

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

WORLD FRESH MARKETS, LLC d/b/a)	S. Ct. Civ. No. 2020-0012
PUEBLO SUPERMARKET,)	Re: Super. Ct. Civ. No. 599/2008 (STX)
Appellant/Defendant,)	
)	
v.)	
)	
LENOR MERCEDES PALERMO,)	
Appellee/Plaintiff.)	
_____)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Robert A. Molloy

Argued: November 17, 2020
Filed: February 4, 2021

Cite as: 2021 VI 1

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

APPEARANCES:

Dwyer Arce, Esq. (argued)
Mattea Fosbender, Esq.
Kutak Rock LLP
Omaha, NE

Michael L. Sheesley, Esq.
Michael L. Sheesley, P.C.
St. Thomas, U.S.V.I.
Attorneys for Appellant,

Lee J. Rohn, Esq.
Rhea R. Lawrence, Esq. (argued)
Law Offices of Lee J. Rohn and Associates, LLC
St. Croix, U.S.V.I.
Attorneys for Appellee,

Carl A. Beckstedt III, Esq.
Beckstedt & Kuczynski LLP

St. Croix, U.S.V.I.

Attorney for Amicus Curiae Virgin Islands Insurance Association.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant World Fresh Market appeals from the January 28, 2020 amended judgment of the Superior Court, which memorialized a jury verdict against it and in favor of Lenor Mercedes Palermo in the amount of \$600,000. For the reasons that follow, we affirm.

I. BACKGROUND

¶ 2 On December 8, 2008, Palermo filed suit against World Fresh Market for negligence stemming from an incident that occurred at a supermarket operated by World Fresh Market on property it leased from PDCM Associates, S.E. Several years after filing suit, Palermo amended her complaint to name PDCM as a co-defendant. The amended complaint alleged that World Fresh Market and PDCM were both aware that the roof of the building had been leaking for an extended period of time, that World Fresh Market had placed a cooler under the leak to collect the leaking water, and that Palermo slipped and fell when the cooler overflowed and water spilled onto and covered the floor. After more than a decade of proceedings not relevant to this appeal, Palermo entered into a settlement agreement with PDCM, with Palermo and PDCM filing a joint stipulation of dismissal with prejudice on February 21, 2018. In a February 27, 2018 order, the Superior Court dismissed the complaint against PDCM with prejudice in accordance with the stipulation.

¶ 3 Over the course of the next eighteen months, Palermo and World Fresh Market engaged in extensive motion practice with respect to the admissibility of evidence at trial, including a motion by Palermo to preclude World Fresh Market from offering evidence of the settlement agreement between Palermo and PDCM or introducing evidence of PDCM's negligence, and motions by

World Fresh Market to exclude the testimony of two of Palermo’s expert witnesses. Ultimately, the Superior Court granted Palermo’s motion to exclude the settlement agreement and any references to PDCM’s negligence and, after holding a hearing, denied World Fresh Market’s motion to exclude the expert testimony.

¶ 4 The matter proceeded to a jury trial, which occurred from November 4, 2019, through November 9, 2019. At trial, the Superior Court strictly enforced its earlier evidentiary rulings, and rejected World Fresh Market’s requests to instruct the jury to apportion liability between it and PDCM, and to instruct the jury on assumption of the risk and collateral sources of compensation. Ultimately, the jury found World Fresh Market liable and awarded Palermo \$600,000 in compensatory damages, of which \$200,000 represented lost future earning capacity. On January 28, 2020, the Superior Court denied World Fresh Market’s post-judgment motions and entered an amended judgment memorializing the jury verdict. World Fresh Market timely filed its notice of appeal with this Court on February 14, 2020. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 5 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over “all appeals from the decisions of the courts of the Virgin Islands established by local law[.]” 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over “all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court.” Because the Superior Court’s January 28, 2020 amended judgment resolved all of the claims between the parties, it is a final judgment within the meaning of section 32(a), thereby conferring jurisdiction on this Court. *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 6 This Court exercises plenary review of the Superior Court’s application of law. *Allen v.*

HOVENSA, L.L.C., 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)).

B. Apportionment of Liability

¶ 7 In its appellate brief, World Fresh Market asserts that the Superior Court erred when it prevented it from introducing evidence of PDCM’s negligence and declined to instruct the jury to apportion liability between it and PDCM. World Fresh Market acknowledges that title 5, section 1451(d) of the Virgin Islands Code provides, in pertinent part that

[w]here recovery is allowed against more than one defendant, the trier of fact shall apportion, in dollars and cents, the amount awarded against each defendant. Liability of *defendants* to plaintiff shall be joint and several but, for contribution between *defendants*, each *defendant* shall be liable for that proportion of the verdict as the trier of fact has apportioned against such *defendant*

(Emphasis added). World Fresh Market concedes that this statute is not applicable because PDCM was not a defendant at the time of trial. Nevertheless, World Fresh Market maintains that even though the plain text of section 1451(d) only provides for apportionment by the trier of fact of recoveries against defendants, this Court may adopt a common law rule providing for apportionment among non-parties that may have contributed to a plaintiff’s injury. Palermo, however, maintains that this Court cannot adopt the rule proposed by World Fresh Market because to do so would effectively rewrite section 1451(d) and usurp the authority of the Legislature. Therefore, we must first determine whether this Court possesses the authority to adopt such a rule and—if it does—determine whether exercising that authority is warranted.

¶ 8 This Court has been established as the highest court of the Virgin Islands and the supreme judicial power of the territory has been reposed within it. 48 U.S.C. § 1613a(d); 4 V.I.C. § 21. The supreme judicial power of the territory includes the authority to create both procedural and substantive law under certain circumstances. “A procedural rule regulates the judicial process for

enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Gov’t of the V.I. v. Durant*, 49 V.I. 366, 373 (V.I. 2008) (quoting *Hanna v. Plumer*, 380 U.S. 460, 464 (1965)). “A substantive rule of law, on the other hand, creates and defines the rights, duties, and obligations that are subsequently administered by procedural rules of law.” *Durant*, 49 V.I. at 373 (quoting *In re Richards*, 52 F.Supp.2d 522, 528 (D.V.I. App. Div. 1999)).

¶ 9 The authority of this Court to create procedural rules and substantive law is concurrent with the Legislature. *See* 48 U.S.C. § 1611(c); *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 976 (V.I. 2011). However, the allocation of authority between this Court and the Legislature differs depending on whether the law enacted is procedural or substantive. If this Court and the Legislature enact inconsistent or conflicting procedural laws, the procedural rule adopted by this Court will always prevail over a procedural statute enacted by the Legislature. *Gerace v. Bentley*, 65 V.I. 289, 303 (V.I. 2016). But if this Court were to establish substantive law— such as through exercising its inherent authority to create common law—a doctrine of law created by this Court must ultimately yield to the substantive statutes adopted by the Legislature. *In re L.O.F.*, 62 V.I. 655, 661 n.6 (V.I. 2015). Consequently, to determine whether this Court has the authority to adopt a rule providing for apportionment of liability among non-parties, notwithstanding that section 1451(d) only requires the trier of fact to apportion damages among named defendants, it is necessary to determine whether rules on how damages are apportioned are procedural or substantive.

¶ 10 Every court to consider the question has determined that laws providing for apportionment of fault are substantive, not procedural, for such laws define the rights, duties, and obligations between those to whom they apply. *See, e.g., Matter of Oil Spill by Amoco Cadiz Off Coast of*

France on March 16, 1978, 954 F.2d 1279, 1315 (7th Cir.1992) (holding that question of whether defendant tortfeasors were entitled to reduction in plaintiffs’ claims by amount of alleged nonparty tortfeasor’s responsibility “was one of substantive law”); *Dale v. ALA Acquisitions I, Inc.*, 434 F.Supp.2d 423, 430 (S.D. Miss. 2006) (“[C]ourts from other states consistently hold that laws on apportionment of fault are substantive, not merely procedural.”) (collecting cases); *Lostritto v. Community Action Agency of New Haven, Inc.*, 848 A.2d 418, 428 (Conn. 2004) (holding that apportionment statute, while “contain[ing] some procedural elements,” was nevertheless substantive); *Forsythe v. Valley Consol. Indus.*, 361 N.W.2d 768, 771 (Mich. Ct. App. 1984) (rejecting argument that apportionment statute was procedural rather than substantive); *see also In re Kelvin Manbodh Asbestos Litigation Series*, 47 V.I. 375, 395 (V.I. Super. Ct. 2006) (characterizing apportionment of liability as “substantive law”). Significantly, section 1451(d) does not merely advert to apportionment or simply acknowledge its existence, but expressly mandates joint and several liability among defendants and creates the cause of action for contribution between defendants. *See Matthew v. Herman*, 56 V.I. 674, 684 (V.I. 2012) (holding that statutes that merely reference a cause of action, such as by creating a statute of limitations for that action, are not evidence that the legislature intended to create substantive law). Consequently, section 1451(d) is clearly a substantive statute, and thus this Court is not free to supersede the legislative enactment by creating an inconsistent common law rule. *L.O.F.*, 62 V.I. at 661 n.6.

¶ 11 Having established that section 1451(d) is substantive and cannot simply be set aside by this Court, it is necessary to determine whether the rule proposed by World Fresh Market would in fact be inconsistent with that statute. While section 1451(d) mandates apportionment by the trier of fact among defendants, it does not affirmatively state whether or not apportionment should occur among non-defendants. The parties disagree as to the effect of that omission—while World

Fresh Market contends that this Court is free to create a common law rule extending apportionment to non-defendants, Palermo maintains that providing for apportionment to those other than defendants essentially expands the definition of word “defendants” beyond what the Legislature intended when it enacted section 1451(d).

¶ 12 We agree with Palermo. “When a statute is silent on a particular topic . . . such silence should be considered in light of the underlying legislative intent.” *Estate of Skepple v. Bank of Nova Scotia*, 69 V.I. 700, 736 (V.I. 2018). Consequently, this Court has repeatedly rejected arguments that rely on legislative silence to create ambiguities or introduce uncertainty to otherwise-clear statutes. *See, e.g., Hansen v. Bryan*, 68 V.I. 603, 612 (V.I. 2018) (rejecting argument that statute’s silence on awarding of costs means that the legislature intended to preclude costs from being awarded under the general costs statute); *Gerace*, 65 V.I. at 299 (holding absence of a limitations period in a cost bond statute was strong evidence that the legislature intended for a security demand to be made at any time). In considering the effect of silence, we must remain cognizant that the Legislature is presumed to be aware of other Virgin Islands statutes, court rules, and judicial decisions at the time it enacts a statute. *See Cascen v. People*, 60 V.I. 392, 403 (V.I. 2014); *Brooks v. Gov’t of the V.I.*, 58 V.I. 417, 428 (V.I. 2013).

¶ 13 As a threshold matter, we reject World Fresh Market’s characterization of section 1451(d) as being “silent” on this issue, in that it presupposes that the Legislature, in limiting apportionment under section 1451(d) to “defendants,” intended to leave open the issue of whether apportionment should occur with respect to non-defendants. The Legislature has instructed that “[t]echnical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to their peculiar and appropriate meanings.” 1 V.I.C. § 42. The word “defendants” is an ancient term in the law, and the Legislature certainly

would have been aware of the meaning of that term when it enacted section 1451(d) in 1973. While the statute does not expressly state that apportionment cannot occur with respect to non-defendants, the Legislature is not required to include such an affirmative statement; rather, the deliberate use of “the narrower term ‘defendant’ . . . evinces a legislative intent to allow allocation of fault among only the parties to a lawsuit – not against nonparties.”¹ *Machin v. Carus Corp.*, 799 S.E.2d 468, 477-78 (S.C. 2017). This is consistent with the canon of statutory construction known as *expressio unius est exclusio alterius*, in which “expressing one item of [an] associated group or series excludes another left unmentioned.” *Chevron U.S.A. Inc. v. Echazabel*, 536 U.S. 73, 80 (2002); *see also N.L.R.B. v. SW General, Inc.*, 137 S.Ct. 929, 940 (2017) (“If a sign at the entrance to a zoo says ‘come see the elephant, lion, hippo, and giraffe,’ and a temporary sign is added saying ‘the giraffe is sick,’ you would reasonably assume that the others are in good health.”).

¶ 14 World Fresh Market, relying on *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967), alleges that Virgin Islands common law already requires apportionment of damages among joint tortfeasors regardless of whether they were defendants or non-defendants, and that the *Gomes* decision therefore needed to be expressly abrogated by the Legislature when it enacted section 1451(d) in 1973. We disagree. The *Gomes* decision itself expressly states “[t]hat no such right is recognized at common law has long been clear [n]or do we find reference to such a right in the statutory or reported decisional law of the Virgin Islands.” 394 F.2d at 467. Since the *Gomes*

¹ In fact, legislatures in other jurisdictions have used such broader terminology in their apportionment statutes to convey that apportionment need not be limited only to defendants. *See, e.g., Walker v. Tensor Machinery Ltd.*, 779 S.E.2d 651, 652 (Ga. 2015) (statute requiring the trier of fact to apportion fault of “all persons or entities who contributed to the alleged injury or damage”).

court expressly acknowledged that there is no such common law or statutory right, yet nevertheless mandated apportionment, the Third Circuit must have necessarily adopted the rule through its then-supervisory authority over the Virgin Islands court system. See *Destin v. People*, 64 V.I. 465, 474 (V.I. 2016) (citing *Gov't of the V.I. v. George*, 741 F.2d 643 (3d Cir. 1984)). That its supervisory authority served as the basis for the decision is reflected by the conclusion of the *Gomes* decision, which notes that “[t]he Virgin Islands is certainly as capable of careful judicial development in the future.” 394 F.2d at 469. Even assuming *arguendo* that a court can resolve issues of substantive law through its supervisory authority, *World Fresh Market* cites to no authority—and there does not appear to be any—to support the proposition that decisions rendered in a supervisory capacity, rather than through common law adjudication, need be expressly abrogated by a legislature. Significantly, while this Court has directed that the Superior Court continue to follow, as binding precedent, decisions of the Third Circuit rendered in its former capacity as the *de facto* court of last resort for the Virgin Islands, it has expressly rejected continued reliance on decisions of the Third Circuit issued in its former supervisory capacity. *Destin*, 64 V.I. at 474 (rejecting application of rule the Third Circuit created through its supervisory authority because “it is clear that any supervisory authority the Third Circuit could exercise over the Virgin Islands Judiciary was divested upon the creation of this Court”).

¶ 15 In any case, even if we were to assume that the rule announced in *Gomes* is a common law rule rather than a rule adopted through supervisory authority, it is clear that the adoption of section 1451(d) by the Legislature in 1973 superseded that decision. Section 1451(d) was enacted by the Legislature as part of a comprehensive scheme applicable to all civil cases, in which the Legislature adopted comparative fault, abolished the use of contributory negligence as a bar to recovery, mandated apportionment among defendants, provided for joint and several liability, and

recognized a cause of action for contribution. In doing so, the Legislature adopted substantive law governing the very same issues addressed in the *Gomes* decision. Were this Court to recognize a common law rule to “supplement” section 1451(d) by providing for apportionment among individuals other than defendants, the effect would be to substitute the judgment of this Court for that of the Legislature on an issue of substantive law on which it has clearly spoken. *See In re Estate of Hannifin*, 311 P.3d 1016, 1022-23 (Utah 2013) (rejecting argument that courts could continue to recognize equitable adoption under the common law after legislature enacted a statutory adoption scheme without expressly stating that it intended to abolish the common law, for “[t]he legislature’s failure to speak more clearly tells us little of relevance to our interpretation of the words that it adopted”); *accord, Corraspe v. People*, 53 V.I. 470, 481-82 (V.I. 2010) (rejecting argument that provisions of Federal Rule of Criminal Procedure 11 could supplement Superior Court Rule 126 through Superior Court Rule 7 when the federal rule addressed more subjects than the local rule, since adopting such an interpretation would be contrary to the intent of the drafters). Importantly, as noted earlier, we must presume that the Legislature was aware of the *Gomes* decision when it enacted section 1451(d) in 1973, yet the Legislature nevertheless chose to use the narrow term “defendants” in section 1451(d) rather than the broader term “joint tortfeasor” used in *Gomes*. Had the Legislature not enacted section 1451(d) at all, pursuant to the *Gomes* decision, the trier of fact would be required to apportion liability among all joint tortfeasors, whether they were defendants or non-defendants. Thus, the position taken by World Fresh Market—that the Legislature intended for the common law as expressed in *Gomes* to continue alongside section 1451(d)—would result in section 1451(d) being entirely superfluous and serving no legislative purpose. In contrast, section 1451(d) would serve a purpose if its intent were to narrow the rule announced in *Gomes* to require apportionment only among defendants. *Corraspe*,

53 V.I. at 482.

¶ 16 Finally, as noted above, we must also presume the Legislature’s familiarity with court rules and procedures. At the time the Legislature enacted section 1451(d), Federal Rule of Civil Procedure 14, made applicable to Superior Court proceedings through former Superior Court Rule 7, permitted a defendant to serve a summons and complaint on a nonparty as a third-party defendant if the nonparty is or may be liable for all or part of the claims.² We must presume that the Legislature was aware of Rule 14 when it enacted section 1451(d), and thereafter would have known that a non-settling defendant had a procedural mechanism to return a settling defendant to the case in order to provide for apportionment of liability. Today, this procedural rule survives in largely the same form as Rule 14 of the Virgin Islands Rules of Civil Procedure. Consequently, there is very little risk that a plaintiff who settles with one defendant may receive a windfall in the form of a double recovery, since nothing in the plain text of Rule 14 prohibits a non-settling defendant from naming the settling defendant as a third-party defendant after becoming aware of the settlement—since a third-party defendant is a defendant, section 1451(d) would require apportionment and prevent the plaintiff from receiving a double recovery. As Palermo correctly notes in her appellate brief, this is precisely what World Fresh Market could have done after

² Moreover, Rule 13(g) of the Federal Rules of Civil Procedure, like Rule 13(g) of the Virgin Islands Rules of Civil Procedure, expressly authorized World Fresh Market to file a crossclaim against PDCM after Palermo amended her complaint to add PDCM as a co-defendant. Although World Fresh Market maintains that it did not believe it was necessary to file a cross-claim under Rule 13(g) to obtain apportionment because section 1451(d) mandated such apportionment, doing so would have prevented the settlement between PDCM and Palermo from resulting in PDCM’s dismissal from the litigation, since such a settlement would not extinguish World Fresh Market’s cross-claim against PDCM. In any event, once the Superior Court dismissed PDCM from the litigation, World Fresh Market could have utilized the Rule 14 procedure, yet failed to do so.

becoming aware of her settlement with PDCM³ yet made no attempt to do so.⁴ Accordingly, we hold that the Superior Court committed no error when it declined to direct the jury to apportion damages between World Fresh Market and PDCM.⁵

C. Exclusion of Settlement Evidence

¶ 17 World Fresh Market asserts that the Superior Court erred when it precluded the admission at trial of the funds Palermo received through its settlement with PDCM. Specifically, World Fresh Market argues that it had the right to present this evidence to the jury pursuant to title 5, section 427 of the Virgin Islands Code. That statute reads, in its entirety, as follows:

In any cause of action alleging damages for medical expenses or lost income sustained by or on behalf of a party, including, without limitation, actions alleging damages for bodily injury, death or property damage, or any combination thereof, the collateral source rule shall not be applied. Any party may introduce evidence that the other party who is claiming damages for medical expenses or lost income has received, or is entitled to receive, other compensation for such damages, including, but not limited to benefits from workmen's compensation, medical and hospital insurance, prepaid health care, social security, retirement or pension, and any employer paid program, such as wage continuation and disability benefits programs. Nothing in this section shall be construed to reduce any award where

³ In its appellate brief, World Fresh Market asserts that it would have been improper for it to commence a third-party action against PDCM because PDCM would not be liable to World Fresh Market. However, section 1451(d) recognizes contribution as a cause of action, and the very nature of a contribution action is for one tortfeasor to recover some or all damages it owes to the injured party from another tortfeasor. *See In re Kelvin Manbodh Asbestos Litigation Series*, 47 V.I. 276, 280 (V.I. Super. Ct. 2005) (“A cause of action for common law contribution generally may lie where two or more persons become liable in tort for the same injury to person or property, even though judgment has not been recovered against any or all of them.”) (collecting cases).

⁴ In fact, at least one Virgin Islands court has held that a cause of action for contribution may be brought even as part of a separate action after a judgment is rendered in the original matter. *Beloit Power Sys, Inc. v. Hess Oil V.I. Corp.*, 18 V.I. 317, 325-26 (D.V.I. 1981).

⁵ Because section 1451(d) only permits apportionment of damages among defendants, and this Court would infringe on the authority of the Legislature were it to use its power to shape the common law to adopt the proportionate share rule proposed by World Fresh Market, we need not address Palermo’s claim that World Fresh Market waived application of its proposed common law apportionment rule by failing to plead it in its answer.

there is a statutory lien against the judgment as a result of a third party payment.

While the Superior Court relied on the text of Restatement (Second) of Torts § 920⁶ to determine that funds received as part of a settlement with a joint tortfeasor cannot be used to reduce a plaintiff's recovery, World Fresh Market maintains that the Superior Court erred in relying on the Restatement—a secondary source—to the exclusion of the plain language of section 427.

¶ 18 World Fresh Market is correct that the Superior Court erred in apparently basing its legal analysis entirely on a Restatement provision to the exclusion of Virgin Islands law. However, World Fresh Market is mistaken that the Superior Court should instead have applied section 427. Section 427 is a procedural statute, in that it essentially establishes a rule of evidence permitting any party to introduce evidence that another party has received compensation for damages for medical expenses or lost income. As explained earlier, both this Court and the Legislature possesses concurrent authority to promulgate procedural rules pursuant to the Revised Organic Act. *See* 48 U.S.C. § 1611(c). However, in the event of a conflict, a procedural rule adopted by this Court will always prevail over an inconsistent procedural statute enacted by the Legislature. *Gerace*, 65 V.I. at 303.

¶ 19 This Court exercised its rulemaking authority under the Revised Organic Act to promulgate the Virgin Islands Rules of Evidence, which went into effect on March 31, 2017. Rule 408 of the Virgin Islands Rules of Evidence provides, in its entirety, as follows:

(a) **Prohibited uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim

⁶ This provision provides, in its entirety, as follows:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

or to impeach by a prior inconsistent statement or by contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, or negating a contention of undue delay.

Rule 408 is largely modelled after the corollary provisions of the Federal Rules of Evidence. By its own terms, the plain text of Rule 408 precludes any party from introducing evidence of a settlement agreement “to prove or disprove the validity or amount of a disputed claim.” *See Portugues-Santana v. Rekomdiv Intern.*, 657 F.3d 56, 63 (1st Cir. 2011) (“Rule 408 clearly prohibits the admission of a settlement agreement at trial for the purpose of arguing a reduction in the damages award.”) (citing *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 (5th Cir. 1983)). Thus, Rule 408 is in direct conflict with section 427; while Rule 408 clearly prohibits World Fresh Market from introducing evidence of the settlement agreement between PDCM and Palermo for purposes of arguing that Palermo’s damages should be reduced, section 427 may arguably permit the introduction of that same evidence. To the extent Rule 408 and section 427 are in conflict in this instance, section 427 must yield to Rule 408.⁷ Accordingly, we hold that the Superior Court did not err when it excluded the settlement evidence, even though it may have erred in its reasoning.

D. Implied Assumption of the Risk

¶ 20 In its appellate brief, World Fresh Market also argues that the Superior Court erred when

⁷ Because section 427 is not applicable to this matter in that the settlement evidence is excluded pursuant to Rule 408, it is not necessary for us to determine whether the Superior Court was correct in also holding that World Fresh Market waived its reliance on section 427 by failing to plead it in its answer.

it instructed the jury on comparative negligence but declined to issue a separate instruction on implied assumption of the risk.⁸ In doing so, the Superior Court relied on the decision of this Court in *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 397 (V.I. 2014), in which we held that the implied assumption of the risk defense has been abolished in the Virgin Islands. While World Fresh Market acknowledges the *Machado* decision, it asserts that *Machado* is somehow limited only to the summary judgment context and that “a jury can still find assumption of the risk.” (Appellant’s Br. 34.)

¶ 21 World Fresh Market’s interpretation of the *Machado* decision is wholly without merit, in that there is absolutely nothing in the text of that decision that even gives the implication that this Court intended to limit its assumption of risk holding solely to the summary judgment stage. On the contrary, the reasoning of the *Machado* decision emphasizes that the implied assumption of risk defense had been abolished by the Legislature through its enactment of the comparative fault statute:

We conclude that maintaining implied assumption of risk as a complete defense to

⁸ Throughout its brief, World Fresh Market refers to the Superior Court declining to instruct the jury on “assumption of the risk.” However, as this Court has previously noted,

The phrase “assumption of risk” has come to encompass two distinct concepts. The first concept—sometimes called express assumption of risk—involves situations where the plaintiff has absolved the defendant of its duty of care, either through express contracts not to sue for injury or loss [or] situations in which actual consent exists such as where one voluntarily participates in a contact sport. The second concept, implied assumption of risk, involves an affirmative defense to an established breach of duty where the plaintiff’s actions demonstrate that she appreciated the risk involved and proceeded regardless of that risk.

Machado v. Yacht Haven U.S.V.I., LLC, 61 V.I. 373, 396 (V.I. 2014) (internal citations and quotation marks omitted). Importantly, while this Court has held that the Legislature has abolished the defense of implied assumption of risk, it did so “without commenting on express assumption of risk.” *Id.* at 397. However, it is clear from the record as well as the parties’ filings that World Fresh Market has attempted to assert the defense of implied assumption of risk.

negligence conflicts with the Legislature's unambiguous directive in 5 V.I.C. § 1451(a) that the plaintiff's fault "shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff." Even though Virgin Islands courts must read statutes abrogating the common law narrowly, because implied assumption of risk is irreconcilable with the Territory's statutory comparative negligence scheme, maintaining it cannot be the soundest rule for the Virgin Islands and would undermine the policy set by the Legislature.

Machado, 61 V.I. at 397 (internal citations omitted). To the extent that the defense of implied assumption of risk "conflicts with" and is "irreconcilable with" the comparative fault statute, that would be the case in all stages of the proceeding, whether summary judgment or trial. Therefore, we conclude that the Superior Court correctly applied the law when it instructed the jury on comparative fault but declined to separately instruct the jury on the defense of implied assumption of the risk.

E. Admission of Expert Testimony

¶ 22 Rule 702 of the Virgin Islands Rules of Evidence provides that

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

World Fresh Market contends that the Superior Court erred when it qualified two witnesses—Sheila Justice and Richard Moore—as experts pursuant to Rule 702 and permitted them to testify as to Palermo's future earning capacity. In doing so, World Fresh Market does not question either witness's knowledge, skill, experience, training, or education. Rather, it only alleges that the methodology used by both expert witnesses was unreliable, in that Justice and Moore had respectively testified that Palermo could earn \$26,000 and \$41,302 per year if she were not injured,

even though Palermo’s pre-injury average annual income had been \$7,498. According to World Fresh Market, there was no evidentiary basis for either expert witness to testify to such a substantial increase in Palermo’s future income, and that these earnings figures were *ipse dixit*—that is, without any basis other than Justice and Moore’s assertion.

¶ 23 World Fresh Market is incorrect that Justice had no basis for arriving at these figures. At the Rule 702 hearing held immediately prior to trial, the Superior Court determined that Justice had utilized a reliable methodology, in that she evaluated Palermo’s medical records and other pertinent records, developed a vocational profile, evaluated her physical limitations, and examined the labor market for her profession. As the Superior Court recognized when it orally denied World Fresh Market’s motion to exclude her testimony, the question of whether Justice’s calculations were credible was a matter to be determined by the jury, and the fact that World Fresh Market may disagree with the calculation is not a legitimate reason to exclude the testimony.⁹ See *Brathwaite v. Xavier*, 71 V.I. 1089, 1096 (V.I. 2019).

¶ 24 Likewise, the Superior Court committed no error when it qualified Moore as an expert and permitted him to testify to Palermo’s lost earnings capacity. While the Superior Court did not conduct a full Rule 702 hearing with respect to Moore, World Fresh Market expressly represented that it had no objection to Moore’s methodology, as the following dialogue shows:

THE COURT: Okay. And, Attorney Sheesley, is there an issue with the methodology used by Dr. Moore in crunching those numbers? I mean, if he has

⁹ In its brief, World Fresh Market represents that courts in other jurisdictions have liberally excluded expert testimony on lost earnings capacity due to the expert’s opinion being incredible. However, the cases in which this has occurred have been in situations where the proffered testimony has essentially no relevance whatsoever—for instance, when an expert relied on income statistics for animal breeders, equipment operators, and loggers when the plaintiff had been employed exclusively as a fisherman and gave absolutely no indication that he ever intended to change careers. See *Subaqueous Services, Inc. v. Corbin*, 25 So.3d 1260, 1267-68 (Fla. Dist. Ct. App. 2010).

inaccuracies -- I think the law is clear, if he used the wrong numbers, or his calculations are incorrect, that's a credibility issue. That's not a methodology, that's not an admissibility issue. Are there any issues with how Dr. Moore reached his conclusions?

MR. SHEESLEY: No, I don't think so, Your Honor. The basis of my report was that the --

THE COURT: The basis of your motion.

MR. SHEESLEY: The basis of my motion.

THE COURT: Right.

MR. SHEESLEY: I apologize.

THE COURT: It's been a long day. It's okay.

MR. SHEESLEY: Yes. It's essentially that he didn't have good grounds for what he was doing, because the underlying grounds were bad, if that makes sense, but I think once we makes a decision on this stuff --

THE COURT: Right.

MR. SHEESLEY: The way that he did his numbers, I'm not disputing.

THE COURT: Okay, but the good grounds goes to the methodology, not to the conclusion.

MR. SHEESLEY: I apologize if I'm using the incorrect language. Yes. No. I think I agree with Attorney Rohn on this one, one of the few times, but, yes, my issue with Dr. Moore is that the results were faulty based on --

THE COURT: The numbers.

MR. SHEESLEY: -- the numbers.

THE COURT: Okay.

MR. SHEESLEY: Right.

THE COURT: But as far as methodology, that's what's customary.

MR. SHEESLEY: Yes.

THE COURT: Okay.

MR. SHEESLEY: Correct.

THE COURT: All right. So we don't need to do that with Dr. Moore.

(J.A. 1017-18.) Because World Fresh Market, through its counsel, expressly represented to the Superior Court that it did not object to Moore's methodology and conceded that the issue was not one of admissibility but credibility, any challenge to the admission of this testimony has been waived. *See Edward v. GEC, LLC*, 67 V.I. 745, 760 (V.I. 2017); *V.I. Waste Mgmt. Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 370-71 (V.I. 2014). Therefore, we conclude that the Superior Court committed no error when it permitted Justice and Moore to testify as to Palermo's lost earnings capacity.

III. CONCLUSION

¶ 25 Because apportionment of liability is a matter of substantive law, this Court cannot exercise its authority to establish the common law to create a rule providing for apportionment of liability among non-defendants, when the Legislature has enacted a statute only providing for such apportionment among defendants. Moreover, the Superior Court correctly excluded evidence of PDCM's settlement with Palermo—albeit for the wrong reasons—in that admission of such evidence would be contrary to Rule 408 of the Virgin Islands Rules of Evidence. The Superior Court also committed no error when it declined to instruct the jury on assumption of risk, and when it qualified Justice and Moore as expert witnesses and permitted them to testify to Palermo's lost earnings capacity. Accordingly, we affirm the January 28, 2020 amended judgment.

Dated this 4th day of February, 2021.

BY THE COURT:

/s/ Rhys S. Hodge

RHYS S. HODGE

Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court