APPEAL NO. 2022-0049

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

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

v.

JOSEPH GERACE AND VICTORIA VOOYS d/b/a CANE BAY BEACH BAR,
Appellees.

On Appeal from the Superior Court of the Virgin Islands,
Division of St. Croix, No. 2005 -CV-00368

BRIEF OF APPELLANTS

Counsel for Appellants

JOEL H. HOLT
2132 COMPANY STREET
CHRISTIANSTED, ST. CROIX
U.S. VIRGIN ISLANDS, 00820
T: (340) 773-8709
holtvi@aol.com
joelholtpc@gmail.com

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JURISDICTION

The Superior Court had jurisdiction under 4 V.I.C. §76. JA161 After a jury trial, Judgment was entered on September 12, 2022. JA60 A notice of appeal was filed on September 27th. JA1 This Court has appellate jurisdiction under 4 V.I.C. §32(a).

ISSUE/STANDARD OF REVIEW

I. Did the court err in denying Defendants' Rule 50(b) motion in Count VIII (Intentional Misrepresentation)?

II. Did the court err in denying Defendants' motion in limine re alleged racial remarks?

III. Did the court err in denying Defendants' Rule 59(a) new trial motion based on counsel's closing arguments?

Standard of Review:

Issue I-Defendants are entitled to judgment as a matter of law if this Court concludes that a reasonable jury could have only entered judgment in favor of Defendants, accepting Plaintiffs' evidence as true, including all reasonable inferences drawn therefrom. *Antilles v. Lembach*, 64 V.I. 400, 409 (2016).

Issue 2-Defendants are entitled to a new trial if the court abused its discretion in admitting irrelevant or highly prejudicial relevant evidence. *Alexander v. People of the Virgin Islands*, 60 V.I. 486, 496 (V.I. 2014).

Issue 3-Defendants are entitled to a new trial if opposing counsel's closing argument was improper and so highly prejudicial as to deny them a fair trial. *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656, 680-81 (2022)

STATEMENT OF THE CASE

Plaintiffs filed an 11-count complaint against Maria Bentley, David Bentley, CB3 Inc, Chrismos Cane Bay LLC, Warren Mosler and Chris Hanley on June 9, 2005. JA161 After David Bentley died, he was dismissed. JA126. Prior to trial, CB3 and Maria Bentley were dismissed. JA137 After a trial, the jury rendered a $320,000 verdict on multiple counts against the Defendants. JA54 Rule 50(b) and 59(a) post-trial motions were filed. JA372 The court denied the Rule 59(a) motion but granted the Rule 50 motion except on Count VIII (Intentional Misrepresentation). JA62 Judgment was entered for $100,000. JA60 Defendants appealed. JA1 The Defendants also posted a supersedeas bond. JA7. Plaintiffs then filed a cross-appeal. JA4

RELATED PROCEEDINGS

There are no pending related proceedings. There was a prior appeal in this case, which resulted in a remand, reported at 65 V.I. 289 (V.I. 2016).

STATEMENT OF FACTS

In 2003, Victoria Vooys attended culinary school in Arizona and met Joe Gerace. They searched the internet and found that a restaurant/bar on St. Croix

known as Cane Bay Beach Bar (CBBB) was for sale. Gerace came to St. Croix and negotiated its purchase for $80,000 (P-1, JA466)[1] from Maria Bentley. JA992-995 They knew before they moved to St. Croix that CBBB had no lease, with a monthly rent of $1500. JA996-998 They closed CBBB on August 1, 2002 as per the contract (P-1, JA466-69). JA997

On September 8, 2003, Chrismos Cane Bay, LLC ("Chrismos") was formed by Mosler and Hanley and bought a large property in Cane Bay, where CBBB was located (P-4, P-6, JA476-480).

Vooys and Gerace met Mosler and Hanley and expressed their desire to have a seven year lease. JA997-998, 1010-1011 Vooys testified that Mosler and Hanley said "that seemed, like, reasonable. We would work on that and we'd get one, you know. We'd talk more about it." JA999 When asked if there were any "conditions on getting a lease," Vooys said "they wanted to see us get up and running, wanted to see improvements, general clean-up, some repairs, paint the place, . . . " JA999-1000

Vooys described the work done to clean up CBBB. JA1000-1001 They received a proposed lease from in March of 2004, which Vooys said was a "terrible" lease, as it was only for 30 months, increased the rent, could not be assigned, had

[1] Plaintiffs' exhibits are referenced as P-_ with defense exhibits being D-_.

late fees, required the waiver of a jury trial, and had no obligation for the Landlord to make repairs. JA1008-1010 Vooys told Hanley the lease was terrible, saying he agreed to "work on a better one." JA1011

There was a fire at the restaurant in August of 2004, requiring it to close for two months. JA1013 They asked the landlord for help, as well as a lease, but were told that "we'd talk about it" after the repairs were made. JA1013-1015. Her counsel then asked the following question (JA1015):

> Q. And who was it that you told you that if you made the repairs on the kitchen, that he would give you a seven-year lease?

An objection was made as to this question being leading, that was overruled, resulting in Vooys answering "Mosler." JA1015. She then said the repairs were done to fix the fire damage at a cost of $15,000 to $20,000. JA1016

Vooys testified they received a second proposed lease in November of 2004. JA1016 It was similar to the first one, except that a corporation Gerace had formed, Barabus, Inc., was the named tenant and the late fees were removed, but the rent was higher. JA1012-1013 They took the lease to their attorney, but never heard back from him and did not sign it. JA1012-1013

Vooys admitted the rent payments were irregular and always late. JA1017-1024 The rent checks introduced into evidence confirmed this fact, with rent not being paid for months at a time (D-14, JA752-754)

Vooys testified that around March of 2005, Mosler began to complain about the rent being late. JA1025 She said Mosler came to CBBB in late March and told them that he did not like the direction CBBB was taking, as he wanted to turn it into "a white, middle-class restaurant" with someone else he had in mind, so he wanted them out. JA1025-1026. Vooys and Gerace said they called Hanley about Mosler's conversation, but after discussing the matter, they told Hanley they did not want to sell CBBB. JA1026-1027 She testified that a week later, Mosler and Hanley came to CBBB together and said they were not getting a lease due to the way it was being run, as it was dirty, but they did not want to leave. JA1027-1028. Vooys testified that they had finally figured out how to run a restaurant/bar and were "barely" on track to finally make a profit. JA1030-1031

Hanley then returned, saying they would be getting a lease, but only to help them sell CBBB to this new person. JA1031-1032 Vooys testified that a smear campaign then began in the media to get them out, including Mosler saying on TV that he was "getting rid" of them because they were always late on rent and did not know how to run a restaurant. JA1031-1034

On April 12, 2005, Vooys was served with a letter from Attorney Logan (P-10, JA482), which stated it was confirming their agreement to vacate the premises by April 30th, which she said was never agreed to. JA1036-1039 She took the letter to Attorney Rohn, who responded (P-14, JA483), saying there was no agreement to

vacate the premises and that her clients needed the promised "two-year lease." JA1039 Vooys testified that Rohn's reference to the two-year lease was an error, as they wanted a seven-year lease (JA1039), but she conceded this error was never corrected. JA1091-1092

Vooys testified about receiving an initial offer from James Jordan in May of 2005 to purchase CBBB for $50,000. JA1042-1044. Vooys then discussed a second offer from Jordan to buy CBBB for $30,000, which they accepted on June 17, 2005. JA1045-1046

Vooys testified that by this time they had spent over $40,000 in repairs, $20,000 for equipment and $50,000 for promotions and advertising. JA1049-1051 She then identified an exhibit that had multiple receipts (P-48, JA594), with a second exhibit (P-30, JA559) that summarized each item. JA1052

On cross-examination, Vooys said she and Gerace saw CBBB posted for sale by Maria Bentley on the internet in July of 2003 for $95,000. JA1066-1067 Gerace came to St. Croix and signed a contract to buy it for $80,000, with a closing then taking place on August 7th, of which $50,000 was paid at closing and a note was signed for the balance of $30,000, JA1066-1070 (D-3, JA728)**.** On August 12th, they formed a corporation, Barabus, Inc. JA1076-1077 (D-5, JA729). Vooys acknowledged that Chrismos was formed on September 7, 2003, by Mosler and

Hanley, which then took title to the property on September 8th. JA1079-1082 (DE-7, DE-8, JA445-449).

Vooys acknowledged that she knew CBBB had no lease before she came to St. Croix. JA1085 She testified that at some point thereafter they met with Mosler and Hanley, who promised them a seven-year lease on multiple occasions, although she conceded that in her interrogatory responses she only listed March of 2004 as the date when they fraudulently made a promise to give a lease for CBBB. JA1085-1090 (D-44, JA812).

She was then asked about the "receipts" for expenditures made to improve and clean up CBBB (P-48, JA594-715), as well as the list summarizing these items (P-30, JA559), which showed a total of approximately $25,000, broken down into these time periods (JA1100-1107):

- $4,240.96 spent between August, 2003, and August, 2004, before the fire;
- $15,152.92 spent in August and September, 2004, to repair the fire damage;
- $5,515.19 spent between October, 2004, and June, 2005, after the fire.

Vooys admitted these receipts in 2005 included buying new grills, chairs and other items that really had nothing to do with repairs. JA1107-1109

Vooys also went over the tax returns for Barabus, Inc. (DE-15, DE16, DE17, JA765-783), which she and Gerace owned. JA1191 The return for 2003 showed no expenses for repairs and maintenance in 2003, although there are other deductions,

such as an invoice sent to Barabus for trash removal, which she admitted she had included her list of "repairs" for the restaurant. JA1114-1120.

Vooys then admitted that Barabus had paid for all of CBBB's improvements and repairs. JA1120. She also went over all of the tax returns for Barabus from 2003 to 2005, which showed both income and expenses for Barabus, including deductions for the items in D-48. JA1120-1130.

Vooys acknowledged that they had a $50,000 offer from James Jordan in May of 2005 to purchase CBBB, with a proposed closing of June 1st, but after further negotiations, they signed a contract to sell it for $30,000 on June 17th, but without agreeing to sell the tradename CBBB. JA1167-1172 The June 17th contract was contingent on Jordan getting a written lease from Chrismos, with terms acceptable to Jordan, which he was able to secure on June 29th, with the closing taking place at the end of June. JA1172-1174

Vooys acknowledged that they had routinely been behind in rent. JA1017-1024 She claimed the rent checks showed they paid the rent in full before they left, although she ultimately admitted that she was relying on a notation on one check (D-14, JA756) for a "Plumber Bills" that she had added to the bottom of the check after it was deposited by Hanley and came back to her from the bank (JA1179-1181, 1185-1186, 1193-1194, 1201-1202), thereby admitting to tampering with the evidence.

Vooys testified that they were open in June of 2005. JA1109 After they left CBBB, they bought a nightclub in Christiansted for $30,000 (JA1073), the same amount they received from Jordan for CBBB, which they sold for $99,000 after four or five years. JA1187-1188 She subsequently left St. Croix after she split up with Gerace. JA1190

Gerace also testified at trial, stating that he heard Vooys' testimony and agreed with it. JA1263 He knew when he came to St. Croix that CBBB did not have a lease. JA1285 He agreed that the first time they met Mosler and Hanley was after CBBB was open. JA1286-1287 He acknowledged that his interrogatory responses stated that Mosler and Hanley made a misrepresentation about giving them a seven-year lease in March of 2004 (D-43, JA807), but not before or after that. JA1287-1289 He agreed they were given a lease in March of 2004, which he was not happy about due to (1) the rent, (2) the lease term and (3) the tenant, as it was in his name rather than his corporation, Barabus. JA1289-1291 He gave this draft to his lawyer, but he was unaware of any further lease negotiations. JA1291-1292

He then went over the letters exchanged in April of 2005 between Attorney Rohn and Attorney Logan, which were copied to him and referenced a promised two-year lease, which he never suggested was inaccurate. JA 1293-1294 He agreed that Mosler and Hanley then took no further action to evict them from the premises after receiving Rohn's April 20th letter. JA1294

The Plaintiffs called several other witnesses. Garry Anthony testified that he was a patron of CBBB when Gerace/Vooys operated it. He observed them replacing ice chests with real coolers at the bar. JA978-979. He said they increased the clientele, that the food was good and the place was clean. JA981-985. He attended the full moon parties, which had reggae music. JA982. As he lived in the Cane Bay area, he still attended full moon parties after they left, which still had reggae music years later. JA987-988

John Woodson testified that he lived in the Cane Bay area from 1997 to 2011, attending full moon parties at CBBB when Vooys/ Gerace owned it, where reggae musci was played. JA1212 He also called the Roger Morgan show to say he thought the concerns about their full moon parties were not the noise, but the type of clientele and music. JA1216 However, he admitted he never heard Mosler or Hanley say anything on the radio (JA1219) and that reggae music continued to be played at CBBB long after Vooys and Gerace left. JA1220

Michael Belcheff met Vooys and Gerace when they took over CBBB, observing them making improvements, like painting, putting in a new sound system, installing new rope lighting and other things, which he helped them do. JA1224-1225 He was friends with Vooys and Gerace and attended the full moon parties, which attracted a mixed clientele. JA1226-1227 He testified that he heard Mosler say on the radio that they were late in paying the rent. JA1230-1231. He also stated

that the clientele at the full moon parties did **not** change after Vooys and Gerace left CBBB. JA1231-1232.

Donna Christiansen testified that she patronized CBBB when Vooys and Gerace owned it and said it appeared to be clean. JA1236

Edward Gerace testified, stating he came to St. Croix with his brother, Joe Gerace, to work as a cook and do maintenance. JA1240-1241 When he arrived, he saw that the place needed painting and other maintenance issues, like nails coming out of the floorboards. JA1242 He did pressure washing and some plumbing maintenance, such as replacing the kitchen sink, the bathroom sink and grease trap. JA1242-1248 Indeed, the problem with the grease trap started the week of their arrival on August 8th, 2003. JA1256-1257 He also talked about the fire damage in 2004, which he said was due to grease in the hood above the stove, which has been there when they took over CBBB in August of 2003. JA1249-1250, JA1257-1258

John Reed was a bartender at CBBB from 1995 to 2005. JA1229-1331 He testified that there were full moon parties prior to when Gerace purchased CBBB. JA1331 He testified that Vooys and Gerace fixed a list of items after they took over, which he thought they were doing in order to get a lease (JA1333-1334), but he never saw Mosler or Hanley give them any such list. JA1348 He said he attended multiple meetings in early 2005 with Jordan and Mosler, where he was told Jordan planned

to take over CBBB, and in fact he worked for Jordan after Jordan bought CBBB JA1337-1342

Reed said he went to CBBB at the end of May of 2005 and found that Vooys and Gerace were gone (JA1356), which directly contradicted Vooys' prior sworn testimony that they kept CBBB open in June. JA1109

Vooys then took the stand again to go over a handwritten summary of gross receipts for CBBB, which was marked as D-46 (JA582), that she said were accurate. JA1361-1362 On cross, she acknowledged these were Barabus' gross receipts. JA1362-1363 She also admitted that she had previously testified under oath that CBBB was open in June of 2005 (JA1109), but since this list showed no gross receipts for that month, CBBB must have been closed down, as Reed had indicated it was. JA1364-1365

After the Plaintiffs rested and Rule 50 motions were made, the Defendants called several witnesses. Hanley testified about forming Chrismos and buying the Cane Bay property in 2003. JA1435-1437 He and Mosler met with Gerace and Vooys, who were already operating CBBB, before the closing and told them they would talk about a lease after they saw how things went, but he denied ever promising them a seven-year lease. JA1437-1438 In March of 2004 he had a written two-year lease delivered to them, but he never heard back from them. JA1438-1439 He testified that they requested a longer lease in the March, 2005, meeting because

they had a buyer for the business and wanted to close by the end of April. JA1441, 1443-1444, JA1514-1515

He then discussed the letters exchanged in April of 2005 and said he and Mosler did nothing further after being told by Rohn that her clients were not leaving the premises, other than to accommodate them by giving Jordan a lease in late June to help facilitate the sale of CBBB pursuant to the contract Vooys and Gerace had with Jordan. JA1445-1447, JA695

He also talked about how Vooys and Gerace were always late in paying their rent, bouncing one large check for back rent. JA1513-1514

James Jordan appeared by video deposition. He testified that he was first a customer of CBBB before discussing whether to buy it with Vooys and Gerace, who told him it was for sale. JA2000-2001 After speaking with them, he sent Mosler an email on May 1, 2005 (D-27, JA785), asking about getting a lease for CBBB in order to complete the purchase from Vooys/Gerace, as he was not going to buy CBBB without a written lease. JA2002-2003 His email noted that Gerace/Vooys had already agreed to accept $50,000 for CBBB and to close by June 1st (D-27, JA785).

He sent a second email to Mosler on May 30th (D-28A, JA787) updating Mosler on his efforts to buy CBBB, which were now in limbo as Vooys/Gerace had rejected all of his offers, despite his belief they had previously agreed to sell it for $50,000, although he understood they were still moving out. JA2006-2011 The email

chain also noted that once he arrived on St. Croix in early June, Vooys/Gerace were moving everything out of CBBB (D-29A, JA791).

Jordan subsequently reached a written agreement with Vooys and Gerace to buy CBBB for $30,000, contingent on his getting a lease from Chrismos, which he subsequently obtained and then closed the purchase of CBBB. JA2014-2018 These documents reflecting the contract to sell and the subsequent closing documents were all trial exhibits (P-21 through P-23, JA494-423). He explained that the price dropped from $50,000 to $30,000 because they had removed everything from CBBB JA2040-2041

Jordan ended his testimony by saying he sold the business later on for $30,000 or so. JA2064

Warren Molser testified last, stating that he never promised Vooys and Gerace a seven year lease, but did offer them a two-year lease that they never responded to. JA1536-1537 He also thought they said at the March, 2005, meeting that they were leaving CBBB, which is why he had a letter sent to verify this statement, but that he did nothing further after Rohn told him her clients were not leaving. JA1537-1540 He denied ever telling them that he wanted a "white, middle-class restaurant." JA1541 He also testified that he agreed with the testimony given by Jordan. JA1541-1544

The Plaintiffs then called a rebuttal witness, Alexandra Myers, who was permitted to testify by the court (after a lengthy discussion with counsel) for the sole purpose of impeachment of Jordan's testimony that he sold the business for $30,000. JA1575-1581 Myers testified that she paid Jordan in the "neighborhood" of $175,000 for CBBB, although she was unsure of the exact figure. JA1586

ARGUMENT

I. The court erred in denying the Rule 50(b) motion on Count VIII (Intentional Misrepresentation).

The Defendants argued that there was insufficient evidence to support the jury's findings on the elements needed to support for a claim for intentional misrepresentation. JA372-380, JA444-447. These issues were raised during the trial (JA1371-1420, JA1597-1618), as well in their Rule 50 motion (JA372), so they were preserved for appeal. In rejecting this argument, the court held that Count VIII was a tort claim for intentional misrepresentation, noting the elements of this tort as follows (JA91-92):

> The elements of an intentional misrepresentation claim are (1) that a material fact, opinion intention, or law was misrepresented; (2) that the person making the misrepresentation knew or had reason to believe that it was false (3) that the misrepresentation was made for the purpose of inducing another to act or refrain from acting, (4) that the other person justifiably relied on the misrepresentation; and (5) that the other person suffered a pecuniary loss. (Footnote omitted).

The jury was instructed on these elements. JA2100 There are several reasons why the court's Rule 50 findings are not supported by the evidence.

A. The Alleged Misrepresentation

In discussing the breach of contract claims, the court included this quote from *Engle v. Heier*, 173 N.W. 2d 454, 456 (S.D. 1970):

> To be binding, an agreement for a lease must be certain as to the terms of the future lease. If it appears that any of the terms of the future lease are left open to be settled by future negotiation between the lessor and lessee "there is no complete agreement; the minds of the parties have not fully met . . . ." *Id.* (quoting *Cypert v. Holmes*, 299 P.2d 650, 651 (Ariz. 1956)).

The court then explained why the evidence showed there was never an agreement to enter into a lease, even if there had been a promise to give a seven-year lease, pointing out that the parties never agreed to multiple other key terms required to have a lease, like the amount of rent, whether there would be a right to renew the lease, who would do the repairs or whether the right to a jury would be waived. JA90-91 Indeed the court noted that Vooys and Gerace had rejected two other leases given to them for multiple reasons, not just because the seven-year term was missing, concluding that these facts led to one conclusion—there was never an agreement to enter into a lease since the essential lease terms were never resolved even if a seven-year lease had been promised. JA90-91

Notwithstanding this finding, the court held that there was sufficient evidence to support the intentional misrepresentation claim, stating (JA93):

> There is no dispute in the testimony that Vooys and Gerace wanted a long term lease seven years according to them. What is disputed is whether Mosler and Hanley promised to give them a seven year lease. The Court concluded above that the evidence does not support finding of a promise between the parties. But the evidence is undisputed that Vooys and Gerace asked for a long term lease, that Mosler and Hanley represented that it was a reasonable request, and they would talk more about it, but Vooys and Gerace had to make repairs to the Beach Bar first.

It is disputed whether there was ever a promise to give a seven-year lease.[2] However, even assuming there was, a promise to give a seven-year lease cannot constitute a

[2] Vooys testified that after the fire at CBBB, they asked the landlord to give them a seven-year lease, but was simply told that "we'd talk about it" after the repairs were made. JA1013-1014. She was then asked (JA1015):

> Q. And who was it that you told you that if you made the repairs on the kitchen, that he would give you a seven-year lease?

An objection was made to this leading question (JA1015), which was overruled, resulting in Vooys answering "Mosler." JA1015. While Vooys had suggested similar promises were made in 2003, this response is the most direct testimony that such a representation was allegedly made and then relied upon. However, this was clearly a leading question, as it suggested that either Mosler or Hanley had promised a seven-year lease if such repairs were made. V.I.R. Evid. 611(c) prohibits leading questions on direct examination. The notes to that rule reference FRE 611, whose advisory notes state as to subsection (c) as follows:

> The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable.

Thus, the jury should never have been permitted to hear this response. By itself, this error is probably insufficient to warrant reversal on appeal under the harmless error provisions of V.I.R. App. 4(i), so it was not raised as a separate issue, but it demonstrates the weakness of the evidence regarding this alleged promise.

misrepresentation by itself, as a lease has other critical terms aside from just the length of the lease, as noted. Indeed, Vooys and Gerace repeatedly emphasized this point, insisting on other specific lease provisions as well (lower rent, options to renew, landlord to do certain repairs, no waiver of a jury trial, etc.).

Thus, as there was never a promise to give Vooys and Gerace a lease with all of the terms they deemed acceptable, there was no representation here they have could reasonably relied upon, even if one term--a seven-year lease--had been promised.

B. Pecuniary Losses

Also missing is any evidence that the Plaintiffs "suffered a pecuniary loss." In this regard, the court instructed the jury as follows on this element as part of the intentional misrepresentation instruction (JA2100):

> Pecuniary loss as it relates to this case means any damage that can be measured or calculated monetarily.

The court made these two findings in its Rule 50 opinion regarding this element (JA94):

> Clearly, Vooys and Gerace suffered pecuniary loss when they repeatedly made repairs to a building owned by Chrismos **and** were then deprived of the benefits and use of those improvements. (Emphasis added)

However, neither of these two findings are supported by the evidence.

As for the first part of this finding, the Plaintiffs claimed they spent substantial monies for repairs and new equipment for CBBB, as shown by their receipts for "money spent on equipment, tools, repairs, services, and hardware to improve and clean and care for the restaurant/bar." P-48, P-30, JA594, JA559 However, these expenditures do not show any pecuniary losses by Vooys and Gerace, **as they conceded at trial that Barabus paid for all of these expenditures**. JA1120. Moreover, Barabus sold food and drinks to pay for its operational expenses, as noted by its tax returns (Exhibits 15-17, JA765-783), so these expenditures were from payments collected from Barabus' customers.

In short, Barabus' ordinary business expenses cannot be claimed by the Plaintiffs as pecuniary losses they personally suffered, as those operational expenditures were made by Barabus as a cost of operating its business, which used its own revenues to pay these expenses.

As for the second part of the court's statement that Vooys and Gerace "were then deprived of the benefits and use of those improvements," there is no evidence to support this finding either, as they voluntarily sold their business to Jordan. Indeed, it is undisputed that Mosler and Hanley took no action to evict them after Attorney Rohn told them on April 20, 2005, that her clients did not want to leave CBBB, as Gerace conceded. JA1294

C. There is no evidence any statement was knowingly false when made.

Finally, there was no evidence that supported a finding that the alleged promises of a seven-year lease were knowingly false when made, as the court simply tried to dictate this result in its Rule 50 opinion (JA93):

> Viewing Vooys testimony in the light most favorable to Plaintiffs, Mosler and Hanley, on behalf Chrismos, represented that they would give, or at least consider giving Vooys and Gerace a long term lease, knowing they had no intention to honor that representation.

This conclusory assertion does not cite any specific evidence to support its finding that Molser and Hanley had no intention of ever giving Vooys and Gerace a seven-year lease, much less one with all of the clauses they were demanding when these discussions took place in 2003 and 2004.

In short, there is no credible evidence to support a finding that Chrismos never intended to give them an acceptable lease. Indeed, to the contrary, Chrismos did give them two draft leases that Vooys and Gerace admitted they never tried to negotiate further.

D. Summary as to Count VIII

In summary, reversal is required if even one element of a claim for intentional misrepresentation is lacking factual support. Here, it is respectfully submitted that most, if not all, of the required elements are not supported by the trial evidence, warranting reversal as a matter of law.

II. The court erred in denying Defendants' Motion To Exclude "Racial Statements"

This Court need not address this issue if it vacates the Judgment and denies the cross-appeal. Prior to trial, Defendants filed a motion in limine to exclude a racial statements Mosler allegedly had made to Vooys and Gerace in March of 2005 that he wanted to turn CBBB into a "white, middle class restaurant." JA195 Thus, this issue was preserved below. [3]

While it was denied this statement was ever made, it should have been excluded as being irrelevant under V.I.R. Evid. 401, or if relevant, excluded under V.I.R. Evid. 403, as its probative value was substantially outweighed by a danger of unfair prejudice.

Gerace/Vooys argued in their opposition memorandum that this statement was relevant to their fraud/misrepresentation claim, as it showed the "motive" of the Chrismos parties in wanting them out of CBBB. JA211-281 The court agreed, finding this evidence admissible to show motive, citing V.I.R.Evid. 404(b). JA119

At the outset, it must be noted that Vooys testified at trial that this statement was made by Mosler in March of 2005 (JA201), which is **after all of the**

[3] The Complaint attributed this statement to Hanley, not Mosler. JA161-165 (¶26). The JFPTO then changed this assertion, claiming Mosler (not Hanley) made these statements on two separate occasions in March of 2005. JA129, 134 At trial, Vooys claimed Molser allegedly making this statement once, in early March of 2005. JA201

improvements had been made to CBBB by Vooys and Gerace. Thus, it was conceded that this "racial" statement was made ***after*** the statements about a seven-year lease were allegedly made (and relied upon) in 2003 or 2004. As such, any "motive" for falsely inducing Vooys and Gerace to improve CBBB had to exist in 2004, as opposed to suddenly appearing in March of 2005 after all improvements were completed. Thus, these alleged "racial" statements should have been excluded as they were irrelevant to the misrepresentation/fraud issues being decided by the jury.[4]

Equally important, they should have been excluded under Rule 403 even if they had some remote relevance, as they certainly were unduly prejudicial. As noted by the V.I. Supreme Court in *Alexander v. People of the Virgin Islands*, 60 V.I. 486, 496 (V.I. 2014):

> In essence, evidence which tends to lure the trier of fact to arrive at a conclusion on an improper, emotional or other basis is unfairly prejudicial. *Id.* at 496. (Citations omitted).

[4] Over his counsel's strenuous objection, the court excluded Mosler's testimony as to his motive for wanting Vooys and Gerace to leave CBBB—that they had lied to him about their losses to excuse their late rent payments. JA922-927. In fact, Gerace stated in his deposition (cited in the limine motion) that he believed Mosler wanted them to leave because they had "deceived" him, not because of any "racial" motive. JA211-214 It was error to exclude Molser's testimony, preventing him from explaining why he came to CBBB in March of 2005. This error would require reversal if Mosler's mindset in March of 2005 were relevant to the misrepresentations allegedly made in 2003 or 2004, but it is not, just like the "racial" statement he allegedly made in March of 2005 is also not relevant to any such misrepresentations made in 2003 or 2004.

In this regard, these alleged racial statements—"white, middle class restaurant"--became the focus of Plaintiffs' case, especially in the closing argument where the phrase was repeated multiple times, including an assertion that Molser did not like 95% of CBBB's patrons being black. JA1838, 1842, 1843, 1845, 1854

In short, this racial statement, allegedly made only to Vooys by Mosler in March of 2005, falls within this rule of being unduly prejudicial, even if it had some marginal relevance. In short, it was an abuse of discretion to allow these alleged inflammatory statements to be heard by the jury.

III. The court erred in denying the Defendants' Rule 59(a) Motion re Attorney Rohn's Closing Arguments

This Court need not address this issue if it vacates the Judgment and denies the cross-appeal. However, if this Court finds that the jury's verdict was supported by the evidence, then this Court should still reverse this matter and order a new trial because of Plaintiffs' closing argument.

Rule 59(a)(1)(A)(vi) permits a court to order a new trial where the closing argument of counsel is so inflammatory as to undermine the fairness of the trial. As noted by the V.I. Supreme Court in *Frett v. People*, 66 V.I. 399, 424 (V.I. 2017);

> "[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence." (Citations Omitted).

It is conceded that the court has broad discretion in deciding when a mistrial is in order when counsel deviates from this "cardinal rule," a high burden to overcome on appeal, particularly because the jury is always instructed that counsel's closing is not evidence. *Frett, id.*

However, not every closing argument can be stamped "not unduly prejudicial" just because of this high burden on appeal and that instruction. It is respectfully submitted that the closing arguments made in this case crossed this line, warranting a new trial if the Judgment is not vacated.

A. Plaintiffs' Initial Closing Argument

Attorney Rohn's opening was inflammatory. As already noted, her closing argument referenced the "white middle class" mantra multiple times (JA1842, JA1843, JA1845, JA1854, JA1857), saying Mosler did not like the "local black clientele." JA1838 She also tried to anticipate arguments that defense counsel would make, actually testifying as a witness at one point regarding the her own statement demanding a two year lease in her April 20th letter, telling the jury as she read the contents of the letter verbatim (JA1850):

> "My clients have never agreed to vacate the premises on April 30th, 2005, and will not do so. It is their position that there was promise made to them to enter into a two-year lease"---**that's my mistake, I misunderstood because I had seen one of the leases**---"with . . . ." (Emphasis added)

However, her argument did not cross the line until she explained to the jury that they could use the testimony of Alexandra Meyers to calculate her clients' damages, stating that had her clients had a lease, they could have sold it like Jordan did to Meyers for $125,000, so that the failure to give them a lease caused them this loss as well. JA1856

Defendants immediately moved for a mistrial, as this evidence was only submitted for impeachment, not substantive purposes (JA1865):

> Your Honor, we move for a mistrial. You indicated that she could ask questions of the rebuttal witness for impeachment only, that she was not allowed to use that as proof of damages, and that's exactly what she did in her closing argument.

This court responded, stating (JA1866):

> Attorney Rohn, my specific--I made it specific, that you were not to mention a number. So the impeachment could not have been where you mentioned or I allowed you to say $125,000. That was not my ruling.

The court then took the matter under advisement, eventually ruling that it was not so egregious as to warrant a mistrial since he instructed the jury that counsel argument is not evidence. JA1932 However, he strongly warned Rohn to not make any further improper arguments. JA1932

B. Defendants' Closing Argument

While a full discussion of counsel's response is not in order, a brief summary explains why Rohn's reply argument also warrants a new trial. In this regard, the

jury had just heard Rohn's repetitive use of the term "white-middle class restaurant" in her closing. To try to overcome this inflammatory accusation, defense counsel went through the testimony to attack Vooys' credibility, whose testimony was the only direct evidence that the Defendants had promised them a seven year lease.

In this regard, counsel pointing out multiple discrepancies in Vooys' testimony. For example, it was pointed out that Vooys tampered with the evidence by adding language to a rent check after it came back from the bank. JA1915-1917 It was also pointed out that Vooys claimed under oath that CBBB was open in June, 2005, when it was not. JA1919-1920

Similarly, counsel stressed that his clients did not do anything illegal, as they did not evict the Plaintiffs or do anything else after receiving Rohn's April 20th letter (P-14, JA483), carefully explaining what transpired after that letter was received, as well as the applicable landlord-tenant law. JA1893-1907 In short, this point was a crucial part of the defense.

C. Plaintiffs' Reply Argument

To undermine defense counsel's closing, Rohn ignored the court's prior warning, making multiple improper arguments, all raised in the second motion for a mistrial (JA1956-1964), as well as in Defendants' Rule 59 motion. JA386-390 Each will be discussed along with the court's Rule 59 findings, made in support his denial of this second mistrial motion.

- Rohn claimed that Vooys added a key statement to the $2,000 rent check because Gerace wrote the check and "forget to make that notation." JA1936-1937. Rohn did so to try to negate the fact that Vooys had altered this check, tampering with the evidence. However, Vooys never testified at trial that Gerace "forgot to add the notation" **on the check she, not Gerace, signed** (JA1179-1181, 1185-1186, 1193-1194, 1201-1202), making Rohn's representation that Gerace "forgot to make the notation" false.

The court agreed in its Rule 59 ruling, finding Rohn's argument improper, as the facts showed Vooys, not Gerace, made this change. JA109 However, he found there was no prejudice because he instructed the jury it was their recollection of the facts that controls. JA109

- Rohn said her clients were intending to leave after they arrived since they did not have a lease, but stayed because they were told they would get a lease. JA1938-1939 Again, Rohn made this assertion to try to bolster her argument that specific promises were made and relied upon. However, neither Vooys nor Gerace ever testified that they were planning on leaving before they changed their mind due to being promised a lease. Indeed, Vooys specifically said they decided to take a "leap of faith and continue" even after learning they had no lease, a decision that was made before they had even met the Defendants (JA966-967). Thus, Rohn's statement was false.

The court again held that no such statements were made by Vooys or Gerace, so these "facts" were made up by Rohn. JA109 However, the court made no ruling about whether a mistrial was warranted as to this specific misrepresentation.

- Rohn said Reed testified that the restaurant was open in June. JA1947-1948 She made this statement to undermine defense counsel's assertion pointing out that Vooys's testimony was untruthful when she testified that CBBB was open in June. However, Reed testified that he came to the restaurant at the end of May and it was closed, with everybody gone. JA1356 Thus, Rohn's representation to the contrary was false regarding this key credibility issue, again unduly prejudicing the Defendants' closing argument.

The court went over Vooys' conflicting testimony on this point, but then held that Rohn's statement as to Reed's testimony was prejudicial (JA110), even though what she told the jury was directly contrary to Reed's testimony, which was unduly prejudicial on the Defendants' efforts to discredit Vooys.

- In response to defense counsel arguments that the Defendants did not take any action to evict the Plaintiffs, nor did they violate any eviction laws, Rohn asserted that the April 12th letter from Logan confirmed there was illegal activity, improperly asserting as follows (JA1949):

> So the idea that they -- that they didn't give them a notice to quit, that letter -- when you serve someone with a letter and tell them that you've got -- on April 12th, which you got it April 18th, and they tell you you have to get out or we're going to take your stuff and throw it away by April 30th, that's illegal. You can't do that. **So what they actually tried to do is to evict my clients without a notice to quit and without obeying the law**. That's what they actually did. **So yes, that's illegal activity**. (Emphasis added)

In addressing this second motion for a mistrial, the court found that Rohn's characterization of this letter and the applicable law was totally inaccurate, as the letter only sought to confirm they were leaving and asked to be corrected if they were not doing so. JA1963-1964 Notwithstanding this express finding made during the trial, the court held in its Rule 59 ruling that there was no prejudice in this admittedly improper argument because it subsequently instructed the jury on the definition of a notice to quit in order to terminate a tenancy. JA110-111

- Finally, Rohn asserted in her closing that ". . . . if indeed they wanted to prove that they didn't say those things on Mr. Morgan's show, it would be they who would bring Mr. Morgan and they did not." JA1951 She made this argument

> because it was pointed out by defense counsel in his closing that the Plaintiffs had not produced Morgan as a witness as promised at the outset of the trial. However, it is improper to make this argument, as it is not the Defendants' burden to show they did not say something---it is the Plaintiffs burden to show they did.

While the court agreed (again) that this argument was improper, it held it was not prejudicial since the court instructed the jury on the burden of proof, which guides their deliberations, not the argument of counsel. JA111

In short, these rebuttal arguments were not based on any reasonable inferences that could be drawn from the evidence, but on clear fabrications of the evidence. Indeed, as noted, the court found each of these rebuttal argument by Rohn to be improper. This conduct was particularly egregious since the court had already admonished Rohn for using impeachment testimony as substantive evidence in closing argument, stating (JA1932):

> If there is another instance like that, I will review the record and if I find it is cumulative, the Court will find it's egregious and I will declare a mistrial.

Notwithstanding the fact that counsel's subsequent improper statements were cumulative, the court simply found they were not so prejudicial as to warrant a mistrial, stating (JA112-113):

> Courts "assume the juries for the most part understand and faithfully follow instructions." (Citation omitted)

Thus, the court reasoned that while counsel's conduct was "certainly far from laudable," they "did not undermine the fairness of the trial" since he had instructed the jury that counsel's arguments are not evidence. JA113

As noted at the outset of this section, the trial court is given broad discretion in deciding when closing argument is so improper as to warrant a mistrial. Here the court found it was not since he had instructed the jury on the applicable law, including telling them to rely upon their own recollection, since counsel's argument is not evidence. However, if such instructions were all that was needed to justify an argument that violated the "cardinal rule" that "counsel must confine comments to evidence in the record and to reasonable inferences from that evidence," then Rule 59 would not be needed.

In this case, Rohn's closing arguments violated this "cardinal rule." They were unduly prejudicial and improper, making it impossible to cure by simply giving standard instructions to the jury. Indeed, they were made after her multiple inflammatory references to the "white, middle class" statement. Thus, it is respectfully submitted that they crossed the line, making the court's denial of mistrial an abuse of discretion, warranting a new trial if the Judgment on Count VIII is not vacated.

CONCLUSION

Defendants request this Court to dismiss Count VIII with prejudice. Alternatively, if this Court finds that Count VIII was supported by the evidence, it should still reverse this matter and order a new trial based on (1) the improper admission of the racial remarks as well as (2) counsel's improper closing arguments.

Dated: November 2, 2022

/s/ Joel H. Holt
Joel H. Holt, V.I. Bar #6
2132 Company Street
Christiansted, St. Croix
USVI, 00820
T: (3400 773-8709
F: 340-773-8677
holtvi@aol.com

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that Joel H. Holt is a member in good standing of the Supreme Court of the Virgin Islands and the Virgin Islands Bar.

Dated: November 2, 2022 */s/ Joel H. Holt*

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-face, type-volume, type-style requirements set forth in the Supreme Court Rules including 7800 word limit in Rule 22(f), as this brief has 7,521 words, excluding the table of contents, table of authorities, signature block and certifications.

Dated: November 2, 2022 */s/ Joel H. Holt*

CERTIFICATION OF VIRUS CHECK

I HEREBY CERTIFY that a virus check was performed by Joel Holt and no viruses were detected.

Dated: November 2, 2022 */s/ Joel H. Holt*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2022, I caused a true copy of the foregoing Brief to be served by this Court's electronic filing system (as well as seven paper copies conventionally filed with the Supreme Court) along with two paper copies on counsel:

Lee J. Rohn, Esq.
Rhea Lawrence, Esq.
Lee J. Rohn & Ass.
1101 King Street, Suite 2
Christiansted, VI 00820-4909
lee@rohnlaw.com
rhea@rohnlaw.com
info@rohnlaw.com

/s/ Joel H. Holt