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**HONORABLE PARIS KALLAS**  
**Hearing Date/Time: October 31, 2008 at 10:00 a.m.**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BENJAMIN BERNI, individually,

NO. 08-2-14963-3 SEA

Plaintiff,

v.

WARWICK CORP., a Washington  
corporation,

DEFENDANT WARWICK  
CORPORATION'S COUNTER-MOTION  
FOR SUMMARY JUDGMENT

Defendant

**I. RELIEF REQUESTED.**

An Order denying plaintiff's motion for summary judgment and dismissing plaintiff Benjamin Berni's (hereafter "Berni") Complaint (*Ex. "1" to Dec. of Eric Johnson*) against Warwick Corporation ("Warwick") upon this counter-motion for summary judgment. Warwick brings this motion in opposition to plaintiff's motion for summary judgment and for judgment reserving its right to file any additional documents in opposition to plaintiff's motion in accordance with the civil rules.

1 **II. FACTS.**

2 **Berni Goes to the Warwick Hotel:**

3 The Warwick is a forty-five unit hotel in a nineteen floor building in downtown Seattle.  
4 On or about May 12 and 13, 2006, several students of Roosevelt High School were registered  
5 guests at the hotel coinciding with the school's prom festivities occurring over the weekend in  
6 Seattle. (*Dec. of Jacob Yi*).

7 Mr. Berni was not an attendee of Roosevelt High School and had never attended the  
8 school. Rather, Berni had attended Nathan Hale High School graduating from Nathan Hale in  
9 2005.<sup>1</sup> (*Berni Supplemental Response to Warwick Interrogatory No. 7, Ex. "2" to Dec. of Eric*  
10 *Johnson*). On May 12 and 13, 2006, Mr. Berni was also not a registered guest at the Warwick  
11 and was not invited into the hotel by the Warwick or any personnel employed by the Warwick.  
12 (*Declaration of Jacob Yi*). Instead, Berni contends that he was invited into the hotel by  
13 unidentified "registered guests of the hotel" who had attended prom and were hosting an "after  
14 prom" party or parties in their room(s). (*Berni Response to Warwick Interrogatories Nos. 37 and*  
15 *38, Ex. "3" to Dec. of Eric Johnson*). Prior to arriving at the Warwick at 11:30 p.m. on May 12,  
16 2008, Berni claims to have drunk four beers at Cowan Park in Seattle accompanied by a friend  
17 named Andy . While at the Warwick, Berni admittedly consumed another two glasses of  
18 champagne while inside an unidentified suite at the hotel.<sup>2</sup> (*Berni Response to Warwick*  
19 *Interrogatory No. 18, Ex. "4" to Dec. of Eric Johnson*).

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22 <sup>1</sup> Nonetheless, in support of his motion, Berni declares that on May 12, 2006 that he was attending an "after prom"  
party with classmates at the Warwick Hotel. (*Dec. of Berni, para. 2*).

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24 <sup>2</sup> Berni later reportedly told admitting personnel at Harborview Medical Center that he had bloodied his face in an  
25 elevator at the hotel and that because he was "drinking too much" and "partying" that he did not recall what  
happened. At Harborview, Berni was diagnosed with, among other things, "alcohol persistent dementia". (*Dec. of*  
*Eric Johnson and Ex. "5" thereto*).

1                    **Berni Departs From What He Describes As Dangerous Condition(s) At The**  
2                    **Warwick.**

3                    Berni asserts he went to hotel room where a party was underway and that “attendees”  
4                    were underage and that alcohol was being consumed. (*Dec. of Berni*) Berni observed “party  
5                    patrons” throwing items off the balcony onto the street and cars below and he asked them to stop.  
6                    (*Dec. of Berni*) Berni also reportedly saw Warwick security come to the door of the room and  
7                    speak with the “person who rented the room.” (*Dec. of Berni*). In his answers to the Warwick’s  
8                    interrogatories, Berni characterizes these observations as constituting dangerous conditions at the  
9                    hotel. (*Berni Response to Warwick Interrogatory No. 43, Ex. “7” to Dec. of Eric Johnson*). Berni  
10                    reportedly left the hotel room and “party” at around 2:00 a.m. on May 13, 2006. (*Dec. of Berni*).

11                    **Berni Voluntarily Returns To The Alleged Dangerous Condition(s).**

12                    At approximately 4:30 a.m. on May 13, 2006, Berni planned to return to the hotel room  
13                    that he considered “dangerous” leaving an undisclosed location on a lower floor of the hotel. He  
14                    reportedly climbed a stairwell to the find the door of the room closed. Berni apparently knocked  
15                    and the door opened slightly but he was denied entry to the room. (*Berni Response to Warwick*  
16                    *Interrogatory No. 43, Ex. “7” to Dec. of Eric Johnson*). Berni asserts that when he turned to  
17                    leave that he was struck repeatedly by Mr. Gilmore and suffered personal injuries as a result.  
18                    (*Berni Response to Warwick Interrogatories Nos. 44 and 47, Ex. “7” to Dec. of Eric Johnson;*  
19                    *Dec. of Berni*).

20                    **Berni’s Theory Against The Warwick.**

21                    Despite what Berni describes as a violent assault and battery by Joey Gilmore, Berni  
22                    contends that only the Warwick is responsible his injuries allegedly inflicted by Mr. Gilmore.  
23                    (*Berni Response to Warwick Interrogatory No. 18, Ex. “8” to Dec. of Eric Johnson*). Berni  
24                     
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1 asserts that the Warwick had a duty to inspect for dangerous conditions at its hotel and to protect  
2 him against dangers of which *it was aware or should have been aware*. (See *Complaint, paras.*  
3 *4.3 and 4.4*, Ex. “1” to Dec. of Eric Johnson). Berni identifies the “dangerous condition” as a  
4 hotel room containing “party attendees” who, according to Berni’s observations, inebriated; and  
5 where Berni had witnessed unidentified items being thrown from the balcony. (*Berni Response*  
6 *to Warwick Interrogatory No. 43, Ex. “7” to Dec. of Eric Johnson*). Berni contends that  
7 Warwick personnel had actual or constructive notice of these alleged dangerous condition(s) and  
8 nonetheless failed to protect him.

9  
10 **Evidence Of What Warwick Personnel Actually Knew.**

11 The Warwick was aware that Roosevelt High was holding its prom the weekend of May  
12 12 and 13, 2006 and that some prom attendees were staying at the hotel. (*Dec. of Jacob Yi*)  
13 Consequently, Warwick personnel anticipated that an unusual number of young people would be  
14 staying at or visiting the hotel. (*Dec. of Jacob Yi*) However, the Warwick did not promote or  
15 authorize any prom activities or parties to occur at the Warwick. (*Dec. of Jacob Yi*) In fact,  
16 security was heightened in an effort to try to identify any noise disturbances or illegal activity  
17 that could arise from activities and events associated with prom season. (*Dec. of Jacob Yi*)  
18 Warwick personnel also denied entry to the hotel of persons not authorized and accompanied by  
19 registered guests. (*Dec. of Jacob Yi*).

20 On May 12 and 13, 2008, Warwick security officers and management patrolled the  
21 corridors and locations open to view in an effort to identify any offending behavior. Verbal  
22 warnings and counseling were used to remind guests of the importance of following the law and  
23 in respecting the rights of other guests. (*Dec. of Charles Corey; Dec. of Jacob Yi*). If necessary,  
24 the police were summoned to stop or evict persons positively identified as breaking hotel rules or  
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1 the law. (*Dec. of Charles Corey; Dec. of Jacob Yi*). On two occasions in the early morning hours  
2 of May 13, 2006, Warwick personnel summoned police to remove persons who were not  
3 authorized to be on hotel premises or to evict adult guests drinking around minor guests in the  
4 hotel's pool area. (*Dec. of Charles Corey and Ex. "1" thereto; Dec. of Jacob Yi and Ex. "1"*  
5 *thereto*).

6 In the morning hours of May 13, 2006, Warwick security and Warwick's 'night  
7 manager', Mr. Corey, also responded and investigated complaints of noise and items being  
8 thrown from unidentified balconies at the hotel. (*Dec. of Charles Corey; Dec. of Jacob Yi*).  
9 However, Warwick personnel did not receive any specific information about the identity of  
10 possible offenders or their location. The location from which the items were thrown could not be  
11 determined. (*Dec. of Charles Corey; Dec. of Jacob Yi*). In an effort to locate the source of the  
12 misbehavior, Mr. Corey accompanied by security spoke to the registered guests where it was  
13 suspected the activities may have occurred. (*Dec. of Charles Corey*) Mr. Corey warned these  
14 guests about the importance of complying with hotel rules and the law, as well as the possible  
15 consequence of eviction for violations. (*Dec. of Charles Corey*) The guests denied that any  
16 persons inside their rooms were misbehaving and provided assurances that they and any of their  
17 visitors would comply with all rules the law. (*Dec. of Charles Corey*)

18 Warwick personnel did not observe the consumption of alcohol by minors or any  
19 apparent intoxication of minors on May 12 and 13, 2006. (*Dec. of Charles Corey; Dec. of Jacob*  
20 *Yi*). If they had, efforts would have been made to stop any such activity including again using  
21 police enforcement if necessary and such evidence would have been documented. (*Dec. of*  
22 *Charles Corey; Dec. of Jacob Yi*).

1 Warwick security noted in their time/activity log book that the hotel was ‘quieted down’  
2 as of 3:40 a.m. on May 13, 2006. However, at approximately 4:30 a.m., a noise was heard near  
3 one of the hotel elevators. When the elevator was opened, Mr. Corey and Warwick security  
4 found Mr. Berni injured and unconscious and accompanied by one Andy Burr who appeared to  
5 be highly intoxicated. (*Dec. of Jacob Yi; Dec. of Charles Corey*). The police and a medic unit  
6 responded and at approximately 4:46 a.m. on May 13, 2008, Mr. Berni was transported to  
7 Harborview Medical Center. (*Dec. of Eric Johnson and Ex. “6” thereto*).

8 It was later determined that Mr. Berni was not a registered guest at the hotel. (*Dec. of*  
9 *Jacob Yi*). Berni’s location at the time he suffered his injuries and the identity of any registered  
10 guest who invited him on the premises could not be determined. (*Dec. of Jacob Yi*)

11 Following the institution of plaintiff’s suit, in discovery proceedings it was learned by  
12 Warwick personnel that Berni may have been assaulted by one Joey Gilmore somewhere on  
13 hotel premises. (*Dec. of Eric Johnson and Ex. “6” thereto*). Mr. Gilmore was unknown to the  
14 Warwick and he was not a registered guest of the hotel on May 12 or 13, 2006. (*Dec. of Jacob*  
15 *Yi*). The Warwick also had no history of similar attacks at the hotel. (*Dec. of Jacob Yi*).

### 17 **III. STATEMENT OF ISSUES.**

#### 18 **1. Whether this Court should deny plaintiff’s motion for summary judgment and** 19 **grant Warwick’s counter-motion for summary judgment.**

- 20 **A) Berni’s Motion and Action Fail For Lack of Evidence Of ‘Duty’.**
- 21 **B) Berni’s Motion and Action Fail For Lack of Evidence Of “Breach” and**  
22 **“Causation”.**
- 23 **C) Berni’s Motion and Action Should Also Be Denied Because of Berni’s Primary**  
24 **Implied Assumption Of The Risk.**
- 25 **D) Conclusion: Warwick is entitled to judgment as a matter of law.**

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**IV. EVIDENCE RELIED UPON.**

Declaration of Jacob Yi with attached exhibits.

Declaration of Charles Corey with attached exhibits.

Declaration of Eric B. Johnson with attached exhibits.

**V. AUTHORITY AND ARGUMENT.**

**SUMMARY JUDGMENT STANDARD.**

Summary judgment is properly granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.” Civil Rule 56(c).

After Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (overruled on other grounds by Young v. Key Pharmaceuticals, Inc., 130 Wn.2d 160, 922 P.2d 59 (1996) which adopted the rationale of Celotex Corp. v. Catrett, 447 U.S. 317, 325, (1986), a defendant may move for summary judgment by simply indicating the plaintiff has failed to support an element of its case:

[A] defendant moving for summary judgment now has a choice: a defendant can attempt to establish through affidavits that no material fact issue exists or, alternatively, the defendant can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of his case or her case. Young, at 225 and n.1; White at 170. If a defendant chooses the latter alternative, the requirement of setting forth specific facts does not apply. The reason for this result is that “a complete failure of proof concerning an essential element of a nonmoving party’s case necessarily renders all other facts immaterial.”

Celotex, 447 U.S. at 323.

1 The whole purpose of summary judgment would be defeated if a case could be forced to  
2 trial by a mere assertion that an issue exists without a showing of evidence sufficient to support a  
3 prima facie case. See Geppert v. State, 31 Wn.App. 33, 40 (1982).

4 **1. WHETHER THIS COURT SHOULD DENY PLAINTIFF'S MOTION FOR**  
5 **SUMMARY JUDGMENT AND GRANT WARWICK'S COUNTER-MOTION FOR**  
6 **SUMMARY JUDGMENT.**

7 **A) Berni's Motion and Action Fail For Lack of Evidence Of 'Duty'.**

8 Berni cites Miller v. Staton, 58 Wn.2d 879 (1961) and Niece v. Elmview Group Home,  
9 131 Wn.2d 39 (1997) for the proposition that the Warwick owed him a duty as a "guest" of the  
10 hotel to protect him from injury at the hands of another guest. However, unlike the bar patrons  
11 in Miller<sup>3</sup> neither Berni nor Mr. Gilmore were guests of the Warwick, registered or otherwise  
12 and Berni presents no evidence to the contrary. (*Dec. of Jacob Yi; Berni Response to Warwick*  
13 *Interrogatory No. 18, Ex. "4" to Dec. of Eric Johnson*). Berni admittedly graduated in 2005  
14 from a school different than those attending the prom and staying at the Warwick. (*Berni*  
15 *Supplemental Response to Warwick Interrogatory No. 7, Ex. "2" to Dec. of Eric Johnson; Dec.*  
16 *of Jacob Yi*) It is unclear why any registered guest from Roosevelt High might invite Berni to an  
17 alleged "after prom" party especially at 4:30 a.m. In fact, Berni admits that he was denied entry  
18 to the alleged party at that time. (*Dec. of Berni*). Berni also admits that he did not pay the  
19 Warwick money to stay overnight and was not a registered guest. (*Berni Response to Warwick*  
20 *Interrogatory No. 37, Ex. "3" to Dec. of Eric Johnson*). Berni claims he was invited to the hotel  
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24 <sup>3</sup> In Miller, it was undisputed that the parties were paying customers and dancing in a bar at the owner's invitation.  
25 The Niece case is even more off point. Niece involved a plaintiff who was developmentally disabled and whose  
care was entrusted to a defendant nursing home who was paid for services provided.



1 by unidentified guests of the Warwick but even if this were true it would not support his bald  
2 claim that he was a guest or invitee of the Warwick.<sup>4</sup>

3 Berni by citing Bernethy v. Walt Faylor's, Inc., 97 Wn.2d 929 (1982) suggests that he  
4 may qualify as a business invitee of the "innkeeper" Warwick. The Bernethy case, however, did  
5 not involve an "innkeeper" at all but rather was a negligent entrustment case where the court held  
6 that a gun shop owner may be liable to a third party for supplying a firearm to an intoxicated  
7 patron. Id. The Bernethy case only serves to highlight seemingly deceptive argumentation by  
8 counsel and the fact that Berni did not have the requisite legal status to invoke any duty of  
9 protection on the part of the Warwick. The Warwick did not invite Berni and there is no  
10 evidence or even argument that his presence served any business purpose of the Warwick. (*Dec.*  
11 *of Jacob Yi*). In Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192 (1997), the Washington  
12 Supreme Court expressly adopted the Restatement (Second) of Torts Section 344 (1965), which  
13 limits any duties to protect others from third-party criminal conduct to the owner's invitee(s).  
14 An "invitee" enters the business premises for the economic benefit of the business.<sup>5</sup>

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19 <sup>4</sup> Mere conclusions of law or fact, or speculative statements, are not admissible evidence for summary  
20 judgment purposes. CR 56(e); Space Needle v. Kamla, 105 Wn.App. 123 (2001); Blomster v. Nordstrom,  
Inc., 103 Wn.App. 252 (2000).

21 <sup>5</sup> Also, an invitee retains the status of an invitee only while he is on the part of the land to which his invitation  
22 extends. See Restatement (Second) of Torts Section 332, Comment 1; Tincani v. Inland Empire Zoological Soc., 92  
23 Wn.App. 297 (1994). Even if Berni argued that because a registered guest allegedly invited him to a room and that  
24 because of any such invitation he also became the hotel's invitee, any such argument is unsupported in law or fact.  
25 Berni admits that he left the room where he was allegedly invited and tried to return hours later at about 4:30 a.m.  
but was denied admittance or invitation to enter. The Warwick also was not open to the public and Berni was not  
authorized admittance without express authority of and accompaniment by a registered guest. (*Dec. of Jacob Yi*;  
*Dec. of Charles Corey*). The Warwick obtained no economic benefit from Berni's presence and he was a trespasser  
when he was assaulted.

1 **B) Berni’s Motion and Action Fail For Lack of Evidence Of “Breach” and**  
2 **“Causation”.**

3 Even if Berni had evidenced some arguable basis to establish duty, the breach and  
4 causation elements of his cause of action cannot be established because the criminal conduct of  
5 third person(s) must involve “imminent criminal harm and reasonably foreseeable criminal  
6 conduct by third persons”. See Nivens v. 7-11 Hoagy’s Corner, 133 Wn.2d 192, 205 (1997).  
7 Criminal conduct of third parties is rarely foreseeable.<sup>6</sup> See Nivens, 133 Wn.2d at 205 note 3.  
8 While determination(s) of foreseeability are usually left for jury determination, if the damage  
9 complained of falls entirely outside the general threat of harm that the plaintiff claims makes the  
10 party’s conduct negligent, there can be no breach or causation of damages. See Fuentes v. Port of  
11 Seattle, 119 Wn.App. 864 (2003); McLeod v. Grant County Sch.Dist.No. 128, 42 Wn.2d 316  
12 (1953). In Fuentes, the plaintiff sued the government when she was injured during a  
13 ‘carjacking’ at an airport’s pick-up drive for passengers. The plaintiff claimed that the  
14 government failed to provide adequate security for invitees using the pick-up drive and pointed  
15 to a pattern of car prowlers working the unoccupied cars in the airport’s garage as proof. The  
16 court in Fuentes, however, determined as a matter of law that the car prowling misconduct was  
17 too different from the harm causing event to establish foreseeability, breach and/or causation. Id.  
18 at 870-871.

19 Similarly, in the present case, Berni does not describe the beating by Mr. Gilmore or even  
20 a pre-existing propensity of Gilmore to beat him<sup>7</sup> as the misconduct of which the Warwick  
21 allegedly had *notice* and failed to prevent. Rather, Berni defines the allegedly relevant criminal  
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24 <sup>6</sup> See e.g., Christen v. Lee, 113 Wn.2d 479 (1989) (criminal assault not a foreseeable consequence of furnishing  
25 intoxicating liquor).

1 harm or danger based upon observations that he made inside a room sometime before 2:00 a.m.  
2 on May 13, 2006 consisting of **persons throwing items off a balcony onto the street and cars**  
3 **below and of alleged “underage” consumption of alcohol.** (*Dec. of Berni, paras. 2-8; Berni*  
4 *Response to Warwick Interrogatory No. 18, Ex. “4” to Dec. of Eric Johnson*). Berni speculates  
5 that Warwick personnel had *notice* of this misconduct stating that he saw “Warwick security”  
6 was at the door of the room speaking with the “person who rented the room”. (*Dec. of Berni,*  
7 *para. 6*). None of the foregoing factual allegations, however, even if they were supported with  
8 some form of admissible evidence, suffice for the purposes of proving foreseeability that Berni  
9 would be pummeled hours later. The alleged criminal misconduct of which Warwick allegedly  
10 had *notice* was simply not “imminent” to the injury or damage sustained by Berni, but rather  
11 remote, disconnected and entirely outside the general threat of harm that Berni claims makes the  
12 Warwick’s conduct negligent (and due to the alleged *notice* received). See Fuentes v. Port of  
13 Seattle, 119 Wn.App. 864 (2003). According to Berni, the alleged battery by Mr. Gilmore  
14 occurred at least two and one-half hours after Berni left the scene of the misconduct he had  
15 observed earlier and only after voluntarily returning to a place he apparently thought was  
16 dangerous. (*Dec. of Berni; Berni Responses to Interrogatories, Ex. “7” to Dec. of Eric Johnson*).

17  
18 Even if Berni could provide some evidentiary support for elements of duty, breach and  
19 causation, his motion for summary judgment would have no merit because the Warwick has  
20 produced ample evidence that its response to the security issues raised by Berni were not  
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22 <sup>7</sup> Berni also doesn’t allege or evidence that the Warwick was familiar with any dangerous individual(s) with  
23 propensities to commit assault on hotel premises or that a history of assaults at the Warwick. Where there is no  
24 evidence that a defendant knew of the dangerous propensities of an individual responsible for a crime and there is no  
25 history of such crimes on the premises, the criminal conduct is unforeseeable as a matter of law. See Raider v.  
Greyhound Lines, 94 Wn.App. 816 rev. den. 138 Wn.2d 1011 (1999); Wilbert v. Metro Park Dist of Tacoma, 90  
Wn.App. 304 (1998).

1 negligent but were rather careful and proper. (*See e.g., Dec. of Charles Corey; Dec. of Jacob Yi*)  
2 Berni also frames the issue as whether the Warwick failed to protect Berni from a group of  
3 rowdy and violent underage drinkers of which Warwick had ‘actual knowledge’. However, as  
4 supported by the Declarations of Jacob Yi and Charles Corey, the Warwick had no ‘actual  
5 knowledge’ of any such ‘group’ despite ongoing and diligent observation and investigation on  
6 the dates in question. Berni bases his assertion of ‘actual knowledge’ of ‘rowdy and violent  
7 underage drinkers’ on pure speculation. (*Dec. of Berni*) The Warwick’s evidence proves  
8 otherwise. (*Dec. of Charles Corey; Dec. of Jacob Yi*). The issue of foreseeability which is  
9 critical the issues of duty, breach and causation of damages is measured by what a defendant  
10 *actually knew* not that which is merely conceivable. *See e.g. Margaret W. v. Kelley R.*, 139  
11 Cal.App. 4<sup>th</sup> 141 (2006) (*attached as Ex. “9” to Dec. of Eric Johnson*).

12  
13 **C) Berni’s Motion and Action Should Also Be Denied Because of Berni’s  
Implied Primary Assumption Of The Risk.**

14 The only person with apparent actual knowledge of any danger Berni confronted in trying  
15 to return to the scene of alleged ‘rowdy and violent underage drinkers’ he witnessed inside the  
16 room is Berni himself. Further, Berni admits that he was an underage drinker of alcohol. (*Berni  
17 Response to Warwick Interrogatory No. 18, Ex. “4” to Dec. of Eric Johnson*) Under these  
18 facts, Berni’s action should also be barred by his implied primary assumption of the risk even if a  
19 duty on the part of Warwick was established. Implied primary assumption of the risk applies  
20 where plaintiff has impliedly consented to relieve a defendant of a duty to plaintiff regarding  
21 specific known and appreciated risks. *See Erie v. White*, 92 Wn.App. 297 (1998).

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23 **VI. CONCLUSION.**

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For all of the foregoing reasons, plaintiff's motion for summary judgment should be denied and his complaint should be dismissed with prejudice upon Warwick's counter-motion for summary judgment granted. A proposed Order has been filed with this motion.

Respectfully submitted this 3rd day of October, 2008.

LAW OFFICES OF ERIC BRIAN JOHNSON

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ERIC B. JOHNSON, WSBA No. 19340  
Attorney for Defendant Warwick Corporation