

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
Civil Action No. 03-1397-D

JULIET M. BRYCE and
SCOTT LACAVALA,

Plaintiffs

v.

RYAN CARROLL; BIG PAPA'S LLC;
and JOSEPH A. MARCUS, as Trustee of
BIG PAPA'S REALTY TRUST,

Defendants

PLAINTIFFS' MEDIATION STATEMENT

On March 21, 2001, Juliet Bryce was a customer at the takeout sandwich shop owned and operated by the Defendants Big Papa's LLC and Joseph A. Marcus, Trustee of Big Papa's Realty Trust (collectively, "Big Papa's"). Ms. Bryce had purchased a take out dinner and was on her way home. She stepped out the doorway and walked toward her car on the narrow (32 inch wide) sidewalk outside the store. At that moment, a car owned by Ryan Carroll struck her and pinned her to the building, causing massive injuries, including the ultimate amputation of her left leg. She was the victim of a common type of accident which injures or kills hundreds, if not thousands, of people each year at convenience stores and takeout restaurants – being struck by a vehicle while at or near the entrance on a walkway which offers no protection from vehicle intrusion.

Ryan Carroll was or had been an employee of Big Papa's and was "helping out" on the night of the accident. He parked his vehicle facing the store and sidewalk in an area marked with yellow paint and clearly labeled as "no-parking":



Photo 1

Although this was a “no-parking” zone, Big Papa’s regularly allowed customers and employees to park in this area. Among the people who parked there regularly was the owner of the business, Joseph A. Marcus. On the night of the accident, Ryan Carroll’s car had been parked in the “no-parking” area for 25-30 minutes. The car was stationary, with its front end overhanging the walkway and its parking brake engaged when it was struck from behind by a pickup truck.



Photo 2

The pickup truck had been forced into the parking lot when it was side-swiped by another vehicle which had been traveling at a high rate of speed off the Beverly-Salem Bridge (“the Bridge”) on Cabot Street where the sub shop is located:



Photo 3



Photo 4

Prior Accidents

Although Mr. Marcus admitted the he knew of prior accidents in the vicinity of the Bridge, he denied knowing of any accidents involving the Big Papa's building. However, 14 months before this accident, a vehicle ran off Cabot Street and smashed through a building at 27 Cabot Street (next door to the Big Papa's building) causing extensive structural damage. Other witnesses will testify to numerous accidents in the immediate vicinity of the subject store caused by vehicles traveling at high speed and/or drivers losing control of their vehicles.

Regulatory Violations

Shortly before Big Papa's opened for business, Mr. Marcus was advised by the Chairman of the Beverly Disability Commission that the narrow sidewalk in front of the store and the parking configuration violated the Americans with Disabilities Act and the Architectural Access Board Regulations. Under these regulations, an owner is required to provide an accessible path of travel having a minimum width of three feet. In order to prevent vehicles from reducing the width of the accessible path of travel below 3 feet, wheel stops or other barriers are often required to be in place. The owner was also advised that the space directly in front of the store needed to be marked as handicapped-accessible parking. This requires a space of at least 8 feet wide, with an access aisle along beside it which is a minimum of 5 feet wide. The space must also be delineated to prevent parking by vehicles not owned or operated by handicapped persons. See Affidavit of Norman Ganley (Chairman of the Beverly Disability Commission.). At the time of the accident, the defendant had built a ramp, but had not widened the sidewalk or created the required handicapped-only parking space in front of the store.

Code Violations

At the time of this accident, the Massachusetts Building Code ("the Code") required the owner to provide safe egress from the building. The purpose of the Code is

to “insure public safety, health and welfare insofar as they are affected by building construction through structural strength, *adequate egress facilities*, sanitary conditions, equipment, light and ventilation and fire safety. Vallone v Donna, 49 Mass. App. Ct. 330, 332 (2000) (emphasis added). A violation of the Code or any other regulation imposed to protect the safety and welfare of the public is a violation of Massachusetts Chapter 93A. Whelihan v. Markowski, 37 Mass. App. Ct. 209, 211 (1994).

Chapter 10 of the Code controls “...the design, construction and arrangement of building elements required to provide *reasonably safe means of egress* from all structures.” “Means of egress”, within the meaning of 780 CMR 1001.1 is defined as: a continuous and unobstructed path of travel from any point in a building or a structure to a public way. A means of egress consists of three separate and distinct parts: the exit access; the exit; and the exit discharge.”

An exit discharge is “that portion as a means of egress between the termination of an exit and a public way...” 780 CMR 1002.1. The sidewalk in front of Big Papa’s where Ms. Bryce was struck by Mr. Carroll’s car is an “exit discharge” within the meaning of the Code.

The importance of safe egress under the Code is underlined in section 3400, entitled “special provisions for means of egress.” In fact, the building inspector is specifically empowered to cite an owner where “any required means of egress component which is not of sufficient width to comply with 780 CMR 1009, or as is not so arranged as to provide safe and adequate means of egress ...” is found.

Negligent Design

Ms. Bryce will testify that she observed the pickup truck headed towards Big Papa’s and, based on the angle at which it was approaching, she thought it was going to miss her and strike the building somewhere near the entrance. Instead, the pickup truck struck the rear of the Carroll vehicle (parked in the “no-parking” area) and pushed it forward into her. Had the Carroll vehicle not been allowed to park in this area, the pickup truck would have missed Ms. Bryce.

The Plaintiffs will also offer expert testimony from nationally-recognized safety and engineering experts who will testify that proper maintenance of the pedestrian walkway in front of the door required the placement of crash-proof bollards (vertical barriers) a sufficient distance from the walkway to insure the safety of patrons whether they were disabled or not. This is due to the fact that, under ordinary circumstances, given the design of the parking lot and the speed of vehicles traveling on Cabot Street, there was no easy transition or redirection of the path of travel; there were potentially routine high speed entries because of the traffic situation; and vehicles customarily were parked nose-in, perpendicular to the pedestrian walkway, which presents a known hazard to pedestrians. See Affidavit of James D’Angelo, P.E.

Under these circumstances, and especially given the requirements of the state building code and the state and federal regulations for handicapped access, a clear delineation of this protected area and a method to prevent physical encroachment by vehicles was necessary.



Photo 5

Such a design in place at the Big Papa's sub shop would have prevented the injury to Juliet Bryce. Moreover, the installation of bollards and proper configuration of the parking lot would not have imposed an undue burden on Big Papa's. The improvements recommended by Mr. D'Angelo, a traffic and safety engineer serving as plaintiff's expert in this matter, could have been completed at an estimated cost of approximately \$8,800.

Legal Analysis of Big Papa's Duty

As a matter of law, a landowner such as Big Papa's has a duty to maintain its "property in a reasonably safe condition in view of all of the circumstances including the likelihood of injuries to others, seriousness of injury and the burden of avoiding the risk." Mounsey v. Ellard, 363 Mass. 693, 708 (1973). A landowner also has the duty to act with reasonable care to prevent harm caused by a third person. Mullins v. Pine Manor College, 389 Mass 47, 54 (1983). The key issue is whether the harm is foreseeable.

In its summary judgment papers, Big Papa's relied on two Massachusetts cases to support its contention that it owed no duty to protect its patrons from vehicle intrusion onto the sidewalk in front of the store: Glick v. Prince Italian Foods of Saugus Inc., 25 Mass. App. Ct. 901 (1987) and Gillespie v. Carver Square Corp., 60 Mass. App. Ct. 1119, 2004 WL 384793 (2004). As evidenced by the denial of its Motion for Summary Judgment, Big Papa's reliance on these cases is misplaced.

Glick, a rescript opinion, involved a car which ricocheted off of a guard rail on a highway and crashed through the wall of a nearby restaurant set back 60 feet from the

highway. The car crashed through the building and struck a customer sitting at a table inside the restaurant. Under those circumstances, the Appeals Court concluded that “[t]he defendant had no obligation or duty to construct an impenetrable barrier surrounding its restaurant to prevent errant automobiles from *entering the building* as it is not reasonably foreseeable that such an incident will occur, resulting in injuries as the plaintiff suffered.” 25 Mass. App. Ct. at 901-02 (emphasis added). In so holding, the Appeals Court was careful to distinguish cases from other jurisdictions in which a proprietor had been held liable for injuries to patrons caused by out-of-control vehicles *outside* of the building. 25 Mass. App. Ct. at 902 distinguishing Barker v. Wah Low, 19 Cal. App. 3d 71, 97 Cal. Rptr. 85 (1971) (accident involving an outside window service); Ray v. Cock Robin, Inc., 57 Ill.2d 19, 310 N.E.2d 9 (1974) (accident involving an outdoor seating area); and Marquadt v. Cernokcy, 18 Ill. App. 135, 151 N.E.2d 109 (1958) (accident involving an outdoor seating area).

The Appeals Court further distinguished Glick from such cases because “[t]he driver [in Glick] of the vehicle causing injury to the patrons was not on the property to avail himself of the services of the defendant; he was unintentionally on the premises.” 25 Mass. App. Ct. at 902. In the instant case, the same might be said of the pickup truck driver, but it cannot be said of Ryan Carroll. Mr. Carroll was purposefully on the premises in order to “help out” and make subs for Big Papa’s and he knowingly parked in the “no-parking” area with the implicit knowledge and consent of Big Papa’s.

Big Papa’s also cites Gillespie, a recent unpublished Appeals Court opinion. Gillespie involved a situation in which plaintiff’s decedent was working inside an office building when she was struck and pinned below an automobile that had been driven “‘like a bullet’ **through** the building.” 2004 WL 384793 at *1 (emphasis added). Relying upon Glick, the Appeals Court found it “unforeseeable ... that a driver would maneuver a slow-moving vehicle carefully into a parking space in front of [the office building] and continue traveling over a sidewalk and **into and through the front of a building.**” 2004 WL 384793 at *2 (emphasis added). In so holding, the Appeals Court was careful to distinguish a California case cited by the plaintiff in Gillespie because the “accident [in the California case] took place **outside the building.**” Gillespie, 2004 WL 384793 *2fn. 5 (emphasis added). The Appeals Court also noted that – unlike the current case – the plaintiff had not offered any expert affidavit on the issues of the proper maintenance and design of parking lots. Gillespie, 2004 WL 384793 *2 fn. 8.

There is ample evidence in this case of Big Papa’s negligence and actual or constructive knowledge of the risk which injured Ms. Bryce, including evidence supported by expert testimony:

- a. There was evidence that Big Papa’s knew or should have known of prior accidents and runaway vehicles in the area, including one which crashed into the building next door just 14 months earlier.
- b. Big Papa’s violated its own policy of forbidding parking outside the entrance, a policy intended to protect customers.
- c. Big Papa’s violated the Building Code provisions relating to safe egress and ADA safety regulations. See Affidavit of Norman Ganley.

- d. The injury to Juliet Bryce occurred *outside* the restaurant on the sidewalk. Every customer had to walk through the door and was channeled onto this sidewalk by Big Papa's, putting the customers directly in the zone of danger created by the vehicles parked nose-in in the "no-parking" area. Because of the layout of the narrow walkway, reasonable care had to be taken to prevent patrons on it from being struck by vehicles.
- e. According to anticipated expert testimony, it makes no difference that the collision was triggered initially by vehicles operating on the street, since the vehicle that actually struck Ms. Bryce was on the premises in a dangerous position. There is very little difference between the speed at impact on Ms. Bryce and what would have happened, if, instead, the vehicle had accidentally accelerated because of driver error. In either instance, bollards and other vertical barriers commonly in use in parking areas are of sufficient strength and durability to have prevented injury. Numerous cases have held the landowner liable for "unwanted acceleration" of a vehicle in a parking situation such as the one in this case. It is such a common occurrence that the convenience store industry calls them "car strikes" or "drive-throughs." See Affidavit of James D'Angelo, P.E.

Big Papa's attempts to divert attention from such evidence by arguing that the circumstances under which this particular accident took place were not foreseeable and (pursuant to Glick) it has no duty to construct an "impenetrable barrier" around its building.

What Big Papa's ignores is the danger to patrons walking along the narrow sidewalk. The danger or risk which injured Ms. Bryce was a car accelerating suddenly and striking her by the door to the restaurant's entrance. The risk was putting high-frequency foot traffic areas in the direct line of vehicles' path of travel. This danger was reasonably foreseeable for all the reasons discussed above.

Reasonable Measures That Would Have Prevented Injury to Ms. Bryce

The danger was not only foreseeable, it could have been avoided without the necessity of creating an "impenetrable barrier ... to prevent errant automobiles from *entering the building*." Had the following civil and traffic engineering measures been designed and constructed prior to the accident, the safety characteristics of the vehicle and pedestrian operations would have improved significantly and averted the pedestrian injuries sustained by Ms. Bryce:

- a. Reconfigure parking to define parking parallel to the front face of the building as well as to the sides.
- b. Reconstruct the front walkway to five feet wide, maintaining a 6-inch vertical curb face.
- c. Install Bollards along the sidewalk edge to create secure pedestrian space.
- d. Educate store managers about the need to enforce parking prohibitions at the site.

Affidavit of James D'Angelo, ¶23.

These steps would not have imposed any undue burden on Big Papa's given that the cost of implementing these steps would have been approximately \$8,800. Moreover, the concept of bollards was not foreign to Big Papa's. Joseph Marcus testified to his general familiarity with bollards and, in fact, there are bollards on the property protecting a phone booth and signal box. Affidavit of James D'Angelo, Photos 6 and 7. Had Big Papa's taken the same care to protect its customers, Ms. Bryce would not have been injured.

Damages

Bryce suffered significant life-threatening injuries. Although efforts were made at the scene to arrange a life-flight, weather prevented such a flight. Instead, Ms. Bryce was taken by ambulance to the Massachusetts General Hospital ("MGH") where she underwent repeated surgeries, including the amputation of her left leg. Her right leg was also severely injured and required several surgeries. She has lost a layer of tissue over her calf muscles, which are now exposed. She must avoid sunlight and injury to that leg, as her ability to heal has been greatly compromised. In addition, she has continued pain in her remaining knee and faces the likelihood of severe arthritic changes to it in the future.

After a month-long stay at MGH, Ms. Bryce was transported to the Shaughnessy-Kaplan Rehabilitation Hospital where she spent another month and then engaged in lengthy physical therapy. As a result of the amputation of her left leg, Ms. Bryce now uses a prosthetic limb. Past medical expenses exceed \$227,432.19. Future expenses for treatment, equipment, accessibility modifications and other costs are reasonably expected to exceed \$225,000.

At the time of the accident, Ms. Bryce was employed on a full-time basis as a Supervisor in the Genotyping Group at Millennium Pharmaceuticals. She had an excellent work record and evaluations. Ms. Bryce eventually returned to work, but due to the limitations caused by her injuries she was transferred to a different department and now works as a Clinical Research Specialist. Ms. Bryce works a 4-day schedule and has never been able to return on a full-time basis. The difference between Ms. Bryce's salary and what she would earn on a full-time basis is \$12,222.08. Ms. Bryce was 33 years old at the time of the accident. Based on anticipated testimony that she intended to work until at least age 65, her total lost earnings total approximately \$391,106.56, even without taking into consideration promotions or raises. Similarly, no adjustment for inflation or reduction to present value has been made as yet, as these are generally considered to be a wash.

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