For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SALVADOR ALVAREZ, Appellant/Plaintiff, v. **ESTATE OF EVERLENA KEEL AND ANTON KEEL,** Appellees/Defendants.	)	**S. Ct. Civ. No. 2019-0009** Re: Super. Ct. Civ. No. 436/2014 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Jomo Meade

Considered: February 13, 2020
Filed: August 19, 2020

Cite as: 2020 V.I. 15

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

APPEARANCES:

Andrew C. Simpson, Esq.
St. Croix, U.S.V.I.
Attorney for Appellant.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Salvador Alvarez appeals from the Superior Court's January 9, 2019 order denying his motion for default judgment in his action to quiet title to 9A, Queen Street, Christiansted. For the reasons that follow, we reverse the disposition below, and remand for entry of a default judgment.

I. BACKGROUND

¶ 2 In 1967, Salvador Alvarez rented the property at plot 9A, Queen Street, on St. Croix, under an 18-month lease from the owner, Leon J. Williams. He used the property to open Salvador Alvarez's Barbershop, which he has operated ever since. After the lease expired, he continued to occupy the premises and pay rent on a month-to-month basis, with Williams' oral permission.

¶ 3 After Williams' death, the property passed to his two daughters, one of whom was Ms. Everlena Keel. Alvarez continued to pay rent to Keel until he lost contact with her at some point. It is unclear in the record as to when he lost contact with Keel, but she died in 1990, and Alvarez indicated that he never had any dealings with her son and heir. On her death on October 14, 1990, Keel willed "real estate valued at over $5000 in NJ and Virgin Islands" to her son, Anton Keel, whom Alvarez has been unable to locate.

¶ 4 In 1996, Alvarez began paying taxes on the property, which he continues to pay. He has also made a number of renovations and improvements to the building that houses his barbershop, including installing new windows, an air conditioning unit, and a wheelchair ramp. After Hurricane Hugo in September 1989 caused substantial damage to the building, Alvarez obtained a loan from the Small Business Administration to repair it.

¶ 5 In 2003 Alvarez began depositing the amount of the rent money into a newly-opened FirstBank checking account. He used this account to pay personal and business expenses, including "living expenses for clothing, shoes, travel, gasoline, home mortgage, utilities and residential taxes," as well as commercial expenses including property taxes, hurricane repair expenses, and improvements to the building. It is unclear from the record what Alvarez did with the rent money between 1989, when he apparently lost contact with Keel, and 2003.

¶ 6 On November 14, 2014, Alvarez filed an action in the Superior Court to quiet title to the property against Everlena Keel, her son Anton Keel, and all others claiming an interest in the property. Because Alvarez was unable to locate the defendants in order to effect personal service, the court permitted him to serve by publication, in the St. Croix Avis and two newspapers in New Jersey (the last known residence of Keel and her son). When the defendants failed to respond to the complaint, Alvarez filed a motion for entry of default on April 7, 2015. The Clerk of Court entered default on May 1, 2017, and on June 20, 2017 Alvarez filed a motion for default judgment. On July 14, 2017, the Superior Court determined that additional evidence was necessary and ordered an evidentiary hearing, which it conducted on July 2, 2018. On January 9, 2019, the Superior Court denied Alvarez's motion for default judgment, finding that "Plaintiff has failed to show hostile claim to support his claim of adverse possession." Alvarez timely filed this appeal on February 8, 2019. *See* V.I. R. APP. P. 4(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 7 This Court has appellate jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32 (a); *see also* 48 U.S.C. § 1613a(d). "A judgment is considered to be final for purposes of this statute if it 'disposes of all the claims submitted to the Superior Court for adjudication.'" *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013). A denial of default judgment is typically not a final judgement and therefore not immediately appealable, *see Prince v. Ethiopian Airlines*, 646 Fed. Appx. 45, 47 (2d. Cir. 2016); *McNutt v. Cardox Corp.*, 329 F.2d 107, 108 (6th Cir. 1964). However, in this case, as we discuss

below, the order denying default judgment served to dispose of all of Alvarez's claims, and so we have jurisdiction.

¶ 8 The Clerk of the Court must enter a party's default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." V.I. R. CIV. P. 55(a).[1] However, an entry of default does not necessitate a default judgment; rather, "the Superior Court must 'consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.'" *King v. Appleton*, 61 V.I. 339, 346 (V.I. 2014) (quoting *Marshall v. Baggett*, 616 F.3d 849, 852 (8th Cir. 2010)). When a court denies a default judgment it declines to enter judgment in favor of the plaintiff, but in so doing it typically does not dispose of all claims submitted to it; those claims remain viable should the plaintiff pursue them under other circumstances. Thus, a denial of default judgment is typically not a final order and therefore not immediately appealable. *See Prince*, 646 Fed. Appx. at 47; *McNutt*, 329 F.2d at 108. However, in this case, the Superior Court effectively adjudicated the dispute on the merits by determining that Alvarez had failed to prove adverse possession. The order therefore serves to dispose of Alvarez's claim for adverse possession, and it is thus a final order under the Virgin Islands Code. As a result, this Court has jurisdiction over the appeal. *See Chapman*, 58 V.I. at 436.

¶ 9 We review the Superior Court's denial of default judgment for abuse of discretion. *King*, 61 V.I. at 345. We exercise plenary review over the Superior Court's application of law. *Connor*

[1] The Virgin Islands Rules of Civil Procedure, containing this provision of Rule 55, were in effect at the time the Clerk of Court took action with regard to the application by Alvarez. *See, e.g., Grisar v. Am. Fed'n of Teachers, AFL-CIO*, 2020 VI 9 ¶ 11 ("[O]n March 31, 2017, 'this Court ... adopted the Virgin Islands Rules of Civil Procedure, which superseded all previous civil procedure rules, including the Federal Rules of Civil Procedure that had been applicable.'").

v. People, 59 V.I. 286, 290 (V.I. 2013).

B. Adverse Possession

¶ 10 Virgin Islands law establishes that "uninterrupted, exclusive, actual, physical[,] adverse, continuous, notorious possession of real property under claim or color of title for 15 years or more shall be conclusively presumed to give title thereto, except as against the Government." 28 V.I.C. § 11. "The party asserting adverse possession bears the burden of proving all the required elements by clear and convincing evidence." *Mahabir v. Heirs of George*, 63 V.I. 651, 659 (V.I. 2015).

¶ 11 The Superior Court found that Alvarez's possession was "continuous, exclusive and notorious," (J.A. 14), and thus the only questions for determination are (1) whether his possession was hostile and (2) whether he sufficiently communicated this hostility to the property owner.[2] *Mahabir*, 63 V.I. at 659. "'[T]here is no fixed rule or mechanical formula [to] determine if possession is hostile." *Id.* The Superior Court concluded that Alvarez's possession of the property was not hostile because: his initial entry was permissive; he indicated that he recognized that someone else possessed a superior interest in the property by continuing to monthly pay the amount of the rent (albeit into his own account); and he never "clearly communicated [his] claim of ownership." *Alvarez*, 2018 V.I. LEXIS 139 at *12. Alvarez argues that his possession was hostile because (a) his entry ceased to be permissive on the death of the initial landlord, (b) he deposited the amount of the rent into his own account, from which he paid both business and personal

[2] "Adverse" is a term of art that in the context of adverse possession means: "Having an opposing or contrary interest, concern, or position." BLACK'S LAW DICTIONARY 62 (9th ed. 2009). "Hostile possession" means: "Possession asserted against the claims of all others, esp. the record owner." *Id.* at 1282. "Hostile" is frequently, including in our caselaw, used interchangeably with adverse, with the same meaning. *See Mahabir*, 63 V.I. at 659.

expenses, which is not payment, and (c) he gave constructive notice to the title holder by making improvements and repairs and by paying property taxes assessed on the property from 1996 onward.[3] We address each argument in turn.

1. Death of the Landlord

¶ 12 Entry by virtue of a lease is permissive entry, which cannot be the basis for adverse possession unless the tenant provides notice to the landlord of a hostile claim. *E.g. Estate of Wells v. Estate of Smith*, 576 A.2d 707, 710 (D.C. 1990); *Lewis v. New York & Harlem R.R. Co.*, 56 N.E. 540, 545 (N.Y. 1900) ("[I]f the first possession is by permission it is presumed to so continue until the contrary appears."); *see also Andrews v. Nathaniel*, 42 V.I. 34, 39 (V.I. Super. Ct. 2000) ("[W]hen possession has begun under circumstances justifying a finding of the 'permission' of the

[3] The dissent alleges that the only evidence to support Alvarez's claims is his own testimony, which the dissent characterizes as "self-serving, self-interested, [and] uncorroborated." However, the Superior Court did not rule against Alvarez because it believed his testimony was not credible—on the contrary, it credited his testimony, denying his motion for a default judgment because it believed the facts as established through his testimony did not establish the hostility and notice elements of adverse possession. Since the Superior Court credited Alvarez's testimony, on appeal we "cannot usurp the role of the [finder of fact] by re-analyzing, re-evaluating, or re-weighing the evidence presented at trial, or by determining the credibility of the witnesses." *James v. People*, 60 V.I. 311, 329 (V.I. 2013); *See Commonwealth ex rel. Robinson v. Robinson*, 478 A.2d 800, 804-05 (Pa. 1984) ("[T]he Superior Court exceeded the proper scope of appellate review in this matter by reviewing the record independently of the issues raised by the parties. . . . [A]n appellate court may not direct the parties to relitigate those same facts by raising factual issues *sua sponte* and remanding for relitigation."). This is particularly true in a case like this, where Alvarez had no notice that the credibility of his testimony would be an issue on appeal because the Superior Court credited his testimony and Keel did not file an appellate brief or otherwise participate in this appeal. Alvarez therefore had no reason to preemptively address the issue in his appellate brief. *See Gumbs v. Koopmans*, 66 V.I. 429, 432-33 (V.I. 2017) (collecting cases); *see also Wiegand v. Wiegand*, 337 A.2d 256, 257 (Pa. 1975) ("*Sua sponte* consideration of issues deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy."). Therefore, we decline to *sua sponte* review the decision of the Superior Court to credit Alvarez's testimony.

true owner, such possession cannot acquire the character of adverse possession until the presumption of continued subservience is rebutted." (quoting 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 1013 (f) (ii) (1998))). Alvarez argues that his entry ceased to be permissive on the death of the landlord, as he became an at will tenant, a relationship that terminates automatically upon the death of either the landlord or the tenant unless the decedent's successor in interest and the surviving party agree otherwise, citing to RESTATEMENT (SECOND) OF PROPERTY: LAND. & TEN. § 1.6 (1977).[4] Thus, upon Keel's death, according to Alvarez, his permission to occupy the property was terminated as a matter of law, automatically transforming the nature of his possession from permissive to hostile.

¶ 13 However, Alvarez is mistaken as to the nature of his tenancy at Williams' death. A lease (written or oral) of no stated duration, with rent to be paid monthly, is a periodic tenancy. *Peppertree Terrace v. Williams*, 52 V.I. 225, 232 (V.I. 2009). A periodic tenancy continues "until it [is] properly terminated by one of the parties," *id.*, which requires 30 days' notice in writing (or 14 days in the case of nonpayment of rent). *See* 28 V.I.C. §§ 752, 790; *V.I. Hous. Auth. v. Edwards*, 30 V.I. 3, 5 (V.I. Super. Ct. 1994) (illustrating the long history of Virgin Islands cases "impos[ing] a thirty day termination notice requirement for month to month, periodic tenancies"). Death of the landlord thus does not "properly terminate[]" a periodic tenancy without written notification. Rather, the lease passes to the landlord's estate and then to his heirs. *See* 15 V.I.C. § 311; *see also Olds v. Morse*, 129 N.E.2d 644, 646 (Ohio 1954) ("[D]eath of a lessor does not terminate a lease

[4] This provision states: "A landlord-tenant relationship may be created to endure only so long as both the landlord and the tenant desire. Statutes commonly require some period of notice to terminate the tenancy."

from month to month [and] the new owner of the fee becomes the landlord in the place of the decedent.").

¶ 14 The record in this case reflects that following the expiration of the original eighteen-month lease, Williams and Alvarez agreed that Alvarez could continue to occupy the property for an indefinite duration on the condition that Alvarez continued making monthly rent payments in the same manner and amount as specified in the original lease. Thus, when Williams died the periodic lease passed with the property to his daughter, Keel, and on her death to her estate. Therefore, the character of Alvarez's possession was not affected by the lessor's death and remained permissive unless and until he gave the true owners sufficient notice that the character of his possession had changed. *See Mahabir*, 63 V.I. at 659.

2. Paying Rent

¶ 15 Possession also cannot be adverse if the possessor recognizes a superior ownership interest in the property, as possession under those circumstances is not hostile to the owner's interest. Thus, paying rent is generally a bar to a claim of adverse possession, as it recognizes a superior claim of another to the property. *See, e.g.*, *Lummer v. Unruh*, 142 P. 914, 916 (Cal. Ct. App. 1914) ("Where a person in the possession of land pays rent to one claiming as owner, a presumption of the relation of landlord and tenant arises."); *Hutchinson v. Taft*, 222 P.3d 1250, 1253 (Wyo. 2010). The Superior Court determined that by paying the monthly amount of rent into a bank account, Alvarez was implicitly recognizing that the landlord had a superior interest. Alvarez argues that the

Superior Court erred because he used the bank account for both personal and commercial expenses. He therefore argues that these deposits are not "payment" of rent.[5]

¶ 17 While it appears that no Virgin Islands court has defined the word "payment," courts in other jurisdictions have defined "payment" as requiring "delivery by the debtor and acceptance by the creditor, both with a common purpose." *See Parnell v. Sherman*, 899 S.W.2d 900, 903 (Mo. Ct. App. 1995). Payment is widely recognized as the "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation." BLACK'S LAW DICTIONARY 1363 (11th ed. 2019). Under either of these definitions, payment requires both delivery and receipt of the money in question.

¶ 18 In this case, while the record shows that Alvarez said he deposited an amount equivalent to his rent payments into his personal checking account beginning in 2003, the evidence establishes that he did not treat these deposits as some form of escrow payment; instead, he actively drew upon the funds to pay both commercial and personal expenses. Moreover, there is no evidence that Keel ever agreed to this arrangement or ever received any of these deposits as payment. In fact,

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[5] Alvarez did not explicitly raise the payments issue in his initial arguments to the trial court. Absent exceptional circumstances, arguments that are not raised before the trial court are waived. *St. Thomas-St. John Board of Elections v. Daniel*, 49 V.I. 322, 335 (V.I. 2007); V.I. R. APP. P. 4(h) ("Only issues and arguments fairly presented to the Superior Court may be presented for review on appeal; provided, however, that when the interests of justice so require, the Supreme Court may consider and determine any question not so presented."). However, in this case, Alvarez presents the exceptional circumstance that he could not have raised the issue before the lower court. At trial, Alvarez testified that he deposited the amount of the rent into a personal bank account to which the owners had no access. The trial court stated in its opinion that "the Plaintiff testified that he paid the rent up until December 2017 or January 2018. This act of paying the rent evidences the Plaintiff's acknowledgment of the owner's title and [that he] had not taken a position adverse or hostile to that title." (J.A. 16). This appeal is Alvarez's first opportunity to address this characterization of his testimony. Thus, he may raise it here. *Id.*

Keel could not possibly have agreed to such an arrangement as she was deceased for several years before Alvarez began making these deposits. Therefore, on these facts, Alvarez's deposits into his personal checking account do not constitute payment under any accepted definition of the word; should the landowner come calling for the rent, the landlord would not find in that bank account the outstanding rental payments, but rather the amount of those payments less Alvarez's personal and unrelated expenses. And of critical importance, the landlord never received any rental payments from Alvarez during this time. Therefore, the Superior Court erred in concluding that Alvarez recognized a superior interest by paying rent up until December 2017.

3. Notice of Hostile Intent

¶ 19 Although paying rent defeats a claim of adverse possession, the failure to pay rent, standing alone, does not compel a finding of adverse possession. In some jurisdictions, the failure to pay rent cannot by itself establish hostility. *See Glover v. Glover*, 92 P.3d 387, 393 n.18 (Alaska 2004) (collecting cases) ("Nonpayment of rent does not establish hostility."). The overriding question, then, is whether Alvarez's long continuous possession without payment of rent, when combined with other factors such as extensive improvements and repairs, and payment of property taxes, provided sufficient notice to the landowner that his possession was under a claim of ownership, hostile to the property owner's interest.

> Because of the "harsh consequences … faced by the record owner, the statutory requirements … are specifically calculated to give the record owner notice that someone else is claiming title to the property." And "[w]here the occupier has not acted to give effective notice of his occupation, the court will not bar the record owner from seeking recovery of the property." . . . "[T]he intention of the [adverse possessor], adequately communicated (either constructively or actually) to the record titleholder, is the crucial element."

Mahabir, 63 V.I. at 659 (citations omitted); *see also Blumrosen v. St. Surin*, 36 V.I. 3, 8 (V.I. Super. Ct. 1995) ("The owner is . . . chargeable with knowledge of what is openly done on his land and therefore calculated to attract attention. As a result, our adverse possession statute mandates that a record owner who has slept on his legal rights will lose his title.") (citations omitted).

¶ 20 In this case, Alvarez's failure to pay rent for nearly 17 years, while maintaining continuous possession, together with his other actions with respect to the property, were more than sufficient to provide constructive notice of his hostile intent. The Superior Court determined that while "[ordinarily] the payment of taxes, making repairs, developing and maintaining the property are activities such as an owner would do," Alvarez was required to take more concrete and declarative action to "repudiate his initial permissive entry upon the property and clearly communicate[] his intention to make a claim of ownership." (J.A. 16.) For example, the Superior Court asked Alvarez if he had, after Hurricane Hugo, "put notices in the newspaper or anything, to tell those two daughters that you were going to claim the property as your property." (J.A. 47.) Alvarez had not. Thus, he had not provided actual notice (other than by ceasing to pay rent). However, as we observed in *Mahabir*, hostility may be communicated constructively.

¶ 21 Alvarez's actions were sufficient, when taken together, to give the owner constructive notice that someone else was acting as owner of the land. In considering how to determine whether there is constructive notice, courts have taken varying approaches. For example, the Supreme Court of Texas has recognized that actual notice to the landlord of a tenant's repudiation of his or her permissive possession is not required and that "[u]nder certain circumstances, notice may be inferred." *Tex-Wis Co. v. Johnson*, 534 S.W.2d 895, 899 (Tex. 1976). The court explained:

> Such notice may be constructive and will be presumed to have been brought home to the co-tenant or owner when the adverse occupancy and claim of title to the property is so long-continued, open, notorious, exclusive and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the co-tenant or owner out of possession, or from which a jury might rightfully presume such notice. It is held that repudiation of the claim of a co-tenant and notice thereof may be shown by circumstances and that a jury may infer such facts from long continued possession of the land under claim of ownership and non-assertion of claim by the owners.

Id.

¶ 22 The Alaska Supreme Court on the other hand has outlined a stricter approach, stating that "when a claimant started out occupying land permissively, it is essential that his new, hostile interest in the property be made clear to the true owner." *Glover,* 92 P.3d at 394. The court observed that "[i]n almost every case, only a distinct and positive assertion of the new claim—or a repudiation of the owner's interest—will provide proper notice." *Id.* The court thereby largely ruled out constructive notice. However, the court noted exceptions to this strict rule:

> Some cases, however, may require an exception to this heightened requirement. While not every undisturbed occupancy by a [former tenant] will result in a finding of ownership by adverse possession[,] . . . when the acts of ownership are overt and unambiguous and the exclusive possession is long held, a factfinder may infer that the tenant has repudiated his landlord's claim of ownership and asserted his own. The long occupation, **with its unambiguous hallmarks of ownership**, serves as the distinct and positive assertion of the claimant's interest and the repudiation of the true owner's interest.

Id. (citations and internal quotation marks omitted) (emphasis added).

¶ 23 In this case, Alvarez meets even this higher bar. He took numerous actions that are "unambiguous hallmark[s] of ownership," including paying taxes. A landowner who fails to notice that someone else is paying property taxes on his land for more than 20 years "has slept on his legal rights." *See Gardner v. Gardner*, 241 N.W. 179, 180 (Mich. 1932) ("[T]he failure of the

plaintiffs' predecessors to make any claim to the lot or to pay the taxes themselves, is some evidence of an abandonment of any right in or claim to the property. . . . [T]he payment of taxes on land for twenty-four successive years by the party in possession [is] powerful evidence of the claim of right to the whole lot upon which the taxes were paid." (internal citations omitted)). Certainly a tenant cannot obtain a leased property by adverse possession simply by paying property taxes, but in addition to possessing the property exclusively for more than 50 years, Alvarez also unilaterally took other actions that a landowner would normally undertake, including making numerous improvements and repairing the property after hurricane damage, without any prior agreement that he would do so, including undertaking an SBA loan to accomplish such improvements and repairs. And the owner must be aware that Alvarez has not paid rent for at least 17 years. Taken together, these facts should have demonstrated to the landowners that Alvarez's interest was possessory and therefore adverse as contemplated by 28 V.I.C. § 11. For the 15 year adverse possession period the owners slept on their rights, and so they lost them.[6]

¶ 24 Because the Superior Court's denial of the default judgment was based on an erroneous application of law, the Superior Court abused its discretion, and we reverse.

III. CONCLUSION

[6] It is noteworthy that throughout these proceedings, no other party has entered an appearance claiming a superior interest in the property in question. In the Virgin Islands, with respect to property possessed by a person who does not have title, "no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within twenty years before the commencement of the action." 5 V.I.C. § 31(1)(A). Alvarez has been the sole person in possession of the property for more than 20 years, and nobody else has been "seized" in the property since Keel died in 1990. *See* BLACK'S LAW DICTIONARY 1480 (9th ed. 2009) (defining "seize" in the context of real property as the act of "plac[ing] someone in possession . . . of property") (alterations omitted). Consequently, any claim to the property by someone claiming title may well be barred by the statute of limitations.

¶ 25 Constructive notice that possession is under a claim of ownership is sufficient to transform a permissive entry to a hostile claim. And because Alvarez paid property taxes, remained on the land, made improvements, requested a government loan to repair the property, and generally acted as the property owner, all the while paying no rent, he provided constructive notice to the landowners that his interest was hostile. Therefore, we reverse the Superior Court's January 19, 2019 denial of default judgment and remand this action with instructions for the Superior Court to enter default judgment awarding title to the subject property to Alvarez.

Dated this 19 day of August, 2020.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

SWAN, Associate Justice, dissenting.

¶26 On appeal, Appellant Salvador Alvarez seeks reversal of the Superior Court's denial of his adverse possession claim asserting ownership of 9A Queens Street in Christiansted, St. Croix US Virgin Islands. For the reasons elucidated below, I dissent.

¶27 In this case, I find it prudent to write an initial paragraph to orientate the reader to the rationale for the dissenting opinion. Alvarez's adverse possession claim rests solely on his self-serving, self-interested, uncorroborated testimony that he repaired 9A Queens Street using Small Business Administration loans following Hurricanes Hugo and Marilyn, paid property taxes after Everlena Keel's death, and provided notice to Keel's heirs of his intent to claim ownership of 9A Queens Street by making the repairs and paying the property taxes. Amazingly, the majority agrees with Alvarez and states he provided constructive notice to Keel's heirs by repairing the property, possessing the premises, and paying property taxes. I cannot condone such a flagrant disregard for a property owner's rights without additional evidence from Alvarez or any adverse possession claimant under similar facts. The majority opinion enables any person to arrive in the Virgin Islands, inhabit a particular structure for a number of years, and subsequently allege successful ownership of that property through adverse possession with the claimant's self-serving, self-interested, uncorroborated testimony as the only evidence the claimant offers to satisfy the statutory requirements for adverse possession. Alvarez's claim of paying real property taxes is no more than a mere assertion, for which no evidence of a single tax bill or payment receipt for any property tax bill for any calendar year was presented. Likewise, no record or application for obtaining loans from the Small Business Administration was offered, nor any records showing the amount of the loans or how the loans were repaid, which Alvarez claimed were for the express purpose of making repairs to the premises, but for which absolutely no business or written record

of documentation was presented to the court. Similarly, the fact that no photographic evidence of the repairs to the property nor other evidence of the cost of the repairs was presented to the court in support of his adverse possession claim is flabbergasting and disconcerting. Although I don't dispute a litigant's right to testify on his own behalf, I believe a heightened scrutiny of the evidence must be employed when the only evidence in the case is the claimant's testimony in an uncontested and uncorroborated action in which the claimant has the sole vested stake and interest in the litigation's outcome. Alvarez's partiality in the outcome of this case is undeniable. This is a disturbing legal precedent for the territory that threatens real property ownership. Accordingly, I dissent.

FACTS AND PROCEDURAL HISTORY

¶28 In 1967, Alvarez entered 9A Queens Street (the "property") pursuant to an 18-month lease with Leon A. Williams, Sr. From the lease's effective date, Alvarez used the premises to operate a barbershop and affixed a sign to the building which read "Salvador's Barbershop." At the conclusion of the 18-month lease, Williams and Alvarez verbally agreed to Alvarez's continued occupation of the property as long as Alvarez paid rent monthly. After Williams's death, Williams's two daughters allowed Alvarez to remain in possession of the property on the same terms that existed between their father and Alvarez. After the death of Williams's second daughter (Everlena Keel) in 1990, Alvarez attempted to locate her heirs in order to identify to whom he would pay monthly rent. However, Alvarez was unable to locate Everlena Keel's heirs. Therefore, from 1990 onward, Alvarez remained in possession of the property without the explicit permission of Keel's estate. On November 14, 2014, Alvarez, with the assistance of an attorney, commenced an adverse possession suit in Superior Court to have him declared the legal owner of the property.

¶29 Before the adverse possession hearing, Alvarez encountered difficulty serving notice on Keel's heirs. Alvarez was unable to serve Keel's heirs personally because none of them resided in St. Croix when he commenced the suit, and he could not locate them in New Jersey, the state where Keel apparently resided prior to her death. Consequently, the Superior Court authorized Alvarez to accomplish service by publishing notices in Virgin Islands and New Jersey periodicals. Alvarez advertised notice in the *St. Croix Avis*, a daily St. Croix publication, and in the *Union County Local Source* as well as the *Ervington Herald*, two daily New Jersey publications. None of Keel's heirs responded to any of Alvarez's notices.

¶30 On April 7, 2015, Alvarez petitioned the Superior Court for an entry of default. Concerned whether the defendants had deficiencies including incompetency, infancy, or military service that may have precluded its ability to adjudicate or render judgment on Alvarez's adverse possession claim, the Superior Court ordered Alvarez on May 14, 2015 to supplement the record with affidavits and documents to satisfy the requirements of FED. R. CIV. P. 55(b), as it relates to the limitations that may have precluded entry of default.[1] On May 29, 2015, Alvarez responded to the court's May 14 order and filed a supplemental response with an attached declaration of counsel on June 8, 2015. Alvarez's responses provided additional information about the defendants and stated

[1] Rule 55(b) of the Federal Rules of Civil Procedure, styled "Entering a Default Judgment," provides in subsection (1) that "If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due— must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person. (2) By the court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the person against whom a default judgment is sought has appeared personally or by representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to: (A) conduct a hearing; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other manner." FED. R. CIV. P. 55(b).

why he thought they were not subject to the limitations of Rule 55(b). On May 1, 2017, the clerk of the court entered default for Alvarez at the court's direction.

¶31 On June 20, 2017, Alvarez asked the court for a default judgment. On July 14, 2017, the court issued a memorandum opinion stating that additional evidence was needed before it could render a default judgment. Accordingly, the court scheduled an evidentiary hearing. The hearing was held on July 2, 2018.

¶32 At the hearing, Alvarez, the only witness, testified he had occupied the property since 1967. He also related that he had continued to occupy the property after the initial 18-month lease expired and both Mr. Williams and his two daughters died. Following Everlena Keel's death in 1990, Alvarez represented that he attempted to locate Keel's heirs to inquire where and to whom he should send rent payments. Unable to locate Keel's heirs, Alvarez stated that he deposited monthly rent in a First Bank account but ceased that practice in either December 2017 or January 2018. Importantly, Alvarez did not offer a scintilla of documentary evidence from a banking institution establishing when and in which bank these deposits were made, assuming they were made in a local bank as he alleged.

¶33 Following Hurricane Hugo in 1989 and Hurricane Marilyn in 1995, Alvarez alleged that he repaired the property using Small Business Administration ("SBA") loans. Yet, no documentary evidence from SBA was offered into evidence, particularly as to the loan amounts. Alvarez further asserted that he paid the property's taxes before Keel's death, and she included his name on the payments. Lastly, Alvarez asserted that he paid the property's taxes after Keel's death.[2]

[2] Although the appendix states Everlena Keel died in 1990 (J.A. 68), Alvarez's testimony at the July 2, 2018 hearing indicates he commenced (or thought he began) property tax payments in 1996. (J.A. 43). This assertion contradicts Alvarez's appellate brief which states he commenced property tax payments in 1990. (Appellant's Br. 4). Therefore,

Exasperatingly, not a single copy of a paid property tax bill was presented to the court. The lack of real property tax receipts or canceled checks is quite disturbing because the Virgin Islands' Lieutenant Governor's Office maintains readily verifiable records on paid real property tax bills and on whether the property tax bills are outstanding or unpaid.

¶34 In a December 31, 2018 order, the Superior Court denied Alvarez's adverse possession claim stating that he failed to satisfy all the adverse possession elements. Specifically, although the court held Alvarez's claim probably satisfied the uninterrupted, continuous, exclusive, actual, and physically adverse requirements for adverse possession, the court opined that Alvarez's claim lacked hostility for the statutory period because Alvarez failed to repudiate the permissive nature of his initial entry, and he failed to communicate his claim of ownership to Keel's heirs.

¶35 On February 8, 2019, Alvarez perfected this appeal.

JURISDICTION

¶36 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, and final orders of the Superior Court." 4 V.I.C. § 32(a). "An order that disposes of all claims submitted to the Superior Court is considered final for the purposes of appeal." *Jung v. Ruiz*, 59 V.I. 1050, 1057 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 677 (V.I. 2012)). The Superior Court's December 31, 2018 order constitutes a final order over which we exercise jurisdiction.

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we note the discrepancy between Alvarez's hearing testimony and the contention in Alvarez's appellate brief to demonstrate the importance of documentary evidence to corroborate witness testimony.

STANDARD OF REVIEW

¶37 We review the trial court's factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)).

DISCUSSION

A. The Nature of Alvarez's Tenancy

¶38 On appeal, Alvarez argues the Superior Court erred when it held, he failed to repudiate the permissive nature of his initial entry onto the property. Specifically, Alvarez contends the permissive nature of his tenancy at will ceased when Everlena Keel died in 1990. I commence the discussion with a review of the various leaseholds implicated in this matter.

¶39 I first acknowledge that "a landlord-tenant relationship can arise from an agreement under which one person, the landlord, gives another person, the tenant, the right to possess a plot of land for a fixed period of time." *Terrace v. Williams*, 52 V.I. 225, 231 (V.I. 2009) (citing RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT §§ 1.1-1.4 (1977)).[3] "Under the Restatement (Second) of Property, '[a] landlord-tenant relationship can be created orally if the duration of an oral lease does not exceed the period specified in the controlling Statute of Frauds.'" *Id.* (citing RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 2.1 (1977)). "In the Virgin Islands, the Statute of Frauds, which generally requires that certain leases be in writing and executed with specified formalities, applies only to leases with terms exceeding one year." *Id.*

[3] "Because there are no local laws governing this question, we turn to the Restatement pursuant to title 1, section 4 of the Virgin Islands Code which provides: "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." *Terrace*, 52 V.I. at n. 4.

(citing 28 V.I.C. §§ 241-42 (1996)). Importantly, "[under] Virgin Islands law, any interest in property orally created . . . for a period of greater than one year is void and unenforceable under the Statute of Frauds." *Terrace*, 52 V.I. 238 (Swan, concurring) (citations omitted).

¶40 A term of years lease is an interest in property for a fixed duration. *Kimberlin v. Hicks*, 94 P.2d 335 (Kan. 1939); *State v. Davison*, 31 S.E.2d 225, 230 (Ga. 1944) (same); *Seabloom v. Krier*, 18 N.W.2d 88, 91(Minn. 1945) (same); *Waldrop v. Siebert*, 237 So.2d 493, 494 (Ala. 1970)).

¶41 In this case, Alvarez initially entered the property pursuant to an 18-month lease. Because the lease between Williams and Alvarez was for a fixed amount of time and in writing, it was a term of years lease that complied with the Statute of Frauds. At the expiration of the lease, Williams had the right to eject Alvarez from the property or compel him to execute a new lease. *See Burnette v. Thomas*, 349 So.2d 1208, 1210 (Fla. Dist. Ct. App. 1977) ("[I]t's rudimentary that a landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being possessory and the landlord's a reversion interest."). However, Williams and Alvarez verbally agreed to Alvarez's continued occupation of the property at the end of the 18-month lease. This arrangement created a new leasehold- a tenancy at will. *See* 52 C.J.S. *Landlord & Tenant* § 223 (explaining that a tenancy at will is a form of periodic tenancy and includes those where the underlying agreement provides no fixed term of occupancy but is for period to period at the will of the lessor or the lessee.)

¶42 According to the Restatement (Second) of Property, a tenancy at will is created when the landlord and tenant agree that a lease should persist as long as both parties agree that it should continue. RESTATEMENT (SECOND) OF PROPERTY § 1.6, cmts. a & b (1977). In the Virgin Islands, a tenancy at will or sufferance terminates upon three months' written notice given by the party

who desires termination. If rent is paid in intervals of less than three months, the amount of notice to terminate is based on how rent is paid. 28 V.I.C. § 752. Noticeably, the local statute fails to state what happens to a tenancy at will upon the death of the landlord. However, the Restatement provides generally that a tenancy at will terminates upon the death of either the landlord or the tenant unless the decedent's successor in interest and the other party agree otherwise. RESTATEMENT (SECOND) OF PROPERTY § 1.6, cmt. e (1977).[4] *See Pennsylvania R. Co. v. Albert & Son*, 98 A.2d 323, 324 (N.J. Super. Ct. App. Div. 1953) ("At common law a tenancy at will . . . could . . . be terminated by implication of law [when] either party died."); *Paddock v. Clay*, 357 P.2d 1, 3 (Mont. 1960) (same)).

¶43 In this case, Alvarez's verbal agreement with Williams following the expiration of the 18-month lease created a tenancy at will because it was a lease between Alvarez and Williams that occurred after Alvarez's initial 18-month possession of the property without any fixed duration. Although verbal, the tenancy at will did not violate the Statute of Frauds because it was a month to month arrangement predicated on the payment of monthly rent. The tenancy at will would have terminated upon Williams' death. However, because Williams' two daughters permitted Alvarez to remain in possession of the property following Williams' death, the tenancy at will continued until Keel's death in 1990. Thereafter, a tenancy at sufferance emerged.

¶44 "[A] tenancy at sufferance 'is an interest in land which exists when a person who had a possessory interest in land by virtue of an effective conveyance, wrongfully continues in the possession of the land after the termination of such interest, but without asserting a claim to a superior title." *Chase Manhattan Bank v. Robert-Surzano*, 51 V.I. 1024 n.11 (D.V.I. 2019)

[4] *See* supra note 2.

(citations omitted). *See Howard v. Newton*, 172 S.W.2d 33, 35 (Ky. Ct. App. 1943) ("[C]ontracts [with landlords for the rental of the landlords' property], if made, were terminated by [the landlords'] death[s] and [the claimant] remained as a tenant by sufferance of the owners, [the decedents'] heirs.").

¶45 In this case, Alvarez's continued occupation of the property after Keel's 1990 death created a tenancy at sufferance because his continued occupation was unsanctioned by Keel's heirs. The effect of Keel's death on Alvarez's continued occupation is the issue on which this case must be decided. The question is: did Keel's death automatically destroy the permissiveness of Alvarez's tenancy at will so that his tenancy at sufferance was unequivocally hostile to her estate, or was Alvarez required to take further action following Keel's death to demonstrate hostility towards the heirs' ownership of the property as well as his intent to claim the property as his own? These fundamental questions are pivotal to Alvarez's adverse possession claim, which I now address.

B. Alvarez's Adverse Possession Allegation

¶46 In the Virgin Islands, adverse possession requires the "uninterrupted, exclusive, actual, physical[ly] adverse, continuous, notorious possession of real property under claim or color of title for 15 years or more. . ." 28 V.I.C. § 11. Additionally, "the claimant's possession must be hostile to the whole world, i.e. [the possessor] must perform acts on the land which customarily only an owner would perform." *Simpson v. Golden Resorts*, 56 V.I. 597 (V.I. 2012). "The party asserting adverse possession bears the burden of proving all the required elements by clear and convincing evidence." *Mahabir v. Heirs of George*, 63 V.I. 651, 659 (V.I. 2015).

¶47 Importantly, "there is no fixed or mechanical formula to determine if possession is hostile." *Id.* (citations omitted). However, "[b]ecause of the 'harsh consequences . . . faced by the record

owner, the statutory requirements . . . are specifically calculated to give the record owner notice that someone else is claiming title to the property.' . . . And '[w]here the occupier has not acted to give effective notice of his occupation, the court will not bar the record owner from seeking recovery of the property.'" *Id.* (citations omitted). Thus, "[i]t would seem . . . the intention of the [adverse possessor], adequately communicated (either constructively or actually) to the record titleholder, is the crucial element." *Id.* (citations omitted). Nonetheless, "[the] hostile intention [of the adverse possessor] need not be evidenced by an express declaration. . . . But such a declaration, if it exists, would be of substantial value." *Tutein v. Daniels*, 10 V.I. 255, 260 (D.V.I. 1973) (citations omitted).

¶48 To help to discern whether the adverse possession elements have been satisfied, definitions for each element may be prudent. First, continuous and uninterrupted possession are distinct elements. "In the law of adverse possession, continuous possession means possession which has not been abandoned by him who claims such possession and uninterrupted possession means possession which has not been effectively broken by the possession of another." *Wallace v. Pack*, 749 S.E.2d 599, 603 (W. Va. 2013). *See Nye v. Fire Grp. P'ship*, 657 N.W.2d 220, 225 (Neb. 2003) ("The term 'continuous' means 'uninterrupted . . . stretching on without break or interruption. . . . The law does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership."); *Bullion v. Gahm*, 842 N.E.2d 540, 545 (Ohio Ct. App. 2005) ("In order for use to be continuous, there must not be a substantial interruption, 'with daily or weekly use generally not being required as long as the use is continuous enough to indicate prolonged and substantial use.'").

¶49 Exclusiveness involves the claimant possessing the land for himself or herself and not for others. *Luttrell v. Stokes*, 77 S.W.3d 745, 751 (Mo. Ct. App. 2002). To meet this requirement, a claimant must demonstrate that he 'wholly excluded' the owner from possession for the statutory period. *Id.* "However, sporadic use, temporary presence, or permissive visits by others, including the record owner, will not defeat the exclusive element." *Id.*

¶50 Hostility (or adversity) denotes "possession that is antagonistic to the claims of all others, with the intent to occupy the disputed land as one's own. . . . A claimant's intent may be inferred from his or her acts of dominion over the land." *Id.* at 750. *See Kline v. Kramer*, 386 N.E.2d 982, 988 (Ind. Ct. App. 1979) (observing that adversity is synonymous with hostility, and that if an "occupant of another's land does not disavow his or her right of possession of the property nor acknowledge that possession is subservient to the title held by the true owner, the possession is adverse or hostile."); *Glover v. Glover*, 92 P.3d 387, 392 (Alaska 2004) ("'Hostile possession' does not imply that the adverse possessor bore ill will or aggression toward the true owner; it only means that the adverse possessor held land in such a way that his interest in the property was incompatible with the record owner's interest."); *Id.* at 392-93 ("[W]hen possession begins with the true owner's permission, it cannot become hostile unless the presumption of permission 'is rebutted by 'proof of a distinct and positive assertion of a right hostile to the owner of the property.'").

¶51 Notoriety requires visible acts of ownership on the disputed property. *Luttrell*, 77 S.W.3d at 751. "Maintaining and improving the property are examples of such visible acts of ownership." *Id.*

¶52 "'Color of title,' in the end, is really only evidence that the possessor claims the property as his or her own, with hostile regard for the titleholder. The requirement in our statute that possession be under a 'claim of right' is actually no more than a restatement of the requirement that possession be hostile to that of the true owner." *Tutein*, 10 V.I. at 260.

¶53 In his appellate brief, Alvarez argues that his continued possession of the property after Everlena Keel's death in 1990 abrogated the permissive nature of his initial occupancy and transmuted it into one that was hostile to her estate. Basically, Alvarez asserts the tenancy at will created when Mr. Williams allowed him to remain in possession of the property following the conclusion of the original 18-month lease, and the agreement by Williams' two daughters to allow him to remain in possession of the premises during their lifetimes, ended when Keel died in 1990. Alvarez claims that, at that time, his continued occupation of the property became a tenancy at sufferance which was immediately hostile to Everlena Keel's estate. Alvarez cites *Pattison v. Dryer*, 57 N.W.814, 815 (Mich. 1894) for the proposition that, once a tenancy at will terminates because of the landlord's death and the lessee remains in possession of the premises, the lessee's continued occupation is hostile to the true owner's title. (Appellant's Br. 12-14). Yet, *Pattison* involved a husband who remained in possession of property for 15 years following death of his wife, who actually owned the property. The couple had no children and the wife's legal heirs were her sister and her nieces and nephews from a deceased sister. The *Pattison* court ruled the adverse possession statute of limitations immediately began against the wife's heirs following her death because the court determined the husband was a trespasser, but not a tenant at sufferance. Interestingly, the court reasoned the husband was a trespasser because he acquired the estate by operation of law and held over following the estate's expiration. *See Joy v. McKay*, 11 P. 763, 764

(Cal. 1886) (explaining a landlord's death terminates a tenancy at sufferance or a tenancy at will and the tenant's continued possession following the landlord's death is wrongful).

¶54 However, other jurisdictions suggest the permissive nature (and the explicit terms) of the initial tenancy at will persist after a landlord's death until the lessee unequivocally communicates to the true owner the lessee's hostile intent to claim the property as his own and overcome the permissive nature of his initial entry.[5, 6] *See WG Associates v. Estate of Roman*, 753 A.2d 1236, 1238 (N.J. Super. Ct. App. Div. 2000) ("[G]enerally, in the absence of a covenant, a tenancy is not terminated by the death of the landlord or tenant.").

¶55 In *Estate of Wells v. Estate of Smith*, 576 A.2d 707 (D.C. 1990), a landlord's estate appealed a trial court's decision that awarded possession of property to a claimant who asserted adverse possession of the property. At trial, the claimant testified that she initially entered the property in November 1955 pursuant to an annual lease in which she agreed to pay $60 a month plus all utilities. At the conclusion of the lease's first year, the landlord allowed the claimant to remain in

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[5] "A tenancy at sufferance is a permissive interest and cannot be the basis for adverse possession. . . . To become an adverse possessor, any tenant, including a tenant at sufferance, 'must openly and explicitly disclaim and disavow any and all holding under his former landlord; and, furthermore, he must unreservedly and steadily assert that he himself is the owner of the true title. . . . This repudiation—a form of the distinct and positive assertion required to turn a permissive occupancy into a hostile one—must provide at least constructive notice to the landlord and true owner that the tenant has repudiated his leasehold interest and claims the land as his own." *Glover*, 92 P.3d at 393 (citations omitted).

[6] "Some courts only require the [tenant at sufferance asserting adverse possession to] meet the usual requirements for adverse possession—as long as the claimant occupies the land openly and notoriously and acts as if he owns it, repudiation of the owner's superior claim may be inferred. Other courts, generally reasoning in the analogous context of a tenant in common making an adverse claim against his co-tenant, have held that 'a tenant . . . does not, merely by exclusive possession, gain title by adverse possession.' Instead, 'stronger evidence is required to prove such adverse possession than in similar claims by strangers to the title.' We adopt this view. Our case law makes it clear that when a claimant started out occupying land permissively, it is essential that in his new, hostile interest in the property be made clear to the true owner. The behavior of a tenant and an owner will often be indistinguishable, if a tenant merely acts as he always did, the owner will not be on notice of his new hostile claim. In almost every case, only a distinct and positive assertion of the new claim—or a repudiation of the owner's interest—will provide proper notice." *Glover*, 92 P.3d at 394 (citations omitted).

possession of the property if, in lieu of rent, the claimant paid all expenses associated with the residence and the property as well as make all necessary repairs. In 1958 or 1959, the landlord also asked and the claimant agreed to pay the property's taxes. In 1960, the landlord died testate and her will devised all her property to her bother and stepson. After learning of the landlord's death, the claimant wrote the landlord's brother in September 1966 to inform him of the landlord's death and the claimant's continued occupation of the landlord's residence, but the letter was returned undelivered because the brother's whereabouts were unknown. The claimant remained in possession until May 1985 when she sued to have the property conveyed to her via adverse possession. During her tenure, the claimant converted the residence's heating system from coal to oil, replaced the water heater when the old one malfunctioned, installed a fence on two sides of the house, and replaced the roof and porch. In September 1968, the claimant leased the premises to two individuals. *Wells*, 576 A.2d at 709-10.

¶56 On appeal, the court said the claimant could not rely on the landlord's death to demonstrate the notorious element required to prevail on an adverse possession claim. The court specifically noted that, although the claimant testified to making repairs, paying the mortgage, paying taxes, and paying utilities, there was only evidence the claimant made a mortgage interest payment. Moreover, the court also said the claimant's actions were indicative of responsibilities required under the tenancy at will and did not provide sufficient notice to the true owner of claimant's intent to assert ownership of the property. *Id.* at 712-13.

¶57 Unfortunately, the issue of whether a tenancy at sufferance is immediately hostile to a true owner's property interest upon a landlord's death in an adverse possession context, as implicated

in this case, has never before been presented to this Court. Accordingly, I will conduct a *Banks* analysis to aid in resolving that deficiency.

¶58 In a *Banks* analysis, I weigh three non-dispositive factors to aid legal analysis when local law fails to address a specific legal question. The three factors which I will apply are (1) whether Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts in other jurisdictions; and most importantly (3) which approach represents the best rule for the Virgin Islands. *Wilkinson v. Wilkinson*, 70 V.I. 901, 907 (V.I. 2019).

¶59 Regarding the first element, local courts have frequently contemplated adverse possession as it relates to a tenant in common asserting an adverse possession claim against other co-tenants as in *Mahibir v. Heirs of George*, 63 V.I. 651, or as it relates to a claimant's satisfaction of all adverse possession elements as in *Jones v. Charles*, No. ST-16-CV-738, 2018 WL 3913924, at*1 (V.I. Super. Ct. Aug. 13, 2018). *See Hodge v. McGowan*, 50 V.I. 296 (V.I. 2008); *DeCastro v. Stuart*, 45 V.I. 591 (D.V.I. 2004); *Sasso v. Hackett*, 45 V.I. 375 (V.I. Terr. Ct. 2004). However, a review of local case law yields no relevant pronouncement about whether the creation of a tenancy at sufferance upon a landlord's death is automatically hostile to a record owner's property interest as to initiate the adverse possession statute of limitations. Thus, this factor favors creating a rule because none currently exists.

¶60 Case law from other jurisdictions is dichotomous about the effect a landlord's death has on a tenancy at sufferance but most agree that a landlord's death does not automatically make a tenancy at sufferance hostile to a true owner's property interest. *See Estate of Wells v. Estate of Smith*, 574 A.2d 707 (D.C. 1990); *Glover v. Glover*, 92 P.3d 387 (Alaska 2004); *St. Regis Pulp & Paper Corp. v. Floyd*, 238 So.2d 740 (Miss. 1970); *Fordson Coal Co. v. Mills*, 27 S.W.2d 382

(Ky. 1930); *Williams v. Martin*, 395 S.W.2d 714 (Tex. Civ. App. 1965); *Kilvert, ex rel. Kennedy v. Clark*, 10 So.2d 795 (Fla. 1942)[7]; *but see Pattison v. Dryer*, 57 N.W.814, 815 (Mich. 1894); *Joy v. McKay*, 11 P. 763, 764 (Cal. 1886). Thus, this factor supports adopting a rule where a landlord's death does not automatically make a tenancy at sufferance hostile to a true owner's property interest.

¶61 Lastly, I find it is in the best interest of the Virgin Islands that, upon a landlord's death, a tenancy at sufferance should not be deemed immediately hostile to a true owner's interest because the statutory requirements are specifically calculated to give the record owner notice that someone else is claiming title to the property. *See, e.g., Mahabir*, 63 V.I. at 658; *McNamara*, 26 V.I. at 111-12 ("[T]he purpose of the requirements that the adverse claimant's use of the property be uninterrupted, exclusive, actual, physical, adverse, continuous and notorious is to give the record owner notice that someone else is claiming title to the property. Open and notorious possession contemplates possession that is unconcealed and so conspicuous that it is generally known by the public or by the people in the neighborhood."); *Cabrita Point Dev., Inc. v. Evans*, Nos. 2006-103 & 2006-109, 2008 WL 5455405, at *2 (D.V.I. Dec. 31, 2008) ("Under Virgin Islands law, a party claiming adverse possession must show ownership that is 'evidenced by such conduct as is sufficient to put a man of ordinary prudence on notice of the fact that the land in question is held

[7] All cases cited in the preceding series do not involve a landlord's death in a tenancy at sufferance scenario. However, most involve a tenant who wrongfully held over following the expiration of a valid tenancy. If a landlord's death terminates a tenancy at will as the Restatement (Second) of Property states and a tenancy at sufferance involves a tenant who held over at the conclusion of a valid tenancy and a tenancy at will is a valid tenancy, it follows that a tenant at sufferance holding over at the conclusion of a tenancy at will wrongfully does so at the conclusion of a valid tenancy and citing these cases is not apposite to the conclusion that most jurisdictions require an adverse possession claimant to do more than merely possessing the property to demonstrate the hostility required to prevail on an adverse possession claim. *See McNamara v. Christian*, 26 V.I. 109, 112 (V.I. Terr. Ct. 1991) ("Mere possession of the true owner's land will be presumed to be with the owner's permission and in subordination to his title and thus not hostile to it.") (citations omitted).

by the claimant as his own.'") (citations omitted); *Sasso*, 45 V.I. at 381 ("The [adverse possession] criteria are established to provide notice to the record owner that the possessor claims an interest in the property that conflicts with his or her own interest.").

¶62 The method by which claimants exhibit hostility need not be exceedingly explicit but claimants must provide sufficient notice to the record owner that they are asserting ownership of the property. *See supra* note 4; *Netsky*, 205 F.Supp.2d at 457 ("Notice may be actual or constructive, and actual notice may be express or implied. . . .Constructive notice is a legal fiction designed to impute to a person not having actual notice where that person has knowledge of certain facts which should lead him to the ultimate fact. . . .Constructive notice frequently arises from the existence of a record, like a recorded instrument. . . .Express actual notice 'consists of knowledge actually delivered into the hands of a person.' . . .Actual notice 'must be complete in every material constituent part, and the party to be legally bound by it must have actually received it.'") (citations omitted)).

¶63 If it were determined a landlord's death satisfied the hostility prong for adverse possession in a tenancy at sufferance scenario, a tenant at sufferance who held over following the conclusion of a valid tenancy (like a tenancy at will) could commence the running of the adverse possession statute of limitations by merely possessing the premises. It is axiomatic that mere possession of property cannot ripen into adverse possession. *See supra* note 6. Therefore, considering the preceding *Banks* analysis, a tenancy at sufferance should not be deemed immediately hostile upon a landlord's death without an adverse claimant's unambiguous rejection of a true owner's property interests demonstrated by the claimant's clear communication that he alleges ownership of the property.

¶64 In its December 2018 order, the Superior Court determined that Alvarez's occupancy satisfied the actual, continuous, exclusive, and notorious prongs of adverse possession for the property at 9A Queens Street, Christiansted, St. Croix. The court apparently concluded these elements were satisfied based on Alvarez's testimony at the July 2, 2018 hearing that he entered the property in 1967, operated a barbershop at the location, and hung a sign indicating his barbershop business. However, the court opined that, since he initially entered the property pursuant to a lease, Alvarez's initial entry was permissive. The court further explained that Alvarez's permissive entry never ripened into a hostile claim adverse to the true owner because "there was no evidence that Alvarez repudiated his permissive possession or took such steps to adequately communicate to the owner that he was asserting a claim of ownership to the property." (J.A. 16). *See Andrews v. Nathaniel*, 42 V.I. 34, 39 (V.I. Terr. Ct. 2000) ("[W]hen possession has begun under circumstances justifying a finding of the 'permission' of the true owner, such possession cannot acquire the character of adverse possession until the presumption of continued subservience is rebutted.") (citations omitted); *Van Buren v. Worley*, No. L-95-047, 1995 WL 704096, at *6 (Ohio Ct. App. Dec. 1, 1995) ("Possession is never hostile or adverse if it is by permission of the owner. . . . While permission for the use of land may be implied from the facts and circumstances in each case, . . . '[s]tronger evidence of adverse possession is required when . . . there exists a relationship between the parties that weighs in favor of a finding that the original entry and use of the property was done with permission.'") (emphasis added).

¶65 To support its holding, the Superior Court noted that Alvarez testified he paid rent until December 2017 or January 2018, which the court correctly stated failed to substantiate Alvarez's

adverse possession claim because paying rent acknowledges the permissive nature of an adverse possessor's occupancy. Alvarez's testimony regarding rent payments is extremely illuminating.

> The Court: So when she passed away, the last daughter, you stopped paying rent?
>
> Alvarez: I been depositing the money in the bank.
>
> The Court: So you realized that you had to pay rent, and you would deposit the money in the bank.
>
> Alvarez: Yes, because I don't have nobody to send the money.
>
> The Court: Okay. So which bank did you deposit the money?
>
> Alvarez: Well, I used to put the money in First Bank.
>
> The Court: First Bank. How much money did you put in First Bank?
>
> Alvarez: How much money?
>
> The Court: Yes, how much money you deposit?
>
> Alvarez: Well, I used to pay a month – lately, used to be $180 a month and then – yeah, about $180 a month.
>
> The Court: So you kept depositing after the last daughter died. Do you remember her name, the last daughter? You don't remember, okay. That's okay. But after the last daughter died, you continued to deposit approximately $180.
>
> Alvarez: Yeah, in the bank.
>
> The Court: Please wait, sir. You have to wait until I finish the question to answer, because you see the gentleman to your left, he has to record everything you're saying, and he cannot record what both of us are saying at the same time. Okay?
>
> Alvarez: Yes.
>
> The Court: You deposited approximately $180 per month in First Bank.
>
> Alvarez: Yes, sir.
>
> The Court: Okay. And did there come a time when you stopped depositing that money?
>
> Alvarez: When I stopped depositing the money?
>
> The Court: The $180, yes.

Alvarez: No. I been putting – let me see. I think between December last year to January, 2018, from '17 to '18.

The Court: Okay. You deposited money.

Alvarez: No.

The Court: Stop.

Alvarez: Lately, I (inaudible) the deposit.

The Court: So let me try and understand. Did you say in December 2017, you stopped depositing money?

Alvarez: Yes, I paid to January this year.

The Court: Okay. So probably January 2018, was the last time you deposited money.

Alvarez: Around there.

The Court: Okay. And the money you would deposit was for the rent where you're occupying now, which is 9E Queens Street; right? (sic)

Alvarez: What you say? Sorry.

The Court: The money you paid up until January, 2018, was for your occupancy of the property described as number 9A Queen Street –

Alvarez: Yes, sir.

The Court: --Christiansted, which you used as Salvador's Barber Shop.

Alvarez: What?

The Court: Which you used as Salvador's Barber Shop.

Alvarez: Yes sir. This is the budget in my name, no?

J.A. 40-43.

¶66 *See Andrews*, 42 V.I. at 40 (finding a claimant's installment payments maintained the permissive nature of his occupancy until he ceased the payments). The majority contends that payment involves a two-part transaction that entails a conveyance of currency by a debtor and the currency's acceptance by a creditor. Therefore, the majority argues, Alvarez's First Bank rent deposits following Keel's 1990 death fail to constitute rent payments because Keel or her heirs never received the deposits. However, there are definitions explaining that a payment is a

transmission or identification of funds to pay a preexisting debt regardless of whether the creditor receives the funds. *See Serv. Nat'l Corp. v. United States*, No. 92-154 Lon, 1994 WL 912143, at *11, *15 (D. Del. Mar. 31, 1994) (observing that "[t]he term 'payment' . . . means the application funds to a liability" and that "[t]he Third Circuit has defined the word 'payment' as 'something given to discharge a debt or obligation'") (citations omitted). Thus, a deposit of money into an escrow account with the subjective intent that those funds will pay a debt could constitute a payment.

¶67 In this case, Alvarez testified he paid rent for 9A Queens Street until December 2017 or January 2018. Although he deposited the payments in a bank account, Alvarez believed that Keel and her heirs were entitled to remuneration for his continued occupancy of the property. Even if the amount of rent Alvarez deposited in First Bank was insufficient, Alvarez's belief that he needed to pay rent demonstrates his recognition of Keel's superior title and prevents the commencement of the adverse possession statute of limitations at least until Alvarez ceased depositing rent in his bank account. Therefore, Alvarez's adverse possession claim is premature if he only ceased paying rent in December 2017 or January 2018, because the Virgin Islands adverse possession statute requires 15 years of uninterrupted, hostile use by the adverse possessor.

¶68 Lastly, in evaluating Alvarez's adverse possession claim, the Superior Court said paying taxes, repairing the premises, and maintaining the property are activities an owner ordinary undertakes and would support a possessor's adverse possession claim if the possessor performs them. However, the court also noted that paying taxes or repairing the property alone could not constitute adverse possession without the claimant's hostile intent, which must be clearly communicated to the record owner. *See NAC Tex Hotel Co., Inc. v. Greak*, 481 S.W.3d 327, 332

(Tex. Ct. App. 2015) ("The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. . . . Mere occupancy of the land without any intention to appropriate it will not support the [adverse possession] statute of limitations.") (citations omitted). Accordingly, the court reasoned none of Alvarez's actions on the property abrogated the permissive character of his occupancy or provided sufficient notice to the true owner of his intent to claim ownership of 9A Queens Street, Christiansted. *See Collier v. Gilmore*, 562 S.W.3d 895, 899 (Ark. Ct. App. 2018) (explaining that permissive use defeats the hostile intent necessary for adverse possession) (citations omitted).

¶69 I agree with the Superior Court's conclusion that Alvarez failed to satisfy all adverse possession elements. Alvarez's actions regarding the property indicate that he was a business occupant and that he took steps to maintain his business. If Alvarez intended to assert ownership of the property through adverse possession, he needed to exhibit more significant hostile acts of ownership than simply maintaining his business, in order to alert the true owner of his intent to claim ownership of the property. *See Carter v. Malone*, 545 N.E.2d 5, 6 (Ind. Ct. App. 1989) ("Periodic or sporadic acts of ownership such as maintenance activities, standing alone, are not sufficient to constitute adverse possession.") (citations omitted); *Lisiewski v. Seidel*, 899 A.2d 59, 66 (Conn. App. Ct. 2006) (explaining that irregular and infrequent hostile acts could not constitute adverse possession); *Rester v. Greenleaf Resources, Inc.*, 198 So.3d 472, 476 (Miss. Ct. App. 2016) (same); *Van Buren*, No. L-95-047, 1995 WL 704096, at *5 (same).

¶70 Moreover, Alvarez's barbershop existed from his initial 1967 entry onto the property when he was under a lease and none of his subsequent actions would have necessarily indicated to Keel's

heirs that he claimed 9A Queens Street as his own. *See Illinois Steel Co. v. Tamms*, 141 N.W. 1011, 1013 (Wis. 1913) ("With one of the partners holding a lease [from the owner]. . . and the partnership occupying the premises, the acts of [a] partner . . ., all the time actively engaged in the business of the firm, would bring no . . . knowledge to the owner [of the possessor's adverse claim]. These acts would ordinarily and naturally be referred to as his work as a member of the partnership, and where that partnership is occupying [the premises] for partnership purposes under a lease to one of the partners would not amount to disseisin of the true owner."). Therefore, although he was not under a valid lease, Alvarez's business maintenance actions were ordinary organizational occurrences which did not possess the required indicia of hostility to support an adverse possession claim particularly because he had conceivably engaged in the same routine activities since he entered the property in 1967. Even if Alvarez's actions were sufficiently hostile, he failed to communicate them to Keel's heirs and thus he still could not sustain a successful adverse possession suit. *See Van Buren*, No. L-95-047, 1995 WL 704096, at *5 ("[P]ossession must be unequivocally 'hostile and adverse . . . accompanied by visible acts which outwardly demonstrate occupation and ownership to give notice for the statutory period.").

¶71 The majority seeks to deprive Keel's heirs of their property based solely on Alvarez's self-serving, self-interested, uncorroborated testimony. Undoubtedly, real property rights are among the most important privileges in American jurisprudence. *See Md. Shall Issue v. Hogan*, 353 F.Supp.3d 400, 417-418 (D. Md. 2018) ("[T]he Maryland Court of Appeals . . . made it explicit that some categories of property—namely contract rights and real property—are more strongly protected than others. . . . '[I]n the spectrum of vested rights recognized previously by the Court, [vested causes of action] are not as important as the vested real property and contractual rights

which have almost been sacrosanct in our history.'") (citations omitted); *Bell v. Radcliffe*, No. ST-13-CV-392, 2015 WL 5773561 at *7 (V.I. Sup. Ct. Apr. 30, 2015) (unpublished) ("'[D]escribing the right to exclusive 'use' as one of the most important ones in the bundle of rights, privileges, and powers an owner of real property enjoys.'"); *Willmon v. Daniel*, No. 3:05-CV-1391-M, 2007 WL 518555, at *3 (N.D. Tex. Feb. 20, 2007) (unpublished) ("[T]he Court finds that the property interest in one's home, and the freedom to use and enjoy it, is of 'historic and continuing importance'. . . "); *U.S. v. Real Prop. Located at 16510 Ashton, Detroit*, 47 F.3d 1465, 1471 (6th Cir. 1995) ("[T]he Court noted when real property is seized, it deprives the person of 'valuable rights of ownership.'"). Therefore, because of the fundamental private interests implicated in owning real property, we should not arbitrarily negate a party's real property interests and transfer his land to a litigant who has only offered self-serving, self-interested, uncorroborated testimony as the basis for the transfer. Accordingly, I disagree with the majority, and therefore I dissent.

C. Sufficiency of the Evidence

¶72 Lastly, it must be noted the evidence Alvarez presented at the July 2, 2018 hearing lacked quality and sufficiency despite his uncorroborated, self-serving testimony to the contrary. As stated previously, "[t]he party asserting adverse possession bears the burden of proving all the required elements by clear and convincing evidence." *Mahabir*, 63 V.I. at 659. *See Cuka v. Jamesville Hutterian Mut. Soc.*, 294 N.W.2d 419, 422 (S.D. 1980) (explaining that clear and convincing evidence involves proof that is clear, satisfying, and convincing). "Adverse possession claims are usually mixed questions of law and fact. . . . Ordinarily, the fact finder determines the facts that bear on the issue of adverse possession. Whether those facts are sufficient to constitute adverse possession is a question of law for the court. In reviewing the Superior Court's

determination whether there was adverse possession, this Court reviews findings of fact for clear error and affords plenary review of the court's determinations of law. . . . On appeal, the Court must give due regard and deference to the credibility determinations of the trial court, which is in the best position to make such assessments." *Powell v. Mahabir*, 50 V.I. 890, 893-94 (D.V.I. 2008) (citations omitted).

¶73 In his testimony at the July 2, 2018 hearing, Alvarez made numerous assertions including entry onto the property pursuant to an 18 month lease in 1967, affixing a sign that said "Salvador's Barbershop" to the exterior of the establishment in 1967, paying the property's taxes since 1990 after Keel's death, repairing the property with loans from the SBA following Hurricane Hugo in 1989 and Hurricane Marilyn in 1995, attempting to find Keel or her relatives to advise them that he repaired the property after the hurricanes as well as to inquire to whom he should pay rent, and depositing rent into a First Bank account until December 2017 or January 2018. (J.A. 33-47). Alvarez also testified he had receipts showing he paid the property's taxes (J.A. 44), but, exasperatingly and appallingly, he never produced any documents, such as paid receipts or canceled checks to substantiate that he, at a minimum, paid property tax for a single year. Likewise, Alvarez did not offer a single document to confirm or corroborate that he obtained SBA loans to repair the property following Hurricanes Hugo and Marilyn. We have no evidence in the trial record regarding the loan amounts, the repair costs for the premises, the scope of the repairs, the materials employed to effect the repairs, who made the repairs, how contractors were paid for making the repairs, or before and after photographs of the repairs. Alvarez's failure to support his contentions with documents, which are obtainable at local government offices, such as the payment of property taxes, is troubling because documents could have bolstered Alvarez's testimony by

providing the court with some evidence of repair costs and when he paid the property's taxes, which would have added credence to his claim. Regrettably, there is not one iota, scintilla, or modicum of documentary evidence or witness testimony by others to substantiate Alvarez's self-serving, self-interested, uncorroborated testimony. Therefore, we should assess Alvarez's contentions with the proverbial jaundiced eye and employ a heighted scrutiny of his credibility.

¶74 Admittedly, I acknowledge testimony alone is sufficient to satisfy a party's burden of production. *See Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm'rs*, 329 P.3d 936, 944 (Wyo. 2014) ("An individual's testimony alone is sufficient to carry the individual's burden if there is nothing to impeach or discredit the individual's testimony and the individual's statements are corroborated by surrounding circumstances. . . . Accordingly, a lack of documentary evidence does not prevent [a court] from making findings of fact . . . since 'the issue of documentary [evidence] versus oral testimony is one of weight.'") (citations omitted); *Lustig v. Legat*, 154 F.2d 680, 682 (Ct. Customs and Patent App. 1946) ("It is too well settled in patent law to require extended discussion or citation of authority in support thereof that one may prove his priority of invention by oral testimony alone. It is true that courts scrutinize such testimony with care because of the possibility of *fraud, mistake, or bad memory* bringing about improper results, but no court . . . has ever held that one cannot establish priority by oral proof and it very often occurs that priority is established in a most convincing way by oral proof, particularly where there is a lack of inconsistency in the testimony of witnesses and where there are related facts shown in the record . . .") (citations omitted).

¶75 However, documentary evidence can substantiate a party's contentions because it is not subject to memory loss or other human deficiencies. *See Eirhart v. Libbey-Owens-Ford Co.*, 996 F.2d 837, 845 (7th Cir. 1993) (Manion, dissenting) ("Sometimes, documentary evidence is the

most persuasive evidence available . . .") (citations omitted); *Baker Hughes, Inc. v. Davis-Lynch, Inc.*, 31 Fed. Appx. 650, 657 ("Our caselaw does favor the use of documentary evidence to corroborate oral testimony.") (citations omitted); *Manzi v. State*, 88 S.W.3d 240, 248 (Tex. Crim. App. 2002) ("Documents or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it."); Michelle L. Querijero, Esq., Documentary Evidence, A PRACTICAL GUIDE TO EVIDENCE IN CONNECTICUT (last visited Dec. 30, 2019), https://www.shipmangoodwin.com/files/19628_Chapter09Final.pdf ("While live witness testimony may be interesting to a jury, documentary evidence can be particularly compelling. Documentary evidence is not subject to an imperfect memory, exaggeration, or vague recollections. . . . [D]ocumentary evidence can establish a claim for damages or a party's statements regarding a material issue with a precision that witness testimony lacks."). Accordingly, Alvarez could have provided the court with numerous documents including contractor estimates for property repairs, SBA loan documents, property tax receipts from the Lieutenant Governor's Office, before and after photographs of the property that identified the repairs Alvarez made, or canceled checks to support the nature and quality of his alleged ownership of the property. Although I recognize such documents are not required to prove an adverse possessor's claim, they certainly would aid a court in evaluating the validity of such claims, especially when in the case no adverse party appeared to compel a claimant to put forth the strongest possible case. Therefore, I encourage the Superior Court in adverse possession cases to compel the claimant to produce documentary evidence, where readily available and in the claimant's possession, to supplement witness testimony, the court's factual findings, and the trial record.

¶76 In this case, although Alvarez failed to submit any documentary evidence into the trial record, the gravity of such evidence in civil litigation is undeniable. As an adverse possession claimant, Alvarez's allegations of ownership of 9A Queens Street include costs related to property maintenance and the payment of property taxes. Obviously, documents demonstrating payments for those and other property-related expenses would bolster Alvarez's adverse possession claim and aid the Court in deciding the viability of the claim. Therefore, this Court should not allow Alvarez to prevail on an adverse possession claim with his self-serving, self-interested, uncorroborated testimony as his only or sole evidence because we have previously demonstrated the importance of documentary evidence and its undeniable significance in helping a court to render precise, informed judgments.

¶77 Given the constant mention of property tax payments in this matter, I believe a short review of the concept is beneficial. As local courts have frequently said, "a hostile claim of right is present when one does such acts on the land 'as ordinarily only an owner would do, such as construction of buildings and making improvements, or the payment of taxes. . . .'" *McNamara*, 26 V.I. at 112-13 (citing *Tutein*, 10 V.I. at 260-61). Although some jurisdictions statutorily require payment of property taxes for adverse possession claimants to prevail, 142 AM. JUR. 3D PROOF OF FACTS § 14 (2014), the Virgin Islands adverse possession statute lacks this requirement. Still, there are jurisdictions where the payment of property taxes is strong evidence of adverse possession albeit not dispositive. *Id.* The payment of real property taxes for several years is one of Alvarez's pivotal claims. Thus, I reiterate that, although property tax payments are strong evidence of adverse possession, such payments alone are insufficient to satisfy all adverse possession requirements.

CONCLUSION

¶78 To conclude, I would affirm the Superior Court's denial of Alvarez's adverse possession claim because Alvarez failed to carry his burden to prove all adverse possession requirements by clear and convincing evidence, namely hostility. Moreover, I would hold that, as a matter of Virgin Islands law, a tenancy at sufferance is not automatically hostile to a true owner's property interest upon a landlord's death.

Dated this 19th day of August 2020

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court