Case No. SCT-CIV-2022-0046

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

STEPHEN EVANS-FREKE

Appellant/Petitioner,

v.

VALERIE EVANS-FREKE,

Appellee/Respondent.

On Appeal From The Superior Court
For The District of St. Thomas & St. John
Case No. ST-2016-DI-00166

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

I. Statement of Jurisdiction 1

II. Statement of the Issues Presented for Appeal 3

1. Whether The Superior Court issued a clearly erroneous finding of fact, and errant conclusion of law; and/or an improper application of law to fact in determining Respondent's monthly expenses where Respondent could not verify or offer support for her estimations, resulting in an abuse of discretion in awarding *pendent lite* support pursuant to Tile 16 § 108.

2. Whether the Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law, and/or an improper application of law to fact in determining that the fees of Respondent's counsel and putative experts, Gregory Cowhey and RSM US, LLP, were reasonable pursuant to Title 5 V.I.C. §541, resulting in an abuse of discretion.

3. Whether the Superior Court issued a clearly erroneous finding of fact, and errant conclusion of law, or an improper application of law to fact in awarding interim attorney's fees and costs to Respondent's counsel in the amount of $350,000.00, while a Motion to Exclude Respondent's putative experts remains pending before the Court, resulting in an abuse of discretion.

III. Statement of the Case 5

IV. Law and Argument 10

Conclusion 26

TABLE OF AUTHORITIES

Cases

Davis v. Varlack Ventures, Inc., 59 V.I. 229 (V.I. 2013) 4
Percival v. People, S. Ct. Crim. No. 2013-0083 (V.I Jan. 7, 2015) 4
Sephen Evans-Freke v. Valerie Evans-Freke, S. Ct. Civ. No. 2019-0046 (2021).... 4
Poe v. Poe, 7 V.I. 30, 36-37 (3d Cir. 1969), ... 11
Coman v. Coman, 11 V.I. 143, 152 (rd Cir. 1974)..... 11
Slack v. Slack, 69 V.I. 567 (2018) 12
Fabien v. Fabien, 69 V.I. 809, 815 (V.I. 2018).....12
Berrios-Rodriguez v. Berrios, 58 V.I. 477, 480 (V.I. 2013)..... 12
Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L. Ed. 2d 40, 51 U.S.L.W. 4552 (1983)..... 18
Perdue v. Kenny, 559 U.S. 542, 130 S. Ct. 1662, 176 L.Ed.2d 494 (2010)..... 19
Mahabir v. Heirs of James Wellington George, 75 V.I. 369 (2021) 19
Perdue v. Kenny,..... 19
Belofsky v. General Elec. Co., 980 F.Supp. 818 (D.V.I. 1997) 23
Daubert v. Merrell Dow Pharms., Inc.,509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) 23
Virgin Islands Antilles Sch., Inc. v. Lembach, Case No. 2015-0039 (V.I. March 14, 2016) 23

Statutes

4 V.I.C. § 76(a) 2, 3, 11, 18
16 V.I.C. § 106(a). 2
16 V.I.C. §108.....2,3,10
4 V.I.C. §33(b)(1).....2
5 V.I.C. § 541.....3, 17, 18
16 V.I.C. § 108(1).....16

Rules

V.I.R.App.P. 4(a) and 5(a)(2)..... 2

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

STEPHEN EVANS-FREKE,	)	
	)	
Appellant/Petitioner,	)	**CASE NO.:SCT-CIV-2022-0046**
	)	
vs.	)	RE: SUPERIOR COURT
	)	CASE NO.:ST-2016-DI-00166
VALERIE EVANS-FREKE,	)	
	)	
Appellee/Respondent.	)	
	)	

APPELLANT'S BRIEF

I. STATEMENT OF JURISDICTION

1. Subject Matter Jurisdiction of Superior Court

The parties presently appear before the lower court for a divorce and the equitable distribution of assets. A decree of divorce was issued on February 14, 2022. A final judgment on the equitable distribution of the marital property has been deferred for a later determination. Discovery is paused.

On June 2, 2022 the parties appeared for a two-day hearing on Appellee's Emergency Motion for *Pendente Lite* Support, Expert Forensic Accounting Fees, Costs, and Attorney's Fees. On August 22, 2022, the Superior Court issued a *Pendente Lite* Orderdirecting that Appellant pay Appellee the following amounts: $7,500.00 in monthly ongoing maintenance and a credit line of $60,000.00 per year

on Appellant's American Express credit line. The Court's Order also awarded a $350,000.00 lump sum "for legal expenses as [Appellee's] counsels determine." App. at 31.

The Superior Court of the Virgin Islands has Subject Matter Jurisdiction, over all divorce, annulment, and separation proceedings, pursuant to Title 4 V.I.C. § 76(a); 16 V.I.C. § 106(a). Pursuant to Title 16 V I C § 108, the Superior Court has the power and authority to issue a temporary award of alimony pending a final decree

2. Jurisdiction of the Supreme Court of the Virgin Islands

Appellant appeals from the August 22, 2022 interlocutory *Pendente Lite* judgment of the Superior Court, Hon. Presiding Judge Debra S. Watlington, presiding. The instant Notice of Appeal was filed on August 28, 2022.

The Supreme Court has jurisdiction over an interlocutory order pursuant to Title 4 V.I.C. §33(b)(1) and Rules 4(a) and 5(a)(2) of the Virgin Islands Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

On August 22, 2022, the Superior Court issued a *Pendente Lite* Orderdirecting that Appellant pay Appellee $7,500.00 in monthly ongoing maintenance, maintain a credit line of $60,000.00 per year on Appellant's American Express credit line for Appellee's use, and awarding a $350,000.00 lump sum "for legal expenses as [Appellee's] counsels determine."

1. Appellant presents the following issues for appeal:

    1. Whether the Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law,and/or an improper application of law to fact in determining Respondent's monthly expenses where Respondent could not verify or offer support for her estimations, resulting in an abuse of discretion in awarding *pendente lite* support pursuant Title 16 V.I.C. § 108. App. at 23-24, 28-30

    2. Whether the Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law, and/or an improper application of law to fact in determining that the fees of Respondent's counsel and putative experts, Gregory Cowhey and RSM US, LLP, were reasonable pursuant to Title 5 V.I.C. §541, resulting in an abuse of discretion. App. at 25-27, 263.

    3. Whether the Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact in awarding interim attorney's fees and costs to Respondent's counsel in the amount of $350,000.00, while a Motion to Exclude Respondent's putative experts remains pending before the Court, resulting in an abuse of discretion. App. at 25-27, 212

A contemporaneous objection is not necessary to preserve an issue for

appellate review where the specific grounds raised on appeal are presented to the trial court in a pre-trial motion and the Court gives a definitive ruling on the subject. *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229 (V.I. 2013); *see also Percival v. People*, S. Ct. Crim. No. 2013-0083 (V.I. Jan. 7, 2015). Appellant submits that, in addition to ongoing and repeated objections during the June 2022 hearing on interim support, Appellant lodged objections in writing in Appellant's April 25, 2022 Opposition to Appellee's Emergency Motion for *Pendente Lite* Support. App. at 67

2. Statement of Related Cases and Proceedings:

Appellant is not aware of any other cases or proceeding that is in any way related, completed, pending or about to be presented before the Supreme Court of the Virgin Islands, the District Court of the Virgin Islands or any other court, state or federal, except a prior ruling by this Court in *Stephen Evans-Freke v. Valerie Evans-Freke S. Ct. Civ No. 2019-0046*, dated December 30, 2021.

III. STATEMENT OF THE CASE

1. Course of Proceedings

Appellant filed the instant action for divorce on November 14, 2016. App. at 33. A decree of divorce was issued on Valentine's Day, 2022, following this Court's earlier order of December 30, 2021 mandating the lower court to enter the decree of divorce. A final judgment on the equitable distribution of the parties' marital assets has been deferred for a later date. Appellee filed an Emergency Motion for Interim Support *Pendente Lite* on March 11, 2022. App. at 40. Appellant opposed. App. at 67. The parties met for a hearing on Appellee's *Pendente Lite* Motion on June 2 and 3, 2022. The Court issued an interlocutory Order on August 22, 2022. App. at 22.

Based upon the lack of verifiable, credible, or even consistent testimony regarding the precise nature of Appellee's inchoate needs, the Superior Court abused its discretion and committed clear error in awarding an almost $160,000.00 increase in Appellee's annual maintenance alongside of $350,000.00 in attorney's fees and costs, most of it allocated to a Philadelphia-based forensic "accountant" whose entire contribution to the instant matter was the unsubstantiated hunch that Appellant's audited finances were inaccurate. To make matters even worse, the

Appellee's accountant is not a qualified CPA nor even licensed to practice in the Virgin Islands and has no requirement to be licensed anywhere!

In contrast to Appellee's putative "expert," Appellant testified on his own behalf and presented the testimony of his comptroller, a certified public accountant who painstakingly detailed Appellant's limited income and restricted cash flow. Through this evidence, Appellant established that his assets and liquidity cannot sustain the approximate $500,000 in annual support for Appellee and certainly cannot shoulder the burden of the Court's additional directives.

2. Statement of the Facts

Appellee resides in the private Gilded Age community of Tuxedo Park, New York. Tr. Vol. 1 at 40. Built in 1899, the spacious residence is over 14,000 square feet, with a 5,000 sq. ft. 'carriage house' on 26 acres of grounds. Tr. Vol. 1 at 83. It is the weekly scene of Appellee's dinner parties, occasionally numbering as many as twenty-eight guests. Tr. Vol. 1 at 111. Appellee regularly enjoys the amenities of the Tuxedo Park Club at Appellant's expense, costing $25,000.00 annually.

Appellee and Appellant have two adult children: Yorick Peter and Roland Charles. Tr. Vol. 1 at 55-56. Prior to her marriage with Appellant, Appellee worked as a model. Tr. Vol. 1 at 59. She is what is commonly known as a "kept woman."

The couple owns two parcels of real property in the United States: The aforementioned residence at Tuxedo Park, New York and an unimproved 210 acre parcel at Crow's Nest, Maine. The parties also owned two properties in Ireland: Castle Freke is a historic family plot (husband's side) including the partially restored ruin of an eighteenth century castle. Tr. Vol. 1 at 74-77 and a single family home within the old walls of nearby Rathbarry Castle. *Ibid* and at 334-335.

The Parties separated in 2008, since when Appellant has continued to support Appellee to the tune of millions of dollars without any Court Orders being needed.

Appellee receives $5,000.00 per month in voluntary interim support along with $5,000.00 in monthly access to Appellant's American Express card. Tr. Vol. 1 at 87. She receives Medicare coverage and supplemental private insurance at Appellant's expense. Tr. at Vol. 2 at 129 and Vol. 1 at 331 Additionally, Appellant pays a salaried employee—Jerzy Grzymski—to assist Appellee at Tuxedo Park, including driving her to and from nearby New York City. Appellant takes responsibility for mortgage payments, property taxes, insurance, utilities and heating oil, car insurance and maintenance, telephone, cell phone, cable and internet costs, veterinary bills, grounds maintenance, and membership fees for three social clubs. Appellee has approximately $170,000.00 of cash spanning four savings accounts

and stock holdings of an unknown value. Tr. Vol. 1 at 103, 106. From these funds, Appellee paid $25,000.00 to retain a putative "expert" to testify regarding Appellant's alleged income. Appellee also has a number of valuable contemporary works of art by celebrated artists, and a high quality collection of antique jewelry.

Appellant resides with his wife, Barbara Birt, in a five-bedroom rental residence on Cabrita Point, St. Thomas. Tr. Vol. 1 at 204. He pays roughly $12,000.00 monthly in rent and $3,000.00 monthly for electricity and water. *Ibid.*; *see also* Tr. Vol. 2 at 122. In addition to his adult sons Yorick and Roland, he is the father of a minor child. Tr. Vol. 1 at 210. The child and his mother, Veronique, reside in Paris, France. *Ibid.* The minor suffers from Asperger's Syndrome and receives special education and related services at Appellant's expense. *Ibid.* Tr. Vol. 1 at 211-213. Appellant pays approximately $147,000.00 annually for the care and maintenance of his minor son and Veronique. Tr. Vol. 2 at 102. Appellant also helps support his two adult sons (the younger one has serious diagnosed personality disorder and is unable to support himself) and his daughter-in-law. Tr. Vol. 2 at 37-39, 63.

Appellant is a managing partner in Auven Therapeutics, a Virgin Islands company founded in 2008, which develops pharmaceutical products. Tr. Vol. 1 at

221, 227-228 He receives a director's fee for his services on the board of ADC Therapeutics (ADCT:NYSE), a Swiss biotechnology company of which he was a co-founder in the amount of $48,000.00 net and monthly distributions from Auven until recently totaling roughly $70,000.00 per month, but now falling rapidly as Auven has moved into liquidation. Tr. Vol. 1 at 222. Additionally Appellant owns 3,500 shares in Auven with a purchase value of less than $70,000.00. *Ibid* at 230. He also owns interest in several businesses including approximately 12% business interest in AeroMD and a sizeable share of Water Islands Development Company. Tr. Vol. 1 at 231, 234.

Appellant's financial status is not picturesque. However, Appellant's income is always variable. Tr. Vol. 2 at 26. Beginning in 2020, COVID, inflation, production delays, market drops, and global financial slowdowns, have resulted in unprecedented hardships. Auven has lost "hundreds of millions of dollars of value" while ADC Therapeutics has seen share value drop from $46.00 per share to $6.50. Tr. Vol. 1 at 308-309; *see also* Tr. Vol. 2 at 32-33. The Castle Freke property remains uninhabitable. Tr. Vol. 1 at 242-244. It is being renovated as a "venue for celebrity weddings and other such social events" but has not turned a profit. *Ibid.*; *see also* Tr. Vol. 1 at 333. Appellant's nascent Irish gin distillery, Castle Freke

Distillery, has not begun sales yet. Tr. Vol. 1 at 238-239. Appellant pays approximately $10,000.00 per week in salary to restoration, artisans, contractors, livestock and apiary managers, a distiller, and a house manager for the maintenance and upkeep of his Irish ventures. Tr. Vol. 2 at 110. In addition to Appellee's monthly stipend, Appellant covers the Tuxedo Park mortgage and property taxes along with Appellee's insurance, hearing, utilities, telephone, taxes, club expenses, and uninsured medical costs. Tr. Vol. 1 at 331-333. Pursuant to the *unamended* support orders, Appellant spends approximately $500,000.00 each year to support Appellee—an amount equal to more than half of Appellant's gross annual income. As a result, Appellant has been forced to sell shares in an attempt to maintain the instant divorce and provide interim support to Appellee. Tr. Vol. 1 at 260-261.Without the intercession of this Court, Appellant will be financially unable to meet his obligations resulting in bankruptcy and insolvency.

IV. LAW AND ARGUMENT

1. **The Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law,and/or an improper application of law to fact in determining Appellee's monthly expenses where Appellee could not verify or offer support for her estimations.**

The U.S. Virgin Islands provides for interlocutory orders that will ensure the safety and well-being of a party during the pendency of a divorce action. Title 16 V.I. Code § 108 states in pertinent part:

> After the commencement of an action, and before a judgment therein, the court may, in its discretion, provide by order –
>
> (1) that a party in need obtain from the other party such funds as may be necessary to enable the party in need to prosecute or defend the action, as the case may be…

16 V.I. Code § 108 [emphasis added]. This right to obtain interim relief is a "unique and characteristic remedy in divorce actions, which permits a wife to obtain maintenance from her husband so that she will not be deprived of subsistence if she seeks to vindicate her rights in an action as Petitioner." *Poe v. Poe*, 7 V.I. 30, 36-37 (3d Cir. 1969).

In determining an award of temporary alimony, as with alimony in general, the Court shall examine the circumstances surrounding the parties, the wife's necessities, the husband's financial ability, the parties' respective physical conditions, the nature of their life together, and the wife's ability to earn her own way. *Poe*, 7 V.I. at 37; *see also Coman v. Coman*, 11 V.I. 143, 152 (3rd Cir. 1974). The party seeking *pendete lite* support bears the heavy burden of proving all elements of his or her claim, "including, as part of demonstrating the need for

alimony, establishing his or her necessary living expenses."*Slack v. Slack*, 69 V.I. 567 (2018); *citing Fabien v. Fabien,* 69 V.I. 809, 815 (V.I. 2018). This Court reviews an alimony determination solely for abuse of discretion, unless the Superior Court based its alimony award on a misapplication of the law or a clearly erroneous factual finding."*Ibid.*

To qualify for an interim award for alimony, it is axiomatic that the movant must establish *something* demonstrating his or her financial need. *Berrios-Rodriguez v. Berrios*, 58 V.I. 477, 480 (V.I. 2013) (noting that a plaintiff seeking an award of alimony has "the burden of proving all the elements of [t]he[ ] claim for alimony"). In the instant case, throughout her testimony, Appellant was the picture of obliviousness.

At the time of the hearing, Appellee received $10,000.00 per month in support, consisting of $5,000.00 in cash along with $5,000.00 in credit access to Appellant's American Express card. Tr. Vol. 1 at 87. She lived rent-free in a large *Belle Époque* home in the private gated community of Tuxedo Park. Appellee conceded that Appellant provided for the home's mortgage, property taxes, and utilities as well as providing for her Tuxedo Club dues and employing the services of handyman and part-time chauffer. Tr. Vol. 1 at 43-44, 115. She testified to having

approximately $176,000.00 in accessible cash resources. Tr. Vol. 1 at 103. Appellant confirmed that she had over forty-two racks of clothes but could provide no estimation of the value of her collection. Tr. Vol. 1 at 102. While Appellee testified to numerous medical treatments she received, she was unaware whether the expenses were covered by Medicare and seemingly unaware that she was still covered by Appellant's private medical insurance. Tr. Vol. 1 at 89-91.

Though Appellee provided a verified financial affidavit, her testimony deviated from her previous budget citing only vague and uncorroborated increases in expenses. For instance, Appellee testified that her in-home dinning expenses had suffered an unspecified increase over the $1,500.00 she previously claimed while her outside dinning expenses increased from $3,000.00 monthly to $3,500.00, for a total expense for nourishment rounding to $5,000.00 per month. Appellee provided no further information regarding how $60,000.00 a year in food equated to a necessary living expense. Moreover, even providing for their outrageous and unverified expenses, the $120,000.00 Appellant already provided to her more than adequately covered these costs. Additionally, Appellee valued her monthly clothing expenditures at $2,000.00 before admitting at the hearing that this amount was

culled from thin air. "I didn't know what to put there. I know that Stephan put 2,000 for his clothing. So, I just put it there." Tr. Vol. 1 at 117.

Appellee failed to establish the paramount element for interim support: Need. Appellee conceded that she was provided in excess of $270,000.00 in annual support *including* monthly remittances and the Tuxedo Park mortgage but *excluding* utilities, a groundkeeper-cum-chauffer, club membership, private insurance, and a cell phone—all expenses that Appellant readily pays. She admitted to having approximately $170,000.00 of cash on hand along with stock holdings of an unknown value and even original at works by the late-Keith Herring. Tr. Vol. 1 at 103-106; Tr. Vol. 2 at 138-139. When asked to point out to the Court the precise nature of her "need" Appellee could only request transportation assistance.

> **Q.** Okay. You said that have housing. You said you got a lot of clothes. You said you have food. You have shelter. What are we missing?
>
> **A.** Transportation, a car so that I can go from place to place.
>
> **Q.** Okay, didn't you testify that you're able to drive your car to New York as long as [Jerzy Grzymski] is in the car with you?
>
> **A.** Yes.

Tr. Vol. 2 at 151.

Moreover, Appellant provided repeated evidence that he was without the financial wherewithal to shoulder the additional—and unsubstantiated—burdens imposed upon him. The biotechnology sector has bottomed out. Auven Therapeutics has lost hundreds of millions of dollars of value. ADCT stocks purchased at $19.00 per share in 2020 are valued two-thirds less at roughly $6.00 per share. Tr. Vol. 2 at 31-33. Numerous start-ups, including the Castle Freke Farms and Castle Freke Distillery remain dead weight. Property and stock holdings are worth less than their purchase price and are stagnant on the market. As Daniela Kauffman, Auven's comptroller, explained: "[T]here's more bills than there are funds available…At the end of May, there was about $40,000.00 in his U.S. accounts left. That is not enough to make all the payments to his dependents. We are clearly behind on taxes." Tr. Vol. 2 at 65, 79. None of Appellant's other assets is easily liquidated. Tr. Vol. 2 at 51.

Appellee clearly failed to establish her requisite need for additional or "emergency" support beyond the nearly half-million dollars she receives annually in mortgage, utilities, club membership, health insurance, monthly stipends, and credit card expenses. Moreover, Appellant clearly demonstrated that he does not have the present ability to pay. Appellant provided the lower court with clear financial

statements and corroborating testimony demonstrating that his financial position has deteriorated greatly since the onset of the 2020 pandemic. Appellant has supported Appellee for approximately fourteen years with a disproportionate share of his earned income. At present more than fifty percent of Appellant's gross proceeds go to Appellee with a large portion of the remaining amounts allocated to Appellant's other dependents. Auven is presently in liquidation, further eliminating a source of income. Additionally, Appellant—who is nearing 71 years of age—is entitled to contemplate retirement, an option that is unavailable given the onerous demands of the Court's crushing *pendente lite* Order.

Based upon the lack of verifiable, credible, or even consistent testimony regarding the precise nature of Appellee's inchoate needs, along with unwavering and uncontroverted testimony of Appellant and his comptroller concerning his financial illiquidity, the Superior Court abused its discretion in failing to consider Appellant's ability to pay and Appellee's lack of demonstrable need. The lower court committed clear error in awarding a $160,000.00 increase in Appellee's annual maintenance alongside of $350,000.00 in attorney's fees and costs, most of it allocated to a Philadelphia-based forensic accountant whose entire contribution to the instant matter was the unsubstantiated hunch that Appellant's audited finances

were inaccurate. Consequently, the lower court's August 22, 2022 judgment should be vacated.

2. **The Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law, and/or an improper application of law to fact in determining that the fees of Respondent's counsel and putative experts, Gregory Cowhey and RSM US, LLP, were reasonable pursuant to Title 5 V.I.C. §541.**

Appellant's legal expert, Gregory Cowhey, is not a Certified Public Accountant. Tr. Vol. 1 at 431. He is not an attorney. *Ibid.* He is not licensed in the Virgin Islands. *Ibid* at 441. He could not confirm if his firm, RSM US, LLP was licensed in the Territory. *Ibid* at 442. Cowhey has no expertise in Irish real estate, in jewelry valuation, in luxury clothing, in modern art. Tr. Vol. 1 at 439. He admitted that he did not employ any industry-wide standards. "There are no rules or standards because there is no regulation of them." *Ibid* at 438. Indeed, based upon his testimony, Cowhey is merely a studious gentleman with an abiding love of numbers and an hourly rate $600.00. *Ibid* at 382.

At the time of his June 2022 testimony, Cowhey had received a retainer of $25,000 which he had not exhausted yet. Tr. Vol. 1 at 409. His billings for February and March 2022 totaled 4.2 hours. Tr. Vol. 1 at 413. At the time of the hearing, Cowhey had only earned $6,000.00 from the retainer. Tr. Vol. 1 at 410.

And yet, without any corroboration, Cowhey insisted that approximately $240,000.00 would be necessary to complete review and analysis of documents he did not have yet and which he could not anticipate. At a "blended rate[1]" of $300.00, Cowhey projected 800 hours of accounting, equating to twenty weeks of forty hours each.

In a typical lawsuit, each party bears its own attorney's fees unless a statute or decisional authority provides otherwise. This principle is known as the "American Rule." *See Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40, 51 U.S.L.W. 4552 (1983). One exception to this rule is found in Title 16 V.I. Code § 108(1)[2], which provides for the interim award of funds to the "party in need...as may be necessary to enable the party in need to prosecute or defend the action...." Where attorney's fees are awarded, they are generally granted in the Court's sole discretion. *See generally,* Title 5 V.I.C. § 541 (listing attorney's fees among the costs recoverable in a civil action "to the prevailing party in the judgment such sums as

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[1] A "blended rate" represents an average rate spread between Cowhey and younger, less-experienced associates who may assist in various tasks. Tr. Vol. 1 at 383.
[2] Conflated in the Court's August 22, 2022 Order as "16 V.I.C. § 541."

the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto [emphasis added]."[3]

The Court's discretion to award fees and costs is not unlimited. On the contrary, the Virgin Islands Supreme Court has held that awarding courts must rely upon the "objective criteria" set forth in *Perdue v. Kenny,* 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010) and its progeny. *Mahabir v. Heirs of James Wellington George*, 2021 VI 22 (V.I. 2021). Accordingly, the Court "should first calculate the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, calculated according to the prevailing market rates in the relevant community." *Ibid.* The Court must evaluate the attorney's experience and skill and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Ibid.* Only in "rare" or "exceptional" circumstances an upward or downward adjustment may be warranted. These include where the method used in determining the hourly rate does not adequately measure the attorney's true market value,where the attorney agrees to represent a party who cannot afford to pay the attorney and understands

[3] Let us point out that the court purported to award fees to Appellee, exparte, without allowing Appellant the benefit to review the requested fee application for reasons unknown to Appellant.

that no reimbursement is likely to be received until the successful resolution of the case. *Ibid.* Critically, "factors such as the novelty of the issue and the experience or quality of the attorney are presumptively already reflected in the attorney's hourly rate and the number of hours reasonably expended on the matter, and so should not be separately considered in order to prevent "double counting."*Ibid.*

Although the Court's award of $350,000.00 in interim attorney's fees was "for legal expenses as Respondent's counsels determine," (App. at 31) there can be no doubt that the lion's share of these proceeds have been earmarked for Appellee's non-licensed, non-CPA forensic "accountant" Gregory Cowhey. As the Superior Court noted in its Order:

> Respondent's expert forensic accountant who specializes in high net-worth divorce cases...testified that he believes that his anticipated costs for this matter would be approximately $240,000.00... Respondent's anticipated costs to hire an expert forensic analyst constitute part of her legal expenses as it legitimately falls under the category of legal fees and costs.

App at. 26-27

The Superior Court misapplied clearly established law or relied on erroneous factual findings. First, Cowhey's estimation of 800 hours is untenable, especially in light of audited reports and documentation presented by Kaufmann and the certified tax filing prepared by Joyce Bailey, a Virgin Islands licensed

CPA. The parties' divorce does not involve uncalculated or indeterminate assets; Appellant, through the auspices of Auven Therapeutics, employs a full-time CPA who is responsible for the management and accounting of his assets. He retains a tax professional and the auditing services of Ernst & Young. In contrast, Cowhey spent $6,000.00 of Appellee's $25,000.00 retainer before concluding—based entirely on the parties' early, voluntary discovery—that he would need a 40x increase in his fee just to determine what it is that he might not know.

Second, Cowhey's rate of $600.00 per hour is unjustifiable, particularly with the abundance of competent, qualified local CPA's who are licensed to practice in the Territory. The beauty of mathematics is that 2 plus 2 equals the same 4 in St. Thomas or Sao Paulo. While Cowhey has experience in the distribution of marital assets, the Court heard nothing to suggest that his experience is unique among Virgin Islanders or that locally sourced accountants could not provide comparable—even superior—services for a fraction of his exorbitant fee. This Territory is the "relevant community" under the *Perdue* factors.

A 4,000% increase in Cowhey's fee from his June 2022 earnings to turn over rocks and beat bushes in the vein hope of uncovering the gold train of

Walbrzych is unsupported by either the law or the evidence. While the Superior Court noted "the selection of an expert or any member of Respondent's legal team is outside the purview of the court," financially supporting Appellant's unreasonable selection of a putative "expert" is firmly within the Court's discretion. Accordingly, the Superior Court abused its discretion and misapplied the relevant law. Appellant respectfully request the Court's August 22, 2022 lump sum award be vacated.

3. **Whether the Superior Court issued a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact in awarding interim attorney's fees and costs to Respondent's counsel in the amount of $350,000.00, while a Motion to Exclude Respondent's putative experts remains pending before the Court, resulting in an abuse of discretion.**

On June 10, 2022, Appellant filed a Motion to Refer Gregory Cowhey and RSM US LLP to the Appropriate Authorities for the Unauthorized Practice of Law and Public Accounting without a License and Prohibit Further Involvement in this Case. App. at 136. As a basis thereof, Appellant accused Cowhey of the unauthorized practice of public accountancy in the U.S. Virgin Islands. In addition, Appellant contends that Cowhey has eschewed mediation and discounted Appellant's voluminous voluntary discovery, markedly driving up litigation costs—and his own fees—while acting in a manner that appears to border on the illegal

practice of law. Beyond mere consultation, Cowhey and RSM appeared to be actively counselling Appellee and her attorney, setting forth the objectives of the litigation, and thwarting any attempt at a resolution. At various stages of the proceedings before the lower court, Cowhey conceded that he will serve discovery requests, assist at depositions, prepare itemized discovery, and determine the adequacy of discovery responses. He has also admitted to advising Appellee to retain co-counsel, seek appointment of a special master, and when or whether to conduct mediation.

Trial courts generally must act as a "gatekeeper" and to ensure that the technique, procedure, and methodology upon which a proposed expert founds his or her opinion is based on good grounds, sound methods and proper standards. *Belofsky v. General Elec. Co.*, 980 F.Supp. 818 (D.V.I. 1997); *citing Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *see also Virgin Islands Antilles Sch., Inc. v. Lembach*, Case No.2015-0039 (V.I. March 14, 2016) (holding that "the *Daubert* standard represents the soundest rule for the Virgin Islands.") It is for this reason that proper licensure is a crucial element of any proposed expert's involvement in a contested case such as this. Cowhey's lack of professional accreditation or reliable performance standards render his work

in this matter untrustworthy. His conduct is tantamount to the unauthorized practice of accountancy without the proper license or oversight.

Cowhey admitted that he is not a CPA or an attorney. Tr. Vol. 1 at 431. He holds no licenses in the Virgin Islands. *Ibid* at 441. He utilizes no industry-wide or recognized standards[4]. *Ibid* at 438. However, by Appellee's own admissions, Cowhey's work involves the investigation and examination of Petitioner's personal and business accounts, duties closely in-step with a formal audit. Cowhey described the scope of his work as "forensic accounting," which includes "analyzing historical information" and "tracing to follow the flow of funds and assets." App. at 168-170. (Resp.'s Opp. to Mot. to Refer, p. 3). In expressing opinion regarding the reliability of Appellant's financial statements Cowhey has donned the hat of someone with

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[4] Contrast with Ms. Kauffman:

> **Q.** Okay, as a CPA, are there any professional standards that you must follow?
> **A.** Absolutely.
> **Q.** For example?
> **A.** We have very strict ethical guidelines we have to follow in preparing accounting statements. I mean, the ethics is probably the most important part.
> **Q.** And [a]re you required to have any type of license?
> **A.** Yes.
> **Q.** Can you tell us what type of license you have, if you have one?
> **A.** Yes, I have a California CPA license. It is current. I keep up with mt CPEs every year.

Tr. Vol. 2 at 135.

specialized training, implicating complex public accounting for which he is neither qualified nor licensed.

In addition, Cowhey's insertion into the very marrow of Appellee's case, suggests the unauthorized practice of law. Cowhey has admitted to serving detailed itemized discovery requests for records on all business, investment, real property, and personal property assets held by Appellant as well as his intentions to assist in the taking of depositions and determine when or if mediation is appropriate. Where, as here, a purported expert actively advises regarding the aims of litigation and independently determines when and how a legal case will resolve, that expert crosses the line into the unauthorized practice of law. This is not consultation. This is co-counselling.

Appellee's Motion has never been ruled upon. Considering both the seriousness of Cowhey's potential violations and the $240,000.00 retainer fee green-lighted by the Superior Court's August 22, 2022 Order, the lower court abused its discretion in rewarding what is likely the unconscionable conduct of an unlicensed forensic "accountant" and armchair attorney. Given that resolution of Appellant's pending motion might have mooted or otherwise altered the Court's award of

$350,000.00 in attorney's fees and costs, the Court abused its discretion in issuing the August 22, 2022 Order.

CONCLUSION

The Superior Court erred in granting a substantial increase is Appellee's monthly support along with a sizeable lump sum award to finance Appellee's counsel and putative forensic "expert." Throughout her testimony, Appellee failed to establish how any aspect of her luxury lifestyle was imperiled. She conceded that her housing, utilities, health insurance, and club memberships were all financed by Appellant, along with $60,000.00 in yearly income and another $60,000.00 in access to Appellant's revolving line or credit. Appellant, meanwhile, presented testimony and documentation demonstrating that his access to liquid assets did not equip him with the resources to meet his recurring obligations and most certainly could not sustain the additional burdens imposed by the Court.

In contrast, Appellee presented the brief testimony of an unlicensed, out-of-state "accountant," who, after a superficial inspection of Appellant's audited records, demanded approximately a quarter of a million dollars for a fishing expedition into Appellant's finances. Appellee's so-called expert testified neither to

Appellee's financial need nor Appellant's ability to pay, trafficking only in conjecture and intimation.

In addition to failing to properly consider Appellee's need or Appellant's ability to pay, the Superior Court erred in failing to identify the proper standard for determining whether Appellee's supposed expert's fees were reasonable in light of the audited reports and documentation presented by Appellee. The lower court failed to utilize the factors identified in *Perdue v. Kenny* and did not consider the Virgin Islands as the relevant community for establishing reasonable expert fees. Finally, the Superior Court erred in awarding costs and fees for Appellee's "expert" while Appellant's pending Motion to Exclude remains unresolved before the Court.

For all of these reasons the Superior Court's August 22, 2022 interlocutory *Pendente Lite* judgment should be vacated and set aside. This matter should be remanded for further proceedings consistent with this Court's judgment.

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Dated: January 30, 2023

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CERTIFICATE OF BAR MEMBERSHIP

Andrew L. Capdeville, Esq., counsel for Appellant, Stephen Evans-Freke, hereby certifies that he is a member in good standing of the Bar of the Supreme Court of the Virgin Islands, having been duly admitted to the Bar of the U.S. Virgin Islands under Superior Court Rules 301-304.

Dated: January 30, 2023

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CERTIFICATION

I hereby certify that the Appellant's Brief contains 5,423 words and does not exceed 7,800 words or 30 pages in length, exclusive of pages containing the Table of Contents, Table of Authorities, Certificate of Bar Membership and Certificate of Service.

_____

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of January 2023 I caused true and correct copy of the Appellant's Brief and the Joint Appendix to be served via the Clerk of the Court using the Virgin Islands Supreme Court E-Filing system, which will send a notification of such filing to Counsel of record via e-mail. A virus check was don on the PDF file via Microsoft Windows Defender I also certify that seven (7) hard copies of the Appellant's Brief and four (4) hard copies of the Joint Appendix shall be hand delivered to the Virgin Islands Supreme Court and two (2) hard copies of the Appellant's Brief and one (1) hard copy of the Joint Appendix shall be mailed on January 30, 2023, to Julie German Evert, Esq. and Justin K. Holcombe, Esq. at the following addresses:

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