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

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**APPEAL NO. WD 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**
**SEVENTEENTH JUDICIAL CIRCUIT**
**THE HONORABLE JACK GRATE**
**Case No. 1416-CV17464**

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# APPELLANT'S REPLY BRIEF

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## STATEMENT OF FACTS

Respondent's Statement of Facts contains inaccurate or misleading assertions, or no citation to the record. As they do not affect the disposition of this case, OOSI will not address them.

## ARGUMENT

### I. Reply to Point I.

In Point I, OOSI claims that the trial court erred in giving Instruction No. 6, *as proffered by Wieland*, submitting her claim against OOSI under the SH Exception to the No-Duty Rule as her sole theory of liability. OOSI claims that the trial court erred in giving Instruction No. 6 because the evidence was insufficient to establish the requisite duty element of the SH Exception.

Wieland pled three alternative theories of liability, the SH, PSI and AD Exceptions. However, as established in OOSI's opening brief, *based upon the way it was drafted by Wieland*, Instruction No. 6 only submitted the SH Exception and, as a matter of law, did *not* submit the other two as theories of liability such that they were abandoned by Wieland. Because she chose to draft Instruction No. 6 in such a way that it could only be interpreted as submitting the SH Exception, she is bound by that and all its legal consequences. Thus, in determining OOSI's claim, the issue is whether the evidence was sufficient to support a submission under the SH Exception and no other theory. Whether Wieland made a submissible case on the abandoned Exceptions is irrelevant to resolving OOSI's claim and, as a matter of law, cannot defeat it.

Wieland contends that she made a submissible case under *both* the SH *and* PSI Exceptions. It is unclear whether she is contending that Instruction No. 6 submitted her claim: (1) on both theories in the conjunctive; (2) on both theories in the disjunctive; or (3) on one theory, leaving it to this Court to decide which one of two Exceptions was actually submitted. Of course, number (1) cannot be the case because **Rule 1.02** prevents

the conjunctive submission of multiple theories in the same verdict director. Likewise, number (2) cannot be the case since Instruction No. 6 does not hypothesize and submit, in the disjunctive, the requisite elements of both the SH Exception and PSI Exceptions. And, finally, No. 3 cannot be the case because Instruction No. 6 does not hypothesize and submit the requisite elements of the PSI Exception.

Logically, an attack on the sufficiency of the evidence to submit a claim is only directed at the theory of liability that was actually submitted to the jury. *See* ***Marion v. Marcus*****, 199 S.W.3d 887, 894 (Mo. App. 2006)** (only the "element of each theory of liability *submitted* to the jury must be supported by the evidence." (emphasis added). Thus, whether Wieland made a submissible on the PSI Exception is irrelevant in determining OOSI's claim because it was not submitted to the jury in Instruction No. 6, as discussed below.

### A. Instruction No. 6 Submitted Only One Theory of Liability – the SH Exception

It is indisputable for several reasons that the PSI Exception was not instructed upon in Instruction No. 6, not the least of which is that the trial court expressly found that it was not. The court found that Wieland's claim was not being submitted on that theory because the evidence necessary for such a submission had been excluded – there was no evidence of prior crimes sufficient to invoke the PSI Exception. **Tr.1219;** *see* ***L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*****, 75 S.W.3d 247, 258 (Mo.** ***banc*** **2002)** (holding that prior violent crimes are an essential element of a PSI Exception claim). Thus, the trial court necessarily found that a submissible case had not been made

on the PSI Exception, which Wieland chose not to cross-appeal. Hence, she is bound by the court's ruling and cannot be heard on appeal to contend that she made a submissible case on the PSI Exception and that Instruction No. 6 instructed upon that theory of liability.

Even if the trial court had not ruled out the PSI Exception, the wording of Instruction No. 6 makes it clear that it was not submitted. Instruction No. 6 does not hypothesize the requisite elements of the PSI Exception, most notably the element of duty. To instruct upon the PSI Exception, Instruction No. 6 would have to have instructed the jury to determine whether "there was a danger that an assailant might attack a person in [the parking lot] and as a result the [parking lot] was not reasonably safe" and the defendant "knew, or, by using reasonable care *should have known*[1] of this condition." ***Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881, 883 (Mo. *banc* 1983)** (emphasis added). Instruction No. 6 did not so instruct, but rather, consistent with the SH Exception, it instructed the jury to determine whether the assailant "was present in defendant's parking lot . . . **and** he posed a danger to plaintiff," and "defendant knew or by using ordinary care could have known that [the assailant] was in its parking lot **and** posed a danger to plaintiff." (Emphasis added.) Thus, these two Exceptions are elementally different and cannot be submitted interchangeably using the same or a similar

[1] Although not raised as a separate claim of error, Instruction No. 6, in using "could have known," is infirm under the Supreme Court's holding in ***Virginia D.***

verdict director. Accordingly, as a matter of law, Instruction No. 6, as worded *by Wieland*, did not instruct on the PSI Exception; only on the SH Exception.

Further reason why Instruction No. 6 instructed upon the SH Exception only can be found in Wieland's response to OOSI's three rejected verdict directors, Instructions A, B, and C, which were proffered alternatively in lieu of Instruction No. 6, depending on which theory Wieland elected to submit to the jury. Instruction A was proffered as the proper instruction for a SH Exception submission, while Instructions B and C were proffered in case Wieland chose to submit on the PSI and AD Exceptions, respectively, which she did not do. Importantly, rather than reject Instruction A in its entirety, as she did with Instructions B and C, Wieland agreed to make many of the changes that OOSI advanced as to why Instruction A more accurately instructed on the SH Exception than Wieland's version. **Tr.1209-11.** This establishes that she understood that Instruction No. 6 was submitting the SH Exception as her lone theory of recovery, foreclosing her from now arguing that Instruction No. 6 instructed on the PSI Exception and not the SH Exception.[2]

[2] Wieland makes no mention of the AD Exception in her Response, thereby conceding that Instruction No. 6 did not instruct upon it and that she had abandoned it. Moreover, as discussed in OOSI's opening brief, Wieland clearly did not make a submissible case on the same.

Having conclusively established that Instruction No. 6 submitted Wieland's claim on a theory of liability under the SH Exception only, this Court must now address whether Wieland made a submissible case on that theory.

### B. Wieland Did Not Make a Submissible Case Under the SH Exception

To make a submissible case on a theory of liability, there must be evidence supporting each and every requisite element of that theory. ***Marion*, 199 S.W.3d at 894.** OOSI contends that Instruction No. 6 was not supported by the evidence because there was no *relevant* evidence from which the jury could find the requisite element of a duty of care owed by OOSI to Wieland under the SH Exception submitted.

In contending that she made a submissible case on the issue of duty under the SH Exception, Wieland relies on an incorrect interpretation of the controlling law defining that duty and then points to evidence in the record consistent with her false interpretation. However, applying the proper interpretation, there clearly is no evidence in the record from which the jury could have found the requisite duty of care under the SH Exception submitted such that it was reversible error for the trial court to have given Instruction No. 6.

The jury was instructed that it could not find for Wieland unless it found that OOSI "could have known[3]" of Lovelace's presence in the parking lot in time for it to act

[3] Wieland did not and does not contend that OOSI had *actual* knowledge of Lovelace's presence until moments before he shot her; it is undisputed that there was insufficient time thereafter for it to have notified law enforcement authorities.

to prevent the shooting. The parties disagree on the meaning of "could have known" in the context of the SH Exception, and hence, what evidence could be properly considered in determining whether OOSI "could have known" of Lovelace's presence on its premises in time to have prevented the shooting.

### 1. The Correct Scope of the SH Exception Duty of Care

Logically, before this Court can address whether Wieland made a submissible case on the issue of duty under the SH Exception, it must first determine what that duty of care is under the controlling law.

In contending that she made a submissible case under the SH Exception, Wieland argues that OOSI had a duty to take certain precautionary actions *before* Lovelace had even entered upon the premises. She is wrong. She did not and cannot cite one appellate decision that supports such a duty *under the SH Exception*.

The Missouri Supreme Court has held that a duty does not arise under the SH Exception until *after* a known third party is physically on the premises and that fact is known to the business owner. ***L.A.C.*, 75 S.W.3d at 257.** Thus, before the known dangerous third party actually physically enters the premises, a business owner has no legal duty to take any precautions to protect an invitee from any potential harm from that person. While a duty to act before entry is found under the PSI Exception, it was not submitted in Instruction No. 6 and is irrelevant to this Point.

Given the firmly established standard of the duty owed under the SH Exception, OOSI was not required to take any precautionary actions before Lovelace entered the parking lot, including any act that might have enabled it to discover his entry sooner.

Accordingly, it had no legal duty to provide new or additional security guards, escorts, monitored security cameras, law enforcement patrols, safety protocols, special parking arrangements for Wieland, etc. As a matter of law, any evidence such things could not be considered by the trial court and cannot be considered by this Court in determining the sufficiency of the evidence to support the giving of Instruction No. 6 submitting the SH Exception.

To establish a submissible case of a duty owed her by OOSI under the SH Exception, Wieland impermissibly relies on what the circumstances would have been *had OOSI taken one or more of the precautionary acts discussed above*, even though it had no duty to do so under the SH Exception. Wieland impermissibly assumes and superimposes a separate and distinct duty owed by OOSI that is not recognized as a duty under the SH Exception and was not instructed upon. Effectively, under her version of the law, she combines the separate and distinct duties of care owed under the SH and PSI Exceptions into one hybrid duty of care that is not recognized in the law. And, as discussed in OOSI's opening brief, without those precautionary actions being impermissibly imposed on OOSI as a duty owed to Wieland, she could not and did not make a submissible case on the element of duty under the SH Exception.

On the element of duty, Instruction No. 6 instructed the jury to consider whether OOSI "knew or could have known" of Lovelace's presence in the parking lot in time to have prevented the shooting. OOSI does not claim that this language was erroneous in instructing upon the requisite duty of care under the SH Exception. Rather, it is claiming that, in determining whether the evidence was sufficient to establish the requisite duty of

care under the SH Exception, the trial court was required, but failed to interpret the duty language "could have known" in accordance with the well-recognized legal standard of that duty.

As explained in OOSI's opening brief, applying the correct legal standard of the duty of care owed under the SH Exception, only those facts and circumstances as they existed *after* Lovelace entered the premises could be considered in determining when OOSI was put on notice of Lovelace's presence. There being no evidence that OOSI had such notice, the evidence was clearly insufficient to establish the requisite duty of care under the SH Exception.

**2. Totality of the Circumstances Test Is Not the Test for Establishing a Duty of Care under the SH Exception**

Despite the Supreme Court's holding in ***L.A.C.***, Wieland contends that, under the purported "totality of the circumstances" test ("TOC test"), in determining what OOSI could have known, OOSI's failure to take the precautionary actions discussed above was relevant. **Resp.Br. at 22.** Her argument apparently is that the TOC test dispenses with the necessity to prove the well-settled requisite elements of the SH Exception such that a duty can be imposed on a business owner to protect an invitee from the criminal acts of a known third party simply based upon a "totality of the circumstances." In other words, she is contending that the recognized test of a duty of care under the SH Exception found in ***L.A.C.*** has been supplanted by the TOC test. She is wrong.

Wieland bases her TOC argument on ***Aziz,*** which, in turn, is based on ***Richardson's*** adoption of the TOC test, which was birthed from ***Richardson's***

misreading of ***Madden***. Therefore, to understand Wieland's miscomprehension of the law as to the duty of care owed under the SH Exception, it is necessary to review each of these three cases, as well as ***L.A.C.,*** which rejected ***Richardson's*** *TOC* test.

**a. The Genesis of the Totality of the Circumstances Test**

The TOC test was adopted by this Court in ***Richardson v. QuikTrip Corp.,*** **81 S.W.3d 54 (Mo. App. *en banc* 2002)**, a PSI Exception case. In ***Richardson,*** the plaintiff was raped in a bathroom at a QuikTrip store. To establish foreseeability, she presented evidence of past crimes in that area. But, the trial court ruled that her evidence was insufficient because she "did not present evidence of a sufficient number of violent crimes at the convenience store to establish a duty on the part of QuikTrip." ***Id.*** **at 58.** The trial court ruled that "only evidence of violent crimes on the premises could establish a duty on the part of QuickTrip, [and] that no other evidence was relevant to determining whether an attack on Appellant was sufficiently foreseeable to give rise to such a duty." ***Id.***

This Court rejected that rigid view of prior crimes necessary to establish the requisite foreseeability for establishing a duty of care *under the PSI Exception*. Construing the Supreme Court's decision in ***Madden*** as having affected a change in the law on the PSI Exception by adopting a TOC test of foreseeability, ***Richardson*** held that trial courts were not limited to looking only at the number of recent violent crimes as the trial court had ruled; instead they could *also* consider "the nature of the business location, the character of the business, and past crimes in the area," *i.e.,* the totality of the circumstances. ***Id.*** **at 64** (emphasis added).

Any fair reading of ***Richardson*** reveals that the TOC test was only adopted in PSI Exception cases to ameliorate what the Court believed was an unfair result in determining the sufficiency of the prior crimes to give rise to a duty of care. Hence, even if good law, ***Richardson*** does not provide any relief to Wieland in trying to shoehorn the facts of this case into a submissible case *under the SH Exception*.

**b. *Madden***

Like ***Richardson***, ***Madden v. C&K Barbecue Carryout, Inc.*, 758 S.W.2d 59 (Mo. *Banc* 1988),** was a PSI Exception case. The Court's analysis began with the proposition that "[g]enerally, there is no duty to protect business invitees from the criminal acts of unknown third persons. However, a duty to exercise care may be imposed by common law *under the facts and circumstances of a given case*." ***Id.* at 62** (citations omitted; emphasis added). After reviewing prior Missouri case law, the Court held:

> Consistent with the holding in [***Virginia D. v. Madesco Investment Corp.*, 648 S.W.2d 881 (Mo. *banc* 1983)**], with the court of appeals decision in [***Brown v. National Supermarkets, Inc.*, 679 S.W.2d 307 (Mo. App. 1984)**], and with the rule established by the [**Restatement (Second) of Torts, § 344**], 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.

***Madden,* 758 S.W.2d at 62** (emphasis added). ***Richardson*** construed this quote as having affected a change in the law by adopting a TOC approach to foreseeability in PSI Exception cases. ***Richardson,* 81 S.W.3d at 59-60.**

***Richardson*** misread ***Madden***. A plain reading of ***Madden*** reflects that its reference to the duty "imposed by common law under the facts and circumstances of a given case" is nothing other than a reference to the existing exceptions to the No-Duty Rule that our courts had carved out using common law tort principles, as in ***Virginia D.,* *Brown*** and **§ 344 of the Restatement**, not the imposition of a new test of foreseeability. *See* ***Madden,* 758 S.W.2d at 61.**

### c. *L.A.C.'s* Rejection of the TOC Test

The fact that ***Madden*** did not adopt a TOC test for PSI Exception cases or any other premises liability cases, was conclusively established by the Missouri Supreme Court in ***L.A.C.*** There, the Court rejected ***Richardson's*** reading of ***Madden.*** It noted that Missouri courts and commentators have construed ***Madden*** with different results. ***L.A.C.*** did not read ***Madden*** as having effected a change in the law by adopting a TOC test for establishing a duty of care in all premises liability cases, but rather it was "simply utilizing traditional tort language." ***L.A.C.,* 75 S.W.3d at 258.** The Court made clear that it had not adopted a TOC test. ***Id.***

Instead of approving the TOC test or other tests courts had proposed, ***L.A.C.*** confirmed the existing law with respect to the standards of the duty of care under the SH

Exception, as well as the separate standard under the PSI Exception. With regard to the SH Exception, the Court reiterated that a duty arises "when a person, known to be violent, is present on the premises or an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury." ***Id.* at 257.** That is the Supreme Court's latest pronouncement on the SH Exception and is the law by which this Court is bound – not the TOC test urged by Wieland.

***L.A.C.*** makes it clear that the TOC test is not good law and especially is not controlling in this case given that this is a SH Exception case. As a consequence, even if ***Richardson*** was good law, it does not apply in this case given its limitation to PSI Exception cases. Thus, Wieland cannot rely on the TOC test to establish a submissible case on the duty of care under the SH Exception. The manner in which Wieland attempts to use the TOC test – by arguing evidence of what OOSI "could have known" if it had taken precautionary actions to protect against potential harm – is wholly inconsistent with the SH Exception.

Under the well-settled law, under the SH Exception, OOSI did not have a duty to act, including taking precautionary actions to learn of Lovelace's entry into the parking lot, before he actually entered. Accordingly, evidence suggesting that OOSI had a duty to take such actions, pursuant to a protocol or otherwise, before Lovelace ever stepped foot on OOSI's premises on the day of the shooting is irrelevant in establishing the requisite duty of care under the SH Exception submitted in Instruction No. 6.

**d. *Aziz***

Despite ***L.A.C.'s*** clear rejection of ***Richardson's*** TOC test across the board, the Eastern District applied ***Richardson's*** TOC approach in ***Aziz by and through Brown v. Jack in the Box, Eastern Div., LP,* 477 S.W.3d 98 (Mo. App. 2015)**. Ignoring ***L.A.C.***, Wieland relies on ***Aziz*** to support her position that the TOC test is the correct test for establishing a duty of care under the SH Exception. Her reliance is misplaced.

In ***Aziz***, unlike in this case, it was undisputed that the business owner had actual knowledge that a group of young people was on its premises and being disruptive in time to have prevented harm to the plaintiff. The issue was when the defendant became aware that group *posed a danger* to the plaintiff such that a duty arose for defendant to act reasonably to protect her. In addressing that issue, the appellate court considered, *inter alia*, the fact that the defendant's policies recognized that customers loitering and being disruptive on the property late at night might pose a danger; and that it had retained a private security company to monitor the premises. ***Aziz,* 477 S.W.3d at 104.** The court held that these facts rendered it foreseeable that the group of kids would cause harm to other invitees "given the totality of the circumstances." ***Id.***

***Aziz's*** reliance on the TOC test was improvident for several reasons. First, under ***Richardson***, the TOC test was limited to PSI Exception cases, *see* ***L.A.C.,* 75 S.W.3d at 258** ("[a] number of subsequent commentators and Missouri courts have attempted to categorize the ***Madden*** decision, to mixed results, *concerning the precise requirements of the second exception* [the PSI Exception]." (emphasis added)). Second, ***L.A.C.*** expressly rejected that test. Third, because ***Aziz*** erroneously applied the TOC test to a SH

Exception case, its holding in that regard was unnecessary *dicta* because the court affirmed on another basis such that the TOC analysis was not necessary in affirming the trial court's judgment.

Another reason why Wieland cannot rely on ***Aziz*** is because our appellate courts have rejected the notion that, in premises liability cases, the existence of security policies establish a duty of care, holding: "The fact that a business undertakes to have a security program is not the equivalent to the assumption of a duty to protect invitees from third party criminal assault." ***Wood v. Centermark Properties, Inc.*** **984 S.W.2d 517, 525 (Mo. App. 1999).** Thus, the existence of OOSI's purported policy or protocol for protecting employees as invitees from potential domestic violence by providing a special parking space, an escort to a parked vehicle, etc., did not impose a duty on it to protect Wieland in excess of the legal duty imposed on it by ***L.A.C.*** under the SH Exception, which did not require it to take those or any other precautionary actions before Lovelace had even entered the parking lot.

For all the foregoing reasons and those set forth in OOSI's opening brief, the trial court committed reversible error in submitting Wieland's claim in Instruction No. 6 under the SH Exception because there was insufficient evidence to support that submission. The error was highly prejudicial to OOSI in that it allowed the jury to return a verdict on a theory of liability that was not supported by the evidence. Accordingly, this Court should reverse the judgment for Wieland outright and remand the case back to the trial court to enter judgment for OOSI inasmuch as Wieland chose to submit her claim solely

on the SH Exception on which she failed to make a submissible case. Legally, she is not entitled to another roll of the dice.

## II. Reply to Point II

OOSI's Point II is not simply a regurgitation of Point I as Wieland contends. Point I claims Wieland did not make a *submissible* case on the lone theory of liability that was submitted in Instruction No. 6; whereas, Point II claims that Wieland was *allowed to argue outside the scope of that instruction*. Those are two distinct claims of legal error to be raised in two separate Points. Even if this Court were to somehow find a submissible case under the SH Exception submitted in Instruction No. 6, it could still find that the closing argument being challenged was outside its scope.

As established in Point I, under the SH Exception submitted in Instruction No. 6, OOSI's duty to take action to protect Wieland did not arise until *after* Lovelace was "present on [OOSI's] premises" and OOSI knew or could have known he was there. ***L.A.C.*, 75 S.W.3d at 258.** Thus, any closing argument that OOSI had a duty to take precautionary actions to protect Wieland from potential harm *before* Lovelace entered the premises, such as following a protocol, would be outside the scope of Instruction No. 6. And, that is precisely what Wieland was allowed to impermissibly argue.

Wieland responds that she did not argue outside the scope of the Instruction because under ***Aziz,*** OOSI's "failure" to follow its protocol was relevant under the TOC test, "to determin[e] whether an owner *could have known of a potential threat* in time to contact authorities." **Resp.Br. at 28** (emphasis added)**.** In other words, contrary to ***L.A.C.***, Wieland contends that ***Aziz*** imposes a new duty of care under a SH Exception

submission of a claim, requiring all business owners to protect against *potential threats of harm* by taking precautionary actions before the known third party even enters upon the premises. As discussed, that is not the SH Exception duty of care recognized by our appellate courts and instructed upon in Instruction No. 6. Thus, *while the language "could have known" correctly instructs upon the requisite SH Exception burden of care*, the so-called ***Aziz*** interpretation given to it by Wieland in closing argument was clearly outside the scope of Instruction No. 6.

Wieland's argument that ***Aziz*** "upheld" the instruction given there, is not only factually and legally incorrect, but it does not defeat OOSI's claim in any event. OOSI does not dispute that Instruction No. 6 properly instructed on the SH Exception burden of proof; rather, Wieland was impermissibly allowed to argue a duty outside that scope.

It is well settled that a trial court has no discretion but must prohibit or promptly correct misstatements of the law during closing argument. ***Fox v. Ferguson*, 765 S.W.2d 689, 690-91 (Mo. App. 1989); *Allison v. Home Savings Association of Kansas City*, 643 S.W.2d 847, 853 (Mo. App. 1982).** "Where the misstatement is contrary to the law as submitted in the court's instructions, and the court permits the misstatement by overruling an objection to it, reversible error is almost inevitable." ***Fox*, 765 S.W.2d at 691; *Allison*, 643 S.W.2d at 853.** "The permissible field of jury argument is broad, but the law does not contemplate that counsel may go beyond the issues or record and urge . . . a theory of claim or defense which . . . conflicts with the trial court's instructions submitting the issues of the case." ***Allison*, 643 S.W.2d at 853.** Under this well-settled standard, the trial court's error in this Point was clear reversible error. The recognized

rationale for why the trial court has no discretion in whether to permit a misstatement of the law as set forth in its jury instructions has been stated, in part, as "argument contrary to the instructions cannot be permitted, or jury trials will become uncontrolled chaos." ***Id.***. Under this well-settled standard, this Court has no reasonable choice in this case, but to reverse the trial court's judgment for what is a clear and obvious argument of a duty not instructed upon that effectively allowed the jury to return a verdict on a theory of liability that was not instructed upon.

**III. Reply to Point III.**

Even if this Court finds against OOSI in Points I and II, the trial court still committed reversible error in allowing Wieland, over OOSI's objections, to argue a *breach* of a duty of care that was not instructed upon. Specifically, although Instruction No. 6 contained only one specification of negligence –failure to notify law enforcement authorities after the risk of harm became apparent – she was allowed to argue an additional specification of negligence: that OOSI was negligent in *breaching its protocol*.

This Point has absolutely nothing to do with the correct duty of care under a SH submission and the proper interpretation of the "could have known" language that instructs upon that duty in Instruction No. 6. Rather, in this Point, OOSI is contending that *even assuming that the duty of care argued for by Wieland for a SH Exception submission such as hers is correct*, she argued outside Instruction No. 6 as to the lone specification she proffered and was instructed upon as to the *breach of that duty of care*.

Instead of constraining Wieland to the sole breach specification *chosen by her*, the trial court allowed her to inject a separate breach of that duty – that OOSI was negligent in failing to follow its purported security protocol. Thus, Wieland impermissibly empowered the jury to consider an entirely different theory of liability in returning its verdict than was instructed upon.

Wieland disputes that her argument as to a breach of protocol was done to show liability, but instead was offered "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." **Resp.Br. at 33-44** (emphasis added)**.** In its opening brief, OOSI points to portions of the Transcript that refute that, as does the following:

> I suggest to you based upon the liability in this case, *breach of the protocol* of not notifying the authorities, not putting her up front.
>
> You find in favor of Amie Wieland.

**Tr.1269-70** (emphasis added)**.** Clearly, these citations establish that Wieland was arguing that if OOSI had "exercise[d] reasonable care" it would not have "breach[ed]" its protocol and would have discovered Lovelace sooner and in time to prevent the shooting such that the breach was clearly being argued to **show liability**.

Under the same standard cited in Point II for reversible error for arguing a theory of the case not instructed upon, the error in this Point was clear reversible error.

**Dated:** October 21, 2016

**POLSINELLI PC**

*/s/ Edwin H. Smith*

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief contains the information required by **Mo. R. Civ. P. 55.03** and complies with the limitations contained in **Mo. R. Civ. P. 84.06(b)(1)**. According to the word count function of MS Word 2003 by which it was prepared, this brief contains 5,082 words, exclusive of the cover, Certificate of Service, this Certificate, signature block and appendix.

/s/ Edwin H. Smith
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I did on this 21st day of October, 2016, electronically file the foregoing with the Clerk of Court, Court of Appeals, Western District by using the e-filing system, which will send a Notice of Electronic filing to all parties entitled to receive notification.

/s/ Edwin H. Smith_____
Attorney for Appellant