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

REPLY BRIEF OF APPELLANT

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JOHN KLEIN,

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S. Ct. Civ. No. SCT-Civ-2021-0044

Re: Super. Ct. Civ. No. ST-2021-CV-00148

APPELLANT'S REPLY BRIEF

I. PRELIMINARY STATEMENT

A preliminary injunction cannot issue unless the movant proves that, without the injunction, she will suffer irreparable harm. Bassil failed to put on evidence of any harm that would befall her that could not be remedied with money damages. In her Brief, Bassil does not, and cannot, point to any such evidence in the record. Instead of articulating what irreversible damage is threatened, and identifying where in the record such damage was proven, Bassil instead invites this Court to overturn its longstanding rule against "presumed" or "inherent" irreparable harm. E.g., Bassil Br. 22 (arguing "The loss of unique real property is inherently irreparable"). This Court should decline Bassil's invitation and reverse the Superior Court's award of the Preliminary Injunction.

II. ARGUMENT

A. The Superior Court erred in its application of the *Petrus* Factors

1. A preliminary injunction is an extraordinary and drastic remedy

"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." JA 606 (internal citations omitted).

2. The court erred in finding irreparable harm to Bassil

The most important of the four *Petrus* factors is irreparable harm – a preliminary injunction cannot issue without it. 3RC & Co. v. Boynes Trucking System, Inc., 63 V.I. 544, 554 (2015). The Superior Court based its finding of irreparable harm on the following four grounds: (1) the mere existence of an alleged trespass; (2) damage to Bassil's property; (3) the potential for premises liability; and (4) the cloud this dispute has put on Bassil's title. None of these constitutes irreparable harm.

a. Mere existence of an alleged trespass does not constitute irreparable harm

i. There is no presumption of irreparable harm

Bassil argues, throughout her Brief, that the law presumes irreparable harm when some property right is infringed. For example, on Page 22, she argues, "The loss of unique real property is inherently irreparable;" on page 23, she argues, "Bassil's loss of control of her unique parcel would also be irreparable 'by its very

nature'" and "Courts in the Virgin Islands are familiar with the concept that the loss of real property is always an irreparable injury."

The Superior Court correctly rejected this "presumed irreparable harm" argument below. This Court should do the same. "[T]he 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 existence of an alleged trespass is not an irreparable injury. As in SBRMCOA, LLC, nothing irreparable or irreversible has happened, and any "damage" can "be undone" at the conclusion of the litigation. Id. at 202. Because there is no *presumption* that a trespass automatically creates "irreparable harm," Bassil was required to come forward with evidence of *actual* irreparable harm – some harm that was irreversible or could not be compensated with money. She did not. Instead, she has doubled down on her erroneous theory of "presumed irreparable harm."

ii. Bassil's damages, if any, are not so difficult to calculate as to render the alleged harm "irreparable"

Bassil also places heavy reliance on the Superior Court's finding that Bassil's damages would be difficult to calculate. E.g., Bassil Br. 22 ("The Trial Court correctly held that although monetary damages could be calculated in theory, it would be so difficult under these unique circumstances that Bassil met the

standard for irreparable harm."). This argument fails because: (a) there is nothing difficult about calculating Bassil's monetary damages; and (b) a party cannot prevail in establishing irreparable harm by simply "not attempting to calculate damages." Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P., 68 V.I. 584, 599 (2018).

Should Bassil ultimately prevail on the merits, 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. The Superior Court acknowledged as much, stating, "trespass is a harm that can be remedied by a monetary award." JA 612.

The Superior Court appeared to base its finding that damages would be difficult to calculate on the unknown number of alleged trespassers (and perhaps on the non-pecuniary nature of annoyance and discomfort damages). But this analysis, upon which Bassil presumably relies, is entirely 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. If, for example, there is $1,000 worth of damage, it will cost $1,000 to repair said damage, whether it was caused by one guest, ten, or one hundred.

With respect to any physical damage to the property, this would plainly be susceptible to simple calculation.[1] 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.[2] 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. . . . [N]either 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

[1] Proving such damages would be a straightforward matter of producing a repair invoice.

[2] 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.

iii. Bassil's reliance on *Hansen v. Government of V.I.* is misplaced

Bassil posits that Hansen v. Government of Virgin Islands, 53 V.I. 58 (Terr. Ct. 1999) "is instructive on the question of irreparable harm and real property" and argues that her "plight here mirrors the irreparable harm that the plaintiffs in Hansen faced." Bassil Br. 24-25. Bassil's comparison of her "plight" to that of the plaintiffs in Hansen is as distasteful as it is absurd. In Hansen, the government intended to build "Sixty thousand square feet of a rocket factory" on the subject property, "Camp Arawak." Id. at *18. Camp Arawak was sacred ground:

> It is a *trust* with unique archaeological, cultural, and historical significance. It's on a bay. It is a place where the African Ancestors of the people lived and worked. The historic structures upon it serve as tangible links to the historic past of the people. They tell a story and remind them of their ancestors' struggles, which eventually led to their freedom from bondage. This freedom is now enjoyed by the people. This special ancestral connection magnifies the harm of depriving the people of Camp Arawak.

Id. The plaintiffs in Hansen would have suffered the following irreversible injury:

> Plaintiffs would also lose the right to own artifacts known to be present on the Camp and those yet to be discovered. Further, they will lose the right to catalog and display any archaeological relics on the site.

Id. Parcel 2D-12 is not Camp Arawak. Unlike Camp Arawak, Parcel 2D-12 has no "archaeological, cultural, and historical significance." There are no priceless archaeological relics on Parcel 2D-12 being put in jeopardy. Unlike Camp Arawak, Parcel 2D-12 is not presently being put to any use by Bassil. In short, this case could not be *more* different from Hansen.

iv. Bassil's reliance on *Yusuf v. Hamed* is misplaced

Bassil's reliance on Yusuf v. Hamed, 59 V.I. 841 (2013) is equally misplaced. Bassil argues that just as "Hamed's loss of control of a business . . . would be irreparable by its very nature," so too "Bassil's loss of control of her unique parcel would also be irreparable by its very nature." Bassil Br. 23 (internal citation omitted). Bassil misreads Yusuf.

First, this is just another way of stating that infringement of a real property right automatically creates a presumption of irreparable harm. As discussed above, "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.

Next, the analogy between "control of a business" (as in Yusuf) and control of real property (as here) is completely inapt. An undeveloped parcel, such as 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 endure and flourish. 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, there is no risk to the value of Parcel 2D-12 by continued use of the Trails. The land remains. Indeed, maintenance and use of the Trails has, over the years, improved the property.

Finally, Yusuf did not create a presumption of irreparable harm even with respect to control of a business (much less with respect to control of real property). In Yusuf, this Court recognized that inability to exert control over one's business *may* constitute an irreparable harm. 59 V.I. 841, 854-55 (2013). The Court found such irreparable harm in Yusuf only after analyzing specific evidence of the extreme harms that were resulting from Hamed's inability to exert control over the business. Id. at 855.

In short, even with respect to control of a business, there is no presumption of irreparable harm – the irreparable harm must be proved, with evidence. Yusuf provides no support for Bassil's argument that "Bassil's loss of control of her unique parcel would also be irreparable by its very nature."

b. Damage to Bassil's property, inability to sell, and remote third-party claims are not irreparable

Even assuming, *arguendo*, the existence of some physical damage to Parcel 2D-12, the same could be remedied by money damages and thus "cannot constitute

irreparable injury." 3RC & Co. v. Boynes Trucking Sys., Inc., 63 V.I. 544, 562 (2015). The same is true with respect to Bassil's title. If she lost a sale, or has to incur attorneys' fees to clear her title, these harms can be remedied with a monetary award. Moreover, enjoining Klein from accessing Parcel 2D-12 has not (and will not) clear Bassil's title to the parcel. Neither party will enjoy clear title until the merits of their claims are adjudicated. Finally, 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., 68 V.I. at 598 (emphasis in original).

c. Bassil's reliance on the "sliding scale" is misplaced

As set out above, Bassil failed to establish any irreparable harm. She cannot identify any irreversible change to Parcel 2D-12, or any personal injury that cannot be remedied by money damages. Unable to establish irreparable harm, the *sine qua non* of a claim for preliminary injunction, Bassil looks to downplay the importance of this factor. Bassil argues that irreparable harm, while "an important factor," is not conclusive[3] and "under the 'sliding-scale test' if the likelihood of success on the merits is very strong, then a showing of irreparable harm is less decisive." Bassil's reliance on the "sliding scale" is misplaced.

[3] While the *presence* of irreparable harm is not conclusive, the *absence* of irreparable harm is. A preliminary injunction cannot issue if there is no irreparable harm.

First, even with a strong showing of likelihood of success, a movant must still establish some measure of irreparable harm, which Bassil has not. Second, Bassil did not make a "very strong" showing of likelihood of success on the merits. She made the absolute minimal showing. The Superior Court held 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 the likelihood of success element was met by the mere existence of some "chance of succeeding on the merits." Id.; JA 607. While this tepid prognosis of Bassil's likelihood of success on the merits could suffice to support a preliminary injunction in a case with an exceptionally strong showing of irreparable harm, this is not such a case.

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

Though lack of irreparable harm is dispositive, in his opening Brief, Klein also addressed the other three *Petrus* factors. As set out there, the Superior Court erred with respect to balancing the harms and weighing the public interest. Klein and the public will both suffer with the Preliminary Injunction in place, for no good reason. Klein will no longer have beach access (needed for his aquatic lung therapy); his AIRBNB business will suffer reputational and economic damage (causing harm to the local economy and tax base); and the Trails will fall into disrepair, inviting vermin like termites and rats. None of this will do Bassil any

good. She is not even on the island to see her vacant parcel free from foot traffic, and the Preliminary Injunction does not give her clean title. The balance of the harms and the public interest both cut against issuing a Preliminary Injunction.

In sum, 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. Consideration of the other three *Petrus* factors only strengthens this conclusion.

B. Bassil Has Mischaracterized the Evidence Adduced Below

1. Bassil conveniently omitted critical facts adduced on cross examination

Throughout this litigation, Bassil has advanced the theory that Klein created the Trails, from scratch, in 2020. E.g., Bassil Br. 6. The testimony adduced at the evidentiary hearing completely debunked this theory. 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.[4]

[4] Regarding these witnesses, Bassil falsely states, "Even Klein's own witnesses admitted that they were largely unaware of the paths . . . ." Bassil Br. 16. Nothing could be further from the truth. These seven witnesses each testified that they were not only highly aware of the Trails but that they had in fact used and enjoyed them on numerous occasions. See citations to Joint Appendix above. Bassil also made much of Alfredo Melhem's use of the phrase "secret path." Bassil Br. 16. But Bassil conveniently omits the fact that Melhem is not a native English speaker, JA 392, and his clarification that "nothing was secret at the entrance. I mean, you can see the entrance of the path, okay." Id.

This established that the Trails existed and were in open and notorious use for greater than fifteen years. Notwithstanding this thorough dismantling of her "New Trails" theory, and notwithstanding the Superior Court's decision to reserve a ruling on the merits of the adverse possession and trespassing claims for trial, Bassil spends much of her Brief attempting to convince this Court that the evidence below supported her theory. Klein feels compelled to correct the record.

a. Bassil argues that her witnesses never saw the Trails but omits the fact that, save one, none of them actually set foot on Parcel 2D-12[5]

Bassil cites testimony from herself and her witnesses to the effect that none of them had ever observed the Trails prior to 2020. E.g., Bassil Br. 8-15. For example, Bassil states, "Three local realtors all testified that they never observed any established trails traversing Bassil's parcel until they were first discovered in late 2020 or early 2021. . . ." Bassil Br. 10 (referring to Lisa Curreri, Jacqueline Marin, and Sharon Hupprich). Bassil conveniently omits the fact that none of these three realtors has ever set foot on the Parcel.

[5] Bassil did present one witness that testified to entering the parcel but nevertheless not seeing the Trails. This 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. For comparison, Klein introduced seven witnesses that had entered the parcel, all of whom testified to using the Trails as early as 2004, some as early as 2002.

Ms. Curreri testified that she "never walked around the exterior boundaries" of Parcel 2D-12, JA 311; "did not traverse the property," JA 312; never viewed Parcel 2D-12 from Klein's property, Id.; and that she "had never been to the interior of the property" and therefore did not "know how the interior of the property looked." JA 313.

Similarly, Ms. Marin testified that she had never "walked through the property," JA 333, had never walked down "the exterior sides or the boundaries of the property," Id., and that she therefore did not "know what's on the interior of the property." JA 334.

Likewise, Ms. Hupprich testified that she had only seen Parcel 2D-12 from the vantage point of Parcel 2D-13 or from the beach, JA 375-76, that she had "never walked inside" Parcel 2D-12, Id., and that she had never walked any of Parcel 2D-12's other boundaries. Id. See also JA 214 (another Bassil witness, Ryan Wisehart, testifying "I was not specifically on the property myself,"); and JA 254-55 (Bassil herself testifying as to her inability to ever set foot on Parcel 2D-12, "[E]ven when I wanted to, I couldn't. I went with Lisa, also once. We couldn't walk it; it was too bushy.").

Bassil also misleadingly states that photographs taken by her witness, Rennix Charles, "clearly depict the *new paths* cut through the bush on Bassil's parcel." Bassil Br. 14 (emphasis added). Mr. Charles was first at the property in

2021, when he was brought there by Bassil's own lawyers. JA 273. Thus, he would have no knowledge as to the age of the Trails (or whether they were "new").

To Bassil's credit, she does cite the most critical part of Charles's testimony. Bassil Br. 15. As of late 2021, when according to Bassil the Trails were clearly visible from the air, they were *not* visible from the public road. Id. ("When Judge Tejo asked if Charles was able to see the paths from the public road, he responded that he could not.") (citing JA 278). This explains why Bassil's witnesses, who never actually set foot on Parcel 2D-12, were never in a position to see the Trails.

b. Bassil's omissions regarding the 2008 and 2021 surveys

Bassil made several misleading statements regarding surveys of Parcel 2D-12. For example, on page 9 of her Brief, Bassil states, "Ryan Wisehart, owner of Brian Moseley & Associates, confirmed that the boundary survey dated August 12, 2008 (Plaintiff's Exhibit 2A, at JA 421) would have shown paths and walkways on Bassil's parcel if they had existed in 2008." In fact, Mr. Wisehart testified that he was not involved in the 2008 survey. JA 213, 221. He further testified that he had no personal knowledge of what the survey crew did or did not observe or even what their task was. Id. He further testified that the survey was unsigned. JA 221. Wisehart also testified that "to this day," he had still "not walked the interior of the property," JA 214, and that to his knowledge, "back in 2008, no one had entered the interior of that property." JA 215. Most critically, Wisehart testified that often

a survey is what is called a "boundary survey," that only surveys the outside boundaries of a parcel. JA 214. In short, it is not at all clear that the unsigned 2008 survey "would have shown" the Trails "if they had existed in 2008."

Bassil also misleadingly states that, "in 2021 Bassil hired Ryan Wisehart to prepare a land title survey of her parcel, which depicts a *newly created* 'meandering path' . . . ." Bassil Br. 13 (emphasis added). While the 2021 survey shows the Trails, it does not establish (or even represent) that they are "newly created." Also, as a matter of fact, Klein ordered and paid for this Survey, not Bassil.

2. Bassil's misleading use of photographs

Bassil's use of photographs is also misleading. For example, on page 16 of her Brief, she misleadingly compares what she purports to be a 2019 Google Earth image of Parcel 2D-12 (which, aside from being blurry, and presumably taken from space, was neither authenticated nor admitted to evidence), with a high-resolution drone photograph taken in 2021. Having not been admitted into evidence (or even offered), the purported 2019 Google Earth image is plainly not part of the record and was thus not considered by the Superior Court in granting the injunction. Bassil apparently hoped this Court would not notice.

Bassil also included, on page 12 of her Brief, a reproduction of Exhibit 1-A from the hearing. This is purportedly a drone photograph taken in 2015 from

above the water facing along the shoreline and including parts of Parcel 2B-12 and 2B-13. According to Bassil, this photograph "clearly show[s] a complete absence of the trails on Bassil's parcel in 2015." Bassil Br. 12. But it is not at all clear, given the dense tree canopy, that a photograph taken from that angle would show the Trails. Indeed, angle is everything. Klein presented two photographs taken the very same day, one from directly overhead, and one from over the sea. JA 510-13, 472-73. The Trails were clearly visible from the overhead angle but were not visible at all from the more obtuse angle:

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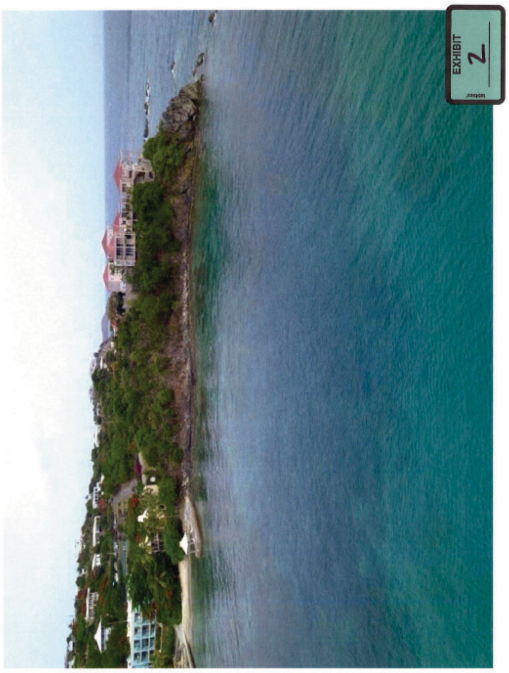

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III. CONCLUSION AND PRAYER FOR RELIEF

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

Respectfully submitted,
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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.

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WORD COUNT CERTIFICATION

Counsel certifies that the Brief of Appellant complies with Virgin Islands Rule of Appellate Procedure 22(f) and contains 3,823 words of the 3,900 word limit.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2022, I electronically filed the foregoing with the Clerk of the Court, which will send notification of such filing to all counsel of record:

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