**For Publication**

# IN THE SUPREME COURT OF THE VIRGIN ISLANDS

**ATLANTIC HUMAN RESOURCE ADVISORS, LLC, SUGAR BAY CLUB AND RESORT CORP., d/b/a SUGAR BAY RESORT AND SPA, and AIMBRIDGE HOSPITALITY, L.P.,**
Appellants/Defendants,

v.

**CAROLYN ESPERSEN,**
Appellee/Plaintiff.

**S. Ct. Civ. No. 2019-0065**
Re: Super. Ct. Civ. No. 355/2014 (STT)

Consolidated Cases:
S. Ct. Civ. No. 2019-0065
S. Ct. Civ. No. 2019-0066
S. Ct. Civ. No. 2019-0073

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

Argued: April 13, 2021
Filed: May 27, 2022

Cite as: 2022 VI 11

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

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# OPINION OF THE COURT

**HODGE, Chief Justice.**

¶ 1 Appellants Atlantic Human Resource Advisors, LLC ("AHRA"), Aimbridge Hospitality, L.P., and Sugar Bay and Resort Corp. (collectively the "defendants") appeal from the Superior Court's March 12, 2019 judgment, which awarded $2,791,103 in favor of Appellee Carolyn Espersen. For the reasons that follow, we reverse the portion of the judgment holding Sugar Bay liable for defamation and reduce the punitive damages awarded against AHRA from $750,000 to $360,000, but affirm the judgment in all other respects.

## I. BACKGROUND

¶ 2 From August 2010 to September 29, 2013, Espersen was employed as a bartender at a resort operated by Sugar Bay. In June 2013, Sugar Bay contracted with Aimbridge to manage the resort on its behalf, which included granting Aimbridge the authority to hire and fire employees. Sugar Bay further contracted with AHRA to provide human resources consulting services, with AHRA assigning Carrie Combs as its on-site representative, who also served as Director of Human Resources for Sugar Bay.

¶ 3 During the period Aimbridge managed the resort and AHRA provided human resources consulting services, two managerial employees—Dusty Goode, Head of Loss Prevention, and Gina Castro, Head of Housekeeping—filed an internal complaint against Espersen based on an incident that occurred on September 15, 2013. At the time, the resort operated on a cashless basis as an all-inclusive resort, with guests wearing wristbands to access the property and receive food

and beverage services. Goode and Castro reported to Joseph Talbert—Espersen's immediate supervisor—and Combs that Espersen had served drinks at the pool bar to a man and a woman that were purportedly not wearing wristbands and not guests of the resort but were likely staying at the nearby Pointe Pleasant Resort. They further alleged that Espersen received $20 from the woman, which she placed in a tip jar without going to the area of the cash register.

¶ 4 On September 19, 2013, Talbert suspended Espersen pending an investigation for possible termination, which was conducted by Combs. Once informed of the suspension and investigation, Espersen immediately stated that the couple she served had been wearing wristbands, and that the $20 had been a cash tip for her services. Moreover, during the investigation, Espersen identified the man as John Huffman, who submitted a letter stating that he and his wife had paid for day passes and that he had given her a $20 cash tip. Together with the letter, Huffman included proof of purchase of the day passes and the wrist bands they wore. Combs spoke with Huffman and reaffirmed the statements in the letter. However, Goode and Castro both reaffirmed their accounts as well, and emphasized that they had seen the female guest and not the male guest give cash to Espersen.

¶ 5 Ultimately, Combs submitted a recommendation to Kashmie Ali—the resort's General Manager—and Cory Santana—the resort's Assistant General Manager—that Espersen be removed from her cash handling position and transferred to a non-cash handling position, and that her employment be terminated if there was no non-cash handling position available. Afterwards, Ali and Santana advised Combs that they had decided to terminate Espersen's employment. On September 29, 2013, Combs called Espersen to inform her of that decision, and memorialized the personnel action in an October 11, 2013 letter.

¶ 6 On July 17, 2014, Espersen filed suit against Sugar Bay, Aimbridge, and AHRA in the

Superior Court, asserting causes of action for wrongful discharge, defamation, and breach of an implied contract covenant of good faith and fair dealing, and seeking both compensatory and punitive damages. After numerous proceedings not relevant to this appeal, the matter proceeded to a jury trial on February 11-15 and 20, 2019, with respect to Espersen's wrongful discharge claims against all three defendants and her defamation claim only against Sugar Bay.[1] At trial, Espersen introduced evidence indicating that she had been fired in retaliation for previously filing internal complaints against Talbert, Castro, and Santana, and to render her "unavailable" to serve as a witness against Sugar Bay in an unrelated slip-and-fall personal injury case where she had previously reported the area of the fall to be slippery. In addition, Espersen introduced evidence that other employees at Sugar Bay had been told that she had stolen money, and that the allegations against her led to depression and other personality changes, such as an inability to trust people. However, it was also established at trial that Espersen had been hired by the Marriott Vacation Club nearly two months after her termination at a higher rate of pay.

¶ 7 Ultimately, the jury rendered a verdict against Sugar Bay for defamation in the amount of $252,000 for loss of reputation and humiliation, $189,000 for mental anguish, and $540,000 as punitive damages, and a verdict against Sugar Bay, Aimbridge, and AHRA for wrongful discharge, jointly and severally, in the amount of $11,103 for loss of income and $189,000 in mental anguish, as well as punitive damages in the amount of $360,000, $750,000, and $500,000 respectively against Sugar Bay, AHRA, and Aimbridge. The Superior Court memorialized the jury verdict in a March 12, 2019 judgment. Although the defendants timely filed motions for a new trial and for judgment as a matter of law on April 9, 2019, the motions were deemed denied due to the failure

[1] The Superior Court, in a July 18, 2018 opinion, entered summary judgment in favor of the defendants on all other counts. Espersen has not appealed that decision to this Court.

of the Superior Court to rule on them within 120 days of their filing. *See* V.I. R. App. P. 5(a)(4). AHRA and Sugar Bay timely filed notices of appeal on August 26, 2019, *see* V.I. R. App. P. 5(a)(1), and Aimbridge timely filed its notice of appeal on September 19, 2019.[2] *See* V.I. R. App. P. 5(a)(3).

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

¶ 8 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's March 12, 2019 judgment resolved all of the claims between the parties, it is a final judgment within the meaning of section 32(a), thereby conferring jurisdiction on this Court. *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012).

¶ 9 This Court exercises plenary review of the Superior Court's application of law. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 436 (V.I. 2013) (citing *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)).

### B. Sufficiency of the Evidence

¶ 10 In their appellate briefs, the defendants maintain that they are entitled to judgment as a matter of law with respect to all causes of action because Espersen failed to introduce sufficient

[2] Espersen filed a notice of cross-appeal with this Court on September 9, 2019, which stated that she intended to appeal the Superior Court's grant of a motion *in limine*, its decision to bifurcate the trial as to punitive damages, and various aspects of its final jury instructions. However, Espersen does not raise any of these issues in her appellate briefs. Therefore, we deem her cross-appeal to have been withdrawn. *See Frett v. People*, 58 V.I. 492, 495 n.1 (V.I. 2013).

evidence from which a reasonable jury could find in her favor. We address each cause of action in turn.

1. Wrongful Discharge

¶ 11 The Virgin Islands Wrongful Discharge Act ("VIWDA") provides, in pertinent part, that

> [u]nless modified by union contract, an employer may dismiss any employee:
>
> (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
> (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
> (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
> (4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
> (5) who performs his work assignments in a negligent manner;
> (6) whose continuous absences from his place of employment affect the interests of his employer;
> (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
> (8) who is dishonest; or
> (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

24 V.I.C. § 76(a). "Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged," provided that the employee was not terminated "as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship." 24 V.I.C. § 76(c). To state a claim under the VIWDA, a plaintiff need only prove that the defendant was his or her employer and that the employer wrongfully discharged him or her, while the defendant bears the burden of proving, as an affirmative defense, that it discharged the plaintiff for one of the reasons set forth in section 76(a). *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 544 (V.I. 2015).

¶ 12 None of the defendants dispute that Espersen introduced sufficient evidence to prove that she had been discharged, and that a reasonable jury could properly find that Espersen had been discharged for a reason other than the permissible grounds enumerated in the VIWDA. However, all defendants argue that Espersen does not meet the statutory definition of "employee," and AHRA and Aimbridge further argue that they do not meet the statutory definition of "employer" under the VIWDA and otherwise did not contribute to her discharge.

*a. Statutory Definition of Employee*

¶ 13 Title 24, chapter 3, section 62 of the Virgin Islands Code defines the term "employee" in pertinent part as "any employee or any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment," but "does not include any person who has been employed by an employer for less than six (6) calendar months." 24 V.I.C. § 62. Section 62 provides that such definition shall apply to "this chapter," and it is located in chapter 3 along with the VIWDA. All defendants argue that this statutory definition of "employee" applies to a claim brought under the VIWDA, and that Espersen does not qualify because the uncontradicted evidence at trial established that she obtained employment with the Marriott Vacation Club on November 30, 2013—approximately two months after her termination—at a purportedly higher rate of pay.

¶ 14 Espersen does not dispute that she obtained employment with Marriott shortly after her termination, although she alleges that this employment was not "regular and substantially equivalent" to her prior employment within the meaning of section 62. However, Espersen maintains that the defendants have all waived this argument and that it is not otherwise properly before the Court. With respect to the merits, Espersen raises a plethora of policy arguments to

essentially justify disregarding the otherwise plain and unambiguous statutory text limiting the definition of "employee" to those "who ha[ve] not obtained any other regular and substantially equivalent employment." 24 V.I.C. § 62. Specifically, Espersen alleges that construing the VIWDA in a way that excludes those who obtained such employment would "resurrect an at-will employment scheme," allow "[e]mployers who terminate employees for any reason [to] escape liability," and place employees who have been discharged "in a no-win situation" where they must choose between mitigating damages and bringing a claim under the VIWDA. (Appellee's AHRA Brief 30.)

i. Waiver

¶ 15 Espersen predicates her waiver argument on the fact that the defendants purportedly did not move for judgment as a matter of law during trial pursuant to Rule 50(a) of the Virgin Islands Rules of Civil Procedure, but only did so in their pre-judgment motions for summary judgment and post-trial Rule 50(b) motions. This, however, is not an accurate characterization of what transpired, at least with respect to Sugar Bay and AHRA, in that their counsel expressly stated, while orally moving for judgment under Rule 50(a) at the conclusion of plaintiff's case in chief, "I would also like to, to the extent it's required for appeal purposes, to reiterate without restating in full my argument with respect to the d[efinition] of employee under Title 24 Virgin Islands Code, Section 62." Thus, contrary to Espersen's representations, Sugar Bay and AHRA did in fact fairly present this issue to the Superior Court in their motions for summary judgment, as well as through pre-verdict Rule 50(a) motions, and post-judgment Rule 50(b) motions.

¶ 16 Nevertheless, Espersen is correct that at no point did counsel for Aimbridge ever expressly move for judgment as a matter of law pursuant to Rule 50(a) based on Espersen failing to establish that she qualified as an "employee" under the VIWDA. This Court has previously construed Rule

50 similarly to its counterpart in the Federal Rules of Civil Procedure and held that "a party only preserves a Rule 50 motion based on sufficiency of the evidence for appeal if she presents a post-verdict motion that raises the same argument under Rule 50(b)." *Charles v. Payne*, 71 V.I. 638, 650 (V.I. 2019) (citing *Unitherm Food Sys v. Swift-Eckrich Inc.*, 546 U.S. 394, 405 (2006)); *see also Tip Top Constr. Corp. v. Austin*, 71 V.I. 549, 562 (V.I. 2019). It did so, however, in the context of a party who made an oral motion under Rule 50(a) yet failed to file a renewed post-judgment motion under Rule 50(b). As such, the situation present here—a party who did not make a Rule 50(a) motion on a claim, yet raised the claim in both an earlier summary judgment motion and a post-judgment motion under Rule 50(b)—represents an issue of first impression for this Court. Moreover, the Supreme Court of the United States has not had occasion to resolve this issue with respect to Rule 50 of the Federal Rules of Civil Procedure, and the lower federal appellate courts are deeply split on the issue, with some courts holding that a Rule 50(b) motion can never be made in the absence of a Rule 50(a) motion, and others holding that a litigant may raise a claim in a Rule 50(b) motion that had not been made in a Rule 50(a) motion so long as that issue represents a pure question of law that had been presented at the summary judgment stage. *Compare Kay v. United of Omaha Life Ins. Co.*, 709 Fed. Appx. 320, 327-28 (6th Cir. 2017); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939-41 (7th Cir. 2006); *with Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC*, 784 F.3d 177, 185-87 (3d Cir. 2015); *McCardle v. Haddad*, 131 F.3d 43, 50-51 (2d Cir. 1997); *see also Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) (declining to resolve the issue of whether a Rule 50 motion is necessary to preserve "a purely legal issue [that] can be resolved with reference only to undisputed facts" that had been previously presented in a summary judgment motion).

¶ 17 We need not, however, resolve this difficult question as part of this appeal. Although

Aimbridge did not make a motion under Rule 50(a), its co-defendants Sugar Bay and AHRA did so, and thus have preserved the issue. This Court has previously joined other courts in holding that when a defendant preserves and then prevails on an issue raised on appeal which had not been preserved by a similarly-situated co-defendant in a related appeal, the benefit of that decision should nevertheless also be given to the co-defendant who waived the claim, for "the disparate treatment of identically situated co-defendants constitute[s] 'manifest injustice'" which establishes "good cause" to waive traditional rules regarding waiver pursuant to Rule 2 of the Virgin Islands Rules of Appellate Procedure. *Boston v. People*, 56 V.I. 634, 645 (V.I. 2012). Importantly, because the opposing party has had the opportunity to brief the issue on the merits in the case in which it has been preserved, the policy reasons in support of waiver—"protect[ing] the appellee from the prejudice that results from the court's consideration of a late argument to which the appellee ordinarily cannot issue a written response" and "ensuring that the court has heard adequate argument on a particular issue prior to rendering its decision"—do not apply to such a unique situation. *Id.* (quoting *Gambino v. Morris*, 134 F.3d 156, 168-69 (3d Cir. 1998) (Roth, J., concurring)). Consequently, it is not necessary for us to determine whether Aimbridge waived this claim, since even if it did, the rule announced in *Boston* would provide Aimbridge with the benefit of any favorable decision given to Sugar Bay and AHRA with respect to the question of whether Esperson meets the statutory definition of "employee."

ii. Regular and Substantially Equivalent Employment

¶ 18 As with all questions of statutory interpretation, our inquiry begins with an analysis of the plain text of the statute – and, if the statutory text is unambiguous, will also end there. *Haynes v. Ottley*, 61 V.I. 547, 561 (V.I. 2014). Moreover, in interpreting a statute, courts should reject constructions that render portions of the statute "wholly superfluous and without an independent

meaning or function of [their] own." *Defoe v. Phillip*, 56 V.I. 109, 129 (V.I. 2012).

¶ 19 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. *See, e.g., World Fresh Market, LLC v. Palermo*, 2021 VI 1; *Hansen v. Bryan*, 68 V.I. 603, 612 (V.I. 2018); *Gerace v. Bentley*, 65 V.I. 289, 300 (V.I. 2016); *see also SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("[P]olicy considerations cannot create an ambiguity when the words on the page are clear.") (citing *SEC v. Sloan*, 436 U.S. 103, 116-17 (1978)). The reason for this is that the Revised Organic Act of 1954, as well as well-established principles of separation of powers, vest legislative power in the legislative branch of government, executive power in the executive branch, and judicial power in the judicial branch. *Bryan v. Fawkes*, 61 V.I. 416, 448 n.13 (V.I. 2014) (citing *Kendall v. Russell*, 572 F.3d 126, 135 (3d Cir. 2009)).

¶ 20 The power to enact legislation on "all rightful subjects of legislation" is a quintessential and express power of the Legislature. 48 U.S.C. § 1574(a). While the Legislature unquestionably possesses the authority to abolish the employment at-will doctrine in the Virgin Islands through the VIWDA, it does not need to be an all-or-nothing proposition—the same authority that permits the Legislature to abolish employment at-will also grants it the authority to codify limits on the effects of its enactments, including precluding liability against an employer under certain circumstances.

¶ 21 While courts must give effect to the plain text of a statute and cannot judicially rewrite such statutes by substituting their own value judgments for those of the legislature, it is also well-established that "[i]nterpretation of one provision of a statute cannot be divorced from its statutory context" and that "[e]ach section . . . must be considered and applied in connection with every

other section . . . so that all will have their due, and conjoint[,] effect." *MacNeil v. Berryhill*, 869 F.3d 109 (2d Cir. 2017) (citations and internal quotation marks omitted). In other words, "even where the language of the statute is plain, its meaning is controlled by its context," and "the statutory language must be construed in light of and governed by its context within the overall statutory scheme." *Motor Vehicle Admin. v. Aiken*, 12 A.3d 656, 665 (Md. 2011). Thus, rather than focusing on isolated parts of section 62, it is important to consider all the pertinent language.

¶ 22 Although the defendants maintain that section 62 provides a definition of "employee," the statute does not actually state that it is providing a definition. Rather, section 62 provides that

> 'employee' includes any employee or any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

24 V.I.C. § 62 (emphases added). The use of the word "includes" rather than a word such as "means" or a phrase such as "is defined as" is highly significant, in that "[t]he word 'includes' is usually a term of enlargement, and not of limitation," and "[t]hus a term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning than where . . . the definition declares what a term 'means.'" *Burgess v. United States*, 533 U.S. 124, 131 n.3 (2008). Consequently, courts have consistently construed statutes that utilize the word "includes" and its variants as only representing a non-exhaustive list, with the listed items only serving as examples. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941); *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014); *State ex rel. Dep't of Economic Security v. Torres*, 431 P.3d 1207, 1211-12 (Ariz. Ct. App. 2018); *State v. White*, 528 A.2d 811, 818 (Conn. 1987) (recognizing that the word "includes" is necessarily ambiguous and requires resorting to other rules of statutory interpretation to determine its meaning in a given statute); *see also* ANTONIN SCALIA & BRYAN A.

GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 226 (2012) ("When a definitional section says that a word 'includes' certain things, that is usually taken to mean that it may include other things as well . . . . When, by contrast, a definitional section says that a word 'means' something, the clear import is that this is its only meaning.").

¶ 23 There is another significant indication that the Legislature did not intend for section 62 to serve as the definition of the term "employee." Again, the pertinent statutory text provides that

> 'employee' includes any employee or any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

24 V.I.C. § 62 (emphases added). In other words, the language chosen by the Legislature is circular, in that the statute literally says that "employee" is included in the definition of "employee." If the Legislature intended section 62 to provide the exclusive definition of the term "employee," it would not have used this language, since it is "completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). However, such circular language is appropriate if the Legislature did not intend to define "employee," but rather wished to convey that the word "employee" as used in the statute includes both individuals who satisfy the ordinary meaning of employee, as well as certain other individuals who would not qualify as employees as that phrase is ordinarily understood—namely, those "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice."[3] 24 V.I.C. § 62.

[3] Further indication of the Legislature's intent can be found in the placement of section 62 in a chapter titled "Labor Relations," which provides that

> [t]he purpose of this chapter is to encourage the friendly adjustment of employer-employee disputes through the practice and procedure of collective bargaining, and

¶ 24 Last, but certainly not least, when interpreting the text of a statute, a court cannot ignore "the grammatical rule of the last antecedent, according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *Fontaine v. People*, 59 V.I. 1004, 1009 (V.I. 2013); *see also* 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.33, p. 369 (6th rev. ed. 2000) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"). The phrase "and who has not obtained any other regular and substantially equivalent employment" is a limiting phrase, which follows the phrase "any employee or any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." 24 V.I.C. § 64. Since "any employee" and "any individual . . ." are both antecedents, the limiting phrase "and who has not obtained any regular and substantially equivalent employment" would not modify the first antecedent—"any employee"—but instead modify only the antecedent which immediately precedes it: "any individual . . .". *Barnhart*, 540 U.S. at 26. "While this rule is not an absolute and can assuredly be overcome by other indicia of meaning," *id.*, in this case the other indicia support application of the rule, for as explained above, the use of the phrase "includes" as well as the circular reference to "employee" provides strong evidence that the Legislature did not intend to limit the ordinary definition of the word "employee," but rather to expand it.

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> to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or mutual aid or protection.

24 V.I.C. § 61. This purpose reflects that the Legislature deliberately crafted an expansive definition of "employee" in section 62 so that individuals—whether or not traditionally considered employees under the common law—would receive the protections of the chapter in the event their work was affected by a work stoppage caused by a labor dispute or unfair labor practice.

¶ 25 For these reasons, we hold that the Legislature intended through section 62 to provide that one is an "employee" for purposes of the VIWDA and other provisions in that chapter if they meet the ordinary common-law definition of the term, or fall into another class of individuals whom the Legislature has elected to extend the protections of the chapter even though they would not qualify as employees under the traditional understanding of that term. Unquestionably, Espersen was an employee within the ordinary meaning of that term, and since the limiting language relied upon by the defendants does not modify the term "employee" but rather modifies the "any individual . . ." language, the fact that she may have obtained comparable employment from the Marriott Vacation Club does not preclude her from prosecuting an action for wrongful discharge under the VIWDA.[4]

iii. Employment for Six Calendar Months

¶ 26 Aimbridge further argues, that to the extent it could be considered her employer—an issue addressed below—Espersen is not an "employee" for purposes of the VIWDA because section 62 provides that the term "employee . . . does not include any person who has been employed by an employer for less than six (6) calendar months." 24 V.I.C. § 62. According to Aimbridge, although Espersen began to work for Sugar Bay in August 2010, Aimbridge did not sign its contract with Sugar Bay until June 2013, and this later date should therefore be used to determine Espersen's length of employment with Aimbridge. Since Espersen was suspended on September 19, 2013, and terminated on September 29, 2013, Aimbridge contends that she would have only been employed for approximately four calendar months, and thus not an "employee" for purposes of

[4] In its final instructions to the jury, the Superior Court erroneously included in the definition of "employee" the requirement that one has not obtained comparable employment. However, because this error benefited the defendants, and the jury nevertheless entered a verdict in favor of Espersen on her wrongful discharge cause of action against every defendant, any error in this regard is harmless. *See Simmonds v. People*, 59 V.I. 480, 502-03 (V.I. 2013).

the VIWDA.

¶ 27 Aimbridge's argument lacks merit. The six-month exclusion expressly applies to "any person who has been employed by an employer for less than six (6) calendar months." 24 V.I.C. § 62 (emphasis added). That the Legislature used the word "an" to preface "employer," as opposed to a more limiting word, such as "the," is highly significant, for "an" is a form of the word "a" and is often a synonym for "any" in ordinary English grammar. *See State ex rel. Fatzer v. Martin*, 258 P.2d 1000, 1002 (Kan. 1953). As one court explained,

> [t]he article "a" is not necessarily a singular term; it is often used in the sense of "any" and is then applied to more than one individual object. So under a statute providing that the issuance of "a" certificate to one carrier should not bar a certificate to another over the same route, a certificate could be granted to more than two carriers over the same route.

*In re Spradlin*, 231 B.R. 254, (Bankr. E.D. Mich. 1999) (quoting BLACK'S LAW DICTIONARY 84 (6th ed. 1990) (internal citations omitted).

¶ 28 The reason for using the phrase "an employer" is clear. The Supreme Court of the United States, in a series of decisions interpreting federal labor and employment laws, repeatedly considered situations where ownership of a business changed yet the employees or the union remained the same. In those decisions, the United States Supreme Court held that in such instances the new owner typically serves as the successor to the former owner and remains liable for all legal obligations, even with respect to events that pre-date the change in ownership. *See, e.g., Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). By using the word "an," the Legislature has preemptively resolved this ambiguity by clarifying that an employee need not have been continuously employed by the same employer for the six-month period, so long as he or she has been employed by any of the employers for the requisite period. This construction is also necessary to prevent obvious abuses to avoid liability

under the VIWDA, such as transferring ownership of a business to a different closely held entity every 179 days so that no employee would ever be continuously employed by any given employer for six calendar months. Consequently, we hold that Espersen does not fall within the six-month exclusion with respect to Aimbridge, in that she had been continuously employed by one of her alleged multiple employers for significantly longer than six months at the time her cause of action for wrongful discharge accrued.

*b. Statutory Definition of Employer*

¶ 28 Aimbridge and AHRA further contend that they were not Espersen's "employer" as that term is used in the VIWDA. Specifically, they both argue that although they provided services to Sugar Bay on a contractual basis, Sugar Bay served as Espersen's sole employer. Moreover, AHRA contends that it is further excluded from the definition of "employer" because it purportedly only employed three employees during the pertinent period.

i. Acting in the Interest of an Employer

Title 24, section 62 of the Virgin Islands Code provides that, for purposes of the VIWDA,

> 'employer' includes any person acting in the interest of an employer directly or indirectly that has employed five (5) or more employees for each working day in each of the twenty (20) or more calendar weeks in the two (2) year period preceding a discharge, but not a 'public employer' as defined in chapter 14 of this title.

As with the term "employee," the Legislature deliberately used expansive language to extend the definition of "employer" beyond its ordinary meaning. In fact, AHRA expressly concedes in its appellate brief that "[a]s the statute is written, there technically is no limitation (other than the number of employees) upon who might qualify as an employer." (AHRA Br. 15.) Nevertheless, both AHRA and Aimbridge maintain that the statute should be interpreted to mean something other than what it says, and that this Court should follow the lead of the United States District

Court of the Virgin Islands in recharacterizing the phrase "acting in the interest of an employer directly or indirectly" to instead mean "joint employer" as that term has been construed by federal courts interpreting federal employment statutes. *See Illaraza v. HOVENSA, LLC*, 73 F. Supp. 3d 588 (D.V.I. 2014).

¶ 29 We emphatically disagree. This Court has already expressly held that the plain language of the VIWDA precludes such reliance on federal case law interpreting Title VII and other federal employment statutes, for the language of the statutes are wholly dissimilar, and they were enacted for completely different purposes. The VIWDA was enacted by the Legislature to abrogate the employment-at-will doctrine while Title VII was enacted by Congress to remediate employment discrimination. *Rennie*, 62 V.I. at 542-43. Rather than grafting federal case law interpreting dissimilar federal statutes onto the VIWDA, this Court has instead applied the traditional rules of statutory construction to determine the meaning of the terms used in the VIWDA. *Id.* at 545.

¶ 30 Continuing this approach, we see no justifiable reason not to construe the pertinent language of section 62 as simply meaning what it says: "'employer' includes any person acting in the interest of an employer directly or indirectly." It may very well be the case that expanding the meaning of the word "employer" for purposes of liability under the VIWDA represents bad policy, and that the better approach would be to use narrower language to not encompass as many persons who would not qualify as employers as that term is ordinarily understood. That, however, is a matter for the Legislature, and not this Court, for "it is not the function of this Court to substitute its judgment for that of the Legislature" on such policy matters. *In re Estate of George*, 59 V.I. 913, 924 (V.I. 2013) (quoting *Brady v. Gov't of the V.I.*, 57 V.I. 433, 443 (V.I. 2012)). Rather, "[s]tatutory construction . . . requires us to take statutes as we find them, understanding that the Legislature purposefully selected the words chosen." *Southwestern Bell Telephone, L.P. v.*

*Emmett*, 459 S.W.3d 578, 584 (Tex. 2015).

¶ 31 Here, the language chosen by the Legislature is unambiguous,[5] and the evidence is overwhelming that AHRA and Aimbridge directly or indirectly acted in the interests of Sugar Bay with respect to their interactions with Espersen.[6] Accordingly, both AHRA and Aimbridge were Espersen's employers for purposes of the VIWDA.[7]

ii. Five Employee Exclusion

¶ 32 AHRA further argues that it did not "employ[] five (5) or more employees for each working day in each of the twenty (20) or more calendar weeks in the two (2) year period preceding [the] discharge," 24 V.I.C. § 62, and that it therefore does not qualify as an employer under the VIWDA. To support this claim, AHRA cites to Combs's testimony at trial that AHRA only had three employees, which it alleges was uncontradicted. Apparently acknowledging that this testimony

[5] For this reason, it is not necessary for this Court to consider any of AHRA or Aimbridge's arguments that they do not qualify as Espersen's joint employer, since one does not need to be a joint employer in order to qualify as an employer under the VIWDA.

[6] It is important to emphasize that the fact that AHRA and Aimbridge were Espersen's employers for purposes of the VIWDA does not mean that they are liable to Espersen for wrongful discharge —as shall be discussed below, Espersen is still required to prove that AHRA and Aimbridge terminated her.

[7] The Superior Court, in its final jury instructions, instructed the jury that

> The term "employer" includes persons who act in the interest of the employer, directly or indirectly, and who controls some aspect of an employee's compensation, term, conditions or privileges of employment, and can include a contractor of multiple employers. The term "control" means that a person or entity had authority to direct Carolyn Espersen's work performance and actually did direct her work performance.

(J.A.1 1407-08.) For the reasons explained above, this definition of "employer" is erroneous. However, because the error accrued in favor of the defendants and disadvantaged Espersen, the error is harmless. *See Simmonds*, 59 V.I. at 502-03.

had been uncontradicted, Espersen maintains that it was AHRA, and not her, who possessed the burden of proving the number of employees that AHRA had during the given time period and alleges that Combs's testimony of having three employees at the time was not sufficiently specific to establish that AHRA had less than five employees for the entire statutory period.

¶ 33 We hold that Espersen did in fact introduce sufficient evidence to establish that AHRA did not qualify for this exclusion. As established earlier, the words "employee" and "employer" carry substantially broader meanings under the VIWDA than in ordinary usage. *Supra* at ¶25 (employee); ¶28 (employer). At trial, Espersen introduced more than sufficient evidence to permit a jury to find that AHRA acted directly or indirectly in the interest of Sugar Bay, and that AHRA was therefore her employer—as well as the employer of all of Sugar Bay's employees—as that term is used in the VIWDA. If AHRA was the employer of Espersen and all other Sugar Bay employees, it necessarily follows that they were AHRA's employees as well for purposes of the VIWDA. Since it was established at trial that the number of Sugar Bay employees exceeded five, the fact that all Sugar Bay employees were also employees of AHRA for purposes of the VIWDA necessarily means that AHRA exceeded the five-employee threshold as well.

*c. Liability of AHRA and Aimbridge*

¶ 34 That AHRA and Aimbridge were Espersen's employers as that term is used in the VIWDA is not the end of the matter. As explained earlier, to state a claim under the VIWDA, a plaintiff must prove that the defendant was his or her employer and that the employer wrongfully discharged him or her. *Rennie*, 62 V.I. at 544. Therefore, to succeed on her wrongful discharge claim, Espersen was required to introduce sufficient evidence demonstrating that AHRA and Aimbridge took some sort of action that contributed to her discharge. AHRA and Aimbridge both contend that this could not have been the case, in that neither of them possessed hire and fire

authority and otherwise could not control whether Sugar Bay elected to terminate or not terminate Espersen's employment.

¶ 35 We disagree. Although Aimbridge maintains that it lacked hire and fire authority, this is belied by its agreement with Sugar Bay, which expressly provides that Aimbridge

> shall select, employ, promote, transfer, compensate, terminate where appropriate, supervise, direct, train, and assign the duties of the Executive Personnel and, through the Executive Personnel, a sufficient number of on-site personnel whom [Aimbridge] reasonably determines to be necessary or appropriate for the proper, adequate and safe operation and management of the Hotel.

(J.A.2 150). Moreover, the same agreement states that Aimbridge would "assist [Sugar Bay] in complying with Legal Requirements having to do with worker's compensation, social security, unemployment insurance, hours of labor, wages, working conditions, and other employer-employee related subjects." (*Id.*) Although Aimbridge maintains that it did not actually exercise this level of control, but instead only performed various accounting, sales, and marketing functions, the jury was entitled to weigh the evidence and conclude that Aimbridge possessed hire and fire authority under the agreement. And even if the jury believed that Aimbridge only performed accounting and similar functions despite having broad hire and fire authority in its agreement, Aimbridge's failure to stop Espersen's termination despite having the power to do so could itself constitute sufficient action on the part of Aimbridge to sustain liability under the VIWDA.

¶ 36 The same is true with respect to AHRA. Although AHRA analogizes its relationship with Sugar Bay to that of a law firm providing advice to a client, which the client can then follow or reject, this is belied by the agreement AHRA executed with Sugar Bay. That agreement did not merely provide for AHRA to advise Sugar Bay, but expressly represented that AHRA "will perform all duties associated with the human resource functions" and that it will "supervise, direct

and coordinate workload for the existing HR staff." (J.A.2 144.) Moreover, in his deposition testimony—which was read into the record at trial—Ali replied "Of course. HR." when asked if someone could have overruled his decision to terminate Espersen, and further stated that he "would never make a decision" and "would not independently make a decision without HR's consultation or advice or direction." (J.A.1 600-01.) This is further supported by the fact that the October 11, 2013 termination letter had been sent by Combs, who identified herself as "HR Representative" in her signature block. (J.A.2 1.) Were the jury to credit this evidence—which, in assessing the sufficiency of the evidence to support the verdict, this Court must assume it did—it could reasonably conclude that AHRA was not a mere disinterested investigator only offering advice, but a pivotal decision maker in the termination decision, and that Combs, although purporting to only "recommend" termination, had in effect made the termination decision. Accordingly, we conclude that Espersen satisfied her burden of proving that AHRA and Aimbridge discharged her.

2. Defamation

¶ 37 Sugar Bay also maintains that Espersen failed to introduce sufficient evidence to sustain her cause of action against it for defamation. "In the Virgin Islands, a claim of defamation requires: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (V.I. 2011) (internal quotation marks omitted). According to Sugar Bay, Espersen failed to prove that Sugar Bay made an unprivileged false publication about her to a third party.

¶ 38 We agree. In her appellate brief, Espersen acknowledges that there was no direct evidence introduced at trial that Sugar Bay or any of its agents made any false statements about her.

Espersen, however, maintains that circumstantial evidence exists from which a jury could infer that such statements were made—that "the day after her termination, non-managerial Sugar Bay employees knew and were actively discussing that Espersen was suspended and terminated for stealing—information which ***should have only been known by managerial employees***." (Espersen Sugar Bay Br. 26-27 (emphasis in original).)

¶ 39 Espersen's reliance on this circumstantial evidence fails for several fundamental reasons. As a threshold matter, it is substantially true that Espersen was suspended for stealing, and that suspension later became a termination. Although Espersen maintains that she did not steal, and that her suspension and termination constituted a wrongful discharge, it nevertheless is a true statement that Sugar Bay suspended her for stealing, and that an internal investigation into the theft allegations occurred. And while it may be technically true that Espersen was ultimately terminated for violating the cash handling policy, "her termination following internal investigation into potential embezzlement could reasonably allow other employees to draw conclusions that embezzlement was, in fact, the cause of her termination." *Ryniewicz v. Clarivate Analytics*, 803 Fed. Appx. 858, 869 (6th Cir. 2020); *see also Armstrong v. Thompson*, 80 A.3d 177, 184 (D.C. 2013) (holding that statement that plaintiff "was under investigation," even though investigation had concluded at the time the statement was made, was not defamatory because the "statement is not materially distinguishable from the facts").

¶ 40 Yet even if these purported statements were false, that various non-managerial Sugar Bay employees were aware that Espersen had been suspended and terminated for stealing does not necessarily mean that Sugar Bay was responsible for making those statements. While "direct proof of a person's actions is not necessary to prove" an element of a cause of action, "the fact finder may only infer [certain facts] from circumstantial evidence when reason and experience

support such an inference because there is a rational connection between the facts proved and the facts inferred." *Penn v. Mosley*, 67 V.I. 879, 899 (V.I. 2017).

¶ 41 Here, the record contains absolutely no indication that Sugar Bay or any of its agents made these statements about Espersen to her co-workers. Yet the record is replete with evidence that Espersen herself told third parties about the circumstances that led to her suspension and termination. Espersen applied for other jobs and disclosed to all those prospective employers that she had been fired for cause. She applied for unemployment benefits, which necessitated the Department of Labor receiving a copy of her personnel file, which included the reports of her stealing money. Espersen testified that she told both her sister and her mother that she had been accused of stealing. She further testified that the day after her suspension, she and one of her friends worked to find Huffman to clear her name, and that she had told him that she had been accused of stealing. And perhaps most significantly, one of her co-workers—Heather Nettleman—testified that she had spoken with Espersen during the time between her suspension and her termination, and that Espersen "was a basket case," "very upset," "didn't know what she was going to do," and "didn't know if they were going to let her go or if she was going to be able to stay." (J.A.1 737-38.) Moreover, Espersen, when asked by her own counsel on direct examination how she knew other employees were talking about her, responded, "[t]he island is small, word gets around." (J.A.1 431-32.)

¶ 42 In light of the complete absence of any evidence indicating that Sugar Bay or any of its agents made any statements about Espersen to her co-workers, yet overwhelming evidence—much of it from her own testimony—that Espersen told numerous third parties, including at least one co-worker, about the allegations, "reason and experience" does not support an inference that Espersen's co-workers only could have known that she had been suspended and terminated for

stealing if Sugar Bay or one of its agents had told them. *Penn*, 67 V.I. at 899. On the contrary, the proven facts support the opposite inference—that Espersen's co-workers found out this information because one or more of the people she voluntarily disclosed this information to elected to spread it to others.

¶ 43 Even if it were the case that these purported statements were false and that the jury could properly infer that they were made by Sugar Bay or one of its agents, Espersen has also failed to meet her burden of proving that Sugar Bay published those statements to a third party. "Publication means the communication intentionally or by negligent act to one other than the person defamed." *Joseph*, 57 V.I. at 586 (internal quotation marks omitted). Although Espersen attempts to draw a distinction in her brief between statements made to "managerial" and "non-managerial" employees, she has cited to no legal authority to support her implicit proposition that statements by "managerial" employees to "non-managerial" employees are statements made to a third party. On the contrary, a majority of courts have held that internal communications within a business or between a business and its agents are not communications to third parties, even when those communications are made by supervisors to subordinate employees, since the business is in effect communicating within itself. *See, e.g.*, *Sacchetti v. Optiv Security, Inc.*, 819 Fed. Appx. 251, 254-55 (5th Cir. 2020) (applying Texas law); *Abrahams v. Young & Rubicam, Inc.*, 793 F. Supp. 404, 407 (D .Conn.1992) (applying Connecticut law); *Brackin v. Trimmier Law Firm*, 897 So.2d 207, 221-22 (Ala. 2004); *Woods v. Helmi*, 758 S.W.2d 219, 223 (Tenn. Ct. App. 1988); *Cangelosi v. Schwegmann Bros*., 390 So.2d 196, 198 (La. 1980); *Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341, 345 (Mo. 1963); *Wells v. Belstrat Hotel Corp.*, 208 N.Y.S. 625, 627-28 (N.Y. App. Div. 1925); *Prins v. Holland-North Am. Mortg. Co.*, 181 P. 680, 680-81 (Wash. 1919). And while it is true that a minority of courts have reached the opposite conclusion, *see, e.g.*,

*Wallulis v. Dymowski*, 918 P.2d 755, 760 (Or. 1996); *Staples v. Bangor Hydro-Electric Co.*, 629 A.2d 601, 603 (Me. 1993); the majority rule represents the better rule for the Virgin Islands, *see Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), in that the minority rule, if adopted, would necessarily have a chilling effect on employers' willingness to conduct internal investigations into serious allegations of employee misconduct, as well as the willingness of employees to report potential misconduct by other employees to their supervisors.

¶ 44 Espersen also maintains that Sugar Bay defamed her by providing a copy of her personnel file to the Virgin Islands Department of Labor after she filed a claim for unemployment benefits, with that personnel file containing false information about the events that led to her termination. However, the Virgin Islands Unemployment Insurance Act, 24 V.I.C. § 301 et seq., requires that "[a]n employing unit having knowledge of any facts which may affect an individual's right to waiting-week credit or benefits shall notify the Commissioner of Labor of such facts promptly, in accordance with regulations prescribed by the Commissioner of Labor." 24 V.I.C. § 305(c). The statute further provides that an individual "discharged for misconduct connected with his most recent work" is disqualified from earning employment benefits. 24 V.I.C. § 304(b)(3). As a result, Sugar Bay was required, pursuant to section 305(c), to promptly notify the Department of Labor that Espersen had been fired for misconduct and the circumstances that led to that firing, since that information would certainly affect her right to unemployment benefits. In *Joseph*, 57 V.I. at 586, this Court recognized the absolute privileges identified in the Restatement (Second) of Torts, including that "[o]ne who is required by law to publish defamatory matter is absolutely privileged to publish it." Restatement (Second) of Torts § 592A. Because Sugar Bay was required by law to provide this information to the Department of Labor, that communication cannot form the basis for defamation liability.

¶ 45 For these reasons, we conclude that Espersen failed to introduce sufficient evidence to support the jury's defamation verdict. Consequently, we reverse the portion of the March 12, 2019 judgment finding Sugar Bay liable to Espersen for defamation, and vacate the corresponding damages awards for that count, totaling $981,000.[8]

**C. Purported Attorney Misconduct**

¶ 46 Aimbridge argues in its appellate brief that it is entitled to a new trial as to liability because Espersen's counsel purportedly committed misconduct during closing arguments. Specifically, Aimbridge maintains that Espersen's counsel acted inappropriately by (1) repeatedly using the words "thief" and "stole"; (2) requesting that the jury "send a message" to the defendants; (3) criticizing the defendants for failing to apologize; and (4) purportedly using racially charged language.

¶ 47 We hold that this issue is not properly before this Court because neither Aimbridge—nor any other defendant for that matter—ever lodged a contemporaneous objection to any of these statements when they were made at trial. Pursuant to this Court's rules, "[o]nly issues and arguments fairly presented to the Superior Court may be presented for review on appeal." V.I. R. APP. P. 4(h); *see also Better Bldg Maintenance of the V.I., Inc. v. Lee*, 60 V.I. 740, 752 n.6 (V.I. 2014). Because Aimbridge did not object, the propriety of these remarks was not presented at all—let alone fairly presented—to the Superior Court, and the Superior Court was further deprived of the opportunity to take corrective action, such as instructing the jury to disregard those statements. Since no exceptional circumstances are present in which "the public interest requires

[8] Because we reverse the defamation verdict for insufficiency of the evidence, it is not necessary for us to consider Sugar Bay's claim that the Superior Court abused its discretion when it denied its motion to amend its answer to assert truth and conditional privilege as defenses to the defamation claim, or that the damages the jury awarded on the defamation claim were excessive.

that the issue[] be heard or manifest injustice would result from the failure to consider such issue[]," we decline to disturb the judgment on this basis. *V.I. Port Auth. v. Joseph*, 49 V.I. 424, 428 (V.I. 2008).

## E. Damages

¶ 48 In their appellate briefs, the defendants raise numerous issues related to the amount of compensatory and punitive damages the jury awarded to Espersen. Yet although all three defendants raise largely the same claims, they do not fully agree on fundamental issues such as the applicable legal standard or the appropriate remedy. To give just one example, while all three defendants argue that Espersen failed to introduce sufficient evidence to warrant a punitive damages award, the defendants disagree as to whether the appropriate remedy for this is vacatur of the punitive damages award and entry of judgment as a matter of law on the issue of punitive damages, or a new trial on the issue of punitive damages. Therefore, before considering the defendants' damages-related claims, it is necessary to first consider the state of Virgin Islands law with respect to judicial review of damage awards entered by a jury.

1. Legal Authority and Standards for Judicial Review of Jury Damage Awards

¶ 49 This Court, in its seminal decision in *Antilles School, Inc. v. Lembach*, 64 V.I. 400 (V.I. 2016), abolished the doctrine of remittitur in the Virgin Islands. In reaching this decision, we emphasized that "it would be inappropriate to permit a court to reduce a jury verdict—and effectively set aside the jury's factual findings without a finding that they were clearly erroneous—'simply because the court thinks that the verdict is too large.'" *Antilles School*, 64 V.I. at 431 (quoting *Van Lom v. Schneiderman*, 210 P.2d 461, 465 (Or. 1949)).

¶ 50 However, our decision in *Antilles School* was limited solely to motions for a new trial predicated on remittitur—that is, motions in which the movant asks the court to substitute its own

judgment for that of the jury. This Court expressly acknowledged that challenges to a damages award on grounds other than remittitur, such as claims "that the evidence is insufficient to support the jury's damages award," that the verdict is against the weight of the evidence, or that "the damages awarded by the jury are so excessive as to violate the Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution," remained permissible. *Antilles School*, 64 V.I. at 438.

¶ 51 Approximately one year after deciding *Antilles School*, this Court promulgated the Virgin Islands Rules of Civil Procedure, which went into effect on March 31, 2017. While many of the provisions in the Virgin Islands Rules of Civil Procedure mirror the Federal Rules of Civil Procedure, the language of Rule 59(a)(1)(A) of the Virgin Islands Rules of Civil Procedure, pertaining to new trials, is strikingly different from that of its federal counterpart. Rule 59(a)(1)(A) of the Federal Rules of Civil Procedure provides that

> The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:
> (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]

FED. R. CIV. P. 59(a)(1)(A). In contrast, Rule 59(a)(1) of the Virgin Islands Rules of Civil Procedure contains an enumerated list of all grounds for which a new trial is permitted:

> The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:
> (A) after a jury trial, for any one of the following reasons:
> (i) newly discovered evidence that is material to a party's claim or defense and that could not have been discovered before trial despite the exercise of due diligence;
> (ii) misconduct of a juror or jury tampering;
> (iii) accident or surprise that ordinary prudence could not have guarded against;
> (iv) excessive or inadequate damages;
> (v) an intervening change in controlling law; or
> (vi) attorney or party misconduct that undermined the trial.

V.I. R. CIV. P. 59(a)(1)(A).

¶ 52 The Reporter's Note which accompanies Virgin Islands Rule 59 does not identify a particular jurisdiction or other source from which this language was borrowed or modeled. *See Mills-Williams v. Mapp*, 67 V.I. 574, 585 & n.6 (V.I. 2017) (utilizing Reporter's Note to determine the meaning of a provision in the Virgin Islands Rules of Civil Procedure). The Reporter's Note does, however, address the effect of the inclusion of "excessive or inadequate damages" as a ground for a new trial, by stating that "[w]hile remittitur is not valid in the Virgin Islands, subpart (a)(1)(iv) is retained to allow for other non-remittitur defects to be remedied." V.I. R. CIV. P. 59 Reporter's Note. Thus, the promulgation of Rule 59(a)(1)(iv) does not overturn the decision of *Antilles School* or otherwise resurrect remittitur, but rather acknowledges that *Antilles School* nevertheless authorizes courts to set aside damage awards and grant a new trial for other reasons.

¶ 53 In *Antilles School*, we identified, at a minimum, three such reasons: situations where "the evidence is insufficient to support the jury's damages award," where the verdict is against "the weight of the evidence," or where "the damages awarded by the jury are so excessive as to violate the Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution." 64 V.I. at 435, 438. In this case, the defendants have asserted all three claims. While we have recognized that such errors are cognizable, we have not yet expressly considered the appropriate remedy if such an error were sustained on appeal.

¶ 54 As a threshold matter, a claim that a plaintiff failed to introduce sufficient evidence to sustain a compensatory damage award is necessarily different from other challenges to the amount of damages. Since compensatory damages are often an element of a cause of action, the failure of the plaintiff to introduce sufficient evidence to prove damages will result in dismissal of the cause

of action and judgment entered in favor of the defendant, just as would be the case with respect to the failure to prove any other element. *See, e.g.*, *Estevez v. Skorishchenko*, 943 N.Y.S.2d 791, 791 (N.Y. App. Div. 2011).

¶ 55 But what is the appropriate remedy for claims that a compensatory damage award—although supported by sufficient evidence—is excessive, inadequate, was influenced by juror bias or prejudice, or is otherwise improper? As this Court recognized in *Antilles School*, the Seventh Amendment as well as the public policy of the Virgin Islands, "express[] a strong policy preference for civil cases to be adjudicated by a jury rather than a judge," and that judges should not be permitted to usurp the role of the jury by "having the final word on damages . . . not because the damages award was legally insufficient . . . but simply because the court thinks that the verdict is too large." 64 V.I. at 437 (internal quotation marks omitted). The reason for this is "the sentiments that led to the proposal, and eventual ratification of, the Seventh Amendment," which considered the civil jury more trustworthy to reach a fair verdict than the judge, since "the jury would reach a result that the judge either could not or would not reach." *Id.* at 437 (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 671 (1973)).

¶ 56 Nevertheless, it remains proper for a court to set aside a jury verdict because it is excessive, inadequate, or otherwise against the weight of the evidence. The reason is to protect litigants and the judicial process from so-called "invisible error," that is, "error that arises from improper jury decision-making that hides behind the shroud of deliberative secrecy." Cassandra Burke Robertson, *Invisible Error*, 50 CONN. L. REV. 161, 201 (2018). The Virgin Islands, like all United States jurisdictions, has adopted the presumption "that juries for the most part understand and faithfully follow instructions," such as their obligation to apply substantive law rather than be guided by their emotions. *Frett v. People*, 66 V.I. 399, 413 (V.I. 2017) (collecting cases). While

this, like other presumptions, is rebuttable, "[i]t is a rare occasion when the fact of either mistake, partiality, passion, or prejudice can be established by direct evidence." *O'Flaherty v. Tarrou,* 43 S.E.2d 392, 335 (W. Va. 1947) (Fox, J., dissenting); *see also Dep't of Human Resources v. Johnson,* 592 S.E.2d 730, 737-38 (Ga. Ct. App. 2003). For this reason, litigants and courts may consider indirect indicators of potential juror misconduct, such as whether the damages awarded by the jury in its verdict were so "markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion." *W. Oliver Tripp Co. v. American Hoechst Corp*., 616 N.E.2d 118, 122 (Mass. Ct. App. 1993); *see also Quick v. Crane*, 727 P.2d 1187, 1197 (Idaho 1986); Robertson, 50 CONN. L. REV. at 173-75.

¶ 57 Jurisdictions largely agree that the remedy to correct such "invisible error" is a new trial. *Id.* at 163 (citing JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 1106 (2011)). Since the very purpose of providing for jury trials in civil cases is that a jury is more likely to reach a fair verdict than a single judge, the remedy of a new trial is appropriate in that it provides a mechanism to test whether the original jury acted improperly, for "[i]f the judge was right that invisible error infected the process, then a second jury is unlikely to return the same verdict," for "it would be highly unusual for the same bias, misunderstanding, or misconduct to influence a second verdict." Robertson, 50 CONN. L. REV. at 199. And "[i]f a second jury in fact returns the same verdict that the judge originally thought weighed strongly against the evidence, then that is a sign that the judge, rather than the jury, was more likely to have been wrong." *Id.* In both cases, it is ultimately a jury, and not a judge, who has the final word on the damages awarded.

¶ 58 There is less consensus, however, as to the appropriate remedy for a claim that a jury awarded punitive damages so excessive as to purportedly violate the Due Process Clause of the Fifth or Fourteenth Amendments of the United States Constitution. The Supreme Court of the United States, in the context of compensatory damages that were reduced by a court based on the weight of the evidence, held that the Seventh Amendment prohibited reduction of the damages to an amount determined by a judge without the option of a new trial before a jury. *Hetzel v. Prince William County*, 523 U.S. 208, 210 (1998). Several courts have extended this reasoning to the context of punitive damages and held that if a claim of unconstitutionally excessive punitive damages is sustained, the appropriate remedy is a new trial on punitive damages, on the theory that to provide otherwise would violate the Seventh Amendment right to a jury trial.[9] *See, e.g.*, *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 125–27 (2d Cir. 2004); *Morgan v. Woessner*, 997 F.2d 1244, 1258 (9th Cir. 1993); *Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 505 (4th Cir. 1991). Other courts, however, have held the opposite, and determined that "the remedy is not to set the punitive damage award aside—as the court would if it determined that the jury's decision-making process was tainted by bias or prejudice or confusion about the question to be answered—but to reduce the award to constitutional limits." *Nickerson v. Stonebridge Life Ins. Co.*, 371 P.3d 242, 249 (Cal. 2016); *see also Thornton v. American Interstate Ins. Co.*, 940 N.W.2d 1, 42 (Iowa 2020) (reducing a punitive damages award to the maximum constitutionally permissible amount without ordering a new trial); *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002) (holding that excessive punitive damages may be reduced

[9] "Although the Seventh Amendment has not been extended to the several States by incorporation through the Fourteenth Amendment, Congress, through the Revised Organic Act, expressly extended the Seventh Amendment to the Virgin Islands." *Antilles School*, 64 V.I. at 433 (citing 48 U.S.C. § 1561).

without a new trial on damages since the constitutionality of a punitive damages award involves a pure question of law). The reason for this is the nature of the inquiry— "whether the amount of the award exceeds the state's power to punish"—which has been analogized to a court reviewing "criminal sanctions for constitutional excessiveness." *Nickerson*, 371 P.3d at 239.

¶ 59 We agree with the courts that have determined that a new trial is not an appropriate remedy for a claim that a jury awarded punitive damages that are so excessive as to violate due process. In the American legal system, it has long been the case that "[t]he controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Consequently, in the case of compensatory damages, "[a] verdict returned by a jury [that] is palpably and grossly inadequate or excessive . . . should not be permitted to stand," but "both parties remain entitled [on remand], as they were entitled in the first instance, to have a jury properly determine the question of . . . damages," since "[b]oth are questions of fact." *Id.* Yet this is not the case for punitive damages. Certainly, the question of whether a party is entitled to any punitive damages—that is, whether the defendant has engaged in "conduct that is not just negligent but shows, at a minimum, reckless indifference to the person injured," *Cornelius v. Bank of Nova Scotia*, 67 V.I. 806, 824 (V.I. 2017)—is a question of fact. But the question of whether a punitive damages award comports with the Due Process Clause of the United States Constitution is a pure question of law on which a jury is entitled to absolutely no deference. *See Ross*, 293 F.3d at 1049-50. Unlike a new trial based on excessive or inadequate compensatory damages, where "[i]f a second jury in fact returns the same verdict that the judge originally thought weighed strongly against the evidence, then that is a sign that the judge, rather than the jury, was more likely to have been wrong," Robertson, 50 CONN. L. REV. at 199, there are no circumstances where a jury can overrule

a judge on the question of whether a verdict comports with the United States Constitution. Thus, it is irrelevant whether one jury, two juries, or fifty juries issue the same punitive damages verdict—if it would be unconstitutional to impose that verdict on a defendant, then it remains unconstitutional regardless of how many juries independently ratified that verdict. To hold otherwise would effectively eviscerate the cornerstone principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Thus, we conclude that reduction of the punitive damages award, and not a new trial, constitutes the appropriate remedy for a constitutionally excessive verdict as to punitive damages.[10]

2. Appellate Standard of Review

¶ 60 Before considering the merits, it is important to recognize that the instant appeal is unique in that the Superior Court never ruled on the defendants' post-judgment motions—rather, those motions were deemed denied by operation of Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure, because the Superior Court failed to rule on the motions within 120 days. That the defendants' motions were deemed denied has no bearing on the defendants' challenges to the sufficiency of the evidence, since such a claim is subject to plenary review without any deference to the Superior Court. Nor is it a consideration with respect to their claim that the damages are unconstitutionally excessive, since the Supreme Court of the United States has held that such

[10] We emphasize that our holding that reduction of punitive damages award to the maximum constitutionally permissible limit constitutes the appropriate remedy for a constitutionally excessive verdict does not mean that a new trial is never appropriate on the issue of punitive damages. Rather, as with compensatory damages, a new trial on punitive damages may remain the appropriate remedy for other types of errors that may have influenced the jury's fact-finding with respect to punitive damages, such as rulings wrongfully excluding evidence relevant to recklessness. *Accord, Brathwaite v. Xavier*, 71 V.I. 1089, 1099 (V.I. 2019).

claims also warrant plenary review without any deference to the trial court. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435-36 (2001). However, the defendants also raised other issues in those post-judgment motions which this Court would ordinarily review only for abuse of discretion or would otherwise grant deference—sometimes substantial—to the decision of the Superior Court.

¶ 61 How, then, should this Court go about reviewing such a claim on appeal? Typically, when the Superior Court issues a discretionary ruling or a decision on another matter to which it receives some degree of deference, yet fails to explain the basis for its ruling, this Court will direct the Superior Court to explain its decision on remand so that this Court can later engage in meaningful appellate review. *See, e.g., In re Q.G.*, 60 V.I. 654, 664 (V.I. 2014); *Rieara v. People*, 57 V.I. 659, 668 (V.I. 2012). However, ordering such a remand would be wholly inconsistent with the policy that led to the adoption of Rule 5(a)(4), which is to ensure that "court business is expedited and to prevent cases from lying dormant in the trial court due to failures to rule on post-trial motions that stifle the prompt administration of justice." *Companion Assurance Co. v. Smith*, 66 V.I. 562, 569-70 (V.I. 2017). In effect, remanding the matter to the Superior Court to issue an explanation for a discretionary post-judgment motion which has been deemed denied by operation of Rule 5(a)(4) would render the rule a nullity with respect to many post-judgment motions, and actually prolong rather than expedite appellate review by in effect establishing a bifurcated appellate process in which all appeals involving a post-judgment motion predicated on anything other than interpretation of a pure question of law would necessarily return to this Court. Yet at the same time, it would be highly unfair to go to the opposite extreme and hold that post-judgment motions that are deemed denied cannot be reviewed on appeal, since whether the Superior Court issues a ruling within 120 days is not in the control of the appellant. And while this Court could

theoretically rule on the post-judgment motion in the first instance as if it were the Superior Court, doing so would transform this Court from a court of review to a court of first view. *See Lewis v. Rogers*, 2020 VI 17 ¶ 14.

¶ 62 We are, however, not the only court to consider this issue. Other jurisdictions that have adopted similar rules and statutes providing that a motion has been deemed denied have coalesced around the view that trial courts are presumed to be aware of the law, and thus are aware of the effect of their failure to rule on a motion within the mandated period. Consequently, when asked to review a post-judgment motion that has been deemed denied that would ordinarily be reviewed only for abuse of discretion, appellate courts must presume that the trial court was aware of the motion yet chose to exercise its discretion to deny it by allowing the time to expire and apply the traditional abuse of discretion standard of review based on the assumption that the trial court rejected all the arguments in the motion. *See, e.g.*, *Moore v. State*, 309 P.3d 1242, 1246-47 (Wyo. 2013); *Bridgewater Quality Meats, LLC v. Heim*, 729 N.W.2d 387, 392 (S.D. 2007); *In re Shepard's Estate*, 34 Cal. Rptr. 212, 215-16 (Cal. Ct. App. 1963). We agree with these well-reasoned decisions and adopt the same principle, for doing so will allow us to review such decisions without nullifying Rule 5(a)(4) or undercutting the policy considerations that led to its promulgation, and without transforming this Court into something other than an appellate court.

3. Lack of Limitation on Non-Economic Damages

¶ 63 Sugar Bay alleges that the Superior Court erred when it instructed the jury that it could award non-economic damages on the wrongful discharge claim for the period after Espersen secured her employment with the Marriott Vacation Club. According to Sugar Bay, the Superior Court engaged in an "impermissible re-writing of the [VI]WDA" and that the "obvious result" of this decision "was to grant Espersen a windfall verdict." (Sugar Bay Br. 34-35.)

¶ 64 Sugar Bay's claim lacks merit. Although Sugar Bay alleges that the Superior Court acted contrary to the VIWDA, no provision of that statute or any other relevant statute places any such limitation on non-economic damages; on the contrary, the VIWDA expressly provides that "any wrongfully discharged employee may bring an action for compensatory and punitive damages in any court of competent jurisdiction against any employer who has violated the provisions of [the VIWDA]." 24 V.I.C. § 79. Sugar Bay fails to set forth any legal argument as to how language that expressly authorizes compensatory damages—which would include non-economic damages such as humiliation and emotional distress—should somehow be interpreted to establish a *per se* rule that a plaintiff cannot collect any non-economic damages after securing alternate employment. Significantly, while it may often—but not necessarily always—be the case that a plaintiff who secures alternate employment at an equivalent or higher salary will cease to suffer further economic damages due to the wrongful discharge, it is unclear why obtaining alternate employment, standing alone and without more, would in every single instance cause a plaintiff to immediately stop experiencing any and all humiliation, embarrassment, reputational loss, mental anguish, or other recoverable non-economic harms. Therefore, we reject Sugar Bay's invitation to effectively place a judicial limitation on the recovery of non-economic damages for wrongful discharge that has no basis in the VIWDA.

4. Sufficiency of the Evidence for Punitive Damages

¶ 65 "Punitive damages are damages awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly." *Cornelius*, 67 V.I. at 824 (internal quotation marks omitted). "Punitive damages must be based upon conduct that is not just negligent but shows, at a minimum, reckless indifference to the person injured—conduct that is outrageous and warrants special deterrence." *Id.* (collecting cases).

¶ 66 All the defendants maintain that Espersen failed to introduce sufficient evidence of recklessness or outrageousness to sustain the jury's punitive damages award on any cause of action. However, before considering the defendants' contentions on the merits, it is necessary to resolve an issue of first impression for this Court: the applicable burden of proof for punitive damage awards.

*a. Burden of Proof*

¶ 67 In their appellate briefs, all the parties assume that a plaintiff possesses the burden of establishing his or her entitlement to punitive damages by clear and convincing evidence, and the Superior Court further instructed the jury on this standard. However, there is no Virgin Islands statute or any binding precedent from this Court that stands for the proposition that the clear and convincing evidence standard is applicable. Since the parties cannot explicitly by agreement or implicitly by omission stipulate to the law, *see Matthew v. Herman*, 56 V.I. 674, 682 (V.I. 2012), we must independently determine whether Espersen was required to prove punitive damages by clear and convincing evidence or only by a preponderance of the evidence.

¶ 68 Title 5, section 740(5) of the Virgin Islands Code provides, in pertinent part, that

> The jury, subject to the control of the court in the cases specified in this title, are the judges of the effect and value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on *all proper occasions* that:
> . . . .
> (5) In civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory the finding shall be according to the preponderance of evidence.

(emphasis added). "Plainly read, section 740(5) establishes the general rule that 'all civil claims brought under Virgin Islands law are governed by a preponderance of the evidence standard.'" *Wilkinson v. Wilkinson*, 70 V.I. 901, 915 (V.I. 2019) (quoting *Addie v. Kjaer*, 52 V.I. 766, 768 (D.V.I. 2009)). Nevertheless, "the introductory clause provides that this general rule applies 'on

all proper occasions.'" *Id.* (quoting 5 V.I.C. § 740(5)). This Court has interpreted that phrase to "leav[e] some discretion for [courts] to decide which cases are properly considered under the preponderance of the evidence standard." *Id.* at 916 (internal quotation marks omitted). In exercising this discretion, courts must consider historical and modern case law and other legal authorities. *Id.* at 918-19. Applying that standard, this Court recently held that plaintiffs must prove fraud by clear and convincing evidence, rather than a preponderance of the evidence, in light of virtually all jurisdictions requiring the higher evidentiary standard, which was based on a finding of fraud carrying the same stigma as a criminal act. *Id.* at 919.

¶ 69 The reasoning that led to this Court adopting the clear and convincing evidence standard for fraud applies with equal force to punitive damages. Virtually every jurisdiction to consider the question has rejected—in the punitive damage context—the preponderance of the evidence standard in favor of the clear and convincing standard. *See Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 937-39 (D.C. 1995) (collecting cases). Courts have adopted this higher standard because "punitive damages are a form of punishment" and, like a finding of fraud, "can stigmatize the defendant in much the same way as a criminal conviction," and thus "[a] more stringent standard of proof will assure that punitive damages are properly awarded." *Masaki v. General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989). We agree and hold that punitive damages are not a "proper occasion" for applying the preponderance of the evidence standard, and that plaintiffs must instead prove their entitlement to punitive damages by clear and convincing evidence as the Superior Court properly instructed in this case. 5 V.I.C. § 740(5).

*b. Wrongful Discharge*

¶ 70 All the defendants contend that Espersen failed to prove, by clear and convincing evidence, that their actions were so reckless or outrageous as to warrant a punitive damages award on the

wrongful discharge cause of action. Specifically, the defendants allege that the evidence merely showed that "Espersen was terminated without fanfare or drama" after an investigation that was conducted "in a discreet and professional manner." (Sugar Bay Br. 37; AHRA Br. 35.)

¶ 71 While this may be the defendants' view of the evidence, when assessing the sufficiency of the evidence, this Court must consider the evidence in the light most favorable to Espersen, including giving her the benefit of all reasonable inferences to be drawn from that proof. *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2013). Although the defendants place great emphasis on *how* Espersen was suspended and terminated, they ignore the issue of *why* Espersen was suspended and terminated. At trial, Espersen introduced evidence indicating that she had been repeatedly harassed at work by Talbert—the individual who suspended her—and that after she filed an internal complaint about his behavior nothing was done and the harassment escalated. She further introduced evidence that not long before her suspension and termination she had filed internal complaints against Castro and Santana for violating resort policies. Moreover, she introduced evidence that Sugar Bay and its agents had been aware that she had been a witness to a slip-and-fall incident at the resort that resulted in a lawsuit, and that Sugar Bay representatives told the plaintiff's counsel in that case that she was unavailable because she no longer worked there, despite Sugar Bay having her contact information. And perhaps most significantly, Espersen introduced overwhelming evidence that the defendants were aware that she did not accept and keep cash payments from unregistered guests as alleged, yet terminated her employment anyway. This evidence, when taken together, provides strong support for the proposition that the defendants suspended, and later terminated, Espersen as retaliation for her internal complaints, and to reduce the likelihood that she would serve as a credible witness against Sugar Bay in the slip-and-fall lawsuit.

¶ 72 In addition, AHRA and Aimbridge maintain that punitive damages should not have been assessed against them because Espersen had been terminated by Sugar Bay, with them not serving as the decision makers. Again, however, this argument ignores the substantial amount of evidence, in the form of both testimony as well as their respective agreements with Sugar Bay, that AHRA and Aimbridge were not mere consultants or advisors, but agents of Sugar Bay who possessed hire and fire authority. Notably, it also ignores the fact that several of the individuals who retaliated against Espersen were either employed by AHRA and Aimbridge or operated under their direct control. Consequently, this Court concludes that Espersen introduced sufficient evidence to sustain a punitive damages award on the wrongful discharge count.

5. Admission of Website Evidence

¶ 73 Aimbridge argues that it is entitled to a new trial on the issue of punitive damages because the Superior Court permitted Espersen to show the jury various pages from Aimbridge's live website. According to Aimbridge, this evidence should not have been admitted because Espersen purportedly never authenticated it.

¶ 74 Rule 901 of the Virgin Islands Rules of Evidence provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." V.I. R. EVID. 901(a). Evidence may be authenticated in a variety of ways, including by simply considering "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." V.I. R. EVID. 901(b)(4). In its appellate brief, Aimbridge cites to several judicial opinions issued primarily by trial courts in other jurisdictions which were decided in the early days of the Internet, often in the context of print copies of webpages being attached to summary judgment filings. However, in recent years, appellate courts

have adopted substantially more flexible approaches to website authentication and have held that websites can be adequately authenticated at trial entirely through circumstantial evidence—including observing the website itself—without the need for any live testimony at all. *See, e.g.*, *United States v. Broomfield*, 591 Fed. Appx. 847, 851-52 (11th Cir. 2011); *Pham v. Lee*, No. H039184, 2014 WL 6992251, at *6 (Cal. Ct. App. Dec. 11, 2014) (unpublished); *Burgess v. State*, 742 S.E.2d 464, 467 (Ga. 2013).

¶ 75 Here, Espersen properly authenticated Aimbridge's website. Espersen's counsel typed in the URL for the website in the presence of the Superior Court and the jury from a computer with an active Internet connection, and the Superior Court and the jury were able to observe the "appearance, contents, substance, internal patterns, or other distinctive characteristics" of that website. V.I. R. EVID. 901(b)(4). Perhaps most notably, at no point—whether before the Superior Court, outside the presence of the jury, when admissibility was first discussed, or after the website was shown to the jury—did Aimbridge ever deny that the website presented was, in fact, its website.

¶ 76 Even assuming *arguendo* that this was not sufficient to authenticate the website, Aimbridge has failed to demonstrate that admission of the website affected its substantial rights or otherwise influenced the punitive damage award. *See* V.I. R. APP. P. 4(i). Importantly, while Aimbridge maintains in its appellate brief that it was prejudiced because the jury saw a page on its website containing a picture of employees who were only white men and that this depiction invoked Espersen's counsel's closing arguments referencing the cultural history of the Virgin Islands, the record reflects that Aimbridge did not object to admission of the website on this basis, but only objected on grounds that it had not been authenticated. In addition, as with the statements Espersen's counsel made during closing arguments, the website was only shown to the jury very

briefly as part of a lengthy trial and was thus highly unlikely to have influenced the verdict in any meaningful way, if at all. Thus, to the extent any error occurred, it was harmless.

6. Constitutional Due Process

¶ 77 Sugar Bay, Aimbridge, and AHRA contend that the punitive damage awards entered against them are so disproportionate to the amount of compensatory damages as to constitute a violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. In considering such a claim, the Supreme Court of the United States has

> instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)). While the United States Supreme Court has emphasized that no single factor is dispositive and courts must consider and weigh all three of these factors, it has nevertheless indicated "that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than [single-digits] may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages," or "where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* (internal quotation marks and citations omitted).

¶ 78 We begin with the third *Campbell* factor, since none of the defendants make any serious attempt to compare the punitive damages awarded in this case to comparable matters. Notably, while Sugar Bay and Aimbridge attempt to portray the punitive damages awards as unusual,

neither cites to any authority or other evidence to support the implication that the verdict in this case is an outlier either in the Virgin Islands or the greater United States. Since the defendants bear the burden of proving that the punitive damage awards are unconstitutionally excessive, *see Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 850 (Mo. Ct. App. 2007), this Court is under no obligation to *sua sponte* scour court judgments, statutes, and other authorities to analyze this factor when the defendants have declined to do so. *See U.S. Bank Trust Nat'l Ass'n v. Junior*, 57 N.E.3d 588, 594 (Ill. Ct. App. 2016) ("An appellant cannot expect this court to develop arguments and research the issues on the appellant's behalf.").

¶ 79 The defendants, however, have presented arguments with respect to the other *Campbell* factors. The United States Supreme Court "ha[s] instructed courts to determine the reprehensibility of a defendant"—which it has identified as the most important factor—"by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419. It is not mandatory, however, for all—or even any—of these factors to be present, though "the absence of all of them renders any award suspect." *Id.*

¶ 80 With respect to the first factor, the harm caused to the present plaintiff was not entirely economic, as is demonstrated by the $210,103 in compensatory damages awarded by the jury representing $11,103 for loss of income and $189,000 for mental anguish. Importantly, several courts have characterized emotional distress, mental anguish, depression, and similar types of harm as physical harm for purposes of analyzing the first *Campbell* factor. *See, e.g., McGinnis v. Am. Home Mort. Servicing, Inc.*, 901 F.3d 1282, 1288-89 (11th Cir. 2018). Moreover, Espersen was

financially vulnerable, in that she only earned approximately $6 per hour, and after her termination testified to having to borrow money from her mother to make ends meet and not even being able to feed her cat. While the defendants' conduct did not constitute a pattern, the conduct was also not accidental, but intentional and the jury had ample basis for finding that it was undertaken with a retaliatory motive. And the underlying accusation—theft—constitutes a crime and carries with it significant social stigma.

¶ 81 It is not enough, however, for this Court to examine the reprehensibility of all defendants collectively. Rather, it is well-established that "the constitutionality of punitive damages is determined as to each defendant, not the resulting harm to plaintiff, and that the constitutionality of punitive damages must be evaluated defendant-by-defendant." *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 874 (Tex. 2017) (internal quotation marks and citations omitted). Therefore, rather than assessing the reprehensibility of all defendants collectively, it is important to consider the role each defendant played in that conduct.

¶ 82 Here, the evidence, if viewed in the light most favorable to Espersen, established that Espersen had filed internal complaints against Talbert, Castro, and Santana. Afterwards, Goode and Castro reported to Talbert and Combs that Espersen had served drinks at the pool bar to a man and a woman who were not guests of the resort, and that Espersen placed $20 she received in a tip jar. Talbert made the decision to suspend Espersen pending an investigation conducted by Combs, and during that investigation Goode and Castro reaffirmed their allegations despite being confronted with evidence that the guests Espersen served had purchased guest passes. Nevertheless, Combs recommended to Ali and Santana that Espersen be transferred to a non-cash handling position and terminated if no such position existed, with Ali and Santana then terminating Espersen based on that recommendation. After the termination, Sugar Bay designated Espersen as

"unavailable" in an unrelated civil lawsuit against it in which Espersen was expected to provide unfavorable testimony. At all pertinent times, Goode, Castro, Talbert, Ali, and Santana were employed by Aimbridge, while Combs was employed by AHRA.

¶ 83 Based on this evidence, Sugar Bay, Aimbridge, and AHRA did not all act with the same level of reprehensibility. The false allegations of theft against Espersen were made by multiple Aimbridge employees, and the decisions to suspend and later fire Espersen based on those false allegations were made by additional Aimbridge employees. The evidence reflected that three of those Aimbridge employees did so to retaliate against Espersen for filing internal complaints against them. While AHRA did engage in some reprehensible conduct due to Combs's involvement in recommending transfer or termination despite knowing that the accusations against Espersen were false, it is certainly less reprehensible than the conduct attributable to Aimbridge. And although there is some evidence that Sugar Bay may have condoned the termination and declined to step in and overturn the acts of its agents Aimbridge and AHRA—perhaps due to the potential benefit of making Espersen "unavailable" in the civil lawsuit—Sugar Bay's conduct is largely based on passive conduct rather than affirmative acts. Consequently, while Aimbridge demonstrated a high level of reprehensibility, the conduct of AHRA and Sugar Bay—while still reprehensible—is rather moderate.

¶ 84 With respect to the second factor—the disparity between the harm and the punitive damages awarded—Sugar Bay and Aimbridge frame the jury as having awarded $210,103 in compensatory damages and $1,610,000 in punitive damages for wrongful discharge. However, they ignore the fact that although the defendants were found jointly and severally liable for compensatory damages, they were not found jointly and severally liable for punitive damages; rather, the jury awarded separate punitive damage awards in the amount of $360,000, $750,000,

and $500,000 respectively against Sugar Bay, AHRA, and Aimbridge on the wrongful discharge claim. Significantly, courts have repeatedly held that the three *Campbell* factors must be evaluated separately as to each punitive damage award against each separate defendant, rather than considering all damages awarded against all defendants collectively. *See Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005); *Horizon Health Corp.*, 520 S.W.3d at 874. Thus the question before this Court is not the disparity between $210,103 in compensatory damages and $1,610,000 in punitive damages, but the disparity between the $210,103 in compensatory damages and the $360,000 punitive damage award against Sugar Bay, the $500,000 punitive damage award against Aimbridge, and the $750,000 punitive damages award against AHRA.

¶ 85 The Supreme Court of the United States has declined to establish a "bright-line rule" or "mathematical formula" for purposes of assessing the second *Campbell* factor. 538 U.S. at 419. Nevertheless, the ratio between the compensatory damages and the punitive damages assessed against each defendant is modest, in that the jury awarded punitive damages at an approximate ratio of 1.5:1 against Sugar Bay, and 2.5:1 against Aimbridge, and 3.5:1 against AHRA. Even if the compensatory damages were apportioned equally amongst the three defendants so that each defendant were deemed to be liable for $70,034, this would still result in approximate ratios of only 5:1 for Sugar Bay and 7:1 for Aimbridge, and 10:1 for AHRA.

¶ 86 As the United States Supreme Court has observed, "[t]he precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," and despite the absence of a bright-line mathematical rule, "[s]ingle-digit multipliers are

more likely to comport with due process."[11] *Id.* at 425. However, even double-digit ratios can comport with due process upon stronger showings of the other two *Campbell* factors. *State Farm*, 538 U.S. at 425.

¶ 87 The Supreme Court has noted that high awards for emotional distress relative to economic damages may indicate that the jury might have used mental anguish damages to punish the defendant. While Sugar Bay and Aimbridge cite to cases decided decades ago characterizing six-figure awards as high, more recent cases have acknowledged that such awards may not be substantial today. *See, e.g., Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 57 (D.C. 2010) (characterizing a $180,000 award as not substantial); *White v. Wycoff*, 2016 WL 9632873, at *5 (D. Colo. June 24, 2016) (unpublished) (concluding that a $100,000 jury award is not substantial or especially generous). Yet in any event, we remain cognizant that the jury awarded only $11,103 in lost wages because Espersen had earned a relatively low hourly wage and found alternate employment only a few months after her termination; had Espersen not been economically vulnerable, or not been able to mitigate her economic damages so effectively due to her own efforts, those economic damages would have been substantially higher. As the California Court of Appeals explained in a similar context,

> [The defendant] focuses on the small amount of the unjust enrichment award and ignores other aspects of his conduct. That is wholly understandable, but the statute focuses not on the amount of harm he caused but on whether his actions were willful

[11] Consequently, that an equal apportionment of compensatory damages amongst the three defendants would result in a ratio slightly exceeding 10:1 with respect to AHRA is not in any way dispositive since the United States Supreme Court has expressly rejected reliance on a mechanical formula or bright line rule. *Campbell*, 538 U.S. at 425. Because the evidence adduced at trial, if credited by the jury, demonstrated that AHRA effectively served as the decision maker and terminated Espersen despite being aware that she had not committed any misconduct, the jury had a proper basis for imposing a larger punitive damages verdict against AHRA than its co-defendants. *See also Simon v. Sao Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 77 (Cal. 2005) (holding that punitive damages ratios of 9:1 and 10:1 are presumed constitutional).

> and malicious. . . . His failure to profit handsomely himself from his wrongdoing does not make the wrongdoing any less malicious. A robber who holds up a store on a day when there happens to be a small amount of cash in the till can hardly plead the poor return on his crime as lessening the offense.

*Applied Gen. Agency, Inc. v. Greenleaf Fin. & Ins. Servs, Inc.*, 2019 WL 5255271, at *9 (Cal. Ct. App. Oct. 17. 2019) (unpublished).

¶ 88 We emphasize again, however, that the punitive damages award is not analyzed collectively as one single award, but as a separate award against each defendant. This requires not just examining the ratios in isolation, but also relative to each other. As noted earlier, the jury imposed punitive damage ratios of 5:1 for Sugar Bay and 7:1 for Aimbridge, and 10:1 for AHRA. However, Aimbridge acted with a much greater degree of reprehensibility than Sugar Bay and AHRA. Moreover, the conduct that justified the jury's mental anguish award—firing Espersen for stealing—was largely committed by Aimbridge employees, with Sugar Bay playing a passive role and only a single AHRA employee actively involved in the termination decision. Under these circumstances, we cannot conclude that the *Campbell* factors, when properly weighed, support imposing a greater amount of punitive damages against AHRA relative to its co-defendants. Consequently, although we affirm the punitive damage awards with respect to Sugar Bay and Aimbridge, we reduce the punitive damages awarded against AHRA from $750,000 to $360,000, so that it is equivalent to the punitive damages assessed against Sugar Bay.

7. Excessiveness of Verdict

¶ 89 Finally, all the defendants contend that the damages awarded by the jury were excessive and could only be explained by the jury being motivated by passion or prejudice. In addition to the amount of the verdict, the defendants renew their claims that the jury was likely influenced by the improper conduct of plaintiff's counsel, such as repeatedly using the words "thief" and "stole";

requesting that the jury "send a message" to the defendants; criticizing the defendants for their failure to apologize; and repeatedly referencing local culture and otherwise purportedly emphasizing race.

¶ 90 As explained earlier, a claim that a jury had to have been motivated by passion or prejudice without any direct evidence but based solely on the amount of the verdict is effectively a request for a new trial on damages based on the weight of the evidence. When conducting this inquiry, the judge does not sit as a thirteenth juror or "super" juror; rather, a new trial should be granted only "if the trial judge discovers that his determination of damages is so substantially different from that of the jury that he can *only* explain this difference as resulting from some unfair behavior . . . on the part of the jury against one or some of the parties." *Quick*, 727 P.2d at 1197; (emphasis in original); *see also W. Oliver Tripp Co.*, 616 N.E.2d at 122.

¶ 91 The Superior Court possesses substantial discretion over the decision to grant or deny a new trial based on the weight of the evidence. *Antilles School*, 64 V.I. at 412 n.4. As explained earlier, although in this case the Superior Court did not issue a formal decision on the defendants' motion for a new trial due to that motion being denied by operation of Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure, this Court must presume that the Superior Court was both aware of the motion, the arguments therein, and the legal effect of its failure to rule within 120 days, and that the Superior Court elected to exercise its discretion to deny the motion. *See Moore*, 309 P.3d at 1246-47; *Bridgewater Quality Meats, LLC*, 729 N.W.2d at 392.

¶ 92 Applying this deferential standard, we cannot conclude that the Superior Court abused its considerable discretion. Here, the damages awarded are not so excessive that the only reasonable explanation is that the jury was biased, inflamed by passion, or engaged in some other inappropriate behavior. *Quick*, 727 P.2d at 1197. Rather, the jury's verdict is consistent with the

evidence introduced at trial. None of the defendants lodged any contemporaneous objections to any of the statements that they now claim were so inflammatory and prejudicial so as to cause the jury to issue a verdict based on passion or prejudice rather than the law. *See* V.I. R. APP. P. 4(h). While it certainly could be the case that another finder of fact could reasonably reach a different verdict based on the same evidence, this is not a valid basis to set aside the verdict and order a new trial. *Id.* Accordingly, we do not disturb the judgment of the Superior Court on this basis.

## III. CONCLUSION

¶ 93 Espersen introduced sufficient evidence to sustain her causes of action for wrongful discharge against all defendants, and to support the awards of compensatory and punitive damages for wrongful discharge. However, Espersen did not introduce sufficient evidence to sustain her defamation claim against Sugar Bay. Moreover, the punitive damages awarded against AHRA are unconstitutionally excessive relative to its conduct in relation to those awarded against Aimbridge and Sugar Bay. Therefore, we reverse the portion of the March 12, 2019 judgment holding Sugar Bay liable to Espersen for defamation, and reduce the punitive damages award against AHRA from $750,000 to $360,000, but affirm the judgment in all other respects.

**Dated this 27th day of May, 2022.**

**BY THE COURT:**

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

**ATTEST:**

**VERONICA J. HANDY, ESQ.**
**Clerk of the Court**

**By: /s/ Reisha Corneiro**
**Deputy Clerk**

**Dated**: **May 27, 2022**