UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER: 03-81110-CIV-HURLEY/HOPKINS

MAUREEN STEVENS, as Personal Representative of the Estate of ROBERT STEVENS, Deceased, and on behalf of MAUREEN STEVENS, Individually, NICHOLAS STEVENS, HEIDI HOGAN and CASEY STEVENS, Survivors,

Plaintiffs,

vs

UNITED STATES OF AMERICA,

Defendant.
_____/

DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT BASED ON THE ABSENCE OF PROXIMATE CAUSE AND MEMORANDUM OF LAW IN SUPPORT

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I. INTRODUCTION

Defendant United States respectfully moves for summary judgment based on Plaintiffs' failure to satisfy the proximate causation requirement that "the defendant's conduct foreseeably … caused the specific injury that actually occurred" (*McCain v. Florida Power Corp.*, 593 So.2d, 500, 502-03 (1992)), as a matter of law and on material facts not in genuine dispute. Fed.R.Civ.P. 56(a). Though Florida law recognized that Plaintiffs' duty "allegations [were] sufficient to open the courthouse doors" (*United States v. Stevens*, 994 So. 2d at 1069 (Fla. 2008), "[o]nce this duty is satisfied, an injured party must still prove the remaining elements of a negligence claim, including the much more specific proximate cause requirement." *Whitt v. Silverman,* 788 So.2d 210, 221 (Fla. 2001) (Pariente, J., concurring). In deciding proximate cause on a motion for summary judgment following the end of fact discovery, the Court should no longer "accept as true" Plaintiffs' erroneous, unfounded allegations of a "history of missing anthrax bacterium, hanta virus and ebola virus dating back to 1992" at Defendant's facility. *Stevens*, 994 So. 2d at 1068. Without proximate cause, Plaintiff's claim fails.

II. LEGAL STANDARD

A. Proximate Cause Turns On Whether Defendant's Conduct Foreseeably Caused The Specific Injury, Not On Duty's Broader "Foreseeable Zone Of Risk"

Notwithstanding the broad duty of care the Court recognized in this case upon "taking the facts alleged in the complaint as true and reading them in the light most favorable to plaintiff…" (994 So.2d at 1069 (citation omitted)), duty does not prove proximate cause. As Florida's Supreme Court held here, duty "is a minimal threshold *legal* requirement for opening the courthouse doors.... As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven." *United States v. Stevens*, 994 So.2d 1062, 1069-70 (Fla. 2008) (quoting *McCain v. Florida*

Power Corp., 593 So.2d, 500, 502-03 (1992) (footnote omitted)). While "duty … focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others", *McCain* held that "proximate causation … is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred" *Whitt*, 788 So.2d at 216-17 (*quoting McCain*, 593 So.2d at 502-03 (citations omitted)).[1] This follows the Florida Supreme Court's holding in *Pinkerton-Hays Lumber Co. v. Pope*, 127 So.2d 441 (Fla. 1961) that for proximate cause, "foreseeability depends in part on whether the *type* of negligent act involved in a particular case has so frequently previously resulted in the *same type* of injury or harm that 'in the field of human experience' the same *type* of result may be expected again." *Id.* at 442-43 (emphasis in original). The Florida Supreme Court reiterated the rule that "harm is 'proximate' in a legal sense if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question." *Goldberg v. Florida Power & Light Co.*, 899 So.2d 1105, 1116 (Fla. 2005) (*citing McCain*, 593, So. 2d at 503).

B. The Court May Properly Decide Proximate Cause on Summary Judgment

If the dispositive issue is one where the nonmoving party will bear the burden of proof at trial (*e.g.*, causation), the moving party may satisfy its summary judgment burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *See Celotex v. Catrett*, 477 U.S. 317, 325 (1986) (holding that the moving party need not produce evidence showing the absence of a genuine

[1] Plaintiffs conceded this distinction: "If Defendant wishes to claim that the conduct of third parties was sufficiently unforeseeable so as to insulate it from liability, it must do so in the context of proximate cause, not duty. In that context, it can argue that the third party's conduct was so unforeseeable as to breach the chain of causation and constitute an intervening cause sufficient to insulate Defendant for liability." *See* [DE# 36] at 9 (citation omitted).

issue of material fact). It is not necessary for the moving party to supply affidavits or other similar materials negating the opponent's claim. *Id.* at 322-23. Once the moving party carries its initial burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. This means that the non-movant may not rely on mere allegations, but must raise significant probative evidence to avoid summary judgment. *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998); *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002).

A complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial, making the moving party entitled to summary judgment. *See Celotex*, 477 U.S. at 323. If the record is devoid of significant probative evidence that Plaintiffs' injury was a foreseeable product of government negligence, summary judgment is appropriate. *See LaChance*, 146 F.3d at 835.[2]

The Florida Supreme Court rejected the suggestion "that all questions involving an intervening cause present a jury question [here, a bench trial on the facts]" in *Department of Transportation v. Anglin*, 502 So.2d 896, 898-00 (Fla. 1987), and reiterated its holding that "[t]he question of proximate cause is one for the court where there is an active and efficient intervening cause.'" *Anglin*, 502 So.2d at 898 (citations omitted). For example, in *Palm Beach County Bd. of County Com'rs v. Salas*, 511 So.2d 544 (Fla. 1987) the Supreme Court found that

[2] *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891, 893-94 (5th Cir. 1980) (affirming summary judgment based on lack of proximate cause under Florida law); *Davies v. Commercial Metals Co.*, 46 So.3d 71, 73-74 (Fla. 5th DCA 2010) (same); *Natural Answers, Inc. v. Carlton Fields, P.A.*, 20 So.3d 884, 889 (Fla. 3d DCA 2009) (same); *Gehr v. Next Day Cargo, Inc.*, 807 So.2d 189, 190-91 (Fla. 3d DCA 2002) (same) (discussing *Barnes v. Gulf Power Co.*, 517 So.2d 717, 718 (Fla. 1st DCA 1987), *Hoffman v. Bennett*, 477 So.2d 43 (Fla. 3d DCA 1985); and *Banat v. Armando*, 430 So.2d 503, 504-05 (Fla. 3d DCA 1983)); *Cassel v. Price*, 396 So.2d 258, 261 (Fla. 1st DCA 1981) (listing cases affirming summary judgment based on lack of proximate cause). Here, because the judge is the trier-of-fact and there can be no jury, the key basis for caution in granting summary judgment – "the constitutional right of jury trial" – does not apply. *Id.* at 262.

"[t]he question presented … is whether [the intervening actor's] conduct was so unusual, extraordinary or bizarre (i.e., so "unforeseeable") that the policy of the law will relieve the county of any liability for negligently creating this dangerous situation." *Id*. at 547.

III. ARGUMENT -- DEFENDANT DID NOT PROXIMATELY CAUSE THE INHALATION ANTHRAX OF DECEDENT

A. The Unprecedented Nature of the Anthrax Attacks Cancels Proximate Cause

The unprecedented 2001 anthrax attack that tragically resulted in Mr. Stevens' death from inhalation anthrax is not a reasonably foreseeable consequence of Defendant's alleged negligence under Florida law governing proximate cause. Florida courts generally hold that such extraordinary events fail to establish proximate cause. As the Florida Supreme Court explained:

> The policy of the law will of course not allow tort liability to attach to all conduct factually "caused" by a defendant:
>
> Florida courts, in accord with courts throughout the country, have for good reason been most reluctant to attach tort liability for results which, although caused-in-fact by the defendant's negligent act or omission, seem to the judicial mind highly unusual, extraordinary, bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence.

Department of Transp. v. Anglin, 502 So.2d 896, 900 (Fla. 1987) (quoting *Stahl v. Metropolitan Dade County*, 438 So.2d 14, 19 (Fla. 3d DCA 1973)). It is undisputed that the anthrax attacks resulted in the first ever deaths from an assailant's malicious use of a pathogen in the history of the United States. U.S. MATERIAL FACTS NOT IN GENUINE DISPUTE ("U.S. Facts") ¶¶1-2. Prior to Mr. Stevens' death, there was no historical basis for a person to reasonably expect that, even if the government negligently secured its anthrax, biological material would be used by a third person as part of a bioterrorism attack on American soil against innocent victims like Mr. Stevens. *See id*. ¶¶1-3. In addition, the likelihood of anyone being killed through the inhalation

of anthrax was (and remains) incredibly remote. Even though anthrax is a naturally occurring substance, "Robert Stevens was the first person to die of inhalation anthrax in the United States of America since 1976." U.S. Facts ¶4. Human anthrax cases have been rare. Among eight human cases reported in Florida throughout the 20th Century, the most recent was a cutaneous (skin) case in 1974. *Id.* ¶5. Here, where the allegedly negligent security has never resulted in inhalation anthrax, the undisputed facts fail to support a finding of reasonable foreseeability, for this is not "the *type* of negligent act" that has "frequently previously resulted in the *same type* of injury or harm that 'in the field of human experience' . . . may be expected again." *Pinkerton-Hays Lumber Co.,* 127 So.2d at 442-43. If the Court finds the anthrax attack that killed Mr. Stevens "highly unusual, extraordinary" or "bizarre," it should be "most reluctant to attach tort liability" by finding proximate cause. *Anglin*, 502 So.2d at 900 (quoting *Stahl*, 438 So.2d at 19).

No anthrax was "missing" in 1992

Nor can Plaintiffs escape the unprecedented nature of the attacks by creating an inauthentic issue by asserting that anthrax was "missing" in 1992. Plaintiffs' Complaint alleges, erroneously, that the United States "failed to adequately secure" anthrax in that "as early as 1992, samples of this formidable, dangerous, and highly lethal [anthrax] organism were known to be missing from the lab at Ft. Detrick, Maryland occupied by [the United States Army Medical Research Institute for Infectious Disease (USAMRIID)] along with samples of the hanta virus and the ebola virus, pursuant to a memo" attached to the Complaint. [D.E. #1, ¶9 & Exh. F, Memorandum of Charles R. Brown, III]. In denying the United States' motion to dismiss, filed before the beginning of discovery, the Court was, as were the appellate courts, required to accept as true these misstatements. [DE# 46, at 2 & 10]. Plaintiffs argued that the government owed a duty to the public, based in large part, on a foreseeable zone of risk created by an alleged

history of dangerous materials going missing or being stolen from USAMRIID. *See Stevens*, 994 So.2d at 1068 (stressing the "allegations of the complaint regarding the facility's history of missing samples of anthrax bacterium, hanta virus and ebola virus dating back to 1992, which the court must accept as true at this juncture"); *Stevens*, 488 F.3d at 903-04. Plaintiffs' mistaken allegations fail for three reasons.

First, the supposedly "missing" samples – both those designated anthrax and otherwise – posed absolutely, positively no danger to anyone. The samples, which were, in essence, slides for an electron microscope that scientists could use to study the internal structure of bacteria and viruses, "were non-viable, non-infectious, and never a hazard to the public environment." U.S. Facts ¶9. "[A]ny material that was reported 'missing' was dead." *Id.* ¶10. Each sample was killed twice – first killed with an overabundance of gamma radiation, then 'killed' with an "aldehyde fixative" and process that included "dehydration through ethanols and finally embedded in resin and cured . . ." *Id.* ¶11. Indeed, the absence of any danger associated with the allegedly "Missing Anthrax Blocks" and other samples of pathogens was confirmed, by implication, in the memorandum attached by to Plaintiffs' Complaint, in which the author noted that the EM blocks "missing from the archival file system . . . are of extreme importance to ongoing research" and of "value to the Pathology Division" but made no mention, whatsoever, of any threat to human health or safety associated with the asserted loss. *Id.* ¶¶6-8.

Second, the samples were not "missing from [a] lab at Ft. Detrick" [D.E. #1 ¶9] because the pertinent office, "the Pathology Division was located off-post (Frederick, MD) in leased commercial space close to Ft. Detrick" where "[o]nly inactivated materials were taken." U.S. Facts ¶12 (emphasis added). Finally, subsequent investigation established that, in fact, no anthrax samples were missing:

> The missing electron microscopy blocks Mr. Brown refers to in his memorandum have been located or accounted for. Despite a standard operating procedure for the division allowing proper disposal of non-essential material after seven years, these samples were located in the archives or accounted for via Pathology logs in January 2002. . . . Mr. Brown's allegation of lost samples is unfounded.

Id. ¶13. As of the close of discovery, Plaintiffs had not identified or produced any evidence that the missing samples were unaccounted for. *See id.* ¶14.

B. Protracted Distance and Time Cancel Proximate Cause Between Asserted Negligence in Maryland as Early as the 1990s and Injury in South Florida in 2001

The protracted distance and time separating Defendant's alleged negligence from the decedent's injury weigh heavily in favor of finding no reasonable foreseeability. As a general rule, the greater the distance, or time, of the injury from the alleged negligence, the less likely it is foreseeable. *See, e.g., Tennessee Corp. v. Lamb Bros. Const. Co.*, 265 So.2d 533, 535 (Fla. 2d DCA 1972) ("time and distance are certainly relevant factors to be evaluated in ascertaining foreseeability"); *Creamer v. Sampson*, 700 So.2d 711, 713 (Fla. 2d DCA 1997) ("We recognize that whether this conduct was the proximate cause of the injury is questionable when the accident occurred some forty-five seconds and some distance from the termination of the pursuit"); *see also Michael & Philip, Inc. v. Sierra ("World Gym")*, 776 So.2d 294, 299 (Fla. 4th DCA 2000) ("…the foreseeable zone of risk created by [alleged negligence] does not include a [plaintiff] injured many miles and many hours away"). With regard to a distance of 100 miles between the negligence and injury, in *Tennessee Corp.*, the Court held that "we would have to conclusively visit such clairvoyance upon a bulldozer operator in Suwannee County when the damages complained of were suffered more than 100 miles away in Tampa. We cannot thus

contradict the finding of remoteness . . .” *Id.* at 535-36 (emphasis added).[3] The one thousand miles that separate USAMRIID from Decedent’s workplace is ten times greater than the distance in *Tennessee Corp*. Given that no evidence reflects any connection between the sites of alleged negligence and injury, the vast expanse between them lays bare Plaintiff’s unstated position, in effect, that there is proximate cause anywhere in the world that an attack takes place. But, at Florida law, proximate cause is not unbounded by distance. The extremely fine, dried anthrax spores that were mailed to Mr. Stevens were radically different from the liquid anthrax used at USAMRIID, and that liquid posed no risk to anyone through the mail. U.S. Facts ¶¶20-22, 24-26. The sites are simply too remote to establish reasonable foreseeability. *See Tennessee Corp.*, 265 So.2d at 535; *World Gym*, 776 So.2d 294, 299; and note 3, *supra* (citing cases).

With regard to the passage of time, any significant period, depending on context, may cancel foreseeability, but as hours drag onto days, weeks, and months, injury is less likely to be deemed a foreseeable consequence of alleged negligence. *See World Gym*, 776 So.2d at 299 (“many hours” between negligence and injury cancelled foreseeability in the context of duty).[4] Even assuming, *arguendo*, governmental negligence was connected to the release of anthrax, because (1) the anthrax attack spores were likely descendants of bacteria in the flask known as

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[3] *See Palm Beach-Broward Medical Imaging Center, Inc. v. Continental Grain Co.*, 715 So.2d 343 (Fla. 4th DCA 1998) (foreseeable zone of risk created by the negligent operation of a motor vehicle does not include an electricity consumer some distance from the scene of an accident); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 713 (1995) (farmer’s fertilizer blown miles away from the farm by inclement weather cannot be considered the proximate cause of death or injury to species exposed to errant fertilizer).

[4] *See Everett v. Carter*, 490 So.2d 193, 195 (Fla. 2d DCA 1986) (“Carter's commission of a criminal act six weeks after the purchase and delivery of the firearm could not have been proximately caused by the delivery of the firearm”); *Creamer*, 700 So.2d at 713; *Braunstein v. McKenney*, 73 So.2d 852, 853 (Fla. 1954) (held evidence was insufficient to show injury proximately caused second accident nine months later); *Cone v. Inter County Tel. & Tel. Co.*, 40 So.2d 148, 150 (Fla. 1949) (injuries when gasoline truck exploded thirty or forty minutes after accident to man reported to repair damage, were not foreseeable result of negligence).

"RMR-1029," (2) Dr. Ivins created RMR-1029 no later than October 1997 (U.S. Facts ¶15), and (3) "it is not known whether some of the initial steps might have occurred well in advance of the letter attacks" – the allegedly negligent act and injury may be separated by as many as four years. *Id.* ¶16. Or, if Plaintiffs argue, contrary to fact, that anthrax missing in 1992 gave rise to the attacks, as many as nine years separate alleged negligence and injury. Regardless, the period of as much as four years (or even nine years) is too attenuated to establish reasonable foreseeability. *See World Gym*, 776 So.2d at 299; note 4, *supra* (citing cases).

C. Key Undisputed Facts about the Anthrax Attacks Establish Intervening Acts that Cancel Proximate Cause

1. The attacker transformed liquid anthrax into an unconventional weapon

The undisputed facts regarding the transformation of anthrax, descended from a strain at Fort Detrick, into the deadly weapon of the anthrax attacks represents the type of unconventional technical modification to an object that then causes injury, whether negligent or intentional, that Florida courts often find is an intervening act that cancels proximate cause. *See East Coast Elec. v. Dunn*, 979 So.2d 1018 (Fla. 3d DCA 2008); *Hohn v. Amcar, Inc.,* 584 So.2d 1089 (Fla. 5th DCA 1991); *Barati v. Aero Industries*, 579 So.2d 176 (Fla. 5th DCA 1991) (mechanic's "improvident choice of method to repair the mechanism was the efficient intervening cause of his injuries"). *East Coast Elec.* held that a contractor's conduct in installing a bus bar without proper end caps was an independent intervening cause of plaintiffs' electrical injuries when testing the newly installed bus bar. Similarly, *Hohn* found that the modification of a coal dust storage bin with a ventilation-hole connection consisting of flexible tubing attached by screw clamps was the superseding cause of injury from the escape and explosion of coal dust, notwithstanding the alleged negligence of the firm that placed the coal dust storage near a fiery

kiln. 584 So.2d at 1092. Thus, regardless of defendant's alleged negligence, an unconventional technical modification supports of a finding of superseding cause of plaintiff's injury. *See id.*

Assuming, *arguendo*, that the biological material related to the anthrax letters was taken directly from RMR-1029 (as opposed to another source of the spores descended from RMR-1029), it was nonetheless transformed into an unconventional weapon. The parties have acknowledged that government-produced anthrax was "genetically similar, *but dissimilar in its form*, to the anthrax that resulted in the death of Robert Stevens." U.S. Facts ¶19. Even if government negligence allowed someone to intercept government-produced anthrax, in order to execute the attack that killed Mr. Stevens, someone had to take anthrax bacteria and cultivate it, concentrate it, dry it, and convert it into an extremely fine powder before mailing. *Id.* ¶20. Without each crucial step, the anthrax never could have been placed into letters, never could have been sent through the mail, and never could have been inhaled by an eventual victim such as Mr. Stevens. *Id.*

To accomplish the attacks, the assailant could not have used the material contained in the RMR-1029 flask as the "immediate, most proximate source of the letter material." *Id.* ¶17. It is scientifically accepted that "one or more separate growth steps, using seed material from RMR-0129 followed by purification, would have been necessary." *Id.* ¶18. First, the anthrax attacker must have cultivated at least "2.8 to 53 liters of liquid medium to produce the spores required for the letters." *Id.* ¶21. By way of comparison, the smallest possible estimate of liquid medium was at least two to three times larger than the liquid contents of RMR-1029, which at its peak, contained less than one liter. *Id.* ¶22. Second, once the assailant completed cultivating anthrax in the liquid medium, he would need to conduct "[s]pore purification . . . typically accomplished by a repeated centrifugation, disposal of the . . . cellular debris, and resuspension of the spore

pellet in fresh liquid…. Purification by any method would involve some liquid washing steps and would require a relatively large-capacity centrifuge." *Id.* ¶23. Then, drying and additional steps to convert the spore to an extremely fine, dry powder, suitable for transition in the letters would take place. *Id.* ¶24. Modifications involving drying and preparation of an extremely fine powder are especially significant for purposes of foreseeability because USAMRIID exclusively used liquid anthrax spore preparations when working with viable anthrax. *Id.* ¶25.[5] It would also take special expertise (even amongst those used to working with anthrax) and equipment to make dried material of the quality used in the attacks. *Id.* ¶27. Alteration of the form of the anthrax required technical equipment that was not routinely used for that purpose, and the equipment used to prepare the dried spore preparations that were used in the letters has never been identified. *Id.* ¶28. Even if the source material had been acquired via government negligence, the transformation into a dry powder suitable for letter attacks is the sort of intervening act which dispels proximate cause. *See East Coast Elec.*, 979 So.2d 1018; *Hohn,* 584 So.2d 1089.

Nor was the particular type of harm that occurred within the scope of danger attributable to the government's alleged negligent conduct. *See Gibson*, 386 So.2d 520, 522 (Fla. 1980). Even if government negligence had allowed anthrax spores or other biological contaminants to exit its facility, it might be expected that a large-scale release could cause localized injuries or even deaths near the locus of the release. Similarly, even if the government negligently allowed an assailant to intercept a flask containing spores of anthrax suspended in a liquid medium, it could be foreseen that someone could suffer a cutaneous anthrax infection by having wet spores touch their skin. No one, prior to 2001, could reasonably expect that the interception or loss of a

[5] When conducting animal challenges to test the effectiveness of vaccines, scientists at USAMRIID only used spore preparations in a liquid medium. They would used a nebulizer to aerosolize the liquid into very fine particles within a confined space so the material would always "retain[ ] its liquid state." U.S. Facts ¶26.

liquid solution containing anthrax spores could lead to someone using highly specialized equipment and techniques to profoundly modify the spores in preparation for their use in the nation's first deadly attack with a pathogen. *See* U.S. Facts ¶¶20-28. The record is devoid of facts suggesting that a person could have reasonably foreseen that government negligence or, for that matter, anyone's negligence, could ever lead to an assailant taking wet anthrax spores, manipulating them, and using dried and pulverized spores as a weapon to be sent to specified targets through the mail. *See id.* "It is incumbent upon the courts to place limits on foreseeability, lest all remote possibilities be interpreted as foreseeable in the legal sense." *Florida Power & Light Co. v. Macias by Macias*, 507 So.2d 1113, 1115 (Fla. 3d DCA), rev. denied, 518 So.2d 1276 (Fla. 1987). Foreseeable consequences are not "what might possibly occur." *Dolan Title & Guar. Corp. v. Hartford Accident & Indem. Co*., 395 So.2d 296, 299 (Fla. 5th DCA 1981). Thus, the Court should find no proximate cause based on the intervening acts that transformed the anthrax from a liquid medium into the deadly contents of the letters, beyond reasonable foreseeability. *See id.*; *East Coast Elec.*, 979 So.2d 1018; *Hohn,* 584 So.2d 1089.[6]

2. Rare, Unpredictable Homicidal Crimes, Like Mass and Serial Murder, Are Not Reasonably Foreseeable

A malicious, intentionally harmful criminal attack is much less likely to be foreseeable, and accordingly more likely to cancel proximate cause. Florida courts have looked favorably on the "clear statement on this question of foreseeability that appears in W. Prosser, The Law of Torts, pp. 173, 174 (4th ed. 1971), where the author states:

[6] This is in stark contrast to where it would be reasonable for a person to foresee that theft of an automobile left unattended with the keys in the ignition in a high crime area could cause harm to users of the highways. *See, e.g., Vining v. Avis Rent-A-Car Sys., Inc.*, 354 So.2d 54 (Fla. 1977).

> There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.

Everett v. Carter, 490 So.2d 193, 195 (Fla. 2d DCA 1986), *accord Drake v. Sun Bank and Trust Co. of St. Petersburg*, 377 So.2d 1013, 1014-15 (Fla. 2d DCA 1979). Thus, where experience has not revealed similar criminal activity associated with the alleged negligence, Florida courts found that rare, unpredictable violence is a superseding cause of the injury to plaintiffs, regardless of whether another's alleged negligence placed them at some risk. *See, e.g., Hoffman v. Bennett*, 477 So.2d 43 (Fla. 3d DCA 1985) (affirmed summary judgment for building contractor who left dangerous chemical on church premises because church employee throwing a harmful chemical in plaintiff's face was a superseding cause of the harm); *Spann v. State Dept. of Corrections*, 421 So.2d 1090, 1092-93 (Fla. 4th DCA 1982) (where nothing supported inference that inattention by guard "probably" indirectly resulted in injury to inmate, who suffered burns when another inmate covered him with flammable liquid and ignited it, intervening act canceled defendant's liability).

In *Barnes v. Gulf Power Co.,* 517 So.2d 717, 718 (Fla. 1st DCA 1987), the plaintiffs were telephone repairmen who claimed they were forced to complete a job after dark due to power company's delay in repairing electrical lines. The repairmen were attacked by unknown assailants at the jobsite. The First District concluded that the power company's conduct did not proximately cause the harm because of the unforeseeable nature of the assault. Similarly, in *Brewer v. Department of Health & Rehabilitative Services*, 526 So.2d 221, 221 (Fla. 4th DCA 1988), the court affirmed summary judgment based on the "intervening cause of injury-a criminal sexual assault by a visiting adult upon a dependent child in a shelter home" where

"[t]here is nothing in the record to indicate any knowledge … in the shelter home or of any propensity of the visiting adult to commit a sexual assault." Id. (citing *Department of Transportation v. Anglin*, 502 So.2d 896 (Fla. 1987).[7]

Florida law does not generally find such an intervening criminal act foreseeable unless the crime that takes place in relationship to the alleged negligence has occurred recently, in the same area, as similar criminal conduct. For example, in *Doe v. United States*, 718 F.2d 1039, 1044 (11th Cir. 1983), the Eleventh Circuit, applying Florida law, reversed the finding that the government's conduct proximately caused the rape victim's injury, holding that "evidence of similar criminal acts in the one square mile area in which the post office was located . . . undifferentiated with respect to the proximity of such acts to the post office is insufficient to support a finding of the foreseeability of plaintiff's tragic injury." *Id.* at 1044.[8] Though there is no bright-line rule for how recently pertinent criminal acts must have taken place to support foreseeability, once a few years pass, the past criminal activity may be too remote to support proximate cause. *See Ameijeiras v. Metro. Dade County*, 534 So.2d 812, 813 (Fla. 3d DCA 1988) (holding that attack in a county-owned park was unforeseeable because no similar violent

[7] In *Roberts v. Shop & Go, Inc.*, 502 So.2d 915 (Fla. App. Dist. Ct. 1986), a gasoline vendor sold gasoline to a customer who acted strangely and did not appear to have a customary use for gasoline. Soon thereafter, the customer deliberately threw gasoline on bystanders and ignited it. *Id.* at 917-18. The vendor was not found liable for damages incurred as a result of the assailant's acts because this kind of criminal conduct was an intervening cause that was not within the realm of reasonable foreseeability. *Id. See, also, The City of Ocala v. Graham*, 864 So.2d 473, 479 (Fla. 5th DCA 2004) (reversed judgment for plaintiffs where, in part, "Calloway's physical attacks upon Sweet served as superseding and intervening causes of the injuries inflicted upon Graham.") (citations omitted); *Florida East Coast Ry. Co. v. Pickard*, 573 So.2d 850 (Fla. 1st DCA 1990) (plaintiff's departure from railroad premises and his reckless attempt to board swiftly moving freight train in rain severed tenuous chain of causation between negligence of railroad employees in telling plaintiff where he could catch freight train and plaintiff's injuries).

[8] *See Admiral's Port Condominium Ass'n, Inc. v. Feldman*, 426 So.2d 1054, 1055 (Fla. 3d DCA 1983) (reversed jury verdict for plaintiffs), *rev. denied*, 434 So.2d 887 (Fla. 1983) ("[E]vidence of violent crime which had occurred substantial distances away from the premises . . . is not probative of foreseeability") (emphasis added) (citation omitted).

crimes were reported to have occurred there in the preceding two years); *Leitch v. City of Delray Beach*, 41 So.3d 411, 412 (Fla. 4th DCA 2010) (held "prior accidental shootings were too remote in time and too infrequent to render the instant event reasonably foreseeable.")

Here, given the unprecedented nature of the anthrax attacks, as previously discussed, there is no occasion to compare either the proximity or recency of similar criminal activities. Indeed, just as the decades in advance of the tragic 2001 anthrax attacks were free of anything like them, so too have the last ten years passed without a recurrence of such attacks.

Plaintiffs' expert Dr. Park Dietz testified that the anthrax attacks were best understood as "a mass murder or serial killer." U.S. Facts ¶29. [9] One court, addressing proximate cause in the related context of mass murder (differentiated from serial murder based on killing all in one incident), held:

> First, as to the foreseeability of harm to plaintiffs, the theft-related and property crimes of the type shown by the history of its operations, or the general assaultive-type activity which had occurred in the vicinity bear no relationship to purposeful homicide or assassination. In other words, under all the circumstances presented, the risk of a maniacal, mass murderous assault is not a hazard the likelihood of which makes [defendants'] conduct unreasonably dangerous. Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of [defendants'] nonfeasance did not facilitate its happening.

Lopez v. McDonald's Corp., 193 Cal.App.3d 495, 509, 238 Cal.Rptr. 436, 445 (Cal. 4th DCA 1987). Similarly, "[s]erial murder is a relatively rare event, estimated to comprise less than one percent of all murders committed in any given year." U.S. Facts ¶30. It is extraordinarily difficult, if not impossible, to predict serial killings.[10] Thus, the nature of the anthrax attacks

[9] "The term 'serial killings' means a series of three or more killings … having common characteristics such as to suggest the reasonable possibility that the crimes were committed by the same actor or actors." 28 U.S.C. § 540B.

[10] Serial killings defy prediction, in part, because:

(best understood as mass murder or serial murder) distinguishes them as extremely rare, unpredictable acts of homicidal violence that Florida courts should find abrogate proximate cause. *See also Hoffman*, 477 So.2d 43; *Barnes,* 517 So.2d at 718.

D. The 1995 Oklahoma City Bombing and 1993 World Trade Center Bombing Cases Support a Finding of No Proximate Cause

Negligence cases arising out of the Oklahoma City Bombing and 1993 World Trade Center Bombing with fertilizer grade ammonium nitrate (FGAN) support a finding of no proximate cause here. Before these bombings, the extraordinary dangers of FGAN were well known. Indeed, the Supreme Court's seminal decision in *Dalehite v. United States*, 346 U.S. 15 (1953) decided vast claims against the government arising out of a disastrous explosion of FGAN at Texas City, Texas, that killed more than 570 persons, injured 3,500, and "leveled" much of the city. *Id.* at 23; *see* H. Report No. 84-1305 (1955). The Supreme Court found that, "FGAN's basic ingredient was ammonium nitrate, long used as a component in explosives" (*id.* at 21), and that "[f]ollowing the disaster of course, no one could fail to be impressed with the blunt fact that FGAN would explode." *Id.* at 23.[11]

The victims of the Oklahoma City bombing sued the manufacturer (ICI Explosives) of FGAN that was modified and used to construct the bomb that destroyed the Murrah Federal

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> The majority of serial killers are not reclusive, social misfits who live alone. They are not monsters and may not appear strange. Many serial killers hide in plain sight within their communities. Serial murderers often have families and homes, are gainfully employed, and appear to be normal members of the community. Because many serial murderers can blend in so effortlessly, they are oftentimes overlooked by law enforcement and the public.

Id. ¶31. Serial murder cannot be predicted because what causes a serial murderer to develop is unclear. *Id.* ¶32.

[11] In *Dalehite*, the complaints against the United States were dismissed on discretionary function exception grounds. The applicability of the FTCA's discretionary function exception here is discussed in a separate motion, filed this day by the United States.

Building, killing 168 people and injuring hundreds more. In *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619 (10th Cir. 1998). The victims alleged that "ICI sold explosive-grade AN mislabeled as fertilizer-grade AN" and "that the perpetrators of the Oklahoma City bombing used the 4000 pounds of explosive-grade AN … mixed with fuel oil or diesel oil, to demolish the Murrah Building." *Id.* at 619. Notwithstanding ammonium nitrate's dangerous propensities, the Tenth Circuit held that the terrorists' act in modifying the ammonium nitrate and making it into a bomb constituted a supervening cause that precluded negligence liability on the part of the manufacturer. *Id.* at 620-21.

The Tenth Circuit based its decision on the Restatement (Second) of Torts § 448,[12] which it found that "Oklahoma has looked to for assistance in determining whether the intentional actions of a third party constitute a supervening cause of harm." *Id.* at 620 (citation omitted).

Section 448 states:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

The Tenth Circuit found that "Comment b to § 448 provides further guidance in the case before us." *Id.* at 620. It states:

[12] One court found that "[w]ith Florida law insufficient to aid in a determination on its own, the Court has examined cases from other jurisdictions which, like Florida, have adopted the Second Restatement of Torts for persuasive authority." *Henry v. National Housing Partnership*, 2008 WL 2277549, *2 (N.D. Fla. 2008).

> There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime. If the situation which the actor should realize that his negligent conduct might create is of either of these two sorts, an intentionally criminal or tortious act of the third person is not a superseding cause which relieves the actor from liability.

The Tenth Circuit found that, "under comment b, the criminal acts of a third party may be foreseeable if (1) the situation provides a temptation to which a "recognizable percentage" of persons would yield, or (2) the temptation is created at a place where "persons of a peculiarly vicious type are likely to be." The Court found that the comment's term "recognizable percentage…is not satisfied by pointing to the existence of a small fringe group or the occasional irrational individual, even though it is foreseeable generally that such groups and individuals will exist." *Id.* at 620.

The Tenth Circuit recognized that there had been: (1) a prior instance of a successful bombing using ammonium nitrate in the United States in the 1970s, (2) a prior "unsuccessful attempt" to blow up the World Trade Center with ammonium nitrate in 1993 in which six people were killed, and (3) that Plaintiffs had alleged that there had been several instances of such bombings in Ireland. *Id.* at 621 & n.3; *see Port Authority of New York and New Jersey v. Arcadian Corp., et al.*, 189 F.3d 305, 308 (3d Cir. 1999). The court nonetheless found that no recognizable percentage of the population would be able to carry out such a bombing (based on the complexity of manufacturing and mixing such a bomb), and, thus, the bombing was not a foreseeable consequence of the manufacturer's allegedly negligent sale of the explosive-grade fertilizer and there was no proximate cause. *Gaines-Tabb,* 160 F.3d at 621.

The reasoning of the Tenth Circuit was adopted by the Third Circuit in relation to the 1993 World Trade Center Bombing case. *Arcadian Corp.*, 189 F.3d at 318-20. The plaintiffs in *Arcadian Corp* case showed the same evidence of other instances of bombings with ammonium nitrate used by the plaintiffs in the Oklahoma City case but also introduced evidence that that (1) the manufacturers were aware of the explosive nature of the product and knew how to make the product *less* dangerous and (2) the use of the product for bombing was so common that many countries outlawed the sale of the product. 189 F.3d 309-10. The Third Circuit nonetheless rejected the notion that the manufacturers or anyone in the chain of commerce could be held liable because the alteration of the products was not objectively foreseeable because "terrorists purposefully manipulated and adulterated" FGAN and the ultimate "danger to the plaintiff was presented not by the raw materials, but by a bomb that incorporated the raw materials." *Id.* at 314.

This Court should look to the Ammonium Nitrate cases in support of a finding that there is no proximate cause here. In some sense, the instant case provides an even weaker case for proximate cause, for while the OKC and WTC bombing plaintiffs could point to at least some "successful terrorist actions using ammonium nitrate" in the past few decades, there were none involving anthrax until the 2001 attacks. *Id.*[13] In pertinent part, the Tenth Circuit's holding in *Gaines-Tabb* with regard to section 448 is equally applicable to the case here:

[13] Relying in part on *Gaines-Tabb* and Rest. (2d) Torts §§ 442 and 448, *New Jersey Dept. of Environmental Protection v. U.S. Nuclear Regulatory Com'n*, 561 F.3d 132 (3d Cir. 2009) held that despite the 9/11 attacks, the Nuclear Regulatory Commission was not required to prepare an environmental impact statement addressing a potential airborne terrorist attack on a nuclear plant, because the superseding act of terrorism would cancel proximate cause. *Id.* at 140-41.

> The apparent complexity of manufacturing an ammonium nitrate bomb, including the difficulty of acquiring the correct ingredients (many of which are not widely available), mixing them properly, and triggering the resulting bomb, only a small number of persons would be able to carry out a crime such as the bombing of the Murrah Building. We simply do not believe that this is a group which rises to the level of a "recognizable percentage" of the population.

60 F.3d at 621. For similar reasons, no "recognizable percentage" of the population could carry out the anthrax letter attacks for purposes of construing § 448. *See* U.S. Facts ¶¶18, 20-28. Florida courts also look to § 448.[14] As one court considering § 448 observed,"[b]oth Florida law and the Restatement (Second) of Torts recognize that the intentional torts or criminal actions of a third party may sever an actor's liability for negligence, even when the actor's negligence is a cause in fact of the plaintiff's injuries." *Flagler v. Housing Authority of City of Sanford, Fla.,* 2008 WL 785937, * 4 (M.D. Fla. 2008) (citing Rest. (2d) of Torts § 448 (1965)). Based on § 448 and comment b, this Court should follow the example of the Ammonium Nitrate cases, and hold that the criminal acts cut off Defendant's liability for alleged negligence.

IV. CONCLUSION

Because Plaintiffs could never present facts to show that decedent's inhalation anthrax and the intervening acts that gave rise to it was "a foreseeable and probable consequence of the wrongful actions of the defendant," the government is entitled to summary judgment on proximate cause. *Goldberg*, 899 So.2d at 1116; *see Barnes,* 517 So.2d 717 at 718.

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[14] *See, e.g., Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981) (interpreting Florida law based on Rest. (2d) Torts § 448 Comments a, b and c (1965)); *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So.2d 248, 251 (Fla. 3d DCA 1985) (citing Rest. (2d) Torts § 448); *Barnes*, 517 So.2d 717, 722 & n.1 (concurring op.) (quoting Rest (2d) Torts § 442 Comment c.):

> [C]riminal acts may in themselves be foreseeable … But if they are not, the actor is relieved of responsibility by the intervention of the third person. The reason usually given by the courts is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him.

Dated: July 15, 2011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER: 03-81110-CIV-HURLEY/HOPKINS

MAUREEN STEVENS, as Personal Representative of the Estate of ROBERT STEVENS, Deceased, and on behalf of MAUREEN STEVENS, Individually, NICHOLAS STEVENS, HEIDI HOGAN and CASEY STEVENS, Survivors,

Plaintiffs,

vs

UNITED STATES OF AMERICA,

Defendant.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I served the foregoing document via the Court's ECF system.

s/ *Adam M. Dinnell*
Adam M. Dinnell

SERVICE LIST

Stevens v. United States
Case No. 03-81110-CIV-HURLEY/HOPKINS
United States District Court, Southern District of Florida

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