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

HATIM Y. YUSUF, Plaintiff, v. OCEAN PROPERTIES, LTD. & AFFILIATES, Defendant.	)	SX-15-CV-008 ACTION FOR DAMAGES (JURY)

MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS

THIS MATTER is before the Court on Defendant's Motion to Dismiss Plaintiff's Claims for Punitive Damages and Gross Negligence in Complaint ("Motion"), filed January 22, 2016; and Plaintiff's Response in Opposition to Motion to Dismiss ("Response"), filed February 8, 2016. Because Plaintiff has made factual allegations concerning Defendant's behavior that could rise to the level of gross negligence depending on Defendant's state of mind, a fact-intensive evaluation of Defendant's state of mind is required and dismissal on the pleadings is inappropriate in this case. Therefore, Defendant's Motion will be denied.

Background

On January 13, 2015, Plaintiff filed his Complaint alleging that on or about October 14, 2013, while an invitee of Defendant's resort, Plaintiff injured his ankle upon tripping and falling into a pothole in Defendant's poorly maintained and poorly illuminated parking lot. Complaint at 2. Plaintiff alleges that despite not being apparent to Plaintiff at the time of the accident owing to the poor lighting conditions in the parking lot, "such condition was obvious to Defendant, which had an abundant opportunity to observe the potholes during daylight hours and a duty to inspect the premises for such hazards." *Id.* Further, because the safety hazards were "chronic and long-standing by nature," Plaintiff alleges that "Defendant must have had abundant actual knowledge of the potholes in question, actual knowledge of the poor lighting conditions at night, and actual knowledge that invitees of the resort were subjected to the risk of personal injury." *Id.* at 3. Finally, Plaintiff alleges that Defendant "displayed a conscious indifference to such risks, failed to timely repair the pavement defects and/or improve the parking lot lighting, and thereby recklessly

exposed resort guests and visitors to needless risks of personal injury." *Id.* For these reasons Plaintiff argues that Defendant is liable for gross negligence justifying an award of punitive damages. *Id.*

On January 22, 2016,[1] Defendant filed its Motion seeking dismissal of Plaintiff's gross negligence claim and prayer for relief for punitive damages; arguing that the allegations of gross negligence in the Complaint are merely conclusory statements of law which must be dismissed.[2] Motion 6-7. On February 8, 2016, Plaintiff filed his Response arguing that, if proven, the facts alleged and the reasonable inferences drawn therefrom could constitute sufficient circumstantial proof that Defendant's conduct was grossly negligent. Response 3-4. Plaintiff further argued that even if his allegations that Defendant had "actual knowledge," and acted with "conscious indifference" to the welfare of others are conclusory legal statement, they are specifically permitted under Fed. R. Civ. P. 9(b) which states that "malice, intent, knowledge, and other conditions of the mind may be alleged generally." *Id.*

Standard

The Supreme Court of the Virgin Islands has established a three-prong analysis to be used in reviewing motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6):

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-

[1] Despite the fact that Defendant's Motion was technically filed out of time, the Court finds that Plaintiff has waived any objection to the Motion on timeliness grounds by Plaintiff's Notice of Filing Executed Summons; Advisory to Court ("Notice"), filed August 7, 2015. In his Notice, Plaintiff asserts that "Defendant has been given an open-ended extension of its answer deadline, in order to make early good faith attempts at settlement with its insurance carrier." However, the more proper course would have been to timely file a Stipulated Motion for Extension of Time with the Court to extend the filing deadline.

[2] The Supreme Court of the Virgin Islands has made it clear that a "claim" for punitive damages is not a separate cause of action, but rather an aspect of a plaintiff's prayer for relief that is properly considered only in the context of evaluating damages. *See, e.g. Bertrand v. Mystic Granite & Marble, Inc.*, 2015 V.I. Supreme LEXIS 36 n.6 (V.I. 2015) (quoting *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 176 n.5 (V.I. 2012)). Thus, it is improper for the Court to consider the merits of Plaintiff's prayer for punitive damages at this early stage of proceedings. *See id.* (finding that consideration of punitive damages is not appropriate at summary judgment, and should not be evaluated until after a determination of liability has been made). The Court will defer consideration of this question until evaluation of damages is appropriate. Likewise, the Court will construe Plaintiff's Complaint as bringing two claims: 1) for negligence and 2) for gross negligence; and praying for relief in the form of both compensatory and punitive damages.

> pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

Joseph v. Bureau of Corrections, 54 V.I. 645, 649-650 (V.I. 2011) (internal quotations and citations omitted); *see also Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471-472 (V.I. 2013).

Discussion

The Supreme Court of the Virgin Islands 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.[3] However, the Supreme Court has implicitly endorsed the concept of gross negligence as a level of culpability distinct from 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").

In cases such as this, where the common law of the Virgin Islands remains unclear in the absence of binding precedent, the 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 ultimately 3) determine which approach represents the soundest rule of law for the Virgin Islands. *See, Banks v. International Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011).

***Banks* Analysis**

Courts in the Virgin Islands have taken different approaches at different times regarding claims of gross negligence. In the Superior Court, gross negligence has frequently been equated with wanton and/or reckless behavior that demonstrates a conscious indifference to potential risk

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[3] Arguably, the Supreme Court has tacitly recognized that gross negligence may exist as an independent cause of action, if only by its silence on the issue when presented with an allegation of gross negligence as a separate count of the complaint. *See, e.g., Brady v. Cintron*, 55 V.I. 802, 809-10 (V.I. 2011). Such arguably tacit recognition stands in marked contrast to the Supreme Court's treatment of punitive damages "claims," which the Supreme Court has repeatedly noted do not constitute separate and distinct causes of action. *See supra* note 2.

of injury to persons or property. For example, in *Tutein v. Parry*, 48 V.I. 101 (V.I. Super. 2006), 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 (20 V.I.C. § 555) and, after noting a split in authorities from other jurisdictions,[4] held 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. Courts following this line of reasoning effectively equate grossly negligent behavior with reckless behavior. *See, e.g., Marian v. Fraser*, 2014 V.I. LEXIS 19, *7 (V.I. Super. 2014) (finding Plaintiff failed to state a claim of gross negligence as defined in *Tutein*); *Powell v. Chi-Co's Distrib.*, 2014 V.I. LEXIS 21, *5 n.11 (V.I. Super. 2014) (declining to conduct a *Banks* analysis and adopting the *Tutein* formulation of gross negligence as equivalent with recklessness).

On the other hand, some Superior Court cases considering the issue have adopted the definition of gross negligence endorsed by the District Court of the Virgin Islands. In *Hill v. De Jongh*, for example, the court, in considering a Rule 12(b)(6) motion to dismiss, 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." 2012 V.I. LEXIS 11, *20 (V.I. Super. 2012) (citing *Thomas v. Rijos*, 780 F.Supp.2d 376, 385-86 (D.V.I. 2011)). The *Thomas* court reasoned that because the Legislature used both the terms "gross negligence," and "recklessness," in different contexts in different sections of Title 20 of the V.I. Code, the Legislature must have intended—at least in the context of applying the relevant statutes[5]—that gross negligence should refer to a level of culpability somewhere between ordinary negligence and recklessness.[6] *Id.* Thus, the *Thomas* court defined gross negligence as "conduct

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[4] Although decided prior to *Banks*, the *Tutein* court effectively engaged in a full *Banks* analysis to determine an issue of common law "as generally understood and applied in the United States" for which there was no binding precedent and upon which the restatements of the law approved by the American Law Institute were silent. 48 V.I. at 105, citing 1 V.I.C. § 4.

[5] 20 V.I.C. § 555 imposes a limit on non-economic damages recoverable from automobile accidents unless caused by gross negligence. 20 V.I.C. § 492 makes it unlawful to operate a vehicle in a reckless manner, where recklessness is defined as behaving in a manner indicating "either a willful or wanton disregard for the safety of person or property."

[6] The *Thomas* court took the position that because the Legislature chose to use two different terms in different sections of the V.I. Code, and because it must be presumed that the Legislature knows the ordinary meaning and legal import of the terms it uses, the Legislature must have intended that gross negligence and recklessness be given different meanings. *Thomas*, 780 F.Supp.2d at 385-86. While, at first glance, this position may appear convincing, it is difficult

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 explicitly found that while a showing of recklessly indifferent behavior would certainly be sufficient to state a claim for gross negligence, such a showing of recklessness was not necessary sustain such a claim. *Id.*

Jurisdictions outside the Virgin Islands are similarly split as to the definition of gross negligence. For example, the Third Circuit, applying Pennsylvania law, has held that gross negligence refers to "a greater want of care than is implied by ordinary negligence," and "the want of even scant care and the failure to exercise even that care which a careless person would use." *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 462 (3d Cir. 1990). Indeed, Professors Prosser and Keeton assert that "most 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 and 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.App. 1978)).

Other jurisdictions have instead held that gross negligence is defined as misconduct demonstrating a wanton and/or reckless disregard for the consequences of one's actions. For example, the Second Circuit has held that "under New York law, a mistake or series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence." 57A Am. Jur. 2d Negligence § 232 (2006) (citing *American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549 (2d Cir. 1996)). Courts in Maryland, North Dakota, and Oklahoma have held that a claim of gross negligence requires a showing of recklessness. *See, e.g., Marriott Corp. v. Chesapeake & Potomac Telephone Co. of Maryland*, 124 Md. App. 463 (1998); *Jones v. Ahlberg*, 489 N.W.2d 576 (N.D. 1992); *Myers v. Lashley*, 44 P.3d 553 (Okla. 2002).[7]

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to logically infer any legislative intent based the ordinary meaning and legal import of selected terms where, as here, the meaning and import of those terms is the subject of such widespread disagreement and debate.

[7] As noted by Prosser and Keeton, courts following this approach tend to apply the words "willful," "wanton," and "reckless," sometimes using all three interchangeably in a single sentence. Prosser and Keeton on Torts § 34 at 212. Prosser and Keeton note further that, as they are typically used, these words indicate that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Id.* at 213.

After extensive review, the Court 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, *7 (finding Plaintiff failed to state a claim of gross negligence as defined in *Tutein*); *Powell*, 2014 V.I. LEXIS 21, *5 n.11 (declining to conduct a *Banks* analysis and adopting the *Tutein* formulation of gross negligence as equivalent with recklessness).

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 and Keeton on Torts § 34 at 214. While some uncertainty doubtless remains as to what specific factual scenarios will constitute gross negligence in this formulation, the weight of authority from other jurisdictions using similar definitions of gross negligence makes it clear "that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention." *Id.* (collecting cases).

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[8] The Restatement of Torts does not contain a section discussing or defining gross negligence. Instead, 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 simplistic approach.

[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 and Keeton on Torts § 34 at 211-12.

Motion to Dismiss

Having determined that gross negligence in the Virgin Islands should be defined as misconduct demonstrating a wanton or reckless indifference to the risk of injury to persons or property, a plaintiff pursuing claims of gross negligence 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. *See Machado v. Yacht Haven U.S.V.I., LLC,* 61 V.I. 373, 380 (V.I. 2014) (establishing elements of a negligence claim).[10] Thus, a claim of gross negligence is, in essence, a claim that a defendant negligently injured the plaintiff with a state of mind indicating a higher order of culpability.

In this case, Plaintiff alleges that he was injured when he "stepped into a hole/defect in the pavement" in a parking lot at Defendant's resort which "had multiple potholes and similar defects," and was "poorly illuminated." Complaint at 2. Plaintiff further alleges that "although the dangerously defective condition of the pavement was not apparent to Plaintiff due to the poor lighting conditions at the time of the injury, such condition was obvious to Defendant, which had an abundant opportunity to observe the potholes during daylight hours and a duty to inspect the premises for such hazards." *Id.* Plaintiff also alleges that because the safety hazards in the parking lot were "chronic and long-standing by nature," it may be inferred that "Defendant must have had abundant actual knowledge of the potholes in question, actual knowledge of the poor lighting conditions at night, and actual knowledge that invitees of the Resort were subjected to the risk of personal injury. *Id.* Finally, Plaintiff asserts that Defendant "displayed a conscious indifference to such risks… and thereby recklessly exposed resort guests and visitors to needless risks of personal injury." *Id.*

In its Motion, Defendant argues that these allegations of gross negligence in the Complaint are merely conclusory statements of law which must be dismissed. And in most cases, simple conclusory statements of law are not entitled to the presumption of truth otherwise afforded the

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[10] Although in *Machado* the Supreme Court established only the elements of an ordinary negligence claim and not a gross negligence claim, the elements of a gross negligence claim may be logically inferred, given that claims of gross negligence are complaints of conduct "which is still, at essence, negligent rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended." Prosser and Keeton on Torts § 34 at 212-13.

allegations contained in a complaint facing a motion to dismiss. *See Joseph*, 54 V.I. at 649-650 (internal citations omitted). Here however, the legal conclusions contained in the Complaint concern the state of mind with which Defendant allegedly breached its duty to Plaintiff, and under Rule 9(b) of the Federal Rules of Civil Procedure,[11] "malice, intent, knowledge, and other conditions of the mind may be alleged generally." Fed. R. Civ. P. 9(b). Plaintiff has alleged Defendant's state of mind in general terms as permitted by Rule 9(b). Plaintiff has also made allegations that, if proven, could be considered circumstantial evidence from which a rational trier of fact might reasonably infer that Defendant's knowing failure to correct the obviously dangerous condition of its poorly maintained and poorly illuminated parking lot constituted wanton or reckless behavior demonstrating a conscious indifference to the substantial risks to the health and safety of its invitees. *See* Complaint at 2-3 (alleging that the safety hazards in Defendant's parking lot were "chronic" and "long-standing," and that though such hazards were not apparent to Plaintiff in the poorly illuminated environment of the parking lot at night, such hazards would have been obvious to Defendant upon any inspection at any time during daylight hours).

In this light, the Court finds that Plaintiff has made allegations sufficient to make out a plausible claim of gross negligence against Defendant to survive dismissal at this stage of the litigation. Assuming all of Plaintiff's well-pleaded allegations to be true, reasonable minds may infer that Defendant is liable for the injuries caused to Plaintiff by Defendant's gross negligence. Moreover, as the critical difference between claims of ordinary negligence and claims of gross negligence is the significantly more culpable state of mind of the defendant, Plaintiff should be allowed to conduct discovery to gather what evidence he may to attempt to prove that Defendant acted with the requisite wanton or reckless state of mind as alleged in his Complaint.

Conclusion

After conducting extensive analysis of legal precedent both within and without the Virgin Islands as required by *Banks* and its progeny, the Court finds that to sustain a claim of gross negligence, a plaintiff must show that the defendant injured him or her through misconduct demonstrating a wanton, reckless disregard for the risk of injury to the plaintiff. Applying that

[11] Made applicable to Superior Court proceedings through Super. Ct. R. 7.

standard to Defendant's Motion, the Court finds that Plaintiff has sufficiently and plausibly alleged a claim of gross negligence against Defendant. Therefore, Defendant's Motion will be denied.

On the basis of the foregoing, it is hereby

ORDERED that Defendant's Motion to Dismiss is DENIED.

Dated: March 7, 2016.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: _____
Court Clerk Supervisor 3/8/16

CERTIFIED A TRUE COPY
DATE: Mar. 8, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: _____
COURT CLERK II