IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: 18-1104

MCCLURE MANAGEMENT, LLC, and CINDY KAY ADAMS,

Petitioners,

v.

ERIK TAYLOR, and JAMES TURNER,

Respondents.

On Appeal from the Circuit Court of Ohio County (12-C-287)

RESPONDENTS' BRIEF

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Equal Justice Society, Wilson Sonsini Goodrich & Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias,*
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Validity, construction and application of § 201(b)(1) and related provisions of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000a(b)(1)), prohibiting discrimination or segregation in inns, hotels, motels, or other establishments providing lodging to transient guests, 1971 WL 28352, 7 A.L.R. Fed. 450 (1971) 10

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COUNTER STATEMENT OF THE CASE

Hotel Provided White Employees with Long-Term Accommodations, While Denying Them to Taylor and Turner for Weeks

Below, Petitioners-Appellants McLure Management LLC ("McLure") and Cindy Kay Adams ("Adams") sales manager of McLure Hotel (collectively "Hotel" or Defendants ("Defs.")), failed to take this case seriously. Defendants served no paper discovery. Neither did Defendants depose either Taylor or Turner before trial. (A-738-742). Their closing argument runs but a few pages (A-719:9-725:13). They now claim "shock" at the verdict of an Ohio County Jury.

Plaintiffs below, Erik Taylor and James Turner, were African-American gentlemen who came to Wheeling from their homes in Los Angeles and Mississippi, respectively, for employment in the Natural gas industry in and about Wheeling West Virginia, obtaining employment as "pipe-liners" for Price Gregory International, Inc. ("Price Gregory") at its gas production site in Moundsville, West Virginia (A-620:13-621:1).

Both men sought accommodation at the defendants' McLure Hotel. Taylor and Turner were the only two African-American employees of Price Gregory seeking accommodation at the hotel (A-620:13-621:5; see A-581:10-12). James Turner was one of the first employees hired at the Moundsville, West Virginia worksite (A-615:7-9), yet when he showed up at the McLure to seek a "long-term" accommodation – an apartment, rather than an overnight "sleeper room," (which were much more expensive per day than long-term apartments, A-513:8-9), he was told by Defendant Cindy Kay Adams, that there were no apartments available, and that he would be put on the "waiting list."

Erik Taylor showed up a short time later (A-117, 123-124, 220-221). He too was told by Defendant Adams that there were no "apartments" available, and was required to pay the more

expensive "daily" rate for a sleeper room. He was also told by Adams that he would be put on the "waiting list."

While waiting for long-term accommodations, Taylor and Turner observed Caucasian employees that were similarly situated who came to the job site after them having no trouble obtaining "long-term" accommodations. (A-510:21-512:17, A-618:7-9, 620:9-7). Finally, Taylor and Turner complained to management as to why Caucasian employees were being given "long-term" accommodations ahead of them, and after a period of some weeks, and much difficulty, Plaintiffs were finally given "long-term" accommodations. Notwithstanding they ultimately received the long-term accommodations they sought from the beginning, they were treated as guests during their entire stay at the hotel in a discriminatory and hostile way, and when Plaintiff Erik Taylor was late on a parking fee of $100.00, Hotel Sales Manager Cindy Kay Adams actually called his employer and disparaged both he and Turner to the Price Gregory "office manager," nearly causing Taylor to be terminated, and both to be seriously inconvenienced, embarrassed, and humiliated. (A-549:10-17; A-603:23-604:3) At trial, Defendant Hotel admitted there had never been a "waiting list." (A-570:15-24, 571:1-4).

COUNTER STATEMENT OF FACTS

After First Denying It, the Hotel Admits That It Committed Actions Other Than Delaying in Providing Apartments to Taylor and Turner; Demonstrating how the Hotel Discriminated on Racial Grounds

The Hotel argues in its Statement of Facts that the delay in providing long-term accommodations to Taylor and Turner amounts to "Petitioners' [sic] sole basis for their racial discrimination claim" (Hotel Appeal Brief, "App. Brf.," p. 2). The Hotel then contradicts that argument. It acknowledges that Taylor and Turner point to additional evidence of disparate treatment (*Id.* p. 4).

The Hotel Committed Other Racially Discriminatory Acts, Including, But Not Limited To, an Unprecedented Call to Plaintiffs' Employer Complaining About Both

At trial, Adams admitted to calling Price-Gregory about Taylor being "late on his rent" payment, but substantially denied making other derogatory comments about either him or Turner during the call to Price-Gregory. Hence, **Adams did not dispute making the call, disputing only how far she went in disparaging Taylor. (A-603:23-604:3).** She first testified she only told Price Gregory's office manager (Melissa) that Taylor was late on his rent, and that "we may have to proceed with having him removed from the McLure." (A-602:22-23). When asked about what she related as to Taylor's financial condition, Adams testified that "I did say that....I did mention...there's something going on that he's late." (A-600:14-603:24), agreeing that she also told Melissa that Taylor "had financial problems." (A-604:1-3). Although the extent of the disparaging remarks about Taylor in the call, and whether or not she mentioned Turner in the call at all was disputed by her, other evidence adduced at trial allowed the jury to reasonably infer that she not only disparaged Taylor during the call to Price-Gregory, but Turner as well, even though Turner was not even "late" on any payment at the time. (A-528:8-20, 542:6-10; A-209:30:12-13; A-624:17-24, 625:1-3; A- 625:11-24, 626:1-4; A-527:1-24).

On this issue, the Hotel misleads this Court, claiming that "Adams called Mr. Taylor's employer to inquire about the lateness of his rent payments." (App. Brf., p. 22). Indeed, even the statement to Price-Gregory's office manager that Mr. Taylor was late on his rent, when made, was untrue. Taylor had paid the rent earlier that day. Adams had not bothered to check before making the call. (A-606:4-607:2). What he still owed, but promised to bring by after work, was his monthly $100 parking fee. (A-527:1-23).

Adams had earlier the same day called Taylor on his cell phone while he was at work in Moundsville. Though Adams not did recall calling him and denied that she had been ranting at

him (A-605:14-606:3), her boss admitted "Cindy Kay [Adams] could get herself all worked up." (A-184:57:9).

Taylor testified without objection that after the call from Adams to Melissa, his boss pulled him aside to talk about the telephone call, which made him "look bad." Taylor had to explain to his boss "why he was not paying his bills." (A-545:15-24).

Having learned of the call from "Melissa," and having been confronted by his boss about it as previously mentioned, Taylor became agitated and left work to confront Adams about the phone call. When he accosted Adams about what he had heard from Melissa, Adams "just sat there and looked at me," refusing to deny calling Taylor and Turner "deadbeat[s]" (A-542:6-10).

Never before in her history of working at the McLure had its Sales Manager called a renter's employer claiming that they were late for rent. (A-601:22-602:8). The Hotel further fails to alert this Court that Hotel's treatment of Taylor and Turner differed from a similarly situated Caucasian co-employee of Price-Gregory, Stan Gusik, who was at times also late on his rent. The hotel made no such disparaging calls to Price-Gregory about him. (A-569:6-21, 601:24-602:1-8).

The Hotel otherwise fails to adequately inform this Court that Turner testified, without objection, that he also confronted Adams about comments made about him in the same phone call, even though he was not late on any rent payments. He testified that when he confronted Adams about disparaging things she had supposedly said about him as well, Adams response was not to deny it, but again to refer to him and Taylor collectively, as in "You guys," "You people" are obnoxious, and "I want all of you out of here." She then walked away from Turner. (A-624:15-625:3).

After Turner complained to Adams that their treatment had been unfair, their relationship changed for the worse: "she took that as a dislike... [and] because of that she started asking me

about me being a drug dealer, about why I got gold teeth and I work for living and...said the last person which previously lived there [in his apartment] was a dope head.... and gambler-holic, and she said was I like that." Turner considered her comments racial stereotyping. (A-618:7-620:12). But the Hotel merely chalks up Adams' questions about his "...gold teeth, a phone call to an employer, and alleged name calling by Defendant Adams" as just "generally rude and discourteous" conduct (App. Brf., p. 22; see Defs. Post-Trial Briefs A-410, 456).

Taylor also testified, again without objection, that Adams' call to his employer, and his attempts to involve Melissa as a witness to Adams' comments, was the reason he was never called back again to work for Price Gregory. (A-545:15-546:23).

The Hotel Committed Still Other Acts of Racial Discrimination, Including its Referring to Them, the Only Two African-American Guests, "collectively" in a Disparaging Way

Rebuttal testimony by Attorney Jay McCamic ("McCamic"), who signed the complaint but did not participate in the trial (A-689:1-696:20), offered evidence which a reasonable jury could infer racial animus based on the Hotel's "collective judgment" of its two African-American guests. McCamic testified how, shortly after Taylor and Turner filed a *pro se* complaint in Magistrate's court, Adams explained to McCamic "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" (A-691:1-24, 692:8-9, 692:13-20).

Additional to the Hotel's delay in providing long-term accommodations, the Hotel's phone call to their employer making untrue claims, and the grouping of the only two African-American guests from the Price-Gregory job, the Hotel did the following discriminatory acts, pre-trial:

1. The Hotel treated Taylor treated differently by requiring and copying a photo ID of him earlier than was the policy. Upon demand, he gave her his photo ID for her to copy "the

first day I came, when I got a hotel." (A-616:11-617:2). Adams testified that the Hotel only required that when someone signed a long-term lease, not when applying for an apartment. (A-581:14-582:7).

2. The Hotel tried to justify its treatment of Turner (and Taylor) on the basis of a nonexistent waiting list. Adams told Turner he was still on the list when he complained. (A-618:2-22). Yet at trial Adams said that technically she didn't have any waiting list. (A-570:15-571:4). The trial court judge noted that "no 'waiting list' has been produced by defendant in discovery of this matter." (A-238:4e). Adams testified "I would certainly put him at the top of my list. Maybe that's where he got a little confused. But, no, there was not a list[.]" (A-572:5-7).

3. The Hotel changed its treatment of Taylor from when he called in and was told there were long-term accommodations available, and when he showed up in person, when Adams could see he was black. (A-506:22-507:8. See also A-721:11-12, Defs. closing). The Hotel admitted that "defendants do not know the race of most interested individuals until the person shows up to sign the lease" (A-96). As Mr. Taylor testified,

> [I] just made a phone call and asked if they had long-term...apartments available. And [he] was told yes...maybe later on that day... [he] went to the McLure...and asked for [Adams] when [he] got there. And...was told that there was a waiting list, and she would get back to [him] when there was a room available, but in the meantime [he] could take a...nightly room.

(A-506:22-507:8; 513:13-20).

So, Taylor on the phone was told there was "availability," but in person and obviously black, a waiting list. (This contrast appears in more than one housing discrimination case, e.g., *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

4. Taylor was given a "run around" when he made objections to what he considered discriminatory treatment, first to Adams, then to Manager Johnson, Adams' supervisor, who said "there wasn't a waiting list," contrary to Adams' statement to Taylor (A-515:6-20). Yet Johnson then sent Taylor back to Adams (A-515:21-516:8). This hands-off approach differs from Adams aggressively "reminding" Taylor about paying his rent every day, then discussing it with the owner who initially said he "had to go" if it wasn't paid (A-596:24-598:9). Evidence indicated that the owner in question is one Fran Garey, from Houston, who owns a number of hotels, including defendant McLure. (A-181, 45:6; 182, 51:11-19).

The Hotel's Actions During Trial Reflected Animus and Lack of Credibility

1. The Hotel's manager admitted discrepancies in McLure records (Johnson dep. A-188-189, pp. 74:8-77:24), read to jury (A-662:16-7), particularly regarding lateness of payment. Johnson stated, **"I'd have to go back and really question this [hotel document]"** (A-189, 77:19-24). The Hotel also produced a receipt after the case was filed purporting to show the "late-rent" was never paid. It was signed by a person who had not signed previous receipts for Taylor, (A-562:4-22). At trial, Taylor admitted the rent was a few days late, but was paid within the 10 days grace period under the lease agreement, and prior to Adams' call to his employer (A-527:1-23; 562:23-563:4; A-606:4-607:2). The receipt showing his payment in cash on the day he said he paid it was introduced into evidence (A-551-552).
2. Though the trial court judge fully restrained himself (e.g. A-572:2-573:10), Adams behaved so improperly that the judge had to admonish her – repeatedly. (A-538:23-541:3; 572:3-573:10; 600: 8-15; 682:17-22).

3. Adams was thoroughly impeached.

    a. She testified in her deposition that the Owner said regarding Taylor "has got to go," after 3 days were up, though she had meant to say it was after 10 days (A-599:21-600:23).

    b. She was asked if she told Turner about a waiting list, she denied that she called it a waiting list, though she inconsistently said "I told him there was a wait," and that he was at the top of the list (A-572:2--574:3).

    c. She said in her deposition that she wasn't involved in the "hotel side" of the McLure, where at trial she testified that she was involved on the hotel side. (A-584:21-587:12; 568:19-22), and otherwise contradicted her deposition (A-592:5-21; 594:16-595:16; 598:4-600:23).

    d. She contradicted the testimony of her boss, Hotel's General Manager, saying "[s]he gave you the wrong information (A-680:20-681:5).

4. Decision-maker Adams showed her eagerness to disbelieve Taylor's status as a Price Gregory employee. She said that the office manager told her that Taylor "was not Price Gregory, he was union," and believed that meant that "Taylor wasn't an employee of Price Gregory" (A-604:22-A-605:9), though he was a union member hired by Price Gregory for this job because it thought him a good employee. (A-504:11-506:9).

5. The Hotel recalled Adams to the stand during its presentation of its defense, in order to "clarify" her testimony that she never said anything derogatory about the plaintiffs to anyone (A-677:12-679:1). During cross of her on recall, plaintiffs counsel asked her specifically if she had ever said derogatory things about them to Attorney McCamic. (A-

684:2-7). This she denied, after which the trial Court properly permitted Mr. McCamic to be called on rebuttal. (A-685:22-686:9).

6. Adams' testimony repeatedly struck false chords with the jury. Though she admitted having spoken to Mr. McCamic, she testified as to the conversation that "I can't remember, I cannot remember. I would think maybe seeing him in person or something. I can't remember. That was seven years ago. I can't remember, I don't remember, I don't." (A-596:1-23).

SUMMARY OF ARGUMENT

Despite its importance, see *Heart of Atlanta Motel v U.S.*, 379 U.S. 241, 253-4, 85 S.Ct. 3487 (1964), *infra* at 36, confronting racial housing discrimination and that in public accommodations has proven intractable. "The evils emanating from governmental acceptance of housing discrimination permeate our entire society." *Mayers v. Ridley,* 465 F.2d 630, 632 (D.C. Cir. 1972)(Wright, Bazelon, and Robinson, JJ. concurring).

While racial discrimination in employment has been hard to stamp out, that in housing and public accommodation can be more subtle yet more powerful: it involves not only where the defendants work, but also where they sleep and have their families. It is more insidious and invidious. "The importance of the [F]air Housing Act ("FHA") *42 USC 3601 et. seq.* aims and the complexity of the problem it addresses cannot be ignored, even so many years after the Act's 1968 enactment." *Hous. Rights Ctr. v. Donald Sterling Corp.,* 274 F. Supp. 2d 1129, 1137 (C.D. Cal. 2003), aff'd sub nom. *Hous. Rights Ctr. v. Sterling*, 84 Fed. Appx. 801 (9th Cir. 2003)(unpublished), noting how housing discrimination has proven intractable.

On a national level, Title II of the *Civil Rights Act of 1964, 42 U.S.C 2000a et. seq.*, forbids discrimination in public accommodation. Nonetheless, "[o]nly a few cases have been

found in which hotels or motels have been involved in litigation in federal courts because of their alleged discrimination against non-white guests." *Powell v. Super 8 Motels, Inc.*, 181 F. Supp. 2d 561, 565 (E.D.N.C. 2000)(citing *Validity, construction and application of sec. 201(b)(1) and related provisions of the Civil Rights Act of 1964 (42 USC sec. 2000a(b)(1))*, 1971 WL 28352, 7 A.L.R.Fed. 450 (1971)).

To address that broader discrimination, the West Virginia Human Rights Act, *5-11-9 et. seq.,* in pertinent part, forbids that "any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations ...[r]efuse, 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."** *W.Va. Code 5-11-9 (6)(A).* See *U. S. v. Johnson*, 390 U.S. 563, 565-6, 88 S.Ct. 1231 (1968)(the right to service in a restaurant is a "right or privilege" in prosecution for conspiracies by outsiders to assault Negroes for exercising their right to equality in public accommodations under the Civil Rights Act).

Reflecting a visceral urge to oppose antidiscrimination efforts, Appellant seeks that this Court legislate from the bench by rewriting state law, contrary to state and federal precedent law, to limit the "public accommodations" section to require a virtually "permanent" withholding of something "tangible," despite its expansive language, "directly or indirectly,""[r]efuse, withhold from, or deny," and "accommodations, advantages, facilities, privileges or services." This runs contrary to the requirement that the Act be read liberally. *W.Va. Code 5-11-15.* Showing that "accommodations" means more than permanent deprivation of accommodations, services, etc., the U.S. Supreme Court applied it to drive in restaurants and sandwich shops, *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S.Ct. 964 (1968).

Secondly, the Court's permitting Attorney McCamic to testify did not constitute error. It was proper rebuttal instigated by the Hotel itself in recalling its chief witness, and having her broadly testify that she never said anything derogatory about the plaintiffs to anyone; which made the rebuttal testimony of Mr. McCamic material, relevant, and within the sound discretion of the Court.

Thirdly, for the substantial inconvenience, humiliation, and reputation damages awarded for the Hotel's discrimination, the undisputedly properly-instructed jury awarded $475,000 to each of the two Plaintiffs. Showing how deep emotion to resist the WVHRA can be, the Hotel is outraged at that verdict, but can cite no non-discriminatory foundation for its opinion. As will be further explained hereinafter, the verdict was not excessive under the facts of this case and the law of this State.

STATEMENT REGARDING ORAL ARGUMENT

Respondents Taylor & Turner believe that the issues raised here are fundamental enough to deserve oral argument.

ARGUMENT

RESPONSE TO ASSIGNMENT OF ERROR I: The Trial Court Committed No Error In Denying The Motion Of Appellants McLure For Judgment As A Matter Of Law

Standard Of Review

This Court applies a *de novo* standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law. (*Sneberger v. Morrison*, 235 W.Va. 654, 667, 776 S.E.2d 156 (2015) (cit. omitted)(recently cited in Memo decision *Goff v. Williams Holdings, LLC,* 2018 WL 2194018 at *3 (W. Va. May 14, 2018)).

Applying That Standard, The Trial Court Committed No Error in Denying Hotel's Motion for Judgment as a Matter of Law

The West Virginia Human Rights Act states that the following are among the enumerated illegal acts:

> 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;**

*W.Va. Code 5-11-9 (6)(A).*The Hotel does not dispute that it is a "place of public accommodations" as defined by *W.Va. Code § 5–11–3(j).*

The *McDonnell-Douglas* Proof Process

This framework as set forth in *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 93 S.Ct. 1817 (1973), is best capsulized in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089,...(1981). Originally developed in employment cases, the *McDonnell Douglas* framework is applicable to housing cases as well. See *Wilson Estates infra* at 13.

In *McDonnell Douglas*, the United States Supreme Court determined that a prima facie case of employment discrimination may be established:

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (footnote omitted).

411 U.S. at 802, 93 S.Ct. at 1824.

Shepherdstown Vol. Fire Dept. v. State ex rel. State of WV HRC., 172 W.Va. 6227, 637, 309 S.E.2d 342 (1983)(holding also that VFD comes within "broad definition" in the statute of "place[s] of public accommodations, id at 636, 309 S.E.2d at 342).

Making out the prima facie case is not onerous. *Hanlon v. Chambers*, 195 W.Va. 99, 106 464 S.E.2d 741, 748 (1995)(cits.omitted)(the showing that the Plaintiff must make as to the elements of the prima facie case in order to defeat a motion for summary judgment is "de minimis.") See *WVHRC v. Wilson Estates, Inc.,* 202 W.Va. 152, 159, 503 S.E.2d 6 (1998)("all a discrimination plaintiff need show is a prima facie case to survive a summary judgment ruling.").

> Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' (citation omitted). Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. (citation omitted).

450 U.S. at 252–53, 101 S.Ct. at 1093 (citing *McDonnell Douglas Corp. supra)*; *Shepherdstown VFD.,* 172 W.Va. at 647, 309 S.E.2d 342.

At the third stage, the "pretext stage," a plaintiff can show by a mere preponderance of the evidence that the Defendant's proffered reason is a pretext rather than the true reason for the adverse employment action. Syl. Pt. 4, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986)(undercut on another point by *Barefoot v. Sundale Nursing Home,* 193 W.Va. 475, 487 n 18, 457 S.E.2d 152 (1995)). The "but-for" test set forth in *Conaway* "is merely a threshold inquiry requiring only that a plaintiff show an inference of discrimination." *Knotts v. Grafton City Hosp.*, 237 W.Va. 169, 786 S.E.2d 188 (2016)(citing *Barefoot*, Syl. Pt. 2).

If the defendant meets its burden of production and the employee offers evidence of pretext, the jury proceeds to decide the ultimate question, i.e., whether plaintiff was adversely affected in substantial part because of an illegal factor. *Barefoot,* 193 W.Va. at 483, 457 S.E.2d 152. See also *Burdine,* 450 U.S. at 253, 101 S.Ct. 1089; *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824; and Syl. Pt. 4, *Conaway.*

A plaintiff need not prove discrimination with scientific scrutiny. *Bazemore v. Friday,* 478 U.S. 385, 400, 106 S.Ct. 3000 (1986)(citing *Burdine,* 450 U.S. at 252, 101 S.Ct. 1089). After a defendant articulates a non-discriminatory justification for its action, plaintiff need show no "more than the articulated reasons were implausible..." *Barefoo*t, Syl. Pt. 5 (in part). There rarely appears direct evidence of a causal connection between an illegal factor and an adverse action by defendant. *Powell v. Wyoming Cable Vision, Inc.*, 184 W.Va, 700, 704, 403 S.E.2d 717 (1991)(citations omitted).

> "Gone are the days (if, indeed, they ever existed) when an employer would admit to firing an employee because she is a woman, over forty years of age, disabled or a member of a certain race or religion. To allow those genuinely victimized by discrimination a fair opportunity to prevail, courts will presume that, once the plaintiff has shown the [*McDonnell Douglas*] elements, unlawful discrimination was the most likely reason for the adverse personnel action."

Woods v. Jefferds Corp., 2019 WL 1006397, at *7 n 8(W. Va. Feb. 28, 2019)(citing *Skaggs v. Elk Run Coal Co, Inc.,* 198 W.Va.51, 72 n.21, 479 S.E.2d 561 (1996)) and *Geraci v. Moody-Tottrup, Intern., Inc.*, 82 F.3d 578, 581 (3rd Cir. 1996)).

> Proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination. Therefore, if the plaintiff raised an inference of discrimination through his or her prima facie case and the fact-finder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.

Barefoot, Syl. Pt. 5; *Mayflower Vehicle Systems, Inc. v. Cheeks,* 218 W.Va. 703, 629 S.E.2d 762 (2006), Syl. Pt 5, in part (citing Syl. Pt. 5, *Skaggs v. Elk Run Coal Co.*).

A plaintiff need only prove that an illegal factor was a substantial or motivating factor in adverse decisions regarding them. They need not prove that the illegal factor was the only factor.

> Indeed, the plaintiff is not required to show that the defendant's proffered reasons were false or played no role in the termination, but only that they were not the only reasons and the prohibited factor was at least one of the "motivating" reasons. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775,... (1989) (plurality opinion) (where employer shows a legitimate motive, the plaintiff need not show the prohibited factor was the sole or principal reason or the "true reason").

Barefoot, 193 W.Va. at 487 n 18, 457 S.E.2d 152, modified on other grounds; *Dodrill v. Nationwide Mut. Ins. Co.,* 201 W.Va. 1, 491 S.E.2d 1 Syl Pt. 1(1996); *WV Institute of Technology v WVHRC & Zavarei,* 181 W.Va. 525, 530, 383 S.E. 2d 490 (1989), *Orr v Crowder,* 173 W.Va. 335, 344, 315 S.E.2d 593 (1984) (protected activity by plaintiff librarian was a substantial or motivating factor in adverse decision and need not be sole motivating factor), modified on other grounds, *Barefoot,* Syl Pt. 1; *Powell,* 184 W.Va. at 703, 403 S.E.2d 71.

Third, evidence does not get used up in one stage. It can be used as multiple points.

> "In making its determination on both intent and causation, the jury should take into account any inferences created by the plaintiff's membership in the protected class, his or her qualifications, the defendant's explanation, the believability of that explanation, and all other relevant evidence bearing on the issues."

Skaggs v. Elk Run Coal Co., Syl. Pt. 8 (in part):

Taylor and Turner showed that they sought accommodations – in this case – long-term apartments, as well as "privileges and services" (See A-669:14-24). See generally, *City of Ripley v. WVHRC,* 179 W.Va. 375, 369 S.E.2d 226 (1988)(complainant alleging unlawful discriminatory practices in employment and access to places of public accommodations under HRA bears burden of proving prima facie case of discrimination by showing membership in a protected group under statute, application and qualifications for opening, that he or she was rejected despite his or her qualifications and that, after rejection, employer continued to accept qualifications of similarly qualified persons). Here Plaintiffs met this burden. (A-510:21-512:17; 618:2-9). They also showed that for the time they did not get long-term accommodations – and related treatment, including but not limited to the phone call to their employer – was due to their status in a "protected class."

The Hotel's Numerous Deviations from Normal Practice Raise an Inference of Discrimination, Supporting a Jury Verdict

In *Fourco Glass v. State HRC,* 179 W.Va. 291, 367 S.E.2d 760 (1988)(*per curiam*), the black plaintiff was the only employee ever required to sign a statement waiving seniority rights

to recall in order to get a voluntary layoff. This evidence of disparate treatment and departure from normal business practice (along with other evidence, a racial reference by a decision-maker) led to the "inevitable conclusion that the [employer's] reasons for requiring [plaintiff] to waive his seniority rights were pretextual." (179 W.Va. at 294, 367 S.E.2d 760).

Thus the jury was entitled to rely upon the substantial evidence before it. See *Tudor v. Charleston Area Medical Center,* 203 W.Va. 111, 506 S.E.2d 554 n 9, 10 (1997)(inconsistency between high narrative ranking and lower numerical ranking creates inference of discrimination).

> [U]nder *Barefoot,* proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination. That is, if the plaintiff has raised an inference of discrimination through his prima facie case and the factfinder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder could justifiably conclude that the logical explanation for the action was the forbidden motive. A reasonable person could conclude that if the employer had a legitimate basis for taking the adverse action, then the employer would have presented it at trial, and the employer's failure to present a credible nondiscriminatory reason leaves a discriminatory reason as a logical inference to be drawn.

Skaggs v. Elk Run, 198 W.Va. at 79. 479 S.E.2d 561.

Federal precedent agrees. If the employer does not follow normal or typical practice, the jury may consider that as some evidence of illegal discrimination against plaintiff, *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997). "We have previously held that disturbing procedural irregularities surrounding an adverse employment action may demonstrate that an employer's proffered nondiscriminatory business reason is pretextual." *Timmerman v. U.S. Bank, N.A.,* 483 F.3d 1106, 1122 (10th Cir.2007).

"In order to establish pretext based on a procedural irregularity, a plaintiff must identify an applicable written or unwritten policy or procedure that the employer failed to follow....Here there is no dispute that Wal-Mart did not seek out Mr. Cooper's side of the story before Mr. Moore decided to terminate him." *Cooper v. Wal-Mart Stores, Inc.* 296 Fed.Appx. 686, 695,

2008 WL 4597226, *9 (10th Cir. 2008). Deviations from normal practice included requiring Taylor to provide, for copying, a photo ID of him earlier than was the Hotel policy. Adams demanded that he provide her with a photo ID for her to copy "the first day I came" (A-616:11-617:2). Adams said that the Hotel only required a photo ID later, when the renter signed a long-term lease (A-581:14-582:17).

The Hotel justified its treatment of Turner (and Taylor) on the basis of a nonexistent waiting list. Adams told Turner he was still on the list when he complained (A-618:2-22) and there would be a wait. (A-573:13-23). Yet Adams said that technically she had no waiting list (A-570:15-571:4).

The Hotel's "Collective" Animus Based Ill Treatment of Taylor and Turner Allowed the Jury to Infer Racial Discrimination

Turner testified, without objection, that when he confronted Adams about the disparaging things that Adams said about them, Adams did not deny the statements but instead collectively referred to Taylor and Turner by lumping them together as "you guys...you people, you're obnoxious," and "I want you all out of here." She then walked away from Turner (A-624:15-625:3).

Adams started asking Turner about "being a drug dealer, about why I got gold teeth...and said the last person that lived there was a dope head and gambler-holic" This, Turner felt, stereotyped him. (A-618:7-620:23) See *Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W. Va. 91, 103-04, 538 S.E.2d 389, 402 (2000)(suggesting that discrimination law seek to prevent defendants from acting on stereotypes) (cited in *Woods, supra*, at *5).

In McCamic's rebuttal testimony, reminiscent of Adams' reference to gambling problems, she explained "they were terrible people," that they had some kind of problems due to the casino, gambling, and that they were "scam artists." (A-692:1-24).

Defendants Propose That This Court Overly Narrow the Interpretation of Accommodations Beyond the Legislative Intent

Oddly similar to Manager Adams' fondness for "technically speaking," the Hotel relied upon technical defenses. One tactic involved claiming that the wrong Defendant had been sued, questioning about whether Adams used the precise term "McLure Management, LLC" (A-629:5), a defense abandoned at trial, but was nothing that would sway the jury into believing that no discrimination occurred. The resulting verdict might have been expected, had defendant's engaged in any pre-trial discovery.

Another strategy involved Hotel's incorrect, narrow, rigid interpretation of "accommodations, advantages, facilities, privileges or services" in *W.Va. Code 5-11-9.* It remains axiomatic that "The West Virginia Human Rights Act shall be liberally construed to accomplish its objectives and purpose." Syl. Pt. 1, *Paxton v. Crabtree,* 184 W.Va. 237, 242, 400 S.E.2d 245 (1990)(quoting *W.Va. Code, 5–11–15*). Yet the Hotel asks this Court to rewrite this section, make new law from the bench, to limit this provision to a virtually permanent withholding of something "tangible," whatever that means, despite the Act's expansive language, such as "directly or indirectly," "[r]efuse, withhold from, or deny" and "accommodations, advantages, facilities, privileges or services."

> Our view is rooted first in the language of the provision itself, which prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b). As we describe somewhat more fully below, a number of our sister circuits have located in that text some degree of post-acquisition protection. We agree with the Seventh Circuit, for example, that the FHA's use of the terms "privileges" and "conditions" refers not just to the sale or rental itself, but to certain benefits or protections flowing from and following the sale or rental. See Bloch v. Frischholz, 587 F.3d 771, 779–80 (7th Cir. 2009) (en banc). And we agree with the analysis of the Ninth Circuit, for example, that "[t]he inclusion of the word 'privileges' implicates continuing rights," indicating that the "natural reading" of the statute "encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired

> possession of the dwelling." Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009). In other words, we rely not only on the Supreme Court's directive that we read the statute broadly, but also and more fundamentally on the statutory text itself.

Francis v. Kings Park Manor, Inc., 917 F.3d 109, 117 (2d Cir. 2019).

The declaration of policy at *W.Va.Code § 5–11–2 (1994)* explains the objectives and purposes of the HRA:

> It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status.
>
> The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, handicap, or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

Holstein v. Norandex, Inc., 194 W.Va. 727 461 S.E.2d 473 n 3 (1995) See generally, *Skaggs,* 198 W.Va. at 77, 479 S.E.2d 561("accommodation," when applied in a different discrimination context, is a flexible concept).

The Hotel's narrowing of the phrase would require a permanent deprivation, which would insulate a place like the Hotel, whose offerings are by definition temporary. It could never be guilty of discrimination in public accommodations, no matter what it did, so long as it argued that accommodations were just "delayed" as a result of some non-existent "waiting list."

Denial of services violates the WVHRA. See *Title II of the Civil Rights Act of 1964, 42 U.S.C 2000a et seq,*, which forbids discrimination in public accommodations. Defendants who refused to provide blacks with the same services as provided to white members of the general public violated Title II. 4 *Am Jur 2d*, Civil Rights, § 223 at 428 (cits. omitted).

This narrowing not only failed with the jury. It is wrong as a matter of law and fact.

K-Mart Corp. v. W. Virginia Human Rights Comm'n is Not Applicable

Defendants rely on *K-Mart Corp. v. WVHRC,* 181 W.Va. 473, 383 S.E.2d 277 (1989). The Hotel attempts to equate the complainants' proof in that case – their "belief" only that they were treated "rudely" by K-Mart by being followed around the store. They adduced no comparative evidence of different treatment of other nationalities, as occurred in the case herein. These Plaintiffs adduced evidence of not just "belief," but actual proof of discriminatory treatment. Treatment of Taylor (and Turner, to whom Adams linked Taylor and whose race connected him) differed from white co-worker Gusik, who was at times late on his rent. (A-602:1-8). Gusik similarly was staying at the hotel in October 2011, also worked for Price Gregory, as a union member like Respondents, and was a member of the same union (A-569:6-570:14) Despite Gusik's lateness, Adams told Melissa when she called to complain about Taylor [and as the jury could reasonably infer, Turner as well], that "I had never had this issue prior" (A-682:2-3), when she had in fact had the same issue with Gusik, a comparator to Taylor and Turner.

As the similarity between a discrimination plaintiff and their comparator increases, the probative weight of the different treatment also increases: "In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Cooper v. S. Co.,* 260 F. Supp. 2d 1278, 1289 (N.D. Ga. 2003), aff'd, 390 F.3d 695 (11th Cir. 2004)(cits omitted). See *Jackson v. VHS Detroit Receiving Hosp., Inc.,* 814 F.3d 769 (6th Cir. 2016)(an issue crucial to overturning summary judgment was whether the facts of comparators "was sufficiently similar to her comparators' such that [the

employer's] differential discipline creates an inference of discriminatory motive.... A plaintiff 'is not required to show that his proposed comparator's actions were identical to his own.'" *Id.* at 777).

Here also, additional later-arriving Caucasian Price Gregory employees were provided long-term accommodations immediately, fulfilling *Knotts,* 237 W.Va. at 180, 786 S.E.2d 188 (reversing and remanding because trial court refused to consider evidence of "comparison employees") and *City of Ripley v. WVHRC,* (complainant alleging unlawful discriminatory practices in employment and access to places of public accommodations under Human Rights Act hears burden of showing that complainant belongs to protected group under statute, that he or she applied and was qualified for opening, that he or she was rejected despite his or her qualifications and that, after rejection, employer continued to accept qualifications of similarly qualified persons).

In housing discrimination cases, comparators are often used and called testers. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 374, 102 S.Ct. 1114 (1982)(tester had standing due to allegation of denial of their right to receive truthful information about availability of housing).

Beyond Gusik, Turner said that he knew the last names of the comparators, but the Hotel was not interested (A-630:4-631:1), making misleading statements that Turner was unable to provide "the name of any Caucasian co-worker who moved into a long-term apartment before him." (App. Brf., p. 12) See *Feacher v. Intercontinental Hotels Group,* 563 F. Supp. 2d 389, 403 (N.D.N.Y. 2008)(rejecting argument that black patrons could not provide the names of the comparator white patrons).

The Hotel extrapolates another new rule (heretofore unheard of "actual and tangible things" rule (A-408, p. 6)) to argue that there can never be a public accommodation case of

unlawful discrimination based on different treatment, despite contacting a guest's employer to complain about their use of the public accommodations facilities. Specifically, the Hotel claims that the "*K-Mart Corporation* decision involved a fact pattern rather similar to that in the present case...." (A-408).

In *K-Mart* a family was followed around a discount store. In contrast to this case, when someone raised it to the father in *K-Mart,* he discounted it and indicated it did not bother him: "Don't pay [them] any attention. Who cares?" 184 W.Va. at 475, 383 S.3.2d 277.

Contrary to the discounting by a plaintiff in *K-Mart*, here the jury fully and justifiably credited the testimony of Taylor and Turner about the emotional, humiliating, and embarrassing impact on them, as Mr. Taylor testified:

> "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."

(A-549:10-17).

As he indicated, he flew from Los Angeles because he felt strongly about how the Hotel had treated him and Turner (A-549:1-17).

Turner testified that the telephone call caused him significant emotional distress.

> I mean because I work hard – we work hard to be in the position we're in. You know it took years for us to get to this position, you know, on our job, you know, and then for someone to call your job to destroy your livelihood, which is me taking care of my family, my kids, that hurts, that hurts me. I was embarrassed, you know, I was ashamed. I didn't think that it would get to this point.

(A-625:13-20).

Further distinguishing this case from *K-Mart*, "[t]he only problem that the complainant had with *K-Mart* is that they were observed by *K-Mart* personnel while in the store...this is a

risk inherent in shopping in any store at any time." 181 W.Va. at 476, 383 S.E.2d 277. Unlike that passivity, here there was active intervention – for example, the call to "Melissa." (A-600:24-601:21).

In *K-Mart,* this Court found it "[m]ost influential" that on about **fifty prior occasions** (once a week for a year) the Syrian wife shopped K-Mart in her native, loose-fitting dress, with her dark-skinned husband. 181 W.Va. at 475, 383 S.E.2d 277; also 181 W.Va. at 475, 383 S.E.2d 277. The family had not only endured no ill treatment, they were given a courtesy card. 181 WV at 478, 383 S.E.2d 277. "If discrimination had been a motive, surely K-Mart would have denied them the card in order to discourage their shopping." *Id.* This distinguishing factor from *K-Mart* was similarly noted in *Charleston Town Ctr. Co., LP v. WVHRC,* 224 W.Va. 747, 688 S.E.2d 915, 924 (W. Va. 2009).

In *K-Mart*, the store had received warnings about a group of shoplifters, 181 WV at 474, providing some basis for the increased surveillance, providing the store with an articulated non-discriminatory reason preventing the Syrian family from showing "pretext." Here the only rational for different treatment was apparent prejudice of Adams and "the owner." (Adams: A-624:15-625:3; owner: A-596:24-598:9).

There this Court focused as well on the fact the family was not denied the ability to buy anything, not even temporarily, 181 W.Va. at 478, 383 S.E.2d 277, distinguishing an out-of-jurisdiction case. Here a more fundamental denial occurred: postponing a proper place where to lay their heads, tired after working in the oil and gas fields, a desperation familiar to anyone who needs, for example, a place to retire after a long drive away from home.

There, and *Charleston Town Center, 224* W.Va., 755-6, 688 S.E.2d at 923-4, the number of individuals was larger, large enough in *Charleston* to constitute an impediment to traffic.

K-Mart stands for the proposition that a plaintiff needs actual proof of discriminatory conduct "to make out a prima facie case." "Belief" of discriminatory intent, standing alone, is insufficient to meet that burden. This case far exceeds subjective belief. Actual disparate treatment is supported by substantial evidence.

That there was specific evidence of withholding of "accommodations," at least for a time, however, does not mean to suggest that Taylor or Turner agree with Hotel's narrow interpretation of "accommodation, advantages, facilities, privileges or services." As the few reported cases on "public accommodation," the *sine qua non* of such cases are not, as Hotel advances, "tangible things."

Thus in *Feacher,* 563 F. Supp. 2d at 403, African-American customers, attending the hotel on a ski trip, were denied entrance to the hotel's restaurant while two Caucasian couples were seated in the restaurant.

> "Together with the statement of the restaurant employee that "We're closed for you" in response to Anthony Feacher's inquiry of why the two Caucasian couples were allowed in, a reasonable fact finder could conclude that the denial of service was motivated by considerations of Plaintiffs' race.

See *Francis v. Kings Park,* 917 F.3d at 117 (holding that the federal housing discrimination act reaches discrimination apart from the precise acquisition of housing).

Just as the federal act reaches services or facilities, our state's act, by inclusion of advantages, facilities, privileges or services" reaches a defendant's action in delaying possession of a unit – and other acts of discrimination.

Thus the *per curiam* case of *Charleston Town Center Co.,* is a "lack of evidence" case and not a case suggesting that the WVHRA be read narrowly. There this Court relied on the absence of evidence that the shopping center code of conduct, prohibiting loud and disruptive behavior, was applied more stringently to African-Americans. (224 W.Va. at 753, 688 S.E.2d at

921) The Court's decision was not framed as a failure to provide "accommodation. Those plaintiffs were already availing themselves of the public accommodation, but were to leave upon violation of the code of conduct. The case was cast as whether defendant, a "public accommodation" engaged in any "unlawful discriminatory practice" under the Act. (*W.Va. Code 5-11-9*).

Similarly, in *Shepherdstown VFD,* this Court upheld the Commission's ruling of "public accommodation" discrimination against the Fire Department, because they were "guilty of unlawful discriminatory practices under the Human Rights Act in excluding women from membership." Again, this Court focused not on what constitutes an actual "accommodation, advantage, facility, privilege or services," but whether or not the Fire Department engaged in unlawful discriminatory practices.

The radical rule advanced by the Hotel would mean that a hotel or motel in West Virginia would be insulated from liability if it provided any accommodations to members of a protected class, not matter how inferior to other accommodations, or no matter how long delayed.

Further, Adams' treatment of Taylor worsened from the call, prior to arriving, which defense counsel admitted (A-721:11-12) to when she could see that he was black. Denying summary judgment, the trial court pointed to Hotel's change in attitude. (A-238, 4a).

Evidence in the case at bar not only far exceeded "rudeness" by Hotel or as in *K-Mart*, a "mere belief" of rudeness.

Evidence here involved myriad evidence from which a jury could reasonably find discriminatory treatment based on Plaintiffs' race. (A-601:22-602:23, regarding the call to employer contrary to treatment of white employee).

Other evidence from which a reasonably jury could infer racial animus included that the McLure Owner (Fran Garey, from Houston, A-182:51:11-19) said "he has got to go," after 3 days were up (Adams at trial said that she had meant to say instead that it was after 10 days (A-599:21-600:23). What Turner said about his tenuous position at the time resonated with the jury: "I had nowhere else to go." (A-615:4-5).

Defendants' reliance upon, and interpretation of law from *K-Mart* provides an extrapolation too far. *K-Mart* stands for the proposition that a plaintiff needs proof of discriminatory conduct "to make out a prima facie case." Taylor and Turner presented just such proof.

RESPONSE TO ASSIGNMENT OF ERROR II: The Circuit Court Committed No Error Denying the Motion of Appellant McLure's Motion for A New Trial Based Upon Taylor and Turner Being Permitting the Plaintiff to Call Jay T. McCamic in Rebuttal

Standard of Review

> Whether a plaintiff will be allowed to introduce further evidence after the evidence in behalf of a defendant is concluded is ordinarily within the discretion of the trial court, and the exercise of such discretion will rarely constitute ground for reversal. *Farley v. Farley*, 136 W.Va. 598, 68 S.E.2d 353; *Weaver v. Wheeling Traction Company,* 91 W.Va. 528, 114 S.E. 131. The testimony of Young, though offered in rebuttal, was in large measure merely cumulative of the testimony offered by the plaintiffs in chief, and its admissibility is within the sound discretion of the trial court.

Edmiston v. Wilson, 146 W.Va. 511, 531. 120 S.E.2d 491 (1961)(approving trial court's decision to permit an attorney, who had actively participated in the trial, to be called as a rebuttal witness).

Applying that Standard Of Review, the Trial Court Committed No Reversible Error in Permitting McCamic to Testify on Rebuttal

The Circuit Court committed no error in permitting the Plaintiff to call an attorney, who had been involved in the case and remained as co-counsel but not actively participating in the

trial, as a rebuttal witness. By omission, the Hotel admits that lack of active trial participation (See App. Brf., p.6).

The Court admonished Defendants that they would have been correct in their argument made at trial (the same argument here), that Plaintiffs should have called McCamic in their case-in-chief, but for Defendant's own "recalling" Adams to the stand during the presentation of its case to "clarify" her testimony that she never said anything derogatory about the plaintiffs, ever.. (A-677:12-679:1). That made it proper for Plaintiffs to ask her "specifically" if she had ever said derogatory things about them to McCamic. This she denied (A-684:2-8), and made it reasonable for the Court to permit Taylor and Turner to call McCamic on rebuttal. (A-685:22-686:9). She had, as Plaintiffs' counsel argued to the Court, and contrary to the Defendants' representation, stated in her deposition that "I don't remember all of that" conversation with McCamic. (A-212:43:3). After being recalled and her broad denial of any derogatory comments, the Court's permitting McCamic to testify did not constitute error.

Post-trial the Hotel relied heavily upon *Edmiston,* 146 W.Va at 531, 120 S.E.2d 491 (1961)(e.g., A-455) In contrast the Hotel now states that the case at bar "may be one of first impression" (Pet. Brf., p. 9).

The Hotel apparently realizes that *Edmiston* supports the trial court. It held that it was not error to allow the testimony, and was based on his sound discretion, and that "such discretion will rarely constitute ground for reversal" (146 W.Va. 511, 532, 120 S.E.2d 491)(citing *Farley v. Farley,* and other cases to the affect that "it does not appear that the trial court abused its discretion in admitting and considering the testimony given by Young." 146 W.Va at. 533, 120 S.E2d 491).

Taylor and Turner do not quibble with the syllabus point of *Edmiston* cited by Defendant that "any practice which enables an attorney, **while engaged in the prosecution or the defense of litigation,** to testify as a witness in the cause of such ligation is emphatically disapproved by this court." Attorney McCamic, at the time of his testimony, was not an attorney as contemplated by the *Edmiston* court who was "engaged in the prosecution."

McCamic had not been involved in the active prosecution of the case for some time. Edmiston's counsel actually handled the trial. McCamic did not, and had not even attended any of the depositions taken by plaintiffs (e.g., A-202). What's more, *Edmiston* was careful to describe that, while a testifying attorney may be risking possible violation of ethical rules, without first withdrawing from the case, if called as a witness, such a witness is bound to testify and it would be error to exclude his testimony. (146 W.Va. at 536, 105 S.E.2d 491).

As the *Edmiston* court put it:

> "In some cases it may be unseembly [sic] especially if counsel is in a position to comment on his own testimony, and the practice therefor, may very properly be discouraged; but the are cases, also, in which it may quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong."

146 W.Va. at 502, 120 S.E.2d 491.

McCamic was NOT in position to comment on his own testimony. He performed no role in the trial, and was not even present at trial until called as a rebuttal witness.(A:703-719; 725-727). He had no participation in "commenting" on any of the evidence to the jury.

In *Edmiston*, this Court suggested that even "ethically" challenged testimony may be proper, material evidence in the case. Even on the facts of *Edmiston* that "it can not be said that his [testifying counsel's] conduct was professionally unethical." (146 W.Va. at 503, 120 S.E.2d

491). There, as here, the attorney did not realize that his testimony would be needed until after the opposing party "had concluded his testimony." *Id.*

This case presents a less close issue than *Edmiston*. McCamic's undisputed testimony was, "I haven't had anything to do with the case for a long time so I don't know what Mr. Cassidy and Miss Albert [trial counsel for plaintiffs] have put forward." (A-693:21-23).

Less factually congruent is *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (1991). Syl. Pt. 3 sets out material considerations relative to an attorney testifying in his/her own case. "'When counsel for a party to a cause finds that he is required to be a material witness for his client he should immediately so advise his client and retire as counsel in the case." *Garlow* (citing Syl. Pt. 2, *Smithson v. USF & G Co.,* 186 W.Va. 195, 411 S.E.2d 850 (1991) and Syl. Pt. 8, *Edmiston*).

In the case at bar, Attorney McCamic's testimony was material and important to a fair portrayal of the facts in issue, and clearly NOT unethical.

The pertinent rule appears at Rule 3.7 of the *West Virginia Rules of Professional Conduct,* which provides in pertinent part as follows:

> **(a)** A lawyer shall not act **as advocate at a trial** in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> **(b)** A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
>
> **COMMENT**
>
> **[1] Combining the roles of advocate and witness can prejudice** the tribunal and the opposing party and can involve a conflict of interest between the lawyer and client.

Conceding its importance, the Hotel cited this language that "a lawyer shall not act as advocate at a trial." R. 3.7 RPC.

The Hotel claims that McCamic testified that Adams "may have been under the mistaken belief that he was an 'ally.'" (App. Brf., p. 20). In fact, McCamic testified that he called her to inform her of two things, the first "that I was going to represent Mr. Taylor and Mr. Turner," but when he made sure that she knew another complaint was going to be filed "she was then even more talkative about them...that they were terrible people and were scam artists..." (A-691:10-692:9). She was hoping, he testified, "to make me an ally." (A-696:13-15).

Moreover, as was clear from his absence from the trial of this matter, McCamic, at the time of his being called as a witness on rebuttal, had not served as an "advocate" under *R. 6(a)).* See McCamic's testimony. (A-693:21-23), *supra.*

Defense counsel sought to get the benefit from her testimony in Hotel's case-in-chief, recalling Defendant Adams to the stand to re-iterate that she testified that she never said anything negative about Taylor or Turner. (A-677:24-679:11). This strategy provided Taylor and Turner with the right to cross-examine her about comments to McCamic, (A-684:2-8). This the trial court found, in the excise of its wide discretion, allowed for proper rebuttal testimony.

This represents a situation where a party cannot deprive his or her opponent of the other side of the coin, the other edge of the sword that cuts both ways. Defendant sought the "benefit" of testimony that could not be challenged by Plaintiffs (A-685:15-686:9). See *McKenzie v. Carroll Intern. Corp.,* 216 W.Va. 686, 693, 610 S.E.2d 341, 348 (2004)(McKenzie sought to leave the door open for him to selectively inform the jury about matters contained in the Commission's records, while simultaneously preventing the jury from learning of matters that Carroll felt were relevant). See also, *In re Burks,* 206 W.Va. 429, 432 n. 1, 525 S.E.2d 310, 313 (1999) ("'[S]auce for the goose' is also 'sauce for the gander.'"); *Graham v. Wallace,* 208 W.Va.

139, 143, 538 S.E.2d 730, 734 (2000)(*per curiam*)(trial judge in malpractice case erred by excluding two rebuttal witnesses from the doctor's own office, requiring vacating of verdict for former patient because "fairness to Dr. Wallace required that he be able to refute the suggestion of document-related misconduct with witnesses who could testify from their direct knowledge.").

The Hotel made unsupported assertions in post-trial briefs that, "there can be no question that the size of the verdict was, in part, caused by the allowance of Attorney McCamic to testify and undermine the credibility of Defendant Adams." (A-413, 454). Instead, contrary to Taylor and Turner, Adams lowered her credibility by her own conduct at trial. Justice Cleckley specifically referred to "believability of [defendant's] explanation" in *Skaggs*, Syl Pt. 8, describing situations where a jury verdict is fully justified. See *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 259 (4th Cir. 2001)("there is ample evidence for a factfinder to conclude that the motel's explanation is false")(transient interracial group survived summary judgment, reversing trial court, in claim for denial of public accommodations).

As indicated *supra,* the Court had to admonish Cindy Kay Adams on multiple occasions for inappropriate conduct, both while listening to the evidence, and while testifying herself. The Court referred to Adams:

> "mak[ing] noises, faces... I don't need gyrations, I don't need gestures, I don't need noises. So far it's bordered on in my mind interfering with the process...but because of that outburst and laughter you just made, it just reminded me that I need to caution you. But if it continues I will have you removed, even though you are a party in this case."

(A-540:1-23).

The Court tried to get her to listen to the entire question rather than interrupting it. (A-571:7-18, 572:17-573:11, 578:21-581:8, 588:21-589:1). The trial judge asked her to respond to

the question asked. (A-578:21-579:9, 580:19-581:8). The Court later said with exasperation to Plaintiff's counsel, "I don't know how many more times I can tell her." (A-600:8-9).

Attorney McCamic's testimony was clearly NOT prejudicial, because it did not even go to what Adams said in her discussion with Plaintiffs' employer, or any other of the actual instances of discrimination alleged by Plaintiffs, but only as to her credibility. But as the Court now knows from the record, her "credibility" was on shaky ground long before that.

RESPONSE TO ASSIGNMENT OF ERROR III: The Jury's Verdict Was Not Excessive

Standard of Review

> In reviewing challenges to damages awards generally, a deferential standard is employed: "in the absence of any specific rules for measuring damages, the amount to be awarded rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict...." 22 Am.Jur.2d *Damages* § 1021, at 1067 (1988) (footnotes omitted). This judicial hesitance stems from the "strong presumption of correctness assigned to a jury verdict assessing damages." *Reel v. Ramirez,* 243 Va. 463, 466, 416 S.E.2d 226, 228 (1992). Accordingly,
>
> > [a] jury verdict ... may not be set aside as excessive by the trial court merely because the award of damages is greater than the trial judge would have made if he had been charged with the responsibility of determining the proper amount of the award. This Court cannot set aside a verdict as excessive ... merely because a majority or all members of the Court would have made an award of a lesser amount if initially charged with the responsibility of determining the proper amount of the award.

Sargent v. Malcomb, 150 W.Va. 393, 401, 146 S.E.2d 561, 566 (1966). *See also Keiffer v. Queen,* 155 W.Va. 868, 873, 189 S.E.2d 842, 845 (1972) ("The courts usually state that though they might have awarded a greater or lesser amount than that contained in the jury verdict, they will not substitute their views for that of the jury."); *Sargent*...150 W.Va. at 396, 146 S.E.2d 561.

Kessel v. Leavitt, 204 W.Va. 95, 181, 511 S.E.2d 720 (1998):

> Moreover,
>
> a mere difference of opinion between the court and the trial jury concerning the proper amount of recovery will not justify either the trial court or this Court in setting aside the verdict on the ground of inadequacy or excessiveness." (citation omitted)). Nevertheless, " '[a] verdict of a jury will be set aside where the amount

> thereof is such that, when considered in the light of the proof, **it is clearly shown that the jury was misled by a mistaken view of the case.**' Syllabus, Point 3, *Raines v. Faulkner,* 131 W.Va. 10 [, 48 S.E.2d 393 (1947)]." Syl. pt. 2, *Keiffer v. Queen,* 155 W.Va. 868, 189 S.E.2d 842. Furthermore, " '[c]ourts [may] set aside jury verdicts as excessive [if] they are **monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.'**

Id.

Considering the Standard of Review, the Trial Court Committed No Reversible Error in Permitting the Jury Verdict to Stand

The Hotel argues that the jury's verdict "stands as simply outrageous" This unsubstantiated opinion of Defendants reflects only the same arguments made in Motion for Judgment as a Matter of Law—that there was "no evidence of discriminatory treatment," and consequently, that the "jury based its verdict on its own distaste as to how Ms. Adams treated, interacted with, or allegedly thought about the Respondents, rather than any acts of actual discrimination." (App. Brf., p. 23). See *State v. Guthrie,* 194 W.Va. 657, 670 461 S.E.2d 163 (1995)("our review is conducted from a cold appellate transcript and record. For that reason, we must assume that the jury credited all witnesses whose testimony supports the verdict.")

In so arguing, the Hotel fails to show that the jury "was misled by a mistaken view of the case," *Kessel,* 204 W.Va. at 181, 511 S.E.2d 720.

Since the law furnishes no measure for damages for unliquidated damages akin to the damages suffered by plaintiffs herein, the decision of the jury is generally conclusive. *Poe v. Pittman,* 150 W.Va. 179, 144 S.E.2d 671 (1965). "It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses is conflicting." 150 W.Wa. at 190, 144 S.E.2d at 679 (1965)(holding modified by *Moran v. Atha Trucking, Inc.,* 208 W.Va. 379, 540 S.E.2d 903 (1997)). Compensation for pain and suffering is indefinite and unliquidated, and there is no rule or measure upon which it can be based. Syl. Pt.

2, in part *Wade v. Chengappa,* 207 W.Va. 532 S.E.2d 37, 38 (1999)(*per curiam*)(upholding verdict of about $24,000 in medical malpractice actin against argument that it was insufficient). Accord: *Marsch v. Am. Elec. Power Co.,* 207 W.Va.174, 530 S.E.2d 173 (1999)(*per curiam*)(awarding no damages for past, present, or future pain and suffering, loss of enjoyment of life, loss of ability to perform household services, and loss of consortium). The trial court, which observed testimony and argument, wrote, "This court has no reason to believe that the jury did anything other than listen to the evidence and calculate an award." (A-17).

Findings of "considerable emotional distress and humiliation" are not unusual in racial housing discrimination cases. E.g., *Phiffer v. Proud Parrot Motor Hotel, Inc.,* 648 F.2d 548, 552 (9th Cir. 1980). The trial court here noted that, with the description of Taylor and Turner as having financial problems, "then from there, embarrassment at a minimum occurred when confronted by PG [their employer] about the conversation." (A-675:17-19).

The jury inferred that what Adams told Melissa about Taylor and Turner was disparaging. Turner testified, again without objection, that he was greatly embarrassed by the fact that she had called his employer: "to destroy his livelihood" (A-625:11-626:7). As noted, Taylor testified without objection that his failure to be called-back for further work with Price Gregory was a result of the phone call, and trying to get Melissa to testify about it.

In *Harless v. First Nat. Bank in Fairmont,* 169 W.Va. 673, 690, 289 S.E.2d 692, 702 (1982), Justice Miller cited *Toler v. Cassinelli,* 129 W.Va. 591, 598, 41 S.E. 672 (1946), "where we recognized that a tenant who had been wrongfully locked out of her apartment could recover damages for emotional distress resulting from humiliation and embarrassment arising from the incident:" *Harless,* 169 W.Va.at 690, 289 S.E.2d 692 (citing 129 W.Va. at 598, 41 S.E. 672).

It is not unheard-of for a jury to award Plaintiffs $475,000.00 each on their race discrimination claims just because there was no ascertainable "economic" loss, given the wrongful conduct, substantial inconveniences and humiliation of hard-working plaintiffs in the context of also impairing their employment and professional reputation.

> This Court has held that damages for emotional distress in cases of this type "may be inferred from the circumstances as well as proved by the testimony." *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir.1977). *See Seaton v. Sky Realty Co., Inc.,* 491 F.2d 634, 636 (7th Cir.1974) ("Humiliation can be inferred from the circumstances as well as established by the testimony"). Defendant stresses that plaintiff's claims are based on mental injuries only. There was no evidence of pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms...That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. The plaintiff need not prove a specific loss to recover general, compensatory damages, as opposed to actual or special damages.

Marable v. Walker, 704 F.2d 1219, 1220–21 (11th Cir. 1983)(housing discrimination case).

This becomes even more clearly a jury issue in view of how bad the Hotel's witness performed. She repeatedly answered questions other than those asked. Asked when she talked to Johnson about complaints from Taylor and Turner, Adams answered instead, "we talked all the time." (A-588:6-13). The Court was required, additional to telling her not to make faces or noises, to caution her to answer the question (A-578:21-581:8,588:21-589:1) She grudgingly admitted to inconsistencies in her answers, "technically" (A-592:17-21), a word she favored (A-570:17-24, 571:4, 576:16, 577:17-18) but the jury apparently did not. Hotel at points generally admits this, e.g. "[t]he jury clearly did not appreciate and/or believe the bulk of the testimony of Petitioner Adams..." (App. Brf. p. 23).

As indicated *supra*, she contradicted the testimony of her supervisor (A-680:20-681:5) along with her own prior testimony. A-(584:21-587:12) See *Hugee v. Kimso Apartments, LLC*, 852 F. Supp. 2d 281, 306 (E.D.N.Y. 2012)("while this award is large for a litigation that

seemingly barely got off the ground," its size was "directly traceable" to the distasteful conduct of the landlord). The analogous federal statute, Title II if the 1964 CRA's purpose is to "eliminate the daily affront and humiliation involved in discriminatory denial of access to facilities ostensibly open to the general public. 4 *Am Jur,* Civil Rights, § 223 at 428 (cits omitted).

Juries today appreciate the value of a job, the value of a person's occupation, or profession, and the pride they take in being hard-working Americans. See *Green v Rancho Santa Margarita Mort Co.*, 33 Cal Rptr 706, 714 (App. 1994). Turner testified that he "was blessed enough to get a job to work for the oil field." (A-613:2-3). He had started his own business to subsidize his income (A-613:11-13) He had traveled for the Price Gregory job to the Northern Panhandle from his local union in New Orleans (A-613:22,24). He and Taylor were "far, far from home" (A-621:10). He still lives in Mississippi but has been working in Elyria, Ohio 3 hours and 200 miles driving away, for 3 months (A-626). See *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 253-4, 85 SCt. 3487 (1964)("Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances"). Juries can and did here fairly and adequately measure compensation for such unliquidated damages as inconvenience, humiliation and impairment to reputation when supported by the evidence. Turner identified several children, some still at home. "I'm always away from my family to make a living." (A-626:6-627:13).

Nor has the Hotel even attempted to show that the verdict was "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." *Id.* The assumption is to the contrary. Some supporters of a federal housing law feared anti-black prejudice on juries "might reduce the effectiveness of

civil rights damages actions." *Curtis v. Loether,* 415 U.S. 189, 191–92 (1974). See generally, Zuckerman et al., *Fair Housing Litigation Handbook* (1983), noting that such statutes sound in tort by creating a new legal duty (citing *Curtis,* 415 U.S. at 196).

The jury was likely swayed instead by the multiple discriminatory actions by Defendants, *supra* at 5-7; by the unbelievable demeanor of the decision-maker, Adams, *supra* at 31-32; and by the contrasting heartfelt testimony of Taylor and Turner as to the damages they suffered (*supra* at 22-23, citing A-625:13-20). Defendants cite no improper argument. Taylor and Turner expressly disclaimed accusing "anyone of being a racist or anything like that." (A-718:7-8). No argument inflamed any racial passion, partiality, prejudice or corruption. (A-703:14-719:3, 725:19-7:27:3). Nothing appears in the record to support any of the grounds generally found to permit courts to set aside jury verdict as excessive. Cf. *Addair v. Majestic Petroleum Co.,* 160 W.Va. 105 232 S.E.2d 821 (1977). ("[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 (cited by Hotel (A-456 and App. Brf, p. 23).

The Hotel declines to cite to this Court any similar cases saying that a similar amount as excessive. Having failed to do so, for it to try that in a reply would be improper. *Cavallo v. Star Enter.,* 100 F.3d 1150 (4th Cir. 1996)(("an issue first argued in a reply brief is not properly before a court of appeals," *id* at 1152 n 2).

Other cases reflected verdicts of similar proportions. E.g., *Ramirez v. New York City Off–Track Betting Corp.,* 112 F.3d 38 (2nd Cir.1997) (award of $500,000 for emotional pain in employment discrimination case NOT unconscionable); *New York City Transit Auth. v. State Div. of Human Rights,* 181 A.D.2d 891, 185 A.D.2d 889, 581 N.Y.S.2d 426, appeal denied, 607

N.E.2d 818 (N.Y.A.D. Nov.24, 1992) (upholding $450,000 compensatory damages award for sex discrimination).

> As the parties and the Court recognized and even cautioned the jury against, this was a "sensitive case" because it involved issues of alleged race discrimination. "'In enacting the [Fair Housing Act], Congress emphasized the harmful effects of housing discrimination. Like its federal counterpart, our Act seeks to encourage fair and equal housing opportunities for all peoples. We expounded in *West Virginia Human Rights Commission v. Garretson,* 196 W.Va. 118, 468 S.E.2d 733 (1996), that
>
> The West Virginia Fair Housing Act is worded as a broad legislative mandate to eliminate discrimination against, and equalize housing opportunities for, all races. The Act is a clear pronouncement of our State's commitment to end the exclusion of African–Americans from the American mainstream. Thus, the right to be free from housing discrimination is essential to the goal of an harmonious and unbiased society.

WVHRC v. Wilson Estates, Inc., 202 W.Va. 152, 159, 503 S.E.2d 6 (1998).

"Racial discrimination in housing…is not conducive to good health, educational advancement, cultural development, or to improvement of general standards of living for isolated minorities (statement of Senator Tydings of Maryland)." Wilson Sonsini Goodrich, Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias,* 11 Hastings Race & Poverty L.J. 241, 245–46 (2014)(fn omitted).

The highest court of this land has publically recognized the potential for emotional, as opposed to economic, harm to African-Americans in the context of discrimination (there in public education), at least since *Brown v. Board of Education*, 347 U.S. 483 (1954).

Since then, we have thankfully not retreated into partisan bickering about whether or not racial discrimination in any form causes harm to its victims. We know that it does, and under our system of justice, it is the properly instructed jury that evaluates this harm in any meritorious case of proven racial discrimination.

Both plaintiffs effectively testified about the humiliation, embarrassment, and inconvenient their treatment by the Hotel caused them. Taylor testified without objection how it actually affected his reputation with his "boss" at Price Gregory, and how the whole incident affected his ability to return to work for Price Gregory after his current project ended.

Absent any evidence that the jury was misled by a mistaken view of the case, or manifestly demonstrated passion, partiality, prejudice or corruption, or was in any way inflamed by counsel for plaintiffs in his arguments to the jury, it is hard to find any non-discriminatory basis for the Hotel's argument that the verdict is excessive.

Rather, it was the considered judgment of an Ohio County Jury that had been undisputedly properly instructed on the elements of damages sustained by Plaintiffs.

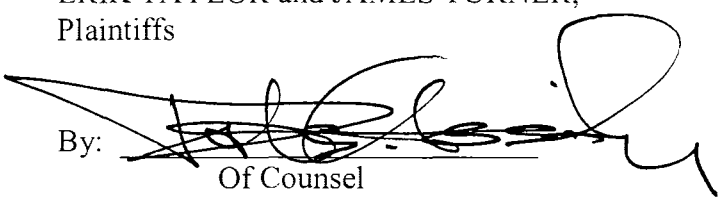
CONCLUSION

Taylor and Turner ask that this Court affirm the jury verdict. When the practice of law seems hopelessly infected by the divisiveness of our politics, one may still experience the inherent good-will of folks on all sides of the political spectrum when it comes to their concern for the enforcement of civil rights.

In addition, they ask that the Court award them their attorneys' fees for defending this appeal. See e.g., *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S.Ct. 964 (1968)(prevailing plaintiffs were entitled, absent special circumstances, to reasonable counsel fees as part of costs in case of racial discrimination at sandwich shop, for plaintiff functioned as "private attorney general"; test was not the subjective good faith of defendants).

Respectfully submitted,

ERIK TAYLOR and JAMES TURNER,
Plaintiffs



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