

## CRASH VICTIMS' LAWSUITS TAKE AIM AT STOREFRONT SAFETY

Forty to fifty times per day in the U.S., a vehicle crashes into a commercial building, retail store, or restaurant. The result is millions of dollars in damage and lost business, injured employees and patrons, and tragically, dozens of fatalities.

Predictably, these crashes also tend to generate lawsuits, although some result only in insurance claims. Cases typically focus on personal injury, negligence, wrongful death, property damage, liability and related issues.

“There have been a number of these types of injury cases in the past 18 months that have resulted in judgments or settlements against property companies or business owners,” said **Rob Reiter, co-founder of the Storefront Safety Council**. “And there seems to be an even larger number currently working their way through the legal process. Clearly, there’s growing recognition that nose-in or head-in parking is a dangerous condition, and that protecting customers and employees from storefront crashes is an obligation — and prudent business.”

While each case is unique, similarities are striking. Here is a brief look at several examples around the U.S.

### **California**

Plaintiff’s attorney: Bart Weitzenberg (Abbey, Weitzenberg, Warren & Emery – Santa Rosa, California – [abbeylaw.com](http://abbeylaw.com))

Incident Summary: Janine Faloni, a 36-year-old vibrant and fit mother of two young children, was at a neighborhood shopping center November 12, 2009. She had gone to the post office and was walking back to the market via the sidewalk adjacent to the parking lot, past a row of "front-in" parking spaces. An elderly man pulling his car into one of those spaces confused his brake and gas pedals, inadvertently accelerating up onto the sidewalk, striking the woman and pinning her against a pillar. He was so startled and confused that he left his foot on the gas, such that the vehicle's motion literally sawed through her leg, severing it below the knee. Her other leg received a compound fracture but remained attached.

Key issues: After filing suit against the shopping center owner, KIMCO Realty, the plaintiff’s attorney discovered that this shopping center had a prior history of vehicle-into-building crashes, identifying at least seven previous incidents. Moreover, investigation revealed 50 to 60 other incidents that had occurred at other properties owned by this company over a 10-year period. Plaintiff’s attorney successfully demonstrated that not only did the owner have prior knowledge of such incidents, but that crashes into storefronts from front-in parking spaces are commonplace throughout the U.S. — thus the property owner had an obligation to protect patrons.

Disposition: Settled

## **Illinois**

Plaintiffs' attorney: Frank Perecone (Ferolie & Perrecone, Ltd., Rockford, Illinois – ferolieperrecone.com)

Parties: Susan Hougan and Thomas Hougan, Plaintiffs, vs. Ulta Salon Cosmetics & Fragrance, Inc., Frith Corporation and Joseph Biddle, Defendants

Incident Summary: Susan Hougan was walking out of a grocery store using the sidewalk that ran parallel to the store directly in front. Heavy rain was falling, so she was standing under the awning, trying to get the attention of her husband, who was in their car waiting for her in the parking lot. Before Susan could get her husband's attention, she was struck by a vehicle driven by a man as he pulled up to the sidewalk intending to pick up his girlfriend, who was standing near Susan under the awning. They were both within five to eight feet from exit door off to the side on the sidewalk.

Key issues: Plaintiffs assert that defendant Ulta had common law duties to: 1) take affirmative action to protect Susan from physical harm caused by foreseeable negligent harmful acts of third parties [Marshall v. Burger King, 222 Ill.2d 422 (2006)]; 2) provide a safe ingress and egress to its store; and 3) maintain the premises in a safe condition [Cooley v. Makse, 46 Ill.App.2d 25, 30 (1964)].

Disposition: Set for trial in January 2014.

## **Massachusetts**

Plaintiff's attorney: Paul Weinberg (Weinberg & Garber, P.C. – Northampton, Massachusetts – w-g-law.com)

Incident Summary: In November 2010, Kimmy Dubuque, 43, was killed when an SUV driven by Edwin Skowrya, 81, crashed through a Cumberland Farms store in Chicopee, Massachusetts, traveling at an estimated 51 mph. The vehicle came to rest completely inside, impacting and pushing Ms. Dubuque as it crashed through and crushing her when it came to rest near the back of the store. Skowrya was hospitalized with what police described as serious injuries. He had not intended to be a customer of the store, but rather apparently suffered a medical problem while driving and thus careened under power into the store. Authorities investigated the incident and decided to not file charges.

Disposition: Lawsuit filed; in progress.

## **New York**

Plaintiff's attorney: Scott Cannon (Cannon & Van Allen – Geneseo, New York – www.facebook.com/CVALLP)

Parties: Plaintiffs include family members of the deceased; defendants include Beverly Kasmore-Torbert (vehicle driver), BlvdCon LLC (the building owner), Cheeburger Cheeburger (both the local franchisee and the corporate parent), and the firm that designed the parking lot.

Incident Summary: On September 17, 2011, Kathryn and Joseph Bennett, and their 13-year-old son Michael, were eating dinner at the Cheeburger Cheeburger restaurant in Amherst, New York. They were seated at a table located directly next to the two-foot high kneewall and window that faced the parking lot. As they dined, 74-year-old Beverly Kasmore-Torbert drove into the parking lot toward the restaurant. She and her elderly passenger were at the tail end of a long drive back from Tennessee. Apparently, she confused her brake and gas pedals as she drove through the parking lot toward the restaurant, thus accelerating. Her vehicle, which was traveling at an estimated 20 mph, jumped a two-inch curb adjacent to Cheeburger Cheeburger and plowed through the wall, striking the Bennett family. The father died on the scene. The mother died in the hospital just hours later. Michael survived.

Key issues: The driver was sued for negligence; the property owner and restaurant franchisee were sued under the theory that they were responsible for creating the dangerous condition of nose-in parking with no protective barrier; the restaurant chain franchisor was sued because it has authority to approve or disapprove the building/parking lot layout; the firm that designed the parking lot was sued after reviewing the building permit and site plan documents relative to building construction and parking lot design. Moreover, Cannon notes as contributing factors that the driving population is aging, and that elderly drivers commit pedal errors at a much higher rate (per a recent NHTSA study). He also notes that vehicle-into-building accidents happen commonly and that their numbers have increased from an estimated 25-30/day in 2007 to an estimated 40-45/day in 2011.

Disposition: Lawsuits filed in January 2012, are being merged into one suit; in progress.

## **Texas**

Plaintiff's attorney: Mark Croley

Incident Summary: Minh Sullivan was standing in the lobby of a Missouri City, Texas, post office on Nov. 9, 2010, when 76-year-old Antonia Jacotin crashed through the building's glass windows. Sullivan was struck by and slammed to the floor by a wall of large, heavy, metal postal boxes that came down on her as the result of the impact of the crash. Sullivan's claimed injuries include: "multiple, complex facial fractures that required surgery and the implantation of three plates with corresponding screws in the right side of her face, facial lacerations, significant facial soft tissue crush; a pelvic fracture; a fracture of the left hip socket; a left comminuted fibular fracture; right rib fractures; nervous system injury; a concussion and other permanent brain damage."

Key issues: Lawsuit alleged that the U.S. Postal Service had a duty of care and a duty to warn, based on what it knew or should have known from its prior composite experience.

Disposition: Motions filed; in progress.

In each case, these attorneys each had to answer a key question: Given the circumstances, was the potential for harm foreseeable at that location? If so, the defendant had an obligation to recognize the risk and take action to protect patrons.

“Creating a safety barrier that will prevent vehicles approaching your front door from accidentally jumping the curb and crashing into the building is most commonly done by installing bollards or other steel barriers, since they are proven to be a very cost effective remedy,” notes Tyler Thompson, a partner at Blockaides®.

Parking expert Warren C. Vander Helm, managing partner of Parking Design Group, LLP, has been hired by counsel in a variety of cases. He is philosophical about the willingness of property owners and others to install bollards or other pedestrian safety barriers.

“How do we get more change? More settlements, perhaps,” he says. “Big settlements get people’s attention.”

An alternative, he adds: code-based solutions.

“The unfortunate truth is that this is currently a reactive process,” concludes Reiter. “Tragedies have to occur before action is taken, sometimes many years after the fact. And in that time, more tragedies inevitably occur. Indications are that more and more steps are being taken to design safer parking and safer storefronts, which will save lives for many years to come.”