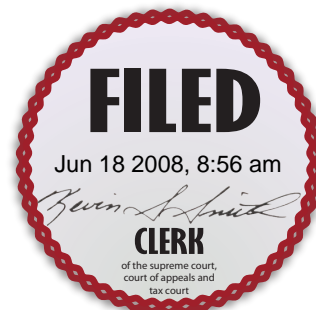


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

**JOHN P. NICHOLS**

Anderson & Nichols

Terre Haute, Indiana

**MICHAEL K. LULICH**

Michael K. Lulich & Associates

Danville, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

JODI LYNN PAGE,

)

Appellant-Plaintiff,

)

vs.

)

No. 49A02-0712-CV-1006

)

BEST BUY COMPANY, INC.,

)

)

Appellee-Defendant.

)

)

)

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Kenneth H. Johnson, Judge

Cause No. 49D02-0508-CT-31870

**June 18, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

Jodi Lynn Page appeals a trial court order granting summary judgment in favor of Best Buy Company, Inc. (“Best Buy”). We affirm.

The facts most favorable to Page, the nonmovant, indicate that Best Buy operates a retail store in a shopping center located on West 38th Street in Indianapolis. It leases its space from Trustco Development Company (“Trustco”), the owner of the premises. The commercial lease provides that, with certain exceptions pertaining to the sidewalk area immediately adjacent to the building, Trustco is responsible for maintaining the shopping center parking lot. On December 18, 2002, Page exited Best Buy and was injured when she stepped in a hole in the parking lot.

On August 11, 2005, Page filed a negligence action against Best Buy in Vigo County. Best Buy moved for a change of venue, and the case was transferred to Marion County. On October 2, 2006, Best Buy filed a motion for summary judgment, which the trial court granted on September 14, 2007. This appeal ensued.<sup>1</sup>

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *McSwane v. Bloomington Hosp. & Healthcare System*, 882 N.E.2d 244, 249 (Ind. Ct. App. 2008); Ind. Trial Rule 56(C). On review, we stand in the shoes of the trial court. *Id.* The trial court’s decision to grant summary judgment is clothed with a presumption of validity. *Id.*

For a defendant to prevail on a motion for summary judgment in a negligence action, he must demonstrate “that the undisputed material facts negate at least one of the elements

---

<sup>1</sup> Best Buy filed a motion to dismiss this appeal on the basis that it was not timely filed. This Court denied the motion on May 5, 2008.

essential to plaintiff's claim." *McClyde v. Archdiocese of Indianapolis*, 752 N.E.2d 229, 232 (Ind. Ct. App. 2001). The elements of negligence are duty, breach of duty, and injury proximately caused by the breach of duty. *Id.* Although negligence cases are rarely appropriate for disposal by summary judgment, "[w]hether a duty exists on the part of a particular defendant to conform his conduct to a certain standard for the benefit of the plaintiff generally is a question of law." *McSwane*, 882 N.E.2d at 249.

A tenant cannot be held to have a duty to safely maintain an area over which the landlord has specifically retained control. *Morris v. Scottsdale Mall Partners, Ltd.*, 523 N.E.2d 457, 458 (Ind. Ct. App. 1988). In *Morris*, this Court upheld summary judgment for the defendant restaurant where the commercial lease provided that the owner/landlord would maintain all common areas, and the plaintiff fell in the stairway after exiting the restaurant.

"As a general rule, a tenant of a part of demised premises is not liable for injuries resulting from the unsafe condition of parts of the premises for which he has assumed no responsibility and over which the landlord has retained control, such as a parking area, sidewalk, or a walk or stairway used by him in common with other tenants[.]" (Footnotes omitted.) 52 C.J.S. Landlord and Tenant § 436.

Since Scottsdale Mall retained control over the stairway upon which Morris allegedly slipped and fell, the Hacienda Restaurant owed no duty to Morris to maintain the stairway in a safe condition. The Hacienda Restaurant was thus entitled to judgment as a matter of law and summary judgment was properly granted by the trial court.

*Morris*, 523 N.E.2d at 458.

Here, section 38 of the commercial lease clearly indicates that Trustco retained control over the maintenance of the parking lot:

*Landlord shall operate, maintain, and repair the Common Areas of the Shopping Center or cause the same to be done (except that Tenant will sweep and keep clean and free of ice, snow and debris, sidewalks adjoining the leased premises) in a manner appropriate for the Shopping Center so as to maintain the Shopping Center in good order, repair and condition.*

Appellant's App. at 39 (emphases added). Section 38(b) requires the tenant to contribute, as additional rent, its pro rata share of the landlord's common area costs. *Id.*

Page contends that by agreeing to contribute financially toward Trustco's maintenance costs, Best Buy assumed a duty to maintain the common areas in a safe condition. Based upon the language of the lease, we disagree. Section 38 of the lease specifically references "repaving" as an example of common area maintenance and specifically places upon Trustco the responsibility for maintenance, operation, and repair of common areas. *Id.* The lease clearly left control of common areas in the hands of the landlord. We fail to see how each tenant's financial duty of contribution translates into a duty to control common area maintenance. Using such logic, Page would be able to recover against any tenant of the shopping center. As Page's fall did not occur inside the Best Buy store or on the immediately adjoining sidewalk, it occurred in an area over which Trustco, not Best Buy, retained control. As such, the trial court properly entered summary judgment in favor of Best Buy.

Affirmed.

BARNES, J., and BRADFORD, J., concur.