

DIVISION OF ST. THOMAS AND ST. JOHN

CECIL OSBORNE

Plaintiff,

VS.

PSMT, LLC, D/B/A PRICESMART,

Defendant.

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) **CASE NO. ST-16-CV-24**
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MEMORANDUM OPINION

Pending before the Court are Defendant's Motion for Judgment on the Pleadings and Plaintiff's Motion to Amend Complaint. For the following reasons, Plaintiff's motion will be granted, but Defendant's motion will be denied.

FACTUAL AND PROCEDURAL HISTORY

On January 21, 2016, Plaintiff Cecil Osborne filed a Complaint against Defendant PSMT, LLC d/b/a Pricesmart, the owner and operator of a retail establishment known as “Pricesmart” on St. Thomas, United States Virgin Islands, seeking damages for injuries he sustained while shopping at Defendant’s store on March 4, 2014. Defendant filed an Answer and Affirmative Defenses on February 23, 2016. On May 25, 2016, Defendant filed a Motion for Judgment on the Pleadings. On June 16, 2016, Plaintiff filed a Motion to Amend Complaint, as well as a Response to Defendant’s Motion for Judgment on the Pleadings, stating the proposed amendments render Defendant’s Motion for Judgment on the Pleadings moot.¹ Defendant filed a timely Response to Plaintiff’s Motion to Amend on July 8, 2016.²

¹ To the extent both filings are responses to Defendant's Motion for Judgment on the Pleadings, they are timely. *See* May 31, 2016, Order; June 14, 2016, Order.

² See July 14, 2016, Order (granting Defendant leave to file its response to Plaintiff's Motion to Amend out of time).

STANDARD

I. Motion to Amend Complaint.

Super. Ct. R. 8 provides:

The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If a party is surprised as a result of such amendment, the court shall adjourn the hearing to some future day, upon such terms as it shall think proper.

Fed. R. Civ. P. 15 offers further guidance on the amendment of pleadings³ and advises that, once the twenty-one day statutory period for amendment has expired, a court “should freely give leave [to amend the pleadings] when justice so requires.”⁴ “The decision whether to grant or deny [a motion to amend] rests within the court's discretion.”⁵

“When considering whether to exercise its discretion and give leave to amend, a court should be ‘guided by the policy that a party ought to be afforded the opportunity to test the claim on the merits.’”⁶ The factors courts consider when evaluating a motion to amend include: delay in bringing the motion, prejudice to the opposing party, and futility of the amendment.⁷ A motion to amend “should be denied only where there exists evidence of ‘undue delay, bad faith or dilatory

³ Because “[SUPER. CT. R.] 8 has been regarded as ‘merely stat[ing] the general rule that a court can correct errors or defects in pleadings[.]’ *Brooks v. Gov't of the V.I.*, 58 V.I. 417, 427 n.11 (V.I. 2013) . . . the Court looks to the standard set out in Rule 15 of the Federal Rules of Civil Procedure for guidance.” *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511, 522 n. 1 (V.I. 2015) (Gomez, J., dissenting in part) (citing *Santiago v. V.I. Housing Auth.*, 57 V.I. 256 (V.I. 2012) (relying upon case law derived from Federal Rule of Civil Procedure 15 in determining if a complaint “related back” to a previous complaint under Superior Court Rule 8). The Court may do so when considering the standard for granting requests to amend pleadings because its application will not render Super. Ct. R. 8 “wholly superfluous” and Super. Ct. R. 8 does not address this standard. *Santiago*, 57 V.I. at 275 n.11 (citing *Corraspe v. People*, 53 V.I. 470, 482-83 (V.I. 2010)). As a result, FED. R. CIV. P. 15 is applicable to these proceedings by way of this precedent or alternatively as a last resort through SUPER. CT. R. 7. See *Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 576 (V.I. 2015) (citing *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014)).

⁴ FED. R. CIV. P. 15(a)(1)-(2).

⁵ *Foman v. Davis*, 371 U.S. 178, 182 (1962); See *Daniel v. Government of Virgin Islands*, 30 V.I. 134, 140 (D.V.I. 1994); *Choate v. Skinner*, 19 V.I. 399 (Terr. Ct. 1983).

⁶ *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 53 (V.I. Super. Ct. 2013) (citing *Daniel*, 30 V.I. at 140).

⁷ See *Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 535 (V.I. 2012) (citing *Foman*, 371 U.S. at 182); See also *Peters*, 58 V.I. at 53-54 (citing *Newfound Management Corp. v. Sewer*, 34 F. Supp. 2d 305, 317, 40 V.I. 335 (D.V.I. 1999)).

motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.”⁸ Nonetheless, “it is the preference of [the Superior] Court, in accordance with precedent from the Supreme Court of the Virgin Islands, that cases be resolved on their merits.”⁹

II. Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.

Under Fed. R. Civ. P. 12(b)(6), a defendant may test the sufficiency of the pleadings against preliminary defenses by seeking dismissal for the plaintiff’s “failure to state a claim upon which relief can be granted.”¹⁰ The pleading requirements of Fed. R. Civ. P. 8¹¹ “require a complaint to set forth a plausible claim for relief, thus allowing courts to dismiss, under Rule 12(b)(6), complaints that fail to meet that standard.”¹² According to the three-pronged analysis employed by the Supreme Court of the Virgin Islands in reviewing motions to dismiss based on Rule 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

⁸ *Mathes v. Century Alumina Co., LLLP*, 2009 U.S. Dist. LEXIS 63280, *4 (D.V.I. July 23, 2009) (quoting *Foman*, 371 U.S. at 182).

⁹ *Adams v. N. W. Co., Inc.*, 63 V.I. 427, 446 (V.I. Super. Ct. Oct. 6, 2015) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011) (“Both this Court and the United States Supreme Court have recognized that there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules”)).

¹⁰ The Supreme Court of the Virgin Islands applies FED. R. CIV. P. 12(b)(6) when considering motions to dismiss for failure to state a claim upon which relief can be granted and evaluates the sufficiency of the challenged complaints in relation to the pleading requirements of FED. R. CIV. P. 8 and principles espoused by the United States Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). See *Fleming v. Cruz*, 62 V.I. 702, 710-711, 713-714 (V.I. 2015) and *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-650 (V.I. 2011). As a result, FED. R. CIV. P. 12(b)(6) and 8 are applicable to these proceedings by way of this precedent or alternatively as a last resort through SUPER. CT. R. 7. See *Vanterpool*, 63 V.I. at 576 (citation omitted).

¹¹ *Id.*

¹² *Joseph*, 54 V.I. at 649 (citing *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 499 (V.I. 2008)) (other citations omitted); See also *Iqbal*, 129 S. Ct. at 1949 (“[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (citing *Twombly*, 127 S. Ct. 1955).

[factual] assertions devoid of further factual enhancement. Finally, where there are well-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.¹³

The Virgin Islands Supreme Court has further instructed that “[t]he plausibility determination is a ‘context-based’ determination which should be guided by the court’s ‘judicial experience and common sense.’”¹⁴ “Plausibility requires that the plaintiff allege facts that are more than simply ‘consistent with a defendant’s liability’ and must permit the court to infer more than the mere possibility of misconduct.”¹⁵

“A motion to dismiss a complaint should be denied if the factual allegations are ‘enough to raise a right to relief above the speculative level’”¹⁶ and “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”¹⁷ Only after satisfying this multi-step analysis can a party survive a motion to dismiss under Rule 12(b)(6).

III. Motion for Judgment on the Pleadings.

According to the Supreme Court of the Virgin Islands,

A motion for judgment on the pleadings should not be granted “unless the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law.” “As with a Rule 12(b)(6) motion, th[e] Court ‘view[s] the facts alleged in the pleadings and the inferences to be drawn from those facts in the light most favorable to the plaintiff’ . . . [and is] foreclosed from considering evidence from any source outside of the pleadings and the exhibits attached [thereto.]”¹⁸

¹³ *Fleming*, 62 V.I. at 713-714 (citing *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471 (V.I. 2013) (other citations omitted).

¹⁴ *Joseph*, 54 V.I. at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950)).

¹⁵ *Id.* (citing *Fowler*, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949)).

¹⁶ *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 54 (V.I. Super. Ct. 2013) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008)); *See also Twombly*, 127 S. Ct. at 1965 & n.3.

¹⁷ *Twombly*, 127 S. Ct. at 1964.

¹⁸ *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 566 (V.I. 2012) (citing *Mele v. Fed'l Reserve Bank of N.Y.*, 359 F.3d 251, 253 (3d Cir. 2004) (quoting *Leamer v. Fauver*, 288 F.3d 532, 535 (3d Cir. 2002))) (internal quotation marks and

ANALYSIS

I. Plaintiff's Motion to Amend Complaint.

Since the operative complaint is fundamental to the action, the Court will first consider Plaintiff's Motion to Amend Complaint. The Superior Court has the inherent power "to control the disposition of the causes on [the court's] docket with economy of time and effort for itself, for counsel, and for litigants. As such, legally, the Superior Court could consider motions in whichever order it chose, [or] simultaneously."¹⁹

Plaintiff seeks to amend his Complaint "to clarify Plaintiff's allegations against Defendant[.]"²⁰ Defendant argues that the Court should deny Plaintiff leave to amend the Complaint on futility grounds because the Complaint, even as amended, would not survive a motion to dismiss for failure to state a claim upon which relief can be granted.²¹ Additionally, Defendant contends that Plaintiff's motion should be denied because it was brought in bad faith with a dilatory motive.²²

A. Futility of Amendment.

The Amended Complaint generally states that Defendant was "negligent" without specifying whether the claim is for ordinary negligence or premises liability. The Supreme Court of the Virgin Islands analyzes premises liability "through the lens of the four elements of [ordinary] negligence[.]" and, therefore, under either theory, "[t]he elements are the same — a plaintiff must

other citations omitted); *See United Corp. v. Hamed*, 64 V.I. 297, 305 (V.I. 2016) (reviewing the Superior Court's grant of a judgment on the pleadings under the standard delineated in *Benjamin*, 56 V.I. at 566).

¹⁹ *Pedro*, 63 V.I. at 527 (Gomez, J., dissenting in part) (internal citations omitted).

²⁰ Pl.'s Mot. to Amend, p. 1.

²¹ Def.'s Response to Pl.'s Mot. to Am. Compl., p. 4.

²² Def.'s Response to Pl.'s Mot. to Am. Compl., pp. 9-10.

prove.”²³ “(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff[.]”²⁴

With respect to duty under an ordinary negligence analysis, a defendant owes a duty to exercise reasonable care to protect against foreseeable harm.²⁵ This same rule applies in premises liability actions, but, because “the basis of the duty of care is the possession or control of the premises where [an] injury occurred[.]”²⁶ the landowner’s duty in a premises liability action is defined as a “duty to protect those it invites onto the property from foreseeable harm caused by ... potentially dangerous conditions on the property.”²⁷ However, “just as in all other negligence actions[.]” in premises liability actions, “foreseeability of harm ‘is the touchstone of the existence of [a land possessor’s] duty of reasonable or ordinary care[.]’”²⁸

In any negligence claim, a defendant breaches its duty of care when the defendant fails to exercise reasonable care to protect the plaintiff against foreseeable harm.²⁹ To prove a landowner defendant breached its duty in a premises liability action, the plaintiff must show that the landowner “had actual or constructive notice of a dangerous condition.”³⁰ To prove causation in all negligence actions, it must be shown that the injury would not have occurred but for the act.³¹

²³ *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 413 (V.I. 2016) (internal quotation marks omitted) (citing *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373 (V.I. 2014)).

²⁴ *Machado*, 61 V.I. at 380.

²⁵ *Id.* at 380, 383; *See Coastal Air Transp. v. Royer*, 64 V.I. 645, 652 & n. 6 (V.I. 2016).

²⁶ *Antilles Sch.*, 64 V.I. at 413 (citations omitted).

²⁷ *Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 533-534 (V.I. 2013) (emphasis added); *Machado*, 61 V.I. at 392-393 (internal and other citations omitted).

²⁸ *See Machado*, 61 V.I. at 383, 386 (adopting its holding in *Perez*, 59 V.I. at 532 as the soundest rule for the Virgin Islands) (internal and other citations omitted).

²⁹ *Id.* at 392.

³⁰ *Id.* at 392-393 (internal and other citations omitted).

³¹ *Brady v. Cintron*, 55 V.I. 802, 823-824 (V.I. 2011) (internal quotation marks and citations omitted).

If there are multiple negligent acts that could have caused the injury, then the negligent conduct must be shown to have been a substantial factor in causing the harm.³²

Though Plaintiff seeks leave to amend on the grounds that the proposed amendments “clarify Plaintiff’s allegations against Defendant[.]”³³ the Amended Complaint is not a model of clarity and many amendments have modified the allegations such that they no longer read as coherent sentences. Notwithstanding this sloppy drafting, in construing the Amended Complaint, the Court must disregard all conclusions of law couched as factual allegations, and, after assuming the veracity of all well-pleaded factual allegations, assess whether the facts, as pled, “plausibly give rise to an entitlement of relief.”³⁴

Here, Plaintiff essentially alleges that Pricesmart had a duty of reasonable care to protect him from foreseeable harm posed by its customer’s use of a “bulk cart low loader,” which Plaintiff defines as a “low shopping cart,” “in close proximity to other customers in a crowded store[.]”³⁵ Specifically, Plaintiff alleges that the unsupervised use of the low shopping cart by Pricesmart customers creates a “potential trip hazard to Plaintiff and other customers” and that Pricesmart had a duty “to warn Plaintiff of the dangers presented by ... [the] unsupervised use” of the low shopping carts or take precautions to ensure against the risk of harm posed by the low shopping carts.³⁶ Plaintiff alleges that Pricesmart breached its duty of care by failing to have “conspicuous markings or devices to delineate the front of the front loader to other customers of [Pricesmart,]” by its employees, who were in the vicinity of Plaintiff, allowing a customer to “position[a low

³² See *id.* (internal quotation and citations omitted).

³³ Pl.’s Mot. to Am. Compl., p. 1.

³⁴ *Fleming*, 62 V.I. at 713-714 (citations omitted).

³⁵ Proposed Am. Compl. ¶¶ 11, 5.

³⁶ Proposed Am. Compl. ¶ 12(a), (c).

shopping cart] behind the Plaintiff[.]”³⁷ Additionally and somewhat contradictorily, Plaintiff also alleges that Pricesmart breached its duty of care by failing to have “trained store staff” supervise the customer’s use of the offending low shopping cart and control “customer traffic flow at the registers (such as done with lanes at banks) so that one customer is served at a time to check out in a reasonable space free from trip hazards and customers do not become unduly crowded into too small space at the check out times.”³⁸ According to Plaintiff, these acts and omissions of Pricesmart caused Plaintiff to sustain the injuries that resulted when Plaintiff “stepped back from the [merchandising] belt, and tripped and fell due to low shopping cart ... left in the area by another [Pricesmart] customer, and fell backward onto the said cart and on the floor of the store[.]”³⁹

In construing all reasonable inferences discerned from the factual allegations in favor of Plaintiff, these facts plausibly suggest that: as a retail establishment, Pricesmart owed Plaintiff, a its customer, a duty of reasonable care to protect against foreseeable harm; Pricesmart employees in the vicinity of Plaintiff had actual or constructive notice that the other Pricesmart customer placed the low shopping cart behind Plaintiff while he was checking out at a cash register; Pricesmart employees did not warn Plaintiff of the placement of the low shopping cart and the low shopping cart was not affixed with warning devices; Pricesmart was crowded on the day at issue; no precautions were taken to control the “customer traffic flow at the registers”; the placement of the low shopping cart by the other Pricesmart customer caused Plaintiff to trip and fall over the low shopping cart when Plaintiff stepped back from the merchandising belt; resulting in injuries to Plaintiff.

³⁷ Proposed Am. Compl. ¶ 12(a), (d).

³⁸ Proposed Am. Compl. ¶ 12(b)-(c).

³⁹ Proposed Am. Compl. ¶ 5.

Since Pricesmart's liability in the Amended Complaint is based on Pricesmart's purported control over the premises as the store owner, the Court will construe the factual allegations under the specific legal constructs governing premises liability actions in the Virgin Islands. The aforementioned factual allegations are clearly sufficient to satisfy the elements of causation and damages of a negligence claim. However, a showing of the elements of duty and breach depends on whether the facts, as pled in the Amended Complaint, are sufficient to plausibly suggest that the low shopping cart constituted a foreseeable, potentially dangerous condition, so as to fall within the duty of reasonable care owed by Pricesmart to Plaintiff.

With respect to premises liability actions, the Supreme Court of the Virgin Islands has implied that whether a condition is "potentially dangerous" is a finding that is made in conjunction with the foreseeability determination.⁴⁰ In most cases, foreseeability is a question of fact, though the Supreme Court of the Virgin Islands has recognized that foreseeability can be decided as a matter of law in certain cases, such as those "where there is no evidence to suggest that the entrant's presence on the property was foreseeable to the possessor because the possessor ... had no reason to anticipate the entrant's injury[.]"⁴¹ Here, however, the Court cannot conclude that the condition and harm were unforeseeable so as to preclude recovery for negligence under a theory of premises liability at the pleadings stage because it can be inferred from the well-pleaded facts that Pricesmart had a reason to *anticipate* Plaintiff's injury since Pricesmart, as a retail establishment, routinely provides its customers with shopping carts and ordinarily confronts the tendency of customers to cluster in close proximity to cash registers, potentially culminating in a trip hazard. Construing all

⁴⁰ See *Machado*, 61 V.I. at 386 (citing *Perez*, 59 V.I. at 533) & n. 8 (discussing the "foreseeability" standard to be applied by the jury when considering a premises liability action) (citations omitted).

⁴¹ *Id.* at 390 (internal and other citations omitted).

factual inferences in favor of Plaintiff, these facts are sufficient to plausibly suggest the low shopping cart constituted a foreseeable potentially dangerous condition. Consequently, the Court concludes that the Amended Complaint states a claim for negligence based on premises liability.

Defendant opines that the factual allegations of the Amended Complaint are insufficient to establish that Defendant owed a duty to Plaintiff because the risk of harm was not foreseeable since the operation of a shopping cart is not “an inherently dangerous activity.”⁴² The Court recognizes that many jurisdictions adhere to the general rule that “a store owner has no duty to take measures to guard against the negligent or intentional misuse of shopping carts by patrons or other third parties” because “[a] shopping cart is not an inherently dangerous instrumentality and no substantial risk of injury is implicit or inherent in the furnishing of shopping carts to patrons by a storeowner.”⁴³ However, there is no statute in the Virgin Islands governing premises liability actions against merchants and commercial establishments, and, the Supreme Court of the Virgin Islands has neither adopted a specific standard regarding same, nor held that a merchant’s duty is limited only to foreseeable harm posed by “inherently dangerous” conditions. Rather, the Supreme Court of the Virgin Islands has clearly held that, in all premises liability actions, a landowner owes a duty to protect against foreseeable harm posed by *potentially* dangerous conditions, a less exacting standard that is satisfied by the facts alleged in the Amended Complaint.⁴⁴

Defendant also contends that it owed no duty to demarcate the front of its low shopping carts with “some unspecified warning” because no factual allegations suggest that the low shopping cart “constituted a hidden defect on the premises for which a warning must be given.”⁴⁵

⁴² Def.’s Response to Pl.’s Mot. to Am. Compl., p. 6.

⁴³ 62A AM. JUR. 2d Premises Liability § 553, 124 (2d ed. 2005) (footnotes omitted).

⁴⁴ See *Machado*, 61 V.I. 373.

⁴⁵ Def.’s Response to Pl.’s Mot. to Am. Compl., p. 6.

This argument fails for two reasons. First, the Amended Complaint does not suggest that the low shopping cart itself constituted a “hidden defect.” Second, Defendant’s argument is reminiscent of the open and obvious doctrine, which, according to the Supreme Court of the Virgin Islands, may not be asserted as “a complete defense to negligence conflicts” because it pertains to the plaintiff’s comparative fault, which is assessed by the fact finder after a trial on the merits.⁴⁶ Indeed, although the Supreme Court of the Virgin Islands initially recognized the open and obvious doctrine, as provided in Restatement (Second) of Torts § 343A,⁴⁷ it has since held that this doctrine constitutes a variation of “implied assumption of risk” and may not be asserted as “an affirmative defense to an established breach of duty” because doing so would violate “the Territory’s statutory comparative negligence scheme[.]”⁴⁸ Thus, even assuming, *arguendo*, the low shopping cart was an “open and obvious” condition, this would not defeat Plaintiff’s negligence claim at the motion to dismiss stage.

Because the Amended Complaint is sufficient to survive a motion to dismiss for failure to state a claim upon which relief can be granted, amendment would not be futile and the Court will not deny Plaintiff leave to amend his Complaint on futility grounds.

B. Bad Faith and Dilatory Motive.

Defendant contends that Plaintiff has moved to amend in bad faith because the Amended Complaint falsely alleges that the offending low shopping cart was “‘left in the area’ where

⁴⁶ *Machado*, 61. V.I. at 395-400.

⁴⁷ See RESTATEMENT (SECOND) OF TORTS § 343A (“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, unless the possessor should anticipate the harm despite such knowledge or obviousness. ... In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated”); *Sealey-Christian v. Sunny Isle Shopping Ctr., Inc.*, 52 V.I. 410, 427 (V.I. 2009) (citing RESTATEMENT (SECOND) OF TORTS § 343A), *overruled in Machado*, 61. V.I. 373; See also *Antilles Sch.*, 64 V.I. at 413 n.5.

⁴⁸ *Machado*, 61. V.I. at 395-400.

Plaintiff fell[.]” when evidence suggests that “the [low shopping c]art was never left unattended in th[at] area[.]”⁴⁹ According to Defendant, this explains the absence of factual allegations regarding “how the [low shopping c]art suddenly came to appear directly behind him in the check-out line” or “why [Plaintiff] was ‘unaware’ of the [low shopping c]art[.]”⁵⁰ In arguing this constitutes bad faith warranting denial of leave to amend, Defendant cites *Dussouy v. Gulf Coast Inv. Corp.*,⁵¹ where the United States Court of Appeals for the Fifth Circuit held:

[A]wareness of facts and failure to include them in the complaint might give rise to the inference that the plaintiff was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case, where the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate.⁵²

The Fifth Circuit’s ruling in *Dussouy* pertains to circumstances where a plaintiff seeks to amend the complaint to assert a new, alternative cause of action or theories along with new factual allegations, despite being aware of the facts at the commencement of the action, in order to avoid the imminent dismissal of the original claims, such as by summary judgment.⁵³

Here, Defendant is correct that the Amended Complaint alleges that Plaintiff “tripped and fell due to [a] low shopping cart ... left in the area by another [Pricesmart] customer[.]”⁵⁴ However, the crux of the theory underlying Plaintiff’s negligence claim is not that the low shopping cart was left “unattended,” but rather, that the other Pricesmart customer used and operated the low shopping cart without supervision, in a crowded area of the store, where no safety precautions

⁴⁹ Def.’s Response to Pl.’s Mot. to Amend. Compl., p. 10.

⁵⁰ Def.’s Response to Pl.’s Mot. to Amend. Compl., p. 10.

⁵¹ 660 F.2d 594 (5th Cir. 1981); Def.’s Response to Pl.’s Mot. to Amend. Compl., pp. 9-10.

⁵² *Dussouy*, 660 F.2d at 599 (citing *Zenith Radio v. Hazeltine Research*, 401 U.S. 321, 332-33, 91 S. Ct. 795, 803, 28 L. Ed. 2d 77, 88-89 (1971)) (other citations omitted).

⁵³ *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 141 (5th Cir. Tex. 1993) (denying plaintiff leave to amend for bad faith and dilatory motive for the reasons foreseen in *Dussouy*) (citing *Dussouy*, 660 F.2d at 596-600).

⁵⁴ Proposed Am. Compl. ¶ 5.

were in place.⁵⁵ Because the factual allegations in the original Complaint support this theory and the parties have conducted only minimal discovery, the proposed amendments will not surprise or unduly prejudice Defendant. For this same reason, the Court finds that the challenged factual allegation does not, without more, show Plaintiff acted in bad faith or with dilatory motive. While Defendant urges the Court to consider evidence purportedly evincing Plaintiff's bad faith, the Court declines to do so under the circumstances here, where discovery has barely begun.⁵⁶ If the evidence is fatal to Plaintiff's claim, then Defendant will not be precluded from seeking summary disposition of the action in the due course of these proceedings.

In light of the foregoing, the Court concludes that the factors justifying the denial of leave to amend are not present here. Consequently, in the interests of justice, the Court will grant Plaintiff leave to amend his Complaint and deem the First Amended Complaint filed.

II. Defendant's Motion for Judgment on the Pleadings.

Defendant filed its Motion for Judgment on the Pleadings in response to the original Complaint, but since this is no longer the operative pleading, Defendant's motion is now moot.⁵⁷ Moreover, to the extent Defendant's motion can be construed in response to the Amended Complaint, it must be denied, since motions for judgment on the pleadings are reviewed under the same standard applicable to motions to dismiss for failure to state a claim upon which can be granted under Fed. R. Civ. P. 12(b)(6), and the Court has already found that the Amended

⁵⁵ Proposed Am. Compl. ¶ 12.

⁵⁶ Further, in reviewing the Amended Complaint under the standard applicable to motions to dismiss under Fed. R. Civ. P. 12(b)(6) and motions for judgment on the pleadings, the Court is "foreclosed from considering evidence from any source outside of the pleadings and the exhibits attached to the pleadings" *Benjamin*, 56 V.I. at 566 (citations omitted).

⁵⁷ *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, *11-12 (V.I. Super. Ct. 2014) (internal and other citations omitted).

Complaint alleges sufficient factual allegations to state a claim for negligence. Consequently, Defendant's Motion for Judgment on the Pleadings will be denied.

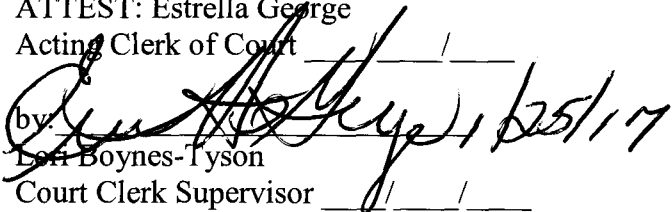
CONCLUSION

For the aforementioned reasons, the Court will grant Plaintiff's Motion to Amend Complaint and deny Defendant's Motion for Judgment on the Pleadings.

An Order consistent with this Memorandum Opinion shall follow.

Dated: January 19, 2017

ATTEST: Estrella George
Acting Clerk of Court

by: 

Lora Boynes-Tyson

Court Clerk Supervisor


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

CERTIFIED A TRUE COPY

DATE: 01-25-17

ESTRELLA H. GEORGE
Acting Clerk of the Court

By: 

Camell A. Clarke
Court Clerk II