IN THE SUPREME COURT OF THE VIRGIN ISLANDS

Appeal No. 2022-0049

WARREN MOSLER, CHRIS HANLEY, AND CHRISMOS CANE BAY, LLC,

Appellants

JOSEPH GERACE, VICTORIA VOOYS D/B/A CANE BAY BEACH BAR

Appellees

On Appeal from
The Superior Court of the Virgin Islands
Division of St. Croix

Superior Court Civ. No. SX-2005-CV-000368

APPELLEES JOSEPH GERACE, VICTORIA VOOYS D/B/A CANE BAY BEACH BAR'S REPLY TO CROSS APPEAL RESPONSE BRIEF

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APPELLEES' REPLY BRIEF

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A. RESPONSE TO APPELLANTS' COUNTERSTATEMENT OF FACTS

Once again, Appellants choose to ignore the legal standard that the Superior Court and now this Court on review must utilize when presented with a V.I.R. Civ. P. 50(b) motion after a jury verdict that evidence must be viewed in the last most favorable to Vooys and Gerace, giving the evidence "every advantage of every fair and reasonable inference."[1]

The Superior Court's misapplication of the factual burden of proof at trial led to the erroneous decision to vacate the jury's verdict on the breach of contract, breach of duty of good faith and fair dealing, and defamation claims. While neither the Superior Court nor Appellants ever discussed the burden of proof, it is clear that, posttrial, Appellees were subject to a much higher standard than a preponderance of the evidence. The Superior Court also repeatedly re-weighed the evidence and became the seventh "super juror" when it concluded that the jury's verdict must be set aside.

This Court has recognized that [t]he function of a standard of proof... is to "instruct the fact-finder concerning the degree of confidence our society thinks he

[1] *Chestnut v. Goodman*, 59 V.I. 467, 474-475 (V.I. 2013) (citing cases).

should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.'"[2]

In the Virgin Islands, the burden of proof in civil cases is governed by title 5, section 740(5) of the Virgin Islands Code, and this Court has recognized that it establishes the general rule that a preponderance of the evidence standard governs all civil claims brought under Virgin Islands law.[3]

To prevail under a preponderance of the evidence standard, "one needs only to prove that 'it is more likely than not that an event occurred.'"[4] This does not require direct proof and can be inferred from circumstantial evidence. [5]

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[2] *Wilkinson v. Wilkinson*, 70 V.I. 901, 916–917 (V.I. 2019).

[3] *Atlantic Human Resource Advisors, LLC v. Espersen*, 76 V.I. 583, 629, (V.I. 2022).

[4] *In Re Campbell*, 59 V.I. 701, 716 (V.I. 2013); See *also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) ('The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [jury] of the fact's existence.'"' (internal citations omitted) (alterations in original)); *see also* Clifford S. Fishman & Anne T. McKenna, 1 Jones on Evidence § 3:9 (7th ed.).").

[5] *Penn v. Mosley*, 67 V.I. 879, 898–899 (V.I. 2017) *Accord LIAT (1974), Ltd. v. Cherubin*, 2022 VI 21, ¶ 19, 2022 WL 17414952, at *5 (V.I. Dec. 5, 2022)("It is well-established that a plaintiff may establish an element of a cause of action through circumstantial evidence alone.")(*citing Charles v. Arcos Dorados USVI, Inc.*, 71 V.I. 1146, 1154-1155 (V.I. 2019).

A jury's finding as to whether a plaintiff satisfied the preponderance of evidence standard is entitled to deference due to the credibility assessment the jury could have made and the permissibility of the inferences the jury could have drawn. The jury, in this case, listened to the evidence for days, weighed the evidence, assessed the credibility of the witnesses, including the trial testimony of Vooys, Gerace, Hanley, and Mosler, and determined that there was sufficient evidence to support the breach of contract, breach of good faith and fair dealing, intentional misrepresentation, and defamation claims.

The Superior Court also took on the forbidden "super juror" role and re-weighed evidence.[6] For example, the jury received evidence that Mosler and Hanley told Vooys and Gerace that they could pay their rent at any time and that it was not required to be paid at the beginning of each month so long as they paid during the month. **(JA1017).** The jury also received evidence that before March 2005, Hanley and Mosler never complained that Plaintiffs had not paid their rent or were late paying rent. **(JA1019-25; JA1499; JA1501).** The jury received evidence that it was not until March 2005 Mosler came to the restaurant and, for the first time, falsely alleged that Plaintiffs were behind on rent. **(JA1019-29;**

[6] *LIAT (1974), Ltd. v. Cherubin*, 2022 VI 21, ¶ 29 (2022)("When conducting this inquiry, the judge does not sit as a thirteenth or 'super' juror," *id.*, and "should avoid displacing the factfinding of the jury.")

JA1499; JA1501). The jury also heard Hanley admit at trial that Plaintiffs did not owe Defendants any rent. (**JA1499; JA1501**.)

The jury also heard Hanley admit that he made statements on the Roger Morgan show about Plaintiffs not being current on their rent and that they were late a lot. **(JA1448-49).** Hanley admitted he told Appellees that Appellants were flexible on the rent payments and Appellees could be late with it if it was paid. **(JA1474-75).** Hanley further admitted that the disparaging claim that rent was always late[7] is false. **(JA1477-78).** When asked, "Do you find that the Plaintiffs owe rent to Chrismos, LLC?, the jury returned a verdict of "no". (**JA59.**) The Superior Court did not vacate that portion of the verdict, and Appellants have not challenged that verdict on appeal.

Despite all of the evidence in support of the Appellees' position that because of the agreement of the parties, they were not late on rent and, therefore, the statements made by Hanley and Mosler on the radio were false, the Superior Court became a super juror opining that:

[7] "Late" is defined as "coming or remaining after the due, usual, or proper time." "Late." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/late. (Last visited, February 17, 2023.)

- "In addition, the statement on the radio that Plaintiffs 'were always late on rent … [and] were behind on rent[,]' *id.* at 210:2-3, were mostly true." (**JA99.**)
- "Out of the twenty-one months Plaintiffs rented from Chrismos, they were clearly late nine times … Given the uncertainty about when rent had to be paid, the Court excluded from its count rent that was paid by the middle or the end of he same month in which it was due. 9 out of 21 is 42.86%, close to half. It may have been an exaggeration for Mosler to say Plaintiffs were always but not by much."**(JA100.)**
- "In fact, the evidence tended to show that Hanley was more willing to work with Plaintiffs than Mosler and, arguably, seemed to be more concerned for them overall, meeting with them to show them how to determine the value of the business, for example. The testimony also tended to show that Hanley was more involved than Mosler."(**JA105**.)
- "At best, the evidence shows that a 25-year-old 'kid,' (Trial Tr. 439:16-17), and his fiancée, both new to the restaurant industry, were taken advantage of by two older and more sophisticated businessmen."(**JA105.**)

B. RESPONSE TO APPELLANTS' ARGUMENTS

1. There was a bargained-for exchange and, therefore, an enforceable contract.

> MR. HOLT: Your Honor, the complaint said a lease. We argue we gave them the lease and that's the evidence the jurors have to resolve. They have to actually decide what was exactly promised.
>
> THE COURT: I agree.

(**JA976**.)

And the jury did just that. The jury determined that Vooys and Gerace were promised many times a lease that would contain a term of no less than seven years, Plaintiffs testified that Defendants promised them a 7-year lease many times, *see e.g.*, **JA1015-16; 1085; JA1090**, Defendants breached that promise and Vooys and Gerace suffered damages because of the breach. Now, after admitting at trial that it was for the jurors to decide what was promised, Defendants' posttrial position is "there never was a contract" and never an enforceable promise. (Response Brief at 16.)

The Superior Court and Appellants spent considerable time discussing that the "terms of the lease" were uncertain and, therefore, there was no enforceable contract. But this is incorrect. The bargained-for exchange was that Plaintiffs would spend money and their time (sweat equity) making improvements and

repairs that were properly the landlord's responsibility if the Plaintiffs were given a lease with a term of no less than seven years. The breach occurred when on March 1, 2004, Plaintiffs received a lease from Defendants not for the promised seven years but only for two and a half years. **(JA1008.)**

This is no different than if the agreement was as follows: Plaintiffs would make improvements and repairs to the Cane Bay Beach Bar if Defendants would give them a jar containing ten jellybeans, but at least one of the jellybeans must be red because the Plaintiffs learned that they would not be able to re-sell the jar of jellybeans without at least one red jellybean in the jar. The colors of the other nine jellybeans are not material to the bargain, but the material term is that one of the jellybeans must be red.

If, after the Plaintiffs had made all the improvements and repairs, Defendants presented Plaintiffs with a jar of jellybeans containing zero red jellybeans, refused to provide Plaintiffs with the red jellybean, and after Plaintiffs vacated the premises, presented the new renter with a jar of ten jellybeans with at least one red jellybean, would there be any doubt that Defendants breached an agreement with Plaintiffs? No. And the fact that the jar of jellybeans was a lease agreement, and the red jellybean was a term of seven years, should make no difference in the analysis.

Further, Vooys and Gerace's full performance of the bargained-for exchange is sufficient evidence that there was a meeting of the minds enough for this Court to determine that the jury verdict as to breach of contract and breach of good faith and fair dealing should not be set aside.[8]

Finally, the Appellants (and the Superior Court) cite *Engle v. Heier*, 173 N.W. 2d 454, 456 (S.D 1970) for the proposition that because of the lease provisions that were not yet resolved, there was no enforceable agreement. Vooys and Gerace disagree with South Dakota law on this issue. However, other jurisdictions have held that an enforceable lease has three essential elements: a description of the property, the duration of the term, and the rental consideration."[9] Here, the three essential elements were decided, the description of the property is undisputed, the duration of the term was seven years, and the rental consideration was $1, 500. **(JA998-99.)**

2. Promissory Estoppel

Despite being provided a full and fair opportunity to brief the issue of whether, if there was no enforceable contract, the jury verdict could be upheld on

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[8] *See, e.g., Sanghavi Jewels, Inc. v. Shalhout*, No. 2011-30, 2012 WL 4462046, at *5 (D.V.I. Sept. 27, 2012)(explaining that partial performance of a contract is evidence that "parties intended to be bound by a settlement agreement in the absence of a document executed by both sides.") (internal citation omitted)

[9] *Avis Rent A Car Sys., Inc. v. Dep't of Revenue*, 330 Or. 35, 39 (2000).

the alternate ground of promissory estoppel, Appellants chose to cursorily dismiss the argument as "waived" and "not plead". However, Appellees had no prior opportunity to raise the issue before the Superior Court because the Superior Court's order granting the posttrial Rule 50(b) motion was the first time Appellees knew that there was an issue with their breach of contract claim. Additionally, this Court's review is *de novo.* Under that standard, "an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue."[10] "Similarly, an appellate court will not set aside the correct result based on the correct reasoning under the wrong law if the result would be the same under the correct law."[11] Promissory estoppel presents a valid, alternate ground to uphold the jury's verdict if this Court determines that there was no enforceable contract.

[10] *Weaver v. Weaver*, 308 Neb. 373, 386 (2021).
[11] 5 Am. Jur. 2d Appellate Review § 736.

3. Vooys and Gerace met their burden of proof as to damages.

i. Sweat Equity is a recoverable form of reliance damages.[12]

Appellants argue that a *Banks*[13] analysis was required for the Plaintiffs to recover for sweat equity but supply no legal authority to support this assertion. (Response Brief at 20.)[14] Sweat equity is a common term that Merriam-Webster defines as "equity in a property resulting from labor invested in improvements that increase its value" and the labor so invested.[15]

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[12] Even taking a conservative look at the evidence,**(JA1029-30),** if the jury awarded the Plaintiffs for only 12 months and 4 hours per day of sweat equity, $100,000 translates to an award of $11.41 per Plaintiff for sweat equity. In other words, the entire $100,000 award is supported solely by sweat equity. This does not shock the conscience in any way.

[13] *Banks v. Int'l Rental & Leasing,* 55 V.I. 967 (2011).

[14] Even if Appellants are correct that a *Banks* analysis is required, recognizing reliance interest as a recoverable form of damages is not a new proposition and represents the soundest rule for the Virgin Islands. Virgin Islands courts have, post-*Banks* relied on Restatement (Second) Contracts §344. See, *David v. Scotland*, No. SX-13-CV-036, 2014 WL 11034925, at *3 (V.I. Super. Ct. Feb. 3, 2014). Most jurisdictions recognize that "[r]eliance damages are designed to compensate the plaintiff for any reasonably foreseeable costs incurred or expenditures made in reliance on the promise that has now been broken."24 Williston on Contracts § 64:4 (4th ed.) Finally, recognizing reliance damages such as sweat equity represents the soundest rule for the Virgin Islands.

[15] "Sweat equity". Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/sweat%20equity. (Last Visited, February 19, 2023).

The loss of the sweat equity is recoverable as a part of reliance damages.[16] The District Court of Nebraska held that "the purpose of this alternative remedy is to reimburse the injured party '*for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made.*"'[17]. Therefore, reliance "loss" is not solely measured by "expenditures," and the loss of "sweat equity is properly recoverable as a component of reliance damages."[18] Plaintiffs also had almost two years of sweat equity, working ten to twelve hours daily to get the restaurant to where it was in March 2005, only to have Appellants breach their promise. Defendants likely would have had to hire

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[16] *See Entergy Arkansas, Inc. v. Nebraska*, 226 F.Supp.2d 1047, 1152 (D.Neb.,2002).

[17] *Id.* (citing *Restatement* § 344(b) (emphasis added)

[18] *Entergy Arkansas*, 226 F.Supp.2d at 1152.; *See also*, Comment a to Restatement (Second) Contracts § 344. Accord *Lutz v. Sortwell,* No. D055792, 2011 WL 3241626 (Cal. Dist. Ct. App. July 29, 2011) (unpublished) (Appellate Court upheld jury award for property manager based upon "sweat equity" damages after property owners breached property management agreement). *Black v. Redmond,* 709 Fed.Appx. 766 (5th Cir. 2017)(affirming jury award in the amount of $200,000 based in part upon plaintiff's sweat equity contributed to partnership for which he never received compensation); *Brown v. AXA RE,* No. 02 Civ. 10138 (LTS) AJ, 2004 WL 941959 (D.N.Y. May 3, 2004)(denying motion to dismiss plaintiff's complaint alleging tortious interference of contract based upon sweat equity damages put into making a movie which defendant insurance company reneged on commitment to insure); *Thayer v. Dial Indus. Sales, Inc.,* 189 F.Supp.2d 81 (S.D.N.Y. 2002) (denying former employees request for contract damages against employer only because already compensated for his sweat equity).

and pay third parties thousands of dollars for the Plaintiffs' work. Defendants don't get to walk away and keep the benefits of the Plaintiffs' labor.

ii. Appellants' waived Barabus, Inc. arguments are without merit.

Appellants' claim:

> First, the Plaintiffs admit they did not spend the "$40,000 in repairs; $20,000 in new equipment; and over $50,000 in advertising," as Vooys conceded at trial that Barabus, Inc. made **all** of these alleged expenditures. JA 1120. Moreover, Barabus sold food and drinks, which it then used to pay all of these expenses, as noted by its tax returns (JA765, 772, and 777), so these funds did not come from the Plaintiffs.

(Response Brief at 19.) These assertions are incorrect. First, the claim that "Vooys conceded at trial that Barabus, Inc. made all of these alleged expenditures" is wrong. Defendants cite JA1120 for this bold assertion, but Vooys made no such "admission". Instead, Vooys responded to questions regarding one element of claimed damages. (**JA1120**.) Further, Defendants' assertion that "Barabus sold food and drinks, which it then used to pay all these expenses, as noted by its tax returns" is also incorrect.

JA765 is part of the 2003 tax return of Barabus, Inc,[19] which demonstrates that Cane Bay Beach Bar, a restaurant in 2003, had gross receipts of $38, 101. (**JA765** at ln 1a). Merriam -Webster defines Gross receipts as "the total amount of value in money or other consideration received by a taxpayer in a given period for

[19] Vooys and Gerace occupied the Cane Bay Beach Bar from August 2003-June 2005.

goods sold or services performed."[20] The next line item is cost of goods sold, i.e., the cost of the food and alcohol sold at the restaurant was $30, 481.00. This has nothing to do with money expended for improvements and repairs, which JA765 indicates that Barabus, Inc. listed as $0. So, the improvements and advertising expenditures that Vooys testified to were paid for with Vooys and Gerace's own money, because they never made any claims on Barabus, Inc.'s tax returns for improvements or advertising in 2003.

JA772 is the 2004 tax return of Barabus, Inc., where Vooys and Gerace indicated a gross profit (sales of food and alcohol minus cost of the goods sold) of $48, 198 (**JA772.**) From that gross profit, Vooys and Gerace spent $18,000 in rent paid to Defendants and $28, 314 in utility bills. Barabus, Inc. had a net profit of $1, 884. (**JA772**) So, any improvements made in 2004 and any advertising would have been money that Vooys and Gerace had to pay out of their own pocket because Barabus, Inc. had no money to do so.

4. Defamation

[20] "Gross receipts." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/gross%20receipts. (Last Visited, February 19, 2023).

This Court clarified that a statement is only an opinion if it is so "imprecise or subjective that it is not capable of being proved true or false".[21] However, the statements made that Plaintiffs were always late with rent, did not know how to run a business, and had drugs on the property, were defamation *per se* and could be proven true or false.

Defendants have provided a laundry list of items that they claim "proves" that the statements made by Mosler and Hanley were true. (Response Brief at 22-23.) What Defendants failed to do at trial and now on appeal is point to any evidence, expert or otherwise, that demonstrates that even if true, the laundry list of issues they identified equals Plaintiffs did not know how to run a business. Because even if it is true that the Plaintiffs' "business in fact lost money every year according to their own tax returns.", that does not mean that Plaintiffs did not know how to run a business.

The same tax returns that Appellants rely upon to purportedly demonstrate that Barabus, Inc. made expenditures, not Plaintiffs, show that in 2003 when

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[21] *Simpson v. Andrew L. Capdeville, P.C.*, 64 V.I. 477, 487 (2016) quoting *Farah v. Esquire Magazine,* 736 F.3d 528, 534–35 (D.C.Cir.2013) ("Where a statement is so imprecise or subjective that it is not capable of being proved true or false, it is not actionable in defamation."). Accord *Mills-Williams v. Mapp*, 67 V.I. 574, 588 (2017)(citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.").

Plaintiffs first took over the restaurant, they made gross sales of $38, 101. (**JA765.**) In 2004, despite closing for two months because of a fire, Plaintiffs made gross sales of $168,584. (**JA772.**) In 2005, even though they only operated for about six months until the Defendants wrongly evicted them, the Plaintiffs had gross sales of $92, 418.00. (**JA777**.) The evidence the jury received showed that the Plaintiffs did know how to run a business.

Additionally, John Reed, a bartender at Cane Bay Beach Bar, testified as follows:

> Did you hear Warren Mosler on the Roger Morgan radio show?
> A. Yeah.
> Q. And what did you hear --
> A. Yes.
> Q. -- Mr. Mosler say about my clients as far as --
> A. Well, it seemed like it was --
> Q. Excuse me. What did you hear him say about my
> clients as far as paying rent or being bad tenants?
> A. Well, if I recall, on the radio, he was saying
> that they didn't pay rent, that they -- supposedly loud parties were there. I think they even mentioned something about drugs or something in that area on the radio. But it was always negative. And every day we had to worry about him coming on the radio again or vice versa so...
> Q. And how long did that negative talk go on?

> A. Well, the radio thing went on it seemed like for days. The negative talk just never stopped....

(**JA1344-45**.) The jury received direct evidence of defamatory statements, and the Superior Court's order vacating the jury verdict as to defamation was an error.

5. Punitive Damages

There can be no dispute that defamation and fraud claims can support a jury verdict of punitive damages. The jury found both defamation and intentional misrepresentation. And unlike the defendants in *Espersen*, Appellants never argued before the Superior Court or this Court that the punitive damages award was constitutionally impermissible. Therefore, the jury was entitled to great deference in its role as a fact-finder on the issue of punitive damages, and the Superior Court could not sit as the seventh juror and vacate the jury award.

An error in the verdict form that benefitted Appellants caused the jury only to award punitive damages to Vooys. A party, such as Appellants, may not complain about an issue favorable to them or injurious only to the adverse party (Appellees). It also could not serve as the basis for the Superior Court to vacate the award.[22]

[22] 16A Standard Pennsylvania Practice 2d § 91:25, Appellate review where error benefits party asserting it.

C. CONCLUSION

The Superior Court's order should be reversed and remanded with instructions to reinstate the jury's verdict in all respects.

RESPECTFULLY SUBMITTED,

LEE J. ROHN AND ASSOCIATES, LLC
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DATED: February 24, 2023

BY: */s/ Rhea R. Lawrence*

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CERTIFICATE OF SUPREME COURT BAR MEMBERSHIP

The undersigned hereby certifies that pursuant to Virgin Islands Rule of Appellate Procedure 22(l) she is a member of the bar of the Supreme Court of the Virgin Islands.

DATED: February 24, 2023

BY: */s/ Rhea R. Lawrence*

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned hereby certifies that **APPELLEES' REPLY BRIEF** complies with Virgin Islands Rule of Appellate Procedure 22(g) and contains 3, 789 words.

DATED: February 24, 2023

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on February 24, 2023, I electronically filed the foregoing with the Clerk of the court using the VIJEFS system, which will send a notification of such filing (NEF) to the following:

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