**SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Lisa A. Achtermann et. al. v. Rose M. Bussard, Oscar Warrington, III, and Mary Warrington**
**C.A. No. 05C-04-198 RRC**

Submitted: February 27, 2007
Decided: March 22, 2007

On Defendants Oscar Warrington, III's and Mary Warrington's
Motion for Summary Judgment.
**GRANTED.**

Dear Counsel:

Before the Court is Defendants Oscar Warrington, III's and Mary Warrington's ("the Warringtons") motion for summary judgment. In this case, Defendant Rose Bussard drove a car across part of a parking lot, over a

curb, across a sidewalk, through the front wall of a restaurant, finally coming to a stop at the rear of the dining area of that restaurant, striking and injuring Plaintiff Lisa A. Achtermann (Mrs. Achtermann), a customer seated at the rear of the restaurant. The issue is whether, under the facts of this case, the injury that occurred was sufficiently foreseeable that the Warringtons, as owners of the restaurant and of the parking lot directly in front of the restaurant, owed a duty to Mrs. Achtermann to have installed wheel stops in the parking lot to prevent the accident. This Court holds that the Warringtons did not owe such a duty to Mrs. Achtermann. Therefore, the Warringtons' motion for summary judgment is **GRANTED**.

## I. FACTS AND PROCEDURAL HISTORY

Mrs. Achtermann was seriously injured while she was a customer at Mr. P's Pizza and Pasta located at 1004 Kings Highway, Lewes, Delaware. Other members of the Achtermann family were also injured in the accident. At the time of the incident, the Warringtons owned and managed the premises. Mrs. Achtermann was dining at the restaurant when Defendant Rose Bussard drove her car over a part of the parking lot, over the curb in front of the store, across the sidewalk, and through the store front. The exact circumstances of Rose Bussard's driving are unclear, but she testified in her deposition that the car "just went out of control" and despite her attempts to apply the brakes, the car would not stop.

The restaurant was located in a small strip shopping center. Oscar Warrington's parents owned the adjoining property, 1006 Kings Highway. That adjoining property had two vertical supports for a portion of the roof which were on the sidewalk. About fifteen years ago, Oscar Warrington placed two wheel stops[1] on that property to prevent cars from hitting the two supports. There were no other wheel stops in the parking lot. Both stores were separated from the parking lot by a sidewalk about five feet six inches wide and a two and three-quarter inch high curb. There had been no similar prior accidents on either property, according to the Warringtons.

Sussex County Zoning Ordinance § 115-166(C) states:

> Separation from walkways and streets. Off-street parking spaces shall be separated from walkways, sidewalks, streets or alleys by a wall, fence or

[1] Wheel stops "are used to designate parking areas and to prevent vehicle intrusions. Typically, concrete wheel stops are made of pre-cast reinforced concrete, and measure 72 inches long by 8 inches to 9 inches wide by 5 inches to 7½ inches high." Pl. Resp. at Ex. A.

> curbing or other approved protective device or by distance so that vehicles cannot protrude over publicly used areas.

Plaintiffs subsequently brought this action against Rose Bussard, the Warringtons and others on different theories of liability. The complaint alleges that the Warringtons were negligent in failing to provide wheel stops or any other protective device in the parking spaces perpendicular to the restaurant. Plaintiffs' expert has opined that Rose Bussard's car was traveling at an approximate speed of sixteen and half miles per hour at the time of impact with the curb. The expert further has stated that a vehicle traveling under thirty-five miles an hour "would not be expected to vault over a wheel stop." Only the Warringtons and Rose Bussard remain as defendants in the case.

## II. THE PARTIES' CONTENTIONS

The Warringtons contend that they are entitled to summary judgment because "there has not been any evidence that [the Warringtons] were negligent in their maintenance of the parking lot which contributed to the cause of the Plaintiff's injuries." They claim that the accident was unforeseeable as a matter of law. Furthermore, they maintain that the Sussex County Zoning Ordinance does not require them to have wheel stops in their parking lot. The Warringtons rely on cases from across the country that have concluded that landowners are not liable, generally, for injuries caused to business invitees by out-of-control drivers under similar facts.

In response, Plaintiffs argue that the Warringtons were in fact negligent for failing to have installed wheel stops in the parking spaces perpendicular to the restaurant. Plaintiffs contend that a wheel stop would have prevented a car from crashing into the restaurant and that it was foreseeable that a car would go over the curb and into the restaurant. Moreover, they argue that the question of foreseeability should be an issue for the jury.

In addition, Plaintiffs allege that the Warringtons undertook the duty to install wheel stops in every parking spot when they installed two wheel stops in front of the store next to their restaurant. Plaintiffs also assert that the Warringtons' parking lot was in violation of the Sussex County Zoning Ordinance § 115-166 and that the curb in front of the restaurant was shorter than DelDOT minimum standards require. Plaintiffs argue that they have demonstrated genuine issues of material fact that preclude the Court from granting summary judgment.

## III. STANDARD OF REVIEW

Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] If, however, the record indicates that material facts are in dispute, or if "it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances," then summary judgment will not be granted.[3] Although the moving party has the burden of demonstrating that no material issues of fact are in dispute and it is entitled to judgment as a matter of law, the facts must be viewed "in the light most favorable to the nonmoving party."[4] Furthermore, "[f]rom those accepted facts the court will draw all rational inferences which favor the non-moving party."[5]

## IV. DISCUSSION

In order to be liable for negligence, a defendant must have been under a duty to protect the plaintiff from the risk of harm that caused the injury.[6] Whether or not such a duty exists, if a certain set of facts are true, is a question of law to be decided by the court.[7] "The court's role, therefore, when determining whether a duty exists is first to study the relationship between the parties and then to determine, based upon statutory and/or common law principles, whether the relationship is of a nature or character that the law will impose a duty upon one party to act for the benefit of another."[8] Specifically, in this case, the court must determine whether a landowner owes a duty to prevent errant vehicles from crashing through their store's walls potentially injuring its business invitees.

There appear to be no Delaware cases that speak directly to the issue of whether or when a landowner can be held liable when a car comes

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[2] Super. Ct. Civ. R. 56(c).

[3] *Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super.) (citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962)).

[4] *Mason v. United Servs. Auto. Ass'n*, 697 A.2d 388, 392 (Del. 1997).

[5] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[6] *Fritz v. Yeager*, 790 A.2d 469 (Del. 2002).

[7] *Shepard v. Reinoehl*, 830 A.2d 1235, 1238 (Del. Super. 2002).

[8] *Higgins v. Walls*, 901 A.2d 122 (Del. Super. 2005).

through a building, injuring a business invitee. However, many other jurisdictions have considered this issue and a majority have found, under the particular facts of those cases, that landowners do not owe such a duty.[9]

For example, in *Albert v. Hsu*, a driver backed her car across a parking lot, over a curb, across a sidewalk, and through the wall of a restaurant, killing a patron who was seated about two feet away from the front wall.[10] The Plaintiff sued the property owners alleging negligence, but the Alabama Supreme Court held that "[i]nsofar as foreseeability is an element of duty, any foreseeability inferred from the facts of this case is too remote to give rise to a duty owed and breached."[11]

Similarly, in Florida, a car drove over the curb, across the sidewalk and into the defendant's store, injuring a customer.[12] The Florida District Court of Appeal held that the defendant did not breach a duty owed to the plaintiff.[13] Rather, the court stated that "[i]f as a matter of law such occurrences are held to be foreseeable and therefore to be guarded against, there would be no limitation on the duty owed by the owners of establishments into which people are invited to enter."[14]

In a Minnesota case, a plaintiff was injured when a car jumped a curb and went through a plate glass window in an office building, propelling fixtures and furniture against the plaintiff.[15] Even though there had been two prior incidents in that parking lot where cars jumped the curb, hitting the side of the building, the Minnesota Supreme Court held that the landowners did not have a duty to anticipate and prevent the possibility of injury from other runaway vehicles.[16] In reaching its decision, the court stated that "[t]o

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[9] *See Jefferson v. Qwik Korner Market, Inc.*, 34 Cal. Rptr. 2d 171, 173 (Cal. Ct. App. 1994) (stating that the majority of courts who have considered cases where negligently driven cars have come onto the sidewalks or through business walls have held that "there is no liability because such accidents are insufficiently likely as a matter of law"); *Carpenter v. Stop-N-Go Markets of Georgia, Inc.*, 512 So. 2d 708, 709 (Miss. 1987) (following the "majority view" that there is "no duty owed by a convenience store owner, to persons inside the store, to erect barriers in order to prevent vehicles from driving through the store's plate glass window"). *See also* Wade R. Habeeb, Annotation, *Liability of owner or operator of parking lot for personal injuries caused by movement of vehicles*, 38 A.L.R. 138 (2006).

[10] 602 So. 2d 895 (Ala. 1992).

[11] *Id*. at 897.

[12] *Schatz v. 7-Eleven, Inc.*, 128 So. 2d 901 (Fla. Dist. Ct. App. 1961).

[13] *Id*. at 904.

[14] *Id*.

[15] *Mack v. McGrath*, 150 N.W.2d 681 (Minn. 1967).

[16] *Id*. at 686.

erect an impregnable barrier around all of the buildings would both obstruct normal pedestrian traffic and impose on the owners a burden completely out of proportion to the anticipated risk."[17]

In Mississippi, a plaintiff was shopping in a convenience store when an automobile drove through the plate glass window of the store, pushing over a display counter and injuring the plaintiff.[18] The plaintiff sued the store alleging it was negligent for failing to put wheel stops or posts to prevent such an accident.[19] The court, however, held that "there is, as a matter of law, no duty owed by a convenience store owner, to persons inside the store, to erect barriers in order to prevent vehicles from driving through the store's plate glass window."[20] There are also similar cases from California, Georgia, Maine, Massachusetts, New York, Oklahoma, and Texas, all refusing to hold a landowner potentially liable in negligence when an errant vehicle driven by a third party injured a business invitee either on the sidewalk or inside a building on the property.[21]

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[17] *Id*.

[18] *Carpenter*, 512 So. 2d at 709.

[19] *Id*.

[20] *Id*.

[21] *Jefferson*, 34 Cal. Rptr. 2d at 171 (holding that a store had no duty to erect additional barriers because the accident that occurred when a car went over a wheel stop and onto the sidewalk, hitting plaintiff, was "not sufficiently likely, and therefore not reasonably foreseeable"); *Sotomayor v. TAMA I, LLC*, 617 S.E.2d 606 (Ga. Ct. App. 2005) (holding that the landlord had no duty to install bumper stops in a parking area because it was "not reasonably foreseeable that a person would drive her vehicle over a concrete curb, a sidewalk, and strike children playing on the grass 17 feet away"); *Howe v. Stubbs*, 570 A.2d 1203 (Me. 1990) (affirming the trial court's grant of the defendant store owner's motion for summary judgment when a car crashed into the store, injuring the plaintiff); *Glick v. Prince Italian Foods of Saugus, Inc.*, 514 N.E.2d 100 (Mass. App. Ct. 1987) (stating that the "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 such injuries as the plaintiffs suffered"); *Marcroft v. Carvel Corp.*, 502 N.Y.S.2d 245 (N.Y. 1986) (holding that summary judgment should have been granted in favor of the defendant store owners when a car came through the store-front window of an ice cream chop injuring patrons inside); *Carter v. Gambulous*, 748 P.2d 1008 (Okla. Civ. App. 1987) (affirming the trial court's decision to grant the defendant owner's motion to dismiss after a car crashed through a store window injuring a shopper because the defendant was not an "absolute insurer of his customers' safety); *Watkins v. Davis*, 308 S.W.2d 906 (Tex. App. 1958) (holding that the defendant store owner owed no duty to his business invitees to erect a barrier in front of the entrance of his store for the purpose of preventing motor vehicles from being negligently driven into the store potentially injuring shoppers inside).

A minority of courts, however, have held that liability potentially can be a question of fact for the jury in "curb-jumping cases."[22] These cases have been grouped into three categories: 1) where the business provided "no protection *whatever* from encroaching vehicles," 2) where the defendants had knowledge of prior similar accidents, and 3) where the design of the building required customers to await service by standing next to a parking lot or driveway.[23] The present case does not fall into any of these categories, including the first category because there was a curb in front of the restaurant.[24]

There is, however, a recent decision from the Supreme Court of Illinois, relied on by Plaintiffs, which held that the defendants, as operators and owners of a restaurant, could potentially be liable to a plaintiff who was hit by a car that became airborne after striking the sidewalk and coming through the brick half-wall and windows surrounding the restaurant's entrance.[25] The plaintiff had alleged that the defendants were negligent for failing to place vertical concrete pillars or poles near the entrance of the building to prevent cars from driving into the building.[26] The trial court granted the defendant's motion to dismiss.[27] However, the Illinois Supreme Court affirmed the appellate court's decision that had reversed the trial court and held that "the allegations in plaintiff's complaint [were] sufficient to establish that the defendants owed a duty of care to the decedent."[28] The majority also held that to the extent that a prior Illinois appellate court decision[29] was inconsistent with their holding, that case was overruled.

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[22] *Jefferson*, 34 Cal. Rptr. 2d at 173.

[23] *See id.* at 173-174 (listing cases in these three categories). *See also Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1071 (Ill. 2006) (5-2 decision) (McMorrow, J. dissenting).

[24] *See, e.g., Fawley v. Martin's Supermakets, Inc.*, 618 N.E.2d 10 (Ind. App. 1993) (holding there was no duty to protect injured patrons when a vehicle hit them on the sidewalk in front of defendant's store where there was a three inch curb and no other barrier); *Grandy v. Bavaro*, 521 N.Y.S.2d 956 (N.Y. App. Div. 1987) (holding that defendant owner did not have a duty to guard against the unforeseeable risk of a car jumping the two inch curb in front of his store and striking the plaintiff on the sidewalk).

[25] *Marshall*, 856 N.E.2d at 1051.

[26] *Id*. at 1051.

[27] *Id*. at 1052.

[28] *Id*. at 1065.

[29] *Stutz v. Kamm*, 562 N.E.2d 399 (Ill. App. Ct. 1990) (holding that where a car crashed into a driver's licensing facility, killing one woman and seriously injuring another, "a duty did not legally exist requiring defendants [facility owners] to prevent the kind of harm which occurred").

Further, the majority stated that "defendants' reliance on authority from other jurisdictions involving situations where out-of-control vehicles crashed into business establishments is unpersuasive."[30] The court also distinguished several of those cases because they were decided at the summary judgment phase.[31]

The dissent in *Marshall*, however, criticized the majority opinion as being "at odds with the clear weight of authority with legal foreseeablity."[32] The dissent also stated that the majority's "unprecedented expansion of premises liability" would have far-reaching negative effects:

> [T]he only means of protecting the invitee from the negligent driving is to construct an impregnable barrier around the building that, even if possible to construct, may have a negative effect on the safety of business invitees in other circumstances. If there is an affirmative duty to protect a business invitee from out-of-control vehicles on these facts, then such a duty exists for every business which owns a building that abuts a road or parking lot.[33]

This Court agrees with the dissent in *Marshall* and the other majority of jurisdictions that have considered "curb-jumping" cases. While landowners do owe a general duty of care to business invitees, they are not the insurers of their invitees' safety.[34] Landowners are only liable for injuries caused by the misconduct of third parties when the misconduct is reasonably foreseeable.[35] Although Plaintiffs urge the Court to follow the Delaware cases that hold generally that foreseeability is usually a question

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[30] *Id*.

[31] *Id*.

[32] *Id*. at 1072 (McMorrow, J., dissenting).

[33] *Id*. at 1077.

[34] *See Jardel v. Hughes*, 523 A.2d 518, 525 (Del. Super. 1987) (stating that even though a property owner "is no more an insurer or guarantor of public safety than are police agencies, there is a residual obligation of reasonable care to protect business invitees from the acts of third persons").

[35] *See* RESTATEMENT (SECOND) OF TORTS § 344, cmt. f (1965) ("Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur."). *See also DioOssi v. Maroney*, 548 A.2d 1361 (Del. 1988) (stating that "the duty of a commercial business owner under § 344 to a business invitee and that owed under § 343 by a private landowner to a business visitor…requires the exercise of ordinary care to reasonably anticipate, and to protect the business visitor from, the likelihood that third persons will pose a danger to the business visitor").

for the jury,[36] under the circumstances of this case, this Court holds that the accident that occurred was not foreseeable as a matter of law.[37] To impose potential liability on the Warringtons under the specific facts of this case would impose too broad of an affirmative duty on them.[38]

The Court also finds the Plaintiffs' argument that the Warringtons were in violation of the Sussex ordinance unpersuasive. Plaintiffs concede that the ordinance does not "explicitly" require the Warringtons to have wheel stops in there parking lot.[39] However, regardless of whether or not they were in violation, this ordinance was enacted for the purpose of protecting people on the sidewalks. Mrs. Achtermann was seated inside the restaurant at the far side of the dining area furthest from the parking lot. There was a curb, a sidewalk, and a wall between the parking lot and the injured plaintiff in this case. Assuming without deciding that the Warringtons were in violation of the ordinance, the Court does not view that as evidence of their negligence in this case.

Likewise, Plaintiffs reliance on the DelDOT standard is unpersuasive. That standard, which "prescribes procedures for new highway construction and highway improvements," requires a four inch curb.[40] The curb at issue in this case was located on a private commercial parking lot. Thus, the standard is inapplicable.

Furthermore, the Court does not find that the Warringtons undertook a duty by installing two wheel stops fifteen years ago in front of the store next to the restaurant where the accident took place. Plaintiffs rely on Restatement (Second) of Torts § 323 which states that "[o]ne who undertakes…to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to

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[36] *See, e.g., Perez-Mechlor v. Balakhani*, 2005 WL 2338665 (Del. Super.) (stating that the "question of foreseeability is usually a finding of fact left to the jury").

[37] *See, e.g., Schatz*, 128 So. 2d at 904 ("Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law.")

[38] *See Hercules Powder Co. v. DiSabatino*, 188 A.2d 529, 534 (Del. 1963) ("There must, however, be some limit to liability since the landowner is not an insurer of the safety of the public.").

[39] Pl. Resp. at 3.

[40] Delaware Department of Transportation Construction Manual, http://www.deldot.gov/static/pubs_forms/manuals/construction_manual/01%20Construction%20Manual%20-%20Introduction.pdf (last visited March 15, 2007).

liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking."[41]

Oscar Warrington testified that fifteen years ago, he placed two wheel stops in front of the store next to Mr. P's Pizza and Pasta and that this was done because on that property there were two vertical supports to a portion of the roof. The wheel stops, therefore, were an attempt to prevent people's cars from hitting these posts located on the sidewalk. There is no evidence to suggest that the wheel stops were installed to protect patrons inside the restaurant, or that there was any reason for the Warringtons to recognize the need to install wheel stops in all parking spaces. Therefore, they did not undertake a duty of protection by having placed the two wheel stops next door.[42]

## V. CONCLUSION

After considering the facts and inferences in the light most favorable to Plaintiffs, the Court finds that there are no genuine issues of material fact in dispute and that the moving defendants are entitled to judgment as a matter of law. Therefore, the Warrington's motion for summary judgment is **GRANTED**.

**IT IS SO ORDERED**.

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[41] RESTATEMENT (SECOND) OF TORTS § 323 (1965). *See also Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991) (applying § 323 in a case where a student sued his university after being injured during fraternity hazing and holding that the "[u]niversity's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students'").

[42] *See Sotomayor*, 617 S.E.2d at 326 (finding that the defendant owners did not undertake a duty to install wheel stops when they installed a few around the leasing office to protect the landscaping because "there is no evidence that the landlord was aware that the devices should have been installed for the protection of pedestrians").