

# Inadequate Pedestrian Barriers Create Dangerous Fall Situation at Retail Store

In October 2006, 67-year-old Michael Kelly (not his real name) decided to visit a new Staples Superstore that had recently opened in his home town of Tamarac, Florida. Upon arriving at the store, no warnings alerted him that the contiguous sidewalks and curbing were still under modification and construction. Mr. Kelly stopped at a store adjacent to Staples, and then walked along the sidewalk to the only entrance to Staples store. As he entered Staples, he noticed traffic barriers along the sidewalk and assumed they were there to prevent cars from parking directly in front of the newly-opened store.

Mr. Kelly completed his shopping at Staples and left the store. Outside, he stepped off the curb into the parking lot and abruptly fell down onto the parking lot pavement. The height of the curbing was unusually high and, not anticipating the precipitous drop-off, he fell hard to the ground. Dazed and embarrassed, he struggled to his feet and made his way to his car and returned home. Throughout the afternoon, Mr. Kelly experienced increasingly severe pain in his left arm and shoulder. Eventually, he went to the emergency room of a local hospital where an MRI was ordered, revealing a full-thickness tear of the supraspinatus muscle in his rotator cuff and tears in attached tendons. Mr. Kelly

was told that he would need immediate surgical consultation for repair of his injured shoulder.

Compounding Mr. Kelly's medical condition was a preexisting mitochondrial myopathy, a metabolic form of muscular dystrophy. Any type of surgical procedure performed on a person suffering from this condition typically requires extensive hospital and recovery care. Surgery was performed in late October. He continued to experience pain and discomfort.

While convalescing at home, Mr. Kelly became concerned about the conditions that had caused his fall. He could not understand why Staples would choose to open a store in the midst of conditions that could cause substantial injury to their customers. Using online research, he found a "prestigious" law firm that he hoped would assist him in filing a civil action against Staples. The law firm promised to obtain pertinent records and to conduct an investigation. Over the next three years, he was assured by the firm that his case was "progressing." Unfortunately, he continued to suffer increased pain and was losing range of motion in his arm and shoulder. He endured two more surgical procedures, including a painful ulnar nerve transplant, in attempts to relieve his pain and restore function.

With the statute of limitations running out for filing such a case, Mr. Kelly's "prestigious" law firm informed him that they would not pursue his case because it had "become too complex." Desperate with medical and out-of-pocket expenses piling up, Mr. Kelly contacted SDSBS attorneys **Karen Terry** and **Brian Sullivan**. They agreed to take on the challenge despite the short time left within which to file.

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Ms. Terry and Mr. Sullivan found that the previous attorneys had done very little investigation of the case. The SDSBS attorneys asked an architectural engineer to inspect the Staples premises and he confirmed that the precipitous drop in curbing was in violation of both state and local building codes. This curb defect was the cause of Mr. Kelly's fall and his severe injuries. They immediately filed suit, naming as defendants the Staples Office Superstore, the owner of the mall, and the companies that were performing construction at the time of the accident.

Not unexpectedly, the defendants' insurers took a defiant position, blaming Mr. Kelly for his failure to "look where he was going." They insisted that he failed to take reasonable notice of traffic barriers present in the area. Depositions from Mr. Kelly and the defendant contractor lasted for hours. Discovery revealed that there had been another fall at the curbing prior to Mr. Kelly's.

Ms. Terry and Mr. Sullivan decided on early mediation, hoping to contain litigation costs and allow presentation of the code violations. At mediation, evidence was presented showing that the defendants had used traffic barriers rather than pedestrian barriers, which would have made it impossible for a pedestrian to walk between the barriers to enter or exit the premises. Staples admitted that they had failed to provide patrons an adequate warning of the ongoing construction. Evidence was also presented showing that Staples could have simply postponed the grand opening until the premises were safe for patrons.

Mediation was contentious. The parties finally agreed to a substantial six-figure settlement for Mr. Kelly's permanent injuries. ♦

