SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
December 16, 1999
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OF WEST VIRGINIA

September 1999 Term

No. 26218

RELEASED
December 17, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MARVIN T. BOWERS, ET AL., AS CLASS REPRESENTATIVES,
Plaintiffs Below, Appellants

v.

GRETCHEN WURZBURG, THE SOUTHLAND CORPORATION, ET AL.,
Defendants Below, Appellees

Appeal from the Circuit Court of Jefferson County
Honorable Christopher C. Wilkes, Judge
Case No. 96-C-73

REVERSED AND REMANDED

Submitted: September 22, 1999
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JUSTICE McGRAW delivered the Opinion of the Court.
JUSTICE SCOTT did not participate in the decision in this case.
JUDGE FRED RISOVICH, II, sitting by temporary assignment.
JUSTICES DAVIS and MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus point 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

2. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syllabus point 6, *Aetna Casualty & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

3. "A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfers possession if, but only if,: (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken." Restatement (Second) of Torts § 379A (1963-1964).

4. A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and both of the following are true: (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and (b) he then knows or should know that it will necessarily involve or is already causing the nuisance. A vendor of land is not liable for a nuisance caused solely by an activity carried on upon the land after he has transferred it.

5. The storage, sale, or distribution of gasoline is subject to the same analysis, as expressed in Restatement (Second) of Torts §§ 519 and 520 (1976), that we would apply to any other activity involving similar or greater danger to the public.

6. "A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied." Syllabus point 2, *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987).

7. The use of a “percentage clause” in a commercial lease, whereby the landlord receives a percentage of sales or profits in addition to or in lieu of the base rent, may be viewed as evidence that a joint venture exists.

McGraw, Justice:

The appellants herein and plaintiffs below, Marvin T. Bowers, Bessie C. Bowers, Esta M. Bell, and John R. Bell (hereinafter "the plaintiffs"), appeal a December 17, 1998, order of the Circuit Court of Jefferson County granting summary judgment in favor of appellee herein and defendant below Gretchen Wurzburg, whom appellants had sued (along with other parties) for damages resulting from a gasoline leak at a 7-11 convenience store near Shepherdstown, West Virginia. For reasons set forth below, we reverse the lower court's grant of summary judgment.

I.

FACTUAL AND PROCEDURAL HISTORY

This represents our third encounter, to date, with this case. The underlying lawsuit stems from a leak of gasoline at a 7-11 convenience store located near Shepherdstown, West Virginia. Like many stores of its kind, this 7-11 offered self-service gasoline sales, the gasoline being stored in underground tanks. At some point in late 1994, some 10,000 gallons of gasoline leaked from the tanks, migrating onto the properties of the plaintiffs. On the ironic date of December 7, 1994, the leaking gasoline caught fire, and produced an explosion in the home of Mr. and Mrs. Bowers. As a result, the other plaintiffs were forced to evacuate their homes for various lengths of time, and suffered other damages.

Consequently, the plaintiffs filed a class action suit[1] in the Circuit Court of Jefferson County against the owner of the property upon which the 7-11 was situated, Gretchen Wurzburg; the company that leased this property and owned and operated the 7-11 store, the Southland Corporation ("Southland"); and three foreign companies who hold a financial interest in Southland, to whom we shall refer to as Ito, IYG, and SEJ.[2]

Without reiterating verbatim the facts of the last two appeals, we find it necessary to provide some background information. The plaintiff's first appeal was a result of the lower court's dismissal of the foreign defendants for lack of personal jurisdiction. We found in *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998) ("*Bowers I*"), that the lower court had erred when it refused to permit discovery on the issue of personal jurisdiction. Without specifically deciding the jurisdictional question, we remanded this case to the Circuit Court of Jefferson County for the pursuit of discovery regarding the court's personal jurisdiction over the foreign defendants. See *Bowers I*, 202 W. Va. at 52-53, 501 S.E.2d at 488-89.

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[1]Appellees suggest that the lower court has refused to certify this lawsuit as a "class action," but such a distinction is irrelevant to our analysis in this opinion.

[2]The Southland Company, the original operator of 7-11 stores throughout the United States, went bankrupt in 1990. A consortium of Japanese companies purchased a majority of Southland after that bankruptcy. Those companies are Ito-Yokado Co., Ltd ("Ito"), IYG Holdings ("IYG"), and Seven Eleven Japan Co., Ltd. ("SEJ"). SEJ is a subsidiary of Ito. IYG is a holding company jointly owned by Ito and SEJ, and is a subsidiary of Ito and SEJ. None of the Japanese companies were involved in the original deal between Ms. Wurzburg and Southland.

The next appeal resulted from the lower court's decision to dismiss the foreign companies for insufficient service of process. Although we agreed that the plaintiffs had not served the defendants properly, in *Bowers v. Wurzburg*, — W. Va. —, — S.E.2d — (No. 25842, June 9, 1999) ("*Bowers II*"), we modified, in part, the circuit court's decision, and remanded the case in order to allow the plaintiffs to effect proper service upon the foreign defendants.

This time around, it is the resident defendant, property owner and landlord, Gretchen Wurzburg, whom the lower court has dismissed from the action. On October 30, 1998, the lower court granted appellee Wurzburg's motion for summary judgment, which became final in an order dated December 17, 1998. It is from this order that the plaintiffs now appeal.[3]

Facts relevant to the instant appeal reveal that Ms. Wurzburg and her late brother Willard developed several convenience stores in the eastern panhandle of West Virginia in the late 1970's. Specifically, on November 1, 1977, the Wurzburgs entered into

[3]Appellees maintain that we should affirm the lower court because plaintiffs did not develop their appellate arguments adequately below. Perhaps because the record in this case has made several trips to Charleston, not all of the relevant documents are contained in the file. However, it appears that in granting summary judgment the trial court did consider the substantive issues raised by the plaintiffs, and did not dispose of the case on the basis of some procedural dereliction on their part. Thus our consideration of plaintiffs' arguments is appropriate.

a lease agreement with Southland whereby the Wurzburgs would construct on their land a building that Southland would lease and operate as a 7-11 store.

In that lease, the Wurzburgs agreed to construct a building on their land in which Southland would operate the store. The Wurzburgs also agreed to maintain the structural integrity of the building, but Southland was to be responsible for all other maintenance and upkeep. Southland was to pay a base rent each month, in addition to a percentage of the store's gross sales.

Shortly after the signing of the November 1, 1977, lease, the parties signed the January 16, 1978, lease, in which the Wurzburgs agreed to let Southland construct and install pipes, pumps, and tanks necessary for the sale of gasoline. Southland also agreed in the second lease to maintain liability insurance and to hold the Wurzburgs harmless in the event others were harmed as a result of the sale of gasoline. Sales of gasoline were not included in the figures used to calculate the gross sales percentage agreed to by Southland in the earlier lease.

Wurzburg maintained in her motion for summary judgment that she had nothing to do with the operation of the 7-11 store, had no control over the day-to-day operations, was unaware of any problems with the gas storage tanks, and owes no duty to the plaintiffs. The lower court agreed, granting Ms. Wurzburg's motion for summary judgment,

and subsequently denying plaintiffs' motion for reconsideration. Because we find that questions of material fact remain, we reverse the decision of the lower court.

II.

STANDARD OF REVIEW

Our standard of review of motions for summary judgment is well established and well known: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Furthermore, "[a] party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." *Id*. at Syl. pt. 6. Our review of such motions is *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

III.

DISCUSSION

A. *The Restatement Argument*

First we note that, when considering landlord or tenant liability for injuries to a third party, "the general principle [is] that once a property is leased, the tenant is liable for

injuries to third persons [that] are caused by the condition of the demised premises." *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 708, 421 S.E.2d 247, 249 (1992). *See also*, *Cowan v. One Hour Valet, Inc*., 151 W. Va. 941, 157 S.E.2d 843 (1967).

However, under certain circumstances, when a landlord knows that the tenant is engaging in potentially dangerous activity, the landlord may be liable for the actions of the tenant, even if that dangerous activity has harmed someone outside of the leased premises. Courts make such an exception to the general rule of landlord immunity to prevent a landlord from knowingly profiting (via the receipt of rent) from certain dangerous activities while passing the liability buck onto the tenant.

In a case where a plaintiff, injured in a gas station explosion, sued the lessee operator as well as the lessor/owner of the property, the Ohio Court of Appeals reversed a directed verdict in favor of the landowner, stating: "Thus, there is simply no case to be made consistent with reality as to why the law should not provide the public with a remedy against a landlord out of possession and control who rents a powder factory to a known pyromaniac." *Benlehr v. Shell Oil Co.*, 402 N.E.2d 1203, 1207 (Ohio Ct. App. 1978).

This concept of imposing liability on a landlord for the actions of a tenant is best explained by reference to the Restatement (Second) of Torts:

> A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfers possession if, but only if,
>
> (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and
>
> (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

Restatement (Second) of Torts § 379A (1963-1964).

Before continuing our discussion, we pause to explain the interrelated nature of several restatement provisions, namely Restatement (Second) of Torts §§ 379A and 837, and Restatement (Second) of Property § 18.4 (1976). First, we note that Restatement (Second) of Property is almost identical to Restatement (Second) of Torts § 379A.[4]

Second, we note that the authors of Restatement (Second) of Torts § 379A, quoted above, emphasize the similarity between that section and another. In the comment

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[4] A landlord is subject to liability for physical harm to persons outside the leased property caused by activities of the tenant or others on the leased property after the landlord transfers possession only if:
(1) the landlord at the time of the lease consented to the activity or knew that it would be carried on; and
(2) the landlord knew or had reason to know that it would unavoidably involve an unreasonable risk, or that special precautions necessary to safety would not be taken.

Restatement (Second) of Property § 18.4 (1976).

to Restatement (Second) of Torts § 379A, the authors write: "The rule stated in this Section is closely related to that stated in § 837 as to the liability of the lessor for a nuisance on the land, and should be read together with that Section. The Comments to § 837 are applicable so far as they are pertinent." Restatement (Second) of Torts § 379A, comment a (1963-1964). Section 837, in full, reads as follows:

> (1) A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and
>
> (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and
>
> (b) he then knows or should know that it will necessarily involve or is already causing the nuisance.
>
> (2) A vendor of land is not liable for a nuisance caused solely by an activity carried on upon the land after he has transferred it.

Restatement (Second) of Torts § 837 (1977). With the interconnectedness of these three sections in mind, we turn to their use by other jurisdictions.

Many states have adopted the language of the above-referenced restatements of the law, in some form or another.[5] The most common application of the restatement logic

[5]*See, Bischofshausen, etc. v. D.W. Jaquays Min.*, 700 P.2d 902 (Ariz. Ct. App. 1985) (adopting Restatement of Torts (Second) § 837); *Commonwealth v. DeLoach*, 714 A.2d 483 (Pa. Commw. Ct. 1998) (comparing criminal liability under ordinance to civil liability under Restatement (Second) of Torts § 837); *Koch v. Randal*, 618 A.2d 283 (N.H. 1992) (continued...)

is in dog bite cases, where a third party, bitten by a tenant's vicious dog, seeks compensation from the landlord as well. *See*, *Uccello v. Laudenslayer*, 118 Cal.Rptr. 741(Ca. Ct. App. 1975) (landlord cannot sit idly by in the face of known danger); *Strunk v. Zoltanzki*, 468 N.E.2d 13 (N.Y. 1984) (landlords, as others, must exercise reasonable care not to expose third parties to unreasonable risk of harm); *Park v. Hoffard*, 847 P.2d. 852 (Or. 1993) (landlord can be liable for injuries to a third party from an attack by tenant's dog off the rental premises).

In a case with facts similar to the instant case, a Colorado court overturned a grant of summary judgment to a defendant landowner, when a tenant allowed methane gas to escape from the property and explode, injuring a third party. The court based its decision on the logic of § 379A: "Under certain circumstances, a lessor may be held liable for physical harm which resulted from a dangerous condition on this land even though he retains no control over it. *See, e.g., Restatement (Second) of Torts § 379A.*" *Salazar v. Webb*, 618 P.2d 706, 707 (Colo. Ct. App. 1980) (footnote omitted).

Another case where an appellate court reversed an award of summary judgment for a defendant landowner is the New Mexico case of *Bober v. New Mexico State Fair*, 808 P.2d 614 (N.M. 1991). In that case, a plaintiff sued the New Mexico State Fair for injuries

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[5](...continued)
(referencing Restatement (Second) of Torts § 837).

she sustained when a car, exiting the state fair grounds after a rock concert, struck and injured her. She alleged that the state should have taken steps, such as installing traffic control devices or deploying policemen, to ensure that the thousands of cars exiting the fair grounds could do so in a safe and orderly manner. The State Fair defended, in part, on the basis that it had leased the fairgrounds to a promoter, and it was the promoter who should bear liability for the accident. The plaintiff relied, in part upon section 379A of the restatement:

> Third, Bober also invokes the rule in Section 379A of the *Restatement (Second) of Torts* . . . The State Fair responds that Bober made no showing that it knew of any unreasonable risks; but this, of course, overlooks the fact that the burden was on the Fair, as the party moving for summary judgement, to adduce some evidence that it was unaware of the danger of an accident arising from a large number of cars exiting the Fairground at one time following an event like the concert at Tingley Coliseum.
>
> We hold that the State Fair could not escape liability to Bober merely by showing that it had leased the Coliseum to [the promoter] for the day and night of the rock concert.

Bober v. New Mexico State Fair, 808 P.2d 614, 622 (N.M. 1991).

Appellant points us to the South Dakota case of *Easson v. Wagner*, 501 N.W.2d 348 (1993). In that case, the defendant tenant injured the plaintiffs when blasting on adjacent property, sending a shower of rocks onto the plaintiffs' home. The lower court had granted the defendant landlord's motion for summary judgment, but the

Supreme Court of South Dakota reversed, applying and summarizing the restatement language:

> Thus the claim . . . gives rise to two questions of fact: whether the landlord knew of, or consented to, the tenant's activity which caused the harm and whether he [or she] realized the risks associated with that activity. If the expected operations under the lease result in a reasonably anticipated injury, the landlord cannot disclaim liability.

Easson v. Wagner, 501 N.W.2d 348, 351 (1993) (citations omitted). Another aspect of *Easson* emphasized by the plaintiffs, is that the defendants in that case, like Ms. Wurzburg, had also received guarantees of insurance coverage and indemnification from their tenants:

> Certainly, mandating insurance coverage and indemnification evinces a recognition by Eggers that mining the Ballard Claim carried with it risks from which liability could result to them as the landowners. The extent of Eggers' appreciation of the risks associated with mining under § 18.4(2), however, raises a question of fact a jury must decide.

Id. While we by no means wish to discourage tenants from obtaining proper insurance to cover themselves or their landlords in the event of an accident like this one, we agree that the existence of insurance and indemnification agreements provides and indication of the risk perceived by the landlord.

We concur with the reasoning of *Easson* and the foregoing cases, and thus adopt the language of the Restatement (Second) of Torts §379A and Restatement (Second) of Torts § 837. A landowner who knows or should know that his or her tenant is conducting

potentially dangerous activities on the leased premises cannot hope to avoid liability by simply avoiding knowledge of the conduct at issue.

Appellee Wurzburg points out a difference between this case and our instant case; *Easson* involves blasting, an abnormally dangerous activity, and one recognized as such in this State. *See, e.g., Witney v. Ralph Myers Contracting Corp.*, 146 W. Va. 130, 118 S.E.2d 622 (1961). Appellee argues that the restatement language we have quoted above requires the tenant's activity to unavoidably involve an unreasonable risk before liability could pass to the landlord; in other words, she argues, if selling or storing gasoline is not abnormally dangerous, like blasting, Ms. Wurzburg cannot be liable under Restatement (Second) of Torts § 379A.

Appellee goes on to point out that dicta in our case of *Peneschi v. National Steel Corp.*, 170 W. Va. 511, 295 S.E.2d 1 (1982), suggests that storing "gasoline in a filling station" should not be considered an abnormally dangerous activity; that is, because we all go to gas stations on a regular basis without preparing a will, gas stations must not pose an "unreasonable risk."[6]

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[6]The instant case involves the sale of gasoline. While we recognize that gas stations are a necessary and integral part of our present society, we are also aware of the inherent dangers the production, transportation, storage, and sale of gasoline present, and we have long considered gasoline to be a dangerous instrumentality:

(continued...)

In *Peneschi*, we discussed the theory of strict liability for the use of dangerous instrumentalities, as propounded in the seminal English case of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). As we explained: "The basic principle of *Rylands* is that where a person chooses to use an abnormally dangerous instrumentality he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality." *Peneschi*, 170 W. Va. at 515 , 295 S.E.2d at 5.

We first addressed the *Rylands* theory of strict liability in a case involving the collapse of a water tower, in which the Court quoted *Rylands* at some length:

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[6](...continued)

> The volatile and dangerous nature of gasoline is recognized by the courts. *Shaffer Oil Co. v. Thomas*, 120 Okl. 253, 252 P. 41; *Gibson Oil Co. v. Sherry*, 172 Ark. 947, 291 S. W. 66, 67, wherein it was said: "Gasoline becomes volatile when exposed to the air and is easily ignited when it comes in contact with a flame. Therefore gasoline is, also, a highly dangerous substance, and the same rule applies to it as above stated with regard to gas." To the same effect are *Sedita v. Steinberg*, 105 Conn. 1, 134 A. 243, 49 A. L. R. 154, and *Hunt v. Rundle*, 10 La. App. 604, 120 So. 696.

Adams v. Virginian Gasoline & Oil Co., 109 W. Va. 631, 636-37, 156 S.E. 63, 65-66 (1930) (Holding that gasoline is a dangerous instrumentality). It is obvious that one must take special precautions to use it safely, and one must remain vigilant in guarding against accidents. "The courts take judicial notice that gasoline and other inflammable petroleum products, gunpowder, and dynamite, are dangerous and explosive, as a matter of common knowledge." *State ex rel. Oil Service Co. v. Stark*, 96 W. Va. 176, 183, 122 S. E. 533, 536 (1924) (citations omitted).

> We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 535, 70 S.E. 126, 128 (1911) (quoting *Rylands*, *supra*).[7]

This is true of items that are inherently dangerous, such as gunpowder, *see*, *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S.E. 1035 (1895), as it is of items that may not be initially dangerous, such as ordinary household garbage in a city dump. We noted as much in a case where the City of Hinton allowed a dump to engulf the home of a Hinton resident:

> [P]ersons who, for their own profit, bring onto their premises, and collect and keep there anything, which if it escapes, will do

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[7]Interestingly, the arguments of the defendant in the *Weaver* case sound much like that of Ms. Wurzburg:

> Defendant, in the present case, had leased the hotel to his son, J. S. Thurmond, who was in possession at the time of the injury complained of, and it is contended that, as there was no agreement by the lessor to make repairs, he is not liable.

Weaver, 68 W. Va. at 535-36, 70 S.E. at 129.

> damage to another, are liable for all consequences of their acts, and are bound at their peril to confine it and keep it on their own premises.

Adkins v. City of Hinton, 149 W. Va. 613, 142 S.E.2d 889 (1965) (citing *Mayes v. Union Carbide & Carbon Corporation*, 143 W. Va. 336, 101 S.E.2d 864 (1958)).[8]

Peneschi is an important case, because it traces the history of this State's application of *Rylands*. In tracing this history, it becomes clear that our application of the *Rylands* doctrine (at least pre-*Peneschi*) was all over the map, but the *Peneschi* court made it clear that we should apply the *Rylands* doctrine as it had been expressed in the Restatement (Second) of Torts §§ 519 and 520 (1976). Though lengthy, we feel it important to quote the restatement and part of its comment to explain our holding in this case:

> § 519. GENERAL PRINCIPLE
>
> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.
>
> § 520. ABNORMALLY DANGEROUS ACTIVITIES
>
> In determining whether an activity is abnormally dangerous, the following factors are to be considered:

[8]Discussed in *Peneschi*, 170 W. Va. at 520, 295 S.E.2d at 10.

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts §§ 519 and 520 (1976). Ms. Wurzburg maintains that selling and storing gasoline cannot meet this test; because the test of § 520 is not met, neither is the test of § 379A. However, the comment on clause (c), above, clarifies this issue:

> There is probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions, and the exercise of the utmost care, particularly as to the place where it is carried on. Thus almost any other activity, no matter how dangerous, in the center of the Antarctic continent, might be expected to involve no possible risk to any one except those who engage in it. **It is not necessary, for the factor stated in Clause (c) to apply, that the risk be one that no conceivable precautions or care could eliminate. What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions in advance and has exercised all reasonable care in his operation, so that he is not negligent.** The utility of his conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.

Restatement (Second) of Torts § 520, Comment on clause (c) (1976) (emphasis added).

Thus, the comment above dismisses our conflict between the section 379A language and the "abnormally dangerous" language of *Rylands*. It is not necessary for a plaintiff to prove that all gas stations are in imminent danger of leaking or exploding to find liability under 379A. As the comment above notes, "[w]hat is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions . . . ." *Id*. Thus we hold that the storage, sale, or distribution of gasoline is subject to the same *Rylands* analysis, as expressed in Restatement (Second) of Torts §§ 519 and 520 (1976), that we would apply to any other activity involving similar or greater danger to the public.

Because this case has not gone to trial, we do not know precisely what precautions Southland used or should have used in handling its gasoline. Plaintiffs also contend that area residents had noticed a persistent odor of gasoline for some time prior to the explosion. Consequently, viewing the facts in the light most favorable to the plaintiffs, as we must when considering a motion for summary judgment, we feel that a jury should consider the issue of Ms. Wurzburg's liability.

B. *Joint Venture*

Plaintiffs argue that Ms. Wurzburg should be found liable on the basis that she is a co-adventurer or joint venturer with Southland in the operation of the store. In support of this argument, plaintiffs note that Southland paid Ms. Wurzburg a percentage of gross

sales in addition to the base rent. Although sales of gasoline were not included in that figure, plaintiffs argue that, by offering gasoline to customers, Southland increased its overall sales, thus increasing Ms. Wurzburg's income. We have defined the term "joint venture" as follows:

> A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.

Syl. pt. 2, *Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987); Syl. pt. 4, *Sipple v. Starr* — W. Va. —, — S.E.2d — (No. 25798, July 15, 1999); accord, *Johnson v. State Farm Mut. Auto. Ins. Co*., 190 W. Va. 526, 438 S.E.2d 869 (1993).

In *Sipple*, we addressed a similar question regarding the effect of gasoline sales upon the sale of non-gas items. In that case, the plaintiff below argued that the owner/operator of a convenience store was engaged in a joint venture with the distributor who supplied gasoline to the store:

> Although Starr [the owner/operator] did not pay directly to PPI [the distributor] some fractional share of every sale of beer or groceries, PPI still could be said to have profited from those sales. It is possible that a jury could find that, the more customers attracted to the Rocket Mart to buy non-gas products, the more potential customers for PPI gasoline, and the converse as well. We feel a jury should be able to consider whether the arrangement produced mutual benefit for both Starr and PPI.

Sipple v. Starr, — W. Va. at —, — S.E.2d at —. The potential connection we found in *Sipple* was of a different nature. There, the distributor did not receive any percentage of the gross sales of the store. The facts of the instant case show that Ms. Wurzburg received approximately 2 percent of the gross sales of the store by virtue of a "percentage clause" in her lease with Southland.

First, we note that the question of whether or not a joint venture exists is to be answered by the jury. "A plaintiff has a right to a jury trial upon the factual issues to determine whether a joint venture existed." *Lasry v Lederman*, 305 P.2d 663 (Cal App. Ct. 1957); "Whether a relation of joint venture exists is primarily a question of fact for the trial court to determine from the facts and the inferences to be drawn therefrom." *Rhodes v Sunshine Mining Co*., 742 P.2d 417 (Idaho 1987); *see also, Bahrs v. RMBR Wheels, Inc*., 574 N.W.2d 524 (Neb. App. 1998); *Johnco, Inc. v. Jameson Interests*, 741 So.2d 867 (La. App. 1999).

We recognize that landlords and tenants commonly use a "percentage clause" to allow some flexibility in long term leases, and to distribute the impact of future inflation upon the parties (*i.e.*, a rise in price produces a rise in gross sales, which increases the amount owed the landlord, while the base rent remains the same). Thus we do not suggest that the mere existence of a "percentage clause" automatically creates a joint venture.

However, we also recognize that a percentage clause could be used to grant a landlord a substantial share in the tenant's business, suggesting a relationship beyond that of landlord and tenant. Thus we find that the use of a "percentage clause" in a commercial lease, whereby the landlord receives a percentage of sales or profits in addition to or in lieu of the base rent, may be viewed as evidence that a joint venture exists. Because we feel this raises a question of fact, summary judgment as to the issue of joint venture was inappropriate.

IV.

CONCLUSION

For the foregoing reasons, the grant of summary judgment as to Ms. Wurzburg was improper. This case is reversed and remanded for proceedings consistent with this opinion.

Reversed and remanded.