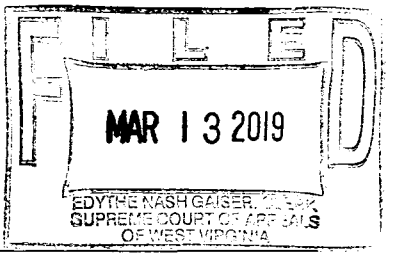

No. 18-1104

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

BRIEF OF PETITIONERS McCLURE MANAGEMENT, LLC And CINDY KAY ADAMS

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STATEMENT OF THE CASE

The Respondents, Erik Taylor and James Turner, who are African-American, alleged that they were discriminated against in violation of the West Virginia Human Rights Act ("WVHRA") by not being provided month-to-month apartments at the Petitioners' hotel in Wheeling, the McClure House Hotel, in a timely manner due to their race. The Respondents also claimed that unnamed and unidentified Caucasian co-workers were placed in month-to-month apartments before the Respondents despite the fact that the Respondents arrived at the hotel before these co-workers. The Petitioners denied these allegations and asserted that the Respondents were treated as any other hotel patron and provided regular daily sleeper hotel rooms immediately upon their arrival, then placed in month-to-month apartments as apartments became available. The Petitioners asserted that no patrons who arrived after the Respondents were provided publicly available long term apartments before the Respondents. The Respondents did not allege in this case, either before or at trial, that they were denied any other services, privileges, or facilities of the hotel.

The Respondents filed their Complaint in Ohio County Circuit Court on August 6, 2012. (A-0738). The Respondents, who were employed in the oil and gas industry at the time, sought accommodations at the McClure House Hotel in October, 2011. Petitioner Eric Taylor arrived at

the hotel on October 31, 2011 and was immediately provided a daily sleeper room, then moved into one of the hotel's month to month apartments on November 12, 2011, a mere twelve days later. (A-0330 & A-0317). Petitioner James Turner arrived at the hotel on October 26, 2011 and was immediately provided a daily sleeper room, then moved into a month-to-month apartment on November 25, 2011, less than a month later. (A-0331 & A-0318). Petitioners' sole basis for their racial discrimination claims is this gap between being provided a daily room and a month-to-month apartment.

This case went to trial in the Circuit Court of Ohio County on July 23 and 24, 2018. The sole issue submitted to the jury was whether the Petitioners denied the Respondents any of the accommodations, facilities, privileges, or services of the hotel based on the Respondents' race in violation of Section 5-11-9 of the WVHRA. (A-0397). The jury found in favor of the Respondents and awarded each $475,000.00, despite the lack of evidence of any special damages, injuries, or tangible losses. (See A-0399).

The Petitioners filed post-trial motions requesting judgment as a matter of law, or in the alternative, a new trial. (A-0402 & A-0405). The Petitioners asserted three reasons in support of the motions:

1. The plaintiffs failed to establish a prima facie case of a violation by the defendants of West Virginia Code Section 5-11-9;
2. The Court committed error in allowing of plaintiffs' own counsel Jay T. McCamic to testify as a rebuttal witness; and
3. The verdict accepted by the trial court was excessive.

The trial court ultimately denied the Petitioner's motion for judgment as a matter of law in an Order dated November 14, 2018. (A-0001). In this appeal the Petitioners seek a reversal of the

trial court's Order denying the post-trial motions, and either granting the Petitioners a judgment as a matter of law or awarding a new trial.

Count I of the Complaint[1] (A-0019) alleges that the Petitioners violated the West Virginia Human Rights Act at 5-11-9(6)(A) by withholding from the Respondents the accommodations, advantages, facilities, privileges, or services of the McClure House Hotel. West Virginia Code Section 5-11-9(6)(A) specifically provides:

> **§5-11-9. 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, religion, color, national origin, ancestry, sex, age, blindness or disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations;

1. Evidence at Trial Related to the WVHRA

The Petitioners acknowledge that the Respondents were patrons of the hotel. Respondent Taylor arrived on October 30, 2011 and began a month-to-month lease on an apartment on November 11, 2011. (A-0330 & A-0317). Respondent Turner arrived on October 26, 2011 and began a month-to-month lease on an apartment on November 25, 2011. (A-0331 & A-0318). Both Respondents remained in their apartments until the end of February 2012. (A-0363 & A-0559).

[1] Count II of the Complaint, a defamation claim, was dismissed prior to the case being submitted to the jury.

The trial of this matter took place on July 23 and 24, 2018. At trial there was no evidence presented by the Respondents that the Petitioners withheld, denied, or refused the Respondents of any of the accommodations, advantages, privileges, or services of the hotel. The evidence instead showed that the Plaintiffs were immediately provided sleeper rooms when they arrived at the hotel and were provided long-term apartments when such apartments became available. (A-0050-51, A-0577-578 & A00628). The Respondents presented no evidence that they attempted to avail themselves of any other advantages, privileges, or services of the hotel, or that they were denied any advantages, privileges, or services of the hotel in any way.

Direct examination of Respondent Taylor revealed two complaints: 1) he was not provided a long-term apartment before unidentified white co-workers who arrived after him allegedly were; and 2) Petitioner Adams called his employer on December 8, 2011 in an effort to collect past due rent from Mr. Taylor. (A-0501-549). That was the sum total of the alleged transgressions of the Petitioners about which Respondent Taylor complained during his testimony.

Respondent Taylor claimed that he was not provided a long-term apartment for up to three weeks after his arrival at the hotel. (A-0513). Mr. Taylor claimed that white co-workers who arrived after him were given long term apartments before him, but was unable to name a single such co-worker. (A-0509-512).[2] Cross-examination revealed that Respondent Taylor was offered a long-term apartment within two weeks of his arrival, directly contradicting his testimony on direct. (A-0551). Respondent Taylor simply failed to establish that the Petitioners in any way denied him accommodations of the hotel.

[2] Petitioner Adams testified that Price Gregory, for whom Respondents were working, had ten long term apartments on retainer at all times, and Price Gregory could occupy these rooms however it saw fit. (A-0679-680).

With regard to Respondent Taylor's anger that Petitioner Adams called his employer about unpaid rent, cross-examination clarified that Respondent Taylor did not pay his rent in full for December of 2015 until December 15, 2015. (A-0556-557). Per the rental agreement, this was ten days after the rent was due and five days after Mr. Taylor could be evicted for non-payment. (A-0559-0560). While Petitioner Adams' calling of Respondent Taylor's employer may have caused Mr. Taylor consternation and angst, this phone call in no way violated the WVHRA. Moreover, Respondent Taylor cannot avoid the undeniable fact that he failed to timely pay his rent and but for his failure no phone call about him would have been made.

The complaints of Respondent Turner were less clear than those of Respondent Taylor. Respondent Turner admits that he was given a room in the hotel when he first arrived and that there were no long-term apartment vacancies upon his arrival. (A-0614-615). Respondent Turner testified that he complained about "other people" getting long-term apartments before him. (A-0617-619). He testified that Petitioner Adams asked him about being a drug dealer and having gold teeth. (A-0618-619). Mr. Turner also testified that he confronted Petitioner Adams about her conversation with Mr. Taylor's employer despite the lack of evidence that Petitioner Adams mentioned Respondent Turner at all during this phone call. (A-0623-624 & A-0679). Respondent Turner appears to have simply bootstrapped Respondent Taylor's complaint about the phone call onto his own case without any evidence that his name was ever involved in the phone call. (A-0624-626). Respondent Turner testified at trial that his treatment at the hotel cost him "seven years of distress" without presenting any evidence to support this contention. (A-0626).

On cross examination, Respondent Turner admitted that his first contact with the McClure House Hotel occurred when he first entered the lobby to obtain a room. (A-0628). Respondent Turner admitted being placed in a regular sleeper room at that time, and being told that no long-

term apartments were available. (A-0626). When asked for a single name of any Caucasian co-worker who moved into a long term apartment before him, Respondent Turner was unable to do so. (A-0630-631).

During closing argument, counsel for the Respondents asserted that the rude behavior of Petitioner Adams toward the Plaintiffs amounted to a denial of the advantages, privileges, or services of the hotel, and thus constituted a violation of the West Virginia Human Rights Act. (A-0706-707). Counsel for the Respondents did not, and could not, argue that any actual and tangible advantages, privileges, or services were denied.

2. Testimony of Respondents' Attorney at Trial as a Rebuttal Witness

Over the objection of the Petitioners, Respondents were permitted at trial to call as a rebuttal witness their own attorney Jay T. McCamic. (A-0685-689). Attorney McCamic is counsel of record, signed the Complaint, and appears as counsel on all filings and pleadings. (A-0693). The purpose of his testimony was to recount his conversation with Petitioner Adams after he began his representation of the Plaintiffs, but before Petitioner Adams had retained her own counsel. (A-0694-0696). Attorney McCamic testified in rebuttal that Petitioner Adams referred to the Respondents as "scam artists" and other disrespectful names. (A-0691-692).

Petitioner Adams denied having any such conversation with Attorney McCamic when the Respondents called Ms. Adams as a witness in their case in chief. (A-0610). Respondents then failed to call Attorney McCamic in their case in chief. Similarly, the Respondents never identified Attorney McCamic as a potential witness despite knowing that he would be called as a witness if Ms. Adams denied making derogatory remarks about the Respondents, just as she had done at her deposition. (A-0245, A-0287 & A-0290).

The Petitioners later called Ms. Adams as a witness in their case in chief but did not inquire into the conversation with Attorney McCamic. (A-0677-680). It was Respondents' counsel, on cross examination, who again asked Ms. Adams about Attorney McCamic after having already done so during the questioning of Ms. Adams during their case in chief. (A-0683). After opening the door himself, Respondents' counsel then called Attorney McCamic as a rebuttal witness over the objection of the Petitioners. The trial court overruled the objection, making the following statement:

> Let me just say briefly on the issue of this rebuttal witness, Pat called her in his case in 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). The trial transcript reveals that it was Respondents' counsel, not Petitioners' counsel, who raised the issue of Attorney McCamic when Adams was called to the stand for a second time. Petitioners' counsel did not open the door for the rebuttal testimony as the quoted trial court's ruling states.

3. Excessiveness of the Verdict

The jury in this case awarded each of the Respondents $475,000.00 as a result of its decision that the Petitioners violated the WVHRA. (A-0399). The evidence is undisputed that both Respondents were provided accommodations in the form of regular daily sleeper rooms upon their arrival at the hotel, and after a short period of time were provided month-to-month apartments. There was no evidence that the Respondents were treated any differently in being provided accommodations than any other guest or any of their white co-workers. The Respondents claimed that white co-workers who arrived at the hotel after them were given long term apartments

before them; however, the Respondents were not able to name a single such co-worker. (A-0630 & A-0510-0512). Furthermore, there was no testimony at trial that the Respondents experienced any out of pocket losses or quantifiable damages.

The evidence at trial of alleged "discrimination" was that Petitioner Adams called Respondent Taylor's employer to inquire about the lateness of his rent payments, hassled Mr. Taylor about late payments, questioned Respondent Turner about his gold teeth, and was generally rude and discourteous to both Respondents. While this evidence may show that Petitioner Adams acted rudely to the Respondents, it falls woefully short of proving any actual discrimination. Yet this was the evidence upon which the jury awarded each Petitioner $475,000.00.

SUMMARY OF ARGUMENT

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure is *de novo*." Syl. Pt. 4, *Stephens v. Rakes*, 235 W. Va. 555, 775 S.E.2d 107 (2015) (quoting Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009)). The West Virginia Supreme Court's review of a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial involves a determination of whether the evidence was such that a reasonable trier of fact might have reached the decision below. Syl. Pt. 5 *Stephens v. Rakes, supra* (citing Syl. Pt. 2, *Fredeking v. Tyler, supra*). However, a trial court's denial of a Rule 50(b) motion following trial is subject to reversal "when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. pt. 2, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009).

In this case, the Respondents failed to present evidence that the Petitioners violated the West Virginia Human Rights Act and denied the Respondents accommodations of the hotel in any

way. The trial court misinterpreted the law of the WVHRA and should not have submitted the case to the jury. Likewise, allowing the Respondents' attorney to testify at trial as a rebuttal witness constituted reversible error such that the jury's passions were inflamed by improper evidence. This led to an excessive verdict for which a new trial should be awarded.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners assert that oral argument is necessary as none of the factors in Appellate Rule 18(a) are applicable. The Petitioners further assert that this case is suitable for oral argument under Rules 19(a)(1), (2), (3) and (4). While it appears that the rebuttal witness assignment of error in this case may be one of first impression, the other assignments of error involve settled law within the purview of Appellate Rule 19. Counsel for the Petitioners asserts that oral arguments for all of the assignments of error can be handled pursuant to Appellate Rule 19 and that this matter is not appropriate for a memorandum opinion.

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.

At trial in this matter, the Petitioners made a Motion for Judgment as a Matter of Law pursuant to West Virginia Rule of Civil Procedure 50(a) on the issue that there was no legally sufficient basis for a reasonable jury to find that the Defendants had violated the WVHRA. (A-0667-668). This motion was denied by the trial court. (A-0672-673). After trial, the Petitioners renewed their Motion for Judgment as a Matter of Law, and alternatively requested a new trial on all issues pursuant to West Virginia Rule of Civil Procedure 59. (A-0402). The trial court issued its Order denying these Motions ("Post-trial Motion Order") on November 14, 2018. (A-0001).

In denying the Petitioners' request for judgment as a matter of law on the issue of a violation of the WVHRA, the lower court simply found that sufficient evidence of a violation existed when resolving all conflicts of evidence in favor of the Respondents. (A-0006-0009). The Petitioners assert that the lower court should have found that no reasonable trier of fact could have reached the decision that the Petitioners' violated the WVHRA. *See* Syl. Pt. 5 *Stephens v. Rakes*, 235 W. Va. 555, 775 S.E.2d 107 (citing Syl. Pt. 2, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16). Moreover, the lower court's ruling in the Post-trial Motion Order demonstrated a misapprehension of the legal interpretation of West Virginia Code Section 55-11-9(6)(A) such that this Court should reverse the lower court's decision. *See* Syl. pt. 2, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791.

The relevant language of the WVHRA, which was the only issue of liability sent to the jury, reads as follows:

> **§5-11-9. 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, a complainant must establish each of the following elements:

> (a) the complainant is a member of a protected class;

> (b) the complainant attempted to avail himself of the 'accommodations, advantages, privileges or services' of a place of public accommodation; and
>
> (c) 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 (W. Va. 1989).

At trial there was no evidence presented by the Respondents that the Petitioners withheld, denied, or refused the Respondents any accommodations, advantages, privileges, or services of the hotel. The evidence instead showed that the Respondents were immediately provided sleeper rooms when they arrived at the hotel and were provided long-term apartments when such apartments became available. There was no evidence that the Respondents attempted to avail themselves of any other advantages, privileges, or services of the hotel. Without such evidence, it cannot be said that the Petitioners withheld, denied, or refused anything in violation of the WVHRA. The Respondents were immediately provided with rooms and apartments as they became available.

The trial testimony of the witnesses bears all this out. As stated above, Respondent Taylor claimed it was up to three weeks after his arrival at the hotel before he was given a long-term apartment. (A-0513). Mr. Taylor claimed that white co-workers who arrived after him were given long-term apartments before him, but he was unable to name a single such co-worker. (A-0509-512). Cross-examination revealed that Mr. Taylor was offered a long-term apartment within two weeks of his arrival, directly contradicting his testimony on direct. (A-0551). Mr. Taylor simply failed to establish that the Petitioners denied him accommodations in any way.

Respondent Turner admits he was provided a room when he first arrived and that there were no long-term apartment vacancies at that time. (A-0614-615). Mr. Turner testified that he

complained about "other people" being provided long-term apartments before him. (A-0617-619). On cross examination, Mr. Turner admitted that his first contact with the hotel occurred when he entered the lobby to obtain a room. (A-0628). He was immediately placed in a regular sleeper room and informed that no long-term apartments were available. (A-0626). When asked for the name of any Caucasian co-worker who moved into a long-term apartment before him, Mr. Turner was unable to do so. (A-0630-631).

The trial court's Post-trial Motion Order focused only on direct examination testimony from Respondents Taylor and Turner. With regard to Respondent Taylor, the Post-trial Motion Order solely references the following testimony:

(1) that when Taylor called the hotel on the phone prior to his arrival, he was told long-term apartments were available but was told that he was on a waiting list when he arrived at the hotel (A-0007);

(2) that other white co-workers were given long terms apartments before Taylor (A-0007); and

(3) that Cynthia Johnson, the hotel's general manager, informed Taylor that there was no physical waiting list (A-0007).

With regard to Respondent Turner, the Post-trial Motion Order references only the following testimony:

(1) that Turner was one of the first people on the job in the local area and was informed by Petitioner Adams that he would be first on the list for a long-term apartment (A-0007);

(2) that Turner and Taylor were the only African-Americans trying to rent long-term apartments at the hotel and that Turner "observed" white patrons moving into long terms apartments before Taylor (A-0008); and

(3) that Petitioner Adams made non-racial comments to him about being a "drug dealer", "dope head", "gambler" and having "gold teeth" that Turner interpreted as negative stereotyping (A-0008); and

(4) that Petitioner Adams made the non-racial comment to Turner that "you guys" or "you people" are obnoxious, and she wanted them gone (A-0008).

During closing arguments, Respondents' counsel asserted that the rude behavior of Petitioner Adams toward the Respondents amounted to a denial of the advantages, privileges, or services of the hotel, and thus constituted a violation of the WVHRA. (A-0706-707). Respondents' counsel crafted his argument to make the conduct of Adams the requisite evidence of discrimination for a jury verdict. This argument does not comport with West Virginia law as found in this Court's *K-Mart Corporation, supra*, decision.

K-Mart Corporation makes it clear that "accommodations," "advantages," "privileges," and "services" of a place of public accommodation are all tangible things, not the incorporeal right to be left alone, as Respondents' counsel argued at trial. *See* Syl. Pt. 1, 181 W.Va. 473, 383 S.E.2d 277. It cannot be disputed that there was no concrete testimony or evidence presented at trial of a refusal, withholding, or denial of any actual identifiable advantages, privileges, or services as required by the *K-Mart Corporation* decision. The Respondents failed to present any evidence that any one of their fellow white co-workers, or even any other white guest of the hotel, was moved into a sleeper room or long-term apartment before they were. The jury simply heard no

evidence that the Respondents were denied any actual accommodations by the Petitioners, let alone denied any accommodations based on their race.

The *K-Mart Corporation* decision involved a fact pattern rather similar to that in the present case:

> On September 19, 1981, [Abdul] Baram, his wife (Ms. Dehnah), their two children, and several adult relatives entered the St. Albans K-Mart store with the intention of purchasing gifts for the relatives to take with them back to Syria. Only Ms. Dehnah wore the traditional loose-fitting Islamic dress. Upon seeing the Baram family group heading toward the store from the parking lot, the K-Mart personnel called the St. Albans Police as a precautionary measure, believing the Barams might be a group of shoplifters the store had been warned were victimizing the area. Upon entering the store, the Barams shopped for approximately fifteen minutes without incident, until Ms. Dehnah noted that the group was being observed by K-Mart employees and one policeman. Upon learning that he and his family were being watched, Mr. Baram remarked "Don't pay [them] any attention. Who cares?" While shopping, neither the police nor any K-Mart personnel confronted or hindered the Barams.
>
> Eventually, Mr. Baram confronted a K-Mart manager and asked why his group was being watched. The manager explained that all customers were observed while in the store and apologized for any embarrassment or inconvenience. Shortly thereafter, the Barams left the store, leaving several half-filled shopping carts.
>
> At this point, a sheriff with the St. Albans Police Department, who had been summoned to the store with two other officers, instructed one of the officers to follow the Barams down the mall to keep an eye on them. After traveling approximately 800 yards from the entrance of the K-Mart store, Mr. Baram realized he was being followed by the police. Mr. Baram angrily requested to know why he was being followed. The officer, believing that Mr. Baram was going to "jump me or something," advised Mr. Baram that he had been instructed by his supervisor to follow him and called for a back-up unit. This confrontation was observed by passing mall patrons. Thereafter, the Barams left the shopping center.

181 W. Va. at 474, 383 S.E.2d at 278. Mr. Baram later contacted the St. Albans Police Department to inquire about the incident and was told that K-Mart personnel had believed his family might be associated with "gypsies" who routinely engaged in shoplifting. *Id.* The Barams subsequently filed a complaint against K-Mart with the West Virginia Human Rights Commission claiming discrimination on the basis of national origin. *Id.* at 474-75, 278-279.

The Human Rights Commission found in favor of the Barams ruling that K-Mart had denied them "the advantages, privileges and services offered to other K-Mart customers because of the ethnic appearance of the complainant and his family...." *Id.* at 475, 279. The Commission determined that the Barams "were victims of [K-Mart's] unreasonable surveillance, intimidation and public embarrassment and thus unable to purchase gifts which they had intended... Discrimination in access to public accommodation may arise through subtleties of conduct just as surely as through openly expressed refusal to serve."[3] *Id.* K-Mart appealed to the Circuit Court of Kanawha County which reversed the findings of the Human Rights Commission and found that the Barams were not denied any privileges accorded to others because of their national origin. *Id.* at 475-76, 279-80. "The only problem that the complainant had with K-Mart is that they were observed by K-Mart personnel while in the store." *Id.* at 476, 280.

The Barams appealed to the Supreme Court of Appeals of West Virginia. The sole issue before this Court was "whether K-Mart denied the Barams the advantages, services, and privileges offered others at ... the store." *Id.* This Court affirmed the ruling of the circuit court and found no discrimination. *Id.* This Court observed that nowhere in the record could it be found that "the appellant and his family were actually denied, refused, or withheld any services or amenities as required by W.Va. Code Section 5-11-9 and the last element of our test." *Id.* at 478, 282.

> **Standing alone, we do not believe rudeness is sufficient to prove a prima facie case of discrimination**. While we do not mean to dismiss the effect of intimidation as an element in discrimination, it is, at best, too objective and difficult to quantify alone. Rather, intimidation should simply be treated as a factor in our test to determine whether the complainant has made a prima facie case of discrimination.

Id. at 478-79, 282-83 (emphasis added).

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[3] This is the exact type of argument which Plaintiffs' counsel made in the present case.

The *K-Mart Corporation* decision makes it clear that "the accommodations, advantages, facilities, privileges, or services" of a place of public accommodations, as set forth in Section 5-11-9, are tangible things. To establish a prima facie case of discrimination a claimant must be able to point to something that was actually refused, withheld, or denied. The Respondents never presented any evidence of such refusal, withholding, or denial of accommodations, facilities, privileges, or services as is required by Section 5-11-9 and the *K-Mart Corporation* decision. The Respondents merely testified as to rude behavior of Petitioner Adams, including questions about gold teeth, a phone call to an employer, and alleged name calling by Ms. Adams to Respondents' own attorney after the Respondents' lawsuit had been filed against her. Importantly, the Respondents could not demonstrate at trial how the Petitioners had refused, withheld, or denied them anything based on their race. The evidence of the behavior of Petitioner Adams may have inflamed the jury, but none of it truly constituted discrimination under Section 5-11-9.

The testimony cited by the lower court in the Post-trial Motion Order was insufficient for a reasonable trier of fact to find that the Petitioners violated the WVHRA. The Respondents presented no evidence as to when month-to-month apartments became available during their stays in the daily sleeper rooms and whether those apartments which became available, if any, were accommodations for the general public or were already under contract by other individuals or entities. Petitioner Adams testified that Price Gregory, for whom Respondents were working, had ten long-term apartments on retainer at all times at the hotel, and Price Gregory could occupy these rooms however it saw fit. (A-0679-680).

The Respondents could not identify one individual, Caucasian or otherwise, who arrived at the hotel after the Respondents but were provided a month-to-month apartment before the Respondents. The unrefuted evidence showed that the Petitioners provided accommodations to

the Respondents upon their arrival at the hotel without any incident or problem. The Respondents claim that the delay in moving from daily rooms to month-to-month apartments is attributable to their race, but presented no evidence to demonstrate that the Petitioners actually withheld such long-term accommodations because of their race. Hotel accommodations were requested by the Respondents, and they were provided by the Petitioners. The Respondents simply failed to demonstrate that they were actually denied anything. It is essential to keep in mind that at all times in this case the Petitioners provided uninterrupted accommodations at the hotel to the Respondents like any other patron.

For these reasons, the lower court erred in denying Petitioners' motion for judgment as a matter of law, and this Court should reverse the lower court's decision.

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.

Following the trial, the Petitioners moved for a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure based on the error committed by the lower court in allowing Respondents' attorney to testify as a rebuttal witness. The Post-trial Motion Order incorrectly determined that the Petitioners opened the door to the rebuttal testimony when Petitioner Adams testified in her own case in chief for a second time after being called as a witness by the Respondents, and that such testimony was relevant. (A-0009-13). The standard this Court applies when deciding whether to reverse the denial of a motion for a new trial on appeal is whether the trial court has "acted under some misapprehension of the law or the evidence." Syl. pt. 2, *Grimmett v. Smith*, 238 W. Va. 54, 792 S.E.2d 65, (2016) (quoting Syl. Pt. 2, *CSX Transp., Inc. v. Smith*, 229 W.Va. 316, 729 S.E.2d 151 (2012)). The lower court erred on both the law and the evidence in allowing Respondents' counsel to testify as a rebuttal witness.

Attorney McCamic is counsel of record for the Respondents. (A-0693). He signed the Complaint, and appeared as counsel on all filings and pleadings. (A-0022 & A-0476). The stated purpose of his rebuttal testimony was to recount a conversation which he had with Petitioner Adams after he began his representation of the Respondents, but before Ms. Adams had retained her own counsel. (A-0685-686). Attorney McCamic testified in rebuttal that Ms. Adams referred to the Respondents as "scam artists" and other disrespectful names. (A-0691-692).

Petitioner Adams denied having any such conversation with Attorney McCamic when Respondents called Ms. Adams as a witness in their case in chief. (A-0610). The Respondents then failed to call Attorney McCamic in their case in chief. The Petitioners called Ms. Adams as a witness in their case in chief, but did not inquire into a conversation with, or even mention, Attorney McCamic. (A-0677-680). It was the Respondents' counsel, on cross examination, who again asked Ms. Adams about Attorney McCamic after having already done so during their case in chief. (A-0684). The Post-trial Motion Order completely ignores the fact that the Petitioners asked Ms. Adams no questions regarding any conversation she had with Attorney McCamic. Accordingly, Respondents' counsel opened the door himself and called Attorney McCamic as a rebuttal witness over the objection of the Petitioners.

The lower court overruled the objection, making the following statement:

> 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). The trial transcript reveals that it was Respondents' counsel, not Petitioners' counsel, who raised the issue of Attorney McCamic when Ms. Adams was called to the stand a second time.

Petitioners' counsel did not open the door for the rebuttal testimony as the quoted ruling of the lower court states, and the lower court did not correct this error in its Post-trial Motion Order.

This Court has held that it is not rebuttal testimony for a plaintiff to attempt to do in rebuttal what should have been done in its case in chief. *Belcher v. Charleston Area Med. Ctr.*, 188 W. Va. 105, 109, 422 S.E.2d 827, 831 (1992).

> Professor Cleckley has spoken to this situation: "Here, the plaintiff is merely requesting an opportunity to do in rebuttal what should have been done in the case in chief. This is not true rebuttal. Rather, it is analogous to a request to permit the plaintiff to reopen its case." Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 3.1(A), at 55 (2d ed. 1986).

Id. Setting aside the issue of whether the Respondents' own attorney was a proper witness in the first place, Attorney McCamic was not a proper rebuttal witness and should have been excluded from testifying as such. The Respondents' only option was to call Attorney McCamic in their case in chief. The Respondents were well aware of the Ms. Adams's deposition testimony regarding her lack of memory of a conversation with Attorney McCamic. The testimony on this topic was no surprise at trial. After Ms. Adams denied the conversation with Attorney McCamic at trial, as was consistent with her own prior testimony, the Respondents should have attempted to call Attorney McCamic in their case in chief. As expressed in *Belcher*, supra, the calling of Attorney McCamic as a rebuttal witness was not true rebuttal but merely an attempt by the Respondents to reopen their case. Attorney McCamic should not have been allowed to testify as a rebuttal witness, and such action by the lower court demonstrated a clear misapprehension of both the law and evidence entitling the Petitioners to a new trial.

Furthermore, the testimony offered by Attorney McCamic should not have been admitted as evidence. Under West Virginia Rule of Evidence 402, a conversation between Attorney McCamic and Petitioner Adams over two years after the Respondents had stayed and vacated the

hotel, and after suit had been filed against Ms. Adams, was not relevant to the issue of whether Adams discriminated against the Respondents on the basis of their race. The conversation occurred after a pro se lawsuit had already been filed against Ms. Adams in the Ohio County Magistrate Court alleging the same claims as the case tried in the Ohio County Circuit Court. (A-0690). A legal adversarial relationship already existed between Petitioner Adams and the Respondents at the time Ms. Adams allegedly made the derogatory statements about which Attorney McCamic testified. The allowance of McCamic's testimony only served to inflame the jury and greatly affected its view of Ms. Adams, and thus was a major factor in the jury's verdict. Attorney McCamic's testimony seriously undermined the credibility of Ms. Adams in the eyes of the jury.

Moreover, if somehow relevant, the testimony of Attorney McCamic should have been excluded under West Virginia Rule of Evidence Rule 403, as any probative value was substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury. There can be no question that the size of the verdict was, at least in part, caused by the allowance of Attorney McCamic to testify and undermine the credibility of Ms. Adams. Attorney McCamic testified that when he spoke with Ms. Adams, she may have been under the mistaken belief that he was an "ally" and that she misunderstood the fact that he would be voluntarily dismissing the magistrate court case BUT re-filing the case in circuit court. (A-0691-692). This conversation with Petitioner Adams, an individual whom Attorney McCamic knew to be unrepresented by counsel, implicates Rule 4.3 of the West Virginia Rules of Professional Conduct which provides, in part, that, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct

the misunderstanding." It is rather clear that Ms. Adams misunderstood Attorney McCamic's role and that Attorney McCamic made no effort to correct that misunderstanding. (A-0694-696).

There can be no doubt from Attorney McCamic's testimony that he allowed Ms. Adams to ramble during their conversation to her own detriment rather than explain the nature of his role in the litigation. This Court has held that "[a]ny practice which enables an attorney, while engaged in the prosecution or the defense of litigation, to testify as a witness in the course of such litigation is emphatically disapproved by this Court." *Edmiston v. Wilson*, 146 W. Va. 511, 531, 120 S.E.2d 491, 502 (1961). Moreover, Rule 3.7 of the Rules of Professional Conduct, which provides that "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," underscores the notion that the law of West Virginia strongly disapproves of lawyers who act as witnesses in cases in which they are involved. As Comment [1] to Rule 4.3 explains, "combining the roles of advocate and witness can prejudice the tribunal and the opposing party." Under these circumstances, it was highly prejudicial and perhaps legally and ethically improper for Attorney McCamic to testify as a witness at trial.

For these reasons, the lower court erred by denying Petitioners' motion for a new trial on this issue, and this Court should reverse the lower court's decision and order 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.

The jury in this case awarded each Respondent $475,000.00 as a result of its verdict that the Petitioners violated the WVHRA. When viewing the evidence in the light most favorable to the Respondents, the verdict stands as outrageous. A review of the undisputed evidence reveals the excessiveness of the verdict. It is undisputed that both Respondents Taylor and Turner were provided accommodations in the form of regular sleeper rooms upon their arrival at the hotel, and

after a short period of time were provided long-term apartments at the hotel. There was no evidence adduced that either Respondent Taylor or Turner were treated any differently than any white guest or their white co-workers. The Respondents both claimed that white co-workers who arrived at the hotel after them were placed into month-to-month apartments before them; however, neither Respondent could name a single white co-worker to which this assertion applied. Lastly, no evidence was presented at trial that the Respondents experienced any out of pocket losses or any quantifiable damages.

The lower court's Post-trial Motion Order without citation to the trial transcript relied on testimony completely unrelated to a denial of accommodations under the WVHRA to justify the amount of the verdict. (A-0016). The court improperly cited to alleged testimony of impairment of employment or professional reputations of which there was no actual evidence to support a damage award for a violation of West Virginia Code Section 5-11-9. (A-0016). Any emotional distress type damages only should have been based on a denial of accommodations, not unsubstantiated claims of other alleged injuries.

The evidence at trial of alleged "discrimination" was the following:

1. Petitioner Adams called Mr. Taylor's employer to inquire about the lateness of his rent payments;
2. Ms. Adams hassled Mr. Taylor only about late rent payments;
3. Ms. Adams questioned Mr. Turner about his gold teeth; and
4. Ms. Adams was generally rude and discourteous to both Mr. Taylor and Mr. Turner.

While this evidence may portray Ms. Adams as a poor example for guest relations, it falls woefully short of proving any actual discrimination. Yet this was the evidence upon which the jury awarded each Respondent $475,000.00, for a total verdict of $950,000.00. The evidence of alleged

discrimination simply does not correlate to the excessive amount of the verdict considering the Respondent's only claim of discrimination amounted to a delay before moving into month-to-month apartments. Such a decision establishes the precedent that a delay of a few days to a week in moving into a hotel apartment costing around $700 per month amounts to several hundred thousand dollars, despite no evidence of any tangible or pecuniary losses whatsoever. The amount of the verdict is simply indefensible.

The law in West Virginia provides that "[c]ourts 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). "Remittitur in its broadest sense is the procedural process by which the verdict of a jury is diminished by subtraction." Syl. Pt. 1, *Earl T. Browder, Inc. v. Cty. Court*, 145 W. Va. 696, 116 S.E.2d 867 (1960). Most importantly, when the compensation which the plaintiff is entitled to recover is "indeterminate in character, the verdict of the jury may not be set aside as excessive unless it is not supported by evidence or 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." *Id.*

This case is a clear example of a jury's verdict amount not being supported by the evidence and instead being influenced by passion and/or a mistaken view of the case. The jury clearly did not appreciate and/or believe the bulk of the testimony of Petitioner Adams regarding the reasons for calling Mr. Taylor's employer or Attorney McCamic's recounting of his conversation with Adams. The jury based its verdict on its own distaste for how Ms. Adams treated, interacted with, or allegedly thought about the Respondents, rather than any acts of actual discrimination. The

requisite discrimination under the WVHRA to support a recoverable cause of action must constitute some denial, refusal, or withholding of accommodations, advantages, facilities, or privileges of the hotel. However, as set forth in the discussion above, there was no evidence of any concrete discrimination in this sense. The size of the verdict when compared to any evidence of actual discrimination shows that the verdict was excessive and influenced by improper factors, which requires remittitur under the law of West Virginia, or in the alternative, the granting of a new trial.

For these reasons, 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. No reasonable trier of fact could have found that the Petitioners violated the WVHRA based on the evidence presented at trial. As such, the Petitioners were entitled to 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 is outrageous on its face and not supported by the evidence.

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