

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

AMINATA NICHOLAS

Plaintiff)

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)

)

vs)

)

SAUL DAMIAN-ROJAS
GEC, L.L.C.

)

)

Defendant

CASE NO. SX-10-CV-0000166

ACTION FOR: DAMAGES - CIVIL

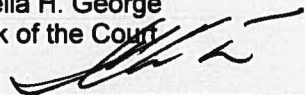
**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: LEE J. ROHN, ESQ.
EUGENIO W.A. GEIGEL-SIMOUNET, ESQ.
JUDGES AND MAGISTRATES OF THE SUPREIOR
COURT
LAW CLERKS, LAW LIBRARY, IT, RECORD BOOK

Please take notice that on June 25, 2018 a(n) MEMORANDUM OPINION
AND ORDER dated June 23, 2018 was entered by the Clerk in the
above-entitled matter.

Dated: June 25, 2018

Estrella H. George
Clerk of the Court



IRIS D. CINTRON
COURT CLERK II

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

AMINATA NICHOLAS,

Plaintiff,

v.

SAUL DAMIAN-ROJAS,

Defendant.

Case No. SX-10-CV-166

ACTION FOR DAMAGES

JURY

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Saul Damian-Rojas' Motion for Partial Judgment to Dismiss Gross Negligence Claim (Motion), styled as a motion for judgment on the pleadings under V.I. R. Civ. P. 12(c), filed February 8, 2018; Plaintiff Aminata Nicholas' Opposition, filed February 23, 2018; and Defendant's Reply, filed March 7, 2018. By Order entered March 22, 2018, Defendant's Motion was converted to a motion for summary judgment pursuant to V.I. R. Civ. P. 12(d), and the parties were permitted to supplement their briefings to provide a reasonable opportunity to present all the material that is pertinent to the Motion. Defendant filed his Supplementation of Motion to Dismiss in Compliance with Court Order (Supplement) on April 23, 2018. Plaintiff responded with her Opposition (Supplemental Opposition) and separate Plaintiff's Response in Opposition to Defendant Saul Damian-Rojas' Statement of Undisputed Facts, both filed May 21, 2018;¹ followed by Defendant's Supplemental Reply filed June 1, 2018. For the reasons set forth below, Defendant's Motion will be granted, and Plaintiff's claim for gross negligence will be dismissed with prejudice.

Background

This suit arises from a February 21, 2010 motor vehicle accident involving the parties that occurred on South Shore Road, near Divi Hotel and Casino in St. Croix, United States Virgin Islands. Plaintiff alleges that Defendant was grossly negligent when he operated the "vehicle in an intoxicated state, traveled at an excessive rate of speed, failed to keep his vehicle left, failed to

¹ Plaintiff's Supplemental Opposition also seeks an order requiring Defendant to show cause why sanctions should not be imposed pursuant to V.I. R. Civ. P. 56(h), claiming "that there are clear disputes of material facts and summary judgment is impossible." Because Defendant's Motion is ultimately granted, the Court finds that it was not submitted in bad faith or solely for delay. Plaintiff's Motion for Sanctions is therefore denied.

keep a proper lookout, failed to keep control of his vehicle among other grossly negligent acts and omissions.” First Amended Complaint, ¶ 10. Defendant denies those allegations and has moved for judgment on Plaintiff’s gross negligent claim.

Legal Standard

In evaluating a motion for summary judgment, the Court must determine whether there exists a genuine dispute of material fact; one that would impact the outcome of the case under applicable law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). Such a dispute is genuine if a reasonable trier of fact could find that factual issue material to the claim presented in favor of the nonmoving party. *Id.* at 391-92. “Summary judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact,” and judgment is appropriate as a matter of law. *Id.* at 379-80.

Reviewing Damian-Rojas’ Motion, the Court does not weigh the credibility of the evidence offered – instead, all reasonable inferences from the evidence are drawn in favor of the nonmoving party, and any conflicting allegations, if properly supported by the record, are resolved in favor of the nonmovant. *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citing *Williams*, 50 V.I. at 194-95). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin*, 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the nonmoving party to introduce some evidence showing the existence of a genuine issue of material fact. *See Perez*, 59 V.I. at 527-28. At this point, “the nonmoving party may not rest on its allegations alone, but must present actual evidence, amounting to more than a scintilla, showing a genuine issue for trial.” *Id.* at 527.

Gross Negligence

The Supreme Court of the Virgin Islands has neither defined gross negligence, nor set forth what elements a plaintiff must prove to succeed on a claim of gross negligence. However, the Supreme Court has implicitly recognized the concept of gross negligence as distinctly higher level of culpability deviating from that of ordinary negligence. *See, e.g., Francis v. People of the Virgin Islands*, 56 V.I. 370, 382 (V.I. 2012) (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”) (internal citations omitted); *St. Thomas-St. John Board of Elections v. Daniel*, 49 V.I. 322, 356 (V.I. 2007) (“even 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”).

This Court has previously engaged in a *Banks* analysis to determine the definition and elements of gross negligence,² ultimately defining it as, “wanton or reckless behavior demonstrating a conscious indifference to the health or safety of persons or property.” *Yusuf v. Ocean Props.*, 2016 V.I. LEXIS 19, *11 (V.I. Super. 2016); *see also Tutein v. Parry*, 48 V.I. 101, 104-07 (V.I. Super. 2006) (effectively performing a full *Banks* analysis despite being decided pre-*Banks*). 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. Gross negligence “tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent,” and represents “an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care.” PROSSER AND KEETON ON TORTS § 34 at 214.

Defendant’s Motion

To successfully pursue a claim of gross negligence, a plaintiff must establish the following elements: 1) defendant owed plaintiff a legal duty of care; 2) defendant breached that duty in such a way as to demonstrate a wanton, reckless indifference to the risk of injury to plaintiff; 3) and defendant’s breach constituted the proximate cause of 4) damages to plaintiff. *Yusuf*, 2016 V.I. LEXIS 19, *13; *cf. Machado*, 61 V.I. at 380 (establishing elements for negligence).³

² *See Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011). In cases where the common law of the Virgin Islands remains unclear in the absence of binding precedent, the trial court must: 1) evaluate the approach taken by other courts in the Virgin Islands, 2) evaluate the approach taken by courts in other jurisdictions and, most importantly, 3) determine which approach represents the soundest rule for the Virgin Islands.

³ Although *Machado* establishes only the elements for ordinary negligence, the elements for gross negligence may be logically inferred therefrom, recognizing that gross negligence is an “aggravated form of negligence” characterized as “involving an extreme departure from ordinary care,” but nevertheless is “still, at essence, negligent rather than actually intended to do harm.” PROSSER AND KEETON ON TORTS § 34 at 212-14.

In this case, Plaintiff alleges that Defendant was grossly negligent when he operated the vehicle “in an intoxicated state, traveled at an excessive rate of speed, failed to keep his vehicle left, failed to keep a proper lookout, failed to keep control of his vehicle among other grossly negligent acts and omissions.” First Amended Complaint, ¶ 10. In his Supplement, Defendant states that there are no facts within the summary judgment record by which a jury could reasonably find gross negligence. Specifically, Defendant argues that the record demonstrates that he was not operating his vehicle recklessly⁴ and was not intoxicated,⁵ and that by this showing, he has shown that there is no dispute of material fact as to whether Defendant exhibited a “wanton, reckless indifference to the risk of injury to plaintiff,” thus shifting the burden to Plaintiff to present actual evidence showing a genuine issue for trial.

⁴ See Supplement, ex. 1 (V.I. Police Department Uniform Crash Report of Officer Keith Williams indicating “no defects apparent” in Defendant and “no apparent improper driving”). Plaintiff vigorously argues that the police report is inadmissible and may not be considered, citing several criminal cases. See Supplemental Opposition, at 11 (citing, e.g., *People v. Fenton*, 2013 WL 7176406, at *2 n.1 (V.I. Super. 2013); *Petschauer v. United States*, 2016 W.L. 1271035, at *3-5 (E.D.N.Y. 2016)). Plaintiff further cites readily distinguishable civil cases. See *id.* (citing, e.g., *Murray v. Donlan*, 77 A.D.2d 337, 342-48 (N.Y.A.D. 1980)) (*Murray* excluded an accident report because it contained hearsay statements made by unidentified witness-declarants, whereas the instant accident report is offered for the firsthand observations of the reporting officer). By Virgin Islands Rule of Evidence 803(8), a public record is admissible as an exception to the hearsay rule if “it sets out... in a civil case... factual findings from a legally authorized investigation; and the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” VIRE 803(8)(A)(iii). In this civil case, the police report setting forth factual findings from the officer’s legally authorized investigation is admissible, with no showing that the source of information or other circumstances indicate a lack of trustworthiness. Officer Williams authenticated the report that he prepared by his affirmation, submitted as exhibit 8 to Plaintiff’s Response in Opposition to Defendant’s Statement of Facts. VIRE 901(a).

⁵ Officer Williams’ report reflects that no on scene testing for intoxication was performed and in reporting regarding Defendant, the officer declined to check boxes “Drinking – Not Impaired,” “Drinking – Impaired” and “Driving Under The Influence.” *Id.* Plaintiff’s argument that “the jury is allowed to conclude that alcohol was consumed at Paulina’s” where Defendant had breakfast is belied by the record. Apart from the police report, the totality of the evidence in the record relating to Defendant drinking is found in his deposition, as follows: “Q. Had you ever eaten at Paulina’s before that day? A. Something small. Also, some drinks like juice, that also I classify it as breakfast.... Q. What did you have to drink at Paulina’s that day with your stew chicken? A. A drink, but I don’t remember. Q. What type of drink? And by that I mean, was it a soft drink? Was it juice? Was it a beer? Was it a cocktail? What type of drink? A. I don’t remember.... Q. When you left Paulina’s did you have any drink that you took with you? A. None. Q. When you left your house that morning, did you take any drink with you, or did you get any drink during the time that you were driving around before going to Paulina’s? A. None.... Q. What did you do in the Divi Casino that day? A. I looked at all the casino, I played some of the games, and I took – I drank from a cup that someone brought to me. It was a cup of beer.... Q. Well, was it a large cup, or was it what you would consider a small cup? A. I take a medium size cup.... Q. How many total alcoholic beverages did you have to drink on the day of the accident? A. A cup.” Supplement, ex. 2, pp. 55-56, 59, 63-64, 96.

Even viewed in the light most favorable to Plaintiff, the evidence provided with Plaintiff's Opposition does not give rise to a genuine dispute of material fact.⁶ In support of her Opposition, Plaintiff provides a sizeable body of deposition testimony. However, this testimony does not support Plaintiff's assertions that Defendant was driving drunk,⁷ grossly exceeding the speed limit,⁸ or that Defendant was traveling in the wrong lane.⁹ Plaintiff is entitled to all reasonable inferences in evaluating her claim at summary judgment, but the inferences Plaintiff asks the Court to draw are not reasonable or supported by "actual evidence," and are based purely on conjecture (e.g. suggestion that Officer Williams' report of "no intoxication" and "no impairment" cannot be relied upon because Williams interviewed Defendant through an interpreter, thus creating a dispute of material fact¹⁰).

⁶ Plaintiff further argues that Defendant's Motion must be denied because it fails to comply with the certification requirement of V.I. R. Civ. P. 56(c)(1)(ii) and because Defendant failed to set forth the legal standard for gross negligence in his Supplement. *See* Supplemental Opposition, pp. 6-9. These arguments are without merit. Plaintiff's claim that Defendant's "motion nowhere briefs the substantive law" is wrong. *Id.* at 9. While the Supplement does not brief applicable law, it is adequately briefed in Defendant's Motion, such that Plaintiff had sufficient notice to respond. Moreover, while Defendant did fail to certify his Supplement, the Supreme Court has consistently noted its preference "that cases be decided on the merits and that any doubts should be resolved in favor of this preference." *Beachside Assocs., LLC. v. Fishman*, 53 V.I. 700, 719 (V.I. 2010). In light of this guidance, the Court will also decline to exclude Plaintiff's separate statement of facts and the exhibits attached thereto, despite that they are outside the permitted filings of V.I.R. Civ. P. 6-1 and, considered with Plaintiff's Supplemental Opposition, exceed the permitted page limitation of the same rule.

⁷ Plaintiff presents the affirmation of Officer Williams with reference to the fact that he declined to state in his report that Defendant had been drinking and did not cite Defendant for drunk driving, stating that such omission from the report "does not mean he was not drinking." Response in Opposition to Defendant's Statement of Facts, ex. 8. While the officer's statement may be accurate, neither his affirmation nor any other evidence presented by Plaintiff is sufficient to permit a finding that Defendant had anything more than the one medium size cup of beer to which he testified.

⁸ Compare Plaintiff's Response in Opposition to Defendant's Statement of Facts, ex. 6, p. 1 (stating that Defendant "had come around the curve at an excessive speed") with Plaintiff's Response in Opposition to Defendant's Statement of Facts, ex. 5, p. 71 ("Q: How fast were you operating your vehicle at the time of collision? A: About 35 miles."). Further, Officer Williams declined to check the boxes on his accident report "Speed Too Fast For Conditions" and "Exceeded Lawful Speed." Defendant was cited for negligent (not reckless) driving by failure to stay as far left as practicable. Supplement, ex. 1.

⁹ Plaintiff's Response in Opposition to Defendant's Statement of Facts, ex. 6, p. 1 (Affidavit of Vernessa Nicholas: Defendant "had driven *into* my lane," as opposed to traveling in the wrong lane) (emphasis added); *id.* at ex. 8, p. 2. The accident report determined the width of the road as 26'1" and the point of impact to be 10'2" from the northern edge, or less than 3 feet over the center line, for which Defendant was cited for negligent driving by failure to stay as far left as practicable. Supplement, ex. 1.

¹⁰ Plaintiff's Response in Opposition to Defendant's Statement of Facts, p. 4.

Plaintiff has presented actual evidence that, viewed in the light most favorable to her, indicates that Defendant came around a tight corner at a speed Plaintiff's affidavit describes as "excessive" and crossed the center line by less than three feet into Plaintiff's lane of travel, and before he could react,¹¹ struck Plaintiff's vehicle.¹² These factors, whether separate or combined as reflected in the record, do not permit an inference that Defendant engaged in wanton or reckless behavior demonstrating a conscious indifference to the health or safety of persons or property. Accordingly, the evidence of record does not permit a finding of gross negligence.

It is well settled in multiple jurisdictions that mere inattentiveness or inadvertence of the driver of a vehicle is insufficient to sustain a claim of gross negligence. *See, e.g., Arthur v. Arthur*, 684 F.2d 558, 561 (8th Cir. 1982) (interpreting Nebraska law, noting that "momentary inattention... does not amount to gross negligence"); *Powers v. Wilson*, 110 F.2d 960, 960 (2d Cir. 1940) ("It is not enough that the actor shall have been momentarily inattentive; he must deliberately embark upon an activity whose risk to others far outweighs any tangible interest that can be realized." (citing RESTATEMENT OF TORTS § 500, cmt. d., interpreting Vermont law)); *Barkes v. First Correctional Medical, Inc.*, 2008 U.S. Dist. LEXIS 14170, *25 (D. Del. 2008) ("To establish gross negligence a party must demonstrate more than ordinary inadvertence or inattention.") (citation omitted); *State v. Neisner*, 16 A.3d 597, 607 (Vt. 2010) (noting that in a traffic prosecution "gross negligence amounts to a failure to exercise even a slight degree of care, and that it requires more than an error of judgment, momentary inattention, or loss of presence of mind") (citation omitted).

The Oregon Supreme Court addressed a fact pattern similar to ours in *Brown v. Bryant*. 440 P.2d 231 (Or. 1968) (per curiam). Therein, Defendant-Appellant Howard Brown was operating his motor vehicle on "a bright sunny day" where "the pavement was dry," when suddenly "at a speed of 35 to 40 miles per hour he attempted to make a left turn." *Id.* at 231. "The tires screeched, the car rocked, the front wheels hit the west curb of Cleveland street, went over the curb and travelled 134 feet where the automobile ran into the concrete wall of an apartment house."

¹¹ Plaintiff's Response in Opposition to Defendant's Statement of Facts, ex. 5, p.p. 70-71 ("Q: were you able to turn the wheel to try to swerve away from my clients' car? A: yes, like every driver, I tried not to hit her. Q: Do you have an actual recollection of swerving or turning your vehicle away from my clients' vehicle? A: No. Q: Did you brake or hit the brakes of your vehicle at any time in the 20 seconds before the accident occurred? A: I don't remember.").

¹² *See* Plaintiff's Response in Opposition to Defendant's Statement of Facts, ex. 5, pp. 69-71.

Id. The Court found that “the conduct of the defendant in attempting an approximately 90 degree turn at 35 to 40 miles per hour is evidence of negligence, but it will not suffice to establish gross negligence.” *Id.* (citations omitted).

Similarly here, Defendant was operating a motor vehicle on a “clear” day¹³ when he rounded a curve at a speed he estimated to be approximately 35 miles per hour, that Plaintiff characterized as excessive, but the investigating officer declined to characterize as too fast for conditions or in excess of lawful speed.”¹⁴ While rounding the curve, Defendant’s vehicle crossed over the center line less than three feet into Plaintiff’s lane of travel and “sideswiped” Plaintiff’s vehicle.¹⁵ Viewing the record evidence and drawing all reasonable inferences, but without speculation or conjecture, in the light most favorable to Plaintiff, Plaintiff has failed to carry her burden of presenting actual evidence showing a genuine issue for trial relative to her claim of gross negligence. While Defendant’s conduct may constitute a departure from a duty of reasonable care, the evidence does not support a finding that such conduct could be characterized as “wanton or reckless behavior demonstrating a conscious indifference to the health or safety” of Plaintiff. As Defendant’s conduct cannot rise to the level of gross negligence, his Motion must be granted.

Accordingly, it is hereby

ORDERED that Defendant’s Motion is GRANTED. It is further

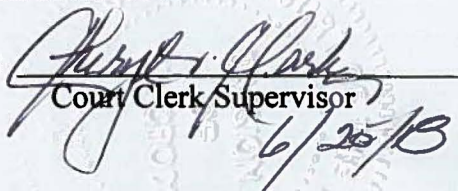
ORDERED that Plaintiff’s claim for gross negligence is DISMISSED WITH PREJUDICE.

June 23, 2018.


DOUGLAS A. BRADY, Judge

ATTEST:

Estrella H. George
Clerk of the Court

By: 
Court Clerk Supervisor

¹³ Plaintiff’s Response in Opposition to Defendant’s Statement of Facts, ex. 5, p. 69.

¹⁴ See *supra* n.8.

¹⁵ See *supra* n.9, n.11; Supplement, ex. 1.