CV 16-441

IN THE ARKANSAS COURT of APPEALS

PARK PLAZA MALL CMBS, LLC and ERMC **APPELLANTS**

v. **CASE NO. CV 16-441**

KIMBERLY MARIE POWELL AND THE ESTATE OF CHRISTIAN HAYES **APPELLEES**

ON APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
JUDGE MICHAEL W. REIF, PRESIDING

BRIEF AMICUS CURIAE OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS

Respectfully submitted,

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ICSC'S INTEREST IN THIS APPEAL

Founded in 1957, the International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. The shopping center industry is essential to economic development and opportunity. Shopping centers are a significant job creator, driver of GDP, and critical revenue source for the communities they serve through the collection of sales taxes and the payment of property taxes. These taxes fund important municipal services like firefighters, police officers, school services, and infrastructure like roadways and parks. Shopping centers aren't only fiscal engines however; they are integral to the social fabric of their communities by providing a central place to congregate with friends and family, discuss community matters, and participate in and encourage philanthropic endeavors.

ICSC has 297 members in Arkansas, including Park Plaza Mall in Little Rock. ICSC members own 1,058 shopping centers in Arkansas, employing over 115,000 people. This represents 9.5% of the state's employment. Arkansas shopping centers generate approximately $958.8 million in sales tax revenue. *See* http://www.icsc.org/uploads/gpp/Arkansas_2016.pdf.

ICSC members also include attorneys from around the country who represent both owners/landlords and retail tenants of shopping centers and are keenly aware of the issues shopping centers face. Many of ICSC members and their counsel have reviewed and given their input to this friend of court brief.

Through participating as a friend of the court in this appeal, ICSC seeks to address the concerns of its members about the unprecedented and dangerous departure from well-established law in this case. The judgment and the the trial court's rulings in this case are contrary to the longstanding general rule that a landlord has no duty to protect others against criminal acts of third-parties. A rejection of the well-accepted general rule will have far-reaching and devastating ramifications for local malls, shopping centers and other businesses.

STATEMENT OF THE CASE

Appellant's statement of the case recites the relevant facts and procedural posture. The following facts are essential to ICSC's position in this appeal:

- Christian Hayes was an assistant manager of the Sbarro restaurant in Park Plaza Mall. He was closing the store after the mall closed at 9 p.m. Abs. 4, 33-35.

- Deonte Edison and Tristan Bryant were both employees of mall tenants. Abs. 35, 44. Based on surveillance video, they were present in the food court of the Mall eating pizza given to them by Hayes. Abs. 29-30, Add. 1022.

Surveillance video shows them fleeing the Mall at 9:51 p.m. Abs. 24, 56; Add. 1003, 1048, 1147.

- Hayes was murdered by Edison and Bryant. Abs. 5-6. Both have been convicted of murder and are incarcerated. Abs. 56, Add. 1027, 1035.

- The murder occurred inside the space leased by Sbarro. Abs. 35, Add. 697, 702.

- Hayes was present at the mall as an employee of a mall tenant. He was "on the clock" at the time of the shooting. Abs. 33-35, Add. 988.

- As employees of mall tenants, it was not unusual for Edison and Bryant to be present in the mall after closing time.

- At the time of the shooting, the mall had four security guards on duty. Abs. 8, 24, Add. 988.

- Hayes's estate sued Edison, Bryant, Park Plaza, and ERMC for negligence and wrongful death. Add. 324. ERMC is the company that Park Plaza contracted to provide security at the mall.

- The trial court ruled that Hayes was a business invitee, reasoning that he was acting for the benefit of the mall by working at Sbarro because of the percentage rent provision in Sbarro's lease. Add. 529-30, Abs. 54-5, 73.

- A jury returned a verdict of $2.77 million in compensatory damages, and allocated 33% of that to Park Plaza and ERMC. Abs. 75, Add. 575-81.

- The trial court entered judgment on the jury verdict (Add. 593, 684) and issued a Rule 54(b) certification. Add. 686-7. This appeal followed. Add. 688.

SUMMARY OF ARGUMENT

The verdict and judgment in this case is a drastic and dangerous departure from well-settled Arkansas law. The trial court's finding that Hayes was a business invitee is contrary to controlling Arkansas authority. Arkansas law plainly holds that an employee of a tenant is not a business invitee for purposes of common-law status. *Lacy v. Flake & Kelley Mgmt., Inc.*, 366 Ark. 365, 370, 235 S.W.3d 894, 898 (2006).

The trial court's reasoning that the percentage of sales Sbarro paid as rent to the Mall somehow transforms Sbarro's employees into business invitees by making them joint venturers with the Mall has never been applied in Arkansas before, and is contrary to well-reasoned authority in other jurisdictions. Applying such a rule will graft unprecedented and crippling liability onto shopping malls and landlords based on the common use of a percentage-of-sales rent in commercial leases.

The general rule that a landlord is not liable for the criminal acts of a third party must apply here. To rule otherwise will open a floodgate of litigation, liability, and economic devastation on Arkansas shopping centers by declaring,

without any degree of fault, that they are now the deep pocket for victims of unforeseen criminal acts occurring on their premises.

Park Plaza and ERMC have no fault here because the mall did nothing wrong. As such, how can a murderer's criminal act be imputed to the mall for purposes of civil liability?

ARGUMENT

I. HOLDING A COMMERCIAL LANDLORD LIABLE FOR THE CRIMINAL ACTS OF A THIRD PARTY IS CONTRARY TO WELL-SETTLED LAW AND CONTRARY TO PUBLIC POLICY.

A. The general rule is no landlord liability for criminal acts of third-parties

"Traditionally, courts have held that a landlord had no duty to protect tenants from criminal activity on the premises." 43 A.L.R.5th 207 (Originally published in 1996). The ALR explains further: "Traditionally, courts have found that **the mere relation of landlord and tenant falls within the general rule and does not impose upon the landlord a duty to protect the tenant against criminal activities of third parties**, ordinarily reasoning that the liability of a landlord for injuries or damages resulting from such activities must be predicated either upon the breach of a contractual or statutory obligation, or upon the foreseeability, under

the circumstances, of the criminal occurrence." § 2[a], 43 A.L.R.5th 207 (Originally published in 1996)(emphasis added).

Like most general rules, there are exceptions, but none of those exceptions to the general rule apply in this case.

1. Arkansas has adopted the general rule.

The Arkansas Supreme Court has explicitly followed the general rule that a landlord is not liable for criminal acts of third parties. In *Bartley v. Sweetser, infra*, the Court discussed the long and consistent history of applying this general rule in Arkansas:

> Arkansas landlord/tenant law has its own history that bears on the issue before us in this case. Since 1932, Arkansas has adhered to the general rule that, as between a landlord and tenant, the landlord is under no legal obligation to a tenant for injuries sustained in common areas, absent a statute or agreement. *See Glasgow v. Century Property Fund XIX,* 299 Ark. 221, 772 S.W.2d 312 (1989); *Knox v. Gray,* 289 Ark. 507, 712 S.W.2d 914 (1986); *Kilbury v. McConnell,* 246 Ark. 528, 438 S.W.2d 692 (1969); *Joseph v. Riffel,* 186 Ark. 418, 53 S.W.2d 987 (1932). Consistent with the foregoing principle is the general and common law rule that a landlord does not owe a tenant or social guest a duty to protect the tenant or guest from criminal acts. *Pippin v. Chicago Housing Authority,* 78 Ill.2d 204, 35 Ill.Dec. 530, 399 N.E.2d 596 (1979); *Morgan v. 253 E. Delaware Condo Ass'n,* 231 Ill.App.3d 208, 171 Ill.Dec. 908, 595 N.E.2d 36 (1992); 52 C.J.S. Landlord and Tenant § 545 (1968); American Law of Landlord and Tenant § 4.14 121 (1980 and Supp.1994); 43 ALR3rd 331 (1972 and Supp.1994)

> (Landlord's obligation to protect tenant against criminal activities of third persons); *see also 65th Center, Inc. v. Copeland,* 308 Ark. 456, 825 S.W.2d 574 (1992) (court said that a landowner is not liable for the *negligent* act of a third party, when the landowner had no control over the person who committed the act and the act was not committed on his account); *contra Kline v. 1500 Mass. Ave. Apt. Corp.,* 141 App.D.C. 370, 439 F.2d 477, 43 ALR3d 311 (1970); American Law of Landlord and Tenant § 4.15 (1980 and Supp.1994).

Bartley v. Sweetser, 319 Ark. 117, 120-21, 890 S.W.2d 250, 251 (1994).

Bartley was a residential landlord-tenant case involving a crime committed against a college student at an apartment complex. The allegation of negligence was based on the type of lock used on the door to the apartment. However, Justice Newbern's concurrence emphasized that even if a duty was owed, proximate cause was lacking because regardless of the type of lock on the door, the tenant herself opened the door to the attackers. *Id*.

The general rule announced in *Bartley* also applies to commercial landlord-tenant cases. *Lacy v. Flake & Kelley Mgmt., Inc.,* 366 Ark. 365, 368, 235 S.W.3d 894, 897 (2006). The Arkansas Supreme Court in *Lacy* discussed and restated the holding in *Bartley*, and applied it to the facts in *Lacy*, where an employee of a tenant that leased space from the landlord was violently attacked in the parking lot while leaving work. Summary judgment was affirmed in *Lacy*, despite her arguments that the lease agreement between her employer and the landlord created

a duty of care that was breached, and that she was owed a duty based on her status as an invitee. Both arguments were rejected.

2. Other Jurisdictions consistently apply the general rule

A fifty-state survey[1] is beyond the scope of this brief, but it is safe to say that the great weight of jurisdictions apply the general rule. The remaining jurisdictions apply an evolution of the general rule based on foreseeability of the harm and other factors. The most common exception to the general rule is where a special relationship (like common-carrier and passenger, doctor and patient, etc.) where the injured party has placed himself in the control of another.

There is no allegation of a special relationship here, or that Hayes put himself in the control of the mall. Even those states that do not apply the general rule have adopted tests of foreseeability and knowledge or notice of likely criminal activity that would result in the same conclusion under these facts -- this criminal

[1] Sec. 3, 31 A.L.R.5th 550 catalogues the following jurisdictions as having a rule that the owner of a shopping center could not be held liable for a criminal attack by a third party which was not foreseeable (but note here, Hayes was not an invitee, but a licensee): Federal (W.D. Ky.), Alabama, Washington D.C., Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, New York, North Carolina, Tennessee, and Texas.

attack by a third-party was a surprise to everyone. It was not foreseeable. The mall had no notice of this particular attack, or other incidents of violent homicides at the mall. *See gen*. Appellant's Br. at Arg. 11-17. So there is no basis for holding the mall liable for the criminal acts that occurred in this case.

Some leading examples of jurisdictions that apply the general rule are Alabama and Michigan. The reasoning in both jurisdictions is persuasive.

The seminal case in Alabama is *Moye v. A.G. Gaston Motels*, 499 So.2d 1368 (Ala. 1986). In *Moye*, the Alabama Supreme Court observed that as of that date, no case in Alabama had imposed liability on a business for injuries to its invitees as a result of criminal conduct of third parties. *Id.* at 370. The *Moye* court held there was a lack of duty and no evidence of proximate cause when an attendee at a dance at a motel was shot and killed. Absent a "special relationship," a person has no duty to protect another from criminal acts of a third-party. *Id.* Numerous Alabama cases have consistently followed the reasoning in *Moye*. *See Tort Liability for Criminal Acts of Third Parties*, 56 Ala. Law. 112 (1995).

Where Alabama cases have departed from *Moye*, they turn on the "special relationship" exception to the general rule. For instance, *Young v. Huntsville Hospital*, 595 So.2d 1386 (Ala. 1992) upheld civil liability for an assault that occurred while a patient was sedated.

Similarly, Michigan follows the general rule of no premises liability for criminal acts of third-parties. The leading case is the consolidated case of *MacDonald v. PKT, Inc. & Lowery v. Cellar Door*, 628 N.W.2d 33 (Mich. 2001). Quoting from *MacDonald* on the status of Michigan law:

> We recognized in *Mason* the general rule that merchants "do not have a duty to protect their invitees from unreasonable risks that are unforeseeable." *Id.* at 398, 566 N.W.2d 199. Accordingly, we held that a duty arises only on behalf of those invitees that are " 'readily identifiable as [being] foreseeably endangered.' " *Id.,* quoting *Murdock v. Higgins,* 454 Mich. 46, 58, 559 N.W.2d 639 (1997).

MacDonald v. PKT, Inc., 464 Mich. 322, 332, 628 N.W.2d 33, 38 (2001).

The *MacDonald* case also reiterated that a merchant has no obligation generally to anticipate and prevent criminal acts against its invitees. To hold otherwise, the Court reasoned, would mean merchants have an obligation to provide police protection, which the Court has soundly rejected. *Id.* Further, the Michigan Supreme Court held that a merchant can assume third-parties will obey criminal laws, and is not expected to assume third-parties will disobey the law. *Id.* at 335. In rejecting liability based on foreseeability, the *MacDonald* court held that the assumption against criminal conduct should continue "until a specific situation occurs on the premises that would cause a reasonable person to recognize risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond." *Id.* at 335.

So under *MacDonald*, even under a reasonable care standard for an invitee, the facts in this case do not warrant liability on Park Plaza. It was reasonable for Park Plaza to assume third-parties would obey criminal laws, and there is absolutely no evidence that Park Plaza had any knowledge of any specific risk of imminent harm to an identifiable person -- Hayes. In fact, the perpetrators were known to be former or current employees for mall businesses, and were seen on surveillance cameras casually eating pizza in the food court just before the shooting. And the victim, Hayes, served the pizza to them. Abs. 29-30, Add. 1022.

Finally, even if a duty was imposed on the landowner in *MacDonald*, the duty would be limited to the merchant reasonably expediting the involvement of police. *Id.* at 345. Likewise, the most that could possibly be expected of Park Plaza in this tragic situation was to timely notify the police and render aid to the victims. Park Plaza met this duty.

3. The Restatement[2]

[2] Arkansas has not adopted the Restatement approach. This analysis is background for the court's benefit, and to illustrate the point that under *any* standard, it is error to hold Park Plaza liable for the criminal conduct of third parties based upon the facts of this case.

The Restatement (Second) of Torts (June 2016) alters the general common law rule to provide landowner liability when a landowner discovers intentionally harmful acts and fails to give visitors warning or otherwise protect them. This phraseology produces results consistent with the general rule by the application of notice and foreseeability tests.

§ 344 Business Premises Open to Public: Acts of Third Persons or Animals

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344 (1965).

While the Restatement retains the distinctions between trespassers (§ 329), licensees (§ 330), and invitees (§ 332), the significance of those distinctions is not clear as it relates to intentional conduct of third parties. Regardless, a landlord's liability for criminal acts of third parties under the Restatement is constrained by notice and foreseeability. Here, there is no evidence to support Park Plaza having

notice or foreseeability of the criminal conduct, so even under the Restatement approach, the verdict must be set aside.

4. Public Policy Favors the General Rule

The verdict in this case is alarming for shopping centers and business owners of all types. Violent crime is an unfortunate reality. It occurs too frequently, even in places with an extremely high level of security like airports and courthouses. To hold a business liable for the tragic death of a victim of crime strains any sense of fairness or justice. Penalizing a shopping center or business where there is absolutely no fault on their part only compounds the tragedy of crimes committed by third-parties.

Here, Park Plaza had no reason to know the two perpetrators were about to commit a murder. Surveillance showed Hayes served Edison and Bryant pizza in the food court just before the attack. Abs. 29-30, Add. 1022. Both perpetrators were current employees of a mall tenant, so it was not at all unusual for them to be present at the mall at closing time. Abs. 35, 44. Likewise, Park Plaza had ample security presence on site, and they were stationed at appropriate locations. Abs. 63. Even if security had been in close proximity to the crime, its role would be to observe and report. Abs. 66. Security personnel are not armed. They could only contact the police and render aid to the victim. Park Plaza has no fault here

because the mall did nothing wrong. As such, how can a murderer's criminal act be imputed to the mall for purposes of civil liability?

An Illinois court weighed the policy concerns in a similar situation, and held that imposing on landlords the cost of protecting third parties from all criminal attacks at a strip mall was too burdensome.

> In the instant case, we find that imposing the cost of protecting third parties from all criminal attacks at Yards Plaza on the landlord Simon Management Company is too burdensome. The shopping center's common areas are large and open and Simon Management had only attenuated control over these areas. We do not believe that Simon Management could reasonably be expected to secure this entire area. How many guards would Simon Management have to hire to protect against any criminal act occurring in the common area of a shopping center which is open to the public? 2? 50? or 100? Alternatively, what else could Simon Management do except erect a fence around Yards Plaza and screen all persons entering the premises? Either of these scenarios would certainly place too onerous an economic burden on Simon Management.

Kolodziejzak v. Melvin Simon & Associates, 292 Ill. App. 3d 490, 498, 685 N.E.2d 985, 991 (1997).

The Illinois appellate court in *Kolodziejzak* noted the landlord's attenuated control of the premises. Here, the facts are even more compelling. The murder occurred **inside** the Sbarro premises, and not in any common area. Abs. 35-6, 66. Sbarro had exclusive use of that space pursuant to their lease. Add. 700, 712. The lease agreement

clearly states that mall security covers only common areas, and in fact security was not supposed to enter tenant spaces. Add. 713, 859-60.

B. The trial court erred in characterizing Hayes as a business invitee

The level of duty owed to a tenant's employee has traditionally been based on common law distinctions carried forward form English feudal heritage.

> Summarily stated, the traditional common–law approach to the problem of a landowner's or occupier's liability in tort to a person who comes upon the premises and is injured thereon because of the condition of the premises has been to measure the extent and scope of the occupier's duty according to the status of the entrant at the time of the accident. Thus, entrants have been classified generally as invitees, licensees, or trespassers, and the duty of the landowner or occupier to the entrant has been accordingly graduated.

§ 2[a], 22 A.L.R.4th 294 (Originally published in 1983).

Common-law status distinctions are the law in Arkansas, and the trial court clearly erred here by classifying Hayes as a "business invitee." Abs. 54-55, Add. 529-30.

> In Arkansas, for purposes of premises liability, there are three basic categories of persons present on another's property who may allege injury against the landowner: trespasser, licensee, and invitee. Arkansas courts adhere to common law distinctions between the duties owed to these three categories of persons. *Baldwin v. Mosley,* 295 Ark. 285, 748 S.W.2d 146 (1988). When determining whether a visitor qualifies as either an invitee or licensee, it is important to look to the purpose

> of the visit and the property owner's invitation. *Slavin v. Plumbers & Steamfitters Local 29,* 91 Ark. App. 43, 207 S.W.3d 586 (2005).

Lloyd v. Pier W. Prop. Owners Ass'n, 2015 Ark. App. 487, 4, 470 S.W.3d 293, 297 (2015), *reh'g denied* (Oct. 28, 2015).

A licensee is one who goes on the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998). A social guest is a licensee. *Lloyd, supra*. A landowner owes a licensee the duty to refrain from injuring him through willful or wanton conduct. *Id*.

In contrast, an invitee is someone who is induced to come onto the property for the business benefit to the owner of the property. *Bader v. Lawson*, 320 Ark. 561, 898 S.W.2d 40 (1995). Within the classification of "invitee," there are two types: public and business. A public invitee is invited to enter or remain on the property as a member of the public for a purpose for which the property is held open to the public, such as a hospital or library. *Lively v. Libbey Mem'l Physical Med. Ctr., Inc.,* 311 Ark. 41, 841 S.W.2d 609 (1992). A business invitee is invited to enter or remain on the property for a purpose directly or indirectly connected with the business dealings of the possessor of the property. *Id. Lloyd v. Pier W. Prop. Owners Ass'n*, 2015 Ark. App. 487, 5, 470 S.W.3d 293, 298 (2015), *reh'g denied* (Oct. 28, 2015). A landowner owes either type of invitee the duty to use

ordinary care to maintain the premises in a reasonably safe condition. *Derrick v. Mexico Chiquito, Inc.,* 307 Ark. 217, 221, 819 S.W.2d 4, 6 (1991) *citing Dye v. Wal–Mart Stores, Inc.,* 300 Ark. 197, 777 S.W.2d 861 (1989); *Johnson v. Arkla, Inc.,* 299 Ark. 399, 771 S.W.2d 782 (1989).

There is no dispute that Hayes was an employee of Sbarro Pizza and that Sbarro operates a store serving food at the food court on the ground floor of Park Plaza Mall. Sbarro is a tenant of the mall. Add. 697. The crime occurred in Sbarro's leased premises, not in any mall common area. The crime occurred after both Sbarro and the mall had closed for the day; however, Hayes was still on-the-clock closing the store. Arkansas law plainly holds that an employee of a tenant is not a business invitee for purposes of common-law status. *Lacy v. Flake & Kelley Mgmt., Inc.*, 366 Ark. 365, 370, 235 S.W.3d 894, 898 (2006).

Appellee argued below that Hayes was a business invitee on the basis that he was furthering the business of the mall by working at Sbarro, and cited to *Kay v. Kay*, 306 Ark. 322, 812 S.W.2d 685 as an example of a case where an employee was deemed an invitee of her employer. But this argument ignores the controlling holding in *Lacy*, and misapplies the criteria for a business invitee under Arkansas law. The Court in *Lacy* carefully distinguished *Kay*, and that same distinction applies here.

> Lacy cites to this court's decision in *Kay, supra,* in support of her position. In the *Kay* case, Mary Harris, a

> housekeeper, was bitten by a brown recluse spider while working in the home of Thomas and Gladys Kay. Harris's complaint alleged that the Kays knew of the presence of spiders in their home and did nothing to make the premises safe for her. Given the facts, it was clear that Harris was on the property for the benefit of the Kays, who had dual roles as both employers and property owners. As a result, this court labeled Harris as an invitee and held that "an employee working on her employer's premises is an invitee." *Kay,* 306 Ark. at 323, 812 S.W.2d 685.
>
> The case at bar is easily distinguishable from the *Kay* case in that Lacy was not an employee of U.S. Bank—she was a tenant. Here, unlike the housekeeper in *Kay,* Lacy has made no allegations that she was on the property for the benefit of U.S. Bank. It is undisputed that Lacy did not work for U.S. Bank, nor was she banking with U.S. Bank at the time of the incident in question. Simply put, Lacy was not an invitee, and U.S. Bank did not owe her an affirmative duty to see that the premises were reasonably safe. For this reason, Lacy's second argument must also fail. *See Wheeler v. Phillips Dev. Corp.,* 329 Ark. 354, 947 S.W.2d 380 (1997) (holding that a tenant is not an invitee on her landlord's premises).

Lacy v. Flake & Kelley Mgmt., Inc., 366 Ark. 365, 370, 235 S.W.3d 894, 898 (2006).

Furthermore, a tenant cannot be an invitee when under the lease the leasehold interest held by the tenant gives the tenant exclusive possession of the property. A person cannot be deemed "invited" to be present on property where that person already has a legal right to be present under the terms of a lease.

The question of the duty, if any, owed by one person to another is always a question of law and never one for the jury. *Bader v. Lawson*, 320 Ark. 561, 564, 898 S.W.2d 40, 42 (1995) *citing Lovell v. St. Paul Fire and Marine Ins.,* 310 Ark. 791, 839 S.W.2d 222 (1992). Therefore, the erroneous status applied to Hayes pervades this case. It was error to deny summary judgment on this point. Add. 529-30. It was error to incorrectly instruct the jury on the duty Park Plaza owed to Hayes based on an incorrect status (invitee rather than licensee). Add. 559 (Jury Instruction No. 23). It was error to deny a directed verdict in favor of Park Plaza and ERMC on this point. Abs. 54-55, 72. And finally, it was error to deny Park Plaza's motion for JNOV on this point. Add. 613, 684.

C. No authority supports the notion that the payment of a percentage of a tenant's gross profits as rent makes the tenant's employee a joint venturer with the landlord.

1. The finding that Hayes was acting for the benefit of Park Plaza at the time of the incident is clearly erroneous

The trial court's short order (Add. 529-30) denying summary judgment stated in part:

> 2. The lease between Park Plaza Mall and Sbarro America, Inc., where Hayes was employed referenced gross proceeds Sbarro was required to pay to Park Plaza Mall over and beyond the rent and other consideration.

3. Therefore, Hayes was acting for the benefit of Park Plaza Mall at the time of the incident.

The Court applied the same reasoning in denying Park Plaza's motion for directed verdict. Abs. 54-55.

The Court's order and oral ruling suggest that the nature of the rent due under the lease -- which included a percentage of Sbarro's gross profits -- somehow transformed Sbarro and its employee, Hayes, into joint-venturers with the mall who were acting in concert for a common business purpose and sharing profits and losses. This reasoning is not consistent with the terms of the lease, finds no support in any authority interpreting such leases, and contradicts well-settled law holding that employees of a tenant are licensees, not invitees.

The Ohio Court of Appeals addressed this precise question in *Chovan v. Dehoff Agency, Inc.*, 2010 WL 1452528.[3] An employee (Michelle Chovan) was on her lunch break from her employment at the Stark County Department of Job and Family Services when when she tripped on a defective walkway at the office

[3] *Chovan* is an unpublished opinion. However, all opinions of the Ohio courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published. Rep. Op. R. 3.4. Use of Opinions.

building. The office building was owned by Dehoff Agency, Inc. Chovan sued the Dehoff Agency as the landlord, alleging negligence for the defective walkway.

Like Arkansas, Ohio follows the common-law status distinctions to ascertain what duty a landlord owes.

> In premises liability situations, the duty owed by a landowner to individuals visiting the property is determined by the relationship between the parties. *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 502 N.E.2d 611. Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability which determines the standard of care owed to the individual. *Shump v. First Continental–Robinwood Assoc.* (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291, 1994–Ohio–427; *Boydston v. Norfolk S. Corp.* . (1991), 73 Ohio App.3d 727, 733, 598 N.E.2d 171; *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287.
>
> Under Ohio law, "a person who enters the premises of another by permission or acquiescence, for his *own* pleasure or benefit, and not by invitation, is a licensee." *Light v. Ohio Univ.,* (1986) 28 Ohio St.3d 66, 68, 502 N.E.2d 611. The only duty an owner owes a licensee is to "refrain from wantonly or willfully causing injury." *Id.* (citing *Hannan v. Ehrlich,* 102 Ohio St. 176, 131 N.E. 504, paragraph four of the syllabus (1921)).
>
> In contrast, "business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 68, 502 N.E.2d 611. The duty of care owed by a landowner to a business invitee is to exercise ordinary care to keep the premises in a reasonably safe condition so as to not expose the individual to any unnecessary or unreasonable risks of harm. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d

> 474, citing *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9, 90 N.E.2d 694.

Chovan v. DeHoff Agency, Inc., 2010-Ohio-1646, ¶¶ 19-21.

The *Chovan* court applied Ohio law to this situation, holding that Michelle Chovan was a licensee. The court was not persuaded by the argument that the owner of the premises derived any benefit by Michelle Chovan working there.

> In the instant case, Appellant receives a direct benefit from being on the premises in the form of her employment with Job and Family Services. Appellee receives a benefit from its tenant, Job and Family Services, in the form of rent. This does not automatically make Appellant a licensee. As stated above, what determines whether a person is an invitee rather than a licensee, however, is whether the owner of the premises benefits by the person being on the premises. While Appellee does receive a benefit from its tenant, Job & Family Services, in the form of rent, we can discern no direct benefit to Appellee from Appellant being on the premises. We therefore find that Appellant is a licensee in the case sub judice and that as such the only duty Appellee owed her was to "refrain from wantonly or willfully causing injury." *Ehrlich,* supra.

Chovan v. DeHoff Agency, Inc., 2010-Ohio-1646, ¶ 23.

Here, the same reasoning should apply. While Park Plaza does receive a benefit from Sbarro paying rent, there is no discernable direct benefit to Park Plaza based on Hayes' presence at the mall. The only direct benefit of Hayes' presence is for his own purpose -- to work and earn a wage. For purposes of common-law status, that means Hayes was a licensee.

2. A percentage of gross profits paid as rent does not alter the common law status of a tenant's employee

Many commercial leases include payment of a percentage of a tenant's gross sales as all or part of the rent for the leased space. Heretofore, no case has ever used that method of rent to transform a tenant from its ordinary status of a licensee to the elevated status of an invitee. Illinois rejected this argument, properly describing it as "novel" and "grandiose."

> It must be pointed out that the only questions before the court are entirely novel. The parties do not take issue with the general proposition that when a landlord turns over possession and control of the demised premises, he is not liable for injuries to invitees which arose from the operation of the tenant's business (*Richardson v. Bulk Petroleum Corp.* (1973), 11 Ill.App.3d 655, 297 N.E.2d 405). The argument presented by plaintiffs is that the relationship created by the lease between Northwoods and Skewer Inn was different in kind from that of merely landlord and tenant.
>
> Using the Northwoods-Skewer lease as ammunition, plaintiffs construct alternative grandiose theories of vicarious liability.

Clapp v. JMK/Skewer, Inc., 137 Ill. App. 3d 469, 470, 484 N.E.2d 918, 919 (1985).

Specifically, the plaintiff/appellant (Barbara Clapp) was an invitee who was injured while eating food prepared by a mall tenant, Skewer. The mall was owned by Northwoods Development Company. Clapp argued that the agreement between

the tenant and landlord to share a fixed percentage of the tenant's profits transformed their relationship into a joint-venture, making the mall owner vicariously liable for the tenant's negligence.

The *Clapp* court soundly rejected the joint-venture argument, holding: "It is readily apparent that plaintiff's joint venture theory cannot withstand the most basic analysis." *Id*. at 471. The *Clapp* court noted that joint venturers share profits **and losses.** *Id*. at 472. Here, like *Clapp*, there is no allegation that Park Plaza would share in Sbarro's losses. On that basis, the Illinois court held the allegation that the tenant was a joint venturer with the mall was insufficient as a matter of law. *Id.* at 472.

Nebraska has explicitly adopted the reasoning in *Clapp* in a premise liability case alleging vicarious liability against a landlord for a defect in the parking lot of the Sunshine Tavern where Kathy Bahrs fell and was injured. The Nebraska court held:

> Regarding the common pecuniary interest requirement for a joint venture, the Restatement, *supra,* provides that it entails participants' having a financial stake in the endeavor. Other authorities explain the common pecuniary interest requirement for a joint venture includes an agreement to share in profits and losses. See, 46 Am.Jur.2d *Joint Ventures* § 17 (1994); 48A C.J.S. *Joint Ventures* § 13 (1981). See, also, *S & W Air Vac v. Dept. of Revenue,* 697 So.2d 1313 (Fla.App.1997); *Matter of Marriage of Louis,* 911 S.W.2d 495 (Tex.App.1995). See, also, *Global Credit Servs., supra.* In the context of the landlord and tenant

> relationship, even an agreement between landlord and tenant that the landlord will receive as rent a stipulated portion of the income or net profits derived by the lessee through its business conducted on the premises does not create a joint enterprise. See *Clapp v. JMK/Skewer, Inc.,* 137 Ill.App.3d 469, 92 Ill.Dec. 187, 484 N.E.2d 918 (1985).

Bahrs v. RMBR Wheels, Inc., 6 Neb. App. 354, 361, 574 N.W.2d 524, 529 (1998).

Here, Arkansas should follow the well-reasoned authority in Illinois and Nebraska to reject the novel and grandiose theory that a percentage of profits lease alters the legal relationship between a landlord and tenant. To do otherwise would hold that all employees of a tenant in Arkansas are business invitees of the landlord, drastically changing the meaning and intent of all commercial leases that include percentage-of-sales rent.

D. There is no evidence to support a finding of inadequate security

Amicus has established above that there is no basis under controlling Arkansas law to apply vicarious liability on a landlord under these facts. Likewise, there is no evidence of any inadequate security in this case that would justify any negligence by the mall. Appellant addressed the unrebutted testimony of a well-qualified expert in mall security. Appellant's Br. at Arg. 20-26. This testimony established that Park Plaza's security was appropriate in all respects.

Shopping centers are faced with providing appropriate security without locking down their premises with metal detectors and armed guards such that no one would want to go there to shop. In the face of unrebutted proof that the mall's security in this case was appropriate in all respects, if this verdict is not reversed, it will lead down the slippery slope of requiring malls to look more like airports or courthouses. Body scanners, metal detectors, drug-sniffing dogs, and intrusive armed security will destroy the very purpose of shopping centers by creating a powerful disincentive for customers to go to shopping centers. That will damage the mall's role in providing jobs and tax revenue, and destroy the social benefit malls provide to their communities.

Conclusion

The trial court in this case ignored the general rule that a landlord is not responsible for the criminal acts of third parties.

The trial court also misapplied Arkansas law to reach the erroneous finding that Hayes was an invitee.

Finally, the trial court's reasoning that a percentage of sales as rent in a commercial lease transforms a tenant into a joint venturer with a common interest with the landlord is deeply flawed.

These errors resulted in a jury verdict that is contrary to the facts and the law.

"The issue of whether a duty exists is always a question of law, not to be decided by a trier of fact. *Hall, supra.* If no duty of care is owed, summary judgment is appropriate. *Smith v. Hansen,* 323 Ark. 188, 914 S.W.2d 285 (1996)." *Lacy v. Flake & Kelley Mgmt., Inc.,* 366 Ark. 365, 371, 235 S.W.3d 894, 898 (2006).

Here, the same fundamental misapplication of duty pervades this case.

It was error to refuse Park Plaza's motion for summary judgment. Add. 529-30.

It was error to give the jury incorrect instructions about Park Plaza's duty of care. Add. 559.

And it was error to refuse Park Plaza's motion for directed verdict. Abs. 54-55, 72.

And it was error to refuse Park Plaza's motion for judgment notwithstanding the verdict. Add. 613, 684.

Amicus ICSC urges the Court to clearly and plainly address these important issues. Amicus's interest is in stability and predictability for merchants, shopping centers, and landlords generally. Retail shopping centers are the centerpiece of many communities. They serve the social, economic and practical needs of their customers and contribute generously to the local economy with jobs, sales tax, and property tax revenue. But shopping centers cannot be asked to be the insurer of

last resort when a heinous crime is committed on their premises. Without a doubt, the events in this case are tragic. But where the mall has no control over the space where the crime occurred, no special relationship with or control over the victim, and no breach of any duty under its lease with the tenant, there is simply no basis to transfer the massive cost of an event like this to the mall.

Shopping centers are attuned to security threats. Most shopping centers, like Park Plaza, have trained security officers on site around the clock. But even the best security cannot prevent criminals determined to commit a murder from doing so. In those cases, upholding the general rule that a landowner has no liability for criminal acts of third parties is essential to the continued viability of shopping centers in all communities. The true perpetrators of this murder have been convicted and punished. Justice, common sense, and controlling law dictate the conclusion that a landlord's only duty to a licensee is to refrain from injuring him thorough willful or wanton conduct. *Lloyd, supra*. Imposing the wrong duty on the landlord throughout this case was a clear error of law that resulted in the manifest injustice of imposing liability on the landlord for the criminal acts of third-parties.

For all these reasons, the International Council of Shopping Centers, as *Amicus Curiae*, supports the Appellant's request that this Court reverse and dismiss the judgment in this case.

Respectfully submitted,
International Council of
Shopping Centers
Amicus Curiae

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Rule 1-8 CERTIFICATION

I hereby certify that I have served on opposing counsel an unredacted and, if required, redacted PDF document that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding paper document from which it was created as filed with the court. To the best of my knowledge, information and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

/s/ Tim Cullen

CERTIFICATE OF SERVICE

The undersigned attorney does hereby state that a true and correct copy of the foregoing was served on the following by U.S. mail and by the Court's electronic noticing system this 27TH day of July, 2016:

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