

DIVISION OF ST. THOMAS AND ST. JOHN

Defendant

ACTION FOR: DAMAGES - CIVIL

**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: MICHAEL L. SHEESLEY, ESQUIRE
NIVA M. HARNEY-HILLER, ESQUIRE 305-379-3690
JUDGES, MAGISTRATES, CLERK OF THE COURTS,
LAW CLERKS, IT

Please take notice that on November 28, 2016 a(n) **MEMORANDUM
OPINION AND ORDER** dated November 28, 2016 was entered by the Clerk in
the above-entitled matter.

Dated: November 28, 2016

Estrella H. George
Acting Clerk of the Court

HERMINA SCOTLAND
COURT CLERK II

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

MYRON LIBIEN and LOIS LIBIEN,	)	
	)	
Plaintiffs,	)	CASE NO. ST-15-CV-107
	)	
vs.	)	ACTION FOR DAMAGES
	)	
MIFR (Virgin Islands), Inc. and	)	
MARRIOT OWNERSHIP RESORTS	)	
(St. Thomas), Inc.	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on a Motion to Dismiss and/or Strike Plaintiffs' First Amended Complaint, filed by Defendant MIFR (Virgin Islands), Inc. ("MIFR"), and a separate Motion to Dismiss and/or Strike Plaintiffs' First Amended Complaint, filed by Defendant Marriot Ownership Resorts (St. Thomas), Inc. ("MORI"). For the reasons set forth herein, the motions will be granted in part and denied in part.

BACKGROUND

Plaintiff Myron Libien and his wife, Plaintiff Lois Libien, (collectively "Libien" or the "Libiens") allege that on November 30, 2013, they arrived in St. Thomas for vacation. The Libiens allege that they stayed at the Marriot Frenchman's Reef and Morning Star Beach Resort during their trip. They further allege that they paid a "resort fee" of \$35.00 per day to utilize "Partner Property beach access and Partner

Property access.”¹ The Libiens allege that the “resort fee” was collected by the “hotel.”²

The Libiens further allege that they attended a beach party on a property known as “Marriot Frenchman’s Cove” on December 2, 2013, and that the party was “advertised and promoted” at the “Marriot Frenchman’s Reef property” which is allegedly owned by MIFR.³ The Libiens allege that a shuttle operated by MIFR transported them from the “Marriot Frenchman’s Reef” to the beach party at “Frenchman’s Cove.”⁴

The Libiens allege that Myron Libien fell into an unmarked and unlit drainage ditch while walking down the beach during the beach party. They allege that Myron Libien was subsequently transported to Schneider Regional Hospital where it was confirmed that he broke his shoulder, tore his rotator cuff, and damaged his bicep muscle.

The Libiens initiated this matter by filing a complaint on June 8, 2015 and subsequently amended their Complaint. They contend that Myron Libien’s injuries resulted from Defendants’ negligence in maintaining the area where he fell. They

¹ Pl.s’ First Amended Compl. at ¶ 13.

² Pl.s’ First Amended Compl. at ¶ 13. To be clear, paragraph 13 of Plaintiffs’ First Amended Complaint does not use the term “hotel” as a proper noun and the First Amended Complaint does not define an entity or premises as the “hotel.” The first sentence of paragraph 13 refers to the “Marriot Frenchman’s Reef and Morning Star Beach Resort.” Presumably, the First Amended Complaint refers to the “Marriot Frenchman’s Reef and Morning Star Beach Resort” when it uses the term “hotel.”

³ Pl.s’ First Amended Compl. at ¶ 14.

⁴ Pl.s’ First Amended Compl. at ¶ 15.

further contend that Defendants' conduct constitutes gross negligence and they request punitive damages.

Defendants filed the instant motions to dismiss and/or strike the First Amended Complaint on October 7, 2015. The Libiens filed an Opposition and both Defendants filed Replies.

ANALYSIS

MIFR and MORI move to dismiss Libien's First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and/or in the alternative to strike portions of Libien's First Amended Complaint pursuant to Fed. R. Civ. P. 12(f). MIFR's and MORI's Motions to Dismiss are identical except that MIFR additionally contends that the Libiens improperly named MIFR as a Defendant in this case. As such, the Court will first resolve MIFR's unique issue before considering the balance of the issues together.

I. MOTIONS TO DISMISS

MIFR and MORI now move to dismiss the Libiens' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6),⁵ the Court must conduct its analysis under the assumption that all facts (as opposed to mere legal conclusions) pleaded by the non-movant are true.⁶ In evaluating the sufficiency of pleadings, courts identify the legal elements of

⁵ Applicable to the Superior Court through Virgin Islands Supreme Court precedent. See e.g. *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011).

⁶ See, e.g., *Joseph*, 54 V.I. at 650.

the claimant's cause of action; identify well-pleaded factual allegations; and compare the well-pleaded allegations against the legal elements and assess whether those allegations, if true, would plausibly lead to the conclusion that the claimant is entitled to relief.⁷ "[W]here 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."⁸ "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"⁹ When considering if there are facts in the Complaint sufficient to show plausible entitlement to relief, the Court disregards any allegations in the Complaint which are merely "labels and conclusions [or] a formulaic recitation of the elements."¹⁰

A. Whether MIFR is a Proper Defendant

MIFR argues that it is not a proper defendant in this lawsuit because it does not control, maintain, or operate the property upon which the incident occurred. MIFR appended a pair of verified declarations to its Motion to Dismiss that essentially state that MIFR does not control, maintain, or operate the property where Libien alleges he fell.

⁷ *Id.* at 649-650.

⁸ *Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011).

⁹ *Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 678 (U.S. 2007)).

¹⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1. Whether the Court May Consider MIFR's Proffered Exhibits

As a preliminary matter, the Court must determine whether it will consider the exhibits which MIFR attached to its Motion to Dismiss. MIFR cites to a host of Third Circuit cases for the proposition that the Court may consider documents attached to a movant's motion to dismiss if a document is integral to the complaint.¹¹

The Supreme Court of the Virgin Islands has held that the Superior Court of the Virgin Islands is "foreclosed from considering evidence from any source outside of the pleadings and the exhibits attached to the pleadings" at the motion to dismiss stage.¹² Consequently, the Virgin Islands Supreme Court has foreclosed the possibility of this Court deciding MIFR's Motion to Dismiss on the basis of MIFR's verified declarations because said declarations were not attached to the pleadings.¹³

¹¹ MIFR relies primarily on *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. N.J. 1997) for the proposition that the Court should consider its verified declarations. The Court reminds MIFR's counsel that the Third Circuit's interpretation of the Federal Rules of Civil Procedure are persuasive authority at best and ought to be cited by counsel as such. *See generally Vanterpool v. Gov'n't of the V.I.*, 63 V.I. 563, 582 (V.I. 2015). MIFR is reminded that, in the absence of discussion addressing: (1) whether cited authority is binding upon this Court or presented as persuasive authority, and (2) why the Court should adopt this view as the 'appropriate ... rule based on the unique characteristics and needs of the Virgin Islands' and the parties, the Court may strike motions and responses as fatally deficient. *See Benjamin v. Coral World V.I., Inc.*, 2014 V.I. LEXIS 35, *16 n.38 (V.I. Super. June 12, 2014) (warning litigants that simply citing the Restatements and other non-binding authority without any discussion of *Banks* may result in sanctions). Not only is *Burlington* not binding on this Court, *but Burlington* provides no support for MIFR. In *Burlington*, the Third Circuit anchored its holding (which ultimately affirmed the district court's dismissal of a complaint) on the contention that the complaint "relied upon these documents [the extrinsic documents at issue] in framing the complaint." *Id.* at 1426. Thus, MIFR finds no support from *Burlington* because, unlike the plaintiff in *Burlington*, the Libiens clearly did not rely on the verified declarations in framing their First Amended Complaint.

¹² *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 566 (V.I. 2012) (holding that only exhibits attached to the pleadings may be considered on a motion for judgment on the pleadings and recognizing that the standard is the same for a motion to dismiss).

¹³ *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012) ("[I]f, on a motion under Rule 12(b)(6) ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). The Court finds that consideration of MIFR's Motion to Dismiss as a motion for summary judgment is premature at this juncture and, as such, the Court will exclude MIFR's verified declarations.

2. Whether MIFR Controls, Maintains, or Operates the Premises in Question

MIFR cites a plethora of cases for the proposition that the Court should grant MIFR's Motion to Dismiss because it does not control, maintain, or operate the premises on which Myron Libien alleges he was injured. In contrast, the Libiens contend that MIFR and MORI share their properties to increase profits for both entities. As such, Libien argues, MIFR had a duty to maintain the beach property operated by MORI.¹⁴

In order to succeed on a claim for premises liability, a plaintiff must prove "(1) duty, (2) breach, (3) causation, and (4) damages."¹⁵ To prove a duty on the part of a defendant, a plaintiff must show that the defendant possessed or controlled the premises where the injury occurred.¹⁶

The most similar case cited by MIFR for this proposition is *Mannion v. CBI Acquisitions, LLC*.¹⁷ In *Mannion*, the plaintiff sued CBI Acquisitions, LLC ("CBI")—the owner of Caneel Bay Resort—after she was injured aboard a charter boat operated by Nauti Nymph Power Boat Rentals ("Nauti Nymph"). While staying at Caneel Bay Resort, the plaintiff booked a boat trip with Nauti Nymph via Caneel Bay Resort's concierge and the cost of the trip was billed to the plaintiff's room. Nauti

¹⁴ See Pl.'s' Opp'n to MIFR (Virgin Islands), Inc.'s Mot. to Dismiss and/or Strike, at 3.

¹⁵ *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 413 (V.I. 2016) (internal quotations omitted).

¹⁶ *Id.*

¹⁷ 2015 U.S. Dist. LEXIS 25863 (D.V.I. Mar. 4, 2015).

Nymph and CBI had an agreement that Nauti Nymph held the exclusive right to offer charter trips leaving from the Caneel Bay Resort docks. In return, a portion of Nauti Nymph's profits went to CBI. After extensive discovery, the district court granted summary judgment in favor of CBI. The court found that no joint venture or any other arrangement existed which could extend liability to CBI for the plaintiff's injuries which occurred aboard a Nauti Nymph charter vessel.

Unlike *Mannion*, this litigation is not at the summary judgment stage and the Libiens are just beginning discovery, presumably including ownership arrangements between MIFR and MORI. Thus, while MIFR may not have ultimately bore a duty to the Libiens to maintain the premises in question, the Court cannot reach that determination at this stage in the litigation. As such, the Court will deny this portion of MIFR's Motion to Dismiss.

**B. Whether the Libiens Failure to Delineate Which Actions are
Attributable to Each Individual Defendant is Deficient**

MIFR and MORI argue that the Libiens' First Amended Complaint is deficient because it fails to delineate which acts are attributable to each named Defendant. Specifically, they argue that the vast majority of Count I and all of Count II of the First Amended Complaint refer to Defendants in the plural form; and thus, neither MIFR nor MORI can determine exactly which accusations are leveled against which defendant.

In response, the Libiens argue that MIFR and MORI shared their properties in order to entice MIFR guests to purchase MORI's time shares, albeit without a single legal citation supporting the contention that such an arrangement, if true, warrants premises liability for both parties. The Libiens contend that both MIFR and MORI are responsible for the Libiens' alleged injuries because of their cooperation in advertising and shuttling guests back and forth between MIFR's hotel and MORI's residential properties. The Court will not entertain this legal argument from the Libiens because they fail to furnish a single supporting legal citation.¹⁸

Fed. R. Civ. P. 10(b), applicable to these proceedings via Superior Court Rule 29,¹⁹ states "If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense."²⁰ The separate paragraph requirement is defeated when

¹⁸ See *V.I. Taxi Ass'n v. West Indian Co.*, ST-16-CV-551, at p. 5 (V.I. Super. Ct. Oct. 18, 2016) (denying motion because movant failed to include supporting legal sources); see also *Tutu Park, Ltd. v. Harthman Leasing I, LLLP*, 2016 V.I. LEXIS 159, *30-31 (V.I. Super. Ct. Sept. 27, 2016) (denying a Motion to Dismiss in part because the movant uncritically relied on a century-old California case for a proposition of common law); *Carducci v. Regan*, 714 F.2d 171, 176 (D.C. Cir. 1983) (suggesting that, while courts are not precluded from reaching decisions on issues beyond the briefings, attempting to resolve complex legal questions without proper briefing by the parties deprives the court of the assistance of counsel necessary to properly develop the law in an adversarial system and declining to entertain appellant's argument); *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 121 (3rd Cir. 1997) (refusing to address complicated legal issues that were not properly developed by the parties in their briefs); *Schneider's Dairy v. Serv. Pers. & Emples., Teamsters Local Union No. 205*, 2013 U.S. Dist. LEXIS 174350, *5-6 n.1 (W.D. Pa. Dec. 10, 2013) (noting that "[i]t is not the Court's job to research and construct legal arguments open to parties ... In order to develop a legal argument effectively, the facts at issue must be bolstered by relevant legal authority; a perfunctory and undeveloped assertion is inadequate[.]") (internal citation omitted). The Supreme Court of the Virgin Islands has also spoken on the importance of this principle: "The rules that require a litigant to brief and support his arguments ... before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument[.]" *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012).

¹⁹ See *Bryan v. Ponce*, 51 V.I. 239, 249 (V.I. 2009) (recognizing the applicability of Fed. R. Civ. P. 10 in the Superior Court of the Virgin Islands).

²⁰ Fed. R. Civ. P. 10(b). To the extent that this Court's application of Rule 10(b) through Superior Court Rule 29 may constitute "mechanistic application" of a federal rule, the Court finds that no Virgin Islands statute, Supreme Court

a plaintiff groups defendants together—referring to all defendants collectively—rather than specifying what each party is alleged to have done wrong.²¹

In *Crawford v. Bobeck*,²² the Superior Court required the plaintiff to amend her complaint because she referred to multiple defendants collectively throughout her complaint and, as such, each individual defendant could not properly prepare defenses.²³ The court required the plaintiff to name each defendant individually with respect to the allegations charged against each defendant.

Similarly, here, the Libiens refer to the defendants collectively throughout their First Amended Complaint. Consequently, neither MIFR nor MORI can determine what wrongs are attributed to each individual defendant and neither Defendant can properly prepare its defense. Therefore, the Court will direct Plaintiffs to amend their complaint to separate the claims against each defendant.

C. Whether the Libiens Properly Pled Gross Negligence

The Supreme Court of the Virgin Islands has not yet defined gross negligence nor squarely addressed the question of what elements a plaintiff must prove to make

precedent, or Superior Court Rule determines the specificity of pleading requirements as discussed herein. See *Vanterpool v. Gov't of the Virgin Islands*, 63 V.I. 563, 576 (V.I. 2015). Furthermore, the Court finds that Rule 10(b) serves the valid purpose of promoting clarity in pleadings—thus aiding the Court in the judicious use of its resources and allowing parties to respond properly.

²¹ *Veltmann v. Walpole Pharm.*, 928 F. Supp. 1161, 1164 (M.D. Fla. 1996) (holding that plaintiff's lumping defendants together in the complaint precluded defendants from responding and warranted dismissal without prejudice); *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 962 (S.D. Cal. 1996) (holding that pursuant to Rule 10(b), "Defendants may be accused of a violation only by supporting allegations that specifically refer to that defendant.").

²² 2016 V.I. LEXIS 12 (V.I. Super. Ct. Feb. 4, 2016).

²³ *Id.* at *8.

out a cause of action for gross negligence. As such, the Superior Court must conduct a three-part analysis consistent with the Supreme Court of the Virgin Islands' holding in *Banks v. International Leasing Corp.*,²⁴ before adopting a particular rule. Recently, a *Banks* analysis was conducted in *Yusuf v. Ocean Props.*,²⁵ to determine the best rule for Virgin Islands regarding the definition of gross negligence. The *Yusuf* court found that the standard laid out in *Tutein v. Parry*,²⁶ constitutes the soundest rule of law for the Virgin Islands. *Yusuf* defined gross negligence as "wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property."²⁷ Furthermore, the *Yusuf* court found that "any mere mistake resulting from inexperience, excitement, or confusion" will not constitute gross negligence; instead, there must be "more than mere thoughtlessness or inadvertence, or simple inattention."²⁸ This Court is satisfied that *Yusuf* lays out the soundest rule for defining gross negligence in the Virgin Islands and consequently, this Court adopts *Yusuf's* analysis as though it were set forth in this Opinion.

To begin, the Court finds that the Libiens have not sufficiently distinguished the claim of negligence from the claim of gross negligence under the *Tutein* standard because it is unclear which facts the Libiens proffer to support their claims of Defendants' gross negligence as opposed to Defendants' simple negligence.

²⁴ 55 V.I. 967, 979 (V.I. 2011).

²⁵ 2016 V.I. LEXIS 19 (V.I. Super. Ct. Mar. 7, 2016).

²⁶ 48 V.I. 101, 107 (V.I. Super. Ct. 2006).

²⁷ *Yusuf*, 2016 V.I. LEXIS 19, at *11-12.

²⁸ *Id.* at *13.

In *Tutein*, the Court held that a “plaintiff must allege gross negligence as a separate claim from negligence...to permit a defendant to adequately defend against a claim of gross negligence.”²⁹ While *Tutein* made this distinction between pleading negligence and gross negligence for the purposes of interpreting a statute governing recoverable damages in motor vehicle accidents, the same logic applies here.

Paragraph 28 of the Libiens’ First Amended Complaint reads “Defendants’ acts and/or omissions were willful, outrageous, wanton, in total disregard of the rights of the Plaintiffs, grossly negligent and negligent as set forth above and were the actual and proximate cause of Plaintiff’s [sic] injuries and damages that resulted.”³⁰ Paragraph 28 constitutes the Libiens’ sole reference to gross negligence. As such, the Libiens fail to plead gross negligence as a claim separate from ‘simple’ negligence.

Assuming arguendo that the Libiens had pled negligence and gross negligence separately, their claim for gross negligence still fails because they did not plead factual allegations sufficient to sustain a claim for gross negligence. The Court finds the facts in this case similar to the facts in *Powell v. Chi-Co’s Distrib.*³¹ In *Powell*, the plaintiff alleged that she tripped over the edging of stairs and fell because the stairs were in a state of disrepair and they did not include lighting or a railing. The court dismissed the plaintiff’s claim for gross negligence because, it held, said allegations

²⁹ *Tutien*, 48 V.I. at 108.

³⁰ Pl.s’ First Amended Compl. at ¶ 28.

³¹ 2014 V.I. LEXIS 21 (V.I. Super. Ct. Apr. 3, 2014).

did not rise to the level of recklessness.³² Similarly, here, the Libiens base their allegations of gross negligence on the Defendants' failure to install handrails and lighting around a walkway over a drainage ditch.³³ Also, like *Powell*, these alleged "failures to act" do not rise to the level of recklessness or conscious indifference to the safety of the Libiens. Therefore, the claim for gross negligence will be dismissed.

D. Whether the Libiens Pled Sufficient Fact To Support A Claim For Punitive Damages

The Libiens' prayer for relief states "the Plaintiffs respectfully pray for judgment against the Defendant for compensatory, special and *punitive damages*, costs including attorney's fees and for such further relief as the Court deems proper."³⁴ Defendants argue that the Libiens fail to allege the minimum recklessness state of mind on the part of Defendants necessary to support a claim of punitive damages. To support their contention, Defendants cite to a myriad of Virgin Islands Superior Court cases and Virgin Islands District Court cases. The Libiens respond by arguing that Defendants cite non-binding cases for their proposition. They then fail to heed the Virgin Islands Supreme Court's explicit warnings and puzzlingly cite to

³² *Powell*, 2014 V.I. LEXIS 21, at *9.

³³ Pl.s' First Amended Compl. at ¶ 27.

³⁴ Pl.s' First Amended Compl. at p. 6 (emphasis added).

the Restatement (Second) of Torts and a United States Supreme Court case for the proposition that an award of punitive damages is necessarily a question for the jury.³⁵

Punitive damages are a remedy incidental to a cause of action; they do not constitute an individual cause of action.³⁶ Claimants must plead punitive damages with particularity pursuant to Fed. R. Civ. P. 9(g).³⁷ Fed. R. Civ. P. 9(g) states “If an item of special damages is claimed, it must be specifically stated.” The Supreme Court of the Virgin Islands has yet to issue an opinion recognizing the standard of conduct necessary to warrant punitive damages. As such, a three-pronged *Banks* analysis must be conducted to determine the best rule for the Virgin Islands.³⁸

In *Segura v. Meyer*,³⁹ the Superior Court conducted a *Banks* analysis to determine the best rule for the Virgin Islands regarding the standard of conduct necessary to garner an award for punitive damages. The *Segura* Court adopted the Restatement (Second) of Torts § 908(2) as the best rule for the Virgin Islands. Section 908(2) provides that “[p]unitive damages may be awarded for conduct that is

³⁵ *Lembach*, 64 V.I. at 428 n.13 (“[T]here is absolutely no basis in any of this Court's precedents for the proposition that attorneys are not required to fully brief all questions of law relevant to the issues that are being litigated, including all three Banks factors.”); see also *Tutu Park, Ltd.*, 2016 V.I. LEXIS 159, *25-26 n.68 (reminding parties that under LCRI 11.1, by signing a brief, an attorney certifies that the applicable law in this jurisdiction has been cited, including authority for or against the position being advocated by counsel and warning parties that briefs not supported by proper legal authority may result in sanctions); accord *IGY-AYH St. Thomas Holdings, LLC v. Cool Signs, LLC*, 2014 V.I. LEXIS 78, *4 n.8 (V.I. Super. Ct. Sept. 22, 2014); *Pate v. Gov't of the Virgin Islands*, 62 V.I. 271, 291 (V.I. Super. Ct. 2015); *V.I. Daily News v. PSC*, 45 V.I. 139, 146 (V.I. Terr. Ct. 2002) (finding attorney's failure to cite binding authority rendered it fatally deficient).

³⁶ *Anthony v. FirstBank Virgin Islands*, 58 V.I. 224, 227, n.5 (V.I. 2013).

³⁷ *Myers v. Derr*, 50 V.I. 282, 291 (V.I. 2008) (“Rule 9(g) thus carves out an exception to Rule 54(c)'s liberal pleading requirements for special damages in order to protect a defendant against unfair surprise.”).

³⁸ *Banks*, 55 V.I. at 981; *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 602 (V.I. 2014).

³⁹ ST-13-CV-565, mem. op., n. 24 (V.I. Super. Ct., Feb. 21, 2014).

outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.” The Court is satisfied that *Segura* determined the soundest rule for determining the conduct necessary to garner punitive damages in the Virgin Islands and consequently adopts *Segura*’s analysis as though it were set forth in this Opinion. Furthermore, the Superior Court has held “entitlement to punitive damages requires something more than knowledge of, and failure to act on, possibility or probability of injury on the part of the defendant.”⁴⁰

The Court will consider the sufficiency of the Libiens’ request for punitive damages by assuming the veracity of the factual allegations asserted in the First Amended Complaint and drawing all factual inferences in favor of the Libiens.⁴¹ It appears the Libiens base their request for punitive damages on the following factual allegations: Defendants did not warn their guests of the danger associated with the subject walkway; Defendants failed to place a railing around the subject walkway; Defendants failed to light the walkway as it crossed the drainage ditch.⁴² The Court finds this factual scenario similar to a number of other Superior Court cases.

In *Powell*, the Superior Court declined to award punitive damages when a plaintiff pled only that a defendant maintained a staircase in a “dangerous”

⁴⁰ *Melchior v. Univ. of the V.I.*, 2016 V.I. LEXIS 56, *12 (V.I. Super. Ct. Apr. 27, 2016).

⁴¹ See *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 130 (2d Cir. 2001); accord *K.E.K. v. Grier Sch.*, 2005 U.S. Dist. LEXIS 48460, *7 (M.D. Pa. July 25, 2005) (evaluating a request for punitive damages under Fed. R. Civ. P. 12(b)(6)); *Aniero Concrete Co. v. New York City Constr. Auth.*, 2000 U.S. Dist. LEXIS 8833 * (S.D.N.Y. June 27, 2000); *Acosta v. Hovensa, LLC*, 53 V.I. 762, 767 (D.V.I. 2010).

⁴² Pl.’s First Amended Compl. ¶ 27.

condition.⁴³ Likewise, in *Johnson v. Marriott Hotel Mgmt. Co. V.I.*,⁴⁴ the Superior Court refused a plaintiff punitive damages when her allegation that defendant failed to maintain a rug in a safe condition did not establish the requisite “evil motive” or “reckless indifference to the rights of others.”⁴⁵ In *Adams v. North West Co., Inc.*,⁴⁶ the Superior Court granted the defendants motion to dismiss plaintiff’s prayer for punitive damages because the plaintiff’s allegations that the defendant knowingly stacked boxes improperly on a store’s shelves such that they were likely to fall failed to meet the “evil motive” test.⁴⁷

While the Court recognizes that *Powell*, *Johnson*, and *Adams* are not binding on it, it nonetheless finds them persuasive. The Court finds that the Libiens fail to plead punitive damages with the requisite particularity under Fed. R. Civ. P. 9(g) because, like the plaintiffs in *Powell*, *Johnson*, and *Adams*, the Libiens fail to provide any allegations of sufficient outrageousness or evil motive. Rather, the Libiens’ First Amended Complaint fails to allege even minimal factual content beyond Defendants’ knowledge of the unsafe condition.⁴⁸

The Libiens’ First Amended Complaint does allege that “Defendants’ acts and/or omissions were willful, outrageous, wanton, [and] in total disregard of the

⁴³ *Id.* at *6.

⁴⁴ 2013 V.I. LEXIS 46 (V.I. Super. Ct. June 17, 2013).

⁴⁵ *Id.* at *5-6.

⁴⁶ 63 V.I. 427 (V.I. Super. Ct. 2015).

⁴⁷ *Id.* at 444.

⁴⁸ See Pl.s’ First Amended Compl. ¶¶ 26 & 27.

rights of the Plaintiffs...”⁴⁹ But, because this paragraph is essentially a pure legal conclusion, the Court will not consider it in assessing whether the First Amended Complaint meets the 12(b)(6) standard. As such, the Court will dismiss the Libiens’ claim for punitive damages.

II. MOTIONS TO STRIKE

To begin, the Court points out that in *Vanterpool v. Gouv’t of the V.I.*, the Virgin Islands Supreme Court unmistakably indicated that federal rules of procedure supply *rules of last resort* for the Superior Court of the Virgin Islands.⁵⁰ Virgin Islands courts must first determine whether a statute, precedential opinion, or Superior Court Rule applies to the situation at hand and, if so, such rules displace the federal rules.⁵¹ To the extent no such rule exists, the Court must still not “reflexively and mechanistically” apply federal rules but instead must “independently determine[] whether the rule serve[s] a valid purpose when applied to the Superior Court.”⁵² Thus, before applying a federal procedural rule, the Superior Court must consider the fitness and purpose of applying such a rule in the Virgin Islands.⁵³

⁴⁹ See Pl.s’ First Amended Compl. ¶ 28.

⁵⁰ *Vanterpool*, 63 V.I. at 582. (emphasis added).

⁵¹ *Id.*

⁵² *Id.*; see also *Cianci v. Chaput*, 2016 V.I. Supreme LEXIS 24, *17 (V.I. 2016) (“In the Superior Court of the Virgin Islands, 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 procedure.”); see also *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014).

⁵³ See *Vanterpool*, 63 V.I. at 582.

No statute, precedential opinion, or Superior Court Rule exists that could be seen as parallel to or in conflict with Fed. R. Civ. P. 12(f). Furthermore, the Court finds that Rule 12(f) serves the valid purpose of allowing the Court to purge redundant, immaterial, impertinent, or scandalous matter from the pleadings before it; thus, the Court finds that Rule 12(f) aids the Court in efficiently expending its judicial resources. As a result of the Court's *Vanterpool Analysis*, it will apply Fed. R. Civ. P. 12(f) to these proceedings. Under Rule 12(f), the Court may strike from a pleading any insufficient defense, or redundant, immaterial, impertinent, or scandalous matter.

In order to succeed on a Rule 12(f) motion, the movant must demonstrate the impertinence, redundancy, or immateriality (the lack of possible relationship to the controversy) *as well as* prejudice to one of the parties or that the allegation confuses an issue.⁵⁴ "A motion to strike redundant, immaterial, impertinent or scandalous matter is also viewed with disfavor as a time waster,"⁵⁵ because a court will not strike matter from a pleading unless it lacks any possible relation to the dispute or could confuse the issues.⁵⁶

Defendants argues that the while the Libiens' First Amended Complaint lists negligence and premises liability as independent causes of action, including such claims in a single complaint is impermissibly duplicative. In *Antilles School v.*

⁵⁴ See *Flanagan v. Wyndham Int'l, Inc.*, 2003 U.S. Dist. LEXIS 24211, *4 (D.V.I. Apr. 21, 2003) (emphasis added).

⁵⁵ *Id.* (internal quotations omitted).

⁵⁶ *Id.*

Lembach, the Supreme Court of the Virgin Islands held that a plaintiff's causes of action for negligence and premises liability were duplicative because premises liability is a theory of negligence and because the elements are the same.⁵⁷

In their Opposition the Libiens argue this case is different to other cases where courts have held that a premises liability theory and a negligence theory cannot be brought simultaneously because they are the same claim. They say—in a single sentence—that plaintiffs have alleged different facts relating to each defendant, and that a premises liability claim may coexist with a negligence claim. But the Libiens fail to highlight allegedly different facts for the Court. While the Libiens could conceivably have separate claims against each defendant, their Complaint is written in such a fashion.

Here, the Court can only infer a single negligence claim of the premises liability variety. Paragraphs 26 through 28 of the Libiens' First Amended Complaint clearly allege that both MIFR and MORI are liable for breaching a duty of care regarding the beach where Myron Libien's injury occurred. The complaint is clear that the alleged wrong is the failure to maintain the premises—for which the Libiens claim both MIFR and MORI are liable. Thus, the only claim for premises liability that the Court can infer arises from the Libiens' negligence claim. As such, the negligence and premise

⁵⁷ *Lembach*, 64 V.I. at 413.

liability claims are duplicative, and consequently, the Court will strike the Libiens' premises liability claim.⁵⁸

CONCLUSION

In light of the foregoing discussion, the Court finds that MIFR has not met its burden of demonstrating that it is an improper party. Therefore, its Motion to Dismiss will be denied.

However, the Court finds that the Libien's First Amended Complaint is improperly crafted because it impermissibly groups the two defendants together. "[I]f 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. Moreover ... [a] court must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend."⁵⁹

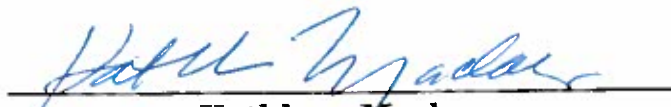
Therefore, the Court will allow Plaintiffs an opportunity to amend their complaint again, this time to distinguish the claims against each defendant. However, the claims for gross negligence and punitive damages lack sufficient factual basis. Therefore they will be dismissed. Finally, the claim for premises liability is duplicative of the negligence claim, so the claim for premises liability will be stricken.

⁵⁸ The Court would note that the Libiens' First Amended Complaint is not a model of clarity. The Libiens appear to assert claims of negligence, gross negligence, and premises liability all within Court I of the First Amended Complaint.

⁵⁹ See *Benjamin v. Bennerson*, 2012 V.I. LEXIS 7, *7 (V.I. Super. Ct. Feb. 13, 2012).

An Order consistent with this Opinion will follow.

DATED: November 28, 2016

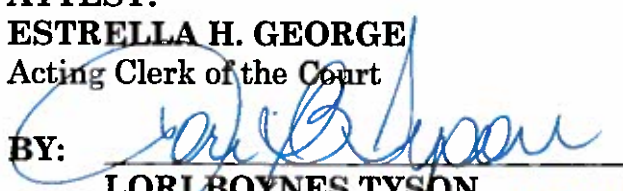


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

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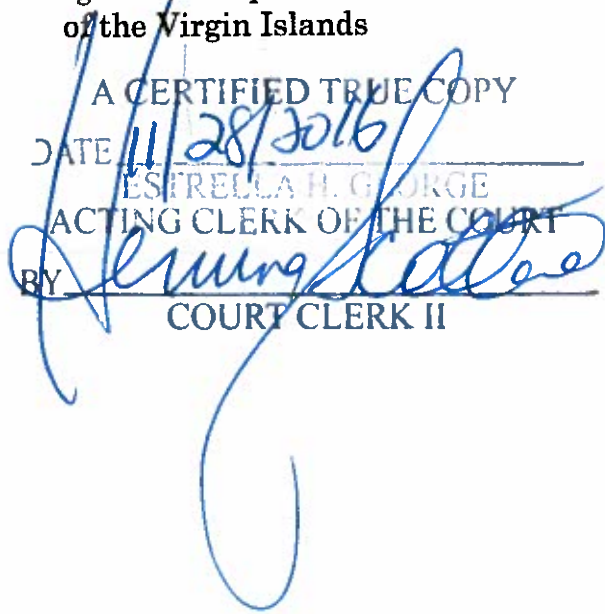
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Acting Clerk of the Court

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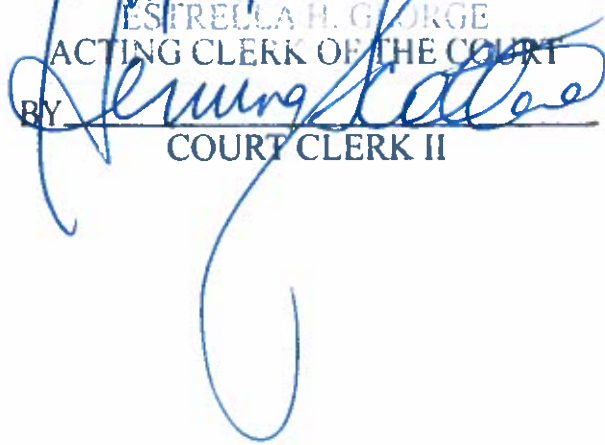

LORI BOYNES TYSON
Court Clerk Supervisor 11/28/16

A CERTIFIED TRUE COPY

DATE 11/28/2016


ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT

BY


COURT CLERK II

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

MYRON LIBIEN and LOIS LIBIEN,	)	
	)	CASE NO. ST-15-CV-107
Plaintiffs,	)	
	)	
vs.	)	ACTION FOR DAMAGES
	)	
MIFR (Virgin Islands), Inc. and	)	
MARRIOT OWNERSHIP RESORTS	)	
(St. Thomas), Inc.	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

ORDER

THIS MATTER is before the Court on a Motion to Dismiss and/or Strike Plaintiffs' First Amended Complaint, filed by Defendant MIFR (Virgin Islands), Inc. ("MIFR"), and a separate Motion to Dismiss and/or Strike Plaintiffs' First Amended Complaint, filed by Defendant Marriot Ownership Resorts (St. Thomas), Inc. ("MORI"). For the reasons set forth in the Memorandum Opinion entered on this day, it is hereby

ORDERED that MIFR's Motion to Dismiss all claims against it is **DENIED**;

ORDERED that Plaintiffs shall amend their complaint to separate their claims against each defendant;

ORDERED that Plaintiffs shall file their amended complaint within **20 days** of the date of entry of this Order;

ORDERED that Plaintiffs' claims for gross negligence and punitive damages are dismissed;

ORDERED that the Motion To Strike is **GRANTED**;

ORDERED that the Plaintiffs' claim for premises liability is **STRICKEN**; and
it is further

ORDERED that copies of this Order and the Memorandum Opinion shall be
directed to all counsel of record.

DATED: November 28, 2016

Kathleen Mackay
Kathleen Mackay

Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

A CERTIFIED TRUE COPY
DATE November 28, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY *Estrella George*
COURT CLERK II

BY: *Lori Boynes Tyson*
LORI BOYNES TYSON
Court Clerk Supervisor 11/28/16