

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

BRUCE STREIBICH,	)	S. Ct. Civ. No. 2019-0038
Appellant/Defendant,	)	Re: Super. Ct. Civ. No. 459/1995 (STT)
	)	
v.	)	
	)	
KAREN R. UNDERWOOD, WARREN	)	
STRYKER, AND MARGARET STRYKER,	)	
Appellees/Plaintiffs.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas/St. John
Superior Court Judge: Hon. Renee Gumbs Carty

Argued: February 11, 2020
Filed: March 23, 2021

Cite as: 2021 VI 3

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

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Bruce Streibich appeals from a February 25, 2019 order of the Superior Court granting Warren and Margaret Strykers' motion for partial summary judgment on their request for a

permanent injunction preventing Streibich from blocking plaintiffs' access to an alleged dirt road on his property. For the reasons that follow, we affirm in part and reverse in part.

I. BACKGROUND

¶ 2 On June 6, 1956, Marshall and Sidney Dierssen bought Parcel 4 Estate Tabor & Harmony in St. Thomas, consisting of 100 undeveloped acres. In 1958 the Dierssens filed subdivision plan PWD B9-31-T57 ("T57"), depicting their intention to subdivide the property into 19 parcels and a private road system. T57 shows three roads, labeled as "private road" and drawn with detailed metes and bounds. T57 also shows a marked passage referred to as "R.O.W.," which has no metes or bounds or other descriptors. The R.O.W. appears to bisect Parcel No. 4-22, then continue along the boundary line between Parcel Nos. 4-22 and 4-26 (approximately half in each parcel) and into Parcel No. 4-27.

¶ 3 On November 9, 1962, the Dierssens sold Parcel No. 4-26, the parcel currently owned by Appellant, to Norman and June Brilliant. The deed to the Brilliants (as well as every other deed from the Dierssens) transfers the property in question

... as more fully shown on [T57], a copy of which is hereto annexed and made a part hereof as though more fully set forth herein . . .

TOGETHER with all the appurtenances and all the estate, title, rights and interest of the parties of the first part [the Dierssens], their heirs and assigns, in and to said premises, including a perpetual easement to the parties of the second part [the Grantees], their heirs and assigns, to run with the land over **all roads** in Parcel No 4 which are now in existence or shall hereafter be constructed for ingress and egress from the Public Road or otherwise.

(i) Easements and rights-of-way are hereby expressly reserved for the creation, construction and maintenance of utilities, such as gas, water, telephone, telegraph, electricity, storm drains and land drains, public, quasi-public and private, as well as for any public, private or quasipublic utility or function deemed necessary and/or expedient

by the parties of the first part for the public health and welfare. **Such easements and right-of-way shall be confined to the rear five (5) feet of every parcel and five (5) feet along the side of every building parcel and along every street of the subdivision.**

(j) **The common roadways shall be constructed by and at the cost and expense of the Parties of the first Part in a proper manner with adequate ditches, drains and culverts to provide proper drainage.** Thereafter, the parties of the first part, the parties of the second part, and all subsequent purchasers of Parcel No. 4 Estate Tabor and Harmony shall maintain the road upon which their property abuts in Parcel 4 in reasonably good condition on a pro rate expense basis, according to the acreage of the sub-divided residential parcels abutting on said road, until such time as the Government accepts a dedication of said road.

(emphasis added). In 1969 the Brilliants sold Parcel No. 4-26 to Sylvia Weaver, who on August 6, 1981, sold the property to Brenton and Susan Lugo Battles. In 1989, Brenton Battles conveyed Parcel No. 4-26 to Streibich by Warranty Deed.¹ This deed conveyed “Parcel No. 4-26 Estate Tabor and Harmony . . . as shown on P.W.D. No. D9-4345-T88 [“T88”]. . . SUBJECT, HOWEVER, to . . . easements of record.” (J.A. 88.) T88 depicts a corridor outlined by dotted lines (as opposed to estate roads, which are drawn with solid lines), labeled as “20’ easement to Parcels 4-27 and 4-28” and with the notations that “dirt road is within this easement” and “exit to public road see [T57].” However, the marked corridor is in a slightly different location from the R.O.W. depicted on T57.

¶ 4 Parcel No. 4-27, Underwood’s property, was transferred from the Dierssens’ estates to Susan Lugo on March 30, 1990, under a warranty deed that described the property as “more fully

¹ The record is incomplete with regard to the title history of the parcels as it contains no evidence of any transfer from Brenton and Susan Lugo Battles to Brenton Battles so as to permit a subsequent transfer by Brenton Battles alone.

shown on [T57]” and conveyed it “TOGETHER WITH all right, title and interest of Grantor to use of the estate roads and rights-of-way shown on [T57] for ingress and egress.” (J.A. 91.) On January 23, 1994, Lugo conveyed the property to Underwood “as shown on P.W.D. No. D9-4961-T90”; that map depicts dotted lines labeled as the “approximate location of a 20’ easement to Parcel No. 4-28.” (J.A. 302, 283.)

¶ 5 Parcel No. 4-28, the Strykers’ property, was transferred by the Dierssens to George and Jean Vander May on April 23, 1963 using the Dierssens’ standard warranty deed. (J.A. 6.) Subsequent transactions are not part of the record until March 30, 2001, when Noreen McCarthy conveyed the property to the Strykers “as shown on [T57] . . . TOGETHER WITH . . . easements for ingress and egress over estate roads, all as of record appear.” (J.A. 107.)

¶ 6 It is currently unclear whether there is in fact a dirt road over Parcel No. 4-26. Underwood and the Strykers argue that the road exists and that it was regularly used by Underwood’s predecessors in title; Streibich admits that the area “has the appearance that it could function as a road serving Plaintiff[s]’ parcel,” but maintains that it was overgrown when he bought the property and has never been used as a road. (J.A. 198.) He submitted two third-party affidavits stating that since 1967 there has been no road across Parcel No. 4-26 leading to Parcel Nos. 4-27 and 4-28.

¶ 7 On June 20, 1995, Underwood filed suit in the Superior Court, requesting that the court declare that she had an easement over the alleged dirt road over Parcel No. 4-26. Streibich responded on August 18, 1995. Over the next 24 years, the suit proceeded in fits and starts, with several multi-year periods during which there was no activity. On March 19, 1996, Underwood filed a motion for summary judgment granting a declaratory judgment that she had an easement as

shown on T57.² In May 2002 the Strykers sought to intervene, seeking both a permanent injunction and damages.³ Thereafter, on December 29, 2010, they filed a motion for partial summary judgment, seeking an order “confirming [Stryker’s] right to use the right of way over Defendant’s property to access [Stryker’s] property” as well as “issuance of a restraining order preventing Defendant from restricting access across the easement, preventing the maintenance, repair and clearing of the easement, threatening those who use the easement or slandering title or interfering with prospective contractual relations and dismissal of Defendant’s counterclaim.” (Intervenor’s Mem. in Support of Motion for Partial Sum. Judg., Dec. 29, 2010.)

¶ 8 On August 9, 2016, the case was assigned to the current judge, who first held a status conference on May 15, 2018. On October 26, 2018, Arthur Schmauder, Elizabeth McGuire, and Blue Water Retreat, LLC, the owners of Parcels Nos. 4-25 and 4-22B, filed a motion to intervene. After several back-and-forth motions, on February 4, 2019, the court conducted a site inspection, *Underwood v. Streibich*, 70 V.I. 179, 209 (V.I. Super. Ct. 2019), and on February 15, 2019, denied Schmauder, McGuire, and Blue Water Retreat’s motion to intervene. On February 25, 2019, the Court issued memorandum opinions granting: (1) Underwood’s motion for summary judgment on her claim that an easement existed over the alleged dirt road in favor of Underwood and the Strykers, and (2) the Strykers’ motion for partial summary judgment granting a permanent injunction to prevent Streibich from blocking access to the alleged dirt road. The active portion of

² This is not consistent with her initial pleadings, which sought an easement over the alleged dirt road on Streibich’s property; however, at oral arguments counsel for Appellees observed that the motion for summary judgment had implicitly amended the pleadings, and no party has raised this issue. (J.A. 117, 135.)

³ It does not appear that this motion was ever actually granted until the February 25, 2019 orders, which at least implicitly granted the motion. However, that issue is not before us.

the order in the Stryker case states, in its entirety: “it is hereby ORDERED that Intervening Plaintiffs’ motion for partial summary judgment is GRANTED; and it is further ORDERED that a copy of this Order shall be directed to [defendant].” (J.A. 18.) The order in the Underwood case states similarly that “it is hereby ORDERED that Plaintiff’s motion for summary judgment is GRANTED.” (J.A. 52.)

¶ 9 On March 21, 2019, the parties participated in a status conference with the Superior Court. The Court observed that the only outstanding issue was the damages claim by the Strykers (J.A. 436). The judge also stated, in response to a question concerning the easement’s location, that “I made it very clear, abundantly clear in my opinion, that the easement should be made accessible to 4-27, and 4-28, the Strykers and the Underwood families. So I don’t see why you’re asking now about the specifics of this particular road. It’s the same road that you all walk across.” (J.A. 439-40.) The judge also acceded to the assertion by plaintiffs’ counsel that the grant of the motion for partial summary judgment had effected all of the relief sought in the motion, as noted above (J.A. 438.)

¶ 10 On March 26, 2019, Streibich timely filed the instant appeal.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 11 This Court has appellate jurisdiction over “all appeals arising from final judgments, final decrees or final orders of the Superior Court.” 4 V.I.C. § 32(a); 48 U.S.C. § 1613a(d). A final order is one that resolves all claims of all parties. V.I. R. Civ. P. 54(b) (“[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties.”). While the Superior

Court's grant of summary judgment resolves all claims by Karen Underwood, the Strykers' claim for damages remains outstanding; thus the Superior Court's February 25, 2019 order is not a final judgment within the meaning of section 32(a).

¶ 12 We also have jurisdiction over “[i]nterlocutory orders of the Superior Court of the Virgin Islands . . . granting, continuing, modifying, refusing or dissolving injunctions.” 4 V.I.C. § 33(b)(1). However, under Virgin Islands Rule of Civil Procedure 65(d), “[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail -- and not by referring to the complaint or other document -- the act or acts restrained or required.” The Superior Court's February 25, 2019 order purporting to grant the Strykers' motion for a permanent injunction did not comply with this rule and therefore did not establish a valid injunction.⁴

¶ 13 Nevertheless, the order is injunctive for the purposes of exercising appellate jurisdiction. An interlocutory order is “injunctive and, therefore, subject to immediate appeal” when it is “(1) directed to a party; (2) enforceable by contempt; and (3) designed to accord or protect some or all of the substantive relief sought by a complaint in more than a temporary fashion.” *Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 316 (V.I. 2007) (internal citation and quotation marks omitted). The Superior Court's order is directed to Streibich and designed to permanently accord the substantive relief sought by the Strykers. The Superior Court judge also made clear during the March 21, 2019 status conference that she intended the order to have resolved all issues and provided definitive requirements for Streibich; it is therefore punishable by contempt. *See In*

⁴ This conclusion is further supported by our holding in *Malloy v. Reyes*, 61 V.I. 163, 181 (V.I. 2014), in which we held that “a judgment which affects an interest in real property must describe the interest with such certainty that the rights and liabilities of the parties are clearly fixed.”

re Sheesley, 70 V.I. 1007, 1025-26 (V.I. 2019) (“Violations of an order are punishable as criminal contempt even though the order is set aside on appeal. This is because a party’s disagreement with how a court interpreted the law does not provide license to disobey a court order without consequence, for to hold otherwise would cause our entire system of justice to collapse.” (internal quotation marks and citations omitted))⁵; *Int’l Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 76 (1967) (finding that a trial court’s order to enforce an arbitrator’s award that contained “only an abstract conclusion of law, not an operative command capable of ‘enforcement[.]’” was not an injunction but was nevertheless an “order granting injunction” because the lower court judge had made clear that it would be enforced by a contempt charge.)). The order thus complies with the *Enrietto* factors; it is “an equitable decree compelling obedience under the threat of contempt and . . . therefore an ‘order granting an injunction,’” *Int’l Longshoremen’s Ass’n*, 389 U.S. at 76, and so we have jurisdiction over it as an interlocutory order.

¶ 14 Further, a number of federal courts, including the United States Supreme Court, have observed that when reviewing an order that fails to comply with the identical Federal Rule of Civil Procedure 65(d),⁶ the better approach is to assert jurisdiction and then vacate the defective

⁵ However, the order is not punishable by civil contempt, as “a civil contempt sanction cannot stand after an appellate court invalidates the underlying order.” *Sheesley*, 70 V.I. at 1025.

⁶ Both Federal Rule 65(d)(1) and V.I. Rule 65(d)(1) state: “Every order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail -- and not by referring to the complaint or other document - - the act or acts restrained or required.” FED. R. CIV. P. 65(d)(1); V.I. R. CIV. P. 65(d)(1). While this case began before the V.I. Rules of Civil Procedure were promulgated in 2017, “the Virgin Islands Rules of Civil Procedure permit their application to pending cases in the Superior Court if doing so would not be infeasible or work an injustice.” V.I. R. CIV. P. 1-1(c); *see also Basic Services, Inc. v. Gov’t of the V.I.*, 71 V.I. 652, 660 (2019). Because the text of the Virgin Islands

injunction and remand for a new order, as “[a] contrary holding would be perverse.” *Abbott v. Perez*, 138 S. Ct. 2305, 2321 (2018) (“Rule 65(d) protects the party against which an injunction is issued by requiring clear notice as to what that party must do or refrain from doing. Where a vague injunction does not comply with Rule 65(d), the aggrieved party has a particularly strong need for appellate review. It would be odd to hold that there can be no appeal in such a circumstance.”); *id.* (holding that the Court has jurisdiction “to hear an appeal from an order that has the same practical effect as one granting or denying an injunction”); *see also Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (“Since the opinion of the District Court by its own terms authorizes the granting of injunctive relief to the appellee, we believe that the judgment here is sufficient to invoke our jurisdiction.”); *see, e.g., Seattle-First Nat. Bank v. Manges*, 900 F.2d 795, 800 (5th Cir. 1990) (vacating and remanding an injunction for failure to comply with Rule 65(d)); *Fed. Election Comm’n v. Furgatch*, 869 F.2d 1256, 1264 (9th Cir. 1989) (remanding for the district court to comply with Rule 65(d)); *compare Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 390 (1970) (holding that the Court lacked jurisdiction to hear an appeal when the lower court’s order stated that: “The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief[,]” but did not purport to grant such relief).

¶ 15 While the Superior Court’s order in this case was not a valid injunction under Rule 65, it purported to be, and it was thus an order punishable by contempt. Refusing to assert jurisdiction in such a case would not only unfairly punish the Appellant, it would also waste judicial resources because we would almost certainly find ourselves once again confronted with the same case on

rule is identical to that of the Federal Rule, there can be no injustice or infeasibility under the present circumstances.

the Superior Court’s issuing a new order. *See Hard Rock Café v. Lee*, 54 V.I. 622, 640 (V.I. 2011). We therefore have jurisdiction over this appeal as an appeal of an interlocutory injunctive order. *See Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 697-98 (V.I. 2011).

¶ 16 Moreover, we exercise pendent appellate jurisdiction over the Superior Court’s declaratory judgment that there exists an easement in favor of Underwood and the Strykers, because that determination requires the same analysis and findings. *See People v. Ward*, 55 V.I. 829, 839 (V.I. 2011) (exercising pendent appellate jurisdiction over issues that were expressly referenced in the appealable portion of the opinion); *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 604 (V.I. 2012) (exercising pendent appellate jurisdiction over a summary judgment order where appellate jurisdiction is based on an injunction that is itself based on a summary judgment award).

¶ 17 “Generally, the Supreme Court reviews the Superior Court’s findings of fact for clear error, while the review of the Superior Court’s conclusions of law is plenary.” *Caribbean Healthways*, 55 V.I. at 98. However, “[t]he decision to grant or deny a permanent injunction is reviewed for abuse of discretion. . . . ‘An abuse of discretion arises only when the decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.’” *Id.* (quoting *Stevens v. People*, 55 V.I. 550, 555 (V.I. 2011)).

B. Permanent Injunction

¶ 18 Streibich argues that the Superior Court erred in granting the Strykers a permanent injunction for several reasons: first, the court did not make findings on all four of the permanent injunction factors; second, the court did not conduct a *Banks* analysis to determine governing law; third, the court resolved disputed issues of material fact on summary judgment; fourth, the court refused to consider whether to relocate the easement; and fifth, the court denied the motion by

other property owners to intervene as third-party defendants.⁷

¶ 19 “[T]he factors that govern a permanent injunction are essentially the same as those that govern a preliminary injunction, except that the movant must demonstrate actual success on the merits rather than a mere likelihood of success.” *Sarauw v. Fawkes*, 66 V.I. 253, 273 n.14 (V.I. 2017). These factors are: “(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.” *Marco St. Croix, Inc. v. V.I. Hous. Auth.*, 62 V.I. 586, 590 (V.I. 2015). Without actual success on the merits there can be no injunction. In this case, the Superior Court found actual success on the merits on summary judgment.⁸

¶ 20 “The court shall grant summary judgment if the movant shows that there is no genuine

⁷ Appellees argue that this Court lacks jurisdiction over the third-party intervention question because it is not directly related to the permanent injunction. However, “[a] court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action. An injunction can lie only when its scope is limited in effect to the rights of parties before the court.” *Two Islands Dev. Corp. v. Clarke*, 157 So. 3d 1081, 1083 (Fla. Dist. Ct. App. 2015) (quoting *Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579, 583 (Fla. Dist. Ct. App. 2003); see also *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 68 V.I. 584, 601 (V.I. 2018) (refusing to overturn the Superior Court’s determination “that rigid enforcement of private agreements that threaten the interests of third parties . . . is against public policy.”). This question is thus directly tied to the permanent injunction: if the proposed defendants should have been permitted to intervene, the Superior Court had no jurisdiction to issue the injunction. However, as we reverse the permanent injunction on other grounds, we need not address this issue.

⁸ “[A]ctual success on the merits alone is ordinarily not sufficient to obtain a permanent injunction as of right. . . . the Superior Court must make findings on every injunction factor.” *Sarauw*, 66 V.I. at 272. Here, the Superior Court did not acknowledge the other factors or apply them to the facts of this case. Similar to the failure to comply with Rule 65, the Superior Court’s failure to address every injunction factor is typically an abuse of discretion requiring remand. *Id.* at 272-73. However, in the interests of judicial economy and because this case has been pending for 24 years, see *Hard Rock Café*, 54 V.I. at 640, we address the Superior Court’s findings on the first factor, actual success on the merits, without which there can be no permanent injunction.

dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.I. R. Civ. P. 56(a). We review a grant of summary judgment de novo, applying the same test that the lower court applies. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2019).

In applying the facts to the law, we view the evidence, and any inferences therefrom, in the light most favorable to the nonmoving party, and take the nonmovant's allegations as true if properly supported by the record. The movant bears the burden of demonstrating the absence of any genuine issue of material fact. Only if the movant meets this burden must the non-moving party introduce some evidence showing a genuine issue for trial.

Alexander v. Alexander, 65 V.I. 372, 378 (V.I. 2016) (internal citations omitted).

¶ 21 In this case, the Superior Court determined on summary judgment that there was an easement over the alleged dirt road on Streibich’s property and consequently that Underwood was entitled to declaratory relief and the Strykers were entitled to an injunction. This determination required finding that Underwood and the Strykers have an easement, across the area of the alleged dirt road, for ingress and egress. And because the injunction was granted on a finding of actual success on the merits made at the summary judgment stage, the court necessarily concluded that there was no genuine dispute of fact as to whether the easement (a) exists and (b) exists in that particular location and for that particular purpose. As will be shown below, the Superior Court was correct in determining that there is no dispute of material fact that there is an easement by implication, but incorrect in establishing the scope of the easement on summary judgment and incorrect as a matter of law in finding that the easement encompasses the alleged dirt road.

C. Express Easement

¶ 22 An express easement is an easement that is explicitly conveyed in accordance with the statutory rules for conveying property, 28 V.I.C. § 124 (the recording statute) and 28 V.I.C. § 241

(the Statute of Frauds).⁹ Under the Statute of Frauds:

(a) Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any manner relating thereto, can be created, granted, assigned, transferred, surrendered, or declared, otherwise than—

(1) by operation of law; or

(2) by a deed of conveyance or other instrument in writing, signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law.

28 V.I.C. § 241.

¶ 23 Thus in order to expressly reserve an easement, a deed must explicitly “creat[e], grant[], assign[], transfer[], surrender[], or declar[e]” that easement. The Dierssen deeds explicitly refer to only two types of easements: one general but confined to the “rear five (5) feet of every plot and five (5) feet along the side of every building plot and along every street of the subdivision,” which

⁹ Appellees argue that creation of an express easement must be judged under the law in existence at the time. However, Appellees are incorrect as to the law in effect at the time the Dierssens created T57. Appellees argue that the state of the common law was summarized in *Smith v. DeFreitas*, 4 V.I. 525, 532 (3d. Cir. 1964), but the *DeFreitas* court conflated express and implied easements. The common law regarding express easements was essentially the same in the first restatement (assuming *arguendo* that Appellees are correct that the applicable law would be the first restatement under 1 V.I.C. § 4) as it is today: under Restatement (First) of Property § 467, Creation of Easements – Express Grant, “The formal requisites for the creation of an easement by conveyance inter vivos are (a) those required in a conveyance of an estate in land of like duration, and, (b) subject to statutory modification, a written instrument under seal.” These are the same requirements that we note today for creation of an express easement. Moreover, the law in the Virgin Islands at the time T57 was created was not settled enough to have induced reliance. *DeFreitas* was not decided until 1964, and 1 V.I.C. § 4 could not have served as the basis for reliance because (1) the statute specifies that decisions will be made by the judiciary, which in 1958 had not yet ruled on this issue, and (2) nothing in section 4 addresses retroactivity; even if 1 V.I.C. § 4 remained the rule today, nothing in that statute indicates that the First Restatement would apply in perpetuity and could not be superseded by the Third Restatement or other authority. The issue of what happens when a new restatement is created to supersede an older restatement was an issue of first impression not resolved until *Banks* itself.

plainly cannot include the R.O.W., and one over “all roads in Parcel No. 4 which are now in existence or shall hereafter be constructed for ingress and egress from the Public Road or otherwise” Therefore, there is only an express grant to an easement over the R.O.W. if it is a “road.”

¶ 24 A deed is a contract, and thus in most circumstances the principles of contract interpretation govern. *See Pavel*, 2019 V.I. 23 ¶7; *see also Sam’s Food Distributors, Inc. v. NNA&O LLC*, 2020 VI 7 ¶ 15 (“Easements are reviewed under the same principles that have been established for the interpretation of contracts.”) (quoting 25 AM. JUR. 2d *Easements and Licenses in Real Property* § 63); *Christmas v. V.I. Water & Power Auth.*, 527 F. Supp. 843, 847, 18 V.I. 621, 630 (D.V.I. 1981) (“[A]n easement deed . . . is, of course, a contract to be construed and enforced according to the principles of contract law.” (internal quotation marks omitted)). It is a basic principle of contract interpretation that the terms of a contract should be interpreted according to their plain meaning, and thus when two different terms are used, the terms should be interpreted differently absent other indication. *See Phillip v. Marsh-Monsanto*, 66 V.I. 612, 625 (V.I. 2017) (“Where the language of a contract is clear and unambiguous, the parties' intent must be derived from the plain meaning of its terms.”); *see, e.g., Bank of N.Y. Mellon Trust Co., N.A. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 309 (2d. Cir. 2016) (noting the “well established principle that, where contract provisions use different language, courts must assume the parties intended different meanings”); *Penncro Assocs. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1156-57 (10th Cir. 2007) (“When a contract uses different language in proximate and similar provisions, we commonly understand the provisions to illuminate one another and assume that the parties' use of different language was intended to convey different meanings.”).

¶ 25 Here, there is no indication that the Dierssens intended that “roads” and the “R.O.W.”

should not have different meanings; rather, there is every indication that they should be treated differently. In addition to being referred to by different names on the same official document, the two are depicted differently on the map. The roads are depicted clearly with metes and bounds, while the R.O.W. is not, and at the time of conveyance the two were in a very different state: the roads were fully established roads, while the R.O.W. was unpaved, overgrown, and unused. Further, the deeds expressly reserved the title to and burden of building “roads” to the Dierssens, but they did not reserve any rights in the R.O.W. Finally, while the “roads” form the bounds between parcels, the R.O.W. instead burdens individual parcels. The express easement over roads therefore does not apply to the R.O.W. As a result, there are no words conveying an easement over the R.O.W. within the Dierssens’ deeds, and so there is no express easement over the R.O.W.¹⁰ *See, e.g., Sam’s Food*, 2020 VI 7 ¶ 15; *Kobrine v. Metzger*, 846 A.2d 403, 412 (Md. 2004) (“[T]he instrument must contain the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted.”) (internal quotations omitted); *Lizama v. Dep’t of Pub. Works*, 2005 Guam 12 at ¶ 21. (“[W]hile ‘no particular words’ are required to create an express easement, the writing ‘must identify with reasonable certainty the easement created and the dominant and servient tenements.’”) (quoting *Dunlap Investors, Ltd. v. Hogan*, 650 P.2d 432, 434 (Ariz. 1982)).

D. Implied Easement

¶ 26 While there is no express easement over the R.O.W, Appellees may nevertheless have an

¹⁰ The deed from Lugo to Underwood does expressly convey “all right, title and interest of Grantor to use of the estate roads and **rights-of-way** shown on the aforesaid survey for ingress and egress.” [emphasis added]. However, this language simply conveys any right or interest that already benefits the property; it does not create a new one.

implied easement over the R.O.W.¹¹ An implied easement exists when the grantors intended to create a servitude but neglected to do so expressly. The most common type of implied easement (also referred to as an easement by implication) is an easement that is implied based on past use. In this case, however, it is necessary to consider a different type of implied easement: an easement implied by an indication on a map that is incorporated into the deed.¹²

¶ 27 This Court has not yet determined how easements indicated on an incorporated map should be interpreted in the Virgin Islands. The Superior Court applied the Third Restatement of Property, which provides, in pertinent part, that:

In a conveyance or contract to convey an estate in land, description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied by the circumstances:

(1) A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for

¹¹ Appellants argue that a property owner may not create an easement over one part of their property, and that prior easements merge when the properties are united under one owner. This is correct in most cases; however, a property owner who intends to subdivide their property and sell it as separate parcels may create easements to benefit some or all of those parcels. *See Pavel*, 71 V.I. at 696 (“[P]rivate persons, in the exercise of their constitutional right of freedom of contract, may ordinarily impose whatever restrictions upon the use of land which they convey to another that they desire to impose.”) (quoting *Grubel v. MacLaughlin*, 6 V.I. 490, 507 (D.V.I. 1968)).

¹² Appellees note that there is extensive caselaw, including in the Virgin Islands, to stand for the proposition that “where property is sold with reference to a parcel or map, an easement is implied in the existing or proposed roadways described therein.” *Olson v. Mee*, 8 V.I. 253, 257 (D.V.I. 1971). However, in addition to being non-binding, that caselaw is specific to an estate road system; for example, in *Olson* the road in question was a cul-de-sac that was clearly part of the estate road system, and *Olson* cited for that proposition a case that was specifically discussing “where parcels are sold by reference to a recorded plat or plan showing existing or proposed streets which constitute boundaries of the parcels.” *Gagnon v. Moreau*, 225 A.2d 924, 925-26 (N.H. 1967). Here, as noted above, T57 establishes that the R.O.W. is separate from the system of estate roads, and rather than form the boundaries of parcels, it burdens individual parcels, creating important policy differences from an estate road system.

common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses.

(2) A description of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.13 (2000). However, to determine whether to apply this—or any other—rule, the Superior Court should have first conducted a *Banks* analysis, under which a court must determine: “(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands.” *Pavel v. Estates of Judith's Fancy Owners' Ass'n*, 2019 V.I. 23 at ¶ 11 (quoting *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014)). While the Superior Court’s failure to perform this necessary *Banks* analysis is reversible error, *see Connor*, 60 V.I. at 605, due to the long pendency of this case and to offer guidance to the Superior Court, we will nevertheless resolve the question of law in this case. *See Pavel*, 2019 V.I. 23 at ¶11.

¶ 28 On the first factor, as we observed in *Pavel*, “courts in the Virgin Islands have consistently invoked the rules governing the creation of implied easements expressed in the Restatement.” 2019 VI 23 at ¶13. Virgin Islands courts have also endorsed the “well-settled law” explicated by § 2.13. RESTAT. (3D) OF PROP.: SERVITUDES § 2.13 Reporter’s Notes; *see also Smith*, 329 F.2d at 633; *McIntosh v. Prince*, 9 V.I. 3, 8 (V.I. Super. Ct. 1971) (observing that “it is also a general rule that an easement is created in favor of a grantee whenever real property is sold and conveyed with reference to a parcel or map on which streets or alleys are shown,” but that ultimately the question is one of the grantor’s intent) (citing 25 AM. JUR. 2D *Easements and Licenses in Real Property* § 26.). For the second factor, the rule stated in § 2.13 of the Restatement is the generally-accepted

rule across “a majority of courts from [United States] jurisdictions.”¹³ And finally, the rule expressed in § 2.13 of the Third Restatement of Property is the soundest rule for the Virgin Islands. As we have noted, land in the Virgin Islands is scarce, and “restrictive covenant[s] will be strictly construed against limitations on the free use of land, with all doubts to be resolved in favor of the unfettered use of land.” *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 593 (V.I. 2014) (internal quotation marks omitted). Therefore, while a map is evidence that a grantor intended to create an easement over the marked R.O.W., that evidence can be rebutted or countered by circumstances that show a different intent. We therefore adopt the rule expressed in § 2.13 of the Third Restatement of Property, and we proceed to apply it to the facts of this case.

¶ 29 T57 creates “an inference that the parties intended for there to be an easement, which any other party may rebut by pointing to evidence of a contrary intent, with the strength of the evidence needed to rebut the inference of an easement varying based on the strength of the evidence — particularly the explicitness of the map — used to support the inference.”¹⁴ *Brodhurst v. Frazier*,

¹³ See, e.g., *McBurney v. Paquin*, 28 A.3d 272 (Conn. 2011); *Bonifay v. Garner*, 445 So.2d 597 (Fla. Dist. Ct. App. 1984); *Walker v. Duncan*, 223 S.E.2d 675 (Ga. 1976); *Lindsay v. Annapolis Roads Property Owners Ass’n*, 64 A.3d 916 (Md. 2013); *Stines v. Willyng*, 344 S.E.2d 546 (N.C. 1986); *State v. East Shores, Inc.*, 329 A.2d 585 (N.J. 1974); *Ute Park Summer Homes Ass’n v. Maxwell Land Grant Co.*, 427 P.2d 249 (N.M. 1967); *Dayton v. Jordan*, 381 P.3d 1031 (Or. App. 2016) (stating that the appropriate inquiry is fact-based as to the intent of the grantor, where the representation on a plat may be evidence of intent); *Kapp v. Norfolk Southern Ry.*, 350 F. Supp. 2d 597 (M.D. Pa. 2004); *Stracener v. Bailey*, 737 S.W.2d 536 (Tenn. App. 1986); *Bauer Enters., Inc. v. City of Elkins*, 317 S.E.2d 798 (W.Va. 1984); R. CUNNINGHAM, W. STOEBUCK, & D. WHITMAN, PROPERTY § 8.6 (1984); 25 AM. JUR. 2D *Easements and Licenses in Real Property* § 21. Some jurisdictions have created special rules for areas of common benefit, such as roads, illustrated on a subdivision or similar plat, establishing that such illustrations are presumptive easements. However, we need not address that here, as the R.O.W. benefits at most two parcels, rather than all parcels illustrated on the original plat.

¹⁴ This is consistent with our caselaw regarding contracts in general: While the interpretation of unambiguous terms in a contract or deed are a matter of law, in determining whether or not the

57 V.I. 365, 370 (V.I. 2012); *see also* RESTAT. (3D) OF PROP.: SERVITUDES § 2.13. Here, the map explicitly states that there is an R.O.W. And while it is true that the word “easement” does not appear on T57, a “right of way” in 1957 was, by definition, an easement granting the holder the right to pass through property owned by another. *See, e.g.*, BLACK’S LAW DICTIONARY 1489 (4th ed. 1951) (defining “right-of-way” as “a servitude imposed by law or by convention, and by virtue of which one has a right to pass . . . through the estate of another.”); *Kurz v. Blume*, 95 N.E.2d 338, 339 (Ill. 1950) (“It is settled that a right of way is an easement.”); *Campbell v. Bishields*, 80 A.2d 262, 266 (Md. 1951) (“A right of way is an easement appurtenant to an estate owned by the person

terms are unambiguous, we look beyond the language in the document:

Virgin Islands courts have generally declined to consider extrinsic evidence when, as here, the written terms of a contract appear unambiguous. However, ‘[t]o decide whether a contract is ambiguous, we do not simply determine whether, from our point of view, the language is clear Before making a finding concerning the existence or absence of an ambiguity, we consider the contract language . . . and the extrinsic evidence offered in support of each interpretation. Extrinsic evidence may include . . . the conduct of the parties that reflects their understanding of the contract's meaning.’ Nevertheless, a finding that extrinsic evidence renders a contract latently ambiguous will typically defeat a motion for summary judgment and necessitate that the trier of fact resolve the ambiguity in light of the extrinsic evidence.

White v. Spenceley Realty, LLC, 53 V.I. 666, 678 (V.I. 2010) (internal citations omitted) (quoting *Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir. 1993)). In *White*, we held that when a party to a contract acted in accordance with the written terms, despite both parties testifying that they interpreted the contract differently, a “reasonable trier of fact could infer” that notwithstanding their testimony to the contrary, the parties interpreted the contract in accordance with the written text. Contrastingly, in *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702 (V.I. 2011), we concluded that there was no ambiguity when both parties testified that they interpreted the contractual provision in accordance with the language’s most logical interpretation. *Id.* at 714-15.

in whose favor the easement exists.” (citation omitted)). Referring to the R.O.W. as such on the filed map is therefore extremely strong evidence of the intent to create an easement.

¶ 30 Appellant cites several items as evidence of contrary intent. First, the deeds explicitly grant two different types of easements but make no reference to the R.O.W., which Appellant alleges demonstrates an intent to differentiate the R.O.W. Second, the deeds expressly reserve the title and burden of building any roads to the Dierssens, but the Dierssens did not reserve any rights in the R.O.W. Third, he asserts that the Dierssens’ failure to “create a new map converting the [R.O.W.] across 4-26 and 4-27 into an estate road” demonstrates that they “did not intend to establish an access route along the [R.O.W].”¹⁵ (Appellant’s Br. at 26.) Finally, Appellant argues that the R.O.W. was never used as a road or for transit, even by previous owners of the Underwood and Stryker properties. However, these indications cannot overcome the extremely strong evidence of intent that is depicting the R.O.W. on the map in the first place. *See Brodhurst*, 57 V.I. at 370. This depiction is therefore also sufficient to have given Streibich notice when he purchased the property that it was likely encumbered. *Contra Thomas*, 60 V.I. at 595 (finding that there was insufficient notice when the conveyance was “susceptible to multiple interpretations by a reasonable

¹⁵ Streibich notes that when the Dierssens subdivided parcel 4-22 to create parcels 4-22A and 4-22B, they submitted new public works drawings, T61 and T62, replacing the portion of the original R.O.W. running across parcel 4-22 with an estate road running along approximately the same path. According to Streibich, the Dierssens’ decision to depict only a portion of the original R.O.W. as a proper estate road constitutes evidence that the Dierssens intended to eliminate the remaining portion of the right of way originally depicted in T57, the portion running across parcels 4-26 and 4-27. However, the deed from the Dierssens to the Brilliants expressly references T57 but makes no mention of T61 or T62, despite the fact that both of these drawings existed at the time of the conveyance. Moreover, T57 is a complete map of the entire planned subdivision, while the two later drawings are limited in scope to the relevant parcels. These drawings are therefore of limited significance in determining the Dierssens’ intent towards the remainder of the R.O.W.

person”).¹⁶ As a result, Appellees are the holders of an easement allowing them passage over the R.O.W. as depicted in T57.¹⁷

¶ 31 However, the Superior Court erred in determining that the easement is over the alleged dirt

¹⁶ Streibich argues that an easement should not be implied because the right of way depicted on T57 is neither necessary nor beneficial for the enjoyment of Underwood’s and the Strykers’ property and would operate as an onerous servitude upon Streibich’s own property. (Appellant’s Br. at 25-26.) He relies on *McIntosh*, in which the Municipal Court reasoned that “[w]here an unopened right of way is neither necessary nor beneficial for the enjoyment of the dominant tenement such an easement should not be presumed contrary to evidence of intention, particularly where, under the existing circumstances, it would operate as an onerous servitude upon the land of the grantor.” 9 V.I. at 10. However, *McIntosh* is not binding on this Court. Moreover, the inquiry conducted by the *McIntosh* court is whether, at the time the easement was created, the impact on the value of the burdened estate would have been so severe and the value to the benefited estate so negligible that it is unlikely that the Dierssens and the Brilliants intended to create the right of way depicted in T57. Such evidence would be an indication of intent, though it would not be the only factor considered in determining intent. See Restatement (Third) Property- Servitudes § 2.13, cmt. B (“The circumstance that the impact on the value of the burdened estate would be severe and the value to the benefited estate would be negligible, may indicate an intent that no servitude should be implied.”). Evidence that recognition of the right of way would impose an onerous burden on Streibich today is simply not relevant in determining the intention of the Dierssens and the Brilliants over fifty years ago when the easement when the easement was created. Such evidence would be relevant to consideration of an easement by necessity, but, as noted below, that issue is not currently before this Court.

¹⁷ It is important to note that the R.O.W., derived from the map and the use of the term “right of way,” gives Appellees only the right to pass across the R.O.W. and no more. See BLACK’S LAW DICTIONARY 1489 (4th ed. 1951) (“When [a right of way easement] is the result of a contract, its extent and the mode of using it is regulated by the contract); *Thomas*, 60 V.I. at 593 (holding that servitudes in the Virgin Islands are to be strictly construed in favor of the unfettered use of land); *McIntosh*, 9 V.I. at 11 (“No use may be made of a right of way, different from that established at the time of its creation, so as to burden the servient estate to a greater extent than was contemplated at the time of the grant.”); see also *McBurney v. Paquin*, 28 A.3d 272, 277 (Conn. 2011) (affirming the lower court’s holding that an easement implied from a map permitted passage but did not permit appellants to engage in other activities on the easement); *Beres v. United States*, 104 Fed. Cl. 408, 439 (Fed. Cl. 2012) (holding that when a deed specifically granted a “right of way” along railroad tracks and the right of way had been used exclusively for railroad purposes, the deed had created an easement solely for the purposes of use as a railroad, and a hiking trail was not within the scope of the easement).

road, as depicted on T88. The alleged dirt road is not located within the R.O.W. shown on T57: in her initial complaint, Underwood herself stated that “[n]o road has ever been created that is coextensive with the road as shown on [T57] and, upon information and belief, such a road could not be constructed.” (J.A. 114.) Underwood argued that she “has acquired a right to use the existing [dirt road] by implication based upon the references in the deeds to [T57] showing a road, and based upon the public policy of avoiding the economic waste that would occur if she were required to create a road in exact conformance with that depicted on [T57] rather than using the road currently in existence.” (J.A. 117.) However, any easement implied from a map is located where the map depicts it – unless there is evidence of contrary intent. And in this case, for the same reasons that the map implies an easement in the first place, there is insufficient evidence of contrary intent as a matter of law.¹⁸ Thus the easement is located where it is depicted on T57, and not over the alleged dirt road.

¶ 32 While the Superior Court correctly determined that an easement exists by implication over the R.O.W. as shown in T57, the court erred in implicitly determining the scope of the easement on summary judgment and was incorrect as a matter of law in locating the easement over the alleged dirt road. As a result, we affirm the Superior Court’s grant of Underwood’s motion for

¹⁸ Appellees refer to 28 V.I.C. § 47, which states: “The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it . . . (6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them, if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.” However, this rule of construction is inapplicable to this case because there is no inconsistency; the deeds do not mention the R.O.W.. Moreover, if the rule did apply, it would make clear that there is no easement over the alleged dirt road, as the alleged road is not the R.O.W. depicted on T-57.

summary judgment declaring that Underwood and the Strykers have an easement by implication as depicted in T57, but reverse the Superior Court’s grant of summary judgment establishing an easement over the alleged dirt road, and therefore also the attendant permanent injunction.

E. Easement by Necessity

¶ 33 Finally, Appellees argue that there is an easement by necessity, as an easement over Streibich’s property is necessary to access their own parcels. This Court has not determined the standards for an easement by necessity under Virgin Islands law; however, necessity is a question of fact, and Streibich has provided an engineer’s affidavit asserting that the easement is unnecessary, thus demonstrating that there is a genuine dispute of fact on that issue. Moreover, Appellees concede that there is a genuine dispute as to material fact on the question of whether an easement by necessity exists. (Appellees’ Br. 26).¹⁹ Thus the Superior Court’s determination of actual success on the merits based on the assessment that there is no genuine dispute of material

¹⁹ In determining whether an easement was necessary, the Superior Court not only weighed and decided the evidence, which is the province of the ultimate trier of fact after a trial and not appropriate at the summary judgment stage; the court further appears to have made this determination on the basis of its own observations during a visit to the site, during which it “*deduced* that there exists no other commercially reasonable or feasible option to access Intervenor’s property, Parcel No. 4-28, other than through the disputed right-of-way.” *Underwood v. Streibich*, No. ST-95-CV-459, 2019 V.I. LEXIS 22, at *15 (V.I. Super. Ct. Feb. 21, 2019) (emphasis added). The court determined, based entirely on its own “inspection during the site visit,” that the alternate option proposed by Streibich’s engineer’s affidavit “on its face, presents a cost-prohibitive, cumbersome, time-consuming option and may run the risk of violating the Virgin Islands road grading restrictions.” *Underwood v. Streibich*, 70 V.I. 179, 208 (V.I. Super. Ct. 2019). However, the court failed to make any findings, thus preventing our review, which is itself generally cause for a remand. *Wessinger v. Wessinger*, 56 V.I. 481, 488 (V.I. 2012). Moreover, in making this determination the Superior Court acknowledged but apparently discounted the engineer’s affidavit. (J.A. 48.) Such weighing of evidence is impermissible on summary judgment, *Rymer v. Kmart Corp.*, 68 V.I. 571, 582 (V.I. 2018); the court countermanded an expert’s opinion based on its own observations, reaching factual conclusions by simply looking at a site, without the benefit of expertise or evidence and ignoring evidence provided by an expert.

fact that an easement by necessity exists is premature and thus in error. However, because we find an easement by implication, this error is harmless.²⁰

III. CONCLUSION

¶ 34 The Superior Court did not issue a valid permanent injunction under Rule 65; moreover, the court did not address the *Enrietto* factors. There is thus no valid permanent injunction. However, we accept jurisdiction because the order complies with the *Enrietto* factors. In addressing the merits of the motion for partial summary judgment, we hold that (1) there is no express easement over the R.O.W. as a matter of law; (2) there is an easement by implication over the R.O.W., but there is a genuine dispute of material fact as to its scope, and it is located where it is depicted on the T57 map and not over the alleged dirt road; and (3) as both parties agree, there is a genuine dispute of fact as to whether an easement by necessity exists. As a result, we affirm the grant of summary judgment granting Underwood's motion for declaratory judgment of an easement in favor of Parcel Nos. 4-27 and 4-28 as depicted in T57; reverse the grant of summary judgment on the Strykers' motion; and remand to the Superior Court for further proceedings consistent with this opinion.

Dated this 23rd day of March, 2021.

BY THE COURT:

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

²⁰ We note the Superior Court's error to guide the court, as necessity may be relevant in determining the scope of the easement; scope is not a matter for this appeal, but the parties and/or the court will certainly need to establish it in the future.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court