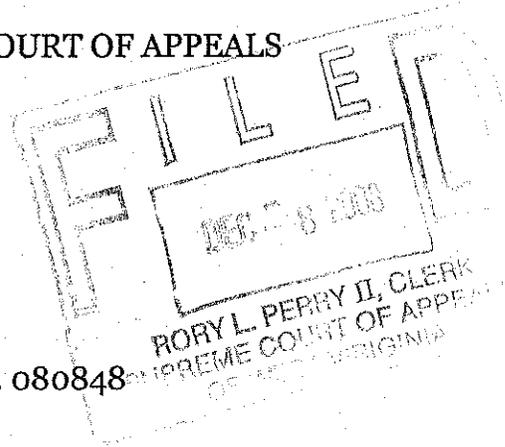


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CLIFFORD CRUM,
PLAINTIFF,

VS.

CASE NO. 080848



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

DEFENDANTS.

APPELLEE'S BRIEF OF VIM, INC.

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December 4, 2008

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NATURE OF PROCEEDING

Appellant Clifford Crum appeals a grant of summary judgment to Equity Inns, Inc. by the Circuit Court below. Mr. Crum seeks to reverse that summary judgment, and to amend his Complaint, in part, to assert the doctrines of res ipsa loquitur and strict liability. Appellant's Petition for Appeal stated that "All viable defendants should be in this case. Discovery should proceed against all viable parties and all should be subject to res ipsa loquitur." Petition p. 4 (emphasis added). Accordingly, defendant Virginia Inn Management (whose name has been changed to "VIM, Inc.") filed a response to that Petition.

It is unclear from a review of Appellant's subsequently filed Brief whether Appellant still asserts that res ipsa loquitur should be applied to all parties herein, or how strict liability would be applicable in this case. However, the Complaint against VIM currently asserts res ipsa

loquitor claims, and therefore, in order to make it clear that neither res ipsa loquitur nor strict liability apply in this case, VIM files this response.¹

STATEMENT OF FACTS

Plaintiff Clifford Crum was injured on July 7, 2004, while attending a meeting at a Hampton Inn in Beckley, West Virginia, when a light fixture fell. Mr. Crum was acting within the scope of his employment as a federal mediator while occupying the conference room in question.

It is undisputed that at the time of the accident, the hotel in question was owned and operated by Equity Inns, Inc., which had purchased the premises from the original owner, Beckley Hotel Limited Partnership, on November 18, 1994, nearly ten years before the accident occurred.

The Circuit Court granted summary judgment to Equity Inns based in large part upon the undisputed report of an expert, Francis A. Guffey, who noted that the anchoring system utilized by the contractor to install the light fixture in question was improper in that plastic anchors were mounted in a 5-8 inch Gypsum Board ceiling only, rather than into the concrete deck as should have occurred. Mr. Guffey's report noted that once the incorrect installation was completed, there were no visual indications of the length of the anchor or what it penetrated; specifically, this type of anchoring would not be apparent to anyone examining the fixture. See April 12, 2006 report of Francis Guffey. Accordingly, the Court granted summary judgment to Equity

¹ VIM currently has pending before the Circuit Court its own Motion for Summary Judgment, primarily on the grounds that VIM never owned the subject hotel property, that it neither installed the light fixture nor hired anyone else to do so and that VIM merely provided accounting and management services after completion of construction, up until the sale of the hotel by Beckley Hotel Limited Partnership in November, 1994. Plaintiff was injured on July 7, 2004, over twelve (12) years after the completion of the construction of the hotel and nine (9) years and approximately eight (8) months after the sale of the hotel by Beckley Hotel Limited Partnership to Equity Inns, Inc. VIM had no involvement with the hotel during that nine year, eight month period.

Inns by Order entered July 28, 2006. Despite a standard briefing schedule and oral argument on this motion, plaintiff did not contradict Mr. Guffey's report.

POINTS AND AUTHORITIES

Foster v. City of Keyser, 202 W.Va. 1, 501 S.E.2d 165 (W.Va. 1997)

DISCUSSION OF THE LAW

Although Appellant seeks to invoke res ipsa loquitur and/or strict liability, neither is applicable or appropriate to this case.

A. RES IPSA LOQUITUR

It is well-established in West Virginia that by use of the doctrine of res ipsa loquitur, plaintiff may infer that the harm suffered by him is caused by "negligence of the defendant when (a) the event is of the 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. "*Foster v. City of Keyser*, 202 W.Va. 1, 501 SE2d 165 (W.Va. 1997) (emphasis added). Appellant in this case wishes to ignore the second requirement.

The expert report of Mr. Guffey makes it clear that the negligence in this case that led to the light fixture falling was that of the person or company who installed the light fixture improperly twelve years before the accident occurred. This evidence, in and of itself, establishes that the doctrine of res ipsa loquitur may not be applied against Virginia Inn Management. To hold otherwise would be to completely eliminate requirement (b) of the holding of *Foster v. City of Keyser* ("other responsible causes including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence."). Obviously, the conduct of the contractor is an "other

responsible cause” that cannot be eliminated, and in addition, Appellant asserts that the actions of Equity Inns’ janitor in cleaning or changing bulbs may have contributed to the accident and caused the fixture to fall. Accordingly, as a matter of law, res ipsa loquitur cannot apply against VIM.

B. STRICT LIABILITY

In addition, Appellant’s Brief states that he urges “the unusual theory of strict liability on this Court as well. There must be some rational way for Mr. Crum to be compensated.”

Appellant’s Brief at p. 12. However, Appellant provides no rationale, no statutory law, and no case law which would permit an application of strict liability as to Virginia Inn Management.

Appellant does not explain at all how such a theory could be asserted in this action. This is not a products liability case, and therefore strict liability in that context is not applicable. This is certainly not a case involving an abnormally dangerous activity, and therefore VIM cannot conceive of how a claim of strict liability could be applicable in this case. Appellant’s request to assert such claims must fail as a matter of law.

C. THE CONTRACT OF SALE

Appellant notes both in the Petition and Brief that he has sought a copy of the Contract of Sale by which Equity Inn purchased the hotel from Beckley Hotel Limited Partnership, ostensibly as a vehicle through which the assignment of duties by and between Equity Inns and Beckley Hotel Limited Partnership may be determined, apparently in order to determine some duty owed to Appellant. It should be noted that the Sales Contract was provided to Appellant/Plaintiff on November 18, 2008 pursuant to a Protective Order issued by the Circuit Court. Accordingly, Appellant’s counsel is now aware that this contract provides no support for any claims against VIM.

CONCLUSION

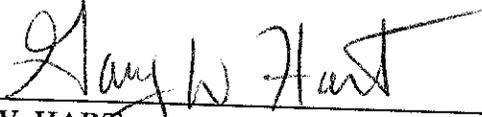
The frustration of Appellant and his counsel in this case is understandable, given that they have been unable, apparently, to serve a party that is at fault in this case. However, that inability does not mean that liability should be imposed on parties who are without fault. Mr. Crum is not completely without a recovery here, in that he was working at the time of the accident, and as a result was entitled to Federal Workers' Compensation Benefits as a result of this injury.

However, VIM merely provided accounting and management services after completion of construction of the hotel in question. It never owned the hotel, and did not install the light fixture or hiring anyone else who did so. As Appellant's Brief essentially admits, VIM had nothing to do with the hotel since November, 1994, almost ten years before the fixture fell.²

Accordingly, neither *res ipsa loquitur*, nor the doctrine of strict liability may be asserted against this defendant, and VIM urges the Court to refuse Appellant's request that they be applied in this action.

VIM, INC.,

BY COUNSEL.



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² See Appellant's Brief at p. 6 ("[Equity Inns] had complete control over the hotel and light fixtures for almost ten years by the time the fixture fell.")



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CERTIFICATE OF SERVICE

I, GARY W. HART, counsel for VIM, Inc., do hereby certify that I have this the
5TH day of DECEMBER, 2008, served a true and correct copy of the foregoing

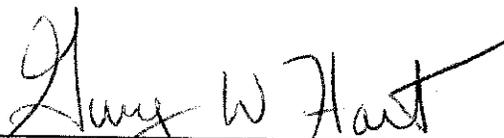
APPELLEE'S BRIEF OF VIM, INC. upon:

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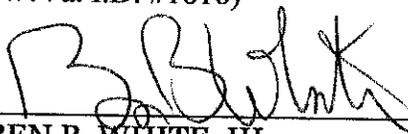
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By depositing same in the United States Mail, postage prepaid, addressed to the
above addresses, which are the last known addresses of said attorneys known to me.



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