

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

JOSEFA OLEA,

Plaintiff,

vs.

**VIRGIN ISLANDS TELEPHONE
CORPORATION d/b/a VIYA f/k/a
INNOVATIVE TELEPHONE,
CARIBBEAN COMMUNICATIONS CORP.,
d/b/a VIYA CABLE TV ST. THOMAS-ST. JOHN)
f/k/a INNOVATIVE CABLE TV
ST. THOMAS-ST. JOHN,
VIRGIN ISLANDS WATER AND
POWER AUTHORITY AND MLC HOLDINGS,
LLC d/b/a IMPORT SUPPLY,**

Defendants.

Case No. ST-16-CV-386

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on (1) Defendant Virgin Islands Telephone Corporation d/b/a VIYA f/k/a Innovative Telephone's Motion to Dismiss Plaintiff's Complaint, filed September 21, 2016 (the "Innovative MTD")¹ and (2) Defendant Caribbean Communications Corp.'s Motion to Dismiss Plaintiff's First Amended Complaint (the "CCC MTD" and collectively with the Innovative MTD, the "Motions to Dismiss").² Save for the substitution of different named defendants, the two

¹ Plaintiff filed her opposition on November 10, 2016 (the "Innovative Opposition") and Innovative filed their response on December 12, 2016 (the "Innovative Reply").

² Plaintiff filed her opposition on November 30, 2016 (the "CCC Opposition") and CCC filed their reply on December 14, 2016 (the "CCC Reply")

motions are identical.³ Therefore, this Court will address the two motions in a single Memorandum Opinion.

For the reasons set forth herein, the Motions to Dismiss will be denied.

Background Facts

On or about February 17, 2016, a utility pole located in the vicinity of the Ron de Lugo District Court Buildings, near the intersection of Taarneberg Gade and Norre Gade, broke apart and fell to the street below (the "Utility Pole"). When the Utility Pole fell, some or parts of it allegedly landed on a vehicle being operated by Plaintiff Josefa Olea ("Olea"), thereby destroying the vehicle and causing injuries to Olea. Olea filed this action charging Defendant Virgin Islands Telephone Corporation d/b/a VIYA f/k/a Innovative Telephone ("Innovative"), Defendant Virgin Islands Water and Power Authority ("WAPA") and Defendant MLC Holdings, LLC d/b/a Import Supply with negligence, gross negligence and negligent infliction of emotional distress.⁴ Olea later filed her First Amended Complaint (the "First Amended Complaint"), adding Defendant Caribbean Communications Corp. d/b/a VIYA Cable TV St. Thomas-St. John f/k/a Innovative Cable TV St. Thomas-St. John ("CCC") as an additional defendant. In their instant Motions to Dismiss, Innovative and CCC ask that the Court dismiss Olea's First Amended Complaint pursuant to Fed. R. Civ. P.

³ Both Defendants are represented by the same attorney.

⁴ Plaintiff Josefa Olea and Defendant MLC Holdings, LLC, d/b/a Import Supply have since settled their dispute and Olea's claims against MLC Holdings were dismissed with prejudice.

12(b)(6), or in the alternative, that the Court order Olea to replead her First Amended Complaint pursuant to Fed. R. Civ. P. 12(e).⁵

Legal Standard

I. V.I. R. Civ. P. 12(b)(6)

V.I. R. Civ. P. 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. Importantly, V.I. R. Civ. P. 8(a)(2) expressly states that the Virgin Islands is “a notice pleading jurisdiction” and that a plaintiff need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” The Reporter’s Note to V.I. R. Civ. P. 8(a)(2) further emphasizes that under the notice pleading approach, courts in the Virgin Islands should decline “to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief.”

II. V.I. R. Civ. P. 12(e)

Per V.I. R. Civ. P. 12(e), a party may “move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.”

Analysis

⁵ The Court notes that although the Motions to Dismiss were brought pursuant to the Fed. R. Civ. P., the Virgin Islands have since adopted the Virgin Islands Rules of Civil Procedure, as discussed in more detail, below.

I. Rule 12(b)(6)

Innovative and CCC bring the instant Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In analyzing a 12(b)(6) motion, the Supreme Court of the Virgin Islands has previously applied to this Court, through Superior Court Rule 7, the plausibility pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See, e.g., Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015). However, effective March 31, 2017 the Supreme Court adopted the Virgin Islands Rules of Civil Procedure, which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal Rules of Civil Procedure. *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017). As a result, “the plausibility standard has been abolished for proceedings in any . . . actions that were pending on March 31, 2017, unless the Supreme Court of the Virgin Islands specifies otherwise by order or the Superior Court makes an express finding that an injustice or infeasibility would result from the application of the Virgin Islands Rules of Civil Procedure.” *Carter v. Univ. of the V.I.*, 2017 V.I. LEXIS 129, at *4 (Super. Ct. July 31, 2017). Moreover, the Supreme Court has indicated that it regards the Reporter’s Note to Rule 8(a)(2), stressing that courts should now adopt “an approach that *declines* to enter dismissals of cases based on failure to allege specific facts which, if established, plausibly entitle the pleader to relief” (emphasis added) as binding, explaining:

[T]his Court was certainly aware of its prior precedents applying the plausibility standard, yet nevertheless chose to adopt a rule of civil procedure that expressly and unambiguously eliminated the plausibility standard, any precedents of this Court construing the former rule must

prospectively yield to the plain language of the new rule to the extent the new rule differs from the old rule.

Mills-Williams, 67 V.I. 574, n.6. See also *Augustin v. Hess Oil Virgin Islands Corp.*, 67 V.I. 488, 518 (Super. Ct. Aug. 23, 2017) (noting that in *Mills-Williams*, the Virgin Islands Supreme Court had indicated that the Reporter's Note to V.I. R. Civ. P. 8(a)(2) has the status of law).

First, the Court finds that application of the Virgin Islands Rules of Civil Procedure would not result in injustice or infeasibility in this matter. Olea's initial Complaint was filed on June 30, 2016, less than a year before the Supreme Court adopted the V.I. R. Civ. P. The subsequent First Amended Complaint was filed on August 9, 2016, just over six (6) months prior to the March 31, 2017 adoption of the Rules. Since the adoption of the V.I. R. Civ. P., the Superior court has repeatedly applied the notice pleading standard to matters filed prior to adoption. See *Bank of Nova Scotia v. Flavius*, 2018 V.I. LEXIS 14, at *4 (finding that application of the more liberal notice pleading standard would not be infeasible or work an injustice in a matter filed ten months prior to the adoption of the V.I. R. Civ. P.); *Gifford v. V.I. Tel. Corp.*, 2018 V.I. LEXIS 55, at *6 (finding that application of the notice pleading standard was appropriate in a matter filed four months before adoption of the Rules); *Toutouyoute v. St. Croix Trading Co.*, 2018 V.I. LEXIS 56, at *2, n.1 (Super. Ct. May 31, 2018) (applying the notice pleading standard to a matter filed five months prior to adoption). Further, "both this Court and the United States Supreme Court have recognized that there is a strong preference for trial courts to decide doubtful cases

on their merits rather than dismiss them for a failure to strictly follow purely procedural rules.” *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011). The Court finds that, all things considered, applying the more liberal notice pleading standard articulated in V.I. R. Civ. P. 8(a) to the instant matter “would not be infeasible or work an injustice” per V.I. R. Civ. P. 1-1(c). Therefore, the notice pleading standard as set forth in V.I. R. Civ. P. 8(a)(2) and applied in *Mills-Williams* will control here.

Olea brought her instant Action for Damages on three claims: (i) negligence, (ii) gross negligence and (iii) negligent infliction of emotional distress.⁶ Olea further asked the Court to award punitive damages, as well as costs and fees, including attorney’s fees. In the Motions to Dismiss, Innovative and CCC argue that (i) Olea has failed to state plausible claims for either negligence or gross negligence and (ii) has failed to allege the type of behavior required to state a claim for punitive damages. Further, Innovative and CCC suggest that Olea is statutorily banned by Virgin Islands law from recovering an award of attorney’s fees and ask that this prayer be stricken from the First Amended Complaint. The Court will address each issue in turn.

⁶ The Motions to Dismiss make no mention Olea’s claim of Negligent Infliction of Emotional Distress.

A. Negligence

“‘[T]he foundational elements of negligence’ are: ‘(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff.’” *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 409 (V.I. 2016) (quoting *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014)). Olea asserts that Innovative and CCC (as well as WAPA), as regulated utilities in the Virgin Islands, “owed a duty to the general public to provide utility services in a safe and careful manner.” First Am. Compl. ¶ 8. Olea claims that Innovative and CCC breached that legal duty of care when they “negligently and carelessly”

(a) failed to properly design, construct, inspect, maintain, repair, and/or replace the Utility Pole; (b) overloaded the Utility Pole with attachments, thereby rendering it top-heavy and unsafe and more susceptible to breakage and collapse; (c) failed to properly hire, supervise and train their employees in the proper design, construction, inspection, maintenance, repair and replacement of their utility poles; and (d) failed to adequately warn the public of the dangerous condition of the Utility Pole.

First Am. Compl. ¶ 17. Olea further claims that as a direct and proximate result of Innovative and CCC’s negligence, she suffered both property damage and personal injuries in the incident, including mental pain and anguish. First Am. Compl. ¶ 18. Lastly, Olea asserts that as a direct and proximate result of Innovative and CCC’s negligence she has incurred ongoing medical and related expenses, as well as the inability for her to return to her regular occupation. First Am. Compl. ¶ 20-21.

“Under notice pleading, there is a very low threshold to determine whether a complaint states a claim.” *Gifford*, 2018 V.I. LEXIS 55, at *9 (citing *Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995)).

“[A] complaint should provide factual allegations sufficient to advise the responding party of the transaction or occurrence on which the claim is based and identify the claim, reciting its elements, so as to enable the defendant to respond intelligently and to enable the Court to determine on a motion to dismiss under V.I. R. Civ. P. 12(b)(6) whether the claim is adequately pled.”

Oxley v. Sugar Bay Club & Resort Corp., 2018 V.I. LEXIS 81, at *10 (Super. Ct. May 14, 2018). A complaint will survive “so long as it ‘adequately alleges facts that put an accused party on notice of claims brought against it.’” *Mills-Williams*, 67 V.I. at 585, (quoting *Brathwaite v. H.D.V.I Holding Co.*, 2017 V.I. LEXIS 76, at *3 (Super. Ct. May 24, 2017)). “A bare allegation of negligence satisfies notice pleading standard. *See, e.g., Fua Mai Jiang*, 199 F.R.D. at 272 (stating that a bare allegation of discrimination satisfies notice pleading standards).” *Gifford*, 2018 V.I. LEXIS 55, at *9. In her First Amended Complaint, Olea has set forth sufficient allegations to put Innovative and CCC on notice of the negligence claim against them.⁷

B. Gross Negligence

The Supreme Court of the Virgin Islands has not yet defined gross negligence or established what elements a plaintiff must prove to succeed on a claim of gross negligence.⁸ As a result, the Superior Court must conduct a three-part analysis

⁷ Innovative and CCC also have sufficient notice that their alleged liability is shared with WAPA.

⁸ “However, the Supreme Court has implicitly recognized the concept of gross negligence as distinctly higher level of culpability deviating from that of ordinary negligence. *See, e.g., Francis v. People of the Virgin Islands*, 56 V.I. 370,

consistent with the Supreme Court's holding in *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011), before adopting a particular rule. In *Yusuf v. Ocean Props.*, 2016 V.I. LEXIS 19 (Super. Ct. Mar. 7, 2016), the Superior Court conducted such an analysis to determine the best definition of gross negligence for the Virgin Islands. "The *Yusuf* court found that the standard laid out in *Tutein v. Parry*, 48 V.I. 101, 107 (Super. Ct. Oct. 24, 2006), constitutes the soundest rule of law for the Virgin Islands." *Libien v. MIFR, Inc.*, 2016 V.I. LEXIS 193, at *13 (Super. Ct. Nov. 28, 2016). Per *Yusuf*, to prevail on a claim of gross negligence, a plaintiff must prove "wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property." *Yusuf*, 2016 V.I. LEXIS 19, at *11-12. "[A]ny mere mistake resulting from inexperience, excitement, or confusion' will not constitute gross negligence; instead, there must be 'more than mere thoughtlessness or inadvertence, or simple inattention.'" *Libien*, 2016 V.I. LEXIS 193, at *14 (quoting *Yusuf*, 2016 V.I. LEXIS 19, at *13). As it did in *Libien*, this Court finds that the *Yusuf* court determined the soundest rule for defining gross negligence in the Virgin Islands and as a result, the Court adopts *Yusuf's* analysis as though it were set forth in this Opinion.

Accordingly, to state a claim for gross negligence, a plaintiff must establish the following elements: "1) defendant owed plaintiff a legal duty of care; 2) defendant breached that duty in such a way as to demonstrate a wanton, reckless indifference

382 (V.I. 2012) (citations omitted) (finding that gross negligence may constitute an independent, intervening cause while ordinary negligence may not)." *Nicholas v. Damian-Rojas*, 2018 V.I. LEXIS 66, at *3-4 (Super. Ct. June 23, 2018).

to the risk of injury to plaintiff; 3) and defendant's breach constituted the proximate cause of 4) damages to plaintiff." *Yusuf*, 2016 V.I. LEXIS 19, at *13.

Incorporating the elements of her negligence claim to establish duty of care, Olea further asserts that Innovative and CCC knew or should have known of the dangerous condition posed by the Utility Pole and that, as they were aware of the possible danger the Utility Pole presented to passersby, Innovative and CCC's conduct in failing to repair the Utility Pole was indeed "wanton, reckless . . . in complete and utter disregard for human life and safety and an extreme departure from the ordinary standard of care." First Am. Compl. ¶ 22-24. Olea also alleges that Innovative and CCC's grossly negligent conduct led to the loss of her vehicle and caused her to suffer personal injury and extreme physical and mental pain. First Am. Compl. ¶ 25.

Again, as the Virgin Islands is now a notice pleading jurisdiction, Olea has set forth the elements of gross negligence and offered allegations sufficient to put Innovative and CCC on notice of the claim against them. *Contra Brathwaite*, 2017 LEXIS 76, at *7, (finding that a Plaintiff who failed to specifically allege the elements for gross negligence in his complaint had failed to state a claim for gross negligence under the notice pleading standard.)

C. Punitive Damages

Innovative and CCC argue that Olea has failed to allege sufficient facts required to support a claim for punitive damages. Olea's prayer for relief states, in relevant part, "Plaintiff prays for Judgment against Defendants . . . as follows:

compensatory, special and punitive damages in an amount to be proven at trial [and] costs and fees, including attorney's and expert fees" First Am. Compl. ¶ 9.

Although "a claim for punitive damages may be the target of a motion to dismiss," *Acosta v. Hovenssa, LLC*, 53 V.I. 762, 780 (D.V.I. 2010),

[t]he Supreme Court of the Virgin Islands has made it clear that a 'claim' for punitive damages is not a separate cause of action, but rather an aspect of a plaintiff's prayer for relief that is properly considered only in the context of evaluating damages. *See, e.g., Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 783 n.6 (V.I. 2015) (quoting *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 176 n.5 (V.I. 2012)).

Yusuf, 2016 V.I. LEXIS 19, at *2.

The Superior Court conducted a *Banks* Analysis in *Segura v. Meyer*, 2014 V.I. LEXIS 130 (V.I. Super. 2014), to determine the best rule for the Virgin Islands regarding the standard of conduct necessary to garner an award for punitive damages. The *Segura* Court adopted the RESTATEMENT (SECOND) OF TORTS § 908(2) as the best rule for the Virgin Islands. Section 908(2) provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Libien v. MIFR, Inc.*, 2016 V.I. LEXIS 193, *18-19. This Court adopts the same standard.

Here, Olea has alleged and sufficiently pled the elements for a claim of gross negligence, which includes an element of wanton or reckless indifference to the risk of injury to plaintiff. The claim for punitive damages has a similar element: conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. *Id.* Thus, Olea has pled facts sufficient to withstand a motion

to dismiss in a notice jurisdiction. Therefore, the claim for punitive damages will survive the motions to dismiss.

II. Rule 12(e)

Innovative and CCC also argue that the Complaint should be dismissed because Olea has failed to separate her negligence claims against Innovative, CCC and WAPA. V.I. R. Civ. P. 10(b) requires, *inter alia*, that a party “must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.” The Reporter’s Note to Rule 10 specifies that “[Rule 10(b)] . . . states the preference for achieving clarity in multi-count or multi-defense cases by having each claim founded on a separate transaction or occurrence – and each defense other than a denial – stated in a separate count or defense.” The court in *Crawford v. Bobeck* found that, in a case against multiple defendants, the plaintiff “must specifically name the defendants in each count in order to apprise the defendants of which claims they should be prepared to defend.” 2016 V.I. LEXIS 12, at *1 (Super. Ct. Feb. 4, 2016). Likewise, in *Libien* this Court found that the complaint in a matter involving multiple defendants must “delineate which acts are attributable to each named Defendant.” 2016 V.I. LEXIS 193, at *9. In both *Crawford* and *Libien*, the court ordered the plaintiffs to amend their complaints to clarify the claims. However, in both *Crawford* and *Libien*, the plaintiff referred to the collective defendants as “Defendants”, rather than by name, thus making it impossible to determine which individual parties were being referenced. *Crawford v.*

Boback, 2016 V.I. LEXIS 12, at *7 (“the actions of the Defendants . . .”); *Libien*, 2016 V.I. LEXIS 193, at *9 (“the vast majority of Count I and all of Count II of the First Amended Complaint refer to Defendants in the plural form . . .”)

Here, Olea has specifically named each individual co-Defendant in the applicable counts of the First Amended Complaint. “10. Defendants, Innovative, CCC and WAPA carelessly, negligently, and/or unlawfully constructed, operated, inspected, and/or maintained” First Am. Compl. ¶ 10. “17. Defendants, Innovative, CCC and WAPA breached their legal duty of care to Plaintiff in that, among other things” *Id.* ¶ 17. In *Gifford*, the plaintiff also addressed the co-defendants by name in each applicable count: “Defendants, WAPA and INNOVATIVE, and each of them, did not properly” 2018 V.I. LEXIS 55, at *7 (quoting from the complaint.) The court in *Gifford* found that this form of pleading was sufficient to give each of the parties notice of plaintiff’s negligence claim and denied defendant’s motion for a more definite statement. This Court likewise finds that Olea’s First Amended Complaint was properly pleaded to give the Defendants notice of Olea’s claims against them and therefore no further amendment of the First Amended Complaint is necessary.

III. Attorney’s Fees

Finally, Innovative and CCC argue that Olea’s prayer for an award of attorney’s fees must be stricken from the Complaint on statutory grounds. 5 V.I.C. Ann. Tit. § 541(b) provides that “the award of attorney’s fees in personal injury cases is prohibited unless the court finds that the complaint filed or the defense is

frivolous.” Further, for the purposes of the section, 5 V.I.C. Ann. Tit. § 541(c) defines “frivolous” as “(i) without legal or factual merit; or (ii) for the purpose of causing unnecessary delay; or (iii) for the purpose of harassing an opposing party.” Innovative and CCC assert that there is no suggestion “particularly at this stage in the proceedings” that Olea’s claim meets the frivolity standard. Innovative Mot. to Dismiss 16. However, this Court has already established that the time for determining whether a complaint or defense is frivolous is at the time of judgment, not at the pleading stage. *Percival v. Overbeek*, 2016 V.I. LEXIS 158, at *10 (Super. Ct. Sep. 27, 2016). *See, e.g., Adams v. North West Co., Inc.*, 63 V.I. 427, 445 (Super. Ct. Oct. 6, 2015) (refusing to strike plaintiff’s request for attorney’s fees in a personal injury case because it was “too early to know if the complaint or defense is frivolous.”) Therefore, Innovative and CCC’s plea that Olea’s prayer for attorney’s fees be stricken will be denied.

Conclusion

The Court finds that Olea has sufficiently pleaded the elements for negligence and gross negligence to put Innovative and CCC on notice of the claims against them. Further, the Court finds that has pled sufficient facts to support a claim for punitive damages. Therefore, Defendant Innovative’s Motion to Dismiss Plaintiff’s First Amended Complaint and Defendant CCC’s Motion to Dismiss pursuant to V.I. R. Civ. P. 12(b)(6) will both be denied.

The Court finds that Olea’s First Amended Complaint is properly crafted and gives the parties notice of the claims brought against them. Thus the Court will deny

Innovative and CCC's request that Olea be ordered to amend her First Amended Complaint under V.I. R. Civ. P. 12(e).

Finally, the Court will reserve decision on Olea's request for attorney's fees until a more appropriate time, such as at judgment.

An Order consistent with this Memorandum Opinion will be entered.

DATED: October 2, 2018



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

BY:



LORI BOYNES TYSON
Chief Deputy Clerk 10/3/18

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ST. THOMAS-ST. JOHN,
VIRGIN ISLANDS WATER AND
POWER AUTHORITY AND MLC HOLDINGS,
LLC d/b/a IMPORT SUPPLY,

Defendants.

Case No. ST-16-CV-386

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

ORDER

FOR THE REASONS set forth in the Memorandum Opinion entered on this day, it is hereby

ORDERED that the Motion To Dismiss filed by Defendant Virgin Islands Telephone Corporation d/b/a VIYA f/k/a Innovative Telephone is **DENIED**;

ORDERED that Motion To Dismiss filed by Defendant Caribbean Communications Corp. is **DENIED**; and it is further

Olea v. Innovative et al.
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Order
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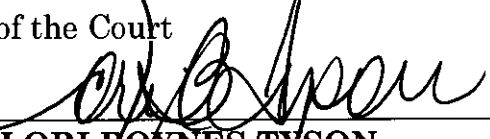
ORDERED that copies of this Order and the Memorandum Opinion shall be directed to counsel of record.

DATED: October 2, 2018



Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: 

LORI BOYNES TYSON
Chief Deputy Clerk 10/3/18