

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13380

**NORVELLA HILL-JUNIOUS,
Individually and Administrator of the Estate of DRAKE SCOTT, JR.,
Plaintiff-Appellant,**

v.

**UTP REALTY, LLC,
Defendant-Appellee.**

On Appeal from a Judgment of the Norfolk Superior Court
(Lower Ct. Docket No. 1982CV00192)

**BRIEF OF PIONEERLEGAL, LLC AS AMICUS CURIAE
IN SUPPORT OF THE APPELLEE AS TO
THE FORESEEABILITY ISSUE**

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CORPORATE DISCLOSURE STATEMENT

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RULE 17(c)(5) DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), the undersigned counsel declares that (1) no party’s counsel has authored this Brief in whole or in part; and (2) no party, person or entity has contributed money to fund preparation or submission of this Brief. The undersigned counsel for the amicus curiae has prepared and submitted this Brief on a pro bono basis. Counsel and their law firm do not represent any party in this case or in any other proceeding or legal transaction.

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INTEREST OF THE AMICUS CURIAE

PioneerLegal is a non-profit, non-partisan, public interest law firm that defends and promotes economic fairness and opportunity, open and accountable government, and educational choice and opportunities throughout New England. PioneerLegal's work in the area of economic fairness and equal opportunity largely focuses on the interests of small businesses, which are essential to a healthy economy, and which often do not have a voice in the public policy arena.

SUMMARY OF ARGUMENT

Immigrant entrepreneurs and property owners in low income, high crime areas should not be made to shoulder disproportionately the financial burden of our society's violent crime problem. Because the tragic, assassination-style, revenge killing in this case was, by its nature, unforeseeable, unpreventable, and causally unrelated to the location in which it took place, this case is not an appropriate one in which to expand premises liability in the negligent security context. The Superior Court's decision should be affirmed.

ARGUMENT

Unsophisticated purchasers of commercial real estate in crime ridden neighborhoods—many of whom are recently arrived Americans—will be disproportionately and unfairly impacted if the Court decides that a landlord’s duty to prevent reasonably foreseeable criminal acts by third parties includes an obligation to know about crimes that occurred at the property before it was purchased. Appellant urges the Court to hold that owners of properties with a history of being frequented by violent individuals may be held civilly liable for criminal acts committed in or around the property, regardless of whether the property, or even a tenant’s use of the property, enabled or facilitated the crimes, or whether such crimes could have reasonably been prevented. Such a holding would obviously have a disparate impact on owners of property and operators of small businesses in low income, high crime areas where, through no fault of their owners, properties are much more likely to be frequented by people who might commit crimes in and around them. Many of these owners and entrepreneurs are immigrants struggling to gain a foothold in the risky, low-income, dilapidated neighborhoods in which they can afford to live and work. Placing additional legal burdens and costs on these under-appreciated drivers of neighborhood revitalization, without bringing about a meaningful reduction in the incidence of

violent crime in and around their properties and businesses, would not be in the public interest.

The owner of the company being sued in this case has a classic immigrant story. Uyen Phan, was born in Vietnam and immigrated to the U.S. in 2003. (RA. I. 172). As is not uncommon for women who have come to America from her part of the world, Ms. Phan opened up a nail salon. She rented space in a small, rundown shopping plaza in Randolph, Massachusetts (the “Property”).¹ (RA. I 66). By November 2015, when she had been a tenant there for less than three years, her company, UTP Realty, LLC, was able to purchase the Property. (RA. I 66).

Ms. Phan’s story of success through hard work and economic risk-taking is repeated throughout the Commonwealth where immigrant property owners and entrepreneurs play a vital role in revitalizing Massachusetts neighborhoods. Seventeen percent of the Commonwealth’s residents are, like Ms. Phan, immigrants to the United States.² One fifth of the Massachusetts labor force is

¹ According to the 2020 census, nearly 37% of Randolph’s population is, like Ms. Phan, foreign-born. As of the 2010 census, Randolph was one of the fastest growing majority minority cities in America: 60% of all elementary school students there were African-American, 21% were Hispanic (predominately Dominican), 11% were white, and 8% were Asian (predominantly Vietnamese).

² Aidan Enright and Joshua Bedi, *Immigrant Entrepreneurs and the Barriers They Face: An Academic Literature Review*, Pioneer Institute White Paper, Nov. 2022, p. 8. <https://pioneerinstitute.org/pioneer-research/immigrant-entrepreneurs-and-the-barriers-they-face-an-academic-literature-review/>.

foreign-born.³ Despite facing obstacles like not being fluent in English, not having access to capital and financing, and not being familiar with our fairly intimidating regulatory environment, immigrants like Ms. Phan have managed to open successful businesses in Massachusetts.⁴ In 2018, around 23% “of all self-employed Massachusetts residents were immigrants.”⁵ Immigrants “pursue entrepreneurial opportunities at rates slightly higher than native-born workers; and . . . they pay considerable amounts of money into the local economy in the form of mortgages and home equity loans.”⁶ Women-owned businesses, like Ms. Phan’s, “have a strong presence among foreign-born entrepreneurs.”⁷ Some speculate that

³ *Id.* p. 9. In Boston, Black and/or African American communities “have a rich history and presence of foreign-born persons; these communities are the ‘oldest’ in terms of presence of foreign-born persons and [have] a relatively high proportion of foreign-born persons who are citizens.” James Jennings, *Analysis of Boston’s Foreign-Born Labor Force: Past, Present and Future*, Boston Mayor’s Office of Workforce Devel. Report, Oct. 2018, p. 4. <https://sites.tufts.edu/jamesjennings/files/2020/08/reportsAnalysisForeignBorn2018.pdf>.

⁴ Enright and Bedi, p. 7.

⁵ American Immigration Council, *Immigrants in Massachusetts*, 2020. <https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts>. In Boston, close to 39% of all workers who are self-employed in non-incorporated businesses are immigrants. Jennings, p. 43.

⁶ *Id.* p. 3.

⁷ *Id.*

immigrants' penchant for opening their own businesses is due to the difficulty they face in getting jobs because of their relatively poor English language skills and discrimination by their would-be employers. Others suggest that the type of people who are willing to take a chance on moving to a foreign country may be inherently less risk-averse than the average native-born American.⁸ Their lack of alternatives and higher tolerance for risk may also explain why immigrants are more likely to purchase their real estate and their open businesses in low income, high crime areas in the Commonwealth.

Small, immigrant-owned businesses play an important role in the revitalization of neighborhoods and cities across America.⁹ Nationally, 28% of Main Street businesses (retail, accommodations and food, and personal care businesses) are owned and operated by immigrants.¹⁰ Forty-nine percent of

⁸ David Jaeger, et al., *Direct Evidence on Risk Attitudes and Migration*, Review of Economics and Statistics 92(3), p. 684-689 (2010); Caroline Brettell and Christopher Alstatt, *The Agency of Immigrant Entrepreneurs: Biographies of the Self-Employed in Ethnic and Occupational Niches of the Urban Labor Market*, Journal of Anthropological Research 63(3), p. 383-97 (2007); Enright and Bedi, p. 9-10.

⁹ David Dyssegaard Kallick, *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow*, Fiscal Policy Institute Report, Jan. 2015, p. 12.
https://www.immigrationresearch.org/system/files/Bringing_Vitality_to_Main_Street.pdf.

¹⁰ *Id.* p. 5.

immigrant-owned Main Street businesses are owned by Asian immigrants like Ms. Phan, most commonly restaurants, dry cleaners, and nail salons.¹¹ In the first thirteen years of this century, immigrants accounted for 100% of the growth in the number of Main Street businesses in the U.S.¹²

“Immigrants often get a foothold in this country by opening small businesses in run-down areas” where other members of their community have previously settled.¹³ “Gradually, the neighborhood becomes more interesting, and with more ‘eyes on the street,’ it starts to feel safer.”¹⁴ By attracting new customers to formerly blighted areas, immigrant entrepreneurs and property owners revitalize business corridors, and bring new life and character to neighborhoods and cities that had been in decline.¹⁵ Eventually, what was once a high crime, dilapidated neighborhood becomes a desirable, stable, culturally rich place in which to live.¹⁶

¹¹ *Id.* p. 7.

¹² *Id.* p. 7.

¹³ *Id.* p. 12.

¹⁴ *Id.* p. 12.

¹⁵ *Id.* p. 34.

¹⁶ *See, generally*, Dominic Vitiello and Thomas Sugrue, eds., *IMMIGRATION AND METROPOLITAN REVITALIZATION IN THE U.S.*, University of Pennsylvania Press (2017).

Cambodian community leader, Rasy An, has described his family's path toward immigrant entrepreneurship and real estate ownership after he and his surviving family members had escaped the Khmer Rouge's killing fields and settled in Lowell. At the time, Lowell was reeling from the shock of deindustrialization and crime was on the rise. In 1985, Mr. An's stepfather saw a storefront for sale and took a chance. "We were in survival mode. That's all we knew. We took on something we knew nothing about. It worked out," Mr. An explained. Today, the first grocery in Lowell to offer native foods to the growing Cambodian population has become a community gathering place with a restaurant, function hall, a supermarket, and a music store.¹⁷

The Fields Corner success story in Dorchester provides another example of immigrant-driven revitalization. In the 1970s, conditions around the intersection of Adams Street and Dorchester Avenue in Boston had for "a host of reasons, deteriorated and the police had come to see the Fields Corner business section as a high crime area."¹⁸ However, in the 1980s, Vietnamese immigrants and refugees

¹⁷ *New Americans in Lowell: The Demographic and Economic Contributions of Immigrants in the Region* (2019), p. 4.
https://media.wbur.org/wp/2019/07/0710_lowell.pdf.

¹⁸ Ramon Borges Mendes, Michael Liu, and Paul Watanabe, *Immigrant Entrepreneurs and Neighborhood Revitalization: Studies of the Allston Village, East Boston and Fields Corner Neighborhoods in Boston*, IMMIGRANT LEARNING CENTER, INC. REPORT, Dec. 2005, p. 20.
https://www.ilctr.org/wpcontent/uploads/2009/09/immigrant_entrepreneur.pdf.

began settling in the area and opening businesses. They were attracted to this part of the city because the high crime rates had driven down the prices of real estate in the area.¹⁹ Vietnamese immigrants are now credited with having revived an area once considered a dangerous, under-utilized neighborhood. Today, their businesses meet the needs of many neighborhood residents and they have generated commercial activity of all kinds in the area.²⁰ Similar revitalization processes have occurred in East Boston, the Allston section of Boston, and in neighborhoods in Massachusetts Gateway Cities.²¹ Consider what our Gateway Cities would look like today if the immigrant investors of the past had had even less access to conventional financing and insurance services, and were forced to bear the burden of additional security expenses to guard against threats that they had no part in creating, and no chance of eliminating. It is questionable whether these investments in our communities ever would have been made.

Given the important role that immigrants are playing in stabilizing and providing essential services in some of our most challenging, low income, high crime areas, the Court should be cautious about unnecessarily adding to the

¹⁹ *Id.* p. 22-24.

²⁰ *Id.* p. 24-25.

²¹ *Id.*

significant burdens already facing those who are intrepid enough, or desperate enough, to invest their time and money in these struggling communities.²²

Appellant suggests that “a reasonably prudent commercial landlord would make inquiry upon purchase to understand the [crime-related] risk profile” of the property being purchased. (App. Brf. pp. 17-18, 26-27). This shows a lack of understanding about the complex etiology of America’s crime problem and what any of us—especially an undercapitalized, unsophisticated newcomer to our

²² Because they are heavily concentrated in food service, immigrant property owners and entrepreneurs in low income, high crime neighborhoods are well-positioned to help to address the “food desert” problems that afflict these areas. According to the Massachusetts Food Trust Program, more than 80 percent of Lawrence's population live in what's called a "food desert," defined by the CDC as an area with limited access to whole grains, low-fat milk and other foods that are included in a healthy diet. Karen Hensel, NBC Boston, *Limited Access to Healthy Food Impacts Certain Neighborhoods*, 2019. <https://www.nbcboston.com/news/local/your-neighborhood-could-be-harming-your-health>. “Because of a lack of transportation and few full-service supermarkets, thousands of the mostly immigrant residents of Lawrence must walk for groceries to their corner store, where the selection is extremely limited.” *Id.* A 2005-2009 survey found that 31% of self-employed restauranteurs and other food service providers, and 19.7% of groceries and related products and merchant wholesalers in Massachusetts were foreign-born. American Community Survey 5-Year Estimates, Public Use Microdata Sample 2005-2009. According to the U.S. Census 2016, Five-Year Community Survey which tracks residents’ occupations, around 28 percent of foreign-born incorporated business owners in Worcester reported operating a restaurant or other food service business. This accounted for 71 percent of the total restaurant and food service category run by Worcester residents. *The Immigrant Entrepreneur in Worcester*, The Worcester Regional Research Bureau, Report 18-09, Nov. 2018, p. 6. <https://www.wrrb.org/wp-content/uploads/2018/11/WRRB-Immigrant-Entrepreneur-WBJ-Logo.pdf>.

country— has the ability to do about it. The “obligation to perform due diligence on security issues” being proposed by Appellant (App. Brf. pp. 17-18, 26-27), would fall most heavily upon new purchasers of properties in blighted areas, hampering their ability to obtain financing and affordable insurance, yet it would do nothing to reduce the incidence of crime in areas with high ambient crime levels. Had Ms. Phan thoroughly researched the history of all criminal incidents that had occurred in and around the Property in the decade before her company purchased it, this information would not have enabled her to prevent the premeditated, assassination-style, revenge killing at issue in this case. (RA. I. 144).

Massachusetts courts have implicitly recognized that it would be unfair to place responsibility for America’s violent crime problem on the commercial property owners whose buildings happen to be located in the low income neighborhoods where crimes more frequently take place.²³ *See, e.g., Whittaker v.*

²³ The Appellant’s list of crimes that had happened in and around the Property going back to 2005 exemplifies the problem with conflating ambient crime with crimes causally connected to a particular property. According to Appellants’ expert, there were 12 such incidents that were relevant to whether UTP should have foreseen that the murder of Drake Scott might occur. However, several of the supposedly relevant criminal incidents occurred—not on the Property itself—but on land nearby (RA., I. 40), as did the revenge killing itself which happened on the public way. (RA. I, 144). Appellant’s expert mistook crimes that happened to occur in a location frequented by violent individuals for crimes that were connected to the Property. Such errors will become more common if the Court rules that knowledge of a property’s criminal history should be imputed to new owners of property in high crime areas.

Saraceno, 418 Mass. 196, 200 (1994); *Luisi v. Foodmaster Supermarkets, Inc.*, 50 Mass. App. Ct. 575, 577 (2000). Our courts have rightly held that the general foreseeability of criminal activity in an area with a higher-than-average incidence of crime is not enough to establish the foreseeability of a crime for which there was no particularized awareness of a preventable threat. *See, id.*; *Anderson v. 124 Green Street, LLC*, 28 Mass. L. Rptr. 119, 121 (Suffolk Super. Ct. 2011) (rejecting landlord’s civil liability for a murder committed by one tenant against another even though landlord knew that Lynn was a “working class city” with buildings like his in which “criminal activity happens . . . all the time.”). It would be a mistake to rule that foreseeability can be established by simply listing a string of criminal incidents that previously occurred in the vicinity of a commercial property.

Immigrant entrepreneurs and property owners in Allston, Dorchester, and East Boston are proud that they are revitalizing their urban neighborhoods, but they also are aware of their vulnerability within a system that may not appreciate their value.

[They] feel vulnerable . . . to the machinations of institutions much larger than themselves . . . that in a heartbeat can alter their livelihoods. The challenges for those who care about these businesses and the people they serve are to help the businesses ride the wave when those institutions and other powerful forces create opportunities and to shelter them as much as possible from negative consequences.²⁴

²⁴ Mendes, Liu, and Watanabe, p. 5.

The Superior Court's decision should be affirmed.

Dated: March 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Mass. R. App. P. 16(k))

This Amicus Brief complies with the rules of court that pertain to the filing of Amicus Briefs, including, but not limited to: Mass. R. App. P. 16(a)(13)(B) (appealed judgment and decision), 16(a)(13)(C) (reproduction of statutes, rules, regulations), 16(a)(13)(D) (copy of unpublished decisions cited), 16(a)(13)(E) (copy of plans or maps), 16(e) (references to the record), 17(c) (Amicus Briefs), and 20 (form and length of briefs). Rule 21 (redaction) is not applicable to this Amicus Brief.

For the purposes of the length limitation contained in Appellate Rule 20, this Amicus Brief contains 3,200 non-excluded words and uses Times New Roman 14-point font in Microsoft Word 2013.

/s/ John C. La Liberte

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing Amicus Brief of PioneerLegal, LLC on counsel of record for the parties hereto through the Tyler-filing system, directed to their counsel of record:

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