IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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SONIA J. FRANCIS,	)	
	)	
Plaintiff,	)	CASE NO. ST-15-CV-177
	)	
v.	)	
	)	ACTION FOR DAMAGES
THE CARMEN V. RUAN LIVING TRUST,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Pending before the Court is the "Motion to Dismiss and Memorandum of Law in Support Thereof" filed by Defendant The Carmen V. Ruan Living Trust's ("Ruan Trust" or "Trust") on June 24, 2015. For the following reasons, Defendant's Motion will be **GRANTED** in part and **DENIED** in part.

I. FACTUAL AND PROCEDURAL BACKGROUND.[1]

On July 27, 2014, Plaintiff Sonia J. Francis, a citizen of St. Thomas, U.S. Virgin Islands, took her dog on a walk passing a property owned by Defendant, a citizen of St. Thomas, U.S. Virgin Islands. During Plaintiff's walk, a dog ran from Defendant's property towards her and her dog, both on a public road. In an attempt to attack Plaintiff's small dog, Plaintiff was knocked down by this unknown dog. After trying to protect her dog with an umbrella, an unknown man appeared and made the dog heel. Plaintiff had trouble standing immediately after due to the pain in her leg and had to be helped up by the man. Due to the pain worsening, Plaintiff went to see

[1] As the issues raised in Defendant's motion to dismiss are not fact intensive, the Court will not recite all of the allegations set forth in the existing record.

Dr. Adam Flowers. He did not diagnose any broken bones at the time, however Plaintiff did receive an injection for the pain. As Plaintiff continued to have pain for approximately two more weeks, she had an MRI taken of her leg. The MRI revealed a cracked bone and fractured kneecap; a tibial plateau fracture.

Plaintiff filed a complaint in the U.S. Virgin Islands Superior Court on April 13, 2015. Plaintiff seeks to recover damages for her injuries, under Virgin Islands statute: 19 V.I.C. §2612, and under the theories of common law strict liability, negligence, and gross negligence. Ruan Trust has since responded with a motion to dismiss for failure to state a claim upon which relief can be granted, and failure to join a party under Rule 19 of the Federal Rules of Civil Procedure.[2] A motions hearing was held on this matter on August 12, 2016.

II. STANDARD

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim,[3] a trial court must apply the three-part test from the United States Supreme Court decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This legal standard requires the trial judge to, "1) take note of the legal elements of the asserted cause of action; 2) identify and disregard naked factual contentions and legal conclusions framed as allegations of fact; and 3) review the well-pleaded facts against the necessary legal elements to determine whether the claims are plausible."[4] No assumption of truth attaches to allegations the court deems to be conclusory legal conclusions, as opposed to well-pleaded facts.[5] With regards to a claim's plausibility, a court must assume its veracity, and

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2 Plaintiff responded to Defendant's Motion to Dismiss on July 15, 2015. Defendant filed no reply.
3 FED. R. CIV. P. 12(b)(6) is made applicable to the Virgin Islands through Superior Court Rule 7.
4 *Benjamin v. Bennerson*, 2012 V.I. LEXIS 7 at *2 (V.I. Super. Ct. Feb. 13, 2012).
5 *Joseph v. Bureau of Corrs.*, 54 V.I. 644, 649-50 (V.I. 2011).

then conduct a "context-based" inquiry based on "judicial experience and common sense."[6] Furthermore, for a claim to be plausible, the plaintiff must allege facts in the complaint that permit the court to infer more than a possibility of misconduct.[7]

With regards to a Rule 12(b)(7) motion to dismiss, a party may move for dismissal if the plaintiff fails to join a necessary party under Rule 19(a).[8] A party is considered "necessary" under Rule 19 if:

> (A) in [the party's] absence, the court cannot accord complete relief among existing parties; or
> (B) [that party] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
> (i) as a practical matter impair or impede his ability to protect that interest or
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If the Court determines that a party is necessary and that he cannot be joined, for dismissal to be granted the moving party must prove that the necessary party is also indispensable according to Rule 19(b) balancing factors.[9]

III. LEGAL DISCUSSION

a. Plaintiff has not pled sufficient facts to establish her claim of strict liability under 19 V.I.C. §2612 or alternatively under the common law for the Virgin Islands.

In her Complaint, Sonia Francis alleges a cause of action based on strict liability. In her first count, Francis alleges that as owner of the property from which the dog came, Ruan Trust was strictly liable for her damages resulting from the attack. In her Complaint, Plaintiff does not

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6 *Id.*
7 *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Joseph*, 54 V.I. at 650.
8 FED. R. CIV. P. 12(b)(7) is made applicable to the Virgin Islands through Superior Court Rule 7.
9 FED. R. CIV. P. 19(b); *see Walsh v. Daly*, 2014 V.I. LEXIS 36, *6 (V.I. Super. Ct. June 18, 2014).

specify whether these claims are made under the statutory claim or the common law of the Virgin Islands, thus this Court addresses both in the interest of judicial efficacy.

A. Strict Liability Under §2612

Under Section 2612 of the Virgin Islands Code, dog owners are held "liable for any damage done by their dogs".[10] Thus, to assert a claim under this statute, the plaintiff must only prove that the defendant was the owner of the dog, as defined in 19 V.I.C. §2602(2), and that the dog caused damage to the plaintiff. Under §2602(2), an "owner" includes "any person owning, keeping or harboring any domestic animal, or leasing any domestic animal from another, or any person who allows a domestic animal habitually to remain about the premises inhabited by such a person."[11]

Here, Defendant is the owner of the property where the dog was seen at prior to attacking Plaintiff. It is not alleged that Defendant is the dog's "owner" based on the plain meaning of the word. Yet, Defendant may be an "owner" under the statute if they are shown to have "allow[ed] a domestic animal habitually to remain about the premises..."[12] Plaintiff has not alleged any facts to suggest that type of relationship. Implicit in the statute's allowance of an animal to remain on the premises, is the requirement of knowledge or some action by the owner that would demonstrate knowledge.[13] Thus, even if the owner does not explicitly allow the animal on his/her premises, the owner must have, at minimum, known of the animal's existence. Otherwise, the dog owner's "allowance" could be demonstrated just by proof of ownership of a property. This interpretation is a slippery slope that this Court does not feel comfortable descending upon. Francis has failed

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10 V.I. CODE ANN. TIT. 19, §2612(a) (2015).

11 *Id.* at §2602(2).

12 *Id.*

13 *See, e.g., Borns v. Voss*, 70 P.2d 262, 267-75 (Wyo. 2003) (recognizing a state's ability to legislate the "scienter" requirement in statutory strict liability claims); *Anderson v. Christopherson*, 816 N.W.2d 626, 630-31 (Minn. 2012).

to demonstrate that Ruan Trust is a dog "owner" under the statute, and thus this claim cannot go forward.

B. Common Law Strict Liability under *Banks*

A Virgin Islands court has never discussed common law strict liability in the context of a "dog bite" case. In *Jeffrey v. Caesar*, the Territorial Court[14] discussed the negligence of a landlord when a tenant's dog bit a third party.[15] However, there the discussion of strict liability was in a limited context via a reference to a Florida statute that provides such relief alongside Florida's common law.[16] Thus, to determine the strict liability of pet owners for attacks done by their domestic animals, in the absence of binding authority this Court must conduct a *Banks* analysis.[17] As noted in the recent Supreme Court decision, *James v. Faust*, a *Banks* analysis requires this Court to "...examine which common law rule Virgin Islands courts have applied in the past; ... identify the majority rule adopted in other jurisdictions; and... determine which common law rule is soundest for the Virgin Islands."[18]

Finding no Virgin Islands case law on this topic, this Court starts with identifying the majority rule from other jurisdictions. The Second[19] Restatement on Torts provides that "a possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class" is subject to strict liability for harm done by the animal.[20] Furthermore, the Comments for §509 note that it is not necessary for the dog's possessor to have reason to know of

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14 The Territorial Court of the Virgin Islands' name was officially changed to the "Superior Court of the Virgin Islands" on October 29, 2004, via Act No. 6687.

15 *See Jeffrey v. Caesar*, 38 V.I. 84, 88-90 (V.I. Terr. Ct. 1998).

16 *Id.* at 90.

17 *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 981-84 (V.I. 2011).

18 *James v. Faust*, 2016 V.I. Supreme LEXIS 33, *16 (V.I. 2016).

19 The language of the Third Restatement is essentially the same on the applicable aspects of this topic, adding the additional class of "owners" to the aforementioned "possessors" as subject to liability, and limiting liability to physical harm. Restatement (Third) of Torts § 23 (2010).

20 Restatement (Second) of Torts § 509 (1979).

the dog's abnormally dangerous propensity, so long as a "...servant to whom he has entrusted its custody has reason to know."[21] Thus when addressing this issue, most jurisdictions[22] have constructed rules that focus on the two elements of scienter (knowledge of the owner or possessor) and the propensity of the dog.

Starting with the element of scienter, jurisdictions typically require the dog's owner to possess actual[23] or constructive[24] knowledge of the dog's propensity to act in a certain fashion. Jurisdictions are split relatively equally on whether actual knowledge is required, thus the sole contemplation of this Court, is for the soundest rule for the people of the Virgin Islands. This Court finds wisdom in an Oregon case, *Park v. Hoffard*, 847 P.2d 852 (Or. 1993) referenced in *dicta* by the Virgin Islands Territorial Court.[25] In *Park*, the court found that a landlord may be liable for injuries to a third party by a tenant's dog that occurred off the landlord's property, when the landlord had actual knowledge of the tenant's dog and constructive knowledge that the dog would create a risk of harm to persons not on the property.[26] When viewed alongside another case from Oregon's Supreme Court, *Westberry v. Blackwell*, 577 P.2d 75 (Or. 1978), it seems that whereas only constructive knowledge is required of dog owners, landlords, somewhat removed

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21 Restatement (Second) of Torts § 509 cmt. h (1979).

22 There are some exceptions to this rule such as Maryland, which does not recognize strict liability claims for dog bites, instead holding that an owner with constructive knowledge of his dog's dangerous propensities may be liable for all "proximately caused injuries" depending on the circumstances. *See, e.g., Bramble v. Thompson*, 287 A.2d 265, 268 (Md. 1972).

23 *See Blose v. Mactier*, 562 N.W.2d 363, 378 (Neb. 1997); *Bauman v. Auch*, 539 N.W.2d 320, 324 (S.D.1995); *Young v. Proctor*, 495 A.2d 828, 830 (Me. 1985); *White v. Law*, 454 So.2d 515, 518-19 (Ala. 1984); *Sappington v. Sutton*, 501 P.2d 814, 815-16 (Okla. 1972); *Portillo v. Aiassa*, 32 Cal.Rptr. 2d 755, 760-61 (Cal. Ct. App. 1994; *see also Anderson*, 816 N.W.2d at 630-31 (noting that while the common law claim required actual knowledge, that the statutory-based claim did not require such).

24 *See Bard v. Jahnke*, 848 N.E.2d 463, 466-67 (N.Y. 2006); *Zukatis by Zukatis v. Perry*, 682 A.2d 964, 967 (Vt 1996); *Jividen v. Law*, 461 S.E.2d 451, 457-61 (W.V. 2003); *Van Houten v. Pritchard*, 870 S.W.2d 377, 378-79 (Ark. 1994); *Hossenlopp v. Cannon*, 329 S.E.2d 438, 440-41 (S.C. 1985); *De Robertis v. Randazzo*, 462 A.2d 1260, 1265-67(N.J. 1983); *Westberry v. Blackwell*, 577 P.2d 75, 76 (Or. 1978); *Sinclair v. Okata*, 874 F. Supp. 1051, 1057-58 (D. Alaska 1994).

25 *See Jeffrey*, 38 V.I. at 90.

26 *Id.* (citing *Park v. Hoffard*, 847 P.2d 852, 856 (Or. 1993).

from the relationship of the owner and his dog, must possess actual knowledge.[27] This rationale seems appropriate for the Virgin Islands, as liability for injuries by a dog should be more assessable to dog owners, than to the property owners who rent property to these dog owners. Furthermore, injured parties may still pursue a negligence claim if the dog owner had constructive knowledge of the dog's propensities.

As to the propensity of a dog, vicious,[28] dangerous,[29] and violent[30] all seemed to be used somewhat synonymously across jurisdictions. These aforementioned terms show a more liberal reading of "propensity", as opposed to a minority of courts that narrowly define "propensity" as meaning that the dog previously demonstrated a propensity to engage in the exact same behavior that caused the injury.[31] Of the majority of jurisdictions that take a liberal reading of "propensity", a few courts have focused on the distinction of whether "propensity" includes all acts that can be read as having a vicious or dangerous nature,[32] or only those acts that are not the result of a dog's

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27 *Compare Park*, 847 P.2d at 856 (requiring actual knowledge of a tenant's dog's propensities in order for a landlord to be found strictly liable for a third party's injury) *with Westberry*, 577 P.2d at 76 (only requiring constructive knowledge to prove a dog owner was strictly liable for one's injuries).

28 *See Hossenlopp*, 329 S.E.2d at 440-41 (noting that a "dangerous propensity" refers to an animal of vicious or dangerous nature); *accord Bard*, 848 N.E.2d at 466-67; *Jividen*, 461 S.E.2d at 457-61; *White*, 454 So.2d at 518-19; *Sappington*, 501 P.2d at 815-16.

29 *See Jividen*, 461 S.E.2d at 457-61; *Zukatis by Zukatis*, 682 A.2d at 967; *Young*, 495 A.2d at 830; *Hossenlopp*, 329 S.E.2d at 440-41; *Westberry*, 577 P.2d at 76; *Sappington*, 501 P.2d at 815-16; *see also Van Houten*, 870 S.W.2d at 378-79 (holding that an owner that keeps an animal he knows to be vicious is committing an ultrahazardous act for which strict liability is an available form of relief); *De Robertis*, 462 A.2d at 1265-67 (finding a domestic animal with abnormally dangerous characteristics to be similar to an artificial condition on one's property in the contest of strict liability).

30 *See Portillo*, 32 Cal.Rptr. 2d at 760-61.

31 *See Blose*, 562 N.W.2d at 378 (holding that "... the animal must have demonstrated a propensity to engage in the same behavior which led to the injury at issue").

32 *See Bard*, 848 N.E.2d at 466-67 (finding a vicious propensity to include "any act that might endanger the safety of the persons and property of others in a given situation"); *see also Sinclair*, 874 F. Supp. at 1057-58 (noting that a "dangerous or vicious propensity is a propensity to injure persons, whether by anger, viciousness or playfulness"); *Westberry*, 577 P.2d at 76 (holding that any knowledge of an animal's propensity to bite or attack, whether in play or anger is sufficient to prove liability); *cf. Bauman*, 539 N.W.2d at 324 (finding that mischievous propensities of a dog that cause injury, which the owner should have known of are enough to show liability).

unruly[33] propensities. This essentially becomes a question as to the foreseeability of harm based on the propensities of the dog.[34] The majority of jurisdictions lean against treating unruly characteristics as sufficient for imposing strict liability. In the eyes of this Court, that is the soundest rule of law for the Virgin Islands. Here, we are tasked with juxtaposing the harshness of strict liability alongside the unpredictability of dogs. Strict liability needs no level of intent by the owner, only the factual existence of the harm alleged. Thus, to hold a dog owner strictly liable for even the most innocent of behaviors done by a dog would be overly harsh. Moreover, as plaintiffs may still pursue an action based in negligence, it seems wise to require a higher standard for a dog's "unruly" tendencies than for its more aggressive ones.

In light of this analysis, we find the soundest rule to be: a landlord may be subject to strict liability, if he has actual knowledge of a tenant's dog's dangerous or vicious propensity to act in a way that does not lend itself to mere unruly characteristics. Here, Plaintiff has not pled that Defendant had actual or constructive knowledge of the dog's existence on the property. Even if this Court is to read that Defendant had actual knowledge of the dog's existence, Plaintiff has failed to allege that this knowledge of the dog's existence, included knowledge as to any of the dog's propensities. As Francis has not articulated a plausible claim for statutory or common law strict liability, Ruan Trust's Motion to Dismiss on Count I will be **GRANTED**.

b. Plaintiff has pled sufficient facts to support her claim of negligence but not her claim of gross negligence against Defendant Ruan Trust.

In Francis's second count, she claims **both**[35] negligence and gross negligence under Virgin Islands common law. She bases these claims on Defendant's failure to keep the dog enclosed

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33 *See Jividen*, 461 S.E.2d at 457-61 (holding that unruly characteristics of a dog like rambunctiousness and friskiness are insufficient to prove strict liability).

34 *See Zukatis by Zukatis*, 682 A.2d at 967.

35 The Court strongly cautions Plaintiff's counsel to closely abide by the federal and local rules that govern practice and procedure before this Court, specifically referring to counsel's failure to link particular facts with

behind a fence, and alternatively argues that Defendant was negligent by renting to a tenant with a large dog.

A. Negligence

In order "[t]o establish a plausible claim for negligence, a plaintiff must allege sufficient facts that establish "(1) a duty of care, (2) a breach of that duty by defendant, which (3) was the factual and proximate (legal) cause of (4) damages to plaintiff."[36] Plaintiff alleges that as owner of the property, Defendant had a duty to take reasonable precautions for tenant's dog such as providing a proper enclosure to prevent the dog from escaping, or in the alternative not renting the property to a large dog owner. Plaintiff continues, that as a result of Defendant's failure to confine the tenant's dog, the dog attempted to attack her small dog, injuring her in the process. The Complaint does not address whether the dog was owned by Defendant or any of its tenants, and at this stage in litigation the Court is limited to the pleadings as alleged.[37] Still, reading this Complaint liberally, that the dog left the property owned by Defendant and attacked Plaintiff leading to her injuries, is sufficient to plead this negligence claim. Thus, accepting as true all well-pleaded allegations in the Complaint, Francis has articulated a plausible claim for relief under a negligence theory.

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particular causes of action, more commonly known as "shotgun pleading". *See* FED. R. CIV. P. 12(e); *see also Cavalli v. Port of Sale, Inc.*, 2014 U.S. Dist. LEXIS 20192, *7-8 (D.V.I. Feb. 19, 2014); *Belizaire v. Whitecap Inv. Corp.*, 2014 U.S. Dist. LEXIS 140845, *6-7 (D.V.I. Oct. 3, 2014). As this Court has noted before, "this method of pleading is generally considered to be unacceptable." *Id.* Furthermore, there is considerable Virgin Islands case law that distinguishes between gross negligence and negligence pleadings, finding additional proof necessary in claims of the former. *See Bell v. Radcliffe*, 2014 V.I. LEXIS 119, *37-38 (V.I. Super. Ct. Apr. 30, 2014); *see Thomas v. Rijos*, 780 F. Supp. 2d 376, 384-86 (D.V.I. 2011).

[36] *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (VI. 2014); *see also Marian v. Fraser*, 2014 V.I. LEXIS 19 (V.I. Super. Ct. Mar. 17, 2014).

[37] *See Iqbal*, 556 at 673; *Callendar v. Nichtern*, 32 V.I; 96, 99 (V.I. Terr. Ct. 1995).

B. Gross Negligence

Under Virgin Islands common law, a claim for gross negligence, at minimum, requires a degree of "recklessness" or "a conscious indifference to the consequences of...the conduct."[38] Furthermore, distinguishing a claim of negligence from that of gross negligence, the courts have noted that gross negligence is "conduct that presents 'an unreasonable risk of physical harm' " that is "substantially greater than that which is necessary to make the conduct negligent."[39]

Here, Plaintiff does not offer any additional pleadings to suggest recklessness. In fact, her Complaint states a mere allegation of a lack of "ordinary and reasonable care". "[W]ithout more... "failures to act" do not demonstrate conduct showing [d]efendant had a conscious indifference to the safety of individuals[.]"[40] Therefore, Plaintiff has not articulated a plausible claim for relief under gross negligence. As Francis has likely articulated a plausible claim for negligence but not gross negligence, Ruan Trust's Motion to Dismiss on Count II will be **DENIED** on the claim of negligence, but **GRANTED** on the claim of gross negligence.

c. Defendant has failed to demonstrate that there is a necessary party who is not presently a part of this action.

Defendant additionally seeks dismissal on the failure to join a necessary party, specifically the unnamed owner of the dog and Dr. Flowers, who they allege possibly misdiagnosed Plaintiff's injury. This Court reads that argument as a red herring. Neither of the parties mentioned would prevent this Court from granting complete relief. Additionally, if Ruan Trust believes that the lack of joinder for either of those parties would subject it to additional liability, the Federal Rules offer

38 *Powell v. Chi-Co's Distrib.*, 2014 V.I. LEXIS 21, *5-10 (V.I. Super. Ct. Apr. 3, 2014).
39 *Hill v. De Jongh*, 2012 V.I. LEXIS 11, *19-20 (V.I. Super. Ct. Apr. 19, 2012).
40 *Id.* (discussing gross negligence in the context of a defendant failing to ensure that stairs were well lit or featured safety rails).

alternative ways of bringing additional parties to litigation. Thus, Ruan Trust's Motion to Dismiss for failure to join a necessary party is **DENIED.**

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part Defendant's motion to dismiss. The motion is denied with regards to the negligence claim of Count II as Plaintiff has sufficiently pled this claim. Plaintiff has not articulated a plausible claim for strict liability in Count I under §2612 or alternatively under the common law. Additionally, Plaintiff has not articulated a plausible claim under the remainder of Count II, based on the theory of gross negligence. Therefore, Defendant's motion to dismiss will be granted on the claim of gross negligence and both strict liability claims. Finally, Defendant has failed to demonstrate that the unknown owner of the dog or Dr. Flowers are a necessary party under Rule 19, thus Ruan Trust's motion to dismiss as based on Rule 12(b)(7) shall be denied. An Order consistent with this Opinion shall follow.

Dated: October 5, 2016

Hon. Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella George
Acting Clerk of the Court

By: _____
Lori Boynes-Tyson
Acting Chief Deputy Clerk 10/6/2016