For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELBE V. BRATHWAITE, Appellant/Plaintiff, v. **PHILLIP XAVIER d/b/a** **GARY'S MARINE SERVICE,** Appellee/Defendant.	)))))))))	**S. Ct. Civ. No. 2017-0037** Re: Super. Ct. Civ. No. 375/2013(STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Renee Gumbs Carty

Argued: October 9, 2018
Filed: July 16, 2019

Cite as: 2019 VI 26

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Appellant Elbe V. Brathwaite ("Brathwaite") appeals from an April 5, 2017 judgment of the Superior Court in her favor against Phillip Xavier ("Xavier") in the amount of $92,000 for damages she suffered as a passenger on a boat owned and operated by Xavier when he negligently crashed that boat onto a rocky outcropping near Cruz Bay, St. John. For the following reasons, we reverse the Superior Court's decision to exclude portions of the testimony of Brathwaite's expert witness, vacate the court's April 5, 2017 judgment, and remand for a new trial. And though we find that the Superior Court committed procedural error by dismissing, *sua sponte*, Brathwaite's claim for gross negligence and accompanying prayer for punitive damages without providing her any notice or opportunity to be heard, we affirm the dismissal as harmless error because Brathwaite failed to introduce any evidence to establish that Xavier was grossly, as opposed to ordinarily, negligent. Finally, because Xavier failed to introduce any evidence from which the jury might reasonably infer that Brathwaite was comparatively negligent in causing her injuries, we conclude that the Superior Court abused its discretion by instructing the jury on comparative negligence.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 On the evening of January 19, 2013, Brathwaite and Xavier both attended a concert on Jost Van Dyke. Following the concert, at approximately 2:30 a.m. the following morning, Brathwaite, together with other passengers, boarded Xavier's boat for the return trip to St. Thomas. As the boat, operated by Xavier, approached the Pillsbury Sound along the north side of St. John, the boat crashed on a small, low-lying, rocky outcropping near Caneel Bay causing significant injuries to Brathwaite.

¶ 3 On July 18, 2013, Brathwaite filed a complaint against Xavier alleging claims for negligence, negligence per se, and gross negligence, seeking both compensatory and punitive

damages. In his answer, Xavier denied the allegations against him and asserted various affirmative defenses, including that Brathwaite was comparatively negligent in causing her own injuries. After the close of discovery, but before trial, Xavier filed two motions *in limine*. The first sought to exclude portions of the testimony of Brathwaite's medical expert, Dr. David Weisher, and the second requested, among other things, that the Superior Court dismiss Brathwaite's claim for negligence per se.[1] By order entered March 1, 2017, the Superior Court granted Xavier's motion to exclude portions of Dr. Weisher's testimony. In the same order, the court denied, as moot, Xavier's request to dismiss Brathwaite's claim for negligence per se, because in her response to Xavier's motion, Brathwaite expressly renounced her intention to pursue that claim. Additionally, the Superior Court went on to purportedly grant Xavier's motion *in limine* as to Brathwaite's gross negligence claim, despite the fact that the issue of gross negligence was not included in Xavier's motion and was only raised for the first time in his reply to Brathwaite's response.

¶ 4 Brathwaite immediately filed a motion for reconsideration, which she argued before the court on the first day of trial on March 7, 2017, and which the court denied from the bench. In the course of denying Brathwaite's motion, the Superior Court further decided to dismiss Brathwaite's request for punitive damages, reasoning that punitive damages may not be awarded for claims of ordinary negligence. At the close of evidence, Brathwaite renewed her argument and moved the court to include a punitive damages section on the jury verdict form, arguing that she had

[1] As explained further below, Xavier's motion was styled as a motion *in limine* to exclude certain evidence as inadmissible, including evidence of future lost earnings, evidence concerning Xavier's payment to Brathwaite for medical expenses, and evidence of liability insurance coverage. Also included in that motion however, were two separate arguments "that the court should not permit Plaintiff's claim for negligence *per se*" —the first arguing that Brathwaite's failed to "sufficiently plead" negligence per se, and the second arguing that Brathwaite failed to introduce sufficient evidence of "facts establishing negligence per se." In fact, Xavier's first argument is more appropriately characterized as an argument for dismissal under V.I. R. Civ. P. 12(b)(6), while his second argument is best viewed as an argument for summary judgment under V.I. R. Civ. P. 56.

introduced sufficient evidence to support the inference that Xavier acted in reckless disregard for the safety of his passengers. The Superior Court denied the motion.

¶ 5 Before closing arguments, Brathwaite objected to the Superior Court's inclusion of a jury instruction on comparative negligence where neither party requested such an instruction. She argued that Xavier failed to introduce any evidence from which the jury could reasonably infer that Brathwaite had any fault in contributing to her injuries. Once the court indicated that it was inclined to overrule Brathwaite's objection, she moved, one final time, to amend her pleading under V.I. R. Civ. P. 8 to reinstate her previously dismissed claim and associated prayer for punitive damages. After denying Brathwaite's motion and overruling her objection, the Superior Court heard closing arguments and instructed the jury. Following deliberations, the jury returned a verdict finding Xavier liable for negligence and assessing damages in the amount of $184,000. However, the jury also found that Brathwaite was comparatively negligent such that Brathwaite and Xavier were each 50% liable. Accordingly, on April 5, 2017, the Superior Court entered judgment in favor of Brathwaite and against Xavier in the amount of $92,000. Brathwaite timely filed a notice of appeal on March 27, 2017.

II. JURISDICTION

¶ 6 We have jurisdiction over this civil appeal pursuant to title 4, section 32(a) of the Virgin Islands Code, which provides that "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." Because the Superior Court's April 5, 2017 judgment memorializing the March 10, 2017 jury verdict conclusively adjudicated all disputes between the parties, it is final order within the meaning of 4 V.I.C. § 32(a). *See, e.g.*, *Antilles Sch., Inc. v. Lembach*, 64 V,I, 400, 408

(V.I. 2016) (judgment implementing jury verdict is a final order for purposes of 4 V.I.C. § 32(a) because it adjudicates all of the issues between the parties).

III. DISCUSSION

¶ 7 On appeal, Brathwaite asserts that Superior Court erred by: (1) excluding significant portions of Dr. Weisher's expert testimony; (2) dismissing Brathwaite's claim for gross negligence and request for punitive damages despite evidence demonstrating that Xavier acted in reckless indifference to the safety of passengers on his boat; and (3) instructing the jury on comparative negligence in the absence of any evidence demonstrating that Brathwaite was negligent. We review the Superior Court's exclusion of expert testimony for abuse of discretion, and we review, *de novo*, the court's decision to dismiss Brathwaite's claim for gross negligence and prayer for punitive damages. Because Brathwaite timely objected to the court's comparative negligence instruction, we review the instruction for abuse of discretion. We address each issue, in turn, below.

A. Exclusion of Expert Testimony

¶ 8 Brathwaite argues that the Superior Court erred by misapplying the *Daubert* standard to exclude all testimony concerning any expert opinion of Dr. Weisher that was not independently verified by objective medical tests, including opinions about possible closed head or sheering brain injury.[2]

¶ 9 In its memorandum opinion granting Xavier's motion *in limine*, the Superior Court expressly concluded: (1) that Dr. Weisher was qualified as an expert neurologist; (2) that his

[2] Brathwaite also argues that the court erred by ruling on Xavier's motion without first holding a *Daubert* hearing. Although Brathwaite opposed Xavier's motion, she never requested a hearing on the motion. We have previously explained that the court "is not obliged to look into the questions posed by Rule 702 when neither side either requests or assists," *Virgin Islands Waste Mgmt. Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 371 (V.I. 2014) (citing *Malloy v. Reyes*, 61 V.I. 163, 183 (V.I. 2014)), and have further indicated that the failure to request such a hearing may result in the entire *Daubert* issue being deemed waived for purposes of appeal. *See Antilles School, ,* 64 V.I. at 426 n. 11. And though we find that Brathwaite sufficiently preserved her substantive objection to the exclusion of Dr. Weisher's

methodology, differential diagnosis, was not merely reliable, but constituted "one of the cornerstones of the medical industry;" and (3) that Dr. Weisher's testimony was relevant and would assist the jury in resolving factual disputes concerning Brathwaite's injuries and damages. Accordingly, the court explained that it would "allow expert testimony on Dr. Weisher's methodologies used in diagnosing the … closed head injury or shearing brain injury…" and would further allow testimony "that [spoke] to the types of neurological injuries that an accident such as this might cause." In summary, the Superior Court found "that with noted exception, Dr. Weisher's testimony satisfie[d] both [V.I. R. E. 702] requirements of reliability and fit."

¶ 10 Nevertheless, citing V.I. R. E. 403,[3] the court expressed concern that Dr. Weisher's opinion that Brathwaite suffered a closed head or shearing brain injury as a result of the boating accident was the product of differential diagnosis based solely on Brathwaite's subjective, self-report of her own symptoms and was not independently verified by objective imaging tests or scans of Brathwaite's brain, which failed to reveal any abnormalities. The Superior Court explained its decision as follows:

> As part of Dr. Weisher's diagnosis he recommended a series of tests to be performed on Plaintiff, including several that would take images of the brain and allow trained physicians to evaluate any injury. However, the results of these tests were all negative. In Dr. Weisher's deposition he opines that although all objective imaging tests showed that Plaintiffs brain was normal, and did not suffer injury, he still believes one occurred. In essence, Dr. Weisher attempts to supersede the results of a test that he ordered, with his own expertise. This is done without providing any evidence to the court that these test results are irregular or incomplete. Such testimony would likely mislead the jury, as Dr. Weisher would subjectively be able to trump objective medical technology. If a juror were to hear that Dr, Weisher should be trusted over medical results, then it reasonably follows that jurors may

testimony as articulated in her opposition to the motion in *limine*, we conclude that by failing to timely request a *Daubert* hearing, Brathwaite waived, for purposes of appeal, her procedural argument that the Superior Court erred by failing to conduct a *Daubert* hearing. V.I. R. APP. P. 22(m).

[3] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of… unfair prejudice…[or] misleading the jury…" V.I. R. E. 403

> believe Dr. Weisher should be trusted above any other opposing evidence. Although probative, the jury seems highly likely to misuse the expert's testimony to being superior to medical technology. Without proper basis for such this Court is not prepared to grant such an allowance, due to its unfair prejudice to Defendant. Thus, this Court does not find that the proffered expert testimony of Dr. Weisher should be allowed as it relates to his belief of the cause of the accident, as it contradicts his objective medical results.

¶ 11 Although the Superior Court attempted to couch its decision in terms of the Rule 403 balancing test, a close examination of the excerpted language clearly reveals that the court's decision to exclude the testimony was, in fact, based on its determination that Dr. Weisher's conclusions about Brathwaite's alleged brain injuries—drawn from Brathwaite's self-reports of her own symptoms—were contradicted[4] by certain objective medical tests and scans, and were therefore not credible in the eyes of the court. In the context of Rule 403, "unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *See People v. Todmann*, 53 V.I. 431, 443 (V.I. 2010) (citing advisory committee notes to FED. R. CIV. P. 403). But here, the only "unfair prejudice" identified by Court is the possibility that the jury might find Dr. Weisher's conclusions credible despite the absence of corroborating, objective, medical tests; a finding with which the court disagreed. In essence then, the Superior Court concluded that Xavier would be unfairly prejudiced by Dr. Weisher's testimony, because the jury might fail to correctly weigh the evidence.

¶ 12 Yet, as we have repeatedly emphasized, "[t]he law irrefutably declares that the jury, and not the court, determines the credibility of witnesses in a jury trial." *Alexander v. People*, 60 V.I. 486, 498 (V.I. 2014) (citing *United States v. Saada*, 212 F.3d 210, 221 n.12 (3d. Cir.2000)).

[4] The Superior Court described the negative imaging test results as contradicting Dr. Weisher's opinions concerning Brathwaite's brain injuries based upon her own self-reported symptoms. However, Dr. Weisher testified that the scans and tests he performed were not normally capable of detecting brain injuries on the microscopic level, and that those tests were only intended to rule out other possible diagnoses.

Moreover, "it is the jury's special province to weigh conflicting testimony, determine credibility and draw factual inferences." *Id.* (quoting *United States v. Montoya*, 827 F.2d 143, 155 (7th Cir. 1987)(internal quotation marks and citations omitted)); *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) ("[I]t is the responsibility of the jury not the court to decide what conclusions should be drawn from evidence admitted at trial."). In this same vein, we have generally held that inconsistencies or discrepancies in witness testimony generally go to the weight, rather than the admissibility of the testimony. *See Ostalaza v. People*, 58 V.I. 531, 547 (V.I. 2013) (citing *Nanton v. People*, 52 V.I. 466, 485–86 (V.I. 2009)).

¶ 13 Here, the Superior Court correctly concluded that Dr. Weisher's methodology—differential diagnosis—satisfied the *Daubert* reliability test. Indeed, we have previously recognized "a patient's medical history, including subjective complaints, to be a sound basis for a medical expert's diagnosis in some instances." *Suarez v. Gov't of the V.I.*, 56 V.I. 754, 761 (V.I. 2012) (citing *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir.2000) (permitting of admission of medical expert testimony as to the cause of an injury based on subjective complaints)).[5] Thus, even to the extent that the negative test results can be said to conflict with Dr. Weisher's opinions based on Brathwaite's subjective complaints, the existence of conflicting evidence does not render the opinions inadmissible. Rather, Brathwaite was entitled to have the

[5] However, the evidence to support an expert opinion must be sufficient to provide the reliability that is essential under Rule of Evidence 702 and our case law. And in *Suarez* we also noted that the United States Supreme Court has warned that there is nothing that requires a trial court "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion offered." *Id.* at 761 (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Indeed, it is a fundamental premise of Rule 702 that "[p]roposed [expert] testimony must be supported by appropriate validation—i.e., 'good grounds' based on what is known." *Daubert*, 509 U.S. at 590. We also note that while our decision in *Suarez* was controlled by the former 5 V.I.C. § 911 rather than the *Daubert* standard adopted by this Court in *Antilles School, Inc. v. Lembach*, 64 V.I. 400 (V.I. 2016), the Seventh Circuit's decision in *Cooper*—which was the basis of our observation that subjective complaints may form the basis of expert opinion—reached its conclusion interpreting and applying the *Daubert* test.

jury weigh for itself the apparently conflicting evidence and reach its own determination as to the credibility of Dr. Weisher's conclusions. The Superior Court's assertion that jurors would be "highly likely" to improperly evaluate the expert testimony as "being superior to medical technology" is effectively an assertion that, when it comes to expert testimony, jurors are inherently incapable of performing their most essential function—weighing evidence and assessing the credibility of witnesses. Thus, because the Superior Court improperly usurped the role of the jury by substituting its own determination of weight and credibility for that of the jury, we conclude that the court abused its discretion by excluding Dr. Weisher's testimony. In turn, because we cannot say with any degree of certainty how the inclusion of testimony from Dr. Weisher about additional injuries suffered by Brathwaite may impact the jury's verdict with respect to damages, we vacate the Superior Court's April 5, 2017 judgment and remand this matter for a new trial.

B. Claim for Gross Negligence & Request for Punitive Damages

¶ 14 Brathwaite argues that the Superior Court erred by dismissing, *sua sponte*, her gross negligence claim and corresponding prayer for punitive damages, without providing her with any notice of its intention to rule or opportunity to defend her claim. Brathwaite also contends that the court erred both by failing to conduct a *Banks* analysis to determine the elements of gross negligence, and by dismissing her gross negligence claim on the merits.[6] For the reasons discussed

[6] Xavier argues that any claim of error based on the dismissal of Brathwaite's gross negligence claim is waived because Brathwaite failed to object to the dismissal of her gross negligence claim before the Superior Court. It is true that Brathwaite objected only to the dismissal of her prayer for punitive damages, as she maintained that she could obtain an award of punitive damages without any claim of gross negligence. Nonetheless, because the issue of gross negligence is likely to occur on remand, we exercise our discretion to consider this issue in the interests of judicial economy. *Tremcorp Holdings, Inc. v. Harris*, 67 V.I. 601, 608 n.4 (V.I. 2017) ("[T]his Court possesses the authority to address an issue that is likely to occur on remand.") (citing *Frett v. People*, 58 V.I. 492, 512–13 (V.I. 2013)); *Fontaine v. People*, 56 V.I. 571, 593 (V.I. 2012) (stating that the Supreme Court may address an issue that is likely to recur on remand in order to provide guidance to the Superior Court); *Smith v. Turnbull*, 54 V.I. 369, 374 (V.I. 2010)

below, although we agree that the Superior Court erred by dismissing Brathwaite's claim, *sua sponte* and by failing to conduct the requisite *Banks* analysis, we conclude that these errors were harmless, as the record lacks sufficient evidence to support an inference that Xavier acted in reckless disregard for the safety of his passengers.

1. Sua Sponte Dismissal

¶ 15 As a general matter, we have repeatedly held that the Superior Court errs when it raises and decides an issue without presenting one or both parties with notice and an opportunity to be heard. *See, e.g.*, *Malloy v. Reyes*, 61 V.I. 163, 175 (V.I. 2014) (citing *Brunn v. Dowdye*, 59 V.I. 899, 905 (V.I.2013)). In this case, Xavier's motion *in limine* only challenged Brathwaite's claim for negligence *per se* and made no mention of her claim for gross negligence. Rather, Xavier only raised the issue of gross negligence for the first time in his reply to Brathwaite's response to his motion. We have held that it is improper for a party to raise an issue for the first time in a reply brief in Superior Court, because the opposing litigant is not, as a matter of course, given an opportunity to respond to that new argument in a filing provided for under the rules governing standard motion practice in Virgin Islands trial courts. *See, e.g.*, V. I. R. CIV. P. 6-1(c) (providing that "[o]nly a motion, a response in opposition, and a reply may be served on other parties and filed with the court," that "further response or reply may be made only by leave of court obtained before filing," and that "[p]arties may be sanctioned for violation of this limitation"); *Perez v. Ritz-Carlton Virgin Islands, Inc.*, 59 V.I. 522, 528 n.4 (V.I. 2013) (citations omitted) ("Like an issue raised for the first time in an appellate reply brief, an issue raised for the first time in a reply brief supporting summary judgment is deemed waived because the opposing party typically does not

(same); *see also Garcia v. Garcia*, 59 V.I. 758, 772 (V.I. 2013) ("[T]his Court, in the interests of judicial economy, may resolve issues that will likely recur on remand in order to provide guidance to the Superior Court.").

have the opportunity to respond."). And, as the Superior Court has previously held, in these circumstances "the court, in its discretion, could grant the opposing party leave to respond further, either sua sponte when warranted or on motion." *Der Weer v. Hess Oil Virgin Islands Corp.*, 64 V.I. 107, 121 (V.I. Super. 2016); *see also Virgin Islands Econ. Dev. Auth. v. Hypolite*, 2019 WL 451370, at *4 (V.I. Super. Jan. 28, 2019) (citing cases) (concluding that "it is appropriate . . . to allow the non-moving party the opportunity [, via a filing,] to respond to arguments raised for the first time in the movant's reply"). Thus, the Superior Court erred by ruling on the issue—effectively *sua sponte*—without first notifying Brathwaite and providing her with an opportunity to respond to Xavier's reply.[7]

¶ 16 However, the court's decision will not be reversed if the error was harmless. And in order to determine if the Superior Court's procedural error was harmless in this case, we must first ascertain both the elements of a claim for gross negligence, and the nature of the relationship between such claims and prayers for punitive damages.

2. Elements of Gross Negligence

¶ 17 Although this Court has neither defined gross negligence nor squarely addressed the question of what elements a plaintiff must prove to make out a cause of action for gross negligence, in prior cases we have implicitly endorsed the concept of gross negligence as a level of culpability distinct from ordinary negligence. *See, e.g., Francis v. People*, 56 V.I. 370, 382 (V.I. 2012)

[7] The Superior Court also erred in failing to identify the standard under which it evaluated Brathwaite's claim for gross negligence. It is not clear, either from the court's opinion or the parties' briefs, whether the Superior Court's order constituted a dismissal of Brathwaite's claim under V.I. R. Civ. P. 12(b)(6) or an entry of summary judgment against Brathwaite on her claim under V.I. R. Civ. P. 56. The court's failure to explain the basis for its decision renders meaningful appellate review impossible and generally results in remand. *See, e.g., Mahabir v. Heirs of George*, 63 V.I. 651, 666 (V.I. 2015) (remanding matter for Superior Court to clarify its order awarding legal fees and costs because a "lack of explanation makes it impossible for this Court to meaningfully review the Superior Court's determination—under abuse of discretion or any other standard").

(citations omitted) (finding that gross negligence may constitute an independent, intervening cause while ordinary negligence may not); *Cape Air Int'l v. Lindsey*, 53 V.I. 604, 621 n.9 (V.I. 2011) (noting that under a "gratuitous bailment ... [the bailee] would have been liable for loss or damage caused by its gross negligence") (citations omitted); *St. Thomas–St. John Board of Elections v. Daniel*, 49 V.I. 322, 356 (V.I. 2007) ("[E]ven in the absence of gross negligence (which does exist here) or fraud, an election marred by pervasive irregularities that affect the outcome of the election should not stand."). Thus, before issuing any decision with respect to Brathwaite's claim for gross negligence, the Superior Court was required to determine: "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014) (quoting *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013)). And although the court's failure to conduct the required analysis itself constitutes reversible error, this case presents an appropriate opportunity for us to exercise our discretion to address this issue of first impression in the first instance, both in the interest of judicial economy, and to provide guidance to the Superior Court. *See Frett v. People*, 58 V.I. 492, 512–13 (V.I. 2013) (deciding to reach issue to guide the Superior Court).

¶ 18 Courts have long struggled to define gross negligence. In 1875, the Supreme Court of the United States observed:

> It is insisted, however, that, where there is 'gross negligence,' the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is, that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability … beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions.

Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 493-94 (1875).

¶ 19 In recent years, courts in the Virgin Islands have applied two different, competing definitions of gross negligence. Since its decision in *Tutein v. Parry*, 48 V.I. 101 (V.I. Super. 2006), the Superior Court has most frequently defined gross negligence in terms of wanton and/or reckless behavior that demonstrates a conscious indifference to potential risk of injury to persons or property. In *Tutein*, the court analyzed the meaning of gross negligence in the context of the statutory cap on non-economic damages arising from a motor vehicle accident established in 20 V.I.C. § 555. After noting a split in authorities from other jurisdictions, the court concluded that "gross negligence in that context encompasses 'reckless' and 'wanton' conduct" wherein the actor "demonstrate[s] a conscious indifference to the consequences of his conduct or act so unreasonable that imminent likelihood of harm or injury to another is reasonably apparent." 48 V.I. at 107. Subsequent trial-level cases following this line of reasoning expressly equate grossly negligent behavior with reckless behavior. *See, e.g.*, *Powell v. Chi–Co's Distrib.*, 2014 V.I. LEXIS 21, at *5 n.11 (V.I. Super. 2014) (unpublished) (adopting the *Tutein* definition of gross negligence as equivalent to recklessness); *Marian v. Fraser*, 2014 V.I. LEXIS 19, at *7 (V.I. Super. 2014) (unpublished) (holding that Plaintiff failed to state a claim of gross negligence as defined in *Tutein*).

¶ 20 However, a minority of Superior Court cases considering the issue have adopted the definition of gross negligence articulated by the District Court of the Virgin Islands in *Thomas v. Rijos*, 780 F.Supp.2d 376, 385–86 (D.V.I. 2011). *See, e.g.*, *Hill v. De Jongh*, 2012 V.I. LEXIS 11, at *20 (V.I. Super. 2012) (adopting *Thomas* formulation of elements of gross negligence in ruling on defendant's motion to dismiss). The *Thomas* court reasoned that because the Legislature used both the terms "gross negligence," and "recklessness," separately in different sections of Title 20 of the V.I. Code, the Legislature must have intended for gross negligence to refer to a level of

culpability somewhere between ordinary negligence and recklessness. *Id*. Therefore, the District Court in *Thomas* defined gross negligence as "conduct that presents an unreasonable risk of physical harm to another ... that ... is substantially greater than that which is necessary to make the conduct negligent." 780 F.Supp.2d at 386 (internal citations and quotations omitted). The *Thomas* court also opined that although a showing of recklessly indifferent behavior would be sufficient to support a claim for gross negligence, a showing of recklessness is not required to sustain the claim. *Id.*

¶ 21 Jurisdictions outside the Virgin Islands also disagree on the proper definition of gross negligence. As explained by Professors Prosser and Keeton, the majority of courts "consider that 'gross negligence' falls short of a reckless disregard of the consequences and differs from ordinary negligence only in degree, and not in kind." W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 34, at 212 (5th ed. 1984) (citing *Thompson v. Bohlken*, 312 N.W.2d 501 (Iowa 1981); *Thone v. Nicholson*, 269 N.W.2d 665 (Mich. Ct. App. 1978)). For example, noting that "[t]he general consensus finds gross negligence constitutes conduct more egregious than ordinary negligence but does not rise to the level of intentional indifference to the consequences of one's acts," the Supreme Court of Pennsylvania has defined gross negligence as "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference;" where the behavior of the defendant is "flagrant, grossly deviating from the ordinary standard of care." *Ratti v. Wheeling Pittsburgh Steel Corp*., 758 A.2d 695, 704 (Pa. 2000). Similarly, the Supreme Court of New Jersey has adopted the majority approach, defining gross negligence as "the failure to exercise slight care or diligence," explaining that "[a]lthough gross negligence is something more than 'inattention' or 'mistaken judgment,' it does not require willful

or wanton misconduct or recklessness." *See Steinberg v. Sahara Sam's Oasis, LLC*, 142 A.3d 742, 754 (N.J. 2016) (collecting cases).

¶ 22 Yet, a minority of jurisdictions have held, like the Superior Court in *Tutein*, that gross negligence is defined as misconduct evidencing a wanton, reckless disregard for the consequences of one's actions. For instance, the Court of Appeals of New York has defined gross negligence as "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing," which "differs in kind, not only degree, from claims of ordinary negligence." *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Servs.*, 611 N.E.2d 282, 284 (N.Y. 1993) (citing *Sommer v. Federal Signal Corp.*, 593 N.E.2d 1365, (N.Y. 1992); *see also American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549 (2d Cir. 1996) ("[U]nder New York law, a mistake or series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence."). Similarly, courts in Mississippi, North Dakota, Maryland and Oklahoma have held that a successful claim of gross negligence requires proof of recklessness. *See, e.g., W. Cash & Carry Bldg. Materials, Inc. v. Palumbo*, 371 So.2d 873, 877 (Miss.1979) ("Gross negligence is that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them."); *Jones v. Ahlberg*, 489 N.W.2d 576, 581 (N.D. 1992) ("Gross negligence is a lack of care which is practically willful in its nature and evinces a reckless temperament"); *Marriott Corp. v. Chesapeake & Potomac Telephone Co. of Maryland*, 723 A.2d 454, 478 (Md. Ct. App. 1998) (defining gross negligence as "[a]n intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, [also implying] a thoughtless disregard of the consequences without the exertion of any effort to avoid them."); *Myers v. Lashley*, 44 P.3d 553,

563 (Okla. 2002) ("Gross negligence is characterized as reckless indifference to the consequences.").

¶ 23 Thus, the choice between the majority and minority definitions of gross negligence is effectively a choice between recognizing a four-tiered spectrum of culpability—distinguishing between ordinary negligence, gross negligence, recklessness, and intentional wrongdoing—and a more simplified three-tiered spectrum of culpability—recognizing only negligence, gross negligence, and intentional wrongdoing. The former approach draws a distinction between grossly negligent conduct and reckless conduct, while the latter rejects any distinction and equates gross negligence with recklessness. With these differences in mind, we must now determine which approach represents the best rule of law for the Virgin Islands.

¶ 24 Recently, the Superior Court, in *Yusuf v. Ocean Properties*, 2016 WL 9454143 (V.I. Super. 2016), conducted the requisite *Banks* analysis to determine the soundest rule of law for the Virgin Islands with respect to gross negligence. After reviewing the definitions previously used by courts in the Virgin Islands and in other jurisdictions, the court opined:

> After extensive review, the [c]ourt finds that the soundest rule of law for the Virgin Islands is to define gross negligence as wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property. This is consistent with the majority of Superior Court decisions that address the issue, as well as with the position of the Restatement of Torts.[8] *See, e.g., Tutein*, 2006 V.I. LEXIS 27; *Marian*, 2014 V.I. LEXIS 19, at *7 (finding Plaintiff failed to state a claim of gross negligence as defined in *Tutein*); *Powell*, 2014 V.I. LEXIS 21, at *5 n.11 (declining to conduct a *Banks* analysis and adopting the Tutein formulation of gross negligence as equivalent with recklessness).

[8] The Restatement of Torts does not contain a section discussing or defining gross negligence. Instead, the Restatement (Second) of Torts § 500 defines reckless conduct and notes that some courts refer to such conduct as gross negligence, eschewing the entire concept of gross negligence being distinct from recklessness and ordinary negligence in favor of a more simplified approach.

> This approach is also favorable in that it equates gross negligence with a state of mind—reckless disregard—that is, at least in theory, different in quality and not merely in degree from ordinary negligence; thereby eliminating, or at least reducing, the confusion inherent in applying a nebulous and impracticable gross negligence standard vaguely defined as occupying a space somewhere between recklessness and ordinary negligence on the spectrum of culpability.[9] Rather, gross negligence, when defined in terms of wanton, reckless behavior, "tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent," and represents "an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care." PROSSER & KEETON ON TORTS § 34, at 214. [Additionally], the weight of authority from other jurisdictions using similar definitions of gross negligence makes it clear "that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention." *Id.* (collecting cases).

Yusuf, 2016 WL 9454143, at *4 (footnotes in original).[10]

¶ 25 In determining the soundest rule of law for the Virgin Islands, we must be mindful of the practical consequences of our decision. As discussed above, the choice between the majority and minority rules is, in this case, a choice whether to draw a distinction between gross negligence and recklessness. Thus, one way to frame our inquiry is in terms of the relative utility of the two

[9] As summarized by Prosser and Keeton, gross negligence was originally explained as "very great negligence," or "a failure to exercise even that care which a careless person would use," however many courts, "dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring willful, wanton, or reckless misconduct." PROSSER & KEETON ON TORTS § 34, at 211–12.

[10] Since the case was decided in 2016, the *Yusuf* formulation of gross negligence, together with its underlying reasoning, has been expressly considered and reaffirmed in no fewer than seven subsequent Superior Court cases. *See Ford v. Virgin Islands Dep't of Educ.*, 2016 WL 3606304, at *12 (V.I. Super. June 27, 2016) ("Having reviewed this *Banks* analysis, and agreeing with the methodology and conclusions of same, the Court hereby adopts the standard articulated in *Yusuf*."); *Turnbull v. Parris*, 2016 WL 6755831, at *2 (V.I. Super. November 3, 2016) (adopting and incorporating by reference the *Banks* analysis from *Yusuf*); *Libien v. MIFR (Virgin Islands) Inc.*, 2016 WL 7017642, at *4 (V.I. Super. November 28, 2016) ("This Court is satisfied that *Yusuf* lays out the soundest rule for defining gross negligence in the Virgin Islands and consequently, this Court adopts *Yusuf*'s analysis as though it were set forth in this Opinion."); *Frazer v. Police Benevolent Association, Local 816*, 2017 WL 2495487, at *12 n.107 (V.I. Super. June 7, 2017) ("After reviewing this *Banks* analysis and agreeing with the methodology and conclusions, the Court adopts the standard articulated in *Yusuf v. Ocean Props.*"); *Nicholas v. Damian-Rojas*, 2018 WL 3127426, at *2 (V.I. Super. June 23, 2018) ("The Court again adopts this definition of gross negligence as involving wanton, reckless behavior demonstrating a conscious indifference to the health or safety of persons or property."); *Olea v. Virgin Islands Telephone Corporation*, 2018 WL 4904935, at *4 (V.I. Super. October 2, 2018) ("As it did in *Libien*, this Court finds that the *Yusuf* court determined the soundest rule for defining gross negligence in the Virgin Islands and as a result, the Court adopts *Yusuf*'s analysis as though it were set forth in this Opinion.").

approaches. In other words, we might ask: what is the benefit, if any, of defining gross negligence as a distinct level of culpability that is greater than ordinary negligence but less than recklessness? On this issue, leading scholars have remarked:

> *Degrees of negligence generally irrelevant*. The extent to which the defendant departed from the norm of reasonable care—the "degree" of his negligence—is relevant in allocating damages among two or more negligent persons and on the issue of punitive damages, where the extent of culpability is a major factor in assessing the punitive award. Otherwise, apart from statute, there is no occasion at all to distinguish among degrees of fault. A defendant is subject to liability for negligence that causes damages within the scope of the risk for which he is responsible whether his negligence is great or small. He is liable for damages that will compensate the plaintiff for the plaintiff's actual harm, but that liability is not diminished if the defendant's negligence is slight, nor is it increased if the defendant's negligence is gross. Where courts tried to institute a general scheme of slight, ordinary, and gross negligence, practical difficulties led them to abandon it. Nothing was lost in leaving the scheme behind because the reasonable prudent person test, with its attention to circumstances, was quite adequate to deal with the cases.

DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 138 (2d ed. 2011) (styled "Degrees of negligence and the tripartite classification") (footnotes omitted).

¶ 26 In this light, the distinction (or lack of a distinction) between gross negligence and recklessness is important in two contexts: awarding punitive damages and interpreting statutory provisions limiting liability to cases of gross negligence. First, courts in the Virgin Islands have long held that an award of punitive damages "must be based upon conduct that is not just negligent but shows, at a minimum, *reckless indifference* to the person injured—conduct that is outrageous and warrants special deterrence." *See Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 824 (V.I. 2017) (collecting cases) (emphasis added). As such, adopting the minority approach as endorsed by the Superior Court—equating gross negligence with recklessness—yields a simple, bright-line rule: punitive damages may be awarded on a successful claim of gross negligence, but not on a claim of ordinary negligence. On the other hand, adopting the majority approach would result in a

situation where a successful claim of gross negligence may, or may not, permit an award of punitive damages depending upon whether the gross negligence complained of rises to the requisite level of "reckless indifference." Under this rule, a claim of gross negligence would not allow the plaintiff any additional recovery beyond that available on a claim for ordinary negligence, and the distinction between a claim of gross negligence and a claim of ordinary negligence would remain relevant only in the context of certain provisions of the Virgin Islands Code that specifically condition liability upon a finding of gross negligence.

¶ 27 Turning to the statutory references to "gross negligence," the term appears in numerous provisions of the Code. The great majority of these references take the form of limitations on liability, in which the officers of some government instrumentality, authority, commission, or board are exempted from liability for any actions taken in the scope of their respective duty except for actions constituting "willful wrongdoing or gross negligence." *See, e.g.*, 29 V.I.C. § 87(d) ("Board Members of the V.I. Housing Authority or the Virgin Islands Housing Finance Authority, while acting within the scope of their duties as board members, shall not be subject to personal or civil liability… unless the conduct of the member is determined by a court of competent jurisdiction to constitute willful wrong doing or gross negligence."); 32 V.I.C. § 202(h) ("The members of the Virgin Islands [Horse Racing] Commission while acting within the scope of their duties as members of such Commission, shall not be subject to any personal or civil liability … unless the conduct of the member or members is determined by a court of competent jurisdiction to constitute willful wrongdoing or gross negligence."). Other related provisions limit the liability of these government instrumentalities in civil actions to some fixed amount unless the injury to person or property is caused by the gross negligence of an employee of the instrumentality. *See, e.g.*, 29 V.I.C. § 556(c)-(d) (limiting liability of the V.I. Port Authority to $75,000 unless "the

injury, loss of property or death is caused by the gross negligence of an employee of the Authority while the employee is acting within the scope of employment."); 29 V.I.C. § 500e(c)-(d) (same with respect to V.I. Waste Management Authority); 32 V.I.C. § 84(a)-(b) (establishing $25,000 limit on liability of the St. Croix Park Authority except for grossly negligent actions of employees). The second most common category of code provisions referencing gross negligence deals with the discipline of various professions and occupations including the suspension or revocations of professional licenses for grossly negligent conduct. *See, e.g.,* 27 V.I.C. § 250g(a)(5) (authorizing the Virgin Islands Board of Accountancy to revoke or limit permits to operate a certified public accounting firm upon finding of "dishonesty, fraud, deceit or gross negligence in the performance of services as a permittee…"); 27 V.I.C. § 101a(f) ("The [Virgin Islands Board of Medical Examiners] may refuse to issue or to renew, or may revoke, suspend, place on probation, censure or reprimand, or take other disciplinary action" upon a finding of "[g]ross negligence in the practice of advanced practice nursing.").

¶ 28 Yet, despite dozens of references to gross negligence throughout the Code, the term 'gross negligence' is only defined once, in the context of the Virgin Islands Food Donation Act. As used in that section, "'Gross negligence' means voluntary and conscious conduct by a person with knowledge, at the time of the conduct, that the conduct is likely to be harmful to the health or well-being of another person." 19 V.I.C. § 508(a)(7). While not quite identical, this definition closely resembles the minority rule discussed above, under which gross negligence means wanton,

reckless behavior demonstrating a *conscious indifference to the health or safety of persons* or property.[11]

¶ 29 Thus, the conception of gross negligence under the minority rule—as equivalent with recklessness—is wholly consistent with the large majority of references to gross negligence in the Virgin Islands Code. The provisions discussed above expressly condition either civil liability or professional discipline upon a finding of gross negligence and specifically foreclose the possibility of facing such liability or discipline for merely negligent conduct. This suggests that the Legislature intended to allow for the imposition of such liability or discipline only where the behavior in question rises to a level of culpability that is categorically different than ordinary negligence. And as the Superior Court observed in *Yusuf*, 2016 WL 9454143, at *4, the minority rule is "favorable in that it equates gross negligence with a state of mind—reckless disregard—that is, at least in theory, different in quality and not merely in degree from ordinary negligence."

¶ 30 In light of these considerations, we find no compelling reason, based upon the statutory usage of the term gross negligence, to adopt the more complicated and less well-defined four-tiered spectrum of tort liability of the majority approach.[12] Rather, we are moved by concerns of simplicity and clarity as outlined both by the Superior Court in *Yusuf*, and by this Court in the

[11] Although the definition of gross negligence in § 508 only speaks of injuries to the health or well-being of a person and not to injuries to property, this is unsurprising given that this section specifically addresses the liability of persons charitably donating food for human consumption.

[12] We note that out of the dozens of provisions of the Virgin Islands Code referencing gross negligence, only two provisions reference both gross negligence and recklessness, potentially indicating an intent to draw a distinction between gross negligence and recklessness. *See* 19 V.I.C. § 217(b)(1) (exempting individuals who use or attempt to use an automated external defibrillator device in good faith from civil liability unless "the harm involved was caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the victim who was harmed"); *and* 19 V.I.C. § 248(a) (exempting members of the Board of Directors of the V.I. Government Hospitals and Health Facilities Corporation from liability for actions taken in the scope of their duty "unless such conduct is determined by a Court of competent jurisdiction to constitute willful wrongdoing, gross negligence or reckless disregard"). However, we are not called upon to interpret these statutes, or indeed any particular statutory provision, in this case and we will therefore not consider these specific questions of statutory interpretation here.

discussion above, to conclude that the minority rule—equating gross negligence with recklessness-—represents the soundest rule of law for the Virgin Islands. Thus, we hold that in the Virgin Islands, gross negligence means wanton, reckless behavior demonstrating a conscious indifference to the health or safety of persons or property. Moreover, we agree with those courts holding that gross negligence "must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention." *See Yusuf*, 2016 WL 9454143, at *4.

¶ 31 Accordingly, for the reasons discussed above, and recognizing the widespread acceptance of the definition of gross negligence articulated by the Superior Court in *Yusuf*, we conclude that the soundest rule for the Virgin Islands is that to prevail on a claim for gross negligence in the Virgin Islands, a plaintiff must establish that: (1) the defendant owed plaintiff a legal duty of care; (2) the defendant breached that duty in such a way as to demonstrate a wanton, reckless indifference to the risk of injury to plaintiff; (3) and the defendant's breach constituted the proximate cause of (4) damages to plaintiff.

3. Availability of Punitive Damages

¶ 32 Brathwaite argues that her request for punitive damages should be submitted to the jury on a theory of ordinary negligence even if her gross negligence claim is dismissed. Recently however, in *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806 (V.I. 2017) we explained:

> Punitive damages are "damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly—called also exemplary damages, smart money." Merriam–Webster's Dictionary of Law 120 (2005); *see also* Black's Law Dictionary 448 (9th ed. 2009) ("Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer or making an example to others."). *Punitive damages must be based upon conduct that is not just negligent but shows, at a minimum, reckless*

> *indifference to the person injured*—conduct that is outrageous and warrants special deterrence.

Id. at 824 (emphasis added). Thus, Brathwaite's argument that she is entitled to maintain a prayer for punitive damages in connection with her ordinary negligence claim is explicitly foreclosed by our prior precedent.

¶ 33 Having established the elements of a claim for gross negligence and examined the legal relationship between these claims and prayers for punitive damages, we must next determine whether Brathwaite has introduced sufficient evidence to sustain her gross negligence claim and accompanying request for punitive damages.

4. Brathwaite's Claim for Gross Negligence

¶ 34 Brathwaite contends that she both properly pled, and introduced sufficient evidence to support, her allegation that Xavier was grossly negligent in operating the boat under "excessive fatigue." Specifically, Brathwaite points to evidence that Xavier's boat departed from Jost Van Dyke at approximately 2:30 a.m.—which, according to Brathwaite, should have put Xavier on notice of the risk that he might fall asleep. Brathwaite contends that this evidence, together with her own testimony that Xavier admitted to falling asleep at the wheel, is sufficient evidence from which the jury could reasonably infer that Xavier operated the boat in reckless disregard for the safety of his passengers.[13]

¶ 35 However, we recently considered and rejected substantially similar arguments in *Milligan v. People*, 2018 WL 4350120 (V.I. Sept. 11, 2018). where we explained:

[13] Brathwaite also argued for the first time in her Reply brief that the jury could reasonably infer that Xavier was grossly negligent based on evidence "that Xavier drifted off course, was aware that he had drifted off course, and once aware he was off course sped up instead of slowing down…" However, arguments raised for the first time in reply briefs are waived. *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 567 (V.I. 2012) ("When an argument is raised for the first time on appeal in a reply brief, that argument is deemed waived because the appellee will not get an opportunity to respond to the argument." (citations omitted)).

> [A]lthough evidence that a defendant fell asleep at the wheel is sufficient proof of negligence, it is well-settled that the mere act of falling asleep while driving does not per se demonstrate a willful or wanton disregard for the safety of others. *See Clancy v. State*, 829 N.E. 2d 203, 207 (Ind. Ct. App. 2005) ("[M]erely falling asleep while driving is insufficient evidence of recklessness. Instead, there must be some proof that the driver consciously ignored, for a period of time, substantial warnings that he or she might fall asleep, and continued to drive despite the warnings, before actually falling asleep and causing an accident."); *c.f. Hargrove v. Commonwealth*, 394 S.E.2d 729, 731-32 (Va. Ct. App. 1990) (finding that evidence failed to support an involuntary manslaughter conviction because the simple fact of falling asleep at the wheel did not meet the requisite standard of grossly negligent, wanton, or reckless malperformance of a lawful act).

Id. at *3. On the record before us, there is no direct evidence that Xavier ever experienced, let alone ignored any signs of fatigue at any time prior to the accident.[14] Thus, "the only way the jury could have found that [Xavier] was sleep-deprived—and that he disregarded feelings that sleep was imminent when he got behind the wheel—is through circumstantial evidence." *Id.*

¶ 36 In *Milligan*, we further concluded that evidence merely establishing "that Milligan was awake for fourteen hours during the night instead of the day, without context, does not support the inference that he was sleep-deprived when he drove." *Id.* at *5. To hold otherwise, we explained, "would set the dangerous precedent that anyone who drives after fourteen waking hours, per se does so with willful and wanton disregard for the safety of persons and property." *Id.* Without any additional evidence to establish when Milligan woke up the night before, how much he slept, or whether he was used to being awake in the early morning hours, evidence that Milligan had been awake for fourteen hours before driving home in the early morning hours was insufficient to support an inference that Milligan acted in wanton or reckless disregard for the safety of others.

[14] *Cf. Kennedy v. Commonwealth*, 339 S.E.2d 905, 907 (Va. Ct. App. 1986) (finding sufficient evidence of reckless driving where defendant briefly pulled off the road to rest because he was sleepy, then continued driving, and proceeded to fall asleep at the wheel); and *Perkins v. Roberts*, 262 N.W. 305, 546 (Mich. 1935) ("A driver overcome by sleep is not guilty of wanton or willful misconduct unless it appears that he continued to drive in reckless disregard of premonitory symptoms.").

¶ 37 Similarly, in this case, without additional evidence to establish how long Xavier had been awake at the time of the accident, how much he slept in the preceding days, or whether he was in the habit of being awake in the early morning hours, evidence merely demonstrating that Xavier operated his boat at approximately 2:30 a.m. is insufficient to support a claim of gross negligence. Thus, because Brathwaite failed to introduce sufficient evidence to support her claim of gross negligence, and because Brathwaite may not seek an award of punitive damages on a claim for ordinary negligence, we conclude that the Superior Court's procedural errors in dismissing Brathwaite's claim for gross negligence and accompanying request for punitive damages were harmless. Accordingly, we affirm the Superior Court's March 1, 2017 order as to that issue.[15]

C. Comparative Negligence Instruction

¶ 38 Brathwaite argues that the Superior Court erred by instructing the jury on comparative negligence when there was no evidence in the record to support an inference that Brathwaite was at all negligent in causing her injuries. Indeed, we have previously held that the Superior Court errs when it instructs the jury on affirmative defenses such a mitigation of damages or comparative negligence in the absence of sufficient supporting evidence. *Better Bldg. Maint. of the Virgin*

[15] The concurring opinion criticizes our reliance on *Milligan*—in which we reversed the defendant's conviction for recklessly driving a motor vehicle in violation of 20 V.I.C. § 492—and suggests that we should instead look to local and federal statutes prohibiting the negligent or reckless operation of marine vessels. Aside from the obvious fact that this case involves a boat, it is unclear what relevance the cited statutes have to the question presented. Xavier is not charged with violating any statute. Here, Brathwaite presents a common law cause of action against Xavier for gross negligence in the operation of his boat. In *Milligan*, we held that while evidence that a defendant fell asleep at the wheel may be sufficient to sustain a finding of negligence, a finding of recklessness requires more: some evidence that the defendant experienced symptoms of fatigue but consciously ignored them. But, our analysis in *Milligan* was neither based upon any particular provision of the reckless driving statute, nor grounded in any special considerations peculiar to the operation of motor vehicles. Rather, the rule articulated in *Milligan* is based upon generally applicable common law precepts concerning the hierarchy of culpable states of mind, and the respective burdens of proof required to establish that a defendant in a given case acted with the requisite level of culpability. Thus, the type of proof required to demonstrate that a defendant committed some injurious act in reckless disregard of his or her own excessive fatigue will generally be the same whether the injurious act involved the operation of a motor vehicle, the operation of a marine vessel, or something else entirely.

Islands, Inc. v. Lee, 60 V.I. 740, 761 (V.I. 2014) (citing *Robinson v. Morrison*, 246 So.2d 94, 95 (Miss. 1971) ("[T]he trial court erred in [giving] a comparative negligence instruction because there was no evidence justifying the granting of such an instruction.")).

¶ 39 In response, Xavier contends, without any citation to supporting authority, that Brathwaite's decision to forego her prepaid, roundtrip ticket aboard a commercial ferry in favor of boarding Xavier's smaller, private boat at 2:30 a.m. on an "exceptionally dark" night, was itself sufficient to permit the jury to conclude that Brathwaite contributed to causing her own injury. However, as Brathwaite notes, the weight of authority holds that a passenger may, in the absence of knowledge of danger, properly rely upon the operator of the vehicle to operate it with due care. See, e.g., *McGlothlin v. Wiles*, 487 P.2d 533, 537 (Kan. 1971) ("A passenger, as a general rule, may properly rely upon the driver to attend to the operation of the vehicle in the absence of knowledge of danger or of facts which would give him such knowledge."); *Carroll v. Aetna Cas. & Sur. Co.*, 301 So.2d 406, 409 (La. Ct. App. 1974) ("A guest in a boat, like a guest passenger in an automobile, is not obliged to look out for sudden or unexpected dangers. He has a right to place reliance upon the operator to discharge that obligation and is not required to monitor the operation or pay attention to the path ahead or the presence of obstructions or other boats."). Thus, Brathwaite's decision to board Xavier's boat rather than the commercial ferry does not, by itself, constitute evidence of negligence. Additionally, for the same reasons discussed above in the previous section, the simple fact that Brathwaite boarded Xavier's boat at approximately 2:30 a.m., without more, does not constitute a fact that would give Brathwaite knowledge of the danger that Xavier might fall asleep.

¶ 40 Therefore, we conclude that there was no evidence upon which a jury could rationally base a finding of contributory fault on the part of Brathwaite, and hence the Superior Court abused its

discretion by, *sua sponte*, instructing the jury on comparative negligence over Brathwaite's objection despite the absence of any evidence that Brathwaite knew or should have known that Xavier was excessively fatigued prior to boarding the boat.

IV. CONCLUSION

¶ 41 Because the Superior Court improperly usurped the role of the jury by substituting its own determination of weight and credibility for that of the jury, we conclude that the court abused its discretion by excluding Dr. Weisher's testimony, vacate the Superior Court's April 5, 2017 judgment, and remand the matter for a new trial consistent with this opinion. And although the Superior Court erred in dismissing Brathwaite's gross negligence claim and accompanying request for punitive damages, we nevertheless affirm the court's decision as harmless error, as Brathwaite failed to introduce sufficient evidence to support an inference that Xavier acted in wanton or reckless disregard for the safety of his passengers. Finally, we conclude that the Superior Court abused its discretion by instructing the jury on comparative negligence despite the absence of any evidence showing that Brathwaite knew or should have known that Xavier was excessively fatigued.

Dated this 16th day of July, 2019.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

SWAN, J., Concurring in the Judgment

¶42 Although I concur with the majority's decision, I find it prudent to reiterate my dissent in *Milligan v. People*, 69 V.I. 779 (2018) so the salient points raised in the dissent are not lost by my concurrence in this matter.

¶43 The majority cites *Milligan* principally for the purpose of stating sleep deprivation alone is insufficient to satisfy the willful or wanton prong of reckless driving.[1] Specifically the majority observes, *ante* at ¶ [page 25], that "although evidence that a defendant fell asleep at the wheel is sufficient proof of negligence, it is well-settled that the mere act of falling asleep while driving does not per se demonstrate a willful or wanton disregard for the safety of others." However, one must recognize the *Milligan* dissent asserted more than just sleep deprivation as grounds for affirming Milligan's reckless driving conviction.

¶44 First, Milligan's vehicle encountered no obstruction in the roadway that would have caused him to veer off Melvin H. Evans Highway. *Milligan*, 69 V.I. at 801. Interestingly, Milligan's vehicle was so entrenched in the dense foliage adjacent to the highway that a tow truck was needed to extricate it and return it to the road. Second, Milligan's vehicle had no mechanical defect or mechanical failure and operated perfectly when he careened into the foliage adjacent to Evans Highway. *Id*. Third, Milligan was the sole operator and occupant of the vehicle when the accident occurred. *Id*. Fourth, no vehicle in an oncoming lane crossed over into Milligan's lane of travel causing Milligan to swerve off the roadway to avoid an accident. *Id*. Fifth, no pedestrian or animal entered Milligan's lane of travel causing him to swerve off the roadway to avoid an accident. *Id*.

[1] "It shall be unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of this Territory. For the purpose of this section to 'operate in a reckless manner' means the operation of a vehicle upon the public highways of this Territory in such a manner as to indicate either a willful or wanton disregard of the safety of person or property." 20 V.I.C. § 492.

Although the jury would have used circumstantial evidence to conclude that Milligan was sleep-deprived, the aforementioned facts were evidenced directly in the trial record.[2] Accordingly, while I agree with the majority that the record in this case offers minimal support to find Xavier was sleep-deprived, the record in *Milligan* contained adequate direct and circumstantial proof that Milligan operated his vehicle recklessly under a totality of the circumstances, even if one excludes the sleep deprivation evidence. *See Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1522 (10th Cir. 1997) ("Whether a defendant's conduct constitutes wantonness depends on the facts and circumstances of each case."); *Marturello v. Nat'l R.R. Passenger Corp.*, 127 Fed.Appx. 328, 334 (9th Cir. 2005) ("[E]vidence was sufficient in the totality of the circumstances, with other evidence presented, to permit a jury to assess whether [defendant's] conduct was wanton . . . ."); *Wilson v. City of Biloxi*, No. 1:11CV126-HSO-JMR, 2013 U.S. Dist. WL 2244309, at *6 (S.D. Miss. May 21, 2013) ("In determining whether someone's conduct constituted reckless disregard, this Court considers the totality of the circumstances."). Therefore, my concurrence in this matter should not eradicate the cogent rationale in the *Milligan* dissent "because no vehicle in the Virgin Islands will run completely off the road on its own volition, [but a vehicle may do so given] a driver's reckless, wanton, or callous operation of [it]." *Milligan*, 69 V.I. at 801.

¶45 As a subordinate concern, I question if the majority's reliance on *Milligan* is misplaced considering the stark differences between Milligan's case and this one. First, 20 V.I.C. § 492, the reckless driving statute applicable in *Milligan*, has no relevance in this case. Importantly, 20 V.I.C. § 492 clearly references driving over and along the public highways of the Virgin Islands. However, the collision in this case occurred in the open waters between the British Virgin Islands

[2] "A defendant may be proven guilty by either direct or circumstantial evidence." *United States v. Gulino*, 588 F.2d 256, 257 n.2 (9th Cir. 1978).

and American Virgin Islands. Locally, 25 V.I.C. § 297 governs reckless operation of marine vessels.[3] We must be mindful that both accidents involve vastly different circumstances and different applicable territorial laws. Additionally, 46 U.S.C. § 2302 federally regulates operation of marine vessels and provides penalties for reckless or negligent operation of aquatic crafts.[4] Internationally, 72 COLREGS delineates global tenets for preventing sea collisions.[5] Given such statutory options, the majority could have used one or more to establish whether Xavier recklessly operated the vessel that injured Brathwaite. *See Green v. U.S. Coast Guard*, 642 F.Supp 638, 643-44 (N.D. Ill. 1986) (explaining there was sufficient evidence for the trial court to conclude defendant operated his boat negligently); *Engle v. Stull*, 377 F.2d 930 (D.C. Cir. 1967) (same). Therefore, although *Milligan* is only used to determine the issue of Xavier's sleep deprivation, the majority could have evaluated the issue using statutes that directly relate to the operation of marine vessels rather than a case which involved a statute regulating the operation of automobiles on the streets and highways of the Virgin Islands.

[3] "No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device in a reckless or negligent manner as to endanger the life or property of any person." 25 V.I.C § 297(a).
[4] "A person operating a vessel in a negligent manner or interfering with the safe operation of a vessel, so as to endanger the life, limb, or property of a person is liable to the United States Government for a civil penalty of not more than $5,000 in the case of a recreational vessel, or $25,000 in the case of any other vessel." 46 U.S.C. § 2302(a).
[5] The International Rules for Preventing Collisions at Sea, commonly known as 72 COLREGS, were promulgated in 1972 at an international convention in London. In 1977, Congress adopted the regulations under the International Navigational Rules Act of 1977. The demarcation rules are codified in 33 CFR chap. 1, subchap.D, part 80 (33 C.F.R. § 80.01 et seq.), the implementation rules are codified in 33 CFR chap. 1, subchap.D, part 81 (33 C.F.R. § 81.1 et seq.), and the interpretive rules are codified in 33 CFR chap. 1, subchap.D part 82 (33 C.F.R. § 82.1 et seq.).

Dated this 16th day of June, 2019

/s/ Ive Arlington Swan

IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court