SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ISHMAEL TODMAN, JR., AND ALANI HENNEMAN TODMAN, **Plaintiffs,** **v.** **GARY A. HICKS, AND DEFT, INC., D/B/A THRIFTY CAR RENTAL,** **Defendants.**	**CIVIL NO. ST-16-CV-158**

ORDER

The Court having issued a Memorandum Opinion on this date, consistent therewith it is

ORDERED that Plaintiffs' motion for summary judgment on liability is GRANTED with respect to the negligence *per se* violations of 20 V.I.C. § 503, 20 V.I.C. § 495, and 23 V.I.C. § 163, and DENIED with respect to the negligence and negligent entrustment claims; and it is

ORDERED that Hicks' motion for partial summary judgment is GRANTED, and the gross negligence and IIED claims are DISMISSED; and it is

ORDERED that Deft's motion for partial summary judgment is GRANTED, and the gross negligence and IIED claims are DISMISSED; and it is

ORDERED that Defts' motion for summary judgment is GRANTED, and the negligent entrustment claim is DISMISSED; and it is

ORDERED that the portions of Hicks' and Defts' individual motions for partial summary judgment, which each ask the Court to dismiss Plaintiffs' request for punitive damages, are GRANTED; and it is

ORDERED that Deft's motion to amend its answer is DENIED as moot; and it is

ORDERED that Hicks' motions in limine to exclude evidence are DEFERRED until Hicks supplements his motions with any arguments regarding specific disclosures

Dated: April 17, 2019

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Clerk of Court ___/___/___

by: __________
Lori Boynes-Tyson
Court Clerk Supervisor 4/23/19

A CERTIFIED TRUE COPY
DATE 4/25/2019
ESTRELLA H. GEORGE
CLERK OF THE COURT
BY __________
LATOYA A. CAMACHO
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ISHMAEL TODMAN, JR., AND ALANI HENNEMAN TODMAN,	)
	) **CIVIL NO. ST-16-CV-158**
Plaintiffs,	) **Cite as: 2019 VI Super 60**
v.	)
GARY A. HICKS, AND DEFT, INC., D/B/A THRIFTY CAR RENTAL,	)
Defendants.	)

MEMORANDUM OPINION

¶1 Before the Court are seven motions: (1) Plaintiffs' motion for summary judgment, (2) Defendant Gary A. Hicks' motion for partial summary judgment, (3) Deft, Inc.'s motion for partial summary judgment and (4) motion for summary judgment, (5) Deft's motion to amend its answer, (6) Defendant Hicks' motion in limine to exclude Plaintiffs' pretrial witnesses and exhibits not disclosed, and (7) Hicks' motion in limine to exclude evidence with respect to income, gross negligence, the intentional infliction of emotional distress, and punitive damages. Plaintiffs' motion for summary judgment on the issue of liability with regard to his claims for negligence and negligence *per se*, must be granted in part, since there is an absence of an issue of fact with respect to Hicks' violations of certain statutes, and denied in part, because Hicks has presented evidence to create a genuine issue of material fact regarding comparative negligence, and thus, the extent of Todman's damages. Plaintiffs' motion for summary judgment on the claim of negligent entrustment must be denied, since Plaintiffs have failed to cite evidence from the record to support an essential element of that claim. Hicks' motion for partial summary judgment seeking dismissal of the gross negligence and IIED must be granted, since the Todmans have failed to present evidence in support of a required element for each of those claims. Deft's Motion for Partial Summary Judgment seeking dismissal of the gross negligence and IIED claims must be granted for the same reasons. Defts' motion for summary judgment asking for dismissal of the negligent entrustment claim must be granted, because the Todmans have failed to produce evidence in support of an essential element of that claim. The portions of Hicks' and Defts' individual motions for partial summary judgment, which each ask the Court to dismiss Plaintiffs' request for punitive damages, must be granted since no claims supporting punitive damages will remain in this case following this opinion. Similarly, Deft's motion to amend its answer must be denied as moot, since no claim asserted against Deft will remain in this case following this opinion. Finally, Hicks' motions in limine to exclude evidence are deferred until Hicks supplements his motions with any arguments regarding specific disclosures.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

¶2 On April 2, 2014, a rental vehicle driven by Gary A. Hicks collided with a vehicle driven by Ishmael Todman, Jr.[1] On March 3, 2017, Plaintiffs filed a First Amended Verified Complaint, in which Ishmael Todman asserts claims of negligence *per se* (for violation of motor vehicle statutes), negligence, intentional infliction of emotional distress, and gross negligence, against Hicks, and asserts a claim of negligent entrustment against Deft, Inc.[2] In addition, Alani Henneman Todman asserts a claim for loss of consortium against Hicks[3] and appears to assert a

---

[1] *See* First Amended Verified Complaint, pgs. 2-3.
[2] *See id.*, pgs. 3-10.
[3] *See id.*, pgs. 8-9.

claim for the intentional infliction of emotional distress against Hicks[4] and a claim for negligent entrustment against Deft.[5]

¶3 On April 5, 2018, Plaintiffs filed a Motion for Summary Judgment seeking judgment in their favor on the negligent entrustment claim and on liability.[6] On June 15, 2018, Hicks filed a Motion for Partial Summary Judgment asking for dismissal of the gross negligence and IIED claims and Plaintiffs' request for punitive damages.[7] On June 29, 2018, Deft filed a Motion for Partial Summary Judgment also seeking dismissal of the gross negligence and IIED claims and Plaintiffs' request for punitive damages,[8] and a Motion for Summary Judgment on the negligent entrustment claim.[9] On March 7, 2019, Deft moved to amend its April 10, 2017, Amended Answer to Plaintiffs' March 3, 2017, Verified Amended Complaint. Finally, on April 2, 2019, Hicks filed two motions in limine—the first, "to Exclude Plaintiff's Exhibits and Witnesses Not Disclosed Pursuant to V.I. R. CIV. P. 26(a)(3)", and the second, "to Exclude Evidence of Past Lost Income, Future Lost Income, and Future Loss of Earning Capacity; Gross Negligence; Intentional Infliction of Emotional Distress, and Punitive Damages."

DISCUSSION

I. Motions for summary judgment

A. Legal standard

---

[4] *See id.*, pgs. 7-8.
[5] *See id.*, pgs. 6-7.
[6] On May 7, 2018, Hicks filed a Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Liability. On May 16, 2018, Deft filed an Opposition to Plaintiffs' Motion for Summary Judgment on Liability.
[7] On August 10, 2018, Plaintiffs filed an Opposition to Hicks' Motion for Partial Summary Judgment. On August 20, 2018, Hicks filed a Reply in Support of its Motion for Partial Summary Judgment.
[8] The Court observes that Deft is under the impression that gross negligence and IIED claims were asserted against it, since it argues for dismissal of those claims. But, Plaintiffs' First Amended Verified Complaint indicates that those claims were only asserted against Hicks.
[9] On August 10, 2018, Plaintiffs filed an Opposition to Deft's Motion for Summary Judgment and an Opposition to Deft's Motion for Partial Summary Judgment. On August 20, 2018, Deft filed a Reply to the Opposition to Deft's Motion for Partial Summary Judgment and a Reply to the Opposition to Deft's Motion for Summary Judgment.

¶4 Motions for summary judgment or for partial summary judgment are governed by V.I. R. CIV. P. 56, which provides that the Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[10] "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]'"[11] and a fact is material only where it "might affect the outcome of the suit under the governing law[.]"[12] "[T]he party moving for summary judgment [or partial summary judgment] possesses the initial burden of identifying evidence indicating that there is an absence of any issue of material fact."[13] "If the moving party does so, the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in [its] favor."[14] But, "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial."[15] "A party asserting that a fact cannot be or is genuinely disputed must . . . (B) support the assertion by (i) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (ii) showing that the materials cited do not establish the absence or presence of a

---

[10] V.I. R. CIV. P. 56(a) Motion for Summary Judgment or Partial Summary Judgment.
[11] *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 73 (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
[12] *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (quoting *Anderson*, 477 U.S. at 248).
[13] *United Corp. v. Hamed*, 64 V.I. 297, 309 (V.I. 2016) (quoting *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010)) (citations omitted).
[14] *Hawkins v. Greiner*, 66 V.I. 112 (V.I. Super. Ct. 2017) (citation and internal quotation marks omitted).
[15] *United Corp.*, 64 V.I. at 309-10 (citing *Martin*, 54 V.I. at 391) (internal quotation marks omitted).

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[16]

¶5 "The [C]ourt must credit all reasonable inferences from the evidence on record in favor of the nonmoving party in considering whether there are any disputed issues of material fact"[17] and "must take the non-moving party's conflicting allegations as true if supported by proper proofs."[18] Further, the Court "should not weigh the evidence, make credibility determinations, or draw 'legitimate inferences' from the facts when ruling upon summary judgment motions because these are the functions of the jury."[19] "The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits."[20] The Court must deny summary judgment where a factual dispute exists[21] and must grant summary judgment if the non-moving party cannot establish an essential element of its claim.[22]

B. Todman is not entitled to partial summary judgment on the issue of liability with respect to negligence, because Hicks has presented evidence creating a genuine issue of material fact regarding comparative negligence and the extent of Todman's damages. Todman is entitled to summary judgment on the issue of liability for negligence *per se*, with respect to Hicks' violations of 20 V.I.C. § 503, 20 V.I.C. § 495, and 23 V.I.C. § 163.

¶6 Todman asks the Court to grant summary judgment on the issue of liability, arguing that there exists no genuine issue of material fact with respect to liability for the collision, since

---

[16] V.I. R. Civ. P. 56(c)(1).
[17] *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) (citing *Burd v. Antilles Yachting Servs.*, 57 V.I. 354, 358 (V.I. 2012) and *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011)).
[18] *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (citations and internal quotation marks omitted).
[19] *Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).
[20] *Hawkins*, 66 V.I. at 117 (citing *Williams*, 50 V.I. at 195).
[21] *See id.* (citing *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009)).
[22] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (explaining that summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

Hicks was ticketed for negligent driving, admitted to driving in the wrong lane just before the accident, and admitted to colliding with Todman.[23] Plaintiffs' arguments regarding "the issue of liability" pertain only to their claims of negligence, gross negligence, and negligence *per se*.[24] Since the Court dismisses the gross negligence later in this opinion, the Court will consider Todman's argument for partial summary judgment on the issue of liability with respect to his negligence and negligence *per se* claims.

¶7 Hicks contends that Todman is not entitled to summary judgment on the issue of liability, on the ground that an issue of fact exists, precluding summary judgement.[25] Specifically, Hicks contends that "a jury could conclude that Mr. Todman bears partial responsibility for the accident because he was driving too fast for conditions and was not paying sufficient attention", and thus, Todman may be liable for contributory negligence.[26] Hicks further asserts that under 5 V.I.C. § 1451(a), the jury must apportion damages for comparative fault.[27]

¶8 To prevail on a negligence claim in the Virgin Islands, a plaintiff must show that "1) a legal duty of care [was owed] 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".[28] Black's Law Dictionary defines "liability" in the context of civil law, as "[t]he state of being legally obligated for civil damages".[29] Thus, to be liable for negligence, a defendant's breach of a duty must constitute the factual (but-for cause)[30] and legal cause (proximate cause)[31] of the plaintiff's

[23] Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment on Liability, pgs. 4-6.
[24] *See id.*
[25] *See* Defendant Hicks' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, pgs. 4-5.
[26] *Id.* at 4.
[27] *See id.*
[28] *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014).
[29] BLACK'S LAW DICTIONARY 997 (9th ed. 2009).
[30] *Id.* at 250 (providing that "but-for cause" is also termed "factual cause").
[31] *Id.* at 250 (providing that "proximate cause" is also termed "legal cause").

damages. Further, "if there is evidence suggesting that a plaintiff's actions contributed to her own injury it must be presented to the jury, which may then allocate fault accordingly under section 1451(a)".[32]

¶9 With respect to the negligence claim, the Court observes that contributory negligence is an affirmative defense, which Hicks pled in his First Amended Answer.[33] Further, Hicks' assertion that Todman was driving "very fast" immediately prior to the collision is sufficient to create a genuine issue of material fact as to contributory negligence and the cause of the extent of Todman's damages,[34] rendering summary judgment inappropriate on the issue of liability with regard to negligence.

¶10 As to the negligence *per se* claims, Hicks admits in his First Amended Verified Answer that he violated 20 V.I.C. § 503 (Operating motor vehicle in negligent manner) and 20 V.I.C. § 495 (Meeting; passing; turning; signals) by driving on the wrong side of the road.[35] Thus, Todman is entitled to summary judgment with regard to Hicks' liability for the violations of 20 V.I.C. § 503 and 20 V.I.C. § 495. In addition, because Hicks' admission to not driving on the

---

[32] *Machado*, 61 V.I. at 398. 5 V.I.C. § 1451 (Damages where contributory negligence) provides in relevant part:

(a) In any action based upon negligence to recover for injury to person or property, the contributory negligence of the plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff. The burden of proving contributory negligence shall be on the defendant. If such claimant is found by the trier of fact to be more at fault than the defendant, or, in the case of multiple defendants, more at fault than the combined fault of the defendants, the claimant may not recover.

Thus, under 5 V.I.C. § 1451(a), a defendant found liable for negligence must prove that a plaintiff is liable for any contributory negligence. If proven, the trier of fact must determine the plaintiff's degree of fault and apportion damages accordingly.

[33] *See* Defendant Hicks' First Amended Answer and Affirmative Defenses to First Amended Verified Complaint, pgs. 9-10, ¶ 4.

[34] *See* Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment on Liability, Exhibit A: Hicks' Affidavit, ¶ 12 ("Mr. Todman, who would have had to bear right at the intersection from Frenchman's Bay Road to Upper Havensight Road, was going very fast as he entered the intersection. I had no chance to correct my turn.").

[35] *See* Defendant Hicks' First Amended Answer and Affirmative Defenses to First Amended Verified Complaint, ¶ 37, ¶ 46.

left side of the road evidences a violation of 23 V.I.C. § 163 (Riding and driving; rules of the road), which provides that "[a]ll drivers and riders shall keep to their left on the road, or street, where they meet", there is no issue of material fact for trial regarding Hicks' liability for the violation of the statute, entitling Todman to summary judgment.[36]

C. Plaintiffs are not entitled to summary judgment on the negligent entrustment claim, because Plaintiffs have failed to present evidence in support of an essential element.

¶11 In their motion for summary judgment on liability, Plaintiffs also ask for summary judgment on the negligent entrustment claim.[37] Observing that the Virgin Islands Supreme Court has not yet determined the rule for a claim of negligent entrustment in the Virgin Islands, this Court agrees with the methodology, reasoning, and conclusions of the *Banks* analysis performed in *Faulknor v. Government of the Virgin Islands* and adopts the *Faulknor* Court's imprimatur of the Restatement (Second) of Torts § 390 as the soundest rule for the Virgin Islands.[38] Restatement (Second) of Torts § 390 provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.[39]

In support of their argument, Plaintiffs assert that (1) Thrifty Car Rental was the owner of the rental car, (2) Deft did business as Thrifty Car Rental, (3) Deft entrusted the car to Hicks without

[36] Plaintiffs do not make an argument, and thus, do not seek summary judgment regarding Hicks' alleged violation of 20 V.I.C. § 492 (Operating motor vehicles in reckless manner).
[37] *See* Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment on Liability, pgs. 6-7.
[38] *See* 60 V.I. 65, 88-89 (V.I. Super. Ct. 2014).
[39] Restatement (Second) of Torts § 390 (1979).

first investigating his driving record or knowing whether Hicks was unfit to drive for health reasons or poor driving skills, and (4) Deft failed to ascertain whether the tires or brakes were defective prior to renting the car to Hicks.[40] At a minimum, Plaintiffs produce no evidence demonstrating that Deft had affirmative knowledge or a reason to have knowledge indicating that Hicks was likely to use the vehicle in a manner involving the unreasonable risk of physical harm, as will be discussed in the next section. Accordingly, Plaintiffs are not entitled to summary judgement in their favor on the negligent entrustment claim.

D. Deft is entitled to summary judgment on Plaintiffs' negligent entrustment claim, because Plaintiffs have failed to present evidence in support of an essential element.

¶12 Deft argues that Plaintiffs have failed to present facts in support of their negligent entrustment claim.[41] Specifically, Deft disputes that Deft owned the rental car driven by Hicks and argues that, even if Deft owned the rental car, Plaintiffs have failed to show facts in support of an essential element of a claim for negligent entrustment.[42] In response, Plaintiffs make arguments identical to those included in their motion for summary judgment on negligent entrustment.[43] Plaintiffs contend that prior to supplying the vehicle to Hicks, Deft lacked knowledge regarding Hicks' fitness to drive and with respect to whether the tires or brakes on the vehicle could fail[44] but have not produced any evidence that could prove to a jury that the vehicle was negligently entrusted to Hicks. Thus, even assuming for argument that Deft supplied the

---

[40] *See* Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment on Liability, pgs. 6-7.
[41] *See* Deft's Motion for Summary Judgment, pgs. 7-13.
[42] *See id.* at 3-13.
[43] *Compare* Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment on Liability, pgs. 6-7 *with* Plaintiffs' Memorandum of Law In Opposition to Deft's Motion for Summary Judgment, pgs. 4-5.
[44] *See id.*

rental car to Hicks, Plaintiffs have failed to meet their burden to show affirmative evidence of knowledge or reason to know that the Hicks would use the vehicle in a manner involving unreasonable risk of physical harm to himself and others, an element that is required for a jury to find that Deft negligently entrusted the vehicle to Hicks. Hicks attested that he "momentarily forgot" to drive in the left lane, rather than the right,[45] and this does not prove that Deft knew or had a reason to know that Hicks was likely to drive in the wrong lane. Accordingly, Deft is entitled to summary judgment on the claim. Further, Mrs. Todman was not involved in nor did she experience any physical harm as a result of the collision, and thus, she could not sustain a claim for negligent entrustment even if the claim of negligent entrustment asserted against Deft could survive summary judgment.

E. Hicks is entitled to summary judgment on the gross negligence claim, since Todman has failed to produce evidence in support of a required element.

¶13 Hicks moves for summary judgment on the gross negligence claim, arguing that Todman has not presented evidence to demonstrate that Hicks behaved in a reckless or wanton manner.[46] Hicks asserts that he inadvertently drove in the wrong lane.[47] This Court adopts the *Banks* analysis conducted in *Yusuf v. Ocean Properties, Ltd., & Affiliates*, and its conclusion that the soundest rule for the Virgin Islands is to define gross negligence as "wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property."[48] The *Yusuf* Court distinguished gross negligence from negligence as follows:

> This approach is also favorable in that it equates gross negligence with a state of mind — reckless disregard — that is, at least in

[45] *See* Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment on Liability, Exhibit A: Hicks' Affidavit, ¶ 9 ("I drove in the wrong lane on April 2, 2014, because I momentarily forgot that Virgin Islanders drive on the left side of the road").
[46] *See* Hicks' Motion for Partial Summary Judgment, pgs. 4-6.
[47] *See id.*
[48] 2016 V.I. LEXIS 19, *11 (V.I. Super. Ct. Mar. 7, 2016).

> theory, different in quality and not merely in degree from ordinary negligence . . . [G]ross negligence, when defined in terms of wanton, reckless behavior, "tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent," and represents "an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care." Prosser and Keeton on Torts § 34 at 214. While some uncertainty doubtless remains as to what specific factual scenarios will constitute gross negligence in this formulation, the weight of authority from other jurisdictions using similar definitions of gross negligence makes it clear "that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention."[49]

¶14 Todman submits that whether Hicks' behavior constituted gross negligence or negligence is a matter of fact for the jury to decide rather than a matter of law.[50] While Todman testified that Hicks appeared distracted and was looking downward immediately prior to the collision, Todman also testified that he did not know whether Hicks used his cell phone while driving.[51] In

[49] *Id.* at *12-*13 (V.I. Super. Ct. Mar. 7, 2016). Notably, in *Milligan v. People of the V.I.*, 2018 V.I. Supreme LEXIS 27, *11 (V.I. 2018), the Virgin Islands Supreme Court distinguished between negligent and reckless driving, with respect to motor vehicle statutes 20 V.I.C. § 504 (Negligent homicide by means of motor vehicle) and 20 V.I.C. § 492 (Operating motor vehicles in a reckless manner), stating, "unlike negligence, which only requires a showing of carelessness, reckless driving requires the defendant to have demonstrated a malicious and purposeful indifference, *i.e.* willful or wanton disregard, for the safety of others." Similarly, this Court observes that 20 V.I.C. § 503 (Operating motor vehicle in negligent manner) states in relevant part:
"[T]o 'operate in a negligent manner' means the operation of a vehicle upon the public highways of this Territory in such a manner as to endanger or be likely to endanger any person or property."
By contrast, 20 V.I.C. § 492 (Operating motor vehicles in reckless manner) provides in pertinent part:
"[T]o 'operate in a reckless manner' means the operation of a vehicle upon the public highways of this Territory in such a manner as to indicate either a wilful or wanton disregard for the safety of person or property."
And, Chapter 43 on the Regulation of Traffic (§§ 491 — 513) in the V.I. Code includes statutes defining the negligent operation of a vehicle and the reckless operation of a vehicle but does not include a statute defining the grossly negligent operation of a vehicle. That the V.I. Code does not codify grossly negligent driving nor does it distinguish it as separate offense from reckless driving lends further support for concluding that the soundest rule for the Virgin Islands is to define gross negligence as "wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property."

[50] *See* Plaintiffs' Memorandum of Law in Opposition to Deft's Motion for Summary Judgment, pgs. 5-6.

[51] *See* Hicks' Motion for Partial Summary Judgment, Exhibit 2: Deposition of Ishmael Todman, Jr., pgs. 260, 263-265.

response, Hicks produced records from his cellular service provider showing that there was no activity immediately prior to or during the collision.[52] Accordingly, no evidence demonstrates that Hicks used his phone while driving prior to or during the accident.

¶15 Even if Hicks looked downward or was distracted immediately prior to or during the collision, Todman has not presented any evidence to show that, in so doing, Hicks was willfully distracted or possessed a conscious indifference to the health or safety of others. The record reflects only that Hicks momentarily, inadvertently forgot to drive on the left side of the road, and momentary forgetfulness does not exemplify willfulness or conscious indifference. Thus, Todman has failed to meet his burden to present any evidence to support an essential element of the claim of gross negligence, entitling Hicks to summary judgment on the claim.

F. Hicks is entitled to summary judgment on the claim for intentional infliction of emotional distress, because Plaintiffs have failed to present facts in support of an essential element.

¶16 Plaintiffs also assert a claim for the intentional infliction of emotional distress. For a claim of intentional infliction of emotional distress, the Superior Court has previously adopted as the best rule for the Virgin Islands the Restatement (Second) of Torts § 46(1), under which a defendant who, "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm

[52] *See* Hicks' Motion for Partial Summary Judgment, Exhibit 5: Gary Hicks' cell phone voice, messaging, and web usage. The parties do not dispute the police report's indication that the crash was reported at 10:49 a.m. (*see* Hicks' Motion for Partial Summary Judgment, Exhibit 4: Police Report, page 1; *see also*, Plaintiffs' Memorandum of Law in Opposition to Hicks' Motion for Partial Summary Judgment, page 5). Regarding voice usage, Hicks' mobile phone records show no activity between 8:02 a.m. and 10:52 a.m. on 4/2/2014. Regarding messaging and wireless web usage, no activity is listed for 4/2/2014. While Todman asserts that Hicks' cell phone records may not reflect Hicks' actual mobile phone activity, contending that such records do not show attempted calls or attempted texts, Todman fails to present affirmative evidence demonstrating that Hicks attempted to make any calls or texts.

to the other results from it, for such bodily harm."[53] Comment i. to the Restatement (Second) of Torts § 46 provides that an actor intentionally causes severe emotional distress "where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct."[54] Comment i. further provides that an actor recklessly causes emotional distress where he or she acts "in deliberate disregard of a high degree of probability that the emotional distress will follow."[55] Accordingly, to survive a motion for summary judgment on a claim for intentional infliction of emotional distress, a non-movant must, at a minimum, present evidence demonstrating that the defendant intentionally or recklessly caused severe emotional distress to another.

¶17 Here, Todman has failed to present any facts demonstrating that Hicks intentionally caused or deliberately disregarded a high degree of probability that Todman would suffer severe emotional distress or that Hicks exhibited intentional or reckless conduct at all. Though the First Amended Verified Complaint alleges that "Mr. Hicks intentionally used his smart phone" while driving,[56] as previously discussed, Todman admitted in a deposition that he never saw Hicks use

---

[53] *See Joseph v. Sugar Bay Club & Resort*, 2014 V.I. LEXIS 14, *7-9 (V.I. Super. Ct. Mar. 17, 2014) (overturned on other grounds). This Court endorses the *Banks* analysis conducted therein. *See also* Restatement (Second) of Torts § 46(1) (1979).

[54] Restatement (Second) of Torts § 46, cmt. i. (1979). Defining "intention" and "recklessness", comment i. provides:
"The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow."
The Restatement (Second) of Torts § 500 (1979) defines the "reckless disregard of safety" as:
"The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

[55] Restatement (Second) of Torts § 46, cmt. i. (1979).

[56] First Amended Verified Complaint, ¶ 79.

his smart phone while driving.[57] Further, Hicks' cell phone records do not reflect activity in the minutes prior to or during the collision.[58] Notwithstanding whether any facts in the record show either that Hicks exhibited extreme or outrageous conduct or that Todman suffered severe emotional distress, at a minimum, Todman has not presented any evidence to show that Hicks, behaved intentionally or recklessly by driving in the wrong lane or by any other conduct. Accordingly, Hicks is entitled to summary judgment on the claim.

¶18 Notably, Count IV of Plaintiffs' First Amended Verified Complaint, which outlines the claim for the intentional infliction of emotional distress, alleges that "Defendant has intentionally inflicted emotional distress on the Plaintiffs" and that "Plaintiffs have suffered damages" with respect to the claim for IIED.[59] Thus, it appears that Count IV of the First Amended Verified Complaint asserts an IIED claim against Hicks on behalf of Mrs. Todman, too. Because Mrs. Todman was not involved in the motor vehicle accident or even present at the scene when it occurred, under Restatement (Second) of Torts § 46(1), she lacks standing[60] to assert a claim of IIED against Hicks on behalf of Todman.

¶19 Further, the Plaintiffs pled the IIED claim under one count in the Complaint, and thus, failed to plead the claim under two separate counts if they intended to make an IIED for each of them, or two separate IIED claims.[61] V.I. R. CIV. P. 8(a)(2) states that "the pleading shall be set

[57] *See* Hicks' Motion for Partial Summary Judgment, Exhibit 2: Deposition of Ishmael Todman, Jr., pgs. 260, 263-265.
[58] *See* Hicks' Motion for Partial Summary Judgment, Exhibit 5: Gary Hicks' cell phone voice, messaging, and web usage.
[59] First Amended Verified Complaint, ¶¶ 103-104.
[60] *See Victor-Perez v. Diamondrock Frenchman's Owner, Inc.*, 2017 V.I. LEXIS 146, *3 (V.I. Super. Ct. Aug. 31, 2017) ("The Supreme Court of the Virgin Islands treats justiciability considerations—such as standing, ripeness, and mootness—as claims processing rules and it is well-established that courts may invoke claims processing rules *sua sponte* if the rule implicates judicial interests beyond those of the parties" (citing *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564-565 (V.I. 2012) and *Simon v. Joseph*, 59 V.I. 611, 629 (V.I. 2013)) (internal quotation marks and brackets omitted)).
[61] *See* First Amended Verified Complaint, ¶¶ 78-104.

forth in separate numbered paragraphs as provided in Rule 10(b),[62] with separate designation of counts and defenses for each claim identified in the pleading". For this Court to construe the IIED claim that is pled as a single claim under one count as two separate IIED claims would be both to the detriment of Hicks and call into question the impartiality of this Court.[63] Even if it would be proper for the Court to assume for argument that Mrs. Todman is attempting to assert a bystander claim for IIED against Hicks, Mrs. Todman fails to assert any facts or cite any legal authority in support of thereof, and the Court "will not make a [party]'s arguments for him [or her] when he [or she] has failed to do so."[64] Accordingly, the Court grants summary judgment in favor of Hicks and against Mrs. Todman on her apparent claim for intentional infliction of emotional distress.

II. Motion to amend answer

Deft's Motion for Leave to File an Amended Answer to Plaintiffs' First Amended Verified Complaint is denied as moot, because the Court has dismissed the negligent entrustment claim asserted against Deft.

---

[62] V.I. R. CIV. P. 10(b) provides, in part, "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense."
[63] *See Phillip v. Marsh-Monsanto*, 66 V.I. 612, 623 (V.I. 2017) ("The court may not assume the role of advocate or rewrite pleadings to include claims that were never presented . . . Requiring . . . courts to explore exhaustively all potential claims of a pro se plaintiff . . . would transform the trial court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party . . . Leniency in construing pleadings does not allow a court to re-draft the substance of a claim because a court cannot assist the pro se litigant to the detriment of the opposing party or to the point that the impartiality of the tribunal can be called into question") (internal citations, quotation marks, and brackets omitted). The *Phillip* Court's discussion regarding the lenient pleading standard for pro se plaintiffs implies that for a court to construe two claims out of one under the stricter pleading standard for represented parties would be in derogation of the court's role.
[64] *Joseph v. Joseph*, 2015 V.I. LEXIS 43, *5 (V.I. Super. Ct. Apr. 23, 2015) (citing *People of the Virgin Islands v. Penn*, 53 V.I. 315, 318 (V.I. Super. Ct. 2010) and *Schneider's Dairy v. Serv. Pers. & Emples., Teamsters Local Union No. 205*, 2013 U.S. Dist. LEXIS 174350, *5-6 n.1 (W.D. Pa. Dec. 10, 2013) ("[i]t is not the Court's job to research and construct legal arguments open to parties ... In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate[.]") (internal citation omitted)). *See also Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 823 (V.I. 2017) (quoting *Simpson v. Golden*, 56 V.I. 272, 280-281 (V.I. 2010) ("The rules that require a litigant to brief and support his arguments, both here and before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument before it is presented to this [Virgin Islands Supreme] Court")).

¶20 On March 7, 2019, Deft moved to amend its April 10, 2017, Amended Answer to Plaintiffs' March 3, 2017, Verified Amended Complaint. "A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion"[65] so that a "court's decision on [the] pending motion [would] be 'hypothetical or academic' or without any 'practical significance[.]'"[66] "In that instance, the motion should be dismissed or denied as moot because a decision [would] have no practical impact in the case however the court decides the motion."[67] Because this Court has dismissed the negligent entrustment claim asserted against Deft, Deft's Motion to Amend its Amended Answer to Plaintiff's First Amended Verified Complaint must be denied as moot.

III. Punitive damages

Hicks' request to dismiss Plaintiff Todman's plea for punitive damages is granted, because no claims that would support an award of punitive damages remain in this case.

¶21 In his motion for summary judgment, Hicks' asks the Court to dismiss Todman's request for punitive damages.[68] While a request for punitive damages is not an independent cause of action,[69] and Hicks has cloaked a motion to strike a request for punitive damages in the form of a motion for summary judgment, punitive damages are nonetheless not a permitted form of

---

[65] *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, *11 (V.I. Super. Ct. 2014) (citations omitted).
[66] *Id.* at *12 (citing BLACK'S LAW DICTIONARY 1099 (9th ed. 2009)); *see also id.* at *12-13 (citing *Oparaji v. N.E. Auto-Marine Terminal*, 437 Fed. Appx. 190, 193, n.1 (3d Cir. 2011) ("A motion is moot when a court is unable to fashion any form of meaningful relief") and *Carlock v. Kmart Corp.*, 227 Ga. App. 356, 489 S.E.2d 99, 104 (1997) ("A motion is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.")).
[67] *Id.* at *13.
[68] *See* Hicks' Motion for Partial Summary Judgment, pgs. 11-12. Deft also requests the dismissal of Todman's request for punitive damages (*see* Defts' Motion for Partial Summary Judgment, pgs. 6-7. But, no claims asserted against Deft will remain in this case following this opinion, rendering Deft's request moot.
[69] *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, n.6 (V.I. 2015) (observing that a request for punitive damages is not an independent cause of action and that consideration of punitive damages is not appropriate at summary judgment).

damages for any of the claims remaining in this case—negligence *per se*, negligence, and loss of consortium.[70] Thus, Hicks' request is granted.

IV. Motions in limine

Hicks' motions in limine to exclude any pretrial disclosures that Plaintiffs may file are premature and deferred until Hicks submits arguments regarding any specific disclosures.

¶22 Finally, on April 2, 2019, Hicks filed two motions in limine. Hicks' first motion in limine to exclude Plaintiffs' exhibits and witnesses not disclosed asks the Court to preclude any of Plaintiffs' pretrial disclosures not yet made.[71] Similarly, Hicks' second motion asks the Court to disallow Plaintiffs from submitting evidence regarding lost income, gross negligence, the intentional infliction of emotional distress, and punitive damages.[72] "The purpose of a motion *in limine* is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence."[73] "In general, on a motion *in limine* the moving party has the burden to show that the evidence is irrelevant or should be excluded."[74] Under V.I. R. CIV. P. 37(c)(1), generally, the Court may exclude evidence if a party fails to provide information required by Rule 26, unless the failure was substantially justified or is harmless.[75] V.I. R. CIV. P.

---

[70] Following the Court's dismissal of the gross negligence and intentional infliction of emotional stress claims, the claims remaining in this case are negligence *per se*, negligence, and loss of consortium.
[71] *See* Motion in Limine to Exclude Exhibits and Witnesses Not Disclosed Pursuant to V.I. R. CIV. P. 26(a)(3), pgs. 1-2.
[72] *See* Motion in Limine to Exclude Evidence of Past Lost Income, Future Lost Income, and Future Loss of Earning Capacity; Gross Negligence; Intentional Infliction of Emotional Distress, and Punitive Damages.
[73] *In re Asbestos, Catalyst & Silica Toxic Dust Exposure Litig.*, 68 V.I. 507, 522 (V.I. Super. Ct. 2018) (quoting *People v. Hatcher*, 68 V.I. ___, ___, 2018 V.I. LEXIS 34, at *4 (V.I. Super. Ct. 2018) (citations omitted)).
[74] *Id.* at 520.
[75] V.I. R. CIV. P. 37(c)(1) provides:
(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> (B) may inform the jury of the party's failure; and
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

26(a) provides that "a party must, without awaiting a discovery request, provide to the other parties ... a copy ... of all documents ... the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment". If disclosures or responses are shown later to be "incomplete or incorrect", a party has a duty to supplement the disclosures or responses unless the additional or corrective information has "otherwise been made known to the other parties during the discovery process."[76]

¶23 Hicks argues that jury selection is set for April 23, 2019, and that Plaintiffs have not yet made any pretrial disclosures.[77] After Hicks filed his motions, the parties filed a Joint Pre-Trial Brief on April 15, 2019, containing a list of Plaintiffs' exhibits and witnesses for trial.[78] Because the Court must know what evidence Hicks seeks to exclude before ruling on the motions in limine, Hicks' motions in limine are premature and are deferred until Hicks supplements his motions with any arguments regarding specific disclosures.

CONCLUSION

¶24 For the foregoing reasons, Plaintiffs' motion for summary judgment on liability is granted with respect to the negligence *per se* violations of 20 V.I.C. § 503, 20 V.I.C. § 495, and 23 V.I.C. § 163, and denied with respect to the negligence and negligent entrustment claims. Hicks' motion for partial summary judgment is granted, and the gross negligence and IIED

---

[76] V.I. R. CIV. P. 26 Reporter's Note (Committee Discussion Point: "*Supplementation of disclosures and discovery responses is required by Subpart (e) of Rule 26, and is applicable two the initial disclosures as well as responses to interrogatories, requests for production or requests for admissions. Where those responses are shown later to be "incomplete or incorrect" supplementation is required if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. This updating requirement is also applicable with respect to expected expert testimony, and applies both to statements in the required "report" of the expert and to testimony given by the expert in any deposition.*").

[77] *See* Motion in Limine to Exclude Exhibits and Witnesses Not Disclosed Pursuant to V.I. R. CIV. P. 26(a)(3), page 2.

[78] *See* Joint Pre-Trial Brief.

claims are dismissed. Deft's motion for partial summary judgment is granted, and the gross negligence and IIED claims are dismissed. Defts' motion for summary judgment is granted, and the negligent entrustment claim is dismissed. The portions of Hicks' and Defts' individual motions for partial summary judgment, which each ask the Court to dismiss Plaintiffs' request for punitive damages, are granted. Deft's motion to amend its answer is denied as moot. Lastly, Hicks' motions in limine to exclude evidence are deferred until Hicks supplements his motions with any arguments regarding specific disclosures. An Order consistent with this Opinion shall follow.

Dated: April 17, 2019

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

~~ATTEST:~~ Estrella George
Clerk of Court ____/____/____

by:
Lori Boynes-Tyson
Court Clerk Supervisor 4/23/19

A CERTIFIED TRUE COPY
DATE 4/25/2019
ESTRELLA H. GEORGE
CLERK OF THE COURT
BY
LATOYA A. CAMACHO
COURT CLERK II