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

GOVERNMENT OF THE VIRGIN ISLANDS,
MARK LONSKI, AND PROPERTY KING, 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

BRIEF OF APPELLEE

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SUPPLEMENTAL STATEMENT OF FACTS

The Government's statement of the facts is accurate for the most part, with two glaring omissions. First, the Government failed to state that at the hearing on November 9, 2022, at which the Government appeared and participated, Director of Workers Compensation Raina Thomas testified regarding a conversation between undersigned Counsel for Appellee Elvis George, Julie German Evert, and Gary Molloy, Commissioner for the Virgin Islands Department of Labor ("VIDOL"), during a teleconference at which Ms. Thomas was present. According to Director Thomas, Commissioner Molloy told Attorney Evert that VIDOL had the right to recoup the amount of funds spent on Mr. George's workers' compensation claim from the third-party settlement. (JA 237:12:23, 238:20-25.) However, the amount of attorney's fees and costs expended in settling the case would be subtracted from the full amount of the settlement, and the balance would go to VIDOL. (JA 238:3-6, 239:1-5.)

In other cases, Director Thomas testified that she received tenders of settlement from Attorney Rohn and Attorney Holt equal to the amount of the settlement less attorney's fees and conceded that that practice was common in the St. Croix office where she was assigned. (JA 239:20–JA 240:17.) Director Thomas further stated that she was not aware whether or not VIDOL had sent written notice to members of the Virgin Islands Bar that the VIDOL would expect to receive the

entire amount of any settlement received by a plaintiff in any third-party litigation. (JA 240:23–241:2.)

Second, the Government's Statement of Facts does not mention Attorney Evert's promise to give her client part of the amount of any fee recovered because she "do[es] not ever take money when [her] client gets nothing." (JA 81, ¶ 14.) Accordingly, this case is not about a $6,037.33 attorney's fee, but about a pro rata attorney's fee award of $3,000.00, the remaining $3,037.33 to be shared with Mr. George in acknowledgment of his pain and suffering, for which he was not compensated under the workers' compensation scheme.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE GOVERNMENT'S AUGUST 5, 2022 MOTION FOR LEAVE TO INTERVENE BECAUSE THE MOTION WAS UNTIMELY AND, IN ANY EVENT, THE GOVERNMENT WAS GIVEN AN OPPORTUNITY TO ARGUE ITS POSITION ON THE WORKERS' COMPENSATION LIEN

The Government of the Virgin Islands ("GVI") states that it moved to intervene when it learned that Appellee Elvis George was seeking distribution of funds obtained in a settlement with the tortfeasor, Mark Lonski, and his employer, Property King, Inc., without complying with 24 V.I.C. § 263. (Gov't's Brf. at 18.) This assertion misstates the record. In fact, Mr. George's February 12, 2021, suit for damages against Mr. Lonski and Property King, Inc., for injuries Appellee sustained

in an on-the-job accident on July 14, 2020 (JA 44-JA 48, JA 258) was specifically permitted by 24 V.I.C. § 263. Mr. George brought this action because the Workers' Compensation Administration ("WCA") never made an effort to determine whether there was potential third-party liability at any time within the two-year statute of limitations set forth in 24 V.I.C. § 263. (JA 80-JA 81.) On February 2, 2022, Counsel for Mr. George notified the WCA of the suit in writing and asked for information on the lien anticipation of mediation. (JA 79.) Although GVI was given notice of the mediation (JA 68-JA 69), it chose not to participate in the mediation or sign a release of the amount of its lien (JA 70, JA 85).

Because VIDOL declined to participate in mediation of the third-party claim and later refused to consider compromising its lien on the settlement amount to allow for payment of costs and attorney's fees—even though VIDOL has the authority to compromise pursuant to 24 V.I.C. § 263—Appellee was forced to bring a motion for interpleader (JA 70-JA-83), in which Mr. Lonski and Property King, Inc., joined (JA 84-JA 86). It is the denial of GVI's August 5, 2022 motion to intervene in the motion for interpleader (JA89-JA 101) to which the Government now objects.

As a practical matter, it is irrelevant that the Superior Court denied GVI's motion to intervene because in its August 4, 2022, order granting the joint motion for interpleader, the Superior Court "**ORDERED** that the parties, *and any other interested party*, shall have sixty (60) days from the date hereof to file any legal

briefs in support of their position concerning the worker's compensation lien, which is the subject of this interpleader." (JA 88) (emphasis added). The Government was given ample opportunity to address the merits of its lien, including fully participating in the November 9, 2022, hearing. The inability to intervene did not prevent the Government from protecting its interests or change the outcome. Therefore, GVI's interest in the settlement proceeds was not "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest," as required for showing a right to intervene as of right. V.I. R. Civ. P. 24(a)(2).

Even if the Superior Court had not given the Government an opportunity to address the propriety of awarding the proceeds of the mediation settlement to GVI, less an appropriate attorney's fee for Mr. George, it still would have been appropriate to deny the motion to intervene because the two-year period for WCA to have instituted a third-party action against Mr. Lonski and Property King, Inc., set forth in 24 V.I.C. § 263, ran on July 14, 2022, and, in spite of notice of the suit brought by Mr. George, the Government neither participated in the mediation nor engaged in negotiations to compromise its claim during that two-year period. The only reason for the Government's belated motion to intervene was to assert its lien, of which the parties and the Superior Court were well aware. Indeed, Appellee made the motion for interpleader because he acknowledged the lien. The decision of the Superior

Court did not "involve[] 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, 277 (2021) (internal quotation marks omitted), and, thus, the court below did not abuse its discretion in denying the Government's motion to intervene.

II. THE SUPERIOR COURT DID NOT ERR IN ORDERING THE GOVERNMENT TO EXECUTE A GENERAL RELEASE CONSISTENT WITH EQUITABLE PRINCIPLES

In *Gov't of V.I. v. Garvey*, Civil No. 7/1985, 1990 V.I. LEXIS 30 (Terr. Ct. Oct. 4, 1990), an employee who received compensation from the Government Insurance Fund for a work-related injury timely sued the third-party tortfeasor by private counsel. Following settlement of the third-party claim, GVI demanded reimbursement of the full amount of benefits paid from the settlement fund. The employee and his attorney acknowledged the Government's right of subrogation under 24 V.I.C. § 263, but requested that the Government pay a proportionate share of the attorney's fees and costs incurred in the litigation. The Territorial Court agreed with the employee and his attorney and held that, under theories of either joint ownership of the settlement fund or unjust enrichment, "the Government of the Virgin Islands in this case should be required to contribute to the costs and legal fees incurred by defendant Garvey in successfully creating the funds out of which the Government now seeks reimbursement." *Id.*, 1990 V.I. LEXIS 30, *6.

Subsequently, in *Jennings v. Richards*, 31 V.I. 188 (1995), the Territorial Court held that 24 V.I.C. § 263 both gives the Commissioner of Labor the authority to compromise the Government's subrogation lien on a third-party settlement and "implies a duty on the part of the Commissioner to participate in settlement negotiations." *Id.* at 191. Included in the power to compromise recovery claims is "the authority to waive all recovery from that third party." *Id.* at 190. The Territorial Court recognized a need for total waiver because in *Jennings*, just as in this case,

> the compensable damages of the injured party far exceed the potential recovery from the tortfeasor, [and, thus] there can be no incentive for the injured party to initiate an action since any recovery by the plaintiff would automatically revert to the Government. In a negotiated compromise among the plaintiff, the tortfeasor and the Government, both the Government and the injured party would recover something. Otherwise, the Government Fund could only be recompensed through litigation initiated by the Attorney General.

Id.

Both *Garvey* and *Jennings* remain good law. However, in contrast to the adherence to equitable principles illustrated by these two decisions, the Government takes the position that its power to compromise encompasses the right to refuse to negotiate or otherwise participate in settlement of a third-party action brought by an insured worker and his attorney. Here GVI demanded payment of the entire $17,500.00 obtained through the efforts of Mr. George and his attorney, Attorney Evert, based on the misplaced logic that because the Government Insurance Fund had expended over $60,000.00 on Appellee George's workers' compensation claim

the Government was not required to compromise unless and until it received full recovery of the amount paid out. This argument completely ignores the fact that but for Mr. George's third-party action GVI would not have been reimbursed by as much as one penny of compensation paid to Mr. George. Both *Garvey* and *Jennings* required VIDOL to engage in good faith negotiations regarding the amount to be compromised, taking into account, at a minimum, the costs and attorney's fees expended by the employee and his counsel.

Whether or not the Superior Court had the authority to order the Government to accept a specific amount in compromising the amount to which it was entitled from the third-party action is not at issue in this case. The Superior Court order that "in this matter and this matter only" (JA 260) VIDOL and/or WCA should execute a general release allowing the Cashier of the Superior Court to release $6,.037.33 of the interpleaded funds to Mr. George and his attorney and the remaining $10,426.67 to VIDOL/WCA was based solely on the court's assessment that notwithstanding the testimony of Commissioner Molloy that he had never agreed to accept a settlement amount less attorney's fees, GVI had agreed to accept settlement amounts less attorney's fees in cases brought by Attorneys Holt and Rohn in the past. Moreover, Appellee's counsel sent the Assistant Commissioner/Legal Counsel a letter on September 1, 2022, acknowledging the existence of the lien and setting forth the amounts expended in pursuing the third-party litigation (JA 120-JA 126), but the

Department of Labor never responded. The settlement obtained by the Appellee less attorney's fees was still $400.00 more than the Government could have recovered if it had initiated its own third-party suit, since only $10,000.00 was available under the applicable insurance policy. (JA 10, JA 80, JA 109, JA 168, JA 181, JA 183.) And the Government has the discretionary authority to enter into compromise agreements, and regularly does enter into such agreements without violating the Code. (JA 10.) Ultimately the Superior Court ordered disbursement of the interpleader funds as just described because the Government refused to engage in its obligation to negotiate a settlement in good faith and to exercise its authority to compromise its lien amounts where equity demands it. This was not error.

III. THE SUPERIOR COURT'S DECISION DOES NOT VIOLATE THE SEPARATION OF POWERS INHERENT IN THE REVISED ORGANIC ACT

The Government's contention that the Superior Court's decision violates the separation of powers relies on a misstatement of the court's order. The Superior Court did *not* hold that the Government must compromise the amount of its lien without its consent in violation of 24 V.I.C. § 263. Rather, as set forth in Point II, *supra*, the Superior Court held that on the particular facts of this case—taking into account the Government's unwillingness to participate in mediation of the third-party claim, the Commissioner of Labor's unwillingness to engage in a serious discussion of its lien on the settlement amount notwithstanding its statutory authority

to compromise the amount of its recovery and VIDOL's past practice of comprising the amount of its recovery, the fact that counsel for Appellee obtained a recovery for GVI that was $400.00 more than what the Government could have achieved if it had timely filed suit or approached Mr. Lonski and Property King, Inc., about a claim, and the fact that the Government did not dispute the amounts Mr. George expended in pursuing the third-party claim—the interpleader fund should be distributed to the Government in an amount equal to the amount of the settlement fund less the amount of costs and attorney's fees expended, which were distributed to Mr. George and his attorney, Attorney Evert. The Superior Court merely decided the case before it and did not order the Government to act beyond the scope of its statutory authority.

IV. THE SUPERIOR COURT DID NOT DISREGARD THE LANGUAGE OF 24 V.I.C. § 263 IN DISTRIBUTING THE INTERPLEADER FUND

As repeated throughout this response brief, the Superior Court's order was based on the unique facts of this case in which the Commissioner of Labor attempted to change VIDOL's past practice and policy of compromising the amount of its lien, as specifically allowed by 24 V.I.C. § 263, in an amount equal to the amount of costs and attorney's fees expended by the employee and his attorney in the midst of a third-party action without prior notice to the employee or his attorney. The Superior Court did *not* hold that the Government was precluded from changing its policy *with notice* to refuse to compromise the amount of its lien to allow for a reasonable attorney's

fee—as nonsensical as the proposed policy would be. In fact, the Superior Court commented in a footnote that VIDOL and WCA should put the legal community on notice of its new policy. (JA 10 n.3.) Therefore, a detailed response to Point IV of the Government's brief is unnecessary.

However, two quick points must be made. First of all, the notion that Appellee has received a "windfall" to the detriment of the WCA and the People of the Virgin Islands (Gov't's Brf. at 27) defies logic and is beyond ludicrous. Appellee was absolutely under no obligation to repay the full amount of benefits he received from the Government Insurance Fund as a consequence of his work-related injury. Had Mr. George never brought his third-party action, the Government—which elected not to seek relief from the third-party tortfeasors—would not have recovered anything to offset the approximately $60,000.00 the fund paid out in benefits to Mr. George, and no one, including Mr. George, would have been liable to the Fund. Putting forth the time and effort to achieve a benefit for the Government is hardly a windfall for Mr. George. Taking advantage of the time and effort of Mr. George and his attorney is, however, a windfall to the Government. The fact that Mr. George was not able to obtain a settlement equal to the full amount of the benefits he received did not harm the People of the Virgin Islands since, as the Government pointed out in its brief, "The funds for these payments come from the Government

Insurance Fund, which is financed by employer premiums. Section 272(a) and (c)." (Gov't's Brf. at 13-14) (footnote omitted).

Second, the Government's attempt to raise conflict of interest concerns (Gov't's Brf. at 29) falls short. The case the Government cites for the proposition that Attorney Evert has a conflict of interest does not arise out of a third-party action in a workers' compensation matter. Rather, it involved a dispute between a law firm and an attorney formerly employed by the law firm over representation in a products liability suit. *See Lee J. Rohn & Assocs., LLC v. Chapin*, Case No. ST-16-CV-655, 2018 V.I. LEXIS 144 (Super. Ct. Dec. 18, 2018). Moreover, the language immediately following the case citation that purports to be a quote from the cited case is not a quote of language found in the case, but further argument of the Government's position. The Government offers no explanation as to why the attorney who allegedly engaged in tortious activity in *Lee J. Rohn & Assocs., LLC v. Chapin* is similarly situated to Attorney Evert, who merely sought recovery of a fee for her services pursuant to a longstanding past practice of VIDOL, which, as previously stated, she shared with Appellee. (JA 81, ¶ 14.)

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be affirmed in its entirety and the Government's appeal should be denied.

April 10, 2023

Respectfully submitted,

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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 370.

/s/ Julie German Evert

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. P. 22(f) in that the brief, exclusive of pages containing the table of contents and the table of authorities, contains 2,768 words.

/s/ Julie German Evert

CERTIFICATE OF SERVICE

The other parties are represented by a Filing User. I hereby certify that on April 10, 2023, a true and exact copy of the foregoing was sent via VISCEFS to:

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