No. 34400 – Clifford Crum 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.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, dissenting:

This case required the Court to determine whether the circuit court erred in denying the appellant's motion to amend his complaint and refusing to disturb its prior grant of summary judgment to Equity Inns. The majority opinion concluded that the circuit court's order was proper. For the reasons outlined below, I believe that the majority of this Court has erred in upholding the circuit court's actions. Therefore, I dissent.

The appellant was legitimately upon the premises of the Hampton Inn[1] in Beckley, West Virginia, serving as a mediator for a civil lawsuit, and as such, occupied the status of an invitee and guest of the hotel. During the mediation, a thirty-three pound light fixture fell and hit the appellant in the head, causing him serious personal injury. In the original complaint and the subsequent motions to amend, the appellant attempted to assert claims sounding in negligence, *res ipsa loquitur*, and strict liability.

As a result of the majority's opinion, the hotel where the incident occurred is now free and clear of any liability. The circuit court's grant of summary judgment was based

[1]This Hampton Inn is owned by the appellee, Equity Inns.

primarily on a one-page letter from a Mr. Guffey, who was hired by Equity Inns to provide an expert opinion. His opinion, based upon photographs of the fallen light provided by Equity Inns' counsel, was that the subject light fixture fell because it was improperly installed twelve years earlier by an unknown entity. Mr. Guffey stated:

> 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 decor 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.

Based upon this speculative and self-serving hearsay "mention" by an unnamed individual, from his recollection of more than twelve years in the past that another unnamed and unknown "decorator" **may** have provided "lighting and interior decor to complete the building" for the previous owner, the circuit court granted summary judgment in favor of Equity Inns. It is also important to note that only a short time passed between the Guffey report and the grant of summary judgment, allowing the appellant an inadequate period of time to conduct discovery of the appellee's expert in this complicated case where numerous parties were, through no fault of his own, unknown to the appellant.

After reading Mr. Guffey's short letter opinion in its entirety, it is unknown who the individual was who made these comments to him. We are told that he was the

original project architect, but we do not know anything about this unnamed mysterious individual other than the assertion that he has since retired, and that his firm no longer exists. Likewise, we do not know if this unknown person, who, according to Mr. Guffey, admitted that the lighting "was never under his control," was on the job for two days, two weeks, or throughout its entire completion. We just do not know anything about him or his relationship with the prior owners of the hotel in question. In fact, we do not even know who the so-called "decorator" was who **may** have installed the lighting twelve years earlier. Thus, the circuit court granted summary judgment on the basis of a very sketchy opinion that was based on rank hearsay and speculation. Clearly, there were "genuine issue[s] of fact to be tried and inquiry concerning the facts [was] desirable to clarify the application of the law." *See* Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

The majority was dead wrong in holding that: "We have never applied the doctrine of strict liability to hotels and hotel owners, and choose not to do so here." There is existing law on this issue, and this Court has held that an innkeeper is strictly liable for injury to innocent guests. Existing law governing the duty of an innkeeper to a guest is based on common law, an 1899 statute, and a very limited older case law. Nevertheless, there is existing law, which the majority ignores. Not only does the majority fail to enunciate or apply existing law, it fails to clarify or modify it, if that was their purpose. It leaves completely unanswered what the majority of this Court's view is as to the extent generally

of innkeepers' liability to guests and invitees. This is the kind of case that gives the legal system a bad reputation with the general public, because it not only ignores existing law, but also fails to focus on the common sense issue of who should be responsible for injury in a set of circumstances like the one here, where a patron is injured in an established hotel business which holds itself out as a safe environment for paying guests and invitees.

An examination of the common law as modified by W.Va. Code § 16-6-22 (1899) and by subsequent case law makes clear that under existing law, the standard for liability of an innkeeper for personal injury to a guest is one of strict liability absent an affirmative showing by the innkeeper that it has lived up to its duty of due care, at which time the burden of proof would then shift to the guest. In 1947, this Court issued the opinion of *Shifflette v. Lilly*, 130 W.Va. 297, 43 S.E.2d 289 (1947), which considered the nature and extent of the liability of an innkeeper, "designated in our statute as 'hotel keeper,' for loss of goods and chattels taken and carried away from the room of a guest; and, specifically, to what extent, if any, Code, 16-6-22,[2] changed the common law liability for such loss." 130

[2]West Virginia Code § 16-6-22 (1899), provides:

> It shall be the duty of the keepers of hotels and restaurants to exercise due care and diligence in providing honest servants and employees, **and to take every reasonable precaution to protect the persons and property of their guests and boarders**, but no such keeper of any hotel or restaurant shall be held liable in a greater sum than two hundred and fifty dollars for the loss of any wearing apparel, baggage or other property, not hereinafter mentioned, belonging to a guest

W.Va. at 298, 43 S.E.2d at 289.

In the Syllabus of *Lilly*, this Court held:

> Notwithstanding Code,16-6-22, **the common law doctrine of liability of an innkeeper** for loss of or damage to the property of a guest, or for injury to his person, **remains in force**, and applies to the keeper of a hotel or restaurant in this State; and said statute, properly construed, relieves from, or limits, the right of recovery of a guest, only where such innkeeper, hotel or restaurant keeper **affirmatively shows** that he has met the requirements of said statute.

(Emphasis added). While the *Lilly* Court was dealing primarily with the issue of the statutory limitation of liability of an innkeeper regarding the loss of **property** of a guest, it also discussed generally an innkeeper's duty to protect the **safety** of a guest, which was required under common law liability as well as by the statute at issue in that case. This Court stated that: "It seems to be conceded that prior to the enactment of Chapter 48, Acts of the Legislature, 1899, the liability of an innkeeper for the loss of property of a guest, while the relationship of innkeeper and guest continued, was, in effect, absolute." 130 W.Va. at 299-

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> or boarder, when such loss takes place from the room or rooms occupied by said guest or boarder; and no keeper of a hotel or restaurant shall be held liable for any loss on the part of any guest or boarder of jewelry, money or other valuables of like nature, provided such keeper shall have posted in a conspicuous place in the room or rooms occupied by such guest or boarder, and in the hotel office and public reception room of such hotel or restaurant, a notice stating that jewelry, money and other valuables of like nature must be deposited in the office of such hotel (or restaurant), unless such loss shall take place from such office after such deposit.

(Emphasis added).

300, 43 S.E.2d at 290.

> As to personal injury to a guest, this Court further stated:
>
> In the old days when inns were remote from the towns, and when highwaymen were rampant, it was not an uncommon thing for highwaymen and innkeepers to be in league together, and it was realized at a very early stage in our existence that the only safe thing for the general public was **that the innkeeper should be responsible for the safety of his guest** and his guest's goods. That law still remains.

Id. (Emphasis added). The Court in *Lilly* explained that:

> The **strict rule of liability** [against an innkeeper] is generally justified on the ground of public policy. It is said to have been imposed for several reasons, namely, because it was a good policy to encourage convenient and secure intercourse between different parts of the kingdom; because travelers and strangers must of necessity trust to and confide in the honesty and vigilance of the innkeeper and those in his employ.

130 W.Va. at 301, 43 S.E.2d at 291. (Emphasis added). Moreover,

> . . . of the two, the innkeeper is better able to protect himself against loss, while the guest is practically helpless to ascertain or enforce his rights. It is no more a hardship for an innkeeper than for his guests to sustain a loss, neither party being at fault, especially since the former undertakes a trade with a full knowledge of his liabilities, for he may so regulate his charges as to indemnify himself. Moreover, he has special privileges.

Id. (Citation omitted).

The *Lilly* Court recognized that W.Va. Code § 16-6-22 instructed innkeepers "to take every reasonable precaution to protect . . . his guests," and then limited liability only

as to property loss and only under certain circumstances. Neither the statute nor the Court in *Lilly* limited liability in any manner for an innkeeper's failure to protect the safety of its guests. 130 W.Va. at 305, 43 S.E.2d at 293. The Court stated:

> We are of the opinion that the same rule should be applied to the duty to exercise due care and diligence in providing honest servants and employees, and the other requirements of the statute. That, we think, always was the duty of an innkeeper, even though whether he exercises such due care was unimportant, inasmuch as his liability was, in effect, absolute in any event. In our opinion, **it was not the intent of the Legislature in enacting the 1899 statute, to destroy the common law absolute liability, and to set up a new standard in respect to the duty of innkeepers, but merely to give relief to innkeepers in the way of providing means of relieving themselves of all liability in certain instances, and limiting liability in others**, provided certain things, namely, the exercise of due care and diligence in providing honest servants, and the exercise of reasonable precaution to protect the person and property of guests should be established.

130 W.Va. at 306, 43 S.E.2d at 293. (Emphasis added). The Court further explained:

> Under our statute, all he has to do is to establish that he has exercised due care in providing honest servants and employees, and **has taken every reasonable precaution to protect the person and property of his guests.** This is not difficult to establish where such care has been exercised, and difficult to disprove. So, in effect, the limitation provided by the statute is open to all reputable innkeepers, where in their own interest, care is taken to provide honest servants. If such care is not taken, the innkeeper should bear the burden of his negligence because the guest is, to a very large degree, at his mercy, and, on grounds of public policy, entitled to his protection.

130 W.Va. at 307-308, 43 S.E.2d at 294.

Thus, the *Lilly* opinion, read in the context of common law and the 1899 statute, seems to have established a hybrid strict liability-negligence standard on the duty of innkeepers. While making clear that innkeepers remain strictly liable for personal injury to guests, it also enunciated an opportunity for an innkeeper to make an affirmative showing that he "has taken every reasonable precaution to protect . . . his guests." 130 W.Va. at 307-308, 43 S.E.2d at 294. Existing law must be read then to place the initial burden of proof upon the innkeeper, not the guest. Absent an affirmative showing of non-negligence, an innkeeper is subject to strict liability.

Essentially, then, this Court in *Lilly* reiterated that, except in the case of the statutory limitation of liability for theft, the absolute liability for the injury to a guest remained intact absent an affirmative showing by the innkeeper that it met its duty of care. The Court in *Lilly* concluded that, "[w]e see no real hardship imposed on the innkeeper, in our interpretation of the statute [limiting recovery for theft] as a mere limitation on the common law rule, and not as abolishing the same and setting up a new standard." *Id.* The Court declared:

> The reasons that led up to the adoption of the stringent common-law rule for the protection of the traveling public in earlier times are not altogether wanting in principle at the present day. There is as much occasion for traveling now as then, and, in fact, the amount of travel is immeasurably greater today than many years ago. . . . It would seem to be just, therefore, that . . . the innkeeper should at least be called upon for an explanation, he having been placed in full charge of the property, and being in receipt of a valuable consideration for its

safe custody.

130 W.Va. at 308-309, 43 S.E.2d at 295. (Citation omitted). Further, by requiring an affirmative showing by the innkeeper that he has met his duties and responsibilities, the *Lilly* Court essentially places the initial burden on the defendant innkeeper when a guest is injured through no fault of his own. The failure to make such an affirmative showing results in strict liability.

Similarly, in *Early v. Lowe*, 119 W.Va. 690, 692, 195 S.E. 852, 853 (1938), this Court explained:

> It is the duty of an innkeeper or hotelkeeper to keep his buildings and premises in a condition reasonably safe for the use of his guests, and where his negligence in this respect is the proximate cause of an injury to a guest, he is liable therefor, provided the guest at the time is in a place where he has a right, and is reasonably expected, to go. The foregoing rule has been applied in cases involving unguarded or unlighted stairways, unguarded elevator shafts, defective railings, unguarded openings in platforms of fire escapes, defective or insecurely or unsafely fastened window screens, defective chairs, and an unsafe room in which the guest was placed.

This is precisely the situation with the case at hand. The fact is that Equity Inns had complete control over this hotel and light fixture for nearly ten years by the time the light fixture fell on Mr. Crum's head. Under our law it owed Mr. Crum a duty. Moreover, that duty existed whether or not Equity Inns owned the hotel in question for ten years or ten days. Equity Inns was clearly responsible for cleaning and inspecting the light fixtures during the past ten years, and was responsible for keeping its buildings and fixtures in a condition

reasonably safe for use by its guests. Thus, under existing law, Equity Inns was absolutely liable for injury to Mr. Crum, absent an affirmative showing by Equity Inns that it exercised due care to him. Had Equity Inns met this affirmative duty, then the burden of proof would have transferred to the plaintiff-appellant at that time. Thus, in consideration of the aforementioned, and separate from the fact that I believe the circuit court erred in granting summary judgment to Equity Inns, the court should have also granted Mr. Crum's motion to amend to assert a strict liability claim providing him an opportunity to litigate that issue.

Many other jurisdictions share this view. For example, in *Fontana v. Wilson World Maingate Condominium*, 717 So.2d 199 (Fla.App. 5th Dist.1998), the Florida District Court faced a similar situation as this Court faced with the falling light fixture. In that case, a guest of the hotel sat in a chair which was defective causing it to collapse and injure her. At the conclusion of her case, the lower court directed a verdict in favor of the hotel because there was no evidence of actual or constructive notice as to the condition of the chair. The District Court reversed the lower court and held that:

> Even though a hotel is not an insurer, it nevertheless owes its guests the duty of ordinary and reasonable care. One who conducts a business in which the public is invited to enter owes a duty to such invitees with respect to their safety. . . . The situation involved in this case is not like a normal slip and fall case in which the danger is a pool of liquid or a banana peel on the floor which would be readily apparent from a visual inspection at reasonable intervals; here, the defect was hidden. Housecleaning personnel merely looking at the chair would not have observed danger.

717 So.2d at 199-200. The Court further reasoned:

> Even though the defendant might have put on contrary evidence had the directed verdict not been entered, the fact is that the only record evidence is that appellee had no procedure in place for the inspection or maintenance of its furnishings. Thus, at the time the directed verdict was entered, there was evidence that appellee did not check the condition of its furniture to see that it was in a safe condition. Even ordinary wear and tear over a period of time can become a hazard. The jury could have found that the owner's ostrich-like approach to the safety of its premises did not meet its obligations to its invitees. In a situation such as this . . . where an overnight guest is injured because of a defective condition that existed prior to such guest checking into the hotel, a condition that would have been discovered upon a reasonable inspection, the issue of negligence should have gone to the jury.

717 So.2d at 200.

Regarding Mr. Crum's case, the majority's blanket statement that: "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" was based on their citation of *Mallet v. Pickens*, 206 W.Va. 145, 155, 522 S.E.2d 436, 446 (1999). *Mallet*, however, is distinguishable both factually and legally from the situation at hand.

In *Mallet*, Patricia and Ernest Mallet, decided to visit their good friends, the Pickens family. The Mallets, however, did not realize that the Pickenses were having work done to their home resulting in the only access to the front door of the house being a set of

temporary, wooden stairs, which did not have a railing or banister. While exiting the home, Ms. Mallet fell, striking her head on a concrete block. She suffered broken bones in her face that required surgery. In *Mallet*, the circuit court found that there was no insurance coverage for Ms. Mallet based upon common law distinctions between an invitee and licensee. In reversing the circuit court, this Court abolished such a distinction between an invitee and licensee and found that coverage for Ms. Mallet's injuries did exist. In Syllabus Point 4 of *Mallet*, the Court held specifically that:

> The common law distinction between licensees and invitees is hereby abolished; landowners or possessors now owe any non-trespassing entrant a duty of reasonable care under the circumstances. We retain our traditional rule with regard to a trespasser, that being that a landowner of possessor need only refrain from willful or wanton injury.

206 W.Va. at 155, 522 S.E.2d at 446.

The holding in *Mallet* did not alter the common law duties imposed between an innkeeper and a guest due to the special relationship that exists between the two, nor the older case law which was directly on point to the issue of innkeeper liability. Likewise, the *Mallet* Court did not address this Court's previous ruling in *Lilly*, or the impact of W.Va. Code § 16-6-22 on an innkeeper's duty to take "every reasonable precaution to protect . . . his guests." 130 W.Va. at 307-308, 43 S.E.2d at 294. It did not address those issues because they did not apply to the situation in *Mallet*. The Court in *Mallet* dealt with the specific situation of a neighbor visiting another neighbor's home wherein an injury occurred in an

area that was under construction. This involved a social guest, not a paying guest. I see nothing in *Mallet* that alters a duty of an innkeeper to a guest based upon our existing law.

In the situation at hand, on the day in question, Mr. Crum entered the conference room of the hotel to conduct mediation in a civil lawsuit. Then, through no fault of his own, a thirty-three pound light fixture fell on his head. Although a very sketchy expert opinion was rendered concluding that Equity Inns was without fault, the appellant never had a meaningful opportunity to conduct discovery of this expert and refute this opinion. Even if the Guffey opinion letter was determined to constitute a prima facie showing of the defendant having met its affirmative duty to the plaintiff, the appellant should have been able to pursue further discovery on the alleged negligent maintenance of the hotel and what duties and obligations, if any, were assumed by Equity Inns when it purchased the hotel. It is my belief that the better view would be for strict liability to be imposed upon an innkeeper for personal injury to a guest who is without fault. If that is not the majority view, the least they could have done was to clarify or modify existing law to their liking. The majority does absolutely nothing to enunciate existing law, nor to modify or clarify it. The majority leaves the law even murkier than it has been for the last sixty-two years, since this Court issued the opinion of *Lilly*.

Therefore, for the reasons stated above, I respectfully dissent.