IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 34400

CLIFFORD CRUM,
Plaintiff Below, Appellant,

V.

EQUITY INNS, INC., D/B/A THE HAMPTON INN;
VIRGINIA INN MANAGEMENT OF W. VA., INC.;
TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY;
AND JOHN DOE,
Defendants Below, Appellees.

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Civil Action No. 05-C-296

AFFIRMED

Submitted: April 8, 2009
Filed: June 22, 2009

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. "A trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should freely be given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend." Syllabus Point 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968).

3. "Pursuant to the evidentiary rule of *res ipsa loquitur*, 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." Syllabus Point 3, *Kyle v. Dana Transport, Inc.*, 220 W. Va. 714, 649 S.E.2d 287 (2007).

4. "The doctrine of *res ipsa loquitur* cannot be invoked where the

existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances." Syllabus Point 5, *Kyle v. Dana Transport, Inc.*, 220 W. Va. 714, 649 S.E.2d 287 (2007).

PER CURIAM:

The instant action is before this Court upon the appeal of Clifford Crum [hereinafter "Appellant"] from a December 10, 2007, order of the Circuit Court of Raleigh County denying a motion to amend filed by Appellants against Equity Inns, Inc. [hereinafter "Equity Inns"] and refusing to disturb its prior grant of summary judgment as to Equity Inns. Herein, Appellant alleges that the circuit court erred by granting summary judgment to Equity Inns, and by refusing to permit Appellant to amend his complaint against Equity Inns to assert claims for *res ipsa loquitur* and strict liability.[1] Conversely, Equity Inns asserts that the circuit court properly granted it summary judgment and appropriately denied Appellant's motion to amend his complaint as to Equity Inns. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons expressed below, the December 10, 2007, order of the Circuit Court of Raleigh County is affirmed.

I.

FACTUAL AND PROCEDURAL HISTORY

On July 7, 2004, Appellant, a mediator employed with Federal Mediation and

[1] Appellee Equity Inns has been dismissed from the instant action on summary judgment. However, this case is still currently pending before the circuit court as it pertains to the remaining defendants. Although Appellant attempts to raise collective issues in his brief regarding all defendants, this Court will only address those issues raised pertaining to Equity Inns.

Conciliation Service, suffered injuries when a thirty-three pound light fixture which had been attached to the ceiling fell on his head while he was mediating a case in a conference room at the Hampton Inn located in Beckley, West Virginia. Appellant filed the instant action in the Circuit Court of Raleigh County on March 31, 2005, alleging that he was injured as a result of John Doe's negligence in failing to properly install the light fixture to the ceiling, Virginia Inn Management, Inc.'s[2] [hereinafter "VIM"] negligence in failing to properly inspect and maintain its premises in a safe manner prior to the sale of the property, and Equity Inns' negligence in failing to properly inspect and maintain the premises in a safe manner.[3] Appellant also named Travelers Property and Casualty Insurance Company in the Complaint, asserting a claim for bad faith.

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[2] Appellee Beckley Hotel Limited Partnership and/or VIM contracted in or around 1992 with Construction Concepts, Inc. or Wright & Associates to construct the building that now operates as the Hampton Inn at 110 Harper Park Drive, Beckley, West Virginia. The architect on this project was W.R. Eades, Jr. It is believed that the subject light fixture was installed by Construction Concepts, Inc., Wright & Associates, other builders, or by decorators brought in by the original owner or manager of the building to provide lighting and interior decor in completion of the building. VIM contends that it provided accounting and managing services for the business until November 18, 1994, when Beckley Hotel Limited Partnership sold the building to Equity Inns. Equity Inns is the current owner of the subject property.

[3] VIM previously filed a Motion to Dismiss on May 11, 2005, which was granted by the circuit court on July 1, 2005, on the grounds that VIM, as a seller of real property, did not owe to a subsequent invitee of the purchaser a duty to inspect the premises prior to the sale. The circuit court found that the cause of action pled against VIM arose from VIM's role as a vendor, not from its role as a builder. The court held that to succeed on such a tort claim, Appellant must allege that VIM, as a vendor of real property, breached a duty owed to the Appellant. For reasons more thoroughly stated below, VIM was subsequently brought back into the instant action, and currently remains a defendant in the case.

On May 5, 2006, Equity Inns filed a Motion for Summary Judgment seeking dismissal of the only claim filed against it - a claim of negligence for failure to properly inspect and maintain its premises in a safe manner.[4] In its Motion for Summary Judgment, Equity Inns provided the expert report of architect and planner, Mr. Francis A. Guffey, II, dated April 12, 2006, which opined that the subject light fixture fell because it was improperly installed with plastic wall expansion anchors and #8 wood screws mounted in the five-eighths inch gypsum board ceiling only, rather than with one-half inch by three inch Tapcon Anchors that would have reached past the ceiling, through the furring space, and into the concrete deck above, as per the recommendation of Lithonia Lighting, the manufacturer of the light fixture. This defective light fixture was installed approximately two years before Equity Inns purchased and took possession of the building in 1994. Equity Inns also presented Mr. Guffey's expert testimony wherein he opined that once the installation of the light fixture was complete, its defects were not capable of being observed or detected by anyone changing the light bulbs or otherwise examining the fixture.

Thereafter, on May 11, 2006, Appellant filed a one-page Response in Opposition to Equity Inns' Motion for Summary Judgment, asserting that Equity Inns'

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[4] On January 9, 2006, Appellant filed a Motion for Leave to File Amended Complaint, seeking to add two additional counts against Equity Inns and John Doe for strict liability and *res ipsa loquitur*. This motion was not addressed by the Court prior to Equity Inns' Motion for Summary Judgment.

motion was premature, as the proposed amended complaint raised a *res ipsa loquitur* claim[5] and Appellant sought discovery as to the insurance policies and contracts between the parties to the sale and construction of the building, revealing who may be responsible for the condition which caused the light fixture to fall. Appellant also filed a Motion to Amend Complaint and for Relief From Judgment Order Dismissing Virginia Inn Management of West Virginia on May 12, 2006, asserting that there were new facts discovered through Equity Inns' expert which implicated VIM and other newly-identified parties, including Construction Concepts, Inc., who were formerly John Does. The proposed amended complaint contained additional claims for *res ipsa loquitur* and strict liability against all parties.

Equity Inns filed a Reply to Appellant's Response in Opposition to its Motion for Summary Judgment on May 22, 2006, alleging that Appellant failed to meet his burden under Rule 56 of the *West Virginia Rules of Civil Procedure* of producing affidavits, depositions, or discovery demonstrating that a genuine issue of fact existed for trial, and failed to demonstrate adequate reasons why a continuance for further discovery was needed. Additionally, Equity Inns argued that the fact that Appellant had filed a motion to amend his complaint was not sufficient reason to deny summary judgment, as the motion to amend had

[5] For reasons unknown, Appellant's Response in Opposition to Equity Inns' Motion for Summary Judgment did not address the strict liability claim Appellant also sought against all parties.

not yet been granted. Thereafter, on June 1, 2006, Equity Inns filed a Response to Appellant's Motion to Amend Complaint and for Relief From Judgment Order Dismissing Virginia Inn Management of West Virginia asserting that Appellant could not state a legitimate claim for *res ipsa loquitur* against Equity Inns because Appellant could not eliminate other responsible causes for the incident as required by our law in *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997), since the conduct of third persons was implicated by the evidence presented by Equity Inns. Equity Inns also asserted that Appellant could not state a legitimate claim against it based upon strict liability because the *Restatement (Second) of Torts* §§519-20 and West Virginia case law demonstrate, as a matter of law, that the operation of a hotel would not constitute an abnormally dangerous activity.

By Memorandum entered on July 27, 2006, and Order entered July 28, 2006, the circuit court granted Equity Inns' Motion for Summary Judgment, finding that Appellant's response to Equity Inns' Motion for Summary Judgment failed to challenge the opinion of Equity Inns' expert that the failure of the light fixture was due to a construction defect and not by Equity Inns' insufficient or inadequate maintenance or inspection of the fixture. Thus, the circuit court found that Appellant produced no evidence, depositions, affidavits, admissions, or other materials which show that there is an issue of material fact that Appellant breached a duty owed to Appellant. Further, the circuit court found that although Appellant alleged that Equity Inns' motion was premature because further

discovery needed to be conducted, he failed to identify with reasonable specificity the facts to be discovered, or explain how the facts might show that there is a genuine issue of material fact that would defeat summary judgment or show why he had not already engaged in such discovery, as required by *Elliot v. Schoolcraft*, 213 W. Va. 69, 576 S.E.2d 796 (2002).

Additionally, the circuit court found that although Appellant alleged that Equity Inns' motion was premature because a proposed amended complaint had been filed, this allegation was not sufficient to prevent summary judgment, as the possibility that Appellant may have been permitted to file an amended complaint is not recognized by Rule 56 of the *West Virginia Rules of Civil Procedure* as a basis upon which summary judgment should be refused. Furthermore, in assessing whether the motion to amend prevented summary judgment, the circuit court found that the proposed amended complaint did not state any allegations against Equity Inns that were not among the issues raised in the Motion for Summary Judgment, because the only factual allegations the Appellant made in the proposed amended complaint were the same as those previously stated - that Equity Inns failed to properly install the light fixture and that it was negligent in failing to properly inspect and maintain its premises in a safe manner. The circuit court ruled that Appellant could not present any evidence through its claim for *res ipsa loquitur* against Equity Inns

that would raise an issue of fact preventing summary judgment.[6]

Following those orders, on September 22, 2006, Appellant filed a Petition for Appeal with this Court claiming that it was error for the circuit court to deny his motion to amend his complaint, including his new claims of *res ipsa loquitur* and strict liability; that it was error for the circuit court to deny him the right to proceed against VIM because his claims were not extinguished by the statute of repose; and that the circuit court erred in granting summary judgment to Equity Inns. However, subsequent to filing the Petition for Appeal, Appellant's counsel located a deed indicating that the subject accident of July 7, 2004, occurred a few months short of ten years after the November 18, 1994, sale of the hotel to Equity Inns Partnership, L.P. Because the circuit court's order denying Appellant's Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn

[6] Additionally, by Memorandum dated July 28, 2006, and Order dated August 2, 2006, the circuit court denied Appellant's Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management of West Virginia. Regarding Appellant's motion to amend his complaint as to Equity Inns, the circuit court merely reiterated that the motion to amend was denied, and that the issue was addressed by the court when it ruled on Equity Inns' Motion for Summary Judgment. As to Appellant's request for relief from the judgment order dismissing VIM, the circuit court found that Appellant failed to adequately address this issue in its motion and present any argument that the criteria and requirements of Rule 60(b) apply to the present circumstances. Additionally, the court found that the statute of repose, W. Va. Code §55-2-6(a), barred the cause of action stated in Appellant's proposed amended complaint against VIM because VIM sold the building to Equity Inns in 1994, more than ten years before the subject incident occurred. Accordingly, Appellant's request for relief from the judgment dismissing VIM and Appellant's request to amend the complaint as to VIM were denied. This belief by the court was subsequently determined to be in error.

Management, Inc. was grounded on the court's mistaken belief that the subject incident occurred more than ten years after VIM sold the building and that the statute of repose under W. Va. Code 55-2-6(a) barred the cause of action, Appellant and VIM filed a Joint Motion to Remand the appeal to the Circuit Court of Raleigh County on December 6, 2006. On December 19, 2006, Equity Inns filed an Objection to the Motion for Remand as it relates to Appellant's claim against Equity Inns, stating that the fact that the incident occurred just less than ten years after the sale of the hotel had no bearing on Appellant's cause of action against Equity Inns, which owned and operated the hotel at the time of the incident. Because a joint Motion to Remand had been filed, on January 24, 2007, this Court granted Appellant and VIM's motion and remanded the matter to the circuit court for further proceedings. No further action was taken on the appeal.

Thereafter, on February 26, 2007, Appellant filed a second Motion to Amend Complaint and for Relief from Judgment Order Dismissing Virginia Inn Management, Inc. before the circuit court, asserting that there were new facts discovered which implicated VIM, that other defendants which were previously named as John Does had been identified, and that the two-year statute of limitations had not yet expired at the time his original motion to amend was filed. Appellant's newly proposed amended complaint was virtually identical to the amended complaint he had submitted to the circuit court on May 11, 2006, which the circuit court initially refused.

On March 12, 2007, Equity Inns filed a Response to Appellant's motion alleging virtually the same arguments it previously made in response to the first motion to amend filed by Appellant. On March 19, 2007, Appellant filed a two-page reply which asserted that summary judgment was premature until the case was completely developed and discovered pursuant to a time frame which allowed for liberal discovery and development of experts. In particular, Appellant contended that the sales contract which was requested before summary judgment was granted could not be found, but could possibly determine liability for the accident. Appellant also submitted an affidavit of counsel regarding the need for further discovery which alleged that Appellant still needed to take the deposition of Francis Guffey, to hire an expert to review Mr. Guffey's report, to obtain sales receipts and warranties for the light fixture requested in previous discovery, and obtain contracts for the sale of the property which were also requested in previous discovery.

On October 31, 2007, a hearing was conducted before the circuit court where the parties discussed the issues of whether the summary judgment granted by the circuit court in favor of Equity Inns regarding Appellant's negligence claim should be set aside; and whether Appellant should be permitted to amend his complaint to state claims against Equity Inns based on the legal theories of *res ipsa loquitur* and strict liability although the circuit court had previously ruled that such claims could not be maintained. Following the hearing, the circuit court entered an order on December 10, 2007, that held that there was no reason

to disturb its prior ruling which granted summary judgment to Equity Inns, and denied Appellant's motion to amend his complaint as it related to Equity Inns. Specifically, the circuit court found that "[t]he amended complaint does not allege new allegations against [Equity Inns] that were not disposed of already in the . . . grant of summary judgment."[7] It is from this order that Appellant now appeals.

II.

STANDARD OF REVIEW

Our review of the circuit court's grant of summary judgment to Equity Inns is *de novo*. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("[a] circuit court's entry of summary judgment is reviewed *de novo*."). However, regarding the circuit court's denial of Appellant's motion to amend the complaint to assert claims for *res ipsa loquitur* and strict liability against Equity Inns, our standard of review is abuse of discretion. We have held that

> "[a] trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should freely be given when justice so requires, but the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend."

Syl. Pt. 6, *Perdue v. S.J. Groves and Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968).

[7] The circuit court granted Appellant's motion to amend as to all parties except Equity Inns.

With these standards of review in mind, we proceed to consider the arguments of the parties.

III.

DISCUSSION

Herein, Appellant asserts two assignments of error. First, Appellant alleges that the circuit court erred by granting summary judgment to Equity Inns because discovery was still pending and a motion to amend his complaint had been filed. Second, Appellant alleges that the circuit court erred by refusing to permit Appellant to amend his complaint to assert claims for *res ipsa loquitur* and strict liability against Equity Inns. We will address each of these arguments separately.

A. Summary Judgment

Rule 56(c) of the *West Virginia Rules of Civil Procedure* allows a Motion for Summary Judgment to be granted to the defendant if the pleadings, depositions, answers to interrogatories, and any admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. *See Angelucci v. Fairmont General Hosp., Inc.*, 217 W. Va. 364, 368, 618 S.E.2d 373, 377 (2005)(*quoting Syl., Redden v. Comer*, 200 W. Va. 209, 488 S.E.2d 484 (1997); Syl. Pt. 1, *Wayne County Bank v. Hodges*, 175 W. Va. 723, 388 S.E.2d 202 (1985)). "The essence of the inquiry the court must make is 'whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Wilson v. Daily Gazette Co.*, 214 W. Va. 208, 588 S.E.2d 197 (2003)(*quoting Williams v. Precision Coil*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995)). The dispute about a material fact is genuine only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996).

In West Virginia, landowners and occupiers such as Equity Inns are not liable in negligence for injuries that occur to non-trespassing entrants of their land, unless such landowners or occupiers breach their duty of reasonable care under the circumstances. *Mallet v. Pickens*, 206 W. Va. 145, 155, 522 S.E.2d 436, 446 (1999). In order to establish a prima facie case of negligence in West Virginia, a plaintiff must show that a defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action will lie without a duty broken. *Jack v. Fritts*, 193 W. Va. 494, 497-498, 457 S.E.2d 431, 434-435 (1995)(*quoting* Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981)).

In the case *sub judice*, Equity Inns filed a Motion for Summary Judgment seeking dismissal with prejudice of the claim asserted in Appellant's complaint that Equity

Inns was negligent in failing to properly inspect and maintain its premises in a safe manner. In support of said motion, Equity Inns provided the expert report of architect and planner, Francis A. Guffey, II, which opined that the subject light fixture fell because it was improperly installed with plastic wall expansion anchors and #8 wood screws mounted in the five-eighths inch gypsum board ceiling only, rather than with one-half inch by three inch Tapcon Anchors that would have reached past the ceiling, through the furring space, and into the concrete deck above, as per the recommendation of Lithonia Lighting, the manufacturer of the light fixture. This defective light fixture was installed approximately two years before Equity Inns purchased and took possession of the building in 1994. Significantly, Equity Inns also presented Mr. Guffey's expert testimony wherein he opined that once the installation of the light fixture was complete, its defects were not capable of being observed or detected by anyone changing the light bulbs or otherwise examining the fixture.

Once Equity Inns filed a properly supported Motion for Summary Judgment, Appellant had the affirmative burden of producing affidavits, depositions, answers to interrogatories, and/or a response which set forth specific facts showing that a genuine issue for trial existed. However, Appellant failed to meet his burden to defeat summary judgment. In his one-page Response to Equity Inns' Motion for Summary Judgment, Appellant argued that Equity Inns' Motion for Summary Judgment was premature, as the proposed amended complaint raised a *res ipsa loquitur* claim and Appellant sought discovery as to the insurance

policies and contracts between the parties to the sale and construction of the building, revealing who may be responsible for the condition which caused the light fixture to fall. However, Appellant failed to produce any evidence, depositions, affidavits, admissions, or other materials which show that there is an issue of material fact that Appellant breached a duty owed to Appellant, and failed to identify with reasonable specificity the facts that still needed to be discovered, or explain how the facts might show that there is a genuine issue of material fact that would defeat summary judgment. Rule 56 of the *West Virginia Rules of Civil Procedure* requires more than this.

> Indeed, we have held that,
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> > [i]f the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the *West Virginia Rules of Civil Procedure*.

Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins. Co., 206 W. Va. 458, 466, 525 S.E.2d 649, 657 (1999). To meet its burden, the nonmoving party on a motion for summary judgment must offer more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. *Williams v. Precision Coil, Inc.*, 194 W. Va. at 59, 459 S.E.2d at 336. The nonmoving party must also

present evidence that contradicts the showing of the moving party by pointing to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact. Moreover, the nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another. *Id*. at 60, 337. The party opposing a motion for summary judgment may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. at 698 nn. 10, 11, 474 S.E.2d at 878 nn. 10, 11.

An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. *Elliott v. Schoolcraft*, 213 W. Va. at 73, 576 S.E.2d at 800. However, at a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good

cause for failure to have conducted the discovery earlier. *Id*.

In assessing the merits of Appellant's arguments herein, Appellant continues to make very loose, generalized assertions that summary judgment was granted prematurely because discovery was still pending and a motion to amend had been filed. As he did below, Appellant fails to identify with reasonable specificity any other facts to be discovered, or explain how the facts might show that there is a genuine issue of material fact that would defeat summary judgment or show why he had not already engaged in such discovery. The only specific argument Appellant makes is that summary judgment was granted prematurely because the written report of Equity Inns' expert architect, Francis Guffey, leaves possible inferences and questions of fact that Equity Inns would be responsible for contribution to the accident 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."

Appellant contends that an inference exists that if it was owned by Equity Inns for almost 10 years, they might have caused or hastened the process of the light fixture falling by changing the bulbs or cleaning the light fixture. However, this argument was never presented to the circuit court below. To the extent that is now attempting to make an

argument that was not previously presented to the circuit court for consideration, we will not now entertain the same. *See Mayhew v. Mayhew*, 205 W. Va. 490, 506, 519 S.E.2d 188, 204 (1999)("Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal."); *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 585, 490 S.E.2d 657, 672 (1997); *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996)("Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal.").

When the circuit court ruled on Equity Inns' Motion for Summary Judgment, there was no outstanding discovery as to Equity Inns. A review of the record reveals that Equity Inns had already provided Appellant with every document that was responsive to his requests that was in Equity Inns' possession. In fact, Appellant had been given copies of Equity Inns' insurance policies at the time summary judgment was granted, which revealed no information regarding whether Equity Inns was responsible for the condition that caused the subject light fixture to fall. Additionally, although the sales contract that Appellant requested had not been produced by Equity Inns because it was not in its possession, VIM subsequently provided this contract to Appellant on November 18, 2008. The sales agreement also does not appear to impute any liability to Equity Inns.[8]

[8] Although a copy of said contract could not be located within the record, Equity Inns (continued...)

Additionally, the circuit court correctly held that the proposed amended complaint did not prevent summary judgment. The proposed amended complaint simply rehashed the same two issues, improper installation of the light fixture and improper inspection of its premises, and thus, there was nothing new presented that prevented summary judgment. In its order granting summary judgment to Equity Inns, the circuit court explained,

> An examination of the proposed amended complaint discloses that it does not state any allegations against this defendant that were not among the issues raised in the Rule 56 motion. The only factual allegations in the amended complaint against the moving Defendant are that it (among "all defendants") failed to "properly install . . . the fixture" and that Hampton (the moving defendant) was negligent "in failing to properly inspect and maintain its premises in a safe manner.
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> Both of these issues were disposed of in the consideration of the motion for summary judgment. There is no dispute that the moving Defendant did not participate in the installation of the fixture, and the Plaintiff presented no factual material in response to the Defendant's expert report that points to any specific act or omission which could constitute the failure to maintain or inspect the light fixture in a way which could have disclosed the defect.

The circuit court also considered, but rejected, Appellant's attempt to keep his case alive against Equity Inns by amending his complaint to rely upon the principle of *res*

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[8](...continued)
represents that the sales contract states the following:

> 8.1 Liability of Purchaser. Except for any obligation expressly assumed or agreed to be assumed by the Purchaser hereunder, the Purchaser does not assume any obligation of the Seller or any liability for claims arising out of any occurrence prior to Closing.

ipsa loquitur. The court's analyzed the matter as follows:

> Plaintiff's proposed amended complaint alleges in Count 13 that the moving Defendant is "liable to the plaintiff under the theory of Res Ipsa Loquitur since the light fixture was under the exclusive control and management of defendant Equity Inn." Count 13 asserts the application of a legal principle as distinguished from the assertion of fact. As such, the Court is permitted to determine, as a legal issue, whether the reliance on res ipsa loquitur in Count 13 is sufficient to defeat the Rule 56 motion for summary judgment.
>
> It is well established that the principle of res ipsa loquitur does not create a cause of action. It is, rather, an evidentiary principle that allows the trier of fact to infer negligence when three criteria are present: "1) the instrumentality which causes the injury must be under the exclusive control and management of the defendant; 2) the plaintiff must be without fault; and 3) the injury must be such that in the ordinary course of events it would not have happened had the one in control of the instrumentality used due care."
>
> The permissible inference is not a substitute for a factual basis upon which to find negligence. "In making general allegations of fault, stated without support, a party cannot avoid summary judgment merely because the doctrine of res ipsa loquitur is invoked. The plaintiff must still produce evidence to establish the existence of a genuine issue of material fact for a res ipsa loquitur case to survive." Syl. Pt. 6, *Bronz v. St. Jude's Hosp. Clinic*, 184 W. Va. 594, 402 S.E.2d 263 (1991).

We agree with the circuit court. Because the circuit court properly found that Appellant did not offer specific facts or evidence showing that there is a genuine issue remaining for trial, the circuit court's grant of summary judgment to Equity Inns should be affirmed.

B. Motion to Amend Complaint

In his second assignment of error, Appellant maintains that the circuit court erred in refusing to allow Appellant to amend his complaint to assert claims for *res ipsa loquitur* and strict liability against Equity Inns. Upon thoroughly reviewing the arguments of the parties and the record before us, we find that the circuit court correctly refused to permit Appellant to amend the complaint.

Addressing Appellant's claim for *res ipsa loquitur* first, Appellant alleges that "Defendant Equity Inn, Inc. d/b/a The Hampton Inn, and/or all other defendants are also liable to the plaintiff under the theory of Res Ipsa Loquitur since the light fixture in question was under the exclusive control and management of defendant Equity Inn, Inc. d/b/a The Hampton Inn, and/or all other defendants. Mr. Crum was entirely without fault and his injuries would not have happened in the ordinary course of events had the defendants in control used dire (sic) care." However, pursuant to the evidentiary rule of *res ipsa loquitur*, it may only be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when: 1) the event is of a kind which ordinarily does not occur in the absence of negligence; 2) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence, and 3) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Syl. Pt. 3, *Kyle v. Dana Transport, Inc.*, 220 W. Va. 714, 649 S.E.2d 287 (2007); *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E.2d 803 (2002); Syl. Pt. 4, *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997).

Herein, there is no question that Appellant cannot satisfy the second criteria necessary for the invocation of res ipsa loquitur, because other responsible causes, including the conduct of third persons, have not been sufficiently eliminated by the evidence. To the contrary, the conduct of third persons who incorrectly installed the light fixture has been implicated by the evidence to be the responsible cause for the subject incident. Appellant has also maintained that there are multiple parties who may have been responsible for his injury, including the builders, unknown decorators, and previous owners and managers. We held in Syl. Pt. 5, *Kyle v. Dana Transport, Inc.*, 220 W. Va. 714, 649 S.E.2d 287, that

> The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances.

Id. (*quoting* Syl. Pt. 5, *Davidson's, Inc. v. Scott*, 149 W. Va. 470, 140 S.E.2d 807 (1965)).

Furthermore, regarding Appellant's claim for strict liability against Equity Inns, we note that, for reasons unknown, Appellant did not initially address this claim in his response to Equity Inns' Motion for Summary Judgment. Thus, this issue was not discussed or ruled upon by the circuit court below.[9] However, even if the issue had been properly

[9] Despite the fact that the strict liability claim was not raised or addressed by the circuit court below, Equity Inns has responded to Appellant's arguments on appeal that the court erred in refusing to permit him to amend his complaint to assert a strict liability claim. (continued...)

presented below, the circuit court would not have committed error in denying Appellant's motion to amend as it pertains to this claim. Appellant's proposed amended complaint alleges that "Defendant's Equity Inn, Inc. and all others are strictly liable to the plaintiff because the situation he faced with the falling light fixture was inherently dangerous to plaintiff." In his brief, Appellant herein alleges that "[t]he 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." Appellant also alleges that Equity Inns "should be legally responsible for the incident. It occurred on their watch on their property."

In *Peneschi v. National Steele Corp.*, 170 W. Va. 511, 295 S.E.2d 1 (1982), we explicitly adopted into our common law the doctrine of strict liability for abnormally dangerous activity as articulated in the *Restatement (Second) of Torts* (1976). *Restatement (Second) of Torts* §519 (1976) provides that: (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; and 2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. *Restatement (Second) of Torts* §520 (1976) states that in determining whether an activity is abnormally dangerous, six factors are to be balanced. The

[9](...continued)
Accordingly, we will address this argument.

factors are:

> 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, §520.

In applying the doctrine of strict liability in prior cases, we have, for instance, ruled that the use of explosives in blasting operations, though necessary and lawfully used, being intrinsically dangerous and extraordinarily hazardous, renders the contractor liable for damages resulting to the property of another from such blasting, without negligence on the part of the contractor, whether the damage was caused by vibrations or by casting rocks or other debris on the complaining party's property. *Whitney v. Ralph Myers Contracting Corp*., 146 W. Va. 130, 118 S.E.2d 622 (1961); *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*, 152 W. Va. 549, 165 S.E.2d 113 (1968); *Perdue v. S.J. Groves & Sons Co.*, 152 W. Va. 222, 162 S.E.2d 250. We have also held that the sale and distribution of gasoline could be an abnormally dangerous activity and is subject to the *Restatement*

(Second) of Torts test that is applicable to any other activity involving similar or greater danger to the public. *Bowers v. Wurzburg*, 207 W. Va. 28, 528 S.E.2d 475 (1999). We have never applied the doctrine of strict liability to hotels and hotel owners, and choose not to do so here.

Although Appellant urges this Court to "tread new waters" and hold hotels and their owners strictly liable for any injuries that occur on their premises, the *Restatement (Second) of Torts* §519-20 and our prior case law demonstrate that the operation of a hotel would not constitute an abnormally dangerous activity which would subject Equity Inns to strict liability for the injuries allegedly sustained by Appellant.[10] Furthermore, we cannot simply disregard the requirement that a duty of care must in fact be breached before an owner and/or occupier of land can be held liable to a non-trespassing entrant. *Mallet v. Pickens*, 206 W. Va. at 155, 522 S.E.2d at 446. As we have previously cautioned,

> Courts have traditionally recognized that, '[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting to impose new duties and, concomitantly, liabilities, regardless of the economic and social burden. Thus, the courts have generally recognized that public policy and social considerations, as well as foreseeability, are important factors in

[10] In his Reply brief, Appellant alleges, for the first time, that the common law of West Virginia makes an innkeeper responsible for injuries which occur to a guest. *Shifflette v. Lilly*, 130 W. Va. 297, 43 S.E.2d 289 (1947). While this may have conceivably been a plausible theory of recovery for Appellant to pursue against Equity Inns, such a claim was never asserted by Appellant below. To the extent that this issue is now being presented for the first time before this Court, we will not consider the same.

> determining whether a duty will be held to exist in a particular situation.'

Id. at 156, 447 fn 15.

Appellant contends that as a result of the circuit court's rulings, he is now left with a meaningless case and "an innocent victim is left without any remedy for an injury which was caused by others." Appellant asserts that there is no one responsible to sue because he cannot locate Construction Concepts, one of the decorators, or obtain valid service or jurisdiction over Beckley Hotel Limited Partnership, the entity which sold the hotel to Equity Inns, because they withdrew from West Virginia. However, we find this argument wholly unconvincing. Although Construction Concepts, Inc. has moved from West Virginia and has not yet been located, this does not mean that Appellant's counsel could not find the corporation with effort. Likewise, there is no evidence that service could not be accomplished upon Beckley Hotel Limited Partnership by delivering a copy of the summons and complaint to an officer, director or agent of the company or by publication, as permitted by Rule 4 of the *West Virginia Rules of Civil Procedure*. It appears from the record that both of these entities formerly did business in West Virginia, thus the circuit court likely maintains personal jurisdiction over them.

Rule 56 is designed to provide a method of promptly and speedily disposing of the controversy if there is no triable issue of fact. *Guthrie v. Northwestern Mut. Life. Ins.*

Co. , 158 W. Va. 1, 8, 208 S.E.2d 60, 65 (1974) (*citing Weather-Rite Sportswear Co. v. United States*, 298 F.Supp. 508 (U.S. Cust. Ct.); 10 Wright and Miller, *Federal Practice and Procedure*, Section 2712, p. 370). Because the circuit court appropriately used summary judgment in this matter to discern that no genuine issue of material fact exists, there is no need for the Appellant to waste valuable judicial resources by continuing futile litigation against Equity Inns. Accordingly, we believe the circuit court correctly granted summary judgment and correctly refused to permit Appellant to amend his complaint against Equity Inns, and the order of the Circuit Court of Raleigh County is affirmed.

IV.

CONCLUSION

For the foregoing reasons, the December 10, 2007, order of the Circuit Court of Raleigh County is hereby affirmed.

Affirmed.