87,684 NC



A34735-7/SHL/vsc/231519

SUPREME COURT OF FLORIDA
CASE NO. _____
SECOND DCA CASE NO. 95-0714

SPRINGTREE PROPERTIES, INC., SPRINGTREE PROPERTIES, INC., as General Partner of SPRINGTREE LTD., PHASE I, and HARDEE'S FOOD SYSTEMS, INC.

Petitioners,

vs.

JAMES P. HAMMOND, JR. and LUCY R. HAMMOND, his wife,

Respondents.

_____/

# JURISDICTIONAL BRIEF OF PETITIONERS

SHELLEY H. LEINICKE, ESQ.
WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM, & FORD, P.A.
Attorneys for Petitioners, SPRINGTREE PROPERTIES, INC., SPRINGTREE PROPERTIES, INC., as General Partner of SPRINGTREE LTD., PHASE I, and HARDEE'S FOOD SYSTEMS, INC.
One East Broward Blvd., Fifth Floor
P.O. Box 14460
Ft. Lauderdale, FL 33302
305/467-6405

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## STATEMENT OF CASE AND FACTS[1]

This appeal arises from an interdistrict conflict as to the liability of a restaurant where a car unexpectedly jumps a curb and hits a patron on the sidewalk.

As Mr. Hammond exited a Hardee's Restaurant, he was hit when a customer's van jumped the six-inch curb onto the sidewalk in front of the building. Hammond's complaint alleges that the van's driver jumped this six-inch curb when she inadvertently stepped on the accelerator instead of the brake. Suit was filed against both the van's driver and the restaurant. The van's driver is not a party to this appeal.

The Hammonds allege that the restaurant breached its duty of care by failing to install bumper posts or other similar barriers to further protect the front door and raised sidewalk from cars using the front parking spaces. Hammond's Second Amended Complaint alleges that the restaurant failed to maintain the premises because it did not prohibit curb-side parking in front of the restaurant or otherwise correct an allegedly dangerous condition.

After relevant discovery was completed, the trial court granted the restaurant's motion for summary judgment on the grounds that the accident was unforeseeable as a matter of law. The summary judgment motion was supported by an unrebutted affidavit of one of the property owners plus the deposition

[1]The facts are a summary of the statements from the opinion of the Second District Court of Appeal and the parties' briefs. Because the record is not transmitted at this time, record citations are omitted.

testimony of Susan Warner (Director of Risk Management for Hardee's) establishing that there had been no prior incidents of a motor vehicle jumping the curb and damaging either property or persons. Ms. Warner testified that she conducted a computer search of incident reports dating back to 1985 from 1100 company-operated Hardee's restaurants. The records showed no similar incidents where a person was injured by a motor vehicle jumping the curb, no similar incidents where property damage was caused by a motor vehicle jumping the curb, and no lawsuits filed against Hardee's for such injuries or damage. The evidence also showed that both the curb and the method of ingress and egress to the building fully complied with the building code.

The Hammonds countered the summary judgment motion with an affidavit from a registered professional engineer who opined that the design and construction were defective because a van could mount the curb traveling at four miles per hour. The Hammonds also submitted an affidavit from a local resident who provided photographs of 45 locations in Polk County where barricades were placed in front of a building. There was no evidence in the record whether any of the photographed establishments had a history of auto-related injuries on the premises.

The district court acknowledged that there are numerous cases where the plaintiff alleges personal injury because a business failed to install bumper posts to protect pedestrians from motor vehicles. Despite these "all fours" cases, the district court reversed the summary judgment based upon this Court's case of *McCain v. Florida Power Corporation*, 593 So.2d 500 (Fla. 1992) where a plaintiff

was injured when a blade of a mechanical trencher struck an underground Florida Power Corporation electrical cable.

Because the instant opinion creates conflict with the settled law that a premises owner is entitled to summary judgment where an individual is injured by a vehicle that jumps the curb, this petition follows.

## ISSUE

WHETHER THE INSTANT DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE CASES OF *SCHATZ v. 7-ELEVEN, INC.*, 128 SO.2D 901 (FLA. 1ST DCA 1961); *WINN-DIXIE STORES, INC. v. CARN*, 473 SO.2D 742 (FLA. 4TH DCA 1985) *REV. DENIED*, 484 SO.2D 7 (FLA. 1986); *MOLINARES v. EL CENTRO GALLEGO, INC.*, 545 SO.2D 387 (FLA. 3D DCA 1989), *REV. DENIED*, 557 SO.2D 866 (FLA. 1989); *CABALS v. ELKINS*, 368 SO.2D 96 (FLA. 1979); AND *KRISPY KREME DOUGHNUT CO. v. CORNETT*, 312 SO.2D 771 (FLA. 1ST DCA 1975), *CERT. DENIED*, 330 SO.2D 16 (FLA. 1976).

## ARGUMENT SUMMARY

Multiple decisions from other districts hold that a store owner or restaurant is not liable to an individual who is injured by a car which unexpectedly jumps the curb and drives onto the sidewalk. The instant decision creates an express and direct conflict in the law.

## ARGUMENT

THE INSTANT DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE CASES OF *SCHATZ v. 7-ELEVEN, INC.*, 128 SO.2D 901 (FLA. 1ST DCA 1961); *WINN-DIXIE STORES, INC. v. CARN*, 473 SO.2D 742 (FLA. 4TH DCA 1985) *REV. DENIED*, 484 SO.2D 7 (FLA. 1986); *MOLINARES v. EL CENTRO GALLEGO, INC.*, 545 SO.2D 387 (FLA. 3D DCA 1989), *REV. DENIED*, 557 SO.2D 866 (FLA. 1989); *CABALS v. ELKINS*, 368 SO.2D 96 (FLA. 1979); AND *KRISPY KREME DOUGHNUT CO. v. CORNETT*, 312 SO.2D 771 (FLA. 1ST DCA 1975), *CERT. DENIED*, 330 SO.2D 16 (FLA. 1976)

While questions of foreseeability are often left for a jury's resolution, Florida courts have routinely upheld (but for the instant case) summary determination of foreseeability issues in the precise situation presented by this action. The courts have repeatedly stated that injuries caused by an automobile unexpectedly leaving the public roadway and striking an individual on a public sidewalk in front of a store are unforeseeable. *Winn-Dixie Stores, Inc. v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985); *rev. denied*, 484 So.2d 7 (Fla. 1986); *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1960); *Cabals v. Elkins*, 368 So.2d 96 (Fla. 1979); *Molinares v. El Centro Gallego, Inc.*, 545 So.2d 387 (Fla. 3d DCA 1989).

In the case of *Schatz v. 7-Eleven, Inc., supra*, the plaintiff was injured by a car that jumped a 5 3/4 inch curb onto the sidewalk in front of the store. The plaintiff asserted the store was at fault for allowing vehicles to park at right angles

to the store and for failing to provide an adequate barrier. Summary final judgment was affirmed in favor of 7-Eleven with an explanation that

> We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanism, which sometimes results in damage or injury to others. In a sense, all such occurrences are foreseeable. They are not, however, incident to ordinary operation of vehicles, and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. If, as a matter of law, such occurrences are to be held foreseeable and therefore to be guarded against, there will be no limitation on the duty owed by the owners of establishments into which people are invited to enter. Such occurrences fall within the category of the unusual or extraordinary, and are, therefore, unforeseeable in contemplation of the law.

*Schatz, supra*, at 743.

In the case of *Winn-Dixie v. Carn*, *supra*, the Fourth District quoted from the *Schatz* decision and held that the trial court erred in failing to grant a directed verdict in favor of defendant, Winn-Dixie, when a plaintiff was injured by a car while standing on a public sidewalk in front of the store.

In the case of *Cabals v. Elkins*, *supra*, this Court affirmed an order granting a defendant's motion to dismiss a suit where a plaintiff was injured by a motorcycle which was negligently driven on the premises of an automobile dealership.

In the case of *Molinares v. El Centro Gallego, Inc.*, *supra*, the plaintiff was hit by a third-party motorist and was pinned against the building. Just as in the instant case, the driver apparently hit the accelerator by mistake instead of the brake. Summary judgment was affirmed by the Third District, which found that the defendant did not breach any duty to the patron because it provided a protective sidewalk with a two-inch curb (the instant curb is six inches) between the business entrance and the parking lot. The district court also stressed the importance of the absence of any prior motor vehicle accidents involving customers in front of the store. The court said that in the absence of any history of similar accidents, the store had no duty to place bumper guards, guardrails, warning signs, etc. The court noted that the result would have been different if the sidewalk had been level with, or flowed into, the asphalt parking lot, or if there had been a history of similar accidents.

The instant district court decision also conflicts with the well-settled law that where there is no building code requirement for a business to place a barrier to stop the progress of vehicles, the business is not negligent in failing to erect such a barrier. *Krispy Kreme Doughnut Co. v. Cornett*, *supra*.

Rather than rely on this settled law, the district court in the instant case has created a conflict by basing its ruling on the factually distinguishable case of *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). In the *McCain* case, the plaintiff was injured when the blade of a mechanical trencher he was operating struck an underground electrical cable.

Uniformity of law can be accomplished only if this Court accepts the instant case for review. Conflict certiorari is appropriate because of the direct conflict between the Second District's decision and the cited cases. *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981). Review is appropriate because of the need for uniformity decision as precedent. *Mystan Marine, Inc. v. Harrington*, 339 So.2d 200 (Fla. 1976). Permitting the Second District's decision to stand as legal precedent causes confusion in the body of the law of this state. Because of the conflict which is presented between the decision of the Second District and the cited case law, this court has jurisdiction to review the instant case to resolve this conflict.

## CONCLUSION

For the reasons set forth herein, it is respectfully urged that this Court exercise its discretionary jurisdiction, order full merit briefing on this cause and, upon review, quash the decision of the Second District and reinstate the summary judgment in favor of Defendants/Petitioners, which was entered where a review of all evidence in the record established that there were no genuine issues of material fact and that summary judgment was proper as a matter of law.

Respectfully submitted,

SHELLEY H. LEINICKE, ESQ.
WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, & FORD, P.A.
Attorneys for Petitioners

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing, Jurisdictional Brief of Petitioners, was mailed March 28, 1996, to: Charles B. Draper, Esq., 705 West Emmett Street, P.O. Drawer 422084, Kissimmee, Florida 34742-2084, Attorney for James P. Hammond and Lucy R. Hammond; A. Craig Cameron, Esq., 15 West Church Street, Orlando, Florida 32801, Attorney for Gretel G. Ashley.

WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, & FORD, P.A.
Attorneys for Petitioners, SPRINGTREE PROPERTIES, INC., SPRINGTREE PROPERTIES, INC., as General Partner of SPRINGTREE LTD., PHASE I, and HARDEE'S FOOD SYSTEMS, INC.
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By: _____
SHELLEY H. LEINICKE, ESQ.
Florida Bar No. 230170

CASE NO.:

# INDEX TO APPENDIX

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231894.51

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

FEBRUARY 28, 1996

| | | |
|---|---|---|
| JAMES P. HAMMOND, JR. and LUCY R. HAMMOND,<br><br>Appellant(s),<br><br>v.<br><br>GRETEL G. ASHLEY, etc.,<br><br>Appellee(s). | ) | Case No. 95-00714 |

BY ORDER OF THE COURT:

Counsel for appellees having filed a motion for rehearing in this case, upon consideration, it is

ORDERED that the motion is hereby denied. It is further

ORDERED that appellants motion to strike or dismiss appellees' motion for rehearing and appellants motion for attorney's fees is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Charles Draper, Esq.
Shelley H. Leinicke, Esq.
Craig Cameron, Esq.

/PM

DISTRICT COURT OF APPEAL SECOND DISTRICT SAT CITO SI RECTE STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES F. HAMMOND, JR., and LUCY M. HAMMOND, his wife,

Appellants,

v.

SPRINGTREE PROPERTIES, INC., a Florida corporation; SPRINGTREE PROPERTIES, INC., as General Partner of SPRINGTREE LTD., PHASE I, a Florida Limited Partnership; JOSEPH M. NOLEN; THOMAS C. FLOYD; and HARDEE'S FOOD SYSTEMS, INC., a North Carolina corporation,

Appellees.

CASE NO. 95-00714

Opinion filed January 26, 1996.

Appeal from the Circuit Court for Polk County; Susan Wadsworth Roberts, Judge.

Charles B. Draper of Draper Law Office, Kissimmee, for Appellants.

Shelley H. Leinicke of Wicker, Smith, Tutan, O'Hara, McCoy, Graham, Lane & Ford, P.A., Ft. Lauderdale, for Appellees.

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BLUE, Judge.

James and Lucy Hammond appeal from the trial court's order granting summary judgment to the appellees, defendants below. They argue that a jury question was presented on the issue of foreseeability. We agree and reverse.

This case involves an accident at a Hardee's restaurant where a customer's van jumped the curb and hit Mr. Hammond after he exited the restaurant. The Hammonds filed suit against the van driver and the appellees. The van driver is not a party to this appeal. The Hammonds alleged that the appellees breached their duty of care by failing to install bumper posts or other barriers between the front parking spaces and the front door and sidewalk. The appellees sought summary judgment, arguing that the accident was unforeseeable as a matter of law.

In support of their motion for summary judgment, the appellees submitted the deposition of Susan Werner, Hardee's Director of Risk Management. She conducted a computer search of incident reports dating back to 1985 from 1,100 company-operated Hardee's restaurants. The records revealed no similar incidents where a person was injured by a motor vehicle jumping the curb, no similar incidents where property damage was caused by a motor vehicle jumping the curb, and no lawsuits filed against Hardee's for such injuries or damage.

The Hammonds submitted an affidavit from a registered professional engineer who opined that the design and construction were defective because the van could mount the curb travelling only four miles per hour. The engineer concluded that the absence of adequate car stops constituted a defective design. A second affidavit identified forty-five locations, with pictures attached, of Polk County establishments that use vertical bumper posts.

There are numerous cases involving accidents where a business allegedly breached its duty of care by failing to install bumper posts or otherwise to protect pedestrians from motor vehicles.[1] These cases differ slightly, depending on

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[1] See, e.g., Grissett v. Circle K Corp. of Texas, 593 So. 2d 291 (Fla. 2d DCA 1992) (reversing summary judgment for Circle K; although no evidence of prior incidents at that store, similar accidents had occurred at other Circle K stores); Molinares v. El Centro Gallego, Inc., 545 So. 2d 387 (Fla. 3d DCA) (affirming summary judgment for restaurant based in part on lack of prior similar accidents), review denied, 557 So. 2d 866 (Fla. 1989); Cohen v. Schrider, 533 So. 2d 859 (Fla. 4th DCA 1988) (reversing summary judgment for store which had past history of ten similar incidents); Winn-Dixie Stores, Inc. v. Carn, 473 So. 2d 742 (Fla. 4th DCA 1985) (ordering directed verdict for Winn-Dixie in case arising from injury after auto left public roadway and struck plaintiff who was standing on public sidewalk in front of store), review denied, 484 So. 2d 7 (Fla. 1986); Jones v. Dowdy, 443 So. 2d 467 (Fla. 2d DCA 1984) (affirming summary judgment for store; customer inside when car crashed through front window); Cabals v. Elkins, 368 So. 2d 96 (Fla. 3d DCA 1979) (affirming dismissal for failure to state a cause of action); Thompson v. Ward Enters., 341 So. 2d 837 (Fla. 3d DCA) (reversing directed verdict for supermarket), cert. denied, 351 So. 2d 409 (Fla. 1977); Krispy Kreme Doughnut Co. v. Cornett, 312 So. 2d 771 (Fla. 1st DCA 1975) (reversing judgment for plaintiff; parking lot met all building codes), cert. denied, 330 So. 2d 16 (Fla. 1976); Johnson v. Hatoum, 239 So. 2d 22 (Fla. 4th DCA 1970) (reversing summary

whether the customer was inside or outside the business, whether similar accidents had occurred in the past, and what type of curbs, barriers or parking the business provided. Based on the majority of these cases, the appellees argue that the issue of foreseeability is determined by a business' history with similar incidents. They argue that the absence of prior similar incidents at Hardee's restaurants makes Mr. Hammond's accident unforeseeable as a matter of law, thus entitling them to summary judgment. We have concluded, however, that the lack of similar incidents in the past is not dispositive on the threshold issue of foreseeability.

In McCain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992), the supreme court examined the different ways that foreseeability relates to duty versus proximate causation.

> The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. . . . [T]he former is a minimal threshold legal requirement for opening the courthouse doors, whereas the latter is part of the much more specific factual requirement that must be proved to

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judgment for restaurant; plaintiff struck by car while waiting at outside walk-up counter), cert. dismissed, 244 So. 2d 740 (Fla. 1971); Schatz v. 7-Eleven, Inc., 128 So. 2d 901 (Fla. 1st DCA 1961) (affirming summary judgment for 7-Eleven, holding that automobiles losing control is unforeseeable).

> win the case once the courthouse doors are open.

593 So. 2d at 502 (citations and footnote omitted).

Based on our reading of McCain, we hold that the trial court erred by granting summary judgment on the threshold issue of foreseeability. Just as Florida Power had the ability to foresee the zone of risk that was created when people worked near or around electric lines, the appellees here had the ability to foresee the zone of risk created by the presence of both pedestrian and vehicular traffic. Just as Florida Power would be entitled to offer proof regarding intervening causes, precautions, lack of similar occurrences in the past, etc., so too the appellees here would be entitled to offer proof that this type of incident had never occurred. This evidence, however, is relevant to determine the fact-based element of whether there has been a breach of duty, not whether the duty existed in the first place.

We conclude that the supreme court's decision in McCain requires that we reverse and remand. Even without McCain, however, we would be inclined to reverse. As a test of foreseeability, the appellees' reliance on their own lack of experience with this type of accident is misplaced. As shown by the cases reaching the appellate courts, this type of accident is not without precedent. We believe there is a sufficient history of the type of accident alleged in this case to create a factual

question as to whether the appellees knew or should have known of the risk, irrespective of their own experience.

We hold that the absence of similar accidents at Hardee's company-operated restaurants does not make this accident unforeseeable as a matter of law. Instead, it presents a matter for the jury to consider. Accordingly, we reverse and remand for further proceedings.

DANAHY, A.C.J., and SCHOONOVER, J., Concur.

actually given, the court's instructions fully and accurately covered the subject matter involved. *Florida East Coast R. Co. v. Lawler*, 151 So.2d 852 (Fla. 3d DCA 1963). Finally, we do not agree, as the appellant argues, that the court's response to a question asked by the jury during the course of its deliberations was in any way incorrect.

Affirmed.


**Maria CABALS, Appellant,**

**v.**

**Ricky G. ELKINS, Robert Q. Strait, Old Reliable Fire Insurance Co., South Carolina Insurance Co., and Volkswagen South, Inc., Appellees.**

**No. 78–1101.**

District Court of Appeal of Florida, Third District.

March 6, 1979.

Shopper brought action against merchant, seeking to recover for injuries sustained while shopping on merchant's premises. The Circuit Court for Dade County, Harold R. Vann, J., entered order dismissing plaintiff's action, and plaintiff appealed. The District Court of Appeal held that complaint filed against merchant by shopper who was injured when negligently operated motorcycle ran onto defendant's place of business, alleging negligence on part of defendant in failing to provide barrier or necessary buffer zone around its premises, which bordered on highway, failed to state a cause of action.

Affirmed.

**Negligence ⇐111(1)**

Complaint filed against merchant by shopper who was injured when negligently operated motorcycle ran onto defendant's place of business, alleging negligence on part of defendant in failing to provide barrier or necessary buffer zone around its premises, which bordered on highway, failed to state a cause of action.

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Martell, Blanco & Villalobos, Coral Gables, for appellant.

Walton, Lantaff, Schroeder & Carson and James Knight and David K. Tharp, Miami, for appellees.

Before HENDRY, BARKDULL and HUBBART, JJ.

PER CURIAM.

This appeal brings up for review the question of the correctness of the trial court's final order dismissing appellant's action against appellee, Volkswagen South, Inc.

The complaint charged that appellee was negligent in failing to provide a barrier or necessary buffer zone around its premises which border on U. S. 1 at the intersection of S. W. 160th Street, Miami, Florida, and as a result thereof appellant was injured by a motorcycle which was negligently operated on S. W. 160th Street so as to run onto the appellee's place of business and cause serious injuries to appellant while she was on its premises shopping for an automobile.

The determinative point on appeal is whether the trial court erred in granting appellee's motion to dismiss for failure to state a cause of action. We hold that the order of dismissal was correct and affirm. *Schatz v. 7–Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1961); *Krispy Kreme Doughnut Co. v. Cornett*, 312 So.2d 771 (Fla. 1st DCA 1975).

Affirmed.




**Thomas FRASER, Appellant,**

**v.**

**Fay FRASER, Appellee.**

**No. 78–1128.**

District Court of Appeal of Florida, Third District.

March 6, 1979.

Husband appealed with respect to the alimony provision of a marriage dissolution judgment entered in the Circuit Court, Dade County, Ira L. Dubitsky, J. The District Court of Appeal held that the award to the wife of the husband's interest in the marital residence was unsupported by the record.

Reversed and remanded.

**Divorce ⇐252.5(1)**

Where husband earned a net income of approximately $1,000 per month and had no major assets other than his undivided interest in the marital residence and where wife had worked part-time most of her married life and was in good health and earning $500 per month and there was no showing of necessity, circumstances did not warrant awarding husband's interest in marital residence to wife, upon dissolution of 20-year marriage.

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Marvin & Sheppard and Dennis P. Sheppard, Miami, for appellant.

Albert E. Schrader, Jr., Coral Gables, for appellee.

Before HAVERFIELD, C. J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

Petitioner, Thomas Fraser, appeals the alimony provision of a dissolution of marriage judgment.

A final judgment was entered dissolving the bonds of the twenty-year marriage between Thomas and Fay Fraser. Fay Fraser was awarded custody of the two minor children, ages seventeen and fifteen, and child support of $50 per week. In addition, the trial judge entered the following alimony award:

* * * * * *

"4. *ALIMONY.* By the way of lump sum and periodic alimony, in view of the long standing marriage and disparate earning capacity of the two people, FAY FRASER is awarded THOMAS FRASER'S interest in the house at 3900 S W 122nd Avenue, Miami, Florida, and THOMAS FRASER is ordered to continue to make the payments on the mortgage, being responsible for the mortgage payments to the extent of $275.00 month, FAY FRASER being responsible for the balance of the monthly payment until such time as the mortgage is retired. In the event that the house is sold before then, or death of the parties payment shall cease. This order shall remain in effect as long as FAY FRASER is alive and living in the house. If the house should be sold before her death and the mortgage retired, THOMAS FRASER shall continue to make payments in the amount of $275.00 to her per month."

* * * * * *

We reverse.

The record reflects that Thomas Fraser, sales manager, earns a net income of approximately $1,000 a month. Other than his undivided interest in the marital residence, he has no major assets. Fay Fraser had worked part-time most of her married life and was currently earning $500 per month. She is in good health.

The award of Thomas Fraser's interest in the marital residence is unsupported by the record in that there is no showing of necessity on Fay Fraser's part. See *Cummings v. Cummings*, 330 So.2d 134, 136 (Fla.1976); *Meredith v. Meredith*, 366 So.2d 425 (Fla. 1978). We, therefore, vacate this award and remand the cause to the trial court with directions to (a) award Fay Fraser and the minor children possession of the marital

of and amounts owed to unpaid lienors and payment to all other lienors, and submitted a copy thereof to the court together with a motion to amend the complaint to reflect compliance with § 713.06(3)(d)1, Fla.Stat. Bruns then moved to dismiss the complaint for noncompliance with the requirements of such statute in that the affidavit had not been delivered to him at least five days before suit was filed, which he contends is a statutory prerequisite to the institution of any suit to enforce a lien. At the hearing, the trial court denied Mardan's motion to amend, granted without prejudice, Bruns' motion to dismiss the complaint, discharged the notice of lis pendens, dismissed Bruns' counterclaim without prejudice, and finding Bruns to be the prevailing party, granted his motion for attorneys fees.

Mardan contends that the court erred in denying its motion to amend, in dismissing the complaint without prejudice since the complaint stated a viable claim for an action in contract for work done and materials furnished, and in awarding attorneys fees to Bruns, since the prevailing party in such a lawsuit could be determined only at the conclusion of the contract action. We disagree with all three contentions.

[1, 2] The court was correct in denying the motion to amend and in dismissing the complaint without prejudice since neither the complaint alone nor with the amendment added to it, could present a valid action for mechanic's lien foreclosure. The affidavit is a statutory requirement, and dismissal for failure to comply therewith is proper. Oper v. Russell, Inc., Fla.App. 1967, 197 So.2d 13. Where the complaint fails to allege that the affidavit required by statute as a prerequisite to institution of suit has been filed, such omission is jurisdictional in nature and requires that the complaint be dismissed. Potts v. Orlando Building Service, Inc., Fla.App.1968, 206 So.2d 221. Mardan's proposed amendment to add the allegation that an affidavit had been supplied was futile since the affidavit was not timely.

[3] Although Mardan claims that the complaint states a cause of action in contract, it contains no mention of breach of contract or claim for such damages,[1] and we are of the opinion that absent sufficient allegations to constitute a contract action, dismissal without prejudice was proper. Mardan " . . . may still have (its) remedy at law, however, for damages for breach of contract upon satisfactory complaint and proof." Oper v. Russell, Inc., supra, at 15.

[4] As to Mardan's third contention, § 713.29, Fla.Stat., provides that the prevailing party in an action to enforce a mechanic's lien is entitled to recover attorneys fees. A party such as Bruns, who successfully resists an action to enforce a mechanic's lien is the prevailing party and is entitled to attorneys fees under the statute. See Dominguez v. Benach, Fla.App. 1973, 277 So.2d 567.

Affirmed.

**Lyman Emmett PHILLIPS, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. W-478.**

District Court of Appeal of Florida, First District.

May 7, 1975.

Rehearing Denied June 10, 1975.

Appeal from Circuit Court, Marion County; D. R. Smith, Judge.

Richard W. Ervin, III, Public Defender, and Judith Jeanne Daugherty, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Gerry B. Rose, Asst. Atty. Gen., for appellee.

PER CURIAM.

Affirmed. See Kelly v. State, Fla.App. (1st), 254 So.2d 22; Williams v. State, Fla.App. (1st), 259 So.2d 753.

RAWLS, C. J., and JOHNSON and McCORD, JJ., concur.

1. See C. A. Davis, Inc. v. Yell-for-Pennell, Inc., Fla.App.1973, 274 So.2d 267, 268–269.



**KRISPY KREME DOUGHNUT COMPANY, Appellant,**

**v.**

**Roy CORNETT, Appellee.**

**No. U-233.**

District Court of Appeal of Florida, First District.

May 9, 1975.

Rehearing Denied June 10, 1975.

Invitee brought action against business place for injuries sustained when an automobile crashed into the business place after overrunning a space in the business place's parking lot. The Circuit Court, Volusia County, J. T. Nelson, J., rendered judgment for the business invitee, and business place appealed. The District Court of Appeal, McCord, J., held that where there was no building code requirement that a business place erect a barrier sufficient to stop an automobile from entering the premises from its parking lot, the business place was not negligent in failing to do so.

Reversed and remanded with directions.

**1. Trial ⇐138**

Whether municipal ordinance is applicable to facts of particular case and should thus be admitted in evidence is question of law for court.

**2. Trial ⇐138**

Where applicability of municipal ordinance is dependent upon disputed factual issues, factual issues are question for jury and jury will, under proper instructions from court, apply or not apply ordinance depending upon its finding as to facts.

**3. Automobiles ⇐17**

In action by business invitee against business place for injuries sustained when automobile overran space in business place's parking lot and ran into business place, building code provision concerning requirements for parking buildings of multiple decks was inadmissible.

**4. Automobiles ⇐17**

Where there was no building code requirement that business place erect barrier sufficient to stop automobile from entering premises from business place's parking lot, business place was not negligent in failing to do so.

James W. Smith, Hoffman, Hendry, Parker & Smith, Daytona, Beach, for appellant.

Richard D. Bertone, and Maurice Wagner, Daytona Beach, for appellee.

McCORD, Judge.

This is an appeal from final judgment, denial of appellant's motion for a new trial and denial of appellant's motion for directed verdict.

On March 19, 1972, Ricky McVay (driver) and several friends were returning by automobile from Daytona Beach to their home in Winter Garden. On the way, they decided to stop at appellant's Krispy Kreme Doughnut Shop located in the City of Daytona Beach. Previously, on the way to Daytona Beach, they had trouble with

the brakes of the automobile. As they approached the doughnut shop, McVay began pumping the brakes and slowed the car down to a speed of four or five miles per hour as it entered the parking area of the doughnut shop but it would not stop. The vehicle ran over a 2½ inch curbing or wheel guard at the edge of a sidewalk approximately three feet wide which extended along the front of the shop. The car then crossed the sidewalk and ran into and partially through the wall and plate glass window comprising the front portion of the shop. At the time of the impact, appellee Roy Cornett was sitting on a stool at the counter in the shop with his back to the point of impact. He was struck by debris and knocked to the floor amidst a pile of bricks and glass sustaining injuries.

The Krispy Kreme Doughnut Shop consists of a building, a parking area and a sign. The parking area or lot is a ground-level area which vehicles enter immediately upon leaving the street. It has marked perpendicular parking spaces along the front of the building. The shop was constructed according to company specifications which are modified for different localities to meet each municipality's building codes and ordinances. In order to receive a certificate of occupancy in the City of Daytona Beach, the city's inspectors must certify that the building meets or exceeds all city ordinances and regulations pertaining to the particular type of structure. Such certification was made in this case.

During trial, at the close of plaintiff's (appellee's) case, plaintiff voluntarily dismissed defendants McVay, driver of car, and Donald Eagles, owner of the car, leaving appellant as the sole remaining defendant.

This case is governed by the law as set forth by this court in Schatz v. 7-Eleven, Inc., Fla.App. (1st), 128 So.2d 901, unless appellee is correct in its contention that appellant failed to comply with the building code of the City of Daytona Beach in the construction of its parking area. The facts in Schatz are remarkably similar to those in the case sub judice. There Schatz, a business invitee shopping in 7-Eleven Drive-in Food Store, was struck by an automobile which ran through the front of the store from a parking slot perpendicular to the front of the building. The suit was brought by Schatz against 7-Eleven, Inc., to recover for her injuries. As in the case sub judice, the 7-Eleven Drive-in Food Store was located in Daytona Beach, but the municipal building code was not injected in that suit. This court's opinion specifically mentioned that the court was unaware of any ordinance, statute, or rule of law requiring that the owner of the store erect a barrier between the entrance to his establishment and the street, highway, or parking area, sufficient in height and strength to prevent motor vehicles negligently operated by others from entering the store where customers are usually present. In affirmance, a summary judgment for defendant 7-Eleven, Inc., Judge John Wigginton writing for the court, said:

"Plaintiff was a business invitee on defendant's premises at the time of her injury. The law imposes on defendant the duty of exercising ordinary care to maintain his premises in a reasonably safe condition for the purpose for which they are adapted. Defendant did not owe plaintiff a duty as insurer of her safety while on the premises in question, but is charged with the duty of guarding against subjecting plaintiff to dangers of which defendant is cognizant or might reasonably foresee.

In the Pope case this court discussed the law of proximate cause and the several tests to be applied in determining whether a given act is the proximate cause of damages sustained. It was there pointed out that the two essential elements of proximate cause are causation and the limitation to foreseeable consequence. Causation is that act which, in the natural and continuous sequence, unbroken by any intervening cause, produces the injury, and without which the result would not have occurred. Even though the person charged may be guilty of a negligent act, there can be no recovery for an injury resulting therefrom which was not a reasonable foreseeable consequence of his negligence. For the consequence of a negligent act to be foreseeable, it must be such that a person by prudent human foresight can anticipate will likely result from the act, because it happens so frequently from the commission of such an act that in the field of human experience it may be expected to happen again."



Daytona Beach Municipal Ordinance 67-79, § 507, commonly known as the Southern Standard Building Code, was admitted in evidence by the trial judge subject to further testimony being offered "to tie in any particular section." § 507 states as follows:

"507.1—Parking Lots

"Open sheds or canopies may be erected up to two-thirds (⅔) the area of a lot, provided such construction is not less than required for Type IV—Non-Combustible Construction, and that all such construction meets the approval of the Building Official.

507.2—Public Parking Decks

(a) As defined in Section 201.2, Public Parking Decks may be constructed of Types I, II, III, and IV Construction without exterior walls. When such structures are within six (6) feet of common property lines they shall be provided with an enclosure wall along the common property line of not less than two (2) hours fire resistance without openings therein, except that doors opening to buildings adjacent thereto may be permitted provided that such door openings meet the requirements of Section 703.4.

(b) Type III structures shall be limited to a height of four (4) stories and an area limitation of 30,000 square feet per floor with roof parking permitted. Type IV structures shall be limited to a height of eight (8) stores and an area limitation of 30,000 square feet per floor with roof parking permitted. When of Type I—Fireproof or Type II—Fire-Resistive Construction, the height and area shall not be limited. When of Type III or Type IV Construction area increases may be allowed in accordance with Section 403.

(c) Each floor of such structure shall have a continuous wheel guard not less than six (6) inches in height above the floor, with a clear passage of four (4) feet between the wheel guard and edge of structure. In such structures without exterior walls there shall be placed in addition to the wheel guard a continuous protective railing not less than three (3) feet six (6) inches above the floor around the entire outside perimeter of the structure."

Expert testimony was allowed on the question of whether or not § 507.2 entitled "Public Parking Decks" was applicable to appellant's parking area. The building inspector of the City of Daytona Beach testified it was not applicable and that appellant's building and parking lot met all the requirements of the existing building code. Appellee presented contradictory testimony of a Volusia County building inspector who testified that the County of Volusia has adopted the same building code and that § 507.2(c) applies to the Krispy Kreme parking area.

[1-4] Whether or not a municipal ordinance is applicable to the facts of a particular case and should thus be admitted in evidence is a question of law for the court. Where its applicability, or lack thereof, is dependent upon disputed factual issues, the factual issues are, of course, a question for the jury and the jury will, under proper instructions from the court, apply or not apply the ordinance depending upon its finding as to the facts. In this regard, ap-

pellee points to the recent opinion of the Supreme Court in Noa v. United Gas Pipeline Company, Fla., 305 So.2d 182, apparently as supportive of appellee's position that the trial court correctly submitted the ordinance to the jury with expert testimony as to its applicability and left the question of its applicability to the jury for its determination. As we view the Supreme Court ruling in Noa, however, that court merely held that the trial court may permit expert testimony to aid in the interpretation of an administrative rule that is so technical in nature that the judge and jury cannot understand it without expert technical assistance. There, the Supreme Court said:

". . . The legal basis for expert testimony in this case was to aid the jury in determining factually whether the spurline leading from the main pipeline of United was a service line for distribution of a large volume of gas to Gulf, a customer, within the contemplation of the definitions of items 805.62 and 805.64 of the regulations prescribed by the Florida Public Service Commission under the 'Gas Safety Law of 1967' (F.S. 368). And if so upon whom did the responsibility devolve to see to it that gas passing from United to Gulf through the service line was odorized as required by the regulation. The jury factually found the duty to odorize devolved upon United.

These were factual questions which a 'highly qualified' expert engineer in gas line distribution technology could properly testify about. They were not readily answerable by the trial judge referring to the cold language of the regulations. The trial judge could properly allow an expert's testimony to elucidate a clearer understanding of the safety regulations and their practical application for the benefit of the jury in resolving this factual issue of the case."

The Supreme Court in Noa went on to refer to the opinion of our sister court of the Third District in Chimeno v. Fountainbleu Hotel Corp., Fla.App. (3d), 251 So.2d 351, and said:

"*Chimeno* squarely holds that expert testimony may be adduced to show presence or absence of the elements which call a regulation into play. A service line is given a definition under the regulations here. But whether or not the pipeline here serviced a customer through a 'meter set assembly' could be answered only by experts. A jury—nor a judge for that matter—could not be expected to know whether a certain device was or was not a meter set assembly."

Thus, we see that in Noa the Supreme Court considered expert testimony pertinent and helpful because of the highly technical nature of the Public Service Commission rule and facts. In the case sub judice, such is not the situation. From a casual reading of § 507.2, it is apparent and obvious that appellant's parking area around its doughnut shop is not a "public parking deck" as that term is applied in Paragraphs (a), (b) and (c). Throughout those paragraphs, public parking decks are referred to as structures. Paragraph (c), which the county building inspector testified was the applicable regulation for appellant's parking area, refers to "each floor of such structure" and states that "in such structures without exterior walls, there shall be placed in addition to the wheel guard a continuous protective railing not less than three feet six inches above the floor around the entire outside perimeter of the structure." It is apparent that § 507.2 applies only to parking buildings of multiple decks. This is even more apparent when we note that § 507.1 is the section pertaining to parking lots. There the only requirement relating to parking lots pertains to the erection or construction of open shed or canopies on the lot. The City of Daytona Beach construed its ordinance (§ 507.2) as not applicable to appellant's parking lot both at the time it was built and at the time of this trial. Appellant's parking area is clearly a "parking lot" and not a "public parking deck." The municipal ordinance relating to "public parking decks" is not applicable to the facts of this case and it was error to admit it into evidence. Based upon the previous ruling of this court in Schatz v. 7-Eleven, Inc., supra, appellant's motion for directed verdict should have been granted.

Reversed and remanded with directions to enter judgment for appellant.

RAWLS, C. J., and JOHNSON, J., concur.



**Officers ⇐72(2), 76**

Career Service Commission had no authority to alter judgment of state university, which dismissed university employee for stealing, by amending the dismissal to a suspension of about six months; the Commission had power to affirm and reinstate with or without back pay, but it could not affirm the finding of guilt and then mitigate sentence in any manner other than to reinstate employee without pay.

**BOARD OF REGENTS of the State of Florida, a body corporate, For and on Behalf of the University of Florida, of the Department of Education, Division of Universities, Petitioner,**

**v.**

**Leslie F. HOPKINS and Career Service Commission of the State of Florida, Department of Administration, Division of Personnel, Respondents.**

**No. W-440.**

District Court of Appeal of Florida, First District.

May 23, 1975.

Petition was brought by Board of Regents for writ of certiorari, seeking to reverse order of the Career Service Commission which "amended" action of state university in firing employee who was caught stealing university property. The District Court of Appeal, Johnson, J., held that the Commission had no authority to alter judgment of state university, as employer, by amending the dismissal to a suspension of about six months.

Order reversed, dismissal of employee reinstated.

McCord, J., concurred specially and filed opinion.

Thomas S. Biggs, Jr., and Judith A. Brechner, Gainesville, for petitioner.

Robert L. Shevin, Atty. Gen., Stephen F. Dean, Asst. Atty. Gen., and C. Valentine Bates, for respondents.

JOHNSON, Judge.

This is a petition for a writ of certiorari seeking to reverse the Order of the Career Service Commission which "amended" the University of Florida's action in firing an employee who was caught stealing University property.

The "amended order" almost amounted to making a nullity of the University of Florida's Order of dismissal of the employee.

The opening statement of the case as contained at page v of the Brief of the Career Service Commission gives us about the whole picture as it existed, and we will not attempt to improve thereon:

"The University of Florida discharged the employee, Hopkins, for misappropriation of University property. The employee, Hopkins, appealed said dismissal to the Career Service Commission. The Career Service Commission heard the appeal and entered its order dated August 16, 1974. The Respondent, University of Florida, filed its Petition for Writ of Certiorari seeking review of the Career Service Commission's order."

The employee was caught stealing, and when caught, confessed. There were other

SHIVERS, Judge.

The employer/carrier (E/C) in this workers' compensation case appeal an order of the deputy commissioner (DC) awarding the claimant temporary and permanent wage-loss benefits, evaluation by a rehabilitation counselor, continuing medical care, penalties, and costs. We find there to be competent substantial evidence in the record to support wage-loss benefits and a rehabilitation evaluation; however, we reverse the award of continuing palliative medical treatment as well as a portion of the penalties.

[1] The record indicates that claimant began receiving authorized treatment from an orthopedic surgeon, Dr. Charles Abrahamsen, in December 1986. In June 1987, Dr. Abrahamsen referred claimant to another orthopedic surgeon, Dr. Helfet, for a second opinion. Helfet, in turn, arranged for claimant to be examined by yet another orthopedic surgeon, Dr. Leffers. In his order, the DC authorized continuing palliataive medical treatment by either Dr. Leffers, Dr. Helfet, or another mutually agreed-upon physician. Since there is no indication in the record that the services furnished by Dr. Abrahamsen were inadequate or inappropriate, and no significant conflict in the three doctors' diagnoses and recommended treatment, we find that the deputy erred in authorizing treatment by yet another physician. *K-Mart Corporation v. Nasoni*, 377 So.2d 821 (Fla. 1st DCA 1979).

[2] Last, the DC awarded penalties on late payment of wage-loss benefits, on the basis that the E/C failed to file notices to controvert. Claimant concedes on appeal that the E/C did in fact file three separate notices to controvert, corresponding to benefits claimed for the periods January 8, 1988–February 25, 1988, February 26, 1988–March 10, 1988, and May 13, 1988–May 31, 1988. Accordingly, we reverse the DC's award of penalties for those periods of time. The record indicates that no notices were filed for the periods August 15, 1987–January 7, 1988 and March 11, 1988–May 12, 1988. The award of penalties for those periods is therefore affirmed.

Accordingly, we affirm in part, reverse in part, and remand for correction of the order in accordance with this opinion.

SMITH, C.J., and WIGGINTON, J., concur.

**Jerome WEINKLE, Appellant,**

**v.**

**HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, Appellee.**

**No. 88-1756.**

District Court of Appeal of Florida, Third District.

June 6, 1989.

An Appeal from the Circuit Court for Dade County, Leonard Rivkind, Judge.

Michael Winer, Fort Lauderdale, for appellant.

Allan M. Elster, Miami, for appellee.

Before SCHWARTZ, C.J., COPE, J., and GAVIN K. LETTS, Associate Judge.

PER CURIAM.

The final summary judgment under review is reversed because the plaintiff-appellee failed conclusively to establish the absence of a genuine issue of material fact as to whether the parties entered into a valid and enforceable novation reducing the amount of the guarantee upon which the defendant-appellant is liable. Accordingly, the judgment is reversed for further proceedings not inconsistent herewith.[1]



**Alejandro MOLINARES, Appellant,**

**v.**

**EL CENTRO GALLEGO, INC., Appellee.**

**Nos. 87-2148, 87-1757.**

District Court of Appeal of Florida, Third District.

June 6, 1989.

Rehearing Denied July 21, 1989.

Patron brought suit against owner of restaurant for injuries he sustained when car driven by third party climbed over two-inch sidewalk in front of restaurant and pinned patron against restaurant building. The Circuit Court, Dade County, Jack M. Turner, J., granted defendant's motion for summary judgment, and patron appealed. The District Court of Appeal held that restaurant owner was not liable for injuries patron sustained when third party drove car over two-inch curb in front of restaurant and struck patron, on theory that owner should have erected guardrail or warning signs in addition to sidewalk, absent showing of any similar accidents in past.

Affirmed.

Baskin, J., dissented and filed opinion.

**1. Negligence ⇐51, 52**

Restaurant owner was not liable for injuries patron sustained when third party drove car over two-inch curb in front of restaurant and struck patron, on theory that owner should have erected guardrail or warning signs in addition to sidewalk, absent showing of any prior, similar accidents such as would put owner on notice that two-inch curb was not sufficient protection for its customers.

**2. Negligence ⇐51**

Restaurant owner will be liable for injuries patron sustains when third party drives car over sidewalk in front of restaurant and strikes patron, where evidence shows that curb flows into surface of parking lot, or where there has been prior history of motor vehicle accidents in front of restaurant despite protective sidewalk.

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Horton, Perse & Ginsberg and Edward A. Perse and Arnold R. Ginsberg, Miami, Sadow, Lynne & Gonzalez, North Miami, for appellant.

Joe N. Unger, Kopplow & Flynn, Miami, for appellee.

Before BARKDULL, HUBBART and BASKIN, JJ.

PER CURIAM.

This is an appeal by the plaintiff Alejandro Molinares from an adverse final summary judgment in a premises liability negligence action. As he was preparing to enter the front entrance of the defendant El Centro Gallego, Inc.'s restaurant, the plaintiff was struck by a third-party motorist and received certain injuries after being pinned against the restaurant building; the motorist, who had parked her automobile directly in front of the restaurant, mistakenly propelled the automobile forward across the curbed sidewalk in front of the restaurant and struck the plaintiff. The plaintiff faults the defendant restaurant for failing to have parking stalls, markings, warning signs, bumpers, or guard rails in front of the restaurant.

[1] We affirm the final summary judgment under review upon a holding that the defendant restaurant did not, as a matter of law, breach any duty of due care owed

1. Specifically, this opinion permits the entry of a non-final order, see *Fontainebleau Hotel Corp. v. Young*, 162 So.2d 303 (Fla. 3d DCA 1964), that, as appears as a matter of law, the appellant *is* liable for the amount of the reduced guarantee, less any sums which have been paid.

) the plaintiff as a business invitee under
ıe circumstances of this case. We reach
his result because, in our view, a business
stablishment satisfies its duty to provide a
afe ingress or egress for its business invi-
ees when, as here, (a) it provides a protec-
ve sidewalk with a two-inch curb between
s business entrance and the asphalt area
here motor vehicles may be driven in
ront of the subject entrance, and (b) there
re no prior motor vehicle accidents involv-
ıg its customers in front of its business
ntrance despite the protective sidewalk.
n the absence of such a history of acci-
ents, the business establishment is not
equired, as urged, to place bumpers,
uard rails, or warning signs along the
idewalk or to place marked parking stalls
irectly in front of the building. *Schatz v.
-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA
961); *see also Tieder v. Little*, 502 So.2d
23 (Fla. 3d DCA), *rev. denied*, 511 So.2d
98, 300 (Fla.1987); *Winn-Dixie Stores,
nc. v. Carn*, 473 So.2d 742 (Fla. 4th DCA
985), *rev. denied*, 484 So.2d 7 (Fla.1986);
*ood Fair, Inc. v. Gold*, 464 So.2d 1228
Fla. 3d DCA), *rev. denied*, 476 So.2d 673
Fla.1985); *Cabals v. Elkins*, 368 So.2d 96
Fla. 3d DCA 1979); *Krispy Kreme Dough-
ut Co. v. Cornett*, 312 So.2d 771 (Fla. 1st
)CA 1975), *cert. denied*, 330 So.2d 16 (Fla.
976); *Jones v. Dowdy*, 443 So.2d 467 (Fla.
d DCA 1984).

[2] We recognize that the result we
each in this case would be different if the
idewalk in front of the defendant's restau-
ant had been level with or otherwise
lowed into the asphalt of the road surface
ext to the sidewalk—as, in that event,
here would be no protective curb to pro-
ide safe ingress and egress for the busi-
ess invitees of the defendant's restaurant.
*Thompson v. Ward Enters.*, 341 So.2d 837
Fla. 3d DCA), *cert. denied*, 351 So.2d 409
Fla.1977); *Johnson v. Hatoum*, 239 So.2d
22 (Fla. 4th DCA 1970), *cert. dismissed*,
244 So.2d 740 (Fla.1971). We also recog-
nize that our result would be different if there had been a prior history of motor vehicle accidents in front of the restaurant despite the protective sidewalk—as, in that event, the defendant would be on notice that its protective curb might be inadequate to protect its invitees from errant motorists. *Cohen v. Schrider*, 533 So.2d 859, 860 (Fla. 4th DCA 1988); *see Gibson v. Avis Rent-A-Car Sys.*, 386 So.2d 520, 522–23 (Fla.1980); *Nance v. Winn-Dixie Stores, Inc.*, 436 So.2d 1075, 1076–77 (Fla. 3d DCA 1983), *rev. denied*, 447 So.2d 889 (Fla.1984); *Homan v. County of Dade*, 248 So.2d 235, 238 (Fla. 3d DCA 1971). We only conclude that much like most governmental entities which quite properly build curbed sidewalks along their streets without parallel barriers or bumpers to protect pedestrians from motorists driving in the street [1], a business establishment is similarly entitled to rely on the safety of a curbed sidewalk in front of its business to protect its invitees as they enter and exit the said business—at least in the absence of any prior history of motor vehicle accidents involving its invitees in front of its business notwithstanding the protective sidewalk.

Affirmed.

BARKDULL and HUBBART, JJ., concur.

BASKIN, Judge (dissenting).

As he entered El Centro Gallego Restaurant, Alejandro Molinares was struck by an automobile driven by another restaurant patron. The automobile had been parked in a paved area lacking parking stalls, markings, warning signs, bumpers, or guard rails. The parking area designated for the restaurant was located on the side of the building. The evidence indicates that as Molinares prepared to enter the restaurant, the car parked in front of the building accelerated forward, over the sidewalk, advanced to the front entrance of the restaurant, and pinned Molinares against the building. Molinares sued the owner of the restaurant, El Centro Gallego, Inc., for damages to compensate him for the injuries he sustained. He alleged that El Centro Gallego, Inc., negligently failed to maintain the premises in a reasonably safe condition and failed to provide customers a safe method of ingress and egress. El Centro Gallego sought a summary judgment. Applying the decision in *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1961), and deciding that the restaurant owner breached no duty to Molinares because the accident was not reasonably foreseeable, the trial court entered final summary judgment. The majority affirms; I would reverse.

An occupier of premises has a duty to guard against foreseeable harm by maintaining the premises in a reasonably safe condition. *Earley v. Morrison Cafeteria Co.*, 61 So.2d 477 (Fla.1953); *Johnson v. Hatoum*, 239 So.2d 22 (Fla. 4th DCA 1970), *cert. dismissed*, 244 So.2d 740 (Fla.1971); *Carter v. Parker*, 183 So.2d 3 (Fla. 2d DCA 1966); *Schatz*. The duty extends to providing a reasonably safe method of egress and ingress for business invitees. *Marhefka v. Monte Carlo Management Corp.*, 358 So.2d 1171 (Fla. 3d DCA 1978); *Shields v. Food Fair Stores*, 106 So.2d 90 (Fla. 3d DCA 1958), *cert. denied*, 109 So.2d 168 (Fla.1959). In *Schatz*, the first district ruled that, as a matter of law, it was unforeseeable that an automobile parked in a marked stall would move forward, over a sidewalk and into a store, and injure a patron inside the store. The *Schatz* scenario is not present here. The automobile that struck Molinares was parked on a large, unmarked, paved area directly in front of the restaurant even though the marked stalls were on the side of the building. Molinares, unlike Schatz, was not inside the establishment at the time of his injury; he was in the process of entering the building when he was struck by the automobile. I am unable to say that, under these circumstances, such an accident was unforeseeable. Indeed, in other cases with similar facts, courts have held that the question of foreseeability is a matter for jury determination. *Thompson v. Ward Enter.*, 341 So.2d 837 (Fla. 3d DCA), *cert. denied*, 351 So.2d 409 (Fla.1977); *see also, Cohen v. Schrider*, 533 So.2d 859 (Fla. 4th DCA 1988); *Johnson*. I would therefore reverse the judgment and remand the cause to permit the jury to determine whether the accident was foreseeable and, thus, compensable.

1. We note that there was testimony below to the effect that many curbs leading from public roadways to public sidewalks range from eight to ten inches high; however, the fact that governmental entities might provide higher curbs than the two-inch one provided by the private business establishment herein makes no difference in our conclusion that the curb provided in this case satisfies any duty to protect pedestrian invitees where there is no history of other similar accidents at the location.




**MOTORS INSURANCE CORPORATION,**
**Appellant,**

**v.**

**HEAVY LIFT SERVICES, INC., Appellee.**

**Nos. 88–1427, 88–1951.**

District Court of Appeal of Florida, Third District.

June 6, 1989.

Insurer of automobile dealerships for loss of vehicles due to theft brought action against several individuals and entities alleging violations of statute providing that no person shall transport, or cause to be transported, from any port or airport facility any motor vehicle or mobile home without first having obtained certificate of right of possession. The Circuit Court, Dade County, Sidney B. Shapiro, J., held that company which stored stolen vehicles for persons who organized scheme for shipping vehicles out of country did not fall within purview of statute. Appeal was taken. The District Court of Appeal, Cope, J., held that company did not fall within purview of statute.

Affirmed in part, reversed in part and remanded.

her the disputed triangular strip, nor does she claim that since making the conveyance in August 1952, she has adversely occupied the strip and paid taxes thereon for the statutory period prerequisite to establishing title in her by adverse possession.[1]

[2-4] It is a settled principle of law prevailing in this state that a person who purports to convey an estate by deed is estopped as against the grantee to assert anything in derogation of the deed; that for the purpose of defeating the title of the grantee such person will not be heard to say that no title passed to the grantee by the deed, nor can he deny to the deed its full operation and effect as a conveyance.[2] It well may be that prior to the execution of the conveyance by defendant to plaintiffs in August, 1952, the defendant and her predecessors in title owned and enjoyed the exclusive title and possession of the rectangular parcel conveyed to plaintiffs as alleged in her answer. It might also be true that subsequent to the conveyance in question defendant continued to remain in possession of the disputed triangular strip which lies wholly within the rectangular parcel so conveyed, as is likewise alleged in defendant's answer. Neither of these facts, however, provide any basis for relief to defendant, as she is estopped to assert continued ownership or continued right to possession of the disputed strip after her conveyance of August, 1952, under the doctrine of equitable estoppel above-mentioned. If defendant had denied that the disputed triangular strip was located within the rectangular parcel previously conveyed by her to plaintiffs, the issues made by the pleadings would be entirely different from what they are found to be under the pleadings contained in this record. In the latter event the dispute would be over the true location of the boundary line between the plaintiffs' and defendant's land, which issues are traditionally resolved by a suit at law in ejectment. Under these circumstances it would have been proper for the trial court to transfer the cause to the law side of the court for final disposition. In view of defendant's admission in her answer that she occupies and holds adversely to plaintiffs the triangular strip which is shown to lie wholly within the rectangular parcel conveyed by defendant to plaintiffs, the defensive allegations of the answer are of no avail, and constitute no defense to plaintiffs' claim of title and right to possession.

[5-9] The only remaining question is whether under the circumstances hereinabove related plaintiffs have sufficiently alleged a cause of action for injunctive relief. That defendant's act in excluding plaintiffs from the full possession and enjoyment of the parcel of land conveyed by defendant to plaintiffs constitutes a continuing trespass cannot be questioned. Entitlement to injunctive relief to restrain a continuing trespass on land owned by the complaining party is recognized in this jurisdiction.[3] Plaintiffs having established by the allegations of their complaint a right to injunctive relief, the trial court erred in entering its order transferring the cause to the law side of the court for final disposition. If this cause is permitted to continue as a suit in law as ordered by the trial court, defendant would be precluded from offering any evidence in derogation of plaintiffs' title or right to possession of the disputed triangular strip in question under the doctrine of estoppel by deed. A verdict and judgment in favor of plaintiffs could do no more than entitle plaintiffs to a writ of assistance placing them in possession of the disputed strip. No provision could be made in the final judgment for restraining defendant from committing a continuing trespass on the property involved. Plaintiffs would then be forced to the necessity of filing a separate action in equity to mandatorily require defendant to remove her fence and garage from plaintiffs' property and to restrain the continuing trespass. The law does not look with favor upon a multiplicity of suits when plaintiffs' right to full and complete relief can be afforded in one action. It is our view, and we so hold, that suit for injunction under the circumstances existing in this case was proper. Accordingly the order transferring the case to the law side of the court is hereby reversed and the cause is remanded for further proceedings.

Reversed.

STURGIS and CARROLL, DONALD K., JJ., concur.

1. F.S. Sec. 95.18, F.S.A.

2. Spencer v. Wiegert, Fla.App.1959, 117 So.2d 221; Daniell v. Sherrill, Fla.1950, 48 So.2d 736, 23 A.L.R.2d 1410; Reid v. Barry, 93 Fla. 849, 112 So. 846.

3. Baylen Street Wharf Co. v. City of Pensacola, Fla.1949, 39 So.2d 66; 17 Fla.Jur., Injunction, § 44, p. 402.



**Martha W. SCHATZ et al., Appellants,**

**v.**

**7-ELEVEN, INC. et al., Appellees.**

**No. C-213.**

District Court of Appeal of Florida.

First District.

April 11, 1961.

Rehearing Denied May 8, 1961.

Personal injury action. The Circuit Court of Volusia County, P. B. Revels, J., rendered summary final judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Wigginton, C. J., held that operator of drive-in food store breached no duty to business invitee when it permitted automobiles to park perpendicularly to curb in front of open and unobstructed entrance to its store building and failed to erect higher curb in front of entrance to store, and that it was not foreseeable that operator of vehicle so parked would negligently cause it to be propelled forward into store, and held that in absence of evidence that higher curb would have prevented happening of such occurrence, it was not error to render summary final judgment for storekeeper in this action for injuries sustained by business invitee who was struck by such automobile.

Affirmed.

Carroll, J., dissented.

**1. Negligence ⇐32(1)**

Law imposes on storekeeper duty of exercising ordinary care to maintain his premises in reasonably safe condition for purposes for which they are adapted.

**2. Negligence ⇐32(1)**

Storekeeper was not insurer of safety of business invitee but was charged with duty of guarding against subjecting her to dangers of which storekeeper was cognizant or might reasonably foresee.

**3. Negligence ⇐56(1.7, 1.12)**

"Causation" is that act which, in natural and continuous sequence, unbroken by any intervening cause, produces injury, and without which injury would not have occurred.

See publication Words and Phrases, for other judicial constructions and definitions of "Causation".

**4. Negligence ⇐10**

There can be no recovery for injury resulting from negligent act unless injury was a reasonably foreseeable consequence of negligence.

**5. Negligence ⇐10**

For consequence of negligent act to be "foreseeable" it must be such as prudent human foresight could anticipate would likely result from act because it happens so frequently from commission of such act that

in field of human experience it could be expected to happen again.

See publication Words and Phrases, for other judicial constructions and definitions of "Foreseeable".

6. Automobiles ⇐197(1)
Judgment ⇐181(33)

Operator of drive-in food store breached no duty to business invitee when it permitted automobiles to park perpendicularly to curb in front of open and unobstructed entrance to its store building and when it failed to erect higher curb in front of entrance to store; and it was not foreseeable that operator of vehicle so parked would negligently cause it to be propelled forward into store; and in absence of evidence that higher curb would have prevented happening of such occurrence, it was not error to render summary final judgment for storekeeper, in action for injuries sustained by business invitee who was struck by such automobile.

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Raymond, Wilson & Karl, and Wesley A. Fink, Daytona Beach, for appellants.

Alfred A. Green, Alfred A. Green, Jr., and Marks, Gray, Yates, Conroy & Gibbs, Jacksonville, for appellees.

WIGGINTON, Chief Judge.

Plaintiff has appealed from a summary final judgment rendered in favor of defendant. It is contended that from the pleadings, answers to interrogatories, admissions contained in a pre-trial order, and affidavits before the court at the hearing upon the motion, there existed a genuine issue of the material fact relating to defendant's liability, and that the court erred in holding that defendant was entitled to judgment as a matter of law.

Plaintiff was a business invitee shopping in the drive-in food store controlled and operated by defendant. The building housing defendant's store was constructed in accordance with plans and specifications prepared and provided by it. Customers are invited to drive in and park motor vehicles on the paved area located in front of the building. A sidewalk ten feet wide and a curb 5¾ inches high separate the front of the building from the parking area furnished for the accommodations of defendant's motoring customers. Automobiles approaching the building park perpendicular to the curb. At the time alleged in the complaint an automobile operated by the third party defendant drove to a parking slot directly in front of the store and came to a stop at the curb at a point directly in front of the open and unobstructed entrance to the store building. When the operator of the vehicle later attempted to start her car and put it in operation, she negligently and carelessly caused it to be propelled forward over the curb and across the sidewalk into defendant's store striking plaintiff and pinning her against a fixture, inflicting upon her severe injuries.

It is the theory of plaintiff's action that defendant breached a duty owed plaintiff as a business invitee of its store in failing to either so regulate the parking of motor vehicles in front of the store in such manner that they would not be headed directly toward the interior of the store when in a parked position, or in the alternative, failing to provide an adequate curb, barrier, wall or other obstacle in front of the store adequate to prevent the entry therein of any motor vehicles parked at the curb in front of the building. It is alleged that as a result of the foregoing failures on the part of the defendant, it breached a duty owed plaintiff to maintain its premises in a reasonably safe condition for customers inside the store, which breach of duty was the proximate cause of the injuries suffered by plaintiff under the circumstances above related.

In opposition to defendant's motion for summary judgment plaintiff submitted an affidavit of the city engineer to the effect that the standard and ordinary sidewalk curbs in the area of defendant's business are constructed to a minimum of six inches



in height. The affidavit of another engineer averred that in his expert opinion the nature of appellee's business, when considered in conjunction with the architectural design of the store building, required that reasonable precaution be taken to protect customers shopping inside the store against the danger of automobiles crossing the sidewalk, entering the store and injuring those who may be shopping therein. He further deposed that reasonably safe construction and engineering standards would require that a barrier of not less than eight inches in height be constructed along the curb, separating the sidewalk from the parking area. He stated that in his opinion the height of the curb constructed in front of defendant's store failed to comply with reasonably safe construction and engineering standards in the area, and was not sufficient to impede the entry of a motor vehicle into the store building from the parking area.

The prime question for our consideration is whether, upon the undisputed facts above related, there existed a genuine issue of a material fact from which a jury could have lawfully found that defendant breached a duty owed plaintiff, which breach was the proximate cause of plaintiff's injuries.

[1, 2] Plaintiff was a business invitee on defendant's premises at the time of her injury. The law imposes on defendant the duty of exercising ordinary care to maintain his premises in a reasonably safe condition for the purpose for which they are adapted.[1] Defendant did not owe plaintiff a duty as insurer of her safety while on the premises in question, but is charged with the duty of guarding against subjecting plaintiff to dangers of which defendant is cognizant or might reasonably foresee.[2]

[3-5] In the Pope case[3] this court discussed the law of proximate cause and the several tests to be applied in determining whether a given act is the proximate cause of damages sustained. It was there pointed out that the two essential elements of proximate cause are causation and the limitation to foreseeable consequence. Causation is that act which, in the natural and continuous sequence, unbroken by any intervening cause, produces the injury, and without which the result would not have occurred. Even though the person charged may be guilty of a negligent act, there can be no recovery for an injury resulting therefrom which was not a reasonable foreseeable consequence of his negligence. For the consequence of a negligent act to be foreseeable, it must be such that a person by prudent human foresight can anticipate will likely result from the act, because it happens so frequently from the commission of such an act that in the field of human experience it may be expected to happen again.

Applying the foregoing rules to the facts which were contained in the record before the trial court at the hearing on motion for summary judgment, the question of defendant's liability was one of law to be decided by the court, and presented no issue of fact eligible for jury consideration.

[6] Can it be said from the facts in this case that defendant breached a duty owed plaintiff to maintain its premises in a reasonably safe condition when it permitted automobiles to park perpendicularly to the curb in front of the open unobstructed entrance to its store building. In the alternative, can it be said that defendant breached a duty owed plaintiff by failing to erect an eight inch barrier in front of the entrance to the store adequate to prevent a motor vehicle from proceeding forward over the sidewalk and into the store where customers may be present. Tested by the rules relating to proximate cause as outlined above,

1. Food Fair Stores of Florida v. Sommer, Fla.App.1959, 111 So.2d 743.

2. Walker v. Feltman, Fla.App.1959, 111 So.2d 76.

3. Pope v. Pinkerton-Hayes Lbr. Co., Fla. App.1960, 120 So.2d 227.

we do not conceive that defendant breached a duty owed plaintiff in either of the particulars contended for by plaintiff.

We are unaware of any ordinance, statute or rule of law, and none has been cited by the parties to this appeal, which requires that the owner of a store erect a barrier between the entrance to his establishment and a street, highway or parking area, sufficient in height and strength to prevent motor vehicles negligently operated by others from entering the store where customers are usually present. There is no evidence in the record from which it could be reasonably inferred that the presence of a six or eight inch curb or barrier in front defendant's store, as contended by plaintiff, would have prevented the happening of the occurrence described in the complaint which proximately resulted in the injuries sustained by plaintiff.

Secondly, it cannot be contended with any degree of reason or logic that the owner of a store, by permitting automobiles to park perpendicularly to the curb in front of his entrance, or by failing to erect an impregnable barrier between the entrance of his store and an adjacent area where motor vehicles are driven and parked, should have anticipated that automobiles will be negligently propelled over the curb and across the sidewalk into the entrance of his store. We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanisms, which sometimes results in damage or injury to others. In a sense all such occurrences are foreseeable. They are not, however, incidents to ordinary operation of vehicles, and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. If 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. Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law.

Our research has revealed only one decision by another appellate court based upon facts similar in all material respects to the facts present in this case, and in which the exact questions of law were involved and decided.[4] In that case defendant operated a drive-in food store constructed with an open front entrance, the floor of which was level with the parking area separating the building from the street. No curb or barrier was erected between the building and the area where vehicles customarily parked perpendicular to the entrance. A customer parked a truck in front of the store while he entered in order to shop for merchandise, leaving the engine of his vehicle running. While in the store his truck lunged forward and crashed into the store pinning the plaintiff against fixtures located therein and inflicting on him serious bodily injury. Plaintiff sued the owner of the store on the theory that he breached a duty owed plaintiff by failing to construct a curb or barrier in front of the store entrance sufficient to have prevented the truck from entering therein and causing the damage alleged. On appeal from a judgment for plaintiff it was held that the owner of the store 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 propelled into the store with the likelihood of injuring patrons shopping therein. It was further held that the likelihood of the truck in question being negligently permitted to run off the parking area and into the entrance of the store was not foreseeable by defendant as a matter of law, and that any negligence which might conceivably be imputed to defendant in failing to erect a barrier in front of his building would not have been the proximate cause of the injuries suffered by plaintiff. The principles of law applied by the Court of Civil Appeals of Texas in the rendition of its decision in that case are the same rules relating to the law of proximate cause followed by the courts of this state.

We therefore hold that the evidence in the record before us affirmatively establishes no breach of duty owed by defendant to plaintiff, and the trial court was correct in holding that defendant was entitled to judgment as a matter of law. The summary final judgment appealed is accordingly affirmed.

Affirmed.

128 So.2d—57½
Fla.Cas. 126-129 So.2d—44

4. Watkins v. Davis, Tex.Civ.App.1957, 308 S.W.2d 906.



STURGIS, J., concurs.

CARROLL, DONALD K., J., dissents.

CARROLL, DONALD K., Judge (dissenting).

I feel compelled to dissent because of my view that the evidence as to liability, specifically on the question of the reasonable protection owed to business invitees, presents a question of fact which under our rules should be submitted to a jury rather than be disposed of as a matter of law by summary judgment. I would reverse that judgment and remand the cause for further proceedings.

trial court order as to these issues is affirmed.

[7, 8] We reverse, however, that portion of the order providing for future reductions of alimony. Absent a clear evidentiary basis that the financial needs of the receiving spouse will change in the future, it is error to provide for an automatic reduction in future permanent periodic alimony payments. *Sever v. Sever*, 467 So.2d 492 (Fla. 2d DCA 1985); *McClung v. McClung*, 465 So.2d 637 (Fla. 2d DCA 1985); *Ramsey v. Ramsey*, 431 So.2d 258 (Fla. 2d DCA 1983), and cases cited therein; *Cooley v. Cooley*, 409 So.2d 533 (Fla. 4th DCA 1982). There is no evidence in this record to support a finding that the wife's financial needs will change five years hence, therefore that portion of the order directing future diminution of the amount of alimony payments is reversed. In all other respects, the trial court order is affirmed.

Affirmed in part, reversed in part.

ERVIN, C.J., and SHIVERS, J., concur.

ON MOTION FOR REHEARING

JOANOS, Judge.

Appellant has filed a motion for rehearing of this court's opinion, seeking reconsideration or a clarification of that portion of the opinion which found that an insurance settlement occasioned by the wife's injury went into a common account. We agree with appellant that a more precise statement regarding the disposition of the insurance settlement would read:

> The insurance settlement occasioned by the wife's injury was put together with $10,000 from another source and used to purchase a 3-month certificate of deposit, in the total amount of $60,000. This certificate of deposit was held in the names of both parties as joint payees. Later, the funds represented by the certificate of deposit were used for the purchase of the sailing vessel in which the wife claims a special equity.

The opinion is, therefore, clarified as set forth above. Motion for rehearing is denied as this change in the opinion does not affect the outcome.

ERVIN and SHIVERS, JJ., concur.

**WINN-DIXIE STORES, INC., Appellant,**

**v.**

**Kathleen CARN and Patricia Carn, Appellees.**

**No. 84-994.**

District Court of Appeal of Florida, Fourth District.

June 19, 1985.

Rehearing and Rehearing En Banc Denied Aug. 29, 1985

Store patrons injured when struck on a public sidewalk in front of store by an automobile which had left the adjacent public roadway brought action against store owner to recover for injuries. The Circuit Court, Palm Beach County, John D. Wessel, J., entered judgment in favor of patrons, and store owner appealed. The District Court of Appeal, Anstead, C.J., held that fact that store's exit opened onto a public sidewalk which was adjacent to a busy street would not subject store owner to liability for injuries sustained by patrons.

Reversed with directions.

**Municipal Corporations ⇐808(1)**

Fact that store's exit opened onto a public sidewalk which was adjacent to a busy street would not subject store owner to liability for injuries sustained by store patrons who were struck on sidewalk in front of store by an automobile which had left the adjacent public roadway.

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Montalto & Blank, Miami, and Larry Klein of Klein & Beranek, P.A., West Palm Beach, for appellant.

Jeffrey Colbath, West Palm Beach, and Edna L. Caruso of Edna L. Caruso, P.A., West Palm Beach, for appellees.

ANSTEAD, Chief Judge.

We reverse the judgment and hold that the trial court erred in failing to direct a verdict for appellant, Winn-Dixie Stores, Inc., on a claim for injuries sustained by appellees, Kathleen Carn and Patricia Carn, when an automobile left the public roadway and struck appellees on the public sidewalk in front of appellant's store.

In essence, appellees' theory of liability was that appellant should be held liable because the store's exit opened onto a public sidewalk which was adjacent to a busy street. In *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1961), Chief Judge Wigginton summed up our view of the instant situation in an opinion which approved the entry of summary judgment for a store owner under similar circumstances:

> We are not unmindful of the obvious fact that at times operators lose control over the forward progress and direction of their vehicles either through negligence or as a result of defective mechanisms, which sometimes results in damage or injury to others. In a sense all such occurrences are foreseeable. They are not, however, incidents to ordinary operation of vehicles, and do not happen in the ordinary and normal course of events. When they happen, the consequences resulting therefrom are matters of chance and speculation. If 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. Such occurrences fall within the category of the unusual or extraordinary, and are therefore unforeseeable in contemplation of the law.

There is nothing about the facts of this case that distinguish it from the situation and holding in *Schatz*.

Accordingly, we reverse the judgment with directions that judgment be entered in favor of appellant.

HURLEY, J., and SALMON, MICHAEL H., Associate Judge, concur.

**Editor's Note:** The opinion of the District Court of Appeal of Florida, in *Judson v. Nicson Engineering Co.* published in the advance sheet at this citation, 473 So.2d 743–745, was withdrawn from the bound volume because rehearing is pending.

**Gregory Cliff EVANS and Robert Kimball Anderson, Appellants,**

**v.**

**STATE of Florida, Appellee.**

**No. 84-1814.**

District Court of Appeal of Florida, Second District.

June 26, 1985.

Rehearing Denied Aug. 13, 1985.

Defendants were convicted before the Circuit Court, Pinellas County, Susan F.