IN THE SUPREME COURT OF THE VIRGIN ISLANDS
SCT-CIV-2022-0110

GOVERNMENT OF THE VIRGIN ISLANDS, MARK LONSKI, AND PROPERTYKING, INC.,
Appellants/Defendants,
v.
ELVIS GEORGE,
Appellee/Plaintiff

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
CIVIL NO. ST-2021-CV-00079

APPELLANT GOVERNMENT OF THE VIRGIN ISLANDS BRIEF

CAROL THOMAS-JACOBS, Esq.
Acting Attorney General

PAMELA R. TEPPER, Esq.
Solicitor General

By: /s/ *Tracy Myers*
TRACY MYERS, Esq.
V.I. Bar No. 1149
Assistant Attorney General
Department of Justice
34-38 Kronprindsens Gade
GERS Complex, 2nd Floor
St. Thomas, VI 00802
Telephone: (340) 774-5666
Fax: (340) 777-9848
Tracy.Myers@doj.vi.gov

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Superior Court of the Virgin Islands had original jurisdiction over this matter pursuant to title 4 of the Virgin Islands Code, section 76(a).

The Supreme Court of the Virgin Islands has jurisdiction over this matter pursuant to 4 V.I.C. § 33(a) and V.I. R. APP. P. 5(a) as a final appealable order. "[T]he denial of a motion to intervene is a final, appealable order." *Anthony v. Indep. Ins. Advisors, Inc*., 56 V.I. 516, 524 (V.I. 2012) (*quoting United States v. Alcan Aluminum, Inc*., 25 F.3d 1174, 1179 (3d Cir. 1994)).

Appellant Government of the Virgin Islands filed a Notice of Appeal with the Supreme Court of the Virgin Islands on December 6, 2022, regarding the November 14, 2022, Order. This appeal is timely pursuant to V.I. R. APP. P. 5(a)(1).

STATEMENT OF ISSUES PRESENTED

I. Whether the Superior Court erred when it denied the Government's August 5, 2022, Motion for Leave to Intervene under 24 V.I.C. § 263. (Raised, JA 256; objected to JA 263; ruled upon, JA 294. The standard of review is abuse of discretion.)

II. Whether the Superior Court erred in ordering the Government to execute a general release associated with the case when under 24 V.I.C. § 263, only the Government may compromise its rights to recover from third party

tortfeasors. (Raised, JA 256; objected to, JA 263; ruled upon, JA 294. The standard of review is plenary.)

III. Whether the November 14, 2022, Order violates the separation of powers principles inherent in the Revised Organic Act. (Raised, JA 256; objected to, JA 263; ruled upon, JA 294. The standard of review is plenary.)

IV. Whether the Superior Court violated the clear and unambiguous language of 24 V.I.C. § 263, which grants first priority of recovery to the Government, when it ordered the Cashier of the Superior Court to release recovery funds to Plaintiff's counsel before ensuring that all sums due the Government were secured (Raised, JA 256; objected to, JA 263; ruled upon, JA 294. The standard of review is plenary.)

STANDARD OF REVIEW

This Court "normally review[s] the Superior Court's denial of a motion to intervene for an abuse of discretion." *In re Q.G.*, 60 V.I. 654, 660 (2014) (citation omitted). When presented with a question of statutory interpretation, this Courts standard of review is plenary. *Miller v. Sorenson*, 67 V.I. 861, 868 n.5 (2017) (citation omitted). Questions of law – such as whether there has been a violation of the separation of powers doctrine – are subject to plenary review as well. *Rivera v. People of the V.I.*, 2023 V.I. Supreme LEXIS 1, at *52 (Jan. 23, 2023) (citation omitted).

STATEMENT OF RELATED PROCEEDINGS

This case has not previously been before the Virgin Islands Supreme Court. The Appellee is not aware of any case or proceedings – past or present – that is related to this case.

STATEMENT OF THE CASE

Elvis George was injured by a third-party tortfeasor while doing work for the Virgin Islands Waste Management Agency. (JA 45.) He filed for Workers Compensation benefits after his injury, and the Workers Compensation Division expended over Sixty-Thousand Dollars ($60,000) on George's behalf. (JA 100.) George then filed suit against the third-party tortfeasor, and reached a settlement agreement. (JA 68.) The Workers Compensation Division sought to intervene in the matter to protect its claim against the settlement funds. (JA 89.) The Superior Court denied the Division's motion and ordered that the settlement first be distributed to George's counsel, in contravention of the plain language of V.I. Code Ann. tit. 24, § 263. The Government filed a timely appeal on the Division's behalf. (JA 127.)

STATEMENT OF FACTS

Elvis George was injured on July 14, 2020, while working for the Virgin Islands Waste Management Agency. (JA 45.) George underwent shoulder surgery and

physical therapy in the Virgin Islands, and the Virgin Islands Division of Workers' Compensation (the "Division")[1] paid these bills on George's behalf. (JA 107.)

An initial lien was made by the Division at or near the time of George's injury against any recovery from third persons responsible for his injuries. (JA 100.)

George filed a complaint with the Superior Court on February 12, 2021, alleging that Mark Lonski drove a truck into him in July of 2020, causing multiple injuries. (JA 45.) George alleged that as a result of his injuries, he lost income and continued to incur medical costs. (JA 45.) Lonski's employer, PropertyKing, Inc., was joined as a defendant because Lonski was driving a work truck for his employer at the time of the accident. (JA 46.) (Lonski and PropertyKing are collectively referred to as the "Defendants.") George sought general damages; all costs and incidental expenses; costs of suit; reasonable attorney's fees; and "such other and further relief as the Court deems just and proper." (JA 48.)

George's October 19, 2021, Notice of Production, and November 2, 2021, Notice of Production, indicated that the Defendants had been provided with an executed copy of the Workers' Compensation Authorization, (JA 56), and a document titled "St. John Physical Therapy Workmen's Compensation." (JA 59.)

[1] To avoid confusion, the Appellant uses the term the "Division" to refer collectively to the Government of the Virgin Islands, Virgin Islands Department of Labor, the Virgin Islands Workers' Compensation Division, the Administrator of the Workers' Compensation Administration, the Commissioner of the Department of Labor, and the Government Insurance Fund. When necessary for clarity these entities are referred to by their particular title.

On February 10, 2022, the Department of Labor sent a letter to George's counsel referencing the now Final Lien and the money owed to the Division by George. (JA 61.) The letter requested a General Release in the event that the matter was settled. (JA 61.)

George provided the Defendants a copy of the Workers' Compensation Lien on February 14, 2022. (JA 62.)

On April 4, 2022, Lonski and PropertyKing filed an Informational Notice stating that the parties were unable to proceed with mediation because the Workers' Compensation Division of the Department of Labor had not yet been made a party to the case despite its significant lien. (JA 64.) The Defendants acknowledged that "[b]y law, this lien must be satisfied first and foremost before any payments are made to [George,]" and indicated that the Division needed to participate in mediation to "prove, compromise, or withdraw its lien." (JA 65.) The Defendants stated that they cannot proceed to mediation until the Division was fully involved in the case. (JA 66.)

The Defendants included as Exhibit A an email from their counsel to George's counsel, which argued that the Division must participate in the mediation based on the pre-2002 amendments to 24 V.I.C. section 263.[2] (JA 67.) Defendants cited a

[2] 24 V.I.C. § 263. Liability of third persons; subrogation
In cases where the injury, the occupational disease or the death entitling the workman or employee or his beneficiaries to compensation in accordance with this chapter has been cause under circumstances making third persons responsible for such

injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third person responsible for said injury, disease, or death within two years following the date of the injury. The Administrator may subrogate himself to the rights of the workman or employee or his beneficiaries to institute the same action in the following manner:

When an injured workman or employee, or his beneficiaries in case of death, may be entitled to institute an action for damages against a third person in cases where the Government Insurance Fund, in accordance with the terms of this chapter, is obliged to compensate in any manner or to furnish treatment, the Administrator shall subrogate himself to the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or employee or of his beneficiaries, within two years following the date of the injury, and any sum which as a result of the action, or by virtue of a judicial compromise, may be obtained in excess of the expenses incurred in the case shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto. The workman or employee or his beneficiaries shall be parties in every proceeding instituted by the Administrator under the provisions or this section, and it shall be the duty of the Administrator to serve written notice on them of such proceedings within five days after the action is instituted.

The injured workman or employee or his beneficiaries may not institute any action, nor may compromise any right of action they may have against the third person responsible for the damages, unless the Administrator is a party to the action or agrees to the compromise, but the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result in dismissal of the claim, so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are secured by any recovery.

No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third person responsible shall be valid or effective in law unless the expenses incurred by the Government Insurance Fund in the case are first paid. No judgment shall be entered in actions of this nature and no compromise whatsoever as to the rights of parties to said actions shall be approved, without making express reserve of the rights of the Government Insurance Fund to reimbursement of all expenses incurred. The clerk of the court taking cognizance of any claim of the above-described nature, shall notify the Administrator of any order entered by the case, as well as the final deposition thereof.

case from before 2002, when the Superior Court would be deprived of jurisdiction over a claim involving Workers' Compensation benefits if the Division had not been joined as a party or agreed to a compromise.

It is unclear what resolution was reached to alleviate the Defendants' concerns, but the parties proceeded to mediation. George's April 8, 2022, Notice of Mediation was the first time the Department of Labor appeared in a Certificate of Service for the matter. (JA 68.)

The May 26, 2022, Mediation Report indicated that "[t]he conflict has been completely resolved." (JA 68.)

On July 29, 2022, George filed a "Motion to Interplead Settlement Funds," stating that the Division was refusing to sign a release because the Department of Labor wanted all of the proceeds of the Seventeen Thousand Five-Hundred Dollar and Zero Cents ($17,500.00) settlement agreement, minus attorney's fees and costs. (JA 70.) Defendants joined the motion on August 3, 2022. (JA 84.)

The Defendants remitted the full amount of the settlement funds into the Registry of the Superior Court on August 9, 2022. (JA 260.)

The Administrator may compromise as to his rights against a third party responsible for the damages. No such extrajudicial compromise, however, shall affect the rights of the workman or employee, or of his beneficiaries, without their express consent and approval.

Any sum obtained by the Administrator through the means provided in this section shall be covered into the Government Insurance Fund.

On August 4, 2022, the Superior Court gave all parties of interest sixty (60) days to file any legal briefs in support of their position regarding the Division's lien. (JA 88.)

The Government of the Virgin Islands filed a Motion for Leave to Intervene and a Proposed Complaint in Intervention on August 5, 2022, on behalf of the Division because it was aware that George, Lonksi, and PropertyKing had entered into a settlement agreement, and that the parties were seeking to distribute these funds to George and his counsel without complying with 24 V.I.C. § 263. (JA 89.) The Government indicated that it was seeking to intervene to enforce its rights under Section 263 to pursue the Division's lien because "[b]y operation of law, [the Division] is required to recoup all monies expended [under the Workers' Compensation Program] for [George's] care before any settlement funds may be distributed." (JA 96.) The Government asked the Superior Court to issue an order ensuring that any funds paid under the settlement first be paid to the Division. (JA 98.)

The Government attached the Final Lien and an affidavit from Rainia Thomas, the Director of the Division of Workers' Compensation to the Proposed Complaint. (JA 100 and 61.) In the affidavit, Director Thomas indicated that a lien had been made at or near the time of the accident, and that the Final Lien reflected that the Division was owed Sixty-One Thousand Two-Hundred and Five Dollars and Twenty-Seven Cents ($61,205.27) as funds it had previously expended on George's behalf. (JA 100.)

On the same day, the Division also filed a Notice to the Court, reiterating that it has a lien to enforce its rights under Section 263 and objecting to any disbursement of settlement proceeds until the Division had been reimbursed of monies it had already expended to George for his injuries. (JA 102.)

The Superior Court ordered George and the Defendants to file any reply or opposition to the Division's motion to intervene and notice to the court by October 3, 2022. (JA 127.) George's September 19, 2022, response included a request for a hearing to determine disbursement of the settlement funds. (JA 106.) The Division replied that a hearing "to determine disbursement" is unnecessary when the language of the statute is so clear – the Division is entitled to disbursement first, absent any agreement from the Division otherwise. (JA 133.)

The Defendants filed a response to the motion to intervene on September 23, 2022, arguing that it should be denied because "it was untimely filed," and concluding that because the Division can only institute proceedings against third-parties within two (2) years of injury under Section 263, the Division also must intervene to seek to protect its statutory guarantees within that same time-frame. (JA 135.) George filed a reply on September 19, 2022, arguing that the Division's attempt to collect on their lien was "a new policy [to] reap all monies obtained by private counsel in civil cases against third parties for injuries sustained by employees who are injured on the job." (JA 139.)

The Superior Court scheduled a status conference for November 9, 2022, on George's request for a hearing. (JA 402.) George's counsel testified that she submitted a release to the Division but that it was never signed. (JA 199.) Gary Molloy, Commissioner for the Department of Labor, and Rainia Thomas, Director of Workers Compensation, also testified. (JA 205 and 232.)

An order was issued on November 14, 2022. (JA 256.) The Superior Court noted that the Division's position is that it is entitled to the entire settlement proceeds to be paid back into the Government Insurance Funds. (JA 258.) The court found that "[a]t no time did the Department of Labor institute legal action against the Defendants to recover money to repay the Government Insurance Fund," "the department of Labor neither attended the mediation nor initiated any action to stop or intervene in the mediation," (JA 258), and that the Department of Labor did nothing to subrogate its claim until August 5, 2022, more than two years after Plaintiff's injury." (JA 259.)

The Superior Court looked to and applied the Section of 263 which discusses the Division's obligations if it initiates a claim against a third-party, instead of the section that clarifies the rights of the parties when, as here, the injured worker initiates suit, (JA 258-259.)

The Superior Court then held that "given the circumstances… equity requires the court disburse the money to both the Department of Labor and Plaintiff's counsel." (JA 259.) The Superior Court denied the Division's motion to intervene as

untimely; ordered the Division to execute a General Release associated with the matter; ordered the Cashier of the Superior Court to release to George's counsel the sum of Six Thousand Thirty-Seven Dollars and Thirty-Three Cents ($6,037.33) for attorney's fees and expenses; and ordered the Cashier to release the remaining funds to the Division. (JA 260-261.)

The Government of the Virgin Islands filed a timely appeal on the Division's behalf on December 6, 2022. (JA 1.) The matter has been stayed pending appeal. (JA 294.)

SUMMARY OF THE ARGUMENT

Although the Division can seek to collect from the third-party tortfeasor directly, it does not seek additional damages on the injured worker's behalf. "[T]he principal purpose of [Section 263] is to provide for subrogation by the Commissioner in cases where the injured employee seeks both compensation under the statute and damages from a third party tort-feasor." *Ayala v. Conrad*, 6 V.I. 615, 618 (Mun. Ct. 1968). Under Section 263, an injured worker has the opportunity to both meet the employee's obligation to ensure that the Division collects an amount already expended on the injured worker's behalf from the third-party tortfeasor *and* potentially collect additional damages. In this case, the settlement funds fall far short of what is owed to the Division.

Here, George's counsel argues that the Division has waived its right to recover money from the Defendants through the settlement agreement. George's counsel

argues in the alternative that if the Division is allowed to collect from a settlement in matters where the settlement would be consumed by the Division's lien, private counsel would be forced to work for free and thus attorney's fees should never be deducted from the settlement amount.

Under the statute, the Division does not have to pursue a claim against the third-party tortfeasor, particularly when the injured party has already elected to file suit – the Division's right to subrogation is guaranteed by the statute. Personal injury suits are rife with risk, including the risk that a settlement might not cover all of one's obligations. However, the statute allows the injured party to assume this risk because this allows the injured party the opportunity – but not guarantee – of additional damages. The Division is thus not obligated to forgo monies it is owed when an injured party was unable to obtain a settlement that covers all costs, expenses, and attorney's fees, and the Division is not obligated to cover their counsel's risk in taking on a personal injury case. Additionally, here, the injured party contracted to his obligation to pay his attorney's fees as part of the settlement agreement. Thus, the Division should be paid the entirety of the settlement funds.

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT DENIED THE GOVERNMENT'S MOTION TO INTERVENE.

The Superior Court's decision to deny the Division's request to intervene in this matter once George and the Defendants indicated their intent to distribute the

funds in contravention of the plain language of Section 263 compromised the rights of the Division and was contrary to the plain meaning of the statute.

To understand why the Court's action was an abuse of its discretion, a review of the history of Section 263 is warranted.

a. The history of Section 263.

Compensation for a worker's injury resulting from a personal injury begins on the first day of the disability, and compensation for medical attendance begins at the time of injury. 24 V.I.C. § 252(a).[3] The injured employee "is entitled all medical services, including chiropractic, optometric and dental services, appliances, supplies and transportation which are required by the nature of his injury and which will relieve pain and promote and hasten his restoration to health and employment." Section 254a(a).[4] Generally, an injured worker is authorized to receive a maximum of $75,000 in benefits. Section 254a(f).[5] The funds for these payments come from the

[3] 24 V.I.C. § 252(a). Right to compensation for personal injury or occupational diseaseEvery employer shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury … arising out of and in the course of his employment, irrespective of fault as a cause of the injury or death. ….

[4] § 254a(a). Medical rehabilitation. For any injury covered by this chapter, … the employee shall be entitled to all medical services, including chiropractic, optometric and dental services, appliances, supplies and transportation which are required by the nature of his injury and which will relieve pain and promote and hasten his restoration to health and employment. ….

[5] § 254a(f). Medical rehabilitation. An employee shall be entitled to a maximum of $75,000 in benefits under this section….

Government Insurance Fund, which is financed by employer premiums. Section 272(a) and (c).[6]

Section 263 was enacted in 1954 to provide for subrogation by the Division in cases where an injured worker seeks both Workers' Compensation and damages from a third-party tortfeasor. *Ayala*, 6 V.I. 615. "Section 263 preserves to an injured employee his right to claim and recover damages from the third person responsible for his injury subject… to the right of the Commissioner to subrogate himself to that right for the benefit of the Government Insurance Fund to the extent of the expenses of that Fund in the case." *Berkeley v. W. Indies Enters*., 480 F.2d 1088, 1091 (3d Cir. 1973). "Any sum obtained by the Commissioner through the means provided in this section shall be covered into the Government Insurance Fund." 24 V.I.C. § 263. Thus, the damages collected from the party at fault is used to support the Government Insurance Fund for future injured workers or their estates.

Section 263 provides that "where an injured employee receives compensation from the Government Insurance Fund for an injury that occurred 'under circumstances making third persons responsible for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages

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[6] § 272(a) and (c). Insurance required, period of coverage. Every employer shall secure the payment of compensation under this chapter by insuring with the Government Insurance Fund created by this chapter. …. Every employer who has not filed the required reports and paid the premium due to which this section refers within the term herein fixed shall be considered an uninsured employer.

from the third person responsible for said injury, disease, or death." *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 786 (2015) (*quoting* 24 V.I.C. § 263). "Under these circumstances, 'the Administrator shall subrogate himself to the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or employee or of his beneficiaries,' and '[n]o compromise between the injured workman or employee, or his beneficiaries in case of death, and the third person responsible shall be valid or effective in law unless the expenses incurred by the Government Insurance Fund in the case are first paid." *Id*.

"[T]he Government's right of subrogation constitutes a first lien on any recovery from a third-party tortfeasor, and this to the full extent of all benefits, medical expenses, and other compensation paid out of the insurance fund." *Gov't of V.I. v. Garvey*, No. 7/1985, 1990 V.I. LEXIS 30, at *3 (Oct. 4, 1990). "Funds recouped when a beneficiary recovers in a third-party tort action are not deposited in the Virgin Islands general treasury but go to replenish the fund for payment of future workmen's compensation benefits." *Nieves v. Hess Oil V.I. Corp.*, 819 F.2d 1237, 1249 (3d Cir. 1987).

At the time the statute was enacted, if the Division had not instituted an action within 90 days of the final decision of the case by the Commissioner of Labor, the worker could bring an action on their own behalf without being obligated to reimburse the Government Insurance Fund. *Ayala*, 6 V.I. at 618. A 1975 amendment

clarified that a two-year statute of limitations applies to suits brought by either the injured party or the Division, and the time period began on the date of the employee's injury. *Galvan v. Hess Oil V.I. Corp*., 549 F.2d 281, 286 (3d Cir. 1977). "We see the purpose of 24 V.I.C. § 263, as amended, to be assurance that the Commissioner will be able to recoup payments when a third party tortfeasor is found liable. As such [§ 263] governs the relationship between the recipient employee and the Commissioner, and the relationship between the Commissioner and a third-party tortfeasor". *Id.* at 287.

In *Gov't of V.I. v. Garvey*, No. 7/1985, 1990 V.I. LEXIS 30 (Oct. 4, 1990), an injured employee obtained benefits through Workers Compensation and chose to file suit against the third-party tortfeasor that caused his injuries. The injured worker refused to pay the Division the amount it was owed from his settlement fund unless the Division also paid a proportionate share of the attorney's fees and litigants costs he incurred from filing suit. *Id*. at *1-2. The then Territorial Court in *Garvey* concluded that the under the theories of co-ownership and unjust enrichment, the Division is required to share proportionately in the necessary costs and attorney's fees involved. *Id*. at *6-7. The Territorial Court determined the Division's proportionate share of fees by dividing the amount the Division paid out by the amount of the settlement. *Id.* at *7. The Territorial Court in *Jennings v. Richards*, 31 V.I. 188, 191 (1995), reached a similar conclusion that the Division is responsible for a pro rata share towards the attorney's fees. The court also concluded that Section 263 implied

a duty on the part of the Division to participate in settlement negotiations, *Id.*, though it may have reached this conclusion because in 1995, the statute required the Division to be listed as a party to the suit. *Garvey* and *Jennings* appear to be the only matters that address attorney's fees in relation to a matter involving Section 263.

Until the statute was amended in 2002, "[an injured] employee [could] not [even]… institute any action against the third party [tortfeasor] unless the Commissioner [was] a party to the action." *Paez v. Pittsburgh-Des Moines Corp*., 21 V.I. 237, 243 n.2 (1985). *See also Hood v. Hess Oil V.I. Corp*., 650 F. Supp. 678, 679 n.2 (D.V.I. 1986) ("The territory's Commissioner of Labor has been joined as a party to this action pursuant to 24 V.I.C. § 263.); *but see Shetter v. Amerada Hess Corp*., 14 F.3d 934, 941 (3d Cir. 1994) (The Third Circuit applied Rule 19(a) and determined that "there is no substantial basis for deciding that the Commissioner's joinder is necessary for a judge adjudication," particularly when the Division retains its right to subrogation, the statute of limitations had run, and "[i]f the case [was] dismissed, the Commissioner in this particular instance will lose any ability to recover monies".) In 2002 the Legislature amended Section 263 to add the bolded language below:

> The injured workman or employee or his beneficiaries may not institute any action, nor may compromise any right of action they may have against the third person responsible for the damages, unless the Administrator is a party to the action or agrees to the compromise, **but the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result**

> **in dismissal of the claim, so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are secured by any recovery**.

24 V.I.C. § 263 (emphasis added).

In *Bertrand*, 63 V.I. at 775, this Court denied the Division's request for reimbursement pursuant to Section 263 from a settlement reached between an injured worker and third-party tortfeasors because Bertrand's employer was uninsured. This Court indicated that Section 261(a)(2)[7] – not 263 – applies to actions involving uninsured employers, and thus the Division should have been seeking recompense from the uninsured employer for monies expended on the injured worker's behalf, not the third-party tortfeasor.

The November 14, 2022, Order denied the Division's request to be added as a party in the suit against the Defendants. The Division had requested intervention when it was made aware that the parties were seeking to distribute the settlement funds to George and his counsel without complying with 24 V.I.C. § 263.

[7] 24 § 261(a)(1). Uninsured employers. In the case of an injury to an employee, who was injured while working for an uninsured employer, the Administrator shall determine the proper compensation plus the expenses in the case, *and shall collect from the employer*, to be covered into the Uninsured-Employer Cases Fund hereinafter created, such compensation and expenses…. (Emphasis added.)

b. The Government was entitled to intervene as of right.

The Division did not need to intervene in a suit in order to retain its rights under the statute. However, intervention as of right must be allowed when, as here, parties seek to disburse funds without first fulfilling their own obligations.

Pursuant to Virgin Islands Rules of Civil Procedure 24(2), a party may intervene as of right if it "timely … claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." "An abuse of discretion involves a finding of clearly erroneous fact, an errant conclusion of law, or an improper application of law to fact." *Suid v. Law Office of Karin A. Bentz, P.C.*, 75 V.I. 272, 276-77 (2021). Here, the parties had already indicated that they intended to circumvent the plain requirements of Section 263 – that the Division's lien be satisfied first, absent the Division's consent otherwise – and distribute the funds first to George's attorney. (JA 70.)

"To intervene as of right, the applicant must first show that the motion to intervene was made in a timely manner." *Anthony*, 56 V.I. at 527. The Superior Court based its decision on its finding that the motion was untimely, because any delay in filing the motion to intervene was a result of the parties' failure to ensure that the Division would be paid as required by the statute.

This Court should find that the Superior Court's denial of the Division's motion to intervene was an abuse of discretion. The Superior Court was aware that the plain language of the statute requires that the Division's interests be protected, whether it is a party or not; that the parties instead were going to distribute money first to George's counsel; and that the Division only sought to intervene once it was clear that the parties were intent on circumventing the law. Thus, the Decision of the Superior Court should be vacated with an order to direct that the settlement funds be directed to the Division since the denial of the motion to intervene was an abuse of discretion.

II. THE SUPERIOR COURT ERRED WHEN IT ORDERED THE GOVERNMENT TO EXECUTE A GENERAL RELEASE BECAUSE ONLY THE GOVERNMENT MAY ELECT TO COMPROMISE ITS RIGHTS TO RECOVER FROM THIRD PARTY TORTFEASORS.

This next question – whether the Superior Court properly applied the law when it ordered the Division to execute a general release – the order is subject to plenary review.

Although the Division never consented to subrogating its rights to the settlement funds to George's attorney's fees, the Superior Court ordered the Cashier of the Superior Court to release to George's counsel a sum of Six Thousand Thirty-Seven Dollars and Thirty-Three Cents ($6,037.33) for attorney's fees and expenses. By its plain language, Section 263 obligates a plaintiff to first obtain the consent of the Division to any settlement unless the Division has first been paid. Section 263

("No compromise shall be valid or effective in law unless the expenses incurred by the [Division] are first paid.") Here, the Division's lien has not been paid.

While George argues that the holding by the then Territorial Court in *Jennings* – which held in 1995 that the Division is liable for a proportionate amount of attorney's fees when a private attorney worked on reaching a settlement on behalf of an injured worker – should apply here, even *Jennings* did not require the Division to be responsible for the entirety of the attorney's fees and expenses. (JA 140.)

Under Section 263, only the Division can choose when or if it will compromise its statutory right to repayment. ("The Administrator may compromise as to his rights against a third party responsible for the damages."). That the Division has executed its statutory right to compromise in the past does not forego its statutory right to also pursue its right to recoupment. *See also Jennings*, 31 V.I. at 191 n.1 ("Whether the Commissioner of Labor chooses to follow a principle of proportional recovery or some other level of compromise is, at present, left to his or her discretion.") Therefore, this Court should find that the Superior Court's order, which forced the Division compromise its rights in contravention of the plain language of Section 263, involved errant conclusions of law and should be vacated and remanded with an order that the entire funds be remitted to the Division..

III. THE SUPERIOR COURT'S ACTIONS VIOLATE THE SEPARATION OF POWERS PRINCIPALS INHERENT IN THE REVISED ORGANIC ACT.

Whether the Superior Court violated the separation of powers doctrine when it chose to disregard the plain language of Section 263 is a question of law and thus subject to plenary review.

George argued below that "[i]n all the decades of personal injury practice in the Virgin Islands, it has been the professional practice and experience [of George's counsel] that [the Division] will always discuss reducing the lien amount after the case is settled so that [the Division] knows exactly how much money is available," and that "[d]iscussions concerning a reduction in the lien amount occur when the settlement figure is not enough to satisfy the lien amount." (JA 107.) George goes on to state that the Division "acted fairly when the settlement amounts have been small, despite the actual amount of the lien," (JA 107), the inference being that it is unfair for the Division to now seek the full amount due to it under the statute. George then points out that the Division "did no work or seek to recover any money from third parties in this matter" (JA 108) - something the Division is not even required to do under the statute when an injured party decides to file its own claim against a third-party tortfeasor. *See* 24 V.I.C. § 263 ("When an injured workman... may be entitled to institute an action for damages against a third person... [the Division] may institute proceedings against such third person in the name of the injured workman" but "[t]he injured workman... may [initiate suit]... against the third-person

responsible for the damages... [but must] acknowledge[s] that all sums due [the Division] are secured by any recovery.") George's counsel also argued that the "policies and procedures of the [Division] for the past four or five decades are contrary to the present 'position' of the [Division]" to enforce its rights under Section 263. (JA 73.)

The Superior Court then ordered the Division to compromise its claim without its consent, in violation of the plain language of the statute, asserting that because the Division has compromised in the past, it would continue to do so here, stating that it made this decision based on equitable principals. (JA 256.) "It is axiomatic that equitable relief is only available where there is no adequate remedy at law." *3RC & Co. v. Boynes Trucking Sys*., 63 V.I. 544, 554 (2015) (*quoting Cacciamani & Rover Corp. v. Banco Popular*, 61 V.I. 247, 252 n.3 (V.I. 2014)). Equity, then, is not a substitute for following the law.

"When it enacted the Revised Organic Act, the United States Congress not only delegated certain powers to the Government of the Virgin Islands, but also established a system of separation of powers within its branches, with executive functions vested in the Executive Branch, legislative functions vested in the Legislative Branch, and judicial functions vested in the Judicial Branch." *Balboni v. Ranger Am. of the V.I., Inc*., 70 V.I. 1048, 1084 (2019) (citation omitted). The Executive Branch enforces the laws created by the Legislative Branch. *Sekou v. Moorhead*, 72 V.I. 1048, 1078 (2020) (citation omitted). While "interpretation of a statute… is

unquestionably within the jurisdiction of the Judicial Branch of the Virgin Islands," *Balboni*, 70 V.I. at 1085 (citations omitted), which includes the Superior Court, when the plain language of a statute discloses the legislative intent, the interpretive inquiry is over. *In re Sherman*, 49 V.I. 452, 456 (V.I. 2008). Thus the Judicial Branch cannot overstep its boundaries by removing a right granted by the Legislative Branch to a division of the Executive Branch when the language of the statute granting this right is clear.

"This Court has repeatedly cautioned that policy arguments cannot serve as justification for creating an ambiguity in an otherwise unambiguous statute or for otherwise disregarding the statute as written by the Legislature." *Atl. Human Res. Advisors, LLC v. Espersen*, 76 V.I. 583, 604 (2022) (citations omitted). The legislature possesses the power to enact laws, *Todmann v. People of the V.I.*, 57 V.I. 540, 547 (2012), and when the statutory language is clear, as it is here, *see Haynes v. Ottley*, 61 V.I. 547, 561 (V.I. 2014) (internal citation omitted) ("When interpreting the meaning of a statute, we first look to its plain text. This is because courts, as a general rule, should not adopt an interpretation of a statute that contradicts its plain text."), this Court should find that the Superior Court erroneously violated the separation of powers doctrine when it circumvented the Division's statutory right to first consent to any distribution of settlement funds.

IV. THE TRIAL COURT DISREGARDED THE CLEAR AND UNAMBIGUOUS LANGUAGE OF 24 V.I.C. § 263 WHEN IT ORDERED THE RELEASE OF SETTLEMENT FUNDS TO GEORGE'S COUNSEL BEFORE ENSURING THAT ALL SUMS DUE THE GOVERNMENT WERE SECURED.

Although the Superior Court acknowledged that pursuant to Section 263, an injured government employee cannot compromise the right of action without the assent and participation of the Division, it concluded that, "given the circumstances, in this matter, equity requires the court disburse the money to both the Department of Labor and [George's] counsel." (JA 410.) The Superior Court indicated that its decision turned on whether the Division had already agreed to accept the settlement proceeds minus attorney's fees, (JA 410), while noting that the testimony regarding any agreement was conflicting. (JA 408.) Despite that conflict– and without clearly indicating that the Superior Court had even found that the Division had indeed agreed to such a division – the Superior Court concluded that because the Division is vested with the discretionary authority to enter into compromise agreements, and it and other agencies have done so in the past, then the Division would be required to do so now. (JA 260.)

a. The court order and George's requests for relief are in contravention of the plain language of the statute.

George asked that his counsel be paid first from the settlement funds and the Superior Court ordered that the monies be dispersed as he requested. This was in clear contravention of the plain language of the statute.

George never made any effort to join the Division as a party to the proceedings, and by the time the matter went to mediation, all parties were well aware of the requirements of Section 263: that the Division's interest be guaranteed.

George's Motion to Interplead Settlement Funds argued that the Division made no efforts "to settle case during the two-year period in which the statute of limitations existed." (JA 71.) Again, under Section 263, the Division is not obligated to file a suit, especially when an injured party who is receiving Workers' Compensation benefits already filed a claim with the Superior Court seeking recompense less than six (6) months after an accident, (JA 44), long before the Division would have any statute of limitation concerns against the tortfeasor under Section 263. Additionally, the Division had an active lien against the funds.

George also argues that allowing the Division to first collect from settlement funds "would leave the plaintiff with no recovery for his pain and suffering." (JA 70.) The Division is allowed to both let the injured party both pursue their claim for damages, and also to expect fulfillment of the claimant's obligation to reimburse the Division for monies already expended on that party's behalf. Two things can be true at one time. An injured party is not prohibited from also seeking additional damages, attorney's fees, and any other costs since, if the Division files a case on the injured party's behalf instead, it will not seek these additional damages and costs. There admittedly is incentive for parties to pursue their own claims against tortfeasors if they so choose.

But despite the clear language of the statute – which allows a party to initiate its own claims against the third-party tortfeasor – George's counsel argued that "[c]ivil counsel represents Plaintiff to help recompense Plaintiff for his injuries and does not undertake representation to compensate [the Division]." (JA 143.) This reasoning overlooks the injured and represented party's obligation to ensure that the Division's interests are also protected. See Section 263 ("No compromise between the injured workman… and the third person responsible shall be valid or effective in law unless the expenses incurred by the Government Insurance Fund in the case are first paid.")

Additionally, the parties' settlement agreement included the provisions that George would continue to "be responsible for any time of workers' comp liens" and "[e]ach party shall bear its own costs, expenses and attorneys' fees". (JA 75.) George's counsel now asks that the Division fulfill obligations she herself negotiated on her client's behalf. In short, she asks that individuals who receive funds from the Division should receive a windfall while the People of the Virgin Islands and other injured workers have to make up any shortfalls of Division funds. Again, the Division is not obligated to participate in a suit brought by an injured party, nor is it obligated to participate in any mediation. It is, however, entitled to pursue its lien.

George's counsel added that she would "not be taking cases in which the [Virgin Islands Department of Labor] will have its hand out for all proceeds less fees and costs," when the Division's entitlement to be repaid for money it already paid on a

claimant's behalf has been guaranteed by the Virgin Islands Legislature since at least 1954. George's counsel also argued that if attorney's fees are not first taken from the settlement funds – instead of the money statutorily obligated to first go to the Division – George would be subject to double, new, or redundant liability. (JA 85.) The statute, however, only obligates George to repay monies collected from a third-party tortfeasor to the Division in the amount of funds already paid on his behalf, nothing more, nothing less. *See Galvan*, 549 F.2d at 288 n.13 ("Because … the employee … must join the Commissioner as a party plaintiff, the Commissioner will not miss recoupment opportunities, and the employee will not receive 'double' recoveries.")

George also argued that "[a]t no time did any individual from the [Division] inquire as to whether a third-party might be liable for the injuries sustained by the Plaintiff." (JA 107.) Again, George asks that the Division fulfill obligations already imposed on a claimant by Section 263, in which the claimant – not the Division – is required to join the Division as a party to the action, obtain the Division's agreeance to a compromise; or acknowledge that all sums due the Division are secured by any recovery. 24 V.I.C. § 263.

George now asks that the Division bear all the risks that he took under the advice of counsel – risk that he could lose the suit, risk that a settlement might not be reached, and risk that any settlement reached may not meet his obligations to the

Division, let alone to his counsel. Regardless of the amount George settled for, he was not relieved of his obligation to reimburse the Division.

George's counsel also asks that the Division take on any risks taken on by any and all personal injury attorneys who seek damages against third-party tortfeasors on behalf of clients who are also beholden to the Division – risk that they may lose the suit, risk that a settlement may not be reached, and risk that any settlement may fall short of monies due to both the Division and counsel. This risk is inherent to contingency fee agreements and personal injury representation. Additionally, that George's counsel seeks payment from funds that would be consumed by money already due by George to the Division raises conflict of interest concerns in both this Court and the Superior Court. *Lee J. Rohn & Assocs., LLC v. Chapin*, No. ST-16-CV-655, 2018 V.I. LEXIS 144, at *7 and *13 (Super. Ct. Dec. 18, 2018) ("George's counsel continues to advocate for payment of her attorney's fees from the settlement funds first despite the plain language of Section 263 and despite the clear terms of the settlement agreement between her client and the Defendants that states that each party is responsible for their own attorney's fees. It is perplexing that the Defendant's, the non-prevailing party, and George - the party who initiated the suit, accepted the settlement, and agreed to be responsible for his own attorney's fees and costs – now demand that the Division be entirely responsible for attorney's fees.

Lastly, Defendants argue below that they are unable to "make a payment on the negotiated Settlement Agreement without receiving in consideration therefor a

full release of all claims," (JA 85), when, under the same statute the Division eagerly seeks to enforce, the Division would not be able to pursue any shortfall from the tortfeasor. "[The Division] may institute proceedings against such third person in the name of the injured workman... within two years following the date of the injury". 24 V.I.C. § 293.

This Court should hold that ordering the release of the settlement funds first to George's counsel was an erroneous application of the law. The Court should also conclude that the Division is not liable for attorney's fees when an injured party contracts to pay them themselves.

CONCLUSION

The parties do not dispute that the Division expended Sixty-One Thousand Two-Hundred and Five Dollars and Twenty-Seven Cents ($61,205.27) on George's behalf and that 24 V.I.C. 263 is applicable to George's claim. George asked that the judicial system disregard the plain language of the statute because the Division had at times been more lenient with its statutory rights in the past when the Division exercised its alternate right to compromise. The Superior Court's order should be vacated, and this Court should find that the Division should be awarded the entire amount of the settlement funds in this matter.

Respectfully submitted,

CAROL THOMAS-JACOBS, Esq.
Acting Attorney General

PAMELA R. TEPPER, Esq.
Solicitor General

Dated: March 13, 2023

By: */s/ Tracy Myers*
TRACY MYERS, Esq.
V.I. Bar No. 1149
Assistant Attorney General
Department of Justice
34-38 Kronprindsens Gade
GERS Complex, 2nd Floor
St. Thomas, VI 00802
Telephone: (340) 774-5666
Fax: (340) 777-9848
Tracy.Myers@doj.vi.gov

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the Supreme Court of the Virgin Islands under Virgin Islands Bar Number 1149.

/s/ *Tracy Myers*

CERTIFICATION OF COMPLIANCE WITH LENGTH LIMITATIONS

I hereby certify that the foregoing brief complies with the limitations on the number of words as provided in the V.I.R.APP. 22(f) in that the brief, exclusive of pages containing the table of contents and the table of authorities, contains 7769 words.

/s/ *Tracy Myers*

CERTIFICATE OF SERVICE

The other parties are represented by a Filing User. I hereby certify that on March 13, 2023, a true and exact copy of the foregoing was sent via VISCEFS to:

Julie German Evert, Esq.
Law Office of Julie German Evert
5034 Norre Gade, Suite 6
St. Thomas, VI 00802
lawofficesofjulieevert@gmail.com

James L. Hymes, III, Esq.
Law Office of James L. Hymes, III, PC
P. O. Box 990
St. Thomas, VI 00804-0990
jim@hymeslawvi.com