For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MARLENE WILKINSON, Appellant/Defendant, v. **SINCLAIR WILKINSON,** Appellee/Plaintiff.	)))))))))	**S. Ct. Civ. No. 2016-0016** Re: Super. Ct. DI. No. 134/2013(STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise Hinds-Roach

Argued: November 15, 2016
Filed: March 26, 2019

Cite as: 2019 VI 9

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

APPEARANCES:

Judith L. Bourne, Esq.
The Bourne Law Office, PLLC
St. Thomas, U.S.V.I.
Attorney for Appellant,

Clive Rivers, Esq.
Law Offices of Clive Rivers
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

CABRET, Associate Justice.

¶1 Marlene Wilkinson ("Marlene") appeals from the Superior Court's March 7, 2016 order denying her motion to vacate a portion of a Mediated Settlement Agreement ("MSA") arguing that

her former husband, Sinclair Wilkinson ("Sinclair"), fraudulently misrepresented the amount of money owed under a contract for the construction of their marital home. Because the Superior Court failed to consider certain evidence offered in support of Marlene's claim, we reverse the court's March 7, 2016 order and remand for the court to make findings of fact with respect to this evidence, and to apply the law of fraud in the inducement, as outlined below, to the facts of this case in the first instance.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 During their marriage, Marlene and Sinclair Wilkinson jointly owned property at Bolongo 61-13, St. Thomas. On October 31, 2013, Sinclair filed for divorce, and on May 7, 2014, assisted by counsel, they entered into mediation. At the mediation, Marlene and Sinclair discussed the disposition of the marital property and, for the first time, Sinclair showed Marlene the construction contract, which reported an outstanding debt of $204,579 owed to contractor Steadroy Charles for construction work done on the Bolongo property. Despite harboring doubts concerning the debt purportedly owed to Charles, Marlene signed the MSA. The "Bolongo provision" of the MSA provided, in relevant part:

> Husband agrees to quit claim his interest in the jointly owned marital property, Bolongo 61-13, St. Thomas, U.S. Virgin Islands to Wife in exchange for eighty-two thousand dollars $82,000.00. Wife agrees to assume the outstanding balance on the Scotia Bank Mortgage and debt owed to Steadroy Charles-Subcontractor and indemnify and hold Husband harmless from said debts, thereby releasing Husband from said obligations. Wife shall seek financing and file an application for refinancing within seven (7) days to pay husband $82,000.00 and to pay off the Scotia Bank Mortgage and to satisfy the contractual obligation to Steadroy Charles-Subcontractor. The parties agree to allow Wife a total of forty-five (45) days to secure financing.
>
> If Wife cannot secure financing, Husband agrees to assume the outstanding balance of the Scotia Bank Mortgage and debt owed to Steadroy Charles-Subcontractor and indemnify and hold Wife harmless from said debts, thereby releasing Wife from said obligation. Husband shall seek financing and file an application for refinancing

> within seven (7) days to pay Wife $82,000.00 and to pay off the Scotia Bank mortgage and to satisfy the contractual obligation to Steadroy Charles-Subcontractor. The parties agree to allow husband a total of forty-five (45) days to secure financing if Wife signifies an inability to secure financing. For $82,000.00 Wife will quit claim her interest in the jointly owned Bolongo property.
>
> The parties agree that should neither party secure financing to buy the other out and settle the remaining debt, the property will be listed for sale and the parties will split the net proceeds equally.

Unable to dispel her doubts, Marlene testified that she looked through Sinclair's file cabinet the night after the mediation and found a ledger listing payments made to Charles and other workers, which seemed to confirm her suspicion that the construction contract debt was inaccurate. Marlene provided the document to her attorney who responded with a request for additional proof. The day after mediation, Marlene "asked [Charles] for receipts, invoices because he said he's owed for labor and material."

¶3 Despite her misgivings, Marlene applied for approximately $300,000 in financing to buy out Sinclair's interest in the property, pay off the mortgage, and satisfy the $204,579 debt purportedly owed to Steadroy Charles. She testified that a woman from the bank told her she qualified for an amount she could not recall. The same week, she discovered several checks from the bank account she shared with Sinclair that revealed discrepancies between the dates of payment indicated by the construction contract and the dates of payment indicated on the checks. For example, the contract indicates that Sinclair paid Charles 25% of labor costs, totaling $3,000, for completion of stage five of the seven-stage construction project on July 23, 2005, but Marlene alleges that the checks indicate that Charles received approximately 70% of labor costs, totaling $8,528, between February 5, 2005 and November 18, 2005 for completion of stage five.

¶4 Notwithstanding her discovery of the ledger and checks, Marlene joined Sinclair in filing a motion for summary judgment requesting that the court incorporate the MSA into the divorce

decree on May 22, 2014. On May 29, 2014, Charles recorded a construction lien on the Bolongo property. Marlene testified that she became aware of the lien only after the bank informed her that the lien would prevent her from qualifying for a loan. Notably, the construction contract indicates that construction was to be completed in August of 2008, but the construction lien indicates that the construction was completed on March 31, 2014.

¶5 The Superior Court granted the joint motion for summary judgment and incorporated the MSA into the June 23, 2014 divorce decree. The next day, Marlene's former counsel filed a motion to withdraw as counsel, which the Superior Court granted on July 16, 2014. Sinclair's counsel sent a letter dated July 2, 2014 to Marlene's former counsel requesting information on the status of Marlene's financing. Approximately two months later, on September 12, 2014, Sinclair filed a motion to enforce the MSA so that he could exercise his option to buy out Marlene's interest in the property after Marlene failed to secure financing within 45 days. Marlene did not respond, and the Superior Court granted the motion in a November 25, 2014 order. On December 3, 2014, Marlene's newly retained counsel moved to vacate the November 25, 2014 order and void the portions of the MSA induced by material fraud. Sinclair filed an opposition to Marlene's motion on March 30, 2015. After conducting a two-day evidentiary hearing on October 30, 2015 and November 6, 2015, the Superior Court denied Marlene's motion to void in an order entered March 7, 2016. The Superior Court reasoned that Marlene was required to show clear and convincing evidence of (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will be induced to act, (4) justifiable reliance on the misrepresentation, and (5) damages, but that she failed to show a misrepresentation or a fraudulent utterance thereof. Having concluded that elements one and two were absent, the Superior Court declined to address

the remaining elements and denied the motion to void portions of the MSA. On April 4, 2016, Marlene filed this timely notice of appeal.

II. JURISDICTION

¶6 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE. ANN. tit. 4, § 32(a). The Superior Court's March 7, 2016 order denying Marlene's motion to void portions of the MSA induced by material fraud constitutes a final order over which we have jurisdiction. *Edney v. Edney*, 64 V.I. 661, 664 (V.I. 2016) (citing *Bradford v. Cramer*, 54 V.I. 669, 671 (V.I. 2011)). We review the Superior Court's application of law *de novo* and its findings of fact for clear error. *Malloy v. Reyes*, 61 V.I. 163, 173 (V.I. 2014) (citing *Brunn v. Dowdye*, 59 V.I. 899, 904 (V.I. 2013)).

III. DISCUSSION

¶7 Marlene argues that the Superior Court incorrectly applied the law of fraud when it denied her motion to void portions of the MSA and that it clearly erred when it found an absence of fraudulent misrepresentation. Relying on *Gov't of the V.I. ex rel C.C. v. A.P.*, 36 V.I. 14 (Terr. Ct. 1995), *vacated on other grounds*, 961 F. Supp. 122, 124 (D.V.I. 1997), the Superior Court explained that a claim of fraud requires proof of "(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage[s]." The court predicated its denial of the motion to void portions of the MSA on Marlene's failure to show element one, a misrepresentation, and element two, a fraudulent utterance. Although this Court has recognized the common law fraud cause of action following *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), we have yet to determine the elements of fraudulent misrepresentation using the

factors outlined in *Banks*. *See Todmann v. People*, 59 V.I. 926, 942 (V.I. 2013) (citing *Bowry v. People*, 52 V.I. 264, 269 (V.I. 2009)); *Pollara v. Chateau St. Croix, LLC*, 58 V I. 455, 471 (V.I. 2013). When "addressing issues of Virgin Islands common law that this Court has yet to address" using the *Banks* framework, the Superior Court must engage in the three-factor analysis outlined in *Banks*. *King v. Appleton*, 61 V.I. 339, 349 (V.I. 2014). Accordingly, the Superior Court erred in relying on *C.C. v. A.P.* without conducting a *Banks* analysis. *Id.*; *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 756–57 (V.I. 2014).

¶8 Although this Court has remanded cases with instructions to conduct a *Banks* analysis when the Superior Court has applied a common law rule without using the *Banks* framework, *see Gov't of the V.I. v. Connor*, 60 V.I. 597, 604–05 (V.I. 2014), in the interests of judicial economy, we elect to examine the elements of Marlene's claim for fraudulent misrepresentation using the *Banks* framework to provide guidance and clarity. *See Frett v. People*, 58 V.I. 492, 512–13 (V.I. 2013) (choosing to reach issue to guide the Superior Court). Under *Banks*, we consider (1) the common law rule this jurisdiction has applied in the past; (2) the majority rule adopted in other jurisdictions; and most importantly (3) the soundest rule of law for the Virgin Islands. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (citing *Better Bldg. Maint. of the V.I.*, 60 V.I. at 757).

A. Elements of Claim for Rescission Based on Fraud in the Inducement

¶9 At the outset, we must distinguish between actions for fraud or deceit—sounding in tort and seeking damages—and claims to void or rescind a contract where the claimant's assent was obtained through fraud—commonly called "fraud in the inducement."[1] For, as Professor Williston has observed:

[1] As illustrated in the discussion below, using the classical legal term "fraud in the inducement" as a kind of catch-all to describe claims for relief based upon misrepresentation is somewhat misleading. Modern contract law allows parties

> Fraud may become important either for the purpose of giving the defrauded person a right to sue the fraudulent person for damages in an action of deceit, or its equivalent, or to enable the defrauded person to rescind the transaction. The requirements of the law for these two purposes are not always identical.
>
> It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract, they will certainly warrant avoidance or rescission of the bargain. The converse is not, however, true. There are cases where the belief of the deceived person is not due to such a consciously fraudulent misrepresentation as would justify an action of deceit; and yet there may be every reason why rescission should be allowed.

WILLISTON ON CONTRACTS § 69:4 (Richard A. Lord ed., 4th ed. 2003) (footnotes omitted). In this case, Marlene does not request damages; she only seeks to rescind those portions of the MSA related to the Bolongo property because of Sinclair's alleged fraudulent misrepresentation about the amount of money owed to Charles. Thus, Marlene presents a claim for rescission based upon fraud in the inducement, which is governed by contract law rather than tort law.

¶10 Historically, in evaluating claims for rescission based upon fraud in the inducement, courts in the Virgin Islands have applied the widely accepted rule, articulated in the Restatement (Second) of Contracts § 164 (1981), that "[i]f a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." *See, e.g.*, *Jackson v. Smith*, 19 V.I. 361, 365-68 (V.I. Super. Ct. 1983) (granting rescission of sale of real property where seller's misrepresentation as to boundaries of property, though not fraudulent, was material, induced the

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to maintain actions for rescission based not only upon fraudulent misrepresentations, but upon negligent, and even innocent misrepresentations as well. "The use of the words 'fraud and 'deceit,' which are frequently used by courts in discussing innocent misrepresentations, have probably exercised an unfortunate influence in the development of the law on the subject of liability for misrepresentations not made intentionally for the purpose of defrauding, because such words naturally import consciously dishonest conduct on the part of the defendant." WILLISTON ON CONTRACTS § 69:30 (Richard A. Lord ed., 4th ed. 2003). Nonetheless, for consistency with the historical use of the term, we refer in this opinion to claims for "fraud in the inducement" as an umbrella term for the various species of actionable misrepresentation—whether fraudulent, negligent, or innocent—discussed below.

buyer's assent, and was justifiably relied upon by buyer); *Homer v. Lorillard,* 6 V.I. 645, 652 (V.I. Super. Ct. 1968) (rescinding contract for sale of land upon finding "that the plaintiff was induced to enter into the contract upon a [non-fraudulent] misrepresentation of a material fact [the location and identity of the land conveyed] by defendant"); *Colon v. Gremer Dev. Co.*, 28 V.I. 83, 87 (V.I. Super. Ct.1993) (citing RESTATEMENT (SECOND) OF CONTRACTS § 164) ("For the contract to be voidable, the party must show that there was misrepresentation, that the misrepresentation was fraudulent or material, that the misrepresentation induced the recipient to enter the contract and that the recipient's reliance on the misrepresentation was reasonable."); *Castolenia v. Crafa*, No. ST-13-CV-243, 2014 WL 239427, at *6 (V.I. Super. Ct. Jan. 15, 2014) (unpublished) (citing *Colon,* 28 V.I. at 88) ("For the contract to be voidable, the party must show that: (1) there was a misrepresentation, (2) that the misrepresentation was fraudulent or material, (3) that the misrepresentation induced the recipient to enter the contract, and (4) that the recipient's reliance on the misrepresentation was reasonable."); *Connor v. Connor*, 65 V.I. 3, 3-4 (V.I. Super. Ct. 2011) (citing *Colon*, 28 V.I. at 88) (reciting same elements); *Lempert v. Singer*, 26 V.I. 326, 342 (D.V.I. 1991) ("[T]he contract is voidable only if the misrepresentation was fraudulent or material, Lempert was justified in relying on it, and the misrepresentation substantially contributed to Lempert's decision to manifest her assent to the contract.").[2]

[2] We note at least two cases from the District Court of the Virgin Islands in which the court opined that, "[i]n the Virgin Islands, a fraudulent inducement claim has essentially the same elements as common law fraud," which are: "(1) a misrepresentation of fact, opinion, intention or law; (2) knowledge by the maker of the representation that it was false; (3) ignorance of the falsity by the person to whom it was made; (4) an intention that the representations should be acted upon; and (5) detrimental and justifiable reliance." *Fitz v. Islands Mech. Contractor, Inc.*, 53 V.I. 806, 826 (D.V.I. 2010); *see also Goss v. Sun Constructors, Inc.*, No. 10-CV-65, 2011 WL 1627012, at *2 (D.V.I. Apr. 28, 2011) (unpublished) (citing *Fitz*, 53 V.I. at 826). However, these cases appear to be aberrations, conflating the contract law requirements for obtaining rescission of a contract based on fraudulent misrepresentation with the requirements for obtaining an award of damages for the common law tort of fraud or deceit. Indeed, in support of its explanation of the elements of fraud in the inducement, the court relied exclusively on previous district court cases involving tort actions for fraudulent misrepresentation and on the Restatement (Second) of Torts itself.

¶11 In applying this rule, courts in the Virgin Islands have generally used the accompanying definitions of "fraudulent" and "material" found in Restatement (Second) of Contracts § 162 (1981), which provides:

> (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion.
>
> (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

See, e.g., Pollara v. Chateau St. Croix, LLC, 58 V.I. 455, 471 (V.I. 2013) ("To succeed on a claim of fraudulent misrepresentation one must prove that the maker of the contract 'intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion.'") (citing RESTATEMENT (SECOND) OF CONTRACTS § 162); *Mills-Williams v. Mapp,* 67 V.I. 574, 587-88 (V.I. 2017) (citing *Pollara* for recitation of elements of fraudulent misrepresentation claim); *see also Jackson,* 19 V.I. at 366 (applying Restatement definition of material misrepresentation "as one which would be likely to induce a reasonable person to manifest his assent, or one which the maker knows would be likely to induce the recipient to do so"); *Colon,* 28 V.I. at 88 ("A misrepresentation is material if it likely would have induced a reasonable person to enter into the contract and is fraudulent if the person making it knew or believed that his assertion was false at the time he made it.") (citing *Redick v. Kraft, Inc.*, 745 F.Supp. 296 (E.D.

Pa. 1990).[3] Virgin Islands courts have also used the Restatement's definition of misrepresentation: "an assertion that is not in accord with the facts." *See Lempert*, 26 V.I. at 342 (citing RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981)).

¶12 Additionally, a substantial majority of other jurisdictions apply the same or substantively similar rules in evaluating claims for rescission based upon fraud in the inducement, often directly citing the Restatement in support of these longstanding and widely-accepted principles of contract law.[4] As Professor Williston explains:

> Most jurisdictions now recognize the existence of a claim for constructive or equitable fraud, with respect to which a finding of dishonesty or intent to deceive is not required; reckless, negligent, and in certain circumstances innocent misrepresentations will support relief in a constructive fraud case.
>
> For purposes of enforceability of contracts the Restatement (Second) has incorporated the concept of constructive fraud, and culpability without evil intent, by providing that an assertion constitutes a misrepresentation if it is either

[3] The *Colon* case, like many other decisions of Virgin Islands courts, recited truncated, but substantially similar versions, of the definitions of "fraudulent" and "material," borrowed from the Eastern District of Pennsylvania, which were, in turn, originally based upon the provisions of the Restatement. *See Redick*, 745 F. Supp. at 301 (citing *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 141-42 (Pa. Super. Ct. 1985) (citing RESTATEMENT (SECOND) OF CONTRACTS § 162)).

[4] *See, e.g.*, *Cousineau v. Walker*, 613 P.2d 608, 613 (Alaska 1980) (recognizing that "a misrepresentation may be grounds for voiding a contract if it is either fraudulent or material") (citing RESTATEMENT (SECOND) OF CONTRACTS § 164); *Wood v. Kalbaugh*, 39 Cal. App. 3d 926, 930 (Ct. App. 1974) ("As the Restatement of Contracts puts it, the '. . . materiality of the mistake induced by innocent misrepresentation is essential while materiality is not essential if a mistake induced by fraud produces the intended consequences.'"); *Munroe v. Great Am. Ins. Co.*, 661 A.2d 581, 584 (Conn. 1995) ("As a matter of common law, a party to a contract … may rescind that contract and avoid liability thereunder if that party's consent to the contract was procured either by the other party's fraudulent misrepresentations, or by the other party's nonfraudulent material misrepresentations."); *Sarvis v. Vermont State Colleges*, 772 A.2d 494, 498 (Vt. 2001) ("It is well established that a party induced into a contract by fraud or misrepresentation can rescind the contract and avoid liability for any breach thereon… Where the procurer of a statement knew it was false, materiality is not required… Materiality is required where the mistake or false statement was not intentionally made… and may be proved where the statement is 'likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce' such assent." (citing RESTATEMENT (SECOND) OF CONTRACTS § 162(2)); *Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982) (quoting sections of Williston on Contracts and the Restatement on fraud in the inducement and noting that "[m]ost American jurisdictions which have addressed this issue appear to recognize that an innocent material misrepresentation by a vendor which induces the sale of the property is ground for rescission of the contract.") (collecting cases); *Barrer v. Women's Nat. Bank*, 761 F.2d 752, 757 (D.C. Cir. 1985) ("It is well established that misrepresentation of material facts may be the basis for the rescission of a contract, even where the misrepresentations are made innocently, without knowledge of their falsity and without fraudulent intent.") (collecting cases).

> fraudulent or material, and in turn many jurisdictions have adopted the position set forth in the Restatement (Second).

WILLISTON, *supra*, § 69:2 (footnotes omitted) (collecting cases).

¶13 Several federal Courts of Appeal have also relied heavily upon, and in some cases, expressly adopted the relevant Restatement provisions as the basis for the development of the federal common law governing claims for rescission on grounds of fraud in the inducement in ERISA[5] cases.[6] In *Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 967 (1st Cir. 1991), the court wrote:

> Our research indicates that Massachusetts law regarding fraud in the inducement follows the widely-accepted model set forth in Restatement (Second) of Contracts § 164 (1979) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying the contract is voidable by the recipient"); *see Shaw's Supermarket, Inc. v. Delgiacco*, 410 Mass. 840, 575 N.E.2d 1115 (1991) (citing § 164 for proposition that a contract induced by fraud is voidable); *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 563 N.E.2d 188 (1990) (citing § 164). We find Massachusetts contract principles governing fraud in the inducement an appropriate model from which to fashion federal common law principles governing fraud in the inducement.

See also Sec. Life Ins. Co. of Am. v. Meyling, 146 F.3d 1184, 1191 (9th Cir. 1998) (concluding that insurance contracts governed by ERISA may be rescinded based upon material false representations because under traditional contract law "an agreement can be rescinded when it is entered into on the basis of a fraudulent or material misrepresentation.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981)) (collecting cases); *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 943 (6th Cir. 1997) (adopting common law principles governing fraud in the inducement

[5] "ERISA" is an acronym for the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

[6] "Under ERISA, Congress has authorized the courts 'to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in [the Act].'" *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1191 (9th Cir. 1998), as amended on denial of reh'g and reh'g en banc (Sept. 14, 1998).

as set forth in *Tingle v. Pacific Mutual Insurance Co.*, 837 F.Supp. 191 (W.D. La. 1993), originally borrowed from the RESTATEMENT (SECOND) OF CONTRACTS § 164); *Shipley v. Arkansas Blue Cross & Blue Shield*, 333 F.3d 898, 902 (8th Cir. 2003) (finding Restatement provisions governing rescission for fraud in the inducement consistent with general contract and insurance law principles, and adopting relevant provisions as federal common law).

¶14 Given the longstanding and widespread acceptance of these traditional principles of contract law governing claims for rescission based upon fraud in the inducement, we do not hesitate to conclude that sections 162 and 164 of the Restatement (Second) of Contracts represent the soundest rules of decision for the Virgin Islands. These rules have been regularly applied to evaluate rescission claims in courts of the Virgin Islands for the last fifty years, and we see no reason to deviate from that practice now. *See, e.g.*, *Homer v. Lorillard*, 6 V.I. 645 (V.I. Super. Ct. 1968); *Colon v. Gremer Dev. Co.*, 28 V.I. 83 (V.I. Super. Ct. 1993); *Connor v. Connor*, 65 V.I. 3 (V.I. Super. Ct. 2011).

¶15 Moreover, allowing parties to rescind contracts on the basis of either fraudulent or material misrepresentations best promotes the interests of justice and equity by providing a means of relief for those induced to enter into contracts by another party's misrepresentations, fraudulent or otherwise. As explained in a comment to the Restatement: "a non-fraudulent misrepresentation does not make the contract voidable unless it is material, while materiality is not essential in the case of a fraudulent misrepresentation. One who makes a non-fraudulent misrepresentation of a seemingly unimportant fact has no reason to suppose that his assertion will induce assent. But a fraudulent misrepresentation is directed to attaining that very end, and the maker cannot insist on his bargain if it is attained, however unexpectedly, as long as the additional requirements of inducement and justifiable reliance are met." RESTATEMENT (SECOND) OF CONTRACTS § 164 cmt. b.

Thus, permitting rescission of contracts, or other recovery, on the basis of fraudulent but immaterial misrepresentations is, in a sense, punitive as the right of rescission is justified by the fraudulent party's culpable mind.

¶16 On the logic of permitting relief based upon material but non-fraudulent misrepresentations, Professor Williston cogently observes:

> The inherent justice of the severer rule of liability that in some cases at least holds a speaker liable for damages [or permits rescission] for false representations, although his or her intentions were innocent and his or her statements honestly intended, is equally clear. However honest one's state of mind, he or she has induced another to act, and damage has been caused thereby.
>
> If to this be added that the plaintiff had good reason to attribute to the defendant accurate knowledge of what he or she was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding defendant liable.

WILLISTON, *supra*, § 69:30.

¶17 Therefore, we hold that to prevail on a claim to rescind a contract based upon fraud in the inducement, a party must show that: (1) there was a misrepresentation, (2) the misrepresentation was fraudulent or material, (3) the misrepresentation induced the recipient to enter the contract, and (4) that the recipient's reliance on the misrepresentation was reasonable. A misrepresentation, in this context, is "an assertion that is not in accord with the facts."[7] *See Lempert*, 26 V.I. at 342 (citing RESTATEMENT (SECOND) OF CONTRACTS § 159). In turn, a misrepresentation is fraudulent where the maker "intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have

[7] Actionable misrepresentations may also include, in certain circumstances, concealment or even non-disclosure. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 160, 161. However, in this case, Marlene seeks rescission based upon an alleged, affirmative misrepresentation as to the amount of money owed to Charles, and therefore we need not address these issues here.

the basis that he states or implies for the assertion. *See Pollara*, 58 V.I. at 471. And a misrepresentation is material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." RESTATEMENT (SECOND) OF CONTRACTS § 162(2).

B. Applicable Burden of Proof

¶18 Having established the elements of a claim for rescission based upon fraud in the inducement, we now address the applicable burden of proof. In the Virgin Islands, the burden of proof in civil cases is governed by title 5, section 740(5) of the Virgin Islands Code. Accordingly, to determine the applicable burden of proof we look to the plain language of section 740(5). *Engeman v. Engeman*, 64 V.I. 669, 675 (V.I. 2016). Title 5, section 740(5) provides, in relevant part:

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

(emphasis added). Plainly read, section 740(5) establishes the general rule that "all civil claims brought under Virgin Islands law are governed by a preponderance of the evidence standard." *Addie v. Kjaer*, 52 V.I. 766, 768 (D.V.I. 2009). However, section 740(5) must be read in context, 1 V.I.C. § 42, and the introductory clause provides that this general rule applies "on all proper occasions." To determine the significance of the phrase "on all proper occasions," we first look to the meaning of the adjective "proper," which is defined as "[a]ppropriate, suitable, right, fit, or correct." BLACK'S LAW DICTIONARY 1410 (10th ed. 2014); *accord Bhd. of Ry. & Steamship Clerks*

v. Ry. Express Agency, 238 F.2d 181, 185 (6th Cir. 1956); *Davis v. Smith*, 583 S.W.2d 37, 42 (Ark. 1979). "Proper" modifies the noun "occasion," which is defined as "a favorable opportunity." THE MERRIAM-WEBSTER DICTIONARY 344 (2005); *accord United States v. Moreno-Arredondo*, 255 F.3d 198, 204 (5th Cir. 2001). Although we can glean from these definitions that the general rule should apply at a suitable or appropriate opportunity, these definitions do not shed light on what a "proper occasion" is in the context of the statute. Accordingly, we find it necessary to look to other jurisdictions interpreting similar statutes to provide guidance. *See Ottley v. Estate of Bell*, 61 V.I. 480, 494 n.10 (V.I. 2014) ("When statutes from other jurisdictions are substantially similar to a Virgin Islands statute, this Court may look for guidance at how that jurisdiction's courts have interpreted the similar statute." (citations omitted)).

¶19 The Supreme Court of Alaska, interpreting a statute similar to section 740(5),[8] deviated from the preponderance of evidence standard when "public policy dictate[d] that a higher degree of proof than a preponderance of the evidence should be required." *Waks v. State*, 375 P.2d 136, 137-38 (Alaska 1962) (holding that clear and convincing evidence was required as a matter of policy to prove relationship to decedent to claim property escheated to the state in spite of the general preponderance of evidence statute). Likewise, the Supreme Court of Oregon has interpreted "on all proper occasions" to allow for the use of the higher clear and convincing burden of proof "in cases that are between 'civil' and 'criminal' and where what is to be established is

[8] "[Alaska Compiled Laws Annotated (1949)] Section 58-5-1 . . . relating to the instructions to be given by the court to the jury on all proper occasions, provides in the Fifth subdivision thereof as follows: 'That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory the finding shall be according to the preponderance of the evidence.'" *Waks*, 375 P.2d at 137.

akin to guilt."[9] *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 737 P.2d 595, 603 (Or. 1987) (quoting *Mut. of Enumclaw Ins. Co. v. McBride*, 667 P.2d 494, 498 (Or. 1983)). And although this Court has never specifically addressed 5 V.I.C. § 740(5), we have deviated from the preponderance of evidence standard and required proof by clear and convincing evidence in cases involving adverse possession, *Mahabir v. Heirs of George*, 63 V.I. 651, 659 (V.I. 2014), and civil contempt, *In re M.R.*, 64 V.I. 333, 344 (V.I. 2016). Accordingly, we conclude that the phrase "on all proper occasions . . . leav[es] some discretion for [courts] to decide which cases" are properly considered under the preponderance of evidence standard. *See Riley Hill*, 737 P.2d at 605 (internal quotation marks omitted).

¶20 To determine what degree of proof should be required, we examine both the purpose and function of burdens of proof in general, as well as the specific reasoning employed by courts to justify the requirement that claims of fraud must be proved by clear and convincing evidence. The Supreme Court of the United States has explained: "The function of a standard of proof… is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 424 (1979) (citing *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

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[9]Oregon Revised Statutes § 10.095 provides, in relevant part:

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

> Historically, the "clear and convincing" standard of proof was first applied in equity to claims [such as fraud] which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience. Conceding the validity of policies which the parol evidence rule and the Statutes of Wills and Frauds were designed to carry out, the chancery courts compromised between becoming a mecca for the trumped-up prayer for relief and refusing altogether to mitigate the stern fulfillment of these policies in the law courts, by granting relief only in cases where the evidence in support of this type of claim was 'clear and convincing.'

Riley Hill, 737 P.2d at 601 (citing Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence, 60 HARV. L. REV. 111, 112 (1946)). Many courts continue to adhere to this historical distinction between legal claims for fraud in the inducement seeking damages—which may be proven by a preponderance of the evidence—and equitable claims for rescission based upon fraud in the inducement—which require proof by clear and convincing evidence. *See, e.g.*, *Andrew v. Power Mktg. Direct, Inc.*, 978 N.E.2d 974, 988 (Ohio Ct. App. 2012) ("A party seeking an equitable remedy, such as declaratory judgment, reformation or rescission of a contract, must prove a fraud claim with clear and convincing evidence, while a party seeking a monetary remedy must prove fraud by the preponderance of the evidence.") (citing *Household Finance Corp. v. Altenberg*, 214 N.E.2d 667 (Ohio 1966)); *Mix v. Neff*, 473 N.Y.S.2d 31, 33 (N.Y. App. Div. 1984) (citing *Adams v. Gillig*, 92 N.E. 670 (N.Y. 1910) ("When an opponent of a contract alleges fraud in the inducement, whether as an affirmative defense or by way of a counterclaim seeking rescission, he must sustain the burden of persuasion… which we interpret to be clear and convincing evidence rather than only a fair preponderance of the credible evidence."); *Elchlepp v. Hatfield*, 294 S.W.3d 146, 150 (Tenn. Ct. App. 2008) ("When a claimant is alleging the tort of fraud in an action for damages, the claimant is obligated to meet a preponderance of the evidence burden of proof. When one is trying to set aside or reform a written

instrument then fraud must be proven by clear and convincing evidence.") (internal citations omitted).

¶21 In the modern era, many courts, including the Supreme Court of the United States, have articulated a different justification for requiring a heightened degree of proof for certain types of claims, including fraud. In *Addington v. Texas*, Chief Justice Burger wrote that the

> intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless is no stranger to the civil law. One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases.

441 U.S. at 424 (citing *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization); MCCORMICK ON EVIDENCE § 320 (1954); 9 WIGMORE, EVIDENCE § 2498 (3d ed. 1940)). These courts emphasize that fraud is akin to guilt in that it "stains the person accused with a mark of dishonesty," *Treider v. Doherty & Co.*, 527 P.2d 498, 500 (N.M. 1974), and it "imputes venality and corruption to the person charged." *Gibson v. Smith*, 422 S.W.2d 321, 328 (Mo. 1968). This rationale is equally applicable to claims at law for damages and claims in equity for rescission, as regardless of the remedy sought, the stigma attached to one found liable for fraudulent conduct is the same.

¶22 Significantly, in the context of claims for rescission based upon fraud in the inducement, both the historical and the modern approach lead to the same conclusion: that these claims must

be proved by clear and convincing evidence.[10] This rule ensures that no person is labeled by a court of law as the perpetrator of a fraud—a label carrying lasting and potentially detrimental consequences for both personal and professional life—upon the factfinder's mere determination that the defendant more likely than not committed the fraud. Rather, as the Supreme Court of Oregon observed in analyzing a statute nearly identical to 5 V.I.C. § 740(5), fraud must be proved by clear and convincing evidence because "[a] person who has been found 'guilty' of deceiving or cheating someone certainly has been found 'guilty' of conduct which carries the same stigma of guilt whether the conduct is a criminal or civil act of deceit." *Riley Hill*, 737 P.2d at 605. Therefore, considering both the historical and modern application of the clear and convincing standard of proof, both in the Virgin Islands and in other jurisdictions across the nation, we conclude that claims for rescission of contracts based upon fraudulent misrepresentation present a "proper occasion" to deviate from the general preponderance of the evidence standard provided in section 740(5) and demand a heightened degree of proof by clear and convincing evidence.[11]

[10] Two jurisdictions have held that while claims for damages based on fraud must be proved by clear and convincing evidence, claims for rescission based on fraud need only be proved by a preponderance of the evidence; effectively reversing the historical rule. *See In re Estate of McKenney*, 953 A.2d 336, 342 (D.C. 2008) ("A further distinction between the two remedies is that the right to rescission may be proven by the normal preponderance of the evidence standard common to contract actions.") (citing *Lockwood v. Christakos*, 181 F.2d 805, 807 (D.C. Cir. 1950); 17 AM.JUR.3D PROOF OF FACTS 287, § 9 at 311 (2000)); and *Sarvis v. Vermont State Colleges*, 772 A.2d 494, 498 (Vt. 2001) ("Unlike a fraud action seeking damages in tort, a party seeking to rescind a fraudulently induced contract is not required to prove its case by clear and convincing evidence.") (citing *Union Bank v. Jones*, 411 A.2d 1338, 1342 (Vt. 1980)). However, these cases, and the cases they cite in support, contain no discussion or analysis of either the historical or modern use of the clear and convincing evidence standard and provide no reasoning in support of their approach. As such, we find these decisions unpersuasive and reject the approach taken by the District of Columbia and Vermont.

[11] On appeal, Marlene argues only that rescission is justified based upon Sinclair's *fraudulent* misrepresentation and does not argue or suggest that she is entitled to relief based on a non-fraudulent— that is, negligent or innocent—but material misrepresentation. Accordingly, we need not decide here whether claims for rescission based upon non-fraudulent, material misrepresentations should be proved by a preponderance or by clear and convincing evidence.

C. Motion to Void MSA

¶23 Keeping in mind the elements and burden of proof applicable to Marlene's claim, we now review the Superior Court's denial of Marlene's motion to void portions of the MSA that she claims to have been induced by material fraud. As discussed above, to prevail on a claim to rescind a contract based upon fraud in the inducement, a party must prove by clear and convincing evidence that: (1) there was a misrepresentation, (2) the misrepresentation was fraudulent or material, (3) the misrepresentation induced the recipient to enter the contract, and (4) that the recipient's reliance on the misrepresentation was reasonable. Marlene argues that the Superior Court's finding "that there was no fraudulent misrepresentation is without basis in the evidence." Specifically, Marlene contends that at least five pieces of circumstantial evidence, when considered together as a whole, demonstrate by clear and convincing evidence that Sinclair fraudulently misrepresented the amount of money owed to Charles under the construction agreement in an effort to prevent her from exercising her option to secure the property under the Bolongo provision of the MSA. They are: (1) Marlene's personal observation that the house was built with cheap labor; (2) the "internally inconsistent" construction contract that Sinclair presented at mediation; (3) a series of cancelled checks allegedly showing that Charles was paid more for stage five of construction than the amount reflected in the construction contract; (4) the belated filing of an unenforceable and purportedly forged construction lien against the property;[12] and (5) the longstanding, close, personal relationship between Sinclair and Charles.

[12] Pursuant to the Virgin Islands Code, "[a] claimant's lien does not attach and shall not be enforced unless he has, not later than 90 days after his final furnishing of materials or services, recorded a notice of lien." 28 V.I.C. § 264. Charles filed the construction lien on May 29, 2014, but the construction agreement provides that construction was to be completed in 2008. Sinclair alleges that Charles performed additional labor in 2014 to repair property that was damaged by evicted tenants. Marlene claims that she repaired the property, not Charles. But even if Charles did repair the property in 2014, these repairs were independent of the work contemplated in the construction contract between Sinclair and Charles and cannot be used to extend the time for filing a construction lien for the work detailed in the

In denying Marlene's motion, the Superior Court explained:

> While Ms. Wilkinson raised three salient points to refute the debt owed to the contractor—that of cheap labor used, the unreasonableness of Mr. Wilkinson making repairs to the property while she lived there post-divorce, and the language in the Construction Agreement—none of the bases proffered demonstrate misrepresentation or fraudulent utterance thereof…
>
> This [c]ourt having found an absence of fraudulent misrepresentation, it need not address the issues of inducement, justifiable reliance or damages since the remaining elements are predicated upon the presence of elements 1 and 2.

¶24 Although the Superior Court is correct that the first step in evaluating a claim for rescission based on fraud in the inducement is to determine if any misrepresentation was in fact made, the court failed to identify either the series of cancelled checks, the late filing of the construction lien, or the longstanding relationship between Sinclair and Charles as evidence relevant to making that determination. In doing so, the Superior Court erred, either by ignoring this evidence presented by Marlene, or, if the court found that the evidence was irrelevant, inadmissible, or simply not credible, by failing to articulate and explain that finding. *See Wessinger v. Wessinger*, 56 V.I. 481, 488-89 (V.I. 2012) (noting that "trial court's failure to provide sufficient findings of fact on the record frustrates appellate review" and generally requires remand) (citing *Dennie v. Swanston*, 51 V.I. 163, 168 n.1 (V.I. 2009)); *see also In re D.A.B.*, 63 V.I. 623, 628 (V.I. 2015) (explaining that "it [is] the duty of the Superior Court, when sitting as the finder of fact, to resolve [any] factual dispute").

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construction agreement. *See Massey Asphalt Paving, Inc. v. Lee Land Dev., Inc*., 203 So. 3d 1271, 1275 (Ala. Civ. App. 2016) (holding that contractor had performed the last item of work upon initial completion of the paving work in April 2008 and not upon completion of the corrective work); *Huffman Wholesale Supply Co. v. Terry*, 399 S.W.2d 658, 660 (Ark. 1966) ("If the purchases made in September were for material not anticipated in the original construction of the house or was for repair on the original construction of the house, then the purchase of such material would not extend the lien time."); *Sam Rodgers Props., Inc. v. Chmura*, 61 So.3d 432, 438 (Fla. Dist. Ct. App. 2011) ("[R]emedial work such as warranty work, corrective work, [or] repair work . . . does not extend the time for filing a claim of lien.").

¶25 Although it is true that fraud is rarely susceptible to direct proof and must normally be proved by circumstantial evidence, *see, e.g., Wilson v. S & L Acquisition Co.*, 940 F.2d 1429, 1440 (11th Cir. 1991) and *China Resource Products (U.S.A.) Ltd. v. Fayda Intern., Inc*., 856 F.Supp. 856, 863 (D. Del. 1994), Marlene's case is somewhat unusual in that she seeks to establish the existence of the misrepresentation itself based upon purely circumstantial evidence. She has no direct evidence to support her claim that the amount of money owed to Charles for work on the Bolongo property is anything different than the amount shown on the construction contract. Instead she asks the court to infer that the contract produced by Sinclair at mediation fraudulently misrepresented the amount owed to Charles based on a series of allegedly suspicious documents, observations, and occurrences. According to Marlene, this evidence, when considered together, constitutes clear and convincing proof that Sinclair, with the cooperation of his longtime friend Charles, inflated the amount of money owed on the construction contract and then filed an unenforceable construction lien to prevent Marlene from exercising her right to purchase the Bolongo property, even if no single piece of evidence, considered in isolation, would satisfy this burden.[13] In a case such as this, where proof is based upon the cumulative probative value of various discrete pieces of circumstantial evidence, it is critically important for the trial court to clearly examine and explain its findings with respect any and all evidence presented. *See Wessinger*, 56 V.I. at 488-89.

[13] Because of the nature of the evidence presented by Marlene, much, if not all, of the circumstantial evidence she relies on to establish the first element of her claim—that there was misrepresentation—is the same evidence she relies on to satisfy the second element—that the misrepresentation was fraudulent. In this sense, on a theory of fraudulent misrepresentation, the first and second elements of Marlene's claim will likely rise or fall together. However, this would not necessarily be the case if Marlene sought rescission of the contract on a theory of non-fraudulent but material misrepresentation.

¶26 For example, although the facial inconsistencies in the construction contract standing alone may not constitute clear and convincing evidence of misrepresentation, if the court were to credit Marlene's testimony that the house was built using cheap labor and that Charles and Sinclair were close, longtime friends, the court might find it reasonably likely that the contract presented at mediation did not accurately reflect the costs of construction. And if, in addition, the court were to credit Marlene's testimony that the construction lien was actually written by Sinclair and further find that the late filing of the purportedly forged lien was intended solely to prevent Marlene from obtaining financing, then the court might reasonably conclude that the contract, like the lien, was drafted long after construction was completed, not as an accurate reflection of the transaction between Charles and Sinclair, but as part of a strategy calculated to prevent Marlene from exercising her right of purchase under the MSA. Thus, while no single piece of evidence presented may be enough, if the court were to credit each item of evidence offered by Marlene and draw the relevant inferences as she urges the court to draw them, the court could reasonably find that the evidence introduced by Marlene, when considered as a whole, clearly and convincingly establishes that the construction contract fraudulently misrepresented the amount of money owed to Charles.

IV. CONCLUSION

¶27 Because the Superior Court failed to consider each piece of evidence presented in support of Marlene's claim, we reverse the court's March 7, 2016 order and remand this matter for the court to make specific findings of fact with respect to each of the five items of evidence presented and to explain its determinations concerning the credibility and weight of that evidence. After making its findings of fact, the Superior Court shall apply the law of fraudulent inducement outlined above to determine whether, considering all the evidence together, Marlene has demonstrated by clear and convincing evidence that Sinclair misrepresented the amount of money

owed to Charles, and if so, whether she has satisfied the remaining elements of her claim for rescission based upon fraud in the inducement.

Dated this 26th **day of March, 2019.**

BY THE COURT:

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

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court