

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

GUARDIAN INSURANCE COMPANY,) **S. Ct. Civ. No. 2018-0047**
Appellant/Plaintiff,) Re: Super. Ct. Civ. No. 189/2008 (STT)
)
v.)
)
WARREN KNIGHT, Administrator of the)
Estate of Valerie Knight-David, EUSTON)
DAVID, JESSICA GRELL, MYRTLE)
KNIGHT, and E.D. PLUMBING)
CONTRACTORS, INC.,)
Appellees/Defendants.)
_____)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Judge Michael C. Dunston

Considered: October 13, 2020
Filed: November __, 2021

Cite as: 2021 VI 20

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

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Attorney for Appellees Euston David and E.D. Plumbing Contractors, Inc.

OPINION OF THE COURT

CABRET, Associate Justice.

¶1 Appellant Guardian Insurance Company (“Guardian”) appeals from the Superior Court’s June 14, 2018, judgment in favor of Guardian and against the Estate of Valerie Knight-David in the amount of \$696,825.20, arguing that the jury’s verdict was “clearly erroneous” insofar as it failed to assign any liability to the other remaining appellees—Myrtle Knight, Jessica Grell,¹ Euston David, and E.D. Plumbing Contractors, Inc. Because Guardian failed to present this argument to the trial court and has, more generally, failed to identify any error committed by the Superior Court, we conclude that Guardian’s sole argument on appeal is waived. We therefore affirm the judgment of the Superior Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 Guardian is an insurance company with a long history of issuing policies to customers in the Virgin Islands. (Joint Appendix 809.) From 1996 until 2006, Valerie Knight-David d/b/a Val’s Insurance, operated under an insurance brokerage agreement with Guardian to act as a licensed insurance broker and as agent of prospective customers seeking insurance from Guardian. (J.A. 1586-1589.) On or about August 23, 2006, Knight-David fell into a coma, and she passed away on September 1, 2006. (J.A. 598.) For several months following Knight-David’s death, the Agency – operated by Knight-David’s staff, including appellees Knight, Grell, and David – continued to conduct business and issue new insurance policies. Grell testified that Guardian directed the staff to “continue with business as usual” after Knight-David’s passing (JA 702-703),

¹ Jessica Grell has neither appeared nor filed any brief in this appeal.

and Guardian's Executive Vice President, Octavio Estrada, testified that Guardian accepted these policies and applications without objection. (JA 1005.)

¶3 On April 18, 2008, Guardian filed a complaint in the Superior Court alleging, among other things, that between 2003 and 2006, Valerie Knight-David converted and embezzled \$696,825.20 in insurance premiums that were collected by the Agency from customers but never remitted to Guardian as required by the brokerage agreement between the parties. (J.A. 34.) Additionally, Guardian alleged that appellees Knight, Grell, David, and E.D. Plumbing Contractors, Inc. aided and abetted Knight-David's conversion and embezzlement of the funds, and alternatively, that all of the appellees engaged in a conspiracy to achieve that end.

¶4 Over the course of a five-day jury trial, the jury heard evidence, including testimony from the parties and other witnesses. In proving its case, Guardian relied primarily upon the report of the Division of Banking and Insurance which concluded, upon examination, that from January 1, 2003, through November 9, 2006, Val's Insurance Agency collected and wrongfully withheld from Guardian \$696,825.20 worth of premiums from 1,430 customers. (J.A. 1534, et seq.)

¶5 At the conclusion of the trial, by special verdict, the jury found the Estate of Valerie Knight-David liable for converting and embezzling \$696,825.20 rightfully owed to Guardian, but found that the remaining appellees were not liable, either for aiding and abetting Knight-David's tortious conduct, or for engaging in a conspiracy to accomplish the same. (J.A. 1519-1521.) Subsequently, the Superior Court entered judgment for the same amount in favor of Guardian and against the Estate of Knight-David and dismissed Guardian's claims against the remaining appellees with prejudice. The Estate of Knight-David timely filed its notice of appeal, and Guardian timely filed its notice of cross-appeal. However, the Estate subsequently moved to dismiss its appeal, and by Order entered March 27, 2019, this Court dismissed the appeal brought by the Estate and directed

the Clerk of the Court to re-designate Guardian as appellant in this matter and re-designate all other parties as appellees.

II. JURISDICTION

¶6 This Court may not consider the merits of an appeal unless it first determines that it has jurisdiction over the matter. *Virgin Islands Gov't Hosps. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276, 279 (V.I. 2008). Generally, this Court may only hear an appeal from a final judgment, which is defined as “one that ends the litigation on the merits and leaves nothing to do but execute the judgment.” *In re Joseph*, 65 V.I. 217, 222 (V.I. 2016) (citations omitted). Because the Superior Court’s June 14, 2018, judgment conclusively adjudicated all disputes between the parties, it is a final order within the meaning of 4 V.I.C. § 32(a). Generally, we exercise plenary review over the trial court's application of law while we review its findings of fact for clear error. *Slack v. Slack*, 69 V.I. 567, 570-71 (V.I. 2018).

III. DISCUSSION

¶7 On appeal, Guardian argues that the jury erred in failing to “find by a preponderance of the evidence that Guardian Insurance Company suffered damages as a proximate result of a conspiracy” between appellees Knight, Grell, David, and E.D. Plumbing Contractors, Inc. to convert or embezzle at least \$4,987. Specifically, Guardian asserts that because the jury found that Guardian had suffered \$696,825.20 in damages, and because the \$696,825.20 figure – taken from the Division of Banking and Insurance report – included \$4,987 that was converted or embezzled after Valerie Knight-David fell into a coma and ceased working, the jury could not have rationally concluded that Knight-David was solely responsible for the entire amount of damages. Rather, according to Guardian, the jury was logically required to conclude that the remaining appellees engaged in a civil conspiracy to convert or embezzle at least \$4,987 following

Knight-David's incapacity and death.² Thus, Guardian prays that this Court overturn the jury's verdict, reverse the judgment of the Superior Court, and enter judgment as a matter of law "finding that at least \$4,987.00 in damages were due to civil conspiracy by Grell, Knight, David, and E.D. Plumbing Contractors, Inc.," or, in the alternative, direct the Superior Court to hold a new trial on the civil conspiracy claims against appellees. (Appellant's Br. at 32.)

¶8 However, as appellee Knight points out in her brief on appeal, Guardian failed to present this argument to the Superior Court at any point during the proceedings below.³ (Knight's Br. at 6.) Indeed, Guardian's brief fails to assign or indicate even a single error committed by the Superior Court, asserting only that the *jury* erred in reaching its verdict. In effect, Guardian asks us to hold that the Superior Court erred in failing to enter judgment as a matter of law, *sua sponte*, based upon a finding that the jury lacked a legally sufficient evidentiary basis to support its verdict, despite Guardian's failure to timely raise any argument or motion asserting that claim. We decline to so hold.

¶9 We have previously held that "[t]o preserve a challenge to the sufficiency of the evidence for appeal, the appellant must: (1) move for judgment as a matter of law before the matter is submitted to the jury under V.I. R. Civ. P. 50(a), (2) renew the motion for judgment as a matter of law after judgment is entered pursuant to V.I. R. Civ. P. 50(b), and [where applicable] (3) amend

² Appellees David and E.D. Plumbing Contractors, Inc. assert additional errors in their respective briefs on appeal. However, neither David nor E.D. Plumbing Contractors, Inc. filed a notice of appeal in this action and therefore these issues are not properly before this Court. V.I. R. APP. P. 4.

³ In its reply brief, Guardian points to portions of the opening and closing arguments in which counsel mentioned that the conversion and embezzlement of funds continued after Valerie Knight-David fell into a coma and passed away. However, Guardian has failed to identify any portion of the record in which Guardian presented to the Superior Court the argument it presents on appeal: that based upon on the jury's finding that Guardian suffered the full \$696,825.20 of damages documented in the Division of Banking and Insurance report, a rational jury would also be forced to find, as a matter of logical necessity, that appellees Knight, Grell, David, and E.D. Plumbing Contractors, Inc. conspired to convert or embezzle at least \$4,987 following Knight-David's incapacity.

any notice of appeal filed prior to the resolution of the motion to include an assertion of error as to the denial of that motion.” *Tip Top Constr. Corp. v. Austin*, 71 V.I. 549, 562 (V.I. 2019); *see also Charles v. Payne*, 71 V.I. 638, 651 (V.I. 2019) (explaining that to preserve a challenge to the sufficiency of the evidence for appeal, the appellant must make both a pre-verdict motion under Rule 50(a) and a post-verdict motion under Rule 50(b)). As the Supreme Court of the United States has observed, requiring litigants to raise challenges to the sufficiency of the evidence by way of a Rule 50 motion for judgment as a matter of law before the trial court is no mere procedural formality. Rather, this requirement is a necessary and integral aspect of the judicial process because the determination of whether judgment should be entered as a matter of law or a new trial should be granted “calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.” *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006) (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)).

¶10 Additionally, Guardian did not file a motion seeking either a new trial or to alter or amend a judgment pursuant to Rule 59 of the Virgin Islands Rules of Civil Procedure, which “must be filed [in the immediate court] no later than 28 days after the entry of judgment.” V.I. R. CIV. P. 59(b) and (e).⁴ Guardian states that the jury could not have logically found the appellees unaccountable when funds were converted after Knight-David was in a coma or dead – in essence, Guardian argues that the jury’s finding came as a surprise. Rule 59(a)(1)(iii) states that after a jury trial “[t]he court may, on motion, grant a new trial on all or some of the issues—and to any party” in the instance of a “surprise that ordinary prudence could not have guarded against.” “However,

⁴ “Extension of deadlines for a new trial or under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b) are not permitted.” V.I. R. CIV. P. 6, Note.

'surprise does not always warrant the granting of a new trial. Courts will grant a new trial on the basis of "surprise" only when it deprives the movant of a fair hearing. Thus, a movant must show reasonably genuine surprise, that is inconsistent with substantial justice, and resulted in actual prejudice.'" *Burdyn v. Old Forge Borough*, 330 F.R.D. 399, 410 (M.D. Pa. 2019) (quoting *Becton Dickinson & Co. v. Tyco Healthcare Grp. LP*, No. CIV.A. 02-1694 GMS, 2006 WL 890995, at *10 (D. Del. Mar. 31, 2006) (unpublished)). Here, Guardian does not allege that it did not get a fair hearing – only that the jury's finding was not supported by the evidence. However, the jury could have reasonably found that the evidence presented supported the appellees' contention that they were directed by Guardian to continue collecting premiums after Knight-David's incapacity. Therefore, even if Guardian had timely filed a motion for new trial or for an amended judgment, the jury's findings are not inconsistent, and a new trial or amended verdict is not warranted here.

¶11 Although Guardian moved for judgment as a matter of law under Rule 50 with respect to its claims against the Estate of Valerie Knight-David, the record reveals that Guardian failed to make any similar motion with respect to the other appellees. (J.A. 1272, 1516.) Accordingly, we conclude that Guardian failed to take the steps required to preserve its sufficiency of the evidence arguments for appeal and that these arguments with respect to Guardian's claims against appellees Knight, Grell, David, and E.D. Plumbing Contractors, Inc. are therefore waived. *See Tip Top Construction Corp.*, 71 V.I. at 562 (appellant's failure to include an assertion regarding sufficiency of the evidence in its notice of appeal resulted in waiver of that argument); *see also* V.I. R. APP. P. 22(m) ("Issues that were . . . not raised or objected to before the Superior Court . . . are deemed waived for purposes of appeal . . .").

¶12 We note that while Myrtle Knight raised the issue of Guardian's waiver in her brief on appeal, appellees David, Grell, and E.D. Plumbing Contractors, Inc. failed to do so. As we have

previously explained, “waiver is a judicially created doctrine that can itself be waived if the other party . . . fails to assert the waiver and suffers no prejudice by our reaching the issue.” *Etienne v. Etienne*, 56 V.I. 686, 692 n.6 (2012) (citing *Simpson v. Golden*, 56 V.I. 272, 281 n.6 (V.I. 2012) (explaining the doctrine of “waiver of waiver”). Even then, the decision to apply the “waiver of waiver” doctrine is vested in the sound discretion of this Court and the doctrine should only be invoked “when the appellee suffers no prejudice from the appellant’s failure to properly raise the issue.” *Id.*

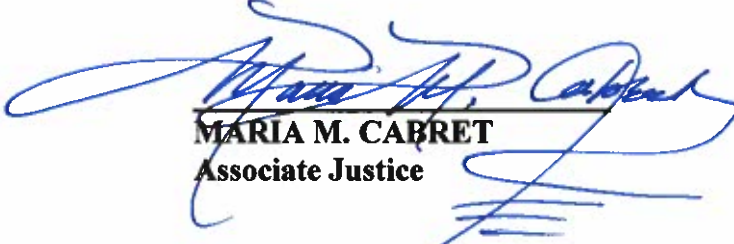
¶13 Given the special considerations inherent in the evaluation of any challenge to the sufficiency of the evidence, including the uniquely vital role of the trial judge in ruling on such challenges in the first instance based upon his or her immediate observations of the live presentation of testimony and other evidence, we cannot conclude that the appellees would not suffer prejudice from Guardian’s failure to properly raise the issue before the trial court. Indeed, the heightened requirements for preserving a sufficiency of the evidence challenge on appeal exist to safeguard against the precisely this type of prejudice that would invariably result from permitting appellate review of the sufficiency of the evidence without the benefit of the trial court’s first-hand impressions. Therefore, we conclude that this case does not present an appropriate opportunity to exercise our discretion to apply the “waiver of waiver” doctrine, and we affirm the Superior Court’s June 14, 2018, judgment.

IV. CONCLUSION

¶14 Because Guardian failed to timely raise its challenge to the sufficiency of the evidence in the Superior Court, we conclude that Guardian has waived this argument on appeal. Accordingly, we affirm the June 14, 2018, judgment of the Superior Court.

Dated this 8th day of November, 2021.

BY THE COURT:


MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: 
Deputy Clerk

Dated: 11-8-2021