Deadly Roadways:

Guideposts for Defective Guardrail Litigation

by Theodore J. Leopold, Diana L. Martin & Leslie M. Kroeger

Guardrails are installed along America's roadways for the protection of motorists. Guardrails, if properly designed, keep vehicles from straying off the roadway into dangerous places and, when impacted at the end points, should absorb or dissipate energy from the crash and give way, rather than remaining rigid and potentially intruding into the accident vehicle. But, unfortunately, there are tens, if not hundreds, of thousands of guardrails that will not achieve this purpose either due to poor design or improper installation.

At the end of every guardrail not embedded in the ground is a piece called the "end treatment" that faces oncoming traffic. The type of end treatment used dictates what will happen when a vehicle hits the end of the guardrail in a crash. If the end treatment is not the proper height, it could launch the vehicle, often causing it to rotate and land upside down. If the end treatment or guardrail is too rigid, failing to absorb the energy from the crash, the vehicle may be deflected back onto the roadway, into traffic or the guardrail could penetrate the vehicle, potentially causing massive damage to its occupants.

Each of these conditions can potentially be caused by defective guardrail design, improper guardrail installation, or a combination of the two. The Florida Department of Transportation often contracts with third-parties to install and repair guardrails, and it has been known to use prisoners to do that work. The installers may not be properly trained in how to install a guardrail system and how to put the myriad of parts together correctly. And, the guardrail manufacturer may not properly label the parts of the guardrail system, or sufficiently explain in the accompanying manual and directions the proper method for installing the guardrail.

For instance, guardrail end treatments have been known to experience "throat lock," which means the end treatment is not able to move back along the guardrail, but stays rigidly in place when impacted. This can be due to the manufacturer's design not allowing sufficient clearance for the end treatment to recede and absorb the energy of the impact. Or, as manufacturers sometimes claim, it can be caused by the guardrail being put together in the wrong way—or even with the wrong pieces. Although all guardrails tend to look alike, their parts can be model specific, and interchanging what appear to be similar looking parts can interfere with the ability of the guardrail system to function properly.

Because of Florida's *Fabre*[1] law, you will likely need to sue both the guardrail manufacturer and guardrail installer in any case in which the plaintiff was injured as a result of impacting a guardrail. The typical products liability claims should be brought against the manufacturer—strict liability for placing a defective product into the stream of commerce; negligence in design; and, likely, failure to warn (both the purchaser and installer) of the dangers of the product. While you can't sue a third-party installer for strict liability—that count is reserved for those in the chain of product distribution—you can still sue for negligent installation or maintenance if improper installation, repair or upkeep of the guardrail was a proximate cause of the plaintiff's injuries.

If suing the Florida Department of Transportation, you must allege that its actions were operational, not a planning-level decision, in order to avoid your claims being dismissed for failing to plead around sovereign immunity.[2] This requires allegations of facts sufficient to demonstrate the guardrail posed a "'known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap.'" *DOT v. Stevens*, 630 So.2d 1160, 1162 (Fla. 2d DCA 1993) (quoting *DOT v. Konney*, 587 So.2d 1292, 1298-1300 (Fla. 1991)).

In *Stevens*, a driver fell asleep while driving, allowing his vehicle to drift off the road. When the vehicle hit the guardrail, it was launched over the guardrail, causing the vehicle to fall over a bridge and land, upside-down, in the embankment below, killing its passengers. 630 So.2d at 1161. There had been prior similar incidents of vehicles being vaulted over the guardrail at the same location, and the DOT had knowledge that the guardrail was substandard to those at market at the time of the accident. *Id*. Nevertheless, the Second District held that the FDOT was protected by sovereign immunity because "the dangers of running off the road while asleep at the wheel are readily apparent, and such dangers include the potential for the unguided vehicle to collide with, penetrate, or vault bridge guardrails." *Id*. at 1162. The Court recognized that it was not just the conspicuousness of the danger that was at issue, but also "the degree of danger presented by the guardrails at the time of the accident," *Id*. at 1162, holding:

> The law does not impose a duty on the state to provide guardrails meeting more recent design standards, nor does it mandate warnings unless the existing model exposes persons to the significant type and degree of danger referred to by Justice Kogan in *Konney*. This is true even where it is shown at trial that motorists would be better protected by replacing existing substandard railing or safety systems with improved modern materials or designs.

Id. at 1163. Because the danger of the guardrail was not so great that the court considered it a trap lying in wait for passing motorists, it determined the DOT was not liable for the injuries caused by the antiquated, unsafe guardrail.

Because of the requirement enunciated in *Stevens*, it is often much more difficult to maintain a guardrail case against the FDOT than the manufacturer or third-party installer. But, for those wishing to avoid federal court, it will be worth the effort in those cases where the other defendants are foreign companies.

Defective guardrails crisscrossing America's roadways have caused calamitous injuries to motorists, raising an issue that should not be overlooked when investigating catastrophic injuries in motor vehicle accidents. Discovery in current litigation has revealed that unauthorized models of guardrail systems may have been installed across the country, increasing the likelihood that you might encounter in your practice a motor vehicle accident involving guardrail related injuries. ■

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[1] *Fabre v. Marin,* 623 So.2d 1182, 1185 (Fla. 1993) (stating that "the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."), receded from on other grounds by *Wells v. Tallahassee Mem'l Reg'l Med. Ctr.*, 659 So. 2d 249 (Fla. 1995)).

[2] *Dep't of Transp. v. Neilson*, 419 So.2d 1071, 1075 (Fla. 1982) (noting *"Commercial Carrier v. Indian River County*, 371 So.2d 1010 (Fla. 1979), established that discretionary, judgmental, planning-level decisions were immune from suit, but that operational-level decisions were not so immune.")

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