

SC 83718

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IN THE SUPREME COURT OF MISSOURI

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L.A.C., a minor, by and through  
her Next Friend, DINA CANNON  
Appellant,

vs.

WARD PARKWAY SHOPPING CENTER  
COMPANY, L.P., W.S.C. ASSOCIATES,  
L.P., IPC INTERNATIONAL  
CORPORATION, and  
G.G. MANAGEMENT COMPANY, INC.,  
Respondents.

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SUBSTITUTE BRIEF OF RESPONDENTS  
WARD PARKWAY SHOPPING CENTER COMPANY, L.P.,  
W.S.C. ASSOCIATES, L.P., and  
G.G. MANAGEMENT COMPANY, INC.,

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On Transfer from the Missouri Court of Appeals, Western District  
Case No. WD 58111  
Spinden, C.J., and Ulrich and Smith, JJ

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COMPANY, L.P., W.S.C. ASSOCIATES, L.P.,  
AND G.G. MANAGEMENT COMPANY, INC.



**TABLE OF CONTENTS**

I. TABLE OF AUTHORITIES ..... iv

II. JURISDICTIONAL STATEMENT .....1

III. POINTS AND AUTHORITIES RELIED ON .....2

IV. STANDARD OF REVIEW .....3

V. RESPONSE TO PLAINTIFF’S SUMMARY OF THE CASE .....4

VI. RESPONSE TO PLAINTIFF’S STATEMENT OF FACTS .....5

VII. RESPONSE TO PLAINTIFF’S SUMMARY OF ARGUMENT .....11

VIII. ARGUMENT.....13

1. The trial court did not err in granting summary judgment in favor of Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P., and G.G. Management Co., Inc. in that no duty was owed on the part of these Defendants to Plaintiff to protect her from a criminal act by an assailant known to Plaintiff but unknown to these Defendants, because said criminal act was not foreseeable and in that there were no prior specific incidents of crime that were sufficiently numerous, recent, and similar in type to the crime allegedly committed against Plaintiff .....13

A. Defendants did not owe a duty to Plaintiff to protect her from a criminal act by an assailant known to Plaintiff but unknown to these Defendants, because said criminal act was not foreseeable and in that there were no prior specific incidents of crime that were sufficiently numerous, recent, and similar

in type to the crime allegedly committed against Plaintiff . . . . .14

1. Defendants acknowledge that a “special relationship”  
existed between the Plaintiff and Defendants . . . . . 16

2. Plaintiff has not produced evidence showing prior specific  
incidents of violent crimes at Ward Parkway Mall that are  
sufficiently numerous and recent to put these defendants on  
notice that there is a likelihood third persons will endanger the  
safety of defendant’s  
invitees . . . . . 16

3. Plaintiff has not produced evidence showing that the incident  
causing the injury claimed is sufficiently similar in type to the  
prior specific incidents occurring at Ward Parkway Mall that  
a reasonable person would take precaution to protect his  
invitees against that type  
of activity . . . . . 32

4. Plaintiff has not produced evidence showing that the  
assailant was unknown . . . . . 41

B. Response to Plaintiff’s argument that the Court should ignore Missouri  
law and find these defendants liable based  
on basic fairness and public policy . . . . . 43

C. Response to Plaintiff’s argument that the Court should  
replace Missouri law with law from other jurisdictions . . . . . 44

D. Response to Plaintiff's Points 2 and 3 of Appellant's  
Substitute Brief ..... 45

IX. CONCLUSION .....47

X. CERTIFICATION AND CERTIFICATE OF SERVICE ..... 48

## **I. TABLE OF AUTHORITIES**

<u>Ackerman v. Lerwick</u> , 676 S.W.2d 318 (Mo. App. 1984) .....	14
<u>Becker v. Diamond Parking, Inc.</u> , 768 S.W.2d 169 (Mo. App. W.D. 1989) . . . . .	26, 31
<u>Bowman v. McDonald’s Corp.</u> , 916 S.W.2d 270 (Mo. App. W.D. 1995) .	26, 29, 30, 31, 32
<u>Brown v. National Super Markets, Inc.</u> , 731 S.W.2d 291, 294  (Mo. App. E.D. 1987) . . . . .	25, 26, 31
<u>Burns v. Black &amp; Veatch Architects, Inc.</u> , 854 S.W.2d 450 (Mo. App. W.D. 1993) .....	14
<u>Decker v. Gramex Corp</u> , 258 S.W.2d 59 (Mo. banc. 1988) .....	26, 31, 44
<u>Faheen, by and through Hebron v. City Parking Corp.</u> , 734 S.W.2d 270  (Mo. App. E.D. 1987) .....	2, 11, 12, 15, 16, 28, 32, 43
<u>Gladis v. Rooney</u> , 999 S.W.2d 288 (Mo. App. E.D. 1999) .....	3
<u>Hudson v. Riverport Performance Arts Centre,,</u> 37 S.W.3d 261  (Mo.App.E.D. 2000) . . . . .	2, 4, 40, 41, 44
<u>Irby v. St. Louis County Cab Company</u> , 560 S.W.2d 392 (Mo. App. 1977) .....	11, 15
<u>Keenan v. Miriam Foundation</u> , 784 S.W.2d 298 (Mo. App. 1990) .....	25, 39
<u>Keesee v. Freeman</u> , 772 S.W.2d 663 (Mo.App.W.D. 1989) . . . . .	33
<u>Linzenni v. Hoffman</u> , 937 S.W.2d 723 (Mo. 1997) . . . . .	45
<u>L.A.C. v. Ward Parkway Shopping Center Company</u> , 2001 WL 376347  (Mo. App. W.D. April 17, 2001) . . . . .	5, 6, 7, 13, 26, 29, 31, 33, 36, 37, 41, 42
<u>Madden v. C&amp;K Barbeque Carry-Out, Inc.</u> , 758 S.W.2d 59  (Mo. banc. 1988) . . . . .	26, 27, 28, 31, 44
<u>Meadows v. Friedman R.R. Salvage Warehouse</u> , 655 S.W.2d 718	

(Mo. App. E.D. 1983) .....	13
<u>Mulligan v. Crescent Plumbing Supply Co., Inc., 845 S.W.2d 589</u>	
(Mo. App. E.D. 1992) .....	43
<u>Pickle v. Denny’s Restaurant, Inc., 763 S.W.2d 678 (Mo. App. 1988)</u> . . . . .	25, 26, 30, 31
<u>Pizzurro v. First Northern County Bank &amp; Trust Company, 545 S.W.2d 348</u>	
(Mo. App. 1976) .....	11, 15
<u>Smoot v. Sinclair Oil Corp., 1999 WL 1219882</u>	
(Mo. App. E.D. December 21, 1999) .....	26, 28, 29
<u>Wood v. Centermark Properties, Inc., 984 S.W.2d 517</u>	
(Mo. App. E.D. 1998) . . . . .	2, 4, 11, 12, 14, 16, 25, 32, 33, 37, 38, 39, 40, 41, 42
 <u>Other Authority</u>	
Mo.Sup.Ct. 83.08(b) .....	44

**II. JURISDICTIONAL STATEMENT**

Respondents Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P., and G.G. Management Company, Inc. agree with the jurisdictional statement of Appellant.

### **III. POINTS AND AUTHORITIES RELIED ON**

#### **POINT I**

**The trial court did not err in granting summary judgment in favor of Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P., and G.G. Management Co., Inc. in that no duty was owed on the part of these Defendants to Plaintiff to protect her from a criminal act by an assailant known to Plaintiff but unknown to these Defendants, because said criminal act was not foreseeable and in that there were no prior specific incidents of crime that were sufficiently numerous, recent, and similar in type to the crime allegedly committed against Plaintiff.**

Faheen, by and through Hebron v. City Parking Corp., 734 S.W.2d 270 (Mo. App. E.D. 1987)

Hudson v. Riverport Performance Arts Centre, 37 S.W.3d 261 (Mo.App.E.D. 2000)

Wood v. Centermark, 984 S.W.2d 517 (Mo. App. E.D. 1998)

#### **IV. STANDARD OF REVIEW**

These Defendants agree that the appropriate standard of review with respect to appeal of summary judgment is *de novo*. Gladis v. Rooney, 999 S.W.2d 288 (Mo. App. E.D. 1999).

## **V. RESPONSE TO PLAINTIFF'S SUMMARY OF THE CASE**

This Appeal involves the Circuit Court of Jackson County granting summary judgment in favor of Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P., and G.G. Management Company, Inc., on claims against them for damages arising from Plaintiff's alleged abduction and rape at the Ward Parkway Shopping Center on March 15, 1997. The trial court found that the Defendants were entitled to judgment as a matter of law in that the Plaintiff had not and would not be able to produce sufficient evidence to establish that these defendants had a duty to protect Plaintiff from the attack in question.

On appeal to the Missouri Court of Appeals for the Western District, the Court reversed and remanded the trial court's ruling stating that it was improper for the trial court to grant summary judgment because at trial, a fact finder could find that the owners/managers owed a duty to the Plaintiff to protect her from the alleged abduction and rape. Defendants disagree with the Appellate Court's ruling because the opinion is contrary to established Missouri law. *See Hudson v. Riverport Performance Arts Centre*, 37 S.W.3d 261 (Mo. App.E.D. 2000) and *Wood v. Centermark Properties, Inc.*, 984 S.W.2d 517 (Mo.App.E.D. 1998).

## **VI. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS**

Ward Parkway Shopping Center (hereinafter "WPSC") is owned by Ward Parkway Shopping Center Company, L.P. G. G. Management provides management services at WPSC pursuant to a Management Agreement. (LF 142) Respondent IPC is a security services company contracted by G. G. Management to provide security at WPSC. (LF 1571-1581)

Plaintiff, L.A.C., alleges that on March 15, 1997 she was raped by Brandon Fitzpatrick at WPSC. L.A.C. first met Brandon at WPSC one week prior to the alleged incident. (L.A.C. Deposition p. 21, ll. 12-14) (LF 485-486) Upon meeting one another, L.A.C. gave Brandon her telephone number. (Id. at p. 26, ll. 9-11) (LF 486) After their initial meeting at the mall, L.A.C. referred to Brandon as her boyfriend. (Griddine Deposition p. 33, l. 16) (LF 839) On March 9, 1997, the day after L.A.C. and Brandon met, L.A.C. and Brandon talked to one another for approximately twenty minutes by telephone. (L.A.C. Deposition p. 27, l. 25- p. 28, l. 3) (LF 486-87) L.A.C. and Brandon again talked by telephone on March 11 or 12, 1997. (Id. at p. 28, l. 8-16) (LF487) During the March 11 or 12, 1997 telephone conversation, Brandon told L.A.C. he was a member of a street gang known as the Cryps. (Id. at p. 30, l. 22 - p. 31, l. 4) (LF 487)

On March 15, 1997, L.A.C. and her friend Alicia Griddine went to WPSC to see a movie and to see other friends. (Id. at p. 8, ll. 18-21) (LF 483) L.A.C. was aware that Brandon might be at WPSC on March 15, 1997, as he had communicated such to her in an earlier conversation. (Id. at p. 9, ll. 14-17) (LF 483) Upon arriving at WPSC, L.A.C. spoke to Brandon in the food court area prior to L.A.C. going into the movie theater with her friend. (Id. at p. 12, l. 21 - p. 13, l. 19) (LF 484) L.A.C. told Brandon that she was going to see a movie. (Id. at p. 13, l. 20-24) (LF 484) Brandon's response was "oh we'll probably see you around" to which Plaintiff responded "Okay." (Id. at p. 13, ll. 21-24) (LF 484)

While in the movie theater, L.A.C. and her friend Alicia saw Brandon and his cousin Tenance seated a few rows behind the girls. (Griddine Deposition, p. 14, ll. 8-16) (LF 836) During the movie, Brandon and Tenance playfully tossed ice cubes at the girls to get their attention. (Id. at p. 15, ll. 1-12) (LF 836-837) L.A.C. and her friend did not sit through the entire movie and, in fact, left the movie theater between 8:00 p.m. and 8:30 p.m. (L.A.C. Deposition, p.32, ll. 9-12) (LF 487). Soon thereafter, Brandon and Tenance also left. (Griddine Deposition, p. 17, ll. 6-7) (LF 837) L.A.C. met up with Brandon at approximately 8:15 p.m. to 8:30 p.m. on March 15, 1997, in front of the “J.M. Porters” store located on the top level of the mall. (L.A.C. Deposition, p. 34, l. 25 - p. 35, l. 4) (LF 488) There, L.A.C. and Brandon kissed one another on the lips. (Id. at p. 44, l. 25 - p. 45, l. 5) (LF 489) Brandon then playfully took Plaintiff’s purse and ran into a hallway adjacent to the J.M. Porters store. (Id. at p. 38, ll. 1-9) (LF 488 - 489) L.A.C. followed Brandon into the adjacent hallway. (Id. at p. 40, ll. 14-16) (LF 489) Once in the hall, L.A.C. requested her purse from Brandon, however, he would not return the purse unless L.A.C. kissed him again. (Id. p. 42, ll. 15-17) (LF 489) L.A.C. then proceeded to kiss Brandon and put her tongue in his mouth. (Id. at p. 44, ll. 15-18, p. 105, ll. 12-14) (LF 489, 499) L.A.C., while still in that hallway, was also given a hickey by Brandon. (Id. at p. 45, ll. 22-25) (LF 489) Brandon then picked L.A.C. up and carried her through a door leading to an area referred to as a “catwalk.” (Id. at p. 59, l. 23 - p. 60, l. 6) (LF 491) This catwalk is a fire exit/second story walkway which can be used to access an upper-level parking lot. (Levenberg Deposition, p. 46, l.24 - p. 47, l. 3, Swann Deposition, p. 33, ll. 17-25) (LF 738, 795) L.A.C., prior to being carried through the door into the “catwalk”, admitted that she never called to any of her friends for help, and none of her friends heard her cry for help. (L.A.C. Deposition, p. 75, ll. 10-15, Griddine Deposition, p. 23, ll. 11-24) (LF 702, 838) Once outside, Brandon put L.A.C. down in an area described as a “cubbyhole.” (L.A.C. Deposition, p. 63, ll. 16-18, p. 80, ll.

9-10) (LF 492; 495) At this point, L.A.C. and Brandon had sex. (Id. p. 92, ll. 7-13) (LF 497) After L.A.C. and Brandon had sex, L.A.C.'s friend, Alicia, saw L.A.C. walking through the WPSC north door "laughing and giggling" with a happy-go-lucky look on her face. (Griddine Deposition, p. 31, ll. 20-23, p. 38, l. 15 - p. 39, l. 8) (LF 839 - 840)

Crime has occurred at WPSC in the four years predating L.A.C.'s alleged injury. (LF 910-1171) However, none of the crimes cited by Plaintiff in the four years predating the alleged incident involved a rape. (LF 910-1171) Moreover, there are no facts to support the conclusion that in 1992 an "attempted rape" occurred at WPSC. (LF 876) There are no facts to support the conclusion that a sexual assault occurred at WPSC. (LF 848, 868, 880, 1178, 1181, 1186) There are no facts to support the conclusion that a sexual attack on a fourteen year old girl occurred at WPSC. (LF 848, 868, 880, 1178, 1181, 1186) There are no prior specific incidents of violent crime on WPSC premises that share common elements with the crime allegedly sustained by L.A.C. such that these Defendants were on notice that there was a likelihood that third persons would endanger the safety of these Defendants' invitees. (LF 910-1171)

These Defendants have always denied owing any duty to Plaintiff, contrary to Plaintiff's assertion that "the mall's management acknowledged that the mall had a duty to protect its customers from crime." (LF 239, 242) (Appellant's Substitute Main Brief, p. 25) Plaintiff cites to G. G. Management employee David Levenberg's deposition testimony in an attempt to prove its assertion, however, Plaintiff fails to include Defendant's objections. (Id.) Levenberg's deposition testimony is as follows:

"Q. Do you believe that Ward parkway Mall has a duty to protect its customers from criminal activity?"

MR. HASTY: Object to the form of the question. Calls for a legal opinion or conclusion. Invades the province of the Court and jury.

A. I believe the owner of the property has a duty, yes.

Q. (By Mr. Ketchmark) And as the manager of the property, General Growth would have such a duty in your opinion; correct?

MR. HASTY: Same objections.

A. Yes.

Q. (By Mr. Ketchmark) And that duty would apply to the type of crimes we're talking about -- assault, sexual assault, rape -- correct?

MR. HASTY: Same objections.

A. Correct.”

(Levenberg Deposition, p. 42, 1. 5-22), (LF 737) Furthermore, WPSC management did not acknowledge any duty by the testimony of its representative cited by Plaintiff. (LF 737) Additionally, no G.G. Management corporate representative testified that the security contract with IPC created a duty to provide security at the mall as Plaintiff alleges. (LF 489) Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, and G.G. Management Company, Inc., filed a Motion for Summary Judgment and Suggestions in Support because as a matter of law, no duty was owed by these Defendants to protect Plaintiff from an unknown assailant in that there were no prior specific incidents of crime on these Defendants' premises that were sufficiently numerous, recent, and similar in type to the crime allegedly committed against Plaintiff. (LF 444, 646) The trial court granted summary judgment in favor of Ward Parkway Shopping Center Company, L.P., and W.S.C. Associates, L.P., ruling that Plaintiff did not establish a duty owing from these Defendants to Plaintiff. (LF 1617) The Court also ruled that issues existed as to whether G.G. Management Company, Inc., and IPC had a contractual obligation to Plaintiff

or had assumed the duty to protect her. (LF 1617) The Court thereupon granted Plaintiff leave to file an amended petition to allege those theories against these Defendants and IPC. Plaintiff filed a Third Amended Petition alleging that G.G. Management owed Plaintiff a duty pursuant to a security agreement between G.G. Management and IPC or in the alternative G.G. Management had assumed the duty to protect the Plaintiff. (LF 1617) G.G. Management Company, Inc. filed a Motion for Summary Judgment and Suggestions in Support because (1) it had no contractual obligation to Plaintiff, and (2) it had not assumed a duty to protect Plaintiff. (LF 1675, 1679) The trial court granted G.G. Management Company, Inc.'s Motion for Summary Judgment ruling that G.G. Management owed no duty to Plaintiff whatsoever. (LF 1749)

Lastly, Plaintiff's "Statement of Facts" includes a "**Proceedings Below**" section. A "Proceedings Below" section is not authorized by Missouri Supreme Court Rule 84.04. Nonetheless, this section amounts to a crude attempt to interject irrelevant proceedings at the trial court level and to once again complain about the trial court's ruling. This section by no means complies with Rule 84.04(c) which provides in relevant part:

"The Statement of Facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument . . . ."

This section amounts to nothing more than inflammatory argument, misrepresentation, and irrelevant fact which should be ignored by this Court.

## **VII. RESPONSE TO PLAINTIFF'S SUMMARY OF ARGUMENT**

Plaintiff asserts that this Court has squarely held that business owners owe a duty to protect their invitees from criminal attacks if violent crime is foreseeable on their property. (Appellant's Substitute Brief, p. 45). While this may be true in a broad sense, the general rule is that a business owner has no duty to protect an invitee from a deliberate criminal act by a third person. Wood v. Centermark Properties, Inc., 984 S.W.2d 517, 523 (Mo.App.E.D. 1998). However, there is a "special facts" exception to this general rule which requires a relationship between a plaintiff and defendant which encourages a plaintiff to come upon defendant's premises. Faheen by and Through Hebron v. City Parking Corp., 734 S.W.2d 270 (Mo.App. E.D. 1987). The "special facts" exception includes two possible theories of liability: (1) an intentional infliction of injury by known and identifiable third persons; or (2) frequent and recent occurrences of violent crime against persons on the premises by unknown assailants. Id. at 272. Irby v. St. Louis County Cab Co., 560 S.W.2d 392 (Mo.App. 1977); Pizzurro v. First North County Bank & Trust Co., 545 S.W.2d 348 (Mo.App. 1976).

In this case, Plaintiff sought to impose liability on these Defendants under the second theory, the violent crimes exception. This exception contains four elements, all of which must be met before the exception applies. Faheen at 270. The first element requires a "special relationship" to exist between a plaintiff and defendant, such that plaintiff is encouraged to come upon Defendant's premises. Second, there must be prior specific incidents of *violent* crimes on the premises that are *sufficiently numerous* and *recent* to put a defendant on notice that there is a likelihood third persons will endanger the safety of defendant's invitees. Third, the incident causing the injury claimed must be *sufficiently similar* in type to the prior specific incidents occurring on the premises that a reasonable man would take precaution to

protect his invitees against that type of activity. Fourth, the assailant must be unknown. Wood, 984 S.W.2d at 524 (emphasis added); Faheen, 734 S.W.2d at 273.

In the case at hand, the trial court granted summary judgment in favor of Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P. and G.G. Management Company, Inc., finding that Plaintiff did not establish a duty owing from these Defendants to Plaintiff. The Missouri Court of Appeals, Western District, then reversed the trial court's ruling and found that the Plaintiff met all four elements of the violent crimes exception. Defendants/Respondents disagree. First, there were no violent crimes on the premises of WPSC that were sufficiently numerous or recent to put defendants on notice that there was a likelihood of third persons endangering the safety of defendant's invitees. Second, the incident causing the injury claimed was not sufficiently similar in type to the prior specific incidents occurring on the premises of WPSC that a reasonable person would take precaution to protect his invitees against that type of activity. Lastly, the assailant in this case was not unknown to the Plaintiff.

## **VIII. ARGUMENT**

### **POINT I**

**The trial court did not err in granting summary judgment in favor of Ward Parkway Shopping Center Company, L.P., W.S.C. Associates, L.P., and G.G. Management Co., Inc. in that no duty was owed on the part of these Defendants to Plaintiff to protect her from a criminal act by an assailant known to Plaintiff but unknown to these Defendants, because said criminal**

**act was not foreseeable and in that there were no prior specific incidents of crime that were sufficiently numerous, recent, and similar in type to the crime allegedly committed against Plaintiff.**

In order for L.A.C. to prevail in her negligence action against these Defendants, L.A.C. must prove that these Defendants owed a duty to L.A.C., that these Defendants breached their duty, and that as a result of that breach, injury or damage resulted. Meadows v. Friedman R.R. Salvage Warehouse, 655 S.W.2d 718, 720 (Mo. App. E.D. 1983). The only issue on appeal in this matter is whether a duty existed from these Defendants to L.A.C. The issues of breach of duty, causation, and injury to Plaintiff are not at issue in this appeal because without the existence of duty, argument relative to those elements is irrelevant. Thus, Plaintiff's argument that the remaining elements in Plaintiff's negligence claim against these Defendants are not in dispute because Plaintiff has produced sufficient evidence of breach, causation, and injury should not be heard by this Court.

The issue of duty is purely a question of law for the Court to decide. Wood v. Centermark, 984 S.W.2d 517, 519 (Mo. App. E.D. 1998); Ackerman v. Lerwick, 676 S.W.2d 318, 322 (Mo. App. 1984). Duty cannot be established by an expert opinion. Expert opinion testimony only deals with whether there was a breach of a legally existing duty, not whether a duty exists. Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450, 453 (Mo. App. W.D. 1993). Thus, neither an expert opinion nor a lay opinion can be used as an admission to establish a legal duty. Plaintiff's citation of G.G. Management employee David Levenberg's deposition which purports to establish a duty owed by these Defendants to Plaintiff is not only an incomplete and deceptive argument to this Court, but is also contrary to the existing law of this state.

**A. Defendants did not owe a duty to Plaintiff to protect her from a criminal act by an assailant known to Plaintiff but unknown to these Defendants, because said criminal act was not foreseeable and in that there were no prior specific incidents of crime that were sufficiently numerous, recent, and similar in type to the crime allegedly committed against Plaintiff.**

The trial court cited, in its decision, the general rule in Missouri that an owner of a business has no duty to protect an invitee from a deliberate criminal attack by a third person. Wood v. Centermark, 984 S.W.2d 517, 523 (Mo. App. E.D. 1998). The trial court then went to great lengths to explain to Plaintiff that her cause of action against these Defendants fails not because these Defendants owed her no duty under the general rule, but rather because Plaintiff did not meet the elements of the “special facts” exception to the general rule which she attempted to employ to impose liability on these Defendants. (LF 1780)

As the Court is well aware, the “special facts” exception to the general rule requires a relationship between a plaintiff and defendant which encourages a plaintiff to come upon defendant’s premises. Faheen by and Through Hebron v. City Parking Corp., 734 S.W.2d 270, 272 (Mo.App. E.D. 1987). The “special facts” exception includes two possible theories of liability: (1) an intentional infliction of injury by known and identifiable third persons; or (2) frequent and recent occurrences of violent crime against persons on the premises by unknown assailants. Id. at 272. Irby v. St. Louis County Cab Co., 560 S.W.2d 392 (Mo.App. 1977); Pizzurro v. First North County Bank & Trust Co., 545 S.W.2d 348 (Mo.App. 1976).

Plaintiff has never maintained that this case was one involving a theory of liability under the first theory of the “special facts” exception, as Plaintiff presented no evidence that Brandon Fitzpatrick was a known and identifiable person to these Defendants. Thus, Plaintiff sought to impose liability on these

Defendants under the second theory, the violent crimes exception. This exception contains four elements, all of which must be met before the exception applies. Faheen at 270. The first element requires a “special relationship” to exist between a plaintiff and defendant, such that plaintiff is encouraged to come upon Defendant’s premises. Second, there must be prior specific incidents of *violent* crimes on the premises that are *sufficiently numerous* and *recent* to put a defendant on notice that there is a likelihood third persons will endanger the safety of defendant’s invitees. Third, the incident causing the injury claimed must be *sufficiently similar* in type to the prior specific incidents occurring on the premises that a reasonable man would take precaution to protect his invitees against that type of activity. Fourth, the assailant must be unknown. Wood, 984 S.W.2d at 524 (emphasis added); Faheen, 734 S.W.2d at 273.

**1. Defendants acknowledge that a “special relationship” existed between the Plaintiff and Defendants.**

With regard to the first element of the prior violent crimes exception, Defendants acknowledge that Plaintiff was an invitee of these Defendants on the date in question, and therefore, she satisfies the first element of the violent crimes exception. However, Plaintiff fails to satisfy the second, third, and fourth elements of the exception.

**2. Plaintiff has not Produced Evidence Showing Prior Specific Incidents of Violent Crimes at Ward Parkway Mall that are Sufficiently Numerous and Recent to Put These Defendants on Notice that There is a Likelihood Third Persons Will Endanger the Safety of Defendant’s Invitees.**

In order to meet the second element of the prior violent crimes exception, Plaintiff must produce evidence of prior specific incidents of violent crime on the premises. These crimes must be sufficiently

numerous and recent to put these Defendants on notice that there is a likelihood that third persons will endanger the safety of Defendant’s invitees. In an attempt to meet this second element, Plaintiff cited thirty-seven crimes, in its response to Defendants’ Motion for Summary Judgment, that had allegedly occurred at the Ward Parkway Shopping Center as being “indisputably violent” and occurring within twenty-five (25) months prior to the alleged assault on the Plaintiff. They were as follows:

**TABLE 1**

<b>No.</b>	<b>Date</b>	<b>Type of Crime</b>	<b>Location of Incident</b>	<b>Description of Incident</b>	<b>Legal File Page No.</b>
1	3/13/97	Assault	Outside	Female victim of purse snatching. Female pushed to the ground during purse snatching.	1027-1029
2	03/07/97	Attempted Robbery	Outside	Unknown male entered the van of the victim and attempted to rob the victim at knife point.	923-924

3	02/26/97	Armed Robbery	Outside	Female was robbed of her purse and vehicle by two men with a gun.	925-926
4	02/08/97	Robbery	Outside	Female victim robbed in parking lot.	961
5	01/15/97	Armed Robbery	Outside	Two female patrons were robbed by an armed man in the parking lot.	929-930
6	12/02/96	Assault	Inside	An individual who had fallen asleep inside the TGI Fridays restaurant awoke, became belligerent and extracted a knife. A fight then ensued between the bartender and offender.	995-996
7	02/01/96	Assault	Outside	Female patron pushed against her vehicle in parking lot by an unknown offender.	1034-1035
8	11/22/96	Armed Robbery	Outside	Male patron approached by an unknown man in the parking lot	932-933

				who demanded money and patron's jacket.	
9	11/09/96	Assault	Inside	One movie theater patron told another to "shut the F___ up or I'll shoot you." When a search was done of the patron, no weapon was found.	997-998
10	10/26/96	Reported Robbery	Inside	Kansas City dispatcher reported to IPC that an armed robbery occurred at Dillard's.	934
11	09/24/96	Assault	Inside	Female victim is grabbed around the neck and punched in the mouth by a male attacker.	1040-1044
12	09/23/96	Robbery	Outside	Persons were seated in a car and approached by two other individuals who demanded their money.	935-936
13	09/10/96	Battery	Outside	Female patron was walking from her car to Steinmart when	1074-1075

				an individual representing to have a gun demanded her car keys. The individual also hit the patron on the shoulder.	
14	08/30/96	Armed Robbery	Outside	Patron walking to her car in parking lot when she was approached by an individual who pointed a hand gun at her and demanded her car keys.	937-938
15	08/19/96	unlawful use of firearm	Inside	Offender ran through the mall, picked up a handgun, and pointed it at two IPC officers as he attempted to escape the mall.	1161-1164
16	07/26/96	Robbery	Outside	Two mall tenant employees were robbed at gunpoint in the parking lot.	966-969
17	06/18/96	Armed Robbery	Inside	An unknown male stole a mens ring from Helzberg Diamonds and in doing so stated that he	940-941

				had a gun and instructed that no one was to follow him.	
18	06/17/96	Assault	Inside	An unknown male put his arm around a mall tenant employee, placing his hand on her upper chest.	1049-1050
19	06/01/96	Armed Robbery	Inside	Mall tenant employee robbed his coworker at knife point and demanded to be driven to a different location.	916-922
20	05/15/96	Robbery	Inside	An unknown male snatched the purse of a female near the food court.	970-972
21	04/15/96	Sexual Assault	Inside	Female mall tenant employee reported being sexually assaulted by her coworker in the ladies public restroom.	416-418
22	03/29/96	Armed Robbery	Outside	Mall employee robbed in parking lot by unknown armed assailant.	944-945

23	12/02/95	Assault & Battery	Inside	Female patron beaten by unknown assailant.	1085-1086
24	02/01/95	Robbery	Outside	Unknown perpetrator snatched the purse of a female mall patron in parking lot.	973-974
25	11/07/95	Assault	Inside	Female store manager struck in face by male customer and knocked to the ground.	1022-1024
26	10/29/95	Battery	Outside	Unknown male put female in a headlock. When security investigated the matter, both parties represented they were “playing around.”	1087-1088
27	9/29/95	Assault	Inside AMC movie theater	Male movie theater patron put his hand on the thigh of a young female also in the movie theater and grabbed her buttocks and genitals.	912-915
28	08/16/95	Armed	Outside	Woman robbed of her purse at	949-950

		Robbery		gun point in parking lot.	
29	08/11/95	Assault	Outside	Female patron attacked by three other females outside entrance doors.	1058
30	07/31/95	Assault & Robbery	Inside	Two unknown males pushed a female patron and stole some items from her "fanny pack."	977-978
31	06/30/95	Armed Robbery & Assault	Inside	Unknown female robbed assistant manager of mall patron by spraying mace at her.	951-955
32	06/12/95	Armed Robbery	Inside	Member of cleaning crew robbed at knife point - sustained scratches to his hands and chest.	956-957
33	06/10/95	Robbery	Outside	Mall patron had her purse snatched in the parking lot.	979-981
34	03/26/95	Assault	Inside	Fifteen to sixteen year old boy hit female patron in the arm.	1067

35	03/05/95	Assault	Inside	Man struck a woman who was in a fight with another woman.	1068-1069
36	02/20/95	Assault & Robbery	Inside	Woman struck by unknown offender.	982-983
37	02/19/95	Robbery	Outside	Woman walking to her car hit in the face by offender and purse snatched.	986-987

Plaintiff claims that the above-listed crimes are sufficiently numerous and recent to have put these Defendants on notice that there is a likelihood that third persons will endanger the safety of Defendants invitees. However, out of the above-listed thirty-seven (37) crimes, the Appellate Court found that only twenty of those crimes (without specifically identifying which ones) fit the Wood criteria.<sup>1</sup> These crimes

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<sup>1</sup>For purposes of the violent crimes exception, violent crimes are defined as ““assaults, robberies, murder, rape, things such as that, that require some attempt at bodily harm or bodily harm together with whatever else may have occurred, such as a robbery.”” Brown v. National Super Markets, Inc., 731 S.W.2d 291, 294 (Mo.App.E.D. 1987). To be eligible, the Courts have held that (1) past crimes must occur on the premises at issue; (2) indoor or outdoor past crimes are to be excluded depending on the subject crime’s location; and (3) past crimes involving a perpetrator’s escape are to be excluded. Wood, 984 S.W.2d at 524 (citing Keenan v. Miriam Foundation, 784 S.W.2d 298 (Mo. App.E.D. 1990); Pickle v. Denny’s Restaurant, Inc., 763 S.W.2d 678 (Mo. App.W.D. 1988)). Yet with that said, Plaintiff still

were found to have consisted of five armed robberies, three robberies, nine assaults, one incident of the unlawful use of a firearm, and two sexual assaults. (L.A.C. v. Ward Parkway Shopping Center Company, 2001 WL 376347 at \*12) (Mo.App.W.D. April 17, 2001)) The Court then found that, in their view, twenty prior crimes in the twenty-five months immediately preceding the alleged attack on the Plaintiff would be sufficiently *numerous* to have put the owners/managers on notice that they should have taken all reasonable steps to protect Plaintiff from the alleged abduction and rape. (Id.) Defendants disagree because the Appellate Court attempted to create a duty against these Defendants simply because of the number of all crimes occurring at WPSC. As this Court well knows, the number of crimes which occur at

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argues that the incidents occurring both inside and outside of these Defendants' premises should be included in the Court's analysis because the Plaintiff was allegedly raped in the "catwalk" area of the mall which is accessed through a security door. Plaintiff fails to advise the Court, however, that the catwalk area is attached to the WPSC mall structure and not part of the "outside" of the WPSC. Notwithstanding, even if both inside and outside crimes are considered, none are sufficiently recent, numerous, and similar to the crime alleged by Plaintiff.

a landowner's premises is only *one* of the criteria Plaintiff must satisfy to create a duty against these Defendants. These crimes must also be sufficiently similar.

The Plaintiff goes on to argue that, based on the authority of Madden/Decker, Smoot, Bowman, Becker, Pickle, and Brown, Missouri courts have imposed a duty upon land owners based upon a far lower number of prior crimes than is presented in this case. (Appellant's Substitute Main Brief, p. 53, 54) These cases cited by Plaintiff, however, are distinguishable from the case at hand and are of no assistance to this Court in deciding the issue on appeal.

In Madden, plaintiff drove into the parking lot of C&K Barbeque to purchase food. Upon leaving the restaurant, Madden was approached by an unknown male who displayed a gun and forced his way into Madden's car, kidnaping her, taking her to another location and sexually assaulting her. Plaintiff brought a negligence action against C&K Barbeque seeking damages for personal injuries sustained as a result of the assault and kidnaping. Madden contended that the Defendant failed to provide adequate security to protect its patrons and failed to warn business invitees of the danger present on the premises. Her petition alleged C&K Barbeque was the scene of numerous violent crimes over the three-year period immediately preceding the assault. These crimes included six armed robberies, six strong-armed robberies, one assault, and one purse snatching.

The Madden court recognized that business owners may be under a duty to protect their invitees from the criminal attacks of unknown third persons depending on the facts and circumstances of the given case. The Court said that the touchstone for the creation of a duty is foreseeability . . . a duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. Madden 758 S.W.2d at 62. The Madden court ruled that plaintiff's allegations that the defendant's restaurant was the scene of numerous violent crimes against persons during the three-year period

immediately preceding the incident which included armed robberies, strong-armed robberies and assault, are sufficient to put a defendant on notice to the possibility that these invitees may be exposed to dangers from criminal attacks of unknown third persons including the danger of kidnaping and assault. In Madden, the crimes preceding Plaintiff's injuries were not only recent and numerous, but also similar. Indeed, in Madden plaintiff was attacked with a gun. Plaintiff produced evidence that demonstrated in the three years preceding her incident there were six armed robberies and an assault in defendant's parking lot. Moreover, C & K Barbeque was a small barbecue restaurant. Because these cases must be examined on a case-by-case basis, crimes on that defendant's property were numerous given the relative size of the business.

The Missouri Court of Appeals for the Eastern District announced in Faheen, 734 S.W.2d at 270, that the violent crimes exception requires that all elements of the exception be met. All three elements were met in Madden, and thus liability was imposed upon the defendant in that case. In this case, there is no such showing that there existed prior specific incidents of violent crimes at WPSC that are sufficiently numerous and similar to the crime Plaintiff allegedly sustained such that a duty can be found.

Plaintiff also cites Smoot v. Sinclair Oil Corp., 1999 W.L. 1219882 (Mo. App. E.D. 1999) as support for the creation of a duty. Plaintiff argues that a duty was created against the defendant in Smoot by six armed robberies, two attempted armed robberies, and two assaults. This case is also distinguishable from the case at hand. In Smoot, an off-duty police officer was shot during an attempted robbery while using a pay phone at a convenience store. The police officer/plaintiff sued the store's owner/operator for failing to use ordinary care to make its premises reasonably safe from the threat of criminal attack by unknown third persons. The Smoot court recognized the general rule that a landowner has no duty to protect business invitees from the criminal acts of unknown third parties on its premises. It also recognized that duty has been found when "special facts and circumstances" exist.

To meet the burden under the special facts exception, Smoote produced evidence of prior incidents which were sufficiently recent, numerous, and similar to the incident in which Smoote was injured. This evidence came in the form of police reports which detailed two incidents of assault, one against an uniformed police officer. Additionally, there were eight incidents of violence which included six armed robberies and two attempted armed robberies. The Smoote court held that the ten incidents were sufficient to establish a duty on the part of the defendant to keep plaintiff and other invitees reasonably safe from criminal activity by unknown third-party assailants. Id at \*\*7.

In Smoote the crimes presented by plaintiff occurred within two years and three months of plaintiff's injury and, thus, recent in time to the crime to cause plaintiff's injury. Also, the number of violent crimes occurring on the premises, given its relative size, were numerous. Finally, the crime which injured Smoote shared common elements with the crimes that occurred on the defendant's premises which pre-dated Smoote's incident in that hand guns were used in their commission.

Unlike the plaintiff in Smoote, L.A.C. offered no evidence at the trial court level and does not direct this Court to any section of the legal file which evidences crimes numerous, recent, and similar to the crime she allegedly sustained at WPSC such that a duty owing from these Defendants to Plaintiff should be imposed.

Plaintiff also cites Bowman v. McDonalds Corp., 916 S.W.2d 270 (Mo. App. W.D. 1995) and represents to this Court that said case created a duty by evidence of ten prior violent crimes. However, like Plaintiff's other citations in this regard, this is inaccurate and misleading. In Bowman, plaintiff was an invitee of a McDonalds restaurant in question on the date of the incident, August 23, 1991. Plaintiff was confronted by two unknown men who demanded plaintiff's car keys. The unknown assailants drew weapons and shot at Bowman who was attempting to flee. One of the shots struck Bowman. Bowman filed suit against this

McDonalds restaurant alleging McDonalds owed a duty to protect him as a customer from third party criminal attacks. Plaintiff presented evidence at trial that armed robberies occurred at the McDonalds in question on December 15, 1990, February 23, 1991, and June 21, 1991. The Bowman court recognized that to state a cause of action for the third-party criminal assault by an unknown person, plaintiff must prove the defendant had a duty to protect invitees from such assaults by meeting the criteria under the “special facts and circumstances” exception. The touchstone for the creation of this duty is foreseeability; the duty arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. Id. at 277. Clearly in Bowman, there was evidence of armed robberies that occurred at the defendant’s premises that were numerous. These crimes were also recent, occurring within eight months of plaintiff’s injury. These crimes were also similar to the crime that injured the plaintiff in Bowman in that hand guns were used in their commission.

Plaintiff argues that Bowman stands for the simple proposition that a duty is created by evidence of ten prior violent crimes. However, more accurately, the Bowman court held that duty arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. Id. at 270 citing Pickle v. Denny’s Restaurant, Inc., 763 S.W.2d at 681. The circumstances considered by the court included the location of the injury, the foreseeability of the business owner that particular acts will cause injury based on prior incidents, the number and similarity of prior incidents, and how recent said crimes occurred. In short, all three elements were met under the violent crimes exception.

Furthermore, Plaintiff conveniently fails to advise this Court that the prior crimes advanced as evidence in Bowman and which established a duty as against defendant shared common elements with the crime committed against the plaintiff in said case. Moreover, the prior crimes presented as evidence occurred approximately two years and three months prior to the Plaintiff’s injury. This is not so in the case

at hand. L.A.C. attempts to convince this Court that alleged crimes occurring five years before her alleged incident and sharing no common elements with Plaintiff's alleged injury are sufficiently numerous, recent, and similar to her incident to be considered. They are not.

Plaintiff also cites Becker v. Diamond Parking, Inc., 768 S.W.2d 160 (Mo. App. W.D. 1989), Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678 (Mo. App. W.D. 1988), and Brown v. National Supermarkets, Inc., 731 S.W.2d 291 (Mo. App. E.D. 1987) to support the argument that duty should be found. These cases are also distinguishable from the case at hand in that they involve plaintiffs who were able to maintain actions against defendant business owners or operators because the crimes committed against them on the respective defendant's premises shared common elements with crimes committed on defendant's premises that were recent and numerous to the crime committed against the Plaintiff. None of the cases are analogous to the case at hand. Thus, contrary to Plaintiff's argument, Madden, Decker, Bowman, Becker, Pickle, and Brown do not assist this court in disposing of the issue presented by Plaintiff on appeal.

Plaintiffs burden to withstand summary judgment at the trial court level was clear. In order to impose a duty upon these Defendants pursuant to the violent crimes exception, Plaintiff had to demonstrate the criteria detailed above. As the Bowman court announced, the touchstone of the creation of the duty Plaintiff sought to impose upon these Defendants is foreseeability. The duty arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. Bowman at 277. Clearly, the trial court cited ample authority for its ruling that all the incidents of crime cited by Plaintiff were not sufficiently numerous, recent, and similar to the incident alleged by Plaintiff to have occurred such that liability would be created against these Defendants. Therefore, this Court should affirm the trial court's grant of summary judgment.

**3. Plaintiff has not Produced Evidence Showing that the Incident Causing the Injury Claimed is Sufficiently Similar in Type to the Prior Specific Incidents Occurring at Ward Parkway Mall that a Reasonable Person Would Take Precaution to Protect his Invitees Against that Type of Activity.**

In order to meet the third element set forth in Wood, the crimes that Plaintiff relies upon must not only be violent in nature, but must be sufficiently *similar* to the incident in question. Faheen, 734 S.W.2d 270. Missouri courts have held that “[i]t is not necessary that [the crimes cited] be identical to the crime against [the plaintiff], but the nature of the criminal acts must share common elements sufficient to place the [business owner] on notice of the danger and alert it of the safeguards which are appropriate to the risks.” Wood, 984 S.W.2d 517 (citing Keese v. Freeman, 772 S.W.2d 663 (Mo.App.W.D. 1989)).

So out of the twenty crimes that the Appellate Court found to have fit the Wood criteria, the Court only considered seventeen of those crimes in their analysis here. L.A.C. v. Ward Parkway Shopping Center Company, 2001 WL 376347 at \*12) (Mo.App.W.D. April 17, 2001) The Court stated that they had excluded one of the reported robberies that did not involve either the use of a weapon or bodily harm, or an attempt of bodily harm, and excluded the two reported “sexual assaults,” which consisted of groping only.

Id. Hence, the Court considered five armed robberies, two robberies, nine assaults, and one incident of the unlawful use of a firearm, again not stating which incidents they were specifically considering.

Respondent assumes that the Court considered the following in their analysis:

No.	Date	Type of Crime	Lo ca	Description of Incident	Legal File
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			<b>ti on of In ci de nt</b>		<b>Page No.</b>
1	12/02/96	Aggravated Assault	Inside	An individual who had fallen asleep inside the TGI Fridays restaurant awoke, became belligerent and extracted a knife. A fight then ensued between the bartender and offender.	995-996
2	11/09/96	AggravatedA ssault	Inside	One movie theater patron told another to “shut the fuck up or I’ll shoot you.” When a search was done of the patron, no weapon was found.	997-998
3	10/26/96	Armed Robbery	Inside	Kansas City dispatcher reported to IPC that an armed robbery	934

				occurred at Dillard's.	
4	09/24/96	Assault	Inside	Female victim is grabbed around the neck and punched in the mouth inside of the mall by male attacker.	1040-1044
5	08/19/96	Unlawful use of a firearm	Inside	Offender ran through the mall, picked up a handgun, and pointed it at two IPC officers as he attempted to escape the mall.	1161-1164
6	06/18/96	Armed Robbery	Inside	An unknown male stole a mens ring from Helzberg Diamonds and in doing so stated that he had a gun and instructed that no one was to follow him.	940-941
7	06/01/96	Armed Robbery	Inside	Mall tenant employee robbed his coworker at knife point and demanded to be driven to a different location.	916-922
8	12/02/95	Assault and Battery	Inside	Female patron beaten in Mall's interior by an unknown assailant.	1085-1086

9	11/07/95	Assault	Inside	Female store manager struck in face by male customer and knocked to the ground.	1022-1024
10	9/29/95	Sexual Misconduct Assault	Inside AMC movie theater	Male movie theater patron put his hand on the thigh of a young female also in the movie theater and grabbed her buttocks and genitals.	912-915
11	07/31/95	Assault and Robbery	Inside	Two unknown males pushed a female patron and stole some items from her "fanny pack."	977-978
12	06/30/95	Armed Robbery and Assault	Inside	Unknown female sprays mace in store manager's face and steals jewelry.	951-955
13	06/12/95	Armed Robbery	Inside	Mall custodian is assaulted and robbed at knife point resulting in injuries to hands and chest.	956-957
14	03/26/95	Assault	Inside	Fifteen to sixteen year old boy hit female mall patron in the arm.	1067
15	03/25/95	Assault	Inside	Officer assaulted after discovering	1064

				two people having sec in Mall's interior	
16	03/05/95	Assault	Inside	Man struck a woman who was in a fight with another woman.	1068-1069
17	02/20/95	Assault and Robbery	Inside	Elderly female attacked at entrance to store by an unknown offender and sustains bruised shoulder and jaw as well as broken finger.	982-983

The Appellate Court then found that the prior assaults at the shopping center involving a weapon, or bodily harm or an attempt at bodily harm, were sufficiently *similar* to her alleged abduction and rape to put these Defendants on notice that business invitees were subject to such assaults, including sexual assaults and rapes. L.A.C. v. Ward Parkway Shopping Center Company, 2001 WL 376347 at \*13 (Mo.App.W.D. April 17, 2001) The Appellate Court additionally found that the robberies cited by the Plaintiff involving a weapon, or bodily harm or an attempt at bodily harm, were sufficiently similar to her alleged abduction and rape to put these Defendants on notice, without explaining how these crimes were similar to Plaintiff's alleged abduction and rape. Id. Specifically the Court said:

Our review of the cases would lead us to the conclusion that the extent of the commonality of elements necessary to invoke the exception essentially rests on the similarity of crimes with respect to their violent nature and whether they occurred inside or outside the

premises. This is a logical approach in that, to require anything more stringent as to similarity of crimes would, in our view, destroy the underlying logic for establishing the exception in the first instance. Id.

If this Court were to examine the incident reports corresponding to these seventeen crimes, the Court would see that these crimes are not sufficiently similar to the rape or abduction that allegedly occurred in this case. These incidents involve escaping suspects, verbal and physical altercations, robbery and indecent acts. Therefore, Respondents respectfully disagree with the Court's approach and findings, and state that the crimes considered by the Appellate Court fail to share common elements with the crime allegedly committed against Plaintiff. Thus, the Appellate Court ignored the established law in Missouri and attempted to create law that is unsupported.

In Wood, the family of a mall tenant's employee sued the owner/manager of the South County Center Mall, Centermark Properties, for the wrongful death of plaintiff's decedent resulting from a car-jacking, abduction, and murder in the mall's parking lot. The plaintiff's decedent was an employee of a retailer at the mall at the time of her abduction and murder on January 15, 1994. On said date at approximately 5:45 p.m., plaintiff's decedent arrived for work and was accosted by at least two assailants. She was driven to a remote location where she was shot four times in the chest and thrown over a bridge railing into the Mississippi River.

Plaintiff's petition in Wood set forth 77 incidents of alleged criminal activity at or near the mall which took place from January 11, 1989 to January 15, 1994. They included various incidents of purse snatching, indecent acts, shoplifting, assault, burglary/robbery, and child abuse, but did not include any prior car-jackings, abductions, or murders. Of the incidents included in plaintiff's petition, only one took place on mall property involving a potential weapon. Said incident involved a victim who was robbed after exiting her

vehicle in the Dillard's parking lot. The only other incident involving a weapon was an armed robbery which took place on the premises of the "Big 'N Tall men's shop" which was not on the premises of the mall.

Defendant, Centermark, moved for summary judgment based on the material, uncontested facts because Centermark asserted that it owed no duty to protect decedent from the criminal acts of third parties. Specifically, Centermark argued that a review of the police reports from the prior incidents listed in plaintiff's petition showed a lack of prior crimes that were "sufficiently numerous, recent, and similar in type" to the car-jacking, abduction, and murder of the decedent to impose a duty of care on the part of Centermark to protect decedent from harm. Additionally, an examination of those police reports revealed no other car-jackings, abductions, murders, or even any incidents involving serious bodily injury of any kind in the mall parking lot.

The circuit court of the City of St. Louis granted Centermark's motion for summary judgment. The circuit court's ruling was upheld on appeal. The appellate court, in affirming the circuit court, held that crimes like indecent acts do not constitute violent crime under the circumstances in the case because there was no evidence of bodily harm or attempted bodily harm. Thus, all crimes which offered no evidence of bodily harm or attempt at bodily harm were excluded. The Wood court also cited Keenan when it held that to be considered under the violent crimes exception, the incident must occur on the premises controlled by the defendant. Further, incidents where bodily harm occurred incident to a criminal's escape attempt may be excluded as well. After excluding all incidents off the premises, outside the mall, all the incidents of indecent exposure, and injuries resulting from an escaping shoplifter, there remains about 20 incidents of allegedly violent crimes occurring within the five year period alleged in plaintiff's petition. The crimes included nine assaults, five purse snatchings, one robbery, one robbery/hold-up with the potential use of a weapon, one

fight, two strong-arm robberies and one miscellaneous incident in which a youth attempted to run over a mall employee.

The Wood court held that these crimes were *not* sufficiently similar to the car-jacking, abduction, and murder of the decedent. The Court found that the nature of these crimes did not share common elements sufficient to place the owner on notice of the danger. Additionally, there were absolutely no other murders and car-jackings during the five years preceding the murder of the decedent. The assaults and fights, for the most part, involved mall patrons who exchanged blows with one another after some previous altercation. There is no indication that any of the assaults involved serious or permanent injury; most involved minor cuts and bruises. Based on the evidence presented by plaintiff, the Wood court held that Centermark could not be expected to be put on notice that a person would be abducted at gunpoint and then killed based on the occurrence of several purse snatchings, robberies, and a handful of incidents where patrons assault one another, especially where only one of those incidents suggested the potential use of a weapon.

Additionally, in Hudson v. Riverport Performance Arts Centre, 37 S.W.3d 261 (Mo. App.E.D. 2000), plaintiff filed suit to recover for injuries sustained from an assault while attending a concert at the Riverport Amphitheater during a Lynyrd Skynyrd and Doobie Brothers Concert. The plaintiff was allegedly struck in the face with a whiskey bottle by an unknown man after an argument arose over a blanket.

Plaintiff set forth fifty-five incidents of alleged criminal activity at or near the Amphitheater which took place within a five year period. Out of those fifty-five incidents, the Court found that fifty-two of them evidenced assaults. After excluding all of the incidents that took place outside the Amphitheater, there remained thirty-eight assaults within a five year period. Out of those assaults, the Court found that most appeared to be fistfights, elbowing, pushing, kicking, and pulling hair, *none* of them involved a bottle or similar object. Therefore, the Court found that the assaults were *not* sufficiently similar in nature to the

incident alleged, *or* numerous to put either the Riverport or BMW on notice. Therefore, the Court found that the plaintiff failed to establish that the case fell within the “special facts and circumstances” exception. And on March 20, 2001, by denying transfer, the Supreme Court, by its silence, adopted this as the law of this state.

Thus, based on Wood and Hudson, the nature of the crimes cited by the Plaintiff in this case, and considered by the Appellate Court, do not share a common element sufficient to place the owners/managers on notice that business invitees were subject to abduction and rape, nor were they sufficiently numerous to have put the owners/managers on notice that business invitees were subject to abduction and rape.<sup>2</sup>

**4. Plaintiff has not Produced Evidence Showing that the Assailant was Unknown.**

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<sup>2</sup>In an attempt to interject inflammatory argument, Plaintiff states in her brief that a rape was attempted at the Mall in 1992, a sexual assault occurred in the Mall restroom in 1996, and a 14-year-old girl was attacked and molested in 1995. However, the trial court, nor the Appellate Court considered these alleged incidents in their analysis, and there are no facts to support them. (LF 848, 868, 876, 880, 1178, 1181, 1186)

In order to meet the fourth element put forth in Wood, the Plaintiff must prove that the alleged crime was committed by an unknown assailant. The facts in this case clearly demonstrate that Brandon Fitzpatrick was not an unknown assailant. Indeed, L.A.C. knew Brandon and referred to him as her boyfriend. (Griddine Deposition, p. 33, l. 16). Moreover, L.A.C. and Brandon arranged to see one another at WPSC on the date in question. (L.A.C. Deposition, p. 9, ll. 14-17) The facts are replete with details of conversations between L.A.C. and Brandon and their planning to meet one another. Under the facts in this case, Plaintiff is not seeking to impose a duty on a business owner for a deliberate criminal attack by an unknown third person. Rather, L.A.C. seeks to impose a duty on a business owner to protect her from the deliberate criminal acts of persons with whom she chooses to associate. There is no case law in this state for the creation of a duty such as this and it is clearly impossible for a business owner to adhere to such a duty. The imposition of such a duty would have disastrous consequences. For instance, this type of duty would require a business owner to protect a battered wife from a deliberate criminal attack by her husband simply because she is present on the premises of the business owner. This duty would exist even though the wife planned to meet her husband at the business owner's premises.

L.A.C.'s inability to meet the fourth criteria is a foundational problem that is fatal to Plaintiff's case. Clearly, no duty exists requiring a business owner to protect Plaintiff from the deliberate criminal acts of known persons Plaintiff chooses to associate with and arranges to meet on a business owner's premises. To impose such a duty would violate sound public policy reasons for refusing to impose a duty on business owners which includes (1) the difficulty that exists in determining the foreseeability of criminal acts; and (2) the notion that protecting private citizens is a government's duty rather than the duty of the private sector. Wood 984 S.W.2d at 524. Indeed, Plaintiff has not cited a single case where a duty was found against a business owner under fact analogous to this case.

**B. Response to Plaintiff’s Argument that the Court should Ignore Missouri Law and Find these Defendants Liable Based on Basic Fairness and Public Policy.**

Plaintiff also argues that basic fairness and public policy require that this Court find a duty owing from these Defendants to Plaintiff. As authority for this argument, Plaintiff cites Mulligan v. Crescent Plumbing Supply Co., Inc., 845 S.W.2d 589 (Mo. App. E.D. 1992). However, Mulligan is not a case involving violent crime or a crime against a person. Mulligan involves a case wherein the plaintiff’s vehicle was stolen from the parking lot of the defendant. Plaintiffs filed an action against the defendant and sought to avail themselves of the special facts and circumstances exception recognized in Missouri. However, the Missouri Appellate Court held that “[a]s a matter of public policy, the parameters of the “special facts and circumstances” exception, do not reach a duty as to damage to or loss of property.” The facts in Mulligan are not even remotely analogous to the facts in the case at hand. Indeed, the holding in Mulligan provides that a special facts and circumstances exception will not be extended to causes of action for property damage.

The courts of this state considered basic fairness and public policy when they adopted the violent crimes exception. In Faheen, the court recognized that a defendant is not an insurer of his invitee’s safety and is ordinarily under no duty to exercise any care against the criminal acts of third persons. The court went on to announce that crime is foreseeable in our society, at any place and at any time. The fact that crimes in general have occurred in an area or that a business is located in a “high crime” area is insufficient to invoke duty. Notwithstanding, the violent crimes exception was held to be a viable legal theory in Missouri. In so finding, Missouri courts have recognized that, in some circumstances, duty does exist. Under the violent

crimes exception, that duty exists if the criteria detailed in this brief are met. However, Plaintiff in this case fails to meet said criteria for the reasons set forth in this brief.

**C. Response to Plaintiff’s Argument that the Court should Replace Missouri law with Law from Other Jurisdictions.**

Plaintiff argues that “the Mall’s owners and managers clearly owed a duty to plaintiff under the prior violent crimes rule adopted by this Court in Madden and Decker because the history of violent crime at the Mall made future crimes foreseeable.” (Appellant’s Substitute Brief, p. 72). As discussed above, Plaintiff is incorrect. Furthermore, as discussed above, the cases that Plaintiff cites to in her argument, Madden and Decker, are distinguishable from the case at hand.

Plaintiff then states that since this Court has not reviewed a case involving the duty of business owners to protect their customers from criminal attack in the thirteen years, since Madden and Decker were decided, it should revisit the prior violent crimes approach to foreseeability adopted in those two cases and replace it with the “balancing approach” that is emerging in other jurisdictions. Id.

First and foremost, this issue was not raised in Appellant’s brief before the Court of Appeals. Therefore, this issue cannot be raised on transfer to the Supreme Court. Mo.Sup.Ct. 83.08(b); Linzenni v. Hoffman, 937 S.W.2d 723 (Mo.1997), also *see* Respondent’s Motion to Strike filed simultaneously with this brief.

As the Court is well aware, Plaintiff is mistaken in her assertion that this Court has not reviewed a case involving the duty of business owners to protect their customers from criminal attack in thirteen years because on March 20, 2001, this Court denied transfer of Hudson v. Riverport Performance Arts Centre, 37 S.W.2d 261 (Mo.App.E.D. 2000) from the Missouri Court of Appeals, Eastern District. By denying transfer, this Court reaffirmed its position and adopted the Appellate Court’s decision as the law of this state.

This case is before the Supreme Court today, because the Missouri Court of Appeals, Western District ignored the established law in Missouri and attempted to create new law that is unsupported. Appellant realizes this, so she is now trying to assert that Missouri needs to adopt a different criteria under the Missouri violent crimes exception. As previously stated, this issue was not raised in Appellant's brief before the Court of Appeals, and therefore, it cannot be raised now.

**D. Response to Plaintiff's Points 2 and 3.**

Plaintiff goes on to allege additional error by the trial court. Plaintiff alleges that IPC assumed a duty pursuant to a contract with G.G. Management. Plaintiff also alleges IPC breached the contract and further argues Plaintiff was a third party beneficiary of this contract. No such allegations are made against these Defendants including G.G. Management. In fact, Plaintiff affirmatively represents to this Court on page 40 of her Brief that because General Growth (G.G. Management) did not contract to provide security services and because it specifically stated an intent not to assume a duty or to create third party beneficiaries to its contract with IPC, Plaintiff is not appealing the trial court's granting of summary judgment in favor of G.G. Management and against Plaintiff on Plaintiff's contract based claims against G.G. Management. Thus, these Defendants do not respond to Plaintiff's Points 2 and 3.

## **IX. CONCLUSION**

In order to create a duty going from these Defendants to Plaintiff, Plaintiff is required to meet the criteria of the violent crimes exception to the general rule that a business owner has no duty to protect an invitee from a deliberate criminal attack by a third person. The criteria has been detailed extensively in this Brief. In examining the facts asserted by Plaintiff in this case, it is clear that neither a rape, nor an abduction occurred at the Ward Parkway Shopping Center during the twenty-five months immediately preceding the alleged attack. Furthermore, none of the seventeen crimes that the Court of Appeals considered share a common element with the rape and abduction that allegedly occurred on March 15, 1997. Therefore, based on Missouri law, the Plaintiff did not establish that this case fell within the “special facts and circumstances” exception. Thus, the trial court’s grant of summary judgment in favor of these Defendants should be affirmed.

Respectfully submitted,

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**84.06(c) CERTIFICATION**

I hereby certify that this brief contains the information required by Rule 55.03. Further, this brief complies with the limitations contained in Rule 84.06(b) in that it contains 10, 813 words, and that this disk has been scanned for viruses and is virus free.

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**CERTIFICATE OF SERVICE**

I hereby certify that two (2) copies of the above and foregoing was mailed, via U.S. mail, postage prepaid, this 9<sup>th</sup> day of October, 2001, to the following:

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