IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00744-COA

KATHY VIRGINIA RAY **APPELLANT**

v.

BLOCKBUSTER, INC., A DELAWARE CORPORATION, AND CRYSTAL ADAMS, INDIVIDUALLY **APPELLEES**

DATE OF JUDGMENT:	03/23/2007
TRIAL JUDGE:	HON. W. SWAN YERGER
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MICHAEL RICHARD BROWN ROGEN K. CHHABRA
ATTORNEYS FOR APPELLEES:	REBECCA B. COWAN EDWARD J. CURRIE DENISE WESLEY
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT ENTERED
DISPOSITION:	REVERSED AND REMANDED-11/04/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE MYERS, P.J., CHANDLER, BARNES AND ISHEE, JJ.

ISHEE, J., FOR THE COURT:

¶1. The Circuit Court of Hinds County entered summary judgment in favor of Blockbuster, Inc., and Crystal Adams. The circuit court found that Kathy Virginia Ray had presented no material facts on the issue of duty regarding her claim of negligence against Blockbuster and Adams. Aggrieved, Ray appeals. She argues that the circuit court erred in relying on *Brookhaven Funeral Home, Inc. v. Hill*, 820 So. 2d 3 (Miss. Ct. App. 2002) as

authority in issuing its ruling and, therefore, erred in granting summary judgment.

¶2. Finding that the circuit court was in error when it granted summary judgment to Blockbuster and Adams, we reverse the judgment of the circuit court and remand the case for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶3. In April 2002, Ray exited a Blockbuster video store franchise in Clinton, Mississippi. While she was stepping down from the curb that separated the walkway in front of the franchise from the parking lot, she fell into a pothole, injuring herself. Ray subsequently filed a negligence claim against the owner of the franchise – Crystal Adams; the parent company of the franchise where she was injured – Blockbuster, Inc.; and the company that managed the development where the franchise was located – Madison Development (Madison).

¶4. Madison settled with Ray during the early stages of litigation, leaving only Blockbuster and Adams as defendants. Before trial, Blockbuster filed a motion for summary judgment in the circuit court, arguing that it lacked any legal duty to warn Ray of the pothole because it lacked the necessary possession and control over the parking lot needed to give rise to liability.

¶5. Ray responded to the motion for summary judgment, claiming that she presented issues of material fact and citing the lease between Madison and Blockbuster in support of her position. Specifically, she refers to paragraph ten, which reads as follows:

> Lessee agrees to and does hereby indemnify and save Lessor 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 Lessee to be performed, pursuant to the terms of this lease, or from any act or negligence of Lessee, its agents, contractors, servants and employees, in or about the demised premises, the sidewalks adjoining 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 action or proceeding.

The lease also required Blockbuster to maintain general liability insurance "for the benefit and protection of Lessor in an amount not less than $200,000.00 for injuries to any one person, and not less than $500,000.00 for injuries to more than one person . . . arising out of any one accident or occurrence." The insurance policy was to cover "the demised premises, the sidewalks adjoining the same[,] and other areas of the shopping center." Ray pointed out that the lease contemplated that Blockbuster's customers would use the parking lot. Also, she argued that according to an answer to her requests for admission, Blockbuster knew about the defect for over a month, and it admitted that there were no signs warning about the defect.

¶6. The circuit court found that there was no genuine issue of material fact on the issue of duty, but the court did not make any other findings. The circuit court granted Blockbuster's motion for summary judgment, citing *Brookhaven* in support of its judgment. It is from that judgment that Ray now appeals.

STANDARD OF REVIEW

¶7. We review a lower court's grant of summary judgment de novo. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (¶9) (Miss. 2002). In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the nonmoving party, and

examine all evidentiary matters before the lower court at the time the judgment was granted. *Id*. at 1177 (¶9). If no genuine issue of material fact exists upon review, then a grant of summary judgment in favor of the moving party is appropriate. *Id*.

DISCUSSION

¶8. The only issue that Ray currently presents on appeal is whether the circuit court erred in granting summary judgment in favor of Blockbuster and Adams. She argues that the circuit court erred in relying on *Brookhaven* when instead the court should have looked to *Wilson v. Allday*, 487 So. 2d 793 (Miss. 1986) when ruling on the motion.

¶9. In this case, we are confronted with a question concerning under what circumstances, if any, a lessee may potentially be held liable to a third party for injuries sustained on property incidental to, but not on, the leased property. Here, the leased property consists of the building space leased by the Blockbuster franchise; the incidental property consists of the parking lot where Ray was injured. The third party in this case is Ray, a business invitee.

¶10. The prevailing law in this state is that liability can be imposed on a lessee for injuries sustained by invitees, regardless of the contractual relationship between the lessor and the lessee, so long as the lessee exercised some degree of possession and control over the property. *Wilson*, 487 So. 2d at 797. In *Wilson*, a woman leaving a grocery store was injured when her shopping cart became caught in a pothole in the parking lot. *Id*. at 795. The grocery store shared the parking lot with other businesses, and the lease agreement between the grocery store (as lessee) and the owner of the development (as lessor) specified that the owner of the development would keep the parking lot in good repair. *Id*. at 794-95.

¶11. In holding that the grocery store could potentially be held liable for injuries sustained

by its customers in the parking lot, the *Wilson* court stated that: "If the lessee's use of the premises was tantamount to possession and control, then the lessee owed a duty of ordinary and reasonable care to its invitees upon the premises. Whether there was a breach (notice, dangerous conditions, etc.) [then] becomes a question of fact." *Id*. at 797. However, "if the lessee's use of the lot did not constitute control, there would be no duty owed and[,] therefore[,] no cause of action." *Id*. The *Wilson* court found that "a tenant may be responsible for the condition of approaches and stairways, or a *parking area*." *Id*. (quoting 52 C.J.S. *Landlord & Tenant*, § 436 (1966)). In summarizing its holding, the *Wilson* court stated:

> It would appear that a tenant/lessee/occupier of 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 which 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.

Id. at 798. Of importance in the supreme court's ruling was the fact that the grocery store in *Wilson* had constructed a shopping cart corral in the parking lot, which the store expected its customers to use and which its employees visited at least twelve times a day. *Id*. at 797. Aside from the shopping cart corral, the only other fact supporting the grocery store's possession and control of the parking lot in *Wilson* was the fact that the store invited its customers to park in the lot. *Id*.

¶12. The facts of the present case comport well with those of *Wilson*. In this case, Blockbuster leased space in a retail development from Madison. The development contained a parking lot, which was made available for use by the patrons and employees of the several

businesses leasing space in the development, including Blockbuster. The lease agreement between Blockbuster and Madison provided that Madison was responsible for the maintenance and upkeep of the parking lot. However, an amendment to the lease also provided Blockbuster with a right to erect a sign in the parking lot. Additionally, the lease required Blockbuster to carry its own insurance covering accidents or occurrences on "the demised premises, the sidewalks adjoining the same[,] and other areas of the shopping center." Blockbuster was further required to defend suits arising from its acts or negligence stemming from its rights in the parking lot and from suits "arising from the conduct or management of the business conducted by [Blockbuster]." According to the lease, Blockbuster's duty to defend also applied "in or about the demised premises, the sidewalks adjoining same and the other areas of the shopping center used by [Blockbuster] in common with others."

¶13. Furthermore, the accident did not occur in a remote area of the parking lot. The Appellees admitted in response to the requests for admission that the defect in the parking lot, which Ray alleged was just at the edge of the sidewalk, existed within twenty feet of the store. The Appellees also admitted that the defect had existed in front of the store for over a month. However, they claimed that they had notified Madison, which, according to the lease, was responsible for repairing any defects in the parking lot. A lessor's duty to repair defects may, of course, serve as the basis for recovery against the lessor; however, the lessee may also have a duty to its invitees concerning any incidental areas substantially under its control. *Wilson*, 487 So. 2d at 798; *see also Doe v. Cloverleaf Mall*, 829 F. Supp. 866, 870 (S.D. Miss. 1993).

¶14. On the other hand, the situation in this case is distinguishable from the one presented in *Brookhaven*, which was the only authority the circuit court relied on in granting summary judgment. In *Brookhaven*, the accident occurred on a sidewalk adjacent to a funeral home. *Brookhaven*, 820 So. 2d at 4 (¶2). This Court found that the plaintiff did not present sufficient evidence that the funeral home exercised any possession or control over the sidewalk. *Id*. at 7 (¶19). The sidewalk in *Brookhaven* was in no way connected to the funeral home other than the fact that it was adjacent to the building. *Id*. Furthermore, the fact that the funeral home offered to pay for the concrete to create steps on the dangerous portion of the sidewalk and also received permission from the city to install a handrail after the accident did not show that the funeral home exercised any possession or control over the sidewalk. *Id*. at 6-7 (¶16). To the contrary, this Court found that those facts proved that the City solely possessed and controlled the sidewalk. *Id*. at 7 (¶16).

¶15. As the supreme court found in *Wilson*, we find that Ray presented sufficient evidence to create a question of material fact for a jury to determine whether Blockbuster exercised the requisite possession and control over the parking lot to create a duty to warn its customers of a known dangerous condition in the parking lot directly in front of the store's entrance. This is not to say that Ray has proved that Blockbuster exercised any possession and control over the parking lot, merely that she presented sufficient evidence to create an issue of material fact. Summarized, the facts that Ray presented included the following: (1) the lease provisions requiring Blockbuster to maintain insurance and to defend claims arising out of incidents on the leased premises and surrounding areas, (2) Blockbuster's right to erect a sign in the parking lot, (3) the close proximity of the parking lot defect to the store's

entrance, (4) the fact that the defect existed in front of the store for more than a month without any attempt to repair it, and (5) the fact that Blockbuster's customers and employees were permitted to use the parking lot. We find that these facts, when taken together, were sufficient to create a question of material fact as to whether the Appellees owed any duty to Ray to warn about the allegedly dangerous condition stemming from their interest in the parking lot.

¶16. We conclude that Ray presented sufficient evidence of the Appellees' possession and control of the parking lot to survive the motion for summary judgment; therefore, the circuit court erred in granting summary judgment in favor of Blockbuster and Adams. Accordingly, we reverse the judgment of the circuit court and remand this case for further proceedings consistent with this opinion.

¶17. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER AND BARNES, JJ., CONCUR. GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY ROBERTS AND CARLTON, JJ.

GRIFFIS, J., DISSENTING:

¶18. Because I believe the majority has misconstrued *Wilson v. Allday*, 487 So. 2d 793 (Miss. 1986), I respectfully dissent.

¶19. The majority correctly states the holding of *Wilson*. However, the opinion fails to correctly apply the law to the facts. First, the *Wilson* court framed the issue as follows:

> whether a lessee would be liable to a third party for injuries received on property incidental to (but not on) demised property (common area--parking

> lot) which lessor had agreed to maintain in good repair. *An examination of the relevant law would indicate that the liability of the lessee would depend on whether or not the lessee exercised control of the premises in question.*

Wilson, 487 So. 2d at 795 (emphasis added). The court then held that:

> If the lessee's use of the premises was tantamount to possession and control, then the lessee owed a duty of ordinary and reasonable care to its invitees upon the premises. Whether there was a breach (notice, dangerous conditions, etc.) becomes a question of fact. *Conversely, if lessee's use of the lot did not constitute control, there would be no duty owed and therefore no cause of action.*

Id. at 797 (emphasis added). The opinion ends with the following holding:

> *If the lessees occupied and controlled the premises in question, then there was a duty concurrent with both the lessee and lessor to repair the dangerous condition or to warn invitees coming onto the premises*. The judge was correct in submitting this issue to the jury for determination. The jury apparently concluded that the store controlled the property and therefore owed a duty to the appellant.

Id. at 798 (emphasis added).

¶20. Here, the parking lot was not part of Blockbuster's leasehold. Thus, Blockbuster could have only breached a duty owed to business invitees if it controlled the portion of the parking lot where Ray fell. The majority finds that "Ray presented sufficient evidence to create a question of material fact for a jury to determine whether Blockbuster exercised the requisite possession and control over the parking lot to create a duty to warn its customers of a known dangerous condition in the parking lot directly in front of the store's entrance."

¶21. The majority's conclusion that Blockbuster presented sufficient evidence of possession and control is based on five factual statements:

> 1. The lease provision requiring Blockbuster to maintain insurance and to defend claims arising out of incidents on the leased premises and surrounding areas,

2. Blockbuster's right to erect a sign in the parking lot,

3. The close proximity of the parking lot defect to the store's entrance,

4. The fact that the defect existed in front of the store for more than a month without any attempt to repair it, and

5. The fact that Blockbuster's customers and employees were permitted to use the parking lot.

¶22. Only the first two factual statements – that the lease (1) required Blockbuster to maintain insurance and to defend claims arising out of incidents on the leased premises and surrounding areas and (2) provided Blockbuster the right to erect a sign in the parking lot – could possibly support a claim against Blockbuster. However, neither of these facts indicate possession and control over the parking lot.

¶23. The last three statements simply do not evidence "possession and control" over the parking lot. Clearly, the parking lot where Ray fell was at a location both owned and controlled by Madison regardless of how close it was to Blockbuster. The lease agreement granted Blockbuster only the rights of control and possession over the interior portion of the store. The lease expressly refused to extend Blockbuster any control of the adjacent parking lot. The parking lot was made available for use by the patrons and employees of several businesses located in the development. None of these factual statements evidence "possession and control" over the parking lot. Further, none of these facts are sufficient to establish an issue of material fact to allow a claim against Blockbuster to survive summary judgment.

¶24. In *Wilson*, like here, the lessor of the grocery store was required, under the terms of

the lease agreement, to maintain the parking lot for the use of the lessees and the lessees' customers. *Wilson*, 487 So. 2d at 796. However, the supreme court found that there was evidence that the grocery store exercised possession and control of the parking lot when it constructed a cart corral on the parking lot. *Id.* at 797. In other words, the construction of the cart corral indicated that the grocery store invited its customers to take carts into the parking lot and use the cart corral; therefore, the grocery store could be liable for the dangers that were associated with the use of grocery carts in the parking lot. The court held that these facts were sufficient to allow the jury to determine whether the grocery store had possession and control of the parking lot. *Id.* at 798. Such was not the case here; there is no evidence that Blockbuster exercised possession and control of the parking lot.

¶25. There are two other cases that are instructive here. First, in *Brookhaven Funeral Home, Inc. v. Hill*, 820 So. 2d 3, 4 (¶1) (Miss. Ct. App. 2002), Deborah Hill fell on a sidewalk that was located in front of Brookhaven Funeral Home. The sidewalk was owned by the City of Brookhaven. *Id.* She brought an action for her injuries against the funeral home. *Id.* at 5 (¶5). The jury awarded a verdict in favor of Hill for $75,000. *Id.*

¶26. This Court, in an opinion written by Presiding Judge Leslie Southwick, reversed the jury verdict and held that Hill failed to prove the funeral home's ownership or control of the sidewalk where she fell. *Id.* at 7 (¶¶19-20). The Court reasoned that in order for the funeral home to be 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). Thus, the case was decided on "whether there was evidence to make a jury question of the funeral home's responsibility for defects in the segment of sidewalk on which Hill

fell." *Id.* at 6 (¶12). The Court then determined that:

> [T]hese are the items of evidence that arguably created a fact question about the funeral home's ownership, possession or control of the sloping sidewalk.
>
> > 1) The funeral home notified the City after Hill's fall that improvements should be made.
> >
> > 2) The funeral home agreed to pay for the concrete if the City would construct steps to replace the sloping sidewalk.
> >
> > 3) The funeral home gained permission from the City to add a handrail.
> >
> > 4) The sidewalk is adjacent to the funeral home.
>
> We find nothing in these facts to create an issue for the jury. Municipal sidewalks will be adjacent either to private property or to other governmental property. Proximity is the unavoidable reality of sidewalks and does not by itself create a fact issue on ownership or control. Post-injury efforts to improve the walk were consistent with the City's ownership and control over the property; all the funeral home did was offer to pay for the concrete as an incentive for the discretionary action of the City. The post-accident handrail is similarly ineffective to prove the funeral home's liability.
>
> . . . .
>
> 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 7 (¶¶18-20).

¶27. *Hill*, just as the instant case, involved a question of ownership and control of the property where the plaintiff was injured. Blockbuster is in a similar position to that of the funeral home in *Hill*. Here, Ray did not offer any evidence that Blockbuster actually owned the parking lot where she fell. Instead, the lease clearly established that Madison had ownership, control, and possession of the parking lot. The evidence also revealed that Madison, not Blockbuster, made the repairs to the parking lot when Ray fell. There was no

evidence that Madison relinquished its legal control of the parking lot to Blockbuster.

¶28. The second case is *Doe v. Cloverleaf Mall*, 829 F. Supp. 866 (S.D. Miss. 1993) – a case that was removed to federal court. In *Doe*, the questions before the court were: (1) whether the defendants were fraudulently joined and (2) whether the case should be remanded to state court jurisdiction. *Id.* at 869. The court had to consider the substantive law as it applied to the resident defendants.

¶29. In *Doe*, the plaintiff brought an action against Cloverleaf Mall, its management company, and five tenants of the Cloverleaf Mall. The tenants were J.C. Penney Company, Inc.; K& B Mississippi Corporation; Morrison, Inc.; McCrory Corporation; and McRae's, Inc. *Id.* at 868. The plaintiff was abducted at gunpoint from the parking lot of the Cloverleaf Mall on the east side of J.C. Penney's. *Id.* The plaintiff filed the action to recover the damages that resulted from the abduction. *Id.*

¶30. The district court determined that the issue was "whether the resident defendants had a duty to maintain the mall parking lot in a reasonably safe condition for mall patrons." *Id.* at 870. The court, citing *Wilson*, summarized Mississippi law as follows:

> 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.

Id. at 870 (emphasis added). The court held that the Mississippi Supreme Court followed this rule in *Wilson* to find that the tenant had control over the parking lot, but the facts in

Wilson were distinguishable from those in the claim against Cloverleaf Mall and its tenants. The court also provided a list of factors that would not reflect a tenant's possession 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, 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, 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 (Kan. App. 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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> . . . .
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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 Catherman v. United States*, No. 90-CV-576, 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-Fernandez v. Grand Union Supermarket*, 841 F.2d 11, 14 (1st Cir.), *cert. denied*, 488 U.S. 864, 102 L. Ed. 2d 135, 109 S. Ct. 164 (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*, 1992 U.S. Dist. LEXIS 19279, at *8-9 No. 91-7273 (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. at 872-73. Hence, the court concluded:

In this case, no facts have been alleged in support of plaintiff's allegation of possession and control by the tenant defendants. In *Catherman v. United States*, 1992 U.S. Dist. LEXIS 11120, No. 90-CV-576, (N.D.N.Y. July 21, 1992), the court, in granting summary judgment for the defendant tenant where there was a lack of any proof that the defendant took any action constituting control of the common area in which the plaintiff was injured, appropriately stated:

> The defendant must have taken specific action constituting control of the . . . area in order to assume a duty to plaintiff upon which liability for his accident may be premised. None of the evidence before the court indicates that defendant took any action with respect to the [area] which could be construed as an exercise of control, nor does plaintiff suggest any evidence he would like to discover which might indicate that defendant exercised control over the . . . area.

See also Gladman v. Revco Discount Drug Centers, Inc., 669 S.W.2d 677 (Tenn. Ct. App. 1984) (judgment for tenant defendant for injury resulting from fall in parking lot where parking lot remained in control of lessor under lease agreement and tenant was not shown to have exercised control over parking lot); *Garcia v. Arbern Realty Co.*, 89 A.D.2d 616, 452 N.Y.S.2d 665 (2d Dept. 1982) (tenant had no duty to warn patron of defective condition in common stairway where tenant did not lease stairwell and did not exercise any control over it); *Torres v. Piggly Wiggly Shop Rite Foods, Inc.*, 93 N.M. 408, 600 P.2d 1198 (N.M. Ct. App. 1979) (judgment for lessee where lease agreement did not require that tenant care for parking lot and there was no showing that tenant actually had or assumed control over parking lot); *Kiser v. A.J. Bayless Markets, Inc*., 9 Ariz. App. 103, 449 P.2d 637 (1969) (where parking lot on which plaintiff was injured was not part of premises leased by defendant tenant and responsibility for maintaining parking lot was upon lessor, plaintiff's failure to come forward with sufficient proof to show duty warranted entry of judgment for tenant); *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 153 A.2d 1 (1959) (judgment for tenant where landlord retained control over common passageways and tenant exercised no measure of control over

> such passageways); *compare Coyle v. Gerritsen Ave. Shopping Center, Inc.*, 176 A.D.2d 232, 574 N.Y.S.2d 58 (2d Dept. 1991) (summary judgment denied in parking lot slip and fall where defendant tenant had occasionally cleaned drain into which plaintiff fell); *Farrar v. Teicholz,* 173 A.D.2d 674, 570 N.Y.S.2d 329 (2d Dept. 1991) (issue of fact as to control where defendant tenant regularly inspected parking lot and notified landlord of defects or hired contractor to perform repairs).
>
> Inasmuch as the plaintiff here neither alleged nor presented any facts which could reasonably be found to demonstrate possession and control by the resident tenant defendants of the mall parking lot, the court must conclude that there is no factual basis for her allegation of possession and control by the resident defendants. Hence, there is no reasonable possibility that the resident defendant could be held liable and they are therefore due to be dismissed from this action. The court will, therefore, reverse the magistrate judge's order of remand and dismiss the resident defendants.

Id. at 873-74.

¶31. Here, as in *Hill* and *Doe*, there is simply no evidence that Blockbuster had possession and control of the parking lot. Therefore, there is no factual basis to support a claim against Blockbuster. I find that summary judgment was correctly granted in favor of Blockbuster. Accordingly, I would affirm the judgment of the circuit court.

ROBERTS AND CARLTON, JJ., JOIN THIS SEPARATE OPINION.