IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

JO ANNE SICKLER, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN DIEHL, Plaintiff, v. MANDAHL BAY HOLDING INC., Defendant.	CASE NO. ST-10-CV-331 ACTION FOR WRONGFUL DEATH JURY TRIAL DEMANDED

JOEL H. HOLT, ESQ.
Law Office of Joel H. Holt
2132 Company Street
Christiansted, VI 00820
Attorney for Plaintiff

MICHAEL C. QUINN, ESQ.
Dudley, Topper and Feuerzeig, LLP
P.O. Box 756
St. Thomas, VI 00804
Attorney for Defendant

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION
(Filed: July 7, 2014)

Before the Court is the "Defendant's Motion for Summary Judgment" filed by Mandahl Bay Holding, Inc. ("MBH" or "Defendant").[1] Plaintiff Jo Anne Sickler, as the Personal Representative of the Estate of John Diehl, ("Ms. Sickler" or "Plaintiff") opposes the motion. For the reasons set forth below, summary judgment will be entered in favor of MBH and this action dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This litigation grows out of a tragic incident which occurred on February 8, 2009, in Estate Mandahl in St. Thomas, U.S. Virgin Islands ("Estate Mandahl"). The parties agree on several of the underlying facts, though they disagree greatly as to the legal import of those facts. Based on a review of the parties' submissions and the record, the Court determines that the following are the undisputed facts of this case.[2]

---

1 The Court has subject matter jurisdiction over this case. *See,* V.I. CODE ANN. tit. 4, § 76(a) (1997).

2 The undisputed facts are derived from the parties' statements and counter-statement of facts, the responses thereto, answers to interrogatories, affidavits, deposition testimony, and the trial transcript of *People of the Virgin*

John Diehl ("Mr. Diehl") resided at No. 3-H Estate Mandahl, St. Thomas, U.S. Virgin Islands with Ms. Sickler and their two children. MBH owns several acres of real property, developed and undeveloped, in Estate Mandahl. Its holdings include the Mandahl Beach and the acreage on which the former Old Mandahl Inn (the "Inn") was located. The Inn was severely damaged by hurricanes in the 1990s, and its structures remained in a state of disrepair at all times relevant to this case. The Inn and its parking lot border a part of the main road for ingress and egress for Estate Mandahl. Mr. Diehl's and Ms. Sickler's residence was approximately one-half (1/2) mile away from the Inn. The parties do not dispute that the Inn and its parking lot were frequented by various persons for illicit activities. These activities included drug use and transactions, sexual trysts, vagrancy, and automobile repair, abandonment, and destruction.[3]

On the fateful day, around 1:30 p.m., Marvis Chamarro and Kyle Gumbs drove to and parked Mr. Chamarro's greyish-black Suzuki adjacent to the Inn. They went to the area to smoke marijuana. While Messrs. Chamarro and Gumbs were on-site, a blue Toyota approached and parked. In the Toyota were Neville Potter, who was driving, and another person. Mr. Potter told Mr. Gumbs and Mr. Chamarro to exit their vehicle. When they did, Mr. Potter stepped out of his car carrying a machine gun with a long clip and began firing gunshots at them. Mr. Gumbs and Mr. Chamarro fled from the area by running into the bushes on the Inn property and continuing off of that real estate. However, Mr. Potter pursued them and continued to fire his weapon. Mr. Gumbs escaped deadly injury, but Mr. Chamarro was shot and killed by Mr. Potter.

At that time, Mr. Diehl and Ms. Sickler were in their abode with one of their sons. Ms. Sickler was napping at the time, but Mr. Diehl and his son heard approximately twelve (12) gunshots coming from the general direction of the Inn. Mr. Diehl told the son to stay inside the house, then went outside, entered his Jeep, and drove to investigate the incident. Mr. Diehl was unarmed. Apparently, at an unidentified point in time, Mr. Diehl exited his vehicle and came across Mr. Potter, who then chased Mr. Diehl. Mr. Diehl ran back towards his home, passed by it, and attempted to scale the wall of a neighbor, Timothy John. However, Mr. Potter shot Mr. Diehl, who still managed to get onto Mr. John's property and collapsed into a planter. Mr. John drove Mr. Diehl to Schneider Regional Medical Center, where Mr. Diehl succumbed to his wounds.

Islands v. Neville Potter, Case No. ST-09-CRF78. At the criminal trial, Mr. Potter was convicted of first degree murder with respect to the deaths of Mr. Diehl and Mr. Chamarro. These convictions were affirmed by the Supreme Court of the Virgin Islands. *See, Potter v. People,* 56 V.I. 779 (2012).

[3] Plaintiff did submit an expert report of Delroy Richards, Sr. which indicated that some persons told him that they had heard gunshots in the area. However, the report did not indicate the sources of such information, nor were any affidavits or other factual materials submitted by Ms. Sickler which confirmed whether any gunshots were previously fired at the Inn property rather than from other parts of Estate Mandahl. In a separate opinion, the Court ruled that it would not consider Mr. Richards' report when deciding the motion for summary judgment. Further, the deposition testimony of Ms. Sickler states that she had not heard gunshots in the area of the Inn prior to the unfortunate demise of Mr. Diehl.

II. LEGAL DISCUSSION.

A. Summary Judgment Standard.

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment in this tribunal.[4] On a motion for summary judgment, the trial court determines whether there is a genuine dispute of material fact such that the movant is entitled to judgment as a matter of law.[5] In making its determination, the Court looks at the portions of the record presented by the parties including, but not limited to, the pleadings, documents produced, deposition transcripts, responses to interrogatories, answers to requests for admissions, and any affidavits presented.[6] When assessing these materials, this tribunal must draw all reasonable inferences in favor of the non-moving party.[7] However, the trial court has no obligation to accept a non-movant's speculative or irrational inferences.[8]

As noted by the United States Court of Appeals for the Third Circuit ("Third Circuit"),

> Under a summary judgment standard, however, a burden-shifting framework applies, pursuant to which the moving party bears the initial burden of showing that the non-movant has failed to establish one or more essential elements of its case, and, once that initial burden is met, the non-moving party must go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.[9]

In addition, "the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance."[10] Further, "If the nonmoving party 'fails to make a showing sufficient to establish the existence of an element essential to [the non-movant's] case, and on which [the non-movant] will bear the burden of proof at trial,'" summary judgment is proper as such a failure "necessarily renders all other facts immaterial."[11] If, after completing this analysis, there is no genuine dispute as to any material fact, the trial court **shall** enter summary judgment in favor of the appropriate party.[12]

---

4 *See,* SUPER. CT. R. 7.

5 FED. R. CIV. P. 56(a).

6 *See, United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 707 (2011); *White v. Spenceley Realty, LLC,* 53 V.I. 666, 673 (2010).

7 *Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 581 (2012); *Pickard-Samuel v. Gov't,* S. Ct. Civ. No. 2008-0031, 2010 WL 2342414 at * 2 (V.I. June 4, 2010).

8 *Euromotion, Inc. v. BMW of N. Am., Inc.*, 136 F.3d 866, 872-73 (1st Cir. 1998); *Fogarty v. Boles,* 121 F.3d 886, 890 (3d Cir. 1997).

9 *Guidotti v. Legal Helpers Debt Resolution, L.L.C.,* 716 F.3d 764, 773 (3d Cir. 2013) (all citations and quotations omitted).

10 *Brodhurst v. Frazier,* 57 V.I. 365, 369 (2012) (quoting *Joseph v. Hess Oil V.I. Corp.*, 54 V.I. 657, 664 (2011)).

11 *Jakimas v. Hoffmann-LaRoche, Inc.*, 485 F.3d 770, 777 (3d Cir. 2007) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)).

12 FED. R. CIV. P. 56(a) (emphasis added).

B. The Evolution of the Common Law of the United States Virgin Islands.

Historically, the courts of the Virgin Islands relied upon the common law as articulated by the restatements of law published by the American Law Institute. This precept was followed in accordance with title 1, section 4 of the Virgin Islands Code. However, that provision was impliedly repealed when the Virgin Islands Legislature created the Supreme Court of the Virgin Islands.[13] Therefore, "...the Restatements no longer hold an automatic preferred status in Virgin Islands law, but as in all other jurisdictions, merely represent persuasive authority...."[14] Moreover, the Superior Court has the authority to shape the common law of the Territory unless binding precedent of the Supreme Court applies to the pertinent case.[15]

Previously, the Supreme Court of the Virgin Islands directed that cases decided by the Appellate Division of the District Court of the Virgin Islands ("Appellate Division") and the Third Circuit prior to 2007 were binding on the Superior Court.[16] Now, in light of *Banks,* even if such cases are found, and the common law doctrines espoused therein are premised upon title 1, section 4, of the Virgin Islands Code, they are no longer automatically binding on this Court. Rather, this Court must explicitly consider the following non-dispositive factors: "(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."[17] In this matter, the summary judgment motion involves tort claims of negligence and public nuisance. Below, the Court will review these theories against the legal analysis required by *Banks.*

C. Plaintiff's Negligence Claim Fails Because the Actions of Mr. Potter Were Not Reasonably Foreseeable, Thus Negating any Legal Duty on the Part of Defendant.

In arguing whether summary judgment is appropriate under the circumstances of this case, both parties initially cited to numerous sections of the Restatement (Second) of Torts.[18] Nevertheless, they appear to agree that the essential elements of a negligence cause of action require the plaintiff to demonstrate the existence of a legal duty on the defendant's part, a breach of that duty, causation between the breach of duty and the plaintiff's alleged injury, and damages.[19] Whether a defendant owes a legal duty to the plaintiff generally is a question of law

---

13 *Thomas v. V.I. Bd. of Land Use Appeals,* S. Ct. Civ. No. 2013-0001, 2014 WL 691657 at * 5 (V.I. Feb. 24, 2014) (citing *Banks v. Int'l Rental & Leasing Corp.,* 55 V.I. 967, 978-79 (V.I. 2011)).

14 *Gov't v. Connor,* S. Ct. Civ. No. 2013-0095, 2014 WL 702639 at * 3 (V.I. Feb. 24, 2014).

15 *Id.* (citing *Banks,* 55 V.I. at 977-78).

16 *In re People,* 51 V.I. 374, 389 n. 9 (2009).

17 *Palisoc v. Poblete,* S. Ct. Civ. No. 2013-0041, 2014 WL 714254 at * 3 (V.I. Feb. 25, 2014) (citations omitted).

18 In her memoranda, Plaintiff cited to Sections 291, 302B, 314A, 366, 431, 434, 435, and 449 of the Restatement (Second) of Torts. Defendant cited to sections 302B, 312A, 314, and 344 of the same treatise.

19 *White v. Spenceley Realty, LLC,* 53 V.I. at 673. In *White,* the Virgin Islands Supreme Court cited to title 1, section 4 of the Virgin Islands Code, which is inconsistent with its subsequent holding in *Banks.* However, even under a *Banks* analysis, it is clear that this four-point negligence analysis accurately represents the common law of the Virgin Islands. First, numerous Virgin Islands courts have applied this same test for several years. *E.g., Perez v. Gov't,* 23 V.I. 220, 221-22 (D.V.I. 1987); *Baumann v. Canton,* 7 V.I. 60, 67 (D.V.I. 1968); *Kosick v. Bar-Sela,* 49 V.I. 3, 6 (Super. Ct. 2007). Second, this test, which is based on Section 281 of the Restatement (Second) of Torts,

for the court to determine.[20] The causation element is comprised of two components – cause-in-fact and legal, or proximate, cause.[21] While the determination of causation is generally a question of fact for a jury, where the injuries suffered are not reasonably foreseeable a court may find that causation does not exist on a motion for summary judgment.[22]

In its motion, Defendant focuses primarily on section 302B of the Restatement (Second) of Torts which provides,

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Defendant contends, that under the circumstances presented, no duty may be imposed on it because the intervening actions of Mr. Potter in chasing, shooting, and killing Mr. Diehl were criminal. As noted in the comments to section 302B, "In the ordinary case 'the actor' may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."[23]

Defendant does acknowledge that, under section 302B, one may be liable even where there is intervening criminal activity if there is a special relationship between the actor and the injured party. Some examples of such special relationships include: a contractual duty to protect; legally recognized relations such as carrier/passenger, innkeeper/guest, employer/employee, possessor of land/invitee, bailee/bailor; where the actor affirmatively acts in a manner which undermines a protection which the injured party put in place to protect himself or herself from third party acts; where the actor brings the third party in contact with the injured party, with knowledge that the third party has dangerous propensities; where the actor provides access to a dangerous instrument to a person the actor has reason to believe will use the item to inflict damage; where the actor has control over the third party and knows of his or her dangerous propensities; where the actor's property offers certain opportunities or temptations for intentional

---

appears to have been adopted throughout the entire United States in both federal and state courts. The comments to Section 281 indicate that it has been cited as authority by approximately nine (9) federal courts of appeals, nineteen (19) federal district or bankruptcy courts, and fifty three (53) various appellate state courts. Finally, for these same reasons, this four-part test is the soundest rule for the Territory. Altering such a longstanding and widespread precedent would unnecessarily, unfairly, and suddenly place litigants in uncharted waters with respect to negligence claims. Therefore, the Court will apply this four-element negligence standard to the case at bar.

20 *E.g., Holmes v. Kimco Realty Corp.*, 598 F.3d 115, 118 (3d Cir. 2010) (applying New Jersey law); *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006).

21 *Brady v. Cintron*, 55 V.I. 802, 823 (2011) (quoting *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 73 (3d Cir. 1996)).

22 *E.g., Hammonds v. United States*, 418 F. App'x 853, 857 (11th Cir. 2011) (applying Alabama law); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) ("...causation should not go to the jury unless the inference of causation is reasonable: it must 'indicate the *probable*, as distinguished from a *possible* cause.'") (italics in original) (applying Kentucky law).

23 RESTATEMENT (SECOND) OF TORTS § 302B cmt. d (1965).

harm; or where the actor acts knowing of certain conditions which create a high risk for intentional harm.[24] However, Defendant argues that there are no material facts in the record on which a reasonable jury could determine that any of these special relationships or circumstances exist.

Ms. Sickler, also relying on section 302B, counters that the list of relationships and circumstances in comment e are not exclusive. Further, according to Plaintiff the last two examples set out in comment e are bases for imposing a duty of care on Defendant under the circumstances of this case. Plaintiff contends that MBH was aware of previous crimes which had been committed on the Inn property, but failed to properly secure that real estate. In support of the argument that Defendant's property provided opportunities and temptations for persons to inflict intentional harm on third parties, Ms. Sickler relies in part on her expert's report, which this Court has already excluded in a separate memorandum. She also points to certain statements attributed to Mark Small, president of MBH, in which he makes reference to violent crimes taking place on the beach. However, as confirmed in Plaintiff's deposition testimony, and conceded at the oral argument, the beach area is a separate and distinct piece of real property from the Inn, which is subject of this litigation. Nothing in the record demonstrates that violent crimes, much less murder, had previously occurred on the Inn property.[25]

Per the *Banks* inquiry, both parties have cited to two cases from the Territorial Court of the Virgin Islands which apply section 302B,[26] and this Court has not found any other such cases. However, both cases are factually distinguishable from this litigation. In *Fisher* and *Vidal* the injured parties were tenants of the defendants, and they sued the landlords for negligence based upon the assaults that were inflicted on them on the defendants' properties. In both cases, the then-Territorial Court noted that the landlord/tenant relationship is not, by itself, a special circumstance which creates a duty to protect a person from the intentional harms inflicted by third parties. Also, in both cases the assaults which caused the injuries to the plaintiffs occurred on the properties of the defendants. In the present case, there are no facts of record which indicate there was landlord/tenant relationship between Ms. Sickler and MBH. Importantly, in this case it is not disputed that Mr. Diehl was shot and killed by Mr. Potter by the wall surrounding the property of Timothy John, and not on Defendant's property. Therefore, *Fisher* and *Vidal* do not provide much guidance under the circumstances presented by this case.

The record in this case does not establish any recognized legal relationship between Defendant and Plaintiff, except that they both owned real property in Estate Mandahl. Indeed, the "actor" in this matter was Mr. Potter, and no evidence has been presented that he had any relationship, special or otherwise, to either party to this litigation. The absence of any relationship amongst the involved players favors Defendant. This conclusion is bolstered by

---

24 *Id.* at cmt. e.

25 In her responses to interrogatories, Ms. Sickler also avers that the Inn property was run down and used for the illicit activities listed above. However, there is no reference to violent crimes being committed on that real estate.

26 *Fisher v. Behan*, 37 V.I. 9 (Terr. Ct. 1997); *Vidal v. V.I. Hous. Auth.*, 20 V.I. 3 (Terr. Ct. 1983). In addition, under the second *Banks* factor, it appears to the Court that, according to the reporter's notes of the Restatement, section 302B has been cited as authority in ten (10) federal courts of appeals, twenty (20) federal district or bankruptcy courts, and state courts in forty one (41) jurisdictions.

other case law emanating from this jurisdiction. In *Abdallah v. Caribbean Security Agency*,[27] the Third Circuit relied upon section 448 of the Restatement (Second) of Torts,[28] which states

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

In this lawsuit, MBH is alleged to have created the situation that led to Mr. Diehl's demise by not adequately securing the Inn property. However, it is undisputed that violent criminal activity had not previously been committed on the Inn property. Further, it is uncontroverted that Mr. Diehl was shot after being chased by Mr. Potter on real property not owned or controlled by Defendant. Indeed, Mr. Diehl's and Mr. John's property, where the shooting occurred, were not even adjacent to the Inn property, but one-half (1/2) of a mile away. It is beyond reason to expect that Defendant should have realistically contemplated that an encounter between persons, such as Mr. Potter and Mr. Chamarro, on its property could result in intentional criminal actions being committed on other properties in Estate Mandahl. Further attenuating any alleged negligence by Defendant from the injuries and damages claimed is the uncontested fact that Mr. Diehl went toward the area where the gunshots were heard and, unfortunately, encountered Mr. Potter on his brutal rampage.

The Court concludes that, applying 302B and 448 together, the better judicial policy is to insulate landowners from liability for the criminal actions of third persons with whom they do not have any relationship. This is especially true where the injury is inflicted via a criminal act by a third person on real property some distance away from, and not controlled by, the putative defendant's land.[29] To create a duty on a landowner to prevent third parties from committing criminal acts on another's property is inconsistent with fundamental principles of both tort and real property law. A person cannot, under most circumstances, anticipate when another human being will undertake criminal activity. Thus, the foreseeability element is missing in tort law. As to real property law, a person has no authority to take any actions to design security protocols

---

27 557 F.2d 61 (3d Cir. 1977).

28 The Court has not located any other cases in this jurisdiction which cite to this section. However, in addition to being cited by the Third Circuit, Section 448 has been cited as authority by the United States Supreme Court (referenced in a dissenting opinion), ten (10) other federal courts of appeals, nineteen (19) federal district or bankruptcy courts, and state courts of varying levels in thirty five (35) jurisdictions.

29 *Bradford Square Condo. Ass'n, Inc. v. Miller*, 573 S.E.2d 405, 410 (Ga. Ct. App. 2002) ("Before we can impose the duty to protect against the criminal acts of third parties, we must find that the defendant has a duty to control the security of the premises where the criminal act took place."); *Daly v. City of New York*, 642 N.Y.S.2d 907, 908 (App. Div. 1996) (noting that a landowner's duty to protect members of the public from reasonably foreseeable criminal acts of third persons is based upon the right to control the property on which the crime is committed); *Simpson v. Big Bear Stores Co.*, 652 N.E.2d 702, (Ohio 1995) ("We conclude that a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner. The duty does not extend to premises not in the possession and control of the business owner.")

or structures on property which does not belong to her or him. Thus, it is legally illogical to hold a party responsible for a criminal act committed on another's real estate. While the initial contact between Mr. Potter and Mr. Chamarro took place on MBH's land, in the absence of evidence that Mr. Diehl was on Defendant's land at the time in question, some connection between the players, or knowledge of prior violent crimes being committed on the Inn property, the Court concludes that the foreseeability element required under the Restatement (Second) of Torts is absent and liability does not attach.

A review of the pertinent sections of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) ("Restatement (Third)") does not alter the Court's determination in this case.[30] According to the parallel tables contained in the Restatement (Third), section 302B of the Restatement (Second) is covered by section 19 of the Restatement (Third), and section 448 of the Restatement (Second) is addressed in section 34 of the new iteration. The comments to both sections 19 and 34 of the Restatement (Third) make clear that foreseeability is the touchstone which must be demonstrated before liability can be imposed on a putative actor for the criminal actions of a third party.[31] As discussed above, it was not foreseeable that the alleged failure of Defendant to further secure the Inn property would result in murder on real property located 1/2 mile away. Because the Court concludes that MBH owed no duty to Mr. Diehl based upon the record before it,[32] summary judgment will be entered in Defendant's favor on the negligence count.

D. Ms. Sickler's Cause of Action for Public Nuisance also Fails Due to the Absence of Foreseeability.

In the remaining count, Plaintiff alleges that Defendant maintained a public nuisance by not properly securing the Inn property, despite having knowledge of the criminal activity which had occurred on that site. Essentially, the factual assertions are the same as the ones underlying her negligence claim, but brought under a different legal theory. Both sides rely on the Restatement (Second) of Torts §§ 821B, 821C (1965) to support their arguments and counter-arguments on this issue. Some Virgin Islands courts have relied upon these provisions to define what constitutes a public nuisance.[33] But, these cases incorporated this Restatement provision through title 1, section 4 of the Virgin Islands Code, which no longer has any effect under *Banks*. The Court also notes that the Legislature of the Virgin Islands has enacted a statutory definition of public nuisance.[34] This statute has been interpreted as declaring the standard common law definition of public nuisance.[35]

---

[30] The parties submitted supplemental memoranda addressing whether any provisions of the Restatement (Third) had any impact on the issues presented.

[31] RESTATEMENT (THIRD) § 19 cmt. c (2010); RESTATEMENT (THIRD) § 34 cmt .g (2010).

[32] *See, Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (V.I. 2013) ("It is a longstanding tenet of American jurisprudence that negligence can only arise from foreseeable harms, as "[t]he risk reasonably to be perceived defines the duty to be obeyed." (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)).

[33] *See, Henry v. St. Croix Alumina, LLC*, Civil Action No. 1999-0036, 2009 WL2778011at * 6 and n. 6 (D.V.I. Aug. 28, 2009); *Bluebeard's Castle Inc. v. Hodge*, 51 V.I. 672, 683 (D.V.I. App. Div. 2009); *Gov't Guar. Fund v. Hyatt Corp.*, 34 V.I. 257, 264 and n. 8 (D.V.I. 1996).

[34] Under Virgin Islands law, a public nuisance is:
Anything which-

In this instance, Ms. Sickler has not presented evidentiary material in the record demonstrating that "a considerable number of persons" have been adversely affected in their enjoyment of life or property. While it does appear from the deposition transcripts and interrogatory responses that some people residing in the Mandahl area were aware of the illicit activities at the Inn property and did not like its condition, the number of persons presented in the record is not "considerable."[36] That term is commonly understood, as is pertinent to this case, to mean "large in extent, amount, or degree."[37] Further, the persons who are referenced in the record do not articulate if or how their lives or the use of their real property were negatively affected by Defendant's actions or inactions. There was no testimony of bad smells coming from the property, or of loud noise, other than the gunshots on the day in question, or music generated by any persons on the Inn property. These are examples of the type evidence which Plaintiff would have the burden of presenting at trial, and in the absence thereof, a reasonable jury could not find in favor of Plaintiff on the claim for public nuisance.

In addition, for the same reasons stated in disposing of the negligence-based claim, the Court finds that the causal connection between Defendant's alleged omissions and the resulting harm are too tenuous. No court in the Virgin Islands has categorically held that proximate cause must be established in a case for public nuisance. However, other jurisdictions appear to follow the rule that, as with all other torts, proximate cause is a necessary element which must be established by a plaintiff in a public nuisance civil action.[38] Ms. Sickler has not asserted any policy reason, and the Court does not see one, justifying turning the tort of public nuisance into one of strict liability. Moreover, the Court concludes that the intentional criminal acts of Mr. Potter severed the causal link, if any, between the alleged tortious conduct of Defendant and the death of Mr. Diehl.[39] Therefore, Plaintiff's claim for public nuisance will also be dismissed.

> (1) is injurious to health, indecent, offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by a considerable number of persons; or
>
> (2) unlawfully obstructs the customary free passage or use of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway-
>
> is a public nuisance. 14 V.I.C. § 1461 (2012).

35 *Gov't v. Latalladi,* 8 V.I. 137, 141 (Mun. Ct. 1970). Title 14, section 1461 of the Virgin Islands Code was also cited, with other statutory provisions, as the legal definition of public nuisance in the U.S. Virgin Islands. *See, Collins v. Gov't,* 5 V.I. 87, 96, 236 F. Supp. 441, 445 (D.V.I. 1964), *rev'd on other grounds,* 5 V.I. 622, 366 F.2d 279 (3d Cir. 1966). As this is a Virgin Islands statutory definition, other jurisdictions would not have any reason to cite to this legal provision.

36 The parties provided deposition testimony of Ms. Sickler, Mark Small, and Theresa Roberts. Plaintiff also submitted Plaintiff's responses to interrogatories. However, no information has been provided which demonstrates how many persons lived in the area and the number of those who claimed to be adversely affected by the alleged acts and omissions of MBH. Hence, there is no basis on which a trier-of-fact could reasonably determine whether a "considerable' number of persons were adversely affected.

37 *The Merriam-Webster Dictionary* 106 (2005).

38 *See, generally,* 58 AM. JUR. 2D *Nuisances* § 66 (Database Updated May 2014).

39 *See, Young v. Bryco Arms,* 821 N.E.2d 1078, 1090-91 (Ill. 2004); *Garcia v. 398 Crescent St. Prop., Inc.,* 920 N.Y.S. 2d 241 (App. Div. 2010) ("...no recovery may be had for nuisance where the injury is caused by subsequent intervening criminal conduct by a third-party.") (unpublished case).

III. CONCLUSION.

While there is no dispute that Plaintiff suffered harm when Mr. Diehl was murdered, Defendant MBH was not the actor which proximately caused his death. The actions of Mr. Potter were the proximate cause of the harm and were not reasonably foreseeable as a matter of law. Therefore, summary judgment will be entered in favor of Defendant on both remaining counts, and this case will be dismissed with prejudice in an appropriate order of even date.

Dated: July 7, 2014

Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella George
Acting Clerk of the Court

By:
Lori Boynes-Tyson
Court Clerk Supervisor 7/7/14

CERTIFIED A TRUE COPY
Date: 7/7/14
Clerk of the Court
By
Court Clerk