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Court of Appeals

STATE OF NEW YORK

IN RE: WORLD TRADE CENTER BOMBING LITIGATION

STEERING COMMITTEE

Plaintiff-Respondent,

against

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant-Appellant.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

The purposes of the Defense Association of New York, Inc. are to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense and also those whose practice consists in representing insurance companies, self-insured firms and corporate defendants; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings related to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standard of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools and emphasizing trial practice for defense attorneys; to inform its members and their clients of

developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just personal injury claim and to present effective resistance to every non-meritorious or inflated claim; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This is an action where plaintiffs seek to hold the Port Authority of New York and New Jersey (hereinafter "Port Authority") liable in tort for the predetermined and sophisticated car bombing of the World Trade Center in 1993. No such event had ever before taken place on United States soil, let alone on any property occupied by the Port Authority.

The terrorists were able to detonate the bomb in the parking garage notwithstanding comprehensive precautions and extensive security measures in place at the time of the incident. Such precautions include the various studies and risk assessments concerning potential criminal threats affecting the premises, as well as close communications with various law enforcement agencies, foreign counties and other entities. The

intelligence revealed no threat that such a car bombing may take place. The protective measures in place included extensive police and security guard presence, as well as utilization of security cameras.

Despite the foregoing precautions and security measures, the terrorists were able to detonate a bomb by means of a plot which had its genesis almost a year before the bombing and involved six terrorists engaging in numerous acts of subterfuge. Sadly, the terrorists succeeded in detonating the sophisticated car bomb in the basement of the World Trade Center. Fortunately, in this attack, the terrorists did not meet their goal of completely destroying the Twin Towers.

The proceedings thus far have resulted in an affirmed finding that the Port Authority was 68% responsible for the bombing while the terrorists only bore 32% of the fault.

The Defense Association respectfully submits its amicus curiae brief in support of the Port Authority's appeal from the judgment based upon the jury verdict rendered against it. While the Defense Association supports all of the arguments contained in the Port Authority's well-written brief, its amicus curiae brief will focus on the premises security issues as they pertain to owners or occupiers of real property acting in a propriety capacity.

It is respectfully submitted that the claim based upon inadequate security should be deemed to be insufficient as a matter of law. The harm in this case resulted from a planned

and calculated terrorist attack whose aim was the complete destruction of the Twin Towers. The intentional actions of the terrorists were the sole proximate cause of the damages in this case. Any assertion that the closing of the parking lot or an increased security presence therein may have deterred the terrorists from their goal of destroying the Twin Towers is so unlikely as to attenuate, as a matter of law, any connection between the bombing and the alleged improper security.

Moreover, the Defense Association respectfully submits that the security studies and measures implemented by the Port Authority far surpassed the now-familiar standard of providing minimal security measures in the face of foreseeable criminal activity on the subject premises. Initially, it cannot be overemphasized that the terrorist bombing in this case was an event completely unprecedented on United States soil. Accordingly, the incident was not reasonably foreseeable. Further, the terrorists were able to detonate the bomb notwithstanding considerable planning and implementation of security measures by the Port Authority. The voluminous Record on Appeal in this case is replete with proof of substantial and significant efforts to protect the World Trade Center from harm. No private occupier of realty should be expected to do more.

While hindsight often engenders an assertion that more should have been done, hindsight is not the legal standard. Rather, the controlling standard is the sound and well-settled requirement that the criminal conduct be reasonably foreseeable.

Here, no such foreseeability existed, and in any event, the Port Authority's comprehensive security measures should be viewed as sufficient as a matter of law.

The Port Authority is entitled to a dismissal.

STATEMENT OF FACTS

A. The Sophisticated and Calculated Attack on the World Trade Center

This action involves the February 26, 1993 bombing at the World Trade Center (hereinafter "WTC") parking garage. In March of 1994, four individuals, Mahmoud Abouhalima (hereinafter "Abouhalima"), Ahmad Mohammad Ajaj (hereinafter "Ajaj"), Nidal Ayyad (hereinafter "Ayyad"), and Mohammad Salameh (hereinafter "Salameh") were found guilty of charges arising from the conspiracy which led to that bombing. Two others, Ramzi Yousef (hereinafter "Yousef") and Eyad Ismoil (hereinafter "Ismoil") were later captured and, in 1997, also convicted of offenses related to the bombing.

Evidence at various proceedings arising from the bombing demonstrated the calculated and premeditated nature of this unprecedented event.

In April of 1992, Ajaj left his home in Houston, Texas and traveled to the Middle East to attend a terrorist training camp. While in the Middle East, Ajaj made contact with Yousef. The two met at a terrorist training camp on the border of Afghanistan and Pakistan. U.S. v. Yousef, 327 F.3d 56, 78 (2d Cir. 2003). There, they plotted to enter the United States illegally.

In September of 1992, the two traveled to New York. Id. They did so with assumed names and falsified passports. U.S. v. Salameh, 54 F.Supp.2d 236, 246 (U.S. Dist. Court, SDNY 1999).

Ajaj also brought with him on that trip multiple terrorist guides and materials. U.S. v. Yousef, 327 F.3d at 78. While Yousef made it through customs in New York, inspectors recognized Ajaj's passport as a forgery. Ajaj was arrested, pled guilty to passport fraud and was sentenced to six months imprisonment. Despite his confinement in prison, though, Ajaj kept in contact with Yousef. U.S. v. Salameh, 54 F.Supp.2d at 246.

While Ajaj was imprisoned, Yousef continued organizing the plot. Yousef was deemed the "mastermind of the plot" and his role was in organizing the individuals and means necessary to carry out the bombing. U.S. v. Yousef, 327 F.3d at 78. Yousef ordered the required chemicals. U.S. v. Yousef, 327 F.3d at 78. Yousef and Salameh rented a storage unit and an apartment to manufacture the bomb and established their headquarters in that apartment. U.S. v. Yousef, 327 F.3d at 78. Abouhalima helped Salameh and Yousef get the apartment and build the bomb.

Salameh and Ayyad opened a bank account to deposit monies to fund the bombing. U.S. v. Salameh, 54 F.Supp.2d at 247. Salameh kept chemicals and explosive materials, which were intended to increase the damaging effects of the bomb to be utilized. Id. at 246. Abouhalima was seen in the weeks before the bombing moving things in and out of the apartment and storage area. Id. at 247. He also helped mix chemicals in the apartment. Abouhalima's role in the conspiracy also included obtaining calling cards that the group used to contact each

other, as well as suppliers of components for the bomb, providing a refrigerator which was used to store chemicals used in the production of the bomb and obtaining ingredients for the bomb. Id.

In December of 1992, Yousef contacted Ismoil, and on February 22, 1993, Ismoil joined the group to help complete the bomb preparations. U.S. v. Yousef, 327 F.3d at 79.

Ayyad, a chemical engineer, also obtained chemical ingredients for the bomb through his job. Ayyad also served as the spokesperson for the group, writing to the New York Times and calling the New York Daily News to claim responsibility for the bombing. U.S. v. Salameh, 54 F.Supp.2d at 247.

Three of the defendants, Ayyad, Salameh and Abouhalima all attempted to rent a van to use in the bombing. Ayyad and Salameh were successful; Abouhalima was not.

On February 26, 1993, Yousef and Ismoil drove the van with the bomb in it onto the B-2 level of the parking garage and set the bomb's timer for it to detonate minutes later. U.S. v. Yousef, 327 F.3d at 79. At 12:18 p.m. that day, a bomb exploded on the B-2 level of the underground parking garage. Id. The bomb had been detonated in a van parked on the ramp of the garage. The explosion created a crater six stories deep and destroyed the communication system, including the police area and operations control center. In the Matter of World Trade Center Bombing Litigation, 3 Misc.3d 440, 452, 776 N.Y.S.2d 713, 723 (Sup. Ct. N.Y. 2004). As a result, the Port Authority lost

its ability to communicate with tenants and employees to effectuate evacuation procedures. Id.

As demonstrated in the Port Authority's principal brief, the conspirators intended the bombing to result in the complete destruction of the Twin Towers (See, Brief for Defendant-Appellant, p. 6).

Despite the fact that parts of the van were found at the World Trade Center after the bombing, Salameh returned to Ryder, where the van was rented, to receive his $400 rental deposit. It was there he was arrested. U.S. v. Salameh, 54 F.Supp.2d at 246.

Abouhalima fled the United States after the bombing. He was ultimately captured in Egypt. Yousef and Ismoil also fled the United States and were captured and returned to face charges leading from the events. Id.; see, also, U.S. v. Yousef, 327 F.3d at 79.

The conspirators ultimately were convicted of numerous offenses in connection with the bombing, including: (1) conspiracy to destroy by explosives buildings, vehicles and property; (2) damaging the WTC by means of an explosive, causing injury or death; (3) damaging or destroying buildings, vehicles and other property owned or leased by the United States Government by means of an explosive, causing injury or death; (4) transporting explosive materials in interstate commerce with an intent to use the explosive to destroy buildings, vehicles or property, resulting in injury or death; (5) destruction by

improvised explosive device, causing the death of at least one person; (6) assaulting a federal officer with a deadly weapon; (7) destruction of building and property by improvised explosive device; (8) using and carrying a destructive device during a forcible assault of a federal officer; (9) using and carrying a destructive device in relation to the conspiracy count; and (10) violations of the Travel Act (R. Vol. X, 4675-4705). Each was sentenced to two hundred and forty years in prison. Id. In addition, Yousef was convicted of those same ten counts, as well as other counts relating to an attempted bombing of a United States civilian aircraft (R. Vol. X, 4706-4709).

The terrorists were able to detonate the bomb, notwithstanding extensive and comprehensive security measures and studies by the Port Authority, which will now be detailed.

B. The World Trade Center's Physical Plant and Historical Security/Police Activities

The Port Authority was created in 1921 in an effort to regulate the Hudson River passages, facilitating commerce and travel between New York and New Jersey (R. Vol. II 399-400). The Port Authority owned the World Trade Center (hereinafter "WTC") located in downtown New York City. The WTC's physical plant contained seven buildings as well as six sublevels under Building 1 (the North Tower), Building 2 (the South Tower), Building 4 (the Southeast Tower), and Building 5 (the Northeast Tower) (R. Vol. IX, 4595-4596). Parking areas were located in Sublevels B2-B6 (R. Vol. IX, 4596). Those areas included public

parking, tenant parking, and delivery docks (R. Vol. VII, 3862). The Port Authority maintained its own precinct in the sub-grade area and the Secret Service and New York State Police parked on that level (R. Vol. II, 458-459). In fact, the Secret Service maintained presidential limousines in the sub-grade level (R. Vol. II, 458-459; R. Vol. III, 1247-1248). The Secret Service had a protective and investigative function and, if it detected vulnerability, it could report it to the Port Authority (R. Vol. III, 1248). The Governor's office was also located in Tower 2 (R. Vol. IV, 1540).

In the 1980s and early 1990s, parking in the area of the WTC was scarce (R. Vol. IV, 1504). The garage at the WTC was the one large parking garage in the area. (R. Vol. IV, 1504). There were two kinds of parking at the WTC: public (transient), parking and parking for those who worked there (R. Vol. IV, 1537). The public parking areas in the B-2 level could be accessed by two entry ramps located on West Street. In Re World Trade Center Bombing Litigation, 3 Misc.3d 440, 444, 776 N.Y.S.2d 713, 718. Two exits ramps allowed users of the lot to return to West Street. Id. The sub-grade areas could also be accessed through the truck dock entrance, which was located on Barclay Street. Trucks making deliveries to the WTC had to drive through a manned gate (R. Vol. V, 2104). Id. The public parking lot had a control gate and booth that was manned when the lot was in operation (R. Vol. IV, 1537, 1541). The purpose of the attendant was both to watch the lot and to take the

parking fee (R. Vol. IV, 1537-1538). Eight to ten people worked at the four transient lots, in two shifts per day, five days per week (R. Vol. IV, 1547). This cost the Port Authority approximately $1 million per year out of the approximately $5 million needed to operate all of the parking facilities (R. Vol. IV, 1548). As of 1993, the gross revenue of the WTC was $350 million (R. Vol. IV, 1545). Any income made by the WTC was reinvested in economic development in the region (R. Vol. IV, 1544). Parking was not a substantial source of revenue for the WTC, generating only $4-5 million per year (R. Vol. IV, 1547). The daily transient parking was "almost a break even scenario." (R. Vol. IV, 1859-1860).

There were security cameras in the garage (R. Vol. IV, 1559-1560). This allowed the Port Authority police and operations desk to monitor who was coming into the garage (R. Vol. IV, 1562). Both the Port Authority Police and private security personnel patrolled the WTC complex (R. Vol. VII, 3552-3613; 3917-3924). The Port Authority Police had a command post on the B-1 level. In Re World Trade Center Bombing Litigation, 3 Misc.3d at 444, 776 N.Y.S.2d at 719. Over the years, the Port Authority Police implemented a variety of plans designed to outline steps for addressing threats and adverse events occurring at the WTC. For example, the Port Authority Police maintained a Bomb Threat Plan for the WTC. (R. VIII, 4111-4129). It also maintained a Structural Fire Plan (R. Vol. VIII, 4130-4145), and a Mass Evacuation Procedure (R. Vol. VIII, 4155 -

4174). These plans supplemented or supplanted other similar plans that had been in effect during the WTC's existence (R. Vol. VIII, 4197-4231, 4234-4278, 4308-4357).

Between 1971, when the WTC was completed, and February 26, 1993, when the unprecedented criminal attack on the WTC occurred, the WTC, together with the Port Authority Police and the private security personnel retained by the WTC, continuously engaged in assessments of the security at the WTC and took action to maintain the security of the complex. As discussed below, at no time prior to the criminal attacks of 1993 was closure of the parking facilities considered to be a feasible or necessary action.

In 1983, the Superintendent of the Port Authority Police established the Terrorist Planning and Intelligence Section (the "Section") (R. Vol. VII, 3615). In the first six months of its existence, the Section, among other things, established relationships with various national agencies to expand its intelligence gathering capabilities, reviewed facility vulnerability studies and provided assessments to various Port Authority facilities. Id.

Thereafter, in 1984, with Peter C. Goldmark as its Executive Director, the Port Authority created the Office of Special Planning ("OSP") as part of a comprehensive approach to address security and counterterrorism issues at all Port Authority facilities and to determine whether the Port Authority buildings had any areas vulnerable to terrorists (R. Vol. II,

328, 426, 432-433, 462). At no time during Mr. Goldmark's tenure as Executive Director of the Port Authority from 1977 - 1985, was there any specific threat against the WTC or the garage thereunder (R. Vol. II, 447). Nor was there any history of any threat at any Port Authority facility that a truck bomb would be used in a parking garage (R. Vol. II, 448). Nonetheless, the OSP was established to determine whether there were potential threats to Port Authority facilities (R. Vol. II, 428, 433). The OSP consisted of civilian and police employees of the Port Authority (R. Vol. III, 927).

Edward O'Sullivan was the head of the OSP from 1984 - 1987 (R. Vol. III, 863). Working in concert with national and local law enforcement and intelligence agencies, the OSP's mission was to conduct risk assessments for Port Authority facilities including the WTC and to formulate recommendations for an overall security plan (R. Vol. IX, 4975-76, Vol. VII, 3616-3617). The OSP dealt closely with the NYPD, which at the time was developing an expertise about terrorism and which surveyed Port Authority facilities to evaluate their potential vulnerability (R. Vol. II, 434-435, 451). This included meeting with the Joint Terrorist Task Force (hereinafter "JTTF") (R. Vol. II, 462). The JTTF included the FBI, NYPD, New York City Transit Authority Police, The Port Authority Police, United States Custom Services, Drug Enforcement Administration, Alcohol, Tobacco and Firearms and the Secret Service (R. Vol. IV, 1938).

During his tenure as the head of OSP, Mr. O'Sullivan attempted to evaluate the terrorist risk to the WTC by speaking to security experts at the State Department, the Department of Transportation, the CIA, the FBI, the National Security Agency, universities, and the Anti-Defamation League in the United States, as well as security experts in England, France, Italy, Switzerland, Africa and the Middle East (R. Vol. III, 884, 895, 898, 929-930, 1074-1075, 1078-1079). Mr. O'Sullivan never received any intelligence from federal or international agencies warning of car bombings (R. Vol. III, 900, 1069, 1269, 1274, 1285). Similarly, during his tenure as the Executive Director of the Port Authority, Mr. Goldmark went to Scotland Yard to visit several agencies with expertise in terrorism (R. Vol. II, at 430). The primary purpose was to learn about anti-terrorism practices (R. Vol. II, at 456). None of the security experts in any of those countries warned of a possible attack in the United States (R. Vol. III, 1077, 1079). In fact, the FBI, CIA, State Department and Interpol all concluded that a car bomb attack was a low risk and the FBI's data showed that terrorism was on the decline during the 1980s (R. Vol. III, 1024, 1311; R. Vol. IV, 1336-1337).

In an effort to ascertain more information about possible terrorism, Mr. Goldmark asked Victor Strom, the Director of the Port Authority's Public Safety Department from 1984 - 1988, to tour the four major airports in Europe - in Paris, Rome, Zurich and London - where there had been problems with terrorism or

threats of a terrorist attack and to meet with top level security officers in each of these airports (R. Vol. III, 1911).

The OSP issued its "Counter-Terrorism Perspectives: World Trade Center Report" in 1985 (R. Vol. III, 877; R. Vol. VII, 3820-3839). The report was based on historical data, such as where and when attacks were occurring and how they were carried out, as well as intelligence reports suggesting when an attack was to occur (R. Vol. IV, 1442-1444). While acknowledging that the possibility of a bombing at the WTC was real, the OSP concluded that such an event "is not considered to be a high-risk situation at this time." (R. Vol. VII, 3836). The report further noted that public parking at the WTC presented a security risk but also acknowledged that eliminating such parking would be problematic, both in terms of tenant and public reaction, inconvenience, and finances (R. Vol. VII, 3838-3939). Recommendations to reduce the risk included manned entrances, restrictions on pedestrian access to ramps, random vehicle inspections, and canine explosive detection patrols (R. Vol. VII, 3839). Each recommendation was considered and ultimately, determined to be impractical for a variety of reasons (R. Vol. VII, 3889). For example, while complete elimination of public parking was identified as a possible security enhancement, the "inconvenience to tenants and substantial loss of revenue" was determined to render it impractical (R. Vol. III, 995, 957, 1282; R. Vol. VII, 3889). The garage was an amenity that was highly prized by the tenants (R. Vol. III, 1282, 1293). Steven

Berger, then the Executive Director of the Port Authority, having succeeded Peter Goldmark, believed that having a parking garage was important because it enhanced the WTC's image of having a free flow of commerce (R. Vol. II, 642). Removing that parking might put the WTC at a disadvantage in keeping tenants and impact parking and traffic around the WTC if the garage was closed (R. Vol. III, 1282, 1293). Manning entrances to the public parking areas was deemed too expensive, restricting pedestrian access to ramps impractical because of the variety of other means of accessing the parking areas other than by the ramps, and random vehicular inspections unconstitutional, as they could not be conducted without probable cause (R. Vol. VII, 3889). However, sub-grade security checks were implemented (R. Vol. VII, 3893). The Port Authority Police patrolled the sub-levels in a marked car (R. Vol. VIII, 4054-4055), and, when circumstances warranted, "police manpower [was] assigned directly to the lot until the threat [was] settled or resolved." (R. Vol. VIII, 4054).

As aforestated, at the time the OSP report was issued, Stephen Berger was the Executive Director of the Port Authority (R. Vol. II 303, 351). Mr. Berger had made the decision, after reading the report, not to close the parking garage (R. Vol. II, 353). When he received the OSP report, Mr. Berger asked the facilities management of each department, and the Port Authority Police Chief, Hank DeGenesle, to read the report (R. Vol. II, 375-376, 379). The Police Chief, Mr. DeGenesle, agreed with the

decision not to close the parking garage (R. Vol. II, 381, 412, 627). Mr. DeGenesle told Mr. Berger that his opinion was based on conversations with the CIA, FBI and Secret Service (R. Vol. II, 409-411). Moreover, in deciding not to close the parking garage, Mr. Berger met with the OSP, the police and public safety officials (R. Vol. II, 630). Joseph Martella, who joined the Port Authority Police Department in 1972, ultimately became captain and commanding officer of the WTC Police Command (R. Vol. VI, 2612, 2616). He too read the OSP report and believed the essence of the report, that the WTC was at a low risk of attack, was still valid (R. Vol. VI, 2621, 2640). This was confirmed by intelligence obtained through the JTTF (R. Vol. VI, 2621, 2640). Prior to the bombing at the WTC in 1993, Mr. Martella had no intelligence suggesting there would be a car bombing. While there was a general threat about 4 - 6 weeks before the bombing, it did not involve a car bomb (R. Vol. VI, 2665, 2670).

Private security guards amplified the police details at the World Trade Center. For example, the 1990 WTC Security Guard Training Manual detailed numerous security posts and the responsibilities of the guards manning those posts. These included the Ramp E Post, which controlled access to the truck dock, the Truck Dock Coordinator Post, and the Subgrade Firewatch Post, which included all subgrade parking areas (R. Vol. IX, 4625, 4627, 4631-34).

The OSP was later reconstituted by the Special Planning

Unit ("SPU") of the Port Authority Police (R. Vol. III, 1019-1020; see Vol. II, 617). The SPU's Counter-Terrorist Program gathered intelligence data on domestic and international terrorist incidents, disseminated such information, performed security studies to determine the vulnerability of Port Authority facilities to terrorist attack, interacted with governmental and private security entities and tracked various terrorist groups viewed as potential threats to Port Authority facilities (Vol. VIII, 4072-4073).

C. Reports of Outside Security Experts Retained by the Port Authority

The Port Authority did not rely solely on the Port Authority Police to assess and address security in and around the WTC. In 1986, while Stephen Berger was the Executive Director of the Port Authority, the Port Authority retained Science Applications International Corporation ("SAIC"), a private consulting firm, to conduct a physical security assessment of the WTC. SAIC was tasked with providing a baseline assessment of the physical security and security upgrade prioritization (R. Vol. VII, 3844). The SAIC's recommendations were essentially the same as OSP's (R. Vol. III, 1302; R. Vol. IV, 1430-1431). Among the vulnerabilities identified was vehicular access to and from the sublevel parking areas under certain WTC buildings (R. Vol. VII, 3851). However, in light of the low relative possibility of such an attack occurring, SAIC did not recommend that access to the parking

facilities be eliminated (R. Vol. VII, 3851 -3852). SAIC concluded that such action fell within the scope of upgrades that would be "very costly either in terms of operational impact, public acceptance, or monetary cost." (R. Vol. VII, 3854-3855).

Following the Persian Gulf War, the Port Authority retained Burns and Roe Securacom, Inc. ("Burns and Roe") in 1991 to conduct an electronic engineering security review (Vol. VII, 3874). The Burns & Roe report was requested because of world events at the time, i.e., the Gulf War, because the WTC wished to assess its vulnerability in light of strategic and long-term planning for the facility which had included a recent architectural review of the complex (R. Vol. VI, 3041). As a result of the Burns & Roe report, the level of risk was raised and there was an increase in police and security guard coverage (R. Vol. VI, 3042). Although the vulnerability of the garage to a terrorist bombing attack was discussed, it was agreed that there was no indication that this was a real danger to the WTC and its occupants (R. Vol. VI, 3043-3045).

The study concluded that, based on intelligence existing at the time, the most vulnerable areas were those with high population density (R. Vol. IV, 1556). The greatest threat came from two sources: either a truck bomb outside the WTC, or a hand-held suitcase bomb brought into the WTC and detonated in a highly populated area (R. Vol. IV, 1556, 1626, 1629). The intelligence indicated that a truck bomb posed a threat to

outside areas, not the area under the building (R. Vol. IV, 1627, 1631, 1679).

By December 1991, Burns and Roe presented its "Full Engineering Feasibility Study" (R. Vol. VII, 3899-3932). The Burns and Roe report, a security vulnerability study which was an update of the OSP report, confirmed the low threat level for a terrorist bombing, and assessed the parking garage as a very low risk area (R. Vol. VI, 2621, 2640, 2667). More specifically, that study assessed the vulnerability of various areas of the WTC to attack and recommended that the Port Authority use the assessment to assist in creating an overall plan for security upgrades. The parking garage facility received one of the lowest vulnerability rankings - only 7 out of a possible 350. Eight other areas were identified as being more vulnerable to attack, including the WTC concourse, the plaza, the observatory, Windows on the World, and the hotel located within the WTC (R. Vol. IX, 4669). The report indicated that the WTC plaza and concourse, where great numbers of people congregated, were the most vulnerable areas of the complex and warned that terrorists were most likely to strike in these areas (R. Vol. II, 546-548, 555, 565, 594; R. Vol. VI, 2685, 2693-2694). Of those, the concourse received a vulnerability factor of 350 out of 350, the highest possible rating, and the plaza, 245 out of 350. Again, the parking garage was listed as the least vulnerable area (R. Vol. VI, 2685, 2693-2694). As was the case with SAIC report, closure of the garage facilities was not

recommended (R. Vol. II, 595).

D. Port Authority Action in the Face of Specific Threats

When faced with intelligence suggesting the heightened possibility of an attack, the Port Authority proactively undertook additional steps to enhance security. For example, in advance of the centennial celebration of the Statute of Liberty, known as Liberty Weekend 1986, additional security measures were implemented (R. Vol. VIII, 4399-4453; R. Vol. IX., 4530-4550). Random searches were conducted (R. Vol. III, 873-874, 1013, 3013). In addition to requiring persons entering the complex to hold certain types of identification and Port Authority issued passes, the truck dock was closed to all traffic beginning at 3:00 pm on July 3, 1986. It would not reopen at all on July 4, 1986 (R. Vol. IX. 4544).

Similarly, during the events in 1989 commemorating George Washington's inauguration as the nation's first president, additional measures, including closure of the parking facilities, were enacted on a temporary basis (R. Vol. VIII, 4456; R. Vol. IX, 4547-4548).

Another such time was at the beginning of the Gulf War in 1991 (R. Vol. IV, 1633, 1831). At that time, perimeter patrols were increased, vehicles were checked, plainclothes detectives were stationed on the observation deck, trash cans were removed from public areas, and the security force was increased throughout the complex, including the garage (R. Vol. IV, 1633-

1634). As part of the capital program, closed circuit cameras were installed in the garage and other areas (R. Vol. IV, 1634). The heightened alert lasted until after hostilities had ceased (R. Vol. IV, 1635, 1832-1833).

In 1992, security was once again increased during the 500th anniversary of Columbus' discovery of America (R. Vol. IV, 1834).

On January 22, 1993, the PA received word from federal intelligence officials that a telephone call had been intercepted in the Middle East reflecting that a bomb would be exploded at a nonspecific office building in New York that Sunday (R. Vol. IV, 1636). The bomb was to go off at a set time if certain prisoners were not released by the Israelis (R. Vol. IV, 1636). Charles Maikish, the Director of the World Trade Department of the Port Authority, spoke to Captain Joseph Martella, who was in charge of the police command at the WTC, and was responsible for any intelligence associated with the protection of the WTC, and they decided to increase the police presence at the WTC (R. Vol. IV, 1641, 1647, 1842-1843). Mr. Maikish increased private security guards and guard posts, increased the number of police on the concourse, deployed plainclothes detectives at Windows on the World and on the observation deck, and instituted a perimeter patrol around the WTC (R. Vol. IV, 1642-1643). On the Monday after the bomb was supposed to go off, no further intelligence was received and the heightened security was discontinued (R. Vol. IV, 1643).

At no time prior to the bombing in February of 1993 did the Port Authority receive any information that terrorists were planning to drive a truck bomb into the WTC garage and it was not something that was anticipated (R. Vol. IV, 1661-1662). Mr. Maikish acknowledged that the experts from whom he received intelligence miscalculated the threat of a car bomb in the garage but he understood that they reached this conclusion based on the fact that the area was not as populated as others at the WTC complex (R. Vol. IV, 1686).

E. The Instant Action

As a result of this premeditated and unprecedented incident, various parties who were damaged by this event commenced this action against the Port Authority alleging that they were harmed because of inadequate security at the World Trade Center.

This matter proceeded to trial, where the jury found for plaintiffs, and it found that the Port Authority was 68% responsible for the bombing and that the actual terrorist were only 32% responsible for the attack. The trial court denied the Port Authority's motion to set aside the verdict.

The Appellate Division affirmed. Nash v. Port Authority of New York and New Jersey, 51 A.D.3d 337, 856 N.Y.S.2d 583 (1st Dep't 2008).

Thereafter, this Court granted the Port Authority's motion for permission to appeal. 15 N.Y.3d 708, 929 N.Y.S.2d 22 (2010).

POINT I

ANY ALLEGED NEGLIGENCE ON THE PART OF THE PORT AUTHORITY IN ITS ROLE AS LANDLORD, AS DISTINCT FROM ITS POLICE POWER FUNCTION, WAS NOT A PROXIMATE CAUSE OF THIS INTENTIONALLY TARGETED ASSAULT ON THE WORLD TRADE CENTER

The issues presented on this appeal cannot be addressed in a vacuum. The implications of the lower courts' decision upon the potential liability of all landlords -- and not merely governmental agencies such as the Port Authority -- must be addressed, lest the role of such landlords be turned from one charged with providing reasonably safe premises, to that of an insurer against the conduct of criminals.

In this point, we focus upon the crucial policy-based role played by the mandate to prove proximate causation. Proximate causation is a necessary element of any tort claim, even one based upon strict liability (see, e.g., Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 493 N.Y.S.2d 102 [1985]; Mack v. Altman's Stage Lighting Co. Inc., 98 A.D.2d 468, 470 N.Y.S.2d 664 [2d Dep't 1984]). In claims against landlords based upon alleged insufficient security against criminal assaults, it serves another crucial function. It limits what would otherwise be a crushing burden upon landowners to shoulder the financial costs of crime.

It is axiomatic, but bears repeating, that as a matter of public policy, the responsibility of a landlord to protect its tenants, visitors, and premises from the acts of third parties

over whom the landlord exercises no control is perforce limited. As a general rule, under common law, a landlord is not liable for a willful criminal act committed on the premises by a third party (see, Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 429 N.Y.S.2d 606 [1980]). Among other things, the rationale for this rule is that criminal conduct constitutes an intervening, superseding event cutting off any connection between whatever may be claimed to be the landlord's negligence and the ultimate injury (Bridges v. Riverbay Corp., 102 A.D.2d 800, 477 N.Y.S.2d 157 [1st Dep't 1984], affd on opinion below, 64 N.Y.2d 1075, 489 N.Y.S.2d 909 [1985]; Santiago v. New York City Housing Authority, 63 N.Y.2d 761, 480 N.Y.S.2d 321 [1984]). Of equal importance is the recognition that providing security from criminal conduct is principally a function of government, not of landowners (see Miller v. State of New York, infra, 62 N.Y.2d 506, 478 N.Y.S.2d 829 [1984]). It is the police power of government that functions to protect "against all enemies, foreign and domestic" (United States Military Oath of Enlistment), not landlords.

This Court permitted a narrow exception to the rule of non-liability for criminal acts of others, where past experience establishes the likelihood of danger to tenants from such conduct which "minimal" or "rudimentary" safety measures might prevent (Jacqueline S. v. City of New York, 81 N.Y.2d 288, 598 N.Y.S.2d 160 [1993]; Miller v. State of New York, 62 N.Y.2d 506, 478 N.Y.S.2d 829 [1984]; Nallan v. Helmsley-Spear, Inc., supra,

50 N.Y.2d at 519, 429 N.Y.S.2d at 613 [1980]). Nevertheless, it continued to recognize the critical need to limit, as a matter of public policy, the potential liability of landowners for damages caused by criminal conduct of third parties, lest a "burden of impossible practical and functional dimensions" be imposed (Jacqueline S., supra, 81 N.Y.2d at 295, 598 N.Y.S.2d at 163 [1993]).

As stated by this Court in Nallan, "a landowner or a leaseholder, is not an insurer of the [tenant's] safety" (50 N.Y.2d at 519, 429 N.Y.S.2d at 613). Thus, even where a landlord is aware of past criminal activity on the premises, to hold the landlord liable, this Court has required that a plaintiff prove all elements of a negligence cause of action. There must be proof of a duty to the plaintiff, a breach of that duty, and, particularly relevant to this point, proximate causation. Waters v. New York City Housing Authority, 69 N.Y.2d 225, 513 N.Y.S.2d 356 [1987]; Bridges, supra). Imposition of liability in the absence of proof by the plaintiff of all the classic elements of a negligence claim, including causation, would cast upon a landlord the heavy burden of insuring against costs of urban crime and other social ills.

By the same token, the proximate causation required by the law must be traced to the alleged negligence of the landlord as a landlord. As recognized in Miller, and certainly significant here, the difficulty in determining where "along a continuum of responsibility to individuals and society" certain alleged non-

feasance of a landlord may fall is exacerbated where the landlord is a governmental agency, which also exercises police power (62 N.Y.2d at 511-512, 478 N.Y.S.2d at 832. Certainly, the alleged failure of the Port Authority in its duty to properly allocate police resources cannot be the premise for liability (Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 448 N.Y.S.2d 141 [1982]). Of equal significance, that which caused the plaintiffs' injury must be traced to an act or omission falling on the "landlord" end of that "continuum," rather than on the portion falling within the duty of a governmental agency. Put simply, placement of conduct or omission on the continuum not only determines the nature of the duty imposed, but must also inform the determination of proximate causation.

It is in this context that this Court's oft-expressed limitation of the responsibility of a landlord to take "minimal" safety precautions against intrusion by criminals -- e.g., providing a functioning door lock and intercom system in a residential building (Miller, supra, 62 N.Y.2d at 513, 478 N.Y.S.2d at 833), providing an unarmed lobby attendant in a commercial building (Nallan, supra) -- becomes critical. It is precisely based upon such limitation that landlords traditionally have been held without liability where the conduct at issue was a purposeful, intentional, targeted criminal act (see, e.g., Flynn v. Esplanade Gardens, Inc., 76 A.D.3d 490, 907 N.Y.S.2d 189 [1st Dep't 2010]; Maria T. v. New York City Holding

Co. Assoc., 52 A.D.3d 356, 862 N.Y.S.2d 16 [1st Dep't 2008], appeal denied, 11 N.Y.3d 708, 868 N.Y.S.2d 600 [2008]; Cynthia B. v. 3156 Hull Ave. Equities, Inc., 38 A.D.3d 360, 832 N.Y.S.2d 520 [1st Dep't 2007]; Flores v. Dearborne Mgt., Inc. 24 A.D.3d 101, 806 N.Y.S.2d 478 [1st Dep't 2005]; Buckeridge v. Broadie, 5 A.D.3d 298, 774 N.Y.S.2d 132 [1st Dep't 2004]; Rivera v. New York City Housing Auth., 239 A.D.2d 114, 657 N.Y.S.2d 32 [1st Dep't 1997]; Harris v. New York City Housing Authority, 211 A.D.2d 616, 621 N.Y.S.2d 105 [2d Dep't 1995]; Tarter v. Schildkraut, 151 A.D.2d 414, 542 N.Y.S.2d 626 [1st Dep't 1989], appeal denied, 74 N.Y.2d 616, 549 N.Y.S.2d 961 [1989]). The reasoning is readily understood: "it is most unlikely that reasonable security measures [undertaken by a landlord] would have prevented an attack of this kind" (Flynn, supra, 76 A.D.3d at 492, 90 N.Y.S.2d at 191 (citations omitted)). A functioning door lock, as those cases make clear, simply would not deter a criminal bent on a purposeful and targeted attack on a specific individual.

No one disputes that the attack here involved was a targeted intentional attack -- planned, orchestrated and aimed at the WTC. Plaintiffs and the courts below point to the information provided to the Port Authority in advance by various governmental agencies concerning the potential for a targeted attack, the results of studies undertaken to crystallize the nature of the potential attack, the weak points and the areas that might be strengthened, all aimed at showing that the Port

Authority was remiss in failing to take better or other steps than it did. But they miss an essential point: landlords don't do any of that. The type of typically secret and sensitive information provided in an effort to thwart a terrorist attack is not shared with and among landlords. It is, precisely, shared if at all, between and among federal, state and local arms of the governmental police power, here including the Port Authority's own police force. Typical landlords do not commission studies on the potential for a terrorist attack on their buildings; the police forces do that, here, including the Port Authority. None of this is within the realm of the type of "minimal" or even "reasonable" protective conduct expected of landlords, other than those few that are also acting in a governmental capacity. Respectfully, what has occurred below in this case was warned against by this Court more than 25 years ago in Miller v. State of N.Y., supra, 62 N.Y.2d at 511, 478 N.Y.S.2d at 832:

> The difficulty here arises from defendant's dual role, where it has acted in a proprietary capacity as a landlord by its ownership and control of the [premises], and also in a governmental capacity by providing police protection through the appointment of . . . security officers "to preserve law and order. . . ." A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment

> building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. (Citation omitted).

Whatever blame may be assigned to the Port Authority, through 20/20 hindsight, in terms of its choice among different anti-terrorist security measures on the basis of multiple studies and the information exchanged with various other governmental agencies, none of that is conduct fitting within the parameters of a landlord's function; rather, it is conduct which, ultimately, "only invoke[s] governmental functions." This targeted attack on an intended victim -- the WTC -- is not the type of intentional criminal behavior which may reasonably be expected to be thwarted by the limited security measures envisioned by this Court in Miller as falling within a landlord's domain. Accordingly, reversal and dismissal of the action is warranted.

POINT II

THE PORT AUTHORITY WAS NOT LIABLE FOR THE UNFORESEEABLE TERRORIST ATTACK ON THE WORLD TRADE CENTER IN 1993, AND THIS COURT SHOULD REVERSE AND DISMISS THE COMPLAINT

With the wisdom born of the event, the consequences of virtually every act or omission will be considered possible. But that is not the standard for negligence. Negligence does not impose liability for what is possible, but what is the probable consequence of an act or omission. And crucial to any determination of what is probable is consideration of the concept of foreseeability. Foreseeability is what one would reasonably expect, not what might conceivably occur, and it does not call for prophetic vision. In this case, the Appellate Division has saddled owners with the unsustainable burden to protect against an entirely unforeseeable and unprecedented terrorist attack.

In its ruling, the Appellate Division held that the Port Authority was responsible for this unforeseeable act of violence committed by a group of committed terrorists. The evidence, however, showed that the Port Authority provided reasonable security for the WTC, and it conducted significant internal reviews of its security measures. The OSP and Port Authority Police worked in close contact with the FBI, NYPD, and Joint Terrorism Task Force. The Port Authority hired outside security consultants to assess its areas of vulnerability. (R. Vol. VII,

3851; 3874) Burns and Roe identified a bombing in the underground garage as the ninth in terms of vulnerability: i.e., it was not a high area of vulnerability because it was not an area where high numbers of people congregated (R. Vol. IX, 4669). Further, no prior attack on U.S. soil had ever targeted an underground garage with the express intent of bringing down a building. Succinctly, it was not foreseeable before February 23, 1993 that terrorists would park a truck loaded with explosives in an underground garage. There were no prior similar attacks in the United States or threats made against the WTC. There was no "natural or probable" reason for the Port Authority to have foreseen this type of terrorist attack, and it is thereafter submitted that this Court should dismiss the complaint.

Negligence is not a thing, but a relation. And it does not exist in a vacuum. The concept must be relative to time, place, circumstances, and persons, and what may be negligence to one person, may not be as to another. See, Levine v. New York, 309 N.Y. 88, 127 N.E.2d 825 (1955). Further, the mere fact that an incident occurred does not establish liability on the part of the Port Authority. See, Lewis v. Metro Transportation Auth., 99 A.D.2d 246, 472 N.Y.S.2d 368, aff'd, 64 N.Y.S.2d 670, 485 N.Y.S.2d 252 (1984).

As an owner or possessor of land, the Port Authority had a duty to act in a reasonable manner in maintaining its property in a reasonably safe condition in view of all circumstances. See,

Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976). But a landlord is not a guarantor of safety. See, Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980). And an owner will not be held liable for failing to guard against the remote possibility of an accident that could not have been foreseen in the exercise of ordinary care. See, Hubbell v. City of Yonkers, 104 N.Y. 434, 10 N.E. 858 (1887). In civil cases involving criminal conduct, the landlord owes a common-law duty to take "minimal precautions to protect tenants from foreseeable harm", including the foreseeable criminal conduct of third parties. See, Jacqueline S. v. City of New York, 81 N.Y.2d 288, 293-294, 598 N.Y.S.2d 160, 162 (1993) (emphasis supplied) (whether injury was foreseeable depends on location, nature, and extent of previous criminal activity and similarity, proximity, and other relationship to crime in question).

Contrary to the assertions of counsel for plaintiffs and the Appellate Division's finding, liability is determined by what is probable, not what is possible. But that was precisely the conclusion reached by the Appellate Division: it decided that the Port Authority was liable for the 1993 WTC bombing because there was evidence that it was possible that there could be a terrorist attack in the form of a truck bomb in the underground garage. Respectfully, this was not an attack that was foreseeably probable under the law. As Justice Cardozo eloquently wrote, "(t)he risk reasonably to be perceived defines the duty to be obeyed . . . " Palsgraf v. Long Island R.R. Co.,

248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). And based upon the facts of this case, no act or omission on the part of the Port Authority was a probable cause of this incident:

> Probable . . .must refer to consequences which were to be anticipated at the time of the defendant's conduct. The phrase therefore appears . . . as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance.

Prosser and Keaton, Torts, p. 282 (5th ed.).

At the time of the incident in 1993, the greater risks -- and the ones that the Port Authority reasonably prioritized -- were bombings to the WTC concourse, the plaza, the observatory, and Windows on the World. The parking-garage facility actually received the lowest vulnerability rating in a December 1991 security study by Burns and Roe. It was not a foreseeable risk that terrorists would park an explosives-laden truck in an underground garage with the intent of taking down a high-rise building. Such an attack had never occurred before, and based upon the evaluation of the risks, the Port Authority allocated its limited resources to areas where the threat was determined to be greater. But that is not to say that the Port Authority abandoned the parking garage. It did increase security for the garage, and it was vigilant in updating security threats through its close contact with law-enforcement and counter-terrorism officials.

The attack on the WTC's underground garage was not

reasonably foreseeable. Whether a breach of a duty has occurred depends upon whether the resulting injury was a reasonably foreseeable consequence of the defendant's conduct. See, Danielenko v. Kinney Rent A Car, Inc., 57 N.Y.2d 198, 455 N.Y.S.2d 555 (1982). If the incident was not foreseeable, or if the owner's conduct was reasonable in light of the circumstances, there is no negligence and no liability. Id., 57 N.Y.2d at 204, 455 N.Y.S.2d at 558. As this Court held in 1931, liability can always be found "(l)ooking back at the mishap with the wisdom born of the event." Greene v. Sibley, Lindsay & Curr Co., 257 N.Y. 190, 192, 177 N.E. 416 (1931). But the Appellate Division eschewed the Greene Court's directives and unreasonably imposed a duty upon the Port Authority akin to clairvoyance.

Significantly, the events of 1993 cannot be looked at through the prism of history with the knowledge of current events. The bombings at Oklahoma City, the Khobar Towers, the U.S. Embassies in Kenya and Tanzania, the U.S.S. Cole, and the terrorist attack on September 11, 2001 had not happened in February 1993. While there were threats, the Port Authority, as with any governmental or pseudo-governmental agency, had to prioritize these risks. And in the face of the intelligence the Port Authority received from law-enforcement and counter-terrorism agencies, security was heightened in what was determined to be the most vulnerable areas--the concourse and observatory. Even in what outside experts identified as low-vulnerability areas such as the underground garage, the Port

Authority increased security by adding patrols and security cameras. Further, a police precinct was located in the parking garage.

According to the Appellate Division's decision, however, the Port Authority should have provided even more security for the underground garage or closed it completely, which would have not only been extremely inconvenient, it would have likely breached the leases of countless tenants. Contrary to the wishes of plaintiffs, the liability of a landowner is not limitless as its duty will arise only when the risk is foreseeable. See, Palsgraf, supra, 248 N.Y. at 344, 162 N.E. at 100 (1928). The concept of proximate cause "stems from policy considerations that serve to place manageable limits upon liability that flows from negligent conduct." Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 314, 434 N.Y.S.2d 166, 169 (1980). In DiPonzio v. Riordan, 89 N.Y.2d 578, 657 N.Y.S.2d 377 (1997), this Court held that a landowner is not liable for the consequences of every untoward event:

> ...although virtually every untoward event can theoretically be foreseen "with the wisdom born of the event", the law draws a line between remote possibilities and those that are reasonably foreseeable because "[n]o person can be expected to guard against harm from events which are. . . so unlikely to occur that the risk . . . would commonly be disregarded".

Id., 89 N.Y.2d at 583, 657 N.Y.S.2d at 380 (citations omitted).

Similar to the innkeeper's duty to maintain the premises in

a reasonably safe condition, there must be proof of notice or a likelihood of criminal activity. Further, to establish foreseeability, the injury-producing criminal conduct "must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate" to where the injury occurred. See, Maria T. v. New York Holding Co. Assoc., 52 A.D.3d 356, 862 N.Y.S.2d 16 (1st Dep't 2008). Here, the bombing in the parking garage was not reasonably predictable. In Nallan, this Court held that even where there was an extensive history of criminal activity, there must be evidence of a likelihood of harm:

> Thus, even where there is an extensive history of criminal conduct on the premises, the possessor cannot be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of the visitor.

Id., 50 N.Y.2d at 519, 429 N.Y.S.2d at 613 (emphasis added).

In Nallan, there was evidence of 107 crimes reported in the building, including ten unlawful acts against people. Id. The type of crime committed in this case could not reasonably have been anticipated. Here, there were no attacks of any kind at the WTC. There were no similar prior bombings in the United States. There were no threats of bombings in the underground garages. Numerous other purportedly "high-profile" facilities did not close their underground garages. As demonstrated in Point I of

this brief, the terrorists that perpetrated this heinous and unforeseeable act were the sole causes of the resulting damages and injuries. See, also, Hashem v. Manemah Food Corp., 232 A.D.2d 153, 647 N.Y.S.2d 511 (1st Dep't 1996), where the First Department held that because the unexpected attack on grocery store patron was not a situation that store owner could reasonably have anticipated or prevented. Even if it had knowledge of similar prior incidents at or near its location, the owner owed no duty to protect patrons from attack, and it could not be held liable for injuries suffered.

The case of Todorovich v. Columbia University, 245 A.D.2d 45, 665 N.Y.S.2d 77 (1st Dep't 1997) addressed allegations concerning "minimal security measures." In Todorovich, the plaintiffs were injured by an armed assailant as they unsuccessfully attempted to gain access to their apartment. The plaintiffs were unaware that the lock on the front door had been changed by the landlord while they had been away on vacation. The First Department held that the occupier of property will only be held liable for criminal acts where ambient criminal activity has infiltrated the premises, and the landlord knew of this. Id. It continued that even where the landlord failed to take "even the most minimal security precautions to preserve its premises from unusually pervasive ambient crime," "it is more frequently the case that the failure is not so egregious nor the neighborhood crime so pronounced as to render the mere combination of the two tantamount to notice of the risk of

criminal encroachment." Id. The Appellate Division ruled that foreseeability was "contingent upon actual notice to the landlord of prior incidents in which ambient crime had infiltrated the building." (emphasis added). Id.

In Buckeridge v. Broadie, 5 A.D.3d 298, 774 N.Y.S.2d 132 (1st Dep't 2004), the defendant owned a two-family house in the Bronx. The plaintiff was a handyman hired by the defendant on numerous occasions to perform various jobs at the house. The plaintiff was at the house to do some interior painting one morning when an unknown man and woman, dressed in work clothes, orange vests, helmets and carrying test tubes and folders, gained entry to defendant's house while posing as environmental protection workers investigating a water-main break in the area. The two intruders robbed the house and physically attacked the plaintiff and the defendant. The plaintiffs argued that the defendant was aware of other criminal activity in the neighborhood.

The First Department dismissed the plaintiffs' claims. It reiterated New York's rule that a property owner may be liable for the injuries inflicted by a trespasser who commits a violent crime against a third person only where the owner knew or should have known of the probability of conduct on the part of the trespasser that was likely to endanger the safety of those lawfully on the premises. Id., 5 A.D.3d at 299, 774 N.Y.S.2d at 133. In general, notice can only be established by proof of a prior pattern of criminal behavior, but ambient neighborhood

crime alone is insufficient to establish foreseeability. Id., 5 A.D.3d at 300, 774 N.Y.S.2d at 134.

The Appellate Division then applied these principles to the facts in Buckeridge and held that the record was devoid of any proof of prior criminal incidents at the defendant's residence or at other neighborhood residences that would have placed him on notice that a robbery of this type would have been likely to happen. Id. While the defendant was aware of several robberies in the grocery store located next door, the Appellate Division found that these incidents were insufficient to place defendant on notice that his home was vulnerable to this type of criminal activity. Id.; see, also, Williams v. Citibank, 247 A.D.2d 49, 677 N.Y.S.2d 318 (1st Dep't 1998) (general claim that ATMs attract criminal activity and that ATM in question located in "high crime" area insufficient to establish notice of prior criminal acts at ATM in question); Novikova v. Greenbriar Owners Corp., 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dep't 1999) (where decedent shot in struggle during forcible robbery, proof of apartment burglaries, vandalism and car theft insufficient to put landlord on notice of same type of crime against the decedent); and Browning v. James Properties, Inc., 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dep't 2006).

Here, there was no evidence that the Port Authority should have provided even more security against the unforeseeable terrorist attack on the WTC's underground parking garage. The Port Authority Police and its private security patrolled the WTC

complex (R. Vol. VII, 3552-613, 3917-924). The Port Authority implemented numerous plans to address a variety of threats. It worked in concert with national and local law-enforcement and intelligence agencies to assess risks (R. Vol. VIII. 4072-73). As there was little debate about these facts, the issue of foreseeability and proximate cause can be considered by the court as a matter of law. See, Ventricelli v. Kinney Sys. Rent A Car, Inc., 45 N.Y.2d 950, 411 N.Y.S.2d 555 (1978). The plaintiff in Ventricelli leased a car with a trunk lid that repeatedly flew open. The plaintiff had complained of the defective trunk to the lessor on several occasions. On the date of the incident, the plaintiff parked alongside the curb on a city street and tried to slam the trunk shut when Antonio Maldonado's car, which was parked several lengths behind plaintiff, jumped forward and struck the plaintiff. The jury eventually apportioned fault: 80% to Kinney and 20% to Maldonado.

This Court found that the issues of proximate cause and foreseeability could be considered by the courts. Id., 45 N.Y.2d at 952, 411 N.Y.S.2d at 556 (1978). In addressing Kinney's liability, this Court determined that while its negligence was "manifest" and was "of course, a 'cause' of the accident," but that it was not a proximate cause. Id. This Court reasoned that the word "proximate" meant that the law refused to "trace a series of events beyond a certain point." (citation omitted). Id. The immediate cause of the incident

was Maldonado's operation of his vehicle. Id. While it was reasonably foreseeable that Kinney providing a car with a defective trunk would result in the plaintiff's repeated attempts to close it, this Court ruled that the collision of the vehicles was not foreseeable. Id.

This Court's decisions in DiPonzio and Nallan and those from the Appellate Divisions demonstrate that the Port Authority should not be held liable for this unforeseeable terrorist attack. Even where a plaintiff can demonstrate a history of criminal conduct at a premises, in order to impose liability upon an owner, the plaintiff still must demonstrate that the owner "either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons," which will place plaintiff in danger. See, Nallan, supra, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613.

The Appellate Division and plaintiffs attempt to portray the Port Authority's decision to not close the underground garage as one driven purely by profits. Respectfully, this cursory analysis does a disservice and fails to take into consideration the totality of the circumstances. While consideration of economics was involved in the decision-making of the Port Authority, so was significant intelligence that placed a bomb attack in the underground garages as a low risk. DeGeneste -- the Port Authority Police Chief -- agreed with the decision not to close the garage, and his opinion was based upon discussions with the CIA, FBI, and Secret Service (R. Vol. II, 409-11).

Indeed, there was no historical data upon which to base a risk of a car-bomb attack in the underground garages (R. Vol. III, 1023-24, 1274, 1278, 1285; Vol. IV, 1398). Indeed, the Secret Service parked the President's limousine in the underground garage (R. Vol. II, 458-59).

What plaintiffs in this case demand is that this Court, with the benefit of "wisdom borne of the event," hold that the Port Authority should have enacted drastic security measures -- the closing of the underground garage. Plaintiffs do not claim, nor can they, that the Port Authority did not implement minimal security measures. The record is replete with evidence that the Port Authority acted reasonably and that it was proactive in its protective measures. Rather, plaintiffs demand that the Port Authority should have done "more" to guard against countless possible attacks. They demand that the underground garage should have been closed, despite the fact that FBI headquarters in Washington, D.C., the United Nations Building, and the Sears Tower in Chicago never took such drastic action.

The Appellate Division adopted plaintiffs' reasoning and essentially changed the law when it ruled that the minimal-precaution standard was inapplicable to the Port Authority because of the risk presented. Respectfully, there was no legal or factual support for such a dramatic change in the law. As a landowner, the Port Authority was governed by the well-settled and reasonable minimal-precaution standard that every other landlord in this State must comply with when it came to security-

related matters. The Port Authority satisfied its duty of care, but the Appellate Division, inexplicably and without justification, changed the duty of care from one requiring the Port Authority to provide minimal-security measures to mandating that it possess prophetic vision so that it could guarantee protection against all possible terrorist attacks, no matter how remote.

Between 1971 through the attack in 1993, the Port Authority Police continuously engaged in assessing the security risks at the WTC. Its own security force worked in conjunction with the national and local law-enforcement and counter-terrorism agencies, including JTTF. The Port Authority retained outside security consultants who never identified the underground garage as a location of a probable terrorist attack.

According to the facts in the Port Authority's possession on February 22, 1993, the closing of the parking garages was not a feasible or necessary action because the there was not a foreseeable probability that there would be a terrorist attack there. Although it was conceivable that terrorists could possibly choose to launch an attack in the underground garages, conceivability is not the equivalent of foreseeability, and to hold the Port Authority or any owner liable for the injuries caused by the terrorist attack would stretch the concept of foreseeability beyond acceptable limits and effectively make the Port Authority and all owners -- including municipalities and private landowners -- insurers of safety. Such a standard finds

no support in the record or in the law, and this Court should dismiss.

CONCLUSION

For the foregoing reasons, the decision and order of the Appellate Division should be reversed and the complaint against the Port Authority should be dismissed.

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