1995); Maynard v. Adkins, 193 W. Va. 456, 457 S.E.2d 133 (1995); In re State Public Building Asbestos Litig., 193 W. Va. 119, 454 S.E.2d 413 (1994)). Under this standard, which is less stringent than Rule 50, a circuit court is not obligated to view the evidence in the light most favorable to the verdict winner. Id. (citing Manley v. Ambase Corp., 337 F.3d 237 (2d Cir. 2003)). When the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict should not be disturbed unless it is plainly wrong. Id. (citing Toler, *supra*; Bailey v. Norfolk and Western Ry. Co., 206 W. Va. 654, 527 S.E.2d 516 (1999); Fortner v. Napier, 153 W. Va. 143, 168 S.E.2d 737 (1969); overruled on other grounds; Roberts v. Stevens Clinic Hosp., Inc., 176 W. Va. 492, 345 S.E.2d 791 (1986); Rhodes v. National Homes Corp., 163 W. Va. 669, 263 S.E.2d 84 (1979); Bourne v. Mooney, 163 W. Va. 144, 254 S.E.2d 819 (1979)).

## III. THERE WAS A LEGALLY SUFFICIENT BASIS FOR THE JURY TO FIND DEFENDANTS VIOLATED THE WVHRA AND DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER RULE 50(b)

The relevant language of the West Virginia Human Rights Act ("WVHRA") reads as follows:

> **§ 55-11-9. Unlawful discriminatory practices.**
>
> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia or its agencies or political subdivisions:
>
> > (6) for any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to:
> >
> > > (A) Refuse, withhold from or deny to any individual because of his or her race . . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations;

In order to make a *prima facie* case of discrimination in a place of public accommodation under the WVHRA, 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.

Syl. pt. 1, K-Mart Corp. v. W. Virginia Human Rights Comm'n, 181 W. Va. 473, 383 S.E.2d 277 (1989)

The Defendants focus solely upon subsection (c) above by arguing "[a]t trial there was no evidence presented by the Plaintiffs that the Defendants withheld, denied, or refused the Plaintiffs accommodations, advantages, privileges, or services of the hotel." Thus, this Court will focus only upon that element. Considering the deferential Rule 50 standard of review cited above, this court disagrees that there was insufficient evidence for the jury to conclude that "accommodations, advantages, privileges or services" were withheld, denied or refused to the Plaintiffs.

While the Defendants eventually provided long-term apartments to the Plaintiffs, there was evidence of the Defendants' refusal, withholding and/or denial of those long-term apartments from the Plaintiffs ***for a certain period of time*** on the basis of their race. Plaintiff Taylor testified:

- When he called the Defendants on his way into town, he was told by Defendants' manager, Cindy Kay Adams, that there were long-term apartments available. However, when he arrived in person, she told him he was on the "waiting list." (TT, pgs. 29:5, 29:21, 29:24, 30:6-7);

- There while "Caucasian co-worker" employees that came to the job after him, they received long-term apartments from Defendants before him (TT, pgs. 32:21-4:17) and when he confronted Ms. Adams how this happened, she told him they were ahead of him "on the list." (TT, pg 35:13-20);

- He complained to Defendants' general manager, Cynthia Johnson, she advised there was "no list," and sent him back to Ms. Adams (TT, pgs. 37:7-14, 37:19-20) who he then had to "battle" with for several weeks before getting a long-term apartment and then only after his family arrived on the scene and couldn't all fin into the "by-the-day" room. (TT, pgs. 35-13-20, 38:1-24)

Plaintiff Turner testified:

- He was one of the first people on the job in the local area and when he first arrived he was informed by Ms. Adams that he would be "first on the list" to get a long-term apartment. (TT pgs. 135:20-23, 136, 9)

- He and Plaintiff Taylor were the only African-Americans trying to rent apartments with Defendants and that he "observed" Caucasians getting and moving into long-term apartments before him and who came in later than he did. (TT pgs. 39:1-9, 138:20-24)

- He questioned Ms. Adams about the above discrepancy, and Ms. Adams asked him (what he believed to be inappropriate questions) about whether he was a "drug dealer," or a "dope head," or a "gambler-holic," because of his "gold teeth" and Plaintiff Turner took this is as negative "stereotyping." (TT pg. 140:1-23)

- When he confronted Ms. Adams about the phone call she made to his employer complaining about him, she did not deny it and said "you guys," "you people," are obnoxious, "I want all of you out of here." (TT pgs. 145:17-24, 146:1-3)

Ms. Adams testified:

- There never really was a "waiting list" in the first place. (TT, pgs. 91:15-24, 92:1-4);

- She sought to involve Plaintiff Taylor's employer in her complaints that he was a few days later on his rent, even though this was different treatment from another co-worker, who was also at times late on his rent, a Caucasian, Stan Guzek. (TT pgs. 20:9-14, 122:14-24, 123:1-6)

- She did not dispute making a call to Plaintiffs' employer, but did dispute how far she went in "disparaging" Plaintiff Taylor. She did admit that with regard to telling Plaintiffs' employer's office manager that Plaintiff Taylor was late on his hotel rent that "I did mention that something's going on that he's late." (TT pg. 124:1-24)

- Prior to calling Plaintiff Taylor's employer as indicated above, she called Plaintiff Taylor on his cell phone while he was working to complain that, although he paid the late rent earlier in the day, he had still not paid his $100 parking fee, and told him that she had nothing but problems from "you people" -- which Plaintiffs took as an obvious reference to them because they were the only African-Americans on the job and always hung out together. (TT pgs. 47:14-15, 142:1-12)

Considering the above evidence in a light most favorable to the Plaintiffs; assuming any and all conflicts in the above evidence were resolved by the jury in favor of the Plaintiffs; assuming as proved all facts which the above evidence tends to prove; and giving to the Plaintiffs the benefit of all favorable inferences which reasonably may be

drawn from the facts proved, it cannot be said that the Plaintiffs were provided with accommodations, advantages, privileges or services when they became available. Unlike K-Mart Corp., where the Supreme Court found that being "observed" in a store is insufficient to prove a *prima facie* case of discrimination because it is too difficult to quantify as a tangible "service or amenity," in the case *sub judice* there was an identifiable and tangible "service or amenity" at issue being denied, withheld, and/or refused on the basis of Plaintiffs' race (even if ultimately it was temporary denial, withholding and/or refusal) -- i.e., long-term apartment accommodations.

**ACCORDINGLY**, Defendants Rule 50(b) Motion for Judgment as a Matter of Law on this issue is **DENIED**.

The Court now turns to Defendants' Rule 59 Motion for a New Trial.

## IV. IT WAS NOT CLEAR ERROR FOR THE COURT TO PERMIT PLAINTIFFS TO CALL THEIR OWN ATTORNEY AS A REBUTTAL WITNESS

The Defendants make three arguments in this regard: (1) Attorney McCamic's testimony was not "rebuttal" testimony; (2) Attorney McCamic's testimony was not relevant per WVRE 402 and, even if relevant, more prejudicial than probative under 403; and (3) it is improper under West Virginia common law and the Rules of Professional conduct for an attorney, while engaged in prosecuting or defending litigation to testify as a witness.

### A. ATTORNEY MCCAMIC'S TESTIMONY WAS "REBUTTAL" TESTIMONY

In their case-in-chief, Plaintiffs called Defendant Adams as an adverse witness. Among other things, Defendant Adams testified that she never said anything derogatory about the Plaintiffs. Before resting their case, the Plaintiffs should have called any and all

witnesses it desired (including potentially Attorney McCamic) to discredit this testimony by Defendant Adams. Plaintiffs chose not to. Had the Defendants not to "opened the door" again to such testimony in their case-in-chief, the issue would have been closed and there would be nothing for Plaintiffs to have "rebutted" and this court would have refused to allow the Plaintiffs to call Attorney McCamic. However, Defendants chose a different tactic.

In their case-in-chief, Defendants called Defendant Adams to the stand again and re-opened the issue on whether she said anything derogatory about the Plaintiffs and again, she denied that she had. Additionally, when asked on cross examination by Plaintiffs whether she said anything derogatory about the Plaintiffs directly to Attorney McCamic, Defendant Adams denied the same. This, in this court's opinion (and assuming *arguendo* it was appropriate to call an attorney as a witness at all), was sufficient cause for the Plaintiffs to call Attorney McCamic as a rebuttal witness to impeach this specific area of testimony. (TT pg. 44:13-24)

Specifically, Attorney McCamic testified in rebuttal that, after Plaintiffs filed a "pro se" complaint in Magistrate court, Defendant Adams explained to him "how terrible they [both] were," that they had some kind of financial problems due to the casino, or gambling, and that they were "scam artists." (TT pgs. 49:1-6, 49:2-24, 50:8-9, 50:13-20)

"A plaintiff should be given the opportunity for pure rebuttal as a matter of right when the rebuttal evidence consists of non-collateral evidence that is made material and relevant only because of the defense case." Syl. pt. 3, Wheeler v. Murphy, 192 W. Va. 325, 452 S.E.2d 416 (1994). In Wheeler, the Supreme Court of Appeals of West Virginia

discussed at length the use and misuse of "rebuttal evidence" and the trial court's discretion in allowing or disallowing the same:

> Under Rule 611(a), WVRE [1994], identical to its federal counterpart, the circuit court judge is entitled to exercise broad discretion over the manner in which proceedings are conducted. Rule 611(a) [1994] provides:
>
> > (a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> [Emphasis added.] In Belcher v. Charleston Area Medical Center, 188 W. Va. 105, 422 S.E.2d 827, 832 (1992), we stated that 'the trial court's discretion in permitting or excluding rebuttal evidence comes within the ambit of Rule 611(a).' However, 'the most significant limitation on the court's authority under Rule 611(a) is that ***the action of the court must be reasonable.***' Cleckley, supra, § 6-11(A) at 767.
>
> Despite the discretionary language of Rule 611(a), there are some rights associated with the order of proof that cannot be denied. Although Rule 611(a) [1994] gives ***the circuit court broad discretion in admitting or excluding rebuttal evidence***, in Belcher, supra, we stated that this Court will ***reverse the ruling of the circuit court when there has been an abuse of discretion.*** We have suggested in several opinions that the plaintiff or prosecution has the right to rebut defense evidence. State v. Dennison, 85 W. Va. 261, 101 S.E. 458 (1919); State v. Williams, 49 W. Va. 220, 38 S.E. 495 (1901); Johnson v. Burns, 39 W. Va. 658, 20 S.E. 686 (1894). 'Therefore, the evidence that plaintiff is entitled to introduce ***must tend to deny, explain, or discredit facts and witnesses adduced by the defense during its case in reply.*** Refutation evidence offered by the plaintiff/prosecution after the close of the defendant's case in chief is called rebuttal.' Cleckley, supra, § 6-11(D)(3) at 777.
>
> We find that the ***plaintiff should be given the opportunity for rebuttal as a matter of right, when the rebuttal evidence consists of '[n]on-collateral evidence that is made material and relevant only because of the defense case.***' Cleckley, supra, § 6-11(D)(3) at 779. There is considerable confusion among lawyers and judges alike, when considering the plaintiff's right to introduce pure rebuttal evidence, (evidence offered after the close of the defendant's case to explain, or refute contradictory evidence offered by the defendant, limited in scope to matters covered in

reply), compared to the case where the evidence sought to be admitted on rebuttal could have or should have been offered in the case in chief.

***It is the admission of rebuttal evidence under the second category above which falls entirely within the discretion of the circuit court***. Cleckley, supra, § 6-11(D)(3) at 779. The court has discretion in admitting evidence admissible in-chief, when offered in rebuttal. In Edmiston v. Wilson, 146 W.Va. 511, 120 S.E.2d 491 (1961), we stated that:

> [A]s a general rule, the conduct of trials and the order of introducing testimony, subject to well established rules of practice and procedure, rest within the sound discretion of the trial court, and the rule is applicable to the admissibility of evidence in rebuttal which could and should have been introduced by the plaintiff in chief.

[Emphasis added] Accord Belcher, 188 W. Va. at 109, 422 S.E.2d at 831. We find that ***a plaintiff does have the right to introduce pure rebuttal evidence, to explain, repel, counteract, or disprove facts offered into evidence by the defendant, when the scope is properly limited to matters in reply to issues raised by the defendant.***

In the Handbook on West Virginia Evidence Justice Cleckley considered judicial discretion under Rule 611, WVRE and the plaintiff's right to present rebuttal evidence:

> [Where], the plaintiff is merely requesting an opportunity to do in rebuttal what should have been done in the case in chief ... [t]his is not true rebuttal. Rather, it is analogous to a request to permit the plaintiff to reopen its case. On the other hand, where the court has found the evidence to be truly rebuttal, such evidence has been consistently allowed as a matter of right or within the discretion of the court. For example, in State v. Williams, the court stated: 'But this is rebuttal evidence, and the prisoner had the right to give evidence to meet it.' See also State v. Dennison, 85 W. Va. 261, 101 S.E. 458 (1919). Similarly, in State v. Oldaker, 172 W. Va. 258, 304 S.E.2d 843 (1983), the ***court in an actual rebuttal situation that there was no abuse in permitting a witness for the state to be called in rebuttal where such witness was called to impeach the defendant's testimony and where the rebuttal by such witness was limited to impeachment.*** In either of the above cases, refusal to admit this testimony would undoubtedly be error.

Cleckley, supra, § 6-11(D)(3) at 779. (emphasis by this court) Wheeler v. Murphy, 192 W. Va. 325, 333-34, 452 S.E.2d 416, 424-25 (1994)

Thus, had the Defendants not opened the door in their case-in-chief, this court would have not permitted the Plaintiffs to call Attorney McCamic in "rebuttal." However, Defendants chose, at their own peril, to re-open that door in their case-in-chief and it cannot be said it was unreasonable for this court to have allowed the Plaintiffs to refute that issue, and only that issue, in "rebuttal."

Accordingly, this court rejects this argument of the Defendants.

**B. ATTORNEY MCCAMIC'S TESTIMIONY WAS RELEVANT UNDER 401/402 AND NOT MORE PREJUDICIAL THAN PROBATIVE UNDER 403**

For reasons similar to that expounded upon in subsection A above, this court also rejects this argument of the Defendants. With Plaintiffs claims resting upon proof of racial discrimination and the denial, withholding, and/or refusal to provide accommodations to Plaintiffs because of their race, testimony regarding Defendant Adams use of derogatory language toward the Plaintiffs has a "tendency to make the existence of [racial discrimination] more probable . . . than it would without the evidence." Additionally, because the Defendant Adams testified twice, once as an adverse witness in Plaintiffs' case-in-chief and once in Defendants' case-in-chief, that she did not use derogatory statements to refer to the Defendants, this court did not and does not believe that the probative value of such evidence was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Accordingly, this court rejects this argument of the Defendants.

### C. IT WAS NOT CLEAR ERROR FOR THIS COURT TO PERMIT ATTORNEY MCCAMIC TO TESTIFY AS A WITNESS

Defendants argue that Rules 3.7 and 4.3 of the Rules of Professional Conduct barred Attorney McCamic from testifying. This court disagrees. First, Defendants cite no rule of procedure or case which states that a trial court is required to defer to the Rules of Professional conduct in assessing its role under WVRE 611. A trial court has wide discretion under WVRE 611 to exercise control over the mode and order of interrogating witnesses and presentation of evidence. Whether a violation of any Rule of Professional Conduct has occurred or will occur by the allowance or disallowance of a witness is not necessarily the prerogative of a trial court. Such matters are within the discretion of Office of Disciplinary Counsel.[1] To the extent that this court is permitted to consider ethical implications, this court does state that such considerations were taken into account when this court conducted the WVRE 403 balancing test prior to allowing Attorney McCamic to testify and, as explained in more detail above and below.

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[1] As the Supreme Court of Appeals in Edmiston v. Wilson, 146 W. Va. 511, 120 S.E.2d 491 (1961) stated when it quoted with approval the U.S. Supreme Court case of French v. Hall, 1991 U.S. 152, 7 S.Ct. 170 (1886):

> There is nothing in the policy of the law, as there is no positive enactment, which [h]inders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseem[]ly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong.

Edmiston v. Wilson, 146 W. Va. at 531, 120 S.E.2d at 502.

Further, the Court went on to suggest that ethical considerations are not paramount to a trial court, but rather it is whether the witness is competent to testify and whether it is admissible:

> In the circumstances with which he was confronted it can not be said that his conduct was professionally unethical. But however his conduct may be judged or regarded, a question not specifically determinable on this appeal, he was competent to testify as a witness, his testimony was admissible, and it was the province of the trial chancellor to determine its weight and credibility.

Id., 146 W. Va. at 533, 120 S.E.2d at 503.

Second, the rules in question cited by the Defendants discuss situations where the lawyer in question is acting as "advocate at trial in which the lawyer is likely to be a necessary witness." In this case, Attorney McCamic was not participating as a lawyer in the trial, and he testified that he had not been involved in the case for some time and that, to the extent his firm was still involved, the case was being handled by Attorney Elvira Albert. (TT, Vol. II, pgs. 51-52)

Finally, while the Defendants cite Edmiston, *supra*, for the proposition that it is inappropriate to allow an attorney engaged in the prosecution or the defense of litigation to testify as a witness, the Plaintiffs correctly point out that the Edmiston Court actually held that trial court did not commit error in allowing the testimony of an attorney who was ***actively involved*** in the participation of the trial because it was based upon the trial court's sound discretion and that "such discretion will rarely constitute ground for reversal."

Accordingly, this court rejects this argument of the Defendants.

## V. THE JURY'S VERDICT WAS NOT EXCESSIVE

"Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice, or corruption." Syl. pt. 1, Addair v. Majestic Petroleum Co., 160 W. Va. 105, 232 S.E.2d 821 (1977). The Defendants argue that the jury's verdict of $475,000.00 per plaintiff must have been "influenced by passion and/or a mistaken view of the case" because "there was no evidence of any concrete discrimination. . . ." However, as this court found above in Section III, there was evidence of "concrete" discrimination -- specifically, this court has found that "While the

Defendants eventually provided long-term apartments to the Plaintiffs, there was evidence of the Defendants' refusal, withholding and/or denial of those long-term apartments from the Plaintiffs for a certain period of time on the basis of their race."

It is this court's opinion that such an award is not "beyond all measure, unreasonable, outrageous, and manifestly shows jury passion, partiality, prejudice, or corruption" because there was sufficient evidence of wrongful conduct which substantially inconvenienced and humiliated the plaintiffs and in the context of impairing their employment and professional reputation. In addition to Plaintiff Turner testifying at length about his embarrassment and humiliation (TT pgs. 146:11-24, 147:1-4), Plaintiff Taylor summed testified as follows about what the Defendants' conduct made him feel:

> Embarrassment, humiliation. But as a black man in America, I see this on a daily basis, but you learn to live with it. If you don't like me for the color of my skin, I really don't have to deal with you on a daily basis. But when you impact me directly and you're trying to purposely harm me, then I have to stand up for that. It's like, no, I can't accept that, I'm sorry. So that's why I came from L.A. to say it was wrong and we're not gonna stand for it. (TT pg. 70:10-17)

Given the jury's verdict, the Plaintiffs convinced the jury of their point of view and position and there was evidence to support the same. When it came to assessing the damages in this case, the jury was appropriately instructed, without objection by the Defendants as to the specific language used, and was not given a specific formula to use to calculate the amount that they returned. Specifically, the jury was instructed as follows:

> In assessing the damages to which the Plaintiffs may be entitled, ***you may take into consideration*** any of the following which you believe from the evidence to have resulted from Defendants' discriminatory actions: any effect of the violation of the West Virginia Human Rights Act causing ***emotional distress, upset, humiliation, and embarrassment, and impairment to reputation.***

> Your verdict may be for any of the elements of damages which are proven by the evidence and ***for such sum as may fully and fairly compensate*** Erik Taylor and James Turner for their damages sustained as a result of any violation of their accommodation rights under the WVHRA as the evidence may show.
>
> Any award of damages entered by the jury in this case ***also may include compensation for emotional distress. In awarding damages of this nature, there will be no specific number to guide you, since the determination of the amount of such damages does not manifest itself in quantitative terms. It is your job to determine a fair and proper value*** for any emotional distress that Plaintiffs' suffered in connection with the violation of their accommodation rights under the WVHRA which is the subject of this case.
>
> 'Emotional distress,' is any mental suffering or emotional distress as distinguished from physical pain and suffering. This term can be inclusive of such mental states as fear, nervousness, grief, anxiety, worry, shock, apprehension, ordeal, embarrassment, humiliation, and loss of personal dignity.
>
> Therefore, if you feel by a preponderance of the evidence that Erik Taylor and James Turner suffered emotional distress as defined by any one of the aforementioned states, and that this condition was proximately caused by the Defendants' actions, then ***you may award them damages in the amount you deem just and proper.***

(emphasis by this court)

This court has no reason to believe that the jury did anything other than listen to the evidence and calculate an award, based upon the instructions given to them, they felt was just, fair, and appropriate. As such, this court is not about to disturb the same.

Accordingly, this court rejects this argument of the Defendants.

## V. CONCLUSION

Based upon the foregoing, the Court **FINDS**: (1) that the jury could have properly found for either party upon the factual issues; and (2) the verdict was not against the clear weight of the evidence, was not based on false evidence, nor does it result in a miscarriage of justice.

**ACCORDINGLY**, this court **DENIES** the Defendants Renewed Motion for Judgment as a Matter of law, or in the Alternative, for a New Trial.

Defendants' objections and exceptions are preserved.

The Clerk is directed to forward attested copies to all counsel of record.

**DATED this 14th day of November, 2018.**

Jason A. Cuomo, Judge

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