IN THE SUPREME COURT
OF THE VIRGIN ISLANDS
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IN THE SUPREME COURT OF THE VIRGIN ISLANDS

KENRICK ROBERTSON, Appellant/Plaintiff, v. **BANCO POPULAR DE PUERTO RICO, AMERICAN INTERNATIONAL INSURANCE CO., and ATLANTIC SOUTHERN INSURANCE CO.,** Appellees/Defendants.	**S. Ct. Civ. No. 2022-0026** Re: Super. Ct. Civ. No. 330/2013 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Renee Gumbs-Carty

Argued: October 11, 2022
Filed: March 24, 2023

Cite as: 2023 VI 3

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Kenrick Robertson, Esq.
St. Thomas, U.S.V.I.
Pro se,

Lisa M. Komives, Esq.
Dudley Newman Feuerzeig, LLP
St. Thomas, U.S.V.I.
Attorney for Appellee Banco Popular de Puerto Rico,

Ann Cecile O'Neill, Esq. (argued)
GS Law Offices, P.C.
St. Croix, U.S.V.I.

Eugenio W.A. Geigel-Simounet, Esq.
Law Offices of Wilfredo A. Geigel
St. Croix, U.S.V.I

Attorneys for Appellee American International Insurance Co.,

Mark D. Hodge, Esq.
Hodge & Hodge
St. Thomas, U.S.V.I
Attorney for Appellee Atlantic Southern Insurance Co.,

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Kenrick Robertson appeals the Superior Court's April 22, 2022 order entering summary judgment in favor of Appellees Banco Popular de Puerto Rico ("Banco Popular"), American International Insurance Co. ("American International"), and Atlantic Southern Insurance Co. ("Atlantic Southern") (collectively "the Appellees"). He also appeals from another Superior Court order, also issued on April 22, 2022, denying as moot his motion to hold the Appellees in contempt for failure to comply with discovery deadlines. For the reasons that follow, we reverse the order granting summary judgment and, as a result, necessarily also vacate the order entered on the same date denying Robertson's discovery sanctions motion as moot. This litigation is remanded for further proceedings consistent with this opinion.

I. BACKGROUND

¶ 2 Around June 1992, Robertson opened a bank account with Banco Popular. As part of a promotion, Banco Popular offered a free year of coverage under an accidental death insurance policy. After the one-year free period of coverage ended, Robertson authorized Banco Popular to debit his bank account $6.00 per month to continue having the accidental death insurance policy in force.

¶ 3 In December 2012, Robertson requested an English copy of his policy from Banco Popular. However, Banco Popular informed Robertson that his policy was cancelled. Robertson asserts

that Banco Popular provided him with conflicting explanations, first advising him that the policy had been cancelled after the one-year free policy period but later stating that it cancelled the policy around 1998.

¶ 4 Robertson filed suit against Banco Popular, American International, and Atlantic Southern in the Superior Court in September 2013. He alleged that the Appellees breached contractual obligations, breached fiduciary duties they owed him, and converted funds that belonged to him. Initially, Robertson was represented by counsel but on January 30, 2018, Robertson, who is an attorney, began representing himself.

¶ 5 During the litigation, Robertson attempted on multiple occasions to get responses to his interrogatories from the Appellees. The Appellees requested various extensions of time to answer Robertson's interrogatories, to which Robertson agreed. However, when the Appellees continuously failed to respond to his interrogatories, on October 26, 2020, Robertson filed a document captioned "Order to Show Cause Why Defendants Should be Held in Contempt of Court," in which he requested that the Superior Court hold the Appellees in contempt for their failure to comply with the discovery deadlines.

¶ 6 After other proceedings not relevant to this appeal, the Appellees filed a notice with the Superior Court on May 7, 2021, in which they advised that they had made an offer of judgment to Robertson pursuant to Rule 68 of the Virgin Islands Rules of Civil Procedure, which provides in pertinent part that "if the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the offeror's costs incurred after the offer was made," including attorney's fees. V.I. R. CIV. P. 68(d)-(e). Because Robertson did not accept the Appellees' offer of judgment in writing within fourteen days, the offer was deemed withdrawn by operation of Rule 68(b) of the Virgin Islands Rules of Civil Procedure.

¶ 7 On May 27, 2021, the Superior Court held a status conference at which it stated that the purpose was primarily to determine the amount in dispute. (J.A. 250.) Banco Popular stated that the maximum amount Robertson could recover was $1,440 but stated that Robertson was not entitled to recover that amount. Robertson did not agree with the amount and argued that there was still interest to account for. Banco Popular countered by offering $3,000 to account for the interest. However, Robertson stated that there needed to be more discovery to determine how much damages he was owed. Nevertheless, the Superior Court stated that there was no more time for discovery, and that the case needed to be settled that day. The Superior Court told Banco Popular to issue a $3,000 check.

¶ 8 Later that same day, the Appellees filed a joint motion for summary judgment, in which they stated that they had mailed a check to Robertson in the amount of $3,000. The Appellees represented that "[t]his payment is not a settlement offer that requires [Robertson's] acceptance" but that "without admitting liability, or [Robertson's] entitlement to any sums, this payment is voluntarily made by Banco Popular to pay to [Robertson] a sum that exceeds any awardable damages, and to thereby terminate the case." The Appellees represented that Robertson's maximum damages were only $2,675.70, a figure which they arrived upon based solely on multiplying $6.00 a month from January 1998 through December 2012 and adjusting for interest. According to the Appellees, their payment of $3,000 negated the required element that Robertson have suffered damages, and therefore dismissal of the complaint with prejudice was thus appropriate.

¶ 9 On May 28, 2021, the Superior Court entered an order directing that Robertson respond to the joint motion no later than June 28, 2021. On that date, Robertson timely filed an opposition, which contended that the Appellees' motion had been premature because the parties had not yet

conducted discovery. In addition, Robertson asserted that he had not only sued the Appellees for breach of contract, but also brought claims for breach of fiduciary duty and conversion, and that a payment of $3,000 was not sufficient to compensate him for his damages, particularly since punitive damages could potentially be awarded for those tort claims.

¶ 10 The Appellees filed a reply to Robertson's opposition on July 2, 2021, asserting that the summary judgment motion was properly before the Superior Court despite their failure to respond to Robertson's interrogatories because he did not comply with the provisions of Virgin Islands Rule of Civil Procedure 56(d), which permits the nonmovant to file an affidavit or declaration explaining why a party cannot present the facts necessary to justify filing an opposition to a summary judgment motion. With respect to Robertson's contention that he had also brought claims for conversion and breach of fiduciary duty, the Appellees asserted that Robertson had never pled a request for punitive damages in his complaint and also contended—for the first time—that in any event his tort claims were barred by the so-called "gist of the action" doctrine that the United States Court of Appeals for the Third Circuit had predicted would be adopted by this Court, *see Addie v. Kjaer*, 737 F.3d 854 (3d Cir. 2013), and which had since been applied by the Superior Court in various other cases.

¶ 11 On April 22, 2022, the Superior Court entered an order granting the Appellees' joint motion for summary judgment, agreeing with them that the gist of the action doctrine barred Robertson's tort claims, and – with respect to his breach of contract claim – determined that Robertson "has been made whole" by the $3,000 payment, opining that it "would be a monumental waste of judicial resources" to allow the matter to proceed further. In a separate order also entered on April 22, 2022, the Superior Court construed Robertson's "Order to Show Cause" as a motion and denied it as moot because "the action has been resolved on May 27, 2021, upon the Defendant Banco

Popular having tendered a check in the amount of Three Thousand Dollars ($3,000) satisfying all damages."

¶ 12 Robertson timely filed his notice of appeal with this Court on May 3, 2022. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 13 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's April 22, 2022 orders resolved all of the claims between the parties, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 14 This Court exercises plenary review over all questions of law, including the grant or denial of motions for summary judgment, and reviews finding of fact for clear error. *See St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007).

B. Summary Judgment

¶ 15 In his appellate brief, Robertson contends, on various grounds, that the Superior Court erred when it granted the Appellees' joint motion for summary judgment. As this Court previously explained,

> A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379–80 (V.I. 2014). A drastic remedy, a court should only grant summary judgment when the "pleadings, the discovery and disclosure materials on file, and any affidavits, show

> there is no genuine issue as to any material fact." *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). Once the moving party has identified the portions of the record that demonstrate no issue of material fact, "the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in his favor." *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (internal citations and quotation marks omitted). The non-moving party "may not rest upon mere allegations, [but] must present actual evidence showing a genuine issue for trial." *Williams*, 50 V.I. at 194. Further, the reviewing court must consider the record evidence in the light most favorable to the non-moving party. *Machado*, 61 V.I. at 379.

Rymer v. Kmart Corp., 68 V.I. 571, 575-76 (V.I. 2018). We address each of Robertson's claims in turn under this standard.[1]

1. Breach of Contract

¶ 16 To establish a cause of action for breach of contract, a plaintiff must demonstrate "(1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages." *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 621 (V.I. 2017). In its April 22, 2022 order, the Superior Court agreed with the Appellees that the fourth element—damages—had not been met as a result of the Appellees issuing a $3,000 check to Robertson on May 27, 2021. Because the Superior Court committed multiple serious errors in arriving at this result, we reverse its grant of summary judgment to the Appellees on Robertson's breach of contract claim.

¶ 17 While not directly raised by the parties, we note that the transcript of the May 27, 2021 status conference reveals that the Superior Court stated that it wanted "to settle this today," J.A. 267, that "[w]e cannot go back" to addressing Robertson's discovery motion because "we're here today" and "we're not going to go through this process of discovery and interrogatory" because

[1] Robertson asserts in his appellate brief that the Superior Court erred by granting summary judgment without weighing the six factors set forth in *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505 (V.I. 2010). However, in his reply brief, Robertson concedes that the *Halliday* factors have no applicability to this case since the *Halliday* decision itself states that they apply only when a Superior Court judge is determining whether to dismiss a case for failure to prosecute.

"[i]t's too much time, money, paper" and "too much of a waste of the Court's resources, their time, money, everything, just for this small amount of money," J.A. 269-70, and expressly telling Robertson, on multiple occasions, that he had to "[a]ccept the money and move on." (J.A. 270-71.) Moreover, the Superior Court told counsel for Banco Popular to "[c]ut him a check today," and—after Robertson responded that he is "not going to accept the check just like that"—announced that "[t]he matter will be dismissed after [the bank] cuts the check" and directing Banco Popular's counsel to notify it once he did so. (J.A. 271.)

¶ 18 While the Virgin Islands Rules of Civil Procedure permit a judge to hold a pretrial conference for the purpose of "facilitating settlement," *see* V.I. R. CIV. P. 16(a)(5), this provision certainly "does not sanction efforts by trial judges to effect settlements through coercion," including through "pressure tactics," for Rule 16 "was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise." *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (discussing directly analogous provisions of FED. R. CIV. P. 16); *see also Brooks v. Great Atlantic & Pacific Tea Co.*, 92 F.2d 794, 796 (9th Cir. 1937) ("The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged."). Based on its comments appearing in the record, it appears the Superior Court (1) prejudged Robertson's lawsuit as only involving a small amount of money despite his protests to the contrary; (2) declined to consider the merits of a motion that Robertson had duly filed with it because it would take "too much time" and be a "waste" of its resources and the "time" and "money" of opposing counsel; (3) ordered Robertson to "accept the money" despite him repeatedly refusing to settle the matter; and (4) announcing that it would dismiss the matter "after [the bank] cuts the check," regardless of whether Robertson accepts the payment and notwithstanding the fact that no motion to dismiss or for summary judgment had yet

been filed. This is particularly problematic given that the status conference occurred approximately three weeks after the Appellees had made an offer of judgment to Robertson pursuant to Rule 68 of the Virgin Islands Rules of Civil Procedure, which Robertson had rejected by allowing the fourteen-day period for acceptance to expire. The "excessive zeal" of the Superior Court to force a settlement in this case, over Robertson's repeated objections, thus itself constitutes sufficient reason to vacate the April 22, 2022 summary judgment order.[2] *See Kothe*, 771 F.2d at 670.

¶ 19 Although the actions of the Superior Court at the May 27, 2021 status conference warrant vacatur of its April 22, 2022 order, the issue of whether the Appellees' unilateral tender of a $3,000 check to Robertson negates the damages element of his breach of contract claim will almost certainly recur on remand. Therefore, "in the interests of judicial economy," we exercise our discretion to consider this issue on the merits "in order to provide guidance to the Superior Court." *Garcia v. Garcia*, 59 V.I. 758, 772 (V.I. 2013).

¶ 20 We conclude that the Superior Court erred when it determined that the unilateral tender of a $3,000 check to Robertson caused him to "ha[ve] been made whole, when the easily calculated damages amounted to $2,675.80, including interest." Like the Appellees, the Superior Court viewed Robertson's damages as being limited only to the $6.00 per month, plus interest, that had

[2] Of course, "[n]o error or defect in any ruling or order or in anything done or omitted by the Superior Court . . . is ground for granting relief or reversal on appeal where its probable impact . . . is sufficiently minor so as to not affect the substantial rights of the parties." V.I. R. APP. P. 4(i). However, because the Superior Court effectively forced the parties to settle the case on its terms, we believe its actions constitute a structural error that obviates harmless error analysis. *See Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 319-20 (V.I. 2014) (examining the differences between structural errors and trial errors, including emphasizing that structural errors "defy analysis by harmless error standards") (collecting cases). And even if this were not the case, there is a high probability—for reasons that we explain below—that Robertson could receive a recovery greater than $3,000 if he succeeds even on just his breach of contract claim, let alone his tort claims.

been debited from his account from January 1998 to December 2012 for an accidental death insurance policy that had already been cancelled without his knowledge. Even if we were to assume *arguendo* that this is the case, the Superior Court ignored the fact that, if Robertson were to prevail, he would be entitled to an award of costs from the Appellees, which would include

> (1) Fees of officers, witnesses, and jurors;
> (2) Necessary expenses of taking depositions which were reasonably necessary in the action;
> (3) Expenses of publication of the summons or notices, and the postage when they are served by mail;
> (4) Compensation of a master as provided in Rule 53 of the Federal Rules of Civil Procedure;
> (5) Necessary expense of copying any public record, book, or document used as evidence on the trial; and
> (6) Attorney's fees as provided in subsection (b) of this section.

5 V.I.C. § 541(a)(1)-(6). Notably, Robertson had been represented by counsel from the filing of his complaint in September 2013 to January 30, 2018, when he elected to proceed *pro se*. By their own admission, the Appellees and the Superior Court based the $2,675.80 figure only on the $6.00 per month debits plus interest; there is absolutely no indication whatsoever that this figure took into consideration any of the recoverable costs set forth in section 541, including the attorney's fees Robertson incurred during the nearly five years he had been represented by retained counsel. Not only is there no evidence in the record of what those costs amount to, but it is extraordinarily unlikely that these costs would have been equal to or less than the $324.20 difference between the $3,000 check and the $2,675.80 representing the debit charges plus interest. *See Mahabir v. Heirs of George*, 75 V.I. 369, 375-77 (V.I. 2021) (analyzing the factors that the Superior Court must consider in awarding attorney's fees under section 541). In fact, by entering summary judgment against Robertson and in favor of the Appellees, the Superior Court essentially provided the

Appellees with a windfall by making them the prevailing party, thus precluding Robertson from seeking costs and attorney's fees pursuant to section 541.[3]

¶ 21 But even putting aside the issue of costs, including attorney's fees, the Superior Court erred by adopting a very narrow view of Robertson's potential damages for his breach of contract claim. Typically, "[a] plaintiff claiming a breach of contract has available and need not choose between three types of damages—actual, consequential, and benefit-of-the-bargain."[4] *Catroppa v. Metal Bldg. Supply, Inc.*, 267 S.W.3d 812, 817 (Mo. Ct. App. 2008). Certainly, $2,675.80 could very well represent Robertson's out of pocket loss for the period from January 1998 to December 2012. This premise ignores, however, the nature of the contract: that Banco Popular would debit $6.00 from Robertson's account and *in exchange provide him with an insurance policy covering accidental death*. In other words, the Appellees not only debited $6.00 from Robertson's bank

[3] It is for this reason that in the rare cases where a court has found that the damages element has been negated after the filing of a complaint due to the defendant unilaterally providing the plaintiff with the complete relief sought in the complaint, courts have consistently determined that the remedy is not a judgment in favor of the defendants, but a judgment in favor of the *plaintiff*, given that the plaintiff has obtained a complete victory by fully attaining the relief sought in the complaint. *See, e.g., Geisman v. ZocDoc, Inc.*, 909 F.3d 534, 542 (2d Cir. 2018) ("[W]here a defendant surrenders to complete relief in satisfaction of a plaintiff's claims, the district court may enter default judgment against the defendant—even without the plaintiff's agreement thereto—and then, after judgment is entered, the plaintiff's individual claims will become moot.") (internal citations and quotation marks omitted); *Nev. State Educ. Assoc. v. Clark Cnty. Educ. Ass'n*, 482 P.3d 665, 676 (Nev. 2021) ("Generally, when a defendant offers to pay the full amount of a plaintiff's claim, the court should enter judgment for the plaintiff and against the defendant, even over the plaintiff's objections.").

[4] The forms of damages available to a breach of contract plaintiff represent an issue of common law that this Court has not yet had the opportunity to determine pursuant to the *Banks* framework. The issue in this case, however, is not what damages Robertson is actually entitled to for his breach of contract claim, but what damages he could potentially receive were he to prevail on that claim at trial, given that the Appellees' sought summary judgment on the ground that their $3,000 offer of payment exceeds any possible judgment that Robertson could obtain for breach of contract.

account each month, but also deprived him of the benefit of the bargain: an accidental death insurance policy.

¶ 22 Of course, Robertson did not accidently die during this period. But the loss of a contracted-for insurance policy itself constitutes harm, and the lifetime cost difference between the cancelled policy and the cost of a substitute policy is certainly an additional measure of damage for the formerly insured. *See Ill. Bankers' Life Assur. Co. v. Payne*, 62 S.W.2d 315 (Tex. App. 1933) ("[I]f the insured can secure insurance of like character and value to that canceled, the measure of damages would be the difference between the costs of carrying the insurance which was canceled for the term stipulated, and the cost of the new insurance at the rate she would then be required to pay for a like term."); *see also Weber v. Blue Cross of Mont.*, 643 P.2d 198, 203-04 (Mont. 1982) ("If the insured can secure insurance of a like character and value to that cancelled, the difference between the cost of carrying the cancelled insurance for the term stipulated and the cost of new insurance for a like term would be his measure of damage."). This measure of damages recognizes the reality that insurance rates are typically determined according to a wide variety of risk factors, including but not necessarily limited to the insured's age, health, occupation, and whether the insured is obtaining a new policy or renewing an existing policy. Thus, while Robertson was able to obtain accidental death insurance in 1998 at a cost of $6.00 per month, the record is silent as to what it might have cost Robertson to obtain equivalent accidental death insurance in December 2012; it may very well be the case that a substitute accidental death insurance policy could cost more than $6.00 per month, provide less favorable benefits, or both.

¶ 23 Also, the Superior Court failed to consider that the discovery process, were it to proceed to a natural conclusion without further obstruction by the Appellees, could very well change the damages available to Robertson. "An important purpose of discovery is to reveal what evidence

the opposing party has" to reduce the information disparity between a plaintiff and a defendant. *Comput. Task Grp, Inc. v. Brotby*, 364 F.3d 1112, 1117 (9th Cir. 2004). While discovery is not intended to serve as a "fishing expedition," it may very well be the case that a plaintiff will discover new damages, or identify new causes of action after having the opportunity to obtain discovery from the defendant. *See Palmer v. United Press*, 73 N.Y.S. 456, 460 (N.Y. App. Div. 1901). To give one possible example, if discovery revealed that Banco Popular knew that the insurance policy would terminate after the free year expired at the beginning of 1998, yet nevertheless induced Robertson to agree to have $6.00 debited from his account for insurance that he would never receive, Robertson could assert a new cause of action for fraud.[5]

¶ 24 Last, but certainly not least, the Superior Court overlooked the fact that "many plaintiffs have multiple purposes in pursuing litigation" besides recovering money, and the legal system may be used to further such purposes "so long as the merits of their claim, viewed objectively, are supported by a good faith belief that the allegations are well founded and not frivolous." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 581 (5th Cir. 2008). As one court recently observed,

> Lawsuits don't have to be about money, or just about money. Some plaintiffs who sue over use of a dangerous product have as a goal getting the product off the market; some of those who sue because they have been abused by the police hope the offending officer will be fired and want to try to force permanent change; some persons who get unwanted robocalls and sue for money also want to put an end to the defendant's robocalling business even if their own injury is minimal. Those aren't improper purposes.

See Mullen v. GLV, Inc., 2022 WL 4534789, at *3 (N.D. Ill. Sept. 28, 2022).

[5] At oral argument, counsel for the Appellees maintained that Robertson had always been insured and that the policy had not been cancelled by them. However, because we hear this case on appeal from a grant of summary judgment to the Appellees, we must consider the disputed facts in the light most favorable to Robertson.

¶ 25 Even if this Court were to assume *arguendo* that the Superior Court and the Appellees are correct that Robertson's damages for breach of contract could under no circumstances ever possibly exceed $3,000, the Superior Court overlooked the fact that in their joint summary judgment motion the parties expressly represented that "[t]his payment is not a settlement offer" and that it is being made "without admitting liability." However, if Robertson were to obtain a favorable judgment against the Appellees after a trial on the merits, that judgment would certainly establish that the Appellees were liable. In addition to any cathartic benefits that Robertson may gain from "getting his day in court" and prevailing, a judgment against the Appellees has other practical benefits as well, such as providing Robertson with an enforcement mechanism as well as the protections of res judicata or collateral estoppel in the event any of the issues become the subject of a future judicial or administrative proceeding. It is for this reason that courts have repeatedly emphasized that a case should not be dismissed on the basis of the defendant providing full relief to the plaintiff unless that full relief "is unconditional" and the "defendant admits liability." *Joiner v. SVM Mgmt., LLC*, 161 N.E.3d 923, 936 (Ill. 2020); *see also Zinni v. ER Sols., Inc.*, 692 F.3d 1162, 1166-67 (11th Cir. 2012) ("Offers for the full relief requested have been found to moot a claim. Those cases are distinguishable, however, because the defendants there offered the full relief requested—the full amount of damages *plus* a judgment.") (emphasis in original) (internal citations omitted); *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 764 (4th Cir. 2011) (reversing dismissal of complaint based on the defendants purportedly providing the plaintiff with "full relief" because "the offer for 'full relief in this case' did not offer for judgment to be entered against the Defendants, but rather only offered for the parties to enter into a settlement agreement"). Consequently, the Superior Court erred in concluding that the $3,000 offered by the Appellees was sufficient to provide Robertson with the full relief sought in his complaint.

2. Tort Claims

¶ 26 In addition to dismissing his breach of contract claim, the Superior Court dismissed Robertson's tort claims for breach of fiduciary duty and conversion under the "gist of the action" doctrine and, in the alternative, for failure to plead punitive damages in his complaint. We address each basis for dismissal in turn.

a. The Gist of the Action Doctrine

¶ 27 The gist of the action doctrine provides for the dismissal of tort claims

> when the [tort] claims are (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.

Addie v. Kjaer, 737 F.3d 854, 866 (3d Cir. 2013). To determine whether to adopt the gist of the action doctrine this Court must, as it must with every other common law rule, consider and weigh three factors. *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011). To perform this inquiry—known as a *Banks* analysis—a court considers "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions and (3) most importantly, which approach represents the soundest rule for the Virgin Islands."[6] *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674,

[6] Because the Appellees raised the gist of the action doctrine in only a single sentence in a footnote to their joint motion for summary judgment—which otherwise focused exclusively on Robertson not having suffered damages exceeding $3,000 on his breach of contract claim—and only developed the argument in their reply to Robertson's opposition, we question whether this defense was properly before the Superior Court. *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 529 n.4 (V.I. 2013). Nevertheless, because the Superior Court addressed the issue on the merits and applicability of the gist of the action doctrine is an issue of law that would almost certainly recur on remand if not addressed by this Court as part of this appeal, we exercise our discretion to resolve the issue notwithstanding any potential waiver. *See Garcia*, 59 V.I. at 772.

680-81 (V.I. 2012)).

¶ 28 While none of these three factors is individually dispositive, each plays an important role in the analysis. The first factor—whether other Virgin Islands courts previously adopted a particular rule—in effect requires a court to consider *stare decisis*; that is, whether the legal community and the public have reason to rely on a particular common law rule despite it not having yet been adopted by this Court. *Banks*, 55 V.I. at 985 & n.10. The second factor—the positions taken by other jurisdictions—informs the court of the existence of the majority and minority rules as well as the reasoning other jurisdictions relied upon to support them, thus ensuring that the court is not only aware of the potential possibilities but that it also may benefit from any national debate and how those rules may have operated in practice elsewhere. *Accord*, *Brathwaite v. Xavier*, 71 V.I. 1089, 1103-04 (V.I. 2019). And the third and most important factor—determining the soundest rule for the Virgin Islands—requires a court to consider the practical implications of adopting a particular rule in the Virgin Islands as well as what rule is best in accord with the public policy of the Virgin Islands, including its consistency with related statutes, court rules, and judicial precedents. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 397 (V.I. 2014). Notably, the ultimate goal of a *Banks* analysis is "to ensure the creation of indigenous Virgin Islands law free of undue outside influence—as intended by Congress and the Virgin Islands Legislature in creating a local judiciary independent of the federal judiciary." *In re L.O.F.*, 62 V.I. 655, 661 n.6 (V.I. 2015).

¶ 29 A weighing of these three factors strongly cautions against adoption of the gist of the action doctrine. As to the first factor, it is certainly true that the Superior Court, the District Court, and the Third Circuit have generally—although not universally—applied the gist of the action doctrine. *Compare Addie*, 737 F.3d at 865-66; *Charleswell v. Chase Manhattan Bank, N.A.*, 308 F.Supp.2d

545, 566-67 (D.V.I. 2004); *Ringo v. Southland Gaming of U.S. Virgin Islands, Inc.*, Super. Ct. Civ. No. 116/2010 (STT), 2010 WL 7746074 (V.I. Super Ct. Sept. 22, 2010); *V.I. Port Authority v. Callwood*, Super. Ct. Civ. No. 302/2011 (STT), 2014 WL 905816 (V.I. Super Ct. Feb. 28, 2014); *Pegasus Holding Grp. Stables, LLC v. Share*, Super. Ct. Civ. No. 069/2014 (STT), 2015 WL 13894849 (V.I. Super. Ct. Sept. 14, 2015); *Joseph v. Divine Funeral Servs. LLC*, 71 V.I. 121 (V.I. Super Ct. 2019); *Gerace v. Bentley*, 2022 VI Super 78 (V.I. Super. Ct. 2022) (applying the gist of the action doctrine), *with First Am. Dev. Grp./Carib, LLC v. WestLB AG*, 55 V.I. 316, 330 (V.I. Super. Ct. 2011) (rejecting the gist of the action doctrine on the basis that "Pennsylvania is apparently the only state to have adopted the doctrine" and thus "the Court cannot say that it is a rule of the common law as generally understood and applied in the United States.") (internal quotation marks omitted). The Third Circuit and the District Court, however, did so in their capacities as federal courts hearing cases pursuant to diversity jurisdiction that require application of Virgin Islands law. *See Addie*, 737 F.3d at 865-66; *see also Charleswell v. Chase Manhattan Bank, N.A.*, 308 F.Supp.2d 545, 566-67 (D.V.I. 2004) (noting that "Virgin Islands courts have not discussed the gist of the action test" but predicting that the Virgin Islands would adopt it based on the Third Circuit's application of it to Pennsylvania cases).

¶ 30 But the first factor involves more than simply the rote counting of judicial decisions: after all, the purpose of this factor is to determine the extent, if any, that the legal community and the public have grown to rely upon and potentially shape their conduct by a given rule. *Banks*, 55 V.I. at 985 & n.10. To determine the extent and reasonableness of any such reliance, it is necessary to not just consider the number of judicial decisions, but also the character of those decisions. This requires consideration of additional elements besides the sheer number of judicial decisions, such as the age of the decisions, whether these judicial decisions are binding or non-binding precedent,

and the general reasoning that underlies those decisions, *i.e.*, whether the court performed a *Banks* analysis or otherwise considered the merits of a given rule, or simply applied it mechanistically or uncritically. *See, e.g., Cook v. State*, 870 S.E.2d 758, 771 (Ga. 2022).

¶ 31 Here, despite most local decisions adopting or applying the gist of the action doctrine, any reliance interests are certainly minimal. The gist of the action doctrine has a very short history in the Virgin Islands, in that the earliest decision to ever apply it was in 2004—when the District Court "predict[ed] that Virgin Islands courts would adopt the Third Circuit's application of the gist of the action test" from Pennsylvania, *Charleswell*, 308 F.Supp.2d at 566-67, and the first Superior Court decision that ever considered it was only issued in 2010. *See Ringo*, 2010 WL 7746074. Moreover, none of the judicial decisions adopting or applying the gist of the action doctrine ever constituted binding precedent on any Virgin Islands court so as to form the basis for a reasonable reliance interest by attorneys or litigants outside of those particular cases. This Court has already instructed that "the decision of a single Superior Court judge is not binding precedent on other Superior Court judges," *In re Q.G.*, 60 V.I. 654, 661 n.8 (V.I. 2014) (internal citations omitted). And while decisions of the Third Circuit are certainly entitled to great respect as persuasive authority, "the Superior Court is only required to follow cases the Third Circuit decided while serving in its capacity as the de facto court of last resort in the Virgin Islands, as opposed to those cases decided in its capacity as a federal court exercising jurisdiction in federal question or diversity cases." *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755-56 (V.I. 2014) (internal citations omitted). Furthermore, some—though certainly not all—of the Superior Court cases adopting or applying the gist of the action doctrine did so without independent analysis but largely based on the Third Circuit adopting the doctrine in *Addie*. But the Third Circuit in *Addie* had only predicted that this Court would adopt the doctrine and arrived at that prediction without

any substantive analysis or otherwise explaining why it believed this Court would adopt the doctrine. 737 F.3d at 899-900. In this context, while the first factor may provide some support for adoption of the gist of the action doctrine, declining to adopt the doctrine would only minimally—if at all—disrupt practice in the courts of the Virgin Islands.

¶ 32 The second factor—the positions taken by other jurisdictions—does not favor adopting the gist-of-the-action doctrine. Only two jurisdictions—Pennsylvania and West Virginia—have adopted this doctrine, *see e.g., eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 19 (Pa. Super. Ct. 2002); *Tri-State Petroleum Corp. v. Coyne*, 814 S.E.2d 205, 218 (W. Va. 2018), with West Virginia doing so only very recently. Moreover, the doctrine has not been incorporated into any of the Restatements of the Law published by the American Law Institute, and in fact has been criticized in the commentary to the most recent Restatement of Torts. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9, Reporter's Note (a)(3) ("This Restatement does not subscribe to the approach taken in *eToll*. The distinction between fraud that is 'tangential' to a contract and fraud that is 'intertwined' with it is too hard to draw in a satisfactory way."); *see also First Am. Dev. Grp.*, 55 V.I. at 331; *Simon*, 59 V.I. at 623 ("Although only representing non-binding persuasive authority in light of our decision in *Banks*, the Restatements of the Law promulgated by the American Law Institute remain a helpful guide to determining how other jurisdictions approach [a] question."). Importantly, while some courts in other jurisdictions have placed some limitations on the recovery of damages in tort for conduct that arises from a breach of contract or vice-versa, these limitations are significantly more restricted in scope than the gist of the action doctrine and are certainly not tantamount to endorsing the entire doctrine. *See, e.g., Pasco Common Condo. Ass'n, Inc. v. Benson*, 218 A.3d 83, 102 (Conn. 2019) ("[T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims."); *Yerrell v.*

EMJ Realty Co., No. 19-CV-1160, 2022 WL 3970972, at *3 (D.C. Sept. 1, 2022) ("While a cause of action that could be considered a tort independent of contract performance is a viable claim, the injury to the plaintiff must be an independent injury over and above the mere disappointment of plaintiff's hope to receive his contracted-for benefit."); *CH2M Hill Se., Inc. v. Pinellas Cnty.*, 598 So. 2d 85, 88 (Fla. Dist. Ct. App. 1992) ("It is a well established rule in Florida that tort damages are not recoverable in a breach of contract action, absent an accompanying independent tort.").

¶ 33 However, as with the first factor, this second factor is not intended as a rote counting exercise, but a process of review intended to inform the *Banks* analysis by allowing a court to benefit from any national debate and the experiences in other jurisdictions. Notably, the Supreme Court of Pennsylvania only recently adopted the gist of the action doctrine in 2014; prior to that time, the lower Pennsylvania courts, the Third Circuit, and the federal district courts in Pennsylvania had applied the doctrine based on a prediction that the Supreme Court of Pennsylvania would eventually adopt it. *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014) (collecting cases). Significantly, when that court ultimately adopted the gist of the action doctrine, it adopted a narrower version than had been applied by the federal courts and the lower state courts, emphasizing that "the mere existence of a contract between two parties does not, ipso facto, classify a claim by a contracting party for injury or loss suffered as the result of actions of the other party in performing the contract as one for breach of contract" and expressly noting that the gist of the action doctrine would not bar claims that allege the breach of "a broader social duty" owed by the defendant. *Id.* at 68-69. In other words, the gist of the action doctrine formulated by the *Addie* court in 2013—which it predicted this Court would adopt—was largely rejected by the Pennsylvania Supreme Court one year later.

¶ 34 Notably, the gist of the action doctrine adopted by the Supreme Court of Pennsylvania in

2014 has been characterized as an adoption in name only, in that it "contradicts the doctrine's intent by granting broad deference to potential tort claims" and has "create[d] additional ambiguity in the lower courts" due to its "inability to articulate a clear standard" which adds to substantial "doctrinal confusion surrounding the gist of the action doctrine within the state." Lauren Anthony, *Home Is Where the Confusion Is: Pennsylvania Formally Adopts the "Gist of the Action" Doctrine and Builds a House for Ambiguity in* Bruno v. Erie Insurance Co., 61 VILL. L. REV. 235, 257 (2016). That the Supreme Court of Pennsylvania retreated from decades of lower state and federal court precedents to adopt a more tempered, far less robust version of the gist of the action doctrine is powerful evidence that the doctrine—as it had been previously articulated and applied by those other courts—had been too harsh. Thus, in context, the second factor strongly cautions against adoption of the gist of the action doctrine in the Virgin Islands.

¶ 35 Last, but certainly not least, the third factor—determination of the soundest rule for the Virgin Islands—also strongly disfavors adopting the doctrine. In analyzing this factor, it is important to consider not just the practicability of the doctrine, but also what purpose it serves. The Supreme Court of Pennsylvania recently explained that the gist of the action doctrine had been applied by Pennsylvania courts "in the 1800s," and that "the doctrine was utilized . . . to distinguish a breach of contract claim from a tort claim for purposes of ascertaining which court had jurisdiction over a particular action, due to the fact the law at that time gave jurisdiction over contract claims valued at less than $100.00 to justices of the peace, as opposed to courts of common pleas which had jurisdiction over all tort claims irrespective of the dollar value of the injury." *Bruno*, 106 A.3d at 60-62. In other words, the gist of the action doctrine did not develop in Pennsylvania because it represented good substantive law; rather, it had been adopted as a procedural mechanism for determining which Pennsylvania courts would exercise jurisdiction

over a particular case, given that Pennsylvania had at the time chosen to vest jurisdiction in contract and tort claims to different trial courts.[7] Because the Virgin Islands does not structure its judicial system in such a manner, instead vesting the Superior Court with "original jurisdiction in all civil actions regardless of the amount in controversy," 4 V.I.C. § 76, the gist of the action doctrine would serve no practical purpose in the Virgin Islands.[8]

¶ 36 In addition to providing no practical benefit, adoption of the gist of the action doctrine in the Virgin Islands would impair the administration of justice by barring plaintiffs from bringing

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[7] Although the Superior Court did not perform its own *Banks* analysis in its April 22, 2022 order, it stated that it would adopt the *Banks* analysis performed by the Superior Court in *Franken v. Bradley Cisneros & Conundrum Mktg., LLC*, Super. Ct. Civ. No. 88/2015 (STT), 2016 WL 11723593 (V.I. Super. Ct. Apr. 18, 2016). In performing that analysis, the court in *Franken* minimized the fact that only Pennsylvania and West Virginia have adopted the gist of the action doctrine by stating that "[t]he gist of the action doctrine is a relatively new development in the common law of U.S. jurisdictions." *Id.* at *5 n.13. However, as the Supreme Court of Pennsylvania explained in *Bruno*, the gist of the action doctrine is not a new doctrine but is in fact centuries old.

[8] In its April 22, 2022 order, the Superior Court cited favorably to *V.I. Port Auth. v. Callwood*, Super. Ct. Civ. No. 302/2011 (STT), 2014 WL 905816 (V.I. Super Ct. Feb. 28, 2014), an earlier Superior Court case applying the gist of the action doctrine. In *Callwood*, the Superior Court opined that one possible benefit of the gist of the action doctrine is that "[b]luring the line between tort and contract could diminish confidence in the value of the negotiated instrument and deter private parties from entering into contracts." *Id.* at *3. However, the idea that not adopting the gist of the action doctrine would somehow deter private parties from entering into contracts is extraordinarily unlikely given that the doctrine has only ever been adopted by two states—Pennsylvania and West Virginia—and has not been adopted by the other 48 states, any of the five territories, or the District of Columbia. As one court recently explained, this type of rank speculation is not a valid basis for adopting a common law rule:

> [T]he Court must generally show restraint in altering existing allocations of risk created by long-tenured common law rules and resist the temptation of experimentation with untested social policies, especially where the individual record and the advocacy of the parties in the context of that record offer little more than abstract justifications. Thus, the Court is not in a position to upend risks and expectations premised upon broad-based arguments calling for a judgment about socially acceptable economic incentives.

Tincher v. Omega Flex, Inc., 104 A.3d 328, 354 (Pa. 2014).

potentially meritorious claims. As one commentator succinctly explained,

> Consider the following scenario. A homeowner hires a pest-control contractor to spray a gallon of pesticide around the outside of the homeowner's house. The homeowner signs a contract provided by the contractor which requires the contractor to apply the pesticide in a manner consistent with the pesticide's labelling. However, instead of spraying one gallon of pesticide around the outside the house, the contractor inexplicably (and contrary to the labelling) sprays 500 gallons of highly toxic pesticide inside the house, causing a fire that destroys the house. The homeowner sues the contractor for the negligence of his work only to lose at summary judgment because the court held that "the gist of the action" was really a breach of the contract that the homeowner signed, not a negligence claim (despite the homeowner's protests to the contrary). Perhaps the homeowner can recover some measure of the money he paid for the contracting services due to the contractor's breach of his promise to apply pesticide in a proper manner, but he can recover nothing for his destroyed house.
>
> While this may seem farfetched and unfair, recent appellate court decisions based on similar fact patterns have upheld this result.

Alex A. Tsiatsos, *The Gist of the Action Doctrine: Lessons from Pennsylvania's Search for Cause of Action Essences*, 119 W. VA. L. REV. ONLINE 1, 1 (2016) (citing *Severn Peanut Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 89 (4th Cir. 2015)). Consequently, incorporating the gist of the action doctrine into the common law of the Virgin Islands would do more than simply require the Superior Court to apply a vestigial rule: it would provide certain defendants with a substantial windfall by limiting damages based on form rather than substance.[9]

¶ 37 Finally, the gist of the action doctrine is inconsistent—or at least in tension—with existing

[9] In their respective appellate briefs, the Appellees seem to hint that, since Robertson was purportedly made whole for his breach of contract claim, permitting him to proceed with tort claims premised on the same transaction may provide him with a double recovery. But the gist of the action doctrine does far more than simply bar a plaintiff from recovering "double damages" from a defendant. To be sure, the gist of the action doctrine would prohibit a plaintiff from recovering under a tort claim that essentially duplicates a breach of contract claim. However, as noted in the text above, the gist of the action doctrine also bars claims where a double recovery would not result, such as precluding a homeowner from suing a pest-control company for negligence for burning his house down simply because the homeowner had contracted with the pest-control company to provide its services. *See* Tsiatsos, 119 W. VA. L. REV. ONLINE at 1.

Virgin Islands common law and public policy. This Court has previously held that a party may bring a cause of action for legal malpractice under either a tort theory or a breach of contract theory. *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 128-29 (V.I. 2009). However, were the gist of the action doctrine adopted in the Virgin Islands, a legal malpractice claim could never proceed based on a tort theory, since a contract will necessarily exist between an attorney and a client in virtually all cases and the duty of a lawyer to provide competent legal representation to a retained client will always be a duty "created and grounded in the contract itself." *Addie*, 737 F.3d at 866. Consequently, adopting the gist of the action doctrine would require this Court to overturn—or at least considerably narrow—its prior precedent. Moreover, there is a "strong public policy" in the Virgin Islands "for determining civil cases on the merits," *Estate of Skepple v. Bank of Nova Scotia*, 69 V.I. 700, 711 (V.I. 2018) (collecting cases), as well as for considering claims and arguments based on their substance rather than their form, *see, e.g.*, *Davis v. People*, 2022 VI 8 ¶ 29 & n.4 (collecting cases).

¶ 38 For these reasons, we conclude that the gist of the action doctrine does not represent the soundest rule for the Virgin Islands.[10] This is not to say that Robertson, if he were to prevail on

[10] In his appellate brief, Robertson also contends that Banco Popular owed him fiduciary duties of good faith and fair dealing that are separate from those arising from the contract. Banco Popular counters that these duties do not apply to it because it "did not issue a contract for insurance to or for Plaintiff and did not otherwise insure Plaintiff for accidental death." (Banco Popular Br. 9.) While our holding that the gist of the action doctrine does not preclude Robertson's tort claims may render this question irrelevant for purposes of the claims made in the summary judgment motion, the source of Banco Popular's duty to him may nevertheless be relevant in subsequent proceedings on remand. Therefore, we note that whether Banco Popular is or is not an insurer is irrelevant, in that title 22 of the Virgin Islands Code expressly imposes certain duties on all persons generally with respect to insurance agreements. *See, e.g.*, 22 V.I.C. § 2 (providing that the duties of good faith, abstention from deception, and honesty apply to "all persons . . . in all insurance matters."); 22 V.I.C. § 1209 ("No person shall make, issue or circulate, or cause to be made, issued or circulated any misrepresentation of the terms of any policy or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or use any name or

all three of his causes of action, would be entitled to collect a triple recovery. This Court has already held that plaintiffs are prohibited from receiving a double recovery that would require a defendant to pay twice for the same element of damages – not just when a plaintiff sues a defendant for both breach of contract and tort, but also when a plaintiff sues a defendant for two or more torts. *See R.J. Reynolds Tobacco Co. v. Gerald*, 2022 VI 14 ¶ 128 (collecting cases); *see also Gould v. Salem*, 59 V.I. 813, 818-19 (V.I. 2013) (outlining procedural mechanisms for defendants to modify or vacate a judgment to preclude a double recovery for the same injuries).[11]

b. Pleading of Punitive Damages

¶ 39 The Superior Court, as an alternate ground for dismissing Robertson's tort claims, held that the potential damages for those tort claims were duplicative of his available breach of contract remedies notwithstanding the gist of the action doctrine. The Superior Court arrived at this conclusion by agreeing with the Appellees that Robertson had not specifically requested punitive damages in his complaint and was therefore not entitled to them.

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title of any policy or class of policies misrepresenting the nature thereof.); *see also* 1 V.I.C. § 41 (providing that a "person" as that term is used in the Virgin Islands Code includes "corporations, companies, associations, joint stock companies, partnerships and societies, as well as individuals.").

[11] We acknowledge that other common law doctrines, such as the independent duty doctrine or economic loss doctrine, could potentially be applicable to a case such as this where claims are under both a tort and contract theory. *See* Laura A. Wagner, *The Economic Loss Doctrine: A Recommendation for the Supreme Court of Pennsylvania*, 72 U. PITT. L. REV. 825 (2011). However, the Superior Court did not apply the economic loss doctrine or any of these other doctrines to this case, and the Appellees have never moved for dismissal or summary judgment based on such doctrines. Therefore, our rejection of the gist of the action doctrine should not be construed as an endorsement or repudiation of the economic loss doctrine or other related doctrines; those remain open questions, to be considered in an appropriate case where this Court has the benefit of a *Banks* analysis by the Superior Court and briefing from the parties.

¶ 40 We agree with Robertson that the Superior Court erred in so ruling. The purpose of summary judgment is to determine whether the record evidence, if viewed in the light most favorable to the nonmoving party, is sufficient to permit a judgment in favor of the moving party. It is for this reason that "pleading defects[] are not [a] proper [basis] for summary judgment," since the failure of a plaintiff to properly plead a claim in a complaint does not mean that there is not sufficient evidence to support the claim if it were properly pled. *Texas Dep't of Corr. v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974). Importantly, courts will typically not consider pleading defects as a basis for granting summary judgment because pleading defects are curable by amendment to the pleadings, whereas the absence of sufficient evidence to support a claim cannot be so remedied. *Id.* The reason for this is clear: by attacking the sufficiency of a pleading through a summary judgment motion, the plaintiff is denied the opportunity to amend the complaint to cure the defect.[12] *Id.*

¶ 41 Here, the Appellees never asserted that the evidence, if viewed in the light most favorable to Robertson, could not support a claim for punitive damages on either of his tort claims. Rather, they only contended that Robertson had not properly pled punitive damages in his complaint. But pursuant to Rule 15 of the Virgin Islands Rules of Civil Procedure, Robertson was entitled to move to amend his complaint to request other types of damages—such as punitive damages—or to

[12] Using summary judgment as a mechanism to challenge the failure to properly plead punitive damages is particularly inappropriate given that to receive punitive damages, one must prove that the defendant engaged in more than just mere negligence. *See Brathwaite v. Xavier*, 71 V.I. 1089, 1110 (V.I. 2019). However, in many cases a plaintiff may simply not know the degree of the defendant's culpability at the time of the filing of the complaint. For instance, even in this very case, it is certainly possible that the Appellees simply acted negligently by debiting money from Robertson's bank account for many years to pay for a cancelled insurance policy. Yet it is also possible that, after engaging in discovery, Robertson may discover that the Appellees were aware of what they were doing and acted intentionally rather than negligently.

otherwise reformulate his causes of action to cure any potential pleading defects. Robertson, however, was not afforded an opportunity to amend his complaint due to the Superior Court electing to enter judgment in favor of the Appellees. Therefore, the Superior Court also erred when it dismissed Robertson's tort claims for not pleading punitive damages or other damages different from those sought in his breach of contract claim.[13]

III. CONCLUSION

¶ 42 The Superior Court erred when it dismissed Robertson's breach of contract claim based on the Appellees' tender of a $3,000 check to Robertson. The Superior Court also erred when it dismissed Robertson's tort claims pursuant to the gist of the action doctrine. Accordingly, we reverse the April 22, 2022 order granting summary judgment and, as a result, necessarily also vacate the April 22, 2022 order denying Robertson's discovery sanctions motion as moot.[14] This

[13] Given our holding that the gist of the action doctrine does not apply to the Virgin Islands and that the Superior Court improperly granted summary judgment based on a purported pleading defect, it is not necessary for us to fully consider the other arguments Robertson has raised on appeal with respect to the summary judgment motion, such as his claim that the Superior Court erred by considering the summary judgment motion without first resolving his motion for sanctions. Nevertheless, we take this opportunity to remind the Superior Court that while it generally may consider motions in any order it chooses, Rule 56 of the Virgin Islands Rules of Civil Procedure envisions that a court will not adjudicate a summary judgment motion on the merits until discovery on the issues raised in the summary judgment motion has concluded. *See* V.I. R. CIV. P. 56(b); (d). Thus when—as here—a defendant moves for summary judgment on a question of fact and the plaintiff, as the non-moving party, repeatedly asserts that it has received no discovery whatsoever, the Superior Court should strongly consider exercising its discretion to resolve the discovery dispute before ruling on the merits of the summary judgment motion.

[14] In its brief, Banco Popular asserts that Robertson's motion was improper under Rules 11 and 37 of the Virgin Islands Rules of Civil Procedure. However, the Superior Court did not deny his motion on this basis; rather, it denied it solely based on a finding that the motion had become moot due to its entry of judgment in favor of the Appellees on all of the causes of action asserted in Robertson's complaint. While it could certainly be the case that Banco Popular is correct that Robertson's motion was deficient or improper under those Rules, that is an issue that we believe is best addressed by the Superior Court in the first instance rather than by this Court for the first time on appeal.

litigation is remanded for further proceedings consistent with this opinion.

Dated this 24th day of March, 2023.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Yanella Culpepper-Callwood
Deputy Clerk

Dated: March 24, 2023