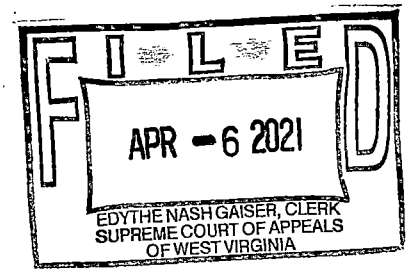


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Case No. 21-0007
(Circuit Case No. 18-C-327)



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONTEMPORARY GALLERIES OF
WEST VIRGINIA, INC.,

Petitioner,

v.

RIGGS COMMERCIAL REALTY, LLC,

Respondent.

FILE COPY

PETITIONER'S BRIEF

On Appeal from
December 8, 2020 Order of Judgment
Denying New Trial in Case No. 18-C-327
Circuit Court of Kanawha County
Before the Hon. Carrie Webster

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

ASSIGNMENTS OF ERROR.....4

STATEMENT OF THE CASE.....6

Procedural History.....6

Statement of Facts.....8

SUMMARY OF ARGUMENT.....13

STATEMENT REGARDING ORAL ARGUMENT.....15

ARGUMENT.....16

Standard of Review.....16

A. Rule 50 Motions for Directed Verdict Are Reviewed De Novo As Questions of Law.....16

B. Motion’s to Reopen Plaintiff’s Case Are Reviewed Under Abuse of Discretion.....16

Points of Fact and Law

A. The Circuit Court’s Denial of Petitioner’s Motion for Directed Verdict After Respondent Rested Was Error As A Matter of Law.....17

B. The Circuit Court’s Denial of Petitioner’s Renewed Motion for Directed Verdict, and Its Motion for New Trial, based on W. Va. Code §30-40-25, Was Erroneous As A Matter of Law.....18

C. The Reopening of Respondent’s Case Was An Abuse of Discretion20

CONCLUSION.....24

CERTIFICATE OF SERVICE.....26

TABLE OF AUTHORITIES

Jane Doe c. Logan Cnty Bd. Of Educ. 829 S.E.2d 45, n.3, (2019).....16

Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., Syl. Pt. 5, 165 S.E.2d 113, 152 W.Va. 549 (W. Va. 1968).....16

Roberts v. Gale , 149 W.Va. 166, 139 S.E.2d 272 (1964).....17

State v. Elder , 152 W. Va. 571, 165 S.E.2d 108 (1968).....18

State Farm Casualty Company v. Prinz, 231 W. Va. 96, 743 S.E.2d 907 (2013).

Timber Ridge v. Hunt Country Asphalt, 671 S.E.2d 789 (W. Va. 2008).

Tug Valley v. Mingo Cty. Comm'n , 164 W.Va. 94, 261 S.E.2d 165 (1979).....18

Wheeling Park Commission v. Dattoli, 237 W. Va. 275, 787 SE2d 546 (2016).....16

W. Va. Code §30-40-25.....*passim*

Rule 50(a), W. Va. Rules of Civil Procedure.....17

Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure § 50(a)(1)*, at 1108 (4th ed. 2012).....17

ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law in denying Petitioner's motion for a directed verdict after Respondent rested at trial, and reaffirming that ruling in the Order entered on July 10, 2020 denying Petitioner's motion for new trial:

a. Where, WV Code §30-40-25, entitled "Collection of compensation" expressly provides that in suits seeking recovery of a real estate broker's fees:

No person may bring or maintain any action in any court of this state for the recovery of compensation for the performance of any act or service for which a broker's license is required, **without alleging and proving that he or she was the holder of a valid broker's license at all times during the performance or rendering of any act or service.**

b. And where, in its case in chief, Respondent presented no evidence – none whatsoever – purporting to show that Respondent was holder of a valid broker's license **at any time**, let alone at all times during the performance or rendering of any act or service.

2. The Circuit Court abused its discretion in granting Respondent's motion to reopen its case in chief, to permit introduction of documentary evidence purporting to prove that Respondent was a licensed real estate at all times relevant to the case, on the ground that Petitioner was not "surprised" by the introduction of such evidence:

a. Where, the test for granting a motion to reopen a case is "surprise" to the Respondent – not the Petitioner – and the effect of allowing Respondent to reopen its case was unfairly to give the Respondent a second chance at proving its case. Respondent cannot plausibly claim "surprise;" its counsel is charged with knowledge of the law, prior to filing its action, and Respondent failed to satisfy its burden of proof with respect to clearly applicable law – W. Va. Code §30-40-25.

b. And where, the Court's ruling permitting Respondent to reopen its case cannot be justified on the theory that the case "should be decided on its merits;" the "merits of the case" were in fact settled once the Plaintiff rested without

satisfying the explicit statutory mandate at WV Code §30-40-25. The judicial policy in favor of deciding a case “on the merits” does not warrant a trial judge selectively providing “back up” to counsel for one party by gratuitously giving counsel a “mulligan.” The Court’s decision to reopen the Plaintiff’s case was arbitrary and an abuse of discretion which served no purpose of justice, other than to give the Plaintiff a second bite at the apple, with which to try, one more time, to prove its case.

3. The Circuit Court erred in denying Petitioner’s renewed motion for directed verdict, at the end of Respondent’s reopened case:

- a. Where, even after the Court inappropriately reopened Respondent’s case, the Respondent failed to meet the explicit evidentiary requirement of W. Va. Code §30-40-5 which requires that a broker prove it was licensed at all times during the performance or rendering of any act or service.
- b. Where, the services for which Respondent sought compensation were purported provided only between September 2016 and the closing of the real estate sale in the Spring of 2017.
- c. And where, in its reopened case, the Respondent introduced real estate licenses, covering the periods: (a) July 1, 2015 to June 30, 2016, (b) July 1, 2017 to June 30, 2018 and (c) July 1, 2019 to June 30, 2020,
- d. But where – critically – Respondent failed to introduce any license for the period from July 1, 2016 to June 30 2017, the time frame in which the Plaintiff alleged that it “perform[ed] or render[ed] [the] act or service” for which the suit was filed, as expressly required by W. Va. Code §30-40-5.

STATEMENT OF THE CASE

A. Procedural History

On March 18, 2018, Respondent Riggs filed a Complaint (**App. at 5**) seeking to recover brokerage fees from Petitioner Contemporary Galleries as compensation to Riggs for purported real estate brokerage services incident to: (a) the sale of a building at 1210 Smith Street, Charleston, W.Va., and (b) the lease of a building in the Kanawha City neighborhood of Charleston. In its Answer (**App. at 11**) Petitioner Contemporary Galleries denied any obligation, contractual or otherwise, to pay any brokerage fees to Respondent Riggs.

In the course of a two-day trial – and in the absence of any signed contract with Petitioner – Respondent Riggs offered hearsay evidence in support of a promissory estoppel theory of recovery, which the Circuit Court admitted in light of this Court’s invalidation of the so-called dead man’s rule in *State Farm Casualty Company v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013).

In its case in chief, Respondent Riggs introduced no licenses purporting to show that it was licensed to engage in real estate brokerage activity at any time. After counsel for Riggs rested, Petitioner Contemporary Galleries moved for a directed verdict (**App. at 48**) in light of the requirements of W. Va. Code §30-40-25 which requires that a broker “allege and prove” it possessed licensed to sell real estate “at all times during the performance or rendering of any act or service.”

The Circuit Court denied Petitioner Contemporary Galleries motion for directed verdict (**App. at 99**), and, over Petitioner’s objection, (**App. at 88**) granted Respondent Riggs’ motion to reopen its case in order to present evidence of real estate broker’s licenses (**App. at 104**).

In the reopened case, Riggs submitted copies of licenses covering the periods: (a) July 1, 2015 to June 30, 2016 (**App. at 137**), (b) July 1, 2017 to June 2018 (**App. at 138**) and (c) July 1, 2019 to June 30, 2020 (**App. at 139**).

However, the Circuit Court noted that Respondent Riggs failed to introduce any license for the period from July 2016 to June 2017 during which it purportedly provided real estate services to Petitioner Contemporary Galleries (**App. at 144**).

Although Respondent's owner argued that a notation of "01/29/2016" and other undecipherable codes on her licenses in evidence (**App at 137-139**) meant that she was licensed continuously from January 29, 2016 forward, Respondent's owner also conceded on cross examination that the notation did not in fact say that:

Q Right, but it doesn't say that on here; does it?

A No, but that's my testimony that it is.

Q I understand. It doesn't say that on here; does it?

A It does not.

Q All right.

(**App. at 119-120**).

At the end of Respondent's reopened case, Petitioner Contemporary Galleries renewed its objection to reopening the case, and its motion for directed verdict (**App. at 121**); the Circuit Court denied Petitioner's objection and motion (**App. at 121**).

Upon submission to the jury, the jury returned a verdict in favor of Respondent Riggs in the amounts of \$102,000 and 14,760, on the Smith Street and Kanawha City counts, respectively, for a total of \$116,760, plus interest (**App. at 147-148, 165**). And order of Judgment (**App. at 148**) was entered on July 10, 2020.

On July 15, 2020, Petitioner Contemporary Galleries filed a timely motion for new trial (**App. at 150**) which the Circuit Court denied in an email ruling dated November 5, 2020 (**App. at 166**). An order of judgment was entered on December 8, 2020 (**App. at 169**), and a timely Notice of Appeal was filed on January 6, 2021. This brief is timely filed under the terms of this Court's January 6, 2021 scheduling order.

B. Statement of Facts

On March, 2018, Respondent Riggs Commercial Realty, LLC (Riggs) filed a Complaint (**App. at 5**) in the Circuit Court of Kanawha County, West Virginia, alleging that Petitioner Contemporary Galleries of West Virginia, Inc. (Contemporary Galleries) had breached a contract between the parties which, Respondent alleged, required Petitioner Contemporary Galleries to pay a brokerage fee to Respondent Riggs if Riggs obtained a purchaser of a building owner by Contemporary Galleries at 1210 Smith Street in Charleston, W. Va. (**App. at 7**)

In a separate count (**App. at 6**), Respondent Riggs alleged that Petitioner Contemporary Galleries breached a separate contract requiring Petitioner to pay Riggs a fee if Riggs obtained a tenant for a rental property owned by Contemporary Galleries in Kanawha City neighborhood of Charleston, WV.

Alternatively, Riggs' Complaint sought relief for both the sale and lease transaction under a theory of promissory estoppel (**App. at 9**).

In its Answer and Counterclaim (**App. at 11**), Petitioner Contemporary Galleries denied that the parties had entered into any contract, denied that Riggs had brought about either the 1210 Smith Street sale or the Kanawha City lease, and denied that Respondent Riggs was entitled to any relief under a promissory estoppel theory. Petitioner Contemporary Galleries admitted that the property at 1210 Smith Street had been sold (**App. at 30**) but denied that the sale was "brought about by the efforts of [Respondent Riggs]." Similarly, Petitioner Contemporary Galleries admitted that the Kanawha City property had been leased but denied that the lease was "brought about by the efforts of [Respondent Riggs]" (**App. at 13**).

Further, in its Answer, Petitioner Contemporary Galleries expressly denied Respondent Riggs allegation that it was a licensed real estate broker. To be sure, in Paragraph 4 of its Answer, Petitioner Contemporary Galleries stated that:

“Defendant has no knowledge of Plaintiff’s status as a licensed broker of real estate but for purposes of this Answer denies same and demands strict proof thereof.”

(App. at 12) at ¶ 4 (emphasis added).

In the course of discovery, Petitioner Contemporary Galleries sought and obtained from Respondent Riggs copies of proposed contracts which, if signed by Petitioner Contemporary Galleries, would have created contractual obligations. Neither Respondent Riggs proposed sales contract for 1210 Smith Street (App. at 28), nor its proposed lease contract for the Kanawha City property (App. at 21) were signed by anyone, specifically not by Petitioner Contemporary Galleries or anyone acting on its behalf.

Respondent Riggs was, in the absence of signed contracts, forced at trial to rely exclusively on its “promissory estoppel” theory of recovery. Leo J. Russell, Jr., the co-owner, Vice President and co-founder of Petitioner Contemporary Galleries, with whom Respondent Riggs claimed to have dealt regarding both the Smith Street and Kanawha City properties, died before trial (App. at 122, 170). Fortuitously for Respondent Riggs, the so-called “*Dead Man’s Rule*” – which would have foreclosed any hearsay testimony regarding Riggs dealings with Leo Russell – was overturned by this Court in *State Farm Casualty Company v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013).

As a consequence of the *Prinz* case, Respondent Riggs was able to introduce extensive self-serving evidence on multiple purported efforts to sale or lease the properties in question and, purported verbal reassurances from the deceased Leo Russell to compensate Respondent Riggs for

those efforts. Although not able to provide live testimony, Leo Russell clearly never signed the contracts proposed by Respondent Riggs (**App. at 23, 26, 29**), and no witness from the purchaser of 1210 Smith Street, or the lessee of the Kanawha City property, testified to corroborate any portion of Respondent Riggs' testimony.

Mary Russell, Petitioner Contemporary Galleries' co-owner, co-founder and sister of Leo Russell, had no interactions with Riggs in the course of its discussions with her brother, Leo Russell, and was consequently not in a position to contradict Riggs' self-serving testimony (**App. at 121-122**).

In the course of its case in chief, Respondent Riggs did not introduce any real estate license – *none whatsoever* – purporting to authorize it to act as a real estate broker at any time, in particular not in the time frame from September 2016 to spring 2017, when it purportedly acted as a real estate broker on behalf of Petitioner Contemporary Galleries.

Upon announcing that it rested its case, Petitioner Contemporary Galleries moved for a directed verdict (**App. at 48**) on the basis of the mandatory requirements of W. Va. Code §30-40-25 that a party seeking compensation as a real estate broker:

No person may bring or maintain any action in any court of this state for the recovery of compensation for the performance of any act or service for which a broker's license is required, **without alleging and proving** that he or she was the holder of a valid broker's license at all times during the performance or rendering of any act or service.

W. Va. Code §30-40-25(emphasis added).

Although Riggs' counsel initially argued that W. Va. Code did not require proof of licensing by introduction of an actual license, the Circuit Court stated that, absent such evidence, counsel for Petitioner Contemporary Galleries would have a clear ground for summary reversal of

any verdict in Respondent Riggs' favor: "I'm not going to set myself up for clear error..." (**App. at 79**). Further, the Circuit Court granted Respondent Riggs a motion to reopen its case in chief over Petitioner Contemporary Galleries' objection (**App. at 99**).

In its reopened case, Respondent Riggs introduced copies of three real estate licenses covering the periods: (a) July 1, 2015 to June 30, 2016 (**App. at 137**), (b) July 1, 2017 to June 2018 (**App. at 138**) and (c) July 1, 2019 to June 30, 2018 (**App. at 138**).

Critically, Respondent Riggs, despite the opportunity presented by the Circuit Court's decision to reopen the case, failed again to introduce any license for the period from July 2016 to June 2017, i.e., in particular in November, 2016, when it purportedly provided real estate services to Petitioner Contemporary Galleries pertaining to 1210 Smith Street (**App. at 6**).

At the end of the reopened case, Petitioner Contemporary Galleries renewed its objection to the reopening of Respondent Riggs' case and, in particular, renewed its motion for a directed verdict on the basis of Respondent Riggs' failure to introduce a license for the July 2016 through June 2017, the requirement of W. Va. Code §30-4-5 being that a plaintiff produce evidence of a valid broker's license at all times during the performance or rendering of any act or service. (**App. at 121**).

The Circuit Court denied Petitioner Contemporary Galleries' renewed motions (**App. at 121**) and, upon submission of the case to the jury on the uncontradicted, self-serving hearsay evidence of Riggs' employees and principals, the jury returned a verdict in a favor of Riggs awarding damages in the amounts of \$102,760 and \$14,760 (**App. at 148, 165**), respectively, for the counts relating to the 1210 Smith Street property and the Kanawha City property.

On July 12, 2020, Petitioner Contemporary Galleries filed a timely motion for new trial (**App. at 150**) which the Circuit Court denied in an email ruling dated November 5, 2020 (**App.**

at 166). An order of judgment was entered on December 8, 2020 (**App. at 169**), and a timely Notice of Appeal was filed on January 6, 2021. This brief is timely filed under the terms of this Court's January 6, 2021 scheduling order.

SUMMARY OF ARGUMENT

1. Because Respondent Riggs, in its case in chief, introduced no real estate license purporting to show that Respondent was licensed to sell real estate at any time – let alone at the time between July 1, 2016 and June 30, 2017 during the purported performance of real estate services for which compensation was sought – Petitioner Contemporary Galleries was entitled to a directed verdict, as a matter of law, under the explicit language of W. Va. Code §30-40-25, entitled “Collection of compensation” which expressly provides that in suits seeking recovery of broker’s fees:

No person may bring or maintain any action in any court of this state for the recovery of compensation for the performance of any act or service for which a broker’s license is required, without alleging and proving that he or she was the holder of a valid broker’s license at all times during the performance or rendering of any act or service.

W. Va. Code §30-40-25 (emphasis added).

2. Although a trial court is invested with discretion regarding a motion to reopen a case to admit new evidence, that discretion is not plenary, and is reviewable as an abuse of discretion. Here, the primary test for granting a motion to reopen a case is “surprise” to the Respondent – not as the trial court ruled, absence of surprise to the Petitioner. The trial court abused its discretion here by allowing Respondent to reopen its case, without any showing of surprise on Respondent’s part.

As a matter of law, Respondent cannot claim “surprise” when it and its counsel are charged with knowledge of the law, prior to filing its action, and failed to satisfy its burden of proof with respect to the elements of a *prima facie* case, W. Va. Code §30-40-25. The trial court’s decision to reopen evidence here was an arbitrary abuse of discretion; effectively nothing more than a

“mulligan,” a gratuitous gift, unfairly conferring on the Respondent a second chance at proving its case.

3. Petitioner was, as a matter of law, entitled to its renewed motion for directed verdict, at the close of Respondent’s reopened case, because Respondent failed to meet the explicit evidentiary requirement of W. Va. Code §30-40-5 which requires that a broker “allege and prove” it was licensed at all times during the performance or rendering of any act or service. The services for which Respondent sought compensation were purportedly provided only between September 2016 and the closing of the real estate sale in the early spring of 2017. In its reopened case, the Respondent introduced real estate licenses, covering the periods: (a) July 1, 2015 to June 30, 2016, (b) July 1, 2017 to June 30, 2018 and (c) July 1, 2019 to June 30, 2020.

Critically, despite the trial court’s decision to permit it to reopen its case in chief, and after being afforded an opportunity overnight to collect the relevant documentary evidence, Respondent failed to produce a real estate license for the period from July 1, 2016 to June 30, 2017 – the time frame in which the Plaintiff alleged that it “perform[ed] or render[ed] [the] act or service” for which the suit was filed – as expressly required by W. Va. Code §30-40-25.

As noted by the Circuit Court,

It’s also undisputed that she did not testify that she was or had or was the holder of a valid broker’s license at all times during the performance or rendering of any act of service.

(App. at 95) (emphasis added).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The decision below in this case should instead be summarily reversed on the basis of W. Va. Code §30-40-25, for the simple reason that Respondent failed – both in its case in chief and again in its reopened case – to satisfy the mandatory provisions of W. Va. Code §30-40-25 which required Respondent to produce a real estate license authorizing it to perform real estate services in the time frame from September, 2016 to the Spring of 2017, the time when it purportedly provided real estate services.

No amount of argument can alter the unambiguous facts that:

- (a) Respondent rested its case in chief without introducing any license to engage in real estate brokerage activities, at any time;
- (b) Respondent cannot plausibly claim surprise justifying reopening its case, as to the requirements of a *prima facie* case for broker's fees, and
- (c) Even in the reopened case, Respondent failed again to introduce evidence of real estate brokerage license for the year July 1, 2016 to June 30, 2017 when the brokerage services for which compensation was sought were purportedly provided.

Nor is any argument necessary to establish that the only surprise here related to knowledge of the law, not unfair surprise as to unanticipated facts.

ARGUMENT

1. STANDARD OF REVIEW

C. Rule 50 Motions for Directed Verdict Are Reviewed De Novo As Questions of Law

This Court to reviews the circuit court's denial of Petitioner's motion for judgment as a matter of law pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure. In *Wheeling Park Commission v. Dattoli*, 237 W. Va. 275, 787 SE2d 546 (2016), held that:

This Court applies "a de novo standard of review to the ... denial of a pre-verdict ... motion for judgment as a matter of law." *Gillingham v. Stephenson*, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001). We also have indicated that a motion for "judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible." *Waddy v. Riggleman*, 216 W.Va. 250, 255, 606 S.E.2d 222, 227 (2004), quoting *Yates v. University of West Virginia Bd. Of Trs.*, 209 W.Va. 487, 493, 549 S.E.2d 681, 687 (2001).

787 S.E.2d 549-550 (emphasis added).

See also: *Jane Doe c. Logan Cnty Bd. Of Educ.* 829 S.E.2d 45, n.3, (2019).

D. Motion's to Reopen Plaintiff's Case Are Reviewed Under Abuse of Discretion

In *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*, Syl. Pt. 5, 165 S.E.2d 113, 152 W.Va. 549 (W. Va. 1968), this Court reviews the Circuit Court's decision to reopen Respondent's case under the standard of abuse of discretion:

Whether, on motion of a party to a civil action, the case may be reopened for the introduction of further testimony after both parties have rested their cases is within the discretion of the trial court and the exercise of such discretion will rarely be cause for reversal by an appellate court.

152 W.Va. 550.

2. POINTS OF FACT AND LAW PERTAINING TO ASSIGNMENTS OF ERROR

A. The Circuit Court's Denial of Petitioner's Motion for Directed Verdict After Respondent Rested Was Error As A Matter of Law

Rule 50, W. Va. Rules of Civil Procedure, entitled "Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings," provides in pertinent part that:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Rule 50(a), W. Va. Rules of Civil Procedure (emphasis added).

In Syl. Pt. 3, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964), this Court cited favorably the treatise by the late Justice Cleckley to the effect that:

When the plaintiff's evidence, considered in the light most favorable to him, fails to establish prima facie right of recovery, the trial court should direct a verdict in favor of the defendant.

Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 50(a)(1), at 1108 (4th ed. 2012) (footnote omitted).

In *Wheeling Park Commission v. Dattoli*, 237 W. Va. 275, 787 SE2d 546 (2016), this Court ruled that the plaintiff bringing suit against a political subdivision for injury on its premises must prove that the injury was the result of "negligent performance," "negligent failure," and "negligence" of the political subdivision or its employees, and reversed the trial court's denial of a motion for directed verdict, where

[T]he Dattolis failed to present a *prima facie* case of negligence and, as a result, the circuit court erred in denying the Commission's motion for judgment as a matter of law.

237 W.Va. 275, 787 S.E.2d 546, 551 (W. Va. 2016)

This Court has held that “[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning.” Syl. Pt. 1, *Tug Valley v. Mingo Cty. Comm’n*, 164 W.Va. 94, 261 S.E.2d 165 (1979). And “a statute that is clear and unambiguous will be applied and not construed.” Syl. Pt. 1, in part, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).” *Wheeling Park Comm’n v. Dattoli*, 787 S.E.2d 553. See also: “Syl. Pt. 1, in part, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968);” *Hasan v. W. Va. Bd. Of Med.*, 835 S.E.2d 147 (W. Va. 2019);

In the present case, there is no argument regarding W. Va. Code §30-40-25’s requirement that in a suit seeking compensation for real estate services a plaintiff must “allege and prove” that it:

[W]as the holder of a valid broker’s license at all times during the performance or rendering of any act or service.

W. Va. Code §30-40-25 (emphasis added).

As in *Wheeling Park Comm’n v. Dattoli*, there is no ambiguity in the language “a valid broker’s license,” nor is there any dispute that Respondent Riggs failed to produce any “valid broker’s license,” in its case in chief.

B. The Circuit Court’s Denial of Petitioner’s Renewed Motion for Directed Verdict, and Its Motion for New Trial, based on W. Va. Code §30-40-25, Was Erroneous As A Matter of Law

Moreover, it is indisputable that, even in its reopened case after the evidentiary requirement of W. Va. Code §30-40-25 was made manifest to Riggs, that Respondent failed to produce a valid broker’s license for the period July 1, 2016 through June 30, 2017, the time during which Respondent sought compensation for its purported performance or rendering of any act or service. Consequently, the grant of Petitioner’s motion for a directed verdict was required by Rule 50 and this Court’s existing jurisprudence.

As noted by the Circuit Court,

It's also undisputed that she did not testify that she was or had or was the holder of a valid broker's license at all times during the performance or rendering of any act of service.

(App. at 95) (emphasis added).

Similarly, despite Respondent's valiant efforts to stretch its licenses from a prior period to a later period, based on cryptic codes on the license purporting to show, in Respondent's view, continuous licensing from 2016 forward, Respondent admitted the licenses said no such thing:

Q Right, but it doesn't say that on here; does it?

A No, but that's my testimony that it is.

Q I understand. It doesn't say that on here; does it?

A It does not.

Q All right.

(App. at 119-120).

And it is undisputed that Petitioner put Respondent's license status in question from the beginning of the case in its Answer to the Complaint. Specifically, in Paragraph 4 of its Answer, Petitioner Contemporary Galleries stated that:

"Defendant has no knowledge of Plaintiff's status as a licensed broker of real estate but for purposes of this Answer denies same and demands strict proof thereof."

(App. at 12) at ¶ 4 (emphasis added).

C. The Circuit Court's Reopening of Respondent's Case Was An Abuse of Discretion

The most common ground for granting of a motion to reopen a case is the occurrence of unfair surprise, *i.e.*, circumstances which a party could not reasonably have foreseen which, in the absence of reopening the case to permit additional evidence, would work a demonstrable injustice.

Thus, in Syllabus Point 5 of *In Interest of Moss*, the Court held that:

"It is within the sound discretion of the court in the furtherance of the interests of justice to permit either party, after it has rested, to reopen the case for the purpose of offering further evidence and unless that discretion is abused the action of the trial court will not be disturbed." Syllabus Point 4, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974); Syllabus Point 4, *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545 (1981).

Moss, In Interest of, 295 S.E.2d 33, 170 W.Va. 543 (W. Va. 1982).

And the Court in *Moss*, citing *State v. Fischer supra*, 158 W.Va. at 72-73, 211 W.E.2d at 667, added:

The basic reason for denying a motion to reopen is to avoid unfair surprise to one of the parties.

295 S.E.2d 42 (emphasis added).

But a trial judge's discretion is not beyond review. And, manifestly, this is not a case in which no party was surprised by the request to reopen the evidence. In *State v. Fischer*, the transcript of a preliminary hearing (to which a party's confession was attached) had been provided to all parties prior to the hearing, but the physical copy of the preliminary hearing actually introduced into evidence had failed to include the confession attachment, inadvertently. No issue of surprise was presented in those circumstances.

To the contrary, as the Court observed,

The purpose of the reopening was to permit the State to introduce the appellant's confession, the text of which had been inadvertently omitted from the preliminary hearing transcript." *Moss, In Interest of*, 295 S.E.2d 33, 170 W.Va. 543 (W. Va. 1982).

170 F.2d 550-551(emphasis added).

This case does not even remotely represent the kind of *unfair* surprise that warranted permitting Respondent Riggs to reopen its case. To be sure, Riggs was no doubt surprised to learn, after it had rested, that a controlling statute, W. Va. Code §30-40-25, imposed a mandatory

evidentiary burden which Respondent was not aware of previously, but learning the law at the end of one's case in chief cannot, as a matter of law, constitute "surprise."

It manifestly is *not* unfair to expect a litigant to be aware of its evidentiary burden, before resting its case, and the decision to rest without satisfying a clear evidentiary requirement is precisely the circumstance which Rule 50 contemplates as grounds for a directed verdict.

At the close of evidence on February 24, 2020, and following Petitioner's Rule 50 motion for directed verdict, the Circuit Court acknowledged, as a matter of fact, its (and likely other counsel's) surprise at the requirement of W. Va. Code §30-40-25:

THE COURT: Let me ponder this. I'll give you that. It was a – a good find.

MR. DEPAULO: That's the way I felt.

THE COURT: Well, you get a star for that one. That's for sure. I'm going to have to look at this. I'm going to have to get the statute and annotations.

(App. at 53)(emphasis added).

Again, later, the Court observed that:

THE COURT: ... you were aware of this and thought I bet they aren't. And I bet a whole lot aren't. I mean –

MR. DEPAULO: Right.

THE COURT: -- because these types of cases aren't before judges.

(App. at 60)(emphasis added).

Further, the Circuit Court observed in a comment directed towards Riggs' counsel that:

THE COURT: I don't know, I'm just say alleging – that's why you get a little time to respond to this because he hit us with it today.

(App. at 62)(emphasis added).

Continuing, the Court observed on February 24, 2020 that:

THE COURT: ... What gives this some legs, it's not limited. It specifies no person may bring or maintain any action because I immediately want to say, well, this is a -- an action in promissory estoppel, but it's still an action. It says no person may bring or maintain any action in any court of this state for the recovery of compensation for the performance of any act or service for which a broker's license is required, so --

THE COURT: Because he is going to say it was your all's duty to know -- to know the law and to establish it through your case. I mean that's what I would argue.

(App. at 62)(emphasis added).

Referring to her grant of leeway to Respondent Riggs in the admission of hearsay evidence of purported promises by the deceased Leo Russell, the Circuit Court observed that:

THE COURT: ... letting in what I did in the trial, which I don't think was, you know, prejudicial, but the exercise of that. In this case, I don't think it was. In some cases, I think it could be very problematic because I -- I definitely thought that it's being offered for the truth of the matter asserted.

That's one thing where I, you know, give some leeway and, in the interest of justice and fairness, allow it so the jury gets the whole story so to speak.

(App. at 63-64)(emphasis added).

However, the Circuit Court noted that the Rule 50 motion was a different matter:

But, you know, the legislature has said you've got to prove that he or she was the holder or a valid broker's license at all times during the performance or rendering of any act or service. So you've got to tell me is this appropriate.

(App. at 64)(emphasis added).

Again, noting the clarity of the requirement of W. Va. Code §30-40-25, the Circuit Court stated:

THE COURT: ... what makes this less ambiguous is it's focused precisely on no person may bring or maintain any action in any court for et cetera, et cetera. So the legislature is saying in no -- you know, there's not a lot of ambiguity. If you're going to bring a suit in the state of West Virginia to recover compensation for the performance of any, you know, act or service for which a broker's license is required, you're going to have to prove that.

(App. at 65)(emphasis added).

Concerning the fairness of raising the W. Va. Code §30-40-25 issue, in the context of a case in which Respondent Riggs was able to introduce unlimited hearsay regarding deceased Leo Russell's purported promises, the Court and counsel had the following exchange:

MR. DEPAULO: And -- and if we're -- and I think it's appropriate for the Court to be affected by concerns about fairness, but I just want to point out one other thing. Leo Russell hasn't had a fair thing. I mean, you know, Leo Russell can't stand up and state --

THE COURT: But it's also, with all due respect, not their fault that he passed away.

MR. DEPAULO: Oh, it's not their fault. You're right. It's not.

THE COURT: I mean there's --

MR. DEPAULO: And it's not my fault that they didn't satisfy the statute.

THE COURT: Well, okay. So that's where -- that's really where we are.

MR. DEPAULO: Right.

(App. at 67-68)(emphasis added).

Both parties in this case encountered matters they did not anticipate. Petitioner Contemporary Galleries did not anticipate that Leo Russell would be unavailable to testify and that Petitioner would -- solely because of *Prinz's* (fortuitous for Respondent Riggs) invalidation of the "Dead Man's Rule," be afforded the opportunity to introduce unlimited hearsay evidence.

Petitioner nonetheless had to live with that relatively new rule.

Nor can Petitioner successfully argue "surprise" merely because the Court admitted Respondent Riggs' testimony against Petitioner under Rule 801(d)(2)(D), W. Va. Rules of Evidence -- the so-called residual rule of hearsay -- even though that was the first application of the residual rule in the forty-seven years Petitioner's counsel had been practicing law.

Similarly, the facts inspiring Respondent Riggs' motion to reopen its own case, to submit evidence of a basic element of its *prima facie* case, cannot be characterized as unfair surprise. As the Circuit Court cogently observed on February 24, 2020:

THE COURT: Because he is going to say it was your all's duty to know -- to know the law and to establish it through your case. I mean that's what I would argue.

(App. at 62-63)(emphasis added).

Indeed.

The reopening of the Respondent's case here, to permit evidence that was required to make out a *prima facie* case, was nothing more than a gift -- effectively a "*mulligan*" -- to Respondent Riggs. Nothing in the jurisprudence of this State warrants such a gratuitous fortuity to any litigant, let alone one represented by fully competent counsel, presumed to know the law.

Petitioner has to live with the fact of its co-founder's death.

Respondent should be required to live with the consequences of closing its case without introducing any evidence on a critical element of its *prima facie* case.

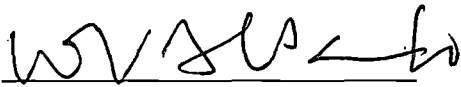
CONCLUSION

This Court should summarily vacate the verdict in Respondent's favor and remand the case to the Circuit Court for entry of judgment on behalf of Petitioner.

Respectfully submitted for Petitioner

**CONTEMPORARY GALLERIES OF
WEST VIRGINIA, INC.**

By Counsel

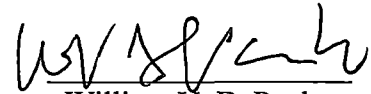


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Brief was mailed, postage pre-paid, this ___ day of April, 2021 to counsel for the Respondent as follows:

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