

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ERNEST GEORGE HALLIDAY, SR. Plaintiff)

CASE NO. ST-07-CV-0000461

ACTION FOR: NEGLIGENCE

vs)

FOOT LOCKER SPECIALTY, INC.,
ET. AL.
FOOT LOCKER RETAIL, INC.)

Defendant

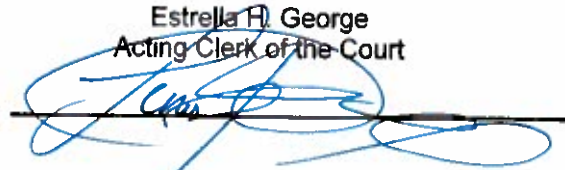
**NOTICE OF ENTRY OF
MEMORANDUM OPINION &
ORDER**

TO: CLIVE RIVERS, ESQUIRE
SHARMANE DAVIS BRATHWAITE, ESQUIRE
BERNARD VANSLUYTMAN, SOLICITOR GENERAL, AG
KAREEM BROWN
KEELO JACOBS

Please take notice that on October 21, 2014 a(n) MEMORANDUM
OPINION & ORDER dated October 20, 2014 was entered by the Clerk in the
above-entitled matter.

Dated: October 21, 2014

Estrella H. George
Acting Clerk of the Court



TENISHA LOWRY
COURT CLERK II

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

**ERNEST HALLIDAY, SR., Individually and as)
A Co-personal representative of JAHLEEL R.)
HALLIDAY, deceased, and MAYSIE PANT,)
Individually and as Co-personal)
representative of JAHLEEL R. HALLIDAY,)
deceased,)**

Plaintiffs,

vs.

**FOOT LOCKER SPECIALTY, INC., FOOT)
LOCKER RETAIL, INC., KAREEM BROWN,)
KEELO A. JACOBS, GOVERNMENT OF THE)
VIRGIN ISLANDS, and JANET)
SMITH-BARRY, Individually and as an)
employee of the Government of the)
Virgin Islands,)**

Defendants.

CASE NO. ST-07-CV-461

**ACTION FOR
NEGLIGENCE,
WRONGFUL DEATH
EMOTIONAL DISTRESS
and DAMAGES**

ORDER

THIS MATTER is before the Court on the following three motions: 1) Plaintiffs' Motion to Amend the Complaint to Reflect the Appointment of the Personal Representative; 2) Motion For Summary Judgment, filed by Defendant Foot Locker based on Plaintiffs' lack of personal representative status at the time this suit was filed, which motion was joined by the Government Defendants; and 3) Motion to Dismiss, filed by the Government Defendants based on the Plaintiffs' failure to become personal representatives before this suit was filed.

In accordance with the Memorandum Opinion entered on this date, it is hereby

ORDERED that Plaintiffs' Motion to Amend the Complaint is **GRANTED**; and it is further

ORDERED that Foot Locker's Motion For Summary Judgment is **DENIED**; and it is further

ORDERED that Government Defendants' Motion To Dismiss is **DENIED**; and it is further

ORDERED that the Plaintiffs' First Amended Complaint, filed on March 25, 2011, is accepted and deemed filed; and it is further

ORDERED that Defendants shall file their Answers or otherwise respond to the First Amended Complaint within twenty (20) days of the date this Order is entered; and it is further

ORDERED that the parties shall thereafter, pursuant to Rule 26(f) F. R. Civ. P., meet and confer and submit a proposed Scheduling Order within 45 days after the Defendants' file their Answers; and it is further

ORDERED that copies of the Memorandum Opinion and this Order be directed to Kareem Brown, Keelo Jacobs, Clive Rivers, Esq., Sharmane Davis Brathwaite, Esq. (Dudley, Rich & Davis), and Bernard VanSluytman, Solicitor General, Office of the Attorney General.

DATED: October 20, 2014


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:

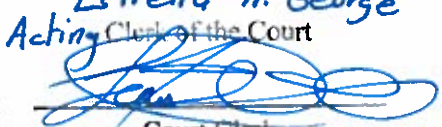

LORI BOYNES-TYSON
Court Clerk Supervisor 10/20/14

CERTIFIED A TRUE COPY

Date:

10/21/2014
Estrella H. George
Acting Clerk of the Court

By:


Court Clerk

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

**ERNEST HALLIDAY, SR., Individually and as)
A Co-personal representative of JAHLEEL R.)
HALLIDAY, deceased, and MAYSIE PANT,)
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representative of JAHLEEL R. HALLIDAY,)
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Plaintiffs,

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**FOOT LOCKER SPECIALTY, INC., FOOT)
LOCKER RETAIL, INC., KAREEM BROWN,)
KEELO A. JACOBS, GOVERNMENT OF THE)
VIRGIN ISLANDS, and JANET)
SMITH-BARRY, Individually and as an)
employee of the Government of the)
Virgin Islands,)**

Defendants.

CASE NO. ST-07-CV-461

**ACTION FOR
NEGLIGENCE,
WRONGFUL DEATH
EMOTIONAL DISTRESS,
and DAMAGES**

MEMORANDUM OPINION

THIS MATTER is before the Court on three motions relating to Plaintiff Ernest Halliday, Sr.'s status as a personal representative of his son Jahleel R. Halliday's estate. Plaintiffs Ernest Halliday, Sr. and Maysie Pant¹ filed a Motion to Amend the Complaint

¹ Plaintiffs' motion and the existing caption recite that Plaintiffs Ernest Halliday, Sr. and Maysie Pant are acting individually and in their capacities as co-personal representatives of Jahleel R. Halliday's estate. However, Ernest Halliday, Sr. is the only personal representative of the estate. Maysie Pant is not a personal representative of the Estate.

to Reflect the Appointment of the Personal Representative.² Foot Locker Retail (“Foot Locker”) filed a Motion for Summary Judgment based on Plaintiffs’ lack of personal representative status at the time this suit was filed.³ The Government of the Virgin Islands and Janet Smith-Barry⁴ (collectively, “the Government Defendants”) joined Foot Locker’s Motion. Finally, the Government Defendants filed a Motion to Dismiss based on the Plaintiffs’ failure to become personal representatives before this suit was filed.

Because the Court’s ruling on the Plaintiffs’ Motion to Amend will inform the outcome of Foot Locker’s Motion for Summary Judgment and the Government Defendants’ Motion to Dismiss, the Motion to Amend is addressed first.

A. Motion to Amend the Complaint to Reflect the Appointment of the Personal Representative

Plaintiffs seek leave to amend their complaint to reflect Ernest Halliday, Sr.’s appointment as personal representative of Jahleel Halliday’s estate. Jahleel Halliday was assaulted in or near a Foot Locker store and died on September 12, 2005. This suit was filed on September 10, 2007, but Ernest Halliday was not appointed a personal representative of the estate until January 9, 2009. Additionally, Plaintiffs propose

² Filed on April 27, 2009. Foot Locker Retail filed an Opposition on June 25, 2010. Plaintiffs re-filed their Motion to Amend on March 25, 2011 after this matter was re-opened on remand from the Virgin Islands Supreme Court. Foot Locker Retail responded on April 4, 2011, and the Government and Janet-Smith Barry filed an Opposition on April 6, 2011.

³ Filed on December 8, 2008. Plaintiffs filed an Opposition on January 23, 2009, to which Foot Locker Specialty and Foot Locker Retail replied on January 29, 2009. Plaintiffs filed additional Oppositions on April 24, 2009, and March 25, 2011. Foot Locker Retail replied, joined by the Government and Janet-Smith Barry, on June 28, 2010.

⁴ Notice of Joinder filed on March 11, 2009.

removing Maysie Pant as a plaintiff in this action, leaving only Ernest Halliday, Sr. as the sole plaintiff.⁵

Both Foot Locker and the Government Defendants oppose the Motion to Amend. Foot Locker argues that Plaintiffs should be barred from amending their complaint because they lacked capacity to sue on the date the complaint was filed. Virgin Islands law provides that only personal representatives of an estate can bring an action for wrongful death. V.I. Code Ann. tit. 5, § 76(d). Because neither Plaintiff was a personal representative at the time this suit was filed, Foot Locker asserts that Plaintiffs lack capacity to continue prosecuting this suit, and therefore their Motion to Amend must be denied.⁶ The Government Defendants echo Foot Locker's argument and also argue that the delay in Ernest Halliday, Sr. being appointed a personal representative is undue.

Rule 8 of the Superior Court Rules permits the Court to "amend any process or pleading for any omission or defect therein." Because Rule 8 "merely states the general rule that a court can correct errors or defects in pleadings," the Court looks to

⁵ In addition to removing Maysie Pant's name from the case caption, Plaintiffs' First Amended Complaint proposes some other additions and deletions. First, Plaintiffs would remove Foot Locker Specialty from the case caption and delete any references to that entity in the complaint. Second, Plaintiffs add one count, Count VIII, which alleges harm to the beneficiaries in the form of mental and emotional suffering, anguish, and shock from Jahleel R. Halliday's death. Finally, the First Amended Complaint makes minor typographical and grammatical changes (e.g., changing the spelling of Janet Smith-Barry's name to Jeanette Smith-Barry). Because Defendants have not objected to these proposed changes, they need not be discussed further.

⁶ Foot Locker hints that Plaintiffs and/or their attorney violated Fed. R. Civ. P. 11 because they all signed the verified complaint that states that Plaintiffs are personal representatives, although neither Plaintiff was a personal representative when the complaint was filed on September 10, 2007. Indeed, the Petition to institute the probate proceedings and request appointment of a personal representative was not filed until December 24, 2008. However, Foot Locker does not explicitly argue nor request Rule 11 sanctions. Therefore, this issue requires no action on the part of the Court.

the standard set out in Rule 15 of the Federal Rules of Civil Procedure for guidance.

Brooks v. Gov't of the Virgin Islands, Department of Ed., 58 V.I. 417, 427 n. 11 (V.I. 2013).

Pursuant to Fed. R. Civ. P. 15(a)(2), “[t]he court should freely give leave [to amend a pleading] when justice so requires.” A motion to amend may be denied for “reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.” *Mountaintop Ltd. P'ship v. Colombian Emeralds Int'l, Inc.*, 43 V.I. 193, 204 (Terr. V.I. 2001) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). “[U]ndue prejudice is the touchstone for the denial of leave to amend.” *Josephat v. St. Croix Alumina, LLC*, No. 1999-0036, 2000 WL 1679502, at *15 (D.V.I. Aug. 7, 2000) (internal quotation marks omitted); see also *Webster v. CBI Acquisitions, LLC*, No. ST-11-CV-558, 2012 WL 832044, at *6 (V.I. Super. Ct. Mar. 5, 2012) (“Leave to amend should be given freely when prejudice would not be caused to the opposing party”).

In the Virgin Islands, an action for wrongful death “shall be brought by the decedent’s personal representative.” V.I. Code Ann., tit. 5, § 76 (West 2013). A two-year statute of limitations applies to wrongful death actions. *Mingolla v. Minnesota Min. & Mfg. Co.*, 893 F. Supp. 499, 504 (D.V.I. 1995) (citing *Cintron v. Bermudez*, 6 V.I. 692, 695 (D.V.I. 1968)). Plaintiffs concede that they were not personal representatives when the complaint was filed. Plaintiff Ernest Halliday, Sr. did not become a personal representative until January 9, 2009, more than one year after the limitations period

expired on September 12, 2007 since Jahleel Halliday was assaulted and died on September 12, 2005.

The District Court of the Virgin Islands has addressed a plaintiff's capacity to sue in a wrongful death action when the plaintiff was not a personal representative when the complaint was filed. In *Hachette v. West Indian Co., Ltd.*, 17 V.I. 549, 551 (D.V.I. 1980), the court referred to the plaintiff's lack of personal representative status as a "procedural defect . . . not fatal to the lawsuit." *Id.* Nonetheless, the district court granted the defendant's motion to dismiss "[b]ecause the action was brought by a party lacking capacity." *Id.* at 550. The dismissal was without prejudice specifically to permit the plaintiff to re-file her complaint if she successfully applied to become a personal representative of the estate. *Id.* at 552.

In subsequent decisions, the district court denied motions to dismiss based on the plaintiff's lack of personal representative status at the time the complaint was filed. In *Mingolla v. Minnesota Min. & Mfg. Co.*, 893 F. Supp. 499, 502 (D.V.I. 1995), none of the plaintiffs were personal representatives at the time the complaint was filed. One plaintiff became a personal representative over one year later. *Mingolla*, 893 F. Supp. at 502. The *Mingolla* court permitted plaintiffs to amend their complaint to reflect this change even though the statute of limitations had run. *Id.* at 504-05. It reasoned that the amendment "does not assert new claims or causes of action" and "the defendant received notice of plaintiffs' claims well within the limitations period and is not prejudiced by the amendment." *Id.*

Similarly, in *Sukow v. Clarke*, No. 2010-102, 2012 WL 3839239, at *1, *4 (D.V.I. Sept. 5, 2012), the district court found that a plaintiff had standing to sue even though the plaintiff did not become a personal representative until over nineteen months after filing suit. The Court explained that the 5 V.I.C. § 76(d)'s requirement that wrongful death actions "shall be brought by the decedent's personal representative" "does not eliminate the rights of survivors or beneficiaries." *Sukow*, 2012 WL 3839239, at *2. Rather, "it was intended instead merely to eliminate multiple suits arising out of the decedent's death by forcing all survivors to assert their claims in a single lawsuit." *Id.* (quoting *Mingolla*, 893 F. Supp. At 505) (internal quotation marks omitted).

In light of the district court's decisions and Rule 15(a)(2)'s simple mandate that "[t]he court should freely give leave [to amend] when justice so requires," the Plaintiffs' Motion for Leave to Amend will be granted. The "amendment" Plaintiffs propose would not change the text of the complaint. The complaint's case caption, and the caption generally used throughout this litigation, lists the plaintiffs as:

ERNEST HALLIDAY, Sr., Individually and as Co-personal
Representative of JAHLEEL R. HALLIDAY, Deceased, and MAYSIE
PANT, Individually and as Co-personal Representative of JAHLEEL R.
HALLIDAY, Deceased

Thus, the amendment with respect to Ernest Halliday Sr.'s appointment as personal representative does not prejudice the defendants because it does not introduce a new cause of action, will not result in any additional discovery, and will not cause any delay in this long-pending matter.

The Government Defendants argue the amendment will prejudice them because they expended time and resources investigating the Plaintiffs' claims only to discover the claims are, in the defendants' view, barred by the statute of limitations. It is the burden of a defendant in any court proceeding to research and investigate the claim brought against it and no doubt the investigation already performed will aide the Government Defendants in their defense . The proposed amendment does not require any additional efforts on Defendants' part, and therefore is not prejudicial to them.

There is also no question that the amendment relates back to the date of the original complaint because it asserts "a claim or defense that arose out of the conduct transaction or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). While the Plaintiffs' delay in petitioning the court to be appointed as personal representatives is vexing to Defendants, this Court discerns no bad faith or dilatory motive. Therefore, Plaintiffs' Motion to Amend shall be granted and Ernest Halliday, Sr.'s appointment as personal representative will relate back to the filing of the original complaint.

B. Foot Locker's Motion for Summary Judgment

Foot Locker's Motion for Summary Judgment is premised solely upon the same argument addressed above, i.e., that Plaintiffs lacked capacity to sue when the complaint was filed because neither Plaintiff had attained personal representative status at that point. Because Plaintiffs' Motion for Leave to Amend will be granted, and the amendment reflecting Ernest Halliday, Sr.'s status as personal representative will

relate back to the filing of the complaint, Foot Locker's Motion for Summary Judgment will be denied.

C. Government Defendants' Motion to Dismiss

The Government Defendants present four arguments in favor of dismissing the claims against them pursuant to Rules 12(b) and 8(c) of the Federal Rules of Civil Procedure. They argue that (1) Plaintiffs lacked authority to sue on behalf of the estate; (2) the statute of limitations barred Plaintiffs' First Amended Complaint; (3) Jahleel Halliday's death was not foreseeable and was too remote from Defendants' alleged negligence to impose liability; and (4) the complaint fails to state a survival claim against Defendants.

The first two arguments have been addressed above. Although Plaintiffs lacked capacity to sue when the original complaint was filed, their Motion to Amend which reflects Ernest Halliday, Sr.'s subsequent appointment as personal representative will be granted. *See Sukow*, 2012 WL 3839239, at *2; *Mingolla*, 893 F. Supp. at 504-05. The statute of limitations does not bar Plaintiffs' First Amended Complaint because the amendment relates back to the original complaint pursuant to Fed. R. Civ. P. 15(c)(1)(B).

The Government Defendants also assert that Plaintiffs cannot state a claim of negligence against them because Jahleel Halliday's death was not foreseeable and the alleged negligence of the Government Defendants was not the proximate cause of Jahleel Halliday's death. Whether an event was foreseeable, and whether Defendants' action constituted a cause of Jahleel Halliday's death, are questions for the fact finder. *Sealey-Christian v. Sunny Isle Shopping Center, Inc.*, 52 V.I. 410, 433 n.14 (V.I. 2009)

(explaining that “[w]hether a cause is foreseeable or not . . . is a question for the jury”); *Fabend v. Rosewood Hotels & Resorts, L.L.C.*, 174 F. Supp. 2d 356, 358 n.5 (D.V.I. 2001) (declining to address issues of duty and causation defendants raised in motion to dismiss or, alternatively, motion for summary judgment). In other words, these arguments are not appropriate grounds for a motion to dismiss because to survive such a motion a pleader need only allege sufficient facts that, assumed to be true, state a plausible claim for relief. *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-50 (V.I. 2011).

Finally, the Government Defendants argue that Plaintiffs may not plead causes of action under 5 V.I.C. § 76 and 5 V.I.C. § 77. Section 76 establishes a wrongful death cause of action whereas § 77 provides that tort actions shall survive the plaintiff’s death. The First Amended Complaint states that “Plaintiff brings this action individually and for the benefit of Decedent’s estate under the provisions of 5 V.I.C. § 76. Therefore, it appears that Ernest Halliday, Sr. seeks relief under § 76 only, not under both statutory sections. There is, however, one reference to § 77 in the First Amended Complaint, but it appears in the jurisdictional section and not in connection with any of the Plaintiffs’ substantive claims.

If Plaintiffs seek relief under both statutory sections, they may do so pursuant to Fed. R. Civ. P. 8(d)(3). That rule provides that “[a] party may state as many separate claims or defenses as it has, regardless of consistency.” Moreover, the Superior Court has held that a plaintiff may plead causes of action under both § 76 and § 77. *Crawford*

v. Daly, 55 V.I. 66, 80, 92 (V.I. Super. Ct. 2010).⁷ Accordingly, the Government Defendants' Motion to Dismiss will be denied.

The Court will issue an Order consistent with this Opinion.

DATED: October 20, 2014


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:


LORI BOYNES-TYSON
Court Clerk Supervisor 10/20/14

CERTIFIED A TRUE COPY

Date:

10/21/2014


Acting Clerk of the Court

By:


Court Clerk

⁷ The Court need not, at this stage of the proceedings, determine whether the Plaintiffs may recover under both statutes.