**IN THE MISSOURI COURT OF APPEALS,**
**WESTERN DISTRICT**

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**Appeal No. 79414**

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**AMIE WIELAND.**
**Plaintiff-Respondent,**

**vs.**

**Owner-Operator Services, Inc.**
**Defendant-Appellant**

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**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY**
**SIXTEENTH JUDICIAL CIRCUIT**
**THE HONORABLE JACK GRATE**
**Case No. 1416-CV17464**

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# RESPONDENT'S BRIEF

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## Statement of the Issues

Amie Wieland was shot in the back of the head by her ex-boyfriend Alan Lovelace ("Lovelace") in the parking lot of her employer Owner Operator Services ("OOSI"). Lovelace had entered Ms. Wieland's van at approximately 4:40 in the afternoon and laid in wait for her there, undiscovered, for over an hour. While Lovelace's actions were captured on security cameras, those cameras were not actively monitored. Two weeks prior to this tragedy Ms. Wieland had shared with OOSI that Lovelace was harassing her, that he could be dangerous, and that he might confront her on OOSI's premises. OOSI reassured Ms. Wieland that it had a protocol for handling such situations and requested a photograph and a description of Lovelace in order to begin implementing that protocol. Ms. Wieland promptly provided the photograph and description and updated OOSI on the behavior of Lovelace as it escalated over the following two weeks. OOSI initiated the first step in its procedure for such situations, providing the picture and description to the receptionist. However, for reasons that were never sufficiently explained, OOSI failed to take the other steps that were part of its standard protocol for these situations. These established, common sense steps included offering Ms. Wieland an assigned parking spot in the visitor lot near the front entrance and that was in view of the receptionist (who had been supplied with Lovelace's picture and description). The other steps OOSI failed to take were notifying its volunteer security team of the potential threat posed by Lovelace, distributing his picture and description to the security team, and offering Ms. Wieland an escort to her vehicle at the end of her shift.

In the absence of these safeguards being implemented, Lovelace was able to enter OOSI's property unobserved and to lie in wait in Ms. Wieland's minivan for over an hour before exiting the vehicle and shooting Ms. Wieland. It is not disputed that OOSI knew that Lovelace posed a known danger to Ms. Wieland and that his potential to harm Ms. Wieland was foreseeable. It was also admitted that Ms. Wieland was "invitee".

> [T]he Court recognizes that business owners may be under a duty to protect their invitees from the criminal attacks of unknown third persons depending upon the facts and circumstances of a given case. 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 v. C & K Barbecue Carryout, Inc.,* 758 S.W.2d 59, 62 (Mo. 1988)

Because Appellant cannot challenge that harm presented by Lovelace was foreseeable, the only question before this Court is whether Appellant's failure to discover Lovelace while he waited in her minivan was a breach of the duty of care it owed to Ms. Wieland. Furthermore, because Appellant cannot credibly argue that the jury erred in finding that Lovelace would have been found if his actions were conducted at the front door of the building instead of in a remote spot in the back of the lot, Appellant asserts, without foundation in Missouri law, that none of the procedures that OOSI had established to address the threat of a potentially violent ex-partner are relevant when considering whether OOSI could have, using ordinary care, discovered the danger posed by Lovelace in time to alert law enforcement. Unfortunately for the Appellant, Missouri law is clear that, under the totality of the circumstances test, its protocol for situations



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such as Ms. Wieland's, is a relevant consideration in determining whether it could have, using ordinary care, discovered Lovelace and prevented the devastating and life altering injuries sustained by Ms. Wieland. *Aziz by & through Brown v. Jack in the Box, E. Div., LP*, 477 S.W.3d 98, 105 (Mo. Ct. App. 2015), *Richardson v. QuikTrip Corp.,* 81 S.W.3d 54, 58-59 (Mo. Ct. App. 2002).



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## STATEMENT OF FACTS[1]

In October of 2012, Ms. Wieland began working at OOSI as a truck insurance agent support specialist. **Tr. 939.** OOSI is a membership organization that services, supports and sells insurance to independent truckers. **Tr. 816-820.** Its membership base is primarily male while the workforce at its Grain Valley world headquarters is primarily female. ***Id*., Tr. 225.** OOSI's headquarters is located on a "dead end" road and there is no reason for people other than employees, vendors, or members of OOSI to enter the parking lot. **Tr. 816-820.** In 2004, nine security cameras were installed to monitor the parking area. While various employees of OOSI had authorization to log in and view the camera feed from their computers, the real time footage was always displayed on a monitor located at the reception desk in the Human Resources department. **Tr. 260-61.** While that desk had been formerly occupied, in November of 2012, there was not a receptionist in HR to monitor the footage in real time and no one had been assigned to that task. **Tr. 261.**

In addition to the security cameras, OOSI had a volunteer security group comprised primarily of male employees called "Team 9." **Tr. 844-45.** Team 9's purpose was to keep employees safe. ***Id*.** It was initially formed, in part, in response to outsiders coming onto the premises. Among the duties Team 9 members undertook was to escort

[1] Respondent provides this supplemental statement of facts because Appellant's statement fails to comply with 84.04 in that it not a "a fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04 (c). Instead Appellant's voluminous statement is rife with argument, contains extraneous factual information that is contrary to the jury's finding and includes facts that are inaccurate or misleading. Finally, every single citation to the transcript by Appellant fails to comply with 84.04 (c) in that it does not point to evidence in the record that supports the proposition of fact alleged by Respondent.

female employees to their cars if those employees had reported a concern about their safety, typically because of a potentially dangerous ex-husband or ex-boyfriend. In 2012, Team 9 was supposed to be informed about similar situations including threats to employees by Suzanne Johnson (aka Suzanne Layton), at the time the director of human resources for OOSI, and the co-chair of Team 9. **Tr. 868-69, Ex 67A pg. 25.** If an employee reported to Ms. Johnson that they were concerned for their safety because of a potential threat from a known person, Ms. Johnson, according to OOSI's protocol, would request a description of the person and, if possible, obtain a photograph. Based on established company procedure, the description and photograph would be kept at reception. **Tr. 859-60.** Ms. Johnson would also email the members of Team 9 alerting them about the situation and providing them with a description of the person who presented a potential security threat and letting them know if a photograph was available for viewing at the reception desk. **Ex. 73A.**

In addition to obtaining the description and photograph of the threat, it was OOSI's protocol to offer the employee a space in the visitor's parking lot, right by the front entrance of OOSI's building and in sight of the company's receptionist. **Tr. 947-8.**

On November 6, 2012, Ms. Wieland went to Ms. Johnson after she had been served at work with an ex parte order of protection by her former partner Alan Lovelace. **Tr. 861.** Ms. Wieland explained to Ms. Johnson that the detailed allegations he made in that order of protection were not made up out of whole cloth, but were instead things he was doing to her. **Tr. 862.** These things included, stalking, threats, physical assaults and



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sexual assaults. **Tr. 862.** When asked by Ms. Johnson, Ms. Wieland stated that she was concerned. **Tr. 859.** Pursuant to OOSI policy, Ms. Johnson requested that Ms. Wieland provide a description and photograph and promised she would make sure the right people were informed. **Tr. 859-60.** Later, Ms. Wieland also informed Ms. Johnson that she believed Lovelace had escalated his behavior by trespassing onto her property and writing a slur in the frost on her car. **Ex. 73A, pg. 60.** However, while Ms. Johnson believes she provided the description and photograph to the front desk receptionist, she did not actually recall informing Team 9, did not offer Ms. Wieland a parking space closer to the building, nor did Ms. Johnson inform Ms. Wieland that members of Team 9 would be willing to escort her to her vehicle. **Tr. 868-70.** Ms. Wieland was not aware that a closer space by the front entrance or an escort was an option and continued to walk alone to her spot at the back of the parking lot. **Tr. 859.**

On November 20, 2012, Ms. Wieland returned to OOSI from the ex parte hearing and informed Ms. Johnson and others at OOSI that Lovelace had failed to show and the order was dismissed, but that he continued to contact and threaten her. **Tr. 655**. That same day, in full view of the security cameras put in place to monitor OOSI's parking lot, Alan Lovelace entered OOSI property, located Ms. Wieland's vehicle in the spot away from the front door, illegally entered the vehicle, and laid in wait for her for over an hour. **Tr. 446-48.** Ms. Wieland, believing that the office and parking lot were monitored and secure, approached her vehicle alone. ***Id***. After Ms. Wieland discovered Lovelace hiding



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in her car, she attempted to return to the safety of OOSI, however, she was unsuccessful and was shot by Lovelace in the parking lot. ***Id.***

After a six day trial, the jury rendered a verdict in Ms. Wieland's favor on November 10, 2015 and awarded her damages of $3,250,000.00.



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**Point I: The trial did not err in submitting Instruction No. 6 under the specific harm exception because there was sufficient evidence that if OOSI had used ordinary care it could have known that Lovelace was on the parking lot prior to Ms. Wieland being shot**

**A. Standard of Review**

The issue of whether a jury was properly instructed is a question of law that this Court reviews *de novo. Harvey v. Washington,* 95 S.W.3d 93, 97 (Mo. banc 2003). "Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by *any* theory, then its submission is proper." *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. 2008)(Emphasis added.) Even if error occurred, instructional errors will be reversed only if the error resulted in prejudice that materially affected the merits of the action. *Id.* "An instruction must be given where there is substantial evidence to support the issue submitted. Substantial evidence is that which, if true, is probative of the issues and from which the jury can decide the case. A party is entitled to an instruction on any theory supported by the evidence. *Ploch v. Hamai,* 213 S.W.3d 135, 139 (Mo. App. E.D. 2006).

**B. Argument**

Reduced to its essence, Appellant's extended discussion of the instruction given in this case boils down to the incorrect and unfounded assertion that the instruction utilized in *Aziz by & through Brown v. Jack in the Box, E. Div., LP, 477 S.W.3d 98, 104 (Mo. App. E.D. 2015),* and adopted by the Court in this case, was error. Appellant inaccurately, and without foundation, maintains that the trial court in *Aziz* and the Eastern

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District Court of Appeals improperly allowed an instruction which permitted evidence of the prior similar incident ("PSI") exception to the rule that a defendant is not liable for the criminal acts of a third party when the case was submitted under the specific harm ("SH") exception to the rule. Appellant argues, without any citation for the proposition, that the evidence of one exception is antithetical to the other. Appellant's theory, unsupported by the facts adduced at trial and recent Missouri law, is that Plaintiff was unable to submit a case on the PSI exception so was forced to submit a case on a hybrid of the SH exception. For a multitude of reasons, Appellant's argument is unfounded. In the first instance, Plaintiff had sufficient evidence for a submissible case under both exceptions to the rule. Secondly, Appellant's insistence that the evidence of special facts and circumstances which support one exception are irrelevant and impermissible in evaluating the other exception is not supported by Missouri law, contrary to the well-articulated rationale for the exceptions themselves and would result in manifest unfairness to injured parties such as Ms. Wieland. Finally, the instruction utilized in *Aziz* and affirmed by the Eastern District was the proper instruction for the facts of this case and is well founded in Missouri law.

**1. Sufficient evidence existed for Plaintiff to take the case to the jury under either theory**

Although not necessary to a determination of the matter at hand, Respondent had sufficient facts to submit under multiple theories showing that Appellant owed her a duty under Missouri law. Missouri's rationale for not imposing a duty on a business to protect

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its invitees from the criminal acts of third parties is that such actions are generally not foreseeable by the business owner. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. 2002)("A duty to protect against the criminal acts of third parties is generally not recognized because such activities are rarely foreseeable.") Courts in Missouri have imposed a duty; however, when "special facts and circumstances" demonstrate that harm to an invitee is foreseeable. *Id.* (quoting *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 61 (Mo. 1988). The exceptions based upon special facts and circumstances include cases where an individual known to be dangerous is on the premises or where the circumstances show that there is a foreseeable likelihood that certain acts or omissions will cause harm or injury. *Richardson v. QuikTrip Corp.,* 81 S.W.3d 54, 58-59 (Mo. Ct. App. 2002). In the present case, Plaintiff put forward evidence that would have supported either theory.

### A. Respondent established that the facts and circumstances supported a duty of care on the part of OOSI

At trial Appellant maintained that Respondent could not submit a case under the PSI exception because there had not been sufficient violent crimes to show that harm to Ms. Wieland was foreseeable.

> What evidence do they have to show? Well, they have to have evidence to establish an exception as to prior violent crimes that put defendant on notice that a (sic) additional security, meaning whether it's security guards, monitor cameras 24/7,whatever it is, was required to be in place before the shooting occurred. **Tr. 785**. (Defendant's argument for Directed Verdict at the Close of Plaintiff's Evidence).

Unfortunately for the Appellant, however, this argument applies outdated Missouri law. Currently, Missouri looks to the *totality of the circumstances* to determine whether an attack is foreseeable, not simply how often a similar attack has occurred in the past. *Richardson v. QuikTrip Corp.,* 81 S.W.3d 54, 58 (Mo. App. 2002); *Aziz,* 477 S.W.3d at 105.

> Consistent with the holding in *Virginia D. v. Madesco Inv. Corp.,* 648 S.W.2d 881 (Mo.banc 1983), with the court of appeals decision in *Brown,* and with the rule established by the *Restatement of Torts,* the Court recognizes that business owners may be under a duty to protect their invitees from the criminal attacks of unknown third persons depending upon the facts and circumstances of a given case. 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. *Lowrey v. Horvath,* 689 S.W.2d 625, 627 (Mo. banc 1985).

*Richardson*, 81 S.W.3d at 59. In *Richardson*, the Missouri Court of Appeals summed up its rationale for rejecting the type of narrow analysis that Appellant proposes:

> This general trend away from the simplistic and subjective prior criminal incidents approach is based upon the general perception that it is "fatally flawed" because (1) it leads to results contrary to public policy by discouraging landowners from taking adequate measures to protect premises known to be dangerous, (2) initial victims who are denied recovery are treated differently from subsequent victims even if the attacks are equally foreseeable, (3) limiting evidence of foreseeability to prior similar criminal acts leads to arbitrary results and distinctions, and (4) the rule erroneously equates foreseeability of a particular act with previous occurrences of similar acts.
> *Richardson* at 63.

Appellant argued that the totality of the circumstances test adopted in *Richardson* was called into question by the Supreme Court in *Ward Parkway*. **Tr. 1215-16.**



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However, this mischaracterizes *Ward Parkway* and ignores the current state of Missouri law. In the first instance, *Ward Parkway* was handed down just two months after Richardson and does not discuss the case or cite to it. *Ward Parkway.*, 75 S.W.3d at 258. While the Court in *Ward Parkway* noted that there was some question in legal scholarship and the case law regarding whether Missouri had adopted a totality of the circumstances test in Madden, the Court in Ward did not by any means overturn Richardson's determination that Missouri employs a totality of the circumstances test. *Id*. Instead the Court in *Ward Parkway* merely stated that it did not have to weigh in on the issue:

> Although *Madden* considered prior similar incidents, it used language implying a totality of the circumstances test ("the facts and circumstances of a given case") *Madden,* 758 S.W.2d at 62. As will be discussed below, this case does not require that we enter the fray
>
> *Id*.

Despite the fact that the Court in *Ward Parkway* did not even discuss the *Richardson* opinion, Appellant argues that *Ward Parkway* renders *Richardson* bad law. Unfortunately Appellant's argument, in the fourteen years since *Richardson* was handed down, subsequent courts have applied the totality of the circumstances test set out in *Richardson*. Most notably, in *Aziz*, an opinion issued well after *Ward Parkway*, the Missouri Court of Appeals relied both upon *Ward Parkway* and *Richardson* and utilized the totality of the circumstances test as the law in Missouri. *Aziz,* 477 S.W.3d at 105. Absent a contrary opinion of the Missouri State Supreme Court, the pronouncement of



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the Missouri Court of Appeals, regardless of the division, is the law of Missouri. *Lambing v. Southland Corp*., 739 S.W.2d 717, 718 (Mo. 1987)

> The Supreme Court is a court of limited appellate jurisdiction. General appellate jurisdiction is vested in a single Court of Appeals, divided into three districts. The responsibility to announce the common law is not, therefore, the exclusive province of this Court. The common law moves tentatively; the process of modification is one of careful steps, of thoughtful maturation. It is a process in which the Court of Appeals plays an important role. We may deny the Court of Appeals its role in the common law process only by ignoring the constitutionally mandated division of judicial power and at the risk of calcifying the common law.

*Id*. See also *City of Lake St. Louis v. City of O'Fallon*, ED93289, 2010 WL 289189 (Mo. Ct. App. Jan. 26, 2010). Consequently, unless, the Missouri Supreme Court accepts transfer of a case or specifically overrules an issue of law determined in an opinion, the latest determination of Missouri's Court of Appeals is controlling law. *Id., McCormack v. Stewart Enterprises, Inc.,* 956 S.W.2d 310, 312 (Mo. Ct. App. 1997). Here the Missouri Supreme Court denied transfer of both *Richardson* and *Aziz*, rendering them the controlling law on the issue in Missouri.

Under the controlling law in *Richardson*, as in *Aziz*, the Courts considered not only evidence of past violent acts but crimes in general, the nature of the business, and other knowledge of the premises owner as to potential dangers posed, as well as policies and procedures that were put into place to account for or combat those dangers. *Richardson, at 63.*; *Aziz,* 477 S.W.3d at 104-5. In the instant case, Ms. Wieland put forward evidence that the security protocols and procedures that OOSI put into place, procedures that it inexplicably failed to employ for the benefit of the Appellant, were



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established because the facts and circumstances made clear to OOSI that its parking lot was not secure and OOSI knew that those under threat of domestic violence were not safe in that area of its premises.

**B. Respondent had sufficient evidence to submit the case to the jury under the specific harm or known dangerous person exception**

In its brief Appellant inaccurately sets out the elements that Ms. Wieland needed to prove to submit her case to the jury. Appellant asserts that Ms. Wieland had to show "(1) that OOSI knew that Lovelace was in the parking lot; (2) that when OOSI became aware of Lovelace's presence in the parking lot, it knew that he posed a danger to Wieland; and (3) there was sufficient time thereafter for OOSI to take action that could have prevented Wieland from being shot by Lovelace." **Appellant's Brief pg. 37-38.** However, Appellant was not required to demonstrate that OOSI knew that Lovelace was in the parking lot, but only to show that OOSI knew or, with the exercise of reasonable care, *could have known*. *Adams v. Badgett,* 114 S.W.3d 432, 438 (Mo.App.E.D.2003)(" A possessor of land owes an invitee a duty of care to prevent injury by known dangers and those that could be revealed by inspection." See also, *Ward Parkway.*, 75 S.W.3d at 262, *Aziz*, 477 S.W.3d at 106, *Nappier v. Kincade*, 666 S.W.2d 858, 862 (Mo. Ct. App. 1984)

In this appeal, however, Appellant advances an argument divorced from the facts of the case and controlling Missouri law to inaccurately argue that "only the facts and circumstances that existed at the time Lovelace entered the parking lot would be relevant



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in determining whether OOSI could have known of his presence in time *thereafter* to have prevented the shooting." **Appellant's Brief pg. 41**. The sole citation Appellant uses to support this bizarre theory is *Nappier v. Kincade*, 666 S.W.2d 858 (Mo. Ct. App. 1984). However, not only does Appellant ignore more recent, substantive and directly on point legal authority, it misconstrues the cited law and also ignores the actual holding of *Nappier*. In *Nappier* a customer of a restaurant was beaten to death by another patron of the restaurant. *Id.* Appellant cites to this case for the proposition that a business owner does not have a duty until it realizes from special facts within its knowledge that a criminal act is occurring or is about to occur. There is simply no basis for the conclusion that appellant draws from this citation. This is particularly the case because the appellate court in *Nappier* ultimately reversed the dismissal to permit the plaintiff to amend their petition. *Id.* at 862. In overruling the trial court to permit this adjustment the trial court noted that liability can attach where a business owner:

> ….fails either to take *reasonable care to discover that dangerous conduct of third persons is occurring or is likely to occur, or to take reasonable care to provide appropriate precautions*. It is not necessary that the business owner be aware of the exact type of criminal act or acts which might take place on its premises. It is sufficient if the business owner has notice, actual or constructive, of prior acts committed by third persons on or about their premises which might cause injuries to its patrons.
>
> However, to bring itself within this rule of law, a plaintiff must allege that specific crimes occurred on the premises; when the identity is known, that specific individuals committed violent acts on the premises; that the individual attacker had been on the premises previously and had acted violently, or that the restaurant operator was aware *or could have been aware of his presence* and potential danger in sufficient time to avert the attack or summon police assistance.



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*Id*. (Emphasis added).

In the instant case, both Ms. Wieland and OOSI knew that Lovelace posed a danger but only Appellant knew that the parking lot was not monitored and not secure. Here there was substantial evidence in the record that Appellant knew that Lovelace had threatened, harassed and intimidated Ms. Wieland in the two weeks prior to his illegal entry into Ms. Wieland's vehicle on OOSI's property. OOSI also knew that Ms. Wieland was afraid that Lovelace might harm her and that he might come onto OOSI property. In fact, representatives of OOSI specifically asked Ms. Wieland about whether she was concerned for her safety and, on hearing that she was, implemented the first step in its protocol for keeping individuals who were known to represent a threat from carrying out that threat. As a result, the jury had sufficient evidence to establish that OOSI had knowledge that Lovelace represented a potential threat to Plaintiff.

Furthermore, Respondent demonstrated that despite the above knowledge OOSI failed to "take reasonable care to discover that dangerous conduct of third persons [was] occurring or likely to occur, or to take reasonable care to provide appropriate precautions." *Id.* Specifically, OOSI didn't follow through with the appropriate precautions it had created to reveal the presence of a potential threat in time to alert the police and avert the danger. At trial, Respondent used Appellant's own procedures and witnesses to show that Appellant failed to take reasonable care to discover the presence of Lovelace when it neglected to follow its established protocol to assist employees

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facing potential domestic violence at work. **Tr. 1156**. Respondent demonstrated that Ms. Wieland should have been provided a parking spot in view of the front desk and where Plaintiff could have seen her vehicle from the safety of the building. Respondent further showed that Ms. Wieland should have been provided with an escort to her car, a step which would have provided Ms. Wieland with someone specifically looking for potential dangers to her. Furthermore, both of these actions, actions which were the policy of OOSI, could have alerted OOSI of the dangerous presence of Lovelace, in time to alert the authorities. If Appellant followed its own protocol and procedure, it could have known when Lovelace illegally entered Ms. Wieland's car in full view of the security cameras and waited there for over an hour before she left work, in time to call the police. Moreover, it was established at trial, through the testimony of Det. Vigliaturo of the Grain Valley Police Department, that if Appellant would have notified the police department of the threat to Ms. Wieland when it was first reported to Ms. Johnson, they could have easily supplied extra patrols of the property and parking lot. **Tr. 885**

Not only were all these facts established by testimony or other evidence, even Colonel Hugh Mills, OOSI's security expert, agreed that the protocol OOSI enacted, but failed to follow, was reasonable in situations such as the one Plaintiff faced:

> Q. You also when we talked before, you said that you believed it was reasonable for human resources to offer someone an up-close parking spot if they raised a safety concern such as Aime Wieland, correct?
> A. I do.
> ****
> Q. That is reasonable. Also reasonable is to allow other employees to escort these ladies who have concerns to their car, correct? You said that's reasonable.

A. That's reasonable, sure.
Q. You're aware that Amie Wieland reported a safety concern of specifically Mr. Lovelace to HR andto Suzanne Layton, correct, Suzanne Johnson?
A. I am.
Q. And you're aware that she started the protocol, meaning she asked for a description of the potential aggressor, correct?
A. That's correct.
Q. And you're aware that she asked Amie to give a photograph, correct?
A. Correct.
**TR. 1156.**

Without direct citation for the proposition, OOSI argues for a reading of the dangerous person exception that would render inadmissible the evidence that OOSI could have known of Lovelace's presence if it had implemented the procedures it had established. This argument misconstrues Missouri law. In *Aziz*, handed down prior to trial of this matter and upheld by the Supreme Court, the Eastern District Court of Appeals utilized the totality of the circumstances test to consider whether a Taco Bell owed a duty to protect invitees from a rowdy group congregated in its parking lot. *Aziz,* 477 S.W.3d at 104-5. While specifically noting that the past violent crimes exception was not relevant to the appeal, the Court examined numerous factors to determine that Taco Bell owed a duty to the injured party, despite the fact that there was not time for it to act when the crime actually began. *Id*. at 105.

> The special facts and circumstances exception only requires that the third party behave in a way indicating danger while on the business owner's premises and that a sufficient time exist to prevent the injury to the invitee. Here, the Lane group was on Defendant's property behaving in a way indicating danger *according to Defendant's own policies* for at least thirty minutes or perhaps as much as an hour before Plaintiff even arrived. When the police were eventually called, they arrived in nine minutes. Therefore, the duration of the actual fight is irrelevant, because Defendant had notice



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> of the potential danger and sufficient time to react and prevent Plaintiff's injury before the fight even began.

*Id*. (Emphasis added.)

As in this case, the Court in *Aziz* based its evaluation of whether harm was foreseeable in part on the fact that Appellant's own policies and procedures established that there was a foreseeability of danger and that certain steps were required to forestall or prevent it before it was clear that an actual crime was in progress.

> ….Defendant's own policies recognized the threat of crime and the danger that could arise to its customers resulting from late night disruptive loitering, rendering it foreseeable. Defendant's written policies on loitering and disruptive activity required that action be taken "immediately" because such activity leads to "fighting," "injury," or other danger to people on the premises. To help implement those policies, Defendant retained Westec to electronically monitor the premises and be available for emergency response. "Generally speaking, commercial establishments are well positioned to know the extent of crime on the premises ... to take measures to thwart it and to distribute the costs associated with providing security." Therefore, just as in *Richardson,* the nature of Defendant's business and its own internal policies demonstrate its awareness that loitering and disruptive behavior can lead to danger for other customers, rendering it foreseeable given the totality of the circumstances.

*Id. (Internal citations omitted).*

The Court in *Aziz* found that that policies and steps established by the defendant were relevant to the question of whether the Defendant knew that a dangerous individual(s) was on its premises in time to prevent injury to the plaintiff, even when those procedures were not followed. *Id*. at 102, 5 (Reviewing as evidence Taco Bell's policy of having the manager monitor the video footage and calling security when groups



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congregated despite the fact that the evidence was the manager was busy during the period in question and failed to actively monitor the security feed.)

In the instant case, Ms. Wieland established that the Appellant knew that its parking lot was unsecure and unmonitored and as a result had created policies to mitigate the deficiencies in the security of its parking lot by having threatened employees park in a spot that was clearly visible from the office, by alerting the security team of the threat represented by Lovelace, and by providing her an escort to make sure she was safe going to her car. Appellant argues that under the SH exception its failure to implement its own policies is not proper evidence of foreseeability because it was under no duty to act on those long established procedures until the dangerous person entered its property.[2] **Appellant's Brief Pg. 41-42**. This hyper technical reading of an instruction is not well founded in logic or the law. *Samuels v. Klimowicz*, 380 S.W.2d 418, 421 (Mo. 1964). For example, in *Aziz* the manager of the Taco Bell was supposed to be monitoring video footage of the parking lot showing the escalating situation but was not because he was

[2] Appellant has mostly abandoned its argument that the verdict director was supposed to have stated that OOSI "should have known" instead of "could have" in the verdict director in Aziz and in this case. However, Defendant still cites cases from prior to 1995 as relevant to the verdict director. These cases were handed down prior to the 1995 revision to MAI 22.03 on premises liability to an invitee. *Id.* That revision altered the language from "should have" to "could have." MAI 22.03. As the committee comment to the 1996 Revision notes:

> "The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice. Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". See Benton v. City of Rolla, 872 S.W.2d 882 (Mo. App. 1994), and Burrell v. Mayfair-Lennox Hotels, Inc., 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice.

*Mo. Approved Jury Instr. (Civil) 22.03 (7th ed)*

counting money in anticipation of a shift change. *Aziz*, 477 S.W.3d at 102. The appellate court properly found that the appellant's failure to implement procedures designed to protect invitees did not shield it from notice that harm was foreseeable. *Id.* Instead, as noted above, an appellant's procedures for dealing with a potentially dangerous person or situation are relevant in assessing foreseeability under the totality of the circumstances. *Id*. at 104-5. Like in this case, the defendant in *Aziz* had policies and procedures that, had they been followed, would have likely prevented the tragedy. While Appellant effectively dismisses *Aziz* by maintaining, without citation, that evidence of OOSI's failure to follow its own protocol is only relevant under PSI or AD exceptions, *Aziz* is consistent with Missouri law and well-reasoned.

Consistent with *Aziz*, Missouri has rejected the idea that simply failing to have actual notice of the presence of a dangerous individual allows a defendant to evade liability for their actions. "When a criminal episode on the premises has begun to unfold and the possessor or his employees are, *or should be*, aware of it, the issue of foreseeability disappears. It would seem logical that the possessor would then owe entrants a duty of reasonable care under the circumstances." *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.,* 75 S.W.3d 247, 263 (Mo. 2002)(quoting The Law of Premises Liability sec. 11.11.)(Emphasis added.). In the instant case Lovelace entered the vehicle in daylight and even exited it to stretch his legs. He lay in wait in the van for over an hour. It was completely reasonable for the jury to conclude that if Ms. Wieland had been provided a front row parking spot in view of the front desk where a picture of



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Lovelace and his description had been placed, that OOSI would have been aware of his presence in time to contact law enforcement.

Appellant's first point on appeal is contrary to Missouri law and policy and should be rejected.



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**Point II: The trial court did not err in allowing Ms. Wieland to argue that OOSI's failure to follow its protocol was relevant to whether OOSI could have known of Lovelace's presence because OOSI knew that Lovelace posed a danger to Ms. Wieland and OOSI's protocol established its standard of ordinary care in the face of a known potential for specific harm**

**A. Standard of Review**

"The trial court has broad discretion in the area of closing arguments; such discretion is not lightly to be disturbed on appeal." *Gleason v. Bendix Commercial Vehicle Sys., LLC*, 452 S.W.3d 158, 180 (Mo. App. W.D. 2014)(Internal citation omitted). In light of the evidence adduced at trial and the court's denial of Appellant's motion to dismiss on the issue of submissibility Respondent contends that the governing standard of review for this point on appeal is for an abuse of discretion. *Id.* However, if this Court determines that the ultimate question is one of instruction then that issue is a question of law that this Court reviews *de novo. Harvey v. Washington,* 95 S.W.3d 93, 97 (Mo. banc 2003). "Review is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by *any* theory, then its submission is proper." *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. 2008)(Emphasis added.) Even if error occurred, instructional errors will be reversed only if the error resulted in prejudice that materially affected the merits of the action. *Id.* "An instruction must be given where there is substantial evidence to support the issue submitted. Substantial evidence is that which, if true, is probative of the issues and from which the jury can decide the case. A party is entitled to an instruction on any theory supported by the evidence. *Ploch v. Hamai,* 213 S.W.3d 135, 139 (Mo. App. E.D. 2006).

## B. Argument

Appellant's second point on appeal is simply a regurgitation of its earlier point in slightly different clothing. OOSI inaccurately argues that the trial court erred in permitting Ms. Wieland to introduce evidence of the procedures it had put in place when there was a known potential threat, because OOSI persists in its argument that it owed no duty to Ms. Wieland until Lovelace broke into her vehicle in a back section of its parking lot. As detailed at length above this argument wholly ignores the finding in *Ward Parkway* that an owner is liable when they *could* have known of the danger to the injured party. 75 S.W.3d at 247. It also is in direct contradiction to the holding in *Aziz* which found that policies and procedures put in place in response to potential threats are relevant to determining whether an owner could have known of a potential threat in time to contact authorities. 477 S.W.3d at 107. As noted above, the jury instruction adopted by the trial court in this case was a virtual mirror of the instruction adopted by the trial court in *Aziz* that was specifically upheld by the Court of Appeals.[3] Nothing in Appellant's complex and tortured distinctions between SH, PSI and AD exceptions distinguishes this case from the facts in *Aziz* in a fashion that shows that OOSI's protocol for addressing potential threats was not relevant in assessing whether the implementation

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[3] First, individuals were present on Defendant['s] parking lot who posed a danger to Plaintiff; and
Second, that Defendant[ ] knew or could have known of the danger posed to Plaintiff; and
Third, either:
Defendant[ ] failed to notify the authorities when the risk of danger to Plaintiff became apparent; or
Defendant[ ] failed to remove the individuals when the risk of danger to Plaintiff became apparent; and
Fourth, sufficient time existed within which to prevent injury to Plaintiff; and
Fifth, Defendant[ was] thereby negligent; and
Sixth, such negligence of Defendant[ ] directly caused or directly contributed to cause damage to Plaintiff.



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of those steps could have allowed OOSI to discover the threat posed by Lovelace in time to contact authorities. As a result, Appellant's conclusory assertion that evidence of its failure to follow its own procedures was not relevant in assessing whether OOSI could have known that an anticipated threat had materialized is simply not founded in Missouri law. *Id*., *Ward Parkway*, 75 S.W.3d at 247, *Nappier,* 666 S.W.2d at 862. Appellant's arbitrary assertion that harm inflicted by a third party who represents a known threat precludes evidence of established procedures that recognize the threat posed by that person represents the elevation of intellectualized legal distinctions over common sense and fortunately is directly contrary to established Missouri law.

**Point III: The trial court did not err in permitting Ms. Wieland to argue that OOSI failed to follow its protocol because Instruction No. 6 specified that OOSI failed to use ordinary care to ascertain if Lovelace was in the parking lot**

**A. Standard of Review**

"The trial court has broad discretion in the area of closing arguments; such discretion is not lightly to be disturbed on appeal." *Gleason v. Bendix Commercial Vehicle Sys., LLC*, 452 S.W.3d 158, 180 (Mo. App. W.D. 2014)(Internal citation omitted). In light of the evidence adduced at trial and the court's denial of Appellant's motion to dismiss on the issue of submissibility Respondent contends that the governing standard of review for this point on appeal is for an abuse of discretion. *Id.* However, if this Court determines that the ultimate question is one of instruction then that issue is a question of law that this Court reviews *de novo. Harvey v. Washington,* 95 S.W.3d 93, 97 (Mo. banc 2003). "Review is conducted in the light most favorable to the submission of



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the instruction, and if the instruction is supportable by *any* theory, then its submission is proper." *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 608 (Mo. 2008)(Emphasis added.) Even if error occurred, instructional errors will be reversed only if the error resulted in prejudice that materially affected the merits of the action. *Id.* "An instruction must be given where there is substantial evidence to support the issue submitted. Substantial evidence is that which, if true, is probative of the issues and from which the jury can decide the case. A party is entitled to an instruction on any theory supported by the evidence. *Ploch v. Hamai,* 213 S.W.3d 135, 139 (Mo. App. E.D. 2006).

**B. Argument**

Defendant inaccurately maintains that Ms. Wieland argued outside the scope of the verdict director in her closing argument by pointing out that OOSI breached its protocol for employees dealing with the threat of domestic violence. It incorrectly argues that since the only negligence asserted in the instruction was OOSI's failure to call law enforcement, that Ms. Wieland should not have been permitted to mention Appellant's failure to monitor its security cameras, failure to escort Ms. Wieland to her vehicle and failure to provide her with a more secure, visible parking space. Appellant inaccurately contends that, by pointing out these lapses, Plaintiff was improperly attempting to attach liability OOSI for omissions other than OOSI's failure to contact law enforcement. Appellant asserts here, without foundation, that the instruction provided only one action or omission that could be considered by the jury as they worked their way through the instructions. **Appellant's Brief, pg. 51.** OOSI leverages that argument to maintain that



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the only evidence of inaction or omission that Ms. Wieland could highlight was its failure to contact law enforcement in time to prevent her injury. *Id.* Appellant in essence asks this Court to hold that it could only have been negligent if there was time to contact law enforcement after Lovelace exited the vehicle. As a result, OOSI improperly maintains that Respondent's arguments pointing out the consequences of OOSI's failure to follow its procedures was not consistent with the instruction. However, as outlined at length above, this is simply not the law.

In *Aziz*, also a case where the specific harm exception was at issue, the Court was faced with an extremely similar question when the defendant in that case argued on appeal that it was not negligent because the attack by a group of loitering customers in the defendant's parking lot lasted only ninety seconds, insufficient time for the police to arrive. 477 S.W.3d at 105. As here, the defendant in *Aziz* asserted that it did not know that the loitering customers represented a threat until the attack actually began to unfold. *Id.* The Court in Aziz rejected this argument under the totality of the circumstances test in substantial part by finding that (1) the defendant's policies identified groups of loitering customers in the parking lot as a potential threat (2) the defendant failed to implement its policy that required employees to request loiterers to leave and to call the police or defendant's private security if the loiterers refused to comply. *Id.* As a consequence, the Eastern District Court of Appeals held that evidence of a defendant's failure to follow policies was relevant to determining whether it could have discovered a potentially dangerous situation in time to call law enforcement. *Id.* ("The Lane group

was violating the loitering and disruptive guest policies, meaning that Defendant could have encouraged them to leave or called the police before Plaintiff arrived.")

While OOSI maintains that Respondent argued in closing that OOSI's breach of its protocol required that the jury find in Ms. Wieland's favor, that is a mischaracterization. In closing argument, counsel for Ms. Wieland in this case clearly utilized evidence of OOSI's policies and protocols for essentially the same purpose as it was utilized in *Aziz*, to show that OOSI could have known of the presence of the danger if it had followed its own policies and procedures. **Tr. 1249-1251.** Counsel played the video of Lovelace entering the property and properly argued that his actions could have been discovered if OOSI had followed the reasonable procedures it had already put into place.

> Had part of this protocol been followed they could have noticed that Mr. Lovelace had entered the property and that they were already aware that he posed a danger. At that time one hour before -- we know he came on the property one hour before. They had ample opportunity to notify the law enforcement authorities.

****

> So had she been offered this spot up front in view of the front desk, where they had the description, where they had the photograph. They could have seen Mr. Lovelace there in her vehicle and notify authorities. Taken care of the situation.

****

> We know that had the vehicle been parked on the front row in the visitor's spot they would have noticed him walking onto the property and getting into the vehicle. Also some 20 minutes later, 18 minutes later we see him get out of the vehicle and stretch or whatever he does and gets back in the vehicle.



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> Again, had this vehicle been parked in the visitor's lot, had the protocol been followed then they could have detected this.

****

> You see him get out on the passenger side and get back in. Had someone been watching they were aware of the known threat, the known danger that he posed to Ms. Wieland; this could have been prevented. We heard law enforcement say had they been notified they could have gotten there well within one hour. We heard Colonel Hugh Mills say he agreed that law enforcement could have responded within an hour, well within an hour. Again at 4:59 nothing is done. Defendant's witness Mills also in his testimony he failed to take into consideration Team 9, he failed to take into consideration his opinions about the company protocol. What he did do, he agreed that the protocol was reasonable and they would have been reasonable to follow through and offer her a parking spot up front.

**Tr. 1249-1251**

Later on in closing, Respondent made perfectly clear it was introducing the evidence of OOSI's breach of its protocol only to show that with the exercise of reasonable care Appellant could have known of the presence of Lovelace in the parking lot in time to contact law enforcement. **Tr. 1255-57**

> Now, let's talk about Instruction No. 6 which is commonly called the verdict director. In this your verdict must be for the plaintiff, Ms. Wieland, if you believe, first, that Alan Lovelace was present in defendant's parking lot on November 20th. We know that's true. And he posed a danger to plaintiff, and we know that's true. Second, that defendant knew or by using ordinary care could have known that Alan Lovelace was in the parking lot and posed a danger to plaintiff. Here the defendant knew or could have known he was in the parking lot if they would have allowed Ms. Wieland to park up front. They had his photograph. They had his description. Had they done this they would have known. So plaintiff meets this part.
>
> ***Id.***



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Finally, while Plaintiff did not equate OOSI's failure to implement its own standard practices with liability, the facts of the case dictated that Plaintiff review those failures in closing argument. Missouri is liberal in the argument it permits during closing argument and the scope of what is permissible varies depending upon the facts elicited at trial. *Mansfield v. Horner*, 443 S.W.3d 627, 656 (Mo. App. W.D. 2014).

> "The trial court has broad discretion regarding closing arguments and closing arguments are not viewed in isolation." Instead, we consider the closing argument with reference to the entire trial. (concluding that the claimed error during closing arguments did not constitute a manifest injustice or a miscarriage of justice because the evidence presented during the trial supported the jury's verdict). "'[C]ounsel is accorded wide latitude in arguing facts and drawing inferences from the evidence, and the law indulges a liberal attitude toward closing argument.' "

*Id.* (Internal Citations omitted.)

Respondent was properly permitted to introduce evidence of the failures on the part of the Appellant to follow its protocol because that failure was relevant to an issue before the jury, whether or not OOSI could have, with ordinary care, been aware of Lovelace's presence on the property. As is detailed above, even OOSI's own expert testified that the common sense actions established to mitigate the danger posed to employees threatened by a past partner were reasonable. Certainly, it would have been reasonable for Appellant to follow its own protocol for this situation and certainly, if its protocol was properly followed, it is proper Defendant could have known of the presence of Alan Lovelace. As such, specific detailing of the steps OOSI had undertaken in the past in situations similar to Ms. Wieland, and failed to take on her behalf, were absolutely



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relevant to the question of whether or not Lovelace could have been detected in time to contact law enforcement. Because actions such as patrol of the parking lot, assignment of a new parking space by the front entrance, alerting Team 9 and escorting the concerned employee to her car were established procedure at OOSI when it was informed that an employee was under threat, these steps were also evidence that such actions were the ordinary care established by OOSI. Since what constituted ordinary care was a question before the jury OOSI's breach of its own protocol was clearly relevant to the questions presented to the jury.

Finally, evidence that Team 9 was not notified of Lovelace was the proper subject of argument. Just as the employees of the defendant in *Aziz* were supposed to contact law enforcement or a security company if loiterer's did not disperse, Team 9's role was to be on the lookout for unusual or suspicious circumstances and, if a situation appeared to pose a danger, contact the police. **Tr. 844-45.** Testimony adduced at trial from James Johnston, the President of OOSI, revealed that requesting a response from law enforcement was an act that was intertwined with the security protocols and procedures that Defendant failed to implement on behalf of Ms. Wieland. ***Id.***

> MR. SHUMATE: You would want your Team 9 if they saw a threat or danger in the parking lot to call the police and ask them for a quick response, correct?
> THE WITNESS: Depending on what the situation was in the parking lot, yes.
> MR. SHUMATE: If there was a danger or threat to safety you would want them to do that, correct?
> THE WITNESS: Yes.

***Id*.**



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Team 9 was the volunteer security team that was supposed to have been informed of the potential threat posed by Lovelace to Ms. Weiland so that they could be on the lookout for him and the group that was supposed to have provided her with an escort to her car. The failure of OOSI to inform Team 9 that Ms. Weiland was concerned Lovelace posed a threat to her safety is evidence that Defendant did not exercise ordinary care that could have resulted in Lovelace's discovery in sufficient time to prevent injury to Plaintiff is patently relevant to issues before the jury. The exclusion of such evidence and argument and inferences from it would have been error, the admission of it was not. *Mansfield*, 443 S.W.3d at 656.



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## VII. CONCLUSION

Because the procedures that OOSI had established to address the threat of a potentially violent ex-partner are relevant under Missouri law when considering whether OOSI could have, using ordinary care, discovered the danger posed by Lovelace in time to alert law enforcement, Appellant's entire argument is without legal basis. Those policies are a proper gauge of whether it could have, using ordinary care, discovered Lovelace and prevented the devastating and life altering injuries sustained by Ms. Wieland and for that reason this appeal should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was served upon the following via Missouri's Electronic Filing System on September 16, 2016:

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**Certificate of Compliance**

I hereby certify pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 9,099 words, exclusive of the sections exempted by Rule 84.06(b)(2) and based on the word count that is part of Microsoft Word 2010. The undersigned counsel further certifies that the file has been scanned and is free of viruses.

*/s/ David Harris*