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

BRIEF IN SUPPORT OF APPELLANT KATHY VIRGINIA RAY

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those listed in the Brief of Appellant-Plaintiff Kathy Virginia Ray, the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Kathy Virginia Ray, Appellant-Plaintiffs
2. Tabor, Chhabra & Gibbs, PA attorneys of record for Appellant
3. The Michael R. Brown Law Offices, PLLC attorney of record for Appellant
4. Rogen K. Chhabra, attorney of record for Appellant
5. Michael R. Brown, attorney of record for Appellant
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7. Blockbuster, Inc., Appellee
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9. Rebecca Cowan, Esq., attorney of record for Appellee
10. Denise Wesley, Esq., attorney of record for Appellee

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STATEMENT OF THE ISSUES

I. **The trial court erred in citing Brookhaven as binding authority to dismiss this case because Brookhaven is distinguished, and this case is controlled by Wilson v. Allday. The Trial Court therefore erred in Granting the Motion for Summary Judgment.**

II. **Plaintiff originally preserved, but chooses not to address, the Lower Court's Granting of the Motion to Strike, because Granting the Summary Judgment Motion was in error regardless.**

STATEMENT OF THE CASE

Kathy Virginia Ray (hereinafter Ms. Ray, Plaintiff or Appellant) exited a Clinton, Mississippi Blockbuster on April 22, 2002. She stepped off the curb to the parking lot within the path of egress from the store. She was injured when she fell into a pothole located just below the curb existing just a few feet from the store's door. Defendant (Hereinafter referred to as Blockbuster) claims it was not responsible for anything that happened outside of the confines of its store. It further attempts to shift the duties regarding ingress and egress for its patrons to its landlord. As will be shown in the argument below, Blockbuster clearly owed legal duties to Plaintiff given the location of the pothole, Blockbuster's legal relationship to the property, and settled law addressing Blockbuster's responsibilities.

Blockbuster had permission to possess and occupy the building space and the parking lot pursuant to a written lease with Madison Development; Blockbuster was in a position to determine potential dangers. (R. at 5-7, 33, 54, and 82). It is undisputed that the lease between Blockbuster and Madison Development covered the building space and parking lot. (R. at 33, 35, 54, and 59). It is also undisputed that with regard to the parking lot and sidewalks, Blockbuster was required to maintain its own insurance, and defend actions based on its own negligence among other responsibilities included in the parties' legal relationship (R. at 35 and 80). In addition, the common areas owned by Madison Development were a "material consideration" for Blockbuster entering the lease, and changes to the common areas could not affect Blockbusters "access, visibility, or parking", which possession rights were guarded by the lease. (R. at 59). Blockbuster customers and employees parked in the parking lot serving the stores' business interests.

Defendant filed a Motion for Summary Judgment claiming Blockbuster should be absolved of all liability for a condition in the parking lot near the store's exit. Blockbuster reasoned that it only had legal control over the interior portion of the store. Blockbuster claimed it did not have "ownership" or "control" over the parking lot and therefore should be relieved of any and all potential liability. (R. at 22). The Trial Court improperly relied on Brookhaven Funeral Home, Inc. v. Hill, 820 So. 2nd 3 (Miss. Ct. App. 2002), which is wholly inapplicable to the facts of this case.

SUMMARY OF ARGUMENT

Blockbuster exercised occupation, or possession and control of its parking lot, such that it should be held liable for injuries caused by the parking lots defective condition. Wilson v. Allday, 487 So. 2d 793 (Miss. 1986). The trial court's ruling and Blockbuster's arguments regarding ownership and control have missed the focus of longstanding Mississippi jurisprudence regarding "possession and control." In determining liability, Blockbuster was absolutely in the best position to warn customers of defects in its parking lot because it was in a legal position of possession, occupation, and control. At the very least, the Lease Agreement with the lot owner, creates a genuine issue of material fact as to who occupied, or possessed and controlled the premises (and to what extent). By its own nature, the subject lease agreement was an agreement for some amount of occupation or possession and control. (*See*, R at. 54 *regarding the right to erect signage in the common area*, R. at 59 *regarding protecting Blockbuster's access, visibility, and parking in the common area*, R. at 35 *regarding tenant's obligations to provide its own insurance and defend actions based on its own negligence stemming from its rights in the common area, See also,* R. at 33 *regarding the right to use the parking lot.)*

The trial court's ruling effectively places the sole burden of all possible legal responsibility in landlord-tenant relationships where a lot owner leases business space and rights to a common area, on the shoulders of landlords only, with regard to conditions in the common area. The trial court's ruling leaves no room for apportionment of responsibility even to those who use the common areas to suit their business needs. It instead requires often rightfully absent landlords to bear responsibility

for the negligence of the tenants when, said negligence occurs within the areas the tenants are allowed to use.

Since there is a genuinely triable issue of material fact on whether Blockbuster "occupied" or "possessed and controlled" the subject premised, the Summary Judgment should be revered and remanded.

ARGUMENT

I. The trial court erred in citing Brookhaven as binding authority to dismiss this case because Brookhaven is completely distinguished

A. Blockbuster "occupied" or "possessed and controlled" the subject premises.

Mississippi case law is clear that "occupation" or "possession and control" are sufficient to require a legal duty from a business to a business invitee to keep the property in safe condition. Brookhaven Funeral Home, Inc. v. Hill, 820 So.2d 3, 6 (Miss. App. 2002) (citing Wilson v. Allday, 487 So. 2d 793 (Miss. 1986). Blockbuster clearly had at least some degree of possession and control of the subject property where Ms. Ray fell, yet they continue to improperly focus on "*ownership* and control" as the sole determining factor. They ignore the "possession and control" language used by the very case they cite.

B. The Trial Court and Blockbuster misinterpret and misapply the Brookhaven case.

Blockbuster would like this Court to ignore the analogous case of Wilson v. Allday where the tortfeasor did not "own" but used, and therefore, "possessed" the adjacent parking lot when considering the use as it occurred. Instead, Blockbuster wants us to focus on the result in the Brookhaven Funeral Home case where the City of Brookhaven (**not** the tortfeasor), "owned", "controlled", "possessed" and "occupied" the sidewalk at issue. Blockbuster's Motion for Summary Judgment claims:

> Because the Lease and First Amendment to the Lease between Blockbuster and Madison clearly establish that Madison was the entity which ***owned*** and/or controlled the parking lot in which Plaintiff fell, the Defendants Blockbuster and Crystal Adams should be dismissed with prejudice from this lawsuit."

Similarly, Blockbuster's Conclusion states,

> "The Plaintiff's suit against Blockbuster and Crystal Adams should be dismissed because the parking lot where the Plaintiff fell was not ***owned*** by Blockbuster or Ms. Adams, but was *owned* by Madison Development, the business entity who ultimately repaired the parking lot." (R. at 22 and 23). (emphasis added).

Defendant's interpretation of Brookhaven and the Trial Court's subsequent ruling failed to take into account whether there was a genuine issue of material fact as to Blockbuster's explicit and implicit occupation, or possession and control of the parking lot. They also improperly ignored legal relationship between Blockbuster and the lot owner allowing occupation, or possession and control over the parking lot.

The legal relationship between Blockbuster and Madison Development (Blockbuster's landlord) is also relevant to the inquiry. The Court in Brookhaven asserted that the Plaintiff was, "required to show the funeral home's legal relationship to the allegedly dangerous segment of the sidewalk" when explaining how the requirements of Wilson v. Allday were not met in Brookhaven (requirements that the Brookhaven Court did not abandon). Brookhaven Funeral Home, Inc. v. Hill, 820 So.2d 3,6 (¶ 14) (Miss. App. 2002), *See also*, Wilson v. Allday, 487 So.2d 793 (Miss. 1986).

The only connections between the funeral home sued in Brookhaven, and the sidewalk where the fall occurred, was that the sidewalk was adjacent to the funeral home. There was no lease implicating a potential legal relationship between the funeral home and the sidewalk owner. There was no explicit, nor written, right of the funeral home to occupy, possess or control the sidewalk for any specific purpose, except for that which might be inferred from the location of the sidewalk nearby (and the general rights of persons to use publicly owned property). The Brookhaven Court concluded, "Since the funeral home's *occupation or* ownership of the sidewalk was never shown, we reverse and enter judgment for Brookhaven Funeral Home" Id. at ¶ 20. (*emphasis added*).

Blockbuster's daily use (possession) of the parking lot in question is completely distinguished from the facts in Brookhaven. Accordingly, the fact finder should determine whether that use combined with the terms of the lease agreement are sufficient to establish "possession and control" such that liability would be implicated. (R. at 59, *See also, "Summary of the Argument" above, citing lease sections illustrating Blockbuster's rights of occupation or possession and control*).

II. This claim is completely controlled by the case of Wilson v. Allday

Wilson v. Allday is directly analogous to the case at hand. In Wilson, the National Foods Store (with whom Allday was associated) leased property including the rights to use a parking lot maintained by the lot owner. The Plaintiff fell due to a pothole in the parking lot while she was in the path of ingress and egress. The dangerous condition in Wilson did not exist as close to the store's door in this case. The Court nevertheless found triable issues. The Court indicated, "The main issue in this case is whether a lessee would be liable to a third party for injuries received on the property incidental to (*but not on*) demised property, common area --- parking lot) which lessor had agreed to maintain in good repair...The lease agreement with National Foods Store included free use of the parking lot to be maintained by the lessor for the use of the lessee and the customers of the lessee." Wilson v. Allday, 487 So. 2d 793 (Miss. 1986) (*also citing and explaining* Stanley v. Morgan & Lindey, Inc., 203 So.2d 473 (Miss. 1967).

The Court reasoned "***Occupation, or possession,* and control is usually one of the attributes that must be shown as a basis for liability on the part of an owner or occupant of premises for injuries resulting from the condition of the premises."** Wilson, at 796 *following* (62 Am.Jur.2d Premises Liability § 12), (*emphasis added*).

Most importantly, Wilson explained the factors determining concurrent responsibility in landlord-tenant relationships involving the possession rights to adjacent surfaces. 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, *following* (52 C.J.S. Landlord & Tenant, § 436.), (*See also*, R. at 62, *Paragraph 25 of First Amendment to Lease*, and R. at 35, *Original Lease regarding proportionate share of maintenance born by tenants.*)

The Wilson Court also adopted the reasoning in Jackson v. K-Mart Corp., 182 N.J. Super. 645 A.2d 1087 (1981). In Jackson, a patron fell on a sidewalk also owned and maintained by the lot owner but servicing the store. In adopting Jackson, Wilson stated:

> The (Jackson) court held that the store was not entitled to summary judgment because its liability was concurrent with that of the lot owner. K-Mart leased the store, but another Defendant was responsible for the maintenance of the sidewalk. In addressing the issue, the Court stated:
>
> These circumstances invite the following conclusions of law and policy:
>
> (1) The operator of a commercial establishment must provide reasonably safe premises for business invitees
>
> **(2) No distinction should be made between the operator-owner and the operator-tenant, since in either case it is the operator who is in the best position to discovery any dangerous condition.**
>
> **(3) The duty to provide a reasonably safe premises includes a duty to provide a safe path of egress from the premises**
>
> It would appear that a tenant/lessee/occupier of the premises owes a duty of reasonable care to its invitees for the demised property and such necessary incidental areas substantially under its control (as the parking lot) and when he invites the public to use, notwithstanding a maintenance agreement with the landlord. While such agreement may serve as the basis for recovery against the lessor, it does not absolve the lessee of his duty to his invitees under the circumstances.

Wilson at 797-798. (emphasis added to illustrate citation within Wilson).

Wilson also pointed out that determining whether there is control or possession of adjacent areas servicing leased properties, involves looking at the tenants power to prevent injury given the tenants presence in the parking lot. Wilson at 796-797.

Blockbuster paid for maintenance of common areas over which it was allowed some possession and control. (R. at 62). Blockbuster could control that employees were allowed to park on the parking lot. (R. at 33, 82 and 5-6). It could control whether or not to allow patrons, specifically referred to in the lease as "invitees", to park there as well. Id. at 33. In addition, Blockbuster was allowed rights to service areas, sidewalks, and facilities for the parking of automobiles at any time and from time to time existing in the shopping center Id.

Finally, Blockbuster even covenanted to defend actions based on its own negligence with regard to common areas among the others (R. at 35). The lease states:

> Lessee *(Blockbuster)* agrees to and does hereby indemnify and save Lessor *(Madison)* harmless against any and all claims, demands, damages, costs and expenses, including reasonable attorneys' fees for the defense thereof arising from the conduct or management of the business conducted by Lessee in the demised premises, or from any breach or default on the part of Lessee in the performance of any covenant or agreement on the part of the Lessee to be performed, pursuant to the terms of the lease, *or from any act or negligence of Lessee, its agents, contractors, servants, and employees in or about the demised premises, the sidewalks adjoining the same and the other areas of the shopping center used by Lessee in common with others.* In the event any action or proceeding is brought against Lessor by reason of any such claim, Lessee covenants to defend such proceeding, by counsel reasonably satisfactory to Lessor.
>
> (R. at 35) *(party names added for clarification, additional emphasis added, UNDERLINED SECTION DELETED IN CONTRACT NEGOTIATONS).*

While the existence of a risk-shifting provision does not control who an injured plaintiff must sue, it shows the parties legal relationship required by this Court in Brookhaven and Wilson. It reveals the intent of the parties not to impose sole legal responsibility on the

lot owner with regard to actionable conduct associated with the common areas. Blockbuster should be equitably stopped from claiming it could never have had any liability as to its actionable conduct related to the common area especially when it negotiated the right to choose its own counsel to defend such actions.

The Court is not asked to determine whether the extent of possession and control is enough to automatically impose liability, but that a genuine issue of material fact exists as to whether it could. In relying on Brookhaven, the lower court did not consider how the complete lack of connection between the Brookhaven Funeral Home's property and the municipal sidewalk owner (aside from their locations at the time of injury) differed from the present case. Brookhaven at 7.

II. The trial court erred in Granting Defendant's Motion to Strike.

Plaintiff is not advancing the above argument raised for appeal. It is not necessary, nor essential to reviewing the trial court's Granting of the Motion for Summary Judgment.

CONCLUSION

A legal relationship existed between Blockbuster and the lot owner. That legal relationship contemplated that Blockbuster owed legal duties, had occupation, and/or possession and control of the property. The Court need not determine the extent of occupation, possession, or control, just that there is a clear genuine issue of material fact as to the extent. Ownership (or lack thereof) does not, in and of itself, determine legal responsibility as to conditions on the premises as Defendant concluded. The party in the best position to determine dangers, and means to provide safe ingress and egress for invitees cannot escape liability especially when they are involved in a legal relationship

involving shared responsibilities over common areas that are required to be used for the customers to access the store.

Blockbuster owed duties to its business patrons regardless of ownership. Just because it did not own the pothole, did not mean it did not have the duty to assure a safe path of egress and ingress. Regardless of whether or not Blockbuster was responsible to the landlord to fix the defective condition, its duties did not stop at the corners of its store. The Lower Court's reliance on Brookhaven was misapplied and completely overlooked Wilson v. Allday.

If this Court were to decide that no duties could exist, therefore upholding Summary Judgment, and effectively overturning Wilson v. Allday, it would also impose heightened, sole responsibility on landlords who are not in possession, and who are not in the best position to promptly assess and correct conditions causing dangers in the path of ingress and egress on their property. It would also prevent landlords from appropriately apportioning responsibility to negligent tenants who must necessarily have some limited possession and control over common areas. Absent landlords should not be required to bear the sole burden of legal responsibility as to conditions their negligent tenants know or should know of on the property leased and controlled by those tenants on a regular basis.

For the reasons stated above, the appropriate remedy is to reverse the Trial Judge's Summary Judgment reliance on a wholly distinguished case and remand the case back for further proceedings.

Respectfully Submitted, this the 30 day of October, 2007 for the Plaintiff, Appellant

KATHY VIRGINIA RAY

BY: MICHAEL R. BROWN
Attorney for the Appellant

BY: ROGEN K. CHHABRA
Attorney for the Appellant

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Attorneys for Appellant,
Kathy Virginia Ray

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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Denise Wesley, Esq.
CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
1044 River Oaks Drive
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DATED this the 30 day of Oct, 2007.

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AMENDED CERTIFICATE OF SERVICE

I, Michael R. Brown, attorney for the Appellant, has this day this day served a true and correct copy of the **BRIEF IN SUPPORT OF APPELLANT KATHY VIRIGINIA RAY SUBMITTED TO THE SUPREME COURT OF MISSISSIPPI TO:**

Rebecca Cowan, Esq.
Denise Wesley, Esq.
CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
1044 River Oaks Drive
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Jackson, MS 39205-0750

The Honorable W. Swan Yerger
Hinds County Circuit Judge
P. O. Box 327
Jackson, Mississippi 39205

DATED this the 30th day of October, 2007.

Michael R. Brown, Esq.

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SECOND AMENDED CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those listed in the Brief of Appellant-Plaintiff Kathy Virginia Ray, the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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5. Michael R. Brown, attorney of record for Appellant
6. Crystal Adams, Appellee
7. Blockbuster, Inc., Appellee
8. Currie, Johnson, Griffin, Gaines, and Myers, PA for Appellee-Defendant.
9. Rebecca Cowan, Esq., attorney of record for Appellee
10. Denise Wesley, Esq., attorney of record for Appellee

11. Madison Development, Richard Madison, or their successors, predecessors, associates and insurers, including but not limited to State Farm Insurance Company to the extent they may assert subrogation rights, or be affected by the proceedings.

RESPECTFULLY SUBMITTED THIS THE 30th DAY OF OCTOBER, 2007.

MICHAEL R. BROWN, ESQ.
For the Appellant, Kathy Virginia Ray

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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6. Crystal Adams, Appellee
7. Blockbuster, Inc., Appellee
8. Currie, Johnson, Griffin, Gaines, and Myers, PA for Appellee-Defendant.
9. Rebecca Cowan, Esq., attorney of record for Appellee
10. Denise Wesley, Esq., attorney of record for Appellee

RESPECTFULLY SUBMITTED THIS THE 30th DAY OF OCTOBER, 2007

MICHAEL R. BROWN, ESQ.
For the Appellant, Kathy Virginia Ray

CERTIFICATE OF SERVICE

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