To be Argued by:
JOHN F. WATKINS
(Time Requested: 30 Minutes)

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Court of Appeals

of the

State of New York

BRYAN SCURRY and BRANDON CRUSHSHON, as Proposed Administrator of the Estate of BRIDGET CRUSHSHON (Deceased),

Plaintiffs-Respondents,

– against –

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellant.

(For Continuation of Caption See Inside Cover)

BRIEF FOR DEFENDANT-APPELLANT

COFFEY MODICA O'MEARA CAPOWSKI LLP
200 East Post Road, Suite 210
White Plains, New York 10601
Tel.: (212) 827-4501
Fax: (914) 233-3561
tcapowski@cmocllp.com
jwatkins@cmocllp.com
sharriton@cmocllp.com
cbitar@cmocllp.com

Appellate Counsel to:

HANNUM FERETIC PRENDERGAST & MERLINO LLC

Attorneys for Defendant-Appellant/Third-Party Plaintiff/Second Third-Party Plaintiff

Of Counsel:
TIMOTHY R. CAPOWSKI
JOHN F. WATKINS
SEAN HARRITON
CHRISTOPHER BITAR

Date Completed: June 6, 2022

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

– against –

"JOHN DOE" and/or "JANE DOE" as fictitious Names of the Executor, Executrix or Administrator of the Estate of WALTER D. BONEY (Deceased),

Third-Party Defendant.

NEW YORK CITY HOUSING AUTHORITY,

Second Third-Party Plaintiff,

– against –

MERCEDES BONEY, as Administratrix of the Estate of WALTER D. BONEY (Deceased),

Second Third-Party Defendant.

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PRELIMINARY STATEMENT

Defendant-Appellant/Third-Party Plaintiff/Second Third-Party Plaintiff New York City Housing Authority ("defendant" or "NYCHA") submits this brief in support of its appeal from the Decision and Order of the Appellate Division, Second Department, dated January 27, 2021 (the "January Decision") which affirmed the prior Order of the Supreme Court, King's County, dated February 23, 2018 (the "Supreme Court Order") that denied NYCHA's motion for summary judgment dismissing plaintiffs' complaint.

Simply put, the horror show that occurred at an NYCHA-owned building in Brooklyn on October 24, 2007 resulted solely from the actions of Walter D. Boney ("Boney"), an individual who personified evil. That evening, Boney ended his relentless pattern of diabolic and sadistic behavior towards his ex-fiancée, Bridget Crushshon, and her family by killing her and injuring one of her sons, Bryan Scurry, who valiantly attempted to save his mother's life. In unspeakable malevolence, Boney doused both Bridget Crushshon and himself in gasoline, brought specially for the premediated purpose, then struck a flame, immolating them both and setting the hallway outside of her apartment on fire.

Neither NYCHA on this appeal, nor, we hope, anyone, denies that Mr. Scurry and his family endured a nightmare. This appeal addresses one discrete question: whether a landowner can be liable for a premediated, targeted, and

malicious attack by a criminal in the absence of any admissible evidence that ordinary security protocols could have deterred what the attacker's own certain death could not.

NYCHA answers no – and not alone. New York jurisprudence stands heavily for the notion that such targeted acts of extreme violence sever any causal nexus between a landowner's liability and a plaintiff's injuries. Further, courts of this State routinely and consistently hold that landowners are simply required to implement minimal security precautions at their premises. However, in contravention of well-established judicial precedent, the January Decision denied NYCHA summary judgment, suggesting that it was required to show that either Boney was lawfully present or that his heinous murder/suicide reflected such a degree of preplanning, coordination, and sophistication that *no level of building security would have prevented the crime*. To be sure, these findings were necessary for the Second Department to reach the January Decision – absolutely no evidence suggests, or could ever suggest, that minimal security measures would have successfully prevented Boney from carrying out his plan.

Following the January Decision, the First Department in Estate of Murphy, 193 A.D.3d 503 (1st Dep't 2021) addressed it directly. The First Department rejected the Second Department's reasoning and re-affirmed its traditional, realistic and pragmatic approach to targeted attack cases. Specifically, the Court in

Estate of Murphy indicated that the First Department deems a landowner to have met its *prima facie* burden of refuting liability by establishing that an attack at its property was targeted, while allowing a plaintiff to carry its shifted burden by presenting evidence that absent or allegedly absent minimal security precautions would or could have actually thwarted the attack. Id. at 50.

The gulf between Estate of Murphy and the January Decision creates conflicting standards of law in New York State – indeed, within the five boroughs of New York City. Consequently, the outcome of cases of this nature currently hinge on the county of the crime's commission, even as against the same defendant property owner.

The Court should rectify this situation, and do so by adopting the First Department's long-held rule, re-articulated in Estate of Murphy, and reversing the January Decision. All evidence leads inexorably to the conclusion that Boney was a hell-bent, suicidal assassin who would not be deterred by the minimal security measures required of a landowner and that his evil plot would not have been thwarted by a locked door. This case presents precisely the type of senseless assault that the "targeted attack exception" was designed to address. The Court should not countenance the erosion of the well-recognized rule applying to targeted attack cases and disregard the unequivocal fact that Boney's murderous intent was the sole proximate cause of Bridget Crushshon's death and plaintiffs' purported

injuries, thereby severing any causal connection to NYCHA's alleged negligence. For these reasons and those discussed extensively below, the Court should reverse the January Decision and grant NYCHA summary judgment.

QUESTION PRESENTED

1. Was the January Decision properly made? No, the January Decision was not properly made.

STATEMENT OF FACTS

A. Boney's Relationship With Crushshon And Violent Behavior

Crushshon was born and raised in South Carolina where she had four (4) sons: Brandon Crushshon ("Brandon") and Jason Crushshon ("Jason") and twins, Bryan Scurry ("Bryan") and Ryan Scurry ("Ryan") (R. 125, 129, 282, 392).[1] In 2001, Crushshon and her children moved from South Carolina to a house she rented on Cornelia Street in Brooklyn, New York (R. 392-93). Thereafter, Crushshon became a residential manager at a mental illness facility, where she worked the overnight shift on a full-time basis (R. 130-31, 292, 393).

In or about 2005, Crushshon met Boney and the two started dating (R. 297-98). Boney quickly moved into the Crushshon family home and he two became engaged (R. 297-98). Boney lived with Crushshon and her sons for approximately six months (R. 134).

Boney soon showed signs of alarming, violent and malevolent behavior. On one occasion, Bryan observed Boney attack his own daughter, Mercedes, for simply being alone with her boyfriend (R. 332-33). Specifically, Bryan stated that Boney (R. 332-33) (emphasis added):

> was shaking and he went in the room and…told Mercedes that [she was] disrespecting him [by being]…in the room with her boyfriend while he's there…He kept going on and on and he tried to go toward her boyfriend and Mercedes stepped in between them *and he started choking her…He had his hands around her throat and started choking her and her friends and family members stepped in*…

According to Bryan, Boney was possessive and controlling of Crushshon and he would often tell his mother "what she needs to do" (R. 300) and "just start flipping" at the family (R. 147). Often, Boney's anger manifested alongside his alcohol abuse. Bryan recounted that Boney "would drink a lot…whenever he was off [from work]," and eventually would be drunk "all the time" (R. 148). Once, Boney arrived home "angry, [and] drunk and he just starting attacking…Ryan, choking him, pushing him and stuff like that" (R. 310). Bryan and his brother Brandon "grabbed [Boney] and pushed him off [Ryan]" (R. 310).

B. Boney's Monstrous Behavior Intensifies After Crushshon And Her Sons Move To The Cypress Hill Houses

Boney and Crushshon broke up shortly after Boney's attack on Ryan, but Boney initially continued to live in the home (R. 311). In April 2006, however,

[1] Brandon Crushshon was born on January 3, 1987 and Bryan and Ryan Scurry were born on May 2, 1988 (R. 282).

Crushshon and her sons moved out (R. 136, 148). Crushshon rented a sixth floor apartment located at 730 Euclid Avenue in Brooklyn, New York (the "building" or the "apartment"), within the Cypress Hill Houses ("Cypress Hill"), a development owned and operated by NYCHA (R. 54, 136, 148, 388, 446, 590-91).

Although Crushshon sought to keep Boney away from her new home (R. 149, 313), Boney began "to stalk [Crushshon]" (R. 144, 456). For example, Bryan, in or about September 2006, began commuting to college, and would notice Boney circling the Cypress Hill apartment in a white van as early as 5:00 a.m. (R. 137-38). Like a predator, Boney would drive "really slow" around the building, as though he was "creeping around the corner," and would "just look around" (R. 138, 150, 312-13).

Crushshon had not cut ties with Boney and continued to treat him like a friend (R. 137). The worth, or otherwise, of a friendship with someone like Boney was laid bare by a horrific incident in or about the end of 2006 or beginning of 2007 (R. 144, 314-15). Specifically, Bryan recalled that Crushshon was driving in a car with Boney while talking to Bryan on the phone, when Bryan overhead Boney arguing with his mother (R. 144, 314-15). Bryan heard Boney threaten to "throw the car off the bridge" and "*kill [them] both*" and heard the fracas that followed when Boney "grabbed the steering wheel[,] and [started] swinging the car from left to right" (R. 144, 314-15) (emphasis added). During this altercation,

Boney explicitly stated to Crushshon, "*Bitch, I'll kill us both*" (R. 144) (emphasis added).

In or about February 2007, Crushshon told Bryan that Boney's behavior was "out of control" and that "she didn't want to be involved with [him]" (R. 146). Crushshon returned her engagement ring to Boney and, around the same time, Boney began "leaving angry voice mails" on her cell phone (R. 299, 307). Bryan listened to "countless" voicemails which his mother saved in which Boney threatened her, called her a bitch – or rather, spelling out the letters "B-I-T-C-H" – and explicitly stated that he would murder her (R. 308).

Thereafter, Boney's maniacal behavior intensified when he showed up at their apartment on three occasions uninvited (R. 208-10, 412-13). First, he appeared on Valentine's Day when Bryan was home alone and continuously knocked on their door but Bryan recognized his voice and did not let him in (R. 208-10). Fortunately, Boney eventually left (R. 210). Boney returned on or about Mother's Day while Crushshon, Bryan, and Brandon were in the apartment (R. 313-14, 412-13). Brandon looked through the peephole and saw Boney knocking on every door on the sixth floor of the building because Boney "didn't know exactly where [they] lived" (R. 451). Crushshon whispered to him not to open the door and he eventually left (R. 314). He made a third unsolicited visit in August or September (R. 412-13).

It is uncontroverted that Boney's repeated menacing advances went unreported to NYCHA or, specifically, to Cypress Hills Property Manager, Michael Jones, Superintendent Edward Esslinger ("Esslinger"), Assistant Superintendent, Freddie Gaillard ("Gaillard"), and Supervisor of Caretakers, Cassandra Newkirk ("Newkirk") (R. 524, 629-630, 805-08, 865-66, 870, 960-61). Esslinger and Newkirk testified that they did not know Boney, Crushshon or her sons prior to the October 2007 attack (R. 865-66, 870, 960-61). Similarly, Cypress Hill Property Manager, Michael Jones ("Jones"), had never heard of Boney and did not believe any NYCHA employees were familiar with him (R. 629). Additionally, Jones had no knowledge of prior assaults, targeted attacks or domestic disputes involving Boney, Crushshon and the Crushshon family (R. 524, 629-30, 805-08, 865-66, 870, 960-61). Furthermore, Gaillard, NYCHA's former Assistant Superintendent, had no familiarity with Boney, Crushshon or her family members prior to the October 2007 attack nor had knowledge of any prior assaults or domestic disputes between Boney, Crushshon and her family (R. 805-06, 808).

Boney's irrational and threatening behavior continued unabated into late October 2007 when Crushshon's SUV "disappeared" forcing her to rent a car (R. 140-41, 304-06). Only days later and approximately one week before the October 2007 attack, Boney appeared at Crushshon's workplace and "physically attacked" and "choked" her (R. 143, 300-01, 305). He demanded title to her SUV and was

screaming about "something to do with the rental car" (R. 143, 300-01, 305). The police were called but Bryan does not know whether Boney was arrested or if his mother considered taking legal action such as getting an order of protection (R. 139-40, 142, 300). Crushshon considered returning to South Carolina and asked Bryan if he wanted to go with her (R. 301-02).

C. The October 2007 Attack

On October 24, 2007, Bryan arrived home at approximately 9:45 p.m. while his mother was preparing to leave for her evening work shift (R. 152-53). At around 10:25 p.m., Crushshon left for work and Bryan locked the door of the apartment (R. 153, 341). While heading to his room, Bryan heard his mother scream and "heard two loud bangs like a gun or like fireworks…in the hallway" (R. 153, 328). Bryan ran out of the apartment into the hallway and saw Boney chocking and restraining his mother (R. 153, 343-44). There was "liquid everywhere and it smelled like gas, it was on the floor, it was everywhere", Boney "was throwing it on himself and [on Bryan's] mother" (R. 153).

Boney attempted to save his mother's life, running at Boney and pushing him off of her (R. 153). Crushshon "fell on the floor" and Boney either flicked a match or a lighter and "the whole hallway spiraled in flames" (R. 153, 347). Crushshon and Boney were both engulfed and Bryan's clothes caught fire (R. 153, 157). Bryan dropped to the floor and "started rolling to try to put the fire out…but

it was no use because everything was on fire" (R. 154). As a result of Boney's heinous murder/suicide attack, Crushshon succumbed to her burn injuries at the scene, Boney died several days later in a hospital and Bryan, who heroically attempted to intervene, suffered significant burn injuries requiring approximately three years of treatment and rehabilitation (R. 93, 247, 354, 399).

D. The Building And Lobby Door

Cypress Hill is a housing development consisting of 15 buildings and over 3,400 residents (R. 553, 611), or averaging approximately 225 residents per building. The New York City Police Department's "73rd Precinct" and "PSA2" patrolled the development (R. 599). The subject building contains seven floors and forty-nine (49) apartment units (R. 600, 611).

In short, the parties dispute whether the building's lobby door was out of order at the time of the attack. This dispute is not strictly relevant on this appeal and summarized briefly for context only. Both Bryan and Brandon testified that the lobby door rarely needed a key to open (R. 162, 410). Indeed, they allege that the door was essentially broken since their initial move-in, either from damage to the magnets or the lock itself (R. 162, 210, 319, 423). Nevertheless, they admitted they were unaware of any criminal victimization in the building (R. 214-15, 425) and admitted they never complained about the condition, nor, to their knowledge, did Crushshon (R. 161-62, 213, 316-318, 422, 424).

NYCHA presented countering evidence through both testimony and contemporary records. Assistant Superintendent Gaillard who "basically managed the maintenance [staff]", contradicts plaintiffs as to issues with the lobby door's locking mechanism or fuse (R. 784, 787, 790, 792-94, 802). Gaillard and Jones actually both testified that the lobby door's locking metal contacts, were "in place" on the date of the October 2007 attack (R. 609-10, 790-92). Superintendent Esslinger also confirmed that the lobby door did not require any repairs following October 24, 2007, the date of the subject attack (R. 965-66).

NYCHA also presented documentary evidence establishing that the lobby door was regularly inspected and maintained. NYCHA completed daily entrance door inspection sheets whereby a janitorial caretaker would inspect the lobby door each morning and communicate any issues to Newkirk by radio (R. 795-96, 884-85, 887). Newkirk documented whether entry doors in each building were "okay" or "out of order" ("o/o/o") that morning and physically handed it to Galliard (R. 584-85, 880, 890, 893). Galliard would review it, task a maintenance worker to make any necessary repairs and sometimes prepare a "high priority [work] ticket" for a maintenance worker to perform emergency repairs (R. 586, 588, 800-01).[2]

[2] Although daily entry door inspection reports were produced during discovery, not all were located despite a diligent and thorough search for same (R. 894). Defendant produced certain records it located for October 2007 noting that the door was "okay" on October 3, 10, 11, 12, 15, 16, 17, 18, 22, and 23 and out of order on October 19 (R. 1892-1914). Even if, *arguendo*, the door had become out of order between the inspection on October 23 and the attack the evening of October 24, no record evidence indicates NYCHA had notice of the same.

On the one instance between September 7, 2007 and December 27, 2007 when an emergency work ticket was issued for the lobby door, on October 3, 2007, approximately three weeks prior to the subject attack (R. 737-38), records establish that the door was fixed same-day (R. 740, 815-16, 983, 999).[3]

E. The Instant Action

1. Plaintiffs' Complaint And Allegations

Bryan and his brother Brandon (as administrator of Crushshon's estate), commenced this action, alleging NYCHA failed to provide "reasonable protection and/or security from [the] criminal acts of third persons" (R. 43-44). They further maintain that the "sole access door" to the building "neither fully locked nor completely impeded access…[and] could be opened by application of minimal physical force without the use of a key" (R. 102-03) and therefore "failed to function as an adequate and sufficient safety and protection device" for tenants (R. 102).

2. Summary Judgment And Appeal

NYCHA moved for summary judgment asserting, *inter alia*, that the premeditated attack severed any causal connection between the purported broken

[3] NYCHA also maintained *monthly* building inspection report checklists (R. 1810, 1983). Items on the monthly inspection report checklists could be rated either "good" or "unsatisfactory" (R. 812). While these records show that the door was routinely "unsatisfactory", Newkirk, who generally completed the inspection sheets, explained she would rate the lobby door "unsatisfactory" even if she observed issues unrelated to the door's operation, such as the door having graffiti or dirt on it (R. 814, 846-47, 877). This is, of course, confirmed by the daily reports noting that the door was "okay", meaning functioning.

lock and the murder/suicide thereby shifting the burden to plaintiffs to establish that defendants should have forecasted this targeted assault and that minimal safety precautions would have prevented the horror that unfolded (R. 20-35). Plaintiffs opposed, arguing, among other things, that issues of fact remained as to whether (1) the lobby door was working properly; (2) defendant's security measures were appropriate given the existence of criminal activity occurring at or about the time of the subject attack; and (3) defendant's purported failure to provide adequate security was a proximate cause of the subject occurrence (R. 1002-59). NYCHA replied, arguing that plaintiffs' opposition could not overcome the long line of similar, targeted attack cases providing the clear precedent defendant relied on where the landowner was granted summary judgment (R. 2143-51).

By Decision and Order entered March 19, 2018, the Supreme Court, Kings County (Graham, S.C.J.) denied defendant summary judgment, finding "several significant questions of fact", namely whether (1) Boney's actions may be considered a "targeted" attack; and (2) the allegedly "often-broken front door…together with the known criminal activity in that police precinct may point to negligence by NYCHA being the proximate cause of the injuries suffered to plaintiffs" (R. 9-15). NYCHA promptly filed a Notice of Appeal to the Appellate Division, Second Department (R. 1-7).

3. Opinion And Order Appealed From

Subsequent to the submission of appellate briefs and oral argument and by Opinion and Order entered January 27, 2021 ("January Decision"), the Appellate Division, Second Department affirmed the Supreme Court Order denying NYCHA's motion for summary judgment (R. 2156-65). The Court "address[ed] whether a 'targeted' attack by a perpetrator against a victim on premises, as distinguished from a 'random' attack on premises, is, by definition, an independent intervening cause that insulates the property owner from liability for negligent security measures, as a matter of law", noting that "[t]here is a line of cases from the Appellate Division, First Department, holding that targeted attacks break the proximate causal link between the reasonableness of security measures by the property owner and the targeted crime itself" (R. 2156).

The Court stated that "[i]n addressing foreseeability where plaintiffs are injured at premises as a result of the criminal acts of third parties, the First Department has distinguished between criminal acts that are intentionally 'targeted' against a particular victim, and criminal acts that are 'opportunistic' against random victims (R. 2160). The Court further stated that "[w]here the criminal act is targeted, the First Department deems the causal nexus between the plaintiff's injury and the landowner's duty of care to be severed as a matter of law…The rationale behind the First Department's distinction between targeted and

random crimes is that, in actions involving premeditated attacks upon known victims, 'it is unlikely that any reasonable security measures would have deterred the criminal attack'" (R. 2160-61).

However, in affirming the Supreme Court's Order, the Court rejected the First Department's logic, reasoning as follows (R. 2162-65):

> In our view, for NYCHA to be entitled to summary judgment under the circumstances presented here, it needed to establish, in the first instance, that Boney's nefarious presence in the hallway at the decedent's apartment was not a result of having gained access to the building through a negligently maintained and lockless front door, but was instead a result of having been given access by a tenant or by other lawful means outside the scope of the minimal security measures that NYCHA had a duty to provide. Otherwise, the concept that an occurrence may have more than one proximate cause becomes meaningless in an action such as this. NYCHA provided no evidence in support of its motion for summary judgment dismissing the complaint that its alleged negligently maintained front door played no concurrent role in enabling Boney's criminal conduct at the specific date, time, and place of his crime, however premeditated that criminal conduct might have been.
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> * * *
>
> The test in determining summary judgment motions involving negligent door security should therefore not focus on whether the crime committed within the building was "targeted" or "random," but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence. In examining whether there is a triable issue of fact as to foreseeability and proximate cause requiring trial, a jury could conceivably conclude that the chronically broken lock at the building's front door provided Boney with an opportunity to attack the decedent, in a manner that might not otherwise have been possible, and that NYCHA could have foreseeably anticipated that its broken front door lock would result in the entry of intruders into the building for the commission of criminal activities against known or unknown specific tenants (*see Terraro v New York City Hous. Auth.*,

> 116 AD3d 570). All of these actions should be examined sui generis, recognizing the unique facts of individualized matters, rather than simplistically or arbitrarily channeling them into either "targeted" or "random" criminal boxes that do not accommodate the factual nuances that may vary from case to case.
>
> Here, while the precise nature and manner of Boney's crime could not necessarily have been anticipated, the alleged longstanding nonoperability of a front door lock to a residential building made it foreseeable that some form of criminal conduct could occur to the detriment of one or more of the residents therein, at some point in time. NYCHA failed to meet its prima facie burden to proffer any evidence that its alleged negligent maintenance of the door lock did not concurrently contribute to the execution of Boney's crime…
>
> On that basis, the January Decision affirmed.

4. Motion For Leave To Appeal And Resulting Order

In June 2021, NYCHA moved for leave to appeal from the January Decision to this Court, citing the department split identified by the First Department in Estate of Murphy. Plaintiffs opposed, but on April 1, 2022, the Second Department unanimously granted the motion. This appeal follows.

ARGUMENT

POINT I

THE COURT OF APPEALS SHOULD FOLLOW THE FIRST DEPARTMENT STANDARD SET FORTH IN *ESTATE OF MURPHY* WHICH APPLIES A FAR MORE EQUITABLE AND PRACTICAL STANDARD FOR ESTABLISHING LANDLORD LIABILITY IN TARGETED ATTACK CASES THAN THE SECOND DEPARTMENT IN THE JANUARY DECISION

A. The January Decision Plainly Mischaracterized First Department Jurisprudence And Misapplied Applicable Authority

The January Decision mischaracterized First Department jurisprudence regarding targeted attacks. As the First Department itself clarified in Estate of Murphy, its approach for determining landowner liability in "targeted attacks" cases is far more nuanced and reasoned than the January Decision appreciated. NYCHA submits that this misunderstanding led the Second Department to err.

Specifically, the January Decision states that the First Department, in targeted attack cases, "deems the causal nexus between the plaintiff's injury and the landowner's duty of care to be severed as a matter of law" while, in cases involving "random" attacks, finds the causal connection "between the plaintiff's injury and landowner's duty of care as potentially raising a triable issue of fact" (R. 2160-61). The January Decision, deemed this "sharp distinction" to be a "binary dichotomy," that "by mechanically focusing on the perpetrator's intent, fails to account for the myriad of facts that may be present in a given case" (R. 2161-62).

However, in Estate of Murphy, the First Department aptly "disagreed" with the January Decision's implication that under the First Department's jurisprudence "the fact that a victim was targeted obviates the need for any inquiry into the security measures in place at the subject premises." 193 A.D.3d at 508. The First Department clarified that it has never held "that a landowner would avoid liability even if minimal precautions would have *actually prevented* a determined assailant from gaining access" – its jurisprudence only reflects that "[i]n reality . . . that is hardly ever the case" (emphasis added). Id.[4] The Court denied that it has held that "the simple fact that a victim was targeted" suffices on its own to shield a property owner from liability. Rather, the First Department clarified that the issue was one of duty, confirming that, "*given the minimal steps a landowner is required to take to secure premises, it has no duty to outwit or outthink those who are determined to overcome those steps*." Id. at 509 (emphasis added).

In short, while the January Decision understood the First Department rule to be that a targeted attack completely severs the causal nexus as a matter of law, entitling the defendant landowner to summary judgment, the First Department's true rule is only that a targeted attack operates to carry the defendant's *prima facie*

[4] The First Department cited, *inter alia*, Estate of Faughey ex rel. Adam v. New 56-79 IG Associates, L.P., 149 A.D.3d 418, 418-19 (1st Dep't 2017) (noting that plaintiffs had no evidence, only speculation, that security measures could have prevented a murder) and Cerda v. 2962 Decatur Ave. Owners Corp., 306 A.D.2d 169, 169-70 (1st Dep't 2003) (noting the absence of evidence that a fixed lock would have deterred a criminal conspiracy to commit murder).

burden for summary judgment. The plaintiff remains perfectly free, as in all cases when a prima facie burden has been carried, to carry *its shifted burden* – i.e., by identifying admissible evidence sufficient to raise a triable issue of fact as to whether the minimal security measures the law requires "would have actually prevented" the attack, where "prevented" means "prevented", not "shifted to another time or place."

B. The Court Should Adopt the First Department Standard

1. The *Estate of Murphy* Approach Is Far More Equitable And Practical Than The Second Department's Competing Standard

Put simply, the First Department employs a far more pragmatic, sensible and well-reasoned "burden shifting" approach to targeted attack cases. In general, the First Department holds "that a targeted attack on a resident of an apartment building does not give rise to liability on the part of the landlord for a failure to provide security." Flynn v. Esplanade Gardens, Inc., 76 A.D.3d 490, 494 (1st Dept. 2010). However, as reflected above, in Estate of Murphy, the Court stated that a landowner would not "avoid liability" in targeted attack cases if admissible evidence tended to show that "minimal precautious would have actually prevented a determined assailant from gaining access" (193 A.D.3d at 508). The general rule prevails because such a scenario is "hardly ever the case." Id.

Thus, properly understood, the First Department's rule deems a landowner to have carried its *prima facie* burden by establishing that the attack was targeted,

while allowing a plaintiff to carry its shifted burden by pointing to evidence that absent or allegedly absent minimal security precautions would or could have "actually" thwarted the attack. Id. This is no different than any other burden-shifting analysis on summary judgment, and as such, clearly comports with ordinary justice while both prudently and properly accounting for the reality that the minimum-security measures required of landowner will rarely be sufficient to deter an assailant hell-bent on committing a crime against a targeted individual.

As a threshold matter, both First and Second Department authorities heavily stand for the sensible notion that a property owner is simply required to implement "minimal" security measures as opposed to ensuring that "no level of building security" would have prevent a crime. Compare Banner v. New York City Housing Authority, 94 A.D.3d 666, 667 (1st Dep't 2012) ("a landowner has a duty to exercise reasonable care in maintaining his own property in a reasonably safe condition under the circumstances . . . [t]his duty includes an obligation 'to take *minimal precautions* to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person'") (citations and quotations omitted; emphasis added); Evans v. 141 Condominium Corp., 258 A.D.2d 293, 295 (1st Dep't 1999) ("A landowner has a legal duty to take *minimal precautions* to protect members of the public from reasonably foreseeable criminal acts by third parties" but "no duty to safeguard tenants from neighborhood crime as such" (emphasis

added); Robinson v. Sacred Heart School, 70 A.D.3d 666, 667 (2d Dep't 2010) ("a landlord has a duty to maintain *minimal security measures*, related to a specific building itself, in the face of foreseeable criminal intrusion") (emphasis added); Waters v. New York City Housing Authority, 116 A.D.2d 384, 386 (2d Dep't 1986) ("It is well settled that there is a duty incumbent upon landlords to take *minimal precautions* to protect tenants against the reasonably foreseeable criminal activities of third parties on the landlord's premises") (emphasis added).

The duty to provide minimal security measures derives from concepts of foreseeability. Common law ordinarily uses foreseeability to limit liability. See, e.g., Basso v. Miller, 40 N.Y.2d 233 (1976). In a case involving a landowner, if the plaintiff's injuries were not a foreseeable consequence of the landowner's negligence, no liability ensues. See Danielenko v. Kinney Rent A Car, Inc., 57 N.Y.2d 198, 204 (1982). Thus, "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury . . . liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315 (1980).

This gives rise to a duty to take steps to shield others from "foreseeable criminal conduct" by third persons. Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 548 (1998), citing Jacqueline S. v. City of New York, 81 N.Y.2d 288, 293-94

(1993). The duty is limited, however, because landowners are not guarantors of safety, courts have attempted "to place 'controllable limits' on [a landowner's] liability." Waters v. New York City Hous. Auth., 69 N.Y.2d 225, 230 (1987). Specifically, courts deem that in the absence of specific notice, a targeted attack is itself "truly extraordinary and unforeseeable" and can therefore "serve to break the causal connection between any negligence on the part of the [landlord] and the plaintiff's injuries." Simmons v. Kingston Hgts. Apts. L.P., 2013 WL 2169361, at *4 (Sup. Ct. Kings Co. May 3, 2013); see also Cerda, 306 A.D.2d 169 (1st Dept. 2003) (targeted assault of ex-drug dealer by assassins was intervening superseding cause despite broken lock); Harris, 211 AD2d 616, 616-17 (2d Dept. 1995) (targeted murder by "long-time enemy" severed causal nexus between landlord's negligence and injuries sustained). Thus, the targeted attack typically serves as a paradigmatic example of an intervening, superseding cause that only operated upon, but does not "flow from the original negligence." Derdiarian, 51 N.Y.2d at 315 (1980).

Mindful of the above, this Court instructs lower courts to "balance a tenant's ability to recover for an injury caused by the landlord's negligence against a landlord's ability to avoid liability when its conduct did not cause any injury." Burgos, 92 N.Y.2d at 551. The qualifier "when its conduct did not cause any injury" crucially indicates that the landowner only avoids liability when there is no

evidence that the proper execution of the duty would have *actually prevented* the injury, i.e., where the alleged negligence could have been a legal or proximate cause of the harm.

The Estate of Murphy decision heeded this instruction and struck that balance by holding that that a landowner's duty to take minimal measures to shield against the foreseeable criminal activity of third persons does not extend to a duty "to outwit or outthink" criminals "determined to overcome" said measures. 193 A.D.3d at 509. To hold otherwise, as the January Decision essentially does, would convert landowners into guarantors of safety, in violation of Waters (69 N.Y.2d at 230), or, worse, dragoon them into the role of law enforcement (a role landlords are ill-suited to play). It would also take the "minimal" out of "minimal measures."

But most significantly, the Estate of Murphy rule allows a landlord whose premises merely *furnished the occasion* for a targeted attack – one that a determined criminal would have carried out eventually on one property or another – to avoid liability unless actual evidence exists tending to show that minimal measures would have "actually" prevented the attack. Thus, far from being a rule that, as the January Decision erroneously states, arbitrarily determines liability based on *intent*, the First Department's rule *avoids* the arbitrary and inequitable outcome of allowing the *happenstance* of where a determined predator chooses to

strike to create massive liabilities. This is only good sense – an assailant who targets and stalks his prey is *not a property hazard*, but a mobile one – and mirrors other furnished-the-occasion jurisprudence where negligence may exist but is not a substantial cause of the harm at issue under the circumstances.[5]

In sum, it is beyond cavil that the approach for resolving targeted attack cases enumerated in Estate of Murphy is far more just, practical and realistic than the January Decision's competing regime, which would throw open the door to foisting liability on the landlord whose property happened to be the place where the predator pounced. Accordingly, it is submitted that the Court of Appeals should employ the former standard on this basis alone and, consequently, grant NYCHA summary judgment.

2. The January Decision's Standard, In Contrast, Imposes An Unreasonable And Senseless Burden On Property Owners

Having analyzed the policy *advantages* offered by the First Department rule, NYCHA now turns to the *disadvantages* embedded in the January Decision's alternative. In brief, this alternative imposes an overtly unreasonable burden on property owners in the form of a novel and near-impossible burden of proof.

[5] See, e.g., Landsman v. Tolo, 194 A.D.3d 1034 (2d Dep't 2021); McGowan-Amandola v. Federal Realty Investment Trust, 191 A.D.3d 868 (2d Dep't 2021); Glassman v. All County Hook Up Towing, Inc., 190 A.D.3d 701 (2d Dep't 2021); Raldiris v. Enlarged City School Dist. Of Middletown, 179 A.D.3d 1111 (2d Dep't 2020); Liquori v. Brown, 172 A.D.3d 1354 (2d Dep't 2019).

Specifically, the January Decision held that landowner-defendants, to establish their prima facie entitlement to summary judgment, must show that the assailant in a targeted attack was lawfully present, as "a result of having been given access by a tenant or by other lawful means" rather than having entered through some alleged gap in security (R. 2162).[6] Alternatively, the January Decision stated, a landowner can make its prima facie burden with evidence that the targeted attack "reflects such a degree of preplanning, coordination, and sophistication *that no level of building security would have prevented the crime*" (R. 2163) (emphasis added).

In other words, despite the well-established rule that a landlord need only provide minimal security measures to prevent intruders, the January Decision held that a landlord can *never* obtain summary judgment in a targeted attack case unless the attacker (a) was not an intruder at all, or (b) executed a plan that is literally unpreventably by *any level of security*.

This is a *sub silentio* rejection of the minimum security measures rule, hitherto well-established in the Second Department as well as the First. See, e.g., Muzafarov v. Casallas-Gonzalez, 164 A.D.3d 680, 680 (2d Dep't 2018) ("A

[6] As discussed in Point II below, and recited in the Statement of Facts above, NYCHA did, in fact, present prima facie evidence that the lobby door's lock was not malfunctioning on the day of the attack. Plaintiffs simply provided testimonial evidence to the contrary.

The fact that a showing of lawful presence can be rebutted by a simple denial underscores that this standard is impossible to meet.

landlord is under a duty to take minimal precautions to protect its tenants and invitees from foreseeable harm") (citations and quotations omitted); Martinez v. City of New York, 153 A.D.3d 803, 805 (2d Dep't 2017) ("Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm"); Johnson v. City of New York, 7 A.D.3d 577, 577 (2d Dep't 2004) ("The defendants were under a duty to take minimal precautions to protect their tenants from foreseeable harm"). It is also an overt rejection of this Court's directive in Burgos.

The Second Department's conspicuous and inexplicable "shift," from requiring landlords to show that *minimal* measures would not have deterred the attack to showing that *no level of security* could have done so, essentially requires landlords to post armed guards at each doorway or be haled into court before a jury – and of course there is no guarantee that armed guards would suffice. "No level" means, and NYCHA infers it to mean, "no level" – a landlord seeking summary judgment must show with admissible proof that the attack would have succeeded even if launched at an airport, on a military base, or at the White House.

This shift is also literally unprecedented. The Second Department's lone authority is Buckeridge v. Broadie, 5 A.D.3d 298 (1st Dep't 2004). Buckeridge, however, provides no support for the January Decision's new rule. In Buckeridge, the plaintiff handyman was attacked by two intruders while performing work at

defendant's house. 5 A.D.3d at 299. Plaintiffs sought to hold the homeowner liable, arguing that defendant was aware of other criminal activity in the neighborhood and had negligently allowed[7] the intruders to access his home. Id. The First Department rejected this argument, concluding that prior criminal incidents in the neighborhood "were insufficient to place defendant on notice" of the specific threat. Id. at 299-300. NYCHA can only infer that the Second Department reasoned that because the intruders in Buckeridge had gained entry through deception, rather than forced entry, they could be considered to have been lawfully present. But (a) this is incorrect and does not constitute lawful presence[8] and (b) even this would not support the "no level of security" rule – indeed, obviously, the Buckeridge defendant could have demanded to see their credentials before admitting them. In fact, the Buckeridge plaintiff made that very argument, and the First Department rejected it. 5 A.D.3d at 300. Buckeridge thus supports NYCHA's position, not the January Decision, which remains unprecedented.[9]

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[7] The assailants posed as environmental protection workers investigating a water main break. Buckeridge, 5 A.D.3d at 299.

[8] See People v. Thompson, 116 A.D.2d 377, 380-81 (2d Dep't 1986) (entry to premise "through trick or misrepresentation" constitutes unlawful entry under the Penal Law. Nor is New York an outlier in this regard: "constructive breaking" by fraud or trick is widely-recognized as a form of breaking and entering. See, e.g., 17 A.L.R. 5th 125.

[9] Certainly the newly-articulated rule breaks Second Department precedent. See, e.g., Cook v. New York City Housing Authority, 248 A.D.2d 501 (2d Dep't 1998) (faulty lock that trapped plaintiff in vestibule did not cause him to be shot by assailants; no requirement that landlord show the assault could not have been stopped by any level of security); Levine v. Fifth Housing Co., Inc., 242 A.D.2d 564 (2d Dep't 1997) (same, but involving a robbery and assault, not a

Further, the January Decision, on its face, significantly expands landowner duty and conflates proximate causation and cause-in-fact. Specifically, the January Decision says a landlord must furnish evidence that its conduct played "no concurrent role" in the targeted attack (R. 2163). Clearly, a mere cause-in-fact that furnishes the occasion for a harm by providing the conditions under which is occurs, has a "concurrent" role. But such a cause-in-fact gives rise to no liability. See Sheehan v. City of New York, 40 N.Y.2d 496, 503 (1976) (negligent parking of bus in traveling lane not a proximate cause); Gerrity v. Muthana, 7 N.Y.3d 834, 835-36 (2006) (same); Quinonez v. New York City Hous. Auth., 56 A.D.3d 257, 258 (1st Dep't 2008) (negligent fence maintenance mere facilitating condition); Lee v. New York City Hous. Auth., 25 A.D.3d 214, 219 (1st Dep't 2005) (same); Roman v. Cabrera, 113 A.D.3d 541 (1st Dep't 2014) (car accident that caused lane obstruction that later caused another car to swerve into plaintiff mere facilitating condition).

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shooting); Harris v. New York City Hous. Auth., 211 A.D.2d 616 (2d Dep't 1995) (granting summary judgment to defendant in broken lock case because murder was targeted and performed by long-time enemy who had made a previous attempt on decedent's life).

As discussed in Point II, the January Decision distinguished the on-point Harris by stating that the Harris assailant had had permissive access to the premises on prior occasions – although it is unclear why that would matter given the "no level of security" argument the January Decision also adopts.

Equally, it is immaterial that some of these cases are "locked out" cases – the faulty lock still played a concurrent role in the events.

The Second Department has cheerfully and recently applied this very rule to award a defendant summary judgment for a roadway case. Charles v. Bagels by Bell, Ltd., 203 A.D.3d 797 (2d Dep't 2022) (illegally double-parked car not a proximate cause of collision in which plaintiff's decedent died, notwithstanding that the double-parking constituted negligence per se). Clearly a concurrent cause-in-fact, even a *negligent* concurrent cause-in-fact, can be subject to a meritorious summary judgment motion in the presence of a superseding and intervening cause. Yet the January Decision, from the same court, has apparently annihilated this possibility *solely in targeted attack cases*, not only without authority, but in defiance of all prior authority. This perversely heightened standard makes no public policy sense.

At base, any rational approach to determining landlord liability in target attack cases – any approach that takes the Burgos directive to properly balance interests seriously – requires acknowledging the cold hard truth that property owners cannot be responsible for providing security measures sufficient to deter all targeted attacks. The January Decision's unprecedented rule fails this test. Its "no level of security" rule requires turning every apartment building, school,[10]

[10] Should school districts be liable for school shootings because hypothetically ever-greater militarization of schools could result in stopping the ever-growing number of school shooters before a fatality? The January Decision suggests so. While New York jurisprudence has previously indicated that a school's duty to guard against third-party attacks on its property mirrors a parent's (Jimenez v. City of New York, 292 A.D.2d 346 [2d Dep't 2002]), the January Decision cited Robinson, which expressly treats, albeit in the context of a private school, a

restaurant, and gathering place into a fortress. The law requires minimal security measures precisely because these measures suffice to ward off the *foreseeable* risk of routine crime, the ambient hazard that is a known risk of American life. These measures were not *meant* to prevent determined, vicious criminals from committing premeditated and targeted attacks. In the rare case where admissible evidence indicates that such measures would have actually performed this function, the matter should go to trial, as the First Department recognized in Estate of Murphy. In other cases, where fulsome discovery has found no such evidence, the matter should not proceed.

That is the better policy, and this Court should adopt the same.

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school's duty to guard against third-party attacks as coextensive with any landowner's. 70 A.D.3d at 667.

POINT II

THE COURT, APPLYING THE CORRECT STANDARD, SHOULD REVERSE THE JANUARY DECISION, AWARDING NYCHA SUMMARY JUDGMENT

As established above, the January Decision deviated from longstanding precedent to conclude that NYCHA could have only obtained summary judgment on an uncontroverted showing that Boney gained access to the building by some lawful means rather than a negligently maintained door (R. 2162). Specifically, the concluded that NYCHA would face trial because it had not shown as a matter of law that the allegedly broken lock played "no concurrent role in enabling Boney's criminal conduct" (R. 2163).

Under the correct standard, that recently was re-articulated in Estate of Murphy, and previously followed by the Second Department in Harris, NYCHA is entitled to summary judgment, as it establishes herein.

A. Estate Of Murphy

In Estate of Murphy, plaintiff-decedent Tayshana Murphy was murdered by Robert Cartagena and Tyshawn Brockington inside a NYCHA residential housing development in Manhattan. Plaintiff commenced an action against NYCHA, alleging that the NYCHA "was negligent in failing to have properly functioning locks at the premises, to properly monitor surveillance equipment, and to provide adequate security." 193 A.D.3d at 505. NYCHA moved for summary judgment arguing, *inter alia*, that Murphy "was killed in an act of vengeance" for the actions

of gang members, "that she was targeted for that purpose" and that "even if the front entrance door was locked when Brockington and Cartagena attempted to enter the building, they would have waited outside for someone to exit the door and then gone inside, or they would have used the intercom system to get someone to open the door for them or some other method to gain access. Id. at 505-06. In other words, NYCHA argued that a faulty lock is not a proximate cause of a targeted attack in the absence of evidence that a non-faulty lock would have actually thwarted the attack, instead of providing only a trivial and easily-surmounted obstacle.

In opposition, plaintiff proffered an affidavit by a licensed locksmith who opined that the subject "electromagnetic door lock was not working as intended" and that defendant's work orders related to the locking mechanism "did not establish that the problems…were actually addressed." Id. at 507. In other words, plaintiff argued that the lock was a concurrent cause.

The First Department specifically noted the following (id. at 509) (emphasis added):

> Murphy's killers *were intent on gaining access to the building*. Cartagena and Brockington arranged to meet Collins, who had a gun, and testimony and text messages revealed that they were bent on revenge. This is further evidenced by the brazen manner in which they entered the building, in plain sight of several other people and surveillance cameras, without attempting to shield their faces. Moreover, considering that at least one other person, by all appearances oblivious to the brouhaha between the two groups,

> entered the building at the same time, it does not take a leap of the imagination to surmise that Cartagena and Brockington *would have gained access to the building by following another person in or forcing such a person to let them in*.

Significantly, the First Department held that the foregoing "negates the unlocked door as a proximate cause of the harm that befell Murphy, and makes her assailants' murderous intent the only proximate cause." Id.

The facts in Estate of Murphy are inescapably similar to those here. Like Murphy's killers, Boney had a preconceived plan to murder his ex-fiancée. Boney was "intent on gaining access to [Crushshon's] building" and absolutely no evidence indicates he could not have "gained access to the building by following another person in or forcing such a person to let them in." Id. Indeed, even "if the front entrance door was locked when [Boney] attempted to enter the building, [he] would have waited outside for someone to exit the door and then gone inside" or used "some other method to gain access." Id. at 505-06. Clearly, the Estate of Murphy Court properly recognized that which the January Decision failed to, that a locked door would never have stopped determined killers from murdering their intended target.

Simply applying Estate of Murphy here requires that summary judgment be granted. Analogous First Department cases confirm as much. See Cynthia B. v. 3156 Hull Ave. Equities, Inc., 38 A.D.3d 360, 360 (1st Dep't 2007) ("These facts suffice to make a prima facie showing that the infant plaintiff was targeted well in

advance by a serial rapist, severing any causal connection between her injuries and defendant's alleged negligence in failing to repair a broken front door lock. *Plaintiffs' response that a functioning front door lock would have deterred the rapist is "'most unlikely'*") (citation omitted) (emphasis added); Rivera v. New York City Hous. Auth., 239 A.D.2d 114, 115 (1st Dep't 1997) ("plaintiff cannot prove that defendant's alleged negligence in failing to provide functioning door locks was the proximate cause of her injuries" because the "preconceived criminal conspiracy to murder plaintiff's stepbrother…renders it most unlikely that any reasonable security measures would have deterred the criminal participants"); Suarez v. Longwood Associates, 239 A.D.2d 250, 250-51 (1st Dep't 1997) ("as a matter of law, the drive-by shooting was an unforeseeable act breaking the chain of causation between defendants' alleged failure to maintain the front door lock, which allegedly prevented plaintiffs from escaping into their building, and plaintiffs' injuries").

In other words, the January Decision would have had the opposite outcome had the subject attack occurred at an NYCHA building one county over in Manhattan or two counties over in the Bronx.

B. The Harris Decision Establishes That At Most The Allegedly Faulty Lock Only Furnished The Occasion For Boney's Attack

Similarly, the application of the Second Department's own precedent in Harris to these facts would require summary judgment. This is because Harris

stands for the proposition that where the record establishes that an allegedly faulty lock, if repaired, would not have prevented the attack, there is no liability – such a lock merely furnishes the occasion for the attack, and does not cause it.

In Harris, plaintiff's son was murdered in a building owned and controlled by NYCHA. 211 A.D.2d at 616. Plaintiff faulted NYCHA's alleged failure to install and maintain a lock on the front door of the building where the murder occurred. Id. The Second Department in Harris noted that "[t]he record reveals that [the decedent] was the victim of a targeted murder by a long-time enemy who had tried to kill him on at least one prior occasion. *Such an intentional act was an unforeseeable, intervening force which severed the causal nexus between the alleged negligence of the NYCHA and the complained-of injury*." Id. at 616-17 (emphasis added). The Court determined that "there is no evidence that the assailant's entry onto the premises was due to the failure of the NYCHA to install or maintain a lock on the front door. Indeed, the record reveals that the assailant had a variety of friends and acquaintances in the building who could have allowed him access, and there is evidence that, at the time of the murder, the door had been tied open by a delivery person." Id. at 617.

In the January Decision, the Second Department stated that "[t]he facts in this action are easily distinguishable from those in Harris" and do not "require the same result here" (R. 2161-62). The Court reasoned that, unlike Harris, Crushshon

and her family "had moved to the subject premises as the decedent's relationship with Boney had deteriorated" and "[a]s a result, Boney never lived with them in that building or even visited them there, and no evidence was presented that he had friends or acquaintances who would have given him access to the interior of the building, even if there had been a working lock on the front door" (R. 2161-62).

This distinction, however, is flawed, for two reasons. First, the Harris court did not conclude that NYCHA would be liable for plaintiff's injuries had there been evidence that the assailant entered the premises through a negligently maintained door. Rather, it merely noted that there was no evidence that this was the manner in which the killer entered the building. The same, however, is true here. Here, as in Harris, there is no admissible evidence indicating that the assailant gained entry through the allegedly broken door. Indeed, no one knows or will ever know how Boney entered the building – he has taken that knowledge with him. Thus, any jury determination that Boney entered the building in this manner would be based on pure speculation. Bernstein v. City of New York, 69 N.Y.2d 1020, 1021 (1987) ("A jury verdict must be based on more than mere speculation or guesswork"); Castellano v. New York City Transit Authority, 38 A.D.3d 822, 823 (2d Dep't 2007) ("the verdict in favor of the plaintiff was based upon pure speculation and conjecture, rather than upon any proof of negligence, and cannot be sustained").

Second, and more to the point, while it is true that no evidence shows that Boney had "friends or acquaintances" in the building to let him in unlike the murderer in Harris, such "distinction" is immaterial because the Harris court did not hold that these were *exclusive* considerations. Rather, it listed these as factors establishing that the record did not support a finding that the attack was "due to" the allegedly faulty lock. 211 A.D.2d at 617. On this record, other facts suffice to make the same showing.

The most important such fact is the specific nature of Boney's assault. Boney attacked Bridget Crushshon in the hallway of the building, immediately outside her apartment, immediately after she left for work (R. 153, 343-44). The record establishes that Boney habitually stalked Crushshon, including circling the building slowly in his car (R. 137-38, 144, 149-50, 312-12, 456). The fact that Boney attacked Crushshon as soon as she exited her apartment to go to work thus demonstrates that he was lying in wait for her to leave.

The record establishes that the main lobby door was the sole access door (R. 102-03). Boney could, quite clearly, have simply prepared his ambush outside the lobby door rather than outside the apartment door. That is, he could have merely picked another spot to lie in wait, and just as easily have carried out his murderous act. The only differences would be trivial ones of time and space – in other words, the lock did not cause the attack.

Even beyond this overwhelming and dispositive fact, there were a wide variety of ways Boney could have gained entry. For example, Boney could have easily gained access to the building through a stranger, i.e., by following a tenant into the building – in a public housing building with 49 units and approximately 225 residents, many of whom worked or socialized in the evenings, he would not have waited long. Likewise, he could have simply asked a tenant outside the building to let him in – again, the size of the complex would have made the fact that he was not recognized immaterial, as a polite request to be let in is often honored.

He could also have easily taken more extreme measures, e.g., using physical force. This is a man who attacked Bridget Crushshon at her workplace (R. 143, 300-01, 305) and who attacked his own daughter at a party (R. 332-33). In both instances he used his bare hands, to choke, despite the presence of others and the possibility of criminal consequences. Again, the attack occurred in the evening in late October, hours after dark.[11]

He was also a man unconcerned with the possibility that the police would be called or that he would face consequences for his actions. The incontrovertible facts establish that Boney intended, in order to kill Bridget Crushshon, to set

[11] The Court may take judicial notice that astronomical twilight ended, and thus full dark began, at 7:34 PM on October 24, 2007 in zip code 11208, the location of the building. https://www.almanac.com/astronomy/sun-rise-and-set/zipcode/11208/2007-10-24. This was two and a half hours before the attack.

himself ablaze and die in one of the most painful ways imaginable – "burning alive" being humanity's primary metaphor for eternal damnation. He was also more than willing to expose others, including plaintiff Bryan Scurry, to the same fate.

Basic logic holds that, for the reasons set out above, a locked lobby door would not have prevented a monstrous individual like Boney from committing this atrocity. No rational finder of fact could conclude Boney would have balked at using force to gain entry under such circumstances. It is manifestly unjust to require NYCHA to *prove* that the lobby door played *no role whatsoever* in the incident when there can be no doubt that it was *not a proximate cause but at most, merely furnished the occasion*.

The sole legal and proximate cause for this unspeakable tragedy are the monstrously cruel acts of a maniacal killer who would have committed his atrocity regardless of any defect in the lobby door. Put another way, no admissible evidence does or could exist that would allow a jury to rationally conclude that a locked door would have prevented this attack. NYCHA should be awarded summary judgment.

C. In The Alternative, Even Under The January Decision's Rule, NYCHA Should Have Been Granted Summary Judgment

Even under the January Decision's idiosyncratic "no level of building security" rule, NYCHA should have been granted summary judgment. To be sure,

the Court should reject this rule. If, *arguendo*, it does not, NYCHA submits that even under this rule, it is entitled to summary judgment.

As just set forth, the record establishes that "no level of building security" implemented by NYCHA would have prevented the horrific incident from occurring. The manner in which this attack occurred itself suffices. Boney was a lunatic who doused himself and Bridget Crushshon in gasoline and burned himself alive to enact his evil desire. Such malice cannot be deterred, just as suicide bombers cannot be deterred – especially where, as set out above, Boney had stalked Crushshon, knew her schedule, and could have simply ambushed her in a different place or at a different time.

CONCLUSION

For the foregoing reasons, the Court should modify the order appealed from to grant (1) defendant's motion for summary judgment dismissing plaintiffs' complaint in its entirety; and (2) such other and further relief as the Court deems just and proper.

Dated: June 6, 2022
White Plains, New York

Coffey Modica O'Meara Capowski LLP

John F. Watkins

Of Counsel
Timothy R. Capowski
John F. Watkins
Sean Harriton
Christopher Bitar

200 E. Post Rd. Suite 201
White Plains, NY 10601
(212) 827-4501
jwatkins@cmocllp.com

Appellate Counsel to:
HANNUM FERETIC PRENDERGAST
& MERLINO LLC

Attorneys for Defendant-Appellant/Third-Party Plaintiff/Second Third-Party Plaintiff

NEW YORK STATE COURT OF APPEALS
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Dated: June 6, 2022

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John F. Watkins