IN THE SUPREME COURT OF MISSISSIPPI

KATHY VIRGINIA RAY — **APPELLANT-PLAINTIFFS**

VS. — **NO. 2007-CA-00744**

BLOCKBUSTER, INC., A DELAWARE CORPORATION, AND CRYSTAL ADAMS, INDIVIDUALLY — **APPELLEE-DEFENDANTS**

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI FIRST JUDICIAL DISTRICT HONORABLE W. SWAN YERGER

REPLY BRIEF IN SUPPORT OF APPELLANT KATHY VIRGINIA RAY

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I. Introduction

A tenant storeowner is liable for injuries caused within a parking lot the tenant occupies, or possesses and controls as defined by Mississippi Law. Wilson v. Allday, 487 So.2d 793 (Miss. 1986). Defendant's Brief incorrectly focuses on ownership and control without adequate reference to the legal *and factual* status of the landlord and tenant's relationship to negligence. Defendant summarily claims the Blockbuster lease "refused to extend Blockbuster any control of the adjacent parking lot" and that "ownership and control of the parking lot adjacent to Blockbuster was held by Madison....". *See, Defendant's Brief p. 3,10.* Defendant's Statement of Relevant Facts considers only that, under the lease, Madison was responsible for upkeep, had fee simple ownership, allowed parking by Blockbuster customers (and Blockbuster), required permission to change the exterior of Blockbuster, and agreed to comply with laws regarding the common area. Id.

Defendant does not account for obvious facts analogous to Wilson. It does not account for the comprehensive lease agreement, nor the legal (and factual) relationship between the pothole and Blockbuster only feet away. Those facts must be considered in determining legal responsibility imposed upon a tenant, especially when a dangerous condition exists just beyond the store's door. Wilson at 797-797, *citing* Jackson v. K-Mart Corp., 182 N.J. Super. 645 A2d 1087 (1981). *The location of a tenant to a negligent condition* invites relevant issues of material fact when tenants are clearly in the best position to discover dangerous conditions, and are in the direct path of ingress and egress Id. The legal and factual relationship between Blockbuster and Madison included, but was not entirely dependent upon, the lease terms. The lease does contemplate some

amount of possession and control, and therefore creates genuine issues of material fact. *See Below.*

Defendant instead asserts Ms. Ray cannot prove a legal relationship to the allegedly dangerous condition because she cannot show Blockbuster's ownership or control, *See, Defendant's Brief p.8., citing* Brookhaven Funeral Home v. Hill, 820 So.2d 3,6 (Miss. App. 2002). Defendant's misapplies Brookhaven, while ignoring the meaning of Wilson v. Allday.

The only connection Defendant points to (and can point to) between the funeral home and the cities' property in Hill (aside from their adjacent locations) is that the funeral home extended funds to the city to add handrails to the sidewalk after an injury. *See, Defendant's Brief p. 9.* Defendant incorrectly states, "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." *See, Defendant's Brief p. 10.*

In contrast to the facts in Hill, Blockbuster's enjoyed a comprehensive agreement with Madison which specifically contemplated Blockbuster's legal responsibility for it's negligence within the common area. (R. at 35). While Defendant claims a tenant's duty to provide insurance over common areas is not enough in and of itself, Blockbuster actually contracted for control of its own legal responsibility as to its own negligent action in the common area. Id.; *See also, Defendant's brief p. 5, citing,* Doe v. Cloverleaf Mall, 829 F. Supp, 866, 873 (S.D. Miss 1993).

Blockbuster had rights to use the parking lot and surfaces directly in front of its store, along with additional rights. (R. at 5-6, and 33,62,82). Blockbuster bargained for a Pylon sign in the common area evidencing its right to possession and control. (R. at 54).

Defendant suggests that Blockbuster legal (and factual) status was similar to that of an island insulated from everything around it, which it directly relied upon to conduct daily business.

Finally, Defendant does not account for the conclusions of Jackson v. K-Mart adopted by Wilson. The Mississippi Supreme Court acknowledged that the duty to provide a reasonably safe premises implicates a duty to provide a safe path of ingress and egress from the premises when inviting "conclusions of law and policy" applicable to apportioning responsibility for negligence between landlords and tenants; tenants are often in the very best position to be responsible for dangers. Wilson at. 797-798, *citing* Jackson at 1087. A business does not exist on an island. It cannot shift all risk to the lot owner when it is in the best position to determine dangers, especially with regard to surfaces directly in front of the store that the tenant invites customers to use, whether explicitly or implicitly. Whether or not Blockbuster customers were told to park in front of the store, they were invited to the front door (and therefore through the path of the pothole). Blockbuster's existence so close to the pothole must be considered in determining whether there is are genuine issues of material fact as to its duties. Even if a landlord is obligated to make repairs in a common area, Wilson illustrates that a tenant is in possession and control over those areas in the clear path of ingress and egress under certain circumstances present here Id.

II. Factual considerations as to the use of the property, and location of Blockbuster's negligence, creates a genuine issue of material fact under controlling law.

Defendant acknowledges that liability can be established by other factual evidence regarding the tenant's use of the property. *See, Defendant's brief p. 5, citing,* Doe v. Cloverleaf Mall, 829 F. Supp, 866, 872 (*citing* Wilson v. Allday, 487 So. 2d 793 (Miss. 1986)). Ownership, or possession and control must be determined on a case by case basis.

Defendant suggests that this Court disregard the clear applicability of Wilson v. Allday to the present facts, and instead adopt a single Federal Court decision whose facts are not analogous. The interpretation of Wilson v. Allday 487 So. 2d 793 in Doe v. Cloverleaf Mall applied to a Plaintiff who sustained injuries when abducted at gunpoint from the Cloverleaf Mall parking lot. Cloverleaf at 868. Numerous defendants were sued even through the injuries occurred at the east side of only one store. The mall spanned a large area, and a large parking lot undoubtedly served many stores (and many alleged Defendants).

By contrast, it is undisputed that the parking lot and pothole at issue existed within twenty feet from Blockbuster's entrance just below the curb. (R. at 85). Blockbuster was absolutely in the best position to know of, and warn customers of defects in the parking lot because it was within the path of the pothole, and therefore in legal possession, occupation and control, when the lease is considered along with all facts.

Defendant claims (with reference to the mall parking lot in Cloverleaf) that the mere use of the parking lot, even if resulting in economic benefit to the tenant, was not

"tantamount to possession and control" and illustrates a "laundry list of factors that would not reflect a tenants possession or control over a parking lot" *See, Defendant's Brief p. 13.* Defendant cites a litany of reasons why defects in a mall parking lot should not impose liability on tenants who might use the parking lot in the absence of other facts. Plaintiff agrees liability is not implicated only by a tenant's right to make repairs or provide security over the leasehold premises, a tenant's reservation of rights to perform landlord's obligations, and the mere use of the property for the benefit of a store. *See, Defendant's Brief p. 13.*

Defendant recognizes that the facts in Wilson v. Allday were distinguishable from those in Doe because Wilson tenant had the right to erect a corral in the common parking lot where its Employees gathered the shopping carts it owned. *See, Defendant's Brief p. 12.* Blockbuster similarly negotiated the right to erect a sign in the common area in front of its store. (R. at 54). When asked under oath, Defendant did not deny that employees at the Blockbuster location walked to and from the parking lot in the months before Plaintiff's alleged fall when they were entering and exiting work. (R. at 86). Plaintiff would submit that Defendant's employee's and customers not only had to walk through the parking lot, but also had to come in close proximity with the pothole existing close to the store's door. The were impliedly invited there in order for Blockbuster to do any business.

Defendant admitted it knew the defect in the parking lot existed for longer than one month before Plaintiff's alleged incident. (R. at 86). The defect did not exist in some unknown remote location at the other side of a common area. Defendant necessarily had to do business in close proximity to the pothole in order to be aware of the amount of time it existed.

Finally, while admitting that it posted no signs within its store, Defendant denied that it failed to post warning signs, cones, tape, or other items associated with providing warning to customers, that any defect existed in the parking lot. (R. at 87). If Defendant did post warnings outside the confines of the store (and therefore the limits of liability it claims) then it did exercise some amount of possession and control over common areas. If Defendant reserved the right to do so, it acknowledges it had possession and control over the very defect it was in the best position to control. The location of the pothole, the right to erect a sign in the common area, and acknowledgment that Blockbuster used the parking lot for ingress and egress establish genuine issues of material fact along with other broad leasehold rights. This Court is not required to determine that Blockbuster's possession and control was tantamount to ownership.

III. Conclusion

Defendant's interpretation of Wilson v. Allday , does not consider the close proximity between Blockbuster and the dangerous conditions in the parking lot. It does not account for Blockbuster's established use of and possession of the parking lot directly in front of the store. Defendant cannot disregard genuine issues of material fact by showing Madison's ownership, rights of Madison to make structural alterations to the interior and exterior, the right of Madison to assure preapproval before any changes are made to the structure, and that Madison owned the lot where Blockbuster parked. *See, Defendant's Brief page 10.* The fact that Madison did have rights to its own property is irrelevant to determining whether Blockbuster also possessed and controlled the property within the law's meaning. Wilson held: "Thus it has been held that a tenant may be responsible for the condition of approaches and stairways, or a parking area. His duty or

responsibility also applies to parts of the premises used in common with other tenants." Wilson at 797. This is true when considering that it would be unjust to hold an absent landlord negligent for conditions tenant is in the best position to know, regardless of whether a collateral source (the landlord) is ultimately responsible for the repairs. A duty to warn and keep a premises safe does not depend on who is contracted to ultimately attend to the repairs. Wilson does not always mandate liability in parking areas not owned by tenants, unless there is a dangerous condition in the path of ingress and egress, the tenant is in the best position to determine dangers, and/or the defect had a legal and factual relationship to the tenants business. Genuine issues of material fact are present in Mr. Ray's case.

Defendant cannot succeed by pointing to a Federal Case which establishes only that limited agreements between landlord and tenant do not support tenant liability in and of themselves. It is incorrect for Defendant to conclude Ms. Ray "vehemently argued that Blockbuster exercised control over the parking lot but she never provided any factual evidence of this control" *See, Defendant's Brief p. 16.* Blockbuster possessed and controlled the path of ingress and egress. It possessed and controlled the very parking lot where it had rights to park, walk (in order to do business), serve its business, erect warnings for dangerous conditions it knew of and should have known, and erect a sign.

Respectfully Submitted, this the 8 day of February, 2007 for the Plaintiff, Appellant

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CERTIFICATE OF SERVICE

I, Michael R. Brown, attorney for the Appellants, have this day this day served a true and correct copy of the above and foregoing:

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