No. 2022-0055

In the Supreme Court of the Virgin Islands

BART ENTERPRISES, LLC,

Appellant/Plaintiff,

v.

SAPPHIRE BAY CONDOMINIUMS WEST,

Appellee/Defendant.

On Appeal From The Superior Court
For The District Of St. Croix
Super. Ct. Civ. Case No. SX-2020-CV-00075

OPENING BRIEF OF APPELLANT

KYE WALKER, ESQ.
THE WALKER LEGAL GROUP
2201 Church Street
Suite 16AB
Christiansted, St. Croix
U.S. Virgin Islands 00820
Telephone: (340) 773-0601
kye@thewalkerlegalgroup.com

Counsel for Appellant

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

(i) Statement of Basis for subject matter jurisdiction in the Superior Court

The Superior Court had original jurisdiction of this civil matter pursuant to Title 4, Section 76 of the Virgin Islands Code.

(ii) Statement of the bases for jurisdiction in the Supreme Court

Pursuant to Title 4, Section 32(a), the Virgin Islands Supreme Court has subject matter jurisdiction of the instant appeal from a final order of the Superior Court dismissing the underlying matter for failure to prosecute. While the lower court's dismissal did not address the existence of the pending counterclaim, the final order of dismissal expressly stated that "**this matter** is DISMISSED" thereby disposing of all claims with respect to all parties. (emphasis added) **App. 003**.

The Court entered its final order of dismissal on September 23, 2022 and Appellant, Bart Enterprises, LLC filed its Notice of Appeal within thirty (30) days on October 19, 2022. **App. 001-003**. As such, the Notice of Appeal is timely.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

The sole issue presented for appeal is whether the Court abused its discretion when it dismissed the underlying action for failure to prosecute. The standard of review for the Supreme Court's consideration of the lower court's dismissal of the underlying matter for failure to prosecute is abuse of discretion. *Halliday v.*

Footlocker Specialty, Inc., 53 V.I. 505, 510 (V.I. 2010). The lower court abuses its discretion when its "decision rests upon a clearly erroneous findings of fact, an errant conclusion of law or an improper application of law to fact." *Stevens v. People of the Virgin Islands*, 55 V.I. 550, 556 (V.I. 2011).

III. STATEMENT OF THE CASE

The instant appeal involves a breach of contract action filed by Appellant, Bart Enterprises, LLC ("Bart") against Appellee, Sapphire Bay Condominiums West ("Appellee") on February 13, 2020 for non-payment of construction services rendered by Bart. **App. 012**. Appellee responded to the Complaint and filed a counterclaim on June 23, 2020. **App. 008**. Bart responded to the counterclaim on July 20, 2020. *Id*.

Bart filed the Complaint *pro se* and represented itself in this proceeding until June 2, 2020 when Attorney Robert King entered his appearance on behalf of Bart. **App. 006**. On December 17, 2021, the Court granted Attorney King's motion to withdraw his representation of Bart and Bart was again unrepresented by counsel until September 1, 2022 when the undersigned counsel entered her appearance. *Id*.

On July 6, 2022 and while Bart was unrepresented, Appellee filed a motion to dismiss for failure to prosecute. **App. 007**. On August 30, 2022, the Court ordered Bart to secure new counsel and to respond to the "Complaint and motion" by September 20, 2022. *Id*. On September 12, 2022, Appellee moved to

reconsider the order granting Bart additional time to respond to the motion to dismiss and requested immediate dismissal of the matter. *Id*.

Eleven days later and without providing Bart a full opportunity to respond to the request to reconsider, the Court granted Appellee's motion to reconsider and dismissed the underlying matter for failure to prosecute. **App. 003**.

On October 18, 2022, Bart moved to reconsider the order of dismissal or, in the alternative to vacate the order of dismissal. **App. 006**. Bart also filed a timely notice of appeal on October 19, 2022. **App. 001**.

IV. STATEMENT OF FACTS

On February 13, 2020, Bart filed the instant breach of contract action *pro se* through one of its principals, Peter R. Najawicz, seeking payment of an outstanding invoice in the amount of $265,296.98. **App. 012**. Bart attached to the Complaint, the subject contract, Bart's demand for payment, and its Notice of the Construction Lien filed by Bart against the Appellee's property. *Id*. Appellee answered the Complaint on June 23, 2020 and also filed a counterclaim. **App. 008**. Bart responded to the counterclaim on July 20, 2020 thereby indicating its intent to both prosecute and defend this action. *Id*.

It is clear from the inception of the matter that Bart struggled to find counsel to prosecute this case. On April 3, 2020, Appellee moved to dismiss the action because Bart was not represented by counsel. **App. 008**. The Superior Court

agreed that Bart needed to be represented by counsel and ordered Bart to have counsel enter an appearance within thirty (30) days of its order of April 28, 2020. *Id*. Unfortunately, Bart was unable to secure counsel within the thirty (30) day deadline. Ultimately, Attorney Robert King entered an appearance on behalf of Bart on June 2, 2020. **App. 008**.

Attorney King moved to withdraw his appearance on December 10, 2021. *Id*. The Superior Court granted leave for Attorney King to withdraw on December 17, 2021 and gave Bart 45 days to have new counsel enter an appearance on its behalf. **App. 007**.

Prior to Attorney King's withdrawal and during the time King represented Bart, Appellee filed a motion to amend the Complaint on August 19, 2021 and a motion for partial summary judgment on December 6, 2021. **App. 008**. Bart, while represented by counsel, did not respond to either motion. **App. 005-011**. The Superior Court granted the motion to amend the counterclaim on September 28, 2021, but the motion for partial summary judgment remained pending. *Id*.

Bart was unable to secure counsel by the 45-day deadline, which deadline expired on January 31, 2022. During the time Bart was unrepresented by counsel, the Appellee filed the following motions:

- Motion to Dismiss Complaint on February 17, 2022 with a supplement to the Motion to Dismiss on June 16, 2022;
- Motion to Dismiss for Lack of Prosecution on July 6, 2022;
- Motion for Partial Summary Judgment on July 28, 2022; and

- request to consolidate the instant matter with St. Thomas Cargo & Ship Services, Inc. v. Bart on September 11, 2022.

App. 005-011. On July 5, 2022, Bart, acting *pro se*, responded to the Motion to Dismiss for Lack of Prosecution by requesting sixty (60) days to find new counsel. **App. 007**. On August 30, 2022, the lower court denied Bart's request, in part, and gave Bart twenty-one (21) days to secure new counsel and to respond to the "Complaint and motion", such that the deadline set by the lower court for new counsel to enter his or her appearance and respond to the pending motion was September 20, 2022.[1] **App. 007**.

The undersigned entered her appearance on behalf of Bart on September 1, 2022. **App. 006**. At the time, the undersigned entered her appearance, five (5) motions were pending. **App. 005-011**.

On September 12, 2022, Appellee moved for reconsideration of the Court's August 30, 2022 order and requested the Court dismiss the case. **App. 006**. The deadline for Bart's response to the motion to reconsider was September 30, 2022. On September 23, 2022, a week before the deadline for Bart's response to the motion to reconsider, the Superior Court granted the motion to reconsider and dismissed the underlying case for Bart's failure to respond to the motion to dismiss for failure to prosecute within 21 days of the August 30, 2022 Order.

[1] It is not clear why Bart would be required to respond to a Complaint when it initiated the Complaint.

The Superior Court granted the motion to reconsider without allowing Bart the opportunity to respond to the motion to reconsider. **App. 003**.

At the time the Superior Court dismissed this matter, there were at least five (5) pending motions, including a motion to consolidate filed by the Appellee. **App. 005-011**.

Further, although this matter was not stayed pending resolution of the motion to dismiss or the motion to consolidate, the lower court never entered a scheduling order providing for the advancement of this matter past the initial pleading stage. *Id*.

V. ARGUMENT

The lower court abused its discretion in three major respects when it dismissed the matter below. First, it failed to apply the *Halliday* factors, which application is required when considering a motion to dismiss for failure to prosecute. The lower court also erroneously dismissed the matter below when several motions and Appellee's counterclaim was pending. Finally, the lower court violated Bart's due process when it granted Appellee's motion to reconsider without allowing Bart the opportunity to respond to the motion.

A. The Court failed to apply the *Halliday* factors.

In *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511-512 (VI 2010), the Supreme Court of the Virgin Islands held that the Superior Court may not

dismiss an action for failure to prosecute unless an analysis of the six "Poulis factors" weigh strongly in favor of dismissal. *Halliday*, at 511. Those factors, now known in Virgin Islands courts as the *Halliday* factors, required the Superior Court to consider:

> 1. the extent of the party's personal responsibility; 2. the prejudice, if any, to the other parties in the litigation; 3. whether the plaintiff has demonstrated a history of dilatoriness; 4. whether the plaintiff or attorney's conduct was willful or in bad faith; 5. the effectiveness of sanctions other than dismissal; and 6. the meritoriousness of plaintiff's claim.

Id.; *see also, Watts v Two Plus Two, Inc*., 54 V.I. 286, 290 (V.I. 2010). The Supreme Court explained that "[b]ecause dismissal for failure to prosecute constitutes an extreme sanction, the Superior Court may not order it" unless it has considered all the factors and found that those factors weigh strongly in favor of dismissal. *Watts*, at *6.

In this instance, the lower court failed to consider the factors and therefore did not determine whether analysis of the factors favored dismissal. The lower court's failure is grounds for immediate reversal on appeal and, in the interest of justice and judicial efficiency, should be reversed. *Halliday*, at 512 (". . . because the Superior Court dismissed Appellant's action without performing the appropriate balancing test, this Court reverses the Superior Court's April 24, 2009 Order.") and *Watts v. Two Plus Two, Inc*., 54 V.I. 286, 291 (V.I.

2010)("Accordingly, since the record contains no evidence indicating that the Superior Court even considered any of these six factors – let alone weighed them – with respect to Bell, this Court reverses the October 19, 2007 Order as it pertains to dismissal of Watt's action against Bell.").

In this instance, application of the *Halliday* factors by the lower court would have revealed that dismissal is not warranted.

1. Bart's personal responsibility was minimal.

The lower court was required to determine to what degree Bart, as opposed to his counsel, bore responsibility for the purported lack of prosecution. *Ventura v. Virgin Islands Hospital & Health Facilities Corp.*, Case No. SX-2010-CV-00453, 2021 V.I. LEXIS 72, at *14 (Super. Ct. August 30, 2021).

In *Kuykendall v. Hart*, 70 V.I. 574 (Super. Ct. 2019), the court found that this first factor weighed against dismissal because the court had not entered a scheduling order such that "some of the history of delay is attributable to the Superior Court." *Kuykendall*, at 580-581. While Bart bears some responsibility for the delay due to its failure to secure counsel by some of the deadlines imposed by the Superior Court, it responded to the Motion to Dismiss for Failure to Prosecute by requesting additional time to secure counsel. Moreover, while Bart's failure to secure counsel resulted in its inability to respond to the Appellee's numerous motions, it did not inhibit discovery or prevent the Superior Court from

entering a scheduling order. Significantly, the Superior Court never entered a scheduling order or even conduct a scheduling conference during the year and a half that Bart was represented by Attorney King. In the absence of a scheduling order, Bart could not have failed to prosecute this action.

This factor weighed against dismissal and should have been considered by the lower court.

2. There was no prejudice to Appellee.

"Prejudice to the opposing party is generally demonstrated by either increased expense to the opposing party in the form of extra costs incurred relative to responding to the dilatory party's behavior, or by the increased difficulty experienced by the opposing party in presenting or defending the claims in issue due to the improper behavior and delays." *Ventura*, at *17. Examples of prejudice include "the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party." *Wells v. VI Source, Inc*., Civ. No. ST-07-CV-324, 2014 V.I. LEXIS 158, at *4 (Super. Ct. November 7, 2014)(citing Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994)). Prejudice could also include "deprivation of information through non-cooperation with discovery, and costs expended obtaining court orders to force compliance with discovery." *Wells*, at *4 (citing Adams, at 874).

The lower court was required to consider the extent of prejudice, if any, to Appellee. *Watts*, at 292.

Regarding prejudice, Appellee argues an inability to defend against the case due to delays and intervening changes in the membership of its board. These arguments do not rise to the level prejudice needed to warrant dismissal for failure to prosecute.

First, Appellee could hardly argue an inability to defend against the case when it has filed three (3) motions to dismiss and two (2) summary judgment motions. Appellee did not seek to meet and confer regarding discovery, did not request the lower court enter a scheduling order, and did not take any steps other than to rush this matter to resolution through the filing of several dispositive motions. Further, a change in board membership did not render witnesses unavailable. This is not a personal injury action, but rather a breach of contract action and is more akin to a business dispute than a personal injury dispute where witness memory is paramount. A board, presumably, maintains minutes, notes, communications, and documents transactions. There was no allegation of witness unavailability or memory loss to support a claim of prejudice. *See, Watts*, at 292 (". . . Two Plus Two never alleged in its July 16, 2007 motion or at the September 18, 2007 hearing that any witnesses had actually become unavailable or had forgotten about the incident . . . ").

Finally, there is no prejudice as it pertains to discovery as the lower court never entered a scheduling order and never ordered the parties' to meet and confer regarding discovery. In *Kuykendall*, the court concluded that no prejudice existed to support dismissal as there was no order for the exchange of discovery. *Kuykendall*, at *12 ("Here, the Superior Court shares in some of the blame because, to date, no scheduling order has issued."). Importantly, Virgin Islands Rule of Civil Procedure 26(f) provides that "the parties must confer as soon as practicable – and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." Rule 16(b)(2) provides that "[t]he judge must issue a scheduling order as soon as practicable . . . within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." Meanwhile, Rule 16(b)(1) requires the Court to enter a scheduling order after receiving the parties' report under Rule 26(f) or consulting with the parties and any self-represented parties at a scheduling conference.

In this instance, no scheduling conference was conducted nor was a scheduling order entered. Moreover, the Appellee never requested discovery or any information from Bart such that Bart could not be considered uncooperative in the provision of information. Most significantly, in the absence of a scheduling order, there was simply no failure to prosecute. At best, Bart failed to respond to

motions. However, as argued in further detail below, a party's failure to respond to pending motions does not authorize dismissal by a trial court. Rather, a trial court is duty bound to consider the motions to ensure that the moving party is entitled to the relief requested. The lower court did not do so here. Instead, it summarily dismissed the action without analysis and as an extreme sanction for Bart's failure to respond to the pending motion to dismiss for failure to prosecute. That dismissal was an abuse of discretion.

Analysis of the second factor would have weighed against dismissal.

3. There was minimal history of dilatoriness.

A history of dilatoriness means "extensive or repeated delay or delinquency that constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders." *Ventura*, at *20 (citing *Adams*, at 874). "Conduct that merely occurs once or twice does not demonstrate a history of dilatoriness." *Id*. (citing *Briscoe v. Klaus*, 538 F.3d 252, 261 (3d Cir. 2008). In addition, when considering this factor, a court should also consider Bart's compliance with its orders. *Watts*, at 293.

There were undoubtedly instances where Bart failed to comply with court orders as to securing new counsel and responding to motions. However, there are also instances of compliance with orders to secure counsel and responsiveness to the Appellee's counterclaim.

In light of the history of both compliance and non-compliance, this factor is neutral and would not have favored either party.

4. Neither Bart's conduct nor its counsel's conduct was willful or in bad faith.

"Willfulness involves intentional or self-serving behavior" and there must be "[s]pecific evidence in the record [to] justify a determination of willfulness or bad faith." *Ventura*, at *23. The Court cannot presume willfulness. *Molloy v. Independence Blue Cross*, 56 V.I. 155, 192 (VI 2012).

There was no evidence of willfulness or bad faith on the part of Bart. Rather, Bart was simply unable to afford counsel or otherwise experienced difficulty in securing counsel. In his motion to withdraw, Attorney King explained that Bart's principal was the subject of a trial or series of trials and had incurred substantial legal fees as a result. **App. 008**. Presumably, that circumstance created hardship for Bart's principal such that Bart struggled to secure counsel. Despite this difficulty, Bart secured counsel on two (2) occasions in an attempt to comply with the Court's orders and had also responded to the Defendant's counterclaim.

In the absence of any evidence of willfulness or bad faith, this factor, had it been considered, would have weighed against dismissal.

5. Alternative lesser sanctions were available to the Court.

"Dismissal is a sanction of last resort, and courts must look to effective alternative methods of sanctioning dilatory litigants before ordering dismissal for

failure to prosecute." *Ventura*, at *25. The lower court was therefore required to consider whether a lesser sanction would best serve the interests of justice." *Id*.

Bart submits that no sanction was warranted in this matter as it had not failed to prosecute the case. While Bart failed to respond to certain motions and experienced gaps in being represented by counsel, those gaps in representation and non-responsiveness to motions did not unreasonably delayed this action. Significantly, Bart had not failed to engage in discovery or otherwise failed to prosecute this matter since no scheduling order had ever been entered by the trial court.

In *Ventura*, the court considered and selected as a lesser sanction, "the imposition of specific timelines and conditions leading to the conclusion of the litigation." The court in *Ventura* reasoned:

> [h]ere, where Plaintiffs actively resist Defendants' Motion to Dismiss and vigorously if not wholly convincingly, argue that they have not failed to prosecute their claims, the Court is loathe to deprive Plaintiff of their day in court if there are appropriate alternate sanctions or other conditions that may be imposed to make certain that all delays have concluded and there will be no more resulting prejudice to Defendants. While the imposition of monetary sanctions against Plaintiffs or their counsel is neither sought nor helpful, it does appear that by the imposition of specific timelines and conditions leading to the conclusion of the litigation the goals of a merits-based determination without further unwarranted delay can be achieved.

Bart submits that the lower court should have considered a similar analysis of alternative sanctions or methods to achieve compliance with its orders, particularly since Bart had secured counsel and this matter was in its infancy as no scheduling order had been entered. The imposition of a scheduling order is a duty of the trial court and would have resulted in the imposition of specific timelines to advance the matter to resolution.

Consideration of alternative sanctions would have also weighed against dismissal.

6. Bart's claim had merit.

"A claim, or defense, will be deemed meritorious when the allegation of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." *Ventura*, at *28. Application of the summary judgment standard is not appropriate when considering this factor. *Id*.

Bart's breach of contract claim was meritorious. Elements of a breach of contract claim are: 1. the existence of an agreement; 2. a duty created by that agreement; 3. breach of that duty; and 4. damages. *Phillips v. Marsh-Monsanto*, 66 V.I. 612, 620 (VI 2017). In the matter below, Bart alleged the existence of a contract and attached the contract to its complaint. **App. 012**. Bart further alleged that Appellee had a duty to pay him. *Id*. Further, Bart alleged that Appellee breached that duty and that Bart suffered damages as a result. *Id*. Bart's

allegations, if established at trial, would have supported his claim for recovery and was therefore meritorious.

Consideration of this factor would have also weighed against dismissal.

B. The Court improperly dismissed the case while motions were pending.

"Courts have unanimously held that dismissing a case for failure to prosecute is not proper when motions are pending." *Albert v. Hess Oil Corp*., 70 V.I. 316, 331 (Super. Ct. 2019)(citations omitted)(*cited in Kuykendall*, at 581).

Notably, there were six (6) pending motions at the time this case was dismissed. The motions included dispositive motions and a motion to consolidate. A scheduling order was never entered and there were no pending discovery requests. As such, this case was ultimately dismissed because Bart failed to respond to the motion to dismiss for failure to prosecute and not due to an actual failure to prosecute.

The lower court's dismissal of this action as a sanction for failing to respond to a motion to dismiss was particularly erroneous as the lower court was duty bound to determine whether the Appellee was actually entitled to the relief requested. *Halliday*, at n. 11 (a party's failure to respond to a dispositive motion does not authorize the Court to deem the motion conceded, rather the Court is still required to perform its own independent legal analysis.). In this instance the lower

court's dismissal of this matter was tantamount to deeming the motion to dismiss for failure to prosecute as conceded and, as such, was an abuse of discretion.

C. The Court violated Bart's due process when it granted the motion to reconsider without providing Bart an opportunity to respond.

Pursuant to Virgin Islands Rule of Civil Procedure 60(b)(4) and arguably under Virgin Islands Rule of Civil Procedure 6-4(b)(3), a judgment can be voided if a court "acted in a manner inconsistent with due process of law." *Edney v. Edney*, Case No. SX-05-DI-104, 2014 V.I. LEXIS 98, at *10 (Super. Ct. October 7, 2014)(citing *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010)); *see also, A.H. Risse Gift Shops v. Government of the Virgin Islands*, Case No. ST-00-CV-420, 2013 V.I. LEXIS 4, at *9 (Super. Ct. January 14, 2013)(citing *Espinosa*, at 130)(". . . Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.")

In *Chavayez v. Buhler*, S.Ct.Civ.No. 2007-060, 2009 V.I. Supreme LEXIS 26, at *9-10 (V.I. June 25, 2009), the Supreme Court held that the lower court erred when it ruled on the Appellee's motion to set aside entry of default and to dismiss without affording the appellee sufficient time to respond. *Id*., at *9-10. Specifically, the appellees moved to set aside an entry of default and to dismiss the complaint on June 12, 2002. Five days later on June 17, 2022, the court granted

the appellees' motion to dismiss thereby depriving the appellee of the twenty (20) day time-period to respond to the motion to dismiss. *Id*., at *2-3. The Supreme Court concluded that:

> . . . the trial court, in prematurely issuing its dismissal order, deprived Chavayez of fifteen days in which she was entitled to respond. Because the trial court's error obviously prejudiced Chavayez and likely adversely affected her substantive rights it cannot be characterized as harmless.

Id., at 9-10.

Similarly here, the lower deprived Bart of the opportunity to respond to the motion to reconsider by 7 days. In doing so, it dismissed the case through the granting of the motion to reconsider without the benefit of a response to the motion to reconsider. The alacrity by which the lower court acted on the motion to reconsider is particularly troubling as Bart had finally been able to secure counsel and, for the first time since December 2021, had a real opportunity to engage in motion practice, to include responding the motion to reconsider.

This violation of Bart's due process warrants reversal of the lower court's order of dismissal.

V. CONCLUSION

For all the reasons cited above, Appellant, Bart Enterprises, LLC requests this Court reverse the Superior Court's September 23, 2022 Order dismissing the underlying matter for failure to prosecute.

Respectfully Submitted,

THE WALKER LEGAL GROUP
Counsel for Appellant

DATED: December 5, 2022

BY: /s/ *Kye Walker, Esq.*

Kye Walker, Esq.
VI Bar No. 995
2201 Church Street, Suite 16AB
Christiansted, St. Croix
U.S. Virgin Islands 00820
Telephone: (340) 773-0601
Fax: (888) 231-0601
kye@thewalkerlegalgroup.com

CERTIFICATE OF COUNSEL

Kye Walker, Esq., counsel for Appellant/Plaintiff, hereby certifies that she is a member of the Bar of the Supreme Court of the Virgin Islands.

BY: /s/ *Kye Walker, Esq.*

CERTIFICATE OF WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the foregoing **APPELLANT'S OPENING BRIEF** complies with the word count requirements of the Virgin Islands Rule of Appellate Procedure 22(f) and contains 4,248 words that count towards the 7,800 word limit, exclusive of pages containing the cover page, Table of Contents, and Table of Authorities.

/s/ *Kye Walker, Esq.*

CERTIFICATE OF COMPLIANCE RE: E-BRIEF

I hereby certify that the e-brief and the text of the hard copy briefs are identical. I also certify that I have performed a virus scan on the e-brief using Webroot Anti-Virus 2021 Edition.

/s/ *Kye Walker, Esq.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 5, 2022, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court using the Virgin Islands Judiciary Branch C-Track E-filing System, which will send a notification of such filing (NEF) to all parties and/or their counsel of record as follows:

J. Daryl Dodson, Esq.
Moore, Dodson & Russell, P.C.
5035 Norre Gade, Suite 201
P.O. Box 310
St. Thomas, VI 00804
Telephone: (340) 777-5490
daryl@mdrvi.com
Counsel for Defendant/Appellee

/s/ *Kye Walker, Esq.*