IN THE SUPREME COURT
OF THE VIRGIN ISLANDS
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In The
Supreme Court of the Virgin Islands

APPEAL NO. 2021-0044

JOHN KLEIN,

***Appellant*,**

v.

MADELINE A. BASSIL,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS SUPERIOR COURT CIV. NO. ST-2021-CV-00148

BRIEF OF APPELLANT

Patrick D. Blake (VI Bar No. 975)
Jason E. Ohana (admitted Pro Hac Vice)
WILLCOX & SAVAGE, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
(757) 628-5500 (Telephone)
(757) 628-5566 (Facsimile)
pblake@wilsav.com
johana@wilsav.com

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. STATEMENTS 1

A. Jurisdictional Statement 1

1. Subject Matter Jurisdiction 1

2. Appellate Jurisdiction 1

B. Statement of the Issues Presented for Review 2

C. Statement of the Standard of Review 2

D. Statement of Related Cases and Proceedings 3

E. Statement of the Case and Facts Necessary to Understand the Issues 3

II. ARGUMENT 4

A. Summary of Argument 4

B. The Superior Court erred in awarding Bassil a preliminary injunction 6

1. A preliminary injunction is an extraordinary and drastic remedy 6

2. The court erred in finding irreparable harm to Bassil 7

a. Mere presence on Bassil's property does not constitute irreparable harm 8

b. Damage to Bassil's property cannot constitute irreparable harm 17

c. Inability to Sell does not constitute irreparable harm 17

i. If a potential sale is lost, the resulting damages are readily calculable 17

ii. A preliminary injunction will not remedy an inability to sell 18

d. Slip and fall risks do not constitute irreparable harm 19

i. Potential future harm to unknown third parties is too remote and speculative to constitute irreparable harm 19

ii. Potential future liability to third parties is transferable and insurable 21

e. Bassil presented no evidence as to emotional distress 21

f. Conclusion 21

3. The court erred in its application of the other *Petrus* factors 22

a. Likelihood of success on the merits 22

b. Irreparable harm to Klein 23

c. Public interest 25

d. Conclusion 27

III. CONCLUSION AND PRAY FOR RELIEF 27

CERTIFICATE OF BAR MEMBERSHIP..28

WORD COUNT CERTIFICATION 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Page(s)

CASES

3RC & Co. v. Boynes Trucking Sys., Inc.,
63 V.I. 544 (2015) .... passim

Caribbean Healthways, Inc. v. James,
55 V.I. 691 (V.I. 2011) 2

County of Suffolk v. Givens,
106 A.D.3d 943 (N.Y. App. Div. 2013) 20

Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.,
68 V.I. 584 (2018) 10, 21

In re Najawicz,
52 V.I. 311 (V.I. 2009) 2

Mack v. Davis,
2013 Guam 13 12

Myers v. Derr,
50 V.I. 282 (2008) 10

Norton v. Dubrey,
116 A.D.3d 1215 (N.Y. App. Div. 2014) 20

Opticians Ass'n of Am. v. Indep. Opticians of Am.,
920 F.2d 187 (3d Cir. 1990) 12, 24

Petrus v. Queen Charlotte Hotel Corp.,
56 V.I. 548 (V.I. 2012) 2, 7, 22, 27

Sam's Food Distribs., Inc. v. NNA & O, LLC,
73 V.I. 453 (2020) 2, 15, 16

SBRMCOA, LLC v. Morehouse Real Est. Invs., LLC,
62 V.I. 168 (Super. Ct. 2015) ....passim

Schneider v. Fried,
320 F.3d 396 (3d Cir. 2003) 2

Stevens v. People,
55 V.I. 550 (V.I. 2011) 2

Wisdom Imp Sales Co. v. Labatt Brewing Co.,
339 F.3d 101 (2d Cir. 2003) 11-12

Yusuf v. Hamed,
59 V.I. 841 (2017) ....passim

STATUTE

VI ST tit. 4, § 33 1

RULE

VI R. Civ. P. 65 ....4, 6

OTHER AUTHORITY

2 J. McCarthy, Trademarks and Unfair Competition § 30:18 (2d ed. 1984) 13, 24

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JOHN KLEIN,	S. Ct. Civ. No. SCT-Civ-2021-0044
Appellant/Defendant,	Re: Super. Ct. Civ. No. ST-2021-CV-00148
v.	
MADELINE A. BASSIL,	
Appellee/Plaintiff.	

APPELLANT'S OPENING BRIEF

I. STATEMENTS

A. Jurisdictional Statement

1. Subject Matter Jurisdiction

The Superior Court has subject-matter jurisdiction over this civil action because it is a court of general jurisdiction without regard to the amount in controversy.

2. Appellate Jurisdiction

This Court has appellate jurisdiction to review "Interlocutory orders of the Superior Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." VI ST tit. 4, § 33.

B. Statement of the Issues Presented for Review

1. Whether the Superior Court erred in its application of the *Petrus* preliminary injunction factors and in awarding the appellee a preliminary injunction.

2. Whether the Superior Court erred in finding that the following, alone or in combination, constitute irreparable harm: (a) the discomfort or annoyance of having others trespass on one's property; (b) physical damage to one's property; (c) the appellee's lack of clear title to her parcel when the injunctive relief will not affect title; and (d) the potential for future premises liability to unknown third-parties.

C. Statement of the Standard of Review

This Court recently set out the standard of review for a decision to grant or deny an injunction as follows:

> We review the Superior Court's decision to grant or deny an injunction for abuse of discretion. Petrus v. Queen Charlotte Hotel Corp., 56 V.I. 548, 554 (V.I. 2012); see also Caribbean Healthways, Inc. v. James, 55 V.I. 691, 698 (V.I. 2011) ("The decision to grant or deny a permanent injunction is reviewed for abuse of discretion.") (quoting In re Najawicz, 52 V.I. 311, 328 (V.I. 2009)). "An abuse of discretion 'arises only when the decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" Stevens v. People, 55 V.I. 550, 556 (V.I. 2011) (citing Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003)). Furthermore, we review the Superior Court's factual findings of each injunction factor for clear error, and we exercise plenary review of its conclusions of law. Yusuf v. Hamed, 59 V.I. 841, 848 (V.I. 2013) (explaining that "we review the Superior Court's factual findings regarding likelihood of irreparable harm, harm to the nonmoving party, and whether the injunction is in the public interest only for clear error.").

Sam's Food Distribs., Inc. v. NNA & O, LLC, 73 V.I. 453, ¶ 8 (2020).

D. Statement of Related Cases and Proceedings

The appellee filed a Notice of a Related Case below, identifying case number ST-2020-CV420, John Klein v. Secret Harbor Beach Associates, LP, et al., The appellee is not a party to that action, and the action is not related. Appellee contended below that the action was related because, according to appellee, it "shows that until August 28, 2020, Klein regularly accessed Secret Harbor Beach via this path and stairway, and NOT via trails across Parcel No. 2D-12 Remainder." This assertion was incorrect; the uncontroverted evidence adduced at the preliminary injunction hearing (the "Hearing") established that, at all relevant times, Klein, his family, and guests, regularly accessed the Secret Harbor beach using both paths (the one at issue here and the one at issue in case number ST-2020-CV420). JA 173-74, 179-81.

E. Statement of the Case and Facts Necessary to Understand the Issues

The Superior Court recited the factual and procedural background in Paragraphs 2 through 6 of the August 16, 2021 Memorandum Opinion and Order from which Klein seeks this appeal. JA 604-06. In a nutshell, this action involves competing claims to walking trails (the "Trails") across a property referred to as Parcel No. 2D-12 Remainder ("Parcel 2D-12"). The appellant is John Klein. Klein owns the adjacent Parcel No. 2D-11 ("Parcel 2D-11") and uses the Trails on Parcel 2D-12 to access the Secret Harbor Beach. The appellee is Madeline Bassil.

Bassil is the fee simple owner of Parcel 2D-12. She contends that Klein's use of the Trails constitutes a trespass and sued Klein below. Klein filed a counterclaim contending that he has acquired rights in Parcel 2D-12, including but not limited to use of the Trails, via adverse possession and/or prescriptive easement. Bassil sought, and after an evidentiary hearing was granted, a preliminary injunction enjoining Klein from using the Trails during the pendency of the action.[1] Klein appeals the Superior Court's preliminary injunction award.

II. ARGUMENT

A. Summary of Argument

The Superior Court erred in awarding Bassil a preliminary injunction. A preliminary injunction can only issue if the movant establishes that she will suffer irreparable harm without one. Here, Bassil would not suffer irreparable harm without a preliminary injunction. This is not a case where one of the parties is facing imminent bodily injury, as in a domestic violence situation. This is not a case where a party's livelihood is at stake, such as the revocation of a medical or law license. There is no wrecking ball set to destroy a sacred monument. This is a garden variety property dispute over whether Klein has the right to traverse

[1] Notably, the Superior Court "did not consolidate the preliminary injunction hearing with a trial on the merits as is allowed at the Court's discretion per Rule 65 of the Virgin Islands Rules of Civil Procedure. The merits of Bassil's trespass claim and Klein's adverse possession claim have not been adjudicated at this time." JA 610.

Bassil's undeveloped Parcel 2D-12. At the conclusion of this litigation, Parcel 2D-12 will still be sitting exactly where it is. If the parcel or Bassil suffer any damage in the meantime, Bassil can be compensated for such injury at the conclusion of this litigation. In short, a preliminary injunction was not necessary (or available) because there was no evidence of irreparable harm.

Notwithstanding the lack of any threatened irreversible change or damage to Parcel 2D-12, the Superior Court nevertheless held that "Bassil demonstrated that she will suffer irreparable harm if an injunction is not granted." JA 612. The Superior Court based its finding of irreparable harm on the following four grounds: (1) the mere existence of an alleged trespass by Klein and his guests; (2) damage to Bassil's property; (3) potential premises liability Bassil could face if one of Klein's guests is injured on her property; and (4) the cloud this dispute has put on Bassil's title to Parcel 2D-12. None of these constitutes irreparable harm. Each of these items of "damage" can be remedied with a monetary award and is thus, by definition, not irreparable. In addition, potential future premises liability is far too remote and speculative to constitute irreparable harm. Finally, with respect to the cloud on Bassil's title to Parcel 2D-12, that will not be lifted until the underlying claims are fully adjudicated. The preliminary injunction does nothing to address that "harm."

In sum, the Superior Court erred in finding that, absent the preliminary injunction, Bassil would suffer irreparable harm. Without irreparable harm, a preliminary injunction cannot issue. 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 554 (2015). For this reason, and for the other reasons set out below, this Court should reverse.

B. The Superior Court erred in awarding Bassil a preliminary injunction

1. A preliminary injunction is an extraordinary and drastic remedy

The legal standard for the issuance of a preliminary injunction was ably set out by the Superior Court as follows:

> A preliminary injunction is considered an "extraordinary and drastic remedy" that is "never awarded as of right, but only "upon a clear showing that the plaintiff is entitled to such relief."" The issuance of a preliminary injunction is governed by Rule 65 of the Virgin Islands Rules of Civil Procedure. Before or after beginning a hearing on a motion for a preliminary injunction, this rule allows for the Court to advance the trial on the merits and consolidate it with the hearing. In considering whether to grant or deny a preliminary injunction, Virgin Islands Courts must consider four factors, known as the Petrus factors:
>
> (1) whether the movant has shown a reasonable probability of success on the merits;
>
> (2) whether the movant will be irreparably harmed by the denial of the relief;
>
> (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and
>
> (4) whether granting preliminary relief will be in the public interest. The Supreme Court of the Virgin Islands has established that the soundest rule for applying this four-factor standard is to use a "sliding

> scale test" that balances the four factors. Courts are to consider evidence demonstrated by the parties regarding all four factors, but a party moving for a preliminary injunction "must demonstrate primarily that irreparable harm is likely without the injunction." Irreparable injury on its own, however, is not enough to support a claim for equitable relief and there must also be a plausible claim on the merits.

JA 606 (internal citations omitted). In short, to carry her burden in establishing her right to the "extraordinary and drastic remedy" of a preliminary injunction, Bassil was required to make a "clear showing" that she was likely to prevail on the merits, that she would suffer irreparable harm, and that the injunction would not do more harm to Klein or to the public. Bassil did not make such a showing.

2. The court erred in finding irreparable harm to Bassil

The most important of the four *Petrus* factors is irreparable harm. Indeed, as the Superior Court correctly held, irreparable harm is a necessary (but not sufficient) element of a claim for preliminary injunction. JA 606 ("[A] party moving for a preliminary injunction 'must demonstrate primarily that irreparable harm is likely without the injunction.'"). The Superior Court was quoting this Court's decision in 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 554 (2015), where this Court held that "[A] party seeking injunctive relief must demonstrate that the injunction is necessary to avoid certain and imminent harm for which a monetary award does not adequately compensate." In short, unless the

movant can demonstrate that irreparable harm would result from not being awarded the injunction, no injunction may issue.

The Superior Court based its finding of irreparable harm on the following four grounds: (1) the mere existence of an alleged trespass by Klein and his guests; (2) damage to Bassil's property; (3) potential premises liability Bassil could face if one of Klein's guests is injured on her property; and (4) the cloud this dispute has put on Bassil's title to Parcel 2D-12. None of these constitutes irreparable harm.

a. Mere presence on Bassil's property does not constitute irreparable harm

The Superior Court correctly acknowledged that "the Supreme Court of the Virgin Islands does not recognize a rule that presumes irreparable injury when a party is denied its use of a property right." JA 608 (citing SBRMCOA, LLC v. Morehouse Real Est. Invs., LLC, 62 V.I. 168, 201 (Super. Ct. 2015). After setting out this correct statement of the law, the Superior Court proceeded to err by applying the precise presumption it stated does not exist. Specifically, the Superior Court found that the mere presence of Klein and his guests on the Trails, in and of itself, constituted irreparable harm to Bassil. JA 613 ("Under general principles of law and equity, every piece of real property is unique, and property ownership provides intangible benefits that cannot easily be remedied with monetary damages. . . . Klein's interference with Bassil's property infringes on these intangible benefits that belong to Bassil.").

It is not clear at all, let alone certain, whether Bassil has suffered or will suffer *any* harm, let alone *irreparable* harm. If Klein ultimately prevails on his adverse possession claim, Bassil's trespass and related claims will necessarily fail, and she will ultimately have suffered no harm from what she thought was a continuing trespass. If on the other hand Bassil prevails, she will obtain title and the right to exclude Klein from Parcel 2D-12 going forward. Any damage to the parcel, as well as any discomfort or annoyance with the prior trespass, could then be remedied by money damages and would therefore, by definition, not constitute irreparable harm. The Superior Court acknowledged as much, stating, "trespass is a harm that can be remedied by a monetary award." JA 612.

To be sure, in the same breath, the Superior Court stressed that these damages would be difficult to calculate. Id. ("calculating the exact harm in money damages would be difficult to ascertain.") and ("Calculating a damages award from each of these trespassing guests would be quite difficult, as it is unclear how many guests may have used or continue to use this path."). To the extent the Superior Court is suggesting that these alleged difficulties render the harm to Bassil "irreparable," its analysis is faulty. The number of guests that have used or will use the Trails is wholly irrelevant to the quantum of damages. The only question is how much damage, if any, has resulted. With respect to any physical

damage to the property, this would plainly be susceptible to simple calculation.[2] With respect to Bassil's personal discomfort or annoyance at the existence of the trespass, this is likewise susceptible to compensation with a monetary award.[3] Myers v. Derr, 50 V.I. 282, 295 (2008) (holding that money damages may be awarded for "discomfort or annoyance" resulting from a trespass). Harm that "can be remedied through money damages," by definition, "cannot constitute 'irreparable injury.'" 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 562 (2015).

That the quantum of "discomfort or annoyance" damages is not as simple to prove as presenting a repair invoice does not render such harm irreparable. E.g., Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P., 68 V.I. 584, 599 (2018) ("A moving party cannot support the argument that its loss is unrecoverable by a monetary award by simply not attempting to calculate damages. . . . Neither the difficulty of calculating losses . . . nor speculation that such losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial.") (internal citation omitted). Indeed if "discomfort or

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[2] Proving such damages would be a straightforward matter of producing a repair invoice. The cost of repairing any damage would be the same regardless of whether the damage was caused by one guest, ten, or one hundred.

[3] Once again, what is relevant is Bassil's discomfort and annoyance – not ascertaining the precise number of guests that used the Trails.

annoyance" damages were simply so difficult to calculate as to render such harm "irreparable," the result would be "a rule that presumes irreparable injury when a party is denied its use of a property right." As the Superior Court correctly held, no such rule is recognized in the Virgin Islands. JA 608 (citing SBRMCOA, LLC v. Morehouse Real Est. Invs., LLC, 62 V.I. 168, 201 (Super. Ct. 2015).

It is therefore no surprise that courts in this jurisdiction have consistently eschewed "a rule that presumes irreparable injury" and instead required detailed factual findings regarding: (a) the harm that would result absent an injunction, and (b) the extent to which such harm would be irreparable. For example, in Yusuf v. Hamed, this Court recognized that inability to exert control over one's business *may* constitute an irreparable harm. 59 V.I. 841, 854-55 (2017). The Court's analysis was very specific to control of a business[4], as the Court's ruling focused on its recognition that "a party's right to control a business 'has intrinsic value' that cannot be compensated by money damages." Id. at 854 (quoting Wisdom Imp

[4] There can be no dispute that Parcel 2D-12 is nothing like a business. There is no actual operation, business license, or staff. A business requires daily, if not hourly, work and oversight to flourish and sustain. An undeveloped parcel of land is stagnant, its value fluctuating with the market. Control over a business is tantamount to its survival. The wrong move kills businesses. Control over an undeveloped parcel of land is essentially irrelevant to its appreciation, and Bassil did not provide any testimony suggesting otherwise. Moreover, in this case, there is no risk to the value of Parcel 2D-12 by the continued use of the Trails. The land remains. In fact, the maintenance and use of the paths over the years has improved the property.

Sales Co. v. Labatt Brewing Co., 339 F.3d 101, 114 (2d Cir. 2003); citing Mack v. Davis, 2013 Guam 13 ¶ 23)). Importantly, the Court also observed that there was specific evidence of very extreme harms that were resulting from Hamed's inability to exert control over the business: "the Superior Court did not clearly err in finding that Hamed was likely to suffer irreparable harm absent an injunction in light of the evidence that Yusuf attempted to unilaterally fire employees, including Hamed's sons Mufeed and Waleed, repeatedly threatened to close down the stores, increased the rent for Plaza East in an attempt to evict the store from its location in United's shopping center, and removed $2.7 million from a Plaza Extra operating account over Hamed's objections, violating the two-signature requirement." Id. at 855.

Under those extraordinary facts, the irreparable harm that Hamed was facing in the absence of injunctive relief was clear, as Yusuf's unilateral actions were destroying important components of the grocery store business in a way that went beyond mere mathematical computation of the lost profits that resulted, but instead involved very fundamental damage to the business' goodwill, reputation, and ability to function as a going concern in the future. These types of injuries, once incurred, cannot feasibly be "undone" at the conclusion of trial. See Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 195 (3d Cir. 1990) ("Grounds for finding irreparable harm include loss of control of reputation, loss of

trade, and loss of good will.") (citing 2 J. McCarthy, Trademarks and Unfair Competition § 30:18 (2d ed. 1984)). Thus, the Yusuf decision was little more than a reaffirmation of the traditional, guiding principle of injunctive relief, that it is only warranted in instances where an award of monetary damages would be inadequate to fully compensate a party. In fact, since Yusuf was decided, the Supreme Court of the Virgin Islands has rejected a request for injunctive relief in a dispute between business partners because there was no evidence of irreparable injury. See 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 559-60 (2015) (party to joint venture agreement had no claim for injunctive relief against fellow party to joint venture agreement because its claim was "a simple contract dispute involving money damages," and did not involve any irreparable harm).

In SBRMCOA, LLC v. Morehouse Real Estate Investments, LLC, plaintiffs asserted rights in a disputed parcel, with the underlying purpose of the suit being to quiet title by determining each party's respective legal claim to the parcel. 62 V.I. 168, 176 (Super. Ct. 2015). Like Bassil, the plaintiffs in SBRMCOA, LLC had no evidence of any irreparable injury they were actually facing due to defendants' conduct in using the disputed parcel, and so they attempted to support their claim for injunctive relief with "non-binding authority, without stating why this Court should rely on that authority, for the assertion that when a party is denied its use of a property right, irreparable injury is presumed." Id. at 201. The court refused to

recognize any such presumption as a rule of Virgin Islands law, and instead analyzed the case—much like the Court in Yusuf and 3RC & Co., Inc.—according to the traditional standard of whether plaintiffs had presented evidence of any alleged harm they were facing that was actually irreparable. Id.

In SBRMCOA, LLC, there was no such irreparable harm; although defendants had denied plaintiffs' access to a road on the disputed parcel, in violation of plaintiffs' asserted property rights as a putative easement holder in the parcel, the evidence also showed that defendants merely intended to "redirect traffic to a different road," and that although they were denying plaintiffs' access to the disputed parcel, defendants did "not intend to destroy the existing concrete driveway." Id. As the court noted, "the 'damage' could be undone by simply re-opening the road," and plaintiffs "will still have an entry and exit point to reach their properties." Id. at 201-02. This is in accord with the analysis of Yusuf and 3RC & Co., Inc., and with the fundamental principles underlying injunctive relief—that it is a remedy to be used sparingly, and only when such relief is necessary to preserve the current state of affairs such that a claim for relief will not be rendered effectively meaningless by actions taken by a party during the pendency of litigation. In SBRMCOA, LLC, there was no wrecking ball at the gate, preparing to knock down a sacred monument; the driveway plaintiffs claimed a right to would still be sitting exactly where it was at the conclusion of the

litigation and, if it was determined that plaintiffs had been improperly denied access to it during the pendency of litigation, they could be compensated for such injury at the conclusion of litigation. See id. Thus, there was no need for the "extraordinary remedy of injunction," irrespective of the fact that the case involved the parties' alleged real property rights. See id. at 202-03.

Sam's Food Distributors, Inc. v. NNA & O, LLC should also be read for the proposition that mere interference with another's real property rights is not a *per se* irreparable harm under Virgin Islands law. In Sam's Food Distributors, Inc., plaintiff sought a permanent injunction, which requires at the outset that the Court fully determine the merits of the case (rather than forming a preliminary impression based upon a party's likely success on the merits). 73 V.I. 453, ¶ 13 (2020). The Supreme Court of the Virgin Islands first determined, on the merits, that plaintiff held an express easement over a disputed parcel for the purposes of ingress and egress, which also included the incidental right to stop, load, and unload. Id. at ¶ 19. Having so decided, and it being undisputed that defendant had denied plaintiff said rights in the subject parcel, the Court nonetheless analyzed whether plaintiff suffered an irreparable harm by being denied its property rights when determining whether an injunction should be issued in favor of plaintiff. Id. at ¶21-23 (determining that defendant's refusal to allow plaintiff to use its easement rights to access the cargo bay doors of plaintiff's warehouse constituted

an irreparable injury because without this access, plaintiff's only means of accessing its warehouse was through a people-sized door, which was causing irreparable harm to plaintiff's business of storing furniture in the warehouse).

The analysis in Sam's Food Distributors, Inc. is entirely in accord with SBRMCOA, LLC, and again affirms that Virgin Islands law does not recognize that interference with a real property interest is a *per se* irreparable harm. If the Virgin Islands recognized Plaintiff's asserted notion of a *per se* irreparable harm, the Court would not have needed to engage in any analysis as to what utility plaintiff could receive by using a cargo bay door rather than a people-sized door. It would have been more than sufficient for the Court to determine that plaintiff did, in fact, possess the property rights they asserted in the subject parcel, and that defendant was, in fact, interfering with plaintiff's property rights by obstructing plaintiff's access to the cargo bay doors. Because no such rule is recognized under Virgin Islands law, however, the Court proceeded in its analysis of whether plaintiff was suffering an irreparable harm before determining that injunctive relief was warranted.

In sum, "the Supreme Court of the Virgin Islands does not recognize a rule that presumes irreparable injury when a party is denied its use of a property right." JA 608 (citing SBRMCOA, LLC v. Morehouse Real Est. Invs., LLC, 62 V.I. 168, 201 (Super. Ct. 2015)). The mere presence of Klein and his guests upon Parcel

2D-12 does not constitute irreparable harm. If this presence turns out to constitute a trespass, this can be remedied with monetary damages and thus, by definition "cannot constitute "irreparable injury." 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 562 (2015).

b. Damage to Bassil's property cannot constitute irreparable harm

In its Memorandum Opinion and Order, the Superior Court referred to "continuing damage to Bassil's property." JA 613. This reference is puzzling because no evidence was presented with respect to physical damage to Parcel 2D-12. While the Superior Court may have viewed the installation of the Trails as damaging the property, Bassil presented no evidence that the Trails in fact reduced the parcel's value or in any other way damaged it. But even assuming, *arguendo*, the existence of some physical damage to Parcel 2D-12, the same could quite obviously be remedied by money damages and thus, by definition "cannot constitute irreparable injury." 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 562 (2015).

c. Inability to Sell does not constitute irreparable harm

i. If a potential sale is lost, the resulting damages are readily calculable

The Superior Court also erred in finding that Bassil's lack of clear title to Parcel 2D-12 supports a finding of irreparable harm and the granting of a

preliminary injunction. JA 612 ("Additionally, due to the present dispute caused by Klein's entrance onto her property and Klein's claim of adverse possession, Bassil does not currently have clear title to her property to be able to list it or sell it on the MLS market."). Presumably, the Superior Court was convinced that Bassil may have lost an opportunity to sell at a favorable price[5] or may have been forced to incur attorneys' fees to clear her title. Even if one or both of these things were to happen, Bassil's harm could be redressed with money damages. The amount of profit she would lose, and the amount of attorneys' fees she would incur, would both be readily calculable. Harm that "can be remedied through money damages" by definition "cannot constitute "irreparable injury." 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 562 (2015).

ii. A preliminary injunction will not remedy an inability to sell

The award of a preliminary injunction fails at an even more fundamental level because there is no connection between the harm and the injunctive relief. The whole point of an injunction is to prevent irreparable harm that would result in its absence. E.g., 3RC & Co. v. Boyne Trucking Sys., 63 V.I. 544, 554 (2015) ("[A] party seeking injunctive relief must demonstrate that the injunction is

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[5] Notably, the record contains no evidence that *any* prospective buyer (other than Klein) ever made an offer to Bassil to purchase Parcel 2D-12, despite Bassil listing the property at least four times since 2014. JA 292-96.

necessary to avoid 'certain and imminent harm for which a monetary award does not adequately compensate.'"). An injunction is only justified if it will address and prevent the purported irreparable harm. Here, the injunction does nothing whatsoever to address or prevent the purported "irreparable harm" of Bassil not enjoying clear title to Parcel 2D-12.

Enjoining Klein from accessing Parcel 2D-12 has not (and will not) clear Bassil's title to the parcel. The cloud on the title to Parcel 2D-12 is the result not of any alleged trespass but of Klein's claim for adverse possession of the parcel (or rights therein). The merits of Klein's claim have yet to be adjudicated. JA 610 ("The merits of Bassil's trespass claim and Klein's adverse possession claim have not been adjudicated at this time."). Until they are, neither Klein nor Bassil will have clear title. Enjoining Klein's access to the parcel in the meantime will do nothing to change this.

d. Slip and fall risks do not constitute irreparable harm

i. Potential future harm to unknown third parties is too remote and speculative to constitute irreparable harm

The Superior Court further erred in finding that Bassil could be irreparably harmed <u>if</u> someone injures him or herself while using the Trails and <u>if</u> that person filed a lawsuit against Bassil.[6] Potential future harm to unknown third parties is

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[6] In all the years Klein and his guests have been using the Trails, no such claim has ever arisen.

simply too *speculative* and too *remote* to constitute irreparable harm. As the Superior Court correctly stated, "Virgin Islands courts define irreparable injury or harm as harm that is '*certain* and *imminent* for which a monetary award does not adequately compensate.'" JA 607 (quoting Yusuf v. Hamed, 59 V.I. 841, 848 (2013) (emphasis added). In other words, a preliminary injunction is not a proper remedy for *potential* harms, only *certain* and *imminent* ones. Accord Norton v. Dubrey, 116 A.D.3d 1215, 1216 (N.Y. App. Div. 2014) (finding a lack of irreparable harm warranting injunctive relief in a dispute between neighbors over their respective rights in a disputed parcel because "[a]lthough defendants voiced concern regarding potential liability in the event that the tenant or his guests are injured on the premises, this potential harm is both remote and speculative. Moreover, defendants have an adequate remedy at law and can be fully compensated by monetary damages for any such liability." (citations omitted) (collecting cases)); County of Suffolk v. Givens, 106 A.D.3d 943, 944 (N.Y. App. Div. 2013) ("Although the plaintiff alleges that it might be subject to liability in the event that a tenant is injured at the premises and brings suit, it failed to show that this potential harm was imminent and not remote or speculative." (collecting cases)).

In short, remote potential liability to unknown third parties does not qualify as "irreparable harm." "For the purposes of a preliminary injunction, harm must be

certain to be irreparable." Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P., 68 V.I. 584, 598 (2018) (emphasis in original).

ii. Potential future liability to third parties is transferable and insurable

The Superior Court further erred in this regard by failing to consider that these remote and speculative risks can be transferred and/or insured against – all without altering the status quo or imposing the drastic remedy that is a preliminary injunction. Indeed, Klein testified that if Bassil is not already included, he would include her on waivers that guests sign. Klein is also willing to sign a defense and/or indemnity agreement with Bassil with regard to any potential claims or to pay a reasonable sum for liability insurance for Bassil. Even if despite all this Bassil incurs any costs or expenses associated with a potential lawsuit, those "damages" can be remedied by a monetary award. After all, any potential claim by the individual would be for monetary damages.

e. Bassil presented no evidence as to emotional distress

Bassil put on no evidence regarding emotional distress, and the Superior Court accordingly made no findings regarding the same.

f. Conclusion

As set out above, the Superior Court erred in finding irreparable harm and, by extension, in awarding the preliminary injunction. Without irreparable harm, a

preliminary injunction cannot issue. 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 554 (2015). This Court should reverse.

3. The court erred in its application of the other *Petrus* factors

Because the lack of irreparable harm is dispositive, this Court should reverse the Superior Court's award of a preliminary injunction on that ground alone. Nevertheless, out of an abundance of caution, Klein will briefly address the Superior Court's analysis of the other three *Petrus* factors.

a. Likelihood of success on the merits

In this action, likelihood of success turns on the question of whether Klein has acquired rights in the Trails (or in Parcel 2D-12 more generally) via adverse possession and/or prescriptive easement. With respect to that question, the Superior Court stated that it "does not find Klein's adverse possession claim to be so strong that Bassil has no chance of succeeding on the merits of her trespass claim." JA 612. In other words, the Superior Court found this element was met by the mere existence of some "chance of succeeding on the merits." Id.; JA 607 ("The moving party does not need to show that it will actually prevail on the merits at trial, or that its success is 'more likely than not.'") (quoting Yusuf v. Hamed, 59 V.I. 841, 849 (2013)). While this tepid prognosis of Bassil's likelihood of success

on the merits[7] could suffice to support a preliminary injunction in a case with an exceptionally strong showing of irreparable harm (or one of the other two Petrus factors), this is not such a case. See *supra* Section II(B)(2) and *infra* Sections II(B)(3)(b)-(d).

b. Irreparable harm to Klein

Klein has made use of the disputed property for many years and has worked to improve it during that time. JA 497-501. He also uses the Trails that go over the disputed property as part of his AirBNB business. JA 179, 498-99. Indeed, use of the Trails is critical to Klein's AirBNB business because without it, Klein cannot advertise that his property has beach access. JA 499. Klein's previous advertisements regarding beach access will now, with the injunction, appear false,

[7] The Superior Court had good reason for this lukewarm prognosis. At the evidentiary hearing, Klein introduced seven witnesses, all of whom testified to using the Trails as early as 2004, some as early as 2002. JA 339-43, 348-51, 360-61, 379-81, 385-89, 398-402, 405-07, 491-97. This established that the Trails existed and were in open and notorious use for greater than fifteen years. To be sure, Bassil offered six witnesses that testified to *not* seeing the Trails prior to 2020. However, all of these witnesses, save one, testified on cross examination that they had never, at any relevant time, so much as set foot on Parcel 2D-12. JA 214, 254-55, 291-92, 311, 317, 333-34, 375-76. Of the witnesses that actually entered Parcel 2D-12, all but one testified to using the Trails. The one witness that testified to entering the parcel but nevertheless not seeing the Trails was Bassil's ex-husband, Terry Anderson. According to his testimony, he last visited the parcel in 2009 and recalls being able to "pick his way" to the beach from it. JA 229-30, 237, 604. The ability to "pick" through what would otherwise be impassable vegetation suggests that, if his testimony is to be believed, he was likely using the Trails without knowing it.

thereby harming Klein's reputation. This type of harm to business and reputational interests has been held, by this Court and others, to be irreparable. Yusuf v. Hamed, 59 V.I. 841, 854-55 (2017); Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 195 (3d Cir. 1990) ("Grounds for finding irreparable harm include loss of control of reputation, loss of trade, or loss of good will." (citing 2 J. McCarthy, Trademarks and Unfair Competition § 30:18 (2d ed. 1984))).

In addition to ignoring this irreparable harm to Klein's commercial and reputational interests, the Superior Court further erred in its analysis of irreparable harm to Klein's property and health interests. The Superior Court recognized that Klein, a service-disabled veteran, requires aquatic therapy, in salt water, for his chronic lung condition. JA 613. It nevertheless gave little or no weight to this evidence, opining that, "[a]n injunction would not deprive him of access to and from his property, and he can still access the beach like the rest of the public beachgoers." Id. This conclusion was not supported by the evidence. Klein cannot simply "access the beach like the rest of the public beachgoers" precisely because he is disabled. Klein's uncontradicted testimony established that walking down the service road to the beach was dangerous, even for those without disability, because of slippery and steep conditions and because of erratic and intoxicated drivers. JA 175, 179-82. Further, aware of his need for regular aquatic therapy, Klein relied on having beach access in choosing to purchase Parcel 2D-11,

build his home there, and make significant further investments. JA 485-86, 491-96.

In short, The Superior Court erred in failing to consider the foregoing irreparable harm to Klein and in failing to weigh it against the purported irreparable harm to Bassil.

c. Public interest

In opening its analysis of this element, the Superior Court correctly stated that, "In considering the public's interest, courts evaluating motions for preliminary injunction should carefully regard consequences of an injunction on the public and should aim not to halt any activities that benefit the public." JA 614 (citing 3RC & Co., 63 V.I. at 558). After correctly stating the rule, the Superior Court then erred by holding, "granting an injunction will have little to no consequence on the public," "[n]o public activities will be halted," and "members of the public will not be impacted." JA 614. These conclusions were not supported by the evidence.

The uncontradicted evidence was as follows. Klein runs an AirBNB business from his Parcel 2D-11. JA 498-99. This business generates tax revenue and stimulates the local economy by bringing in tourists. A particularly important selling point for the business is beach access. JA 498-99. The preliminary injunction has the effect of stripping Klein's AirBNB business of beach access

during the pendency of this litigation. To the extent this reduces tax revenue and the number of tourists patronizing his business, the public interest suffers. See Yusuf v. Hamed, 59 V.I. 841, 858 (2013) (noting that "preventing the potential loss of business, jobs, and tax revenue in a community" is a matter of public interest). Notably, prior to the injunction award, Klein was putting the Trails to a use that benefited the public.[8] By contrast, Bassil was not. Bassil, who does not live on the island and has not developed her property, would prefer that nobody use the Trails during the pendency of this litigation. In issuing her a preliminary injunction, the Superior Court granted her wish. Now, instead of Klein putting the trails to a profitable use that benefits the public during the pendency of this action, the Trails will instead sit unused and deteriorating, providing no benefit whatsoever to the public. The Superior Court erred in failing to consider this evidence and in concluding that "granting an injunction will have little to no consequence on the public," "[n]o public activities will be halted," and "members of the public will not be impacted."

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[8] In addition to putting the Trails to an economically beneficial use, Klein further advanced the public interest by keeping the Trails and their vicinity in good repair and free of vermin, such as termites and rats. JA 497-98. Without these efforts, these vermin would have multiplied and become a nuisance to neighboring property owners, tourists, and the general public.

d. Conclusion

Because the lack of irreparable harm is dispositive, this Court should reverse the Superior Court's award of a preliminary injunction on that ground alone. As set out above, consideration of the other three *Petrus* factors only strengthens this conclusion.

III. CONCLUSION AND PRAY FOR RELIEF

For the reasons set out herein, Klein respectfully requests that this Court reverse the Superior Court's preliminary injunction award.

Respectfully submitted,

JOHN M. KLEIN

By: */s/ Patrick D. Blake*
Of Counsel

Patrick D. Blake, Esquire
Jason E. Ohana, Esquire
Willcox & Savage, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
Telephone: (757) 628-5500
Facsimile: (757) 628-5566
Email: pblake@wilsav.com
Email: johana@wilsav.com
Counsel for Appellant/Defendant

CERTIFICATE OF BAR MEMBERSHIP

Counsel certifies pursuant to Virgin Islands Rule of Appellate Procedure 22(*l*) that he is a member of the bar of the Supreme Court of the Virgin Islands.

/s/ Patrick D. Blake
Patrick D. Blake, Esquire (VI Bar No. 975)
Jason E. Ohana, Esquire (admitted Pro Hac Vice)
Willcox & Savage, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
Telephone: (757) 628-5500
Facsimile: (757) 628-5566
Email: pblake@wilsav.com
Email: johana@wilsav.com
Counsel for Appellant/Defendant

WORD COUNT CERTIFICATION

Counsel certifies that the Brief of Appellant complies with Virgin Islands Rule of Appellate Procedure 22(f) and contains 6,513 words of the 7800 word limit.

/s/ Patrick D. Blake
Patrick D. Blake, Esquire (VI Bar No. 975)
Jason E. Ohana, Esquire (admitted Pro Hac Vice)
Willcox & Savage, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
Telephone: (757) 628-5500
Facsimile: (757) 628-5566
Email: pblake@wilsav.com
Email: johana@wilsav.com
Counsel for Appellant/Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2022, I electronically filed the foregoing with the Clerk of the Court, which will send notification of such filing to all counsel of record:

Matthew J. Duensing, Esquire
Joseph D. Sauerwein, Esquire
Robin P. Seila, Esquire
9800 Buccaneer Mall, Building 2, Suite 9
St. Thomas, USVI 00802
Telephone: (340) 774-6011
Facsimile: (340) 776-8520
Email: mduensing@vilawyers.com
jsauerwein@vilawyers.com
rseila@vilawyers.com
Counsel for Appellee/ Plaintiff

<u>/s/ Patrick D. Blake</u>

Patrick D. Blake, Esquire (VI Bar No. 975)
Jason E. Ohana, Esquire (admitted Pro Hac Vice)
Willcox & Savage, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
Telephone: (757) 628-5500
Facsimile: (757) 628-5566
Email: pblake@wilsav.com
Email: johana@wilsav.com
Counsel for Appellant/Defendant