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

MICHILLE A. TURNBULL, **Plaintiff,** vs. **UNIVERSITY OF THE VIRGIN ISLANDS, BOARD OF TRUSTEES OF THE UNIVERSITY OF THE VIRGIN ISLANDS, AND DR. LAVERNE E. RAGSTER, IN HER CAPACITY AS PRESIDENT OF THE UNIVERSITY,** **Defendants.**	)	CASE NO. ST-07-CV-239 ACTION FOR BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION AND DAMAGES

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff Michille A. Turnbull's Motion for Summary Judgment (filed August 30, 2011), and Defendants' Cross-Motion for Summary Judgment (filed September 20, 2011). For the reasons set forth herein the Plaintiff's Motion will be denied and the Defendants' Cross Motion will be granted in part and denied in part.

I. Background

In 2006, Plaintiff Michille A. Turnbull was a paralegal officer at the Hearing and Appeals Unit in the Virgin Islands Department of Labor. She had completed a legal assistant certificate program at the University of the Virgin Islands (UVI) in 1997, but was seeking an opportunity to improve her credentials. On May 16, 2006, the Department of Labor received a fax entitled "AAS Paralegal Studies Paradigm (Part-Time), 01/16/06." The document contained a chart that showed a four-semester course plan, including courses in paralegal studies, English, mathematics, and communications. The document also contained an instruction to select seven of nine listed electives in paralegal studies, half of which did not have defined course numbers. The Commissioner of Labor's secretary, Ms. Jenelle Gumbs, collected the fax and shared a copy with Turnbull. The paradigm had no accompanying explanation or cover sheet and Turnbull neither knew who had sent the fax nor why.[1]

Armed with the paradigm, Turnbull called the Social Science Division at UVI and spoke with a Ms. Dickinson, whom Turnbull understood to be the Division's administrative assistant. Turnbull says Dickinson confirmed the existence of the paralegal degree program, answered her questions about applying her previously completed UVI credits toward the degree, described the fees associated with the degree, and instructed her to apply for admission. Turnbull submitted an application for admission to UVI on or about May 18, 2006. In addition to providing her personal

[1] The fax machine itself had printed the sender's fax number as well as the text: "UVI SOCIAL SCIENCES." In her affidavit, UVI Professor Aletha Baumann explained that the Division of Humanities and Social Sciences in 2005 had "solicited volunteers from throughout the [legal] community to participate on a Legal Studies Committee to review and design various legal studies degree programs." The Committee first met on September 28, 2005, and sometime later that year it "reviewed and approved a 64-credit curriculum" for an Associate of Applied Science (AAS) degree in paralegal studies (which constituted an expansion of the previous ten-course legal assistant certificate on offer). The Division approved the degree on January 19, 2006, the University's Curriculum Committee approved the degree on March 23, 2006, and the entire faculty approved in April or May 2006. The faculty transmitted the approved degree plans to the Provost on May 5, 2006. The Provost approved the courses related to the degree but decided that the degree plan itself required approval by the University Cabinet and the Board of Trustees, neither of which ever took action on the matter. Baumann also explained that throughout the process draft paradigms and other informational documents were distributed to Committee members and "other persons interested in the progress of the Committee's work." Defendants speculate that these occasional distributions are the source of the May 2006 fax to the Department of Labor.

information on the application, Turnbull checked the box next to "AA" in the list of available undergraduate degrees and handwrote "PAR" on the line for her "Intended Major." By letter dated July 14, 2006, UVI offered Turnbull admission. UVI's letter of acceptance appears to be a form letter but, immediately above the signature block, it included the following text: "Major: Paralegal." The letter made no other mention of Turnbull's specific degree plan and offered her "matriculation to the University" generally. The letter was signed by Robert Fontaine, Registrar and Director of Admissions. Until at least January 2007, Turnbull's online account at UVI, where she could review her course registration and unofficial transcript, continued to list her major as "paralegal."

Turnbull did not review the UVI catalog or seek out additional program information online during the application process. The UVI catalog at the time did not include an associate degree in paralegal studies.[2] Nor did the catalog include a bachelor's degree[3] or any other degree in which a paralegal major was permitted. The catalog's primary reference to paralegal studies at UVI came in the course listings, where the catalog indicated fourteen paralegal studies courses available to students.[4]

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[2] Associate of Arts degrees were available in the following majors: Accounting, Business Management, Computer Information Systems, Hotel & Restaurant Management, Inclusive Early Childhood Education, and Police Science & Administration. Associate of Science degrees were available in the following majors: Nursing, Computer Science, and Physics. An Associate of Applied Science degree was available in Process Technology.

[3] Bachelor's degrees in the Humanities and Social Sciences Division included majors in: Communication, English, Humanities, Music Education, Psychology, Social Sciences, Social Work, and Speech Communication & Theater.

[4] Including: PAR 111. Introduction to the Legal System; PAR 112. Criminal Law and Procedure; PAR 114. Family Law; PAR 117. Legal Research and Writing; PAR 118. Advanced Legal Research and Writing; PAR 119. Torts; PAR 120. Business Organizations; PAR 215 Wills, Trusts, and Estate Planning; PAR 216. Real Property; PAR 221. Contracts; PAR 222. Civil Litigation; PAR 223. Computer Applications in a Legal Environment; PAR 250. Paralegal Internship; PAR 251. Paralegal Seminar.

After receiving her admissions letter, Turnbull called Professor Aletha Bauman for a "pre-evaluation" and course planning. Professor Bauman is a professor of psychology and was the 2005-2006 chair of the Humanities and Social Sciences Division. Baumann says in her affidavit that she spoke with Turnbull during the summer of 2006 and informed her then that UVI had not yet approved the paralegal program. Turnbull denies that Baumann or anyone else ever informed her that there was no paralegal program at UVI, but rather says that Baumann approved her course plan. On July 28, 2006, Baumann sent Turnbull an e-mail with her course plan attached. The e-mail read: "Here is your plan to complete the AAS in Paralegal Studies by May 2007. As soon as the Board of Trustees approves the degree, Ms. Dickinson will contact you and give you the name of your advisor." The attachment was titled "Michille Turnbull, Graduation Plan for AAS in Paralegal Studies" and included a list of courses in paralegal studies, some of which had checkmarks next to them to indicate that Turnbull had already completed them during her prior UVI enrollment, as well as a list of courses to be taken during the 2006-2007 academic year. The list was substantially similar, but not identical, to the degree paradigm that Turnbull received at the Department of Labor. The document concluded with the following text: "Prepared by Aletha Baumann, Ph.D., July 28, 2006." Turnbull enrolled in courses according to the degree plan for both the fall 2006 and spring 2007 semesters.

Professor Malik Sekou replaced Baumann as Administrative Chair in August 2006. In his affidavit, Sekou says that he repeatedly told Turnbull during the fall semester of 2006 that the paralegal program had not yet been approved. However, he also says he told her that the degree would most likely be offered in May 2008 based on an "academic master plan schedule." In contrast, Turnbull says that she heard a rumor in the middle of the fall semester that the Board had not approved the program and further says that other students were starting to withdraw from the university due to the rumor. Turnbull says she approached Professor Sekou about the rumor and that he advised her to continue with her coursework as scheduled.

Believing she would have completed all the degree requirements by the end of the spring semester of 2007, Turnbull submitted an application for graduation to the registrar. That application was denied in February 2007 because the paralegal degree had not yet been approved. Turnbull says Ms. Dickinson told her at that time that the Board would meet before graduation to consider approving the paralegal degree, but this never happened. As graduation approached and no degree was forthcoming, Turnbull filed the instant case. Originally asking for an injunction, the Court declined to intervene in the 2007 graduation. Turnbull since amended her complaint to include counts of breach of contract (count I) and negligent misrepresentation (count II) and asked the Court to award compensatory damages, including damages for emotional disturbance, as well as punitive damages. She moved for summary judgment on August 30, 2011, and Defendants cross-moved for summary judgment on September 20, 2011.

II. Analysis

Each party now moves for summary judgment pursuant to Fed. R. Civ. P. 56 (as incorporated by Super. Ct. R. 7). To succeed, each party must demonstrate "that there is no genuine dispute as to any material fact [such that the party] is entitled to judgment as a matter of law." *Id.* In analyzing these motions, the Court must "view all inferences from the evidence in the light most favorable to . . . the nonmoving party and take [its] allegations as true if properly supported." *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014) (citing *Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013)). Because both Turnbull and UVI have moved for summary judgment, the Court must, when considering each of their particular motions, draw inferences in favor of the other party. However, the nonmoving parties still must offer at least some evidence from which to draw an inference; the parties "may not rest upon mere allegations." *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). "[T]he mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way." *Saldana v. Kmart Corp.*, 43 V.I. 361, 368 (3d Cir. 2001).

A. Breach of Contract

To succeed on her breach of contract claim, Turnbull must demonstrate 1.) the existence of an agreement; 2.) a duty created by that agreement; 3.) a violation of that duty; and 4.) damages caused by the violation. *United Corp. v. Tutu Park, Ltd.*, 55

V.I. 702, 707 (V.I. 2011) (citing *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 134-35 (V.I. 2009)). UVI appears to concede that its relationship with Turnbull is contractual, Opp. to Pl.'s Mot. for Summ. J. and Defs' Cross-Mot. for Summ. J. at 9, so the Court will not here review the record for element one. UVI also concedes the putative breach, i.e. that it did not award Turnbull a degree in paralegal studies. Therefore, the key element for review here is whether there existed a contractual duty to award such a degree. This analysis is remarkably simple because the evidence in the record is deeply ambiguous and frequently contradictory. In order to obtain summary judgment, the record must be so lopsided that a reasonable fact-finder could not plausibly find for the other side, but both parties here have offered enough evidence in this case to render summary judgment inappropriate on this key question.

Unlike with most commercial contract claims, neither party has produced a closed, comprehensive writing governing the rights and obligations of each party. In the presence of a written contract with unambiguous terms, it would be possible for the Court to assess contractual duties as a matter of law. *United Corp. v. Tutu Park, Ltd.*, 55 V.I. at 707. Instead, the contours of the agreement between Turnbull and UVI must be assessed according to a collection of documents, such as the UVI catalog, Turnbull's acceptance letter, etc., as well as testimony concerning other forms of communication between Turnbull and UVI representatives, all of which require fact-intensive weighing of credibility and inferences of meaning to determine what the relevant contractual obligations actually were.

UVI says that awarding an associate degree in paralegal studies upon completion of adequate coursework was not part of the agreement with Turnbull; Turnbull contends the opposite. A reasonable fact-finder could infer that the absence of a degree program or major in paralegal studies in the university catalog, the e-mail from Baumann stating that the degree was not yet approved, and testimony from university officials and faculty that they advised Turnbull that no such program yet existed are creditable, taken alone or taken together, as evidence that UVI never promised to award an associate degree in paralegal studies. On the other hand, a reasonable fact-finder could note how Turnbull's application to the university was expressly for entry into an associate degree program in paralegal studies, further observe how UVI accepted that application, not only without disabusing her of her idea that such a program existed,[5] but affirmatively confirming her status as a paralegal major (despite now asserting that no such major existed at the time), and infer that UVI had made a binding promise. A reasonable fact-finder could also credit Turnbull's testimony that UVI officials and faculty advised her that the paralegal program was, or would be, available to her if she enrolled. There is an abundance of conflicting evidence that must be weighed and balanced in order to assess the precise details of the relationship between Turnbull and UVI – an exercise that is inappropriate at the summary judgment stage; it is up to the ultimate fact-finder to

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[5] Even if, as UVI points out, it did not affirmatively write "associate degree" on the acceptance letter.

decide which testimony and documents to credit at trial. Therefore, summary judgment will be denied to both sides as to breach of contract (count I).

B. Negligent Misrepresentation and the Economic Loss Rule

To succeed on her negligent misrepresentation claim, Turnbull must demonstrate that 1.) Defendants supplied her with false information for her guidance; 2.) that they did so in the course of their employment; 3.) that they failed to exercise reasonable care or competence in obtaining or communicating the information; 4.) that Turnbull justifiably relied on the information; and 5.) that Turnbull's reliance caused pecuniary harm. *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146 (V.I. Super. Ct. Dec. 18, 2015).[6]

As a preliminary matter, the Board and Laverne Ragster, then President of the University, argue that summary judgment is inappropriate as to them specifically because Turnbull has not offered evidence that the Board or Ragster, as opposed to UVI itself via its other agents, made any representations at all. The Court agrees. The only acts evidenced in the record that plausibly qualify as cognizable misrepresentations originate with the admissions office, registrar's office, and the

[6] Although the Court is not aware of any authoritative statement of the law of negligent misrepresentation in the Virgin Islands post-dating *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014), the Court is persuaded that Judge Francois's *Banks* analysis in *Merchants* is sound and adopts her holding as its own here.

faculty. Therefore, the Court will enter partial summary judgment against Turnbull and dismiss her claims against the Board and Ragster.

Turning to Turnbull's motion as applied to UVI and UVI's cross-motion, the Court finds that, as with the breach of contract claim, the record is too mixed to justify summary judgment. Drawing inferences in favor of Turnbull, a fact-finder could reasonably credit Turnbull's testimony that UVI officials advised her that there was, or would be, an associate degree in paralegal studies at UVI and that same fact-finder could infer that her reliance on those statements in enrolling at UVI, even in the face of other signs to the contrary, was justified. Furthermore, the fact-finder could easily find that the remaining elements of negligent misrepresentation were satisfied: that the statements were false (UVI itself insists there never was a paralegal degree), that UVI officials gave the advice in the course of their work, and that those UVI officials should have known that UVI had not approved the paralegal degree. But, drawing inferences in favor of UVI, the testimony of UVI officials that they told Turnbull there was no paralegal degree (including Baumann's e-mail to that effect) plus the absence of the degree from the catalog could certainly lead a reasonable fact-finder to conclude that Turnbull's reliance on other statements to the contrary without further investigation was not justifiable. Therefore, the Court will not enter summary judgment for either side on the strength of the evidence in the record.

However, UVI argues that even if Turnbull could demonstrate all the elements of negligent misrepresentation, recovery should be denied as a matter of law according to the economic loss doctrine. "The economic loss doctrine forbids a party from suing or recovering in tort for economic or pecuniary losses that arise only from breach of contract or are associated with the contract relationship." 74 Am. Jur. 2d *Torts* § 24. The modern rule is a judicially created doctrine that originated with the California Supreme Court's decision in *Seely v. White Motor Co.*, 63 Cal. 2d 9 (Cal. 1965), and found a champion in the United States Supreme Court admiralty decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The Third Circuit has applied the rule extensively since then, notably in *Aloe Coal Co., v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987); *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604 (3d Cir. 1995); and *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002). These earliest cases tended to involve defective products where the alleged harm was primarily to the defective product itself and the doctrine today most cleanly fits this sort of product liability case; indeed, it finds its clearest expression in the restatements in the Restatement (Third) of Torts: Product Liability § 21 (1998). However, the doctrine has since expanded by analogy to include non-products liability cases. R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1802 (2000).

The Court is not aware of any binding Virgin Islands authorities that expound the scope and applicability of the economic loss doctrine in this jurisdiction. Therefore, it is incumbent on the Court to establish the rule for the Virgin Islands' nascent common law, pursuant to *Banks v. International Rental & Leasing Corp.*, 55

V.I. 967 (V.I. 2011), and *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014). *Banks* and *Connor* encourage a three-step analysis to guide the common law-making process: first, the Court should "ascertain whether any . . . local courts have considered the issue" of the economic loss rule's applicability and scope "and rendered any reasoned decisions upon which litigants may have grown to rely." *Connor*, 60 V.I. at 603. Second, the Court should take notice of the "position taken by a majority of courts from other jurisdictions" and consider "the potentially different ways that other states and territories have" applied the economic loss rule. *Id.* Finally, the Court must, in light of the findings from the Virgin Islands and elsewhere, determine and adopt the best and most appropriate rule "based on the unique characteristics and needs of the Virgin Islands." *Id.*

In fact there are two *Banks* questions lurking here: whether to apply the economic loss doctrine in the Virgin Islands at all and then, whether and how the doctrine applies to the particular negligent misrepresentation claim at bar. The prior question is easily answered. Virgin Islands courts have a modest but unmistakable history of applying the doctrine. *See Whitecap Inv. Corp. v. Putnam Lumber & Exp. Co.*, 2013 U.S. Dist. LEXIS 39062 (D.V.I. March 21, 2013); *Ringo v. Southland Gaming of the U.S.V.I., Inc.*, 2010 V.I. Lexis 62 (V.I. Super. Ct. Sep. 22, 2010); *Addie v. Kjaer*, 51 V.I. 507, 515-16 n. 5 (D.V.I. 2009) (dicta only). *Cf. Davis v. Ragster*, 49 V.I. 932, 944-45 (D.V.I. 2008). Moreover, the doctrine in one form or another has been adopted by most common law jurisdictions in this country. Danielle Sawaya, Note, *Not Just for Products Liability: Applying the Economic Loss Rule Beyond its Origins*, 83 Fordham L. Rev. 1073, 1076 (2014); Barton, *supra*, at 1800-01. And the same public policy goal that originally motivated the doctrine is equally applicable in the Virgin Islands, namely, to honor and enforce the allocation of risk to which the parties have agreed previously and to maintain analytical clarity between different areas of law, i.e. to prevent "contract law [from] drown[ing] in a sea of tort." *East River Steamship Corp.*, 476 U.S. at 866. Virgin Islands courts should and will continue to apply the doctrine when appropriate.

The closer question concerns whether and how the doctrine applies to the negligent misrepresentation claim here. Unlike most other torts, "economic loss," or pecuniary loss, is an inherent part of the definition of negligent misrepresentation (see above) and following the broadest possible application of the doctrine would eviscerate the entire cause of action. Barton, *supra*, at 1823-25. Therefore, the oft-cited idea that "economic losses may not be recovered in tort absent physical injury or property damage," *e.g.*, *Addie*, 51 V.I. at 515-16 n. 5, would go too far as a bright line rule in the negligent misrepresentation context. Turning again to the *Banks* factors, Virgin Islands courts applied the doctrine to negligent misrepresentation claims in *Addie* and *Ringo*, although neither opinion acknowledged any special considerations for applying the doctrine to a negligent misrepresentation claim. However, across the country there are as many different applications and exceptions as there are jurisdictions. Some jurisdictions have carved out an exception to the economic loss rule for fraud and negligent misrepresentation claims entirely, Barton, *supra*, at 1803-05, 1814-16; some have limited the economic loss rule strictly to products liability cases, *e.g.*, *Tiara Condo Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013); some have created an exception where the defendant's business itself consisted of information provision, Barton, *supra*, at 1816-19; and some have limited the rule to cases where there is privity between the parties. *Id.* at 1819-22. Notably, the Third Circuit in *Duquesne Light Co.* applied the privity distinction in predicting Pennsylvania law. Still others make no exception of any sort for negligent misrepresentation claims. Barton, *supra*, at 1822-25. The list of potential rules and sub-rules is vast because all the possible unique factual permutations in this complex area of law are legion. This counsels against adopting a bright-line rule for what should involve a fact-intensive, case-by-case approach; the economic loss rule should not be applied to negligent misrepresentation cases mindlessly or mechanistically. Rather, the eccentricities of each case may counsel different conclusions for different reasons at different times. It would be inappropriate, and inconsistent with common law practice, for the Court to elaborate all the possible exceptions to the economic loss doctrine as applied to negligent misrepresentation when the facts of Turnbull's case do not implicate them.

In Turnbull's case, the Court is persuaded that the doctrine should not apply. Almost all the key case law in this area concerns commercial transactions (especially sales and product defects) and the judicial reasoning has been colored by this context. For example, in justifying its application of the doctrine to a negligent misrepresentation claim, the Third Circuit explained that:

> where there is privity in contract between two parties, and where the policies behind tort law are not implicated, there is no need for an additional tort of negligent misrepresentation. Breach of contract, promissory estoppel, unjust enrichment, and other contract or quasi-contract remedies all protect parties *who negotiate and reduce their agreement to writing.*

Duquesne Light Co., 66 F.3d at 620 (emphasis added). The Third Circuit's reasoning demonstrates why the doctrine is ill-suited to the present case. Although a university degree certainly holds economic or pecuniary value, the relationship between a student and a university is not fundamentally commercial. Neither party here has alleged or even hinted that there was an arms-length negotiation concerning the terms of the contract nor have the contract terms been reduced to a well-defined writing or writings. Therefore, because there is no evidence that the parties have allocated the risks of their bargain contractually, nor reason to think that they should have, the Court finds that the economic loss doctrine is fundamentally ill-suited to this case and will not enter judgment for UVI on that ground.

C. Punitive Damages

Finally, UVI asks the Court to enter partial summary judgment against Turnbull and hold that Turnbull may not recovery punitive damages since UVI is a government instrumentality. The United States Supreme Court in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 (1980) observed that "[j]udicial disinclination to award punitive damages against [public entities] has persisted to the present day in the vast majority of jurisdictions" and Virgin Islands courts have extended immunity from punitive damages to a number of governmental entities since, including the Water and Power Authority, *Powell v. V.I. Water and Power Authority*, 20 V.I. 579 (D.V.I. 1984), the Port Authority, *Codrington v. V.I. Port Authority*, 33 V.I. 245 (D.V.I. 1996), and the Housing Authority, *Concepcion v. V.I. Housing Authority*, 47 V.I. 112 (V.I. Super. Ct. 2005). In each instance, the reasoning was the same: it would be inappropriate to apply punitive damages, which by their nature punish and deter rather than compensate, when the population whom the punishment is meant to protect will also be the population that ultimately pays for the punitive damages through higher taxes and fees. Turnbull has not offered any opposition to this argument and the Court sees no relevant distinction between UVI on the one hand and the Water and Power Authority, Port Authority, and Housing Authority on the other. If the Court were to punish UVI, the costs would pass to the taxpayer and to the student – exactly those whom punitive damages ought to protect from bad behavior at UVI. Therefore, the Court will enter partial summary judgment with respect to Plaintiff's claim for punitive damages against UVI.

III. Conclusion

The evidentiary record is too mixed for the Court to enter judgment as a matter of law on Turnbull's claims against UVI for breach of contract and negligent misrepresentation in their entirety. However, the Court will enter judgment on

Turnbull's negligent misrepresentation claim against the Board and Ragster because Turnbull has not offered evidence that either party made any false statements. The Court will also enter partial summary judgment insofar as punitive damages against UVI are disallowed as a matter of public policy. An appropriate Order will accompany this Memorandum Opinion

DATED: March 2, 2016

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:
DONNA DONOVAN
Court Clerk Supervisor 3/3/2016