FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MARIA L. MARTINEZ as Personal Representative for the ESTATE OF FRANCISCO CARRASQUILLO-ACOSTA,	**CASE NO. SX-06-CV-615**
Plaintiff,	**ACTION FOR DAMAGES**
v.	**COMPLEX LITIGATION DIVISION**[1]
HESS OIL VIRGIN ISLANDS CORPORATION; AMERADA HESS CORPORATION; and 3M a/k/a MINNESOTA MINING & MANUFACTURING COMPANY,	
Defendants.	
HESS OIL VIRGIN ISLANDS CORPORATION and HESS CORPORATION f/k/a AMERADA HESS CORPORATION,	
Third-Party Plaintiffs,	
v.	
FLUOR DANIEL, individually and as successor-in-interest to FLUOR ENGINEERS & CONSTRUCTORS, INC.; FLUOR ENGINEERS & CONSTRUCTORS, INC.; RIGGERS & ERECTORS INTERNATIONAL, INC.; RIGGERS & ERECTORS VIRGIN ISLANDS CORPORATION; PARSONS INFRASTRUCTURE AND TECHNOLOGY GROUP, INC., as successor-in-interest to THE RALPH M. PARSONS COMPANY; AND VIRGIN ISLANDS INDUSTRIAL MAINTENANCE CORPORATION,	
Third-Party Defendants.	

[1] The Presiding Judge of the Superior Court of the Virgin Islands transferred this case to the newly-established Complex Litigation Division on August 30, 2018.

Appearances:

THEODORE H. HUGE, ESQ.
Harris & Huge, LLC
Charleston, SC 29403
For Plaintiffs

J. RUSSELL B. PATE, ESQ.
The Pate Law Firm
St. Thomas, VI 00804
For Plaintiffs

CARL A. BECKSTEDT, III, ESQ.
Beckstedt & Associates
Christiansted, VI 00820
For Hess Oil Virgin Islands Corporation, HOVENSA, LLC, and Amerada Hess Corporation

SIMONE R.D. FRANCIS, ESQ.
Ogletree, Deakins, Nash, Smoak & Stewart, LLC
St. Thomas. VI 00802
For 3M Company

MICHAEL J. SANFORD, ESQ.
Sanford, Amerling & Associates
Christiansted, VI 00820
For Riggers & Erectors International, Inc. and Virgin Islands Maintenance Corporation

MEMORADUM OPINION

MOLLOY, Judge.

BEFORE THE COURT are two motions filed by Maria L. Martinez ("Martinez"), as personal representative of the Estate of Francisco Carrasquillo-Acosta, for leave to file an amended complaint. The Court granted the first motion from the bench because the only defendants who opposed it, Riggers & Erectors International, Inc. ("R&E") and Virgin Islands Maintenance Corporation ("VIIMC"), were later dismissed and their arguments in opposition lacked merit. The reasons for granting the first motion are explained below as well as the reasons for granting

Martinez's second motion, but only in part. The Court agrees that wrongful death claims are governed by the two-year statute of limitations provided in section 31(5)(A) of title 5 of the Virgin Islands Code and further adopts the holding of *Jones v. Lockheed Martin Corporation*, 68 V.I. 158 (Super. Ct. 2017), that section 78 of title 5 of the Virgin Islands Code, which governs substitution upon the death of a party, is akin to a statute of limitations. The Court rejects the arguments of Hess Oil Virgin Islands Corporation ("HOVIC"), Hess Corporation ("Hess") (collectively "Hess Defendants"), and 3M Company ("3M") that the statutory deadlines for filing wrongful death actions and survival actions are jurisdictional. Since neither Hess, HOVIC, nor 3M opposed Martinez's first motion to amend to substitute herself in place of the plaintiffs, and since Martinez timely moved to substitute, the Court rejects the argument that Martinez did not timely convert this case into a survival action. The Court agrees, however, that the statute of limitations on wrongful death had run by the time Martinez filed her second motion to amend. However, while Hess and 3M raised the statute of limitations as a defense, HOVIC did not. Thus, the Court will grant Martinez's second motion, construed as motion to supplement not to amend the first amended complaint with a wrongful death claim, but only as to HOVIC, not Hess or 3M.

I. PROCEDURAL HISTORY

Francisco Carrasquillo-Acosta ("Carrasquillo-Acosta" or "Plaintiff") and Ana Julia Bonano ("Bonano") (collectively "Plaintiffs") commenced a personal injury action on October 13, 2006 through Theodore H. Huge, Esq. ("Attorney Huge") with Motley Rice, LLC ("Motley Rice"). The Plaintiffs named twenty-eight businesses and companies as defendants. Fourteen defendants appeared and filed answers: Raritan Supply Company ("Raritan"), Optimized Process Furnaces

("OPF"), General Electric Corporation[2] ("GE"), Crane Company ("Crane"), 3M, Union Carbide Corporation ("Union Carbide"), John Crane, Inc., Foster Wheeler Corporation, Fluor Engineers & Constructors, Inc., VIIMC, Resal, Inc., Garlock, Inc., Hess, and R&E. The following eight defendants have not appeared at any time in this litigation: Litwin Corporation, Bigelow-Liptak Corporation, Chicago Bridge & Iron Company, N.V., Ingersoll-Rand Corporation, Parsons Infrastructure & Technology Group, Inc. ("PITGI"), Portilla Corporation, Stubbs-Overbeck, Inc., and Universal Oil Products Company. Of the remaining five defendants, CertainTeed Products Corporation and Born Inc.—along with Raritan, Crane, GE, Union Carbide, and OPF—joined a motion that Hess filed on June 9, 2009 to dismiss for failure to prosecute. And on October 2, 2012, HOVENSA, LLC ("HOVENSA") filed a motion for summary judgment in lieu of filing an answer. Rubber and Gasket Company of Puerto Rico ("R&G") also did not file an answer, but R&G and HOVENSA were later dismissed voluntarily.

Lastly, HOVIC appeared specially on October 26, 2012, to move to dismiss for failure to timely serve. But HOVIC had also joined Hess and HOVENSA two years earlier, on August 6, 2010, in filing a motion to disqualify Lee J. Rohn, Esq. ("Attorney Rohn"), who appeared on behalf of the Plaintiffs after Attorney Huge left Motley Rice and Motley Rice moved to withdraw because they did not have another attorney licensed to practice law in the Virgin Islands. Once Motley Rice was granted leave to withdraw, the Plaintiffs went unrepresented until Attorney Rohn appeared. In the interim, both Plaintiffs passed away – Carrasquillo-Acosta on April 13, 2009 and Bonano on July 29, 2009. Their deaths were not suggested on the record, however, until September 2010. By then, Hess had filed a motion, on June 9, 2009, to dismiss for failure to prosecute and a notice, on June 15, 2009,

[2] Also referred to as General Electric Company in some papers.

that it served its motion on Motley Rice because Motley Rice never filed proof that it served the Plaintiffs with a copy of the order allowing the firm to withdraw. The Court (Donohue, P.J.) later denied Hess' motion to dismiss for failure to prosecute, but ordered Motely Rice to perfect service on Bonano (proof was not filed for her) and gave Carrasquillo-Acosta a final chance to retain counsel or proceed *pro se*. Again, their deaths had not been suggested on the record at that point.

A day after the Court denied Hess' dismissal motion, but before the order was entered, Attorney Rohn appeared on behalf of the Plaintiffs. Hess, joined by HOVIC who had not previously appeared, immediately moved to have Attorney Rohn disqualified. Notwithstanding that the Hess Defendants' disqualification motion was pending, Attorney Rohn filed a notice on September 17, 2010, on behalf of Maria L. Martinez ("Martinez"), to advise the Court and the parties that Martinez had been appointed personal representative of the Plaintiffs' estate. Three days later, on September 20, 2010, Martinez filed a motion to amend the complaint to substitute herself as personal representative of the Estate of Carrasquillo-Acosta and Bonano ("2010 motion" or "first motion"). R&E and VIIMC opposed Martinez's motion on October 7, 2010 – the same day Hess filed an answer to the proposed amended complaint. The other Defendants did not respond. Even though Martinez stipulated with R&E and VIIMC twice and moved once on her own without opposition for an extension of time to file a reply to their opposition, the stipulations and the motion remained pending—and the reply was never filed—when Martinez filed a second motion for leave to amend on April 19, 2011 ("2011 motion" or "second motion"), but through a different attorney.

After Attorney Rohn appeared and the disqualification motion and the 2010 motion to amend were filed, Attorney Huge, now with the law firm of Harris and Huge, LLC, appeared on behalf of the Plaintiffs on November 3, 2010. Approximately four months later, on March 30, 2011, J.

Russell B. Pate, Esq. ("Attorney Pate") appeared as co-counsel for Martinez and that same day filed a stipulation to dismiss John Crane. Two weeks later, on April 19, 2011, Martinez (again through Attorney Pate) filed the second motion, but without withdrawing the first motion. Like the first motion, the second motion sought to substitute Martinez as personal representative. But unlike the first motion, the second motion also sought to reduce the number of defendants from twenty-eight to nine, not including several as yet-unnamed John Doe Defendants. Hess opposed Martinez's second motion on April 27, 2011, as revised on April 28, 2011, which 3M joined on May 9, 2011. R&E and VIIMC filed an opposition on May 11, 2011, which 3M also joined.

In response to the appearances of Attorneys Huge and Pate, Hess filed another motion to disqualify on June 21, 2011, contending that Attorney Rohn's conflict should be imputed to Attorneys Huge and Pate, both of whom filed separate responses in opposition. Between March 2012 and October 2012, the Court approved the stipulated dismissals between Martinez and John Crane, R&G, Crane, GE, Raritan, OPF, and Union Carbide and by order entered October 10, 2012, the Court granted the motion to disqualify Attorney Rohn, denied the motion to disqualify Attorneys Huge and Pate. A discovery hearing was scheduled for November 15, 2012.

Prior to the November 15, 2012 hearing, Martinez, through Attorney Huge, entered into a stipulated dismissal with HOVENSA. On October 26, 2012, HOVIC filed a motion to dismiss for failure to timely serve, which Martinez opposed. Martinez also filed additional dismissals, all docketed on November 14, 2012, stipulating to dismiss R&E, Resal, Garlock, and VIIMC. At the November 15, 2012 hearing, the parties alerted the Court to the pending motions to amend, which had to be resolved before a scheduling order could issue, the Court concluded. The Court then took both motions under advisement and scheduled a follow-up hearing for January 8, 2013. However, neither Attorney Pate nor Attorney Huge appeared and the case went dormant until February 7, 2013, when the Court denied HOVIC's motion to dismiss for failure to serve. A month later, on March 6, 2013, Hess and HOVIC moved for leave to file a third-party complaint against Fluor Daniel, individually and as successor-in-interest to Fluor Engineers & Constructors, Inc. and Riggers and Erectors Virgin Islands, but also against their former co-Defendants, R&E, VIIMC, and Fluor Engineers & Constructors, who had answered the Plaintiffs' complaint, as well as PITGI, who had not.

This Court[3] scheduled a hearing on April 22, 2015 on all pending motions, but specifically the September 20, 2010 motion for leave to amend, the April 19, 2011 motion for leave to amend, and the March 6, 2013 motion for leave to file a third-party complaint. From the bench, the Court granted Martinez's 2010 motion to amend. The ruling was reduced to writing on April 28, 2015. In the same order, the Court also dismissed Bonano's claims against all Defendants as well Carrasquillo-Acosta's claims against all Defendants except Hess, HOVIC, and 3M based on the various notices and stipulations Martinez had filed and the representations of counsel. The Court also granted the Hess Defendants' motion for leave to file a third-party complaint but stayed the time to serve pending further direction, and withheld ruling on Martinez's second motion to amend because of concerns raised at oral argument. The parties were ordered to brief the following questions:

> (1) whether the deadlines set by statute for bringing a wrongful death claim or a survival action represent a jurisdictional limit on the Superior Court's power or a claims-processing rule that can be equitably tolled; (2) whether an objection on statute of limitations grounds can be made in opposition to a motion for leave to amend or whether it should be asserted in response after the court grants the motion to amend, if ultimately granted; and (3) whether, in light of the Court allowing the

[3] The case was reassigned to the undersigned judicial officer following the retirement of the prior judge.

> 2010 amended complaint, the Plaintiff can amend that complaint for any omission or defect, for instance to add a wrongful death claim or a survivor action, and whether that would constitute an omission or defect and further whether such additional claim would relate back to the September 20, 2010 motion to amend the complaint.

(Order 3, entered Apr. 29, 2015.) The Hess Defendants, 3M, and Martinez filed supplemental briefs.

II. LEGAL STANDARD

At the time when Martinez filed her motions to amend, amendments to pleadings were governed by Superior Court Rule 8, which "allow[ed] a pleading to be amended at any time during a civil proceeding." *Toussaint v. Stewart*, 67 V.I. 931, 944 (V.I. 2017) (citations and footnote omitted). "Rule 8 specifically allow[ed] 'the court' to amend any pleading 'for any omission or defect' or 'for any variance between the complaint and the evidence adduced at the trial.'" *Id.* at 944-45 (quoting Super. Ct. R. 8) (footnote omitted). But "amendment pursuant to Superior Court Rule 8 is not amendment as a matter of right." *Id.* at 944. Rather, "granting leave to amend is reposed in the sound discretion of the trial court" and "when 'justice so requires' is the mandate." *Id.* at 944 (citations omitted).

"Under this [justice so required] standard . . . when the pleading presents a proper claim for relief, leave to amend should be freely given." *Id.* at 944 (citation omitted); *accord* V.I. R. Civ. P. 15(a)(2) ("[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."). But the trial court should "continue the matter to a future date to allow sufficient time for any party who is surprised by an amendment to properly prepare and respond to the amendment, even if that surprise occurs during trial itself." *Toussaint*, 67 V.I. at 945 (citing Super. Ct. R. 8) (footnote omitted). Leave to amend need not be granted, however, if granting leave to amend would be futile. *See Cacciamani & Rover Corp. v. Banco Popular de P.R.*, 61 V.I. 247, 255 n.5 (V.I. 2014) ("[T]he Superior Court is not required to allow a futile amendment." (explaining St. *Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 478 n.4 (V.I. 2014), parenthetically)). "'In determining whether an amendment would be futile, the court considers whether it would survive a motion to dismiss.'" *Adams v. N. W. Co., Inc.*, 63 V.I. 427, 453 (Super. Ct. 2015) (quoting *Jones v. L.S. Holdings, Inc.*, ST-06-CV-145, 2010 V.I. LEXIS 10, *3 (V.I. Super. Ct. Feb. 25, 2010)). Finding futility has been upheld "when the relief requested in the amended complaint was not authorized under Virgin Islands law," *id.* (citing *Harvey v. Christopher*, 55 V.I. 565, 577 n.8 (V.I. 2011)), and "when the movant sought to correct non-waivable statutory jurisdictional conditions that barred her lawsuit entirely." *Id.* (citing *Brady v. Cintron*, 55 V.I. 802, 820 (V.I. 2011)).

III. DISCUSSION

A. The 2010 Motion to Amend

In her 2010 motion, Martinez explained that "Francisco Carrasquillo-Acosta died on April 13, 2009. Ana Bonano died on July 29, 2009." (Mot. to Am. Compl. to Subst. Martinez as Pers. Rep. 1, filed Sept. 20, 2010 ("2010. Mot.".) She had been appointed "personal representative of the Estate of Francisco Carrasquillo-Acosta and Ana Bonano" by the Family Division of the Superior Court "[o]n August 25, 2010." *Id.* Attorney Rohn filed notice "of the appointment of Maria L. Martinez as Personal Representative of the Estate of Francisco Carrasquillo-Acosta and Ana Bonano," *id.*, on September 17, 2010, three days before filing the motion to amend on Martinez' behalf to allow her "to substitute . . . as personal representative." *Id.*

R&E and VIIMC opposed on October 7, 2010, objecting first because the motion ignored other pending motions, namely Hess' motions to dismiss for failure to prosecute and the Hess Defendants' motion to disqualify Attorney Rohn. R&E and VIIMC further opposed because the proposed amended complaint that Martinez submitted failed "to state a cause of action for wrongful death . .

. [or] a survival cause of action." (Defs.' R&E and VIIMC Resp. in Opp'n to Mot. to Am. Compl. 7, filed Oct. 7, 2010 ("R&E Resp.").) Attorney Rohn "did not file a notice of appearance until July 22, 2010, more than a year after both [plaintiffs had] died," they argued. *Id.* at 5.[4] As noted, Martinez did not file a reply.

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[4] R&E and VIIMC also raised an objection to the 2010 motion because "the defendants . . . [were not] heard regarding the possible appointment of Ms. Martinez" and did not have "an opportunity to inquire as to the qualifications of Ms. Martinez to prosecute a complex tort action for two deceased persons." (R&E Resp. 5.) Federal courts are split as to whether a suggestion of death can be by filed the former attorney of a deceased party and, further, whether the defendant (when a plaintiff has died) has an obligation to file notice of the plaintiff's death and serve a copy of that notice on the plaintiff's heir. *See generally Antoine v. V.I. Port Auth.*, Civ. No. 2001/63, 2008 U.S. Dist. LEXIS 55692, *11-17 (D.V.I. July 22, 2008). In *Antoine*, the District Court of the Virgin Islands rejected the contention that service of a notice of death on the deceased plaintiff's attorney triggered the 90-day substitution period under Federal Rule of Civil Procedure 25(a), reasoning that the "Plaintiffs' counsel is not a party to the action and his authority to act on behalf on Johnson terminated upon Johnson's death." *Id.* at *18. The court then joined the majority of federal courts and held that the defendant (again, in cases where it is the plaintiff who has died) has "at least some burden . . . to either locate, notify or serve the deceased plaintiff's successor in order to trigger the . . . limitations period." *Id.* at *16-17 (collecting cases). Here, R&E and VIIMC implicitly concede that they did not learn that the Plaintiffs had died until Attorney Rohn gave notice on September 17, 2010, that Martinez had been appointed as personal representative. Assuming, without deciding, that the Virgin Islands would follow *Antoine* and the majority of federal courts and not require "extended, intensive searches" or "an onerous burden on the suggesting defendant," *id.* at *19 n.20, but rather "a good faith effort to identify an appropriate representative," *id.* at *15, neither R&E nor VIIMC (nor 3M who joined their opposition) took any steps to identify an appropriate representative either before or after "Attorney Rohn . . . moved to appoint Maria L. Martinez as personal representative for both Plaintiffs." (R&E Resp. 5.) That is, R&E and VIIMC (and 3M by joining) failed to identify a person who could serve as personal representative or identify any concerns with having Martinez serve in that capacity. Furthermore, many federal courts have concluded that the remaining parties to a lawsuit have the burden of serving notice of death of a party on that party's heirs or successor in interest, not because they have the right to choose their opponent—defendants do not get to pick their plaintiffs—but in an attempt to balance concerns over fairness and judicial economy. *Compare, e.g., Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985) (deceased plaintiff) ("Personal service on the successor or representative is hardly an onerous burden where, as here, the administratrix had already been appointed when service occurred. In some instances, it may prove more difficult to determine whom to serve, but it is generally appropriate to require the serving party to shoulder that burden, rather than permitting the absence of notice to decedent's representative to lead to forfeiture of the action. Absent personal service, there is no reason to presume that the successor or representative, who must decide whether to pursue the claim, is aware of the substitution requirement. The administratrix may well, as here, be represented by different counsel. Either a motion to substitute, or the suggestion of death should have been served on the nonparty representative of the deceased, not merely on the deceased's attorney, to satisfy Rule 25(a)(1)." (citations omitted)), *with Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir. 1969) (deceased defendant) ("No injustice results from the requirement that a suggestion of death identify the representative or successor of an estate who may be substituted as a party for the deceased before Rule 25(a) (1) may be invoked by those who represent or inherit from the deceased. If the heirs or counsel fear that delay may prejudice the litigation they may move promptly for appointment of a representative, perhaps a temporary representative, either under the law of the domicile or by special order in the court wherein the litigation is pending."). Because R&E and VIIMC voiced only a general objection to Martinez's appointment, not a specific harm or prejudice, their concerns are rejected.

R&E and VIIMC were still parties to this case when the Court heard oral argument on April 22, 2015. And they had raised valid concerns regarding the first motion to amend. "Courts in the Virgin Islands have recognized that death terminates the attorney-client relationship." *Jones*, 68 V.I. at 189 (collecting cases)). Here, Attorney Huge filed the complaint on behalf of the Plaintiffs on October 13, 2006. Carrasquillo-Acosta passed away on April 13, 2009 and Bonano on July 29, 2009. Who retained Attorney Rohn to enter an appearance in this case on July 22, 2010 was a valid concern.

But the Court takes judicial notice, *see King v. Appleton*, 61 V.I. 339, 348 (V.I. 2014), that Martinez, through Attorney Rohn, filed a petition with the Probate Division of the Superior Court of the Virgin Islands on August 20, 2010 to be appointed personal representative of the Plaintiffs' estate. In her August 20, 2010 petition, Martinez represented that she was the Plaintiffs' granddaughter and that she intended to continue their case. The judge assigned to the Family Division granted the petition and issued the order of appointment on August 25, 2010. On September 17, 2010, Attorney Rohn filed notice of death on the record when she alerted the court and the defendants that the Plaintiffs had died, and that Martinez had been appointed as their personal representative. Three days later, Martinez moved for leave to file an amended complaint.

R&E and VIIMC were correct to object to Martinez's motion. Technically it was not proper because Martinez was not a party to this case and "[o]nly the parties to a case may file documents and make requests of the court." *Augustin v. Hess Oil V.I. Corp.*, 67 V.I. 488, 520 (Super. Ct. 2017) (quotation marks and citation omitted). But clearly, Martinez's intent was to substitute herself in place of the Plaintiffs. (*See* 2010 Mot. 1 ("**COME NOW** Plaintiffs, by and through undersigned counsel, and hereby moves this Court for leave to amend the Complaint to substitute Maria L.

Martinez as personal representative in the above matter.").) The proper procedure would have been for Martinez to move for leave to substitute, rather than seek leave to amend a complaint that she had not filed. But elevating form over substance is unwarranted. *Cf. Augustin*, 67 V.I. at 520. Moreover, any concerns regarding Attorney Rohn's authority in this case were mooted once Martinez was authorized to represent the Plaintiffs. *Cf. Jones*, 68 V.I. at 194 (recognizing that under agency principles, the principle (the personal representative) can later ratify acts taken by the agent (the attorney) even though taken without actual authority).

R&E and VIIMC's remaining concerns regarding Hess' pending motion to dismiss for failure to prosecute and the Hess Defendants' motion to disqualify Attorney Rohn were also rejected. First, Hess' motion to dismiss for failure to prosecute was denied without prejudice on July 21, 2010, two months before Martinez filed her motion. Thus, R&E and VIIMC were mistaken in claiming that the motion was still pending and presented an impediment to ruling on the 2010 motion to amend. Second, concerns about Attorney Rohn's authority to file substantive motions in this case may have been valid. *Cf. Grimes v. District of Columbia*, 794 F.3d 83, 90 (D.C. Cir. 2015) ("Resolving asserted conflicts before deciding substantive motions assures that no conflict taints the proceeding, impairs the public's confidence, or infects any substantive motion prepared by or under the auspices of conflicted counsel."); *see also Bowers v. Ophthalmology Grp.*, 733 F.3d 647, 654 (6th Cir. 2013) ("A district court must rule on a motion for disqualification of counsel prior to ruling on a dispositive motion because the success of a disqualification motion has the potential to change the proceedings entirely. . . . The reason is simple: if counsel has a conflict from previously representing the party seeking disqualification, as was alleged in the present case, there is a risk that confidential information could be used in preparing or defending the motion."). But the concern was for the Hess

Defendants' to raise since the claimed conflict was theirs. They did not object. Instead, Hess answered the first amended complaint before the Court had ruled on the motion. And HOVIC later responded by moving to dismiss for failure to timely serve, not to strike the amended complaint.

The final objection R&E and VIIMC raised concerned Martinez's failure to state a claim for wrongful death under section 76 of title 5 of the Virgin Islands Code or a survival action under section 77 of title 5 of the Virgin Islands Code. R&E and VIIMC claimed that the Defendants could not know from the proposed amended complaint Martinez submitted whether she was alleging that the claims Carrasquillo-Acosta asserted in 2006 "are now alleged to have caused his death." (R&E Resp. 7.) They acknowledged that Bonano had "alleged loss of consortium and, it appears, the value of nursing and other services she provided Plaintiff Carrasquillo-Acosta." *Id.* at 6 (citing Compl. ¶¶ 75-76). They also acknowledged that Carrasquillo-Acosta had alleged that he

> suffered lung diseases . . . medical expenses, pain, embarrassment, inconvenience, loss of wages, loss of wage earning capacity, loss of quality and enjoyment of life, shortening of life expectancy, increased risk of cancer and mesothelioma with the worry, fear, and concern that naturally flows from such increased risk, and permanent and debilitating injury.

Id. (brackets omitted) (citing Compl. ¶ 44). Under section 77, "the decedent is substituted by his estate in any lawsuit that the decedent himself could have maintained," R&E and VIIMC explained. *Id.* at 7-8. But "Section 76, on the other hand, allows survivors of a decedent to sue the person responsible for the decedent's death." *Id.* at 8. The proposed amended complaint did not state whether "the Personal Representative is a survivor," they argued. *Id.* While it appeared to assert "a wrongful death action," "nowhere is that stated." *Id.* Yet, Martinez could not be pursuing "a wrongful death claim," they argued, because the proposed amended complaint retained the Plaintiffs' "demand for punitive damages" *Id.* "Section 76 sets forth the different kinds of damages that the decedent's various survivors and the estate may recover. . . . Punitive damages are not available." *Id.*

R&E and VIIMC were correct that survival actions and wrongful death actions are not the same. But they were not correct in that "where claimants die, a personal representative may *either* bring a survival claim . . . or an action for wrongful death." *Id.* at 6 (emphasis added). As this Court held in *Der Weer v. Hess Oil Virgin Islands Corporation*, 61 V.I. 87, 101 (Super. Ct. 2014), "[a]lthough wrongful death claims and survival claims can be related, particularly when the injury is also the cause of death, they are not the same cause of action." "The prime difference between the theories underlying the two types of statutes is that the survival statute merely continues in existence the injured person's claim after death as an asset of his estate, while the usual wrongful death statute creates a new cause of action." *Id.* (quotation marks, ellipsis, and citation omitted). "While both actions must be brought by a personal representative, *see* 5 V.I.C. §§ 37(a), 76(d), and 77, and while the same individual could, if granted the representative authority, assert both claims in the same action, the wrongful death action is not the same as the survival action." *Id.* at 110. Carrasquillo-Acosta asserted claims for negligence (Counts I and IV), strict product liability (Count II), supplying a chattel dangerous for its intended use (Count III), intentional infliction of emotional distress (Count V), negligent infliction of emotional distress (Count VI), and premises liability (Count VII). Bonano sued for loss of consortium (Count VIII). Martinez could continue his claims, and possibly Bonano's claims,[5] and any damages recovered would form part of their estates. *See* 5 V.I.C. § 77.

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[5] The Court assumes, for purposes of this Opinion only, that loss of consortium would be a valid claim under Virgin Islands law that Bonano could assert and that Martinez could continue after Bonano's death. Virgin Islands courts have not decided whether to recognize this claim yet, however, or, if recognized, whether as a stand-alone claim or a derivative claim. *See Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 675 (Cal. 1974) (adopting loss of consortium) ("[A] new common law rule has arisen, granting either spouse the right to recover for loss of consortium caused by negligent injury to the other spouse. Accordingly, to adopt that rule in California at this time would not constitute . . . an

Nevertheless, R&E and VIIMC's objections go to the form of the proposed amended complaint not its substance. Admittedly, Martinez could have pleaded the amended complaint better, by specifying, for example, that she was substituting into the case to continue the Plaintiffs' claims via a survival action. But that much was implied, and any defects could be cured by amendment. *Cf. Der Weer*, 61 V.I. at 98 ("[I]f this were a survival action, failing to 'invoke' the survival statute, section 77 of title 5 of the Virgin Islands Code, as the proper 'authority' for seeking damages, including punitive damages . . . would be a defect that . . . could [be] correct[ed] through Rule 8." (citation omitted)).

Accordingly, because the Plaintiffs' had stated valid claims for relief, and because R&E and VIIMC's objections lacked merit overall, the Court concluded that justice required granting Martinez's 2010 motion. *Cf. Toussaint*, 67 V.I. at 944. None of the other Defendants responded in opposition or joined R&E and VIIMC's opposition and leave should be freely granted when valid claims have been stated. Thus, the Court granted Martinez's 2010 motion to amend.

B. The 2011 Motion to Amend

Whether to grant Martinez's 2011 motion is a more difficult question. Without withdrawing her 2010 motion, Martinez filed a second motion to amend on April 19, 2011. In her second motion, Martinez sought leave "to simplify the Complaint by reducing the number of defendants and by

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extension of common law liability, but rather a recognition of that liability as it is currently understood by the large preponderance of our sister states and a consensus of distinguished legal scholars." (quotation marks and footnote omitted)). *Compare Oltman v. Holland Am. Line USA, Inc.*, 178 P.3d 981, 989-90 (Wash. 2008) ("The loss of consortium claim is separate and independent rather than derivative. Under state law, a loss of consortium claim is not barred simply because no claim can be brought based on the injury of the injured spouse." (citations omitted)); *Perry v. SNH Dev.*, No. 2015-CV-00678, 2017 N.H. Super. LEXIS 32, *35 (N.H. Super. Ct. Sept. 13, 2017) ("In New Hampshire, loss of consortium claims are not derivative claims, but are independent causes of action." (citing *Brann v. Exeter Clinic*, 498 A.2d 334 (N.H. 1985))), *with Alvarez v. Pueblo Int'l*, 24 V.I. 141, 148 (Terr. Ct. 1989) ("Such an action is a derivative right; it is dependent upon and accrues only if the injured spouse has a cause of action against the same defendant. The loss of consortium action of Luisa Alvarez accordingly does not survive the dismissal of the claims of her husband." (citation omitted)). A *Banks* analysis would be required. *Cf. See Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014) (*per curiam*) ("[T]he Superior Court, when considering a question not foreclosed by prior precedent from this Court, must perform a three-part analysis as set forth in *Banks* [*v. International Rental and Leasing Corporation*, 55 V.I. 967 (V.I. 2011)].").

clearly laying out liability for wrongful death and premises liability claims." (Mot. for Leave to File Am. Compl. 2, filed Apr. 19, 2011 ("2011 Mot.").) She claimed "little prejudice to the defendants because little to no discovery has taken place in this matter." *Id.* (citing *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006)). And argued that "a benefit is conferred on the defendants in that the proposed Amended Complaint is more concise and asks for fewer remedies." *Id.* The Defendants disagreed.

Hess opposed Martinez's 2011 motion because the Plaintiffs had failed to prosecute their case while they were alive and because a personal representative was not timely added after Carrasquillo-Acosta died. Hess argued that the 2010 amended complaint Martinez filed "failed to allege a claim for wrongful death pursuant to 5 V.I.C. §77 and failed to allege the existence of any survivors for purposes of suit pursuant to 5 V.I.C. §76." (Def. Hess' Am. Opp'n to Pls.' Mot. for Leave to File Am. Compl. 2, filed Apr. 28, 2011 ("Hess Opposition").) Hess further argued that the 2011 motion "was not timely filed" because Martinez mailed it to the court. *Id.*

Raritan, Crane, GE, Union Carbide, and OPF opposed both the 2010 and the 2011 motions to amend. The "Rohn Motion" had to "be stricken," they argued, because Attorney Rohn was disqualified. (Defs. Raritan, et al.'s Opp'n to Pl.'s Mot. to Am. Comp. 2, filed May 2, 2011 ("Raritan Opposition").) And the "Pate Motion" should be denied, they argued, because it was "not properly before the Court" since it lacked a signature and a "certificate of service." *Id.* R&E and VIIMC also opposed Martinez's 2011 motion because her 2010 motion as well as other motions were still pending. R&E and VIIMC then "adopt[ed], re-allege[d] and re-argue[d], as incorporated herein, their pending Opposition to Motion to Amend Complaint . . . filed on or about October 5, 2010." (Defs. R&E and VIIMC's Am. Opp'n to Pl.'s Mot. to Am. Compl. and Joinder in Hess' Mot. Am. Opp'n 3, filed

May 11, 2011 ("R&E Opposition").) And they joined the Hess Defendants' opposition "to the fullest extent said Opposition is applicable to Riggers and VIMC." *Id*. 3M joined the Raritan Opposition and the Hess Opposition on May 9, 2011, but not the R&E Opposition.

Martinez did not address whether the "Rohn Motion" was proper but did reject Raritan and the others' arguments about the "Pate Motion," explaining that the last page of the proposed amended complaint did contain Attorney Pate's signature and a certificate of service. "Due to the multiplicity of defendants, the Motion for Leave to Amend the Complaint along with the proposed amended complaint was faxed to the defendants." (Pl.'s Reply to Opp'n to Mot. for Leave to Am. Compl. 1, filed May 12, 2011.) And in reply to Hess, Martinez conceded that motions were pending, but rejected the assertion that the "Plaintiff's counsel did nothing to prosecute this case." (Pl.'s Reply to Hess' Opp'n 2, filed May 24, 2011.) "Once defendants filed the motion to disqualify attorney Lee Rohn, defendants were unwilling to progress with the case until the motion on disqualification was ruled on," Martinez argued. *Id.* That motion remained pending when Martinez filed her 2011 motion. So, Hess' argument was "disingenuous," she remarked. *Id.* Should the Court grant the 2011 motion, "undersigned counsel intends to speed this matter through discovery and to trial," she assured. *Id.*

First, before turning to the substantive objections, the Court rejects the objections raised by Raritan and the others, joined by 3M, about Martinez having faxed her motion. While service by fax is not proper, opposing a motion on the merits because it was not served properly is also not proper. Moving to strike the motion, moving for an order compelling the movant to serve it properly, or moving for an extension of the time to reply because it was improperly served would have been appropriate responses to an improperly served motion. Here, the Defendants received actual notice of the motion because they filed responses and joinders. Counsel could have asked Martinez's counsel to resend the motion if pages were missing or rejected the faxed copy and demanded formal service. But more importantly, the Defendants failed to identify any prejudice, harm, or disadvantage and were clearly able to respond in opposition. Hence, the Court rejects their objections as to form.

Turning to the substantive arguments, according to Martinez, the reason for filing her second motion to amend was to simplify the case by dismissing certain Defendants. She claimed that the Defendants would suffer little prejudice because "the proposed Amended Complaint is more concise and asks for fewer remedies," (Mot. 2), she failed to point out that she also added a wrongful death claim. Hess did not. While Hess did spend the bulk of its opposition complaining about the Plaintiffs' lack of prosecution and improperly moving to dismiss within its opposition, Hess did raise a crucial point – that Martinez's 2010 proposed amended complaint "failed to allege a claim for wrongful death . . . and also failed to allege the existence of any survivors for purposes of suit." (Hess Opp'n 2.) Building on that point, Hess correctly observed that the 2011 motion, which "was mailed to the Court," "was not timely filed by the deadline." *Id.* That is, because Martinez chose to mail the 2011 motion to the St. Croix Division of the Superior Court, rather than file it personally on St. Croix or in the St. Thomas/St. John Division, the motion came too late – five days and two years after Carrasquillo-Acosta had died. By then, Hess argued, the statute of limitations for wrongful death had run.

The timeliness of Martinez's second motion came up again during the April 22, 2015 hearing, after which the Court ordered the parties to submit supplemental briefing on whether the statutory deadlines for filing a wrongful death action and a survival action were jurisdictional or claims-processing rules, whether a party can raise statute of limitation in opposition to a motion to amend or should instead move to dismiss after the amendment is allowed, and finally, whether amending a complaint to plead a wrongful death or a survival claim is an omission or defect that can be cured under Superior Court Rule 8 and, if not, whether the claim would relate back. Regarding the first question, Hess (now joined by HOVIC) argued that the deadlines within the survival and wrongful death statutes are jurisdictional because the deadlines are established by statute, and "when the time-period in which to act 'is established by statute, timeliness is a jurisdictional issue.'" (Hess Defs.' Supp. Br. to Ct. re: Pl.'s Wrongful Death and Survivor Claims 3, filed May 19, 2015 (quoting *Pub. Emples. Rel. Bd. v. United Indus. Workers-Seafarers Int'l Union*, 56 V.I. 429, 435 (V.I. 2012)) (remaining citations omitted).) Regarding the second question, the Hess Defendants argued that deadlines should be raised at the earliest opportunity, regardless whether it is jurisdictional or claims-processing. *See id.* at 6 ("Should this Court find the Virgin Islands survivor and/or wrongful death statutes jurisdictional, then the Courts have held that failure to comply "can never be excused and such failure may be invoked at any stage of the proceedings, even by the court *sua sponte*.'" (citing *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 435-436 (V.I. 2013); *First Am. Dev. Group/Carib, LLC v. WestLB AG,* 55 V.I 594, 611 (V.I. 2011)); *see also id.* ("'Because claims-processing rules are equivalent to the statute of limitations and other affirmative defenses, litigants who seek to invoke a claims-processing rule to dismiss or limit an appeal must do so at the first opportunity prior to the case becoming fully briefed.'" (brackets omitted) (quoting *Allen*, 59 V.I. at 436)). Finally, regarding the third question, the Hess Defendants argued that a claimant's failure to plead a claim for relief is not a defect or omission that can be cured by amendment under Superior Court Rule 8. Analogizing Martinez to the plaintiff in *Der Weer*, they asserted that Martinez "failed entirely to plead any form of survival action until after the expiration of the statute of limitations" and thus, her "Amended Complaint was not filed merely to correct an omission or defect, but instead to add a substantive new claim under the Virgin Islands survival statute." *Id.* at 7-8. An amendment can only be allowed if it relates back, they argued. Here, however, "there can be no doubt that HOVIC and Hess did not receive notice of the Plaintiff's claims for survival and wrongful death until after the statute of limitations had run." *Id.* at 9. "[Carrasquillo-]Acosta died on April 13, 2009, but his Estate did not move to amend the complaint to add survival or wrongful death claims until April 19, 2011, six days after the expiration of the two year statute of limitations." *Id.* Further, "[w]hen [Martinez] moved to amend the Complaint on September 20, 2010, there was no mention of survival or wrongful death claims, so HOVIC and Hess were not put on notice within the statute of limitations at that time either," they argue. *Id.*

3M echoed the Hess Defendants' position that the deadline for filing a survival action is jurisdictional.[6] But 3M countered that, "even if the deadline in section 78 is a claims processing rule, which is not conceded, it appears likely that the Supreme Court would construe that two year limitation as an inflexible claims-processing rule that cannot be waived." (3M Resp. to Ct. Order 7, filed May 19, 2015 ("3M Resp.").) 3M analogized section 78 of title 5 of the Virgin Islands Code to section 606(b) of title 15 of the Virgin Islands Code, which the Supreme Court of the Virgin Islands construed in *Ottley v. Estate of Bell*, 61 V.I. 480 (V.I. 2014). 3M explains that

> *Ottley* . . . held that section 606(b) . . . which provides in part that "an action against an executor or administrator shall not be commenced until the claim of the plaintiff has been duly presented to such executor or administrator and by him disallowed," was an inflexible claims processing rule.

[6] 3M did not address the timeliness question relative to wrongful death actions.

Id. at 7-8 (brackets omitted) (quoting 15 V.I.C. § 606(b)). Quoting *Ottley*, 3M argued that

> "[b]y requiring that the executor or administrator have the first opportunity to decide whether a plaintiff's claim is meritorious, and in providing an alternative avenue for prompt summary review through the probate proceedings, it is clear that the Legislature intended creditors to file suits outside of the probate proceedings as an option of last resort." Similarly, the two year deadline for a personal representative to act also promotes the orderly and timely administration of probate proceedings. Absent a clear deadline for the personal representative to act, a probate proceeding could continue indefinitely. Section 78 provides the necessary finality, including for creditors of an estate and for parties who otherwise might be called to defend an action commenced by a personal representative of a decedent.

Id. at 8 (quoting *Ottley*, 61 V.I. at 494). And "although the Supreme Court has held that a claims processing rule is 'subject to equitable remedies at the court's discretion,'" *id.* (quoting *Ottley*, 61 V.I. at 496 n.12), 3M argued that "this is not a proper case . . . to set aside the two year rule." *Id.* Regarding the second question, 3M agreed with the Hess Defendants that raising an objection to timeliness in an opposition is appropriate if granting leave to amend would be futile. *See id.* at 9 (citing *Der Weer*, 61 V.I. at 117). Finally, as to the third question, 3M argued that any wrongful death or survival claims asserted in the second motion to amend could not relate back to the first motion to amend.

Martinez rejected the Defendants' arguments regarding the first question. She countered that "the language of the statutes in question, 5 V.I.C. § 31(5) and 5 V.I.C. § 78, which set the two-year deadlines for the commencement of survival actions and wrongful death claims, do not provide any clear indication that either was meant to include 'jurisdictional consequences.'" (Pl.'s Resp. in Opp'n to Defs.' Supp. Br. 4, filed June 2, 2015 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 438 (2011)).) Further, "[i]t has long been established that filing deadlines 'are quintessential claims-processing rules,'" Martinez argues. *Id.* (quoting *Henderson*, 562 U.S. at 435). Martinez did not address the second question and disagreed with 3M and the Hess Defendants on the third question. The April 19, 2011 complaint relates back to the September 22, 2010 complaint, which was filed less than two years after Carrasquillo-Acosta died, she argued, and both relate back to the October 13, 2006 complaint, assuming the Court were "to follow . . . the majority of case law, that an untimely wrongful death claim encompassing the same factual allegations as the original, timely filed complaint 'arises out of the same conduct, transaction, or occurrence.'" *Id.* at 14 (citing *Banks v. Int'l Rental and Leasing Corp.*, 55 V.I. 967, 974-80 (V.I. 2011)).

Having considered the parties supplemental briefing, the Court agrees with Martinez that statutory filing deadlines are quintessential claims-processing rules. *Cf. Brady v. Cintron*, 55 V.I. 802, 817 n.15 (V.I. 2011) ("It is well-established . . . that Virgin Islands statutes of limitation are presumptively non-jurisdictional, and therefore may be waived if not timely asserted by a defendant or equitably modified by a court." (citing *Jensen v. V.I. Water & Power Auth.*, 52 V.I. 435, 442 (V.I. 2009); Fed. R. Civ. P. 8(c))). *But cf. United States v. Wong*, 135 S. Ct. 1625, 1638 (2015) (holding that the deadline in the Federal Tort Claims Act is not jurisdictional) ("Our precedents make this a clear-cut case . . . [and] require[] an affirmative indication from Congress that it intends to preclude equitable tolling in a suit against the Government. Congress can provide that signal by making a statute of limitations jurisdictional. But that requires its own plain statement; otherwise, we treat a time bar as a mere claims-processing rule." (citations omitted)). But the more specific question at issue here is whether the Legislature intended the deadline in section 78 of title 5 of the Virgin Islands Code to be jurisdictional or merely a claims-processing rule. "In some instances it is clear that a statute is jurisdictional because the Legislature explicitly stated that the statute either gives or limits jurisdiction." *Ottley*, 61 V.I. at 489 (citations omitted). However, some "statutes are not jurisdictional but instead are claims-processing . . . [because they] seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* (quotation marks and citation omitted).

The Court agrees with *Jones* that the deadline in section 78 is not jurisdictional because it requires the parties to take certain procedural steps—substitute a personal representative—within two years from the date of death. *See Jones*, 68 V.I. at 180 ("[T]he two-year statutory deadline in Section 78 of Title 5 of the Virgin Islands for substituting parties after death, disability, or dissolution is not jurisdictional. Instead, like a statute of limitation, Section 78 is simply a rule for processing a party's claims. Accordingly, failure to raise the timeliness of a substitution motion means the untimeliness defense is either waived or forfeited." (citations omitted)). The language of the statute itself supports the conclusion that the two-year deadline is not jurisdictional because it declares that "[n]o action shall abate . . . if the cause of action survives or continues." 5 V.I.C. § 78. If the Legislature had intended section 78 to deprive the trial court of jurisdiction, it would have so directed "since the Legislature knows how to 'speak in jurisdictional terms' when it wants to." *Baumann v. Pub. Emples. Relations Bd.*, 68 V.I. 304, 359 (Super. Ct. 2018) (quoting *Stewart v. V.I. Bd. of Land Use App.*, 66 V.I. 522, 537 n.11 (V.I. 2017)).

What's more, statutes that restrict a court's jurisdiction generally do so before the case is filed. *E.g.*, *Brady*, 55 V.I. at 817 ("Thus, the plain language and historical purpose of the statute clearly indicate that the Legislature intended the *pre-filing* requirements of 27 V.I.C. § 166i to limit the authority of courts in this territory in adjudicating medical malpractice actions." (emphasis added)); *In re: Guardianship of Smith*, 54 V.I. 517, 526 (V.I. 2010) ("[T]this Court has consistently held that when a statute establishes a specific procedure *for invoking* the Superior Court's jurisdiction, the failure to follow that procedure deprives the Superior Court of its jurisdiction." (collecting cases)).

Courts can lose jurisdiction after a case is commenced, however. *Cf. Hansen v. O'Reilly*, 62 V.I. 494, 507-11 (V.I. 2015) (holding that trial court erred in disregarding a notice of removal to federal court because it deprived the court of jurisdiction); *In re: Rogers*, 56 V.I. 325, 342 (V.I. 2012) ("[A]n effective notice of appeal of a final order typically divests the trial court of jurisdiction." (citation omitted)); *see also Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 611 (V.I. 2012) ("The court is powerless to condition [a] stipulated dismissal upon the retention of jurisdiction, as such dismissal *terminates the court's jurisdiction*." (emphasis added) (citation omitted)). *But cf. Yearwood Enters. v. Antilles Gas Corp.*, S. Ct. Civ. No. 2017-101, 69 V.I. ___; 2018 V.I. Supreme LEXIS 32, *7 (V.I. Oct. 3, 2018) ("Although we clarified in *Bertrand* that a valid notice of dismissal under Rule 41(a)(1)(A)(i) automatically *terminates any litigation on the merits* of the action, nothing in either *Bertrand* or the text of the rule itself speaks directly to the effect such a dismissal may have on the Superior Court's jurisdiction to decide *collateral issues* such as a petition for fees and costs." (emphasis added)). But nothing in section 78—or section 77 of title 5 of the Virgin Islands Code, which provides that tort actions survive death—provides "a 'clear sign' of the Legislature's intent," *Stewart*, 66 V.I. at 536 (citation omitted), that death of a party terminates the trial court's jurisdiction over a pending civil action if more than two-years pass from the date of death. Rather, like other statutes of limitation, if the defense is not raised, it is waived, and the claim for relief continues.

Hess and 3M argued in the alternative, that they did not waive the statute of limitations defense because neither Martinez's 2010 motion nor her proposed amended complaint expressly explained that she was pursuing a survival action. "It was not until the filing of the proposed Second Amended Complaint that Martinez alleged a claim under the survival statute," 3M argued. (3M Resp. 13 (citation omitted).) The Hess Defendant asserted a similar point in their reply to Martinez's supplemental brief: "It was not until six days after the running of the statute of limitations that Plaintiff moved to amend her complaint to specifically add causes of action for survival and wrongful death." (Hess Defs.' Reply to Pl.'s Resp. 5, filed June 15, 2015.) But the Defendants fundamentally misunderstand survival actions.

"[A] survival claim is not really a claim. It is merely a vehicle for pursuing someone else's claims." *Der Weer*, 61 V.I. at 103. In other words, a survival action is not a cause of action, in and of itself. A jury does not render a verdict on a survival claim. Judgment is not entered on a survival claim. Instead, a survival action is just a means to another end: filing or continuing a claim that a deceased person commenced or could have commenced within his lifetime. "[A] wrong which results in physical injury to the person . . . shall not abate by reason of the death of the wrongdoer . . . nor by reason of the death of the person injured." 5 V.I.C. § 77. An assault claim survives, or a battery claim survives, or an intentional infliction of emotional distress claim survives death and can be commenced or "continued by or against his personal representatives or successor in interest." *Id.* § 78. There was no specific "claim" or "cause of action" that Martinez had to plead in her 2010 proposed amended complaint. She was appointed personal representative. The only reason she sought leave to substitute into this case was to continue her grandparents' claims. Although the proposed amended complaint could have clarified her authority as well as the statutory authority that allowed the Plaintiffs' claims to continue, pleading legal authority in a complaint is not required. Carrasquillo-Acosta passed away on April 13, 2009 and Martinez moved to substitute on September 20, 2010. Approximately, a year and a half passed in between. The two-year statutory deadline in section 78 is not an issue here.

Martinez's attempt to assert a wrongful death claim is a different matter. Section 76 of title 5 of the Virgin Islands Code governs wrongful death claims. But is does not specify a limitations period for wrongful death claims. *Cf. Hatchett v. W. Indian Co.*, 17 V.I. 549, 550 (D.V.I. 1980) ("Unlike the majority of American wrongful death statutes, 5 V.I.C. § 76 does not provide for a limitations period."). Nonetheless, "[t]he Virgin Islands Code's general statute of limitations provision specifically provides that, 'except when, in special cases, a different limitation is prescribed by statute,' a two-year statute of limitation applies in actions 'for any injury to the person or rights of another not arising on contract.'" *Gerald v. R.J. Reynolds Tobacco Co.*, 67 V.I. 441, 457 (Super. Ct. 2017) (quoting 5 V.I.C. § 31(5)(A)). And "a two-year limitations period was judicially imposed [in] *Cintron v. Bermudez*, 6 V.I. 692 (D.V.I. 1968)." *Hatchett*, 17 V.I. at 550. The court in *Cintron* reasoned that

> [t]he principles of law and the damages in wrongful death actions are so akin to other negligence cases that, although the legislature has not spoken directly, it is reasonable to infer that it would include wrongful death actions in the class to be brought within the period applicable to personal injury cases.

Cintron, 6 V.I. at 695. While *Cintron* is not binding on this Court, the Court sees no reason to depart from this long-standing precedent.

Martinez concedes that "there is no statute of limitations provided," (Pl's Resp. in Opp'n 2 n.2 (emphasis omitted), for wrongful death claims, and that *Cintron* and *Hatchett* "are not binding." *Id.* at 2. But she sidesteps the question of what deadline governs wrongful death claims by claiming that her 2010 motion tolled whatever statute of limitations would apply, since the shortest possible limitation period is two years. But like the Hess Defendants and 3M with survival actions, Martinez misunderstands wrongful death actions. "An action for wrongful death is separate and distinct from a survival action. . . .[T]he wrongful-death statute creates a new cause of action, and such cause of action is distinct from any cause of action that the deceased might have had if he had survived." *Der Weer*, 61 V.I. at 111 (quotation marks and citation omitted). In other words, "a wrongful death is a new claim — with its own elements that must be alleged in a complaint and proven at trial." *Id.* at 102-03 (footnote omitted). Thus, a wrongful death claim cannot accrue until someone dies. *Cf. Richardson v. Knud Hansen Mem'l Hosp.*, 744 F.2d 1007, 1011 (3d Cir. 1984) ("Various provisions of the Virgin Islands statute convince us that the legislature intended to create an independent wrongful death action, and that the accrual date for the action is the date of death.").

Here, if a claim for the wrongful death of Carrasquillo-Acosta accrued, it accrued on April 13, 2009, the day he died. The claim would have expired two years later, on April 13, 2011. Because wrongful death was not a claim that Carrasquillo-Acosta could have pursued on October 13, 2006, it cannot relate back. Two reasons support this conclusion. First, wrongful death claims do not belong to the injured person, but rather to the persons who are left behind, the survivors. *Cf.* 5 V.I.C. § 76(b)(1) ("'Survivors' means the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support."); *accord Richardson*, 744 F.2d at 1011 (explaining that, under independent wrongful death statutes like the Virgin Islands statute, "the decedent's survivors seek damages for *their own injuries* resulting from the death – for example, loss of support and services, and mental pain and suffering."). Second, pleadings are supplemented to add claims or defenses that accrue after a case is commenced, not amended. *See* Fed. R. Civ. P. 15(d) ("On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened *after the* *date of the pleading* to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense." (emphasis added)); *cf. Brady*, 55 V.I. at 818 n. 16 (Rule 15(d) applied via Superior Court Rule 7).

> Because it refers to events that occurred after the original pleading was filed, a supplemental pleading differs from an amendment, which covers matters that occurred before the filing of the original pleading but were overlooked at the time.

Owens-Illinois, Inc. v. Lake Shore Land Co., 610 F.2d 1185, 1188 (3d Cir. 1979); *accord ITT Gilfillan, Inc. v. City of Los Angeles*, 185 Cal. Rptr. 848, 850-51 (Ct. App. 1982) ("We find that the doctrine of relation-back does not apply to a supplemental complaint."). Rule 15(d) permits "claims which arise after the initial pleadings are filed" to be added because the goal of the rule "is to promote as complete an adjudication of the dispute between the parties as possible." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981). Thus, the October 13, 2006 complaint could not be amended to add a wrongful death claim. But it could be supplemented to add that claim.

Arguably, Bonano could have timely supplemented the October 13, 2006 complaint with a wrongful death claim. As Carrasquillo-Acosta's spouse, she was his survivor and could claim wrongful death, a claim that accrued the day her husband died. But she did not ask to be appointed personal representative nor did she file a separate action. Her granddaughter, Martinez, was appointed personal representative of both Plaintiffs' estate. And, as explained earlier, Martinez timely substituted herself in place of the Plaintiffs. But whether her 2010 motion and her 2011 motion can relate back is a different question. One learned treatise explains that

> if the original pleading gave defendant notice that the conduct, transaction, or occurrence is of a continuing nature, he should be prepared to defend against all claims arising out of it, whether they arose before or after the original complaint was filed. There is little basis to distinguish an amended and a supplemental pleading for

> purposes of relation back if defendant had notice of the subject matter of the dispute and was not prejudiced in preparing his defense. Under these circumstances, the policy against stale claims becomes subsidiary to the policy expressed throughout the rules in favor of allowing a party to set forth all his grievances against another party in one action and resolving them on their merits.

William Inglis & Sons Baking Co., 668 F.2d at 1057 n.74 (quoting 6C Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1508 (1971 ed.)).

But the problem here—and the reason why the Court need not decide whether wrongful death relates back—is because Martinez, through counsel, abandoned all claims of Bonano's at the April 22, 2015 hearing. (*Accord* 3M Resp. 6 n.3 (noting "Plaintiff's abandonment at the April 22 hearing of any claims on behalf of Bonano's Estate or her survivors.").) But more importantly, unlike her 2011 motion, Martinez's 2010 motion did not make any reference to wrongful death. In her 2011 motion, Martinez stated that she sought "to amend the Complaint to simplify the Complaint by reducing the number of defendants and by clearly laying out liability for wrongful death and premises liability claims." (2011 Mot. 2.) But in her 2010 motion, she only "move[d] . . . for leave to amend the Complaint to substitute Maria L. Martinez as personal representative." (2010 Mot. at. 1.) The 2010 motion was sufficient to give the Defendants notice that she intended to take over this case and continue the Plaintiffs' claims. After all, she did not move to intervene but to substitute. From the fact that both Plaintiffs had died, and that Martinez sought substitution, the Defendants should have known that she was continuing this action as a survival action. But the fact that Carrasquillo-Acosta and Bonano had died was insufficient to give the Defendants notice in 2010 that Martinez intended to pursue a wrongful death claim.

3M is correct. "[A]lthough Martinez sought to amend the caption of the Complaint in 2010, the Amended Complaint asserted no claims by her. This is not a trivial shortcoming." (3M Reply to

Pl.'s Resp. 7, filed June 12, 2015.) "[W]hile the First Amended Complaint identifies Martinez as personal representative, the pleading as a whole does not state any claim for relief by her in her capacity as personal representative, on behalf of any estate, or on behalf of any survivor." *Id.* Survivors are not relevant to a survival action because it is the claim that survives. But survivors are at the heart of a wrongful death action and Martinez's 2010 motion did not name any survivors or even use the words wrongful death. When she sought in 2011 "to amend the Complaint to . . . clearly lay[] out liability for wrongful death," (2011 Mot. 2,) the statute of limitations on a claim for wrongful death of Carrasquillo-Acosta had run.

But the running of a statute of limitations does not mandate the dismissal or denial of leave to amend or supplement. Rather, because the statute of limitations is an affirmative defense, it must be asserted at the earliest opportunity. *See Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 536 (V.I. 2015) ("[I]t is well established that the statute of limitations is an affirmative defense that must be specifically pleaded at the first opportunity or else is waived."). Here, Hess raised the statute of limitations in opposition to the 2011 motion. (*See* Hess Opp'n 2 ("After more than two years had passed since Plaintiff Carrasquillo-Acosta's death, yet another attorney, Attorney Pate, entered an appearance in this matter by filing a Motion to Amend the Complaint to add Maria L. Martinez as the personal representative. Since that notice was mailed to the Court it was not timely filed by the deadline." (citation and footnote omitted)); *see also id.* ("In light of Plaintiffs' lack of diligence on this matter and failure to properly allege a formidable cause of action *until after the two-year limitations had expired*, Hess respectfully requests this Court exercise its jurisdiction and dismiss this matter.").) 3M "adopt[ed] the reasons identified in the oppositions of" Hess. (3M Not. of Joinder 1, filed May 9, 2011.) Consequently, Hess and 3M raised the statute of limitations defense at the earliest opportunity. HOVIC did not, however.

To explain, first, HOVIC never formally appeared or filed an answer. Instead, more than a year after Martinez filed her 2011 motion, HOVIC made a special appearance to move to dismiss, arguing that "in the six years that this matter has been pending," the Plaintiffs had "failed to serve HOVIC . . . [and] failed to request an extension of time to effectuate service." (HOVIC's Special Appearance & Mot. to Dism. for Failure to Timely Serv. 2, filed Oct. 26, 2012.) More importantly, however, HOVIC's motion came after HOVIC had already joined Hess and HOVENSA in moving to disqualify Attorney Rohn. In its February 7, 2013 order denying HOVIC's motion, the Court acknowledged that HOVIC's October 26, 2012 dismissal motion was the first time that HOVIC, itself, had appeared in this case. And the Court also acknowledged—in finding that Plaintiffs had not shown good cause for an extension of time to serve HOVIC—that even though "both HOVIC and Hess are represented by the same counselor law firm, for the purposes of the law, both are considered separate legal entities. Thus, service must be upon each entity." (Order 3, entered Feb. 7, 2013.) But the Court did find that, "[i]n the past, HOVIC filed joint motions with Hess and HOVENSA without any indication that this was a special appearance." *Id.* at 4 (citing HOVIC, HOVENSA, and Hess' Mot. to Disq. Pls.' Counsel, filed Aug. 6, 2010; Stip. for Ext. of Time, filed Aug. 19, 2010; and HOVIC, HOVENSA, and Hess's Reply to Opp'n to Mot. to Disq. Pls' Counsel, filed Sept. 10, 2010). HOVIC had "attempt[ed] to explain away this discrepancy by stating that HOVIC's name appearing in both the caption and title of the previous motions was merely a typo," *id.*, but the Court rejected that "excuse" finding that it lacked "substance." *Id.* Instead, the Court found that "counsel made tactical decisions regarding the exclusion or inclusion of HOVIC in certain motions," and "[f]urther . . . that HOVIC never notified the Court that its inclusion in the motion to disqualify counsel was a typographical error." *Id.* at 5. The Court then denied HOVIC's motion but ordered Martinez to serve HOVIC within thirty days.

If Martinez did serve HOVIC, she failed to file proof. But even if she did not, HOVIC submitted itself to the jurisdiction of the Superior Court when it filed a motion for leave to file a third-party complaint. "Requesting permission to become a third-party plaintiff certainly constitutes a voluntary appearance under section 115 of title 5 [of the Virgin Islands Code]." (Order 4, entered Mar. 24, 2015.) Therefore, at least as of March 6, 2013, when HOVIC joined Hess in moving for leave to file a third-party complaint, but perhaps as of February 7, 2013, when the Court found that HOVIC may have voluntary appeared, at either point it was incumbent on HOVIC to file an opposition to Martinez's motions to amend, or at least to file a joiner in another defendant's opposition. HOVIC did neither.

Affirmative defenses must be raised at the earliest opportunity or they are deemed waived or forfeited. In some instances, the earliest opportunity to raise an affirmative defense is in an answer. In other instances, it is by filing a pre-answer motion. Here, HOVIC knew what claims Martinez intended to pursue on February 7, 2013 when its dismissal motion was denied. HOVIC likewise knew on March 6, 2013, when it and Hess moved for leave to file a third-party complaint, that Martinez intended to pursue a wrongful death claim. Although the Hess Defendants did acknowledge in their motion that Martinez's 2011 motion was still pending, HOVIC did not simultaneously file an opposition to Martinez's second motion or condition its "share" of the motion for leave to file a third-party complaint on the possibility that the Court might grant Martinez's motions. That is, HOVIC did not explain that it only sought leave to file a third-party complaint if the

Court allowed Martinez to supplement the complaint with a wrongful death claim. Instead, both HOVIC and Hess claimed that they were "not liable to the Plaintiffs for their alleged injuries and that Third Party Defendants must bear the responsibility for Plaintiffs' alleged damages." (Hess Defs.' Mot for Leave to File Third-Party Compl. 2, filed Mar. 6, 2013; *see also* Hess Defs.' Third-Party Compl. ¶ 3 ("Plaintiffs allege that Defendants had a duty to exercise reasonable care in providing Francisco Carrasquillo-Acosta with a safe work environment and to provide adequate protection from the known danger of exposure to asbestos. Plaintiffs allege that Defendants breached this duty thereby causing Francisco Carrasquillo-Acosta to be exposed to asbestos resulting in bodily injuries *and wrongful death*." (emphasis added)), attached to Mot. for Leave to File Third-Party Comp).) Hess may have come perilously close to abandoning its statute of limitations defense. *Cf. Rennie*, 62 V.I. at 538 (citing *Bryan v. Fawkes*, 61 V.I. 201, 222 n.12 (V.I. 2014)). But HOVIC never raised the statute of limitations as a defense until this Court heard oral argument on Martinez's motions to amend and ordered supplemental briefing afterward. The Court agrees with HOVIC and holds that litigants can raise a statute of limitations defense in an opposition to a motion to amend.

> Since a party may challenge whether an amendment to a complaint constitutes an omission or defect . . . when the motion to amend is filed and given the Virgin Islands Supreme Court's directive that invocation of a claims processing rule to dismiss a case be done at the first opportunity, it . . . follow[s] that the objection could be asserted in the motion to amend. Permitting the parties to brief the issue in the earliest possible stages makes the most sense because it . . . preserve[s] . . . judicial resources for other matters . . . . If a party must wait until after the motion to amend is granted, the [c]ourt must then utilize its already stretched resources to rule first on the motion to amend and then again on a motion to dismiss after the amended complaint is filed. It . . . [is] prudent and judicially sound to resolve any and all issues at the outset without additional complications and briefings by the parties.

(Hess Defs.' Supp. Br. 6-7.)

The Hess Defendants made a very judicious and valid point. But they overlooked another, that affirmative defenses are either asserted in an answer or in a pre-answer motion. Here, Hess answered both the complaint and the amended complaint. But HOVIC has not answered either. Hess and 3M raised the statute of limitations for wrongful death in 2011. HOVIC did not because HOVIC never filed its own opposition or joined another defendant's opposition. "[C]ounsel made tactical decisions regarding the exclusion or inclusion of HOVIC in certain motions." (Order 5, entered Feb. 7, 2013.) The consequence is that HOVIC waived the statute of limitations defense and Martinez may assert a wrongful death claim against HOVIC, but not against Hess or 3M.

IV. CONCLUSION

For the reasons stated above, the Court granted Martinez's 2010 motion to amend. Leave to amend should be freely granted when justice so requires, and justice required allowing Martinez to substitute into the case to continue her grandparents' claims through a survival action. Her motion was timely filed and only opposed by R&E and VIIMC and none of the objections they raised justified denying it. The Court also will grant Martinez's 2011 motion to supplement the first amended complaint with a claim for wrongful death, but against HOVIC only. This will require that Hess and HOVIC replead their third-party complaint. The Court will *sua sponte* grant leave to amend and provide a date by when both third-party complaints must be served. An appropriate order follows.

Date: December 7, 2018.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: __________
For Court Clerk Supervisor
Dated: 12/7/2018