IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JAIME LEMBACH,	)	
	)	
Plaintiff,	)	**CASE NO. ST-12-CV-613**
	)	
v.	)	
	)	
ANTILLES SCHOOL, INC.,	)	**ACTION FOR DAMAGES**
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Before the Court is Defendant Antilles School, Inc.'s November 26, 2014, Post-Trial Renewed Motion which requests judgment as a matter of law, remittitur, a new trial or new trial on the issue of damages.[1] Plaintiff Jaime Lembach filed his opposition December 23, 2014, to which the Defendant replied on January 9, 2015.

Defendant argues that it is entitled to relief because: the evidence was not sufficient for the jury to have reached a verdict in favor of the Plaintiff; Plaintiff's expert should not have been permitted to testify; the Court erred in not permitting a defense witness to testify; the jurors were erroneously instructed on general negligence in addition to premises liability; and the verdict was excessive. Plaintiff responded that the evidence presented was sufficient to support a verdict; the expert's testimony was in line with the Court's September 12, 2014, Order; the exclusion of testimony was proper; the parties stipulated to using one liability question; Plaintiff stipulated to the damage award; and Defendant's remaining arguments have already been addressed by the Court at or before trial. Defendant replied that Plaintiff failed to cite evidence sufficient to establish the elements of a claim for premises liability; the expert's testimony was not relevant,

[1] The Court denied Defendant's request for new trial on the alleged irregularity of the verdict by Order dated February 25, 2015. Defendant's November 3, 2014, motion to file a memorandum in excess of 20 pages was granted by Order dated November 10, 2014.

was unduly prejudicial, and violated the Court's September 12, 2014, Order; Defendant only stipulated to the amounts billed, not the amounts recoverable; the denied defense witness was a proper response to Plaintiff's expert witness; the Defendant properly objected to the jury instructions; and it is for the Court to determine whether the damages are excessive.

The Court finds that the jury's findings were reasonable and that the evidence presented at trial was sufficient to support the jury's verdict. Plaintiff's Motion for Judgment as a Matter of Law and Alternatively for a New Trial is denied.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Plaintiff, who was injured when he fell off of a walkway on Defendant's property on January 28, 2012, filed a Complaint on October 25, 2012, alleging negligence (Count I) and premises liability (Count II). Defendant filed its Answer and Affirmative Defenses on November 16, 2012, denying any responsibility for Plaintiff's injuries. A jury trial was begun on September 30, 2014, and the jury returned a verdict in Plaintiff's favor on October 2, 2014. The jury was polled at the Defendant's request, whereupon the jury affirmed its findings.

STANDARD OF REVIEW – RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW[2]

Under Fed. R. Civ. P. 50(b), "[i]f the Court does not grant a motion for judgment as a matter of law made under Rule 50(a),[3] the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." The movant "may file a renewed motion... and may include an alternative or joint request for a new trial

[2] A motion for judgment as a matter of law ("JMOL") made after a jury verdict is also known as a motion for judgment notwithstanding the verdict ("JNOV").
[3] A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury, and the motion must specify the judgment sought and the law and facts that entitle the movant to the judgment. FED. R. CIV. P. 50(a)(2).

under Rule 59."[4] "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."[5]

The Court should only enter judgment as a matter of law 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 [have drawn its findings]."[6] In deciding the motion, the Court "should review the record as a whole"[7] and "must refrain from weighing the evidence, determining the credibility of the witnesses, or substituting [its] own version of the facts for that of the jury."[8]

It is "the exclusive power of juries to weigh evidence and determine contested fact issues."[9] "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence... of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied".[10] Therefore, a jury verdict will not be disturbed if "the record contains [even] the minimum quantum of evidence from which a jury might reasonably afford relief."[11]

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[4] FED. R. CIV. P. 50(b).
[5] *Id.*
[6] *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2013) (further citation omitted).
[7] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000).
[8] *Chestnut*, 59 V.I. at 475 (further citation omitted).
[9] *Berry v. United States*, 312 U.S. 450, 452-53 (1941) (citations omitted).
[10] *Hunter on Behalf of Hunter v. Knoll Rig & Equip. Mfg. Co., Ltd.*, 70 F.3d 803, 808 (5th Cir. 1995) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc)).
[11] *Ross v. Hodge*, 58 V.I. 292, 301 (V.I. 2012) (quoting *Mosley v. Wilson*, 102 F.3d 85, 89 (3d Cir. 1996)).

Fed. R. Civ. P. 50 gives the Court "the right... to enter a judgment contrary to the jury's without granting a new trial"[12] and was "adopted for the purpose of speeding litigation and preventing unnecessary retrials."[13]

STANDARD OF REVIEW – NEW TRIAL

Pursuant to Superior Court Rule 50, "for good cause shown, the Court, upon application and notice to the adverse party, may set aside... judgment after trial or hearing," and Federal Rules of Civil Procedure 59, 60 and 61 "shall govern such applications." Under Fed. R. Civ. P. 59(a), "[t]he court may, on motion, grant a new trial on all or some of the issues... after a jury trial for any reason for which a new trial has heretofore been granted in an action at law in federal court". "The authority to grant a new trial in a jury action is purely discretionary... [and] must be exercised with care and circumspection."[14] "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".[15]

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."[16] 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."[17]

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[12] *Berry*, 312 U.S. at 452-53.
[13] *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940).
[14] *Frank v. Atl. Greyhound Corp.*, 177 F. Supp. 922, 923 (D.D.C 1959) aff'd, 280 F.2d 628 (D.C. Cir. 1960).
[15] FED. R. CIV. P. 61.
[16] *Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3d Cir. 1972) (cited by *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. V.I. 1976)).
[17] *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1271 (D.V.I. 1974) aff'd, 524 F.2d 767 (3d Cir. 1975).

The Court now applies these standards.[18]

DISCUSSION

I. Judgment Notwithstanding the Verdict

Before trial, the Court denied Defendant's motion for summary judgment in which Defendant argued that Plaintiff failed to show that Defendant "owed any duty to erect a different barrier along the walkway or that the lack of such a barrier was the proximate cause of Plaintiff's injuries."[19] Defendant moved for judgment as a matter of law at the conclusion of the case, which the Court denied, and Defendant renews its argument here as a judgment notwithstanding the verdict (JNOV).

When reviewing a request for a judgment notwithstanding the verdict, the Court must determine if "the record contains [even] the minimum quantum of evidence from which a jury might reasonably afford relief."[20] While relief under Fed. R. Civ. P. 50 "should be granted sparingly," Defendant correctly points out that "a scintilla of evidence is not enough to sustain a verdict of liability."[21] However, Defendant presumes that the standard under which its motion

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[18] Under Super. Ct. R. 50, which encompasses Fed. R. Civ. P. 59 through 61, the Court may grant a new trial in both jury and nonjury trials, FED. R. CIV. P. 59(a)(1), but may only amend the verdict of a non-jury trial. FED. R. CIV. P. 59(a)(2) (further actions in a nonjury trial, which include granting a new trial or "amend[ing] findings of fact and conclusions of law or mak[ing] new ones"). *See* FED. R. CIV. P. 60(a) (corrections based on clerical mistakes, oversights and omissions); FED. R. CIV. P. 60(b) (grounds for relief from a final judgment, order or proceeding) and FED. R. CIV. P. 60 (harmless error); *see also* LRCi 7.3 (relief from interlocutory orders), FED. R. CIV. P. 59(e) and 60(b) (motions for reconsideration of final orders). Fed. R. Civ. P. 50 is the appropriate rule to apply to requests for judgment as a matter of law in jury matters because it encompasses additional relief to the parties, including judgment on the verdict, new trial, or entry of judgment, when appropriate, while Super. Ct. R. 50 guides the Court regarding new trial. It should also be noted that while Super. Ct. R. 50 requires a motion by a party, the Court may order a new trial *sua sponte* via its inherent powers. *Compare* FED. R. CIV. P. 59(d) (which allows the Court to order a new trial on its own initiative) and Super. Ct. R. 50 (which requires that the request be made by motion). Because "[t]he practice and procedure in the Superior Court [is] governed by the Rules of the Superior Court [when] not inconsistent [with the Local and Federal Rules]" under Super. Ct. R. 7, the requirements of Super. Ct. R. 50 take precedence over any conflicting Federal Rules. Additionally, the Superior Court Rules do not track the Federal Rules of Civil Procedure.

[19] Defendant's brief, p. 5.

[20] *Ross*, 58 V.I. 292, at *4.

[21] *Jarvis v. Gov't of the V.I.*, 33 V.I. 151, 155 (D.V.I., App. Div. 1996) (citations omitted).

for summary judgment was denied was that of merely a scintilla of evidence,[22] when, in order to survive summary judgment, the non-moving party must present evidence that amounts to "more than a scintilla, but may amount to less than a preponderance."[23] It is at trial – and in consideration of a movant's motion for judgment notwithstanding the verdict – that the Plaintiff has the burden of proving the elements of the causes of action by a preponderance of the evidence. The Court will review the jury's findings to determine if it is "more likely than not"[24] that each element was established. If not, the Court will then determine whether it will order a new trial or direct the entry of judgment as a matter of law.

A. Count I – Negligence

The jury was instructed that "[i]n order to prove the cause of action for negligence as alleged in Count I of the Complaint, the Plaintiff must prove the following elements by a preponderance of the evidence:

1. On or about January 28, 2012, on St. Thomas, U.S. Virgin Islands,
2. Defendant Antilles School, Inc., had a duty to act with reasonable care to protect the Plaintiff,
3. Defendant failed to carry out that duty,
4. Plaintiff suffered an injury, and
5. Plaintiff's injury was proximately caused by Defendant's failure to fulfill that duty."[25]

Both parties contributed to the creation of the jury instructions and verdict form,[26] and the parties stipulated that the incident occurred on Defendant's property on January 28, 2012.

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[22] Defendant's brief, pp. 3 and 5.
[23] *Modern Day Construction v. Carty*, Civ. No. ST-09-CV-608, 2013 WL 2996549, at *2 (V.I. Super. Ct. June 13, 2013) (quoting *Wheatley*, 2012 WL 203480 at *2); September 12, 2014, Opinion, p. 2.
[24] *In the Matter of V.I. Bar Ass'n Comm. on the Unauthorized Practice of Law*, 59 V.I. 701, 716 (V.I. 2013) (citation omitted) ("To prevail under a preponderance of the evidence standard, one needs only to prove that it is more likely than not that an event occurred").
[25] Jury Charge, The Elements of Negligence.
[26] For example: Defendant's October 1, 2014, Memorandum in Support of Request for Curative Instruction Regarding Alleged Cigna Lien; Plaintiff's Requested Non-Standard Instruction No. 1 Punitive Damages, signed September 26, 2014; Defendant's September 30, 2014, First Supplemental Jury Instructions; Defendant's October 1,

"[T]he foundational elements of negligence [are] (1) a legal duty of care to the plaintiff [and] (2) a breach of that duty of care by the defendant, (3) constituting the factual and legal cause of (4) damages to the plaintiff."[27]

i. Duty

Although public policy dictates that "every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others," one does not "owe a duty to everyone at all times."[28] Duty, in the sense of negligence, is created when there is a legal requirement that an actor "conduct or not conduct himself in a particular manner."[29] Duty, then, does not require actual notice of the potential harm, but instead refers to "the degree of diligence which one must observe in the performance of his common-law duty to use care to prevent injury to others."[30] Notice goes to whether this general legal duty has been breached.

2014, Objections to Draft Jury Instructions Furnished on September 30, 2014; Defendant's October 1, 2014, Proposed General Verdict Form; Plaintiff's October 1, 2014, Proposed Jury Instructions; October 1, 2014, Jury Instructions Conference; October 1, 2014, Colloquy.

[27] *Machado v. Yacht Haven U.S.V.I.*, 2014 V.I. Supreme LEXIS 51, at *7 (V.I. 2014) (citations omitted); *White v. Spenceley, LLC*, 53 V.I. 666, at *3 (V.I. 2010) (*citing* RESTATEMENT (SECOND) OF TORTS § 281) (other citations omitted) (numbers added for clarity). Restatement (Second) of Torts § 281 spells out the elements of a negligence claim and is the common law within our jurisdiction, as established by various binding authorities. For example: *Sealy-Christian v. Sunny Isle Shopping Center, Inc.*, 52 V.I. 410, at *4 (V.I. 2009); *Mill Harbour Condo. Owners Assoc. v. Marshall*, 53 V.I. 581, at *2 (V.I. 2010); *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, at *22 (V.I. 2012); *Turbe v. Gov't of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991) (on appeal from D.V.I.); *In re Barbel*, 191 F. App'x 101, 104 (3d Cir. 2006) (on appeal from D.V.I.). The Court's reliance on additional sections of Division 2, Negligence, of the Restatement (Second) of Torts, to define, clarify or expand upon these elements is in line with our local common law. Therefore, reference to additional sections of Division 2 does not necessitate additional *Banks* analysis. See *Gov't of the V.I. v. Connor*, S.Ct. Civ. No. 2013-0095, 2014 WL 702639, at *3 (V.I. Feb 24, 2014), referencing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) ("[T]he Superior Court, when considering a question not foreclosed by prior precedent... must perform a three-part analysis as set forth in *Banks*").

[28] *Rodriguez v. Intel Corp.*, 2014 Del. Super. LEXIS 36, 29 (Del. Super. Ct. Jan. 28, 2014); see also *Felix v. Varlack Ventures*, 12 V.I. 436, 439 (V.I. Mun. Ct. 1976) ("[T]he Court concludes that defendant had no duty of care to the plaintiff other than the negative duty of doing nothing to injure plaintiff").

[29] Restatement (Second) of Torts § 4 cmt. a.

[30] ORDINARY CARE, BALLENTINE'S LAW DICTIONARY (2010).

ii. Breach of Duty

"[B]reach of a duty... does not make the actor liable. It merely subjects him to liability" and "whether or not he is liable depends upon whether his breach of duty results in an injury to someone to whom the duty is owing".[31]

Defendant argues that "the evidence was uncontradicted that there has never been any fall from the walkways bridge in the entire time it existed."[32] Defendant's witness Amy Gurlea testified that she knew "of nobody that has fallen or tripped at that location"[33] and that she was never advised that the bridge was unsafe.[34] Defendant's witness Michael Hughes, the head master of the school, testified that he inspected the entire campus the night of the event "to make sure that it was, indeed, safe,"[35] and that "hundreds of kids every day for 11, 12 years have been over that bridge, [w]e've had hundreds of events at night" and "[t]here's never been an issue."[36]

Hughes also testified that "[a] permit was approved by [the Virgin Islands Department of Planning and Natural Resources ('DPNR')]" and that "[the plans were] certified as safe."[37] Defendant adds that a School Safety Committee performed "walk arounds" to conduct safety checks of the premises, and that no concerns were raised about the bridge during the Middle States Accreditation process, "in which a team of six or eight people reviews 'the entire campus inside and out'".[38] However, prior inspections and building permits do not shield a land owner

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[31] Restatement (Second) of Torts § 4 cmt. a.
[32] Defendant's brief, p. 6, citing to the transcript.
[33] Jury Trial, Vol. I, p. 147.
[34] *Id.* at 179.
[35] *Id.* at 347.
[36] *Id.* at 349.
[37] *Id.* at 340.
[38] Defendant's brief, pp. 6-7, citing to the transcript.

from its duty of care,[39] especially if the jury found that such reliance, in the face of evidence that the walkway was dangerous, was not reasonable. While an invited guest "who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes,"[40] the evidence supports the jury's apparent conclusion that Plaintiff had no knowledge of the condition of the bridge or the dangers it could pose.

And while prior events and inspections can provide notice of a dangerous condition that would give rise to a duty[41] when a plaintiff fails to introduce evidence of actual notice, a reasonable jury can still find from the evidence that the defendant had constructive notice of a dangerous condition.[42] "[E]vidence that the owner 'should have discovered the danger and taken steps to remedy it' can establish constructive notice,"[43] which, just as actual notice, gives rise to a duty of care to the plaintiff. Again, the test is not just whether the Defendant *did* discover the dangerous condition and thus had actual notice. The test for constructive notice is whether the Defendant *should* have realized that the bridge posed a danger to the Plaintiff.[44] That the property was regularly inspected[45] does not foreclose a conclusion that the Defendant overlooked a risk of harm, even if no one had previously fallen in that location. Instead, regular inspections could reasonably be interpreted by the jury as repeated failures to comprehend the risk.

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[39] See *Harris v. Ir. Truck Lines*, 11 Cal. 3d 373, 380 (Cal. 1974) ("[T]he jury could not determine whether the limited inspection and maintenance of the five-ton truck negated negligence").
[40] Restatement (Second) of Torts § 343A, cmt. e.
[41] *Machado*, 2014 V.I. Supreme LEXIS 51, at *31 ("[Plaintiff] failed to introduce evidence showing that [Defendant] knew of other people tripping over the sprinkler heads"); *Gumbs v. Pueblo International, Inc.*, 823 F.2d 768, 770 (3d Cir. V.I. 1987) ("[Defendant] had conceded that it had had actual notice of the spilled oil").
[42] *Machado*, 2014 V.I. Supreme LEXIS 51, at *31.
[43] *Id.* (quoting *Williams v. United Corp.*, 50 V.I. 191, 195 (V.I. 2008)).
[44] Restatement (Second) of Torts § 12 ("The words 'should know' are used throughout the Restatement of this Subject to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists").
[45] Defendant's brief, pp. 6 and 7 (citing to the record).

"In order to show constructive notice, courts applying Virgin Islands law have typically required plaintiffs to demonstrate that the condition existed long enough before the injury that the possessor should have discovered it in the exercise of reasonable care."[46] Defendant states that the bridge was built on the property in 2001, eleven (11) years before the 2012 incident.[47] In short, the proof at trial included evidence that Defendant knew: that the bridge had a low wall separating pedestrians from the five (5) to nine (9) foot drop to the gut below;[48] that the walkway did not have a railing above the wall;[49] that the bridge was traversed daily by children and adults;[50] and that the property hosts events that are open to the community.[51]

Michael Hughes testified that the bridge "was very well lit" with "over 20 lights that you can see from the bridge area"[52] and Amy Gurlea testified that the bridge – which was considered both a road and a pedestrian walkway[53] – had speed bumps.[54] However, inadequate lighting and excessive vehicular speed are not the only dangers that a bridge can pose to pedestrians. Gurlea testified that a bridge with a nine (9) foot drop[55] did not have a railing.[56] "The qualities which primarily characterize the reasonable man... are normal acuteness of perception and soundness of judgment."[57] Further, the Court instructed the jury that the occurrence of an accident does not necessarily mean that a party was negligent.[58] The evidence supports a conclusion by the jury

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[46] *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 530 (V.I. 2013) (citations omitted).
[47] Defendant's brief, p. 7.
[48] Jury Trial, Vol. I, p. 267.
[49] Testimony of Plaintiff's Expert, Rosie Mackay.
[50] Jury Trial, Vol. I, p. 349.
[51] *Id.* at p. 178.
[52] *Id.* at p. 347.
[53] *Id.* at p. 102.
[54] *Id.* at p. 104.
[55] Testimony of Plaintiff's Expert, Rosie Mackay.
[56] Jury Trial, Vol. I, p. 137.
[57] Restatement (Second) of Torts § 11 cmt. a.
[58] Jury Charge.

that Plaintiff's accident was not unavoidable[59] and that the Defendant breached a duty to the Plaintiff to take affirmative measures to protect the Plaintiff, such as warn him of the dangerous drop off, close the bridge to pedestrian traffic, or add railings to the bridge; or breached a duty to place a railing along an oft-used bridge with a low wall over a high drop.

iii. Damages

The parties do not contest that the Plaintiff was harmed by the January 28, 2012, fall.

iv. Proximate Cause

"In order for the negligent act to be regarded as the cause in fact of the injury, it must be shown that the injury would not have occurred but for the act."[60] Defendant argues that "there is no evidence that violation of the alleged [building] standard is the proximate cause of any injuries."[61] But, compliance with minimum code standards does not mean that a defendant does not have any further duty of care to a plaintiff.[62] In fact, even if the Plaintiff knew that the Defendant had failed to meet the minimum standards of the building code, that fact would not serve as a blanket defense for the Defendant. "[K]nowledge of the violation is material only in determining whether the [Plaintiff] is to be charged with contributory negligence, or assumption

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[59] Restatement (Second) of Torts § 8 cmt. a ("The words 'unavoidable accident'... indicate that the particular harm which is said to be accidentally inflicted is not caused by any conduct of the actor which is intended to bring about such a harm, or is negligent as creating an unreasonable risk of bringing it about, or results from an activity which is carried on at the risk of answering for any harm that results from the mere fact that it has miscarried").
[60] *Brady v. Cintron*, 55 V.I. 802, 823-824 (VI. 2011) (citation omitted).
[61] Defendant's brief, p. 7 (citing to its own October 1, 2014, oral motion for judgment as a matter of law).
[62] See, for example, *Graham v. Wyeth Laboratories, Div. of American Home Products Corp.*, 906 F.2d 1399, 1405 (10th Cir. Kan. 1990) ("[F]ederal pre-emption does not prevent state tort law awards arising from improperly manufactured drugs or vaccines, even in situations where the drugs or vaccines have met the FDA's minimum standards for licensing"). And, for example, the Virgin Islands Department of Planning and Natural Resources, Division of Building Permits only "inspects all construction activity throughout the Territory to ensure *minimum* local and national building code compliance," BUILDING PERMITS, DEPARTMENT OF PLANNING AND NATURAL RESOURCES, dpnr.vi.gov (last visited on February 24, 2015) (emphasis added), which may fall below the foreseeability standard for premises liability.

of risk, in coming in contact with the dangerous condition."[63] The evidence supports a finding by a reasonable jury that the Plaintiff would not have fallen from the walkway had Defendant not breached its duty of care (a duty that was not dependent on minimum building standards) because the Defendant should have anticipated the danger that the pedestrian bridge posed to a disabled member of the public.

B. Count II - Premises Liability

Defendant argues that its testimony "demonstrated through overwhelming evidence that [the walkway] was not a 'dangerous condition, and that the [Defendant] had no reason to believe that it presented an unreasonable risk of harm, that anyone would fail to 'discover' it, or that anyone had to be protected against it."[64]

The applicable standard of care is found in the Restatement (Second) of Torts § 343,[65] whereby "[a] possessor of land is subject to liability for physical harm... by a condition on the land[66] if, but only if he:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to [the Plaintiff], and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

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[63] Restatement (Second) of Torts § 343A cmt. d. "[T]he fact that the visitor knows that the possessor has not complied with the requirements of the statute does not prevent the possessor from being subject to liability for his breach of his statutory duty. Such knowledge of the violation is material only in determining whether the visitor is to be charged with contributory negligence, or assumption of risk, in coming in contact with the dangerous condition." See also *Machado v. Yacht Haven U.S.V.I.*, 2014 V.I. Supreme LEXIS 51, 34-35 (VI. 2014) ("[E]vidence that the lighting and parking lot layout complied with Virgin Islands law does not preclude a finding of liability. If the parking lot did indeed comply with Virgin Islands law, this would be persuasive evidence to present to a jury, yet it would not absolve Yacht Haven of liability as a matter of law").

[64] Defendant's brief, p. 6.

[65] September 12, 2014, Opinion, p. 5 (citing *Joseph v. Speedy Gas, Inc.*, 55 V.I. 1219, 1227 (D.V.I., App. Div. 2011)) and *Bright v. United Corp.*, 50 V.I. 215, 223 (V.I. 2008); further citations omitted). "Section 343 is to be read in conjunction with section 343A." *Sealey-Christian v. Sunny Isle Shopping Ctr., Inc.*, 52 V.I. 410, 424 (V.I. 2009); Restatement (Second) of Torts § 343.

[66] Element 2, Jury Charge, Dangerous Condition.

> (c) fails to exercise reasonable care to protect them against the danger."[67]

The jury instructions regarding Count II, premises liability, were in line with Section 343, and the Court broke down the elements for the jury as follows:

> 1. On or about January 28, 2012, on St. Thomas, Virgin Islands,
> 2. Defendant created or permitted a dangerous condition to exist on the campus of Antilles School,
> 3. Defendant knew of, or by the exercise of reasonable care should have discovered, the dangerous condition,
> 4. Defendant should have realized that the dangerous condition involved an unreasonable risk of harm to Plaintiff,
> 5. Defendant should have expected that Plaintiff would not discover or realize the dangerous condition or would fail to protect himself from it,
> 6. Defendant failed to exercise reasonable care to protect Plaintiff against the dangerous condition,
> 7. Plaintiff suffered an injury, and
> 8. Plaintiff's injury was proximately caused by the dangerous condition."[68]

The jury was instructed that a claim for premises liability, though also a negligence claim, involves a purposeful – i.e., intentional – creation or allowance of a dangerous condition upon the property.[69],[70] In the Virgin Islands, the common-law distinction between invitees, licensees and trespassers has been abolished.[71]

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[67] Defendant incorrectly summarizes Section 343, element (a), stating that a possessor of land is subject to liability "'if, and only if' the possessor... knows of a condition that poses an 'unreasonable risk of harm' to invitees," Defendant's brief, p. 7, while glossing over the "should have" discovered portion of the rule – a possessor is equally as liable if "by the exercise of reasonable care [he] would [have] discover[ed] the condition". Restatement (Second) of Torts § 343(a). The "should have" portion of the rule is in line with Virgin Islands precedents that "the touchstone of premises liability in the Virgin Islands is foreseeability". *Machado*, 2014 V.I. Supreme LEXIS 51, at *34. In fact, Defendant is well aware that the standard it argues here is incomplete. *See* September 12, 2014, Memorandum Opinion, pp. 4-5 ("The Court finds that the... argument... that Defendant lacked actual knowledge that the bridge was unsafe... is immaterial to the Court's decision... because actual knowledge is unnecessary under the relevant standard, the Restatement (Second) of Torts § 343... Rather, Defendant adequately raised the argument in its initial motion [for summary judgment] that Plaintiff has presented no evidence to establish that Plaintiff should have known through the exercise of reasonable care of the unreasonable risk of harm").

[68] Jury Charge, Dangerous Condition.

[69] As stated, the common-law distinction between invitees, licensees and trespassers has been abolished in the Virgin Islands and replaced with a foreseeability standard. *Machado*, 2014 V.I. Supreme LEXIS 51. Note, however, that Restatement (Second) of Torts § 343 addresses the duty of a land possessor to an invitee, and the jury instructions were in line with this Restatement section. The common law standard of care owed to an invitee (An invitee "is... entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or

i. Knowledge of the Defendant

"The touchstone of premises liability in the Virgin Islands is foreseeability - if a possessor could anticipate that the conditions on its property would result in injury to those foreseeably using the property, the possessor can be held liable for those injuries."[72] While Defendant states that the Defendant must have had actual knowledge that the condition posed an unreasonable risk of harm,[73] the standard in the Virgin Islands and under Section 343 is that of foreseeability. And as discussed above, the evidence supports a reasonable conclusion that the Defendant should have reasonably anticipated that a low wall on the bridge would be inadequate to prevent a pedestrian from being harmed on its property at night.

ii. Discovery by the Plaintiff

The next consideration in a claim of premises liability is whether the Defendant should have expected that the Plaintiff would not discover or realize the danger or that the Plaintiff would fail to protect himself against the danger. This element contemplates reasonable behavior

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for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances," Restatement (Second) of Torts § 343, cmt. a) is higher than that owed to a licensee ("[A] licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor," Restatement (Second) of Torts § 343, cmt. a) or trespasser (a land possessor does not owe a duty of reasonable care to trespassers, Restatement (Second) of Torts § 333). Because the jury found for the Plaintiff under the highest common law standard of care, the Court finds that although the jury was not specifically instructed in the element instruction on the general "foreseeability" standard of *Machado*, the error, which predated *Machado*, was harmless: the Defendant was granted the benefit of the highest standard of care, and the jury found in the Plaintiff's favor.

[70] Note that the "intent" is in the creation or allowance of a dangerous condition; it is not the same "intent" of an intentional tort claim, which would involve a "desire[] to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 497 (V.I. 2008) (*quoting* RESTATEMENT (SECOND) OF TORTS § 8A (1965)). ("[I]ntentional torts embrace...an actual, specific, and deliberate intent to harm [and] also... situations in which the [defendant] believes the injury is substantially certain to result").

[71] *Machado*, 2014 V.I. Supreme LEXIS 51.

[72] *Id.*, at *34.

[73] Defendant's brief, p. 7.

of the Plaintiff: one is expected to guard oneself against open and obvious dangers. "If the actor is... physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." Restatement (Second) of Torts § 283C. And the jury was instructed that it "may consider any pre-existing physical condition of the Plaintiff that may have affected the level of care that the Plaintiff should have taken to protect himself from harm."[74] This consideration, though not specifically cited in Virgin Islands binding authority, is in line with Virgin Islands case law regarding both negligence and premises liability,[75] the Virgin Islands White Cane Law,[76] the establishment of the Virgin Islands Division of Disabilities and Rehabilitation Services,[77] the Victim's and Witnesses' Bill of Rights,[78] and Congressional creation of the Disability Rights Center of the Virgin Islands.[79] Through the

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[74] Jury Charge.

[75] As noted, Restatements (Second) of Torts §§ 281 and 343 contain the elements that need to be proven to support a claim of negligence and premises liability, and these sections have been accepted in our territory. Section 283C, Physical Disability, helps clarify the standard of conduct of the actor who is ill or otherwise disabled, be it the plaintiff or the defendant.

[76] Chapter 9 of Title 10 of the Virgin Islands Code, Civil Rights of Blind Persons. Because Plaintiff has a vision of 20/60 in his better eye, he does not fall within the definition of "blind" under the Virgin Islands White Cane Law (10 V.I.C. § 160, "not more than 20/200 visual acuity in the better eye"). However, the law is indicative of the Territory's recognition of the rights of the visually impaired. *See* 10 V.I.C. § 151(a) ("It is the policy of this Territory to encourage and enable blind persons to participate fully in the social and economic life of the Territory"); 10 V.I.C. § 152 ("Blind persons have the same right as persons who are not blind to the full and free use of... walkways... and other public places" and "Blind persons are entitled to the full and equal accommodations, advantages, facilities, and privileges... [to] places to which the general public is invited subject only to the conditions and limitations established by law"); 10 V.I.C. § 158(b) ("Any person, firm, or corporation, or agent thereof, who ... interferes with ... enjoyment of any of the places, accommodations, or conveyances listed in section 152 of this chapter, or otherwise interferes with the rights of a blind person ... shall be liable to the blind person in an action at law for actual and/or punitive damages, suit in equity, or other proper proceedings for redress, in any court of competent jurisdiction"); 10 V.I.C. § 161(e) ("The Governor is hereby authorized and directed on October 15 of each year, to take suitable public notice of White Cane Safety Day, as proclaimed by the U.S. Congress, and to issue a proclamation in which he reminds all residents of the right of the blind to enjoy the greatest possible measure of personal independence, namely, the right to move about and live independently").

[77] 3 V.I.C. § 430(e); 3 VIGR 7, Section 5(a)(4).

[78] 34 V.I.C. § 203(g) ("Victims and witnesses who are very young, elderly, who are handicapped, or who have special needs, have a right to special recognition and attention by all criminal justice, medical, and social service agencies. The court shall treat 'special' witnesses sensitively, using closed or taped sessions when appropriate. The prosecutor or defense shall notify the court when a victim or witness deserves special consideration").

[79] DRCVI: A Brief History, DISABILITY RIGHTS CENTER OF THE VIRGIN ISLANDS, http://www.drcvi.org (last visited on Feb. 26, 2015). This list is not exhaustive.

enactment of these laws, our Legislature and Executive Branch have expressed an intent that people with disabilities be treated with the same dignity as able persons, while also making accommodations for their special needs. Clarifying that the reasonable man standard in both negligence and premises liability matters is that of a reasonable man under disability of limited sight is in conformity with existing law.

A witness for the defense testified that on the evening of the incident, the campus was open to the public,[80] which would clearly include the physically and visually disabled. Thus, Plaintiff's presence on Defendant's property was not only foreseeable but invited. To succeed on a claim of premises liability, the evidence must support a finding that Defendant should have expected the Plaintiff, as an individual with limited sight and acting as a "reasonable man under like disability," would not discover or realize the danger of, or fail to protect himself against, the drop-off from the bridge into the gut.

Additionally, even if the Plaintiff's behavior was measured as a reasonable man without disability, Plaintiff testified that it was "so dark" when he walked across the pedestrian bridge, that he took a few steps and "went over the wall."[81] Jean Oriol testified that, upon his arrival to Defendant's property shortly before he discovered the Plaintiff, he could not identify a passing SUV because "it was too dark to tell what color [it was]."[82] Although Michael Hughes stated that the bridge was adequately lit,[83] it is for the jury to decide the credibility of witnesses when there is conflicting testimony,[84] and the Court will disturb their findings only if the testimony

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[80] Jury Trial, Vol. I, p. 178.
[81] Jury Trial, Vol. II, p. 95.
[82] Jury Trial, Vol. I, p. 206.
[83] *Id.* at p. 267.
[84] *Canton v. People*, 2014 V.I. Supreme LEXIS 56, at *10 (V.I. 2014) ("Despite our innumerable recitations in past opinions of not reweighing witness credibility, Canton urges this Court to make an exception, and engage in the weighing of credibility"); see also *James v. People of the Virgin Islands*, 60 V.I. 311, 328 (V.I. 2013) (citations

upon which the jury relied was "incredible as a matter of law."[85] Here, the conflicting testimony regarding the lighting around the bridge was the kind "well within the province of the jury to sort out,"[86] and the evidence supports a finding that the lack of a railing on a bridge with a low wall created an unreasonable risk for even sighted guests on the property at night.

Defendant presented testimony that on the night of the incident, the campus was open for an international dinner,[87] to which the public was invited. Witnesses for the Defendant testified that "[w]hen a night event is held, the school... has employees out on the campus directing visitors."[88] But there was no testimony that anyone was directing pedestrian traffic over or away from the bridge,[89] although it was foreseeable that visitors would park their cars or be dropped off by taxis in the parking lot and then cross the bridge to the event.[90] The incident happened at approximately 7:25 p.m.,[91] the food fair that evening was scheduled to being at 6:00 p.m.,[92] and by 6:40 p.m., approximately 400 guests were present. Thus, it was foreseeable that guests were still arriving and exiting from the event at the time of the incident. The evidence supports a legal conclusion that it was foreseeable that guests would be crossing the bridge at night and that the

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omitted) ("We cannot usurp the role of the jury by re-analyzing, re-evaluating, or re-weighing the evidence presented at trial, or by determining the credibility of the witnesses").

[85] *Thomas v. People of the Virgin Islands*, 60 V.I. 183, 192 (V.I. 2013) ("[F]or instance, by showing that it would have been physically impossible for the witness to observe what he described, or it was impossible under the laws of nature for those events to have occurred at all") (citation omitted).

[86] *Id.* (quoting *United States v. Hayes*, 236 F.3d 891, 896 (7th Cir. 2001) (further citation omitted)).

[87] Jury Trial, Vol. II, p. 57.

[88] Defendant's brief, p. 6 (citing the record).

[89] "If I had seen a person, I would have asked immediately where was the food fair." Jury Trial, Vol. II, p. 163, Plaintiff on cross.

[90] There is some conflicting testimony regarding whether the Plaintiff saw any people on campus. Plaintiff stated at trial that he did not see any people on campus, Jury Trial, Vol. II, p. 196, while during his deposition he stated that he "saw a few people walking by... [a]nd then I knew where the buildings were." Jury Trial, Vol. II, p. 197. However, there is no testimony that the people – if there were any – worked for the Defendant or were otherwise under any duty to warn the Plaintiff of the condition of the pedestrian bridge.

[91] Jury Trial, Vol. I, p. 352.

[92] Jury Trial, Vol. II, p. 57.

lighting on and around the bridge would be insufficient to warn the Plaintiff of the low walled bridge over a deep gut.

iii. Negligence

As discussed above, the evidence supports a reasonable finding of negligence on the part of the Defendant.

II. DEFENDANT'S DEFENSE: PLAINTIFF'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF HIS INJURIES.

Unlike the doctrine of contributory negligence, the Virgin Islands comparative negligence statute does not operate as a bar to recovery because it apportions divisible fault between the negligent parties.[93] However, if the Plaintiff is more at fault for his injuries than the Defendant, the Plaintiff cannot recover.[94]

Defendant argues that:

> [T]he record is replete with evidence that Plaintiff's own conduct was the proximate cause of the incident" and that "Plaintiff was walking in an area he was unfamiliar with... and his own testimony was that he could not see where he was going. He was away from the area of campus where the event he allegedly was attending was being held. After entering the campus in a taxi, he did not see where his event was being held and instead asked the taxi driver to leave him in a parking area. Plaintiff embarked on this course (getting out of a taxi at some distance from the buildings and deciding to walk unaccompanied) despite his exceedingly poor vision...[95]

Defendant also states that Plaintiff knew that his eyesight was poor and that Plaintiff's ophthalmologist testified that Plaintiff needed cataract surgery and that Plaintiff's vision was getting worse over time.[96]

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[93] 5 V.I.C. § 1451.
[94] *Id.* ("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").
[95] Defendant's brief, p. 8 (citing to the record).
[96] *Id.* at pp. 8-9.

While Defendant appears to argue that Plaintiff was lackadaisical about getting his cataract surgery – thus trying to establish that Plaintiff was reckless about his poor vision – Plaintiff testified that he was initially scheduled for eye surgery "a couple of days after the accident."[97] Defendant accurately points out that Plaintiff walked in the direction the taxi had just come onto the property,[98] and this evidence would support that Plaintiff felt that this was a safe route to walk, since the taxi driver had just driven along that very same road.

Moreover, witnesses for the Defendant testified that the campus was open to the public on the night of the incident. And Defendant fails to establish how Plaintiff's belief that the campus was "ma[d]e the... safe for his entry"[99] was unrealistic. Plaintiff had a duty to ensure that the property was reasonably safe for its guests, a duty that extends to individuals with physical disabilities.

III. DEFENDANT'S DEFENSE: PLAINTIFF RECOGNIZED AND FAILED TO PROTECT HIMSELF FROM AN "OPEN AND OBVIOUS" RISK.

Defendant also appears to argue that Plaintiff assumed the risk of negotiating the property, despite Defendant's assertion that "the condition [was] obvious".[100] Knowing confrontation of an open and obvious danger condition "involves 'an affirmative defense to an established breach of duty' where the plaintiff's actions demonstrate that []he appreciated the risk involved and proceeded regardless of that risk."[101] Whether Plaintiff knowingly confronted an open and obvious dangerous condition goes to the weight of Plaintiff's fault[102] and does not

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[97] Jury Trial, Vol. II, p. 209.
[98] Jury Trial, Vol. II, pp. 162-163.
[99] Restatement (Second) of Torts § 343, cmt. a.
[100] Defendant's brief, p. 7.
[101] *Machado*, 2014 V.I. Supreme LEXIS 51, at *38.
[102] *Id.*, at *40 ("[I]f 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 [5 V.I.C. §] 1451(a)").

operate as a complete bar of recovery in the Virgin Islands.[103,104] This is an affirmative defense that requires proof by the Defendant that the Plaintiff was aware of the hazardous condition and that the Plaintiff made the choice to confront it anyway.

In order to support this defense, the Defendant must establish that the Plaintiff knew of the existence of the risk of harm, appreciated the nature of the risk,[105] and chose to walk across the bridge despite the known and appreciated risks. As discussed above, Plaintiff stated that he did not know of the drop-off, which supports a reasonable finding that Plaintiff did not appreciate the nature of the risk. Therefore, Defendant failed to meet its burden of establishing that Plaintiff knowingly confronted an open and obvious dangerous condition and that this consent exceeded the amount of Defendant's own negligence.

IV. Testimony of Plaintiff's Expert, Rosie Mackay

Defendant argues that it is entitled to a new trial, alleging that Plaintiff's expert Rosie Mackay's "testimony at trial violated [the Court's September 12, 2014, order that any testimony about safety standards in certain codes was inadmissible] and resulted in the very evil that [Defendant] predicted: Mackay testified to a specific 48/42 'standard' that 'all safety engineering

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[103] *Machado*, 2014 V.I. Supreme LEXIS 51, at *39-40. While the Supreme Court specifically limited the holding in *Machado* to a situation involving an implied assumption of risk, *Id.* at *39, it appears that the same standard would apply to an express assumption of risk – particularly outside of a written contract – because this would often create a question of fact as to whether the defendant's actions exceeded the scope of the risk assumed. Additionally, although *Machado* appears to have completely replaced the defense of implied assumption of the risk (burden on defendant) with a measure of defendant's foreseeability of harm (burden on the plaintiff), *Id.* at *34, the foreseeability measure by necessity applies to all parties. Plaintiff must establish that the Defendant reasonably foresaw or should have foreseen the risk to the Plaintiff; Defendant then defends that Plaintiff foresaw and accepted the risk; and then the jury apportions fault accordingly.

[104] With the 2013 abrogation of the defense of implied assumption of the risk, there is no longer a discernable difference between the defenses of "implied assumption of the risk" and "contributory negligence." Instead, the touchstone of premises liability in the Virgin Islands is foreseeability". *Machado*, 2014 V.I. Supreme LEXIS 51, at *34. However, the Court discusses the defenses separately here for clarity.

[105] RESTATEMENT (SECOND) OF TORTS § 469D ("[T]he condition of premises upon which he enters may be quite apparent to him, but the danger arising from the condition may be neither known nor apparent, or, if known or apparent at all, it may appear to him to be so slight as to be negligible. In such a case the plaintiff does not assume the risk").

standards are in concert" and "that 'all say the same thing' based on 'all the studies that are done and redone and redone.'"[106]

The jury was instructed that "[e]xpert testimony should be considered just like any other testimony. You may accept or reject it, in whole or in part, and give it as much weight as you think it deserves."[107]

A. DEFENDANT'S REQUEST FOR RECONSIDERATION OF THE COURT'S SEPTEMBER 12, 2014, ORDER IS UNTIMELY.

Defendant argues that Mackay's expert report was "junk science" and this Court "as 'gatekeeper' erred in not precluding her testimony entirely."[108] Defendant first objected to Mackay's expert testimony in a July 7, 2014, motion to exclude, arguing that Mackay's testimony should be excluded because her expert report "is devoid of any reliable methodology, and as a result, it could only confuse the trier of fact and prejudice [Defendant] if the opinions in the Report were presented at... trial."[109] The Court responded on September 12, 2014, that "while Mackay cites to several different safety codes... Plaintiff does not establish that any one of these standards specifically defines the duty of care owed in the Virgin Islands under the facts of this case. Rather, Plaintiff argues that the duty of care owed is outlined by the Restatement (Second) of Torts § 343, and the Court agrees."[110] The Court's pretrial ruling limited the scope of Mackay's testimony.

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[106] Defendant's brief, p. 11.
[107] Jury Charge.
[108] Defendant's brief, p. 12.
[109] Defendant's July 31, 2014, Reply Memorandum in Support of Motion to Exclude Proposed Testimony of Rosie Mackay, p.1.
[110] September 12, 2014, Memorandum Opinion, p. 5.

Defendant appears to be asking the Court to reconsider its September 12, 2014, interlocutory order. Pursuant to LRCi 7.3, a motion for reconsideration must be made within fourteen (14) days of the entry of the order or decision, and the motion must be based on:

1. intervening change in controlling law;
2. availability of new evidence, or;
3. the need to correct clear error or prevent manifest injustice.

"[R]econsideration is an 'extraordinary' remedy not to be sought reflexively or used as a substitute for appeal,"[111] nor is it "a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not."[112]

Defendant's request that the Court reconsider its previous order allowing the testimony of Rosie Mackay is untimely, as it far exceeds the fourteen (14) day deadline, Defendant never sought to extend the deadline to seek such relief, and Mackay has already testified in this matter. The Court will not revisit its September 12, 2014, holding allowing Mackay's expert testimony.[113]

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[111] *In re Infant Sherman*, 49 V.I. 452, 458 (V.I. 2008) (quoting *Bostic v. AT&T of the V.I.*, 45 V.I. 553 (D.V.I. 2004)).

[112] *Bostic*, 45 V.I. 553.

[113] Additionally, the cases cited by Defendant in support of its untimely request for reconsideration are either inapplicable or non-binding. While Defendant correctly points out (Defendant's brief, p. 14) that the District Court of the Virgin Islands held in *Simpson v. Betteroads* that Mackay's "fact-based conclusions do not require any scientific, technical, or specialized knowledge so as to warrant expert testimony," 2013 U.S. Dist. LEXIS 70647, at *13 (D.V.I. May 18, 2013) (not binding upon this Court), the District Court did so because Mackay's "conclusions suggest[] that they are based on Ms. Mackay's subjective beliefs and her assessments of the deposition testimony of certain fact witnesses, which fall squarely within the province of the jury," *Id.*., not, as argued here, in relation to her qualifications to discuss a general safety standard. And, although the 10th Circuit has held that "[t]he requirements of *Daubert* are not satisfied by casual mention of a few scientific studies, which fail to demonstrate that an expert's conclusions are grounded in established research, recognized in the scientific community, or otherwise accepted as scientific knowledge," Defendant's brief, p. 15, quoting *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1126 (10th Cir. N.M. 2006), the expert in that matter failed to establish "whether his testimony would rely on his own research or that of other psychologists" and his "report was insufficient to allow the... court to assess the reasoning and methodology underlying the expert's opinion," *Rodriguez-Felix*, 450 F.3d 1117, 1125 (citation omitted). This Court has already reviewed and approved of Mackay's methodology in this case. September 12, 2014, Opinion, p. 15. While the District Court excluded Mackay's testimony regarding the federal and Virgin Islands Occupational Safety

B. THE COURT NEVER EXCLUDED MACKAY'S 48/42 RULE TESTIMONY AND DEFENDANT FAILED TO OBJECT TO IT AT TRIAL.

While the Court will not revisit its order allowing Mackay to testify, it will consider whether her testimony exceeded the September 14, 2014, order excluding references to specific safety standards.[114] Defendant states that her "opinion did not tell the jury anything that was not obvious – other than that there was a 48/42 'rule' that was allegedly violated," arguing that mention of a 48/42 rule "was a 'standard' that she was not supposed to testify about".[115] Defendant argues that while "[t]his Court did not bar Mackay's testimony [it] did rule that any testimony about safety standards in certain codes was inadmissible" and that "Mackay's testimony at trial violated... that ruling".[116]

In relevant part, the Court held that "while Mackay may base some of her opinions concerning the safety of the bridge based on her knowledge of the various safety codes as well as her training and experience," she could only reference the "safety standards outlined by the International Building Code, the National Fire Protection Life Safety Code, the Occupational Safety and Health Administration, the National Safety Council Accident Prevention Manual, and the Encyclopedia of Occupational Health and Safety" if "raised on cross-examination by the

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and Health Act ("OSHA") in *Saldana v. Kmart Corp.*, the District Court did so because those acts were not applicable to the parties, 84 F. Supp. 2d 629, 634 (D.V.I. 1999) (not binding), and Defendant fails to argue that the 48/42 rule is not applicable here. However, while "[t]he Third Circuit affirmed that the District Court [in *Saldana*] properly found [Mackay's report] would not be admissible at trial because Mackay's 'conclusory statements essentially attempt[ed] to force upon [defendant] a strict liability standard based on Mackay's reading of OSHA, a regulatory scheme far different from the applicable law,'" Defendant's brief, p. 15, quoting *Saldana v. Kmart Corp.*, 260 F.3d 228, 233 (3d Cir. V.I. 2001), the testimony approved as excluded was the application of worker safety requirements to a business invitee, *Id.* at 233, while Mackay's testimony was found to be appropriate for this matter. See also *Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 2014 V.I. Supreme LEXIS 50, n. 14 (V.I. 2014), which cited *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) ("In considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally") and *Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 78 (1st Cir. 2006) ("[W]e interpret Rule 702 "liberally in favor of the admission of expert testimony") (further citations omitted).

[114] September 12, 2014, Memorandum Opinion, p. 8.

[115] Defendant's brief, p. 15.

[116] September 12, 2014, Memorandum Opinion, p. 11.

defense."[117] And, more specifically, the Court ruled that Mackay's "conclusion... in her expert report that the bridge which measured 9 (nine) feet at its deepest area is 'detrimental' and is subject to the general rule that 'any drop off more than 48 inches requires protective measures, installed to a height of 42 [inches] above walking level'" is the "only proferred testimony... based on reliable reasoning."[118] The Court went on to explain that the inquiry as to whether to admit or strike expert testimony is a flexible one,[119] and that "based on [Mackay's] 40+ years of experience, training and education in the field of safety engineering and safety engineering standards, the Could will permit Mackay to testify that an unprotected 9 (nine) foot drop is 'detrimental' without adequate safety precautions; and further that such a drop is subject to the general rule that 'any drop off more than 48 inches requires protective measures, installed to a height of 42 [inches] above walking level".[120]

Despite Defendant's contention, the Court never made a blanket prohibition regarding "testimony on 'studies' and 'standards'".[121] While the Court allowed testimony on the "48/42 rule," it also stated that "[o]f course, this... testimony is subject to liberal cross examination."[122] The Defendant had ample opportunity after the Court's September 12, 2014, Order to prepare its

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[117] *Id.*, pp. 7-9. The Court also excluded any references to the safety of children and any remedial measures taken by the Defendant. *Id.*, p. 9.
[118] September 12, 2014, Memorandum Opinion, p. 11.
[119] See *Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 2014 V.I. Supreme LEXIS 50, 21 (VI. 2014) ("[The witness] testified to being a certified land surveyor since 1989, and a member of the National Professional Surveyor Association with some 26 years of experience at the time of his testimony. As a certified land surveyor, he performed topographic surveys of the surface of the earth, dealt with the volume of soil involved in landfills, subdivided property, and also assisted in the building of roads. While helping in the building of roads, [he] stated that he regularly quantified dirt by volume. He further explained that his prior experience has included calculations in determining how much disturbance may occur to a piece of land and how many cubic yards of soil that disturbance would displace. Therefore, there was adequate evidence presented to support the Superior Court's decision to accept [the witness] as an expert witness having "specialized expertise" in land surveying and the quantifying of excavations").
[120] September 12, 2014, Memorandum Opinion, p. 15.
[121] Defendant's brief, p. 16.
[122] September 12, 2014, Memorandum Opinion, p. 16.

defense regarding whether "the 48/42 rule was a universally applicable standard," whether "Antilles failed to comply with it,"[123] its witnesses' knowledge of such a rule, and whether the rule even applied to the Defendant.

During her voir dire examination, Mackay explained to the Court and the jury what a hazard is and what a hazard analysis entailed. When Plaintiff tendered Mackay as an expert, the Defendant made a general reference to its "earlier Motion in Limine".[124] Then, during direct, counsel for Defendant stated at sidebar – and before Mackay testified to the 48/42 rule – that "[w]e object to the portion about stating the 42 versus 48 inches calling it a hazard" and "[s]he can say this violates the standards, but [she cannot] make a conclusion [that this created] a hazard[ous] condition".[125] Defendant did not take that opportunity to argue that the 48/42 rule was an excludable standard and, instead, argued that Mackay could not use that rule to conclude that the drop-off created a hazardous condition.

Even if the Court's September 12, 2014, Order had excluded the testimony 48/42 rule testimony, Defendant failed to object when Mackay brought the standard up during direct,[126] at which time she testified that "anything that's a drop more than 48 inches should be protected" by "a device that's at least 42 inches high".[127] "[T]he proper time to object was at the time of the testimony in order to provide the court with an opportunity to take corrective action".[128]

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[123] Defendant's brief, p. 20.
[124] Jury Trial, Vol. I, pp. 263-264.
[125] *Id.*, p. 270.
[126] *Id.*, pp. 271-274.
[127] *Id.*, p. 272.
[128] *Hargis v. Wellspeak Enters.*, 2012 U.S. Dist. LEXIS 107450, 16, 2012 WL 3144962 (S.D. Ind. Aug. 1, 2012). See also *Eller v. Paul Revere Life Ins. Co.*, 228 Iowa 1247, 1256 (Iowa 1940) ("Objections should be made at such times as will permit the court to most effectively remedy any harm done") and *Allen v. Blunt*, 1846 U.S. App. LEXIS 436, 460 (C.C.D. Mass. 1846) (citations omitted) ("The proper time to object to the admission of such a question and reply, is that which is conformed to in all other cases of testimony, where the parties and counsel and court are present, and is the time when the question is asked. It is not permissible to acquiesce then by silence, and take the chance of a favorable verdict on the sums stated in former trials... and make the objection for the first time

Defendant offers that it failed to address Mackay's violation of the Court's September 12, 2014, order because to do so would "open the door to even more improper testimony about 'standards'".[129] But, in so arguing, Defendant fails to recognize that previous objections raised in Defendant's pre-trial motion to exclude *had* resulted in the limitation to Mackay's testimony. Further, Defendant enhanced Mackay's testimony when, on cross, Defendant clarified with Mackay how she determined that the drop surpassed 48 inches[130] and invited her to indicate how she establishes whether a wall meets or exceeds 42 inches.[131] Defendant also asked "if there's a 48 inch drop, you have to have a 42 inch wall," a conclusion verified by Mackay. Defendant later responded at sidebar, when Plaintiff asked the Court to reconsider the exclusion of specific code references, that "the code that [Mackay has] articulated is a flat code. It's a general safety standard."[132] The Defendant's objection now is untimely.

The Court's Order did not exclude this testimony, and Defendant did not timely object to Mackay's testimony. The Court's allowance of the testimony was not in error.[133]

V. Plaintiff's Testimony Regarding Medical Bills

The jury was instructed that it "may, but... [is] not required to, compensate the Plaintiff for... reasonable past medical expenses".[134] While the parties stipulated that the medical bills in connection with the January 28, 2012, incident amounted to $328,169.98, Defendant urges that it

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after the jury have returned a verdict for a larger sum. It is well settled, that a new trial should not be granted for a cause existing at the trial, but which was not stated or excepted to then. The more especially is this so, when any wrong or misleading of the jury was likely to flow from the objection not being then made").

[129] "[T]he purpose of sidebar is to keep certain items from getting to the jury". *Yoskowitz v. Yazdanfar*, 900 A.2d 900, 902 (Pa. Super. Ct. 2006).

[130] Jury Trial, Vol. I, p. 292.

[131] *Id.*, p. 294.

[132] *Id.*, p. 264.

[133] "[A]lthough [defendant]'s attorneys — both at trial and on appeal — inexplicably failed to object to the introduction of the video-recorded interview... the admission of the video interview... was unquestionably error". *Rawlins v. People of the Virgin Islands*, 2014 V.I. Supreme LEXIS 62, at *31 (V.I. 2014) (citation omitted).

[134] Jury Charge.

should not have then borne the burden of proving as an affirmative defense that these expenses were *not* reasonable, necessary, and related to the incident.[135] Defendant states that the "Court erred in reversing the burden of proof regarding Plaintiff's medical bills" and that the Court "ultimately accepted Plaintiff's position that... Plaintiff could introduce the bills and that the burden then shifted to the defense to prove that the bills were not reasonable, necessary or related to the accident."[136] Defendant appears to argue that the admission of the medical bills violated Rule 803[137] of the Federal Rules of Evidence.

Defendant contends that the Court's holding that the case relied on by Defendant, *Santana v. Mack*,[138] "is a pre-*Banks* common law decision of the Appellate Division of the District Court [of the Virgin Islands]" and thus "merely persuasive" because it is "otherwise binding authority... predicated on 1 V.I.C. § 4"[139] is an error of law.[140] While Defendant proffers that "the courts are to follow the decisions of the Appellate Division and the Third Circuit Court of Appeals unless there is a contradictory decision by the Supreme Court,"[141] this Court possesses concurrent authority with the Virgin Islands Supreme Court to shape Virgin Islands common law, and it need not even follow otherwise binding precedent that was predicated solely on 1 V.I.C. § 4.[142]

The Court ruled from the bench – the same day it received Defendant's memorandum asking the Court to rule that it is the Plaintiff's burden to establish that his medical expenses are reasonable and customary – that it is the Defendant's burden, after the medical testimony is

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[135] Defendant's brief, p. 20.
[136] *Id.*
[137] Exception to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness.
[138] 889 F. Supp. 223, 227 (D.V.I., App. Div. 1995).
[139] Jury Trial, Vol. II, p. 309.
[140] Defendant's brief, p. 21.
[141] *Id.* (citing *Berrios-Rodriguez v. Berrios*, 2013 WL 303647, at *2 (V.I. 2013)).
[142] *Connor*, 2014 WL 702639, at n. 1.

introduced, to present the affirmative defense that the medical bills are *not* reasonable and customary.[143] The Court stated that it was "not going to rule that for every medical record anywhere in the country that a defendant challenges, the plaintiff has to bring in a medical records custodian, as well as an expert, to testify that those bills are reasonable and customary medical expenses when the actual bills have been sent either to plaintiff or to plaintiff's counsel."[144] The Court was tasked with performing a *Banks* analysis the same day of trial, and, although its holding still stands, it will perform a more complete examination here for the benefit of the parties.

A. Banks Analysis

Pursuant to the Virgin Islands Supreme Court's holding in *Banks*, parties – and indeed, this Court – can no longer automatically and uncritically rely on non-binding authority when discussing the best common law for the Virgin Islands. *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011); *Gov't of the V.I. v. Connor*, 60 V.I. 597, 602 and n. 1. *Connor* also recognized that 1 V.I.C. § 4,[145] that authorized the application of the Restatements of Law in the absence of local laws to the contrary, was impliedly repealed by the Virgin Islands Legislature's establishment of the Virgin Islands Supreme Court in 2004.[146,147] Now, the only decisions binding upon this Court are those rendered by the Virgin Islands Supreme Court; the Third Circuit Court of Appeals, when serving as the de facto court of last resort in the Virgin

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[143] Jury Trial, Vol. II, pp. 263-267.
[144] *Id.*, pp. 266.
[145] "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." 1 V.I.C. § 4.
[146] *Connor*, 60 V.I. at 599.
[147] "The Supreme Court of the Virgin Islands is established pursuant to section 21(a) of the Revised Organic Act of the Virgin Islands, as amended, as the highest court of the Virgin Islands and in it shall be reposed the supreme judicial power of the Territory." 4 V.I.C. § 21.

Islands;[148] and the Appellate Division of the District Court of the Virgin Islands.[149] All other holdings – including decisions rendered by courts outside of the Virgin Islands – as well as the Restatements, law review commentaries, and pre-*Banks* common law decisions of the Virgin Islands Supreme Court, Third Circuit and Appellate Division, are merely persuasive.[150]

As a result, "the Superior Court, when considering a question not foreclosed by prior precedent... must perform a three-part analysis as set forth in *Banks*."[151] A "*Banks* analysis" involves:

> (1) assertion of "whether any... local courts have considered the issue and rendered any decisions upon which litigants may have grown to rely;"
> (2) determination of the "position taken by a majority of courts from other jurisdictions;" and
> (3) identification of "the best rule for the Virgin Islands".[152]

Additionally, this Court "possesses, in the absence of binding precedent... concurrent authority with [the Virgin Islands Supreme Court] to shape Virgin Islands common law," and, as discussed above, it need not even follow otherwise binding precedent that was predicated solely on 1 V.I.C. § 4.[153] And, while only the Superior Court is obligated to conduct *Banks* analyses,[154] parties are required to contribute to the analysis by citing to authority that is binding upon this Court *or* to authority that is presented as persuasive when faced with questions of law that lack precedent.[155]

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[148] "[A]s opposed to those case decided in [the Third Circuit's] capacity as a federal court exercising jurisdiction in federal question or diversity cases." *Better Building Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755-756 (V.I. 2014) (citing *Edwards v. HOVENSA, LLC*, 497 F.3d 355, n. 5 (3d Cir. 2007)).
[149] *Najawicz v. People of the V.I.*, 58 V.I. 315, 327-328 (V.I. 2012); *Connor*, 60 V.I. 587, n. 1.
[150] *Connor*, 60 V.I. at 602-603 and n.1; *Simon*, 59 V.I. at 621 and 623.
[151] *Id.*, at *3.
[152] *Id.*
[153] *Connor*, 2014 WL 702639, at n. 1.
[154] Of course, parties are not discouraged from conducting their own *Banks* analyses.
[155] Although only the Superior Court is obliged to conduct *Banks* analyses, *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 603 (V.I. 2014) (citing *Banks*, 55 V.I. 967), litigants are pointed to the requirements of LRCi 11.1. By signing a motion or supporting memoranda, an attorney certifies that the applicable law in this jurisdiction has been

B. The Rules

Before the Court delves into its *Banks* analysis, it is important to note that the Court's holding is in line with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

1. THE VIRGIN ISLANDS SUPREME COURT HAS NOT DETERMINED WHETHER MEDICAL BILLS ARE GENERAL DAMAGES THAT NEED NOT BE SPECIFICALLY PLED.

Federal Rule of Civil Procedure 9 requires a litigant to specifically plead special damages – "damages that are unusual for the type of claim in question"[156] – while general damages – damages "which ordinarily accompany a particular cause of action"[157] – "need not [be] specifically plead[ed]... but rather [fall] under a general allegation of damages." *Myers v. Derr*, 50 V.I. 282, 291 (V.I. 2008).[158] Pursuant to Fed. R. Civ. P. 54(c), "[e]very ... final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." And, because "general damages typically flow from a particular injury, they are implied by law and a defendant should expect to defend against them."[159] While it is the custom of our local courts to require testimony of medical expenses, pursuant to the Supreme Court's holding in *Myers*, medical expenses would appear to fall in the category of "general

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cited, including authority for or against the position being advocated by counsel. LRCi 11.1(a). Therefore, parties are singularly reminded that, in the absence of discussion addressing: (1) whether cited authority is binding upon this Court *or* presented as persuasive authority; and (2) why the Court should adopt this view as the "appropriate... rule based on the unique characteristics and needs of the Virgin Islands" and the parties, the Court may strike motions and responses as fatally deficient. *Connor*, 60 V.I. 597 and LRCi 11.1; *see also* VIRGIN ISLANDS RULES OF PROFESSIONAL CONDUCT RULE 211.3.1, Meritorious Claims and Contentions ("A lawyer shall not... assert or controvert an issue... unless there is a basis in law and fact for doing so... which includes a good faith argument for an extension, modification or reversal of existing law") and *Cacciamani and Rover Corp. v. Banco Popular De Puerto Rico*, S. Ct. Civ. No. 2013-0063, 2014 WL 4262098, n. 2 (V.I. Aug. 29, 2014) (citing *Benjamin v. Coral World V.I., Inc.*, Super. Ct. Civ. No. 294/2013 (STT), 2014 WL 2922306, n. 38 (V.I. Super. Ct. June 12, 2014)) (warning litigants that simply citing the Restatements and other non-binding authorities without any discussion of *Banks* may result in a finding that the filing is insufficient).

[156] *Myers v. Derr*, 50 V.I. 282, 291 (V.I. 2008) (*citing* RESTATEMENT (SECOND) OF TORTS § 904) (further citation omitted).

[157] *Id.*

[158] *Citing* FED. R. CIV. P. 54(c)) (further citation omitted).

[159] *Id.* (citation omitted).

damages" that need not be specifically pled, and of which the defendant is on notice with the filing of a claim involving personal injuries.[160] The Supreme Court has yet to establish whether medical bills require a more specific pleading in a personal injury case,[161] and, indeed, while the majority of jurisdictions categorize medical bills as special damages, there does not appear to be a national consensus on how medical expenses are classified in these matters.[162] However, because the parties stipulated to the amount of past medical expenses, and these bills were introduced at trial, any requirement of specific pleading would be waived. The Court will continue with its analysis of Defendant's burden once the evidence is before the jury, since Defendant was not obligated to stipulate to the reasonableness and necessity of the medical bills.

2. UNDER THE FRE, THE BURDEN IS ON THE OPPONENT TO SHOW THAT THE SOURCE OF THE INFORMATION LACKS TRUSTWORTHINESS ONCE TRUSTWORTHINESS IS ESTABLISHED UNDER THE RULES.

Changes were made to the business records exception to the hearsay rule under FRE 803(6), submitted to Congress on April 25, 2014, and effective on December 1, 2014:

> to clarify that if the proponent has established the stated requirements of the exception [to the hearsay rule under FRE 803(6) for records of regularly conducted activity] - regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification – then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness...[163]

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[160] A defendant has access to medical bills as part of a plaintiff's initial disclosures. FED. R. CIV. P. 26(a)(1)(A)(iii), computation of damages.

[161] *And see* Restatement (Second) of Torts § 904, cmt. b ("In personal injury cases, ... expenses for medical treatment ... are ordinarily [but not always] treated as bases for special damages").

[162] *Boyer v. Krall*, 47 Pa. D. & C.2d 36, 39 (Pa. C.P. 1969) ("From a statement of the injuries in the complaint, it is only natural, reasonable, and probable that plaintiff ... incurred medical expenses... These are general damages naturally flowing from the injuries described. Plaintiff need not be more specific, and any itemizations of damages in terms of amounts are but evidence and not a statement of the true measure of damages") (case cited favorably for the same proposition by *Kubushefski v. Kleinot*, 8 Pa. D. & C.3d 599, 601 (Pa. C.P. 1978)). These holdings appear to be outdated, or, in the least, infirm, as Pennsylvania has more recently categorized medical expenses as special damages. *Branch v. Ledesma*, 54 Pa. D. & C.4th 129, 139 (Pa. County Ct. 2001).

[163] Advisory Committee Notes on 2014 Amendments to the Federal Rules of Evidence, Rule 803(6).

The Advisory Committee noted that "[i]t is appropriate to impose this burden on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable."[164]

It has also been noted by other jurisdictions that medical bills introduced by the plaintiff are not characterized as business records under FRE 803(6) but, instead, fall within FRE 807, the Residual Exception to the rule against hearsay.[165] Under this rule, after reasonable notice to the adverse party,

> [A] hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804 [if]:
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

"For a statement to be admitted under [the residual exception], the statement's content and context must demonstrate its trustworthiness."[166] In a criminal case, the exception must also be weighed in consideration of the Confrontation Clause.[167] As discussed below, the Defendant received sufficient notice of Plaintiff's intention to introduce a summary of his medical expenses at trial, and the Court finds that the medical bills are material, probative, trustworthy, and admissible under FRE 807.

In 2011, the Virgin Islands repealed the Uniform Rules of Evidence ("URE") (former V.I. Code Ann. tit. 5, §§ 771-956) in favor of the Federal Rules of Evidence because "the

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[164] *Id.*
[165] Both FRE 803(24) and 804(b)(5) were transferred to FRE 807 in 1997. FRE 807, advisory committee's note.
[166] *Gov't of the V.I. v. Mosby*, 512 Fed. Appx. 253, 257 (3d Cir. V.I. 2013) (citation omitted).
[167] *Gov't of V.I. v. Joseph*, 964 F.2d 1380, 1386 (3d Cir. V.I. 1992) ("The Confrontation Clause... bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule").

Territory ha[d] not amended its URE to reflect... revisions or to address the current trends in the law".[168] Under former 5 V.I.C. § 812, "if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates". The FRE – which recently clarified that once records meet the reliability requirements of FRE 803(6) the opponent has the burden of showing a lack of trustworthiness – is in line with our former rules. Thus, via both the FRE and the repealed URE, our jurisdiction has shown a continued preference for the principle that once evidence is presented as reliable and probative, the burden is on the opposing party to establish that it is not.

C. While There is Recent and Binding Authority from the Supreme Court Addressing a Defendant's Burden to Raise Issues That May Reduce a Plaintiff's Recovery, There is No Specific Local Reliance on the Issue of Presentation of Medical Expenses by the Plaintiff.

The first step of a Bank's analysis involves a review of whether any local courts have considered the issue of the trustworthiness of medical records and then come to rely on such holdings.[169]

1. The Supreme Court of the Virgin Islands

Our Supreme Court has rejected business records offered as exceptions to the hearsay rule that were created in anticipation of litigation[170] or were subject to the constraints of the Confrontation Clause.[171] To date, the Supreme Court has not addressed the Residual Exception.

However, the Supreme Court's 2014 holding in *Better Building Maintenance of the V.I. v. Lee* in on point here. *Better Building* involved tort claims resulting from a slip-and-fall in a

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[168] Act No. 7161 § 15(a) (V.I. Reg. Sess. 2010).
[169] *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citations omitted).
[170] *Cascen v. People of the Virgin Islands*, 60 V.I. 392, 411 (V.I. 2014).
[171] *Id.*

department store, and, in part, resolved the unsettled Virgin Islands common law regarding which party bears the "burden of presenting evidence of the proper discount rate... to determine the present value of a future loss."[172] The Supreme Court held that "when there is reason to reduce a plaintiff's recovery... it is uniformly the defendant's burden to raise the issue and support it with appropriate evidence."[173] The Court reiterated that a defendant bears the burden of raising any matter that reduces a plaintiff's recovery[174] and that "present value must be treated in the same manner as an affirmative defense,"[175] siding with the courts that "have recognized the inherent absurdity in requiring a plaintiff to actively assist the jury in reducing her own award."[176] *Better Building*'s holding is in line with this Court's ruling here that Plaintiff's testimony regarding the summary of his present medical expenses falls within the purview of FRE 807, and, once presented with notice and bearing the required markers of trustworthiness, the Defendant bears the burden of asserting and then establishing otherwise.

2. The U.S. Court of Appeals for the Third Circuit

The Third Circuit has addressed the Residual Exception in five cases: three that found that the evidence sought to be or that was admitted was untrustworthy;[177] one decided in

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[172] *Better Building Maintenance of the Virgin Islands, Inc. v. Lee*, 60 V.I. 740, 757-758 (V.I. 2014) (citations omitted).
[173] *Id.* at 760.
[174] *Better Building Maintenance of the Virgin Islands, Inc. v. Lee*, 60 V.I. 740, 761 (V.I. 2014) (citing *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 182 (5th Cir. 1995) and *Laterra v. Treaster*, 844 P.2d 724, 734 (1992)).
[175] *Id.* (citing *Robinson v. Morrison*, 246 So. 2d 94, 95 (Miss. 1971); *Blue Ridge Ctr. Ltd. v. Zadeh*, 943 S.W.2d 357, 359 (Mo. Ct. App. 1997)).
[176] *Id.* at 759.
[177] *Gov't of the V.I. v. Mosby*, 512 Fed. Appx. 253, 257 (3d Cir. V.I. 2013) ("The record supports the Superior Court's conclusion that the statements on the tape were untrustworthy"); *United States v. Lawrence*, 349 F.3d 109, 117 (3d Cir. V.I. 2003) ("The district court viewed the videotape and concluded that the blinks and nods Hodge allegedly made 'in response' to the photo array were simply too ambiguous to constitute a meaningful statement"); *Gov't of the V.I. v. Krepps*, 438 Fed. Appx. 86, 88 (3d Cir. V.I. 2010) ("[T]hat the police officer had no reason to lie... does not establish the reliability of the statements of the three declarants cited within the body of the report").

conjunction with the Confrontation Clause;[178] and one that referenced the exception only in passing.[179] None specifically addressed the admission of medical expenses, let alone other similar documents or bills.

3. The District Court of the Virgin Islands

In 1995, the Appellate Division of the District Court of the Virgin Islands stated in *Santana v. Mack* that "a lay person such as appellant is not qualified or competent to testify to the nature of the medical tests or why they were given" and "adopt[ed] as a general principle the rule that a plaintiff must present medical testimony that the charges itemized in his medical bills were reasonable and the services being billed were necessary for treatment of the trauma suffered by plaintiff."[180] However, the Appellate Division made this ruling in part through a mechanistic and uncritical application of the Restatement (Second) of Torts § 912 pursuant to 1 V.I.C. § 4, a rule that has been recognized by our Supreme Court as repealed in 2004. The District Court held that "[t]his is the rule in Pennsylvania, and we find it to be a most reasonable one,"[181] whilst failing to explain how it is the best rule for the people of the Virgin Islands. Therefore, that case is not binding upon this Court.

While the Court admitted the evidence under FRE 803(6), it also stated that the medical bills could be admitted under the Residual Exception rule, FRE 807. Though not binding, the District Court of the Virgin Islands made a similar ruling in *Peter Bay Owners Ass'n v. Stillman*, where the District Court allowed a letter to be admitted by the Plaintiff to establish effected service. The District Court held that the letter met the Residual Exception rule, even though

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[178] *Gov't of V.I. v. Joseph*, 964 F.2d 1380, 1386 (3d Cir. V.I. 1992).
[179] *United States v. Stanley*, 405 Fed. Appx. 662, 665 (3d Cir. V.I. 2010).
[180] 889 F. Supp. 223, 227 (D.V.I., App. Div. 1995).
[181] *Id.* at n. 9.

there was "other evidence which can be procured to prove" Plaintiff's point, because otherwise "all three attorneys listed on the certificate of service would be necessary to determine whether the parties... received actual notice".[182] Under the Residual Rule, evidence may be admitted when, as in *Peter Bay*, "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts".[183]

In *V.I. v. Morris*, the Appellate Division stressed the importance of determining the trustworthiness of proof "based on the totality of the circumstances surrounding the [evidence offered as an exception to the hearsay rule]".[184] Then, in 2006 in *Krepps v. Gov't of the V.I.*, when rejecting evidence offered pursuant to FRE 807, the Appellate Division held that,

> statements... taken during the course of the officer's investigation... reflected simply what other parties told the officer, with no indication the accuracy of those statements had been -- or could be -- verified. Moreover, neither [the officer] nor the declarants testified at trial. There was, therefore, nothing presented below from which the court -- or this court on review -- could determine that the circumstances surrounding the statements of the witnesses bore exceptional guarantees of trustworthiness, or that the witnesses had a duty or a particular motivation to be truthful.[185]

Here the Court found Plaintiff's testimony to be trustworthy in part because the medical bills lacked any indication of inaccuracy, at least two treating physicians testified at trial, and the medical billing establishments had both a duty and a the motivation to be timely and accurate, all of which are in line with the Appellate Division's holding in *Krepp*.

The remaining Appellate Division cases that addressed the admission of evidence under FRE 803(6), 803(24), 804(b)(5) or 807 found the evidence sought to be admitted to be

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[182] *Peter Bay Owners Ass'n v. Stillman*, 57 F. Supp. 2d 192, 197 (D.V.I. 1999) (negative appellate history on other grounds).
[183] FRE 807(a)(4).
[184] 191 F.R.D. 82, 87 (D.V.I., App. Div. 1999).
[185] 47 V.I. 662, 673 (D.V.I., App. Div. 2006) (upheld in *Gov't of the V.I. v. Krepps*, 438 Fed. Appx. 86 (3d Cir. V.I. 2010)).

untrustworthy[186] or discussed the rule only in passing.[187] And the other District Court case addressing the admissibility of evidence under the Residual Exception discussed the rule only in passing.[188] The Court's admission of the medical bills as reliable – and thus placing the burden on the Defendant to establish otherwise – is in line with District Court authority.

4. The Superior Court

Finally, the Superior Court has not come to rely on any particular application of hearsay exceptions to the presentation of medical bills by a plaintiff. Six Superior Court cases address the residual or business record exceptions to the hearsay rule, two in passing.[189] The other four cases were criminal cases implicating the Confrontation Clause,[190] an interplay that is inapplicable to this civil matter.

D. The Different Ways That Other States and Territories Have Resolved the Question of Which Party Bears the Burden of Addressing or Challenging the Reasonableness and Necessity of Medical Expenses

1. Other Jurisdictions

"Ordinarily, testimony by the patient or by a physician or health care provider on amounts charged or paid for medical services is sufficient evidence of the reasonable value of the services in the absence of some showing to the contrary."[191] The Advisory Committee to the

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[186] *Mosby v. Gov't of the Virgin Islands*, 55 V.I. 1138, 1161-1162 (D.V.I., App. Div. 2011) ("The statement on the tape recording that a hitman was hired to kill Hodge is not consistent with [the] evidence"); *Richardson v. Gov't of the Virgin Islands*, 55 V.I. 1193, 1210 (D.V.I., App. Div. 2011) ("[The tape-recorded] statements lacked sufficient indicia of reliability").
[187] *United States v. Blackett*, 481 Fed. Appx. 741, 742 (3d Cir. V.I. 2012); *Gov't of the V.I. v. Vicars*, 340 Fed. Appx. 807, 811 (3d Cir. V.I. 2009); *Virgin Island v. Henry*, 232 Fed. Appx. 170, 174 (3d Cir. 2007);
[188] *Williams v. Virgin Islands*, 271 F. Supp. 2d 696, 703 (D.V.I. 2003).
[189] *People of the Virgin Islands v. Phillip*, 2012 V.I. LEXIS 43, 3 (V.I. Super. Ct. Aug. 21, 2012); *Fredella by Titchener v. Farrelly*, 28 V.I. 90, 100 (V.I. Terr. Ct. 1993).
[190] *V.I. v. Williams*, 44 V.I. 181, 193, 2002 V.I. LEXIS 17, 26, 2002 WL 531835 (V.I. Terr. Ct. 2002); *Virgin Islands v. Brewer*, 46 V.I. 3, 13, 2001 V.I. LEXIS 45, 17, 2001 WL 36377386 (V.I. Terr. Ct. 2001); *People of the Virgin Islands v. Simmonds*, 56 V.I. 84, 88 (V.I. Super. Ct. 2012); *Virgin Islands v. Tranberg*, 28 V.I. 52, 55, 1993 V.I. LEXIS 9, 6, 1993 WL 13751619 (V.I. Terr. Ct. 1993).
[191] 22 Am Jur 2d Damages § 734

Federal Rules of Evidence has noted that "[w]hile most courts have imposed that burden on the opponent [to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness], some have not."[192] The jurisdictions that place the burden on the defendant allow the patient to identify the bills incurred for treatment of the injury that is the subject of the litigation without requiring an expert witness to testify to the reasonableness or necessity of the expenses. The courts in these jurisdictions do not limit the right of cross-examination.[193]

Even if some jurisdictions where "a plaintiff has the burden of proving the actual amount of her past medical expenses and that those expenses were reasonable and necessary,"[194] the method of establishing reasonableness and necessity is not limited to expert testimony.[195] These jurisdictions allow the trustworthiness of the charges to be established by expert testimony or other means, such as by affidavit or even the plaintiff's own testimony.[196] Thus, even the jurisdictions that place the burden on the plaintiff have taken a more inclusive approach to a proponent's medical expense testimony.[197]

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[192] Advisory Committee Notes on 2014 Amendments to the Federal Rules of Evidence, Rule 803(6).
[193] *For example*: O.C.G.A. (Georgia Code) § 24-9-921, Identification of medical bills; expert witness unnecessary; Miss. Code Ann. § 41-9-119, Evidence of reasonableness of medical expenses. See also: *Wagner v. McDaniels*, 9 Ohio St. 3d 184, 186 (Ohio 1984); .
[194] For example: *Rahimi v. United States*, 474 F. Supp. 2d 825, 826 (N.D. Tex. 2006). See also *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So. 3d 538, 540 (Fla. Dist. Ct. App. 2d Dist. 2012).
[195] *Rahimi v. United States*, 474 F. Supp. 2d 825, 827 (N.D. Tex. 2006) ("[S]ection 18.001 of the Texas Civil Practice and Remedies Code provides a limited exception to this general rule... via a controverting affidavit").
[196] *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So. 3d 538, 540 (Fla. Dist. Ct. App. 2d Dist. 2012) ("To meet this burden, the [Plaintiff] used a one-page summary of [Plaintiff's] medical bills and [Plaintiff] testified that the charges were reasonable"); *Rahimi v. United States*, 474 F. Supp. 2d 825.
[197] *Rahimi v. United States*, 474 F. Supp. 2d 825, 826 (N.D. Tex. 2006) ("Traditionally, expert testimony was the only acceptable means of proving the reasonableness and necessity of past medical expenses").

E. It is in the Best Interest of the Virgin Islands to Allow Testimony of Medical Expenses Pursuant to FRE 807 While Ensuring That the Opponent Has Sufficient Notice of and Opportunity to Question the Reasonableness and Necessity of the Medical Bills.

The third and most important part of a Banks analysis involves "identifying the best rule for the Virgin Islands... based on the unique characteristics and needs of the Virgin Islands."[198]

Because the Virgin Islands is such a small territory, by necessity its residents often, as here, have to travel to Puerto Rico, Miami or beyond for specific and expert medical care. It is already disruptive of a doctor's or other specialist's business to attend a hearing or trial, a burden that is only compounded by requiring the expert to travel sometimes thousands of miles. It is not unheard of for parties to forego expert testimony when faced with the costs and time constraints of bringing experts before the Court. While this alone does not excuse litigants from fully presenting and defending their claims, this is certainly a consideration when the testimony sought to be presented is a summary of medical expenses that can be challenged and addressed well before trial. Therefore, this Court holds that it is in the best interest of the people of the Virgin Islands – especially in consideration of the "unique characteristics and needs" of the People – to allow testimony of medical expenses pursuant to FRE 807. The opponent then bears the burden of challenging the reasonableness and necessity of a plaintiff's costs.

F. Plaintiff's Testimony, Even if Admitted in Error, Resulted in Harmless Error.

Even if the Court's *Banks* analysis from the bench was in error, Defendant fails to establish that it was harmed by the Plaintiff's summary of his medical expenses. Rule 26 discovery began as early as February of 2013. The Plaintiff; an orthopedic surgeon; a custodian of medical records and hospital accounts research specialist at Schneider Regional Medical

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[198] *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citation omitted).

Center; and a program administrator with the Department of Health testified on September 30, 2014; and a spine surgeon testified on October 1, 2014. Even if the burden remained with the Plaintiff, Defendant was afforded ample notice and opportunity to cross-examine Plaintiff and other witnesses on the reasonableness and necessity of Plaintiff's medical treatment and expenses.

G. Banks – Conclusion

The Court finds that medical bills, when presented after sufficient notice to the adverse party, are admissible by a proponent pursuant to FRE 807, the residual exception to the rule against hearsay. The Court finds that medical bills, with notice and when viewed in light of the record and the proponent's injuries, are trustworthy indicia of the present medical expenses[199] borne by a plaintiff or other responsible party. "[A] plaintiff's testimony alone, that the plaintiff had incurred all of the plaintiff's medical bills as a result of an accident, is a sufficient predicate for allowing the jury to resolve the question of whether the medical bills were reasonable or necessary."[200] This finding is in line with binding local case law, as well as the majority approach, and is in the best interest of the people of the Virgin Islands.

VI. Testimony of Amy Gurlea

Defendant argues that the Court erred by not allowing Amy Gurlea to rebut Rosie Mackay's testimony, stating that Gurlea was necessary to dispute Mackay's 48/42 rule testimony and to "show that [Defendant's] wall was... a common, general condition in the territory."[201] The Court finds that Gurlea's rebuttal was unnecessary and indeed could confuse the issue, because, as discussed above, meeting building standards is not prima facie proof of non-

[199] This holding does not address the presentment of evidence regarding future medical expenses.
[200] 22 Am Jur 2d Damages § 734.
[201] Defendant's brief, p. 23.

negligence. Additionally, testifying that other walls are similar to Defendant's wall could just as likely be interpreted by the jury to mean that many locations on island pose an equally dangerous threat to pedestrians.

VII. Jury Instructions on Both Negligence and Premises Liability

Defendant argues that the while Plaintiff's complaint lists counts for negligence and premises liability, Plaintiff's claims are impermissibly duplicative.[202] Defendant also contends that the claims are distinct claims, but the jury should have only been instructed on premises liability.[203]

"In the Virgin Islands, claims that are insufficiently distinct from plaintiffs' other, more established tort claims" are dismissed.[204] "[T]he foundational elements of negligence [are] (1) a legal duty of care to the plaintiff [and] (2) a breach of that duty of care by the defendant, (3) constituting the factual and legal cause of (4) damages to the plaintiff."[205] The elements of a claim for premises liability involve "a condition on the land... that [the possessor]:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to [the Plaintiff], and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

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[202] Defendant's brief, p. 27.
[203] Defendant's brief, p. 25.
[204] *Glenn v. Dunlop*, 423 F. App'x 249, 255 (3d Cir. 2011) (citing to *Moore v. A.H. Riise Gift Shops*, 659 F.Supp. 1417, 1426 (D.V.I. 1987); *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F.Supp. 441, 463 (D.V.I. 1997)). This is also in line with our jurisdiction's recognition of the gist of the action doctrine, which "is designed to maintain the conceptual distinction between breach of contract claims and tort claims" and that, "[a]s a practical matter, the doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." *Pediatrix Screening, Inc. v. TeleChem Intern., Inc.*, 602 F. 3d 541, 548 (3d Cir. 2010) (quoting *eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 14 (2002)). The doctrine prevents parties from unfairly seeking a second bite at the same apple.
[205] *Machado v. Yacht Haven U.S.V.I.*, 2014 V.I. Supreme LEXIS 51, at *7 (V.I. 2014) (citations omitted); *White v. Spenceley, LLC*, 53 V.I. 666, at *3 (V.I. 2010) (*citing* RESTATEMENT (SECOND) OF TORTS § 281) (other citations omitted) (numbers added for clarity).

> (c) fails to exercise reasonable care to protect them against the danger."[206]

While Defendant is correct in noting that the District Court held in 2014 that a plaintiff's premises liability and negligence claims involved the same elements – "(1) duty, (2) breach, (3) causation, and (4) damages"[207] – this case is non-binding and non-dispositive here. Our Supreme Court has pointed to two separate sections of the Restatement as reflective of Virgin Islands common law: Restatement (Second) of Torts § 281[208] and Restatement (Second) of Torts § 343.[209] Section 281, unlike Section 343, does not require actual or constructive notice of a dangerous condition to establish a duty. Further, Section 281 involves a review of Defendant's actions, while Section 343 centers on the conditions upon the land.

And, while Defendant argues that it did *not* have a general duty to act with reasonable care to protect the Plaintiff,[210] under the elements of a premises liability claim, it *did* owe this duty to the Plaintiff. Although a "possessor is not an insurer of the visitor's safety,"[211] a possessor *does* have a duty "of reasonable care to protect [people] from known or foreseeable dangers".[212]

Additionally, while the jury was instructed on the elements of both negligence and premises liability, the Verdict Form asked the jury to determine and weigh Defendant's negligence only once. The Plaintiff is entitled to plead the distinct claims, and the jury is entitled

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[206] Restatement (Second) of Torts § 343.
[207] *Devitt v. Marriott Hotel Mgmt. Co. Virgin Islands*, 2014 U.S. Dist. LEXIS 5595, 10, 2014 WL 184625 (D.V.I. Jan. 16, 2014).
[208] *See* n. 27, above.
[209] *See* n. 65, above.
[210] Defendant's brief, p. 25.
[211] *Id.*, p. 28 (citing *Machado*, 2014 V.I. Supreme LEXIS 51, at *21) (quoting *Perez*, 59 V.I. at 534).
[212] *Perez*, 59 V.I. at 534 (citations omitted).

to rule on alternative theories. Because the Defendant had the benefit of the verdict form including only one question regarding whether Defendant was negligent, the Court did not err.

VIII. THE JURY'S RESPONSES ON THE VERDICT FORM WERE NOT IRRECONCILABLY INCONSISTENT.

Defendant argues that the jury's responses involved inconsistent answers because the jury's October 2, 2014, verdict found both that the Plaintiff's negligence was not the proximate cause of his injuries *and* that the Plaintiff was twenty percent (20%) liable for his injuries. The Court addressed this argument in its February 25, 2015, Order, holding that, pursuant to Fed. R. Civ. P. 49(b)(3), when the jury's answers to questions on the verdict form are inconsistent with the general verdict, the Court may enter an appropriate judgment according to the answers. The Court also found it significant that the harmed party – the Plaintiff – had waived its claim to the additional damages.

IX. Defendant's Argument That the Jury's Verdict Was Against the Weight of the Evidence

Defendant reiterates that if it is not entitled a judgment notwithstanding the verdict, it is still entitled to a new trial because the verdict "was not plausible in light of the full evidentiary record".[213]

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."[214] Unless the Court is

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[213] Defendant's brief, p. 29.
[214] *Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3d Cir. 1972) (cited by *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. V.I. 1976)).

"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."[215]

Here, Defendant alleges that "Plaintiff's testimony... was contradictory and lacked credibility in important aspects".[216] "[A]ll issues of credibility within the province of the jury must be viewed in the light most favorable to the [proponent]."[217] It is not unreasonable (1) that a jury would find that a Plaintiff with limited sight would not be specifically aware of the part of the bridge from which he fell; (2) for the jury to find that, even if the Plaintiff could see enough to read, his vision was still insufficient to negate Defendant's liability; or (3) for the jury to conclude that Plaintiff's testimony that he used to walk about "all of the time," even with his limited sight, did not conflict with his statement to Social Security Disability before his injury that his limited sight had already affected his ability to walk.[218]

X. Excessive Damages – Remittitur or New Trial

In the alternative, Defendant moves for a remittitur or new trial on damages.[219] Defendant argues that the "award for $1,500,000.00... for pain and suffering... was utterly implausible in light of the full evidentiary record, and was so clearly against the weight of the evidence as to constitute a miscarriage of justice."[220] Defendant also states that the "Court abused its discretion with respect to the two damages-related rulings, which likely led to this verdict."[221]

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[215] *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1271 (D.V.I. 1974) aff'd, 524 F.2d 767 (3d Cir. 1975).
[216] Defendant's brief, p. 30.
[217] *Canton v. People of the Virgin Islands,* 2014 V.I. Supreme LEXIS 56, at *10 (VI. 2014) (citation omitted).
[218] Defendant's brief, pp. 30-31.
[219] *Id.*, p. 31.
[220] *Id.*, p. 32
[221] *Id.*

An award of damages is a question for the jury to decide. However, when "a trial judge concludes that a jury verdict is clearly unsupported by the evidence and exceeds the amount needed to make the plaintiff whole,"[222] the Court will substitute its own "judgment for that of the jury regarding the appropriate award of damages."[223] "Because a remittitur invariably raises concerns regarding a litigant's Seventh Amendment right to have his case decided by a jury in its entirety... the remittitur [must be] accompanied [with] offering the verdict-winner the choice of a new trial."[224]

The Court will disturb the jury's award of damages only when the Court "find[s] 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".[225] Because the jury awarded Plaintiff a combined sum of damages for past medical expenses and past and future physical pain and suffering, the Court will review each finding separately.

A. Past Medical Expenses

The jury awarded the Plaintiff $328,169.98 in past medical expenses, the exact amount that the parties stipulated to as medical bills in connection with the January 28, 2012, incident. The Defendant does not appear to argue that this amount is excessive or against the weight of the

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[222] *Marrero v. Brin*, 536 Fed. Appx. 270, 275 (3d Cir. V.I. 2013) (citation omitted).
[223] *C&C Constr. & Maint., Inc. v. Nales-Martinez*, 55 V.I. 1040, 1055-1056 (D.V.I. App. Div. 2011) (quoting *Cortez v. Trans Union, LLC*, 617 F.3d 688, 716 (3d Cir. 2010)); see also *Williams v. Rene*, 886 F. Supp. 1214, 1235 (D.V.I. 1995) ("This inquiry by the Court presents a logical and objective basis for the Court to examine the jury's verdict. The Court has observed the trial just as the jury did, and is in an excellent position to review the evidence in the record and make an assessment as to whether or not the verdict is reasonable in light of that evidence").
[224] *Nales-Martinez*, 55 V.I. at 1055-1056 ("Choice is the lynchpin that allows the remittitur to withstand Seventh Amendment scrutiny on appeal; because, the coupling of the remittitur with the election of a new trial gives the plaintiff the choice of accepting the reduced verdict and foregoing his right to have his damages heard by a jury, or suffering a new trial on damages") (citations omitted).
[225] *Seafarers Intern. Union of North America v. Thomas*, 42 F.Supp.2d 547, 555 (D.V.I. App. Div. 1999) (*citations omitted*).

evidence, and its contention that the Plaintiff did not meet his burden regarding the reasonableness and necessity of his expenses has been addressed above.

B. Physical Pain and Suffering, Past and Future

That there may be situations within our jurisdiction that do not warrant damages on the order of those awarded here does not foreclose the possibility that some injuries do. Therefore, the Court must determine if the jury's $1,500,000.00 award had "no rational basis in the present record for the amount of the jury verdicts."[226] The jury was instructed that "in determining the measure of damages, [is] should use [its] common sense and good judgment to consider the nature and extent of any harm suffered by the Plaintiff, the effect upon the Plaintiff's health, and the duration of the injury, and the amount of damages, if any, that would fairly and adequately compensate the Plaintiff for the harm the Plaintiff suffered and will reasonably suffer in the future."[227] Evidence was submitted at trial that Plaintiff was in extreme pain after he fell off of a bridge on Defendant's property; that he had major back surgery on his back following the incident; that he had a life expectancy of 18.3 years; that the injury interfered with his activities; and that he continued to suffer pain. Under the facts of this case, the jury's verdict was not so excessive as to "shock the judicial conscience"[228] as to justify remittitur.

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[226] *Gumbs v. Pueblo International, Inc.*, 823 F.2d 768, 772 (3d Cir. V.I. 1987) (citation omitted).
[227] Jury Charge.
[228] *Creative Minds, LLC. v. Reef Broadcasting, Inc.*, 2014 V.I. LEXIS 81, at *26 (V.I. Super. Ct. Sept. 24, 2014) (citations omitted).

CONCLUSION

The Court concludes that jury's findings were reasonable and that the evidence presented at trial was sufficient to support the jury's verdict. Consequently Plaintiff's Motion for Judgment as a Matter of Law and Alternatively for a New Trial is denied. An appropriate Judgment and Order shall follow.

Dated: April 1, 2015

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

Attest: Estrella H. George
Acting Clerk of the Court ___/___/_____

by: _____
Lori Boynes-Tyson
Court Clerk Supervisor 4/8/15