For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

NANDI SEKOU, MARTIAL WEBSTER, and TERRENCE JOSEPH, as members of the Virgin Islands Board of Education, on their own behalf and on behalf of the Board of Education, Appellants/Plaintiffs,	)	**S. Ct. Civ. No. 2018-0011** Re: Super. Ct. Civ. No. 01/2017 (STX)
v.	)	
MARY MOORHEAD, JUDY GOMEZ, and JENNIFER JONES, Appellees/Defendants.	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: May 14, 2019
Filed: April 24, 2020

Cite as: 2020 VI 4

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

APPEARANCES:

Nandi Sekou, Esq.
St. Croix, U.S.V.I.
Attorney for Appellants,

Su-Layne U. Walker, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee Judy Gomez,

Maria T. Hodge, Esq.
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Attorney for Appellee Jennifer Jones.[1]

[1] Although appearing *pro se* in the Superior Court proceeding and being identified as an appellee in this appeal, Mary Moorhead has not filed any documents with this Court with respect to this appeal.

OPINION OF THE COURT

HODGE, Chief Justice.

¶1 Appellants Nandi Sekou, Martial Webster, and Terrence Joseph appeal from several orders entered by the Superior Court in the underlying matter, which had the effect of dismissing all their claims against Appellees Mary Moorhead, Judy Gomez, and Jennifer Jones. For the reasons that follow, we affirm the judgment of the Superior Court.

I. BACKGROUND

¶2 This case is the culmination of a long-standing dispute between members of the elected Virgin Islands Board of Education (hereafter "Board"). At a regularly scheduled Board meeting held January 15-16, 2016, Moorhead and Gomez orchestrated a voted to remove Sekou and Joseph as, respectively, Chair and Vice-Chair of the Board. On February 18, 2016, Sekou, Webster, and Joseph filed an action, docketed as Super. Ct. Civ. No. 71/2016 (STX), alleging that their removal had been unlawful because the Board's bylaws require that all matters considered at Board meetings be included in an official, publicly-circulated agenda no later than three days in advance of the meeting, and that Moorhead and Gomez had interfered with the daily operations of the agency. The Superior Court, in a February 19, 2016 order, granted a temporary restraining order and enjoined Moorhead and Gomez from entering into any contracts, taking any actions binding upon the Board, or directing the daily management of the office and employees of the Board. Jones represented Moorhead and Gomez in that lawsuit in her capacity as legal counsel to the Board.

¶3 After issuance of the temporary restraining order, the Board held a meeting on March 18, 2016, with the timely-circulated agenda providing for a vote on the removal of Sekou as Chair and Joseph as Vice-Chair and, if necessary, election of a new Chair and Vice-Chair. At that meeting,

the Board voted to remove Sekou and Joseph from their positions and elected Moorhead as Chair and Gomez as Vice-Chair. Given these developments, the Superior Court dismissed Super. Ct. Civ. No. 71/2016 (STX) as moot. While Sekou, Webster, and Joseph appealed from that dismissal order, this Court dismissed that appeal for failure to prosecute in an August 9, 2016 order.

¶4 On January 3, 2017, Sekou, Webster, and Joseph filed the instant lawsuit against Moorhead, Gomez, and Jones. The complaint stated that they were bringing the lawsuit both in their capacities as members of the Board, as well as on behalf of the Board itself. Count I of the complaint alleged that Moorhead and Gomez had refused to timely call a meeting for election of new Board officers following the 2016 general election, in violation of 3 V.I.C. § 98(a), and sought a temporary restraining order compelling the Board to hold such a meeting between January 9 and January 13, 2017. Count II alleged that Jones's representation of Moorhead and Gomez in Super. Ct. Civ. No. 71/2016 (STX) was improper and sought an accounting and disgorgement of all monies paid to Jones in connection with that representation. Count III alleged that Sekou, Webster, and Joseph had "paid considerable monies and incurred substantial obligations to retain private counsel to vindicate their rights, and those of the Board, in the prior litigation," and requested "nominal, compensatory, consequential, and punitive damages." (J.A. 34.)

¶5 Jones filed a motion to dismiss the lawsuit on January 31, 2017. The motion sought dismissal for failure to state a claim with respect to Count II and dismissal of all claims on the grounds that Sekou, Webster, and Joseph lacked both authority and standing to bring the lawsuit. In addition to joining that motion, Gomez filed a supplemental motion to dismiss Count III on grounds that it represented an attempt to impermissibly collect costs and attorney's fees for Super. Ct. Civ. No. 71/2016 (STX) in circumvention of 5 V.I.C. § 541. Moorhead both joined that motion and requested that Count I of the complaint be dismissed as moot.

¶6 On February 3, 2017, the Superior Court issued an order directing Sekou, Webster, and Joseph to file a response to the motion to dismiss no later than February 21, 2017. However, rather than file a substantive response, Sekou, Webster, and Joseph instead filed a motion to strike the motion to dismiss on grounds that the motion had attached exhibits outside of the pleadings and made legal arguments based on those exhibits.[2]

¶7 The Superior Court, in a March 2, 2017 order, denied the motion to strike, but acknowledged that the motion to dismiss did include exhibits outside of the pleadings and converted the motion to dismiss into a motion for summary judgment. The March 2, 2017 order further *sua sponte* granted Sekou, Webster, and Joseph an additional 21 days to respond to the converted motion. However, Sekou, Webster, and Joseph again failed to file a substantive response by the court's deadline. Instead, on March 23, 2017, they filed a motion to stay the proceeding because they planned to file a motion to disqualify the Virgin Islands Department of Justice from representing Gomez. The next day, Sekou, Webster, and Joseph filed their motion to disqualify. Gomez and Jones separately filed oppositions, and Sekou, Webster, and Joseph subsequently moved for an evidentiary hearing on their disqualification motion.

¶8 Ultimately, the Superior Court, in a May 22, 2017 order, stated that "the Court will grant Plaintiffs' Motion for Evidentiary Hearing," but that "at such hearing Parties shall be prepared to present arguments as to all Motions presently pending before the Court," and specifically noted that "[t]his hearing shall include, first of all, the presentation of argument and relevant evidence concerning Defendant Jones' Motion for Summary Judgment." (J.A. 208.) The Superior Court

[2] Previously, on February 2, 2017, Sekou, Webster, and Joseph filed an informational motion with the Superior Court, which stated that they objected in writing to the Virgin Islands Department of Justice representing Gomez but that they "do not believe that a Motion to Strike the DOJ's appearance in this case on behalf of Defendant Gomez is warranted at this time." (J.A. 80-80a.)

then *sua sponte* extended the deadline for Sekou, Webster, and Joseph to file a substantive response to the motion for summary judgment to June 16, 2017, and also required them to show cause for their failure to submit a response within the deadlines provided in its February 3, 2017 and March 2, 2017 orders.

¶9 Sekou, Webster, and Joseph filed their opposition to the summary judgment motion on June 16, 2017. In their opposition, they argued that Jones's motion should not have been converted to a motion for summary judgment under either the former rules of civil procedure applicable to the Superior Court—which were in effect at the time the motion had been filed—or the Virgin Islands Rules of Civil Procedure, which went into effect on March 31, 2017. And while their response included legal arguments opposing Jones's request for dismissal of Count II, they did not address Jones's claim that they lacked authority to bring the action on behalf of the Board, and they responded to Jones's standing argument by dismissing it as "frivolous" and reiterating that they had spent a "very considerable amount of money in prosecuting the 2016 case." (J.A. 216.)

¶10 The Superior Court held a hearing on July 28, 2017. However, at the start of the hearing, the Superior Court stated that it had denied the plaintiffs' motion for an evidentiary hearing on the motion to disqualify. (J.A. 342.) When the plaintiffs, through their counsel, noted that the May 22, 2017 order had granted their motion for an evidentiary hearing, the Superior Court inquired as to what evidence the plaintiffs needed to present, given that 3 V.I.C. § 114(a)(6) authorized such representation. Ultimately, no evidence was presented with respect to the motion to disqualify. After hearing arguments, the Superior Court denied the motion to disqualify the Department of Justice, and took the summary judgment motion under advisement.

¶11 On September 12, 2017, the Superior Court issued an opinion and order which granted summary judgment in favor of the defendants on Counts II and III. As to Count II, the Superior

Court noted that Sekou, Webster, and Joseph had "almost entirely fail[ed] to address the issue of standing" even though Jones's motion had dedicated pages of argument to the question of whether Sekou, Webster, and Joseph had standing and authority to seek, purportedly on behalf of the Board, an accounting and disgorgement of Jones's legal fees. After considering the pertinent statutes establishing the Board and delineating its powers, the Superior Court concluded that "the power to bring suit on behalf of the Board pursuant to 17 V.I.C. § 21(a)(8) may only be delegated to individual Board members by majority vote." (J.A. 307.) Similarly, the Superior Court determined that while individual Board members "may have an implied right to review records of business conducted by the Board in order to make fully informed decisions in exercising their individual power to vote concerning the business of the Board," the plaintiffs had failed to present any legal argument or authority to support the proposition that individual Board members had a right to demand and review records belong to third parties such as Jones. With respect to Count III, the Superior Court found that 5 V.I.C. § 541 governs the award of costs and fees, and that in any event Sekou, Webster, and Joseph were not the prevailing parties in Super. Ct. Civ. No. 71/2016 (STX), in that their complaint had been dismissed as moot.

¶12 The Superior Court further noted that Moorhead had requested the dismissal of Count I as moot, and it appeared that the parties had proceeded on the assumption that Count I had been either mooted or voluntarily withdrawn. However, the Superior Court directed Sekou, Webster, and Joseph to respond to the mootness concern within 28 days. When neither Sekou, Webster, nor Joseph filed a response, the Superior Court issued a December 7, 2017 opinion and order dismissing Count I as moot. However, on December 18, 2017, Sekou, Webster, and Joseph filed a motion for reconsideration of the December 7, 2017 opinion and order, on grounds that they had never received a copy of the September 12, 2017 opinion and order. The Superior Court, in a

December 22, 2017 order, granted the motion for reconsideration, and granted Sekou, Webster, and Joseph twenty days to file a response to the mootness question, which they ultimately did on January 17, 2018. Ultimately, in a January 23, 2018 order, the Superior Court characterized the plaintiffs' January 17, 2018 filing as a motion under Virgin Islands Rule of Civil Procedure 60(b), and denied the motion on grounds that they had failed to present any legal argument as to why any of the exceptions to the mootness doctrine were applicable to Count I. Sekou, Webster, and Joseph timely filed a notice of appeal with this Court on February 20, 2018. *See* V.I. R. APP. P. 4(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶13 We have jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). Because it resolved the last outstanding claims between the parties, the Superior Court's January 23, 2018 order constitutes a final appealable judgment.

¶14 This Court exercises *de novo* review over the Superior Court's application of law, and reviews factual findings for clear error. *St. Thomas—St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007).

B. Motion to Disqualify

¶15 In their appellate brief, Sekou, Webster, and Joseph allege that the Superior Court abused its discretion when it did not allow them to present evidence on their motion to disqualify at the July 28, 2017 hearing, even though the May 22, 2017 order stated that it was granting their motion for an evidentiary hearing. Moreover, they assert that in any case the Superior Court erred when it denied their motion to disqualify the Department of Justice from representing Gomez.

¶16 Sekou, Webster, and Joseph are correct that the May 22, 2017 order expressly stated that their motion for an evidentiary hearing was being granted, and that the Superior Court therefore proceeded inconsistently with its own directive at the July 28, 2017 hearing when it effectively only heard oral arguments on the motion to disqualify. However, the Virgin Islands Rules of Appellate Procedure provide that "[n]o error or defect in any ruling or order or in anything done or omitted by the Superior Court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." V.I. R. APP. P. 4(i).

¶17 Ordinarily, the Superior Court should hold an evidentiary hearing when considering whether an attorney should be disqualified as counsel. *In re Drue*, 57 V.I. 524 (V.I. 2012). However, this Court has already held that the Superior Court need not hold an evidentiary hearing—even if one would ordinarily be required—if the moving party "fails to 'present[] a colorable factual basis to support [its] claim.'" *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 561 (V.I. 2015) (quoting *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175-76 (3d Cir. 1990)).

¶18 This is such a case. When the Superior Court questioned why Sekou, Webster, and Joseph needed to introduce evidence to support their claim, it expressly invoked 3 V.I.C. § 114(a)(6), which by its own terms authorizes the Attorney General of the Virgin Islands "to appear for and represent the executive branch of the Government of the United States Virgin Islands, and all departments, boards, commissions, agencies, instrumentalities or officers thereof, before all administrative tribunals or bodies of any nature, in all legal or quasi-legal matters, hearings or

proceedings."[3] (emphasis added). The sole argument given in support of disqualifying the Attorney General from representing Gomez is that Sekou, Webster, and Joseph are also members of the Board. However, this Court previously rejected a virtually identical argument in a case in which members of the Virgin Islands Board of Elections had sued the Supervisor of Elections and objected to the Department of Justice representing the Supervisor. *Moses v. Fawkes*, 66 V.I. 454, 470-71 (V.I. 2017). Consequently, because the issue of whether the Department of Justice is authorized to represent Gomez rests on a pure question of statutory interpretation,[4] and that statute has already been interpreted by this Court to permit such representation, there was no colorable factual basis to support disqualifying the Attorney General. Thus the Superior Court committed no error when it denied the motion to disqualify, and any error in converting the hearing on the motion

[3] In their appellate brief, Sekou, Webster, and Joseph assert that "[i]n the instant case, Defendants Gomez and Moorhead are being sued in their individual capacities." (Appellants' Br. 23.) However, it is clear from their complaint that Sekou, Webster, and Joseph are suing Gomez and Moorhead exclusively for actions they took in their respective capacities as Vice-Chair and Chair of the Board.

[4] Sekou, Webster, and Joseph allege that a conflict of interest exists because the Department of Justice is representing the Virgin Islands Department of Labor in an unrelated lawsuit against the Board, and the Board has purportedly not consented to the dual representation. Rule 211.1.7 of the Virgin Islands Rules of Professional Conduct provides that

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client
>
> . . . .

V.I.S.CT.R. 211.1.7.(a)(1). But here, the Department of Justice is representing Gomez, not the Board. In any event, it is not clear how the Department of Justice's representation of Gomez in this matter would be "directly adverse" to its representation of the Department of Labor in a wholly unrelated lawsuit against the Board.

to disqualify from an evidentiary hearing to oral arguments is harmless.[5]

C. Conversion of Motion to Dismiss

¶19 Sekou, Webster, and Joseph renew their argument that the Superior Court improperly converted the motion to dismiss into a motion for a summary judgment. According to them, the converted motion was "procedurally defective under both the old rules and the new rules" of civil procedure. (Appellants' Br. 28.) The "new rules" they refer to are the Virgin Islands Rules of Civil Procedure, which became effective on March 31, 2017, and replaced the "old rules" of civil procedure, including former Superior Court Rule 7, which provided that "[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the

[5] The concurring in part and dissenting in part opinion asserts that our interpretation of section 114 purportedly violates the constitutional separation of powers because the Department of Justice "could conceivably represent Virgin Islands senators or judges in civil matters." 2020 V.I. 4 ¶ 58. Because the Department of Justice and the Board of Education are both within the executive branch, permitting the Department of Justice to represent Gomez as Vice-Chair of the Board poses no separation of power concerns. *See* 3 V.I.C. § 97; *see also St. Croix Avis v. West Indian Co., Ltd.*, 2019 VI Super 81 ¶ 31 ("There is no fourth branch of government. So, [the independent agency] is not a fourth branch of the Virgin islands Government[,] [b]ut is part of the executive branch.").

In any case, courts have repeatedly held that the separation of powers is not violated when the Attorney General, the Department of Justice, or comparable officials represent the legislative or judicial branches in civil litigation. *See, e.g., Waterman v. Anenberg*, 197 F.Supp. 11, 12 (E.D. N.Y. 1961) (holding that "there is no merit" to plaintiff's claim that the Attorney General lacks the authority to represent judges of New York City's municipal court who have been sued under 42 U.S.C. § 1983); *Hussey v. Say*, 384 P.3d 1282, 1291 (Haw. 2016) (rejecting argument that the Hawai'i Attorney General cannot represent the Hawai'i House of Representatives); *Johnson v. Board of Bar Overseers of Ma.*, No. 06-P-1809, 2007 WL 4234100, at *3 (Mass. Ct. App. Dec. 3, 2007) (unpublished) ("[t]he Attorney General also has a common law duty to represent the public interest and enforce public rights," and thus "the Attorney General may represent members of the judiciary" and "also may . . . represent the arms of the judiciary"). Of course, as co-equal branches of government, the legislative and judicial branches may elect to retain independent counsel in lieu of accepting representation by the Department of Justice. *See, e.g.*, 4 V.I.C. § 4(c)(5)(J) (authorizing the Administrator of Courts, subject to the administrative authority of the Supreme Court and the Chief Justice, to "procur[e] legal services to enforce any rights granted to the Virgin Islands court system or to represent individual judges, justices, magistrate judges, supervisors, and other court personnel in legal matters arising from performance of their official duties. . . .").

extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence."

¶20 Although Jones filed her motion on January 31, 2017, and the Virgin Islands Rules of Civil Procedure did not go into effect until two months later on March 31, 2017, Rule 1-1(c)(2)(B) of the Virgin Islands Rules of Civil Procedure provides that the new rules would apply to pending cases unless "applying them in a particular previously-pending action would be infeasible or would work an injustice." Because Sekou, Webster, and Joseph assert that the January 31, 2017 motion is "procedurally defective" due to a failure to comply with provisions of Virgin Islands Rule of Civil Procedure 56 that lack a counterpart in Federal Rule of Civil Procedure 56,[6] it would clearly "be infeasible or would work an injustice" to retroactively apply those provisions to the January 31, 2017 motion. Therefore, we apply the old rules with respect to determining whether the motion was procedurally defective. *Accord*, *Mills-Williams v. Mapp*, 67 V.I. 574, 586 (V.I. 2017) (applying the old pleading rules to a pleading that had been filed and dismissed prior to adoption of the Virgin Islands Rules of Civil Procedure).

¶21 In their brief, Sekou, Webster, and Joseph allege that Jones's motion was defective because of United States District Court of the Virgin Islands Local Rule 56.1. That Rule, which they assert was made applicable through former Superior Court Rule 7, required that a party file a separate statement of material facts with a summary judgment motion. However, the January 31, 2017

[6] Although the Federal Rules of Civil Procedure served as a model for many provisions of the Virgin Islands Rules of Civil Procedure, the Reporter's Note accompanying Virgin Islands Rule of Civil Procedure 56 reflects that the Advisory Committee on Rules had concluded that Federal Rule of Civil Procedure 56 did not "adequately elicit statements of undisputed and disputed facts that prove very helpful in the fair disposition of summary judgment motions." V.I. R. CIV. P. 56 Reporter's Note. Thus, Virgin Islands Rule of Civil Procedure 56 contains several requirements meant to address this concern, including requiring the movant to include "a discrete section of the moving papers that states undisputed facts individually, and numbers them." *Id.*

motion had been filed as a motion to dismiss; it only became a summary judgment motion when the Superior Court converted it to one after determining that it raised matters outside the pleadings. *See* FED. R. CIV. P. 12(d). Sekou, Webster, and Joseph have cited to no legal authority to support the proposition that formatting requirements applicable to summary judgment motions may be retroactively applied to a motion that the litigant never intended to serve as a summary judgment motion.

¶22 Nevertheless, we need not determine whether the conversion of Jones's motion to dismiss to one for summary judgment by the court required her to comply with the procedural rules applicable to summary judgment motions. This Court has already held that District Court Rule 56.1 has never been made applicable to Superior Court proceedings through Rule 7. See *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 583 (V.I. 2015) ("District Court Rule 56.1 does not apply to proceedings in the Superior Court, because it merely established a filing requirement for which there was no basis to extend to the Superior Court."). Consequently, Jones was never obligated to comply with District Court Rule 56.1.

D. Summary Judgment

¶23 Sekou, Webster, and Joseph contend that the Superior Court erred when it granted the motion for summary judgment with respect to Counts II and III. However, virtually all of their legal arguments in this regard focus on the merits, particularly whether Jones was authorized to represent Moorhead and Gomez in Super. Ct. Civ. No. 71/2016 (STX). But the September 12, 2017 opinion reflects that the Superior Court granted summary judgment on Counts II and III primarily based on its determination that Sekou, Webster, and Joseph lacked authority or standing to assert those causes of action. As the Superior Court correctly recognized,

> The Virgin Islands Board of Education has authority and jurisdiction to—

. . . .

> (8) bring court proceedings for enforcement of rights and the collection of accounts, and to this end may contract for such personal services as are deemed necessary by the Board;

17 V.I.C. § 21(a)(8). However, the statute establishing the Board expressly provides that

> The business which the Board is authorized to transact shall be done at regular or special meetings at which not less than five members are present, and no act shall be valid unless voted for by an affirmative vote of a majority of the members present, and a true record made of such votes.

3 V.I.C. § 98(b). Thus, a court proceeding to enforce the Board's rights is only authorized if it receives the affirmative votes of a majority of the members present at a regular or special meeting at which there is a quorum. Here, it is undisputed that no majority of the Board has authorized Sekou, Webster, and Joseph's lawsuit. Therefore, the Superior Court committed no error when it held that Sekou, Webster, and Joseph lacked the authority or standing to bring Counts II and III on behalf of the Board. *Cf., Hansen v. O'Reilly*, 62 V.I. 494, 519-20 (V.I. 2015) (recognizing the principle that a board may only act through an affirmative vote of a majority of its members at a meeting).

¶24 Similarly, the Superior Court committed no error when it held that Sekou, Webster, and Joseph could not bring Count III even in their personal capacities. In its September 12, 2017 opinion, the Superior Court emphasized that 5 V.I.C. § 541 governs the award of costs and attorneys' fees. That statute provides, in pertinent part, as follows:

> (a) Costs which may be allowed in a civil action include:
>
> . . . .
>
> (6) Attorney's fees as provided in subsection (b) of this section.
>
> (b) The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto; provided, however, the award of attorney's fees in personal injury cases is prohibited unless the court finds that the complaint filed or the defense is frivolous.

5 V.I.C. § 541(a)-(b) (emphasis added). As the Superior Court indicated in its September 12, 2017 opinion, it is—at best—questionable whether Sekou, Webster, and Joseph were the "prevailing party" in Super. Ct. Civ. No. 71/2016 (STX), given that the action had been dismissed as moot.[7] However, the proper mechanism for Sekou, Webster, and Joseph to be reimbursed for their costs and attorneys' fees was not a separate lawsuit, but a timely-filed motion for costs attorneys' fees in Super. Ct. Civ. No. 71/2016 (STX), which if granted would have provided for payment of those costs and fees "in the judgment" of that case. *See In re Royers*, S. Ct. Civ. No. 2014-0023, 2014 WL 2938456, at *2 (V.I. June 30, 2014) (unpublished) ("[T]he better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney's fees, and incorporate all of its rulings into a single, written judgment") (quoting *McClure v. County of Jackson*, 648 S.E.2d 546, 551 (N.C. Ct. App. 2007)). Significantly, even though this was the stated basis for the dismissal of Count III, Sekou, Webster, and Joseph do not even attempt to address the issue in their appellate brief. *See* V.I. R. APP. P. 22(m). Consequently, the Superior Court committed no error when it granted summary judgment to Gomez, Moorhead, and Jones on Counts II and III.

E. Mootness

¶25 Finally, Sekou, Webster, and Joseph contend that the Superior Court erred when it

[7] Although the Superior Court concluded that Sekou, Webster, and Joseph were not the prevailing party in that case because it had been dismissed as moot, the fact that a case has nominally been dismissed does not necessarily preclude an award of fees and costs as a prevailing party. Rather, courts must consider the events that led to the case becoming moot, including whether the party has actually received a benefit despite the dismissal. *See Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh*, 964 F.2d 244, 249-51 (3d Cir. 1992). Nevertheless, we decline to resolve this issue as part of this appeal because the appropriate mechanism for Sekou, Webster, and Joseph to obtain costs and attorneys' fees is not a separate lawsuit, but a timely-filed motion in Super. Ct. Civ. No. 71/2016 (STX) requesting such an award under 5 V.I.C. § 541.

dismissed Count I as moot. However, as with their filing in the Superior Court, their appellate brief simply states that exceptions to the mootness doctrine exist, and that this Court has previously declined to dismiss certain appeals as moot, without providing any legal argument whatsoever as to *how* any of those exceptions are applicable to the dismissal of Count I of their complaint. Therefore, Sekou, Webster, and Joseph have waived this argument. *See V.I. Taxi Ass'n v. V.I. Port Auth.*, 67 V.I. 643, 665 n.14 (V.I. 2017) ("Although we have recognized exceptions to the mootness doctrine . . . [the appellant] has not argued that any such exceptions apply here. Accordingly, any such argument is waived."); *see also* V.I. R. APP. P. 22(m) ("Issues that . . . are only adverted to in a perfunctory manner or unsupported by argument and citation to legal authority, are deemed waived for purposes of appeal.").

III. CONCLUSION

¶26 The Superior Court committed no error when it denied the motion to disqualify the Department of Justice, converted the motion to dismiss to a motion for summary judgment, entered summary judgment in favor of Moorhead, Gomez, and Jones with respect to Counts II and III, and dismissed Count I as moot. Accordingly, we affirm the final judgment of the Superior Court dismissing all claims in this action.

Dated this 24th day of April, 2020.

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

SWAN, Associate Justice, concurring in part and dissenting in part

¶27 Appellants Nandi Sekou, Martial Webster, and Terrance Joseph appeal the Superior Court's January 19, 2018 order denying their motion for reconsideration. Appellants filed the motion following the court's December 7, 2017 order granting Defendant Mary Moorhead's motion to dismiss count one of Appellants' three count complaint.[1] For the reasons elucidated below, I concur in part and dissent in part with the majority's opinion.

I. FACTS AND PROCEDURAL HISTORY

¶28 This matter is before this Court following a contentious course. On February 18, 2016, Appellants filed a complaint in the Superior Court's St. Croix Division disputing numerous actions taken by the Virgin Islands Board of Education ("BOE") after its scheduled January 15-16, 2016 meeting. At the meeting, a majority of the BOE members present voted to remove Nandi Sekou and Terrance Joseph as Chair and Vice-Chair respectively and to install Mary Moorhead as Chair and Judy Gomez as Vice-Chair. However, BOE regulations instruct that all matters to be considered by the Board at the meeting be published no later than three days before an upcoming meeting in its official, publicly-circulated agenda. (J.A. 17). Appellants' 2016 complaint alleged that BOE's agenda prior to the January 15-16, 2016 meeting failed to include the subject of the removal and election of officers, in violation of BOE by-laws. The complaint also alleged that Moorhead's and Gomez's actions following the unauthorized election jeopardized the Board's stability because Moorhead and Gomez abused their authority by interfering with routine board operations.

[1] In a September 12, 2017 order, the Superior Court dismissed Count 2 and Count 3 of the Appellants' complaint as moot.

¶29 On February 19, 2016, the Superior Court granted Appellants' motion for a temporary restraining order ("TRO") precluding further action by the newly elected officers. On March 4, 2016, the court continued Appellants' motion for a preliminary injunction and extended the TRO until a regularly scheduled BOE meeting could be held to clarify the issue of the board's elections. Importantly, all parties agreed to the TRO extension until a board meeting verifying the January 15-16, 2016 elections was held.

¶30 On March 18, 2016, BOE held a proper meeting with sufficient notice to its members. At the meeting, BOE upheld Sekou's and Joseph's removal and simultaneously confirmed Moorhead's and Gomez's installation. Eventually, the court dismissed Appellants' complaint as moot because the March 18, 2016 meeting was conducted in accordance with board by-laws and 3 V.I.C. §§ 97-98. The court also noted that Appellants did not contest the legitimacy of the March 18 meeting. Nonetheless, on June 23, 2016, Appellants filed a notice of appeal with this Court, which we dismissed for want of timely prosecution on August 9, 2016.

¶31 On January 3, 2017, Appellants filed a three count verified complaint. In count one, Appellants alleged that Moorhead and Gomez violated 3 V.I.C. § 98(a) by failing to timely call a meeting for the election of new officers following the 2016 general election and asked the court to implement a TRO compelling BOE to hold such a meeting between January 9 and January 13, 2017 rather than January 21, 2017 as had been scheduled by defendants. In count two, Appellants argued that Appellee Jennifer Jones's 2016 representation of the other Appellees in the 2016 action was unauthorized and improper. Accordingly, Appellants asked the court for an accounting and disgorgement of all money paid to Jones for the representation. In count three, Appellants asserted that they expended considerable funds to vindicate their rights as well as those of BOE in the 2016

action and were successful in their efforts by obtaining and extending a TRO. Accordingly, Appellants sought compensatory, consequential, and punitive damages from all Appellees.

¶32 On January 31, 2017, Jones filed a motion to dismiss, which Gomez joined by filing a notice on February 22, 2017. Gomez supported her filing with a supplemental memorandum of law submitted on February 27, 2017. On February 23, 2017, Moorhead filed a separate letter with the court that the court designated as a motion to dismiss. On March 28, 2017, Moorhead, proceeding pro se, also joined Jones's motion by filing a letter so stating.

¶33 On February 3, 2017, the Superior Court issued an order requiring that Appellants respond to Jones's motion by February 21, 2017. However, on that day, Appellants filed a motion to strike, contending that Jones's motion relied on matters outside the pleadings. On March 2, 2017, the court denied Appellants' motion to strike. In the order, the court reasoned that Appellants failed to present any legal or factual basis for striking Jones's motion to dismiss but rather offered considerable basis to convert Jones's motion to strike into a motion for summary judgment. Accordingly, the court sua sponte transformed the motion to dismiss into a motion for summary judgment. Moreover, the court ordered Appellants to respond to Jones's converted motion for summary judgment within 21 days of the March 2, 2017 hearing. However, on that day, Appellants filed a motion to stay further proceedings and, one day later, they filed a motion to disqualify the Department of Justice ("DOJ") as counsel for Gomez. Gomez and Jones filed separate oppositions to Appellants' motion to disqualify, which prompted Appellants to move for an evidentiary hearing.

¶34 On May 22, 2017, the Superior Court again ordered Appellants to respond to Jones's converted summary judgment motion. Its order granted Appellants' motion for an evidentiary

hearing, which the court scheduled for July 28, 2017. The order further informed the parties to be prepared to present arguments on all pending motions. On June 16, 2017, Appellants filed an opposition to Jones's motion. On June 29, 2017, Jones replied to Appellants' opposition.

¶35 On September 12, 2017, the court rendered its decision. As to count two, the court opined that Appellants failed to address the Appellees' standing and authority arguments. On count three, the court found Appellants could not recover damages because they were not the prevailing parties in the 2016 action and their contention ignored the salient facts and established law, considering the matter was dismissed after a proper BOE meeting with adequate notice where officers were elected pursuant to the board's rules and local law. Therefore, the court dismissed both counts.

¶36 On count one, the court granted Appellants 28 days to respond to Moorhead's February 21, 2017 letter that addressed the issue. However, the court noted count one was not subject to Jones's summary judgment motion because neither Jones nor Gomez discussed the issue in their respective filings. The court concluded that the issue had become moot because Appellants' February 2, 2017 informative motion contained an explicit withdrawal of their demand for injunctive relief, which the court construed as a voluntary dismissal or, at least, a formal recognition the issue was moot.

¶37 On November 15, 2017, Moorhead filed a letter with the Superior Court, requesting that Appellants be deemed to have conceded to her February 23 motion to dismiss because they failed to respond. On December 6, 2017, the court entered an order on count one. Finding that Appellants' continued demand for a declaratory judgment was insufficient to sustain the claim and that such a judgment would obliterate the court's ability to render meaningful relief because of the absence of an actual case or controversy, the court dismissed count one.

¶38 On December 18, 2017, Appellants filed a motion to reconsider the December 6 dismissal. In the motion, Appellants alleged that they never received the court's September 12, 2017 order that dismissed counts one and two until November 2017 when their former attorney obtained a copy of the court's December 6 order but lacked contact information to reach them. Therefore, Appellants asked the court for 20 days to respond to Moorhead's motion. On December 22, 2017, the court issued an order construing Appellants' motion to reconsider as a motion to extend the time in which to file a motion for reconsideration. Under that premise, the court granted Appellants 20 days in which to file a proper motion to reconsider.

¶39 On January 16, 2018, Appellants filed a motion to reconsider and a memorandum in support of the motion to reconsider. In the support memorandum, Appellants premised the motion to reconsider on the court correcting clear error or preventing a manifest injustice. They asserted that, without court intervention, the full story would not be heard. They also argued that count one was not moot and cited federal case law to bolster their contention.

¶40 On January 22, 2018, the court denied Appellants' motion for reconsideration. In the order, the court stated that Appellants cited no local case law or applicable rules to support their arguments. The court also found that Appellants' motion failed to apply the federal mootness law it cited to the facts of the case. Finally, the court said, although the exception to the mootness doctrine cited by Appellants exists in the Virgin Islands, the exception principally applied to cases involving the general election of public officials and not the internal election of a board's officers. Thus, the court could not identify any reason to grant Appellants' motion.

¶41 On February 20, 2018, Appellants filed a notice of appeal to this Court. In the notice, Appellants posited four issues with which they took umbrage. First, they contended the Superior

Court abused its discretion in denying their motion for reconsideration. Second, they alleged that the court committed error in dismissing their complaint. Third, they asserted that the court abused its discretion by transforming an evidentiary hearing into oral arguments scheduled on the same day they appeared for the hearing. Fourth, they argued that the court erred in failing to dismiss the Attorney General from representing Judy Gomez.

II. JURISDICTION

¶42 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees, and final orders of the Superior Court." 4 V.I.C. § 32(a). "An order that disposes of all claims submitted to the Superior Court is considered final for the purposes of appeal." *Jung v. Ruiz*, 59 V.I. 1050, 1057 (V.I. 2013) (citing *Matthew v. Herman*, 56 V.I. 674, 677 (V.I. 2012)). Because the Superior Court's January 22, 2018 order denying Appellants' motion for reconsideration disposed of all claims submitted for adjudication, the order is final and we exercise jurisdiction over Appellants' appeal of the motion to reconsider.

III. STANDARD OF REVIEW

¶43 We review the trial court's factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)). "The appropriate standard of review for a denial of a motion to reconsider is generally abuse of discretion, but if the trial court's denial was based upon the interpretation or application of a legal precept, then review is plenary." *Lucan Corp., Inc. v. Robert L. Merwin & Co., Inc.*, No. 2007-15, 2008 WL 901492, at *2 (V.I. Jan. 7, 2008) (unpublished) (citing *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3d Cir. 1985)).

IV. DISCUSSION

A. The Superior Court did not Abuse its Discretion in Changing the July 28, 2017 Evidentiary Hearing into a Hearing for Oral Arguments

¶44 On appeal, Appellants contend the Superior Court abused its discretion in modifying the July 28, 2017 evidentiary hearing on their motion to disqualify DOJ into oral arguments on the matter. A court abuses its discretion when its analysis and resulting conclusion are arbitrary or irrational. *People v. Todman*, 53 V.I. 431, 441 (V.I. 2010) (citing *United States v. Universal Rehab. Servs. (PA), Inc.*, 205 F.3d 657, 665 (3d Cir. 2000)). *See Poleon v. Gov't. of the V.I.*, 184 F.Supp.2d 428, 434 (D.V.I. 2002) ("An abuse of discretion is a clear or obvious error of judgment that must affect substantial rights, and not simply a different result which can arguably be obtained when applying the law to the facts of the case.") (internal citations omitted); *O'Boyle v. Thrasher*, 647 Fed. Appx. 994, 995 (11th Cir. 2016) ("The abuse of discretion standard of review is 'extremely limited and highly deferential.'. . . When employing the abuse-of-discretion standard, 'we must affirm unless we find the district court has made a clear error of judgment or has applied the wrong legal standard.'") (citations omitted).

¶45 In its May 22, 2017 order, the Superior Court did state that it would hold an evidentiary hearing on Appellants' motion to disqualify DOJ as counsel for Gomez. Appellants argue that the court abused its discretion when it prohibited the presentation of evidence and only permitted oral arguments on the issue at the July 28, 2017 hearing. However, Rule 4 of the Virgin Islands Rules of Appellate Procedure clearly provides that "[n]o error or defect in any ruling or order or in anything done or omitted by the Superior Court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor as not to affect the substantial rights of the parties." V. I. R. APP. P. 4(i). *See Pickering v. People*, 66 V.I. 276, 289 (V.I. 2017) ("To affect [an appellant's] substantial rights,

the error must be prejudicial, which means that there must be a reasonable probability that the error affected the outcome of the trial.") (citations omitted); *cf. United States v. Voigt*, 89 F.3d 1050, 1068 (3d Cir. 1996) ("[A]ny 'error' arising from the district court's failure to hold an independent evidentiary hearing in this case is unquestionably harmless.").

¶46 Although an evidentiary hearing is usually held when a party requests an attorney's disqualification, local and federal case law suggest that a hearing is not always necessary. *See Farrell v. Hess Oil Virgin Islands*, 57 V.I. 50, 64-65 n.73 (V.I. Sup. Ct. 2012) (explaining that although the prevailing practice in the Virgin Islands is to hold an evidentiary hearing when deciding attorney disqualification motions, a court may decide the motion on the papers presented before it); *Lowe v. Experian*, 328 F. Supp.2d 1122, 1125 (D. Kan. 2004) ("In some instances an evidentiary hearing is required before the court may enter an order disqualifying counsel. An evidentiary hearing, however, is not required when the parties have fully briefed the issue and when there are no disputed issues or acts or there is otherwise no need for any additional evidence to be presented to the court."); *Gen. Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704, 710 (6th Cir. 1982) ("We think a decision for disqualification is adequately founded without an evidentiary hearing if the 'factual inquiry' is conducted in a manner that will allow appellate reviews, as it is when conducted on affidavits and documents that would be acceptable under Rule 56(e) . . . and if the district judge does not undertake to decide disputed issues of fact."); *GTE North, Inc. v. Apache Products Co.*, 914 F. Supp. 1575, 1580 (N.D. Ill 1996) ("Ordinarily, the proper method for the district court to make [an attorney disqualification] determination would be to either conduct an evidentiary hearing or review evidence in the form of affidavits."), *Weeks v. Indep. Sch. Dist. No. I-89 of Okla. Cnty.*, 230 F.3d 1201, 1212 (10th Cir. 2000) (explaining that the district

court had numerous reasons for not holding an evidentiary hearing including considerable evidence in the trial record before disqualifying an attorney); *Voigt*, 89 F.3d at 1076 (explaining that, although the court heard oral argument on the issue, the trial record was sufficient for the court to disqualify an attorney without an evidentiary hearing); *Ruhlman v. Rudolfksy*, No. 2:14-CV-00879, 2017 WL 9771835, at *1 (D. Nev. Feb. 8, 2017) (unpublished) (explaining that an evidentiary hearing was unnecessary to disqualify a lawyer for violating a local Rule of Professional Conduct).

¶47 In this case, Appellants and Gomez filed papers relating to the issue of DOJ's disqualification. As stated in *Farrell*, a court may decide the issue of an attorney's disqualification based on the papers submitted by the parties without an evidentiary hearing when a proper evidentiary record is already before the court. That situation is precisely what transpired here. Appellants' initial motion to disqualify DOJ contained approximately six pages of facts and three pages of argument, focusing on their contention that DOJ was disqualified pursuant to Rule 1.7(a)(1) of the ABA Model Rules of Professional Conduct and the corresponding provisions of the local Virgin Islands Rules of Professional Conduct. (J.A.81-90). Additionally, Appellants attached exhibits to the motion. *Id*. Prior to filing the motion, Appellants filed a four page motion requesting an evidentiary hearing on the issue. (J.A. 179-182). After DOJ filed its opposition to the motion, Appellants filed an eight page reply. (J.A. 105-112). One day before the July 28, 2017 hearing, Appellants filed a seven page motion that asked the court to disqualify DOJ alternatively as a sanction for interfering with the service of certain subpoenas. (J.A. 273-279). Lastly, Gomez, through DOJ, filed a nine page opposition to Appellants' motion. Thus, the Superior Court had sufficient information to determine in advance of the hearing whether additional submissions

would be necessary or helpful in deciding the issue of whether DOJ should have been disqualified as Gomez's counsel. Even if the court should have held the hearing and DOJ was disqualified, the error in failing to hold the hearing is harmless because neither the hearing nor DOJ's disqualification would not have changed the outcome of the case since Appellants lacked standing to sue on BOE's behalf, and they were not prejudiced by DOJ's representation of Gomez. *Droste v. Julien*, 477 F.3d 1030, 1036 (8th Cir. 2007) ("[W]e believe an error in disqualifying counsel in the civil context is subject to a harmless error analysis.") *See also In re Westgate-California Corp.*, 634 F.2d 459, 462 (11th Cir. 1980) ("Even if the failure to hold an evidentiary hearing on Royal Bank's objections was error, the error was harmless. At the confirmation hearing, the district court had before it all of the evidence that was relevant to the determination of Royal Bank's claim.") Therefore, I conclude that the Superior Court did not abuse its discretion by not holding an evidentiary hearing on the issue of DOJ's disqualification.

B. DOJ Lacked Authority to Represent Gomez

1. Statutory Interpretation

¶48 Appellants argue the Superior Court erred by not disqualifying DOJ as Gomez's counsel. Under 3 V.I.C. § 114(a)(6)-(7), DOJ, through the Attorney General, is charged with representing the executive branch of the Virgin Islands government and providing legal advice to its officers.[2,] [3] At the July 28, 2017 hearing, the court relied on section 114 in denying Appellants' motion to

[2] "[T]o appear for and represent the executive branch of the Government of the United States Virgin Islands, and all departments, boards, commissions, agencies, instrumentalities or officers thereof, before all the tribunals or bodies of any nature, in all legal or quasi-legal matters, hearings or proceedings. All duties and functions with respect to the Government of the Virgin Islands, or any department, board, commission, agency, instrumentality, or officer thereof, hereto assigned to the United States attorney solely by virtue of laws of the Virgin Islands are hereby transferred to the Attorney General." 3 V.I.C. § 114(a)(6).

[3] "[T]o furnish legal advice to the Governor and all executive departments, boards, commissions, agencies, instrumentalities and officers of the Government of the United States Virgin Islands, concerning any matter arising in connection with the exercise of their official powers and duties, and to supervise and direct the legal business of

disqualify DOJ as Gomez's counsel. (J.A. 343-349). However, BOE is created under 3 V.I.C. § 97 (a)-(b), which states that BOE is an independent agency comprised of a total of nine elected members with four members selected from each district and one at large member.[4, 5]

¶49 Because the issue of DOJ's ability to represent Gomez is based on two distinct statutes, I first cite the statutory interpretation rules. This Court has said:

> The first step when interpreting a statute is to determine whether the language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed. In analyzing a statutory scheme, we must give effect to every provision, making sure to avoid interpreting any provision in a manner that would render it –or any other provision-wholly superfluous and without an independent meaning or function of its own. But even where a statutory scheme is plain and internally consistent, no statute should be read literally if such a reading is contrary to its objective [and] this Court must consider whether applying the statute's literal language leads to . . . absurd consequences or is otherwise inconsistent with the Legislature's intent.

In re L. O. F., 62 V.I. 655, 661 (V.I. 2015) (citations omitted). *See N.H. Lottery Comm'n v. Bar*, No. 19-CV-163-PB, 2019 WL 2342674, at *11-12 (D. N.H. June 3, 2019) (unpublished) ("Most statutory text can be readily understood by a careful reader. In such cases, the court's mission is clear: It must give the statute its plain meaning. . . . Sometimes, however, words have multiple meanings even when read in context, and legislators fail to achieve syntactic precision. . . . In such cases, a court cannot blind itself to permissible sources of meaning. It must instead undertake a

every executive department, board, commission, agency, instrumentality, and officer of said government." 3 V.I.C. § 114(a)(7).

[4] "The Virgin Islands Board of Education, referred to as the 'Board' in the remainder of this section is established as an independent agency." 3 V.I.C. § 97(a).

[5] "The Board shall consist of nine elected members. Four shall be elected by qualified electors of the district of St. Croix. Four shall be elected by qualified electors of the district of St. Thomas-St. John. One member shall be elected at large by qualified electors of the Virgin Islands from the Virgin Islands as a whole, provided that such member is a bona fide resident of St. John." 3 V.I.C. § 97(b).

nuanced and comprehensive review of all relevant evidence to give the statute as a whole a fair reading.").

¶50 Although 3 V.I.C § 114(a)(6) and (a)(7) appear unambiguous on their face, ambiguity arises in discerning whether the clause ". . . to appear for and represent the executive branch of the Government of the United States Virgin Islands . . ." in subsection (a)(6) extends to the subsequent clause. That is, did the Legislature intend the second clause to mean the Attorney General appears for and represents all executive branch departments, boards, commissions, agencies, instrumentalities, and officers or did it intend for the Attorney General to appear for and represent all government entities regardless of whether they were in the executive branch? Similarly, subsection (a)(7) presents an identical conundrum. Does the adjective "executive" in subsection (a)(7) only pertain to the noun departments or does it extend to all the other nouns in that series? Thus, the statute is ambiguous because it is open to multiple, plausible interpretations. *One St. Peter, LLC v. Bd. Of Land Use Appeals*, 67 V.I. 920, 924 (V.I. 2017); *Sharpe v. State*, 350 P.3d 388, 391 (Nev. 2015). Fortunately, courts have developed various precepts to assist statutory interpretation.

¶51 The series-qualifier canon is a rule of statutory interpretation in which a modifier that appears at the beginning or end of a series of terms modifies the entire series "where the natural construction of the language demands that the clause be read as applicable to all." *See Thomas v. Bryant*, 919 F.3d 298, 322 (5th Cir. 2019) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series. . . . A typical example is the phrase 'forcibly assaults, resists, opposes, impedes, intimidates, or interferes with,' in which the modifier 'forcibly' modifies each verb in the list.")

(quoting ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)); *United States v. Mateen*, 764 F.3d 627, 631 (6th Cir. 2014) (explaining that use of a canon should not violate the principle that assumes each word in a statute has a particular, non-superfluous meaning); *United States v. Loyd*, 886 F.3d 686, 688 (8th Cir. 2018) (explaining that the series-qualifier canon trumps the last antecedent rule when there is no reason consistent with any discernible purpose of the statute to apply the limiting phrase to the last antecedent alone).

¶52 In this case, the clause in subsection (a)(6), "to appear for and represent the executive branch of the Government of the United States Virgin Islands," logically modifies the second clause so that it not only provides a cohesive result, but also does not render any part of the subsection or the statute itself superfluous. The same result occurs when one applies the canon to the adjective "executive" in subsection (a)(7). Applying these principles, subsection (a)(6) means the Attorney General appears for and represents the executive branch and all executive branch entities and subsection (a)(7) signifies that the Attorney General advises the executive branch and all executive branch units. Therefore, I conclude the Legislature intended the Attorney General to be counsel for the executive branch and the offices and officers under its auspices.

¶53 Although Appellants' brief cites *Moses v. Fawkes*, 66 V.I. 454 (V.I. 2017), the ruling in that case is inapplicable here because the enabling legislation for the Board of Education fails to indicate that it is an executive agency. Importantly, in statutes creating executive departments like DOJ or the Department of Education, the Legislature specifically noted they were executive agencies. *See* 3 V.I.C. § 91 ("The Department of Education . . . is continued as an executive department in the Government of the Virgin Islands."); 3 V.I.C. § 111 ("There is hereby

established as an executive department in the Government of the United States Virgin Islands the Department of Justice . . . ."); *Compare* 18 V.I.C. § 41 ("There is a single Board of Elections that governs both election districts."); 3 V.I.C. § 97 ("The Virgin Islands Board of Education . . . is established as an independent agency."). If the Legislature intended the Board of Education to be an executive agency, it could have easily included that language in the statute creating the Board. *See de O'Neal v. Gov't of the V.I.*, 68 V.I. 619, 626-27 (2018) (explaining that Congress could have used alternate language to make its intent clear and its decision not to specify particular entities by name is of consequence). "Courts . . . presume that a legislature knows the meaning of words, has used words of a particular statute advisedly, and has expressed its intent by the words found in the statute." *Baumann v. Pub. Employees Relations Bd.*, 68 V.I. 304, 338 (V.I. Super. Ct. 2018) (internal citations, quotation marks, and alterations omitted). Accordingly, the Legislature's failure to classify the Board of Education as an executive agency in the Board's enabling provision was a deliberate decision and one that signifies the Board of Education was never intended to be an executive instrumentality because the Legislature would have explicitly and adroitly crafted language to embed such an intent in the organization's enabling statute if it intended otherwise. Therefore, Appellants' reliance on *Moses* is misplaced because this matter does not implicate the Board of Elections but instead centers on DOJ's ability to represent BOE although it is not an executive agency.

¶54 Having concluded subsections (a)(6) and (a)(7) of section 114 clearly state that DOJ represents the executive branch and provides legal advice to its officers, I recognize section 97(a) proclaims BOE is an independent agency. Thus, the lynchpin of whether DOJ could represent BOE turns on whether BOE is an executive agency.

¶55 In *V.I. Daily News v. Gov't. of the V.I.*, 45 V.I. 139, 143-44 (V.I. Super. Ct. 2002), the court evaluated whether the Public Services Commission ("PSC") and its chairman were members of the executive branch and, as such, entitled to be represented by DOJ. In the case, the court recognized that the PSC was initially created under the Department of Public Works and continued to exist as part of the executive branch under the Department of Licensing and Consumer Affairs ("DLCA") for budgetary reasons pursuant to 3 V.I.C. § 273. Thus, the court concluded that PSC, as a subdivision of DLCA and the governor's ability to appoint and remove PSC members, was entitled to DOJ representation. *See United States v. Molander*, 683 F.Supp. 701, 704 (W.D. Wis. 1988) (explaining that a sentencing commission in the judicial branch violated the Separation of Powers Clause since commission members were appointed and removed by the President); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 676-77 (D.C. Cir. 2008) (explaining that executive departments are usually those immediately below the President on the organizational chart of the executive branch and that the heads of independent agencies need not be wholly controlled by the President as long as they are principal officers appointed (with the advice and consent of the Senate) and removable by the President); *Municipality of St. Thomas/St. John v. Gordon*, 2 V.I. 107, 118 (V.I. 1948) ("[T]he governor of the Virgin Islands has the appointive power in all executive appointments for the Virgin Islands . . .").

¶56 In this case, BOE is an independent agency separate and distinct from the executive branch. Unlike the PSC in *V.I. Daily News*, BOE is not under the auspices of any executive department. BOE members are elected by Virgin Islands territorial voters, not appointed by the governor, and the governor cannot remove BOE members. Although 3 V.I.C. § 97(g) allows the governor to appoint a BOE member subject to the Legislature's approval when a BOE vacancy exists, such an

occurrence is an exception to the election of BOE members and only occurs when a BOE member moves out of his district.[6, 7] Moreover, after the court dismissed the 2016 action, Solicitor General Pamela R. Tepper and Assistant Attorney General Carol Thomas-Jacobs submitted letters that undeniably stated that DOJ did not represent BOE in legal proceedings. (J.A. 296, 299). Ignoring those letters as well as Appellants' assertions that, in their nine years on the Board, the rule has always been DOJ does not represent BOE, the court permitted DOJ to represent Gomez. (J.A. 347). This was a blatant error because BOE is not an executive agency which would trigger the protections of section 114. Regardless, I conclude the Superior Court's decision to be harmless because DOJ's disqualification would not have changed the outcome of the case and Appellants were not prejudiced by DOJ's representation of Gomez.

¶57 Additionally, if as the majority contends, 3 V.I.C. §114(a)(6) and (a)(7) allow DOJ to represent any independent board of the Virgin Islands government, why did the Legislature not include that particular governmental unit in the language of either (a)(6) or (a)(7)? "Legislative intent is 'expressed by omission as well as by inclusion.'" *Olympus Aluminum Products, Inc. v. Kehm Enterprises, Ltd.*, 930 F.Supp. 1295, 1312 (N.D. Iowa 1996). Therefore, the Legislature specifically omitted independent boards from the text of (a)(6) and (a)(7) because it did not intend for DOJ to represent them.

[6] "The term of office for each member shall be four years beginning on the first Monday of January following the election. Members must reside in the district where they are elected, therefore, a vacancy shall occur whenever a member moves out of his district. . . ." 3 V.I.C. § 97(c).
[7] "The Governor of the Virgin Islands shall fill any vacancy in the office of a member of the Board of Education subject to the approval of the Legislature, except that the person appointed to such a vacancy shall be a resident of the same island as the member whose office is vacant. The person appointed shall serve the remainder of the term." 3 V.I.C. § 97(g).

2. Separation of Powers

¶58 The majority's interpretation of 3 V.I.C § 114(a)(6) and (a)(7) creates potential constitutional conundrums relating to the separation of powers doctrine. Specifically, if DOJ represents all departments, boards, commissions, agencies, instrumentalities, and officers of the Virgin Islands government as the majority claims, DOJ could conceivably represent Virgin Islands senators or judges in civil matters. Undoubtedly, DOJ's representation of the local Legislature or Judiciary infringes on the concept of three discrete governmental branches. Accordingly, the majority's literal reading of sections 114(a)(6) and (a)(7) renders the provisions absurd and, given the statutory interpretation rules, without any legally binding effect.

¶59 "The separation of powers doctrine lies at the heart of our constitutional structure of government. In establishing the three branches of government, the Legislative, the Executive, and the Judicial, the Framers conferred separate and distinct powers on each, together with correlative checks and balances, as a safeguard against the encroachment or aggrandizement of one branch at the expense of another." *United States v. Scott*, 688 F.Supp. 1483, 1488 (D. N.M. 1988) (citing *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983)). Moreover, the Constitution's Framers believed independence between the branches of government was pivotal to the preservation of liberty and that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective may justly be pronounced [as] the very definition of tyranny." *Id*. at 1487-88. (citations omitted). Nonetheless, "[t]he doctrine of separation of powers does not require the three departments of government to remain 'hermetically sealed' from one another. . . . Rather the

Constitution envisions the three branches of government functioning independently within their separate areas, but cooperatively in their relations with each other." *Id*. at 1490. (citations omitted).

¶60 Although the executive and legislative branches may have concurrent authority on certain matters that intermittently overlap, case law indicates the judiciary cannot be subject to impermissible intermingling because its function is to remain strictly impartial. *Id*. at 1488. (citations omitted). *See Havana Club Holding, S.A. v. Galleon*, 62 F.Supp.2d 1085, 1095 (S.D.N.Y. 1999) ("Legislation violates the separation of powers doctrine when it 'prescribes a rule of decision for courts to follow without permitting courts to exercise their judicial powers independently.'"). Moreover, courts have said a judicial separation of powers violation includes the appearance of impropriety litigants perceive when a judge who will decide their cases has an excessive entanglement with the executive branch. *United States v. Smith*, 686 F.Supp. 847, 856 (D. Colo. 1988) (explaining the supervision and control of a prosecutorial office violated the separation of powers doctrine because of the intimate involvement between Article III courts and the executive branch which undermined the status of the judiciary as a neutral forum for the resolution of disputes between citizens and their government).

¶61 To determine the existence of a separation of powers issue, courts examine "the extent to which [the challenged statute] prevents the [particular] Branch from accomplishing its constitutionally assigned functions. . . . If it does, a further inquiry must be made as to whether that impact is justified by an overriding need to promote objectives within the constitutional authority of the acting branch." *Scott*, 688 at 1490. (citations omitted). *See Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 694 (9th Cir. 1997) ("[I]n determining whether the Act [in question] disrupts the proper balance between the coordinate branches, the

proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.") (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

¶62 Importantly, the separation of powers principle applies to the Virgin Islands through the Organic Act. "[T]he doctrine of separation of powers applies with respect to the coordinate branches of government in the Virgin Islands. The Organic Act of the Virgin Islands created three branches of government in the Virgin Islands. *See* 48 U.S.C. § 1571 (legislative branch); *id*. § 1591 (executive branch); *id*. § 1611 (judicial branch). Congress therefore implicitly incorporated the principle of separation of powers into the law of the territory." *Smith v. Magras*, 124 F.3d 457, 465 (3rd Cir. 1997) (citing *Springer v. Gov't of the Philippine Is.*, 277 U.S. 189, 199-202 (1928)).

¶63 In this case, the majority's interpretation of 3 V.I.C § 114(a)(6) and (a)(7) enables DOJ to represent both the Virgin Islands legislature and judiciary. That is, if, as the majority contends, DOJ represents all local governmental officers, boards, departments, and instrumentalities, then DOJ could legitimately represent the local legislative and judicial branches which consequently raises a potential separation of powers problem. Assuming the legislative separation of powers issue is resolvable because of the innate similarities between the executive and legislative branches, the judicial separation of powers issue persists. Accordingly, application of the separation of powers rules stated above is necessary to evaluate whether the majority's interpretation prevents the local Judiciary from accomplishing its constitutionally prescribed duties. And, if it does, whether the interpretation is warranted by the executive branch's constitutionally sanctioned objectives.

¶64 As already stated, the judiciary's role is to be impartial and objective. *Dunston v. Mapp*, No. 2016-38, 2016 WL 3976642, at *8 (D.V.I. July 22, 2016) (explaining that an Act did not violate the separation of powers doctrine because it did not threaten judicial independence nor did it allow the president to coerce judges in the execution of their professional duties). (citations omitted). However, the majority's interpretation of 3 V.I.C § 114(a)(6) and (a)(7) threatens judicial independence if DOJ, as an executive branch department, can represent judges on civil matters because DOJ could intentionally or unintentionally insert policy considerations into its litigation strategy. Consequently, DOJ's litigation strategy may include contrary or incompatible legal conclusions concerning specific statutes that a judge may have contemplated or will contemplate in deciding cases. Such excessive entanglement between the judiciary and the other branches of government is precisely the debacle the separation of powers doctrine prevents because litigants may believe judges have predetermined notions concerning the statutes they interpret. *See Havana Club Holding, S.A. v. Galleon, S.A.*, 62 F.Supp.2d 1085, 1095 (S.D.N.Y. 1999) ("Under our tripartite system of government, the role of Congress is to enact laws of general applicability and it is for the courts to apply those laws in determining the outcome of particular cases. Legislation violates the separation of powers doctrine when it 'prescribes a rule of decision for courts to follow without permitting courts to exercise their judicial powers independently.'") (citations omitted). Therefore, the majority's understanding of sections 114(a)(6) and (a)(7) presents a separation of powers problem that is warranted only if it is required for the executive branch to accomplish its constitutionally mandated objectives.

¶65 The executive branch's power primarily encompasses its ability to enforce laws created by the Legislature as well as to appoint agents to enforce the Legislature's laws. *Municipality of St.*

Thomas & St. John v. Gordon, 2 V.I. 107, 114 (D.V.I. 1948) (citing *Myers v. United States*, 272 U.S. 52 (1926)). *See Collins v. Mnuchin*, 896 F3d 640, 661 (5th Cir. 2018) (The Constitution vests 'executive power' in the president and obligates him to 'take care that the laws are faithfully executed.'"). DOJ's representation of either the Judiciary or Legislature is not required for the executive branch to accomplish these goals. Moreover, DOJ's representation may hinder the Legislature's ability to draft laws and the Judiciary's ability to interpret laws because DOJ may substitute executive notions for either branch's initiatives. Moreover, if DOJ represented the judiciary and the representation entailed opinions regarding specific statutes, litigants that appear before the judiciary may have less faith in its objectivity to impartially assess the litigants' claims. Diminished faith in the judiciary because of an unconstitutional connection with one of the other governmental branches is one of the consequences the separation of powers doctrine prevents. *Smith*, 686 F.Supp. at 854-55 ("Partiality and predetermined views on behalf of their members are an accepted and integral element of the legislative and executive processes. In the case of the judiciary, however, impartiality and the absence of predetermined opinions are fundamental aspects of the judicial function."). Therefore, the majority's interpretation of subsections (a)(6) and (a)(7) of § 114 fails both prongs of the test and ultimately violates the separation of powers doctrine.

¶66 As an alternative to the majority's interpretation, I support the methodology asserted in *Am. Bankers Ins. Group, Inc. v. United States*, 308 F.Supp.2d 1360 (S.D. Fla. 2004), *rev'd on other grounds by* 408 F.3d 1328 (11th Cir. 2005). In that case, the district court concluded a telecommunications statute was ambiguous and applied statutory interpretation tenets to decide best interpretation for the statute. After concluding the statute was ambiguous, the district court

considered the statute's legislative intent and its limited legislative history. Finding that neither provided adequate assistance, the district court then consulted an IRS revenue ruling for additional insight. "A court may look at evidence of legislative intent other than the statutory language in only three circumstances: We may look to evidence of Congressional intent outside the four corners of the statute if '(1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is a clear intent of contrary legislative intent." *Id*. at 1364. (citations omitted). If any of the three situations mentioned above is present, courts render substantial deference to an agency's interpretation of a statute it's charged with administering. *See Sea Princess Services, Inc. v. United States*, No. Civ. 95-00129, 1996 WL 33362120, at *2 (D. Guam June 25, 1996).

¶67 To evaluate an agency's statutory interpretation, courts apply a test announced in *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 476 U.S. 837 (1984). Since *Chevron*, courts have refined the test into a two-pronged analysis. "The first prong is '[w]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' The second step is more deferential as the court examines whether the agency's action is based on a permissible or reasonable construction of the statute." *Sea Princess Services, Inc.*, 1996 WL 33362120, at *3.

¶68 However, although an agency's statutory interpretation is entitled to deference, the degree of deference depends on how the interpretation is cultivated. Specifically, the Supreme Court later clarified its *Chevron* holding by stating the great "degree of deference required by *Chevron* is only warranted where the statutory interpretation is recorded in a regulation that was subject to notice-

and-comment rulemaking or was promulgated in a manner similar to formal rulemaking." *Am. Bankers Ins. Group*, 308 F.Supp.2d at 1371 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001)).

¶69 In *Am. Bankers Ins. Group*, the court concluded that the IRS informally promulgated the revenue ruling that interpreted the disputed telecommunications statute at issue in that case. Therefore, the court determined the revenue ruling was not entitled to the high deference articulated in *Chevron*. Nonetheless, it opined the revenue ruling was persuasive evidence of the IRS's long-standing statutory interpretation which the court said was entitled to some deference. "[The] revenue ruling[] neither [has] 'the force and effect of regulations' . . . nor can [it] be used to overturn the 'plain language of the statute' . . . However, . . . , a revenue ruling is entitled to as much weight as its persuasiveness allows, much like a decision from a different circuit can be persuasive but is not binding on this Court." *Id*. Furthermore, the court also stated that "although the Supreme Court . . . declined to 'decide whether Revenue Rulings themselves are entitled to deference,' [it] has noted that a 'longstanding interpretation,' if 'reasonable, . . . attracts substantial judicial deference." *Id*. (citations omitted). *See United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 886-87 (11th Cir. 2003) ("The consistency of an agency's interpretation over time is a factor in determining the level of deference due.").

¶70 In this case, subsections (a)(6) and (a)(7) of § 114 are ambiguous and there is limited legislative history for the subsections because the legislative session notes were destroyed.[8] Accordingly, one turns to DOJ's interpretation of the subsections to ascertain the amount of

[8] I contacted the Virgin Islands Legislature to obtain the session notes for subsections (a)(6) and (a)(7) of § 114. Regrettably, I was told the session notes were destroyed before they could be electronically stored on the organization's computer database.

deference the interpretation should be afforded. Under *Chevron*, the analysis commences with an inquiry into whether the legislature has spoken on the issue. If it has, the inquiry ends. If it has not, the inquiry continues to assess the reasonableness of the agency's statutory interpretation in light of the amount of deference the interpretation should be given.

¶71 In this case, the issue of whether subsections (a)(6) and (a)(7) empower DOJ to represent BOE has not been decided by the Virgin Islands Legislature. Therefore, the inquiry continues onto the test's second prong. Under that element, the reasonableness of DOJ's prior statutory interpretation is assessed. As mentioned above, DOJ has a long-standing policy of not representing BOE. Specifically, DOJ, through the Solicitor General Pamela Tepper and Deputy Attorney General Carol Thomas-Jacobs, unequivocally stated that DOJ did not represent BOE. (J.A. 296-99). Similarly, Appellants stated, during their nine year tenure on BOE, the organizational policy was that DOJ did not represent BOE. Certainly, DOJ's non-representation policy of BOE was reasonable because BOE has the ability to retain independent counsel to render legal advice and/or opinions to it. (J.A. 20). However, DOJ's policy of not representing BOE was not delineated in a formal decree and cannot be afforded substantial deference under *Chevron*. Nonetheless, DOJ's longstanding interpretation of subsections (a)(6) and (a)(7) is persuasive because BOE can retain independent counsel and the potential for conflicting interests if DOJ represents BOE against another executive agency namely the local Department of Education ("DOE") is undeniable. *See Sicard v. City of Sioux City*, 950 F.Supp. 1420, 1434 (N.D. Iowa 1996) ("[T]he reviewing court should give effect to the agency's interpretation so long as it is reasonable . . . The Eight Circuit Court of Appeals has said that '[d]eference is due when an agency has developed its interpretation contemporaneously with the regulation, when the agency has consistently applied the regulation

over time, and when the agency's interpretation is the result of thorough and reasoned consideration.") (internal citations and quotation marks omitted). Therefore, DOJ's policy of not representing BOE should be enforced as a reasonable, long-standing agency interpretation of a statute it is charged with implementing.

3. Conflict of Interest

¶72 Another salient point regarding the majority's interpretation of subsections (a)(6) and (a)(7) is the effect it has on litigation between BOE and another executive agency. In such a scenario, which agency would DOJ represent? In part, Rule 211.1.7 of the Virgin Islands Rules of Professional Conduct states a lawyer cannot represent a client if the representation will adversely affect another client unless the lawyer reasonably believes he can diligently represent each affected client and obtains each affected client's written consent to the representation.[9]

¶73 In *Southern Visions, LLP v. Red Diamond, Inc.*, 370 F.Supp. 1314 (N.D. Ala. 2019), the district court disqualified a law firm from representing a new client after that client sued the firm's other client. In the case, the law firm ceased representing the existing client three days after initiating representation of the new client. The court disqualified the law firm using rules almost identical to the local rules. The court held the firm violated rule 1.7 of Alabama's Model Rules of Professional Conduct because it did not obtain the existing client's consent to represent the new

[9] "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." V.I. R. PROF'L CONDUCT 211.1.7.

client and the firm could not represent the new client without adversely affecting its relationship with the existing client.

¶74 In this case, if the majority's interpretation of subsections (a)(6) and (a)(7) is employed, DOJ may encounter a potential concurrent conflict of interest if it undertook the simultaneous representation of BOE and another executive agency where the two entities were litigation adversaries. Importantly, DOE and BOE have overlapping duties. In 3 V.I.C. § 96(a)(2), DOE must integrate a curriculum that incorporates technical and business skills. In 3 V.I.C. § 96(a)(3), DOE must administer and operate all public schools. In 3 V.I.C. § 96(a)(6), DOE is charged with operating a single school system including the selection and certification of DOE staff. In3 V.I.C. § 96(a)(7), DOE may exercise other powers and perform other duties as prescribed by law. However, in 17 V.I.C. § 21(a)(1), BOE is charged with adopting curricula, prescribing general regulations, and doing anything necessary to for the proper establishment, maintenance, management, and operation of the public schools in the Virgin Islands. Similarly, in 17 V.I.C. § 21(a)(5), BOE may approve or disapprove DOE's recommendations for the qualifications of DOE staff. In 17 V.I.C. § 21(a)(6), BOE may approve or disapprove DOE's selection and certification criteria for DOE staff. In 17 V.I.C. § 21(a)(9), BOE can promulgate rules and regulations for the certification of all educational institutions. In 17 V.I.C. § 21(b), BOE may perform other functions that may be prescribed or required by local or federal law.

¶75 If BOE disapproves of DOE staff certification recommendations or BOE disagrees with DOE's school criteria and BOE uses DOJ to sue DOE to halt DOE's actions, DOJ may encounter a concurrent conflict of interest if DOE also employs DOJ. That is, under Rule 211.1.7 of the Virgin Islands Rules of Professional Conduct, DOJ could not simultaneously represent BOE and

DOE in any of the aforementioned scenarios without adversely affecting one party's interests since each party's claims would conceivably be polar opposites. Therefore, the majority's interpretation of subsections (a)(6) and (a)(7) of § 114 also creates the potential for concurrent conflicting interests if DOJ could, as the majority asserts, represent both the executive branch and independent boards within the Virgin Islands government.

C. The Superior Court did not err in granting Jones's converted summary judgment motion

¶76 Appellants argue the Superior Court erred in granting Jones's converted summary judgment motion. Summary judgment should be granted if the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Hawkins v. Greiner*, 66 V.I. 112, 116 (V.I. 2017). *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (explaining that a genuine dispute exists when a rational factfinder, considering the evidence in the summary judgment record, could find in favor of the non-moving party); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining a fact is material if it might affect the outcome of the case); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999) (explaining that summary judgment is appropriate when the non-moving party fails to make an adequate showing on an essential element of the case, as to which that party has the burden of proof).

¶77 However, before I address the court's acquiescence on Jones's summary judgment motion, I consider Appellants' contention that the court incorrectly converted Jones's motion to dismiss into a motion for summary judgment. Appellants also assert that Jones's motion for summary judgment lacked a separate statement of material facts as required by the old procedural rules and was also improper under the new rules since it lacked a written certification, in good faith, concerning the effect of the motion. Therefore, Appellants argue that the Superior Court should

have dismissed Jones's converted summary judgment motion because it was procedurally defective and simultaneously assert the court erred in converting Jones's motion to dismiss into one for summary judgment. I first discuss the alleged procedural defects.

¶78 The Virgin Islands Rules of Civil Procedure "govern . . . proceedings in any action pending on the effective date of the rules or amendments, unless . . . the Supreme Court . . . specifies otherwise by order . . . or . . . the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or work an injustice." *Remak v. Virgin Islands Water and Power Authority*, No. ST-15-CV-662, 2017 WL 3122642, at *1 n. 1 (V.I. Super. Ct. July 21, 2017) (citing V.I. R. CIV. P. 1-1(c)(2)).

¶79 In this case, Jones's motion to dismiss was filed on January 31, 2017. On March 2, 2017, the Superior Court sua sponte converted Jones's motion to dismiss into a summary judgment motion. However, the Virgin Islands Rules of Civil Procedure were promulgated on March 31, 2017. Hence, the Virgin Islands Rules did not exist to govern the conversion of the motion to dismiss to one for summary judgment. Accordingly, I evaluate Appellants' allegations of improper format under the old rules rather than the new ones because the new rules contain specific provisions the old rules lack.[10] This determination denotes the fundamental injustice and infeasibility that retrospective application of a new statute occasionally imparts on the parties. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their

[10] Rule 56 of the Virgin Islands Rules of Civil Procedure require a written certification that a party seeking summary judgment has a good faith basis for asserting a fact is disputed or indisputable. Rule 56 of the Federal Rules of Civil Procedure lack a written good faith certification. The notes from Virgin Islands Rules of Civil Procedure Advisory Committee state the Committee specifically crafted the written certification requirement to prevent abuse of the summary judgment tool and to ensure the party seeking summary judgment has good faith basis to claim a fact is disputed or indisputable. V.I. R. CIV. P. 56 advisory committee's note.

conduct accordingly. . . ."); *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 220 (1913) ("The principle of these cases [on statutory construction] forbids a retrospective operation to be given to the statute under construction. To do so would cause in a high degree the evil and injustice of retrospective legislation."); *Winfree v. Northern Pac. Ry. Co.*, 227 U.S. 296, 302 (1913) (explaining that a statute "should not be construed as retrospective [because it] introduced a new policy and quite radically changed existing law").

¶80 In their brief, Appellants argue that Jones's converted Motion for Summary Judgment was procedurally defective because it lacked a separate statement of facts as required by the old rules. (Appellants' Br. 26-27). Specifically, Appellants allege Jones's failure to include a separate factual statement violated District Court Rule 56.1 which they assert was applicable to the Superior Court through Rule 7. However, no opinion has been located in which a party's failure to comply with specific summary judgment filing requirements would be a litigated issue when the court converts a motion to dismiss into one for summary judgment under Rule 12(d). Moreover, in *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 576 (V.I. 2015), this Court held District Court Rule 56.1 was not automatically applicable to the Superior Court because "federal rules like District Court Rule 56.1 'should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure.'" (internal citations omitted). Essentially, *Vanterpool* stated that application of District Court Rule 56.1 to the Superior Court necessitates an independent assessment of whether the rule served a valid purpose when applied to Superior Court proceedings. *Vanterpool*, 63 V.I. at 582-83. However, *Vanterpool* also noted Rule 56.1 did not apply to Superior Court proceedings merely because it established a filing requirement that did not always extend to the Superior Court. *Id.*

Therefore, the Superior Court did not err in failing to dismiss Jones's converted summary judgment motion with its alleged structural deficiencies because District Court Rule 56.1 was inapplicable to the motion's format. Regardless of our decision to assess Appellants' contentions using the old rules, I agree with the Superior Court's decision to deny Appellants' arguments regarding Jones's

¶81 Similarly, the Superior Court did not err when it converted Jones's motion to dismiss into a motion for summary judgment because the motion to dismiss included information beyond the pleadings. Under both FED. R. CIV. P. 12(d) and V.I. R CIV. P. 12(d), if the parties present evidence outside the pleadings and the court considers that evidence, a motion to dismiss is converted to a motion for summary judgment. *Lewis v. Asplundh Tree Expert Co.*, 305 Fed. Appx. 623, 627 (11th Cir. 2008). As required under the applicable Rule 12 provisions, the parties were given ample opportunity to file any materials necessary for consideration of summary judgment. Accordingly, because Jones's motion to dismiss included information outside the pleadings and the court considered that evidence, the court correctly converted the motion to dismiss into a motion for summary judgment.

¶82 Turning to the substantive summary judgment motion, Appellants allege the Superior Court erred in granting the motion on the grounds they lacked standing and authority to sue on BOE's behalf. In its September 12, 2017 order, the Superior Court noted that standing in the Virgin Islands is a doctrine of judicial restraint that allows courts to control the presentation of litigated issues to ensure they are fully and fairly explored. (J.A. 306). *See Legislature of the V.I. v. deJongh*, 52 V.I. 650, 659 (V.I. 2009) (explaining that standing requires a plaintiff's complaint to establish he has a personal stake in the alleged dispute, and that the alleged injury suffered is particularized to him)). Contrastingly, the court also indicated that authority or capacity involved

a litigant's ability to appear before it to bring claims. *Id. See Comm. on Conservation, Recreation, and Cultural Affairs of the Legislature of the V.I. v. V.I. Port Auth.*, 21 V.I. 584, 588 (V.I. 1985) (explaining that a legislative committee lacked authority to bring a suit against a government agency partly because a majority of legislators had not voted affirmatively for the action)). Declaring that 17 V.I.C. § 21(a)(8) and 3 V.I.C. § 98(b) prevented Appellants from bringing an accounting action on BOE's behalf, the court dismissed Count II of the compliant.

¶83 Essentially, 17 V.I.C. § 21(a)(8) states that BOE may bring court proceedings to enforce the board's rights and to collect outstanding accounts.[11] However, 3 V.I.C. § 98(b) limits BOE's ability to initiate any action, including legal proceedings, without an affirmative vote by a majority of the board members present at a regular or special meeting.[12] In their January 2017 verified complaint, Appellants state they brought the action on BOE's behalf. (J.A. 15-36). However, beyond the incidental powers afforded to BOE's chairman, no individual BOE member has the ability to commence or advance any action without a majority vote by the board. In this case, BOE never authorized Appellants to initiate legal proceedings against appellees. Without an affirmative vote by the board on the issue of initiating court action, Appellants lacked authority to do so. Therefore, because Appellants lacked authority to sue on BOE's behalf and there was no genuine dispute regarding this material fact to preclude a judgment in Appellees' favor as a matter of law, the Superior Court did not err in granting Jones's summary judgment motion on that basis.

[11] "The Virgin Islands Board of Education has authority and jurisdiction to . . . bring court proceedings for the enforcement of rights and the collection of accounts, and to this end may contract for such personal services as are deemed necessary by the Board." 17 V.I.C. § 21(a)(8).
[12] "The business which the Board is authorized to transact shall be done at regular or special meetings at which not less than five members are present, and no act shall be valid unless voted for by an affirmative of a majority of the members present, and a true record made of such votes." 3 V.I.C. § 98(b).

¶84 Furthermore, I reach the same conclusion about the Superior Court's dismissal of Count III. The court accurately cited 5 V.I.C. § 541 as the governing statute regarding the award of costs and attorney's fees.[13] Importantly, to recover costs and attorney's fees, section 541 demands that the movant be the prevailing party in the litigation. However, as the Superior Court's September 12, 2017 opinion noted, it is debatable whether Appellants prevailed in the 2016 action because the case was dismissed as moot and was never adjudicated on the merits. However, the fact that the matter was dismissed as moot is not the sole factor in determining the issue of attorney's fees. *See Metropolitan Pittsburgh Crusade for Voters v. Pittsburgh*, 964 F.2d 249-51 (3d. Cir 1992). Still, I need not contemplate whether Appellants were entitled to attorney's fees as the prevailing party because the proper procedure to seek costs and attorney's fees would have been to file a timely motion in the 2016 action for attorney's fees and not file a separate suit. Because Appellants failed to do so, they waived the issue of attorney's fees on appeal.

D. The Superior Court did not err in denying Appellants' Motion to Reconsider

¶85 The final question in this appeal concerns the Superior Court's denial of Appellants' motion to reconsider. Appellants argue the court erred in dismissing Count I as moot.[14, 15] In their appellate brief, Appellants cite exceptions to the mootness doctrine which this Court has routinely invoked to preserve matters for appeal. *See In re Holcombe*, 63 V.I. 800, 819-20 (V.I. 2015);

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[13] "(a) Costs which may be allowed in a civil action include: . . . (6) attorney's fees as provided in subsection (b) of this section. (b) The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in a judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto; provided, however, the award of attorney's fees in personal injury cases prohibited unless the court finds that the complaint filed or the defense is frivolous." 5 V.I.C. § 541(a)(b).

[14] "A matter is deemed moot, 'when there is no issue between the parties that can be resolved by the court.'" (J.A. 315) (citing *Chavayez v. Buhler*, No. 2007-060, 2009 WL 1810914, at *10 (V.I. June 25, 2009) (internal citations omitted)).

[15] "In determining whether a matter is moot, the Court must evaluate, 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" (J.A. 315) (citing *Chavayez* at *10) (internal citations omitted)).

Haynes v. Ottley, 61 V.I. 547, 558 (V.I. 2014)). However, Appellants' brief fails to state why these exceptions are applicable in this case. Moreover, the Superior Court's January 22, 2018 order denying appellant's motion to reconsider expressly stated that Appellants' motion was devoid of legal arguments as to how the mootness exceptions applied to the case and failed to apply to the facts of the present case the federal case law on mootness and motions to reconsider cited in the motion itself. (J.A. 337-338). Therefore, under V.I. R. CIV. P. 60(b), the Superior Court could not relieve Appellants from its December 6, 2017 order dismissing count one because appellants failed to present any legally cognizable argument to warrant reversal.[16, 17] *See Pramco II, LLC v. Cheyenne Water Serv.*, 50 V.I. 445, 450 (D.V.I. 2008) ("A motion to set aside a judgment under Rule 60(b) is committed to the sound discretion of the Court. . . . Moreover, relief under rule 60(b) is 'to be granted only in exceptional circumstances.'") (citations omitted); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 795 (7th Cir. 1980) ("Rule 60(b) is to be used to disturb the finality of judgments only on narrow grounds and upon a showing of exceptional circumstances."); *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 299 (4th Cir. 2017) (To succeed, "the moving party [on a Rule 60(b) motion] must usually make five showings: (1) a timely motion, (2) a meritorious defense, (3) an absence of unfair prejudice to the

[16] "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not, with reasonable diligence, have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether in a form previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other relief that justifies relief." V.I. R. CIV. P. 60(b).

[17] ". . . Rule 60(b) codifies the courts' inherent, discretionary power-recognized for centuries in English practice- to set aside judgments where enforcement would produce an inequity." *Tanner v. Yukins*, 776 F.3d 434, 438 (6th Cir. 2015).

opponent, (4) exceptional circumstances, and (5) satisfying at least one of the six subsections of the Rule."). Thus, the Superior Court did not err in denying Appellants' motion to reconsider.

V. CONCLUSION

¶86 I concur with the majority's conclusion regarding the Superior Court's decision to convert Jones's motion to dismiss into a motion for summary judgment and its denial of appellant's motion to reconsider. Moreover, although I agree with the majority that the Superior Court committed no error when it held oral arguments on the issue of DOJ's disqualification, I dissent from the rationale the majority employs regarding the Superior Court's decision on that issue as well as on the issue of DOJ's ability to represent Gomez.

Dated this 24th day of April 2020

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

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