

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

Saida Scott,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 07C-02-102 RRC
v.	)	
	)	
Acadia Realty Trust,	)	
Acadia Brandywine Holdings, LLC,	)	
Acadia Brandywine Condominium, LLC,	)	
and Brandywine Town Center, Inc.,	)	
	)	
Defendants and third-party plaintiffs,	)	
	)	
v.	)	
	)	
Target Stores, Inc.,	)	
	)	
Third-party defendant.	)	
	)	

Submitted: November 16, 2009  
Decided: December 8, 2009

Upon Defendants' Motion for Summary Judgment.  
**GRANTED.**

Upon Third Party Defendant's Motion for Summary Judgment.  
**GRANTED.**

**MEMORANDUM OPINION**

Robert K. Beste, III, Esquire, Smith, Katzenstein & Furlow LLP, Wilmington,  
Delaware, Attorney for Plaintiff

William R. Stewart, Esquire, Reger, Rizzo & Darnall LLP, Wilmington, Delaware, Attorney for Defendants Acadia Realty Trust, Acadia Brandywine Holdings, LLC, Acadia Brandywine Condominium, LLC, and Brandywine Town Center, Inc.

Bruce C. Herron, Esquire, Akin & Herron, P.A., Wilmington, Delaware, Attorney for Third Party Defendant Target Stores, Inc.

COOCH, J.

## **I. Introduction**

These motions for summary judgment arise out of a negligence claim brought by Plaintiff, Saida Scott, alleging that Defendants, Acadia Realty Trust, *et al.* (collectively “Acadia”) (collectively the owners of the Brandywine Town Center), failed to keep the “Target Primary Parking Area” (the “Target Parking Lot”) of a Target Store in the Brandywine Town Center safe from “a dangerous condition.” Plaintiff, an employee of Target Stores, Inc. (“Target”), alleges that she suffered a knee injury when she slipped and fell on the icy Target Parking Lot located outside of the Target Store. Plaintiff has brought suit against Acadia alleging that Acadia, as the property owner of the Target Parking Lot, owed her a duty to maintain the Target Parking Lot in a reasonably safe condition and failed to do so in that Defendant did not remove the ice that ultimately caused Plaintiff’s injury. Target has also filed a motion for summary judgment, asserting that if this Court finds that Acadia owed no duty to Plaintiff, then Acadia’s third-party claim against Target is extinguished as a matter of law.

In Acadia’s motion for summary judgment, the Court must decide two related issues. The first issue is whether Acadia maintained “actual control” over the Target Parking Lot and thus owed a duty to Plaintiff to maintain the Target Parking Lot in a reasonably safe condition, when provisions of the lease agreement between Acadia and Target provide that Target had the authority and responsibility to manage and direct activities on the Target Parking Lot, and further gave Target “sole and absolute discretion” to approve any changes or modifications in the Target Parking Lot.

The second issue, assuming the Court does not find that Acadia maintained “actual control” over the Target Parking Lot (and the Court has so found), is whether the relationship between Acadia and Target was “more akin to the [relationship] between a management company and a landlord”<sup>1</sup> such that “the law charges both parties with co-extensive duties to make the land safe.”<sup>2</sup>

This Court holds that, although Defendant did maintain an ownership interest in the Target Parking Lot, Defendant did not have “actual control” or joint control with Target of the Target Parking Lot pursuant to the lease agreement, which is necessary to establish that Defendant owed any duty to Plaintiff. Additionally, this Court holds that the relationship between Acadia and Target is not “akin to the relationship between a landlord and a property management company” such

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<sup>1</sup> Pl. Resp. to Summ. J. at 19.

<sup>2</sup> *Id.*

that Acadia is vicariously liable for Target's actions. Accordingly, Acadia's Motion for Summary Judgment is **GRANTED**. Target's Motion for Summary Judgment is also **GRANTED** because Acadia's third-party complaint against Target is extinguished as a matter of law.

## **II. Facts**

On March 8, 2005, Plaintiff, an employee of Target, suffered a broken knee in the scope of her employment when she slipped and fell on an icy parking lot of a Target Store located at the Brandywine Town Center. Plaintiff brought a negligence action against Acadia alleging that Acadia, as the property owner, was responsible for maintaining the Target Parking Lot in a reasonably safe condition and was therefore responsible for removing the ice that caused Plaintiff injury.<sup>3</sup>

Acadia subsequently asserted a third party complaint against Target alleging that the lease between Target and Acadia required Target to "defend, protect, indemnify and hold Acadia harmless from and against all claims asserted or incurred in connection with or arising out of the Target's failure to perform its duties or obligations under this lease with respect to the maintenance and operation of the Common Area within the Target Primary Parking Area."<sup>4</sup>

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<sup>3</sup> Plaintiff cannot bring an action against Target because of the exclusivity provisions of the worker's compensation statute. *See* 19 *Del. C.* § 2304.

<sup>4</sup> Pretrial Stip. at 2.

Prior to Plaintiff's accident, Acadia had entered into a "Ground Lease" with Target to lease certain portions the Brandywine Town Center to Target. The lease agreement specifically included a "demise,"<sup>5</sup> which states in pertinent part:

Landlord hereby demises and leases to the Tenant, and the Tenant hereby takes and accepts from the Landlord, the Premises . . .<sup>6</sup>

"Premises" is defined in the lease:

**"Premises"** shall mean that portion of the Target Building . . . within the Shopping Center described in Exhibit B . . . . The term "Premises," however, does not include anything below the structural floor slab of the second level of the Target Building nor any sidewalk, driveways or parking areas.<sup>7</sup>

It is undisputed that Plaintiff fell in an area known pursuant to the lease as the "Target Primary Parking Area." "Target Primary Parking Area" is not specifically defined or explained in the lease, but is included in the definition of "Tenant Site," which states:

**"Tenant Site"** shall mean the Premises and the Target Primary Parking Area. "Site" shall mean the Tenant Site or the Landlord Site, as the context requires.<sup>8</sup>

The "Target Primary Parking Area" is not included in the definition of "Landlord Site," which states:

**"Landlord Site"** shall mean the Shopping Center Site less the Premises and the Target Primary Parking Area.<sup>9</sup>

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<sup>5</sup> "Demise" is defined by Black's Law Dictionary to mean in pertinent part: "1. The conveyance of an estate, usu. for a term of years; a lease [(]the demise of the land for one year[)]. 2. The instrument by which such a conveyance is accomplished [(]the demise set forth the terms of the transfer[)]." Black's Law Dictionary (8th Ed. 2004).

<sup>6</sup> Pl. Resp. to Summ. J. Ex. A at 7-8.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

Acadia retained some rights within the Target Primary Parking Area. For example, Acadia could:

- (1) alter Target's easements rights (with Target's approval);
- (2) "close off portions of the Common Area . . . to prevent the acquisition of prescriptive rights . . .";
- (3) limit the frequency of Target's restriction of access to the area while using it as an "outside sales area";
- (4) alter the parking habits of its lessees' employees;
- (5) prevent "any Person who is not a Permittee" from using the area; and
- (6) relocate Utility lines within the Target Primary Parking Area.<sup>10</sup>

Additionally, Acadia retained "additional rights to regulate and restrict Target's use of the Target Primary Parking Area, and Target's store itself."<sup>11</sup>

These rights include:<sup>12</sup>

- (1) to restrict alterations to water management structures;
- (2) to give its other retailers easement rights to access above and below Target's store;
- (3) to require Target to meet first-class construction and remodeling standards;
- (4) the "exclusive right" to regulate construction traffic, storage and construction-related parking . . .";
- (5) to create "temporary staging area" for construction;
- (6) to mandate the design and maintenance of lighting systems;
- (7) to dictate the pavements slope in the Target Primary Parking Area and other areas;
- (8) to control parking space density;
- (9) to prevent the establishment of restaurants in certain areas;
- (10) to modify or change the Common Areas;
- (11) to construct new or additional Common Area improvements;
- (12) to prevent Target from making changes to the Target Primary Parking Area without its approval;
- (13) to prevent Target from unreasonably restricting or hindering access to the Target Primary Parking Area;
- (14) to maintain and repair utility lines running across the Target Primary Parking Area

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<sup>10</sup> Pl. Resp. to Summ. J. at 5-6.

<sup>11</sup> Pl. Resp. to Summ. J. at 6.

<sup>12</sup> The following rights are quoted verbatim from Pl. Resp. to Summ. J. at 7.

- (15) to prevent Target from charging access fees to the area;
- (16) to require Target to collect and corral shopping carts;
- (17) to prevent Target from using loudspeaker that are audible outside its store; and
- (18) to require minimum insurance coverages.

Several other lease provisions specifically establish Target’s rights within the “Target Primary Parking Area” and state as follows:

6.2 Parking; Ingress and Egress

During the Term of this Lease Landlord hereby grants and conveys to Tenant for Tenant’s use. . . a non-exclusive easement for the passage and parking of vehicles over and across the parking and driveway areas of the Shopping Center and for the passage and accommodation of pedestrians over and across the parking, driveways and sidewalk areas of the Shopping Center. The forgoing easement rights shall be subject to the following reservations . . .

(ii) Tenant reserves the right (and Landlord hereby grants and conveys to Tenant the exclusive right), at any time . . . to use portions of the Common area within the Target Primary Parking Area as outside sales areas, thereby excluding . . . any Person from using such areas . . .

(iii) Landlord may . . . require employees of all tenants . . . to park in certain areas . . . however, that (a) Tenant shall have the exclusive authority to designate an employee parking area within the Target Primary Parking Area for Tenant’s employee, (b) Landlord shall not designate any employee parking area within the Target Primary Parking Area . . .<sup>13</sup>

7.2 Common Area . . .

(F) Landlord may, without Tenant’s approval or consent (except as provided herein), (i) modify or change the Common Area . . . Landlord shall be required to obtain Tenant’s prior written consent (at Tenant’s sole and absolute discretion) for any changes or modifications to the following Common Area improvements: (i) the Target Primary Parking Area . . .<sup>14</sup>

9.5 Insurance

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<sup>13</sup> *Id.* at Ex. A. 15-16.

<sup>14</sup> *Id.* at 27.

A. During the Term of this Lease, Landlord shall maintain or cause to be maintained in full force and effect at least the minimum insurance coverages in Constant Dollars set forth below:

(i) Commercial General Liability Insurance covering the Common Area of the Shopping Center excluding the Target Primary Parking Area . . .

B. During the Term of this Lease, Tenant shall maintain or cause to be maintained in full force and effect at least the minimum insurance coverages in Constant Dollars set forth below:

(i) Commercial General Liability Insurance covering the Common Area within the Target Primary Parking Area . . .<sup>15</sup>

It is undisputed that between August 12, 2003 and March 8, 2005, there were no communications between Acadia and Target regarding which party had the responsibility to remove ice from the Target Parking Lot, and the present dispute has arisen over whether the lease between Target and Acadia gives Target “actual control” over the Target Parking Lot, thereby absolving Acadia of liability.

Acadia brought the instant motion for summary judgment arguing that, pursuant to the lease, Target, and not Acadia, owed Plaintiff the duty maintain the safety of the Target Parking Lot. Target also brought a motion for summary judgment arguing that if the Court granted summary judgment in favor of Acadia, that it follows that the Court must also grant its motion for summary judgment because Acadia’s third-party complaint against Target would be extinguished as a matter of law.

The parties agree, for the purpose of these motions, that there are no genuine issues of material fact.<sup>16</sup>

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<sup>15</sup> *Id.* at 55-56.



### **III. Contentions of the Parties**

#### **A. Acadia's Motion For Summary Judgment**

Acadia argues in support of its motion that the “primary focus [of the Court should be] the degree or extent of control asserted by the landlord over the premises in question.”<sup>17</sup> Acadia asserts that the lease agreement entered into with Target gives Target the authority to control and maintain the Target Parking Lot and effectively removed “actual control” from Acadia. Acadia argues that it is possible under a lease agreement, such as the one here, for a party to retain ownership of the property, but lose “actual control” to manage the property.

In response to Acadia's motion, Plaintiff argues that the lease agreement indicates Acadia retained “actual control” of the Target Parking Lot and, thus, was responsible for removing the ice that ultimately caused Plaintiff's injury. Plaintiff argues that the lease demonstrates the intent of Acadia to maintain “actual control” of the Target Parking Lot because Acadia specifically excluded the Target Parking Lot from the demise, which gave Target “control” of the Target store. Plaintiff asserts that Acadia is not a “non-possessory landowner” and, therefore, ownership of the Target Parking Lot is critical to determine

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<sup>16</sup> Originally, Plaintiff's brief in opposition to summary judgment asserted that “this Court should conclude that Acadia ‘controls’ the Target Primary Parking Area or, at a minimum, conclude that a jury should decide that issue.” Pl. Resp. at 15. However, at oral argument, Plaintiff withdrew any contention that there are “genuine issues of material fact” in dispute that relate to Acadia's motion for summary judgment.

<sup>17</sup> Def. Mot. for Summ. J. at 4.

liability. Plaintiff further argues that Acadia retained both ownership of the Target Parking Lot and also retained numerous powers to direct activities in the Target Parking Lot. Therefore, according to Plaintiff, Acadia owed Plaintiff a duty to keep the Target Parking Lot safe.

Alternatively, Plaintiff argues that “the relationship between Acadia and Target with respect to the [Target Parking Lot] is more akin to the relationship between a landlord and a property management company, where the law charges both parties with co-extensive duties to make the land safe.”<sup>18</sup> Plaintiff asserts that Target assumed maintenance responsibilities for the lot on behalf of Acadia. Plaintiff asserts that this relationship fixes responsibility with Acadia because Target was acting on Acadia’s behalf when managing the Target Parking Lot. Under both theories, Plaintiff’s argument is that Acadia was responsible for removal of the ice that ultimately caused Plaintiff’s injury.

#### **B. Target’s Motion for Summary Judgment**

Target has also filed a motion for summary judgment arguing that, if the Court should grant Acadia’s motion for summary judgment, the third party claim against Target would be extinguished as a matter of law because Acadia would no longer seek recovery from Target.

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<sup>18</sup> Pl. Resp. to Summ. J. at 19.

Plaintiff has no separate claim against Target because Plaintiff has “received worker’s compensation benefits as a result of her injury. [There is] no direct claim against Target due to the exclusivity provision in the worker’s compensation statute.”<sup>19</sup>

#### **IV. Legal Standard For Summary Judgment on the Issue of which Party Had the Duty to Remove Ice From the Target Parking Lot**

Establishing the element of duty in a negligence action is an appropriate issue of law for the Court to determine in a motion for summary judgment when there are no material facts in dispute.<sup>20</sup> In a motion for summary judgment, the moving party bears the burden of proving “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>21</sup> Summary judgment is only appropriate when, after viewing all the evidence in a light most favorable to the nonmoving party, the Court finds no genuine issue of material fact.<sup>22</sup>

In the present case, both parties agree that there are no genuine issues of material fact, and the Court is left to decide whether Acadia, as a matter of law, owed a duty to Plaintiff to maintain the Target Parking Lot in a reasonably safe condition.

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<sup>19</sup> Target’s Mot. for Summ. J. at 1 (citing 19 *Del. C.* § 2304).

<sup>20</sup> *Argoe v. Commerce Square Apartment Ltd. P’Ship.*, 745 A.2d 251, 254 (Del. Super. 1999) (citing *Traubaud v. Kenton Ruritan Club, Inc.*, 517 A.2d 706, 707 (Del. Super. 1986)).

<sup>21</sup> Sup. Ct. Civ. R. 56; see also *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>22</sup> *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at \* 2 (Del. Super).

## V. Discussion

This case presents two interrelated issues. The first is whether Acadia maintained “actual control” over the Target Parking Lot and thus owed a duty to Plaintiff to maintain the Target Parking Lot in a reasonably safe condition, when provisions of the lease agreement between Acadia and Target indicate that Target had the authority and responsibility to manage and direct activities on the Target Parking Lot and gave Target absolute discretion to approve any changes or modifications in the Target Parking Lot.

The second is whether the relationship between Acadia and Target is similar to the relationship between a landlord and property management company such that Acadia could be vicariously liable for the actions of Target.

### A. **The Lease Agreement Between Acadia and Target Demonstrates that Acadia did not Retain “Actual Control” of the Target Parking Lot**

The common law rule for premise liability states that a landlord “is responsible for and presumed to be capable of maintaining his or her premises in a reasonably secure and physically safe condition.”<sup>23</sup> Delaware follows this rule and acknowledges that a landlord owes a duty to a plaintiff when the landlord has retained “actual control” of the premises.<sup>24</sup> It is not enough that the landlord maintained the right to inspect the property or retained the ability to retake control

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<sup>23</sup> 62 Am Jur. 2d *Premises Liability* § 16 (2005).

<sup>24</sup> See *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 694-95 (Del. Super. 1989).

of the premise under certain circumstances.<sup>25</sup> The “abstract authority to regulate cannot [] be considered tantamount to the exercise of actual control over the premises . . . .”<sup>26</sup> Issues of control “depend upon the facts and circumstances of each particular case.”<sup>27</sup>

The test that has been established by this Court to determine whether a landlord has retained “actual control” over the premises for purposes of liability is whether the landlord has the authority to “manage, direct, superintend, restrict or regulate [the property].”<sup>28</sup> Plaintiff argues that Acadia retained “actual control” of the Target Parking Lot because Acadia owned the property. Although possession and control are related concepts, “it is possible for a landowner to retain some possession, but relinquish all control to a lessee or another party.”<sup>29</sup>

The lease agreement, which governs the relationship between Target and Acadia is not completely clear on the issue of who maintains “actual control” of the Target Parking Lot. The Target Parking Lot is not included in the demise, which states in pertinent part:

Landlord hereby demises and leases to the Tenant, and the Tenant hereby takes and accepts from the Landlord, the Premises . . .

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<sup>25</sup> *Id.* at 695.

<sup>26</sup> *Lewis v. Route 13 Outlet Market, Inc.*, 1995 WL 654070, at \*3 (Del. Super.).

<sup>27</sup> 52A C.J.S. *Landlord and Tenant* § 894 (2006).

<sup>28</sup> *Craig*, 576 A.2d at 695.

<sup>29</sup> *Volkswagen of Am. v. Costello*, 880 A.2d 230, 234 (Del. 2005).

The definition of “Premises” specifically excludes the Target Parking Lot and states:

“**Premises**” shall mean that portion of the Target Building . . . . within the Shopping Center described in Exhibit B . . . . The term “Premises,” however, does not include anything below the structural floor slab of the second level of the Target Building nor any sidewalk, driveways or parking areas.

Plaintiff argues that under the lease agreement neither party expected that the Target Parking Lot should be included in the demise that gave Target control of the “Premises.” This is Plaintiff’s strongest argument in connection with her construction of the lease agreement.

Even though the Target Parking Lot is not included in the provisions of the lease that gave Target “exclusive control” of the Target Store, other provisions in the lease indicate that that the parties did intend to give control of the Target Parking Lot to Target. For example, the Target Parking Lot is included in the definition of Tenant Site:

“**Tenant Site**” shall mean the Premises and the Target Primary Parking Area. “Site” shall mean the Tenant Site or the Landlord Site, as the context requires.

Notably, however, the Target Parking Lot is absent from the definition of Landlord Site, which states:

“**Landlord Site**” shall mean the Shopping Center Site less the Premises and the Target Primary Parking Area.

The definition of “Tenant Site” in the lease is just as important, if not more so, than the definition of the “Premises” because it indicates that both parties

sought to specifically vest Target with certain rights in the Target Parking Lot. Even though the definition of “Premises” indicates that Target did not have ownership of the Target Parking Lot, the definition of “Tenant Site” demonstrates that the parties understood that Target would have “actual control” over the Target Parking Lot.

Although there does appear to be a discrepancy between the definition of “Premises” and “Tenant Site,” the lease contains other important provisions related to “actual control” of the Target Parking Lot. Therefore, the Court must examine the lease in its entirety to determine which party maintained “actual control” of the Target Parking Lot for purposes of establishing a duty to keep the lot safe.<sup>30</sup>

When analyzing a lease, “the Court must first determine if an ambiguity exists within the [lease].”<sup>31</sup> The lease is reviewed as a whole and “ambiguity can only exist when the terms in contention are ‘reasonably or fairly susceptible of different interpretations’ or if the terms may have two or more meanings.”<sup>32</sup>

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<sup>30</sup> It is possible to have co-control of a property for the purposes of liability. *See Monroe Park Apartments, Corp. v. Bennett*, 232 A.2d 105, 108 (Del. 1967) (“The test is whether the control was actual, not whether it was exclusive. Unquestionably, control may be actual though joint.”).

<sup>31</sup> *Troumouhis v. State, Dept. of Transp.*, 2006 WL 1579776, at \* 3 (Del. Super.).

<sup>32</sup> *Id.* (citing *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at \* 11 (Del. Ch. 2007) (“Delaware courts do prefer to interpret contracts to give effect to each term rather than construe them in a way that renders some terms repetitive or mere surplusage.”).

“Contract language that is clear and unambiguous should be given its ordinary and usual meaning.”<sup>33</sup> Neither party has argued that the lease is ambiguous.

Although the lease does not specifically establish which party is responsible for removing ice from the Target Parking Lot,<sup>34</sup> the lease agreement, when read as a whole, establishes that Target has the authority to “manage, direct, superintend, restrict or regulate [the Target Parking Lot].”<sup>35</sup> The lease, thus, provides in pertinent part:

#### 6.2 Parking; Ingress and Egress

During the Term of this Lease Landlord hereby grants and conveys to Tenant for Tenant’s use. . . a non-exclusive easement for the passage and parking of vehicles over and across the parking and driveway areas of the Shopping Center and for the passage and accommodation of pedestrians over and across the parking, driveways and sidewalk areas of the Shopping Center. The forgoing easement rights shall be subject to the following reservations . . .

(ii) Tenant reserves the right (and Landlord hereby grants and conveys to Tenant the exclusive right), at any time . . . to use portions of the Common area within the Target Primary Parking Area as outside sales areas, thereby excluding . . . any Person from using such areas . . .

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<sup>33</sup> *Quereguan v. New Castle County*, 2006 WL 1215193, at \* 5 (Del. Ch.).

<sup>34</sup> Plaintiff has argued that this Court should follow *Foley v. Elkton Plaza Associates, LLC*, and decline to grant summary judgment. 2007 WL 959523 (Del. Super). In *Foley*, a case involving which party had a duty under a lease agreement to remove ice from a parking lot, the claimant moved for a new trial “because the verdict was the result of a compromise by the jury on the issue of liability, brought about by the lack of clarity in the jury instructions, the Court’s response to the jury’s question regarding the duty owed to Foley, and the distraction of the jury during Foley’s counsel’s rebuttal argument.” *Id.* at 1. The *Foley* Court held that a new trial was unnecessary because there was no indicia of a compromise verdict, the jury instructions and answer to the question did not undermine the jury verdict, and the jury’s distraction during rebuttal argument was not prejudicial. *Id.* *Foley* is not persuasive in this case because *Foley* did not involve a motion for summary judgment and only had a short lease provision. The lease in the present case is much more detailed than the lease in *Foley* and offers better guidance as to which party had the duty to remove ice from the Target Parking Lot.

<sup>35</sup> See *Craig*, 576 A.2d at 695.



(iii) Landlord may . . . require employees of all tenants . . . to park in certain areas . . . however, that (a) Tenant shall have the exclusive authority to designate an employee parking area within the Target Primary Parking Area for Tenant's employee, (b) Landlord shall not designate any employee parking area within the Target Primary Parking Area . . . .

## 7.2 Common Area . . .

(F) Landlord may, without Tenant's approval or consent (except as provided herein), (i) modify or change the Common Area . . . Landlord shall be required to obtain Tenant's prior written consent (at Tenant's sole and absolute discretion) for any changes or modifications to the following Common Area improvements: (i) the Target Primary Parking Area . . .

## 9.5 Insurance

A. During the Term of this Lease, Landlord shall maintain or cause to be maintained in full force and effect at least the minimum insurance coverages in Constant Dollars set forth below:

(i) Commercial General Liability Insurance covering the Common Area of the Shopping Center excluding the Target Primary Parking Area . . .

B. During the Term of this Lease, Tenant shall maintain or cause to be maintained in full force and effect at least the minimum insurance coverages in Constant Dollars set forth below:

(i) Commercial General Liability Insurance covering the Common Area within the Target Primary Parking Area . . .

All three of these provisions demonstrate that Target, and not Acadia, retained "actual control" of the Target Parking Lot because Target had the authority to manage and direct activities within the Target Parking Lot:

First, pursuant to section 6.2, Target was allowed the use the Target Parking Lot as an "extension" of its sales area and retained the "exclusive authority" to designate employee parking in the Target Parking Lot without any input from Acadia.

Second, section 7.2 states that Target retained “sole and absolute discretion” to consent to changes or modifications within the Target Parking Lot. This section recognizes an important difference between “common areas” and the Target Parking Lot. The landlord retains control of the “common area,” but does not retain the authority to manage or supervise the Target Parking Lot because Acadia has given Target the power to reject any request for modification of the Target Parking Lot at “Tenant’s sole and absolute discretion.” This provision indicates that Acadia could not act independently of Target, and Target was free to operate the Target Parking Lot using its own discretion.

Finally, section 9.5 indicates that Target had the responsibility to maintain insurance coverage for the Target Parking Lot. Acadia was not required to maintain insurance coverage for the Target Parking Lot, and the duty to maintain insurance rests exclusively with Target. Target was required to act independently of Acadia when obtaining insurance coverage for the Target Parking Lot. The ability of Target to select an insurance carrier without input from Acadia is an additional strong indication that Target, not Acadia, had the authority to control the activities within the Target Parking Lot.

Looked at in its entirety, the lease agreement indicates that the contracting parties understood that Target retained authority to manage, supervise, or otherwise control activities within the Target Parking Lot. Even though Target

had a “non-exclusive easement”<sup>36</sup> and Plaintiff is correct that Acadia is not a “non-possessory landowner,” ownership or possession of the Target Parking Lot is not dispositive, as Plaintiff suggests. The test to determine control is not whether control of the Target Parking Lot is “exclusive,” but whether control is “actual,”<sup>37</sup> and this Court must focus on which party had the authority to manage or regulate activity within the Target Parking Lot, and not focus on which party owned or possessed the Target Parking Lot.

Although Acadia did retain some rights within the Target Parking Lot, Acadia’s rights as to the Target Parking Lot were subordinate to Target’s rights because all changes made by Acadia required Target’s “prior written consent (at [Target’s] sole and absolute discretion)[.]” Additionally, Target was required to purchase insurance for the lot, and was permitted to use the lot as an “outside sales area.”

This Court finds that the rights retained by Acadia do not evidence “actual control” because Acadia effectively has to receive the consent of Target to make any improvements or decisions with regard to the Target Parking Lot. This Court holds that those provisions effectively removed “actual control” of the Target Parking Lot from Acadia and gave control to Target.

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<sup>36</sup> It is notable that Target’s easement rights within the Target Parking Lot do not mention ice removal.

<sup>37</sup> *Monroe*, 232 A.2d at 108.

**B. The Relationship Between Target and Acadia is Not Akin to the Relationship Between a Landlord and a Property Management Company**

Plaintiff has also alleged that “the relationship between Acadia and Target with respect to the [Target Parking Lot] is more akin to the relationship between a landlord and a property management company, where the law charges both parties with co-extensive duties to make the land safe.”<sup>38</sup> Plaintiff relies on *Argoe v. Commerce Square Apartments Limited Partnership*, and states that the lease in the present case is similar to the lease agreement in *Argoe* because “Target has assumed some maintenance duties in the Target Primary Parking Area and obtained limited easement rights over the area, but the contract simply ‘does not fix exclusive control’ over the area in Target’s hands.”<sup>39</sup>

In *Argoe*, the plaintiff slipped and fell on the parking lot of an apartment complex, which was owned by a landowner. The landowner made arrangements with a management company to manage the apartment complex.<sup>40</sup> The management company would collect rents and maintain the property, except that prior approval was required before the management company could expend more than \$2500.<sup>41</sup>

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<sup>38</sup> Pl. Resp. to Summ. J. at 19.

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Argoe v. Commerce Square Apartment Ltd. P’Ship.*, 745 A.2d 251, 252 (Del. Super. 1999).

<sup>41</sup> *Id.*

The *Argoe* Court found that the landowner owed a duty to maintain the parking lot because the landowner retained numerous powers over the parking lot and could “contract with another management company if [the current company] failed to perform its duties.”<sup>42</sup> *Argoe* stated that “[b]y contracting with [a management company] to perform management duties, [the landowner] may have created an agency relationship with [the management company].”<sup>43</sup> Therefore, *Argoe* denied summary judgment and held that “Plaintiff can prevail if she can show that [the management company], acting as the agent of the defendant who remained legally liable for their property, acted negligently[.]”<sup>44</sup>

An agency relationship is created “when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”<sup>45</sup> Here, unlike *Argoe*, there is no indication in the lease that Target was Acadia’s agent. Pursuant to the lease, Target was permitted to use the Target Parking Lot as an “outside sales area,” needed to give consent prior to any modifications suggested by Acadia, and was required to maintain insurance on the Target Parking Lot. The lease provisions establish that Target’s ability to use the Target Parking Lot was not controlled by Acadia and that Target

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<sup>42</sup> *Id.* at 256.

<sup>43</sup> *Id.* at 254-55.

<sup>44</sup> *Id.* at 256.

<sup>45</sup> Restatement (Third) of Agency § 1.01 (2009).

was not acting on Acadia’s behalf when it used the Target Parking Lot.

Therefore, this Court holds that the relationship is not similar to that of a landlord and a property management company because Target was not acting at the direction of Acadia when it used the Parking Lot. The relationship at issue in the present case is more akin to a lessor/lessee relationship whereby the landlord does not retain “actual control” of the premises.

**VI. Conclusion**

For all the reasons stated above, Acadia’s motion for summary judgment on the issue of whether Acadia owed a duty to Plaintiff under the lease agreement to remove ice from the Target Parking Lot is **GRANTED**. It follows, as a matter of law, that Target’s motion for summary judgment is also **GRANTED** because Acadia’s potential claim against Target is extinguished.

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Richard R. Cooch

oc: Prothonotary