For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

TIP TOP CONSTRUCTION CORP., Appellant/Defendant, v. **KEITH AUSTIN,** Appellee/Plaintiff.	))))))))	**S. Ct. Civ. No. 2017-0045** Re: Super. Ct. Civ. No. 175/2013 (STX)

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

Argued: March 13, 2018
Filed: June 11, 2019

Cite as: 2019 VI 18

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

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

¶1 Tip Top Construction Corporation ("Tip Top") appeals from an April 5, 2017 judgment of the Superior Court awarding Appellee, Keith Austin, $43,200 in economic damages and $2,000 in non-economic damages on his wrongful discharge claim, as well as $164 in economic damages on his claim for breach of the duty of good faith and fair dealing. Tip Top argues that the Superior Court erred in denying its motion for judgment as a matter of law because no reasonable juror could have found for Austin on either of his claims on the basis of the evidence presented at trial. Because Tip Top failed to amend its notice of appeal to include an assertion that the Superior Court erred in denying its post-verdict renewed motion for judgment as a matter of law as required by Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure, its argument challenging the sufficiency of the evidence is not subject to appellate review. However, because the Superior Court committed reversible error in excluding the testimony of one of Tip Top's witnesses without sufficiently explaining its reasoning, and committed further reversible error by excluding the testimony of three additional witnesses whose identities were disclosed by Tip Top during discovery, solely on the basis that Tip Top failed to provide their contact information, we vacate the Superior Court's judgment as to Austin's wrongful discharge claim and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 In August 2012, Tip Top hired Keith Austin as a laborer on a construction crew working on the construction of the National Guard training center on St. Croix. (J.A. 119.) In late October 2012, Austin developed athlete's foot, which he contends resulted from repeated exposure to water, mud, and bacteria present in the drainage pond where Tip Top assigned him to work. (J.A. 115.) As his condition worsened "his feet caused him such distress that many days he was unable to work." (J.A. 116.) Over the course of the next six months of his employment, Austin was marked absent from work a total of forty-five and one-half days, until Tip Top terminated his employment

for "excessive absenteeism" on February 13, 2013. (J.A. 1058, 1093.) Of the days Austin was marked absent from work, Tip Top considered four days to be covered by doctor's notes. (J.A. 1058.) Austin does not contest the fact that he was absent from work as reported by Tip Top, except as to one and one-half days in January 2013 during which he did work but was marked absent because Tip Top's attendance and hours punch-clock apparently did not register Austin's card when it was inserted. (J.A. 1973-74, 2093.)

¶3 On May 21, 2013, Austin filed a six-count complaint, asserting claims for violations of the Workers' Compensation law (Counts I and II), defamation (Count III), breach of the duty of good faith and fair dealing (Count IV), intentional infliction of emotional distress (Count V), and violation of the Wrongful Discharge Act ("WDA") (Count VI). (J.A. 25-28.) The trial court dismissed four counts before trial and ultimately submitted only Austin's claims for wrongful discharge and for breach of the duty of good faith and fair dealing to the jury. Additionally, prior to trial, the court granted Austin's motion *in limine* to exclude the testimony of three witnesses whose identities had been disclosed by Tip Top during discovery, but whose contact information had not been provided. Tip Top also sought to offer the testimony of the Custodian of Records of Juan F. Louis Hospital to rebut evidence presented by Austin showing that he had sought medical treatment at the hospital in the weeks immediately preceding his termination. However, prior to trial, the trial court excluded this testimony as well, reasoning that Tip Top had never notified Austin of its intent to argue that issue. At the close of evidence, Tip Top moved for judgment as a matter of law pursuant to Rule 50(a) of the Virgin Islands Rules of Civil Procedure. (J.A. 2915.) The Superior Court judge denied the motion from the bench as to both counts.

¶4 On April 5, 2017, the jury returned a verdict in favor of Austin on both counts, awarding him $43,200 in economic damages and $2,000 in non-economic damages on his wrongful

discharge claim, as well as $164 on his claim for breach of the duty of good faith and fair dealing. (J.A. 3157-58.) The following day, the Superior Court entered judgment memorializing the jury's verdict and ordering the parties to file any post-judgment motions within twenty days. (J.A. 24.) On May 4, 2017, which was 29 days after the entry of the aforementioned judgment, Tip Top filed a renewed motion for judgment as a matter of law under Rule 50(b) of the Virgin Islands Rules of Civil Procedure, arguing that the jury lacked a sufficient evidentiary basis to find in favor of Plaintiff on either count, and including an alternative request for a new trial. (J.A. 1048-1062.) Three days later, on May 8, 2017, Tip Top filed its notice of appeal seeking review of the Superior Court's April 6, 2017 judgment and asserting that the court committed various errors such as excluding the testimony of several of Tip Top's witnesses, sustaining objections made by Austin during Tip Top's closing argument, charging the jury with certain instructions which misstated the law, and denying Tip Top's Rule 50(a) motion made at the close of evidence. (J.A. 12-14.) The next day, Tip Top filed an amended notice of appeal substantively identical to the original notice, differing only in that it was printed in a fourteen-point font and replaced citations to formerly applicable Supreme Court Rules with citations to the recently adopted Virgin Islands Rules of Appellate Procedure. (J.A. 15-18.) On June 1, 2017, the Superior Court entered its memorandum opinion and order denying Tip Top's Rule 50(b) motion, reasoning that once Tip Top filed its notice of appeal, the Superior Court was divested of jurisdiction to render a decision on Tip Top's post-trial motion. (J.A. 1088.)

II. JURISDICTION

¶5 We have jurisdiction over this civil appeal pursuant to title 4, section 32(a) of the Virgin Islands Code, which provides that "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise

provided by law." The Superior Court's April 6, 2017 judgment memorializing the jury's verdict constitutes a final judgment, as it disposed of all claims submitted to the court for adjudication. *Samuel v. United Corporation*, 64 V.I. 512, 517 (V.I. 2016).

III. DISCUSSION

¶6 On appeal, Tip Top asserts that the Superior Court committed the following reversible errors: (1) denying Tip Top's Rule 50 motion for judgment as a matter of law, or in the alternative for new trial; (2) excluding testimony of the custodian of records of the Juan F. Louis Hospital that would have challenged the authenticity of a doctor's note introduced into evidence by Plaintiff; (3) excluding the testimony of three witnesses and former employees of Tip Top because their contact information was not provided in discovery; (4) charging the jury with instructions permitting the award of damages for loss of income attributable to Austin's work-related injury after the termination of his employment; and (5) sustaining Austin's objection to Tip Top's attempt to inform the jury during closing argument that the Workers' Compensation system is a "no-fault" system for compensating workers who suffer job-related injuries. (Appellant's Br. 1-2.) We address each of Tip Top's assertions of error in turn.

A. Rule 50 Motion for Judgment as a Matter of Law

¶7 Tip Top argues that the Superior Court erred in denying its Rule 50 motion on Austin's wrongful discharge claim because uncontroverted evidence adduced at trial established both that Austin was continuously absent and that those absences affected Tip Top's interests, such that no reasonable juror could conclude otherwise. Therefore, Tip Top contends that it has discharged its burden under 24 V.I.C. § 76(a)(6) and is entitled to judgment as matter of law pursuant to Rule 50. (Appellant's Br. 8-14.) Additionally, Tip Top asserts that the court erred in denying its Rule 50 motion on Austin's claim for breach of the duty of good faith and fair dealing because Austin

failed to present sufficient evidence from which a reasonable juror could conclude either that a contract existed between the parties, or that Tip Top acted in a fraudulent or deceitful manner. (Appellant's Br. 15-16.) In response, Austin argues that Tip Top has waived its right to challenge on appeal the sufficiency of the evidence as to either claim by failing to timely amend its notice of appeal to include an assertion that the Superior Court erred in denying its post-verdict renewed motion for judgment as a matter of law in violation of V.I. R. APP. P. 5(a)(4). (Appellee's Br. 6-7.) In considering the Superior Court's denial of a motion for judgment as a matter of law, our standard of review is plenary, and we apply the same standard of review as the Superior Court should have utilized. *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2013).

¶8 Virgin Islands Rule of Appellate Procedure 5(a)(4) provides:

> If any party timely files in the Superior Court a motion for judgment as a matter of law; to amend findings or make additional findings; for a new trial; to alter or amend the judgment or order; or (if filed within 28 days) for relief from the judgment or order, the time for filing the notice of appeal for all parties is extended until 30 days after entry of an order disposing of the last such motion; provided, however, that the failure to dispose of any motion by order entered upon the record within 120 days after the date the motion was filed shall constitute a denial of the motion for purposes of appeal.
>
> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding or 120 days after the date the last such motion was filed. *Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 4(c), to amend a previously filed notice of appeal.* A party intending to challenge an alteration or amendment of the judgment shall file with the Clerk of the Supreme Court a notice or an amended notice of appeal within the time prescribed by this Rule 5, measured from the entry of the order disposing of the last such motion

> outstanding. No additional fees will be required for filing an amended notice. A motion for attorney's fees shall not affect the running of the time for appeal.

V.I. R. APP. P. 5(a)(4) (emphasis added).

¶9 In this case, Tip Top moved for judgment as a matter of law under V.I. R. CIV. P. 50(a) at the close of evidence, and properly renewed that motion pursuant to V.I. R. CIV. P. 50(b) following the Superior Court's entry of judgment against it. After Tip Top filed the renewed motion, but before the Superior Court entered its order denying that motion, Tip Top filed its notice of appeal.[1] Thus, Tip Top's notice of appeal clearly falls within the scope of V.I. R. APP. P. 5(a)(4) as "[a] notice of appeal filed after announcement or entry of the judgment but before disposition of [a motion for judgment as a matter of law]." And, to obtain appellate review of the Superior Court's denial of that motion, Tip Top was required, under the plain language of Rule 5(a)(4), to amend its previously filed notice of appeal to "designate the . . . order, or part thereof appealed from and the reason(s) or issue(s) to be presented on appeal." *See* V.I. R. APP. P. 4(c) (incorporated by reference in the italicized language of Rule 5(a)(4) reprinted above). However, following entry of the Superior Court's opinion and order denying its renewed motion for judgment as a matter of law, Tip Top failed to amend its notice of appeal to reflect its intention to challenge that ruling.

¶10 In its attempt to rebut Austin's contention that Rule 5(a)(4) precludes appellate review of the denial of Tip Top's motion, Tip Top employs a variety of arguments, largely devoid of citation to authority. First, Tip Top asserts that "the Superior Court's ruling [that it was divested of jurisdiction by the filing of Tip Top's notice of appeal] was correct, and thus [the ruling on the

[1] Because Tip Top's amended notice of appeal is substantively identical to its original notice of appeal, and because Tip Top's failure to further *substantively* amend its notice of appeal to challenge the Superior Court's denial of Tip Top's renewed motion for judgment as a matter of law is critical to resolving Tip Top's sufficiency of the evidence argument, for simplicity and clarity we will refer to Tip Top's operative, amended notice of appeal, filed May 9, 2017, simply as Tip Top's "notice of appeal," unless otherwise specified.

renewed motion was not a matter] that Appellant needed to challenge on appeal." (Reply Br. 5.) Though not so explicitly stated, the thrust of Tip Top's argument is that even though its renewed motion under V.I. R. CIV. P. 50(b) was denied and Tip Top both agreed with and deliberately decided not to appeal that ruling, we should nonetheless consider Tip Top's sufficiency of the evidence arguments in reviewing the denial of its pre-verdict motion for judgment as a matter of law under V.I. R. CIV. P. 50(a).[2] We disagree.

¶11 As noted in Tip Top's own brief, Virgin Islands Rule of Civil Procedure 50 "is drawn almost verbatim from [Rule] 50 [of the Federal Rules of Civil Procedure], and this Court should therefore rely on the abundant federal case law in applying the Virgin Islands Rule."[3] And though decisions of the Supreme Court of the United States interpreting such borrowed rules do not bind Virgin Islands courts in their construction of Virgin Islands rules, such decisions remain persuasive authority and guide us in our interpretation. *See Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 419-20 (V.I. 2016). In *Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394, 405 (2006), the Supreme Court of the United States expressly held that "[a party] may not challenge the

[2] *See* Reply Br. 4 (challenging Appellee's contention "that under V. I. R. APP. P. 5(a)(4) this Court should . . . decline to review the Superior Court's pre-verdict denial on the merits of Appellant's Rule 50 motion.").

[3] Rule 50(a)(1) of the Virgin Islands Rules of Civil Procedure provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Rule 50(b) of the Virgin Islands Rules of Civil Procedure provides:

> If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may: (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law.

sufficiency of the evidence on appeal on the basis of the [trial court's] denial of its Rule 50(a) motion." The Court's reasoning was twofold. First, such a rule is consistent with long standing Supreme Court precedent holding that in the absence of a post-verdict motion under Rule 50(b), an "appellate court [is] without power to direct the [trial court] to enter judgment contrary to the one it had permitted to stand." *Id.* at 400-01 (citing *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)). The Court explained that "[a] postverdict motion is necessary because '[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'" *Id.* at 401 (citing *Cone*, 330 U.S. at 216).

¶12 Second, both the text of the rule itself and the generally accepted practice of the federal district courts support the conclusion that the denial of a Rule 50(a) motion, standing alone, is a purely discretionary matter and thus cannot constitute appealable error. *Id.* at 405. Virgin Islands Rule of Civil Procedure 50(a) is identical to its federal counterpart in providing: "If . . . the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, *the court may* . . . resolve the issue against the party; and . . . grant a motion for judgment as a matter of law…." (emphasis added). Thus, while the trial court *may* enter judgment as a matter of law if it determines that the evidence is legally insufficient to support a verdict against the moving party, nothing in the rule requires it to do so. *Id.*

¶13 Indeed, it is the common, desirable practice of trial courts to submit the case to the jury even where they find the evidence to be wanting. *Id.* As the Court explained:

> Even at the close of all the evidence it may be desirable to refrain from granting a motion for judgment as a matter of law despite the fact that it would be possible for the district court to do so. If judgment as a matter of law is granted and the appellate

> court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.

Id. at 405-06 (quoting 9A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE - CIVIL § 2533, at 319).

¶14 We concur with the reasoning of the Supreme Court and conclude that the denial of Tip Top's original motion for judgment as a matter of law under V.I. R. CIV. P. 50(a), standing alone, is not subject to review on appeal, because the denial of that motion did not constitute error. Rather, "[i]t was merely an exercise of the [Superior Court's] discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence." *Id.* Accordingly, to the extent that Tip Top suggests we should review the denial of its Rule 50(a) motion independently and without regard to the Superior Court's consideration or disposition of its renewed motion under Rule 50(b), we reject Tip Top's argument.[4]

¶15 We also note that Tip Top's assertion that "[t]he Superior Court's ruling [denying Tip Top's renewed motion] was correct, and thus not a ruling that Appellant needed to challenge on

[4] Although a small minority of state appellate courts permit challenges to the sufficiency of the evidence on appeal even where the challenging party fails to file the requisite amended notice of appeal or, in some cases, even when the party failed to file a renewed motion for judgment as a matter of law with the trial court, we find the reasoning of the federal appellate courts highly persuasive on this issue, and find it desirable, in this instance, to interpret our own rules of appellate procedure in a manner consistent with standard practice in federal court. *See Ass'n of Unit Owners of Timbercrest Condominiums v. Warren*, 256 P.3d 146, 153 (Or. App. Ct. 2011), *aff'd*, 288 P.3d 958 (2012) (holding

appeal" is mistaken. Rule 5(a)(4) of the Virgin Islands Rules of Appellate Procedure unambiguously provides that "[a] notice of appeal filed after announcement or entry of the judgment but before disposition of [a renewed motion under Rule 50(b)] is *ineffective* to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion." (emphasis added). Although the Superior Court correctly noted our prior decisions, including *In re Rogers*, 56 V.I. 325, 342 (V.I. 2012), holding that "an *effective* notice of appeal of a final order typically divests the trial court of jurisdiction," the court nevertheless erred in concluding that it lacked jurisdiction to rule on Tip Top's renewed motion because, under the plain language of Rule 5(a)(4), Tip Top's notice of appeal remained *ineffective* until June 1, 2017 when the court issued its opinion and order denying the motion.

¶16 Next, Tip Top argues that even if the Superior Court erred in concluding that it lacked jurisdiction to consider the renewed motion, Rule 5(a)(4) should be "construed to require the filing of an amended notice of appeal only if the Superior Court's ruling on the renewed motion was on the merits." (Appellant's Br. 5.) Tip Top fails to cite any legal authority for this proposition, and merely asserts that "[t]he plain purpose of the amended notice of appeal requirement in V.I. R. APP. P. 5(a)(4) is to place before the [Supreme] Court any additional reasons on the merits for denying the pre-verdict Rule 50 motion that are articulated in a lower court's post-verdict ruling." *Id.* While the distinction between rulings on the merits and rulings not on the merits is sometimes of legal significance — for instance, in the context of determining whether a judgment has

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that appellate court retained jurisdiction to decide the appeal, including the issue whether the trial court erred in denying motion for new trial, without the filing of a new notice of appeal after denial of motion for new trial); *see also Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 864 N.E.2d 518, 532 (Mass. App. Ct. 2007) (rejecting argument that appellant waived its right to challenge the sufficiency of the evidence by failing to make a postverdict motion for judgment notwithstanding the verdict or for a new trial before bringing this appeal").

preclusive effect under the doctrine of *res judicata* — the text of Rule 5(a)(4) makes no such distinction. *See, e.g. Stewart v. Virgin Islands Bd. of Land Use Appeals,* 66 V.I. 522 (V.I. 2017). Indeed, our precedent interpreting and applying V.I. R. APP. P. 4(c) counsels strongly against Tip Top's proposed construction of Rule 5(a)(4). We have repeatedly upheld the general rule that "[w]hen a notice of appeal fails to designate an order, that order is not properly before this Court for consideration." *Virgin Islands Taxi Ass'n v. Virgin Islands Port Auth.*, 67 V.I. 643, 673 (V.I. 2017) (citing *Dessout v. Brin,* 66 V.I. 308, 313 (V.I. 2017)). Thus, finding nothing in the text of the rule or in our relevant precedent to support such a distinction, we decline to read Tip Top's proposed distinction into the otherwise plain and unambiguous language of Rule 5(a)(4), and reject Tip Top's argument.

¶17 Tip Top further contends that reading Rule 5(a)(4) to require the filing of an amended notice of appeal under the circumstances presented here, as urged by Austin, would be "hyper-technical" and would "serve no purpose." We disagree on both counts. Far from being "hyper-technical," the language of Rule 5(a)(4) at issue here could hardly be more clear or straightforward: "Appellate review of an order disposing of [a motion for judgment as a matter of law] requires the party, in compliance with Rule 4(c), to amend a previously filed notice of appeal." Similarly, Austin's proposed synthesis of the requirements of V.I. R. CIV. P. 50 and V.I. R. APP. P. 5(a)(4) results in an equally clear, unambiguous, bright-line rule: To preserve a challenge to the sufficiency of the evidence for appeal, the appellant must: (1) move for judgment as a matter of law before the matter is submitted to the jury under V.I. R. Civ. P. 50(a), (2) renew the motion for judgment as a matter of law after judgment is entered pursuant to V.I. R. Civ. P. 50(b), and (3) amend any notice of appeal filed prior to the resolution of the motion to include an assertion of error as to the denial of that motion. (Appellee's Br. 1.) Adopting the straightforward interpretation of the rule suggested

by Austin serves at least two purposes, by both giving effect to the plain meaning of the language of the rule, and creating a simple, bright-line rule that is easy for attorneys and litigants to understand and follow.

¶18 Additionally, Tip Top invokes our previous decisions recognizing that V.I. R. APP. P. 5 is a claims-processing rule and urges to us exercise our discretion "to avoid applying the Rule in a way that would lead to harsh or inequitable results, or that would otherwise frustrate the purpose of the Rule." (Reply Br. 6.) Tip Top argues that the Superior Court's ruling denying the renewed motion for lack of jurisdiction "led Tip Top to believe that nothing further was required of it on appeal, other than to advise the Court of the ruling." *Id.* In support of this argument, Tip Top refers to our decision in *Peters v. Virgin Islands*, 60 V.I. 479 (V.I. 2014), and suggests that the circumstances of this case are like cases "where a trial court erroneously informs a party that a post judgment motion will toll the time to appeal." *Id.* at 484 (citing *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 197 (3d Cir. 2008)). But, Tip Top's reliance on *Peters* is misplaced.

¶19 In both cases cited by Tip Top in support of its argument, we indeed recognized that Rule 5 is a claims-processing rule subject to relaxation at our discretion. *See Id.*; *see also Simpson v. Bd. of Directors of Sapphire Bay Condominiums W.*, 62 V.I. 728, 731-32 (V.I. 2015). At the same time though, we also explained that "relaxing the requirements of Rule 5 under normal circumstances would severely undermine and weaken the rule's purpose and diminish society's legitimate interest in the finality of a judgment that has been perfected by the expiration of the time allowed for direct review." *Id.* at 484. We echoed the United States Court of Appeals for the Tenth Circuit in observing that strict enforcement of appellate rules of procedure "serves societal interests and the interests of judicial administration by minimizing uncertainty and waste of judicial resources." *Id.* (quoting *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir.2008)). Thus, we

explained that the requirements of Rule 5—in those cases, the time for filing an appeal—will be relaxed only in rare and exceptional circumstances, and in both cases, ultimately declined to exercise our discretion to do so, ruling instead in favor of strict adherence to the rule.

¶20 The circumstances presented here are hardly rare or exceptional; thus they do not justify the exercise of our discretion to relax the rule's requirements. As discussed above, the Superior Court devoted only a single paragraph of its June 1, 2017 opinion and order to the discussion of Tip Top's renewed motion and concluded that because "this matter is on appeal, this Court has no jurisdiction to render a decision on Tip Top's post trial motion." (J.A. 1088.) The Superior Court made no representations about Tip Top's obligation to amend its notice of appeal under Rule 5(a)(4) and no representations on the potential waiver or preservation of Tip Top's sufficiency of the evidence arguments on appeal. To the extent Tip Top construed the Superior Court's terse statements and conclusion concerning the trial court's jurisdiction as an assurance that the denial of its renewed motion was properly before this Court on appeal, such a construction was untenable and any reliance upon it was unreasonable. The situation here is clearly dissimilar from those cases cited by Tip Top in which appellate courts have relaxed timeliness requirements where the trial court expressly misinformed a party as to the permissible time within which to file an appeal. Accordingly, because Tip Top has failed to demonstrate the existence of sufficiently exceptional circumstances, we decline to exercise our discretion to relax the requirements of Rule 5. *See Peters*, 60 V.I. at 485.

¶21 Lastly, Tip Top argues that even if it were required to file an amended notice of appeal reflecting the denial of its renewed motion for judgment as a matter of law, we should treat its informational notice to the Court as the "functional equivalent of such an amendment." (Reply Br. 7.) This argument fails for two reasons. First, the informational notice itself states that it was filed

pursuant to V.I. R. APP. P. 5(a)(6) and makes no reference to Rule 5(a)(4). Substantively, the informational notice is precisely what it purports to be; merely a notice "that … the Superior Court denied Tip Top's post-judgment Motion for Judgment as a Matter of Law on the grounds that it had no jurisdiction … because of the pendency of this appeal." The informational notice contains nothing that could reasonably be construed either as an assertion that the Superior Court erred in its ruling or as an expression of Tip Top's intent to appeal that court's decision. We are wary of the suggestion that an informational notice under Rule 5(a)(6) should be considered the functional equivalent of an amended notice of appeal under Rule 5(a)(4) because such a conclusion verges on rendering the provisions of Rule 5(a)(4), as well as the requirements of Rule 4(c) incorporated by reference therein, superfluous and ineffective. But in any event, even if we were to consider the informational notice filed by Tip Top to be the functional equivalent of an amended notice of appeal, and even if the substance of the informational notice met the requirements of Rule 4(c), the informational notice was untimely under either Rule 5(a)(4) or Rule 5(a)(6). The Superior Court entered its opinion and order denying the renewed motion on June 1, 2017. Tip Top did not file its informational notice with this Court until July 10, 2017, well outside the fourteen-day time period for filing under Rule 5(a)(6), and ten days beyond the thirty-day period within which to file an amended notice of appeal under Rule 5(a)(4). Tip Top does not argue that we should relax these timeliness requirements, and we do not independently find any reason to do so.[5] For these reasons, we must reject Tip Top's functional equivalency argument.

¶22 After considering each of Tip Top's arguments concerning its failure to file an amended notice of appeal, we find nothing sufficient to justify or excuse its failure to comply with the clear

[5] For these same reasons, Tip Top's attempt to save its sufficiency of the evidence challenge by filing a second amended notice of appeal concurrently with its Reply Brief on December 12, 2017, must also fail.

and unambiguous requirements of V.I. R. APP. P. 5(a)(4). We are unpersuaded by Tip Top's suggestion that we should abrogate the plain meaning of the rule and read into it certain qualifications unsupported either by the text of the rule itself or by our precedent interpreting similar, related rules. Furthermore, finding no rare or exceptional circumstances present here, we decline to exercise our discretion to relax the requirements of our procedural rules and conclude that because Tip Top failed to timely amend its notice of appeal as required by Rule 5(a)(4), the denial of Tip Top's motion for judgment as a matter of law, including its alternative request for new trial, is not subject to appellate review.

B. Exclusion of Evidence Challenging Authenticity of Doctor's Note

¶23 Having determined that Tip Top's argument concerning the sufficiency of the evidence is not properly before this Court on appeal, we now turn to Tip Top's remaining arguments asserting various evidentiary errors purportedly committed by the trial court prior to the entry of its April 5, 2017 judgment. First, Tip Top argues that the Superior Court erred in excluding the testimony of the Custodian of Records for the Juan F. Louis Hospital, Brenda Thibou, because of Tip Top's failure to notify Austin before trial that it intended to offer evidence to show that, contrary to Austin's testimony, Austin never visited the Hospital in February, and that the doctor's note memorializing that visit was inauthentic. Tip Top contends that the Joint Pretrial Order was silent on this issue and "left open the right of either party to make challenges to either the *prima facie* authenticity of a proposed exhibit … or to its ultimate authenticity." (Reply Br. 14.) Austin misconstrued Tip Top's argument as challenging the Superior Court's decision to admit the doctor's note. But, Tip Top does not challenge the court's decision to *admit* the doctor's note, arguing instead that the court erred in *excluding* Thibou's testimony—which Tip Top would have offered to impeach the ultimate authenticity of the doctor's note. Therefore, Austin's brief is non-

responsive to the issue presented. We review the Superior Court's decision to exclude evidence for abuse of discretion. *George v. People*, 59 V.I. 368, 386 (V.I. 2013).

¶24 On the record before us, the precise basis for the Superior Court's ruling is unclear, other than the court's repeated, general observations that Tip Top "never put [Austin] on notice that this would be an issue in this trial." (J.A. 2130.) And though lack of notice may justify excluding evidence in a variety of circumstances as provided in both the Virgin Islands Rules of Civil Procedure and the Virgin Islands Rules of Evidence, the court here excluded Thibou's testimony with no reference to, or discussion of either set of rules. Perhaps the Superior Court intended to exclude this evidence pursuant to V.I. R. CIV. P. 37(c)(1)(C) as a sanction for Tip Top's failure to disclose Thibou as a witness during discovery in violation of V.I. R. CIV. P. 26(a)(1) or 26(a)(3). But this explanation seems strained given that the court apparently recognized at the beginning of the argument on this issue that Tip Top had a right to impeach Austin on his testimony about his hospital visit, which would potentially exempt that testimony from the disclosure requirements of Rule 26.[6] (J.A. 1774.)

¶25 Additionally, Austin repeatedly emphasized to the court that Thibou's testimony should be excluded because Tip Top failed to include its challenge to the authenticity of the doctor's note and the credibility of Austin's testimony concerning his February hospital visit as an issue in the joint final pretrial order. But, in explaining its decision to exclude Thibou's testimony, the court's only reference to the joint final pretrial order was to note that Tip Top sufficiently designated the custodian of medical records as a witness and was therefore entitled to call Thibou as a witness at

[6] Rule 26(a) of the Virgin Islands Rules of Civil Procedure specifically excludes from the disclosures required under the rule and witness offered "solely for impeachment."

trial. (J.A. 1854.) Thus, based on the Superior Court's explanation, it is difficult to construe the court's decision as having been based on any defect in the joint final pretrial order.

¶26 Ultimately, without any discussion on the record about whether Tip Top violated the disclosure requirements of Rule 26, the provisions of the joint final pretrial order, or for that matter, any other rule of procedure or evidence, we have no means of assessing whether the court abused its discretion in excluding Thibou's testimony. As we have repeatedly held, meaningful review of an alleged abuse of the Superior Court's discretion is not possible where the court fails to sufficiently explain its reasoning. *See Samuel*, 64 V.I. at 526. In this case, the court's only explanation for its decision to exclude Thibou's testimony was its general observation that Tip Top failed to notify Austin prior to trial of its intention to challenge the credibility of Austin's testimony and the authenticity of the doctor's note, without reference to either the rules of civil procedure, the rules of evidence, or any other legal authority bearing on the admissibility of testimony at trial. Such a thread-bare explanation is insufficient to permit any meaningful review of the court's decision, and thus the Superior Court erred in excluding Thibou's testimony.

¶27 Although we conclude that the Superior Court erred in excluding Thibou's testimony, "[n]o error or defect in any ruling ... by the Superior Court ... 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." *Samuel*, 64 V.I. at 520 (quoting V.I. R. App. P. 4(i)). "Whether an evidentiary error implicates a substantial right depends on the likelihood that the error affected the outcome of the case." *Id.* (citation and internal quotation marks omitted).

¶28 In this case we cannot conclude that the Superior Court's error did not affect Tip Top's substantial rights. Tip Top premised its defense against Austin's wrongful discharge claim on its assertion that it lawfully discharged Austin for his continuous absences which affected Tip Top's

interests. In response, Austin argued that Tip Top only used Austin's absences as a pretext to terminate his employment, and that Tip Top actually fired Austin in retaliation for his filing of a wage claim with the Department of Labor. Austin supported this claim by arguing that Tip Top regularly tolerated the absence of its workers so long as appropriate supervisors were informed and those absences were justified or excused on the basis of, among other things, illness, hospital visits, or doctor's notes. However, according to Tip Top, Thibou would have testified that there were no records reflecting any visit to the hospital by the plaintiff in February 2013. (Appellant's Br. 17). Thus, Thibou's proffered testimony would have tended to show that Austin's absences in the weeks immediately preceding his discharge were not, as Austin contended, justified or excused by hospital visits or doctor's notes, and this evidence, if credited by the jury, would constitute a permissible reason for terminating Austin's employment under the Wrongful Discharge Act. In excluding Thibou's testimony, the Superior Court prevented Tip Top from presenting any defense against the argument that it only used Austin's absences as a pretext to fire him, and consequently precluded Tip Top from presenting a potentially effective defense against Austin's wrongful discharge claim. "By doing so, the Superior Court allowed [Austin] to argue to the jury, essentially without opposition," that his absences were actually excused or justified and merely served as a pretext for terminating Austin in retaliation for his decision to file a wage claim, in abrogation of Tip Top's substantial right to defend itself against Austin's claims. *See Samuel*, 64 V.I. at 520. Accordingly, because this error seems "very likely to have affected the outcome of the case," we vacate the Superior Court's judgment as to Austin's wrongful discharge claim and remand for a new trial. *See id.*

C. Exclusion of Witnesses for Lack of Contact Information

¶29 Tip Top also contends that the Superior erred by excluding the testimony of Gordian Lawrence, Alan Vanterpool, and Donald Thorpe on the grounds that Tip Top failed to provide the contact information for these witnesses as required by V.I. R. CIV. P. 26.[7] Tip Top does not dispute that it failed to fully comply with the disclosure requirements of Rule 26, but argues instead that its failure to do so did not justify the extreme sanction of exclusion because the failure was harmless under V.I. R. CIV. P. 37(c). Austin argues on appeal, as he did at trial, that he was prejudiced by Tip Top's failure to disclose the contact information, "as the failure to disclose [the addresses and telephone numbers of these witnesses] meant that Austin was unable to decide, within the discovery period, whether there was a need to depose the individuals." (Appellee's Br. 33.) We review the Superior Court's decision to exclude evidence for abuse of discretion. *George v. People*, 59 V.I. 368, 386 (V.I. 2013).

¶30 Virgin Islands Rule of Civil Procedure 37(c) provides: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." We consider a number of factors in determining if a Rule 26 violation is harmless, including: "prejudice or surprise to the opposing party; the ability of the party to cure that prejudice; the likelihood of disruption at trial; and the bad faith or willfulness of the violating party." *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 237 (V.I. 2013). Furthermore, "the exclusion of critical evidence is an extreme sanction, not normally to be imposed

[7] Rule 26(a)(1) of the Virgin Islands Rules of Civil Procedure provides that "a party must, without awaiting a discovery request, provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment."

absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." *Id.* (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 791–92 (3d Cir. 1994)).

¶31 In the context of reviewing the exclusion of evidence based upon a failure to comply with the disclosure requirements of Rule 26, the United States Court of Appeals for the Third Circuit has observed "that the plaintiff's assertion of surprise and prejudice [must be] viewed in the context of the plaintiff's own failure to take any steps to [resolve the issue]." *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894, 905 (3d Cir. 1977).[8] And multiple Circuit Courts of Appeal have held that although the text of Rule 37 does not expressly provide any time limit for moving to exclude evidence under the rule, unreasonable delay in bringing such a motion will result in its denial. *See, e.g., Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir.1994) (observing that, in the context of Rule 37, the unreasonable delay standard applies even in the absence of a specified time limit); *Mercy v. County of Suffolk*, 748 F.2d 52, 56 (2d Cir. 1984) ("[M]otion[s] for Rule 37 sanctions should be promptly made, thereby allowing the judge to rule on the matter when it is still fresh in his mind. . . . Indeed, the motion should normally be deemed waived if it is not made prior to trial."). Along these lines, several courts have found that parties who delay unnecessarily in notifying their opponents of certain defects in their Rule 26 disclosures waive the right to seek the extreme sanction of exclusion under Rule 37. *See, e.g., United States v. Stinson*, Case No: 6:14-cv-1534-Orl-22TBS, 2016 WL 8488241, at *5 (M.D. Fl. Nov. 22, 2016) (unpublished) (finding that Rule 37 motion was "untimely because [the party] delayed unreasonably by waiting over a year after the discovery deadline to bring the issue to the Court's attention); *Long v. Howard Univ.*,

[8] Virgin Islands Rules of Civil Procedure 26(a) and 37(c) are substantively identical to their federal counterparts, and therefore we look to persuasive precedent from the federal courts for guidance in the interpretation and application of these rules.

561 F. Supp. 2d 85, 91 (D.D.C. 2008) (two-year delay in bringing Rule 37(c) motion was unreasonable and resulted in waiver).[9]

¶32 On the record before us, we conclude that the Superior Court abused its discretion by excluding Tip Top's witnesses. Here, Tip Top disclosed to the plaintiff during discovery the identity of all three witnesses, as well as the basic subject matter about which they would testify, so that the only defect in Tip Top's disclosures was the lack of contact information for these witnesses.[10] Clearly then, Austin cannot reasonably claim to be surprised that Tip Top sought to call these individuals as witnesses. Austin never sought to obtain the contact information by serving either a Rule 37 discovery letter, or by filing a motion to compel. Instead, Austin withheld his objection to the inadequacy of Tip Top's disclosures for nearly two years—since the witnesses were first identified in Tip Top's responses to Austin's interrogatories in January 2015—and only presented it for the first time in his December 19, 2016 motion *in limine*. Had Austin raised his Rule 37 argument earlier, Tip Top's failure to provide contact information could have been easily remedied, with ample time to contact the witnesses and little, if any, delay in the trial of this matter.

¶33 Additionally, Austin's claim of prejudice based upon his purported inability to decide, in the absence of contact information, whether it was necessary to depose the excluded witnesses is belied by Austin's own conduct during discovery with respect to other witnesses. As Tip Top noted

[9] Indeed, as some courts have noted, "[a] party who receives incomplete or evasive [Rule 26] disclosures consequently faces a dilemma of sorts.... Attorneys who wish to exclude the [witness's] testimony at trial, then, may be disinclined to file the motion to compel, because, if granted, the party which supplied the defective disclosures may be given another opportunity to get them right, and the [witness] will then be permitted to testify at trial." *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 503–05 (D. Md. 1997).

[10] Although the witnesses were not listed in Tip Top's Rule 26 initial disclosures, the identity of the witnesses and their relevance to the case was disclosed in Tip Top's answers to Austin's interrogatories. (J.A. 764-65.) Therefore, under our precedent in *Davis*, Tip Top did not have to further supplement its Rule 26 disclosures to reflect this information. 59 V.I. at 234. Additionally, two of the witnesses, Thorpe and Vanterpool, were identified as witnesses in Austin's Rule 26 disclosures, which were incorporated by reference into Tip Top's own disclosures. (J.A. 790-91.)

in its brief, even in the absence of contact information, Austin determined that it was necessary to depose two other former employees of Tip Top, Jerry and Brian Otto, and Tip Top readily produced them for deposition. (J.A. 1622.) But even if Austin was prejudiced, he had ample opportunity to cure that prejudice in the nearly two year time period between the initial exchange of disclosures about these witnesses and the trial of this case, by simply requesting that Tip Top provide the missing contact information or, if Tip Top failed to provide that information as requested, by moving to compel its disclosure while discovery was still underway. Thus Austin, in light of his decision to withhold his objection until the eve of trial, is at least equally as responsible for any resulting prejudice as Tip Top.

¶34 Because Austin was aware of the lack of contact information in Tip Top's witness disclosures since the very beginning of discovery, but nevertheless waited until the eve of trial to raise his objection, we conclude that his delay in raising this issue was unreasonable. Additionally, because Austin had ample opportunity to obtain the missing contact information but elected not to do so, the prejudice he now purports to suffer is, in large part, attributable to his own dilatory behavior.[11] Thus, considering the factors outlined in *Davis*, along with persuasive federal precedent, we conclude that Tip Top's failure to disclose the contact information for these witnesses was harmless under V.I. R. Civ. P. 37(c) and that the Superior Court erred in excluding their testimony.

[11] Logically, it seems that the longer a party a delays in raising an issue as to a known defect in an opponent's disclosures, the more likely it is that any resulting prejudice has been caused by that party's delay rather than the opponent's initial failure to disclose. In other words, while the initial failure to disclose —in this case contact information — was harmless in that it was easily curable during most of the pendency of the case, a party seeking to exclude evidence on the basis of this failure to disclose is effectively able to convert an opponent's otherwise harmless error into a harmful, prejudicial error by delaying in raising the issue until the only viable sanction left to the court is exclusion. We think it neither fair nor prudent to allow a party to benefit from such dilatory behavior.

¶35 Again, we cannot conclude that the Superior Court's error was harmless as to any of the three excluded witnesses. As discussed above, the main issue the jury had to resolve in reaching a verdict on Austin's wrongful discharge claim was whether Tip Top terminated Austin's employment because his continuous absences affected Tip Top's interests as Tip Top argued, or as Austin argued, whether Tip Top merely used Austin's absences as a pretext to fire him for some other impermissible reason. According to Tip Top's proffer, Gordian Lawrence would have given testimony rebutting Austin's claim that Tip Top failed to make protective rubber boots available to Austin in his size. Alan Vanterpool would have similarly testified about the availability of boots at the job site and would have also rebutted testimony about the purportedly unsafe work conditions in the retention pond in which Austin was assigned to work. Finally, Donald Thorpe would have testified that Austin did not present a doctor's note when Thorpe delivered Austin's termination, and would have testified generally about the Tip Top's reasons for terminating Austin's employment. Thus, the Superior Court's erroneous exclusion of these witnesses prevented Tip Top from introducing evidence critical to its defense that Austin was terminated for his continuous absences, and from rebutting Austin's argument that Tip Top only used Austin's absences a pretext to terminate his employment for other impermissible reasons. For these additional reasons, we vacate the Superior Court's judgment as to Austin's wrongful discharge claim and remand this case for a new trial.

D. Jury Instruction on Damages for Loss of Income

¶36 Because we vacate the Superior Court's judgment and remand for a new trial on the basis of the court's abuse of its discretion in excluding witness testimony as discussed above, we need not reach Tip Top's final assertions of error about the court's jury instruction concerning damages for loss of income or the court's decision to prevent Tip Top from describing the worker's

compensation system as a "no-fault system" during closing argument. However, because Tip Top's argument concerning the court's jury instruction presents an important question of law that may well arise again at any retrial, we exercise our discretion to address the issue. *See, e.g.*, *Tremcorp Holdings, Inc. v. Harris*, 67 V.I. 601, 608 n.4 (V.I. 2017) (observing that "this Court possesses the authority to address an issue that is likely to occur on remand"); *Frett v. People*, 58 V.I. 492, 512–13 (V.I. 2013) (same).

¶37 Tip Top asserts that the Superior Court erred in giving the following instruction to the jury:

> I am instructing you that worker's compensation has determined that Plaintiff Keith Austin's foot condition was a work-related injury. You may not award plaintiff any damages for loss of income from any time periods prior to February 13, 2013. Further, you may not award any damages for medical benefits, rehabilitation benefits, pain and suffering, and/or emotional distress solely related to the work injury.

Tip Top argues that because section 284 of the Workers' Compensation Act provides the "exclusive remedy" for compensating employees for work-related injuries, the court's instruction improperly permitted the jury to award Austin damages for loss of income attributable to his work-related injury. *See* 24 V.I.C § 284;[12] *see also Eddy v. V.I. Water and Power Authority*, 369 F.3d 227, 232-33 (3d Cir. 2004). According to Tip Top, the jury should have been instructed that there could be no damages awarded for any loss of income caused by Austin's injury, either before or after the termination of his employment. We disagree. Although we usually review the Superior Court's decision to overrule an objection to jury instructions only for abuse of discretion, when "the question is whether the jury instructions failed to state the proper legal standard, this court's

[12] 24 V.I.C. § 284 provides, in relevant part: "When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist."

review is plenary." *Gilbert v. People*, 52 V.I. 350, 354 (V.I. 2009) (citing *Gov't of the V.I. v. Isaac*, 50 F.3d 1175, 1180 (3d Cir.1995)).

¶38 In considering Tip Top's argument on this issue, we are called upon to examine the relationship between the exclusive remedy provision of the Workers' Compensation Act and the right to recover damages for wrongful termination under Wrongful Discharge Act. Tip Top is correct insofar as it claims that the exclusive remedy provision of 24 V.I.C. § 284 prevents courts from awarding damages for loss of income attributable *solely* to an employee's work-related injury. In this case, however, Austin's loss of income for the period following his termination on February 13, 2013 was clearly not attributable solely to his work-related injury, because from that date forward, Austin began to lose income for another, more fundamental reason: he was no longer employed. In other words, if the jury determined that Tip Top wrongfully terminated Austin's employment on February 13, 2013, then the exclusive remedy provision of 24 V.I.C. § 284 does not bar the award of damages for loss of income after that date because, no matter whether Austin's injury would have prevented him from working, he was nonetheless prevented from earning income for the more basic reason that he no longer had a job. In essence, Austin's wrongful termination superseded his injury as the legal cause of his loss of income beginning on the date of his termination. Accordingly, we conclude that the Superior Court did not err in instructing the jury in such a way as to permit the award of damages on Austin's wrongful discharge claim for loss of income for the period following the termination of his employment.

E. Austin's Cross-Appeal

¶39 By way of cross-appeal, Austin argues that the Superior Court erred in holding that he could not maintain a separate claim for damages based on Tip Top's failure to rehire Austin following his recovery from his work-related injury in violation of the requirements of 24 V.I.C.

§ 285.[13] In response, Tip Top argues that the Superior Court properly dismissed Austin's claim based upon this theory on four independent grounds: (1) Austin introduced no evidence of a determination by the Workers' Compensation Bureau that Austin was certified as disabled at the time he was terminated; (2) Austin introduced no evidence that the Workers' Compensation Bureau determined that his disability no longer existed; (3) Austin introduced no evidence from which a reasonable jury could find that Austin applied for re-employment in the position he held; and (4) even if Austin had introduced this evidence, 24 V.I.C. § 285 provides that Austin's remedy for Tip Top's failure to rehire him was to seek administrative enforcement of the statute.

¶40 Tip Top correctly points out that Austin's brief on appeal focuses solely on the fourth ground listed above and does not challenge the Superior Court's determination that he failed to present evidence sufficient to satisfy the factual elements of a claim based upon 24 V.I.C. § 285. Instead, Austin appears to argue that he is entitled to bring a claim based on Tip Top's failure to rehire Austin under the Wrongful Discharge Act, without any need to prove the elements listed in 24 V.I.C. § 285. It is telling that Austin fails to include any discussion of the text of the Wrongful Discharge Act, as 24 V.I.C. § 76 is devoid of any reference to work-related injuries or to an employer's failure to rehire former employees injured on the job. Thus, Austin's argument finds no support in the language of the Wrongful Discharge Act.

[13] Section 285 provides:

> An employer shall rehire any employee who (1) has been disabled and thereby unable to continue his employment, as certified under this chapter, and (2) immediately after the termination of the disability, applies to the employer for reemployment in the position which he held, at the time of the injury, or in a substantially equivalent position, unless the employer satisfies the Administrator either that the employee, as a result of the injury, will be unable to resume in full his previous obligations and duties, or that the employer had terminated the employment after the accident for just cause. No employee rehired under this section may be subsequently dismissed without just cause.

¶41 Instead, Austin seems to suggest that based on our precedent in *Rennie v. Hess Oil Virgin Islands Corp.*, 62 V.I. 529 (V.I. 2015), holding that the Virgin Islands Civil Rights Act, 24 V.I.C. § 451, authorized a private cause of action, we should now hold that the Wrongful Discharge Act permits Austin to file a claim for failure to rehire, of the type specifically addressed by 24 V.I.C. § 285, without proving the elements enumerated therein. In effect, Austin seeks to circumvent the requirements of 24 V.I.C. § 285 by characterizing his claim for failure to rehire as a claim under the Wrongful Discharge Act rather than the workers' compensation statute. This argument finds no support either in the text of the Wrongful Discharge Act or the precedent of this Court, and we therefore reject Austin's argument. Whether 24 V.I.C. § 285 itself creates a private cause of action is a separate question. But given that Austin has not challenged the Superior Court's conclusion that he failed to introduce any evidence satisfying the elements listed in the worker's compensation statute, we need not answer that question here. Thus the judgment striking the failure to re-hire claim was not error, and that portion of the judgment attacked in the Austin's separate appeal is affirmed.

IV. CONCLUSION

¶42 Because Tip Top failed to amend its notice of appeal to assert error as to the denial of its post-verdict renewed motion for judgment as a matter of law under V.I. R. CIV. P. 50(b), we conclude that Tip Top's challenges to the sufficiency of the evidence presented here are not properly subject to appellate review pursuant to V.I. R. APP. P. 5(a)(4). However, because the Superior Court failed to sufficiently explain the basis of its decision to exclude the testimony of a witness critical to Tip Top's defense, Brenda Thibou, we hold that the Superior Court abused its discretion and committed reversible error in excluding her testimony, and we vacate the judgment as to Austin's wrongful discharge claim and remand for new trial. Additionally, because Austin

was mostly prejudiced by his own unreasonable delay in raising his objection to Tip Top's failure to disclose the contact information for certain witnesses whose identities were disclosed during discovery, we conclude that Tip Top's failure to disclose the contact information was harmless within the meaning of V.I. R. CIV. P. 37(c). Accordingly, we hold that the Superior Court abused its discretion in excluding the testimony of these critical witnesses solely on the basis of Tip Top's failure to provide contact information. The judgment is reversed as to the plaintiff's wrongful discharge claim, and the case is remanded for a new trial on that claim. The judgment is affirmed to the extent that it denied relief on plaintiff's failure to rehire claim.

Dated this 11th day of June, 2019.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

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