

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

JOSEPHAT HENRY

Plaintiff,

vs.

**WORLD FRESH MARKETS, LLC, D/B/A, PUEBLO
SUPERMARKET,**

Defendant.

SX-10-CV-557

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

Appearances:

LEE J. ROHN, ESQ.

St. Croix

For Plaintiff

KEVIN F. D'AMOUR, ESQ.

St. Thomas

For Defendant

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant World Fresh Markets, LLC's (hereinafter "Defendant" or "Pueblo") Renewed Motion for Judgment as a Matter of Law or Alternatively Motion for New Trial (hereinafter "Motion") filed September 30, 2015. Plaintiff Josephat Henry (hereinafter "Plaintiff") filed his opposition to the Motion (hereinafter "Opposition") on October 20, 2015. For the reasons set forth, the Defendant's Motion shall be denied and a judgment in favor Plaintiff shall be entered in the amount of \$113,096 plus prejudgment interest.

BACKGROUND

This action commenced on December 9, 2010, about a year after Plaintiff allegedly slipped and fell in one of Defendant's supermarkets. Plaintiff alleges that on December 8, 2009, while shopping at Pueblo's supermarket in La Reine, St. Croix, he slipped and fell in a large puddle of dirty water. According to Plaintiff, due to the pain caused by the fall, he was unable to get up on his own. When the manager was notified, the manager shouted at him and threatened to call the police and have him arrested if he did not get off the floor. A security guard was then called on by the manager. The security guard also threatened to have Plaintiff arrested if he did not get up. Plaintiff was eventually assisted up by the store's security guard, but claims no accident report was taken at the time of the incident and that he was treated in a racist manner. Plaintiff claims that as a result of his treatment by the store manager, he was extremely fearful, got very upset, developed a severe headache, had difficulty breathing, and was nauseated. Plaintiff also claims he was physically injured as a result of his fall in Defendant's store. Plaintiff brought this negligence action against Defendant asserting Defendant failed to warn of the unsafe condition in its store, and failed to properly inspect, maintain, and repair its premises.

Trial commenced on August 25, 2015 through August 26, 2018. Due to inclement weather, trial resumed on September 1, 2015. On September 2, 2015, the jury returned a verdict in favor of the Plaintiff. The jury determined that the Defendant was negligent, and that the Defendant's negligence was the proximate cause of the Plaintiff's injuries. The jury awarded the Plaintiff \$20,000 for non-economic damages in the past (mental anguish, pain and suffering, loss of enjoyment of life), \$18,000 for past medical and health care costs, \$45,096 for future medical and

healthcare costs, and \$30,000 in punitive damages. After the jury's verdict, the Defendant filed a motion for judgment as a matter of law. Plaintiff filed a motion for entry of judgment.

STANDARDS OF REVIEW

Renewed Motion for Judgment as a Matter of Law

A motion for a judgment as a matter of law (hereinafter "JNOV") is governed by Virgin Islands Rule of Civil Procedure 50.¹ V.I. R. Civ. P. 50. "A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." V.I. R. Civ. P. 50(a)(2). "If the court denies the motion, the movant may file a renewed motion for judgment as a matter of law no later than 28 days after the entry of the judgment." V.I. R. CIV. P. Rule 50(b).

"[J]udgment as a matter of law "should be granted only when 'viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability.'" *See Corriette v. Morales*, 50 V.I. 202, 205 (V.I. 2008). Motions for judgment as a matter of law should be granted sparingly." *See Royer v. Coastal Air Transp.*, Nos. SX-04-CV-515, SX-05-CV-415, 2015 V.I. LEXIS 147, at *3 (V.I. Super. Ct. Feb. 18, 2015) (citing *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2012)). "[A] scintilla of evidence is not enough to sustain a verdict of liability." *See Corriette*, 50 V.I. at 205 (citation omitted).

¹ Before the adoption of the Virgin Islands Rules of Civil Procedure, Federal Rule of Civil Procedure 50 made applicable to the Superior Court through Superior Court Rule 7, governed motions for judgment as a matter of law. The standard of review articulated in Virgin Islands Rule of Civil Procedure 50 is virtually identical to the language of, Federal Rule of Civil Procedure 50. Ergo, although this action commenced before the adoption of the Virgin Islands Rule of Civil Procedure, application of the new rules would not be "infeasible or [] work an injustice." *See Edwards v. Hess Oil Virgin Islands Corporation*, 2017 V.I. LEXIS 94, *5 n.3. (The Supreme Court of the Virgin Islands promulgated the Virgin Islands Rules of Civil Procedure on April 3, 2017. *See generally In re: Adoption of the V.I. Rules of Civ. P.*, Prom No. 2017-002, 2017 V.I. Supreme LEXIS 22 (V.I. Apr. 3, 2017). The rules took effect March 31, 2017. *See id.* at *1-2. Pursuant to Rule 1-1, the new rules govern all civil actions pending on March 31, 2017, unless the Supreme Court declares otherwise or a Superior Court judge "makes an express finding that applying" the new rules "in a particular previously-pending action would be infeasible or would work an injustice." V.I. R. CIV. P. 1-1(c)(2)(B)).

“The Court does not sit as a trier of fact when making its determination on a motion for judgment as a matter of law.” See *Chestnut*, 59 V.I. at 475. “In performing this narrow inquiry, [trial courts] must refrain from weighing the evidence, determining the credibility of witnesses, or substituting [their] own version of the facts for that of the jury.” See *id.* (quoting *Corriette*, 50 V.I. at 205) “The Court’s only concern is the sufficiency of the evidence.” *Royer*, 2015 V.I. LEXIS 147, at *3. “In ruling on the renewed motion, the court may (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law.” V.I. R. Civ. P. 50(b)(1)-(3).

Motion for a New Trial

A motion for a new trial after a jury trial is governed by Virgin Islands Rule of Civil Procedure 59(a)(1)(A). V.I. R. Civ. P. 59(a)(1)(A). The court may, on motion, grant a new trial on all or some of the issues -- and to any party -- as follows:

(A) after a jury trial, for any one of the following reasons:

- (i) newly discovered evidence that is material to a party’s claim or defense and that could not have been discovered before trial despite the exercise of due diligence;
- (ii) misconduct of a juror or jury tampering;
- (iii) accident or surprise that ordinary prudence could not have guarded against;
- (iv) excessive or inadequate damages;
- (v) an intervening change in controlling law; or
- (vi) attorney or party misconduct that undermined the trial.

V.I. R. Civ. P. 59(a)(1)(A) (i)-(vi). “The authority to grant a new trial in a jury action is purely discretionary ... [and] must be exercised with care and circumspection.” *Lembach v. Antilles Sch., Inc.*, No. ST-12-CV-613, 2015 V.I. LEXIS 35, at *5 (V.I. Super. Ct. Apr. 7, 2015). “Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the Court or a party — is ground for granting a new trial.” *Id.* at *5-6. “If the movant alleges insufficiency

of the evidence, “[t]he appropriate test to be applied by the court in considering [a] motion for a new trial [is] ... whether sufficient evidence existed on the record which, if accepted by the jury, could sustain the verdict.” *Id.* at *6. Unless the Court is “convinced that the jury reached a seriously erroneous result because its verdict was against the clear weight of the evidence, [the Court has] no discretion to order a new trial.” *Id.*

Remittitur

Remittitur is not recognized in the Virgin Islands. “Remittitur is a common-law doctrine in which a court will reduce the damages award indicated in a jury verdict after concluding that “no rational jury, acting on the basis of the full evidentiary record, and without being inflamed by passion or prejudice or other improper consideration, could have awarded such a large sum as damages.” *See Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 427 (V.I. 2016) (citations omitted). “In *Antilles School*, [the Supreme Court of the Virgin Islands (hereinafter “Supreme Court”)] determined that even though a majority of United States jurisdictions have adopted the doctrine, “remittitur does not represent the soundest rule for the Virgin Islands” because it is completely at odds with our “long-standing jurisprudence that questions of fact should be resolved by a jury, that a jury's factual determinations should be respected so long as there is a sufficient evidentiary basis, and that it is not the role of a judge to weigh the evidence when it has been submitted to a jury for a determination.” *See Coastal Air Transp. v. Royer*, 64 V.I. 645, 659 (V.I. 2016) (citing 64 V.I. at 432; *Fahie v. People*, 62 V.I. 625, 636 (V.I. 2015); *Joseph v. Hess Oil V.I. Corp.*, 54 V.I. 657, 667 (V.I. 2011)). As a result, the Supreme Court held “that a jury's verdict may be ‘altered by a judge only if it is not supported by sufficient evidence in the record, or if a reduction is compelled under the United States Constitution.’” *Id.* (citing *Antilles School* at 437-438 (citations omitted)).

DISCUSSION

I. Negligence

Pueblo argues that “plaintiff failed to establish any negligence.” (Mot. at 9). In support, citing *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 530 (2013), Pueblo argues that “Plaintiff never submitted any evidence showing that Defendant ‘had actual or constructive notice of the condition, and that [it] should have realized [the] condition involved an unreasonable risk of harm.’” *Id.* Pueblo argues that “[t]o show constructive notice, Plaintiffs evidence must indicate the dangerous condition existed for so long before the injury that Defendant should have discovered it in the exercise of reasonable care.” *Id.* Pueblo asserts that the spoliation inference cannot be used to infer constructive notice.” (Mot. at 11).

In opposition, Plaintiff argues that there was more than sufficient evidence to support the jury’s verdict. Relying on *Bright v. United Corp.*, 50 V.I. 215 (V.I. 2008), Plaintiff asserts that “the [spoliation] inference, coupled with Plaintiff’s testimony that the water on the floor was black with dirt is sufficient to establish liability under Rule 50 and [Rule] 59 standards.” (Opp’n at 8).

The case at bar is an action for negligence. The Supreme Court previously established that, “the foundational elements of negligence” are: “(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff.” *See Coastal Air Transport*, 64 V.I. at 651 (quoting *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (citations omitted)). The Court instructed the jury that

Negligence is the failure to use ordinary care. Put another way, negligence is the failure to exercise that degree of care which a reasonably prudent person would exercise, given the same or similar circumstances. Negligence may consist of

doing something which a reasonably careful person would not do or the failure to do something which a reasonably careful person would do under the same or similar circumstances. The word “care” denotes not only the attention, which is necessary to perceive danger, but also the caution required to avert it once it is perceived. The “mere fact that an accident occurred does not give rise to an inference that the injured person was the victim of negligence.”

In order to establish negligence, Plaintiff Joseph Henry must prove:

- 1) That Defendant Pueblo Supermarket owed a legal duty of care to Plaintiff Henry;
- 2) Breach of duty of care or failure on the part of Defendant Pueblo Supermarket to fulfill its duty of care to Plaintiff Henry.

(Jury Instructions at 24). With respect to Pueblo’s duty of care as the owner of the premises, the jury was also instructed that “[t]he owner of a premises owes a legal duty to exercise reasonable or ordinary care, under the circumstances, is to keep the premises in a condition reasonably safe for the entry of another.” (Jury Instructions at 25). Furthermore, the jury was instructed that “[t]o determine whether Defendant Pueblo Supermarket’s conduct is reasonable, you must determine whether Plaintiff Henry’s injury or harm was foreseeable to Defendant Pueblo Supermarket, the owner.” (*Id.*) In order to determine if the injury was foreseeable, you may consider:

- 1) the circumstances under which Plaintiff Henry was on the property;
- 2) the foreseeability or possibility of the injury, harm or damage given the type of condition involved;
- 3) the nature of the property and its normal uses;
- 4) the time, manner, and circumstances under which Plaintiff Henry entered the premises;
- 5) the feasibility of either correcting the condition on the property or issuing appropriate warnings; and other factors as may be relevant to this case.

(*Id.*). The jury was also instructed that

An inference of spoliation with regard to video footage on the date on of the incident is appropriate. Spoliation is a party’s failure to preserve an item that may be used as evidence in a pending or reasonably foreseeable litigation. Video footage from the date of the incident was not preserved by the Defendant. Therefore, you may infer that all or portions of the videotape would have shown evidence that was not favorable to Pueblo Supermarket. (Jury Instructions at 9).

At trial, the focus was on whether Pueblo breached its duty of care to the Plaintiff. Under Virgin Islands law, in all premises liability actions, “the foreseeability of harm “is the touchstone of the existence of [a land possessor's] duty of reasonable or ordinary care.” *See Machado*, 61 V.I. at 386 (quoting *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (V.I. 2013) (citations omitted)). “To establish that [Pueblo] breached its duty to protect [Plaintiff] against a dangerous condition, the [Plaintiff] had to show that [Pueblo] had actual or constructive notice of the condition, and that they should have realized this condition involved an unreasonable risk of harm.” *See Perez*, 59 V.I. at 529-30. Plaintiff does not allege that Pueblo had actual notice of the spill; therefore, “[he] would ultimately be required to show that the [water] was ‘on the floor long enough to give [Pueblo] constructive notice of this potential unreasonable risk of harm.’” *See Bright*, 50 V.I. at 224 (citations omitted).

The Court finds the evidence presented at trial is sufficient to prove that Pueblo breached its duty of care owed to Plaintiff. Plaintiff testified that there was water on the floor and he fell in aisle 9 of the supermarket. Plaintiff testified that he did not see the water and when he got up he saw black water in the center of the floor. Plaintiff stated that the black water was on his pants and on the back and side of his shirt. Former Pueblo front end manager Osama Muheisen (hereinafter “Muheisen”) testified that he was in the store on the date of the incident, but he did not see Plaintiff fall because Plaintiff was already on the floor when he made contact with him and he did not know anyone at Pueblo who witnessed the incident.

The Court read to the jury the parties’ Joint Stipulation of Fact that there was a videotape of the incident and that Pueblo reviewed the videotape but failed to preserve it. “The deleted video footage was the only evidence that could have established whether [Pueblo] had constructive notice of the spill.” *See Samuel v. United Corp.*, 64 V.I. 512, 519 (2016). The lack of

evidence of Pueblo's constructive or actual notice is a direct result of Pueblo's destruction of the videotape. Therefore, there is an inference that all or portions of the videotape would have shown evidence that was not favorable to Pueblo. Viewing the evidence in the light most favorable to the Plaintiff, the nonmoving party, there was sufficient evidence presented at trial in conjunction with the inference of spoliation was sufficient for the jury to find that Pueblo was negligent. Ergo, this Court will not disturb the jury's determination.

II. Damages

Last, Pueblo argues that the medical evidence of damages is insufficient and that the jury erred in awarding punitive damages. (Mot. at 5-9, 15-20). Plaintiff counterargues that there was sufficient evidence to support the jury's award of damages. (Opp'n at 8-14).

The jury awarded the Plaintiff \$20,000 for non-economic damages in the past (mental anguish, pain and suffering, loss of enjoyment of life), \$18,000 for past medical and health care costs, \$45,096 for future medical and healthcare costs, and \$30,000 in punitive damages.

As previously mentioned, remittitur is not recognized in the Virgin Islands. "[A] jury's verdict may be 'altered by a judge only if it is not supported by sufficient evidence in the record, or if a reduction is compelled under the United States Constitution.'" *See Coastal Air Transp.*, 64 V.I. at 659.

A. Past Medical Damages

The Court further finds there is sufficient evidence to support the jury's award of \$18,000 in damages for past medical and health care costs. "Economic damages are more concrete and may be evaluated by looking at lost wages or medical expenses." *Smith v. Katz*, Civil No. 2010-39, 2013 U.S. Dist. LEXIS 40804 *44 (D.V.I. Mar. 22, 2013). At trial, Dr. Gary Jett (hereinafter "Dr. Jett"), a medical doctor specializing in psychiatry with knowledge of lifecare planning, testified that

Plaintiff sustained multiple injuries to his hip, back, knee, ankle and foot. Plaintiff complained of constant lower back pain exacerbated by bending, walking and standing, constant pain in his left hip, and intermittent neck pain. Dr. Jett performed several tests on Plaintiff after his fall at Pueblo. The cost of Dr. Jett's services was \$18,887.30. The emergency room chart indicated that Plaintiff sustained a lumbar sprain in the coccyx within normal limits one month after the fall. Dr. Jett diagnosed the Plaintiff with lumbar disc injury which was exacerbated by the fall at Pueblo. The cost of Dr. Jett's services was \$18,887.30. Plaintiff also went to the emergency room for pain. Based on the testimony, there is sufficient evidence to support the jury's award of \$18,000 for past medical and health care costs.

There is sufficient evidence to support the jury's award of \$45,096 for future medical and healthcare costs. Economist Dr. Richard Moore (hereinafter "Dr. Moore") was qualified as an expert and offered testimony on the cost of Plaintiff's future medical needs based on Dr. Jett's opinion. Dr. Moore testified that he independently verified the costs and found Dr. Jett's numbers to be reasonable. Dr. Moore determined that based on Plaintiff's life expectancy of 11.9 years or the year 2027, based on information from the Centers for Disease Control and Prevention, and the average rate of inflation, Plaintiff's future medical costs total \$99,947. Based on the testimony, there is sufficient evidence to support the jury's award of \$45,096 for future medical and healthcare costs.

B. Non-Economic Damages

The Court also finds there is sufficient evidence to support the jury's award of \$20,000 for non-economic damages in the past (mental anguish, pain and suffering, loss of enjoyment of life). Non-economic damages are based on intangible harm that is subjective. *Smith*, 2013 U.S. Dist.

LEXIS 40804 at *46. Since the harm covered by the award of non-economic damages is subjective, the Court must review it with deference. *Id.*

Veronica Henry Llanos (hereinafter “Llanos”), Plaintiff’s daughter, testified the day before the fall, Plaintiff was outside working on his car. She took her father to the hospital the day that he fell at Pueblo. Mary Henry (hereinafter “Henry”), Plaintiff’s wife and Llanos’ mother, drove them to the hospital. Before the fall, Llanos and Henry testified that they did not have to help Plaintiff. Plaintiff did household chores, gardened, and liked to socialize.

After the fall, both Henry and Llanos testified that Plaintiff was in a lot of pain, he mostly stayed in bed, and needed to be brought food and urinate in a pail next to the bed. Llanos stated that Henry, her mother, has to help Plaintiff to dress, walk and go to the bathroom. Henry testified that Plaintiff was in this condition for two to three weeks after the fall. Before the fall he complained about neck pain, back pain and his hands. However, after the fall, Plaintiff could not get up and he no longer does mechanic work.

At trial, the jury was shown a video captured by private investigator Herminio Velasquez on August 19, 2015, of Plaintiff walking up a hill to the shanty near his home without the assistance of a cane. Bryan Alphonse (hereinafter “Alphonse”) identified Plaintiff in the video and recognized that the area was near a shanty. Henry explained that Plaintiff normally takes walks to the shanty and he normally walks with a cane. Alphonse admitted that Plaintiff was not using a cane in the video but stated that Plaintiff usually walks with the assistance of a cane.

Henry testified that her husband is different after the fall because he either stays in bed or sits on the porch, he is always in pain, no longer helps around the house, the garden is dried up, Plaintiff no longer drives, and he does not socialize with friends. Alphonse testified that since the fall, Plaintiff walks with a cane and is limping. Henry testified that since the fall Plaintiff is grumpy

and he cannot support himself without a cane. Based on the testimony, there is sufficient evidence for a jury to award Plaintiff \$20,000 for non-economic damages in the past for mental anguish, pain and suffering, and loss of enjoyment of life.

C. Punitive Damages

The Court further finds there is sufficient evidence to support the jury's award of \$30,000 for punitive damages. Punitive damages are "damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly — called also exemplary damages, smart money." MERRIAM-WEBSTER'S DICTIONARY OF LAW 120 (2005); *see also* BLACK'S LAW DICTIONARY 448 (9th ed. 2009) ("Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer or making an example to others."). "Punitive damages must be based upon conduct that is not just negligent but shows, at a minimum, reckless indifference to the person injured — conduct that is outrageous and warrants special deterrence." *See Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 824 (2017).

Magdalene Joseph-Welcome (hereinafter "Welcome") stated that she was called by Muheisen to watch Plaintiff on the floor. Welcome testified Muheisen did not offer any assistance to the Plaintiff nor offer to call the ambulance. Welcome stated that Muheisen state that he was going to call the police and have him arrested. The Plaintiff testified that Muheisen screamed at him and threatened to call the police and have him arrested. The Plaintiff further testified that he felt he was subject to racism. The Court finds that there is sufficient evidence for the jury to award punitive damages.

CONCLUSION

In light of the foregoing analysis, Pueblo's Motion will be denied. Pueblo is not entitled to judgment as a matter of law or a new trial. There is sufficient evidence on the record to sustain the jury's verdict. The Court will not disturb the jury's award totaling \$113,096 in damages. A judgment against Pueblo in the amount of \$113,096 plus interest shall be entered separately. V.I. R. Civ. P. 58(a)(1). The Court will issue an Order and Judgment consistent with this Opinion.

DATED this 20th day of August, 2018.

ATTEST:

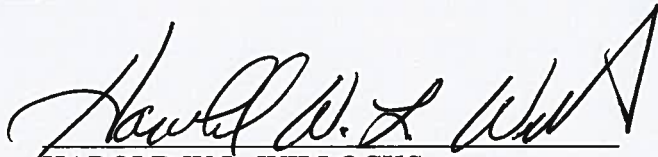
Estrella H. George
Clerk of the Court

By:


Court Clerk Supervisor

Dated:

8/20/18


HAROLD W.L. WILLOCKS
Administrative Judge of the Superior Court