IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOAQUIN Q. ATALIG, JANET U. MARATITA, JOSE P. KIYOSHI, and FELIPE Q. ATALIG, Individually, and On Behalf of Others Similarly Situated,
Plaintiffs-Appellants,

v.

MOBIL OIL MARIANA ISLANDS, INC.,
Defendant-Appellee.

SUPREME COURT NO. 2012-SCC-0006-CIV
SUPERIOR COURT NO. 10-0116E

OPINION

Cite as: 2013 MP 11

Decided October 2, 2013

Michael W. Dotts & Ramon Quichocho, Saipan, MP, for Plaintiffs-Appellants Joaquin Q. Atalig, *et al.*

Lawrence P. Riff, Los Angeles, CA (pro hac vice); Jason Levin, Los Angeles, CA (pro hac vice); Richard L. Johnson, Hagatna, Guam; & Thomas E. Clifford, Saipan, MP for Defendant-Appellee Mobil Oil Mariana Islands, Inc.

BEFORE: JOHN A. MANGLONA, Associate Justice; F. PHILIP CARBULLIDO, Justice Pro Tem; JOSEPH N. CAMACHO, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Plaintiffs-Appellants Joaquin Q. Atalig, Janet U. Maratita, Jose P. Kiyoshi, and Felipe Q. Atalig (collectively, "Plaintiffs") complain of environmental pollution by Defendant-Appellee Mobil Oil Mariana Islands, Inc. ("Mobil") at their Saipan gasoline terminal, the transit point for fuel in Saipan. Despite pleading seven claims, Plaintiffs' First Amended Complaint ("FAC") leaves out crucial information to withstand a Rule 12(b)(6) motion under our Rules of Civil Procedure. For the reasons stated below, we AFFIRM in part, and REVERSE in part, the judgment of the Superior Court.

I. Factual and Procedural Background

¶ 2 Plaintiffs claim that Mobil has unlawfully released pollutants from their gasoline storage and transfer facility ("Mobil's gasoline terminal") beginning as soon as December 16, 1997. Pls.' FAC ¶¶ 33-36. Some of these emissions allegedly resulted from a lack of "appropriate pollution controls" and "monitoring systems," among other things. *Id.* ¶¶ 33, 35. Their injuries from these actions, according to the Plaintiffs, include "interfere[nce] with sleep, upset appetite, . . . irritation of the upper respiratory tract, . . . [and] symptoms of nausea." *Id.* ¶ 48. Plaintiffs, however, do not clarify who among them has suffered what injury. At oral argument, Plaintiffs' counsel offered no additional information.

¶ 3 Plaintiffs also did not provide any specific facts about the onslaught of the harmful emissions, except for asserting that Mobil emitted (seemingly from each of five tanks, although it is unclear), "10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." *Id.* ¶ 30. The record does not indicate what chemicals Mobil discharged, except for a reference to "benzene" (we presume Plaintiffs intend to point to more than one, given their previous statement about a "combination of hazardous air pollutants"). *Id.* ¶ 50.

¶ 4 Mobil removed the lawsuit to federal court, which Plaintiffs unsuccessfully tried to remand back to the Superior Court. Plaintiffs then amended their original complaint by, apparently, removing all references to the federal Clean Air Act. In their place, they made general references to the Commonwealth Environmental Protection Act. Then, in a second attempt, Plaintiffs successfully moved to remand the case to the Superior Court in December 2010.

¶ 5 Plaintiffs' FAC, which prays for class action certification, makes seven claims: (1) Mobil violated a constitutional provision granting "the right to a clean and healthful environment" to Commonwealth citizens by discharging harmful pollutants, NMI Const. art. I § 9; (2) Mobil was negligent per se, due to violation of the Commonwealth Environmental Protection Act and applicable regulations (although Plaintiffs point to no specific provisions that are violated), 2 CMC § 3101 et seq.; NMIAC § 65-10-001 et seq.; (3) Mobil was grossly negligent in its emission of harmful pollutants and lack of proper pollution

controls; (4) Mobil was strictly liable for the injuries caused by its hazardous pollution because Mobil's toxic discharges represented an ultra hazardous activity; (5) pollution from Mobil's gasoline terminal constituted a nuisance; (6) Mobil committed a battery through its repeated release of harmful chemicals; and (7) Mobil violated section 5105(m) of the Commonwealth Consumer Protection Act ("CCPA") by engaging in unfair business practices, which involved a failure to take proper precautions to prevent harmful emissions, thereby lowering its fuel delivery and sales costs.

¶ 6 In response, Mobil filed a motion to dismiss the case for failure to state a claim. Specifically, Mobil alleged that Plaintiffs did not describe the personal injuries suffered by each Plaintiff with any particularity and did not assert the causal nexus between Mobil's wrongful acts and Plaintiffs' injuries. The trial court agreed, and dismissed all of Plaintiffs' claims on that basis, concluding that Plaintiffs had failed to state a claim. It also denied Plaintiffs' motion for leave to amend.

¶ 7 The Plaintiffs filed a timely appeal in this Court, arguing that they had adequately alleged their claims. Alternatively, the Plaintiffs ask for an opportunity to amend their complaint.

II. Jurisdiction

¶ 8 The Supreme Court has appellate jurisdiction over judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a).

III. Standards of Review

¶ 9 We review de novo questions of standing, *Cody v. N. Mariana Islands Ret. Fund*, 2011 MP 16 ¶ 23, as well as the Superior Court's dismissal of a complaint under Rule 12(b)(6) for failure to state a claim. *Syed v. Mobil Oil Mariana Islands, Inc.***,** 2012 MP 20 ¶ 9 (Opinion, Dec. 31, 2012). We review a trial court's decision to deny leave to amend pleadings for an abuse of discretion. *Syed*, 2012 MP 20 ¶ 49.

IV. Discussion

Constitutional Standing

¶ 10 Prior to our review of a Rule 12(b)(6) motion to dismiss, we first address the jurisdictional issue of standing. Standing is a threshold issue that should be raised sua sponte, even though the parties do not, because it is not apparent from the pleadings that Mobil's alleged wrongful conduct is the cause of the Plaintiffs' alleged injuries. *Cody v. N. Mariana Islands Ret. Fund*, 2011 MP 16 ¶ 23 (citing *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002)). In assessing whether Plaintiffs have proper constitutional standing under the Commonwealth Constitution,[1] we "must accept as true all material allegations of the complaint." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Additionally, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof,

[1] We do not address the question of whether statutory standing serves as an alternative basis for standing to sue because neither party made that contention in any of their briefs or at oral argument. *See Benavente v. Taitano*, 2006 Guam 15.

i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-88 (1990)). At the pleading stage, as here, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Defenders of Wildlife*, 504 U.S. at 561. General allegations of injury devoid of any facts will not.

¶ 11 "The essential element of standing is that a plaintiff personally has suffered either actual injury or threat of injury as a result of the defendant's conduct." *Cody*, 2011 MP 16 ¶ 24. Further, "'the plaintiff must show that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.'" *Id.* (quoting *Commonwealth v. Anglo*, 1999 MP 6 ¶ 8). In other words, constitutional standing consists of three elements the plaintiff must demonstrate: injury-in-fact, causation, and redressability. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Injury-in-Fact

¶ 12 Our longstanding test for determining whether a claimant properly alleges an injury-in-fact turns on identification of an invaded legal interest, which is both "'concrete and particularlized'" and "'actual or imminent.'" *Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11 ¶ 19 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). We consider an injury "particularlized" when it affects the plaintiff in a "personal and individual way." *Lujan*, 504 U.S. at 560 n.1. The opposing party also must have an ongoing interest in the dispute, so that the case features "'that concrete adverseness which sharpens the presentation of issues.'" *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). As we have recognized, theoretical or "'hypothetical'" injuries will not suffice. *Estate of Ogumoro*, 2011 MP 11 ¶ 19.

¶ 13 Mobil contends that Plaintiffs' allegations lack a "legally cognizable injury" – a fatal defect. Def.'s Suppl. Br. 1. In support, Mobil suggests a new legal test for determining whether a constitutional injury has occurred, which would apply to situations where an injury has not yet occurred, but a "credible threat" exists that an injury will occur. *Id.* at 2. Mobil contends that the list of injuries provided in Plaintiffs' FAC is not sufficiently concrete. *See* Pls' FAC ¶ 48 (listing the injuries sustained as "interfere[nce] with sleep, upset appetite, . . . irritation of the upper respiratory tract, . . . [and] symptoms of nausea").

¶ 14 We have no need to address the rule proposed by Mobil. At the pleading stage, we presume the truth of Plaintiffs' allegations and make all reasonable inferences in their favor. These allegations of physical harm represent "'actual'" injuries for purposes of constitutional standing; therefore, Plaintiffs' assertion of a number of illnesses suffered properly constitutes an "'actual'" injury. *Estate of Ogumoro*, 2011 MP 11 ¶ 19. Further, Plaintiff's clear interest in addressing the dispute provides the requisite concreteness. That only leaves the question of whether the injury is particularized.

¶ 15 Despite the fact Plaintiffs do not specifically list who suffered their averred injuries, *e.g.*, Pls.' FAC ¶ 41, we determine, based upon the allegations we assume as true and the reasonable inferences we draw from these allegations, they have alleged a "'particularized'" injury. *Estate of Ogumoro*, 2011 MP 11 ¶ 19. Nowhere do Plaintiffs clearly list the injuries they have suffered. They simply include lists of general injuries suffered by someone. *E.g.*, Pls.' FAC ¶ 41. Thus, without drawing a few reasonable inferences, it should be emphasized that Plaintiffs would have alleged no "'particularlized'" injury. *Estate of Ogumoro*, 2011 MP 11 ¶ 19. But, while Plaintiffs are not entitled to every possible inference in their favor, at this early stage in the litigation they are entitled to all reasonable inferences. *See Defenders of Wildlife*, 504 U.S. at 561. And given the close proximity of their allegations of specific harm to their general allegations of suffered harm – indeed, these are in adjacent paragraphs – it is reasonable to infer these specific harms (the only harms alleged) as their alleged injuries. *E.g.*, Pls.' FAC ¶¶ 41-42. Plaintiffs, therefore, established an injury-in-fact at this early stage in the litigation.

¶ 16 We are left to consider the constitutional standing elements of causation and redressability.[2]

Causation

¶ 17 In examining causation, we inquire whether the injury is "fairly traceable" to Mobil's pollution, "and not the result of independent action of some third party not before the court." *Estate of Ogumoro*, 2011 MP 11 ¶ 19. "To satisfy this requirement [in a context involving environmental pollution], 'rather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.'" *Natural Res. Def. Council v. Sw. Marine, Inc*., 236 F.3d 985, 995 (9th Cir. 2000) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 161 (4th Cir. 2000) (en banc)).

¶ 18 Mobil's brief vigorously questions the causal connection drawn by Plaintiffs' allegations between Mobil and any injuries resulting from Mobil's gasoline terminal (although, as we note above, not in the context of standing). But Mobil is mistaken if it means to imply that the Plaintiffs must offer evidence or proof of their injuries to establish standing. For the purposes of the causation inquiry at this early stage in the litigation, "show[ing]" an injury merely means to offer facts alleging a reasonable theory as to the injury claimed. *Sw. Marine, Inc*., 236 F.3d at 995. To claim otherwise would turn the present standing inquiry into a facts-intensive examination, which would likely require a plaintiff to produce evidence prior to discovery. Surely, the threshold inquiry of standing possesses no such requirement for responding to a motion to dismiss. *See Defenders of Wildlife*, 504 U.S. at 561 ("At the pleading stage, general factual

[2] Mobil made no explicit contention, whether in its briefs or at oral argument, about these other two elements of standing. Similarly, Plaintiffs offered no discussion on these issues, as they simply cited to portions of their FAC that they believed demonstrated the presence of these two elements of standing. Appellants' Suppl. Br. 3.

allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [a court] 'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'").

¶ 19 Here, the Plaintiffs point to Mobil's emission of benzene as the prime culprit for their injuries. Pls.' FAC ¶ 50. Given those emissions, and that all the Plaintiffs reside within the Commonwealth (though we do not learn exactly where they live), it is reasonable to infer that that they faced exposure to pollutants emitted by Mobil containing excessive benzene levels, as they allege. It is also reasonable to infer that their injuries arose from the chain of events they describe. Consequently, because we must accept the truth of these allegations – and draw all reasonable inferences from their allegations – in response to a motion to dismiss, *Defenders of Wildlife*, 504 U.S. at 561, we conclude that Plaintiffs have done enough at this early stage to establish causation.

Redressability

¶ 20 The final element of standing takes us to the subject of remedies. Specifically, "'it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.'" *Estate of Ogumoro*, 2011 MP 11 ¶ 19. "A showing that the relief requested *might* redress the plaintiff's injuries is generally insufficient to satisfy the redressability requirement." *WildEarth Guardians v. Public Serv. Co.*, 690 F.3d 1174, 1182 (10th Cir. 2012). Therefore, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982)).

¶ 21 Plaintiffs seek a number of remedies, from monetary damages to an injunction, all of which they assert will address the harmful discharges by Mobil. The question is whether an injury caused by exposure to benzene emitted by Mobil will "'likely . . . be redressed by a favorable decision.'" *Estate of Ogumoro*, 2011 MP 11 ¶ 19. When we accept Plaintiffs' allegations as true, we find that it is more probable than not that a favorable outcome in this litigation will remedy Plaintiffs' injuries for a simple reason: exposure to excessive amounts of a toxic substance, such as benzene, would "'likely'" lead to at least some of the illnesses Plaintiffs assert, even though they are fairly generalized injuries. *Id.* Based upon Plaintiffs' allegations, then, once Mobil significantly reduces or eliminates their current toxic benzene discharges, Plaintiffs' overall health conditions will improve. Further, monetary damages would offer compensation for the health problems allegedly engendered by these emissions. We conclude that Plaintiffs have properly carried their "relatively modest" burden for alleging redressability. *Bennett v. Spear*, 520 U.S. 154, 171 (1997).

¶ 22 Therefore, Plaintiffs, by a narrow margin, have adequately alleged constitutional standing at this early stage in the litigation.

Order Dismissing Claims under Rule 12(b)(6)

¶ 23 We turn to Plaintiffs' FAC. Under Commonwealth Rule of Civil Procedure 8(a)(2) ("Rule 8(a)(2)"), a pleading "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." The Court recently recognized in *Syed v. Mobil Oil* that a proper pleading "must offer more than a blanket assertion of entitlement to relief." 2012 MP 20 ¶ 20. A "complaint must contain either direct allegations on every material point," or contain allegations from which "an inference fairly may be drawn that evidence" regarding these necessary points will be introduced at trial. *In re Adoption of Magofna*, 1 NMI 449, 454 (1990). When a claim lacks "sufficient factual accompaniment," *Syed*, 2012 MP 20 ¶ 20, a court must examine whether the allegations reasonably suggest that the claimant will produce substantiating evidence. "'A statement of facts that merely creates a suspicion that the pleader might have a right of action' is insufficient," *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006) (quoting *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995));[3] Rule 8(a)(2) does not permit a plaintiff to bring purely speculative claims. In conducting this inquiry, the court assumes the veracity of the factual allegations and construes them "in the light most favorable to the [non-moving party]," *Syed*, 2012 MP 20 ¶ 22 (internal quotation omitted), but "has no duty to strain to find inferences favorable to the non-moving party." *Cepeda v. Hefner*, 3 NMI 121, 127 (1992).

Claim One: A Constitutional Right to a Healthy Environment

¶ 24 We apply these principles to Plaintiffs' first cause of action, which depends upon the following constitutional provision: "Each person has the right to a clean and healthful public environment in all areas, including the land, air, and water." NMI CONST. art. I § 9. We have previously found that under this provision private parties may, as a result of environmental pollution, bring an action to enjoin, recover damages, or both against a state actor for significant environmental injuries sustained or probable to occur. *See Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 501-02 (1992) (allowing a challenge to a government-issued lease permit for approving construction of a large hotel complex, which the plaintiff alleged would vastly overwhelm local sewer and water services); *Torres v. Marianas Pub. Land Corp.*, 3 NMI 484, 492 (1993) (recognizing that this constitutional provision extended to a claim involving the application for a government-issued lease that would, allegedly, cause extensive environmental damage to the fragile lagoon from the construction of an expansive resort). Of course, they may only do so through well-pled allegations offering a nexus from a particular cause or activity to a substantial environmental

[3] "This Court 'may . . . look to federal cases interpreting the equivalent provisions of federal law to determine the issues raised' in a given case." *In re Estate of Camacho*, 2012 MP 8 ¶ 19 (Opinion, July 18, 2012) (quoting *Saipan Lau Lau Dev., Inc. v. Superior Court*, 2000 MP 12 ¶ 3)). Here, we look to a federal court of appeals (pre-*Twombly* and *Iqbal*) to flesh out a deeper understanding of Commonwealth Rule of Civil Procedure 8(a)(2). In particular, we rely upon *Rios v. City of Del Rio* because the court also drew guidance from the same authoritative source relied upon by *In re Adoption of Magofna*. *E.g.*, 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (2d ed. 1987).

harm. Plaintiffs have not properly alleged state action and, therefore, have not adequately set forth this claim.

¶ 25 As a threshold matter, Plaintiffs do not argue, as they must, that the Defendant's emissions represent state action. "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978)); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 519 (4th ed. 2011). In dicta, *Govendo v. Marianas Public Land Corporation* suggested this claim did not possess a state action requisite. *See* 2 NMI at 501-02 ("If this right is violated by either a *private person, private entity*, or a government agency, then a private person or the government, . . . may bring an action . . . .") (emphasis added). In making such a broad declaration, however, the Court did not offer any textual or interpretative justification but rather relied upon an opaque sentence in the Commonwealth Constitutional Analysis. *Id.* at 501 (quoting *Analysis of the Constitution of the Northern Mariana Islands* 24 (1976)). Therein, it noted that substances or objects "'may not be added to or cast upon the air or water by government or private activities . . . ." *Id.* (emphasis omitted). This sentence, on its own, does not offer firm ground for setting aside the state action presumption, because state action may sometimes comprise what is seemingly private action. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 297 (2001) (including where government actors possess such influence over a nominally private entity that there exists "public entwinement in the management and control" of the entity). Transforming generalized constitutional language to encompass purely private conduct, based on ambiguous language, is something we cannot countenance. Thus, to bring a private suit under Article I, section 9 of the NMI Constitution, a private party must identify state action.

¶ 26 We have never had an occasion to articulate the specific contours of what constitutes state action, so we do so here. To avoid establishing a different test under the Commonwealth Constitution, we adopt the guidance of the United States Supreme Court regarding state action under the federal constitution. The actions of a nominally private entity are attributable to the state where: (1) the state's coercive power has compelled an entity to act; (2) the state has delegated a public function to the entity; or (3) the state has provided "'significant encouragement'" to the entity, the entity is a "'willful participant in joint activity with the [s]tate,'" or the entity's functions are "'entwined'" with state policies. *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257-58 (2d Cir. 2008) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. at 296).

¶ 27 Under *Sybalski* and *Brentwood Academy*, and unlike in *Govendo v. Marianas Land Corporation*, or *Torres v. Marianas Public Land Corporation*, Plaintiffs have pled nothing resembling state action by Mobil. In contrast, this claim singularly focuses on purely private conduct: Mobil's alleged toxic

emissions. Thus, because Mobil's actions cannot be attributable to the state, they cannot be held liable under Article I, section 9 of the NMI Constitution.

¶ 28 Because Plaintiffs do not point to any state action, we AFFIRM the trial court's dismissal of this cause of action for failing to state a claim.

Claims Two-Four: Various Negligence Causes of Action

¶ 29 We now consider three negligence claims alleged under the theories of negligence per se, gross negligence, and strict liability.

Negligence Per Se

¶ 30 Negligence per se is a common law torts doctrine that provides for, in a negligence claim, substitution of a statutory standard of care for the common law standard of care. RESTATEMENT (THIRD) OF LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010);[4] *e.g.*, *Johnson v. Paynesville Farmers Union Coop. Oil Co*., 817 N.W.2d 693, 706 (Minn. 2012) ("[W]e have recognized that negligence per se is a form of ordinary negligence that results from violation of a statute.") (internal quotation marks omitted). Crucially, only certain statutory violations qualify. RESTATEMENT (THIRD) OF LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 14 ("An actor is negligent if, without excuse, the actor violates a statute that is [1] designed to protect against the type of accident the actor's conduct causes, and [2] if the accident victim is within the class of persons the statute is designed to protect.").

¶ 31 Here, though, we do not have a specific statutory provision to analyze because Plaintiffs chose to cite to the entire Commonwealth Environmental Protection Act ("CEPA"), and regulations promulgated pursuant to it. Pls.' FAC ¶¶ 47, 49, 51. It goes without saying that this puts us in the untenable position of conducting research and crafting arguments for Plaintiffs, which is not the function of the judiciary. The province of the judiciary is to decide cases, not argue them. *Matsunaga v. Cushnie*, 2012 MP 18 ¶ 43 (Opinion, Dec. 28, 2012) ("Constructing . . . legal arguments was counsel's job, not ours."). As a result, by not pointing to any particular provision of CEPA that Mobil violated, we are unable to consider whether Mobil is negligent per se on that basis.

¶ 32 Plaintiffs also proffer a constitutional provision as a basis for negligence per se. Pls.' FAC ¶ 54. We can find no authority for the proposition that a constitutional provision may substitute a standard of care for the common law standard of care, and Plaintiffs cite to none in support. We follow our general rule that when a party does not ground a legal proposition in any legal authority, the issue is waived. *See Matsunaga*, 2012 MP 18 ¶ 13 ("Ordinarily we only consider arguments sufficiently developed to be cognizable.") (internal quotation omitted).

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[4] Pursuant to 7 CMC § 3401, we resort to the relevant Restatement. *Estate of Ogumoro*, 2011 MP 11 ¶ 64.

¶ 33 Therefore, this theory fails to state any claim for relief, and we AFFIRM the judgment of the Superior Court as to this claim.

Gross Negligence

¶ 34 We proceed to consider Plaintiffs' gross negligence allegations. Gross negligence essentially means "aggravated" negligence, which requires a demonstration of heightened tortious conduct, generally through malicious intent or an utter lack of diligence. *See* RESTATEMENT (THIRD) OF LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. a. (2010) (noting that gross negligence "simply means negligence that is especially bad");[5] *e.g.*, *19 Perry St., LLC v. Unionville Water Co.*, 987 A.2d 1009, 1022 n.11 (Conn. 2010) (observing that the court "defined gross negligence as 'very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or slight diligence . . . .'"). In other words, a plaintiff must provide direct factual allegations showing that a defendant committed an aggravated breach of a legal duty, and that aggravated breach caused the damages alleged, or allegations that reasonably suggest the claimant will produce substantiating evidence thereof. Plaintiffs did not accomplish this task.

¶ 35 Plaintiffs' gross negligence allegations fail for the following reasons. While we surmise that the legal duty Plaintiffs' insist Mobil breached involves the release of harmful pollutants, Pls.' FAC ¶ 47, their inability to cite to any statutory provision to substitute a statutory duty of care, as outlined above, obviates these other gross negligence claims. As a consequence, Plaintiffs are left with two viable gross negligence claims: (1) the "negligent[] releas[e]" of harmful pollutants; and (2) a "[f]ail[ure] to eliminate or minimize the harmful impacts and risks posed by the release" of such hazardous materials. *Id.* ¶ 51 (e), (f). Plaintiffs anchor these claims in a duty of care Mobil owed to foreseeable victims – of which they believe includes every Saipan resident. *See* Pls.' FAC ¶ 47 ("Defendant Mobil owed a duty to Plaintiffs as well as to the Class . . . ."); *id.* ¶ 13 (seeking class action certification on behalf of "all persons who reside or [sic] resided in the CNMI during the class period").

¶ 36 Both of these remaining avenues for relief are unsuccessful because, at a minimum, Plaintiffs do not adequately explain what elevates Mobil's actions to those constituting gross negligence. In their FAC, Plaintiffs tender only bare allegations regarding Mobil's "pollutant emissions" and its attendant "failure . . . to install . . . efficient pollution controls," Pls.' FAC ¶¶ 58-59: describing Mobil's actions, in conclusory statements, as "willful, wanton, and reckless." Pls.' FAC ¶¶ 58-59. Important facts that could establish malicious intent or "very great or excessive negligence," *19 Perry St., LLC*, 987 A.2d at 1022 n.11, are missing. For instance, Plaintiffs do not share any specific facts relating to the path, timing, or amount of Mobil's hazardous discharges. Additionally, we do not even learn the type of harmful pollutant that allegedly caused Plaintiffs' injuries – which could help show "excessively bad" conduct,

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[5] *See*, supra, note 4.

RESTATEMENT (THIRD) OF LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. a. – save for a brief comment suggesting "benzene" may be one of the emitted substances. Pls.' FAC ¶ 50(c).

¶ 37 If we construe these allegations in their most favorable light, at most they "'create[] a suspicion'" that the Plaintiffs may have a cause of action for gross negligence. *Rios*, 444 F.3d at 421. But because we will not "strain to find inferences favorable to the non-moving party," *Cepeda*, 3 NMI at 127, we AFFIRM the Superior Court's dismissal of this cause of action.

Strict Liability

¶ 38 We now consider Plaintiffs' strict liability cause of action. Under the common law rule of strict liability, a party is strictly liable for injuries resulting from abnormally dangerous activities. RESTATEMENT (THIRD) OF LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 (2010).[6] A plaintiff demonstrates the presence of an abnormally dangerous activity through a showing that: "(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage." *Id.* § 20(b). We do not find the presence of both elements here.

¶ 39 Plaintiffs, in their FAC, offer no direct or indirect allegations regarding how discharges by Mobil represent a "foreseeable and highly significant risk of physical harm." They only generally assert that Mobil is strictly liable for the harm caused by its toxic emissions. Of course, stylizing Mobil's emissions to present a "foreseeable and highly significant risk of physical harm" is difficult for Plaintiffs when, as we note above, they do not identify the pollutants they allege Mobil emits, except perhaps for one. Pls.' FAC ¶ 50(c). Thus, Plaintiffs merely conclude that a very substantial risk exists. They also do not offer an explanation as to why Mobil could not effectively manage this risk by exercising reasonable care. In fact, Plaintiffs seem to argue the opposite. *See* Pls.' FAC ¶ 38 (declaring that Mobil's harmful discharges "could be eliminated or substantially reduced by the installation of one of several pollution control systems"). Therefore, they do not properly allege Mobil's emissions as an abnormally dangerous activity.

¶ 40 As we have said, a claim "must offer more than a blanket assertion of entitlement to relief." *Syed*, 2012 MP 20 ¶ 20. Plaintiffs impermissibly ask us to "strain" to determine why Mobil's emissions represent an abnormally dangerous activity (when they do not offer any explanation for such a proposition). *Cepeda*, 3 NMI at 127. Because Plaintiffs' fail to offer the necessary allegations to properly allege this claim, we AFFIRM the Superior Court's dismissal of this claim.

Claim Five: Nuisance

¶ 41 Plaintiffs pray for monetary damages and an order enjoining Mobil from discharging harmful pollutants. The common law defines a public nuisance as "an unreasonable interference with a right

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[6] *See*, supra, note 4.

common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B (1) (1979).[7] Among other things, such circumstances include "conduct [that] involves a significant interference with the public health." *Id.* § 821B(2).[8] To seek damages in a public nuisance lawsuit, a party must have suffered a special injury, or "harm of a kind different from that suffered by other members of the public." *Id.* § 821C(1). A claimant need not point to a special injury to seek injunctive relief as a class representative. *Id.* § 821C(2)(c).

¶ 42 In what has become an unfortunate pattern, Plaintiffs set out their nuisance claim by simply pointing to thin allegations of harmful discharges, without bothering to set forth the elements of this cause of action. Pls.' FAC ¶¶ 67-70.[9] While they do not properly classify this claim as a public nuisance in their FAC rather than a private nuisance – which they could not bring because no Plaintiff identifies an unreasonable and intentional interference with the use and enjoyment of land not similarly suffered by another, RESTATEMENT (SECOND) OF TORTS § 821D – their allegations of harmful emissions properly point to "conduct [that] involves a significant interference with the public health." *Id.* § 821B(2).

¶ 43 Plaintiffs' request for damages runs aground, however, when we consider the special injury requirement. The record does not support even a slight inference that special damages are present in this case. Plaintiffs' FAC affirmatively expresses the absence of special damages when it sets forth this case as a class action on behalf of "all persons who reside or [sic] resided in the CNMI during the [c]lass [p]eriod." Pls.' FAC ¶ 13. The fact that plaintiffs assert this claim on behalf of every resident of the Commonwealth implies that whatever damages have been suffered by Plaintiffs have also been suffered by the entire community and, therefore, such damages are *similar* in nature rather than *special*. Moreover, Plaintiffs do not suggest otherwise, whether explicitly or implicitly, in their FAC. In other words, it cannot be a special injury if every person suffers from it, which is precisely what Plaintiffs' FAC alleges. *Id.* ¶ 69.

¶ 44 In seeking to enjoin toxic discharges by Mobil, as we mention above, Plaintiffs need not allege a special injury if they certified as a class, as they have properly set forth this claim. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c).On remand, Plaintiffs will have an opportunity to certify themselves as a class. If certified, they may bring a public nuisance claim for injunctive relief.

¶ 45 We AFFIRM the trial court's dismissal of Plaintiffs' public nuisance claim seeking damages. Regarding their public nuisance claim seeking injunctive relief, we REVERSE the judgment of trial court

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[7] *See*, supra, note 4.

[8] Other circumstances not salient to this claim include: "conduct . . . proscribed by a statute, ordinance or administrative regulation." *Id.* § 821B(2)(b). Had Plaintiffs specifically pointed to a relevant provision of CEPA, or its accompanying regulations, however, perhaps Plaintiffs could also proceed under this public nuisance prong.

[9] We must view their FAC as pled, so correction of this serious error in their brief is no remedy. Appellants' Opening Br. 13.

and REMAND for proceedings consistent with this opinion. On remand, we instruct the trial court first to determine whether Plaintiffs may certify their class pursuant to Commonwealth Rule of Civil Procedure 23. If they cannot, then this claim for injunctive relief must be dismissed for failure to state a special injury.

Claim Six: Battery

¶ 46 Plaintiffs' sixth cause of action represents a novel claim in this jurisdiction: intentional pollution as a battery. Plaintiffs allege that Mobil emitted hazardous substances without properly installing appropriate pollution controls, which they assert would have substantially limited the discharge of harmful pollutants, including benzene. They claim contact with this harmful matter, without offering specific facts. Antecedent to addressing whether alleged pollution from Mobil's gasoline terminal constitutes a battery, however, we must first determine, as a matter of law, whether allegations of pollution can constitute a battery in the Commonwealth. We find they cannot.

¶ 47 Plaintiffs would have us find pollution as a battery under Commonwealth law.[10] Appellants' Opening Br. 7. Mobil, on the other hand, argues that neither offensive nor harmful contact can occur through pollution, as required by the relevant Restatement. Appellee's Resp. Br. 17 (citing RESTATEMENT (SECOND) OF TORTS § 13, 19 (1965)). Mobil cites *Rhodes v. E.I. du Pont de Nemours and Company*, 657 F. Supp. 2d 751, 772-73 (S.D. W. Va. 2009), in support of this proposition. *Rhodes* reaffirmed *McClenathan v. Rhone-Poulenc, Inc.*, 926 F. Supp. 1272 (S.D. W. Va. 1996), which held that under West Virginia law mere inhalation of chemicals cannot support a battery claim. McClenathan, 926 F. Supp. at 1276 n.5. The *Rhodes* Court, like *McClenathan*, expressly relied upon a ruling from the West Virginia Supreme Court of Appeals. *Rhodes*, 657 F. Supp. at 773. The West Virginia Supreme Court of Appeals construed the Restatement as not allowing a claim for battery to proceed for emotional damages based upon an embalmer's later acquired knowledge that a corpse he embalmed was infected with Acquired Immune Deficiency Syndrome (AIDS). *Funeral Servs. by Gregory v. Bluefield Cmty. Hosp.*, 413 S.E.2d 79, 82 (W. Va. 1991), *overruled on other grounds by Courtney v. Courtney*, 190 W. Va. 126 (W. Va. 1993). The *Funeral Services* Court, however, did not address the question of an intentional emitter, as here; rather, it rested its holding on two crucial legal distinctions: (1) the plaintiffs did not allege intentional misconduct; and (2) the plaintiffs only alleged damages resulting from emotional distress, not a "physical impairment" of any kind. RESTATEMENT (SECOND) OF TORTS § 15 (1965). Thus, extrapolation from this line of cases is unwarranted.

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[10] Despite the fact this is an issue of first impression, Plaintiffs do not cite to any case law or offer any prudential concerns buttressing this request.

¶ 48 Mobil is correct to turn to the Restatements in an attempt to answer this question, as there is no Commonwealth authority addressing the issue.[11] As a general legal matter, a civil battery occurs if a party intends to cause a "harmful or offensive contact," and such "harmful [or offensive] contact . . . directly or indirectly results." *Id.* § 13. *Harmful* contact consists of "physical impairment of the condition of another's body, or physical pain or illness." *Id.* § 15. A showing of offensive contact requires asserting how such contact "offends a reasonable sense of personal dignity." *Id.* § 19. For instance, if a person "flicks a glove" in another's face. *Id.* § 19 cmt. a, illus. 1. Ordinarily, that will exclude casual contacts inevitable in everyday life. Thus, typical, although perhaps regrettable, pollution would fall outside the scope of "offensive contact." *See id* cmt. a.

¶ 49 That still leaves the question of whether pollution could qualify as a harmful contact. *Id.* § 13. Notably, the Restatement provides no further clarification in its comments. Thus, neither its plain text nor any comments to the Restatement illuminate whether expansion of this rule to a polluter is appropriate, which underscores the analytical leap in *Rhodes* and *McClenathan*. The Restatement is simply silent, other than a note of caution introduced in the discussion surrounding harmful contact. Therein, the Restatement authors exclusively proffer examples involving physical contact between the tortfeasor and her victim(s), eschewing Plaintiffs' clever academic exercise in the conceivable. RESTATEMENT (SECOND) OF TORTS §§ 13-17. This articulation of "harmful contact" constrains the rule's scope to those acts without a protracted line of causation. In the face of such caution, we decline Plaintiffs' invitation to stretch battery law in the Restatement to its breaking point.

¶ 50 Given the complete absence of either Commonwealth or Restatement authority on point, we further examine the common law. Based upon that examination, we conclude that a claim for civil battery cannot lie in the intentional discharge of harmful substances at a particular individual, group, or entity. We reach this conclusion because we see no persuasive reason to recognize a novel claim in the face of so little supportive case law for this position. *See Werlein v. United States*, 746 F. Supp. 887, 907 (D. Minn. 1990), *vacated in part* 793 F. Supp. 898 (D. Minn. 1992) (holding that under Minnesota law, the allegation of battery presented a triable issue in a pollution case when the defendant disposed of highly toxic substances into sandy ground directly above a regional aquifer, because there was sufficient evidence that the defendant "knew that its conduct was substantially certain to cause an offensive or harmful contact"); *cf. DeNardo v. Corneloup*, 163 P.3d 956, 957 (Alaska 2007) ("There was no error in rejecting [the plaintiffs'] battery claim, because there was no contention that either defendant deliberately caused smoke to contact him."); *Leichtman v. WLW Jacor Comm., Inc.*, 634 N.E.2d 697, 699 (Ohio Ct. App. 1994) (reversing a trial court's dismissal of a battery claim based upon a talk-show host's blowing smoke in the face of anti-smoking crusader guest's face). At most, a line of cases exists to support a

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[11] *See*, supra, note 4.

battery claim resulting from deliberately blown smoke by one party into another's face (with *Werlein* standing as an outlier). Extending this rationale to include pollution is one bridge too far.

¶ 51 We are also well aware of other legal mechanisms for remedying this type of harm, such as properly pled nuisance or negligence claims, or other various federal claims, such as a citizen suit under the federal Clean Air Act, 42 U.S.C. §§ 7401 et seq. *See* 42 U.S.C. § 7604 (creating a private right of action). Therefore, we hold that as a matter of Commonwealth law, a plaintiff may not bring a battery claim on the basis of pollution. For this reason, we AFFIRM the Superior Court's dismissal of this claim.

Claim Seven: Unfair Business Practice

¶ 52 To bring a cause of action under the Commonwealth Consumer Protection Act ("CCPA"), 4 CMC § 5101 et seq., a claimant must be an "aggrieved" party. 4 CMC § 5112(a). We note this at the outset because Plaintiffs do not allege that their injuries arose out of any commercial action they took as a consumer. They press a much different argument instead, implying it is enough that their injuries have arisen from general commercial activity taken by Mobil. More specifically, they allege that Mobil "saves a lot of money by not using the correct equipment," Pls.' FAC ¶ 78, and that these actions "were directed against consumers," *id.* ¶ 79, which includes them.

¶ 53 This contention obscures the actual coverage of this statute. The Commonwealth Legislature identified CCPA's purpose as exclusively regulating the relationship between consumers and merchants. 4 CMC § 5102(b). If it were otherwise, then a claimant could cite to section 5105(m)[12] and complain about any action taken by a business that felt "unfair," much as the Plaintiffs have done here. CCPA does not provide a generalized grievance cause of action for Commonwealth citizens to bemoan business practices, but rather offers only a route to remedy specific injuries arising from a commercial relationship.

¶ 54 That principle renders this claim improper, as Plaintiffs do not cite to actions relating to a commercial relationship as the cause for their injuries. In contrast to the requirements of CCPA, they protest Mobil's alleged profit-maximization strategy of pollution. Even when we assume the truth of these allegations, this claim does not move within the boundaries established by CCPA for private actions.

¶ 55 We conclude that the Superior Court correctly dismissed this cause of action as the Plaintiffs do not properly allege harm that brings them under the auspices of the CCPA, and AFFIRM this judgment.

Claim Eight: Punitive Damages

¶ 56 Plaintiffs treat punitive damages as a separate cause of action. "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT

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[12] 4 CMC § 5105(m): "Engaging in any act or practice which is unfair or deceptive to the consumer."

(SECOND) OF TORTS § 908 (1979);[13] BLACK'S LAW DICTIONARY 357 (9th ed. 2010). An affirmative judgment for liability must come before the question of remedies arises. Given a lack of recovery at the pleading stage, we need not address the issue of punitive damages other than to pronounce that a claim for punitive damages does not constitute a separate cause of action.

Plaintiffs' Request for Leave to Amend

¶ 57 Plaintiffs ask us for another opportunity to amend their pleadings. "Dismissal of a complaint without leave to amend is proper where it is clear that the complaint could not be saved by amendment." *Cooper v. Ramos*, 704 F.3d 772, 783 (9th Cir. 2012). We review the Superior Court's implicit denial of leave to amend for an abuse of discretion. *Syed*, 2012 MP 20 ¶ 49. Plaintiffs have already amended their pleadings once, and they believe they are entitled to do so again. We disagree.

¶ 58 At oral argument, we specifically asked Plaintiffs what facts they would add to their complaint, were they given an opportunity to amend. Even when pressed, Plaintiffs Counsel's answer was non-responsive and did not contain any examples of amendments. *See* Audio Tr. Oral Arg. 32:21-48 ("We, we will assert the, the, the elements. There's a, there's a, there's a duty, there's a breach, and, and there's, there's injury, ah, there's, there's damages, Your Honor. We will assert that specifically. And then we will, um, ah allege further facts to support those, um, um, elements um, in a negligence cause of action, for example. Um, and, and, and if I may, Your Honor, . . ."). As we catalogued above, nearly every claim was deficient and would need significant factual supplement to properly state a claim. Because Plaintiffs could not identify any facts to alleviate these inadequacies at the time of the hearing, we cannot find an abuse of discretion by the trial court. *Syed*, 2012 MP 20 ¶ 52 (holding that the Superior Court did not abuse its decision in granting leave to amend when "Plaintiffs have not indicated any additional facts they would add to redress these gaps"). In addition, it is well within the discretion of a trial court to deny leave to amend when a party, after having had multiple chances to amend their complaint, still does not properly state a claim.

¶ 59 As a general matter, Plaintiffs allege little linking the harmful pollutants discharged by Mobil to harmful contact sustained by them. We do not learn where the Plaintiffs live, work, or recreate. Nor do we have any information about how much time Plaintiffs pass in close proximity to Mobil's gasoline terminal. We also have no information regarding alternative sources of Benzene, the only pollutant Plaintiffs specifically allege Mobil emitted, as well as any explanation for why those alternative sources do not account for the harmful contact Plaintiffs allege. After all, Plaintiffs seek to assert this claim on behalf of "all persons who reside or [sic] resided in the CNMI during the [c]lass [p]eriod." Pls.' FAC ¶ 13. Consequently, their allegations must provide some indication that all other Benzene sources are not

[13] *See*, supra, note 4.

the true culprit. As a result, we have little frame of reference for considering whether Mobil's alleged emissions came into harmful contact with Plaintiffs. We merely have "blanket assertion[s] of entitlement to relief." *Syed*, 2012 MP 20 ¶ 20.

¶ 60 We DENY Plaintiffs' request for leave to amend, and in doing so, AFFIRM the decision of the trial court.

V. Conclusion

¶ 61 Plaintiffs have established standing to sue at this early stage of the litigation. Nonetheless, their complaint does not properly state a claim for relief unless, after being given an opportunity to certify their class, their class is certified and they proceed in seeking only injunctive relief under their public nuisance claim. All of Plaintiffs' other causes of action fail to properly allege a claim for relief and were correctly dismissed. Therefore, we AFFIRM in part, and REVERSE in part, the decision below. This case is REMANDED for proceedings consistent with this opinion.

SO ORDERED this 2nd day of October, 2013.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
F. PHILIP CARBULLIDO
Justice Pro Tem

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOAQUIN Q. ATALIG, JANET U. MARATITA, JOSE P. KIYOSHI, and FELIPE Q. ATALIG, Individually, and On Behalf of Others Similarly Situated,
Plaintiffs-Appellants,

v.

MOBIL OIL MARIANA ISLANDS, INC.,
Defendant-Appellee.

SUPREME COURT NO. 2012-SCC-0006-CIV
SUPERIOR COURT NO. 10-0116E

JUDGMENT

¶ 1 Plaintiffs-Appellants Joaquin Q. Atalig, Janet U. Maratita, Jose P. Kiyoshi, and Felipe Q. Atalig, as well as their proposed class (collectively, "Plaintiffs") appeal the Superior Court's dismissal of their complaint, which seeks damages from allegations of pollution by Defendant-Appellee Mobil Oil Marianas, Inc. ("Mobil"). The Supreme Court AFFIRMS in part and REVERSES in part the trial court's judgment. More specifically, it upholds the trial court's decision dismissing all of the Plaintiffs' claims unless, after being given an opportunity to certify their class, their class is certified and they proceed in seeking only injunctive relief under their public nuisance claim. All of Plaintiffs' other causes of action fail to properly allege a claim for relief and were correctly dismissed. The Supreme Court AFFIRMS in part and REVERSES in part the decision below, and REMANDS the case for proceedings consistent with the accompanying opinion.

ENTERED this 2nd day of October, 2013.

/s/
DEANNA M. MANGLONA
Clerk of the Supreme Court