Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MEDINA HENRY, Appellant/Defendant,	)	**S. Ct. Civ. No. 2012-0130** Re: Super. Ct. Civ. No. 561/2009 (STT)
v.	)	
CECILIA DENNERY, Appellee/Plaintiff.	)	

On Appeal from the Superior Court of the Virgin Islands
Considered and Filed: January 11, 2013

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

ATTORNEYS:

Medina Henry
St. Thomas, U.S.V.I.
Pro Se,

David A. Bornn, Esq.
The Bornn Firm, PLLC
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

PER CURIAM.

Appellant Medina Henry appeals from an October 26, 2012 Opinion issued by the Appellate Division of the Superior Court, and on December 21, 2012, Appellee Cecilia Dennery filed a motion for summary action, urging this Court to invoke Internal Operating Procedure 9.4 to affirm the Appellate Division without full briefing and argument. For the reasons that follow, we agree that summary action is warranted, but reverse rather than affirm because the Appellate

Division abrogated its duty to act as an appellate tribunal in the underlying matter.

I. STATEMENT OF RELEVANT FACTS AND PROCEDURAL POSTURE

This matter originally came before the Court pursuant to Henry's appeal of a March 25, 2010 Opinion issued by the Appellate Division, which this Court, in a December 29, 2011 Opinion, reversed because the judge failed to provide her with proper notice of a trial *de novo* that had been held to adjudicate Henry's appeal of a December 17, 2009 Judgment entered by the Magistrate Division of the Superior Court pursuant to its original jurisdiction over forcible entry and detainer actions. *See Henry v. Dennery*, 55 V.I. 986, 988-89 (V.I. 2011). At the time the Appellate Division had conducted the trial *de novo* and issued the March 25, 2010 Opinion, the Superior Court had not established any rules governing appeals from the Magistrate Division to the Appellate Division. However, the Presiding Judge of the Superior Court, in a November 23, 2010 Order, promulgated Superior Court Rule 322, which, among other things, explicitly prohibits the Appellate Division from taking or considering additional evidence, *see* SUPER. CT. R. 322.3(a), and mandates that factual findings be reviewed for clear error based on the record developed before the Magistrate Division, *see* SUPER. CT. R. 322(b)(1). Consistent with the text of the November 23, 2010 Order—which provided that "[t]his amendment is effective immediately"—this Court subsequently held that Rule 322 applied to all pending cases before the Appellate Division. *See Browne v. Gore*, S. Ct. Civ. No. 2011-0012, 2012 WL 4195994, at *3 (V.I. Sept. 19, 2012).

On remand in this case, the Appellate Division did not limit itself to the factual record before the Magistrate Division; rather, it chose to order a second trial *de novo*, where it considered additional evidence that had not been heard by the magistrate. In its October 26, 2012 Opinion, the Appellate Division acknowledged our *Browne* decision, that Superior Court

Rule 322 applied to Henry's appeal of the December 17, 2009 Judgment, and that Rule 322 precluded consideration of additional evidence. Nevertheless, the Superior Court found "that it is not improper to consider the full record developed at the most recent trial" because the second trial "provid[ed] the parties with an additional opportunity to be heard" and "[b]oth parties indicated that they preferred a trial *de novo*." Thereafter, the Superior Court proceeded to rule in Dennery's favor based on the evidence introduced at the second trial *de novo*, but also noted that "it would have ultimately ordered the same relief [if] the appeal had been conducted based upon the record." Henry timely filed her notice of appeal on November 23, 2012.

II. DISCUSSION

A. Jurisdiction and Standard of Review

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." 4 V.I.C. § 32(a). "An order from the Superior Court affirming a magistrate's final [judgment] in an FED action is a final order appealable to this Court under section 32(a)." *Lehtonen v. Payne*, S. Ct. Civ. No. 2011–0065, 2012 WL 3181348, at *2 (V.I. Aug. 1, 2012) (citing *H & H Avionics, Inc. v. V.I. Port. Auth.*, 52 V.I. 458, 461–63 (V.I. 2009)).

The standard of review for this Court's examination of the Superior Court's application of law is plenary, while the Superior Court's findings of fact are reviewed for clear error. *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). "In most cases, we will decline to directly review the magistrate's rulings, out of consideration for the 'unique relationship' between the Magistrate and Appellate Divisions of the Superior Court, and traditional appellate practices." *Maso v. Morales*, S. Ct. Civ. No. 201-0068, 2012 WL 5935417,

at *2 (V.I. Nov. 21, 2012) (citing *Browne*, 2012 WL 4195994, at *4 n.5).

B. The Appellate Division's Disregard of Superior Court Rule 322

We agree with Dennery that the instant appeal raises no substantial question, and thus qualifies for summary action. *See* V.I. S. CT. I.O.P. 9.4. However, while Dennery argues for summary affirmance based on her claims to the strength of the evidence introduced at the second trial *de novo*, we hold that summary reversal is warranted because the Appellate Division's October 26, 2012 Opinion acknowledged both that Superior Court Rule 322 was applicable to Henry's appeal and that it prohibited consideration of new evidence on appeal and required a deferential clear error standard of review for factual findings, yet nevertheless deliberately chose not to follow the rule.

The Appellate Division's justifications for its own error do not excuse its conduct. As we previously emphasized, "it is 'not only the right but the duty of the [Superior Court] judge to refuse to intentionally commit error.'" *Fontaine v. People*, 56 V.I. 571, 590 n.12 (V.I. 2012) (quoting *State v. Cullen*, 39 S.W.3d 899, 906 (Mo. Ct. App. 2001)). The fact that the Appellate Division believed that proceeding in derogation of Rule 322 in this case would somehow benefit both parties[1] by providing them with additional due process rights is simply no excuse for a single judge setting aside a mandatory court rule that was validly adopted by the Superior Court pursuant to its rulemaking authority. Likewise, even if Henry and Dennery both requested a trial *de novo*, this Court has repeatedly instructed that parties cannot simply stipulate to the law. *See Rohn v. People*, S. Ct. Crim. No. 2011-0087, 2012 WL 5901924, at *2 (V.I. Nov. 21, 2012) (quoting *Matthew v. Herman*, 56 V.I. 674, 682 (V.I. 2012)). While parties may, in certain

[1] Although not determinative to our analysis, it is not clear to us how ordering a second trial *de novo* conferred any benefit upon Dennery, in light of the Appellate Division's statement that it would have reached the same result if it had not held a second trial and constrained itself to the record before the Magistrate Division.

instances, waive certain claims processing rules—such as the time within which to file a petition to review a Magistrate Division decision, *see Lehtonen*, 2012 WL 3181348, at *2 n.3—parties may not stipulate to an appellate court's application of a different standard of review of a lower court decision. *See K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) ("The parties, however, cannot determine this court's standard of review by agreement."). The standard of review is a concept which transcends the parties to a particular case: to allow parties to stipulate to a trial *de novo* on appeal when the law mandates a clear error standard of review would render the proceedings that occurred in the Magistrate Division a complete nullity, and condoning the practice would signal to the magistrates in these cases that the work they dedicated to constructing the record is a complete waste of time.[2]

Finally, the fleeting language in the October 26, 2012 Opinion that the Appellate Division would have reached the same result even if it followed the Rule 322 procedure is immaterial, since the Appellate Division simply states that it would have affirmed the December 17, 2009 Judgment based on the Magistrate Division record without providing any sort of explanation for its decision. As we have previously indicated, "the unique relationship between the Magistrate Division . . . and the Appellate Division," as well as "the practice traditionally employed when a higher appellate court reverses a lower appellate court," counsels us against

[2] In its October 26, 2012 Opinion, the Appellate Division also states that it was "implicit" in our December 29, 2011 Opinion that a trial *de novo* should occur on remand. However, nowhere in our December 29, 2011 Opinion did this Court direct the Superior Court to ignore the law. Although Henry's failure to receive notice of the initial trial *de novo* served as the basis for our reversal, the Appellate Division had held that trial *de novo* in reliance on federal rules relating to review of decisions of federal magistrate judges, which it found applicable through Superior Court Rule 7 due to the absence of any Superior Court rules or other authority prescribing how to review a decision of the Magistrate Division on appeal. As we found in *Browne*—another case where Superior Court Rule 322 was promulgated during the pendency of a case before the Appellate Division—the promulgation of Superior Court Rule 322 on November 23, 2010, eliminated any doubt as to the proper procedure, and thus a second trial *de novo* after remand would not be authorized solely because the first trial *de novo* may have been permissible. *See Browne*, 2012 WL 4195994, at *3-4; *Fontaine*, 56 V.I. at 592 n.16 (noting that, on remand, prior evidentiary rulings decided under the Uniform Rules of Evidence should be reconsidered in light of the subsequent adoption of the Federal Rules of Evidence).

looking beyond the four corners of the Appellate Division's decision and directly reviewing the Magistrate Division's decision pursuant to the standard the Appellate Division should have followed in the first place.

III. CONCLUSION

For the foregoing reasons, we reverse the October 26, 2012 Opinion, and again remand the matter to the Appellate Division for further proceedings consistent with our decision herein.

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