IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

BERYL BERTRAND, as Administratrix of The Estate of JACQUES-PIERRE BERTRAND, Plaintiff, vs. CORDINER ENTERPRSIES, INC. d/b/a CORDINER AND ASSOICATES; MICHAEL P. CORDINER; MYSTIC GRANITE AND MARBLE, INC.; ISLAND TILE AND MARBLE, LLC d/b/a VIRGIN ISLANDS GRANITE AND & MARBLE; AND ABACO MACHINES USA, INC., Defendants.	CIVIL NO. ST-08-CV-457

NOTICE OF ENTRY OF (2) MEMORDANUM OPINION AND (2) ORDER

TO: DAVID A. BORNN, ESQUIRE
ADAM THORP, ESQUIRE
PAUL M. PLATTE, ESQUIRE
RICHARD H. DOLLISON, ESQUIRE
SIMONE FRANCIS, ESQUIRE
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CARL A. BECKSTEDT III, ESQUIRE
EMILY SHOUP, ESQUIRE
MARK W. WILCZYNSKI, ESQUIRE
VENETIA VELASQUEZ, ESQUIRE
ALL JUDGES AND MAGISTRATES OF SUPERIOR COURT V.I.
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(see next page)

Please take notice that on June 27, 2011 (2) MEMORANDUM OPINION and (2) ORDER'S dated June 24, 2011, were entered by the Clerk in the above-entitled matter.

Dated: June 27, 2011

Venetia H. Velazquez, Esq.
Clerk of the Court

M. Skeete
MARSHA SKEETE
COURT CLERK II

FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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BERYL BERTRAND, as Administratrix of the Estate of JACQUES-PIERRE BERTRAND, Plaintiff,	**CIVIL NO. ST-08-CV-457**
v.	**ACTION FOR SURVIVAL AND WRONGFUL DEATH**
CORDINER ENTERPRISES, INC. d/b/a CORDINER AND ASSOCIATES; MICHAEL P. CORDINER; MYSTIC GRANITE AND MARBLE, INC.; ISLAND TILE AND MARBLE, LLC d/b/a VIRGIN ISLANDS GRANITE & MARBLE; and ABACO MACHINES USA, INC., Defendants.	**JURY TRIAL DEMANDED**

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CARROLL, Judge

MEMORANDUM OPINION

(Filed: June ____, 2011)

Plaintiff Beryl Bertrand[1] ("Plaintiff") moves to compel[2] a non-party to respond to deposition questions and to produce documents. Although Island Tile and Marble, LLC, objects that Plaintiff's subpoena was defective, the Court finds that the subpoena was not fatally flawed. The Court will grant the Motion to Compel as to some, but not all, of the deposition questions, and as to all requests for document production.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2008, Jacques-Pierre Bertrand ("Bertrand") was injured while working for Island Tile. He died of those injuries on April 29, 2008. Plaintiff originally brought suit against not only the Defendants named above but also against Island Tile and Marble, LLC, a Virgin Islands Company.

On March 9, 2009, Plaintiff and Island Tile filed a Stipulation of Dismissal, agreeing to dismiss all of Plaintiff's claims against Island Tile. On March 30, 2010, the Court approved the Stipulation, noting that no party had objected to it, and dismissed all of Plaintiff's claims against Island Tile. That Order was entered on April 6, 2010.

On December 11, 2010, Plaintiff subpoenaed Island Tile to attend a deposition on January 10, 2011, and to produce certain documents and records at the deposition. On December 20, 2010, Island Tile notified Plaintiff that it generally objected to the subpoena because it did not have sufficient time to prepare for the deposition and because it felt it was overly broad and burdensome. Island Tile did not, however, move to quash or modify the subpoena. On December 28, 2010, Island Tile forwarded to Plaintiff a list of specific objections and requested

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[1] Bertrand is represented in this action by Paul M. Platte, Esq., of Rogers, Townsend & Thomas, PC, and David Bornn, Esq., and Gregory Adam Thorp, Esq., of The Bornn Firm, PLLC. Before its dismissal in this action, Island Tile was represented by W. Mark Wilczynski, Esq. Attorney Wilczynski has made a special appearance in this action on behalf of Island Tile to respond to the Motion to Compel. Michael Cordiner and Cordiner Enterprises are represented by David J. Cattie, Esq., of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

[2] The Motion to Compel was filed on April 8, 2011. As discussed below, Island Tile did not file any response to the Motion. Instead, it embodied its objections and legal positions within the LRCi 37.2 Stipulation.

$1,500 to cover the costs of production. Plaintiff paid $1,250 on December 29, 2010. Michael Cordiner, Island Tile's sole owner and president, appeared on behalf of Island Tile at the deposition on January 10, 2011.

On February 17, 2011, Plaintiff sent Island Tile a letter requesting to meet and confer regarding deposition questions she felt had not been fully answered, and documents that she alleged had not been produced according to the subpoena. Counsel for Island Tile and Plaintiff conferred telephonically about the discovery disputes on February 25, 2011. Island Tile wrote Plaintiff a letter on February 28, 2011, stating that it was still assessing the breadth of the discovery requests. On March 24, 2011, Plaintiff drafted a LRCi 37.2 Stipulation, which Island Tile's counsel signed. Island Tile responded to Plaintiff's concerns over its representative's deposition answers within the body of the Stipulation. On April 8, 2011, Plaintiff filed this Motion to Compel, appending the LRCi 37.2 Stipulation. Island Tile did not file a response.

DISCUSSION

I. PLAINTIFF'S FAILURE TO INCLUDE THE ENTIRE TEXT OF RULE 45(c) AND 45(d) DOES NOT RENDER HER SUBPOENA FATALLY DEFECTIVE.

A. Federal Rule 45 Is Not Inconsistent With Superior Court Rule 11.

Island Tile objects to Plaintiff's Motion to Compel in part because it claims that Plaintiff's subpoena was defective. Rule 45 of the Federal Rules of Civil Procedure requires subpoenas to include the text of Rule 45(c) and 45(d)[3] to ensure that subpoenaed persons are aware of their rights to challenge the subpoena and otherwise protect their interests. Superior Court Rule 11, which governs subpoenas issued by this Court, has no such requirement. Rule 11(a) calls for every subpoena to state:

> the name of the court and the title, if any of the proceeding, and if the witness is to testify on behalf of the Government, it shall so note, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.[4,5]

Therefore, the Court must determine whether the two rules are inconsistent; for if they are, Federal Rule 45 is displaced[6] and Island Tile's objection must fail.

The Court finds that the Federal Rule supplements the Superior Court Rule and the two are not inconsistent. The Court recognizes that "when two rules or statutes are capable of

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[3] FED. R. CIV. P. 45(a)(1)(A)(iv).
[4] SUPER. CT. R. 11.
[5] Superior Court Rule 11(c) provides for the issuance of subpoenas for the production of documents and evidence, as well as testimony.
[6] The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure of the District Court of the Virgin Islands apply to matters before this Court only when they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

coexistence, it is the duty of the courts to regard each as effective."[7] Thus, the question becomes whether Federal Rule 45(a)(1)(A)(iv) is capable of coexisting with Superior Court Rule 11.

There is an argument[8] that they are not capable of coexisting. Superior Court Rule 11 has a subsection addressing the form of subpoenas.[9] Unlike Federal Rule 45(a), Rule 11 does not require any text to inform non-parties of their rights. In *Corraspe v. People*,[10] the Supreme Court of the Virgin Islands held that because the Superior Court Rule addressing plea negotiations[11] did not include a prohibition on judicial involvement, while the Federal Rule of Criminal Procedure[12] did include such a prohibition, the Federal Rule was inconsistent and the Superior Court Rule governed.

However, this situation differs from the circumstances in *Corraspe*. In *Corraspe*, the Supreme Court of the Virgin Islands recognized that the Superior Court Rule regarding criminal pleas was enacted at a time when the Federal Rule included a prohibition on judicial involvement in plea negotiations. Therefore, the drafters of the Superior Court Rule were aware of the current practices regarding plea negotiations and yet created a new rule to address the same topic. This led the Supreme Court to conclude that the drafters intended to displace the Federal Rule, and specifically intended not to include the proscription on judicial involvement.

Superior Court Rule 11, on the other hand, was created well before the Federal Rule was amended to include the textual requirement in Rule 45(c) and (d). Superior Court Rule 11 was first enacted in 1957 and last amended in 1966. Federal Rule 45 was amended to include the text requirement of 45(a)(1)(A)(iv) in 1991. Even in 1994, when the drafters generally amended the Rules "to reflect modern conditions and the increased judicial economy granted by Congress to the people of the Virgin Islands,"[13] they did not take any action to amend Superior Court Rule 11 or indicate that Federal Rule 45(a)(1)(A)(iv) should be displaced. Because the drafters were undoubtedly well aware of Rule 45(a)(1)(A)(iv)'s textual requirement at the time, their non-action could only be intentional. Indeed, in the nearly twenty years since those general amendments in 1994, the Court has never expressly or implicitly displaced that requirement. This supports the conclusion that the two rules may, in fact, coexist, and that the Federal Rule supplements, rather than displaces, the Superior Court Rule.

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[7] *Gov't of the V.I. v. Santiago*, 798 F. Supp. 274, 281 (D.V.I. 1992) (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976)) (reconciling LRCi 16.5 and 16.5A with FED. R. CRIM. P. 35).

[8] This argument was not raised by either party. In fact, neither party addressed the applicability of Superior Court Rule 11.

[9] SUPER. CT. R. 11(a).

[10] 53 V.I. 470, 480-83 (2010).

[11] SUPER. CT. R. 126.

[12] FED. R. CRIM. P. 11.

[13] *Preface to the First Gen. Amends. to the Rules of the Sup. Ct. of the U.S. Virgin Islands* (as quoted in *Corraspe*, 53 V.I. at 481-82).

B. Additional Analysis Under the Doctrine of Preemption Compels the Same Conclusion.

These considerations lead the Court to the conclusion that Superior Court Rule 11(a) is not inconsistent with Federal Rule 45(a)(1)(A)(iv). Even if these considerations were insufficient, the Court is persuaded by additional analysis related to the doctrine of preemption.[14] The Court finds that the doctrine of preemption might generally be helpful to the analysis of Superior Court Rule 7, which, as noted above, adopts the Federal Rules of Civil Procedure and Evidence unless they are inconsistent with Superior Court Rules.

Under the doctrine of preemption, the general rule that state and federal laws may co-exist is limited by the recognition that in our federal system, federal laws preempt state laws when they conflict.[15] One indication of such a conflict exists when the federal law occupies the field, indicating an attempt by Congress to foreclose the possibility of state regulation in that area of law.[16]

By analogy, a Superior Court Rule might regulate an area of procedure so pervasively that there is no room for supplementation by the Federal Rule.[17] In such a circumstance, the Superior Court Rule would govern, as required by Superior Court Rule 7. Here, Superior Court Rule 11(a) is not so pervasive in its breadth that it is unreasonable to believe it left room for supplementation by the Federal Rule. It addresses what a subpoena form must, *at a minimum*, state.[18] The Federal Rules may change from time to time, yet Rule 11's minimum requirements will stay fixed. But just because the Superior Court Rule stated a minimum requirement does not mean that the drafters intended that no supplementation would be possible. As experience led the drafters of the Federal Rules to understand that non-parties, especially those without counsel, required more information with which to protect themselves in an era of extensive and expensive discovery, the Federal Rules implemented the textual requirement.[19] This requirement is not preempted by the minimum form requirements set forth by the Superior Court Rule.

C. Plaintiff's Failure to Include the Complete Text of Rule 45(c) and 45(d) on Her Subpoena Does Not Render It Fatally Flawed.

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[14] The Court engages in this analysis as an independent basis for coming to the same conclusion stated in Section A, above.

[15] *See, e.g.*, *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 366 (3d Cir. 1999) (observing that, despite the fact that there are a variety of opportunities to assume that the federal rule preempts state law, such a conclusion must not be made lightly).

[16] Two other kinds of preemption include express preemption and conflict preemption, such as when state and federal laws conflict in such a way as to make it impossible for a person to comply with both. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 126 (3d Cir. 2010). Neither of these types of preemption applies here.

[17] *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (indicating, in the area of substantive federal law, that Congress can intend to occupy an entire field, thereby excluding the possibility of state regulation).

[18] A different conclusion would be required if the Rule stated, for example, that subpoenas must include only that information set out in Superior Court Rule 11(a) and nothing more.

[19] FED. R. CIV. P. 45 advisory committee's note ("[One of] the purposes of this revision [is] to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence.").

Because the Court has concluded that Rule 45(a)(1)(A)(iv)'s requirement to include the text of Rule 45(c) and 45(d) on the form of subpoena is not inconsistent with Superior Court Rule 11, the Court must decide whether Plaintiff's failure to include the full text invalidates her subpoena. The Court concludes that it does not.

There is no dispute that the plain language of Rule 45(a)(1)(A)(iv) requires each subpoena to set out in full the text of Rule 45(c) and 45(d). There is also no dispute that Plaintiff recited some, but not all, of those subsections. Her subpoena included most of the language of 45(c), although an earlier version of 45(c) is now in effect.

Island Tile cites *Anderson v. Virgin Islands*[20] for the proposition that the failure to include the text of the Rule renders the subpoena defective. However, the subpoena at issue in *Anderson* included the heading for a different court; was directed to an entity outside the jurisdiction of the District Court; directed the recipient to produce documents to a place outside Rule 45's geographic limits; *and* failed to include the required text. When the District Court concluded that the subpoena was defective, it was considering all of "these serious deficiencies."[21] It never held that the failure to include the text of Rule 45(c) and (d) alone would be enough to defeat the subpoena.

District courts[22] considering the question of whether the failure to include the text of Rule 45 alone is sufficient to render a subpoena defective have come to different conclusions.[23] The Court is persuaded by the analysis in *Elam v. Ryder Auto. Operations, Inc.*, a decision of the District Court for the Western District of New York.[24] *Elam* considered *Anderson* and noted that *Anderson* did not cite anything to support the court's decision. In addition, the court in *Elam* noted that while a party may move to quash a subpoena, failure to set out the text of the Rule is not one of the grounds on which the party may do so. The court in *Elam* concluded that "[t]o quash a subpoena as procedurally defective under these circumstances would be to elevate form over substance, an invitation that the court declines."[25] Without a showing of prejudice, the court said, it would not quash the subpoena.

Island Tile has not only failed to make any showing of prejudice caused by Plaintiff's failure to include the text, but it has not even moved to quash the subpoena. Instead, its representative appeared at the deposition, answered questions and produced documents. If the

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[20] 180 F.R.D. 284, 290 (D.V.I. 1998).
[21] *Id.*
[22] The Court could find no cases in this jurisdiction, aside from *Anderson*, addressing this question.
[23] *Compare Finley v. Count of Martin*, No. C-07-5922 EMC, 2009 WL 3320263 (N.D.Cal. Oct. 13, 2009) (citing *Anderson* and deciding that the failure to include the text is sufficient grounds to grant the Motion to Quash), *and Kutrip v. City of St. Louis*, No. 4:05-CV-358, 2009 WL 2386072 (E.D.Mo. July 30, 2009) (same), *with Pivitol Colorado II, LLC v. Triple M Beteiligungs-GMBH & Co. KG*, No. 07-CV-01991-WDM-KMT, 2008 WL 349059 (D.Colo. Feb. 6, 2008) (deciding that the failure alone to include the text is not sufficient grounds to quash it when the attorney did not object), *and Elam v. Ryder Auto. Operations, Inc.*, 179 F.R.D. 413, 415 (W.D.N.Y 1998) (holding that failure to include the text is not a ground on which a subpoena may be quashed).
[24] 179 F.R.D. 413.
[25] *Id.* at 415.

subpoena were truly fatally flawed, as Island Tile urges, one wonders why Island Tile's representative appeared at all and did not move immediately to quash it.

Form can, at times, matter a great deal. As noted above, the text requirement of Rule 45(a)(1)(A)(iv) was included to ensure that non-parties are sufficiently protected from undue expense and burden by informing them of their rights to oppose or limit disclosure. Where a non-party is unrepresented by counsel, this requirement serves a noble purpose. Here, though, the non-party is represented by counsel, who ought to be fully aware of the protections afforded by Rule 45(c) and (d). Further, counsel failed to move to quash the subpoena or object until a Motion to Compel was filed many months later. The Court, therefore, cannot find that the Rule's purpose is served by quashing the subpoena *nunc pro tunc* or denying the Motion to Compel on the basis of a procedural defect.

II. PLAINTIFF PROPERLY MOVED TO COMPEL PRODUCTION OF DOCUMENTS.

One of Island Tile's many objections to the Motion to Compel is that, it argues, Plaintiff may not obtain an order compelling the production of documents against a non-party via a Rule 37[26] Motion to Compel.[27] Island Tile raises this as a general objection in the Stipulation. However, as the Court reads it, Plaintiff is seeking an order to compel Island Tile's representative to answer deposition questions under Rule 37, and is moving for an order compelling production of documents under Rule 45.

Both motions are proper. Before seeking sanctions, a party may move to compel deposition responses. The party is entitled to do so under Rule 37(a)(3)(B)(i), which permits it to move for an order compelling a response from any "deponent;" the Rule does not require that the deponent be a party.

Plaintiff may also move to compel production of documents pursuant to Rule 45. Rule 45(c)(2)(B) provides that a subpoenaed non-party may object to the subpoena duces tecum. Island Tile did just that. Once the objections are made, the subpoenaing party may move the Court for an order compelling production. That is what Plaintiff has done. Therefore, Plaintiff, citing Rule 37 and Rule 45, properly moved for an order compelling responses to deposition questions and compelling production of documents from a non-party.

Island Tile is correct that Plaintiff cannot seek sanctions against a non-party for failure to produce documents by way of a Rule 37(a) Motion. As Island Tile notes, in *SEC v. Kimmes*,[28] the District Court for the Southern District of New York held that a party cannot obtain an award

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[26] Rule 37 of the Federal Rules of Civil Procedure applies to matters before the Superior Court by operation of Superior Court Rule 38, which states that "[d]epositions and discovery shall be had in the Superior Court of the Virgin Islands, pursuant to the provisions of Rule 26 to 37, inclusive, of the Federal Rules of Civil Procedure." SUPER. CT. R. 38.

[27] Although, as stated above, Island Tile did not respond to the Motion to Compel, it raised this argument in the Stipulation.

[28] No. M18-304, 1996 WL 734892 (S.D.N.Y. Dec. 24, 1996).

of expenses for a non-party's failure to comply with a subpoena duces tecum. However, the alleged failure to comply with the subpoena duces tecum is not the only issue before the Court. Plaintiff also alleges that Island Tile's representative failed to respond completely to deposition questions, necessitating a Rule 37(a)(3)(B)(i) Motion, which, if granted, would entitle Plaintiff to an award of expenses under Rule 37(a)(5)(A).

III. PLAINTIFF HAS COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF LRCi 37.1 AND 37.2.

Island Tile also objects to the Stipulation provided by Plaintiff. Both parties signed a Stipulation pursuant to LRCi 37.2, which was attached to Plaintiff's Motion. Rule 37.2(a) requires the parties to set forth in their Stipulation a statement that they are unable to resolve their differences and certifying their compliance with the meet and confer requirements of LRCi 37.1. They have done so. Island Tile argues that the Stipulation is not proper because Plaintiff does not cite any authority or make any contentions in the Stipulation, citing Rule 37.2(b). However, the requirements of Rule 37.2(b) do not apply to stipulations; they apply to motions. While Island Tile decided to treat the Stipulation as a kind of combined motion and response, making all of its arguments within the Stipulation and choosing not to respond to the actual Motion once it was filed, Plaintiff is entitled to set forth her authority and arguments in a separate motion, attaching the Stipulation to it. This objection is meritless.

IV. PLAINTIFF'S MOTION TO COMPEL ISLAND TILE TO MORE FULLY ANSWER DEPOSITION QUESTIONS.

Plaintiff objects to a number of answers provided by Michael Cordiner, Island Tile's designated representative, during deposition. Most of the answers objected to consist of some form of "I don't know." Plaintiff argues that Island Tile has adequate information within its possession to fully answer the questions, and its failure to designate a deponent who was prepared to answer those questions constitutes sanctionable conduct. Island Tile responds[29] that it did not have sufficient time to prepare all of the documents for the subpoena duces tecum and also prepare its representative for the deposition. It had approximately thirty (30) days to do so, but the deposition took place right after the winter holidays and the scope of the requests, according to Island Tile, was broad.

The failure of a corporation to fully prepare its designee for a deposition "'is tantamount to a failure to appear,'" which is sanctionable under Rule 37(d).[30] While a subpoenaing party is not entitled to receive the particular responses it wants,[31] it is entitled to question a representative "who can answer questions that are both within the scope of the matters described in the notice and are 'known or reasonably available' to the corporation."[32] If a matter is "known or

[29] Again, its arguments are contained within the Stipulation, as it never filed a Response to the Motion to Compel.
[30] *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 305 (3d Cir. 2000).
[31] *Shillingford v. Hess Oil of the Virgin Islands*, Civil Action No. 93-232, 2008 WL 4838134, at *3 (D.V.I. Nov. 4, 2008).
[32] *Ross v. J.P. Morgan Chase*, No. Civ. 2001/0040, 2003 WL 23218481, at *1 (D.V.I. Oct. 30, 2003) (quoting *Starlight Intern. Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D.Kan. 1999)).

reasonably available" to the corporation, then the designee must be prepared to answer questions about it. The issue, therefore, is not whether the particular deponent knew the answer or acted in good faith, but whether the corporation satisfied its obligation to ensure that the deponent knows what the corporation either knows or should know about a topic. Such an interpretation

> is necessary in order to make the deposition a meaningful one and prevent the sandbagging of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process. The Court understands that preparing for a Rule 30(b)(6) can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.[33]

With these requirements in mind, the Court turns to Plaintiff's particular objections.

Question[34] 1:

Plaintiff inquired about the purpose of Island Tile's checks to Cordiner. Island Tile states that Cordiner was truthful in his reply, and that if Cordiner could have been more thorough, his failure to do so was the result of not having sufficient time to prepare for the deposition. Island Tile also objects to the relevancy.

It would seem rather incredible that Island Tile does not know the purpose of a number of payments made to Cordiner. If Island Tile knows it, Cordiner should have known it. Although burdensome, it was Island Tile's responsibility to fully prepare Cordiner for any inquiries within the scope of the Notice. This question is clearly within the scope of the Notice, as Exhibit A to the Subpoena, which set forth the deposition topics, lists "[a]ny payments from Island Tile to Michael Cordiner, including but not limited to loans, donations, salaries, or cash."

Island Tile suggests that, even if the topic was within the scope of the Notice, Plaintiff's stated reasons for its relevancy fall short. Plaintiff states in the Stipulation that she required this information to test Cordiner's claim to co-employee immunity under the Workers' Compensation Act. Island Tile states that, "[i]nsofar as the evidence truly relates to actions taken without Island Tile, that information is necessarily and logically without the scope of information available to Island Tile." However, Plaintiff states that the information about the payments to Cordiner is relevant to challenging Cordiner's defense of immunity by piercing the corporate veil. The Court agrees with Plaintiff. Such payments may prove or disprove Plaintiff's theory and bolster or defeat Cordiner's defense. The fact that items to prove or disprove Cordiner's liability are in the possession of Island Tile is of no moment. Because they are discoverable, even a non-party must produce them. The Motion to Compel a response to Question One will be granted.

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[33] *Starlight Intern. Inc.*, 186 F.R.D. at 640.

[34] The Court refers to the questions posed by Plaintiff as "Questions." Island Tile refers to the topics as "Objections." Because a non-party may file "objections" to topics for which they are subpoenaed, the Court will avoid using that term to refer to the areas in which Plaintiff seeks relief.

Question 2:

Here, Plaintiff asked about a check marked as Exhibit 6 to the Deposition and Exhibit 12 to the Motion. It is a check from Island Tile to Cordiner Enterprises. Island Tile argues, as it did in response to Question 1, that Cordiner was being honest in his response and is not required to know everything, especially with such little time to prepare for the deposition. As the Court addressed in Question 1, this is not a sufficient response to a Motion to Compel discoverable information that is either known or should be available to Island Tile. Therefore, the Motion to Compel a response to Question 2 will be granted.

In fact, because Island Tile's response to Plaintiff's concerns about Questions 4, 11, 15, and 20 is substantially the same as its response to Question 2, Plaintiff's Motion to Compel will be granted as to those questions as well. Insofar as Island Tile raises the issue of sufficiency of time to prepare in response to any other question, that argument is rejected.

Questions 3, 6, 7, 8, 9, 10, 13:

Island Tile is correct that these questions relate to the production of documents, rather than responses to deposition questions. Therefore, they will be addressed in the next section of this Opinion. To the extent Island Tile objects that it did not have time to adequately answer the question, that argument has already been addressed.

Question 5:

In addition to claiming that Cordiner did not have sufficient time to prepare a response to this question about transfers of money between Island Tile and Cordiner Enterprises in 2007-2009, Island Tile also states that the question was answered elsewhere in the deposition. Island Tile notes that Cordiner said such payments were "either as loans or as payments for work completed."[35] Island Tile either knows what the loans or payments were for, or should have this information available to it. Therefore, Cordiner, as the designated deponent, should also have known the answer. Plaintiff's Motion to Compel is granted as to Question 5.

Questions 11, 15, 20:

In response to these questions, Island Tile states that it did not have sufficient time to respond to this question. As discussed above, that argument is not persuasive. The Motion to Compel is granted as to these questions.

Question 12:

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[35] (Island Tile Dep. 37:24-25.)

Island Tile objects that this question, which requests information about a personal injury lawsuit against Island Tile, is beyond the scope of the Notice. The Court agrees. While such information may be discoverable, Plaintiff did not subpeona Island Tile to answer questions about it. The Motion to Compel will be denied as to Question 12.

Questions 14, 17, 18:

Island Tile objects to these questions in part because it states that it did not have sufficient time to respond to these questions. As discussed above, that argument is not persuasive. However, it also states that any questions about Island Tile's workers' compensation coverage are irrelevant because Island Tile has been dismissed. By separate Order issued today, the Court has granted Plaintiff's Motion to Reconsider. Because Island Tile will be brought back into this litigation, this objection is moot and the Motion to Compel will be granted as to these questions.

Question 16:

Island Tile objects to this question in part because it states that it did not have sufficient time to respond to this question. As discussed above, that argument is not persuasive. Island Tile also argues that this question, which is about the cost of shipping marble slabs, is outside the scope of the subpoena. However, Exhibit A to the subpoena requires Island Tile's representative to be prepared to discuss payments to Mystic. Plaintiff alleges that Island Tile purchased over $400,000 in marble from Mystic over a three-year period, including the marble that eventually was involved in the incident that caused Bertrand's death. The shipping costs for that marble are certainly within the scope of "payments made to Mystic" noticed within the subpoena exhibit. The Motion to Compel will be granted as to this question.

Question 19:

Island Tile objects to this question because, it states, Plaintiff seeks the Court to compel an answer to a question asked not by Plaintiff, but by counsel to Cordiner Enterprises. The Court agrees that this is improper. If Cordiner Enterprises wishes to compel Island Tile's representative to answer this question, it may; it is not for Plaintiff to do so. The Motion to Compel will be denied as to Question 19.

In sum, the Court will grant the Motion to Compel as to questions 1-2, 5, 11, 14-18, and 20, relating to Cordiner's responses to deposition questions on behalf of Island Tile.

V. PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS.

As noted above, in addition to moving to compel more complete answers to deposition questions, Plaintiff requests that the Court compel the production of certain documents. Island Tile did not address the requested documents in its Stipulation, and by letter dated December 28, 2010, Island Tile indicated it had no objection to the production of many of the documents.

Island Tile correctly identified a number of deposition questions that relate instead to the production of documents. The Court will address each in turn:

Question 3, 6-10, 13:

In response to these questions, Island Tile's only objection is that these are requests for production, rather than questions, and it did not have time to locate the documents. The Motion to Compel will be granted as to these Questions and Island Tile will be directed to produce the documents.

Documents:

Plaintiff identifies a number of document requests in her Motion to Compel to which, she states, Island Tile failed to respond. Island Tile did not address these document requests in its Stipulation and did not respond to the Motion to Compel. Therefore, the Court has no basis on which to assess its objection, if it has one, to the production of these documents. The Motion to Compel will be granted as to these documents. In fact, if the question was only whether Island Tile had sufficient time to locate and produce the documents, such an objection should have been cured in the intervening three months between the time of the subpoena's return date and the date of the Motion to Compel. If that is the only objection to the production of these documents, the Court is puzzled as to why there is even a Motion to Compel before it and why Plaintiff and Island Tile were unable to resolve this dispute between themselves without court intervention.

CONCLUSION

The Court concludes that Rule 45's textual requirement supplements Superior Court Rule 11, but that the failure to include the text of Rule 45(c) and (d) does not render the subpoena fatally flawed under these circumstances. Plaintiff's Motion to Compel, which complies with LRCi 37.2, will be granted as to most of its deposition questions and as to all of its document requests. By separate Order, the Court will direct Island Tile and Plaintiff to meet within fourteen days of this Order to decide on a return date for the documents. During that conference, Island Tile and Plaintiff must also decide when to re-depose Island Tile, which must occur within forty-five (45) days of entry of this Order.

DATED: June 24, 2011

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 6/27/11

CERTIFIED A TRUE COPY
Date: 6-27-2011
Venetia H. Velazquez, Esq.
Clerk of the Court
By:
Court Clerk

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

BERYL BERTRAND, as Administratrix of the Estate of JACQUES-PIERRE BERTRAND, Plaintiff, v. **CORDINER ENTERPRISES, INC. d/b/a CORDINER AND ASSOCIATES; MICHAEL P. CORDINER; MYSTIC GRANITE AND MARBLE, INC.; and ABACO MACHINES USA, INC.,** Defendants.	)	**CIVIL NO. ST-08-CV-457** **ACTION FOR SURVIVAL AND WRONGFUL DEATH** **JURY TRIAL DEMANDED**

ORDER

AND NOW, consistent with the Memorandum Opinion issued today in this matter, it is hereby

ORDERED that Plaintiff Beryl Bertrand's April 8, 2011 Motion to Compel is **GRANTED in part** and **DENIED in part**; and it is further

ORDERED that Island Tile and Marble, LLC, shall produce all documents requested by Plaintiff in Plaintiff's Exhibit B to the subpoena served on Island Tile and Marble, LLC, on December 11, 2010, and all documents referenced in Questions 3, 6-10, and 13; and it is further

ORDERED that counsel for Plaintiff Beryl Bertrand and counsel for Island Tile and Marble, LLC, shall **meet and confer within fourteen (14) days** of entry of this Order to decide on a return date for the documents herein ordered to be produced; and it is further

ORDERED that counsel for Plaintiff Beryl Bertrand and counsel for Island Tile and Marble, LLC, shall **meet and confer within fourteen (14) days** of entry of this Order to decide on a date to redepose Island Tile and Marble, LLC, which deposition must occur within **forty-five (45) days of entry** of this Order; and it is further

ORDERED that the scope of the deposition shall include the topics discussed in Questions 1-2, 5, 11, 14-18, and 20, and Island Tile and Marble, LLC's designated deponent must testify to all matters known or reasonably available to Island Tile and Marble, LLC, which may necessitate some gathering of documents and information and having the deponent review and become familiar with the documents and information; and it is further

ORDERED that pursuant to Rule 45, Rule 37(a)(3)(B)(i), and Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure, Island Tile and Marble, LLC, shall **SHOW CAUSE within fourteen (14) days** of entry of this Order why it should not be required to pay Plaintiff's expenses incurred as a result of preparing and filing the Motion to Compel; and it is further

ORDERED that Plaintiff Beryl Bertrand may file an opposition to Island Tile and Marble, LLC's response to the Order to show cause within **fourteen (14) days** of service of Island Tile and Marble's response, to which Island Tile and Marble may reply within **fourteen (14) days** of service of the opposition; and it is further

ORDERED that copies of this Order and the accompanying Memorandum Opinion shall be directed to counsel of record for all parties and counsel for Island Tile and Marble, LLC.

DATED: June 24, 2011

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 6-27-2011
Venetia H. Velazquez, Esq.
Clerk of the Court

By: M. Scott
Court Clerk

ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 6/27/11

FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

BERYL BERTRAND, as Administratrix of the Estate of JACQUES-PIERRE BERTRAND, Plaintiff, v. **CORDINER ENTERPRISES, INC. d/b/a CORDINER AND ASSOCIATES; MICHAEL P. CORDINER; MYSTIC GRANITE AND MARBLE, INC.; ISLAND TILE AND MARBLE, LLC d/b/a VIRGIN ISLANDS GRANITE & MARBLE;** and **ABACO MACHINES USA, INC.,** Defendants.	**CIVIL NO. ST-08-CV-457** **ACTION FOR SURVIVAL AND WRONGFUL DEATH** **JURY TRIAL DEMANDED**

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CARROLL, Judge

MEMORANDUM OPINION

(Filed: June ____, 2011)

Plaintiff Beryl Bertrand ("Plaintiff") moves this Court to reconsider two of its Orders. First, she asks the Court to reconsider an Order dismissing former Defendant Island Tile and Marble, LLC. Second, Plaintiff requests that the Court reconsider its Order holding that Michael Cordiner is immune from liability by operation of the exclusivity provision in the workers' compensation statute. Because the Court holds that Island Tile would have been an uninsured employer at the time of the accident if the facts asserted by Plaintiff are true, Plaintiff may pursue its claims against both Island Tile and Cordiner. To that end, Plaintiff will be directed to amend her Complaint.

FACTUAL AND PROCEDURAL HISTORY

On April 17, 2008, Jacques-Pierre Bertrand ("Bertrand") was injured while working for Island Tile. He died of those injuries on April 29, 2008. Originally Plaintiff brought suit against not only the Defendants named above but also against Island Tile.

On March 9, 2009, Plaintiff and Island Tile filed a Stipulation of Dismissal, agreeing to dismiss all of Plaintiff's claims against Island Tile. On March 30, 2010, the Court approved the Stipulation, noting that no party had objected to it, and dismissed all of Plaintiff's claims against Island Tile. That Order was entered on April 6, 2010.

On June 2, 2010, the Court issued a Memorandum Opinion, deciding a number of Motions to Dismiss filed by Defendants. In that Opinion, the Court determined that Defendant Michael Cordiner is entitled to immunity for any acts he performed on behalf of Island Tile as a consequence of the exclusivity provision in the Workers' Compensation Act ("WCA").

DISCUSSION

I. THE COURT WILL GRANT PLAINTIFF'S MOTION TO FILE ITS MOTION FOR RECONSIDERATION OUT OF TIME.

Typically, motions for reconsideration must be filed within fourteen days of the entry of the order or decision from which the party seeks relief.[1] There is no doubt that Plaintiff's Motion was filed beyond that period. In fact, it was filed 364 days after entry of the Order[2] dismissing Island Tile, and 304 days after entry of the Opinion[3] declaring Cordiner immune for acts performed on behalf of Bertrand's employer. Plaintiff concedes that the Motion is untimely and requests leave to file it out of time.

In support of her Motion to file out of time, Plaintiff states that she only recently uncovered evidence that Island Tile had not complied with certain requirements of the WCA during the relevant time period. It is Plaintiff's position that Island Tile's failure to comply makes it an uninsured employer, thereby defeating the Act's restraint on civil actions. Because of this newly discovered evidence, Plaintiff urges the Court to revise its previous orders, reinstate Island Tile as a Defendant, and make clear that Michael Cordiner can be sued for all of his acts or omissions, even those he performed on behalf of Island Tile.

In a footnote to her Amended Motion, Plaintiff urges the Court to consider her untimely Motion for Reconsideration because Rule 54 of the Federal Rules of Civil Procedure permits the Court to revise any order before a final judgment is issued in the case. Island Tile and Cordiner,[4] on the other hand, state that a Motion for Reconsideration filed more than fourteen days[5] after the order must be considered as a Rule 60(b)(6) Motion.

A. Rule 54(b), not Rule 60(b), of the Federal Rules of Civil Procedure Applies to This Late-Filed Motion for Reconsideration.

Defendants strongly urge the Court to apply the Rule 60 standard to Plaintiff's Motion for Reconsideration. Defendants correctly note that the Supreme Court of the Virgin Islands has held that Motions for Reconsideration filed more than fourteen days after a final judgment must be treated as Rule 60 Motions. For example, in *Beachside Associates, LLC v. Fishman*,[6] the

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[1] LRCi 7.3. The Federal Rules of Civil Procedure and the Local Rules of Civil Procedure of the District Court of the Virgin Islands apply to matters before this Court whenever they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

[2] The Order dismissing Island Tile was entered on April 6, 2010. Plaintiff filed a Motion for Reconsideration on April 5, 2011, which was later withdrawn and replaced with a shorter version of the Motion. Nonetheless, the Court will use the April 5, 2011 date in its calculations.

[3] The June 2, 2010 Opinion was entered on June 4, 2010.

[4] Island Tile and Cordiner filed a Joint Opposition to the Motion for Reconsideration on April 19, 2011. Bertrand replied to that Opposition on May 3, 2011.

[5] Actually, Defendants refer to "the 10-day statutory time period." (Defs.' Opp'n at 8.) It appears that Defendants mistakenly believe that LRCi 7.3(1) provides a 10-day period and (2) is statutory. In fact, LRCi 7.3, which is a rule rather than a statute, requires motions for reconsideration to be filed within fourteen days..

[6] 53 V.I. 700 (2010).

court reiterated the position it laid out in *Ruiz v. Jung*,[7] when it held that Superior Court Rule 50 expressly incorporates Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure. According to the court in *Beachside Associates*, if a motion for reconsideration is filed within fourteen days of the order to be reconsidered, it should be treated as a Rule 59(e) motion to amend or alter the judgment.[8] If, however, the Motion is filed outside that fourteen-day period, it should be treated as a Rule 60(b) motion.[9] Applying this rule to Plaintiff's Motion, Defendants argue that Rule 60(b) should apply.

While this Court agrees with the Supreme Court in its analysis of motions brought pursuant to Superior Court Rule 50,[10] it does not agree with Defendants that such analysis applies here. Plaintiff's Motion is not a motion that falls under Superior Court Rule 50. Because it does not, Rules 59 and 60 of the Federal Rules of Civil Procedure are not applicable.

Superior Court Rule 50 incorporates, inter alia, Rules 59 and 60 of the Federal Rules only when a party is requesting that the Court "set aside an entry of default, judgment by default or judgment after trial or hearing."[11] Here, Plaintiff is asking that the Court revise two orders. One of these orders states that Michael Cordiner is immune for any acts performed on behalf of Plaintiff's employer. This Order, which accompanied the June 2, 2010 Opinion, clearly falls outside Superior Court Rule 50. It is not a judgment or final order in any sense.

The other order dismissed Plaintiff's Complaint against Island Tile. That Order dismissed fewer than all Defendants in the action and, therefore, falls squarely within the ambit of Federal Rule 54(b). Rule 54(b) states in relevant part:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

As the District Court observed in *Bostic v. AT&T of the Virgin Islands*,[12] the trial court retains discretion to extend the period for a motion for reconsideration if that motion seeks revision of an order that does not constitute the final judgment in an action. The *Bostic* court observed that Local Rule 7.3 cannot, through its fourteen-day time period, limit the proper exercise of a court's discretion to modify an order under Rule 54(b).[13] In fact, the *Bostic* court recognized a number of circumstances in which it may be appropriate to grant reconsideration

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[7] Civ. No. 2008-035, 2009 WL 3568182 (V.I. Oct. 19, 2009).
[8] *Beachside Assocs.*, 53 V.I. at 714.
[9] *Id.*
[10] Of course, even if the Court were to disagree with the Supreme Court, it would be bound to apply the Supreme Court's holdings.
[11] SUPER. CT. R. 50.
[12] 312 F. Supp. 2d 731 (D.V.I. 2004).
[13] *Id.* at 734.

even though a narrow interpretation of Local Rule 7.3 would not otherwise permit it.[14] It concluded that "[r]arely, if ever, can the decision to do so constitute clear error."[15] The Supreme Court of the Virgin Islands affirmed this analysis in *Hagley v. Henricks*,[16] finding that the trial court did not abuse its discretion by granting additional time to file a motion for reconsideration pursuant to Rule 54(b), where the party moved to reconsider a judgment that did not dispose of all the parties.

Here, the Order approving the parties' Stipulation, which dismissed Plaintiff's Complaint against Island Tile only, did not end the action and did not constitute a final judgment because it did not adjudicate the rights and liabilities of any party and, even if it had, it did not adjudicate the rights and liabilities of *all* parties.[17] Therefore, pursuant to Rule 54(b), it is an order subject to revision at any time. The Court retains discretion to decide whether it will extend the fourteen-day period of Local Rule 7.3.

B. The Court Will Exercise Its Discretion to Accept the Late-Filed Motion for Reconsideration.

Local Rule 7.3 permits the Court to extend the fourteen-day filing period for a Motion for Reconsideration upon a showing of "good cause." In this case, Plaintiff states that she uncovered "new evidence" during discovery. She argues that this evidence demonstrates that Island Tile was not an insured employer at the time of Bertrand's injury and cannot, therefore, avail itself of the WCA's exclusivity provision. She also argues that because Island Tile was not insured, Cordiner is similarly not immune.

Plaintiff indicates in her Motion that she was not able to depose Island Tile and Cordiner until January 10, 2011. She further states that she did not depose Island Tile's bookkeeper until February 9, 2011. Finally, she alleges that Island Tile and Cordiner's statements that Island Tile was insured amount to fraud, which prevented her from discovering the truth.

The Court need not consider whether any party committed fraud upon another party or this Court, nor must the Court decide whether this evidence was available to Plaintiff before. The standard of "good cause" to extend the period for a Local Rule 7.3 motion is more generous than the standards for granting a Rule 60(b) motion. Here, the Court finds that Plaintiff has made a sufficient showing of "good cause" for her delay in filing the Motion for Reconsideration. She abided by the Scheduling Order issued by this Court and, through the discovery process, was able to piece together what she believes is a persuasive argument that Island Tile was not insured. At the time she agreed to dismiss her Complaint against Island Tile, she had no reason to doubt Island Tile's representations that it was insured. It would have been unreasonable to expect her and Island Tile to engage in extensive discovery at that stage of

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[14] *Id.* (observing that courts have considered new evidence, new arguments, and "even newly submitted cases" under Rule 54, even though local rules similar to LRCi 7.3 may not have technically permitted it).
[15] *Id.*
[16] S.Ct. Civ. No. 2007/26, 2007 WL 5060412 (V.I. Dec. 28, 2007). Neither party discussed, or even cited, *Hagley*.
[17] Because the Orders do not constitute final judgments, Superior Court Rule 36(b)'s thirty-day deadline for post-trial motions does not apply.

litigation simply to determine if what Island Tile represented to the Court was true. Perhaps it was a mistake on Plaintiff's behalf to enter into the Stipulation; however, her mistake does not limit the Court's authority to reconsider its decision based on the possibility that Island Tile might not have been insured. Therefore, the Court will accept the late-filed Motion for Reconsideration and will proceed to consider its merits.

II. WHETHER THE MOTION FOR RECONSIDERATION SHOULD BE GRANTED.

The outcome of Plaintiff's Motion depends upon the Court's interpretation of what makes an employer "insured" for the purposes of the WCA. If Island Tile was insured at the time of the accident that killed Bertrand, Plaintiff has no civil remedy against it. If, though, it was not insured, Plaintiff may sue both Island Tile and Bertrand's co-employee, Cordiner.

The Motion for Reconsideration urges the Court to undo its decision approving the Stipulation to dismiss Island Tile and its Order granting in part Cordiner's Motion to Dismiss. The Court may not do in an order granting a Motion for Reconsideration what it could not have done in an Opinion deciding a Motion to Dismiss or approving a Stipulation: decide issues of fact. It may only decide whether Island Tile should be brought back into the action for further proceedings and whether Plaintiff has stated a sufficient claim against Cordiner.

The Court will assume Plaintiff's factual allegations are true. Therefore, the Court assumes that Plaintiff is correct that Island Tile reported false numbers of workers to the Commissioner of Finance in 2006-2008, that it reported the wrong amount of wages paid to its employees in 2006-2008, and that it incorrectly classified its employees in 2007 and 2008. As a result of these errors, it did not pay the correct amount of premiums to the Commissioner. Even assuming all these allegations are true, however, the Court must determine whether these errors would render Island Tile uninsured and, therefore, state a claim for relief.

A. Structure of the Workers' Compensation Act Generally.

The Legislature of the Virgin Islands passed the WCA to "afford expeditious compensation to employees or their dependents without regard to fault or negligence of employer or employee."[18] To that end, every employer is required to be insured with the Government Insurance Fund.[19] To secure the insurance coverage, the employer is required to satisfy certain requirements. It must file with the Commissioner of Finance an actual report of the previous year and an estimated report for the current year by February 28th of the year.[20] The report must show the number of workers employed, the type of occupation, the total amount of wages "paid and to be paid," and the amount of premium that must be paid.[21]

[18] V.I. CODE ANN. tit. 24, § 250(a) (1997).
[19] 24 V.I.C. § 272(a).
[20] *Id.* § 273(a).
[21] *Id.*

Employers are permitted to pay their premiums in two installments: the first must be made by March 31 and must constitute one-half or more of the annual premium; and the second covers the remaining portion of the premium, which must be paid by June 30.[22] After the Commissioner of Finance receives the premium, he forwards to the employer a receipt.[23] The receipt is "prima facie evidence of said payment of the premium and insurance coverage."[24] If the employer does not pay the total premium levied on it "within the time fixed by the Commissioner of Finance," the Commissioner may grant a thirty-day extension.[25] If the premium is not paid in full, the WCA Administrator may not make an insurance policy for that employer.[26]

Employers who do not obtain insurance, who do not comply with the filing requirements, or who do not pay the required premiums suffer a number of possible sanctions. They may be fined and imprisoned.[27] The statute makes clear that this sanction is "in addition to any interest, penalties, or remedies provided for in this chapter."[28] If employers lie in their statements, the signers of the statements could be subject to perjury charges.[29] The Commissioner of Finance also has authority to assess penalties and late charges, and charge interest on the outstanding premium.[30] Finally, an employer who "has not filed the required reports and paid the premium due to which this section refers within the term herein fixed" is an "uninsured employer."[31]

If an employer is insured, the injured employee has only one remedy against the employer and that is to obtain compensation from the Workers' Compensation Administration.[32] However, if the employer is uninsured,

> [t]he injured employee . . . or the employee's beneficiaries, instead of receiving compensation under this chapter may elect, at any time prior to the rendering of a decision by the Administrator, to bring suit for damages against the employer, just as if this chapter were not applicable.[33]

Island Tile and Cordiner argue that because Island Tile had a Certificate of Government Insurance Coverage, it was an "insured" employer within the meaning of the statute.[34] They also

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[22] *Id.* § 273(c).
[23] *Id.* § 273(d).
[24] *Id.*
[25] *Id.* § 273(g).
[26] *Id.*
[27] *Id.* § 277(a).
[28] *Id.*
[29] *Id.* § 277(b). In addition, an employer who intentionally falsifies records may be sanctioned five times the difference between the premiums paid and what ought to have been paid. *Id.* § 279.
[30] *Id.* § 277(c).
[31] *Id.* § 277(c).
[32] *Id.* § 284.
[33] *Id.* § 261(b)(1).
[34] The Defendants attach as an exhibit to their Opposition a copy of the Certificate dated February 26, 2008, and relating to Policy No. 8839.

argue that even if there had been errors in the reports Island Tile submitted, those errors would not effect a cancellation of the policy.

B. The Court Retains Authority Under the WCA to Determine Whether an Employer is Insured.

The Supreme Court of Puerto Rico, interpreting language in Puerto Rico's statute that is essentially the same as the language of Section 261(b)(1) of Title 24, held that the determination of whether an employer is uninsured—in order to decide whether the employee can bring a suit—is for the court.[35] Specifically, it held that,

> [t]he determination of the uninsured-employer status by the State Insurance Fund is the first step in the administrative proceeding that shall continue before the Commission but it is by no means a prerequisite and much less a jurisdictional requisite for the adjudication of the matter in issue in the judicial sphere.[36]

Therefore, the Court finds that although the Workers' Compensation Administration retains the role of determining whether an employer is insured for the purposes of seeking indemnification,[37] that does not deprive the Court of jurisdiction to determine whether an employer is insured for the purpose of determining whether a plaintiff has stated a claim for relief.[38]

C. To Be an Insured Employer, an Employer Must Comply with All of the Statutory Provisions of the Workers' Compensation Act.

Section 272(c) of Title 24 defines "uninsured employer" for the purposes of the WCA. It states that "[e]very employer who has not filed the required reports and paid the premium due to which this section refers within the term herein fixed shall be considered an uninsured employer."[39] A 1958 District Court case, *Carmona v. DeJongh*,[40] interpreting substantially the same language,[41] held that this provision should be read in the conjunctive; that is, an employer

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[35] *Velez Sanchez v. Comision Industrial*, 1978 WL 48819, 7 P.R. Offic. Trans. 867 (P.R. 1978). Because Section 261 of Title 24 of the Virgin Islands Code was modeled after 11 Laws of Puerto Rico Ann. § 16, decisions from the Supreme Court of Puerto Rico interpreting Section 16 that were issued after the Virgin Islands adopted the provision constitute persuasive authority. *Nickeo v. Atlantic*, 45 VI 149, 153 (Terr. Ct. 2003).
[36] *Id.*
[37] Tit. 24, § 261(d)(1).
[38] The Court is aware that administrative agencies often have superior experience determining the facts and applying the laws and regulations applicable to their agencies. However, that would be a reason for the Legislature to make clear that the Administration must first make the uninsured/insured determination before the worker files a civil suit. It did not do so. For this reason, and because the Court is persuaded by the analysis set forth in *Velez Sanchez*, the Court holds that it retains the authority to make that determination in appropriate cases.
[39] 24 V.I.C. § 272(c).
[40] 157 F. Supp. 540 (D.V.I. 1958).
[41] The *Carmona* court interpreted Section 30 of the Pentheny Employees Compensation Act of St. Croix, which at the time of the decision had been embodied in the Virgin Islands Code at Section 277 of Title 24. That Section provided that "[a]ny employer who has been covered by the Government Insurance Fund up to the end of the proceeding year shall be covered during the period January 1, to January 31, provided that every employer who has

could not be considered uninsured unless it both failed to file the required reports and failed to pay the required premium.[42]

Here, Plaintiff does not argue that Island Tile failed entirely to file the required statements or failed entirely to pay a premium. Instead, she urges the Court to find that the errors Island Tile made in its statements, which led to an impermissibly low premium, invalidated Island Tile's status as an insured employer.

The Court begins its analysis with the language of the statute.[43] Section 272 specifically states that the employer must file "the required reports" and must pay "the premium due to which this section refers."[44] The Legislature could have stated that the employer must file reports and pay a premium. Instead, the Section specifically requires the employer to file the reports required by the statute and pay the premium required by the statute. If the employer does not do both, it is uninsured.[45]

To read the statute otherwise, an employer could obtain the benefit of immunity by under-reporting the number of its employees and paying a nominal premium. It would be free to do so unless and until the administrative agency decided to review its books. While it would be subject to perjury penalties if ever discovered, there may be little chance of discovery. In the meanwhile, the employee, who might know no better, may pursue her compensation benefits only, foregoing the chance to sue. This is contrary to the mandate to read the statute liberally and in favor of the employee.[46]

Island Tile and Cordiner state in the fact section of their Joint Opposition—though they raise no argument related to this fact—that the Workers' Compensation Administration declared Island Tile to be an insured employer. In support of that contention, they cite Exhibit D to their Joint Opposition, which is a letter from the Administration to an air ambulance company. The letter states that, "[t]his case is covered under the Virgin Islands Workers' Compensation Statute." In addition, they cite Exhibit E, a letter in which the Administration states that it would be responsible for all of Bertrand's medical expenses. In addition, Exhibit F orders payment for Bertrand's medical expenses. Likewise, Exhibit G orders payment for Bertrand's funeral

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not presented the statement under oath and who has not paid the premiums within the time herein specified shall be considered an uninsured employer."

[42] *Id.* at 543 ("For the proviso contained in section 30 [now Section 272(c) of Title 24] of the Act states that an employer shall be considered uninsured only if he has not presented the statement and has not paid the premiums within the time specified in the Act. Failure to do one or the other is not enough; there must be a failure both to file the statement and to pay the premiums in order to render the employer uninsured and thereby deprive his employees of the protection afforded by insurance with the Government Insurance Fund.")

[43] *People v. Baxter*, 49 V.I. 384, 388 (2008) (noting that the Court begins its analysis with the language of the statute, and the analysis ends if the language is unambiguous).

[44] Tit. 24, § 272(c).

[45] *See Vanterpool v. Hess Oil V.I. Corp.*, 766 F.2d 117, 123(3d Cir. 1985) (*superseded by statute on other grounds*) ("[A]n employer's tort immunity arises as an inevitable consequence of compliance with the Act and loss of immunity is imposed only as a penalty for non-compliance.").

[46] *Carmona*, 157 F. Supp. at 542 (holding that, because the Workers' Compensation Act is remedial in nature, it must be given a liberal construction in favor of the employees it seeks to protect).

expenses. Finally, Exhibit G shows that the Administration paid in excess of $200,000 for all of Bertrand's expenses. Island Tile and Cordiner conclude that this proves Island Tile had insurance and "this is how these things work."[47]

This is indeed "how things work." But the exhibits cited by Island Tile and Cordiner do not prove that Island Tile was an insured employer. Even if the Court is bound by the Workers' Compensation Administration determination—an argument neither raised by any party nor decided in any case law—the Administration never made such a determination. All that Island Tile's documents prove is that Plaintiff received benefits under the WCA. But she would receive benefits even if Bertrand's employer was uninsured. Section 261 of Title 24 makes clear that employees of uninsured employers can receive compensation from the Administration.[48] Therefore, because employees of uninsured employers may still receive prompt compensation from the Administration, proof that Plaintiff received such compensation is not probative of whether Island Tile was an insured employer.[49]

Another issue the Court must decide—though not one explicitly raised by either party[50]—is whether Plaintiff's receipt of benefits bars her suit at this time. Section 261 permits the employee or his beneficiaries to sue an uninsured employer, but requires that this election must be made "prior to the rendering of a decision by the Administrator."[51] The "decision" referred to in Section 261(b)(1) apparently refers to the decision by the Administrator of the amount of compensation due to the employee that must be collected from the employer after hearing from both employer and employee.[52] In this case, the Administrator has never made such a decision. Therefore, the election to sue took place before the rendering of the Administrator's decision.

An alternative interpretation might suggest that the "decision" referred to in Section 261(b)(1) refers generally to the Administrator's decision to pay compensation to the employee. However, this would be inconsistent with the mandate to construe the statute liberally and in favor of the employee[53] because the Administrator might make a decision within hours of the injury to pay compensation, depriving the employee of his statutory right to elect to sue. Illustratively, in this case, the Administrator made a decision on April 17, 2008, the day of the incident, to begin making payments for Bertrand's care.[54] Bertrand's beneficiaries were

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47 (Defs.' Joint Opp'n 4.)

48 *See* Tit. 24, § 261(a)(1) ("Claims for expenses . . . in the case of an employee working for an employer who, in violation of law, is not insured . . . shall be processed and paid for from the Fund in the same manner as claims against insured employers with the exception that any payments made shall be chargeable to the Uninsured-Employer Subfund, hereinafter created."); § 261(c)(2) ("There shall be maintained in the Uninsured-Employer Subfund . . . sufficient funds for the prompt payment of claims involving insured employers.").

49 Again, the Court does not decide now whether or not Island Tile was an insured employer at the time of the accident. It decides only that Island Tile would have been an uninsured employer if the facts asserted by Plaintiff are true.

50 The Joint Opposition discusses the fact that Plaintiff did receive benefits but does not raise any argument about what Plaintiff's acceptance of those funds might signify.

51 Tit. 24, § 261(b)(1).

52 Tit. 24, § 261(a)(2), (a)(3).

53 *Supra* note 46.

54 (Defs.' Joint Opp'n Ex. D.)

consumed with obtaining emergency care for his ultimately fatal injuries at the time the Administrator was making its decision to authorize payment. Neither Bertrand nor his beneficiaries, therefore, ever had any meaningful opportunity to elect to sue if Section 261(b)(1) is interpreted to mean the election must occur before a decision to compensate.[55]

Although the Court interprets Section 261(b)(1) to mean that Plaintiff has not waived her election to sue, it seems obvious from the language of that subsection that Plaintiff cannot retain both the workers' compensation benefits and damages from the uninsured employer. However, as noted above, the Court is not deciding at this stage whether Island Tile was insured; only that if Plaintiff's facts are true, Plaintiff has stated a claim that is not barred by the WCA. Therefore, it would not be proper to condition Plaintiff's pursuit of her claims against Island Tile on a refund of the compensation, because it may ultimately be decided by the Court in a Motion for Summary Judgment or by a jury after a trial that Island Tile was, in fact, insured. Instead, should Plaintiff succeed in proving that Island Tile was uninsured at the time of the incident and that Island Tile is liable to Plaintiff, any award by Island Tile to Plaintiff will be reduced by the amount of compensation Plaintiff or Bertrand has already received.[56]

As noted above, the Court assumes that Plaintiff's asserted facts are true—that is, that Island Tile failed to adequately report the number and type of its employees, and therefore failed to pay the required premium sum. Given those facts, Island Tile is an uninsured employer. Therefore, Plaintiff did not fail to state a claim against Island Tile. The Court will grant the Motion to Reconsider as to Island Tile and will vacate its Order approving the parties' Stipulation of Dismissal. Plaintiff will be directed to amend its Complaint to add again Island Tile as a Defendant in this action.

D. Because Island Tile Has No Immunity if Plaintiff's Assertions Are True, Then Cordiner Has No Immunity to Share and May Be Sued for His Acts or Omissions.

In addition to challenging the Court's dismissal of Island Tile as a Defendant, Plaintiff also challenges the Court's Opinion deciding that Michael Cordiner could not be held liable for any actions he took on behalf of Island Tile. The heart of Plaintiff's argument is that Cordiner was not an employee of Island Tile for the purposes of the WCA.

The Court need not address these arguments, however. As the Court noted in *Nickeo*,[57] only when an employee acts on behalf of an employer and does not possess an independent duty of care does that employee share in the employer's immunity.[58] Because the Court finds that

[55] *See Harris v. No. 1 Contracting Corp.*, 24 V.I. 116, 117 (D.V.I. App. Div. 1988) (finding that an employee has no meaningful opportunity to elect whether or not to sue an employer until such time as he has the chance to learn whether or not the employer is insured).
[56] This is consistent with the Virgin Islands' limitations on the collateral source rule. V.I. CODE ANN. tit. 5, § 427 (1997). The Administrator will have the option under the statute, of course, to pursue Island Tile for the costs of the compensation it paid to Plaintiff, if it is ultimately determined that Island Tile was uninsured.
[57] 45 V.I. at 155.
[58] *Id.*

Island Tile is not an insured company, then Cordiner, acting on Island Tile's behalf, has no immunity to share.

Because Cordiner is not an insured employer and does not share his employer's immunity, he is a "third person" for purposes of the WCA.[59] Therefore, the Administrator of the Workers' Compensation Administration must be made a party to this action.[60]

CONCLUSION

Because the Court interprets the Workers' Compensation Act to require an employer to fully comply with its provisions before the employer can enjoy the benefits of the Act's exclusivity provision, the Court will grant Island Tile's Motion to Reconsider its approval of the parties' Stipulation of Dismissal. Michael Cordiner, as the employee of an uninsured company, has no immunity to share, and can be sued for the acts or omissions taken on behalf of Island Tile. Plaintiff will be directed to file an Amended Complaint within fourteen days of entry of this Order, reflecting Island Tile's re-addition as a party to the action and joining the Administrator of the Workers' Compensation Administration.

DATED: June 24, 2011

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY
Date: 6-27-2011
Venetia H. Velazquez, Esq.
Clerk of the Court
By: M. Scade
Court Clerk

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: Lori B. Tyson
LORI BOYNES-TYSON
Court Clerk Supervisor 6/27/11

[59] Tit. 24, § 263.

[60] Tit. 24, § 263 ("The injured [worker] or his beneficiaries may not institute any action, nor may compromise any right of action they may have against the third person responsible for the damages, unless the Administrator is a party to the action or agrees to the compromise.").

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

BERYL BERTRAND, as Administratrix of the Estate of JACQUES-PIERRE BERTRAND, Plaintiff,	**CIVIL NO. ST-08-CV-457**
v.	**ACTION FOR SURVIVAL AND WRONGFUL DEATH**
CORDINER ENTERPRISES, INC. d/b/a CORDINER AND ASSOCIATES; MICHAEL P. CORDINER; MYSTIC GRANITE AND MARBLE, INC.; ISLAND TILE AND MARBLE, LLC d/b/a VIRGIN ISLANDS GRANITE & MARBLE; and **ABACO MACHINES USA, INC.,** Defendants.	**JURY TRIAL DEMANDED**

ORDER

AND NOW, consistent with the Memorandum Opinion issued today in this matter, it is hereby

ORDERED that Plaintiff Beryl Bertrand's April 13, 2011 Amended Motion to File Out of Time is **GRANTED**; and it is further

ORDERED that Plaintiff Beryl Bertrand's April 13, 2011 Amended Motion for Reconsideration is **GRANTED**; and it is further

ORDERED that **within fourteen (14) days** of entry of this Order, Plaintiff Beryl Bertrand shall file an amended Complaint, accompanied by a red-lined version, which amended Complaint shall reflect the addition of Island Tile and Marble, LLC, and the Administrator of the Workers' Compensation Act as parties; and it is further

ORDERED that Plaintiff Beryl Bertrand shall file proof of service of the amended Complaint on all parties within **thirty (30) days** of entry of this Order; and it is further

ORDERED that Plaintiff Beryl Bertrand shall serve Island Tile and Marble, LLC, and the Administrator of the Workers Compensation Act, with a copy of each of the orders issued by this Court relating to discovery deadlines as well as a copy of this Order and the Memorandum Opinion deciding the Motion for Reconsideration, and shall file proof of such service within **thirty (30) days** of entry of this Order; and it is further

ORDERED that copies of this Order and of the Memorandum Opinion issued today shall be directed to counsel of record for all parties and to counsel for Island Tile and Marble, LLC.

DATED: June 24, 2011

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 6/27/11

CERTIFIED A TRUE COPY
Date: 6-27-2011
Venetia H. Velazquez, Esq.
Clerk of the Court
By: M. Scott
Court Clerk