

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT, IN  
AND FOR CHARLOTTE COUNTY, FLORIDA**

**CASE NO: 07003076CA**

**EDDIE SUTTON AND REBA SUTTON,  
HIS WIFE,**

**Plaintiff,**

**vs.**

**SUN COAST MEDIA GROUP, INC.,  
D/B/A CHARLOTTE SUN HEARLD  
NEWS,**

**Defendant.**

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**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COME NOW the Plaintiffs, EDDIE SUTTON and REBA SUTTON, his wife, and submit this Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment as follows:

**Statement of Facts**

Eddie Sutton had made a truck delivery at Defendant's newspaper business loading dock when he was assaulted and battered by another deliveryman as he attempted to leave. The attacker was Anthony Smith, another deliveryman, with whom Mr. Sutton had had an argument earlier when they both arrived at the loading dock. Plaintiff does not dispute that there has been no evidence of prior similar incidents. Rather, Plaintiff's theory of liability is based upon the allegation (supported by a reading of the record evidence in the light most favorable to Plaintiff) that Anthony Smith informed Defendant's employee(s) that he intended to harm Plaintiff, that it was reasonably foreseeable that Anthony Smith was going to do just that under all the

circumstances, and that Defendant's employee(s) failed to warn Plaintiff, an invitee, or otherwise protect him from the reasonably foreseeable criminal attack.

The record evidence is that Anthony Smith and Plaintiff, two truck drivers making deliveries, arrived at the newspaper parking lot at the same time and had an argument after one of them believed that the other "cut him off" at the entrance. Thereafter, they parted ways with Mr. Sutton understanding the argument was over and that there would be no further trouble between the men. Viewing the evidence of record in the light most favorable to Plaintiffs, Defendant's employee, Ernie Hickman, a delivery truck driver, was then told by Anthony Smith that Mr. Smith was going to do physical harm to Plaintiff. In response, Mr. Hickman told Mr. Smith that he should do it in the parking lot, rather than the dock, and never warned Mr. Sutton or took any action to intervene or protect Mr. Sutton. In addition, he informed other employees who gathered to watch the incident, but disbanded back into the building when it did not happen. Later, approximately thirty to forty minutes after the two men initially had a verbal altercation upon their arrival, Mr. Smith struck Mr. Sutton, without any warning to Mr. Sutton, in an attack at a time when he had no business remaining on the premises and had been observed by employees remaining on the premises when he had no reason to be there and should have departed in his truck. Attached is a summary of pertinent excerpts of depositions on file with the court with citations to deposition transcript pages.

Additional discovery is anticipated, but over Plaintiffs' counsel's objection, Defendants have scheduled the hearing on Defendant's Motion for Summary Judgment for a time prior to the dates on which the private investigator is available for sworn testimony. During the course of the investigation of this case, the private investigator was retained by a prior attorney representing Plaintiff, and he conducted a number of interviews of Defendant's employees, taped

the interviews, and transcribed their statements *verbatim*. Thereafter, he took the statements back to the employees and had them read and sign the transcribed statements and had their signatures notarized. The transcribed statements of the employees are also attached and in some instances conflict with the current testimony of the employees some four years later.

### **Legal Issue and The Parties' Contentions**

Defendant, in moving for summary judgment, contends that prior similar incidents of violence are an absolute prerequisite to imposing civil liability upon a landowner for a criminal attack by a third party, regardless of any other facts in any particular case, and that absent proof of prior similar incidents on Defendant's premises, no duty existed to warn or protect Mr. Sutton from the criminal attack by Anthony Smith, as a matter of law. For the reasons that follow, this position is simply a misinterpretation of Florida law. Plaintiffs dispute Defendant's interpretation of the existing case law and maintain that genuine issues of material fact remain. In fact, Plaintiffs contend that the facts, viewed most favorable to Plaintiff, as they must be, establish that the criminal attack upon Mr. Sutton by another invitee upon Defendant's premises was reasonably foreseeable, giving rise to a duty to either warn Mr. Sutton of the danger or take action to prevent the assault and battery that left Mr. Sutton with severe injuries, including traumatic brain injuries. At a minimum, issues of fact and a jury question remain as to whether the attack upon Mr. Sutton was reasonably foreseeable, precluding entry of summary judgment.

### **Legal Standard Applicable to Motions for Summary Judgment**

#### **Complete Absence of Any Genuine Issue of Material Fact**

It is well established law in Florida that summary judgment is improper where there are any issues of material fact in existence in a case. See, e.g., *Escobar v. Bill Curry Ford*, 247 So.2d 311 (Fla. 1971); *American Banker's v. Nolan's Garage, Inc.*, 262 So.2d 727 (Fla. 3<sup>rd</sup> DCA 1972); *Reed v. City of Winter Park*, 253 So.2d 475 (Fla. 4<sup>th</sup> DCA 1971); *Edwards v. California Chemical Co.*, 245 So.2d 259 (Fla. 4<sup>th</sup> DCA 1971). A party seeking summary judgment has a burden of proving and establishing the lack of any material issues of fact. *Rosen v. Parkway General Hospital, Inc.*, 265 So.2d 93 (Fla. 3<sup>rd</sup> DCA 1972); *Williams v. Florida Realty & Management Co.*, 272 So.2d 176 (Fla. 3<sup>rd</sup> DCA 1973).

It is also axiomatic that on a motion for summary judgment, the Court must resolve *all doubts* regarding existence of issues against the movant and all favorable issues reasonably justified from the record are to be liberally construed in favor of the party opposing the motion. *Davis v. 7-11 Food Stores, Inc.*, 294 So.2d 111 (Fla. 1<sup>st</sup> DCA 1974). A summary judgment cannot be granted where there remains *any* genuine issue of material fact left unresolved. *Century 21, Inc. v. Novak*, 339 So.2d 677 (Fla. 3<sup>rd</sup> DCA 1976).

A case should be taken from the jury only where there is *no evidence* upon which reasonable men could disagree and where it is clear as a matter of law one party must prevail. *Echols v. The Hammet Co., Inc.*, 423 So.2d 923 (Fla. 4<sup>th</sup> DCA 1982).

A summary judgment may be entered when it is shown that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla.R.Civ.P. 1.510(c). The movant has the burden to establish that there remains no genuine issue concerning a material fact. *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.1977). If there is even the slightest doubt as to the existence or nonexistence of a genuine issue of material fact,

that doubt must be resolved against the movant. *Booth v. Mary Carter Paint Co.*, 182 So.2d 292, 297 (Fla. 2d DCA 1966).

A court may not resolve questions of fact, resolve conflicts in testimony or evidence, or enter judgment on disputed inferences drawn from the evidence. *Burroughs Corp. v. American Druggist's Insurance Co.*, 450 So.2d 540 (Fla. 2<sup>nd</sup> DCA 1984).

It is especially important to note the well-settled principle that on a motion for summary judgment, the trial court may not try or weigh facts. *Jones v. Stoutenburgh*, 91 So.2d 299, 302 (Fla. 1956); *Booth, supra*. Furthermore, where conflicting inferences may reasonably be adduced from the evidence, even where the evidence itself is not in conflict, the motion for summary judgment should be denied. *Booth*, 182 So.2d at 297.

Further, it is well established in Florida that summary judgment is not favored in most negligence and tort actions. In tort actions, the question of negligence is usually one to be resolved by the jury from the facts and circumstances of the case, and trial courts should be cautious in granting summary judgments in such actions. *Farrey v. Bettendorf*, 96 So.2d 889 (Fla. 1957). *Tisdale v. BP Oil Company*, 622 So.2d 586 (Fla. 1<sup>st</sup> DCA 1993), *Pate v. Gilmore*, 647 So.2d 235 (Fla. 1<sup>st</sup> DCA 1994).

The party moving for summary judgment has the burden of establishing the irrefutability that the non-moving party cannot prevail. It is only *after* the moving party has met this heavy burden that the non-moving party is called upon to show the existence of a genuine issue of material fact. *Hervey v. Elfonso*, 650 So.2d 644 (Fla. 2<sup>nd</sup> DCA 1995). Thus, if the record reflects the existence of any genuine issue of material fact or the *possibility* of any issue, or if the record raises even the *slightest doubt* that an issue might exist, that doubt *must be* resolved against the moving party and summary judgment must be denied. *Id.*

### **Landowners Are Liable for Foreseeable Criminal Attacks**

The owner or occupier of property has a duty to protect an invitee on his premises **from a criminal attack that is reasonably foreseeable**. *Foster v. Po Folks, Inc.*, 674 So.2d 843 (Fla. 5<sup>th</sup> DCA 1996); *Ameijeiras v. Metropolitan Dade County*, 534 So.2d 812 (Fla. 3d DCA 1988), *rev. denied*, 542 So.2d 1332 (Fla.1989). *See also Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491 (Fla.1983), *receded from on other grounds*, *Mobil Oil Corp. v. Bransford*, 648 So.2d 119 (Fla.1995) (an innkeeper owes the duty of reasonable care for the safety of his guests); *Reichenbach v. Days Inn of America, Inc.*, 401 So.2d 1366 (Fla. 5th DCA 1981), *rev. denied*, 412 So.2d 469 (Fla.1982) (an innkeeper may be liable if he fails to take reasonable precautions to deter the type of criminal activity which results in a guest's injury).

As noted in the case of *Michael & Philip, Inc. v. Sierra*, 776 So.2d 294 (Fla 4<sup>th</sup> DCA 2004), the duty to protect strangers against the tortious conduct of others arises in three contexts: **when the defendant has control of:** (a) the instrumentality of the harm; (b) the tortfeasor, himself; or **(c) the premises upon which the tort was committed**. *Id.* at 297 (quoting *Vic Potamkin Chevrolet v. Horne*, 505 So.2d 560, 562 (Fla. 3<sup>rd</sup> DCA 1987)). In this regard, the duty to protect third persons from injuries rests on the party who has the right of possession, custody, and control of the premises, in that the duty to protect others from injury resulting from a dangerous condition on the property rests upon “the right to control access by third parties.” *See Bovis v. 7-11, Inc.* 505 So.2d 661, 664 (Fla. 5<sup>th</sup> DCA 1987).

### **Foreseeability Can Be Established by Notice or Knowledge of Particular Assailant’s Inclination Toward Violence**

The Supreme Court of Florida has addressed the prerequisites for liability of landowners for criminal attacks by third parties in many cases and under many different fact scenarios.

A finding of whether a particular criminal attack was foreseeable depends upon the facts of each individual case. For example in *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983), the Supreme Court of Florida stated:

We have stated that the proprietor of a liquor saloon, although not an insurer of his patrons' safety, is bound to use every reasonable effort to maintain order among his patrons, employees, or those who come upon the premises and are likely to produce disorder to the injury or inconvenience of patrons lawfully in his place of business. *Miracle v. Kriens*, 160 Fla. 48, 33 So.2d 644 (1948). **A determination as to whether this duty has been violated will, of necessity, depend upon a review of the facts of each individual case.** Additionally, the risk of harm must be foreseeable. **This foreseeability requirement has often been met by proving that the proprietor knew or should have known of the dangerous propensities of a particular patron.** See, e.g., *Sabatelli v. Omni International Hotels, Inc.*, 379 So.2d 444 (Fla. 3d DCA 1980). **But specific knowledge of a dangerous individual is not the exclusive method of proving foreseeability. It can be shown by proving that a proprietor knew or should have known of a dangerous condition on his premises that was likely to cause harm to a patron.** *Fernandez v. Miami Jai Alai, Inc.*, 386 So.2d 4 (Fla. 3d DCA 1980). (Emphasis supplied).

Foreseeability of a criminal attack can be established by proving that the landowner had actual or constructive knowledge that a particular attacker had an inclination toward violence. In *Hall v. Billy Jack's, Inc.*, 458 So.2d 760 (Fla. 1984), in a case involving an assault upon a tavern patron by another patron, the Supreme Court of Florida held as follows:

**Foreseeability may be established by proving that a proprietor had actual or constructive knowledge of a particular assailant's inclination toward violence or by proving that the proprietor had actual or constructive**

**knowledge of a dangerous condition on his premises that was likely to cause harm to a patron.** Fernandez v. Miami Jai Alai, Inc., 386 So.2d 4 (Fla.3d DCA 1980). A dangerous condition may be indicated if, according to past experience (i.e., reputation of the tavern), there is a likelihood of disorderly conduct by third persons in general which might endanger the safety of patrons or if security staffing is inadequate. These indicia are not exhaustive. If the lounge management knew or should have known of a general or specific risk to Hall and failed to take reasonable steps to guard against that risk and if, because of that failure, Hall was injured, Billy Jack's may be shown to have breached its duty and may be held financially responsible for Hall's injuries. The question of foreseeability is for the trier of fact. Gibson v. Avis Rent-A-Car System, 386 So.2d 520 (Fla.1980). (Emphasis supplied).

The Supreme Court further stated in *Hall v. Billy Jack's, Inc.*:

If the lounge management **knew or should have known of a general or specific risk to Hall and failed to take reasonable steps to guard against that risk** and if, because of that failure, Hall was injured, Billy Jack's may be shown to have breached its duty and may be held financially responsible for Hall's injuries. The question of foreseeability is for the trier of fact. Gibson v. Avis Rent-A-Car System, 386 So.2d 520 (Fla.1980). (Emphasis supplied).

By their very nature assaults usually occur suddenly and without warning and without giving an opportunity to defend. Therefore, to prevent an assault by one person upon another requires an opportunity arising from some specific knowledge, notice or warning. *Reichenbach v. Days Inn of America, Inc.*, 401 So.2d 1366, at 1369 (Fla. 5th DCA 1981). **Generally, criminal acts have been found foreseeable, creating a duty to prevent them, only when a defendant with a duty knew or should have known that a specific person was likely to assault someone.** *Id.* at Footnote 13.

In *Sparks v. Ober*, 192 So.2d 81 (Fla. 3<sup>rd</sup> DCA 1966), the assailant departed the defendant's premises following an argument, but before leaving, he announced he was going to go get his shotgun, return and shoot the plaintiff. Only ten minutes later, he did just that. The Third District Court of Appeal stated as follows:

The arguments advanced by the appellees in contending the amended complaint failed to state a cause of action have been considered and found to be without merit. What occurred could not be said to have been unforeseeable as a matter of law. **If, on the facts alleged, there existed a question as to foreseeability that the patron Cox would return and resume the affray with a shotgun, after allegedly leaving the premises in the course of an altercation with another patron and announcing such intention, that question would be one to be resolved by the trier of the facts.** The same applies to a question, if one existed, as to foreseeability that if Cox returned with a shotgun and fired it in the place, someone there could be shot. Moreover, the impending danger which it was alleged gave rise to a need for the operator of the premises to take preventive or protective action for the safety of the patrons, was not one depending of foreseeability here because the bartender was cognizant of the danger which the Cox announcement foretold. (Emphasis supplied).

A directed verdict at trial in the same case was reversed in *Sparks v. Ober*, 216 So.2d 483 (Fla. 3<sup>rd</sup> DCA 1968). The Third District Court of Appeal held that there was conflicting evidence of what the attacker said when he left the bar, and that whether or not the bar owner had a duty to take some action to forestall any injury was a question that should have been left for the jury. The opinion stated, **“He might, for example, warn the patrons in the bar, require the other person in the argument to leave the premises, call the police, close the bar or take some other action to reasonably protect the patrons and business invitees in the bar. If he failed to do so, a jury might reasonably conclude that this constituted negligence.”** *Id.*

In the Fourth District Court of Appeal case of *Slawson v. Fast Food Enterprises, Inc.*, 671 So.2d 255 (Fla. 4<sup>th</sup> DCA 1996), the issue of legal duty and foreseeability were not specifically at issue, but the facts are illustrative of the general concept of foreseeability of criminal attack giving rise to a legal duty of a landowner to protect an invitee from criminal attack by a third party. After a 10-hour drive from South Carolina to Florida and working for two hours on some problems with a rental tenant, Mrs. Slawson sought to ease her hunger in the only restaurant she could find still open, a Burger King. At the same time, one Charles Kidd went to the same Burger King following a session of drinking at a number of different bars. Kidd initially made sexual advances to one of the counter clerks, telling her that he would like to “have” the other clerk “on the counter” and otherwise acted “obnoxious[ly]”. Although the incident was reported by the clerk to her supervisor, the manager failed to have Kidd ejected, to call the police, or even merely to continuously monitor him. Ultimately Kidd forced his way into the ladies room and attacked and raped Mrs. Slawson, who suffered permanent injuries. She sued two defendants for the rape: Kidd, the rapist, for the intentional tort of assault and battery; and Burger King for failing to protect a business invitee on its premises from the reasonably foreseeable intentional attack of a third party. *Id.* The jury found that Burger King failed to protect Mrs. Slawson from the attack and awarded damages. Nowhere in the opinion did the Fourth District Court of Appeal express any concern about the existence of a legal duty on the part of Burger King to take action to protect Mrs. Slawson from the attack, given Mr. Kidd’s behavior on their premises that evening.

In *Stevens* the Supreme Court of Florida rejected the argument and notion that knowledge of a particular assailant’s propensity or inclination toward violence was the only way to establish “foreseeability” and thus establish a duty on the part of the landowner to protect an invitee from

criminal attack by a third party. *See Id.* at 35. Rather, the Supreme Court of Florida held that such foreseeability was established by the plaintiff by evidence, *inter alia*, that the location was a “rough place” with a history of violence and that the defendant had terminated security. Incidentally, it is this type of reasoning that led to the line of cases relied upon by Defendant that prior similar incidents of violence is a prerequisite for foreseeability of a criminal attack, and thus the establishment of a legal duty to the victim. Obviously, the cornerstone of legal duty is foreseeability and if, under all the facts and circumstances of a particular case, a criminal attack by a specific and identified person was foreseeable, such foreseeability is all that is required to establish a legal duty to protect the invitee, whether or not there were prior similar incidents, as in *Sparks*..

### **Whether The Criminal Attack Was Foreseeable Is a Jury Question**

The question of foreseeability, and whether an intervening cause is foreseeable, is for the trier of fact. *Stevens v. Jefferson, supra.* In *Foster v. Po Folks, Inc.*, 674 So.2d 843 (Fla. 5<sup>th</sup> DCA 1996) the Fifth District Court of Appeal wrote the following of the standard for trial courts to apply in ruling on motions for summary judgment on the issue of foreseeability of criminal attacks and the duty owed by the landowner:

In ruling on the propriety of a summary judgment order in a negligence case such as this one, the appellate court must read the record in a manner most favorable to the plaintiff or nonmoving party. *Moore v. Morris*, 475 So.2d 666 (Fla.1985); *Nicholls v. Durst*, 579 So.2d 386 (Fla. 5th DCA 1991). **Only if the appellate court determines there is no basis to conclude the criminal attack on a patron was foreseeable, should it affirm.** (Emphasis supplied).

The question of foreseeability, and whether an intervening cause is foreseeable, is for the

trier of fact. *Stevens v. Jefferson, supra*. As mentioned above in *Sparks*, the appellate court held that whether Mr. Cox's return with a shotgun, after his threat to do so, rendered his attack reasonably foreseeable, was a question for the jury. The Third District Court of Appeal stated:

**If, on the facts alleged, there existed a question as to foreseeability that the patron Cox would return and resume the affray with a shotgun, after allegedly leaving the premises in the course of an altercation with another patron and announcing such intention, that question would be one to be resolved by the trier of the facts. *Sparks v. Ober, supra*.**

As in *Sparks*, as well as in *Slawson*, the instant case involves behavior, conduct and statements by a specific assailant that give rise to a question of fact for the jury as to whether a criminal attack by the assailant was reasonably foreseeable by the landowner, giving rise to a duty to protect an invitee, like Mr. Sutton, by ejecting the assailant from the premises, calling law enforcement authorities for assistance, or, at a minimum, warning the invitee, Mr. Sutton in this case, of the potential danger.

While Defendant and its witnesses now may deny that they believed Mr. Smith was serious about his threat to batter Mr. Sutton, contend they did not take his threat seriously, or otherwise downplay the threat, Plaintiffs have established by deposition testimony and prior statements given to an investigator hired by Plaintiffs during the criminal investigation of Mr. Smith that, in fact, Defendants either did take the threat seriously at the time or should have taken it seriously. At a bare minimum, there is a genuine issue of material fact as to whether Defendant's employees indeed took the threat seriously at the time or whether they should have taken it seriously. Plaintiff has established record evidence from which a jury could conclude that Anthony Smith, Mr. Sutton's assailant, announced to Defendant's employee, Ernie Hickman, that he intended to harm Mr. Sutton and that the employee took it seriously enough to

tell Mr. Smith to do it in the parking lot, rather than the loading dock, and even to spread the word among other employees that the threat had occurred or the battery may occur. Yet, no one took any action to either warn Mr. Sutton of the threat or protect him from the assault and battery which has left him with serious injuries.

Any question of foreseeability of the criminal attack in this case is for the jury. Defendant's Motion for Summary Judgment should be denied since a question of fact remains as to whether Defendant's employees knew or should have known that Anthony Smith's attack upon Eddie Sutton was reasonably foreseeable.

As in *Sparks v. Ober*, the foreseeability of the criminal attack upon Mr. Sutton by Anthony Smith is one for the jury. It has been established, viewing the evidence in the light most favorable to Plaintiff, that Mr. Smith announced his intention to harm Mr. Sutton, an invitee, while upon Defendant's premises, and that Defendant, its agents, servants and employees failed to take any action to either warn Mr. Sutton or protect him from the attack. Rather, Defendant's employee told Anthony Smith he should commit the assault in the parking lot, rather than on the loading dock, while never bothering to take any action to forestall the attack, call law enforcement authorities, order Mr. Smith off the premises, or even warn Eddie Sutton of the threat.

It is of no moment that there is no evidence of prior similar incidents of violence on Defendant's premises where, as here, there was a specific threat of harm under circumstances making the attack reasonably foreseeable, or at a minimum, making the foreseeability of the attack and Defendant's opportunity to forestall it, prevent it, or warn of it, a question of fact for the jury.

### **Summary Judgment Is Premature**

Pursuant to Rule 1.510(f), Plaintiffs further argue that the summary judgment hearing is premature. Through no fault of the Plaintiff, discovery has not been conducted or completed. *A & B Pipe and Supply Co. v. Turnberry Towers Corp.*, 500 So.2d 261 (Fla. 3<sup>rd</sup> DCA 1987) (depositions were pending); *Singer v. Star*, 510 So.2d 637 (Fla. 4<sup>th</sup> DCA 1987); *Commercial Bank of Kendall v. Heiman*, 322 So.2d 564 (Fla. 3<sup>rd</sup> DCA 1975); *Cullen v. Big Daddy's Lounges, Inc.*, 364 So.2d 839 (Fla. 3<sup>rd</sup> DCA 1978); *Societe Euro-Suisse, S.A. v. Citizens and Southern International Bank*, 394 SO.2d 533 (Fla. 3<sup>rd</sup> DCA 1981); *Brandauer v. Publix Super Markets, Inc.* 657 So.2d 932 (Fla. 2<sup>nd</sup> DCA 1995); *Erace v. Erace*, 683 So.2d 1114 (Fla. 3<sup>rd</sup> DCA 1996); and, *Arguelle v. City of Orlando*, 855 So.2d 1202 (Fla. 5<sup>th</sup> DCA 2003).

In fact, Plaintiffs counsel suggested to defense counsel during the scheduling of depositions that the deposition of the private investigator who took sworn statements of many of the witnesses was a material deposition, the transcript of which would be material evidence for the Court to consider in ruling upon Defendant's Motion for Summary Judgment. That deposition is scheduled for a date AFTER the hearing on Defendant's Motion for Summary Judgment which was unilaterally set for October 1, 2008 over Plaintiffs' counsel's objection. As the First District has noted:

A summary final judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact, and in addressing this issue the court must construe all inferences against the moving party. ...

Because the factual underpinnings are critical, . . . the courts should be reluctant to grant summary judgment before the opposing party has an adequate opportunity for meaningful discovery. In opposing summary judgment below, appellant's counsel emphasized to the court that discovery in the case was "still in its infancy," no depositions had yet been taken, and that it was premature to grant summary judgment. We agree with appellant that it was error to grant summary judgment before allowing appellant an opportunity for meaningful discovery.

[citations omitted]

*Ray's Plumbing Contractors, Inc. v. Trujillo Const., Inc.*, 847 So.2d 1086, 1088 (Fla. 1<sup>st</sup> DCA 2003). This is yet another reason Defendant's Motion For Summary Judgment should be denied.

### **Conclusion**

For the foregoing reasons, there exist genuine issues of material fact from which the jury could conclude that the criminal attack upon Plaintiff was foreseeable and that Defendant owed a legal duty to warn Plaintiff or take action to protect him from the attack. Moreover, summary judgment is premature in that material discovery is incomplete. Accordingly, Defendant's Motion for Summary Judgment should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S.  
Mail – postage paid, this \_\_\_\_\_ day of September, 2008, to: John W. Lewis, Esq., P.O. Box 280, 1715  
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