

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLIFFORD CRUM,

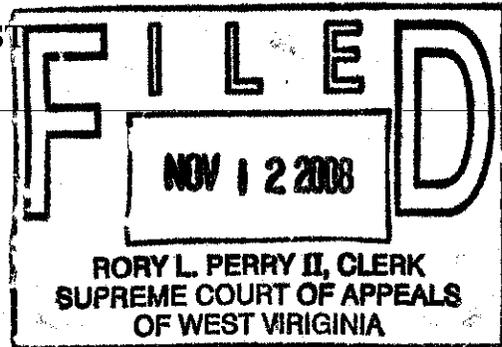
Appellant,

v.

Appeal No. 080848
(Raleigh Co. Civil Action No. 05-C-296-B)

EQUITY INNS, INC., d/b/a THE HAMPTON INN;
VIM, INC.; TRAVELERS PROPERTY CASUALTY INSURANCE
COMPANY; CONSTRUCTION CONCEPTS, INC.,
BECKLEY HOTEL LIMITED PARTNERSHIP, A WEST
VIRGINIA PARTNERSHIP; and JOHN DOE,

Appellee.



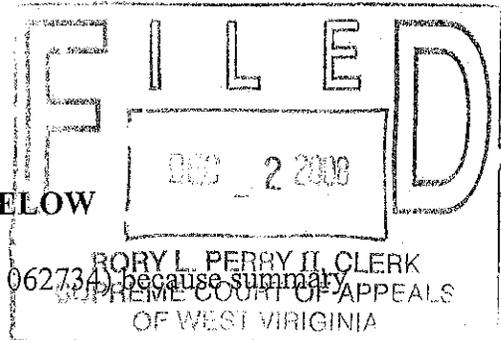
APPEAL BRIEF

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NATURE OF PROCEEDINGS BELOW



This case was previously before this Court (Appeal No. 062734) because summary judgment was granted disposing of all claims against all parties. Judge Burnside prematurely, before a time frame order was entered, and before discovery was completed, ruled against Mr. Crum.

Mr. Crum is a Commissioner with the Federal Mediation and Conciliation Service. He suffered serious personal injuries when a 33 pound light fixture, which had been attached to the ceiling, fell on his head while he was mediating a case on July 7, 2004 in a conference room at The Hampton Inn in Beckley, WV.

The prior erroneous rulings which Mr. Crum brings before this Court for review are:

1. On July 27, 2006, the lower court granted summary judgment to Equity Inns, Inc. [hereinafter "Equity Inns"], the hotel owner at the time Mr. Crum was injured. This Order was entered in haste despite the following:

a. Crum had filed a motion to amend his complaint prior to the applicable two year statute of limitations. The amended complaint which was proposed, as to Equity Inns, alleged Res Ipsa Loquitur as a new cause of action and we also advised the court that there was pending discovery which "seeks discovery as to the insurance policies and contracts between the parties to the sale and construction of what is now the Hampton Inn, which may shed light on who is responsible for the condition which caused the light fixture to fall on Mr. Crum."

b. On July 28, 2006, the Court denied Plaintiff's Motion to Amend the Complaint and for relief from its earlier Order dismissing the claims against Virginia Inn Management of West Virginia (hereinafter "Virginia Inn"). This Order not only discharged Virginia Inn from responsibility, but it refused to allow Mr. Crum to file any

claims against the builder of the Hotel and the decorator who allegedly put in the light fixture.

As noted above, there were also other claims raised in the Amended Complaint.

The quandary presented by the rulings of Judge Burnside is that, contrary to the fairness inherent in West Virginia jurisprudence, an innocent victim is left without any remedy for an injury which was caused by others. Our very system of justice is abnegated by these rulings below.

The prior appeal was filed on September 22, 2006. Thereafter, we discovered that the deed between Beckley Hotel Limited Partnership and Equity Inns was made less than 10 years before the injury and that therefore there were issues which potentially negated the rulings of Judge Burnside which barred some of the claims on the 10 year statute of limitations, § 55-2-6(a). There was no further action on appeal because a joint motion to remand was filed by Clifford Crum and Virginia Inn sending this case back to the Circuit Court "for review and consideration by the Circuit Court of whether an amended complaint should be permitted, and whether additional discovery should be conducted."

Equity Inns' opposed said motion but by order dated January 24, 2007, said motion was granted by this Court.

The Circuit Court held a hearing on October 31, 2007 at which time it entertained our motion to amend.

Equity Inns opposed the motion to amend, Virginia Inn did not.

The motion to amend was granted as to all parties except to Equity Inns, the Current owner. It was done by order dated December 10, 2007. It is from that order that we appeal.

STATEMENT OF FACTS

We are left by the Circuit Court's orders with a meaningless case. We are fighting with one of the three owners or operators or builders of the hotel where Mr. Crum was injured to seek a potential but unlikely recovery. We cannot locate or find the decorator. We cannot get valid service or jurisdiction over Beckley Hotel Limited Partnership, the entity which sold the hotel to the current owner, Equity Inns. We are advised as to Beckley Hotel Limited Partnership that they withdrew from West Virginia and that Construction Concepts, the decorator, has moved from West Virginia. There is no one responsible to sue. (See attached Notices, Exhibits 1 and 2.)

This is clearly a case where *res ipsa loquitur* applies and should serve and be able to be used against the dismissed party, Equity Inns. They should be legally responsible for the incident. It occurred on their watch on their property. Instead, the hotel where the incident occurred is legally exonerated by the Court.

The evidence which has served to release Equity Inns is a report of an expert, Francis Guffey, an architect who based upon an inspection and a phone call with the prior architect concluded that a decorator or former builder was responsible. (See attached report of Francis Guffey, Exhibit 3.)

On October 31, 2008, we had a hearing before Judge Burnside and we sought and were granted discovery from Virginia Inn of the contract which Equity Inns did not have wherein the hotel was sold by Beckley Hotel Management to Equity Inns. We have not received said contract at this time. This was one of the items we sought from Equity Inns at the time they were granted summary judgment.

We have also now deposed William A. Garretson, the janitor who was employed by

Equity Inns. This deposition was taken on July 22, 2008. Counsel for Equity Inns and Virginia Inn were present.

In discovery answers Equity Inns stated “Mr. Garretson is a maintenance worker at the Hampton Inn who is expected to testify that he has cleaned the light fixtures and changed the bulbs, he has never had problems with the fixtures prior to the subject incident on July 7, 2004.”

Contrary to said response, under questioning Mr. Garretson stated that he never changed the bulbs, but can't state that they weren't changed when he was off, and that housekeeping, not he, cleaned the fixture.

ASSIGNMENTS OF ERROR

1. The court should not have granted summary judgment to Equity Inns, all viable defendants should remain in this case.
2. Plaintiff should be allowed to amend his complaint to allow Res Ipsa Loquitur and strict liability against Equity Inns.

POINTS AND AUTHORITIES

<u>Board of Education v. Von Buren and Firestone Architects, Inc.</u> , 267 S.E.2d 440 (1980)	5
<u>Elliott v. Schoolcraft</u> , 576 S.E.2d 796 (2002)	5
<u>Foster v. City of Keyser</u> , 202 W.Va. 1, 501 S.E.2d 165 (W.Va. 1997)	6
<u>Restatement of Torts 2d</u> , § 328D (1965)	6

DISCUSSION OF THE LAW

- I. The court should not have granted summary judgment to Equity Inns, all viable defendants should remain in this case.

Summary Judgment was hastily granted while there was discovery pending. It was granted prematurely upon the written report of Francis A. Guffey, II, an architect who was hired by Equity Inns. His report, on its face, leaves possible inferences that Equity Inns would be responsible for contribution to the accident which are jury questions wherein he stated:

“The furnished photos indicate a light frame that was to be anchored to the ceiling in four locations. The anchoring system used included plastic wall expansion anchors and #8 wood screws. The plastic anchor was mounted in the 5/8" gypsum board ceiling only. This is a totally improper method of anchoring this fixture, as the pullout resistance of the anchor is extremely low. This type of anchoring would not be apparent to anyone changing the light bulbs or otherwise examining the fixture.”

There is clearly the inference that if it was owned by Equity Inns for almost 10 years, they might have in changing the bulbs or cleaning the light fixture caused or hastened the process of the light fixture falling. There is also a legally permissible inference that Equity Inns did not properly inspect the building before they purchased it.

Although we didn't directly raise all of the inferences previously, we did request that we be allowed to amend the Complaint and pursue our theories of Res Ipsa Loquitur and strict liability and that we be allowed further discovery all of which were denied by the precipitous grant of summary judgment. This Court has held that discovery should proceed before summary judgment is granted. Board of Education v. Von Buren and Firestone Architects, Inc., 267 S.E.2d 440 (1980); Elliott v. Schoolcraft, 576 S.E.2d 796 (2002).

In essence, we are arguing and believe that Equity Inns should not escape form responsibility through the hastily granted motion for summary judgment when there was

outstanding discovery and a motion to amend the complaint.

This is a case where it is a hard job to catch and pin down the responsible defendants and the plaintiff should have the opportunity to try do so.

- II. Plaintiff should be allowed to amend his complaint to allege Res Ipsa Loquitur and strict liability against Equity Inns.

The fact that Equity Inns has identified a negligent act by some other actor does not give them carte blanche on liability for an accident which occurred on their property. They have had complete control over the hotel and light fixture for almost 10 years by the time the fixture fell. While the main identified reason the fixture fell was the error in installation, it is likely that since according to their expert architect Mr. Guffey, “. . . the pullout resistance of the anchor is extremely low.” The cleaning and changing of bulbs which Equity Inns admits was done by their employees may well have contributed to the accident and caused the fixture to fall. We don't know, and unless we are allowed to proceed on our theory of Res Ipsa Loquitur, we cannot develop a factual basis for this theory which is and should be Mr. Crum's right as an injured West Virginian.

This Court in Foster v. City of Keyser, 202 W.Va. 1, 501 S.E.2d 165 (W.Va. 1997), adopted § 328D of the Restatement of Torts 2d (1965), which provides:

1. It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
 - a. the event is of a kind which ordinarily does not occur in the absence of negligence;
 - b. other responsible causes, including the conduct of the plaintiff and third

persons, are sufficiently eliminated by the evidence; and

- c. the indicated negligence is within the scope of the defendant's duty to the plaintiff.

2. It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

3. It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

At first blush, our claim would appear to be eliminated by Mr. Guffey's report because part (1)(b) of the restatement would apply, but that, and precisely that, is why we seek contracts, agreements and other avenues of determining what is the arrangement between Equity Inns and their now out of business seller, Beckley Hotel Limited Partnership. We seek to determine not only who was responsible for the alleged negligent installation, but what duties and obligations were assumed by Equity Inns when they purchased this 7 million dollar hotel.

We would also urge the proposition as pled that there is a duty to inspect a multi-million dollar building and that caveat emptor is applicable.

It is obvious when reviewing the restatement as it relates to the evidence in this case that without negligence the light would not have fallen, but it is problematical that an owner can escape its obligation when they have owned the building for almost 10 years.

The jury should be allowed to consider this case and make all appropriate inferences. That is why we urge the unusual theory of strict liability on this Court as well. There must be some rational way for Mr. Crum to be compensated.

In this case there is no way that defendant's evidence pinpoints who actually installed the

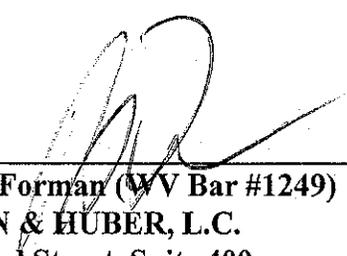
defective light fixture. Mr. Guffey says it was a decorator, brought in by the prior owner, as conveyed to him by the project architect. This is not even evidence which is admissible. There is no record provided to support this conclusion. It is inadmissible hearsay and a serious personal injury should not be defeated by such minimal proof.

RELIEF PRAYED FOR

We urge this Court to reverse the decision granting summary judgment and to remand this case with appropriate guidance to the Circuit Court, which allows Mr. Crum to fully develop his case.

Appellant request oral argument of his brief.

Clifford Crum
By counsel



Roger D. Forman (WV Bar #1249)
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West Virginia Secretary of State's Office

Status of Process Search

Service of Process Details

[Back to List](#)

Civil Action: 05-C-296
Defendant: Construction Concepts, Inc.
Agent: Hollis O. Robison
City/State/Zip: Somerville, TN 38068
Country:
County: Raleigh
Service Date: 1/8/2008 12:00:00 AM
Date Signed: 1/22/2008 12:00:00 AM
Who Signed: MOVED LEFT NO ADDRESS
Response Code: MLNA
Response Details:

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707 Virginia Street East
15th Floor
Charleston, WV 25301

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304 343 9833 fax
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Scan of to
July

January 11, 2008

Roger D. Forman
Forman & Huber
100 Capitol Street
Suite 400
Charleston, WV 25301

Re: Clifford Crum, Pltf. vs. Equity Inns, Inc., etc., et al., including Beckley Hotel Limited Partnership, etc., Dfts.

Case No. 05-C-296

Dear Sir/Madam:

We are herewith returning the Summons and Amended Complaint which we received regarding the above captioned matter.

Beckley Hotel Limited Partnership withdrew to do business in the State of WV on 08/24/1995. When an entity withdraws, the designation of the registered agent is revoked. Service can no longer be taken on behalf of this entity.

Very truly yours,

Sharon Barth

Log# 512968719

cc: Raleigh County Circuit Court
215 Main Street
Beckley, WV 25801





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April 12, 2006

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RE: Crum v. Equity Inns, Inc.

Dear Ms. Chapman;

At your request, I visited the Hampton Inn located at 110 Harper Park Drive in Beckley, WV to observe the conditions present in a meeting room where a ceiling light fixture was alleged to fall from the ceiling and injure a person sitting under the light. You have furnished me photos that were taken contemporaneously when the event occurred.

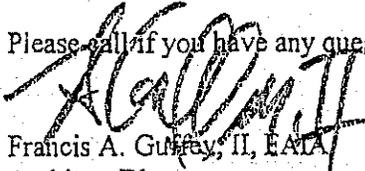
The furnished photos indicate a light frame that was to be anchored to the ceiling in four locations. The anchoring system used included plastic wall expansion anchors and #8 wood screws. The plastic anchor was mounted in the 5/8" gypsum board ceiling only. This is a totally improper method of anchoring this fixture, as the pullout resistance of the anchor is extremely low. This type of anchoring would not be apparent to anyone changing the light bulbs or otherwise examining the fixture.

After the fixture fell, Lowe Brothers Electric reinstalled the fallen fixture as well as another identical fixture in the room that had not fallen. The fixture was anchored through the gypsum board, through the furring space and into the concrete deck above using 1/2" x 3" Tapcon Anchors. This is a secure and approved installation.

I have spoken with Lithonia Lighting, the manufacturer of the lights, who informed me that one entire fixture weighed 33 pounds and should be anchored to the concrete deck, with the anchors passing through the drywall ceiling and furring space. After this installation was completed and observed there was no visual indications of the length of the anchor or what it penetrated.

The original Project Architect, since retired and his firm no longer exists, mentioned to me that the Building Owner brought in "decorators" to provide lighting and interior décor to complete the building, and that was never under his control. Somewhere in that operation the lights in question were improperly installed. The building was originally constructed by Construction Concepts, Inc. from Tennessee and was subsequently purchased several years later by Equity Inns from Virginia Inn Management the original Owner.

Please call if you have any questions.


Francis A. Guffey, II, FAIA
Architect/Planner

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BY:



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Appellant,

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Appeal No. 080848
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EQUITY INNS, INC., d/b/a THE HAMPTON INN;
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Appellee.

CERTIFICATE OF SERVICE

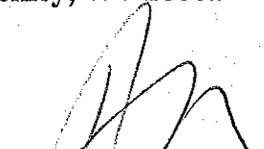
I, Roger D. Forman, counsel for the Appellant do hereby certify that service of the foregoing Appeal Brief has been made this 10th day of November, 2008, by first class mail, postage prepaid, to the following:

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