Michael A. Dibble, Esq.

Reply to:

Michael A. Dibble, Attorney at Law
P.O. Box 952146
Lake Mary, Florida 32795

Telephone: (407) 474-2639
E-Mail: michaeldibble@bellsouth.net

January 27, 2009

Atty. John Doe
P.O. Box 0000
Holiday, FL 00000

Re: **Smith Due Diligence Memo**

Dear Atty. Doe:

Per your request, I have prepared this memo regarding the viability of your client's (Tim Smith) negligence claim against Jane Roe, the owner of the premises where Roe's invitee (Steven Johnson) shot and permanently injured Smith, Roe's neighbor. The issue presented is whether the factual circumstances expose Defendant Roe to vicarious liability for the actions of Johnson.

The general rule in Florida is that a defendant has no legal duty to control the conduct of a third party to prevent that person from causing harm to another. **Aguila v. Hilton, Inc., 878 So.2d 392, 398 (Fla. App. 1st DCA 2004); Michael & Philip, Inc. v. Sierra, 76 So.2d 294, 297 (Fla. App. 3rd DCA 2000)**. Nonetheless, Florida courts have carved out at least two (2) exceptions under which a defendant may be found to have assumed such a duty.

a. "Special Relationship"

Under Florida law, if there exists a "special relationship" between the defendant and the third party/tortfeasor, the defendant may be found to have assumed a legal duty to prevent the third party from injuring another. Although there exists case law identifying the landowner-invitee relationship as a "special relationship", **Gross v. Family Servs. Agency, Inc., 716 So.2d 337, 339 (Fla. App. 4th DCA 1998), aff'd sub nom., Nova Southeastern Univ. v. Gross, 758 So.2d 86 (Fla. 2000)**, such "special relationship", by definition, must include the right or the ability to control the third party's conduct. **Aguila v. Hilton, Inc., supra, 878 So.2d at 399; Garrison Retirement Home Corp. v. Hancock, 484 So.2d 1257, 1261 (Fla. App. 4th DCA 1985)**. In this case, there appears to be is no evidence that Roe had either "the right or the ability" to control Johnson's criminal conduct. As such, I believe the complaint correctly omits any reference to Roe's liability arising from a "special relationship" between Roe and Johnson.

b. Actual/Constructive Control of Instrumentality/Premises/Tortfeasor

Even in the absence of a special relationship, a defendant's duty to protect persons from the tortious conduct of another can arise if, at the time of the injury, the defendant is in actual or constructive control of (i)

the instrumentality, (ii) the premises on which the tort was committed, or (iii) the tortfeasor. **T.W. v. Regal Trace, Ltd., 908 So.2d 499, 503 (Fla. App. 4th DCA 2005); Aguila v. Hilton, Inc., supra, 878 So.2d at 398; Vic Potamkin Chevrolet, Inc. v. Horne, 505 So.2d 560, 562 (Fla. App. 3rd DCA 1987)**. Although Roe was plainly not in control of either the instrumentality (gun) or the tortfeasor (Johnson), she was in control of the subject premises based upon her ownership of same. As such, Plaintiff's claim against Roe is governed by this exception to the "no duty to control actions of third party" rule mentioned above, and therefore Plaintiff's claim against Roe should be subject to a traditional negligence analysis.

To state an actionable negligence claim against Roe, Plaintiff must plead and prove the following elements:

-duty [whether Roe, by inviting Johnson upon her property with knowledge of the particular factual circumstances at issue, foreseeably created a broader zone of risk that posed a general threat of harm to others. **Florida Power & Light Co. v. Periera, 705 So.2d 1359, 1361 (Fla. 1998); McCain v. Florida Power Corp., 593 So.2d 500, 502 (Fla. 1992)**];

-breach [whether Roe breached her duty by failing to take sufficient precautions to protect others from the harm that the risk posed. **McCain v. Florida Power Corp., supra, 593 So.2d at 503**];

-causation [whether Roe's breach of duty foreseeably and substantially caused the specific injury that actually occurred. **Florida Power & Light Co. v. Periera, supra, 705 So.2d at 1361; McCain v. Florida Power Corp., supra, 593 So.2d at 502**]; and

-injury [whether Plaintiff suffered compensable injury as a proximate result of Roe's negligent conduct].

In vicarious liability scenarios such as the one presented in this case, Florida courts repeatedly link a defendant's creation of a foreseeable "zone of risk" to defendant's knowledge of the tortfeasor's dangerous propensities. **See Stevens v. Jefferson, 436 So.2d 33, 34 (Fla. 1983)**("[t]his foreseeability requirement has often been met by proving that the proprietor knew or should have known of the dangerous propensities of a particular patron"); **Crown Liquors of Broward, Inc. v. Evenrud, 436 So.2d 927, 930 (Fla. App. 2nd DCA 1983)**(tavern owner not liable for injuries sustained by patron struck by another patron where "there was no warning that [the tortfeasor] had violent propensities or of any impending violence by [the tortfeasor]"); **Cardounel v. Shell Oil Co., 397 So.2d 328, 329 (Fla. App. 3rd DCA 1981)**(oil company not liable for gas station operator's shooting of customer where oil company had no notice of "particular facts that would have put it on notice of [operator's] dangerous propensities").

In this case, a jury could reasonably find Roe had sufficient knowledge both that (i) she was inviting a man with "dangerous propensities" onto her property, and that (ii) this man would, if given the opportunity, cause the specific injury that actually occurred. In this regard, Roe knew that Johnson was a drug dealer, had a history of violent encounters, routinely carried a firearm, and, most importantly, had an ongoing dispute with your client, who was dating Johnson's ex-girlfriend. As such, on these facts, a cognizable argument exists that, by inviting Johnson onto her property, Roe both "foreseeably created a broader zone of risk that posed a general threat of harm to others", and "foreseeably and substantially caused the specific injury that actually occurred." **McCain v. Florida Power Corp., supra, 593 So.2d at 502**.

Under Florida law, a defendant who creates a foreseeable zone of risk has a duty "either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." **McCain v. Florida Power Corp., supra, 593 So.2d at 503; Aguila v. Hilton, Inc., supra, 878 So.2d at 398**. In this case, however, Roe arguably breached her duty by failing to warn Smith of the "dangerous condition" upon

her property, and thus failed to "see that sufficient precautions [were] taken to protect [Smith] from the harm that the risk poses." **Aguila v. Hilton, Inc., supra, 878 So.2d at 398**.

In summary, it is my opinion that Smith has a non-frivolous negligence claim against Defendant Roe. Thank you for allowing me to assist you regarding this project.

Atty. Michael A Dibble