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

ALISON FORD	)	
	)	
Plaintiff,	)	
vs.	)	**CASE NO. ST-15-CV-489**
	)	
VIRGIN ISLANDS DEPARTMENT OF EDUCATION	)	
and the GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Pending before the Court is Defendants' October 29, 2015, Motion to Dismiss. Defendants' Motion to Dismiss will be granted in part as to Plaintiff's claim for gross negligence and the claims arising under the "intentional tort exception" to the exclusive remedy provision of the Virgin Islands Workers' Compensation Act, but will be denied as to Plaintiff's claim for negligence because the Complaint does not allege facts that suggest the exclusive remedy provision of the Act applies.

FACTUAL & PROCEDURAL HISTORY

On September 21, 2015, Plaintiff Alison A. Ford filed a Complaint against Defendants Virgin Islands Department of Education and the Government of the Virgin Islands seeking damages for the injuries she sustained in an accident that occurred on September 23, 2013, while she was employed by Defendants.[1] According to the Complaint, Plaintiff was "performing her duties as a teacher" at her place of employment, Joseph A. Gomez Elementary School,[2] when she "heard a loud bang and felt the classroom shake."[3] Ford claims that, immediately upon exiting the

[1] Compl. ¶ 5.
[2] Compl. ¶¶ 5-6.
[3] Compl. ¶¶ 5-6.

classroom to investigate, Ford was "struck in the head and both legs by a large portion of overhead concrete that had collapsed upon Plaintiff," leaving her pinned to the floor for more than two hours and causing her to suffer injuries to her "head, both her right and left leg[,] and other parts of her body."[4] Plaintiff alleges that "Defendants, in disregard of their mandated duties, [were] grossly negligent" by "failing to take proper precaution for [her] safety" and "failing to properly maintain and inspect the building."[5]

On October 29, 2015, Defendants filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), (2), (4), and (5) "on the grounds that Plaintiff has failed to state a claim and the Court lacks personal jurisdiction over Defendants."[6] Ford filed a timely Opposition on November 23, 2015,[7] and on December 10, 2015, three (3) days after the Court imposed deadline, Defendants filed a Reply.[8] On April 1, 2016, the Court issued a Memorandum Opinion regarding Defendants' Motion to Dismiss under Rule 12(b)(5) for insufficiency of service of process, finding it lacked personal jurisdiction over Defendants because Plaintiff failed to effectuate proper service. Specifically, the Court found service was deficient because Plaintiff did not serve a copy of the Summons and Complaint on the Governor of the Virgin Islands as required under the applicable procedural rules.[9] Nevertheless, the Court found the interests of justice warranted a discretionary extension of the time period within which Plaintiff must serve Defendants.[10] As a result, the Court ordered Plaintiff

[4] Compl. ¶¶ 7-9.
[5] Compl. ¶ 17.
[6] Mot. to Dismiss, p. 1.
[7] By Order entered on November 5, 2015, Plaintiffs were directed to respond to Defendants' Motion to Dismiss by November 23, 2015, and Defendants were directed to file their reply by December 7, 2015. *See* November 5, 2015, Order.
[8] Neither party has addressed the untimeliness of Defendant's Reply. Because the three (3) day delay did not affect Plaintiff's ability to submit her response in opposition to Defendant's Motion to Dismiss, its prejudicial effect on Plaintiff and the progress of the proceedings is minor. Consequently, the Court exercises its inherent discretion to consider Defendant's untimely Reply and will do so in determining the merits of Defendant's motion.
[9] *See* April 1, 2016, Mem. Op., pp. 4-5.
[10] *Id.* at 6.

to obtain a new Summons and serve a copy of the Complaint on the Governor of the Virgin Islands and file proof of service with the Court by April 22, 2016.[11] In addition, the Court held the remainder of Defendants' Motion to Dismiss, namely that arising under Rule 12(b)(6), in abeyance until the preliminary issues of lack of personal jurisdiction and insufficiency of service of process were resolved.[12]

In accordance with the Court's directives, on April 11, 2016, Plaintiff filed an affidavit evidencing service of the new Summons and a copy of the Complaint on the Governor of the Virgin Islands on April 5, 2016.[13] Consequently, Defendants' October 29, 2015, Motion to Dismiss arising under Rule 12(b)(6) is now ripe for consideration.

STANDARD

Under Fed. R. Civ. P. 12(b)(6), a defendant may test the sufficiency of the pleadings against preliminary defenses by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."[14] The pleading requirements of Fed. R. Civ. P. 8[15] "require a complaint to set forth a plausible claim for relief, thus allowing courts to dismiss, under Rule 12(b)(6), complaints that fail to meet that standard."[16] According to the three-pronged analysis employed by

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[11] April 1, 2016, Order.

[12] *Id.*; April 1, 2016, Mem. Op., p. 6. In its April 1, 2016, Memorandum Opinion, the Court declined to consider Defendant's argument for dismissal under FED. R. CIV. P. 12(b)(4) on the grounds that Defendants failed to adequately support the argument. *Id.* at 2 n. 6. As a result, in rendering its April 1, 2016, decision, the Court only considered Defendant's arguments with respect to FED. R. CIV. P. 12(b)(2) and 12(b)(5) as they relate to service under FED. R. CIV. P. 4(m). *Id.*

[13] Pl.'s April 11, 2016, Notice of Filing.

[14] FED. R. CIV. P. 12(b)(6). FED. R. CIV. P. 12(b)(6) is applicable to the practice and procedure in the Superior Court through Super. Ct. R. 7.

[15] *See Joseph v. Bureau of Corrections*, 54 V.I. 644, 649 (V.I. 2011) ("While Superior Court Rule 22 provides that '[a] civil action is commenced by filing a complaint with the court,' no Superior Court rule establishes any standards with respect to the contents of a complaint. Accordingly, Federal Rule of Civil Procedure 8(a)(2) is applicable to civil actions in the Superior Court through Superior Court Rule 7").

[16] *Joseph*, 54 V.I. at 649 (citing *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 499 (V.I. 2008) (other citations omitted); *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-

the Supreme Court of the Virgin Islands in reviewing motions to dismiss based on Fed. R. Civ. P. 12(b)(6):

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.[17]

The Supreme Court of the Virgin Islands has further instructed that "[t]he plausibility determination is a 'context-based' determination which should be guided by the court's 'judicial experience and common sense.'"[18] "Plausibility requires that the plaintiff allege facts that are more than simply 'consistent with a defendant's liability' and must permit the court to infer more than the mere possibility of misconduct."[19] "A motion to dismiss a complaint should be denied if the factual allegations are 'enough to raise a right to relief above the speculative level'"[20] and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[21] Only after satisfying this multi-step analysis can a party survive a motion to dismiss under Rule 12(b)(6).

"In deciding a Rule 12(b)(6) motion to dismiss, the Court may consider 'the allegations contained in the complaint, exhibits attached thereto, and matters of public record.'"[22] Virgin

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unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

[17] *Joseph*, 54 V.I. at 649-650 (internal quotations and citations omitted).

[18] *Id.* at 650 (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950)).

[19] *Id.* (citing *Fowler*, 578 F.3d at 211) (quoting *Iqbal*, 129 S. Ct. at 1949)).

[20] *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 54 (V.I. Super. Ct. 2013) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008)); *See also Twombly*, 127 S. Ct. at 1965 & n.3.

[21] *Twombly*, 127 S. Ct. at 1964.

[22] *Lockhart v. Treasure Bay V.I. Corp.*, 2015 V.I. LEXIS 101, *5 (V.I. Super. Ct. 2015) (citing *Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 190 n.3 (3d Cir. 1999)); *E.g. First Bank of Puerto Rico v. Prosser*, 2015 V.I. LEXIS 72, *5 (V.I. Super. Ct. 2015) (citations omitted); *Nicholas v. Damian-Rojas*, 2015 V.I. LEXIS 11, *2-4 (V.I. Super. Ct. 2015);

Islands courts have consistently applied Fed. R. Civ. P. 12(d) in finding that all other evidence presented in connection with a Rule 12(b)(6) motion to dismiss constitutes matter outside the pleadings, which, if "presented to and not excluded by the [C]ourt," requires the conversion of the motion to one for summary judgment under Fed. R. Civ. P. 56," which in turn requires the parties "be given a reasonable opportunity to present all the material that is pertinent to the [summary judgment] motion."[23]

ANALYSIS

A. Compensable injuries under the Workers' Compensation Act.

Defendants contend that Plaintiff's injuries are compensable under the Virgin Islands Workers' Compensation Act, which provides Plaintiff's exclusive remedy and bars her from recovering any additional damages from Defendants.[24] The Virgin Islands Workers' Compensation Act ("WCA") "is designed to provide prompt payment of benefits without regard

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Manbodh v. Hess Oil V. I. Corp. (In re Kelvin Manbodh Asbestos Litigation Series), 47 V.I. 375, 381-384 (V.I. Super. Ct. 2006) (citations omitted); *Sprauve v. W. Indian Co.*, 799 F.3d 226, 232 (3d Cir. V.I. 2015).

[23] *See Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 613 (V.I. 2012) ("[A] party need not actually attach admissible evidence to present the court with 'matters outside the pleadings,' for unsworn representations of counsel as to factual matters — which are not themselves evidence, . . . are sufficient to transform a Federal Rule 12(b)(6) motion to a Federal Rule 56 motion pursuant to Federal Rule 12(d)") (internal and other citations omitted); *See also Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 566 (V.I. 2012) ("Like the trial court, we are foreclosed from considering evidence from any source outside of the pleadings and the exhibits attached to the pleadings in determining whether it was proper to grant a motion for judgment on the pleadings") (citations omitted); *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 188 n. 7 (V.I. 2009) ("The motion to dismiss in this case was not converted to a Rule 56 motion for summary judgment as permitted by Federal Rule of Civil Procedure 12(c) because no notice or opportunity was provided to the parties to present pertinent Rule 56 materials"). The foregoing reveals that the Supreme Court of the Virgin Islands applies the procedure set forth in Fed. R. Civ. P. 12(d) when considering "matters outside the pleadings" in connection with Rule 12(b)(6) and 12(c) motions. As a result, FED. R. CIV. P. 12(d) applies in this case. *See Vanterpool v. Gov't of the Virgin Islands*, 2015 V.I. Supreme LEXIS 23, *16 (V.I. 2015) ("[U]ncritical application of the rules of another court to a proceeding in the Superior Court is wholly inconsistent with our admonition that 'the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should represent rules of last resort rather than first resort, and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure'") (citing *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014)).

[24] Mot. to Dismiss, pp. 3-4.

to fault; and to relieve employers and employees of the burden of civil litigation."[25] "In order for an injury to be compensable under the WCA, an employee's injury must have 'aris[en] out of and in the course of his employment'[26] and '[i]f an employee's injury is compensable under the WCA, the employer is not liable for negligence at common law pursuant to the exclusive remedy provision of the WCA.'"[27] The WCA's exclusive remedy provision provides:

> When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.[28]

"In order for the exclusive remedy provision to apply, the injuries complained of must 'fit within the definition of 'injury' set forth in the statute [as compensable], namely, 'harmful change[s] in the human organism.'"[29]

The Complaint alleges that Ford is a 15 year employee of the Defendant the Government of the Virgin Islands who worked for the Department of Education at Joseph A. Gomez Elementary School on or about September 23, 2013, when a "large portion of overhead concrete collapsed" on her while she was "performing her duties as a teacher."[30] Plaintiff alleges that the concrete struck and pinned her down, causing injuries to her "head, both . . . right and left leg[,] and other parts of her body,"[31] resulting in "lengthy surgery," where "permanent . . . pins and screws were affixed within her body" to repair her right kneecap and "a rod and screws [were] placed from her pelvis

[25] *Robles, supra,* 49 V.I. at 495 (citing *Chinnery v. Gov't of the V.I.*, 865 F.2d 68, 71 (3d Cir. 1989) (internal quotation marks omitted)).
[26] *Id.* (citing 24 V.I.C. 24 § 252(a)).
[27] *Id.* (citing 24 V.I.C. §§ 252(a), 284(a)).
[28] 24 V.I.C. 24 § 284(a).
[29] *Robles,* 49 V.I. at 496 (citing *Eddy v. V.I. Water & Power Auth.*, 369 F.3d 227, 232 (3d Cir. V.I. 2004)).
[30] Compl. ¶¶ 5-7.
[31] Compl. ¶¶ 7, 9, 11.

to her [left] knee."[32] These factual allegations clearly demonstrate that Defendants were Ford's employer and that Ford's injury, which caused harmful changes to her body, arose out of and in the course and scope of her employment with Defendants. Accordingly, Ford's injuries are compensable under the WCA, and, so long as the WCA applies in this case, the exclusivity provision of the WCA will bar Plaintiff from suing Defendants in tort unless an exception applies.

B. The intentional tort exception to the exclusive remedy provision of the Workers' Compensation Act.

According to Defendants, the only exception to the WCA's exclusivity provision that potentially pertains is that for intentional torts, and, because the Complaint fails to allege sufficient facts to establish Defendants acted with "actual specific and deliberate intention to cause injury," Plaintiff fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).[33] In opposition, Plaintiff argues the exception to the WCA's exclusivity provision exists in "tort suits where the employee can show that the conduct of the employer . . . [w]as so egregious as to exceed the bounds of negligence and constitute the sort of intentional wrongdoing necessary to comprise an exception to the exclusionary remedy provision."[34] In so arguing, Plaintiff urges the Court to "expand the scope of the intentional tort exception to the exclusionary remedy provision" of the WCA and adopt the Substantial Certainty Test set forth in the Restatement (Second) of Torts § 8A.[35] Defendants' reply that the Substantial Certainty Test was already considered and rejected by the Supreme Court of the Virgin Islands in *Robles v. HOVENSA, L.L.C.*,[36] which instead adopted the majority "specific intent" approach.[37]

[32] Compl. ¶¶ 7, 9, 11.
[33] Mot. to Dismiss, pp. 4-6.
[34] Opp'n to Mot. to Dismiss, p. 2.
[35] Opp'n to Mot. to Dismiss, pp. 2-3.
[36] 49 V.I. 491 (V.I. 2008).
[37] Reply to Pl.'s Opp. to Mot. to Dismiss, p. 2; *See Robles*, 49 V.I. at 499.

In *Robles*, the Supreme Court of the Virgin Islands described the "intentional tort exception" to the exclusive remedy provision of the WCA as follows:

> [T]here is . . . an implied exception to the literal application of § 284(a) . . . [R]egardless of the character of the injury, there is an exception to the exclusivity bar for tort suits where the employee can show that "the conduct [of the employer can] be regarded as so egregious as to exceed the bounds of negligence and constitute the sort of intentional wrongdoing necessary to comprise an exception to the exclusive remedy provision of WCA § 284(a)."[38]

After considering the approaches utilized by a minority and majority of other jurisdictions in defining the scope of the "intentional tort exception," the Supreme Court in *Robles* adopted the majority approach and held that "the intentional tort exception applies only to situations in which the employer had an actual, specific and deliberate intention to cause injury."[39] While Defendants correctly characterize the Supreme Court's ruling in *Robles*, they fail to recognize that the *Robles* opinion was based on 1 V.I.C. § 4, which the Supreme Court referenced as "impressive evidence that the Virgin Islands legislature intends [the majority] rule to govern in the absence of specific legislation" in reasoning that "[a]s long as the substantial certainty test remains the minority rule, it is for the Legislature to determine whether or not such a test should be adopted in the Virgin Islands."[40]

Since the Supreme Court issued the *Robles* opinion in 2008, "[t]he common law of this jurisdiction has undergone a significant transformation" and no longer derives from a rote application of 1 V.I.C. § 4.[41] In *Banks v. Int'l Rental & Leasing Corp.*,[42] the Supreme Court

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[38] *Robles*, 49 V.I. at 496 (citing *Eddy*, 369 F.3d at 233) (quoting *Chinnery*, 865 F.2d at 72).
[39] *Id.* at 499.
[40] *Id.* at 499.
[41] *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *5 (V.I. Super. Ct. 2015) (citing *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011)).
[42] "As established in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 981-84 (V.I. 2011), and subsequent cases, when confronted with an issue of Virgin Islands common law that . . . [the Supreme Court of the Virgin Islands] has not resolved — or that has been addressed only through erroneous reliance on former 1 V.I.C. § 4 — courts [in this

determined that the Legislature implicitly repealed 1 V.I.C. § 4 by vesting the supreme judicial authority in the Supreme Court of the Virgin Islands.[43] Under *Banks*, the "Superior Court, when considering a question not foreclosed by prior precedent from [the Supreme] Court, must perform a three-part analysis"[44] by balancing the following non-dispositive factors:

> (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.[45]

With respect to the Supreme Court's pre-*Banks* decisions, such as *Robles*, the Supreme Court has instructed that "the Superior Court need not consider itself foreclosed from adopting a different common law rule if those decisions were wholly based on a belief that application of the Restatements or the majority rule was mandatory pursuant to 1 V.I.C. § 4 as in effect prior to [the Supreme] Court's ruling in *Banks*."[46] Accordingly, before the Court can address whether the Complaint states a claim upon which relief can be granted, the Court must conduct a *Banks* analysis with respect to the "intent" requirement of the intentional torts exception to the exclusive remedy provision of the WCA.

As to the first factor under *Banks*, approaches taken by Virgin Islands courts in the past, the Supreme Court's opinion in *Robles* is instructive. As discussed, in *Robles*, the Supreme Court adopted the "specific intent" approach applied by the United States District Court for the Virgin

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jurisdiction] must "engage in a three-factor analysis: first examining which common law rule Virgin Islands courts have applied in the past; next identifying the rule adopted by a majority of courts of other jurisdictions; and then finally — but most importantly — determining which common law rule is soundest for the Virgin Islands." *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014); *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014); *Walters v. Walters*, 60 V.I. 768, 777 n. 11 (V.I. 2014)).

[43] *Banks*, 55 V.I. at 979.

[44] *Connor*, 60 V.I. at 603.

[45] *Simon v. Joseph*, 59 V.I. 611 (V.I. 2013) (interpreting *Banks*); *Hamed v. Hamed*, 2015 V.I. Supreme LEXIS 21, *7-8 (V.I. 2015) (discussing the evolution of *Banks* and its progeny).

[46] *Connor*, 60 V.I. at 605 n. 1.

Islands, United States Court of Appeals for the Third Circuit, and a majority of jurisdictions at that time, holding that the "intentional tort exception to the exclusive remedy provision of the WCA is limited to situations in which the employer had an actual, specific and deliberate intention to cause injury."[47] This Court has also applied this "specific intent" approach when considering tort claims in actions arising under the WCA.[48]

The second factor under *Banks*, "determining the position taken by a majority of courts from other jurisdictions[,] directs the Superior Court to consider all potential sides of an issue by viewing the potentially different ways that other states and territories have resolved a particular question."[49] A minority of other jurisdictions do not acknowledge any exceptions to the exclusive remedy provision of their workers' compensation statutes,[50] while some jurisdictions only acknowledge specific statutory exceptions, rather than an overarching "intentional tort exception."[51] At least one jurisdiction recognizes the statutory exceptions to the exclusive remedy provision of the WCA as "non-exhaustive" and focuses on whether the employer's conduct arose

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[47] *Robles*, 49 V.I. at 497 & n. 4 (citing *Eddy*, 369 F.3d at 235; *Ferris v. V.I. Indus. Gases, Inc.*, 23 V.I. 183, 188 (D.V.I. 1987) (collecting cases)).

[48] *Smith v. Elias*, 2007 V.I. LEXIS 33, *9 (V.I. Super. Ct. 2007) ("[T]erritorial jurisprudence has previously recognized that any exception to the exclusivity provision is strictly . . . limited to situations in which there is an 'actual, specific and deliberate intention to injure'") (citing *Eddy*, 369 F.3d at 234) (internal quotation marks omitted); *See O'Neal v. PSMT, LLC*, 2014 V.I. LEXIS 61, *6 (V.I. Super. Ct. Aug. 7, 2014) ("[T]he intentional tort exception to the exclusive remedy provision of the WCA is limited to situations in which the employer had an actual, specific and deliberate intention to cause injury") (citing *Eddy*, 369 F.3d at 235).

[49] *Connor*, 60 V.I. at 603 (citations omitted).

[50] *See* Matthew K. Brown, Case Note, *How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 Okla. L. Rev. 75, App. (2012) (collecting cases); *See also Devero v. N. Am. Bus Indus.*, 154 So. 3d 131, 137-138 (Ala. Civ. App. 2013) (when an employer's conduct is committed within the bounds of the employer's proper role, there are no exceptions to the exclusive remedy provision of the WCA, even if the conduct was intentional or willful) (citing *Ex parte Progress Rail Servs. Corp.*, 869 So. 2d 459, 473 (Ala. 2003).

[51] *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 109 (Haw. 2008) (noting there are statutory exceptions to the exclusive remedy provision of the WCA "for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto") (citing Haw. Rev. Stat. § 386-5); *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 11 (Idaho 2005) (noting the statutory exception to the exclusive remedy provision of the WCA "in any case where injury or death is proximately caused by the willful or unprovoked physical aggression of the employer") (citing Idaho Code § 72-209(3)) (other citation omitted).

out of employment relationship or "proper role" of the employer, rather than whether the conduct was intentional.[52]

With respect to the jurisdictions that recognize an "intentional tort exception" to the exclusive remedy provision of the WCA, the Supreme Court determined in *Robles* that a minority of these jurisdictions define "intent" under the Substantial Certainty Test, as follows:

> Some jurisdictions have adopted a broad approach to the concept of intentional wrong consistent with section 8A of the Restatement (Second) of Torts.[53] Section 8A provides that "[t]he word 'intent' ... denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."[54] Under this approach, intentional torts embrace not only an actual, specific, and deliberate intent to harm, but also includes situations in which the employer believes the injury is substantially certain to result.[55]

This Court's research has revealed that since the Supreme Court issued its opinion in *Robles*,[56] even fewer jurisdictions define "intent" for purposes of the "intentional tort exception" to the exclusive remedy of the WCA under the Substantial Certainty Test, which continues to be the

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[52] *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 367 (Cal. App. 2d Dist. 2010) (citing *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 713, 717-723 (Cal. 1994); Cal Lab Code § 3602(b) (providing exceptions to the exclusive remedy provision of the WCA for: (1) an "employer's willful physical assault"; or (2) an "employer's fraudulent concealment of the existence of the injury and its connection with the employment"; or (3) "[w]here the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person").

[53] *Robles*, 49 V.I. at 497 & n. 2 (collecting cases).

[54] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

[55] *Id.* (citing *Eddy*, 369 F.3d at 234).

[56] Notably, since *Robles*, the workers' compensation statutes of Ohio and Oklahoma were amended so as to recognize the "specific intent" approach to the "intentional tort exception" to the exclusive remedy provision of the WCA, thereby overruling the judicial adoption of the Substantial Certainty Test. *Cincinnati Ins. Co. v. DTJ Enters. (In re Hoyle)*, 143 Ohio St. 3d 197, 199-200 (Ohio 2015) ("The General Assembly's intent in enacting R.C. 2745.01 [in 2005] was to 'significantly restrict' recovery for employer intentional torts to situations in which the employer "acts with specific intent to cause an injury." Although the language of the statute includes tortious acts committed "with the belief that the injury was substantially certain to occur," the statute defines "substantially certain" as acting "with deliberate intent") (citing *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 263 (Ohio 2010)); 85A Okl. St. § 5(B)(2) (2010) (providing that the "intentional tort exception" to the exclusive remedy provision of the WCA "exist[s] only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that the injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort," thereby effectively overruling the Oklahoma Supreme Court's adoption of the Substantial Certainty Test in *Parret v. UNICCO Serv. Co.*, 127 P.3d 572, 575 (Okla. 2005)).

minority approach.[57] Additionally, several jurisdictions employ a heightened standard and require that the employer acted with knowledge that the injury or death was "certain"[58] or "virtually certain"[59] to result. Whether the traditional Substantial Certainty Test or heightened standard is employed, "mere knowledge and appreciation of a risk," "mere recklessness," or "mere negligence or gross negligence," is generally insufficient to trigger the "intentional tort exception" under these minority approaches.[60]

With respect to the majority approach, as was the case in *Robles*, a majority of jurisdictions continue to define the "intentional tort exception" to the exclusive remedy provision of the WCA under the "specific intent" standard.[61] "Courts adopting this standard employ various formulations of the standard, including: deliberate intent, specific intent, actual intent, and true intent."[62] "In all

[57] *See* Brown, *supra* note 50, at 83 & App. ("A significant minority of states now allow an employee to bring a common law suit outside of the workers compensation system when the employer was substantially certain an employee would be injured, even if injury to the employee was not the purpose of the employer") (collecting cases); *See also Trivette v. Yount*, 366 N.C. 303, 306 (N.C. 2012) (citing *Woodson v. Rowland,* 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991); *Patel v. Flexo Converters U.S.A., Inc.*, 309 Conn. 52, 57 (Conn. 2013) (quoting *Suarez v. Dickmont Plastics Corp.*, 242 Conn. 255, 280, 698 A.2d 838 (1997); *Presley v. Republic Energy Drilling, L.L.C.*, 2008 Tex. App. LEXIS 6636, *11-14 (Tex. App. Fort Worth Aug. 29, 2008) (citing *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406-407 (Tex. 1985) (other citations omitted); *Stanley v. Airgas-Southwest, Inc.*, 171 So. 3d 915, 916-917 (La. 2015) (citations omitted); *Speck v. Union Electric Co.*, 741 S.W.2d 280, 283 (Mo. Ct. App. 1987) (citations omitted); W. Va. Code § 23-4-2 (2015) (statute requires specific intent or "actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition"); *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272, 280 (N.M. 2001) (employing a factor test that is essentially akin to the Substantial Certainty Test).

[58] *Walston v. Boeing Co.*, 181 Wn.2d 391, 396-397 (Wash. 2014) (citations omitted); *Zimmerman v. Valdak Corp.*, 570 N.W.2d 204, 209 (N.D. 1997); *Travis v. Dreis & Krump Mfg. Co.*, 453 Mich. 149, 174, 179 (Mich. 1996) (citing MCLS § 418.131(1)) (other citations omitted).

[59] *Van Dunk v. Reckson Associates Realty Corp.*, 210 N.J. 449, 462, 470 (N.J. 2012) (citing *Millison v. E. I. Du Pont de Nemours & Co.*, 101 N.J. 161 (N.J. 1985); *Fryer v. Kranz*, 616 N.W.2d 102, 105-106 (S.D. 2000) (citations omitted); *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 783 n. 5 (Fla. 2004) (citing Fla. Stat. § 440.11 § 440.11(1)(b)(2) (2003)).

[60] *See Mead v. Western Slate, Inc.*, 2004 VT 11, 13 (Vt. 2004) (collecting cases); *See also* Brown, *supra* note 50, at 81.

[61] Brown, *supra* note 50, at 80 & App. (collecting cases); *Robles*, 49 V.I. at 497 n. 4 (collecting cases).

[62] Brown, *supra* note 50, at 80-81 (citations omitted).

variations, however, each court applying the standard is describing 'purpose' to injure: a person acts with purpose to cause injury when the person's conscious object is to cause the injury."[63]

Under the final *Banks* factor, the Court must determine the soundest rule for the Virgin Islands. The Court finds the soundest rule for the Virgin Islands is as follows: The intentional tort exception to the WCA's exclusivity provision applies only in situations where the employer had an actual, specific, and deliberate intention to cause injury. This rule rejects the Substantial Certainty Test in favor of the majority "specific intent" approach and mirrors the language used by the Supreme Court in *Robles*, thereby fostering consistency with respect to the scope of employer immunity under the WCA.[64] Most importantly, this rule is consistent with the purpose of the WCA "to expeditiously compensate injury or disease which arises out of and in the course of employment without regard to the negligence of the employee or employer."[65] In doing so, the WCA "creates a trade-off of legal rights," where the employer provides prompt payment to injured employees, regardless of whether the employer would "be liable for any sum at common law," in exchange for immunity from suits in tort.[66] By adhering to the strict, more exacting "specific intent" approach, this rule narrowly construes and clearly defines the acts and omissions that fall under "the intentional tort exception,"[67] thereby preserving the "balance of interests within the

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[63] *Id.* (citations omitted); *See also* 25 AM. JUR. 2d Workers' Compensation § 68, 84 (2013).
[64] *Robles*, 49 V.I. at 499 ("[A]long with a majority of jurisdictions, we hold that the intentional tort exception applies only to situations in which the employer had an actual, specific and deliberate intention to cause injury").
[65] 24 V.I.C. § 250(c).
[66] *Robles*, 49 V.I. at 495 (citing *Chinnery*, 865 F.2d at 71; *Wilson v. Asten-Hill Mfg. Co.*, 791 F.2d 30, 32 (3d Cir. 1986) (analyzing the analogous Pennsylvania Workmen's Compensation Act); *See Defoe v. Phillip*, 56 V.I. 109, 121 (VI. 2012) ("[ ]WCA immunizes 'employers' from lawsuits filed by employees who are entitled to workers' compensation benefits") (citing 24 V.I.C. § 284(a) ("[w]hen an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist").
[67] *Mead*, 2004 VT at 15 (citing John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 493, 517 (2001) (criticizing Florida's adoption of the "virtual certainty" approach with respect to the "intentional tort exception" to the exclusive

workers' compensation system"[68] and preventing "imping[ement] upon the policy prerogatives of the legislative branch."[69]

C. Adequacy of the Complaint.

a. "Intentional tort exception" to the exclusive remedy provision of the Workers' Compensation Act.

The Court, having concluded the soundest rule for the Virgin Islands is the same as that delineated by the Supreme Court in *Robles*, the *Robles* opinion remains instructive on whether the Complaint *sub judice* pleads sufficient factual allegations to demonstrate "the employer had an actual, specific and deliberate intention to cause injury" so as to state a claim under the intentional tort exception to the WCA's exclusivity provision. As the Supreme Court explained in *Robles*, this "is not an easy task" in that:

> Attempts to characterize contentions that an employer created a dangerous work environment through negligence, recklessness and intentional misconduct "as intentional torts are almost always unsuccessful because the actual injury remains accidental in character even where the corporate employer knowingly permitted a hazardous work condition to exist, willfully failed to provide a safe place to work or intentionally violated a safety statute."[70]

Here, the factual allegations of the Complaint, even when viewed in Ford's favor, are insufficient to suggest that Defendants had an actual, specific, and deliberate intention to injure her. The Complaint does not present adequate underlying factual matter to suggest Defendants intended to cause Plaintiff's injuries, and the facts, as pled, fail to raise a reasonable expectation that discovery will reveal such evidence. As in *Robles*, while the factual allegations suggest

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remedy provision of the WCA as a "vague" and "ill-defined" standard that cannot "be applied in a fair and consistent manner")).

[68] *Id.* (citing Helga L. Leftwich, *The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provision: Woodson v. Rowland*, 70 N.C. L. Rev. 849, 880 (1992)).

[69] *Id.* (citing Note, *Ohio's "Employment Intentional Tort": A Workers' Compensation Exception, Or the Creation of an Entirely New Cause of Action?*, 44 Cleve. St. L. Rev. 381, 404 (1996)).

[70] *Id.* at 501 (citing *Eddy*, 369 F.3d at 234).

Defendants may have "knowingly permitted a hazardous work condition to exist, and/or willfully failed to provide a safe place to work . . . [s]uch allegations are insufficient to support a claim that an employer's conduct was intended to cause injury and, therefore, falls outside the exclusive remedy provision of the WCA."[71] Accordingly, so long as the WCA applies, the Complaint, as pled, fails to state a claim that qualifies under the "intentional tort exception" to the exclusive remedy provision of the WCA, and Defendants will be immune from liability on that basis.

b. Uninsured employers are not immune under the Workers' Compensation Act.

Importantly, Defendants are afforded immunity under the WCA only if they have complied with the statutory requirements for maintaining their status as insured employers under the WCA. Uninsured employers are not "immune from legal action by the injured employee,"[72] as 24 V.I.C. § 261(b)(1) specifically authorizes an "injured employee of an uninsured employer . . . to bring suit for damages against the employer . . . instead of receiving compensation under [the WCA]."[73] The determination of whether "an employer's status as an insured employer under the [ ]WCA is a mixed question of law and fact."[74] To become insured under the WCA, an employer must "secure the payment of compensation under [the WCA] by insuring with the Government Insurance Fund,"[75] which requires "the employer to pay a premium and file 'the necessary reports' with the Government Insurance Fund annually."[76] "On receipt of payment, the Commissioner of Finance shall forward to the employer a receipt which shall be prima facie evidence of said payment of the

[71] *Id.* at 502 (citing *Eddy*, 369 F.3d at 234).
[72] *Bertrand.*, 2015 V.I. Supreme LEXIS 36, at *20 (citing 24 V.I.C. § 284(a)).
[73] *See id.* ("An insured employer is immune from legal action by the injured employee . . . An uninsured employer, on the other hand, is not") (citing 24 V.I.C. § 261(b)(1) (other citation omitted).
[74] *Island Tile, supra,* 57 V.I. at 612 (citing 24 V.I.C. § 273(d)).
[75] *Bertrand,* 2015 V.I. Supreme LEXIS 36, at *20 (citing 24 V.I.C. § 272(a)).
[76] *Id.* at *20-21 (citing 24 V.I.C. § 272(c)).

premium and insurance coverage."[77] "[A]ny employer that fails to pay into the fund or fails to satisfy the reporting requirement 'shall be considered an uninsured employer.'"[78] Further, 24 V.I.C. § 284(b) provides that "an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title."

When a Rule 12(b)(6) Motion to Dismiss seeks dismissal on the grounds that the action is barred under the exclusive remedy provision of the WCA, the Court must first determine whether the Complaint concedes, or contains sufficient factual allegations to establish, that the employer was insured under the WCA.[79] If not, the Supreme Court instructs that "the representations in [the employer's Motion to Dismiss] . . . that it was insured under the [ ]WCA unquestionably require[ ] the Superior Court to consider 'matters outside the pleadings,' transforming it into a motion for summary judgment."[80] The motion is transformed even when the employer does "not attach a copy of its 'Certificate of Government Insurance' or accompany its motion with affidavits or other documents . . . for unsworn representations of counsel as to factual matters — which are not themselves evidence, — are sufficient to transform a Federal Rule 12(b)(6) motion to a Federal Rule 56 motion pursuant to Federal Rule 12(d)."[81]

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[77] *Island Tile*, 57 V.I. at 612 (citing 24 V.I.C. § 273(d)). Note, however, that the "use of the phrase 'prima facie evidence' in a statute 'only establishes a rebuttable presumption,' and 'cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.'" *Island Tile*, 57 V.I. at 612 (citing *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430, 35 S. Ct. 328, 59 L. Ed. 644 (1915)).

[78] *Bertrand*, 2015 V.I. Supreme LEXIS 36, at *21 (citing 24 V.I.C. § 272(c)).

[79] *Island Tile*, 57 V.I. at 613 ("[S]ince the Estate's complaint had not conceded that Island Tile was an insured employer under the VIWCA and — in fact — did not contain any factual allegations relevant to determining Island Tile's status as an insured or uninsured employer, the representations in Island Tile's motion that it was insured under the VIWCA unquestionably required the Superior Court to consider 'matters outside the pleadings,' transforming it into a motion for summary judgment").

[80] *Id.*

[81] *Id.* (citing *see Henry v. Dennery*, 55 V.I. 986, 994 (V.I. 2011); *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 787 (8th Cir. 2007)).

Here, the Complaint does not concede, or even mention, that Defendants are insured under the WCA, nor does it contain any factual allegations relevant to determining Defendants' status as an insured or uninsured employer.[82] Although Defendants are the Government of the Virgin Islands and the Virgin Islands Department of Education, a governmental agency, this does not, *ipso facto*, demonstrate that Defendants complied with the statutory requirements necessary for maintaining status as an insured employer under the WCA,[83] nor does it demonstrate that Defendants are named in the "Certificate of Government Insurance" so as to preclude Plaintiff from initiating a civil action against them under 24 V.I.C. § 284.[84] Additionally, assuming, *arguendo*, that Defendants are uninsured employers, the Complaint contains no factual allegations suggesting that Ford received workers' compensation benefits for the injuries she sustained in the accident so as to preclude recovery against Defendants in this civil action under 24 V.I.C. § 261(b)(1).[85] Further, although Plaintiff's argues in her Opposition that her case falls within the "intentional tort exception" to the exclusive remedy provision of the WCA, thus implying that the WCA applies in this case, these statements constitute the legal opinion of Plaintiff's counsel and

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[82] *See id.*

[83] *See* 3 V.I.C. § 584a(b) ("Any employee of the Government of the United States Virgin Islands who is unable to work due to an injury which may be compensable under the Virgin Islands Workers' Compensation Administration Law, may elect to continue to receive his full wages for a period of time not exceeding his accumulated leave time").

[84] 24 V.I.C. § 284(b) ("an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title"). *Accord O'Neal*, 2014 V.I. LEXIS 61, at *5-6 ("Considering that PSI is not named in a certificate of insurance in the Virgin Islands, 24 V.I.C. § 284 does not bar Plaintiff from suing PSI").

[85] 24 V.I.C. § 261(b)(1) ("The injured employee of an uninsured employer, or the employee's beneficiaries, instead of receiving compensation under this chapter may elect, at any time prior to the rendering of a decision by the Administrator, to bring suit for damages against the employer, just as if this chapter were not applicable").

are not facts of which the Court may take judicial notice under the doctrines of judicial admissions[86] and judicial estoppel.[87]

Consequently, in order to conclude that the Complaint is subject to the exclusive remedy provision of the WCA due to the status of Defendants as insured employers, the Court must consider matters outside the pleadings and, as provided in Rule 12(d), convert Defendants' Rule 12(b)(6) motion into one for summary judgment under Fed. R. Civ. P. 56. But, to do so, Rule 12(d) requires the Court give "the parties a reasonable opportunity to present all the material that is pertinent to the [summary judgment] motion."

Here, Defendants have yet to answer the Complaint, discovery has not yet begun, and Defendants have not identified or attached any evidence that would warrant the Court considering

[86] *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 133 (V.I. 2009) (recognizing judicial admissions doctrine in the Virgin Islands and holding that "facts asserted in pleadings may be regarded as 'judicial admissions' which are binding on the party asserting them for the purpose of that case and any later appeal and which do not have to be later proven"), *overruled in part on other grounds by Benjamin, supra*, 56 V.I. at 564 (citing *Sobratti v. Tropical Shipping & Constr. Co.*, 267 F. Supp. 2d 455, 463 (D.V.I. 2003) ("Hence, a party is precluded from retreating from a factual claim, which he affirmatively asserted in support of his cause of action, simply to avoid summary judgment") (collecting cases); *See also Fletcher v. Eagle River Memorial Hosp., Inc.*, 156 Wis. 2d 165, 179 (Wis. 1990) ("[A] party should not be bound by any misunderstanding or misapprehension of the law . . . 'This rule [in respect to judicial admissions], however, is limited to statements or admissions as to matters of fact. Statements or admissions relative to questions of law are not admissible . . . for the reason that a party should not be affected by a statement which may be attributable to a misapprehension of his legal rights") (quoting *City of Okmulgee v. Wall*, 167 P.2d 44, 46, 196 Okl. 536 (1946)), *but see Mopex v. Barclays Global Investors*, 2003 U.S. Dist. LEXIS 3074, 2003 WL 880996 (N.D. Ill. 2003) (holding that a representation opposition to motion to dismiss constituted a judicial admission); *Chow v. Aegis Mortgage Corp.*, 185 F.Supp.2d 914, 916 (N.D. Ill. 2002) (holding that a concession in an opposition to motion to dismiss constituted a judicial admission).

[87] While the Supreme Court of the Virgin Islands has acknowledged the concept of judicial estoppel, it has yet to adopt the doctrine. *Virgin Islands Taxi Association v. Virgin Islands Port Authority*, 2016 V.I. LEXIS 69, *40 (V.I. Super. Ct. June 8, 2016) (citing *Fontaine v. People of the V.I.*, 56 V.I. 571, 583 n.7 (V.I. 2012) (citing *Boston v. Virgin Islands*, 46 V.I. 520, 526 (V.I. 2005) (quoting Black's Law Dictionary 571 (7th ed. 1999)). Upon conducting a *Banks* analysis, the Superior Court recently adopted the doctrine of judicial estoppel as the soundest rule for the Virgin Islands. *Id.* at *40-49. In so doing, the Court adopted the Supreme Court's definition of judicial estoppel as "estoppel that prevents a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court." *Id.* at *40, 48 (citations omitted). In determining judicial estoppel, the Court concluded the soundest rule for the Virgin Islands is placing importance on whether a party is in fact asserting inconsistent positions, which then prejudices the opposing party in the proceeding before the Court." *Id.* at *47-49. This rule affords the Court discretion to consider the issue of judicial estoppel on a case by case basis and expressly rejects a strict multi-factor test for determining the issue. *Id.* at *48-49. Having reviewed this *Banks* analysis, and agreeing with the methodology and conclusions of same, the Court hereby adopts the standard articulated in *Virgin Islands Taxi Association v. Virgin Islands Port Authority*. *See id.*

the issue of Defendants' status as an insured employer under the WCA under the summary judgment standard. While the Court recognizes that under Rule 56, a party may move for summary judgment at any time prior to thirty (30) days after the completion of discovery, it is also understood that a motion for summary judgment filed prior to the start of discovery runs the risk of being considered premature.[88] In this case, the Court finds conversion inappropriate at this early stage of the proceedings, as it would likely prejudice the parties since no discovery has been conducted and the parties have not been given a reasonable opportunity to respond.[89] Because there is nothing in the Complaint indicating that Defendants are insured employers, the Court is unable to conclude at this time that the WCA applies so as to bar Plaintiff from asserting common law claims under the Act's exclusivity provision.

c. Claims for negligence and gross negligence.

Since the facts, as pled in the Complaint, do not establish that the WCA applies, the Court must determine whether the Complaint states a claim for negligence or gross negligence. To state a claim for negligence, a plaintiff must plead that (1) defendant owed plaintiff a legal duty of care;

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[88] FED. R. CIV. P. 56(b) (2010) & advisory committee note to 2010 amendments. FED. R. CIV. P. 56(b) (2010) applies as a last resort to the practice and procedure of the Superior Court through SUPER. CT. R. 7. The Court recognizes that in *Vanterpool*, the Supreme Court of the Virgin Islands explained that in the *Martin v. Martin*, 54 V.I. 379 (V.I. 2010), the Supreme Court "adopted the standard contained in a prior version of [FED. R. CIV. P. 56], [which] remains controlling in Virgin Islands courts" and does not include the amendments to Fed. R. Civ. P. 56 that went into effect on December 1, 2010. *Vanterpool*, 2015 V.I. Supreme LEXIS, at *30 n. 10 ("Effective December 1, 2010, Federal Rule of Civil Procedure 56 was rewritten substantially to incorporate some — but not all — aspects of local rules similar to District Court Rule 56.1. Nevertheless, this Court's *Martin* decision, which adopted the standard contained in a prior version of the rule, remains controlling in Virgin Islands courts") (citations omitted). Notwithstanding, a review of the Virgin Islands statutes, Superior Court of the Virgin Islands rules, and precedents from the Supreme Court of the Virgin Islands reveals the absence of any other applicable procedure regarding the time limits for filing motions for summary judgments in Superior Court proceedings. *See Sweeney*, 60 V.I. at 442. As a result, the current version of Fed. R. Civ. P. 56(b), as amended in 2010, regarding the time limit for filing motions for summary judgment applies in this case through SUPER. CT. R. 7.

[89] *See Callender v. Nichtern*, 1995 V.I. LEXIS 24, *17 (V.I. Terr. Ct. 1995) (refusing to convert a motion to dismiss into a motion for summary judgment because no discovery had been conducted) (citing *Brug* v. *Enstar Group, Inc.*, 755 F. Supp. 1247 (D. Del. 1991)).

(2) defendant breached that duty; and (3) defendant's breach constituted the factual and legal cause of (4) damages to the plaintiff.[90]

Here, Plaintiff has sufficiently pled the following facts relevant to establishing a negligence claim: that Plaintiff was employed as a teacher by Defendants the Government of the Virgin Islands and Department of Education, who owed her a duty of care to "take proper precaution for the safety of the Plaintiff" and "properly maintain and inspect the building that Plaintiff was working in," Joseph A. Gomez Elementary School;[91] that, while Plaintiff was "performing her duties as a teacher" at Joseph A. Gomez Elementary School, she was "struck in the head and both legs by a large portion of overhead concrete that had collapsed upon Plaintiff, pinning her to the floor;"[92] that Defendants disregarded their mandated duties "[i]n failing to take proper precaution for the safety of the Plaintiff" and "[i]n to failing properly maintain and inspect the building that Plaintiff was working in;"[93] and these "acts, commissions and omissions" of Defendants caused Plaintiff to suffer "real and permanent physical and emotional damages to her body and mental stability."[94] These factual allegations are enough to raise a right to relief above the speculative level and give Defendants fair notice of the claim for ordinary negligence.

As to a claim for gross negligence, this Court has defined gross negligence as "wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property"[95] and concluded that the elements of a gross negligence claim are "logically inferred"

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[90] *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (adopting the basic elements of negligence after agreeing with the analysis performed by the Superior Court pursuant to *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 981-84 (V.I. 2011)).
[91] Compl. ¶¶ 4, 5-8, 17.
[92] Compl. ¶¶ 6-7.
[93] Compl. ¶ 17.
[94] Compl. ¶ 10, 17.
[95] *Yusuf v. Ocean Props.*, 2016 V.I. LEXIS 19, *11 (V.I. Super. Ct. Mar. 7, 2016).

from a claim for ordinary negligence.[96] In so finding, this Court has determined that the elements required to state a claim for gross negligence are the same as those for ordinary negligence, except that, in a gross negligence claim, plaintiff must plead that "defendant breached [the] duty in such a way as to demonstrate a wanton, reckless indifference to the risk of injury to plaintiff."[97]

Plaintiff contends in her Opposition that "the collapsing of a large portion of overheard concrete indicates structural design flaws or the deliberate comprising of the integrity of the structure so as to maximize profit by reducing cost . . . that the Defendants . . . knew about [ ] through their respective agents . . . given [Defendants'] position and control over the structure wherein the Plaintiff was injured."[98] However, these allegations are not made in the Complaint and, while the Complaint styles its cause of action as one for "gross negligence,"[99] it does not contain factual allegations that demonstrate Defendants acted with "wanton, reckless indifference" to the health and safety of Plaintiff. Consequently, the Complaint, as pled, fails to allege adequate underlying facts to support a claim for gross negligence.

D. Leave to Amend Complaint to Cure Deficiencies.

Although not binding, on several occasions this Court has applied Third Circuit precedent, which mandates that "if a complaint is subject to a Rule 12(b)(6) dismissal a ... court must permit a curative amendment unless such an amendment would be inequitable or futile . . . [and] must

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[96] *Id.* at *13-15 n. 10 ("Although in *Machado* the Supreme Court established only the elements of an ordinary negligence claim and not a gross negligence claim, the elements of a gross negligence claim may be logically inferred, given that claims of gross negligence are complaints of conduct 'which is still, at essence, negligent rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended'") (citing W. Page Keeton et al., PROSSER AND KEETON ON TORTS § 34 at 212-213 (5th ed. 1984)).
[97] *Id.* at *13. Although the Supreme Court of the Virgin Islands has not defined the elements of a claim for gross negligence, the Superior Court, in the case of *Yusuf v. Ocean Props.*, 2016 V.I. LEXIS 19, conducted a *Banks* analysis and determined that the rule stated above represents the soundest rule of law for the Virgin Islands. *Id.* at 12-13. Having reviewed this *Banks* analysis, and agreeing with the methodology and conclusions of same, the Court hereby adopts the standard articulated in *Yusuf. Id.*
[98] Opp'n to Mot. to Dismiss, p. 1.
[99] Compl. ¶¶ 17-18 ("Defendant, in disregard of their mandated duties, was [sic] grossly negligent").

provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend."[100] "An amendment would be futile if the complaint, as amended, would fail to state a claim upon which relief could be granted."[101] Because Plaintiff could potentially allege facts in an amended Complaint that substantiate her claim for gross negligence or the applicability the "intentional tort exception" to the exclusive remedy provision of the WCA, amendment is not futile in this case. As a result, the Court will grant Plaintiff the opportunity to amend her Complaint to cure the aforementioned deficiencies.

CONCLUSION

For the foregoing reasons, Defendants' October 29, 2015, Motion to Dismiss will be granted in part as to the gross negligence claim and the claims arising under the "intentional tort exception" to the exclusive remedy provision of the WCA, but Plaintiff will be granted leave to amendment her Complaint. Defendants' Motion to Dismiss as to Plaintiff's claim for negligence must be denied because, in considering Defendants' motion under Rule 12(b)(6) and construing the factual allegations in a light most favorable to Plaintiff, the Complaint alleges adequate facts to state a claim for negligence, but submits no factual allegations that would indicate the WCA applies so as to bar the claim under the WCA's exclusivity provision.

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[100] *Adams v. North West Co., Inc.*, 2015 V.I. LEXIS 123, *18 (V.I. Super. Ct. Oct. 6, 2015) (citing *Benjamin v. Bennerson*, 2012 V.I. LEXIS 7, *7 (V.I. Super. Ct. Feb. 13, 2012); *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *12-13 (V.I. Super. Ct. June 25, 2015) ("[D]espite these deficiencies in the complaint, the Court must grant [plaintiff] an opportunity to amend her complaint unless amendment would be futile") (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)).

[101] *James-St. Jules*, 2015 V.I. LEXIS 74, at *13 (citing *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010)).

An Order consistent with this Memorandum Opinion that shall follow.

Dated: June 27, 2016

ATTEST: Estrella George
Acting Clerk of Court ___/___/___

by: ______________________
for Lori Boynes-Tyson
Court Clerk Supervisor 6/28/2016

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