IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00744

KATHY VIRGINIA RAY — APPELLANT/ PLAINTIFF

V.

BLOCKBUSTER, INC., A DELAWARE CORPORATION, AND CRYSTAL ADAMS, INDIVIDUALLY — APPELLEE/ DEFENDANT

ON APPEAL FROM
THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

(ORAL ARGUMENT REQUESTED)

SUBMITTED BY:

REBECCA B. COWAN, ESQ. ([redacted])
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Honorable W. Swan Yerger, Circuit Court Judge, First Judicial District of Hinds County, Mississippi, Post Office Box 327, Jackson, MS 39205.

2. Rebecca B. Cowan, Esq., Currie Johnson Griffin Gaines & Myers, P.A., Attorney for the Appellee/Cross-Appellant, Post Office Box 750, Jackson, MS 39205-0750.

3. Denise Wesley, Esq., Currie Johnson Griffin Gaines & Myers, P.A., Attorney for the Appellee/Cross-Appellant, Post Office Box 750, Jackson, MS 39205-0750.

4. Michael R. Brown, Esq., The Michael R. Brown Law Offices, PLLC, 120 North Congress Street, Suite 230, Jackson, MS 39201.

5. Rogen K. Chhabra, Esq., Tabor, Chhabra & Gibbs, P.A., 120 North Congress Street, Suite 200, Jackson, MS 39201.

6. Kathy Virginia Ray, Plaintiff, 1401 Arlington Street, Clinton, MS 39056.

7. Blockbuster, Inc., a Delaware Corporation doing business in the State of Mississippi, Defendant.

8. Crystal Adams, a Defendant (dismissed with prejudice and not on appeal), believed to have been a resident of the State of Mississippi at the time of suit.

SO CERTIFIED, this the 22nd day of January, 2008.

Denise C. Wesley [redacted]

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I. The trial court correctly found that Blockbuster was not liable for Ms. Ray's injuries from a trip and fall incident that occurred in a common area of the shopping center that Blockbuster neither owned nor controlled.

A. Because the lease agreement between Blockbuster and its landlord, Madison Development, Inc., establishes that Blockbuster did not lease, own or control the parking lot in which Ms. Ray fell, Ms. Ray has failed to prove the element of duty in her negligence claim against Blockbuster.

B. The trial court properly applied Wilson v. Allday to the specific facts of this case, concluding that Blockbuster was not liable to Ms. Ray because it lacked sufficient control over the parking lot in which she sustained her alleged injuries.

II. Since Ms. Ray has elected not to contest the lower court's granting of Blockbuster's Motion to Strike, this issue has been rendered moot on appeal.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, AND DISPOSITION IN THE COURT BELOW

This lawsuit arises from a trip and fall incident that occurred in a parking lot adjacent to a sidewalk in front of the Blockbuster, Inc. (hereinafter "Blockbuster"), video store in Clinton, Mississippi. (R. 19/ RE 1). The Plaintiff, Kathy Virginia Ray (hereinafter, "Ms. Ray"), sued Blockbuster for her injuries after settling her claims against the owner of the parking lot, Madison Development, Inc. (Hereinafter "Madison"). (R. 72-73/ RE 54-55). Madison leased a store building to Blockbuster. (R. 64/ RE 46). Blockbuster moved for a summary judgment on the grounds that Ms. Ray could not recover damages from Blockbuster because Blockbuster did not own or control the parking lot. (R. 19-75/ RE 1-57). Summary judgment was granted to Blockbuster on this basis, and Ms. Ray subsequently appealed. (R. 116-118).

B. COURSE OF PROCEEDINGS AND STATEMENT OF RELEVANT FACTS

Ms. Ray filed suit against Blockbuster, Inc., alleging that Blockbuster exercised control over the portion of the parking lot in which she fell. (R. 27/ RE 9). Ms. Ray's complaint further alleged that because Blockbuster controlled a portion of the parking lot, Blockbuster breached a duty owed to its business invitees. (R. 31/ RE 13). Essentially, Ms. Ray describes the breach as a failure by Blockbuster to remedy an allegedly dangerous pothole in the parking lot, and a failure to warn invitees of the existence of the pothole. (R. 29/ RE 11).

Discovery responses confirmed that the parking lot in which Ms. Ray fell, as well as the building in which Blockbuster was located were both owned and controlled by Madison. (R. at 33-66/ RE 15-48). The lease agreement between Madison and Blockbuster granted Blockbuster the rights of control and possession over the interior portion of the Blockbuster store; but it expressly

refused to extend to Blockbuster any control of the adjacent parking lot. (R. at 33-66/ RE 15-48). In fact, the lease agreement established that ownership and control of the parking lot adjacent to Blockbuster was held by Madison, and that Madison was responsible for the maintenance and upkeep of the parking lot:

> * * *
>
> 12. Notwithstanding anything to the contrary contained in the Lease, Landlord agrees, at its sole cost and expense, to comply with all laws, ordinances, orders and regulations regarding the common area of the Shopping Center, access up to the Demised Premises and the structural portions of the Demised premises (including the roof, but not including the front door of the Demised Premises)...
>
> * * *
>
> 16. Landlord hereby represents and warrants to Tenant that Landlord is the current fee simple owner of the Demised Premises and the Shopping Center...
>
> * * *
>
> 18. Tenant, and Tenant's invitees and customers shall have the non-exclusive right free of charge, to park in all parking spaces located in the Shopping Center throughout the term of the Lease (including any extensions or renewals thereof).
>
> * * *
>
> 28. Tenant shall not make any structural alterations in any portion of the Demised Premises, nor any alterations in the storefront or the exterior of the Demised Premises without, in each instance, first obtaining the written consent of Landlord which shall not be unreasonably withheld.

(R. 59-60/ RE 41-42 (¶ 12), R. 61/ RE 43 (¶¶16 and 18), R. 63/ RE 45 (¶ 28)).

Based on the fact that Madison, not Blockbuster, owned and controlled the parking lot in which Ms. Ray fell, Blockbuster moved for summary judgment on the issue of whether it owed any duty to Ms. Ray to keep the parking lot safe. (R. 19-75/ RE 1-57). Blockbuster argued in its motion that under Mississippi law, Ms. Ray could not recover from Blockbuster for any injuries she sustained on premises that Blockbuster did not own or control. (R. 19-24/ RE 1-6). Blockbuster also

produced evidence that Madison repaired the pothole to further prove that Madison owned and controlled the parking lot. (R. 68/ RE 50).

Upon consideration of these factors, the trial court granted Blockbuster's Motion for Summary Judgment, and Ms. Ray subsequently appealed. (R. at 116-118).

SUMMARY OF THE ARGUMENT

Mississippi law only allows Ms. Ray to receive compensation for her alleged injuries from the party that actually caused those injuries. Under Mississippi law, a business owner like Blockbuster owes its patrons as business invitees a duty to keep its business premises in a reasonably safe condition and to warn of any unsafe conditions on the premises. Thompson v. Chick-fil-A, Inc., 923 So.2d 1049, 1052 (¶ 10) (Miss. App. 2006). This duty applies to premises owned or controlled by Blockbuster. When a business is only a tenant, leasing only a portion of a larger property owned by a lessor, the lease agreement entered into between the tenant and the lessor provides evidence of the tenant business' ownership, possession, and control. Doe v. Cloverleaf Mall, 829 F.Supp, 866, 870-871 (referring to lease terms of tenant defendants to determine ownership and use of parking lot). Additionally, a tenant's control of certain premises it leases can be established by other factual evidence surrounding its use, if any, of the property. Doe v. Cloverleaf Mall, 829 F.Supp, 866, 872 (citing Wilson v. Allday, 487 So.2d 793 (Miss. 1986), as example of case in which there was evidence of tenant's control of parking lot).

Control, however, is not proven by a mere showing that an injury occurred **near** an area owned or controlled by a business. Instead, the business must actually have possession or control of the premises where the defect causing the injury existed. Doe v. Cloverleaf Mall, 829 F.Supp. 866, 872; Brookhaven Funeral Home v. Hill, 820 So.2d 3, 5 (¶ 9). In this case, the lease agreement defining Blockbuster's ownership interest in the parking lot where Ms. Ray fell designates Madison as the legal entity having control and possession of the premises. (R. 59-60/ RE 41-42 (¶ 12), R. 61/ RE 43 (¶¶16 and 18), R. 63/ RE 45 (¶ 28)). And, Ms. Ray failed to provide any evidence that Blockbuster somehow exercised control over the parking lot outside the terms of the lease.

Because Ms. Ray provided no evidence that Blockbuster controlled the parking lot, Blockbuster is not liable under Mississippi law to Ms. Ray for any dangerous conditions on property that it did not control. Therefore, the trial court properly granted summary judgment in favor of Blockbuster.

ARGUMENT

I. Standard of Review

Under Rule 56 of the Mississippi Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When reviewing the trial court's grant of summary judgment, the Mississippi Supreme Court conducts a *de novo* review of the record. Glennon v. State Farm Mut. Automobile Ins. Co., 812 So.2d 927, 929 (¶ 5) (Miss. 2002). With regard to the standard of review, the Court in Glennon also stated as follows:

> The proponent of a summary judgment bears the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. M.R.C.P. 56(c); Collier v. Trustmark Nat'l Bank, 678 So.2d 693, 696 (Miss. 1996). The non-movant may not defeat the motion merely by responding with general allegations, but must set forth in an affidavit or otherwise, specific facts showing that issues exist which necessitate a trial. Drummond v. Buckley, 627 So.2d 264, 267 (Miss. 1993). After viewing evidentiary matters in a light most favorable to the nonmoving party, this Court can only reverse the decision of the trial court if triable issues of fact exist. Travis, 680 So.2d at 216.

Glennon at 929 (¶ 5).

Pursuant to Glennon, the mere allegations set forth in Ms. Ray's response to Blockbuster's motion for summary judgment and reiterated on this appeal are insufficient to reverse the trial court's decision to grant summary judgment in favor of Blockbuster. Thus, Blockbuster's summary judgment on the issue of duty was properly decided as a question of law. Doe v. Cloverleaf Mall, 829 F.Supp. 866, 873. (S.D. Miss. 1993) (citing Lyle v. Mladinich, 584 So.2d 397, 400 [Miss. 1991], for the proposition that "whether duty exists is question of law; whether duty was breached is issue for fact-finder to resolve").

II. The trial court correctly found that Blockbuster was not liable for Ms. Ray's injuries from a trip and fall accident because the fall occurred in a common area of the shopping center that Blockbuster neither owned nor controlled.

In Brookhaven Funeral Home, Inc. v. Hill, 820 So.2d 3 (Miss. App. 2002), the Mississippi Court of Appeals held that "[i]n order to prove 'liability on the part of an owner or occupant of premises for injuries resulting from the condition of the premises,' a plaintiff must, as a preliminary matter, show that the defendant had occupation or possession and control [of the premises]" Hill, 820 So.2d 3, 6 (¶ 14) (quoting Wilson v. Allday, 487 So.2d 793, 796 (Miss. 1986)). Thus, in a premises liability action such as the incident at issue in this case, Mississippi law requires Ms. Ray to not only establish that a legal relationship existed between herself and Blockbuster, but that law also requires Ms. Ray to establish Blockbuster's legal relationship to the allegedly dangerous premises. Hill, 820 So.2d 3, 6 (¶ 14). Ms. Ray actually acknowledges this requirement in her brief. (Appellant Brief at page 10).

Because Ms. Ray failed to provide any evidence of Blockbuster's legal ownership or control of the parking lot in which she fell, the trial court's dismissal of Ms. Ray's claims against Blockbuster should be affirmed by this Court on appeal.

A. Because the lease agreement between Blockbuster and its landlord, Madison Development, Inc., establishes that Blockbuster did not lease, own or control the parking lot in which Ms. Ray fell, Ms. Ray has failed to prove the element of duty in her negligence claim against Blockbuster.

The case of Brookhaven Funeral Home, Inc., v. Hill, 820 So. 2d 3 (Miss. App. 2002), directly addresses the issues in the present lawsuit against Blockbuster. In Hill, the plaintiff, Deborah Hill, fell on a portion of sidewalk located in front of Brookhaven Funeral Home. Id. at 4 (¶ 1). Although the sidewalk was in front of Brookhaven Funeral Home, it was actually owned by the City of Brookhaven ("the City"). Id. at 4 (¶ 4). In her lawsuit, Ms. Hill only named the funeral home as a

defendant, so the funeral home filed a third party complaint against the City of Brookhaven. Id. at 5 (¶ 5). At trial, the jury returned a verdict in favor of Ms. Hill and against the funeral home for $75,000.00. The trial judge found that the City of Brookhaven had no duty to indemnify the funeral home. Id. at 5 (¶ 5). On appeal, the Mississippi Court of Appeals reversed the trial court, holding that Ms. Hill never proved the funeral home's occupation or ownership of the sidewalk on which she fell. Id. at 7 (¶¶19-20).

The Court of Appeals reasoned that in order for the funeral home to be found liable, "the defect must be to premises for which the funeral home has sole or shared legal responsibility, not just to property in the vicinity of the funeral home." Id. at 5 (¶ 9). The court further reasoned that while "[p]rivate landowners are ... responsible for the sidewalks that they own or maintain," it is the responsibility of the complaining party to "show that the defendant had occupation or possession and control [of the premises]." Id. at 6 (¶¶13-14) (citing Stanley v. Morgan & Lindsey, Inc., 203 So.2d 473, 476 (Miss. 1967), and Wilson v. Allday, 487 So.2d 793, 796 (Miss. 1986)).

Like the trial court in the instant case, the Hill court opined that because the sidewalk was owned by the City, not the funeral home, the funeral home could not be held liable for Ms. Hill's injuries. Id. at 7 (¶ 20). The court held that evidence that the City performed the repairs to the sidewalk after Ms. Hill's fall, and evidence that the funeral home transmitted funds to the City to add handrails to the sidewalk area proved that the City controlled the sidewalk Id. at 7 (¶¶ 16-19).

In the present case, Blockbuster is in a position similar to that of the funeral home in Hill. Blockbuster has been sued by Ms. Ray because she fell in an area near the vicinity of the Blockbuster store. However, Ms. Ray did not offer any proof during the summary judgment proceedings that Blockbuster actually owned the parking lot where she fell. Instead, the proof as set forth in the Lease Agreement and First Amendment to Lease conclusively provide that Madison Development, Inc.,

had ownership, control, and possession of the parking lot. (R. 59-60/ RE 41-42 (¶ 12), R. 61/ RE 43 (¶¶16 and 18), R. 63/ RE 45 (¶ 28)). Furthermore, evidence that Madison made the ultimate repairs to the parking lot when Ms. Ray fell, not Blockbuster, clearly evidence that Madison did not relinquish its legal control of the parking area to Blockbuster. (R. 68/ RE 50).

The control exercised by Madison over the parking lot is further supported by the terms of its lease with Blockbuster. For example, the First Amendment to Lease, Paragraph 12, states that Madison, as the Landlord, agrees to comply with laws regulating the common areas of the shopping center at its own expense. (R. 59-60/ RE 41-42). Paragraph 16 declares the fee simple ownership interest that Madison possesses in the Demised Premises and Shopping Center areas, which encompasses the parking lot where Ms. Ray fell. (R. 61/ RE 43). In Paragraph 18, Madison grants Blockbuster only certain rights of access to the parking spaces that it owns. (R. 61/ RE 43). Lastly, Paragraph 28 allows Madison to govern the right to make structural alterations to the interior and exterior of the Demised Premises, and requires Blockbuster to obtain pre-approval from Madison before any changes are made. (R. 63/ RE 45). These sections of the Lease Agreement between Blockbuster and Madison show that Madison had control and possession of the parking lot in front of Blockbuster.

Ms. Ray also argues on appeal that the Hill case is distinguishable from the instant case. While making this argument, however, Ms. Ray completely ignores the fact that the Hill case involved a question of ownership and control of the property on which Ms. Hill suffered her injuries, which is the precise issue set forth by Blockbuster in its Motion for Summary Judgment. The only distinction between the facts of the instant case and those in Hill are that no lease existed establishing that the City of Brookhaven owned the sidewalk on which Ms. Hill fell. In the instant

case, the lease was submitted to the trial court to provide evidence of ownership and control of the parking lot.

Ms. Ray further argues that the proper legal question in determining whether there are genuine issues of material fact is whether she can establish that Blockbuster, as a leasee, breached duties it owed under the lease. However, Ms. Ray ignores the requirement she had to first establish that Blockbuster owed her a duty under Mississippi law.

Since Blockbuster did not control the parking lot where Ms. Ray fell, Blockbuster is not liable for the damages resulting from her fall. Thus, the trial court's dismissal should be affirmed.

B. The trial court properly applied Wilson v. Allday to the specific facts of this case, concluding that Blockbuster was not liable to Ms. Ray because it lacked sufficient control over the parking lot in which Ms. Ray sustained her injuries.

On appeal Ms. Ray argues that Hill is not applicable to the facts of this case. Instead, she characterizes Wilson v. Allday as a case "directly analogous" to her suit against Blockbuster and claims that its holding "completely control[s]" the outcome of this litigation. (Appellant Brief at p. 11). Ms. Ray argues that an application of Wilson v. Allday to the facts before the trial court shows that a genuine issue of material fact existed as to whether Blockbuster controlled the property comprising the parking lot. Ms. Ray's argument in this regard, however, was rejected by the court in Doe v. Cloverleaf Mall, 829 F.Supp. 866. There, the court held that the holding in Wilson v. Allday actually requires an injured plaintiff to prove a tenant's control over a premises in order to avoid dismissal for failure to prove the element of duty in a negligence claim. Doe, 829 F.Supp. 866, 873.

In Doe, the plaintiff, Jenny Doe, sued the Cloverleaf Mall, its management company, and five tenant stores in the Cloverleaf Mall: J.C. Penney Company, Inc., K & B Mississippi Corporation, Morrison, Inc., McCrory Corporation, and McRae's. Doe, at 868. The plaintiff claimed she

sustained injuries when she was abducted at gunpoint from the Cloverleaf Mall parking lot on the east side of J.C. Penney's. Doe, at 868. The defendants removed the action to federal court, alleging fraudulent joinder of the non-diverse tenants, and the plaintiff moved for remand. Doe, at 869. The Magistrate Judge heard the motion for remand and, while interpreting Wilson v. Allday, held that the plaintiff had valid claims against the Mississippi resident defendants. Doe, at 869. The district court, on review, reversed the Magistrate Judge's decision, finding that the Magistrate Judge had misapplied and/or misinterpreted the decision in Wilson v. Allday. Doe, at 869.

First, the district court acknowledged that the issue before it was "whether the resident defendants had a duty to maintain the mall parking lot in a reasonably safe condition for mall patrons." Doe, at 870. The court interpreted Mississippi law as applying the following duty to a commercial tenant in regard to the property it leases:

> Generally speaking, under Mississippi law, a tenant may be liable for injuries occurring on those parts of the premises which are part of the leasehold; that is, a tenant's duty to invitees extends to those parts of the premises which are actually leased by the tenant. A tenant's duty also extends to areas of the premises not within the leasehold but as to which the tenant has covenanted to maintain and repair, and to areas as to which the tenant exercises actual possession or control. And in the latter instance, that duty of care to invitees devolves upon the tenant even though the lessor has contracted to maintain and repair those parts of the premises.

Doe, at 870.

Second, the court in Doe held that while the Wilson court followed the aforementioned rule, which resulted in its finding that a tenant did have control over the subject parking lot, the facts in Wilson were distinguishable from those in Does's suit against the Cloverleaf Mall. The court recognized that the facts in Wilson showed that the tenant controlled the parking lot to some extent since it had erected a corral in the common parking lot where its employees gathered shopping carts it owned. Additionally, the court held that the tenant in Wilson invited customers to park in the front

of its store and had asked its employees to park in other designated areas. The court in Doe, while arriving at its decision, also provided a laundry list of factors that would **not** reflect a tenant's position or control over a parking lot:

> ... The mere use of the parking lot, however, even though this use resulted in economic benefit to these tenants, is not "tantamount to possession and control." See Catherman v. United States, No. 90-CV-576, 1992 WL 175258, U.S. Dist. LEXIS 11120 (N.D.N.Y. July 21, 1992) (mere fact that Defendant's patrons used entrance for access to leased space in building could not reasonably be asserted as divestment of landlord's possession and control of entryway); Craig v. A.A.R. Realty Corp., 576 A.2d 688, 696 (Del.Super.Ct. 1989) (economic benefit standing alone will not be sufficient to create duty on part of landlord where record otherwise lacks evidence of control; St. Phillips v. O'Donnell, 137 Ill.App.3d 639, 92 Ill.Dec. 354,357, 484 N.E.2d 1209, 1212 (1985) (mere use of parking lot along with customers does not show actual control of parking lot); Hall v. Quivira Square Dev. Co., 9 Kan.App.2d 243, 675 P.2d 931 (1984) (lessor liable for failure to maintain leased area retained for common use of lessor's tenants where tenants and their customers merely entitled to use common area); Leary v. Lawrence Sales Corp., 442 Pa. 389, 275 A.2d 32 (1971).
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> ***
>
> ... A tenant's reservation of the right to make repairs or provide security should the landlord fail to do so, where the tenant never exercises that right, cannot give rise to a duty to make such repairs or provide such security. *See* ****873*** Catherman v. United States, No. 90-CV-576, 1992 WL 175258, at *13, U.S.Dist. LEXIS 11120 at *39 (citing DeLong v. United States, No. 82-CV-1104, slip op. At *4 (N.D.N.Y. 1983)) (right-to-repair clause in lease "does not provide any support"for contention that tenant is in control of that area of premises); Dopico-Fernandex v. Grand Union Supermarket, 841 F.2d 11, 14 (1st cir.) *cert. denied*, 488 U.S. 864, 109 S.Ct. 164, 102 L.Ed.2d 135 (1988) (reservation unto tenant of right to perform landlord's obligations upon landlord's failure to do so could not be read to impose any obligation on tenant); Craig v. A.A.R. Realty Corp., 576 A.2d 688 (Del.Super.Ct. 1989) (neither right to inspect premises, nor reservation of right to inspect coupled with right to retake control under certain circumstances amounted to control); Tu Loi v. New Plan Realty Trust, No. 9107273, 1992 WL 392617, *3, U.S.Dist. LEXIS 19279, at *8-9 (E.D.Pa. Dec. 15, 1992) (rejecting plaintiff's contention that landlord's retention of right to repair was tantamount to control over premises); Underhill v. Shactman, 337 Mass. 730, 151 N.E.2d 287 (1958) (where landlord was to maintain passageways and parking area for benefit of stores in shopping center and control over these areas remained in landlord, tenant had no duty with respect to those areas, even though tenant had right to supply extra parking attendants and duty to carry insurance covering persons injured "in or about the [demised] premises").

Doe, 829 F.Supp., 866, 872-873.

Finally, the court in Doe ultimately phrased the holding in Wilson v. Allday as follows:

> Indeed, Wilson clearly holds that only where a tenant's "use of the premises [is] tantamount to possession and control" does the tenant owe a duty to its invitees upon the premises. Wilson, 487 So.2d at 797. If the tenant's "use of the lot [does] not constitute control, there [will] be no duty owed and therefore no cause of action."

Doe, 829 F.Supp. 866, 872.

Therefore, a reading of Doe and Wilson v. Allday, as interpreted by the court in Doe establishes that before a tenant can be held liable for injuries an invitee incurs in a common area of leased premises, e.g., a parking lot, the invitee must prove that the tenant had possession and control of the area in question. While making this legal determination, a court can look to the actual lease between the tenant and the lessee to determine the issue of possession and/or ownership. A court can also look to factual circumstances that point to any control exercised by a tenant over the premises at issue. In Wilson v. Allday, sufficient facts existed to establish the tenant's duty over the premises. However, in Doe, the court found that there were insufficient facts to establish duty owed by the tenant to the plaintiff:

> The Magistrate Judge apparently reasoned that because the Court in Wilson indicated that the question of whether the lessee's use of the parking lot was tantamount to possession and control was a jury issue, then there was a *possibility* that the Plaintiff would be able to establish her cause of action. Wilson, however, is distinguishable from the case at bar for the reason that in Wilson, in sharp contrast to the case at bar, the Plaintiff actually presented evidence to substantiate her claim of possession and control by the tenant. Therefore, a jury could have found possession and control. In this case, no facts have been alleged in support of Plaintiff's allegation of possession and control by the tenant defendant.

Doe, 829 F.Supp. 866, 873.

In the case at hand, the lease agreement between Blockbuster and its lessor, Madison Development, Inc., establishes that Blockbuster did not own or possess the parking lot in which Ms. Ray fell. (R. 59-60/ RE 41-42 (¶ 12), R. 61/ RE 43 (¶¶16 and 18), R. 63/ RE 45 (¶ 28)). Furthermore, Ms. Ray has failed to provide any evidence that Blockbuster had control over the

parking lot. Following the rule from Wilson v. Allday, as well as the court's interpretation of Wilson in Doe, Blockbuster owed no duty to Ms. Ray unless she could show that Blockbuster controlled the parking lot. On pages 13-14 of her brief, Ms. Ray lists several factors that she contends prove that Blockbuster exercised control over the parking lot. (Appellant's Brief at 13-14). These factors are that (1) Blockbuster pays for maintenance of common areas; (2) Blockbuster *could* control the parking of its employees; (3) Blockbuster *could* control the parking of patrons; (4) Blockbuster was allowed to service common areas; and (5) Blockbuster agreed to defend actions arising from its own negligence. (Appellant's Brief at 13-14).

When viewing these factors in light of the Doe decision, it becomes apparent that the mere use of a parking lot or the reservation of a tenant's right to make repairs or provide security does not amount to an exercise of control over the parking lot. Furthermore, the documents cited in the record as supportive of Blockbuster's control– Ms. Ray's Complaint, her response to Blockbuster's Motion for Summary Judgment, and two pages of the lease– are not enough to establish control. Page 62 of the record, a page from the First Amendment to Lease, provides that the landlord is to carry insurance for the common areas of the shopping center during the term of the lease, and the tenant only had to contribute to the costs of maintaining the common area. (R. 62/ RE 44). Page 33 of the record, where the first page of the lease between Blockbuster and Madison can be found, shows that paragraph 1 of the lease, among other things, only grants Blockbuster the right to use the parking lot. (R. 33/ RE 15). Furthermore, in Section (b) of paragraph 3, of the lease provides that "Lessee covenants and agrees that no employees of leasee shall use the parking areas in the shopping center for the parking of their personal vehicles except in an area to be **designated by lessor** for that purpose." [emphasis added]. (R. 33/ RE 15).

The facts in the instant case, like those in Doe, clearly establish that Ms. Ray could not provide any factual support for her position that Blockbuster had control of the parking lot in which she fell. Therefore, the trial court's summary judgment in favor Blockbuster should be affirmed by this Court.

CONCLUSION

Blockbuster's Motion for Summary Judgment was based solely upon the lack of any duty owed by Blockbuster to Ms. Ray. Blockbuster asked the trial court to hold that no genuine issue of material fact existed as to whether Blockbuster owned or controlled the parking lot in which Ms. Ray fell. Blockbuster submitted a copy of the lease agreement between Blockbuster and Madison Development, Inc., to the trial court, which showed that Madison not only owned the parking lot where the incident occurred, but also that Madison reserved a right to control the parking lot. Blockbuster also provided undisputed evidence that Madison Development, Inc., in a manner consistent with its ownership and control interests, actually repaired the allegedly dangerous condition in the parking lot where Ms. Ray fell. In response, Ms. Ray vehemently argued that Blockbuster exercised control over the parking lot, but she never provided any factual evidence of this control. Therefore, the trial court properly dismissed Ms. Ray's claims against Blockbuster with prejudice. Because this failure of proof continues on appeal, this Court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED,

BLOCKBUSTER, INC., A DELAWARE CORPORATION, AND CRYSTAL ADAMS, DEFENDANTS

BY: 

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a true and correct copy of the above and foregoing instrument by causing a copy of same to be hand delivered and/or mailed, postage prepaid, to the following counsel of record at the address shown:

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THIS, the 22nd day of January, 2008.

Denise C. Wesley

DENISE C. WESLEY