

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

LEOPOLD BENJAMIN,	)	
	)	
Plaintiff,	)	Case No. ST-13-CV-065
	)	(Consolidated with Case No. ST-13-CV-294)
vs.	)	
	)	
CORAL WORLD VI, INC.,	)	ACTION FOR PERSONAL INJURY
	)	AND DAMAGES
Defendant.	)	
	)	JURY TRIAL DEMANDED

MEMORANDUM OPINION

By motion filed October 21, 2013, Defendant Coral World VI, Inc., moves to dismiss Plaintiff Leopold Benjamin's June 14, 2013, Complaint¹ on the grounds that it fails to state a claim upon which relief can be granted² because Plaintiff "was injured by his own negligence".³ Plaintiff responds that "the requisite standard of review does not allow for dismissal at this juncture; Benjamin... has demonstrated a prima facie case of negligence; and... there is no applicable exception barring Coral World from liability."⁴

The Court finds that the Plaintiff has failed to establish the elements of duty, breach and causation, and that his own reckless behavior was a superseding cause of his injuries. Therefore, Defendant's motion to dismiss is granted.

¹ Plaintiff's original Complaint in Case No. ST-13-CV-065 was filed on February 08, 2013. That Complaint was dismissed without prejudice on May 16, 2013 – and Plaintiff was granted leave to amend – because the original Complaint was "devoid of facts... showing that Defendant should have anticipated the harm to Plaintiff". May 16, 2013, Memorandum Opinion, p. 3. Plaintiff filed a new Complaint in a new matter, Case No. ST-13-CV-294, on June 14, 2013, with questions of law or fact common with Case No. ST-13-CV-065. Thus these matters were consolidated on April 27, 2014, under Case No. ST-13-CV-065.

² Defendant is gently and singularly reminded of the requirements of LRCi 12.1(a)(1) and 12.1(d).

³ Defendant's October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff's Claim for Failure to State a Claim Upon Which Relief Can Be Granted, p. 20.

⁴ Plaintiff's December 02, 2013, Renewed Opposition to Defendant's October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff's Complaint, p. 11.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

In the early morning hours of August 23, 2011, Plaintiff Leopold Benjamin was injured when he tripped over a pile of dirt on a pathway on Defendant Coral World's property. At the time Benjamin fell, there was no natural light to reveal the presence of the dirt mound and the path was not otherwise lit.

Plaintiff's June 14, 2013, Complaint alleges that Defendant was negligent. Defendant moved to dismiss on October 21, 2013.

STANDARD OF REVIEW – MOTION TO DISMISS

The Court must consider two factors when deciding a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. First, "all well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them."⁵ Although the Court must take all of the factual allegations in the Complaint as true, courts "are not bound to accept as true a legal conclusion couched as a factual allegation".⁶ Factual and legal elements of a claim should be separated,⁷ and, while Rule 8⁸ does not require "detailed factual allegations,"⁹ it does "demand[] more than

⁵ *Kiskidee, LLC v. Certain Interested Underwriters at Lloyd's of London Subscribing To Policy No. NB043060b*, Civil Action 2009-07, 2012 WL 952752, at *2 (D.V.I. Mar. 21, 2012) (quoting *McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir.2009)); see also *Matheson v. Virgin Islands Cmty. Bank, Corp.*, 297 F. Supp. 2d 819, 825 (D.V.I., App. Div. 2003) ("In considering whether a complaint should be dismissed for failure to state a claim upon which relief can be granted, the Court must consider only those facts alleged in the complaint and accept all of the allegations as true, drawing all reasonable inferences in the plaintiff's favor") (citations omitted).

⁶ *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (also cited by *Matheson*, 297 F. Supp. 2d at 825 ("Legal conclusions offered in the guise of factual allegations... are given no presumption of truthfulness")).

⁷ *Bethea v. Merchants Commercial Bank*, Civil No. 2011-51, 2011 WL 4861873, at *1 (D.V.I. Oct. 13, 2011) (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir.2009), which cited *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009)).

⁸ "A pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief". FED. R. CIV. P. 8(a).

⁹ *Iqbal*, 129 S. Ct. 1937 at 1949 (quoting *Bell Atlanta Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

an unadorned, the-defendant-unlawfully-harmed-me accusation.”¹⁰ A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do,” nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”¹¹

Second, the Court must decide whether the claim is plausible “on its face.”¹² A claim is plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” and a court must “draw on its judicial experience and common sense” in making the plausibility determination.¹³ The plausibility standard requires more than “a sheer possibility that a defendant has acted unlawfully.”¹⁴ If the Court determines that “there are well-pleaded factual allegations, [it will] assume their veracity and then determine whether [the allegations’] plausibly give[s] rise to an entitlement to relief.”¹⁵ The Court now applies this standard.

DISCUSSION

A. Plaintiff’s Conflicting Statements

Defendant states that “in stark contrast to his [original] verified complaint..., Plaintiff now alleges that the mound of dirt in his path ‘was neither open nor obvious’,” and as a result,

¹⁰ *Iqbal*, 129 S.Ct. at 1949.

¹¹ *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555 and 557).

¹² *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

¹³ Saja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, Lewis & Clark L. Rev. 15, 27 (2009) (discussing changes to the requirements for the motion to dismiss as recently established by the Supreme Court in *Twombly* and *Iqbal* and quoting *Iqbal*, 129 S.Ct. at 1949-50).

¹⁴ *Iqbal*, 129 S.Ct. at 1949.

¹⁵ *Id.* at 1950.

Plaintiff should not be allowed to relitigate this issue.¹⁶ Plaintiff does not address his conflicting factual allegations in his December 02, 2013, Response.

i. BECAUSE THE MAY 16, 2013, MEMORANDUM OPINION DID NOT RESOLVE THE ISSUE OF WHETHER THE DIRT MOUND PRESENTED AN OPEN AND OBVIOUS DANGER, THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT APPLY.

Defendant argues that “the doctrine of collateral estoppel prohibits Plaintiff from making [a] new claim [that the mound was not open and obvious].”¹⁷ The doctrine of collateral estoppel, also referred to as issue preclusion, “prevents the relitigation of issues that have been decided in a previous action” and “protect[s] litigants from the burden of relitigating an identical issue with the same party”.¹⁸ Collateral estoppel applies if four elements are present: “(1) the previous determination was necessary to the decision; (2) the identical issue was previously litigated; (3) the issue was... decided in a decision that was final, valid, and on the merits; and (4) the party being precluded from relitigating the issue was adequately represented in the previous action.”¹⁹

The Court stated on May 16, 2013, that “Plaintiff *alleges* he tripped and fell over a mound of dirt on Defendant’s property,” and then cited to the portions of Plaintiff’s original Complaint that supported Plaintiff’s contention that the dirt mound was an open and obvious danger.²⁰ The Court did not make any binding findings of fact and was merely applying the necessary analysis when considering a motion to dismiss by accepting the allegations of the

¹⁶ Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Claim for Failure to State a Claim Upon Which Relief Can Be Granted, p. 5, quoting the June 14, 2013, Complaint, para. 7.

¹⁷ Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Claim for Failure to State a Claim Upon Which Relief Can Be Granted, p. 10.

¹⁸ *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 474 (3d Cir. 1997) (on appeal from D.V.I.) (citing *Montana v. United States*, 440 U.S. 147 (1979) and quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)).

¹⁹ *Hawksbill Sea Turtle*, 126 F.3d at 474 (citing *Raytech Corp. v. White*, 54 F.3d 187, 190 (3d Cir.1995)).

²⁰ May 16, 2013, Memorandum Opinion, p. 2 (emphasis added).

original complaint as true. Because the Court has not yet litigated the issue of whether the dirt mound was “open and obvious,” the doctrine of collateral estoppel is inapplicable.

ii. **THE COURT WILL NOT APPLY THE DOCTRINE OF JUDICIAL ESTOPPEL HERE BECAUSE PLAINTIFF’S LEGAL CONCLUSIONS WERE NOT HIS TO MAKE; AND THEY WILL BE DISREGARDED BY THE COURT.**

Defendant argues that “the doctrine of judicial estoppel prevents a litigant who has taken a position in one judicial proceeding from taking a contradictory position in another.”²¹ Judicial estoppel is “a fact-specific, equitable doctrine, applied at courts’ discretion”²² that “rests on the basic notion that, absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.”²³ Although a party can assert alternative and even conflicting claims,²⁴ it may be judicially estopped from taking “two positions that are irreconcilably inconsistent.”²⁵ Once the Court determines that positions are irreconcilably inconsistent, it must also find that the party’s position was changed in bad faith and that there is no lesser sanction that would adequately remedy the damage done by the misconduct.²⁶

²¹ Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Claim for Failure to State a Claim Upon Which Relief Can Be Granted, p. 11, quoting *Sibley v. McCord*, 173 S.W.3d 416, 419 (Tenn. App. 2004).

²² *Semper v. Gomez*, 747 F.3d 229, 247 (3d Cir. 2014) (on appeal from D.V.I.) (quoting *In re Kane*, 628 F.3d 631, 638 (3d Cir.2010)).

²³ *Semper*, 747 F.3d at 247 (quoting *In re Kane*, 628 F.3d at 638) (further citation omitted).

²⁴ See FED. R. CIV. P. 8(d)(2)-(3), Alternative Statements; Inconsistency.

(2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

²⁵ *In re Prosser*, 534 F. App’x 126, 130 (3d Cir. 2013) (on appeal from D.V.I.) (quoting *In re Kane*, 628 F.3d at 638 (further citation omitted)).

²⁶ *In re Prosser*, 534 F. App’x at 130 (quoting *In re Kane*, 628 F.3d at 638).

The Court must first determine if Plaintiff's statements – initially, that the dirt mound was open and obvious and, now, that it was not – are even “irreconcilably inconsistent”.²⁷ Positions are irreconcilably inconsistent when they are incomparable and impossible to make harmonious.²⁸

That a situation presents an open and obvious danger is a defense to premises liability,²⁹ and, although a plaintiff is under no duty to present defenses on a defendant's behalf,³⁰ a well-prepared complaint can and should acknowledge and discuss obvious defenses before they are even raised by the defending party. Plaintiff is not tasked with deciding which defense(s) the Defendant will choose, and thus the Court finds that Plaintiff's attempt to preemptively remove Defendant's defense is harmless.

“Obvious” means “that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment”.³¹ When danger is so readily apparent that “all reasonable minds can draw but one inference from the facts, the question to be determined is one of law for the

²⁷ *Id.*

²⁸ *Green v. City of Cascade*, 231 N.W.2d 882, 890 (Iowa 1975) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969)).

²⁹ “A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them”. RESTATEMENT (SECOND) OF TORTS § 343A. See also *Figueroa v. Hess Oil Virgin Islands Corp.*, 198 F. Supp. 2d 632, 645 (D.V.I., App. Div. 2002) (“[O]ne is not ordinarily liable for obvious dangers on his land”) (citing to RESTATEMENT (SECOND) OF TORTS § 343A).

³⁰ See, for example, FED. R. CIV. P. 8(b)(1)(A) (“In responding to a pleading, a party must state... its defenses to each claim asserted against it”); FED. R. CIV. P. 55(a) (A clerk must enter default against a party that fails to defend); FED. R. CIV. P. 12(b) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required”) (emphasis added).

³¹ RESTATEMENT (SECOND) OF TORTS § 343A, cmt. b. Restatement (Second) of Torts § 343A, Known or Obvious Dangers, has been accepted as the appropriate common law to be applied in the Virgin Islands by various binding authorities, including: *Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381 (3d Cir. 1995) (on appeal from D.V.I.); *Barnes v. XTRA Superfood Centers, Inc.*, 198 F. App'x 188 (3d Cir. 2006) (on appeal from D.V.I.); *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030 (3d Cir. 1987) (on appeal from D.V.I.); *Figueroa v. Hess Oil Virgin Islands Corp.*, 198 F. Supp. 2d 632 (D.V.I., App. Div. 2002); *Ambrose v. Nat'l Foods Disc.*, 1997-027, 2000 WL 302694 (D.V.I., App. Div. Mar. 17, 2000); *Proctor v. N. Shore Partners, Inc.*, 232 F. Supp. 2d 472, 476-77 (D.V.I., App. Div. 2002).

court.”³² Per Plaintiff’s original and continued admissions that the pile of dirt resided on the pathway,³³ for the purpose of this analysis, the Court draws its own legal conclusion that the mound presented an open and obvious danger. As the Court is not required to accept any legal conclusions alleged in a complaint, the Court finds that Plaintiff’s conflicting statements concerning whether the danger was or was not open and obvious – even when each was supported by his attorney’s signature – are harmless because this legal conclusion is not Plaintiff’s to draw. As a result, Plaintiff’s conflicting allegations will be disregarded. The legal conclusions made by the Plaintiff have not been previously litigated, and had no impact on the parties or the Court, and will not be subjected to estoppel.

B. Negligence

Plaintiff alleges that Defendant was negligent and that “Coral World’s negligent acts were the proximate cause of Benjamin’s injuries.”³⁴ Defendant moves to dismiss, arguing that “Plaintiff’s complaint present no plausible claim that Coral World owed him a duty”.³⁵ “The

³² *Mosheuel v. D.C.*, 191 U.S. 247, 252 (1903) (citations omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 434(1)(a), Functions of Court and Jury (“It is the function of the court to determine whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff”).

³³ February 08, 2013, Complaint, para. 6 (“mound of dirt directly in the path”); Plaintiff’s April 29, 2013, Opposition to Defendant’s Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim, p. 1 (“mound of dirt that was located directly on a walking path”), p. 4 (“mound of dirt that was located on the pathway”) and p. 9 (“mound of dirt left on a common and frequented walking path”); June 14, 2013, Complaint, para. 6 (“mound of dirt on the pathway”) and para. 14 (“dangerous condition upon the walking pathway”; “dangerous condition on pathway”); Plaintiff’s December 02, 2013, Renewed Opposition to Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Complaint, p. 1 (“mound of dirt that was located directly on a walking path”), p. 3 (“mound of dirt that was located on the pathway”) and p. 6 (“mound of dirt on a common and frequented walking path”). Plaintiff twice attempts to claim that the dirt mound was not open and obvious, but fails to support this contention with any facts as to why it was would not be recognized by a reasonable man exercising ordinary perception.

³⁴ Plaintiff’s June 14, 2013, Complaint, para. 15.

³⁵ Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Claim for Failure to State a Claim Upon Which Relief Can Be Granted, p. 9.

elements of a negligence suit are well established: (1) duty, (2) breach of duty, (3) causation and (4) damages.”³⁶

i. DUTY

Defendant argues that “Plaintiff’s Complaint presents no plausible claim that Coral World owed him any duty under his alleged status as an invitee, much less under his obvious status as a trespasser.”³⁷ Plaintiff responds that “[a]s an invitee... Coral World owed [him] a certain duty of care,”³⁸ but even “[i]f this Court does not find that Benjamin was an invitee...

³⁶ *White v. Spenceley, LLC*, 53 V.I. 666, at *3 (V.I. 2010) (citing RESTATEMENT (SECOND) OF TORTS § 281) (other citations omitted) (numbers added for clarity). Restatement (Second) of Torts § 281 spells out the elements of a negligence claim and is the common law within our jurisdiction, as established by various binding authorities. For example: *Sealy-Christian v. Sunny Isle Shopping Center, Inc.*, 52 V.I. 410, at *4 (V.I. 2009); *Mill Harbour Condo. Owners Assoc. v. Marshall*, 53 V.I. 581, at *2 (V.I. 2010); *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, at *22 (V.I. 2012); *Turbe v. Gov’t of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991) (on appeal from D.V.I.); *In re Barbel*, 191 F. App’x 101, 104 (3d Cir. 2006) (on appeal from D.V.I.). The Court’s reliance on additional sections of Division 2, Negligence, of the Restatement (Second) of Torts, to define, clarify or expand upon these elements is, therefore, in line with our local common law. Therefore, reference to additional sections of Division 2 does not necessitate *Banks* analyses. See *Gov’t of the V.I. v. Connor*, S.Ct. Civ. No. 2013-0095, 2014 WL 702639, at *3 (V.I. Feb 24, 2014), referencing *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) (“[T]he Superior Court, when considering a question not foreclosed by prior precedent... must perform a three-part analysis as set forth in *Banks*”).

³⁷ Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Claim for Failure to State a Claim Upon Which Relief Can Be Granted, p. 9.

³⁸ Plaintiff’s December 02, 2013, Renewed Opposition to Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Complaint, p. 5. Defendant cites to Restatement (Second) of Torts § 343 via 1 V.I.C. § 4 without reference or discussion of actual binding authority. 1 V.I.C. § 4 was “implicitly repealed... [by] 4 V.I.C. § 21 in 2004”. *Connor*, 2014 WL 702639, at *1 (citations omitted). Since that time, parties - and indeed, this Court - can no longer automatically and uncritically rely on the Restatements or any other non-binding authority when determining the best common law for the Virgin Islands. See *Connor*, 2014 WL 702639. The only decisions binding upon this Court regarding common law are those rendered by: the Virgin Islands Supreme Court; the Third Circuit Court of Appeals, when serving as the de facto court of last resort in the Virgin Islands, and; the Appellate Division of the District Court of the Virgin Islands. *Najawicz v. People*, 58 V.I. 315 (V.I. 2013); *Connor*, 2014 WL 702639; *Simon v. Joseph*, 59 V.I. 611 (2013). All other holdings are merely persuasive. As a result, “the Superior Court, when considering a question not foreclosed by prior precedent... must perform a three-part analysis as set forth in *Banks*.” *Connor*, S.Ct. Civ. No. 2013-0095, at *3, referencing *Banks*, 55 V.I. 967. A *Banks* analysis involves: (1) ascertainment of “whether any... local courts have considered the issue and rendered any decisions upon which litigants may have grown to rely;” (2) determination of the “position taken by a majority of courts from other jurisdictions;” and (3) identification of “the best rule for the Virgin Islands”. *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citations omitted). However, this Court “possesses, in the absence of binding precedent... concurrent authority with [the Virgin Islands Supreme Court] to shape Virgin Islands common law, and it need not even follow otherwise binding precedent that was predicated solely on 1 V.I.C. § 4. *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citation omitted) and n. 1 (citations omitted). Thus, litigants are reminded of the requirements of LRCi 11.1. By signing a motion or supporting memorandum, an attorney certifies that the applicable law in this jurisdiction has been cited,

[Benjamin] was either a 'discovered' or 'anticipated' trespasser... [and Defendant] is under a duty to exercise ordinary care to warn [him of known]... artificial conditions ...that involve a risk of death or serious bodily injury."³⁹

a. BECAUSE AN UNLIT PATH IS NOT AN INVITATION FOR TRAVERSE, PLAINTIFF WAS NOT A PUBLIC INVITEE UPON DEFENDANT'S PROPERTY TO WHOM DEFENDANT WOULD OWE A DUTY TO WARN OF OPEN AND OBVIOUS DANGERS.

According to Restatement (Second) of Torts § 332:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.⁴⁰

"Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception."⁴¹ "In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes".⁴² A possessor of land is subject to liability for harm

including authority for or against the position being advocated by counsel. LRCi 11.1(a). Therefore, in the absence of discussion addressing: (1) whether cited authority is binding upon this Court or presented as persuasive authority; and (2) why the Court should adopt this view as the "appropriate common law rule based on the unique characteristics and needs of the Virgin Islands" and the parties, the Court may begin striking motions as fatally deficient. *Connor*, S.Ct. Civ. No. 2013-0095, at *3 and LRCi 11.1; *See also* Virgin Islands Rules of Profession Conduct Rule 211.3.1, Meritorious Claims and Contentions ("A lawyer shall not... assert or controvert an issue... unless there is a basis in law and fact for doing so... which includes a good faith argument for an extension, modification or reversal of existing law").

³⁹ Plaintiff's December 02, 2013, Renewed Opposition to Defendant's October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff's Complaint, pp. 9-10.

⁴⁰ See also *Monk*, 53 F.3d at 1384, n. 3 (stating that the Restatement provides the definition of invitee in Restatement (Second) of Torts § 332).

⁴¹ RESTATEMENT (SECOND) OF TORTS § 332, cmt. a.

⁴² RESTATEMENT (SECOND) OF TORTS § 334A, cmt. e.

caused to invitees for known dangers if, but only if, the possessor expects that the invitee would not “discover or realize the danger, or will fail to protect [himself] against it.”⁴³

The Court takes judicial notice of the fact that Coral World’s business is that of a marine park tourist attraction that charges admission to its visitors and a substantial portion of the property is not made available to the general public for this business purpose.⁴⁴ The Court also takes judicial notice that, absent making its premises available for a special function or event, the Coral World premises are generally closed to the public outside of business hours. Plaintiff does not contend – nor do the facts support⁴⁵ – that he was a business invitee to Defendant’s establishment,⁴⁶ so the Court’s analysis will focus on whether the Plaintiff was a public invitee.

A public invitee is a member of the public who enters property “for a purpose for which the land is held open to the public,”⁴⁷ and an invitation is an essential element to determining if

⁴³ RESTATEMENT (SECOND) OF TORTS § 341A, Activities Dangerous to Invitees; *see also* RESTATEMENT (SECOND) OF TORTS § 341A, cmt. a (“The obligation of the possessor is... not limited to one of reasonable care to protect [an invitee] against conditions of which [the invitee] does not know or have reason to know... but extends also to protection against the risk of harm from activities of which the invitee knows or has reason to know, where it may reasonably be expected that he will fail to protect himself notwithstanding such knowledge”).

⁴⁴ *In the Interest of J.J.J.*, S. Ct. Crim. No. 2013–0022, 2013 WL 3378827, at *5 (V.I. July 05, 2013) (“Rule 201 of the Federal Rules of Evidence—which the Virgin Islands has adopted—permits courts to take judicial notice of certain facts. Judicial notice—an evidentiary mechanism by which the proponent is relieved of its duty to prove an adjudicatory fact through normal evidentiary means—is only appropriate when the fact “is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Quoting RESTATEMENT (SECOND) OF TORTS § 201(b)(1)-(2)).

⁴⁵ “Coral Wold VI, Inc.,... is a Corporation... [which] maintains its principle place of business in the United States Virgin Islands... [and i]n the early morning hours... Benjamin... was walking on a pathway commonly used for exercise”. June 14, 2013, Complaint, paras. 3 and 5. Plaintiff also adds that “Coral World held its premises open to the public for the purposes of exercise and leisure activity [and] Benjamin entered the property for these purposes.” Plaintiff’s December 02, 2013, Renewed Opposition to Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Complaint, p. 6 (emphasis added).

⁴⁶ Business visitors fall into two classes. The first class includes persons who are invited to come upon the land for a purpose connected with the business for which the land is held open to the public... The second class includes those who come upon land not open to the public, for a purpose connected with business which the possessor conducts upon the land, or for a purpose connected with their own business which is connected with any purpose, business or otherwise, for which the possessor uses the land. RESTATEMENT (SECOND) OF TORTS § 332, cmt. e.

⁴⁷ RESTATEMENT (SECOND) OF TORTS § 332, cmt. a.

an individual is an invitee.⁴⁸ As used within Restatement (Second) of Torts § 332, “an invitation is conduct which justifies others in believing that the possessor desires them to enter the land”.⁴⁹ “A common form of invitation is preparation of the land for the obvious purpose of receiving the visitor.”⁵⁰ Plaintiff alleges that he was on the property to exercise; that “Coral World held its premises open to the public for the purposes of exercise and other leisure activity;”⁵¹ that “there was no natural light” and that “the pathway was not otherwise lit”.⁵² He does not allege that the area was normally lit or even expected to be illuminated. Even if, *arguendo*, the property was open to visitors at that hour, clearly an invitation to enter would not extend to pitch-black or even poorly-lit areas. Because the path was unlit, the Defendant obviously had not prepared the walking path for after-dark use.

“In determining whether a particular person is an invitee, the important thing is the desire or willingness to receive that person which a reasonable man would understand as expressed by the... conduct of the possessor.”⁵³ The Court finds that a reasonable man would not understand an unlit pathway to be an invitation for traverse. “The possessor of land is subject to liability to another as an invitee only for harm sustained while he is on the land within the scope of his invitation.”⁵⁴ The Plaintiff did not have an invitation to be on the property and was not an

⁴⁸ RESTATEMENT (SECOND) OF TORTS § 332, cmt. b.

⁴⁹ Cmt. b.

⁵⁰ *Id.*

⁵¹ Plaintiff’s December 02, 2013, Renewed Opposition to Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Complaint, p. 6.

⁵² June 14, 2013, Complaint, para. 6.

⁵³ RESTATEMENT (SECOND) OF TORTS § 332, cmt. c.

⁵⁴ RESTATEMENT (SECOND) OF TORTS § 332, cmt. l.

invitee. Therefore, the Defendant did not have a duty to warn the Plaintiff of the open and obvious danger posed by dirt mound upon the pathway.⁵⁵

b. THE PLAINTIFF WAS NOT A LICENSEE TO WHOM DEFENDANT WOULD OWE A DUTY OF REASONABLE CARE BECAUSE THE UNLIT PATH INDICATED THAT DEFENDANT DID NOT CONSENT TO PLAINTIFF'S ENTRY.

Plaintiff alleges that “even if [he] is deemed a ‘licensee’... Coral World would still be tasked with warning him of known dangers.”⁵⁶ A licensee “is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.”^{57,58} The word “consent” “indicates that the possessor is in fact willing that the other shall enter or remain on the land, or that his conduct is such as to give the other reason to believe that he is willing that he shall enter, if he desires to do so.”⁵⁹ “A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but

⁵⁵ Plaintiff also alleges that “Coral World also had a duty to remedy and/or warn Benjamin of open and obvious dangers or hazards when he, as an invitee, could be distracted from observing or avoiding the dangerous condition(s) or may forget what he has discovered and Coral World has reason to expect that he would nevertheless suffer physical harm.” June 14, 2013, Complaint, para. 12. The Court need not address this duty to warn of otherwise obvious dangers, as this duty is owed to an invitee, and Benjamin was not an invitee upon the property. See RESTATEMENT (SECOND) OF TORTS § 343A, cmt. f (“There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger... Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it”).

⁵⁶ Plaintiff's December 02, 2013, Renewed Opposition to Defendant's October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff's Complaint, p. 9.

⁵⁷ RESTATEMENT (SECOND) OF TORTS § 330.

⁵⁸ Comment a. of the Restatement (Second) of Torts § 330 acknowledges that “[i]n some instances ‘licensee’ has been used to include any person who enters or remains on land with the consent of the possessor, including those who are classified as ‘invitees’ under § 332.” Although the distinction or overlap of these terms has not been addressed by binding authority, the Court need not make such an analysis here. The Court instead reviewed the duty owed under either term, excluding neither.

⁵⁹ RESTATEMENT (SECOND) OF TORTS § 330, cmt. c.

only if, he should expect that they will not discover or realize the danger, and they do not know or have reason to know of the possessor's activities and of the risk involved.”⁶⁰

“A failure to take burdensome and expensive precautions against intrusion manifests only an unwillingness to go to the trouble and expense of preventing others from trespassing on the land, and indicates only toleration of the practically unavoidable, rather than consent to the entry as licensee.”⁶¹ Even without signs or fencing, a reasonable man would be aware that failure to provide lighting upon a pathway indicates that the property owner did not consent to entry upon the pathway at night. Because Plaintiff did not have consent to enter Defendant’s property and was not a licensee, Defendant did not owe him a duty to warn him of undiscovered or unknown risks, let alone open and obvious ones.

c. BECAUSE THE DIRT MOUND WAS OPEN AND OBVIOUS, DEFENDANT DID NOT OWE THE PLAINTIFF, A TRESPASSER UPON DEFENDANT’S PREMISES, A DUTY TO WARN.

Plaintiff alleges that if he was not an invitee or a licensee, then he was either a discovered or anticipated trespasser. A trespasser is “is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise,” and with limited exceptions, “a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care to put the land in a condition reasonably safe for their reception, or to carry on his activities so as not to endanger them.”⁶²

“The rule which determines the liability of a possessor of land for bodily harm caused to [persistent] trespassers by the possessor's failure to warn them of dangerous conditions created

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 341.

⁶¹ RESTATEMENT (SECOND) OF TORTS § 330, cmt. c.

⁶² RESTATEMENT (SECOND) OF TORTS §§ 329 (Trespasser Defined) and 333 (General Rule, Liability of Possessors of Land to Trespassers).

on the land by the earlier activities of the possessor... is stated in § 335.”⁶³ According to the Restatement (Second) of Torts § 335,

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if

(a) the condition

(i) is one which the possessor has created or maintains and

(ii) is, to his knowledge, likely to cause death or seriously bodily harm to such trespassers and

(iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and

(b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Plaintiff alleges that Defendant “had actual knowledge or information sufficient for a reasonable person to conclude that Benjamin and other like persons entered onto the premises during early morning hours for the purposes of exercise and other leisure activity.”⁶⁴ Even if the Court were to accept this unsupported contention regarding Defendant’s knowledge as true, the Defendant’s duty to warn is tempered by the level of attention a trespasser, as a reasonable man, should pay to his surroundings.⁶⁵ A possessor of land would reasonably believe that the artificial condition created by the dirt would be discovered by sensible steps to do so. As discussed above, a reasonable man, even as a trespasser, would not walk or run along an unlit path before sunrise. Because the dirt mound was open and obvious, Defendant did not owe the Plaintiff a duty to warn.

⁶³ RESTATEMENT (SECOND) OF TORTS § 334, cmt. b. Sections 335, 336, 337, 338 and 339 do not apply to the facts of this case. (Section 335 applies to harm caused by activity actively being carried out; section 336 requires that the harm be caused by activities carried out after the possessor is aware of the trespasser’s actual presence; section 337 requires that the possessor know or have reason to know of the trespasser’s actual presence in dangerous proximity of the highly dangerous artificial condition; section 338 requires a “moving force over which the possessor is in immediate control; section 339 concerns trespassing children).

⁶⁴ Plaintiff’s December 02, 2013, Renewed Opposition to Defendant’s October 21, 2013, Motion and Supporting Brief to Dismiss Plaintiff’s Complaint, p. 10.

⁶⁵ RESTATEMENT (SECOND) OF TORTS § 335, cmt. f.

ii. BREACH OF DUTY

Plaintiff contends that Coral World had a duty to warn him “of dangerous conditions upon the premises”⁶⁶ and that Defendant breached this duty. The Court finds that Defendant did not owe Plaintiff a duty to warn, as Plaintiff was a trespasser who unreasonably used a pathway in complete darkness. There can be no breach of duty without a duty.

iii. CAUSATION

Plaintiff argues that he “tripped and fell over a mound of dirt on the pathway” and “[a]s a result... [he] sustained multiple traumatic injuries”.⁶⁷ Pursuant to Restatement (Second) of Torts § 431, “[t]he actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm”. In other words, even if there is a finding of negligence, the negligence must have been a “substantial factor in bringing about the plaintiff's harm.”⁶⁸ “Substantial cause” means that “the result would not have occurred without the party's conduct,”⁶⁹ and whether a plaintiff has submitted sufficient evidence to support his contention that the dirt mound was a substantial cause of his injuries is a question of law.⁷⁰ However, if “it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm.”⁷¹

Even if the Court found that Defendant owed Plaintiff a duty of care, the Plaintiff's own factual contentions – that the area was unlit when he traversed the pathway at night – establish

⁶⁶ Plaintiff's June 14, 2013, Complaint, para. 11.

⁶⁷ Plaintiff's June 14, 2013, Complaint, paras. 6 and 8.

⁶⁸ RESTATEMENT (SECOND) OF TORTS § 431, cmt. a.

⁶⁹ BUT-FOR TEST, BLACK'S LAW DICTIONARY (9th ed. 2009); *see also* RESTATEMENT (SECOND) OF TORTS § 431, cmt. a. (the term “substantial” “is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause”).

⁷⁰ *Anders v. Puerto Rican Cars, Inc.*, CIV.A. 04-0036, 2009 WL 3007367 (D.V.I., App. Div. Sept. 15, 2009) *aff'd*, 409 F. App'x 539 (3d Cir. 2011) (citation omitted).

⁷¹ RESTATEMENT (SECOND) OF TORTS § 440, cmt. b.

that Plaintiff has not proven causation. Although Plaintiff alleges that “he did no act which contributed to the injuries he suffered,”⁷² Plaintiff’s choice to walk or run along an unlit path as a trespasser was an unforeseeable and reckless act set into force by his own actions. Plaintiff failed to exercise ordinary care for his own safety, and that decision operated as a superseding and actual cause of his injuries. Therefore Plaintiff fails to establish that “but-for” Defendant’s actions, he would not have been injured.

C. THE COMPARATIVE NEGLIGENCE STATUTE DOES NOT APPLY HERE AS THERE IS NO FAULT TO APPORTION.

Unlike the doctrine of contributory negligence, the Virgin Islands comparative negligence statute does not operate as a bar to recovery because it apportions divisible fault between the negligent parties.⁷³ Because the Defendant did not owe a duty to Plaintiff, the Court finds that Defendant was not negligent. There is no fault on the part of the Defendant to share. Consequently, Plaintiff is responsible for his own injuries.

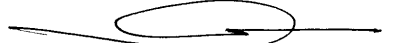
⁷² Plaintiff’s June 14, 2013, Complaint, para. 16.

⁷³ 5 V.I.C. § 1451.

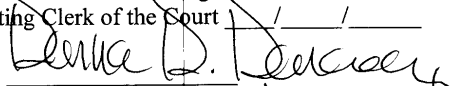
CONCLUSION

Because Plaintiff was a trespasser, Defendant was not under a duty to warn him of the dirt mound on the pathway, an open and obvious danger. Even if the Defendant was found to have such a duty, the Plaintiff's own reckless behavior was the actual and superseding cause of his injuries. Therefore, because the Defendant's acts did not cause Plaintiff's injuries, Defendant is not liable to Plaintiff. Defendant's motion to dismiss is granted. An appropriate Order is issued simultaneously herewith.

Dated: June 12, 2014


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

Attest: Estrella H. George
Acting Clerk of the Court

by: 
Donna D. Donovan
Court Clerk Supervisor

6/16/2014