PRIORITIZE AND WIN THE PREMISES LIABILITY CASE

Arising from Accidental Storefront Crashes

by Ian Kirtman

If you represent a client injured when a vehicle crashed into a building or drove errantly onto a sidewalk, the most apparent case to evaluate is against the responsible driver. But with Florida drivers habitually underinsured and statewide storefronts routinely kept unsafe, the most effective way of achieving justice for your client may be through a premises liability case against the commercial property owner or operator.

As trial lawyers, we can add tremendous value to our clients' storefront crash cases by holding these corporations responsible for the harms they cause. When handling a storefront crash case, focus on proving (1) that the commercial property owner or operator owed your client a duty of care; (2) your client's accident was foreseeable; and (3) had the defendant installed reasonable protective barriers on the property, the accident would have been prevented.

Approximately sixty times per day in the United States vehicles crash into stores, office buildings, bus stops, shopping centers, post offices, restaurants, and onto storefront sidewalks.[1] According to the Storefront Safety Council, each year more than 4,000 people are injured and as many as 500 people are killed as a result of these incidents.[2] While the public may not realize how often these crashes occur, building owners, property managers and business operators have recognized this as a major public safety issue. In 2015 and 2016, alone, insurers and businesses paid more than $100 million dollars to storefront crash victims across the country.[3]

Given the consequences, one may think commercial property owners and operators would recognize the risk posed by storefront crashes and install protective devices. Most do not. Instead, they needlessly endanger their customers and employees even though these incidents are well-known, well-publicized, and predominantly foreseeable.

Proving Foreseeability With Evidence of Prior Storefront Crashes

Businesses have a common law duty to protect their customers from foreseeable storefront crashes.[4] Well established Florida law holds that when "a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses."[5] As in any premises liability case, offer evidence of prior similar incidents to establish the owner or operator's actual or constructive notice to prove foreseeability. This imposes a duty on the defendant to take reasonable steps to protect customers and invitees from future harm.

Ideally, you can identify prior similar incidents that have occurred on the premises to establish the business' actual knowledge of the harms posed by storefront crashes. Once aware of the safety issues, businesses have a duty to address or correct the problems. If they fail to do so they can be held liable or partly at-fault for future incidents occurring on their premises.

However, the absence of prior substantially similar storefront crashes occurring on the subject premises is not fatal to your case.[6] Constructive knowledge of storefront crashes occurring at other similar locations can be sufficient to establish foreseeability.[7]

For cases involving defendants operating stores with multiple locations, discover whether storefront crashes occurred previously at any of their other properties. Florida law holds that evidence of prior storefront crashes involving the same chain of stores at different locations elicits a duty of care at other locations, even those with no history of prior accidents.[8] In *Grissett v. Circle K Corp. of Texas,* 593 So. 2d 291 (Fla. 2d DCA 1992), a Circle K convenience store customer was using a storefront payphone when a car accidentally drove from the parking lot onto the sidewalk where the customer was standing and pinned him against the exterior wall of Circle K. The customer sued Circle K alleging that Circle K negligently maintained a dangerous storefront because it was devoid of any protective barriers rendering the payphone area unsafe. Circle K claimed the presence of a curb coupled with the absence of other similar accidents at the subject location satisfied any duty owed to pedestrian invitees.[9] The Second DCA overturned the trial court's entry of summary judgment against the customer, holding that evidence of similar storefront crashes at other Circle K locations sufficiently raised a jury question regarding foreseeability.[10]

Do not rely solely on the formal discovery process to identify relevant prior incidents. Many major national retailers operate locations that lack proper safety mechanisms and have often been struck multiple times. Start with a simple Google search for news reports. Request police reports and fire department records to uncover other similar incidents not publicized, including ones that merely caused property damage. Search Clerk of Court records for other lawsuits filed against the potential defendant. Utilize the data compiled by the Storefront Safety Council. Then, request information through formal discovery once in suit concerning all similar crashes involving your defendant, and retain an expert who maintains a database of location and business specific incidents. These tactics can help establish the defendant's actual or constructive knowledge necessary to satisfy the element of foreseeability.

Dangerous Designs Necessitate Adequate Storefront Safety Barriers

Head-in parking spots adjacent to storefronts with regular pedestrian traffic illustrate apparent hazards which property owners and operators know, or should know, pose a significant risk of harm to their customers. These parking spots point vehicles directly at vulnerable pedestrian areas, including entrances and exits, exterior seating areas, and ATM machines. Customers are placed directly in the zone of risk because drivers all too frequently mistake the gas pedal for the brake when parking. In fact, 28 percent of storefront crashes are caused by pedal error.[11] Yet, many parking lots continue to be developed with head-in parking spots lacking any kind of safety or landscape barrier.

Florida law recognizes that head-in parking spaces facing storefronts expose customers to foreseeable harm unless adequate protective devices are installed, even in the absence of prior similar incidents on the premises.[12] In *Springtree Properties, Inc. v. Hammond*, 692 So.2d 164 (Fla. 1997), a customer exiting a restaurant was struck by a car when the driver inadvertently stepped on the accelerator while attempting to park in a head-in parking space located directly in front of the restaurant. The customer in *Springtree* argued the restaurant was not maintained in a reasonably safe condition, in part, because the restaurant owner and operator failed to:

1. Prohibit parking directly in front of the restaurant door;

2. Provide an adequate barrier between the restaurant's front parking spaces and the front door;

3. Install bollards, also known as vertical bumper posts, in front of the restaurant's front parking spaces; and,

4. Install wheel stops in the restaurant's front parking spaces.[13]

The customer offered expert testimony from a professional engineer that:

1. The front walkway, sidewalk, and parking lot were defectively designed and constructed;

2. Tests demonstrated a similar vehicle could mount the restaurant's five-inch curb traveling as little as four miles per hour;

3. The failure to install and maintain bollards in the front of the head-in parking spaces was the proximate cause of the customer's injuries; and,

4. Forty-five commercial establishments located in the area used vertical bumper posts in front of head-in parking spaces.[14]

Florida's Supreme Court overturned the trial court's entry of summary judgment in favor of the restaurant, holding this evidence was sufficient for a reasonable person to determine the restaurant breached its duty to maintain a reasonably safe storefront, and that the breach proximately caused the customer's injury.[15]

The *Springtree* opinion highlights the fact specific nature of these cases. It distinguishes those storefront crashes that do not give rise to liability against the business owner or operator.[16] The *Springtree* and *Grissett* crashes involved cars driving on the defendant's premises at relatively low speeds, which struck customers in areas outside of the storefront frequently experiencing pedestrian traffic. Florida law holds premises owners and operators liable under these circumstances if they fail to implement reasonable safety measures.

ASTM F3016: Reasonably Safe Barriers Can Prevent Injuries

Pervasive inadequate storefront protection led to the development and adoption of American Society for Testing and Materials (ASTM) standards to promote customer safety. ASTM F3016 certifies the effectiveness of any tested barrier in the event of an impact from a 5,000-pound vehicle (the size of a large SUV or pickup truck) at 10, 20, and 30 mile-per-hour speeds.[17] A business' failure to install protective devices conforming with ASTM F3016 can constitute a breach of the standard of care.

The yellow vertical posts you will occasionally see affixed into the ground outside of banks, convenience stores, and other storefront locations are called "bollards." Designed and sold in assorted colors, shapes and sizes, they are most commonly used to prevent storefront crashes. Determine whether any bollards installed on the subject property conform with ASTM F3016. Offer expert testimony applying ASTM F3016 to establish industry standards regarding the use of protective devices to prove that your client's crash was preventable if the business implemented reasonable safety measures. In doing so, consider retaining an accident reconstructionist to download the vehicle's black box data to determine its speed at the time it struck your client. Then illustrate how ASTM tested barriers would have prevented the crash.

Florida Ordinances Impose Storefront Safety Standards

In Florida, Miami-Dade County and Orange County responded to this rampant threat of harm by enacting regulations promoting the use of protective devices in parking lots, at retail locations, in pedestrian areas, and places where the public congregates. The relevant Miami-Dade County and Orange County ordinances impose specific duties of care on certain landowners and operators. Where a municipal ordinance imposes a specific duty for the protection or benefit of others, businesses neglecting to comply with the ordinance can be held liable for injuries caused when (1) the injury was suffered by a person(s) for whose protection or benefit the ordinance was imposed, (2) the injury suffered was what the ordinance was designed to prevent, and (3) that the injuries were proximately caused by noncompliance with the ordinance.[18]

Enacted in 2012, Miami-Dade County Ordinance No. 12-47 amended its zoning code to mandate the placement of protective devices to separate head-in parking spaces from storefronts and pedestrian areas. The ordinance requires anti-ram fixtures, or concrete security planters at least 40 inches deep. These devices promote safety by physically separating the vehicle and pedestrian areas to protect store customers from harm posed by head-in parking spaces. Orange County Ordinance 2016-09 requires child care facilities to install protective safety barriers in exposed areas to withstand the impact of a large SUV traveling 30 miles-per-hour.

If your case falls under these relatively narrow circumstances, investigate it thoroughly for noncompliance. This can serve as evidence of negligence in your case and open the door for the use of Florida Standard Jury Instruction 401.9 at trial.[19]

Common Defenses

The premises owner or operator in your case will likely assert several defenses you should anticipate, including:

Unforeseeable and unpreventable crashes: Commercial property owners and operators cannot be held liable for unforeseeable, unpreventable storefront crashes. Florida courts have declined to impose liability against businesses in cases where cars have veered off a public roadway and into a private building, injuring customers inside.[20] If the facts of your case align closely with this scenario, you may need to demonstrate that the defendant had actual knowledge of prior similar crashes occurring on the premises in order to prevail on the issue of liability.[21]

Comparative fault of the driver: Defendants will argue the negligence of the driver caused your client's injuries. This attempt to escape all or some responsibility is particularly problematic in cases where the driver has limited liability insurance coverage available. If the driver is not a party at the time of trial, the defense will seek to add the driver to the verdict form pursuant to *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993). Then, any judgment obtained against the premises owner or operator will be reduced by the percentage of fault assessed against the driver. Use demonstrative aids, including a digital recreation of the crash based on physical evidence, to minimize the role the driver's negligence played in causing your client's injuries.

Reasonable safety precautions were present: The defense may claim that their property was reasonably safe because its storefront had wheel stops and/or curbs. They may further argue that it is unreasonable to impose a duty of installing ASTM conforming barriers Both positions are likely without merit. Florida law holds wheel stops and/or curbs alone may not constitute adequate safety barriers.[22] Argue that, at a minimum, ASTM conforming bollards should be installed. Have your engineering expert testify (1) that ASTM standards are widely used in the industry; (2) that vendors sell bollards and protective devices, marketing their conformance with ASTM F3016; (3) that bollards are relatively cheap and easy to install; and, (4) bollards are effective devices to prevent the harms posed.

[Ed.: An example of a situation where these defenses were successful is the recent case of *The Las Olas Holding Co. v. Denella*, So.3d , 42 FLW D1605 (Fla. 4th DCA 7-19-2017), summarized *supra* at page 15.]

Achieve Justice for Your Client

Develop the facts of your client's case to establish that the crash was foreseeable, preventable and that your client's injury was caused by the defendant's failure to implement reasonable safety measures on its premises. Retain credible experts, offer evidence of prior crashes, and apply local regulations and nationally recognized safety standards to successfully hold commercial property owners and operators responsible for your clients' injuries. Not all storefront crashes are actionable, but you can help achieve the justice your clients deserve by identifying and successfully litigating ones that are. ■

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1 http://www.storefrontsafety.org (last visited Sep. 21, 2017)
2 *Id*.
3 Rob Reiter, *Storefront Crashes: Vehicle Intrusion Risks Increase*, April 5, 2017, at 1, *available at* http://www.propertycasualty360.com/2017/04/05/storefront-crashes-vehicle-intrusion-risks-increas.
4 *Springtree Properties, Inc. v. Hammond*, 692 So. 2d 164 (Fla. 1997); *Grissett v. Circle K Corp. of Texas*, 593 So. 2d 291 (Fla. 2d DCA 1992); *Cohen v. Schrider*, 533 So. 2d 859 (Fla. 4th DCA 1988).
5 *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), citing *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989).
6 *Springtree*, 692 So. 2d 164; *Grissett*, 593 So. 2d 291.
7 *Springtree*, 692 So. 2d at 168.
8 *Grissett*, 593 So. 2d 291; *Cohen*, 533 So. 2d 859.
9 *Id*.
10 *Id*.
11 http://www.storefrontsafety.org/statistics-by-cause.html (last visited Sep. 21, 2017)
12 *Springtree*, 692 So. 2d 164
13 *Id*. at 166.
14 *Id*.
15 *Id*.
16 *See Schatz v. 7-Eleven, Inc.*, 128 So.2d 901, 904 (Fla. 1st DCA 1961); *Jones v. Dowdy*, 443 So.2d 467 (Fla. 2d DCA 1984); *Krispy Kreme Doughnut Co. v. Cornett*, 312 So.2d 771 (Fla. 1st DCA 1975); *Winn-Dixie v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985) (involving a pedestrian injured by a car which left the *public roadway* in front of the grocery store and struck appellee on the *public sidewalk)*.
17 "Standard Test Method for Surrogate Testing of Vehicle Impact Protective Devices at Low Speeds," ASTM F3016 / F3016M - 14, in *Annual Book of ASTM Standards*, vol. 15.08.
18 *Hines v. Reichhold Chemicals, Inc.*, 383 So. 2d 948 (Fla. 1st DCA 1980); *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953); *Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150 (1937).
19 Fla. Std. Jury Instr. (Civ.) 401.9. ("Violation of this [statute] [ordinance] [regulation] is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that (defendant or individual(s) claimed to have been negligent) violated this [statute] [ordinance] [regulation], you may consider that fact, together with the other facts and circumstances, in deciding whether such person was negligent.)
20 See cases cited *supra* note 16.
21 *Cohen v. Schrider*, 533 So. 2d at 860.
22 *See Springtree*, 692 So. 2d 164; *Grissett*, 593 So. 2d 291.

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