

FILED

April 11, 2023 09:08 AM
SCT-Civ-2022-0110
VERONICA HANDY, ESQUIRE
CLERK OF THE COURT

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SCT-CIV-2022-0110

**GOVERNMENT OF THE VIRGIN ISLANDS,
Appellant**

v.

**ELVIS GEORGE,
Appellee/Plaintiff**

**MARK LONSKI and PROPERTY KING, INC.
Appellees/Defendants**

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
CIVIL NO. ST-2021-CV-00079

**BRIEF OF APPELLEES
MARK LONSKI and PROPERTY KING, INC.**

By: */s/ James L. Hymes, III*

JAMES L. HYMES, III

[VI Bar No. 264]

LAW OFFICES OF

JAMES L. HYMES, III, P.C.

P.O. Box 990

St. Thomas, VI 00804-0990

Telephone: (340) 776-3470

E-Mail: jim@hymeslawvi.com;

rauna@hymeslawvi.com

Attorney for Appellees/Defendants

Mark Lonski and

Property King, Inc.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Subject Matter and Appellate Jurisdiction	1
Statement of Issues Presented	1
Standard of Review	1
Statement of Related Proceedings	2
Statement of the Case	2
Supplemental Statement of Facts	3
Argument	6
I. The Superior Court Did Not Err When It Denied The Government's Motion To Intervene	6
II. The Superior Court Did Not Err When It Ordered The Government To Execute A General Release.....	7
III. The Superior Court Did Not Violate The Separation Of Powers Principle Inherent In The Revised Organic Act	8
IV. The Superior Court did Not Disregard The Language Of 24 V.I.C. § 263 In Distributing The Interpleader Fund.....	8
Conclusion.....	10
Certifications	11
Certificate of Service.....	12

TABLE OF AUTHORITIES

Cases

<i>3RC & Co. v. Boynes Trucking Sys.</i> , 63 V.I. 544, 554 (2015)	10
<i>Anthony v. Indep. Ins. Advisors, Inc.</i> , 56 V.I. 516, 524 (V.I. 2012).....	1, 6
<i>In re Q.G.</i> , 60 V.I. 654, 660 (2014).....	1
<i>Jennings v. Richards</i> , 31 V.I. 188 (V.I. 1995).....	2
<i>Miller v. Sorenson</i> , 67 V.I. 861, 868 n.5 (2017)	1
<i>Rivera v. People of the V.I.</i> , 2023 V.I. Supreme LEXIS 1, at *52 (Jan. 23, 2023) (citation omitted)	1
<i>United States v. Alcan Aluminum, Inc.</i> , 25 F.3d 1174, 1179 (3d Cir. 1994).....	1
<i>Cacciamani & Rover Corp. v. Banco Popular</i> , 61 V.I. 247, 252 n.3 (V.I. 2014).....	10

Statutes

4 V.I.C., §76(a)	1
4 V.I.C. § 33(a)	1
24 V.I.C. § 263.....	1, 6, 8
Revised Organic Act	1, 8
Statute of Limitations	8
V.I.R. APP. P. 5(a).....	1
V.I. R. APP. P. 5(a)(1).....	1
Virgin Islands Code.....	4, 5
V.I.R. App. P.22(f).....	11

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellees Mark Lonski and Property King, Inc., agree with the Statement of Subject Matter and Appellate Jurisdiction submitted by the Government of the Virgin Islands. 4 V.I.C., §76(a); 4 V.I.C. § 33(a); V.I.R. APP. P. 5(a); V.I. R. APP. P. 5(a)(1); *Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 524 (V.I. 2012) (*quoting United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1179 (3d Cir. 1994)).

STATEMENT OF ISSUES PRESENTED

Appellees Mark Lonski and Property King, Inc., agree with the Statement of Issues presented by the Appellant Government of the Virgin Islands. Revised Organic Act; 24 V.I.C. § 263.

STANDARD OF REVIEW

Appellees Mark Lonski and Property King, Inc., agree with the Standard of Review as presented by the Appellant Government of the Virgin Islands. *In re Q.G.*, 60 V.I. 654, 660 (2014) (citation omitted), *Miller v. Sorenson*, 67 V.I. 861, 868 n.5 (2017) (citation omitted), *Rivera v. People of the V.I.*, 2023 V.I. Supreme LEXIS 1, at *52 (Jan. 23, 2023) (citation omitted).

STATEMENT OF RELATED PROCEEDINGS

Appellees Mark Lonski and Property King, Inc., agree that there are no cases or proceedings related to this appeal.

STATEMENT OF THE CASE

Appellant Government of the Virgin Islands contended in the Superior Court that it is entitled as a matter of statutory law to all of the settlement proceeds, and that it does not have the ability to compromise its lien to accept a lesser sum other than the total amount expended by it in Worker's Compensation benefits. Appellees Mark Lonski and Property King, Inc., respectfully submit that the Appellant has conceded in its brief that the position taken by the Department of Labor below was erroneous. See page 21 of the Brief of the Appellant which states:

“Under section 263, only the Division can choose when or if it will compromise its statutory right to repayment (“The Administrator may compromise as to his rights against a third party responsible for the damages.”)... See also Jennings, 31 V.I. at 191 n.1 (“Whether the Commissioner of Labor chooses to follow a principle of proportional recovery or some other level of compromise is, at present, left to his or her discretion.”)

The Appellant elected not to become involved in the pending case in the Superior Court, declined an invitation to participate in a Court-ordered mediation, and refused to accept a compromised settlement of its lien which it had authority to do. In the face of the foregoing, the Court fashioned an equitable result from which the Appellant has now appealed.

SUPPLEMENTAL STATEMENT OF FACTS

To parody the ABC wild world of sports, this appeal involves the thrill of settlement and the irony of defeat. The Appellant, Division of Worker's Compensation of the Department of Labor of the Government of the Virgin Islands is appealing the denial of its Motion to Intervene in this case. Ironically, it was invited to appear in the case because the parties knew there was a large Worker's Compensation lien and the administrator of the Department of Labor was not made a party plaintiff to enable him to subrogate his rights to those of the injured plaintiff worker.

Appellees Mark Lonski and Property King agree with the Supplemental Statement of Facts submitted in the Appellee Brief of Elvis George, and further submit its own Supplemental Statement of Facts as follows.

As is customary in pending civil cases, a Scheduling Order was submitted to the Court and approved to govern the development of the

case through discovery, mediation, and trial. A first mediation was scheduled, but abandoned because the Department of Labor was not involved. Thereafter, the Department of Labor was specifically advised of the pendency of the case and that it had been referred to mediation by the Court. A new second mediation date was established on a date and at a time approved by the Division of Worker's Compensation (JA0068). The mediator in charge of the second mediation invited the Department of Labor to participate via Zoom as the other parties were doing. The Department of Labor chose not to participate claiming that it never participates in mediations since the law requires payment to it of a hundred percent (100%) of its lien, and the same law does not authorize it to negotiate in a lesser amount.

At the mediation, the parties agreed to settle the case with a payment to the plaintiff of Seventeen Thousand Dollars (\$17,000.00) (JA0076). The settlement sum was made up of Ten Thousand Dollars (\$10,000.00) from the defendants' automobile policy, it's policy limits, and a Seven Thousand Dollars (\$7,000.00) private contribution. The confidentiality rules of the mediation provisions of the Virgin Islands Code do not permit disclosure of what transpired at mediation. Suffice it to say the issues of liability and damages were hotly contested. There never was the probability of raising

enough funds to cover a Sixty Thousand Dollar (\$60,000.00) Worker's Compensation lien, but there was always the probability that the plaintiff might not recover anything if the case did not settle and went to trial.

The plaintiff magnanimously offered to release all sums of the settlement in excess of the reimbursement to his lawyer of her legal costs and expenses to the Department of Labor. That sum exceeded Ten Thousand Dollars (\$10,000.00). The Department of Labor rejected that offer and thereafter moved to intervene in the case to claim its entitlement to the entire settlement proceeds. The section of the Virgin Islands Code on which the Department of Labor relied to intervene gave it two (2) years from the date of injury within which to subrogate its rights to the injured worker if there was a claim against an alleged third-party tortfeasor. (JA0019) The Department of Labor failed to move to intervene in this case until after the expiration of the two-year period of time from the date of injury. (JA0089-JA0093) Hence, the creation of the irony of defeat which is evident from the fact that the Department of Labor failed to accept an offer to join the litigation voluntarily, chose to reject the offer to remit more than Ten Thousand Dollars (\$10,000.00) of the settlement proceeds, and may now find itself completely out of Court since its efforts to intervene in the case are time-barred.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR WHEN IT DENIED THE GOVERNMENT'S MOTION TO INTERVENE

The denial of the motion by the Government to intervene was mandated by the plain language of Title 24 V.I.C. § 263. That section states that the administrator shall subrogate himself to the rights of the workmen, or employee, or of his beneficiaries, and may institute proceedings against such third persons in the name of the injured workmen, or employee, or of his beneficiaries within two (2) years following the date of injury. (JA00019) The Government's motion to intervene was filed more than two (2) years from the date of the injuries sustained by Appellee George. *Anthony*, 56 V.I. at 527. Therefore, the Court was well within its right to deny the motion based on the clear and unambiguous language of the Virgin Islands.

The Department of Labor had to know the exact date of the injury to Mr. George since he applied for the payment to him of Worker's Compensation benefits by the Department of Labor. In addition, the Department of Labor was contacted on February 22, 2022, by the attorney for Appellee regarding the lien of the Department of Labor, and to determine the amount of payments made to George. Therefore, the

Department of Labor was on notice there was a civil case pending involving Elvis George. The Department of Labor did nothing to inquire about that case, or its status, which would have allowed it to intervene early in 2022. As it turns out, the Motion to Intervene was filed in August, 2022, more than two (2) years after the date of the injury to Mr. George. Therefore, a failure by the Appellant to protect its rights of subrogation fall squarely on the Department of Labor, and no one else.

II. THE SUPERIOR COURT DID NOT ERR WHEN IT ORDERED THE GOVERNMENT TO EXECUTE A GENERAL RELEASE.

The attorney for the Appellee, Elvis George, offered to tender to the Department of Labor all sums relating to the settlement of the case in excess of the cost and expenses, including attorney fees incurred by her in achieving the settlement. Accordingly, since the Government of the Virgin Islands was going to receive a payment, it would be customary and expected for it to execute a release confirming the receipt of these funds. Anyone who is paid money is expected to execute a release, and therefore the Superior Court did not commit error by requiring the Department of Labor to do so if it was going to receive more than Ten Thousand Dollars (\$10,000.00) of the settlement proceeds.

III. THE SUPERIOR COURT DID NOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE INHERENT IN THE REVISED ORGANIC ACT.

The Order of the Superior Court merely applies the law of the Virgin Islands to the Government and its Department of Labor. The Government and its Department of Labor are not above the law, and are subject to its provisions when and where applicable. As indicated above, the Court found that the motion by the Department of Labor to intervene in the case was barred by the applicable Statute of Limitations (JA256:259). This is a simple application of the law as dictated by the law and the facts of the case. In addition, since the Government and its Department of Labor were expected to receive a payment in excess of Ten Thousand Dollars (\$10,000.00) in settlement proceeds, a provision requiring the execution of a release is customary and expected not only with respect to litigation, but to common sense and the requirements of commercial law.

IV. THE SUPERIOR COURT DID NOT DISREGARD THE LANGUAGE OF 24 V.I.C. § 263 IN DISTRIBUTING THE INTERPLEADER FUND.

The plain and unambiguous language of § 263 gives the administrator the right and ability to compromise his rights against a third party responsible for the damages. That section goes on to state “*whether the Commissioner of Labor chooses to follow a principal of proportional*

recovery or some other level of compromise is, at present, left to his or her discretion.”

The record below also contains affidavits by Attorney Rohn and Attorney Holt to the effect that they have compromised settlements with the Department of Labor for many years. This was confirmed by the testimony of the Director of Worker's Compensation, Raina Thomas, that she has received tenders of settlement less attorney's fees, and that this was a common practice in her office. (JA239:20-JA240:17). Therefore, a finding by the Superior Court below that the Department of Labor has the right and ability to compromise Worker's Compensation liens is not erroneous. Here the lien had to be compromised since there never were sufficient assets to reimburse the Government for the more than Sixty Thousand Dollars (\$60,000.00) it paid to Mr. George for medical expenses and lost wages. Accordingly, since it had the ability to compromise a lien and was offered a sum of money representing a compromised settlement, ordering and acceptance of it is not erroneous.

The Order of the Superior Court from which the Appellant appeals granted relief because the Appellant elected not to become involved in the litigation prior to and as a part of mediation, and refused to agree to a compromised settlement when it had the authority to do so. Therefore, the

Court had to effect some kind of equitable relief. *“It is axiomatic that equitable relief is only available where there is no adequate remedy at law.”* 3RC & Co. v. Boynes Trucking Sys., 63 V.I. 544, 554 (2015) (quoting Cacciamani & Rover Corp. v. Banco Popular, 61 V.I. 247, 252 n.3 (V.I. 2014)).

More importantly, this record supports a finding that the Appellant may have forfeited its rights to any interest in the settlement proceeds since it failed to take the necessary and required statutory steps to intervene and subrogate itself to the rights of Mr. George within two (2) years of the date of his injury. In this instance, the order of the Superior Court below could be found to be harmless error.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be affirmed in its entirety and the Government’s appeal should be denied.

Respectfully Submitted,

DATED: April 11, 2023.

**LAW OFFICES OF
JAMES L. HYMES, III, P.C.
*Attorney for Defendants/Appellees
Mark Lonski and
Propertyking, Inc.***

By: /s/ James L. Hymes, III
JAMES L. HYMES, III [VI Bar No. 264]
P. O. Box 990
St. Thomas, VI 00804-0990
Telephone: (340) 776-3470
E-Mail: jim@hymeslawvi.com;
rauna@hymeslawvi.com

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the supreme Court of the Virgin Islands under Virgin Islands Bar No. 264.

CERTIFICATION OF COMPLIANCE WITH LENGTH LIMITATIONS

I hereby certify that the foregoing brief complies with the limitations on the number of words as provided in the V.I.R. App. P.22(f) in that the brief, exclusive of pages containing the table of contents and the table of authorities, contains 2,072 words.

CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of April, 2023, as an approved C-Track filer on behalf of James L. Hymes, III, I have caused an exact copy of the foregoing ***“Brief of Appellees/Defendants Mark Lonski and Property King, Inc.”*** to be electronically served via VISCEFS upon the following counsel of record:

JULIE GERMAN EVERT, ESQ.
LAW OFFICES OF JULIE GERMAN EVERT
5034 NORRE GADE STE. 6
ST. THOMAS, VI 00802
lawofficesofjulieevert@gmail.com
julieevert555@gmail.com
Attorney for Elvis George

ARIEL SMITH, ESQ.
Acting Attorney General

PAMELA R. TEPPER, ESQ.
Solicitor General

TRACY MYERS, ESQ.
Assistant Attorney General
DEPARTMENT OF JUSTICE
34-38 Kronprindens Gade
GERS Building, 2nd Floor
St. Thomas, USVI 00802
Tracy.Myers@doj.vi.gov

/s/ Rauna Stevenson-Otto