

DIVISION OF ST. THOMAS AND ST. JOHN

Plaintiff)

**ACTION FOR: CONTRIBUTION
INDEMNIFICATION**

VS

BONIFACE C. ABBA, M.D.
ROY LESTER SCHNEIDER
HOSPITAL

**NOTICE OF ENTRY OF
MEMORANDUM OPINION &
(2) ORDERS**

Please take notice that on December 21, 2016 a(n) **MEMORANDUM OPINION & (2) ORDERS** dated December 16, 2016 was entered by the Clerk in the above-entitled matter.

Estrella H. George
Acting Clerk of the Court

CAMEIL A. CLARKE
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ROYAL CARIBBEAN CRUISES, LTD.,

Plaintiff,

vs.

**BONIFACE ABBA, M.D. and ROY LESTER
SCHNEIDER HOSPITAL,**

Defendant.

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) **CASE NO. ST-15-CV-119**
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MEMORANDUM OPINION

Pending before the Court is Defendants Boniface Abba, M.D. and Roy Lester Schneider Hospital's August 16, 2016, Motion for Judgment on the Pleadings. Since Defendants have not shown that there are no material facts to resolve with respect to Counts I and II of the Complaint, Defendants' motion will only be granted in part.

RELEVANT FACTS AND PROCEDURAL HISTORY

This matter arises out of a Complaint filed on March 18, 2015,¹ by Plaintiff Royal Caribbean Cruises, LTD ("Royal Caribbean") against Defendants Boniface Abba, M.D. and Roy Lester Schneider Hospital ("RLSH"). According to the Complaint, on March 8, 2008, Royal Caribbean retained Abba to provide medical treatment to its employee, Netaish Seunarine, a Jones Act seaman aboard one of Royal Caribbean's cruise ships, in accordance with Seunarine and Royal Caribbean's employment relationship.² Specifically, Royal Caribbean alleges it "retained Abba to provide Seunarine with medical care to treat his perirectal bilateral abscesses and fistulas[,]"³ but,

¹ Due to a procedural deficiency cured by Plaintiff, the Complaint was not docketed until March 19, 2015.

² Compl. ¶¶ 8-10.

³ Compl. ¶ 10.

in so doing, “Abba performed an unnecessary and aggressive destructive surgery which resulted in excessive anal sphincter damage and directly caused Seunarine to become incontinent of stool[,]” while also erroneously documenting Seunarine’s condition and the surgery.⁴ As a result, it was necessary for Seunarine to receive medical treatment with a variety of physicians and undergo numerous corrective surgeries, the third of which was performed on May 25, 2010.⁵ Royal Caribbean submits that it paid for all of this medical treatment, as well as the “per diem living allowances to cover the cost of food and lodging” in accordance with the maintenance and cure benefits owed to Seunarine under the Jones Act.⁶

On January 28, 2011, Seunarine filed a Complaint against Royal Caribbean in a Florida state court, seeking, as a Jones Act seaman, “to hold [Royal Caribbean] vicariously liable for the actions of Abba and RLSH” and to recover from Royal Caribbean, *inter alia*, “the damages sustained [by Seunarine] as a result of the surgical procedure performed by Abba.”⁷ The state court action was removed to federal court, which “[o]n May 4, 2011, ... entered an Order compelling the parties to resolved their disputes in arbitration” in accordance with the employment contract and collective bargaining agreement governing Seunarine’s employment with Royal Caribbean.⁸ “After arbitration was compelled, [Royal Caribbean] placed Abba on notice of Seunarine’s allegations” and demanded on multiple occasions that “Abba assume full responsibility for the claims asserted against [Royal Caribbean], investigate Seunarine’s claims, [and] agree to indemnify [Royal Caribbean] and hold [Royal Caribbean] harmless from Seunarine’s claims[,]”

⁴ Compl. ¶¶ 11-19.

⁵ Compl. ¶¶ 20-33.

⁶ Compl. ¶ 24 & n. 1.

⁷ Compl. ¶¶ 34, 65.

⁸ Compl. ¶¶ 34-37.

the last demand having been made on March 1, 2013.⁹ Prior to arbitration, Seunarine and Royal Caribbean “reached a settlement agreement and filed a Stipulation of Dismissal with Prejudice” on May 21, 2013.¹⁰ The federal action was dismissed on May 23, 2013.¹¹

From the foregoing allegations, Royal Caribbean asserts the following six counts in its Complaint: indemnification and contribution against Abba and RLSH for the “actual damages” incurred by Royal Caribbean “from Abba’s and RLSH’s negligence through [Royal Caribbean’s] payment of maintenance and cure and settlement of Seunarine’s claims” (Counts I and II);¹² ordinary and gross negligence against Abba for his alleged improper “management, care, and supervision of Seunarine” (Count III);¹³ the intentional tort of battery against Abba for “intentionally perform[ing] an unnecessary and destructive surgery” that “exceeded the scope of any consent to treatment granted by Seunarine” (Count IV);¹⁴ negligent infliction of emotional distress against Abba for performing the “invasive and unnecessary surgery” that resulted in pain and suffering to Seunarine, as well as “mental anguish and a constant fear of developing further medical problems” (Count V);¹⁵ negligence against RLSH under a theory of independent and vicarious liability for being “negligent in its policies, procedures, assignment of work, supervision of work, and recording keeping,” and “improperly training, hiring, and supervising its staff” (Count VI).¹⁶

⁹ Compl. ¶¶ 38-39.

¹⁰ Compl. ¶¶ 39-41.

¹¹ Compl. ¶ 41.

¹² Compl. ¶¶ 42-70 (Count I, asserting a claim for indemnification), 70-90 (Count II, asserting a claim for contribution).

¹³ Compl. ¶¶ 91-103.

¹⁴ Compl. ¶¶ 104-112.

¹⁵ Compl. ¶¶ 112-118.

¹⁶ Compl. ¶¶ 118-129.

With its Complaint, Royal Caribbean attached ten exhibits, labeled Exhibits A – J, and documents purportedly evincing Royal Caribbean’s compliance with the prerequisites for filing suit under the Virgin Islands Medical Malpractice Act.¹⁷ Additionally, Royal Caribbean asserts in the Complaint that the causes of action alleged in Counts III through VI “inure” to Royal Caribbean “[b]y virtue of Seunarine’s duly executed assignment of rights”¹⁸ and that “[r]ecords reflecting payment of the confidential settlement amount and Seunarine’s duly executed Assignment of Rights will be filed under seal, separately.”¹⁹ While the Court granted Plaintiff leave to file the settlement agreement between Seunarine and Royal Caribbean under seal by Order entered on September 21, 2016, the record does not reflect that the exhibit was actually filed.²⁰

Answers and Affirmative Defenses to Plaintiff’s Verified Complaint were filed by Abba and RLSH, on April 24, 2015, and May 22, 2015, respectively. On August 16, 2016, Defendants filed this Motion for Judgment on the Pleadings, to which Plaintiff filed a timely Opposition on September 14, 2016.²¹ Defendants timely replied on September 26, 2016.²²

STANDARD

According to the Supreme Court of the Virgin Islands, when reviewing a motion for judgment on the pleadings,

the [Superior] Court “‘views the facts alleged in the pleadings and the inferences to be drawn from those facts in the light most favorable to the plaintiff,’ and ‘[a] motion for judgment on the pleadings should not be granted unless the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law.’” ... [T]he Superior Court ... “may not ‘consider[] evidence from any source outside of the pleadings and the

¹⁷ See 27 V.I.C. § 166(i).

¹⁸ Compl. ¶¶ 98 (Count III), 107 (Count IV), 118 (Count V), 129 (Count VI).

¹⁹ Compl., p. 7 n. 2.

²⁰ See Pl.’s September 14, 2016, Mot. for Leave to file Exhibit Under Seal; September 21, 2016, Order (granting Royal Caribbean leave to file its settlement agreement with Seunarine under seal).

²¹ See August 23, 2016, Order (setting briefing deadlines).

²² *Id.*

exhibits attached to the pleadings in determining whether it was proper to grant a motion for judgment on the pleadings.”²³

Should the Court consider evidence constituting matters outside the pleadings, “the motion must be treated as one for summary judgment” under Fed. R. Civ. P. 56, which in turn requires the parties “be given a reasonable opportunity to present all the material that is pertinent to the [summary judgment] motion.”²⁴

When reviewing Defendants’ motion, the Court may consider the exhibits attached with Royal Caribbean’s Complaint. The Complaint refers to Royal Caribbean’s settlement agreement with Seunarine, and, though Royal Caribbean was granted leave to file the settlement agreement under seal, the record does not reflect that it was filed. Therefore, the Court need not address whether the settlement agreement constitutes a “matter outside the pleadings” so as to require conversion of the motion into one for summary judgment since no outside matters have been submitted in connection with Defendants’ Motion for Judgment on the Pleadings.

ANALYSIS

A. Prohibition against the assignment of medical malpractice claims.

Defendants argue that Royal Caribbean “cannot recover damages from Defendants based on its employee ... assigning his claim for medical negligence to [Royal Caribbean]” because the Virgin Islands Medical Malpractice Act “prohibits the assignment of a patient’s claim.”²⁵ In

²³ *United Corp. v. Hamed*, 64 V.I. 297, 305 (V.I. 2016) (citing *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 566 (V.I. 2012) (internal citations omitted).

²⁴ See FED. R. CIV. P. 12(d). The Supreme Court of the Virgin Islands has adopted the substance of FED. R. CIV. P. 12(d). See *United Corp.*, 64 V.I. at 306-307 (“While the Superior Court does have the discretion to consider evidence outside of the pleadings in ruling on a motion for judgment on the pleadings — and necessarily convert it to a motion for summary judgment, ... — it committed error by doing so in this case without first notifying the parties and providing United an opportunity to respond”) (citing *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 711 (V.I. 2011)) (internal citation omitted).

²⁵ Defs.’ Mot. for J. on the Pleadings, p. 2; See 27 V.I.C. § 166c.

opposition, Royal Caribbean argues its claims for indemnification and contribution are not “assigned claims,” but distinct causes of action that accrued in favor of Royal Caribbean when the liability of Abba and RLSH was extinguished through Royal Caribbean’s settlement with Seunarine.²⁶ Notably, Royal Caribbean does not address Defendants’ argument regarding Counts III – VI of the Complaint. Defendants argue that this automatically entitles them to a grant of judgment on these claims, but this conclusion belies the clear policy of the Supreme Court of the Virgin Islands against such rulings.²⁷ As a result, the Court will address all of Royal Caribbean’s claims when determining whether to grant or deny judgment on the pleadings.

Defendants are correct that 27 V.I.C. § 166c provides that “[a] patient’s claim for compensation under this subchapter is not assignable.” Applying the rules of statutory construction,²⁸ the plain text of Section 166c clearly refers to “this subchapter[,]” which is Subchapter IX of Chapter 1, Title 27 of the Virgin Islands Code, which, in turn, contains the statutory provisions of the Virgin Islands Medical Malpractice Act (“Act”).²⁹ “Patient” is defined

²⁶ Pl.’s Opp’n to Defs.’ Mot. for J. on the Pleadings, pp. 5-7.

²⁷ See *Vanterpool v. Gov’t of the V.I.*, 63 V.I. 563, 583-584 (V.I. 2015) (“[T]he fact that a summary judgment motion is deemed uncontested due to a procedural defect — such as not filing a timely opposition — is not grounds for accepting the moving party’s undisputed facts as true”); See also *People of the V.I. v. Armstrong*, 64 V.I. 528, 538 (V.I. 2016) (“This Court has consistently held that silence — without more — is not tantamount to consent or agreement ... [t]he failure to submit opposing papers is not tantamount to an affirmative concession that the facts alleged by [the] defendant are true.”) (citing *Najawicz v. People*, 58 V.I. 315, 325 n.6 (V.I. 2013)) (internal and other citations omitted).

²⁸ Statutory interpretation is governed by the “Rules of Construction.” 1 V.I.C. §§ 41 – 52. The Supreme Court of the Virgin Islands has described the standard for statutory interpretation, as follows:

“The first step when interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning. If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed. In analyzing a statutory scheme, we must give effect to every provision, making sure to avoid interpreting any provision in a manner that would render it — or another provision — wholly superfluous and without an independent meaning or function of its own. But even where a statutory scheme is plain and internally consistent, no statute should be read literally if such a reading is contrary to its objective [and] this Court must consider whether applying the statute’s literal language leads to ... absurd consequences or is otherwise inconsistent with the Legislature’s intent.”

In re L.O.F., 62 V.I. 655, 661 (V.I. 2015) (internal and other citations omitted).

²⁹ See 27 V.I.C. §§ 166 – 166l.

under Section 166(i) of the Act as “a natural person who receives or should have received health care from a licensed health care provider, under a contract, express or implied.”³⁰ The meaning of the term “assignable” in Section 166c must be read in its context and “construed according to the common and approved usage of the English language.”³¹ According to Black’s Law Dictionary, “assignable” means “[a]ble to be assigned; transferable from one person to another, so that the transferee has the same rights as the transferor had.”³²

The language “claim for compensation” under the Act in Section 166c is informed by Section 166(f), which explicitly defines malpractice as “*any tort or breach of contract based on health care or professional services rendered, or which should have been rendered by a health care provider, to a patient.*”³³ The United States Court of Appeals for the Third Circuit has construed this provision as expressing legislative intent for the Act “to cover all actions relating to the provision of medical care.”³⁴ This interpretation is consistent with Section 166d(a), which sets forth the statute of limitations for claims arising under the Act, stating, in pertinent part “[n]o claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered unless filed”³⁵

Considering the literal language of Section 166c, in the context of the statutory scheme as a whole, the provision clearly and unambiguously denotes that the right to bring an action for “any tort or breach of contract based on health care or professional services rendered, or which should

³⁰ 27 V.I.C. § 166(i).

³¹ See *Defoe v. Phillip*, 56 V.I. 109, 121 (V.I. 2012) (“[T]he Virgin Islands Legislature has instructed that ‘[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language,’ but that ‘[t]echnical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to their peculiar and appropriate meaning’”) (citing 1 V.I.C. § 42).

³² BLACK’S LAW DICTIONARY 135 (9th ed. 2009).

³³ 27 V.I.C. § 166(f) (emphasis added).

³⁴ *Abdallah v. Callender*, 1 F.3d 141, 145 (3d Cir. V.I. 1993).

³⁵ 27 V.I.C. § 166d(a).

have been rendered by a health care provider, to a patient”³⁶ vests only with the patient, who may not transfer his or her right to other person or entity.³⁷ This interpretation is consistent with the statutory scheme of the Act as a whole, as well as the historical purpose of the Act “to provide continuing medical care in the face of rising malpractice insurance costs and the unavailability of professional liability insurance resulting in the limitation and fear of cessation of medical practice in the islands.”³⁸ This construction of Section 166c is not contrary to legislative intent, nor does it does lead to absurd consequences. As a result, further inquiry is not necessary and the Court will apply the aforementioned literal interpretation of Section 166c.

In Counts III – V, Royal Caribbean asserts claims against Abba for ordinary and gross negligence, battery, and negligent infliction of emotional distress, while in Count VI, Royal Caribbean asserts a claim ordinary negligence against RLSH. All of these claims sound in tort and arise from the health care or professional services rendered, or which should have been rendered, by Abba and RLSH to Seunarine. Thus, Counts III – VI constitute unassignable medical malpractice claims, which may be brought only by the patient, Seunarine, who is not a party to this action.³⁹ As a result, even when construing the factual allegations of the Complaint in a light most favorable to Royal Caribbean, Defendants have demonstrated that there is no material issue of fact to resolve with respect to this issue. Consequently, a grant of judgment on Counts III – VI of the Complaint is warranted.

³⁶ 27 V.I.C. § 166(f) (emphasis added).

³⁷ This narrow interpretation should not be construed to encompass claims asserted by a patient’s beneficiaries after his or her death through a wrongful death or survivor action. *See* 5 V.I.C. §§ 76, 77; *See also* 27 V.I.C. § 166b(f) (“The recovery in an action for wrongful death of a patient shall be as provided in Title 5, section 76, Virgin Islands Code, and shall be subject to the same limitations on recovery as are provided for in this section”).

³⁸ *Brady v. Cintron*, 55 V.I. 802, 816 (V.I. 2011) (citing *Davis v. Omitowoju*, 883 F.2d 1155, 1159 n.5 (3d Cir. 1989)).

³⁹ *C.f. Abdallah*, 1 F.3d at 145 n.7 (“[A]n action for battery is based in tort. Therefore, because Count II is based in tort and is related to health care services rendered, the statute required its submission to the Review Committee prior to the initiation of suit”).

The prohibition against the assignment of medical malpractice claims does not apply to Counts I and II of the Complaint because the right of action on claims of implied indemnification and contribution inures to the indemnitee, not the patient.⁴⁰ In considering claims for indemnification and contribution, this Court has adopted the Restatement (Third) of Torts- Apportionment of Liability §§ 22 and 23.⁴¹ A claim of indemnity is defined, in pertinent part, as follows:

(a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:

- (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
- (2) the indemnitee
 - (i) was not liable except vicariously for the tort of the indemnitor, or

...

(b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.⁴²

Vicarious liability, such as that described in Section 22(a)(1)(2)(i), “is a method of extending tort liability beyond those directly and immediately negligent.”⁴³

⁴⁰ See Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, *2 (2016) (The rule generally recognized in most jurisdictions is that the cause of action for contribution or indemnity based upon tort is distinct from the cause of action for the underlying tort”); 41 AM. JUR. 2d Indemnity § 20, at 407 (2015) (“Implied indemnity claims are distinct, separate causes of action from any underlying contractual relationship between the parties”) (footnotes omitted); See also *Dublin v. V.I. Tel. Corp.*, 1978 V.I. LEXIS 17, *25 (V.I. Terr. Ct. 1978) (“The court agrees with the majority view that actions for indemnity and contribution are distinct from the underlying causes of actions on which they are based”); but see *Robbins v. Port of Sale, Inc.*, 62 V.I. 151, 158-159 (Super. Ct. 2015 March 6, 2015) (rejecting the Territorial Court’s conclusion in *Dublin*, 1978 V.I. LEXIS 17, that the statute of limitations for indemnity and contribution claims begins to run at the same time as the statute of limitations on the underlying tort or contract claim).

⁴¹ *Jacobs v. Roberts*, 2015 V.I. LEXIS 58, *8 (V.I. Super. Ct. May 21, 2015) (conducting an analysis mandated under *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) with respect to claims of indemnification and contribution and adopting the RESTATEMENT (THIRD) OF TORTS- APPORTIONMENT OF LIABILITY §§ 22 and 23 (3rd 2000) as the soundest rule for the Virgin Islands).

⁴² *Id.* at *5, 8 (citing RESTATEMENT (THIRD) OF TORTS- APPORTIONMENT OF LIABILITY § 22).

⁴³ *Paul v. Abramson Enters., Inc.*, 64 V.I. 269, 275-76 (Super. Ct. June 1, 2016) (citations omitted).

On the other hand, a claim of contribution differs from a claim for indemnity and is defined as follows:

- (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff.
- (b) A person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility.
- (c) A person who has a right of indemnity against another person under § 22 does not have a right of contribution against that person and is not subject to liability for contribution to that person.⁴⁴

In determining whether a claim is for indemnity or contribution in circumstances where a person is vicariously liable, the Restatement notes that “[e]xcept for contractual indemnity, a vicariously liable person can obtain indemnity from the person whose negligence was imputed only if the vicariously liable person is not independently liable[.]” while a person who is liable both vicariously and independently “may be entitled to contribution.”⁴⁵

Here, Royal Caribbean asserts that Seunarine, a seaman subject to federal admiralty law, developed “injuries and illnesses” during his service on Royal Caribbean’s vessel, and therefore was entitled to “maintenance and cure” under the general maritime law of the United States,⁴⁶ which obligated Royal Caribbean to provide Seunarine with medical care. Royal Caribbean alleges that, in so doing, it retained Abba and RLSH to provide medical treatment to Seunarine. The factual allegations further evince that, by performing “an unnecessary and aggressive destructive surgery” on Seunarine, Abba and RLSH were negligent. According to the Complaint, Royal Caribbean’s employment relationship with Seunarine rendered it vicariously liable for the tortious acts and

⁴⁴ *Jacobs*, 2015 V.I. LEXIS 58, at *6, 8 (citing RESTATEMENT (THIRD) OF TORTS- APPORTIONMENT OF LIABILITY § 23).

⁴⁵ RESTATEMENT (THIRD) OF TORTS- APPORTIONMENT OF LIABILITY § 23, cmt. e.

⁴⁶ *infra* n. 58 - 61.

omissions of Abba and RLSH, and that, based “solely” on its vicarious liability, Royal Caribbean entered into a settlement agreement with Seunarine, which in turn discharged the primary liability of Abba and RLSH. These factual allegations, when viewed in a light most favorable to Royal Caribbean, satisfy the essential elements of claims for indemnity and contribution against Defendants.

The claim for contribution is, of course, alternative to a claim for indemnity. While the Court is satisfied that factual allegations contained in the Complaint are sufficient to plausibly suggest Royal Caribbean was only vicariously liable for the acts and omissions of Defendants so as to state a claim for indemnity, the factual allegations evincing that Seunarine’s medical care with Defendants was arranged by Royal Caribbean also plausibly suggest the potential for a finding that Royal Caribbean is, to some extent, independently liable. As a purported indemnitee, Royal Caribbean has the right to bring an independent action for indemnity against Defendants, the purported indemnitors. Likewise, Royal Caribbean also has the right to bring an independent action for contribution against Defendants as joint-tortfeasors.

Defendants contend that Royal Caribbean should have made its claims for indemnity and contribution by filing a third-party complaint against Defendants in Seunarine’s action against Royal Caribbean. However, third-party practice in the Virgin Islands, which is guided by Fed. R. Civ. P. 14,⁴⁷ is not mandatory and “a party may refrain from impleading a third-party defendant in

⁴⁷ “Rule 14 governs the procedures and requirements of third-party practice. Rule 14 serves as a procedural mechanism for judicial efficiency by allowing parties to combine the third-party lawsuit with the first-party lawsuit. There are currently no applicable Virgin Islands statutes, Superior Court rules, or Virgin Islands Supreme Court ... that are directly on point regarding third-party practice. Courts and practitioners in this jurisdiction have long recognized the practice of impleading third-party defendants pursuant to Rule 14. [Further, i]t appears that, at this time, the Supreme Court continues to recognize third-party practice under Rule 14 in this jurisdiction. Thus, applying Rule 14 here is not a ‘mechanistic and uncritical reliance’ of the Federal Rules of Civil Procedure.” *In re Refinery Dust Claims*, 2016 V.I. LEXIS 48, *7-11 (V.I. Super. Ct. May 3, 2016) (internal and other citations omitted).

favor of asserting a claim in an independent action.”⁴⁸ Since Royal Caribbean may assert the claims for indemnity and contribution against Defendants in an independent action in its own right, Defendants’ arguments that there are no material issues of fact to resolve because the Virgin Islands Medical Malpractice Act prohibits the assignment of patient rights and that Royal Caribbean was required to implead Defendants in Seunarine’s lawsuit lack merit as to the indemnity and contribution claims.

B. Statute of limitations.

Defendants also argue that all of the causes of action asserted in the Complaint are barred by the statute of limitations.⁴⁹ “[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.”⁵⁰ Here, each Defendant’s Answer and Affirmative Defenses asserted a statute of limitations defense as to the Complaint as a whole.⁵¹ By affirmatively raising a statute of limitations defense in their first responsive pleadings, Defendants have not waived the defense as to any of Royal Caribbean’s causes of action, and the Court may consider that defense when determining Defendants’ Motion for Judgment on the Pleadings.⁵² In opposing Defendants argument that its claims are time-barred, Royal Caribbean only addresses its claims for indemnity and contribution, as set forth in Counts I and II of the Complaint.

⁴⁸ 6 CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE — CIVIL* § 1442, 344 (3d ed. 2010) (footnotes omitted); *See Fernandez v. Corporacion Insular De Seguros*, 79 F.3d 207, 210 (1st Cir. 1996) (“FED. R. CIV. P. 14(a) permits defendants to implead a joint tortfeasor, ... Rule 14 is not mandatory”) (internal citations omitted).

⁴⁹ Defs.’ Mot. for J. on the Pleadings, pp. 4-6.

⁵⁰ *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 536 (V.I. 2015) (citing SUPER. CT. R. 32(b)) (other citations omitted).

⁵¹ Def. Abba’s Affirmative Defenses, ¶ 7 (asserting that “[P]laintiff is barred from recovery herein due to the expiration of the applicable Statute of Limitations”); Def. RLSH’s Affirmative Defenses, ¶ 7 (asserting that “[P]laintiff is barred from recovery herein due to the expiration of the applicable Statute of Limitations”).

⁵² *Rennie*, 62 at 536-537.

a. Counts I and II.

With respect to Counts I and II of the Complaint, this Court has held that “the statute of limitations for contribution and indemnity in the Virgin Islands is not coterminous with the statute of limitations for the predicate tort; the causes of action for contribution and indemnity do not accrue at the time of the tort, but only when liability is discharged.”⁵³ The parties agree as to the applicability of this holding and submit arguments in terms of the two year statute of limitations period applicable to medical malpractice actions under 27 V.I.C. § 166d.⁵⁴

The dispute lies in when this two year statute of limitations on Royal Caribbean’s claims for indemnity and contribution commenced. Defendants contend that the statute of limitations for Royal Caribbean’s claims for indemnity and contribution commenced “when payment was made” to Seunarine by Royal Caribbean.⁵⁵ Since the last payment by Royal Caribbean was made on January 25, 2013, Defendants contend the statute of limitations expired on January 25, 2015, and that this action is time-barred because the Complaint was filed on March 18, 2015.⁵⁶ In contrast, Royal Caribbean argues the Complaint is timely because the statute of limitations for its claims for indemnity and contribution commenced on April 17, 2013, the date Royal Caribbean settled Seunarine’s lawsuit and discharged Royal Caribbean and Defendants’ liability.⁵⁷

The Court agrees with Royal Caribbean. As discussed, Royal Caribbean concedes that it was obligated to pay Seunarine maintenance and cure because Seunarine was a seaman whose

⁵³ *Robbins*, 62 V.I. at 158-159 (conducting an analysis mandated under *Banks*, 55 V.I. 967, with respect to the statute of limitations for claims of indemnification and contribution).

⁵⁴ Defs.’ Mot. for J. on the Pleadings, pp. 4-5; Pl.’s Opp’n to Defs.’ Mot. for J. on the Pleadings, pp. 7-9.

⁵⁵ Defs.’ Mot. for J. on the Pleadings, p. 4.

⁵⁶ Defs.’ Mot. for J. on the Pleadings, p. 5.

⁵⁷ Pl.’s Opp’n to Defs.’ Mot. for J. on the Pleadings, p. 8.

“injuries and illnesses” arose during his service on Royal Caribbean’s vessel.⁵⁸ As a result, “[t]he general maritime law of the United States” conferred on Seunarine the right to maintenance and cure, a “no-fault” remedy that is “neither subject to comparative or contributory negligence nor dependent upon the shipowner’s negligence[,]” that obligates the shipowner to provide:

“Maintenance[, which] has ... been described as the equivalent to food and lodging which a seaman is entitled to be paid while at sea[, and c]ure[, which] refers to a shipowner’s obligation to provide such medical care to such seamen during the period of recovery or rehabilitation from the illness or injury to the point of maximum recovery.”⁵⁹

Importantly, “a seaman’s right to receive, and the shipowner’s duty to pay, maintenance and cure is independent of any other source of recovery[.]”⁶⁰ Therefore, the payment of maintenance and cure by Royal Caribbean would not absolve Royal Caribbean of its potential vicarious liability for Defendants’ alleged medical malpractice, for which Seunarine was seeking damages in his lawsuit against Royal Caribbean.⁶¹

The statute of limitations for claims of indemnity and contribution begins to run “when the underlying claim, a judgment thereon, or a settlement thereof is paid or discharged.”⁶² The factual allegations in the Complaint suggest Royal Caribbean’s liability was not discharged until it settled with Seunarine. Royal Caribbean contends in its Opposition that the settlement agreement between

⁵⁸ “The general maritime law of the United States provides seamen who have become ill or injured while in a ship’s service with the right to maintenance and cure.” 70 AM. JUR. 2d Shipping § 305, at 587 (2005) (footnotes omitted).

⁵⁹ *Id.* at § 305, at 587, § 308, at 590-591 (footnotes omitted).

⁶⁰ *Id.* at § 308, at 591 (footnotes omitted).

⁶¹ Because “[t]he duty to provide a seaman with maintenance and cure includes the obligation to take all reasonable steps to ensure that the seaman, when he or she is injured or becomes ill, receives proper care and treatment[,]” courts have held shipowners vicariously liable for medical malpractice “by a private physician selected by the shipowner’s master or agent[.]” *Id.* at § 309, at 591-592, §334, at 614 (footnotes omitted). *See* Compl., Ex. H, “Seunarine Complaint.”

⁶² *See Robbins*, 62 V.I. at 156, 158 (adopting “the same rule as the majority of jurisdictions” in the United States, which is “that the cause of action for contribution or indemnity based upon tort is distinct from the cause of action for the underlying tort, and the time when the statute of limitations starts to run upon such cause of action is not when the tort is committed, but when the underlying claim, a judgment thereon, or a settlement thereof is paid or discharged”) (citing *Brunner*, *supra* n. 40, *2).

Royal Caribbean and Seunarine occurred on April 17, 2013.⁶³ While this date is not specifically stated in the factual allegations of the Complaint,⁶⁴ the Notice of Intention to File Claim, attached to the Complaint as Exhibit “A,” states that “Seunarine executed a release and Assignment in exchange for money damages” on April 17, 2013.⁶⁵ The Court finds this is sufficient to plausibly suggest that the statute of limitations on Royal Caribbean’s claims for indemnity and contribution did not commence until April 17, 2013. Consequently, Defendants have failed to establish there is no material issue of fact that Royal Caribbean’s claims for indemnity and contribution are time-barred.

Accordingly, the Court will deny Defendants’ Motion for Judgment on the Pleadings as to Counts I and II of the Complaint.

b. Counts III – VI.

As discussed, Royal Caribbean does not have the right to assert the medical malpractice claims, set forth in Counts III – VI of the Complaint, against Defendants. However, even assuming, *arguendo*, Royal Caribbean had a right of action, these claims are time-barred under the statute of limitations applicable to medical malpractice claims. 27 V.I.C. § 166d(a) provides, in pertinent part, that

No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect ... Provided, That any malpractice claim brought under this subchapter may be filed within two years of the last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the alleged act, omission or neglect; Provided further, That [sic] a toll of the statute of limitations shall operate for any period during which the health care provider had actual knowledge of any act, omission or neglect or knowledge of facts which would

⁶³ Pl.’s Opp’n to Defs.’ Mot. for J. on the Pleadings, p. 8.

⁶⁴ Royal Caribbean alleges in the Complaint that “[o]n or about May 21, 2013, [Royal Caribbean] and Seunarine reached a settlement agreement and filed a Stipulation of Dismissal with Prejudice.” Compl. ¶ 41.

⁶⁵ See Compl., Ex. A, “Notice of Intention to File Claim.”

reasonably indicate such act, omission or neglect which is the basis for a malpractice claim and failed to disclose such fact to the patient.

According to the Complaint, Royal Caribbean's medical malpractice claims stem from the surgery performed by Abba at RLSH on March 10, 2008.⁶⁶ It is alleged that Seunarine received treatment from another physician, Dr. Sheik Amir, on April 30, 2008, and "[o]n October 8, 2008, Dr. Manuel Viamonte, a board certified colorectal surgeon in Miami, Florida, performed a sphincteroplasty to correct the damage to the anal sphincter caused by the surgery performed by Abba."⁶⁷ These factual allegations suggest that "the date of the alleged act, omission or neglect" by Abba and RLSH was March 10, 2008, and that Seunarine knew of this purported malpractice when he received corrective surgery on October 8, 2008.

The factual allegations do not suggest, nor does Royal Caribbean argue, that the statute of limitations on Seunarine's medical malpractice claim was tolled under an exception to the statute of limitations under Section 166d(a) or an equitable tolling doctrine.⁶⁸ Moreover, the factual allegations clearly demonstrate that Seunarine possessed the critical facts regarding his medical malpractice claims in 2008, and, therefore, the statute of limitations on Seunarine's medical malpractice claims expired in 2010. As a result, Defendants have satisfied their burden of showing there is no material issue of fact that Seunarine's medical malpractice claims, as alleged in Counts III – VI of the Complaint, are time-barred. For this reason, a grant of judgment on Counts III – VI of the Complaint is also warranted on statute of limitations grounds.

⁶⁶ See Compl. ¶¶ 10-19.

⁶⁷ Compl. ¶¶ 20, 25.

⁶⁸ See *United Corp.*, 64 V.I. at 305-306 ("The discovery rule tolls the statute of limitations when, despite the exercise of due diligence, the injury or its cause is not immediately evident to the victim") (citing *Santiago v. V.I. Hous. Auth.*, 57 V.I. 256, 273 (V.I. 2012)); See, e.g. *Payne v. Government of the Virgin Islands*, 2002 V.I. LEXIS 18 (V.I. Terr. Ct. 2002); *Frederick v. Ellet*, 2014 V.I. LEXIS 5 (V.I. Super. Ct. 2014). See also *Warner v. Ross*, 164 F.App'x 218 (3d Cir. V.I. 2006); *Samuel v. Virgin Islands*, 2006 U.S. Dist. LEXIS 89744 (D.V.I. App. Div. 2006) (all applying the equitable tolling doctrine known as "the discovery rule" to medical malpractice actions).

The Court recognizes that the Supreme Court of the Virgin Islands has noted that “plaintiffs need not anticipate the statute of limitations or other affirmative defenses when they draft their complaints,” therefore the Court should, “at a minimum,” provide plaintiffs with an opportunity to amend the complaint before dismissing any claims as time-barred.⁶⁹ However, Royal Caribbean also does not have a right to assert Seunarine’s medical malpractice claims. Further, Royal Caribbean submitted no argument whatsoever in defense of Counts III – VI of the Complaint. Considering this, the Court finds granting Royal Caribbean an opportunity to amend Counts III – VI of the Complaint would be futile.⁷⁰ As a result, the Court will grant Defendants’ Motion for Judgment on the Pleadings as to Counts III – VI of the Complaint.⁷¹

⁶⁹ *Rennie*, 62 V.I. at 538 n. 5 (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)) (other citations omitted).

⁷⁰ When dismissing claims for failure to state a claim upon which relief can be granted, an opportunity to amend the complaint to cure any deficiencies is not warranted when amendment would be futile. *See James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *12-13 (V.I. Super. Ct. June 25, 2015) (“[D]espite these deficiencies in the complaint, the Court must grant [plaintiff] an opportunity to amend her complaint unless amendment would be futile”) (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)).

⁷¹ Since “[a] grant of a motion ... for judgment on the pleadings constitutes a final judgment on the merits of the controversy” and curative amendment would be futile, it is appropriate to dismiss Counts III – VI with prejudice. *See* 5C CHARLES ALAN WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE & PROCEDURE—CIVIL* § 1372, 276-277 (3d ed. 2004) (discussing motions for judgment on the pleadings under Fed. R. Civ. P. 12(c)); *Benjamin*, 56 V.I. at 562-563 (“The dismissal of a complaint for failure to state a claim is a final order”) (citing *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 187 (V.I. 2009)).

CONCLUSION

For the aforementioned reasons, Defendants' Motion for Judgment on the Pleadings will be granted in part as to Counts III – VI, but denied as to Counts I and II because Defendants have failed to show that there are no material issues of fact to resolve with respect to Royal Caribbean's claims for indemnity and contribution.

An Order consistent with this Memorandum Opinion shall follow.

Dated: December 16, 2016

ATTEST: Estrella George
Acting Clerk of Court

by:

For Lori Boynes-Tyson
Court Clerk Supervisor 12/21/16



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

CERTIFIED A TRUE COPY

DATE: Dec. 21, 2016
ESTRELLA H. GEORGE
Acting Clerk of the Court

By:


Camell A. Clarke
Court Clerk II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ROYAL CARIBBEAN CRUISES, LTD.,

Plaintiff,

vs.

**BONIFACE ABBA, M.D. and ROY LESTER
SCHNEIDER HOSPITAL,**

Defendant.

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) **CASE NO. ST-15-CV-119**
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ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Defendants' Motion for Judgment on the Pleadings is **GRANTED IN PART** as to Counts III – VI of the Complaint; and it is

ORDERED that Defendants' Motion for Judgment on the Pleadings is **DENIED** as to Counts I – II of the Complaint; and it is

ORDERED that Counts III – VI of the Complaint shall be **DISMISSED WITH PREJUDICE**; and it is

ORDERED that copies of this Order and accompanying Memorandum Opinion shall be directed to all counsel of record and the IT Division of the Superior Court of the Virgin Islands.

Dated: December 16, 2016

ATTEST: Estrella George
Acting Clerk of Court

by: [Signature]
Lori Boynes-Tyson
Court Clerk Supervisor 12/21/2016

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

CERTIFIED A TRUE COPY

DATE: Dec. 21, 2016
ESTRELLA H. GEORGE
Acting Clerk of the Court

By: [Signature]
Cameil A. Clarke
Court Clerk II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ROYAL CARIBBEAN CRUISES, LTD.,

Plaintiff,

vs.

**BONIFACE ABBA, M.D. and ROY LESTER
SCHNEIDER HOSPITAL,**

Defendant.

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) **CASE NO. ST-15-CV-119**
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ORDER

In the Scheduling Order entered on March 8, 2016, the Court directed the parties to complete mediation by October 28, 2016, and file a mediation report by October 31, 2016, but a review of the record indicates that the parties have failed to do so. Having resolved Defendants' Motion for Judgment on the Pleadings in a Memorandum Opinion issued on today's date, it is

ORDERED that the mediation deadline is extended and that the parties shall engage in mediation and submit a mediation report by **February 15, 2017**; and it is

ORDERED that copies of this Order shall be directed to all counsel of record and the IT Division of the Superior Court of the Virgin Islands.

Dated: December 16, 2016

ATTEST: Estrella George
Acting Clerk of Court

by: Lori Boynes-Tyson
Court Clerk Supervisor 12/21/2016

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

CERTIFIED A TRUE COPY
DATE: Dec. 21, 2016

ESTRELLA H. GEORGE
Acting Clerk of the Court

By: Cameil A. Clarke
Court Clerk II