SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JOE SMITH **Plaintiff,** **vs.** **LAW OFFICES OF KARIN A. BENTZ, P.C.- Tradename VIRGINLAW.COM, a U.S.V.I. professional corporation, KARIN A. BENTZ, ESQ., and JANE/JOHN DOE,** **Defendants.**	**CASE NO. ST-17-CV-116**

MEMORANDUM OPINION

Pending before the Court are Plaintiff's Motion to Strike the Affirmative Defense of Insufficient Service, Motion for Clarification, and Motion for Reconsideration. The Motion to Strike will be granted. The Motion for Clarification will be granted in part and denied in part, and the Motion for Reconsideration will be denied.

FACTUAL AND PROCEDURAL HISTORY

On February 27, 2017, Plaintiff Joe Smith filed a Complaint alleging Defendants Karin A. Bentz, Esq., her law firm the Law Offices of Karin A. Bentz, P.C., and an unnamed co-defendant labeled as Jane/John Doe are liable for damages he sustained resulting from Bentz's professional legal malpractice, breach of contract, breach of fiduciary duty, breach of covenant of good faith and fair dealing, negligence, and intentional and negligent infliction of emotional distress[1] arising from Bentz's handling a separate personal injury case on Smith's behalf.[2]

Relying on Virgin Islands Rule of Civil Procedure 12(b)(6), Bentz filed a Motion to Dismiss on April 6, 2017, for failure to state a claim upon which relief can be granted.[3] On July 20, 2017, the Court issued a Memorandum Opinion that found Smith's claims sounding in professional legal malpractice, breach of contract, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and negligence not ripe for adjudication and held them in abeyance as a result.[4] The same Opinion dismissed both the intentional and the negligent infliction of emotional distress claims and determined Smith's Motion Requesting that Defendants Waived Defense of Insufficient Service of Process was premature.[5]

Meanwhile, on August 18, 2017, Bentz filed an Answer and Counterclaim, which denied all claims asserted by Smith, asserted defenses—none of which constituted the affirmative defense of insufficient service of process—,and launched a counterclaim for unpaid services relating to Bentz's having represented Smith for an unrelated

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[1] Pl.'s V. Compl. 7-12.
[2] Pl.'s V. Compl. 2-6. Facts concerning Smith's personal injury, owing to a vehicular accident, are discussed in the Court's July 20, 2017 Memorandum Opinion addressing his present legal malpractice claims.
[3] Smith filed an Opposition Response to Bentz's Motion to Dismiss on April 17, 2017, to which Bentz replied on May 16, 2017. On May 30, 2017, Smith filed a Motion Requesting a Ruling that Defendants Waived the Defense of Insufficient Service of Process.
[4] *Smith v. Law Offices of Karin A. Bentz, P.C.*, No. ST – 17 – CV – 116, 2017 V.I. LEXIS 111, *8-*14 (V.I. Super. Ct. July 20, 2017). Hereinafter, all of Smith's claims held in abeyance, namely his legal malpractice, breach of contract, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and negligence, will be collectively referred to as Smith's "legal malpractice-related" claims.
[5] *Id.* at* 3, *5-*6, *14-*17.

employment claim.[6] On September 1, 2017, Smith filed his Answer, Reply, Defenses, Affirmative Defenses, and Counterclaim to Defendant's Counterclaim.[7]

In response to the Court's Opinion, Smith filed motions (1) to strike Defendant's affirmative defense of insufficient service of process,[8] (2) for clarification, and (3) for reconsideration.[9]

Motion to Strike Defendant's Affirmative Defense of Insufficient Service of Process

Virgin Islands Rule of Civil Procedure 12(f) empowers the Court, either *sua sponte* or upon the motion of a party, to strike defenses for insufficiency, redundancy, immateriality, impertinence, or scandalous materials.[10] When a responsive pleading to a plaintiff's complaint is permitted, the Virgin Islands Rules of Civil Procedure continue to require defendants to assert affirmative defenses, such as insufficient service of process, in their first responsive pleading or motion.[11] If the affirmative defenses listed in Rule 12(b)(2)-(5), including insufficient service of process, are not asserted in a defendant's

[6] Def.'s Answer and Countercl.
[7] Pl.'s Answer, Reply, Def.s, Affirmative Def.s, and Countercl. to Def.'s Countercl.
[8] Pl.'s Mot. Strike and Mot. Req'g Ruling that Def.s Waived Def. of Insufficient Serv. of Process 3-4.
[9] Pl.'s Mot. Clarification Recons. of Part of Ct.'s July 20, 2017 Op. Order.
[10] *In re Adoption of the V.I. Rules of Civ. Procedure*, PROMULGATION ORDER No. 2017-001, 2017 V.I. Supreme LEXIS 22, 68 (V.I. Apr. 3, 2017) (Rule 12(f)) (providing "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.").
[11] *Id.* at 66-67 (Rule 12(b)(5)) (establishing Rule 12(b)(5)'s defense of "insufficient service of process" as an affirmative defense which "must be made before pleading, if a responsive pleading is allowed" and "may" be made at trial, if the initial "pleading sets out a claim for relief that does not require a responsive pleading. . . .").

first response, then they are waived and precluded from further assertion in the proceeding.[12]

Here, Smith's Motion to Strike asserts he "is entitled to a ruling that Defendants, Law Offices of Karin A. Bentz, P.C. and Karin A. Bentz, Esq., waived their right(s) to assert the defense of insufficient and improper service of process."[13] Indeed, Bentz's first responsive motion, filed April 6, 2017, asked the Court to dismiss Smith's claims under Rule 12(b)(6), arguing that Smith's failure to apply for an extension to file his separate, underlying personal injury claim under the Virgin Islands Tort Claims Act (hereinafter VITCA) left him with additional remedies to pursue at law.[14] Because Bentz's first motion failed to list insufficient service of process as an affirmative defense and, instead, argued that Smith's claim should be dismissed under Virgin Islands Rule of Civil Procedure 12(b)(6), Bentz waived her ability to assert it in her August 18, 2017 Answer and Counterclaim. Her subsequent attempt to assert the affirmative defense of insufficient service of process, therefore, qualifies as an insufficient defense under Rule 12(f), and, accordingly, the Court will strike it from Defendants' Answer.

Motion for Clarification

The Virgin Islands Rules of Civil Procedure do not include a provision specifically authorizing the Court to grant or deny a motion for clarification. However, in

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[12] *See id.* at 68 (Rule 12(h)(1)(A) and (B) and Rule 12(g)(2)) (providing the interplay between Rule 12(h)(1)(A) and (B), which establish that Rule 12(b)(2)-(5) affirmative defenses are waived when defendants omit them from their first responsive motions or first responsive pleadings "or in an amendment allowed by Rule 15(a)(1) as a matter of course" and Rule 12(g)(2), which prohibits defendants from asserting 12(b)(2)-(5) affirmative defenses in a motion for joinder made under the latter rule).
[13] Pl.'s Mot. Strike and Mot. Req'g Ruling Def.s Waived Def. of Insufficient Serv. of Process 4.
[14] Def.'s Mot. Dismiss 3-6.

the past, Virgin Islands courts have issued orders that clarified decrees issuing from divorce proceedings,[15] property proceedings,[16] and habeas corpus proceedings.[17] These clarification orders work to not only clarify but to also effectuate the Court's original intent reflected in the original order.[18] Similarly, courts in other jurisdictions possess the power to grant or deny motions for clarification.[19] "[A]lthough not specifically described

[15] In *Lewit v. Lewit*, the Court held Virgin Islands trial courts "may issue a modification that effectuates the intent of the [Court's] original order by providing the necessary clarification . . . or adding a formal element that enables the order to be carried out." 52 V.I. 118, 128-129 (V.I. Super. Ct. 2009) (reasoning in its opinion that when it granted a husband's request for a modification of a divorce and property settlement agreement's QRDO, the Court, in substance, granted a *clarification* of the property distribution as the court originally approved in the parties' original agreement).

[16] In *Peter Bay Owners Ass'n v. Stillman*, the Virgin Islands federal district court clarified a 1999 opinion by elucidating the extent to which an easement, addressed in the 1999 opinion, extended from the beach property's low water mark to the vegetation berm line. 163 F. Supp.2d 537, 539-555 (D. V.I. 2001).

[17] In *Harrigan v. Hansen*, an inmate filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, asking the Court to correctly calculate his parole eligibility date. The Virgin islands federal district court ruled the petition was to be treated as a motion for clarification because the Virgin Islands Bureau of Corrections (VIBOC), not the Federal Bureau of Prisons, was the entity responsible for calculating the remainder of the inmate's sentence, therefore Virgin Islands rules of procedure applied. As a result, the correct procedure was to consider the writ as a motion for clarification. No. 2008-136, 2011 U.S. Dist. LEXIS 66604, at *2-*3 (D. V.I. June 22, 2011).

[18] *Lewit*, 52 V.I. at 129 ("In the instant case, the Court's intent was to effectuate the party's [original divorce] agreement, entered into with the advice of counsel [and approval of the Court], that the [p]laintiff was to receive fifty-percent of the defendant's pension benefits accrued during the marriage, minus the $55,000 for the marital homestead. . . . [I]n accord with the parties' [original] intent, the Court issued a decree that called for a lump sum payment of a specific amount of money that both parties could identify. There has been no evidence presented that the Court intended to allow either party to amend the amount of the transfer to provide for market fluctuations."

[19] The Connecticut Court of Appeals upheld a trial court's granting a motion for clarification. When doing so, the appellate court held that an original property settlement decree was ambiguous because the decree was "silent as to whether the proceeds of the sale of [a] marital home should be applied to the carrying costs of the second mortgage." After establishing an ambiguity existed in the original decree, the appellate court affirmed the trial court's decision to clarify the original property settlement because it only clarified and did not modify nor create an inconsistency with the original award's intent, which was to liquidate proceeds from the sale of a marital home. *Holcombe v. Holcombe*, 22 Conn. App. 363, 366-367, 576 A.2d 1317, 1318-1320 (Conn. Ct. App. 1990). The Washington Court of Appeals overturned a trial court's granting a motion for clarification. There, the appellate court held that a trial court modified a divorce decree and child support payment schedule, instead of clarifying it, where the original decree stated the father was to pay child support as long as the daughter was enrolled as a full-time student as defined "by the institution where she is enrolled." In a later hearing, another trial tribunal changed the father's obligations, by making his payments dependent upon whether the daughter was enrolled, continued to take, and successfully completed minimum hours required to be a full-time student." *In re Marriage of Jarvis*, 58 Wash. App. 342, 343-46, 792 P.2d 1259, 1262-1263 (Wash. Ct. App. 1990). The Florida Court of Appeals overturned a trial court's granting a motion for clarification. There, the appellate court held the trial court modified, instead of clarified, the original divorce decree, which ordered the wife to pay the

in the rules of practice [for the Virgin Islands or for other jurisdictions], [such a motion is] commonly considered by trial courts and [is] procedurally proper."[20] Generally, no time restrictions limit a party's filing a motion for clarification."[21]

The Court may grant a motion for clarification "where the meaning of what the [C]ourt has written [in a prior order] is unclear," ambiguous, or vague.[22] In doing so, the Court may "clarify certain language in the [prior order] so that the Court's intended holding is conveyed more precisely."[23] While a motion for clarification is the appropriate procedure to use when ensuring an original judgment is properly effectuated, it "may not . . . be used to modify or to alter the substantive terms of a prior judgment."[24] Nor may [it] be granted in response to a counsel's request "for guidance in the form of an advisory opinion, rather than for specific relief."[25]

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husband one-half of her investment accounts, based on their 2007 amounts. Not all payments were made to the husband immediately. Upon the husband's applying to the trial court to have the remainder remitted to him, the trial court conducted an additional hearing, took expert testimony, and made significant changes to the original divorce decree instead of implementing the original decree's original terms. *Shinitzky v. Shinitzky*, 82 So. 3d. 1010, 1011-1013, 36 Fla. L. Weekly 1820, ____ (Fla. Ct. App. 2011). The Delaware Court of Chancery granted a motion for clarification, which asked the court to elucidate the terms regarding a credit received upon the plaintiff's return of a prior purchased boat. In it, the court specified that the plaintiff had a three-month time frame to use his credit, could use the credit toward any of the defendant's items sold, and could not use the credit on items sold by the defendant in his capacity as a broker/seller for a third party. *Naughty Monkey, LLC v. MarineMax Northeast, LLC*, No. 5095-VCN, 2011 Del. Ch. LEXIS 31, at *4-*10 (Del. Ch. Feb 7, 2011)].

[20] *Holcombe*, 22 Conn. App. at 366, 576 A.2d at 1319.

[21] "[C]ourts have continuing jurisdiction to fashion a remedy appropriate to the vindication of a prior . . . judgment...pursuant to [their] inherent powers. . . . Therefore, when an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events . . . a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior judgment." *Mickey v. Mickey*, 292 Conn. 597, 604-5, 974 A.2d 641, 648 (2009) (quotation marks, punctuation, and brackets omitted).

[22] *Naughty Monkey*, 2011 Del. Ch. LEXIS, at *10-*11.

[23] *Id.* at *4.

[24] *Mickey*, 292 Conn. at 605, 974 A.2d at 648.

[25] *Houston v. Mile High Adventist Academy* 872 F.Supp. 829, 832 (D. Colo. 1994) (denying the plaintiff's motion for clarification because it was "primarily a request . . . as to whether [her] amended complaint [which she submitted with her motion] conformed to the [court's] Order of March 22, 1994," and, specifically, whether her amended complaint correctly asserted certain causes of action against certain defendants.). *See also State ex rel. Draper v. Wilder*, 145 Ohio St. 447, 455-56, 62 N.E.2d 256, 159-60

"[W]hen there is an ambiguity in the language of a judgment, the court may effectuate its prior judgment . . . by interpreting the ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . so long as that interpretation is merely a clarification, and not an alteration, of the original judgment."[26] In short, as long as the motion for clarification's sought-after interpretation "does not seek to change rights and obligations but to make a judgment more clear and precise," the motion may be granted. However, when the motion works "to change the status quo and [to] seek[] a new benefit for one party," it may not be granted.[27]

The Court "looks[s] to the substance of the relief sought by the motion rather than [its] form to determine whether a motion is properly characterized as one seeking a clarification or a modification."[28] Upon determining that a clarification is, indeed, requested, and would be appropriately granted, the Court construes the original order or

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(Ohio 1945) (holding that a petitioner's request, asking that court (1) whether a certain statute addressing the purchase of lands forfeited for the nonpayment of taxes applied to lands sold by a county auditor and (2) if not, whether the petitioner had authority to issue a certificate of registered title to a purchaser upon the purchaser's presenting a deed and the proper fees, amounted to "no more than an advisory opinion" because it "propounded certain questions for the court's advice and opinion, without taking a position one way or the other" therein asking the court to settle no controversy between contesting parties).

[26] *Parisi v. Parisi*, 315 Conn. 370, 381, 107 A.3d 920, 928 (Conn. 2013) (quotations and citations omitted). *See also Rivard v. Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677, 679 (Wash. 1969) (A clarification of a prior order or decree constitutes "merely a definition of the rights [and obligations] which have already been given and [which] . . . may be completely spelled out if necessary." By comparison, a modification of a prior order or decree can be found when a party's rights are "either extended beyond the scope originally intended or where those rights are reduced . . . [from] those . . . originally received.").

[27] *Shinitzky*, 82 So. 3d at 1013, 36 Fla. L. Weekly D at ___. *See also U.S. v. Philip Morris USA, Inc.*, 793 F. Supp.2d 164, 168, (D. D.C.) (finding that the defendant's motion for clarification, as based on its substance, was not asking the court to explain or clarify an ambiguous portion of the order and apply it to a concrete factual situation as it purported, but, instead, was requesting the court to add language that preempted potential future litigation; finding the motion amounted to a request for an advisory opinion; and noting as "significant" that the defendant failed to identify any ambiguous or vague language in the court's order for which it sought clarification) (citing *Resolution Trust Corp. v. KPMG Peat Marwick, et. al.*, No. 92-1373, 1993 U.S. Dist. LEXIS 16546, at *2 (E.D. Pa. June 8, 1993) (finding that the defendant did not seek a motion for clarification, as purported, but, in substance, asked the court to make new findings of fact and alter its previous ruling).

[28] *Mickey*, 292 Conn. at 605, 974 A.2d at 648.

judgment "in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of [the order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making."[29] The Court, also, must give effect "to that which is clearly implied as well as to that which is expressed. . . . [and] should [work to create] a consistent construction as a whole."[30]

Here, upon looking to the substance of Smith's motion as a whole, he requests the Court's clarification as to whether a not-yet-filed personal injury claim, which underlies the present legal malpractice claims he brought before this Court in February 2017, is to be filed as part of a new lawsuit or as part of his present lawsuit. Smith points to two sentences in the Opinion he finds ambiguous and questions "how the language is to be interpreted":[31]

> (1) Importantly, since a motion for permission to file a [personal injury] claim [under the Virgin Islands Tort Claims Act] is not currently before the Court, the Court will not determine whether the facts satisfy the requirements for a late filing.
> (2) Smith should remember that he has an obligation to mitigate his damages.[32]

Second, Smith states:

> This Court's July 20th Memorandum Opinion deemed it important that a motion for *permission to file a late claim is not currently pending before the Court. Such language may be read to mean that Plaintiff should submit such motion in his malpractice case for adjudication of his tort claim case.* Counsel's understanding, however, is that typically a motion/application for late filing would be filed as part of a new/separate lawsuit naming the parties involved in the

[29] *East Windsor v. East Windsor Housing, LTD, LLC*, 150 Conn. App. 268, 273, 92 A.3d 955, 958 (Conn. Ct. App. 2014).
[30] *Id.*
[31] Pl.'s Mot. Clarification Recons. of Part Ct.'s July 20, 2017 Op. Order 3.
[32] Pl.'s Mot. Clarification Recons. of Part Ct.'s July 20, 2017 Op. Order 3 (quoting *Smith*, 2017 V.I. LEXIS at *8, *12, footnote 51).

> vehicular collision. In an abundance of caution, Plaintiff seeks clarification of the Court's intent.[33]

Reading the language to which Smith points in the context of the entire Opinion, it appears Smith's question stems mainly from the verb tense used in the first sentence he highlights from the Opinion, as well as that sentence's placement just after a discussion of the VITCA and just prior to the Court's ripeness analysis finding Smith's legal malpractice-related claims unripe.[34] Due to (1) the sentence's verb tense suggesting that such a motion would be discussed, if placed before the Court, (2) the sentence's placement just after the VITCA discussion and just before the ripeness discussion in the Opinion, and (3) the reminder that Smith has an obligation to mitigate his damages, the Court sees that, when taken together, ambiguity could result concerning the precise ruling conveyed by the Opinion (i.e., Smith's legal-malpractice-related claims, outside of those for intentional and negligent infliction of emotional distress, were not prudentially ripe for adjudication).[35] Therefore, to the extent that Smith's motion for clarification seeks this Court's elucidation regarding his legal malpractice-related claims, we grant Smith's motion. To the extent that Smith's motion operates as a request for this Court's advice and guidance whether to file a claim under the VITCA for a separate, underlying, not-yet-filed personal injury claim on which his legal malpractice-related claims turn,—without

[33] Pl. Mot. Clarification Recons. 4.
[34] The sentence reads: "Importantly, since a motion for permission to file a claim is not currently before the Court, the Court *will* not determine whether the facts satisfy the requirements for a late filing." *Smith*, 2017 V.I. LEXIS, at *8.
[35] *Smith,* 2017 V.I. LEXIS at *8, *12-*13.

taking a side for one position or another—we deny Smith's motion as a request for an advisory opinion.[36]

Accordingly, the Court will clarify its Opinion so that its intended holding is conveyed more precisely. As when interpreting any other judgment, order, or document having legal effect, the Court construes the Opinion like any other written instrument: the determining factor is the Court's intention. First, the Court makes clear that the specific holding of its Opinion is as follows: Smith's claims (for professional legal malpractice, breach of contract, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and negligence) are prudentially unripe for adjudication at present and are, therefore, held in abeyance.[37] Second, the claims' lack of prudential ripeness stems from the Court's inability to determine damages. The inability to determine damages is due to the contingency and indeterminacy of Smith's separate, underlying personal injury claim, which has yet to be filed under the strictures of the VITCA.[38]

The *controversy* in the present case depends upon whether Bentz and her law firm can be found *liable* to Smith *for legal malpractice damages* due to Bentz's professional performance. The issue of Bentz's legal malpractice *liability* arises from facts centering on her professional performance as a lawyer and whether those facts fulfill the elements for the legal malpractice-related claims Smith asserted in his Complaint. Though the elements of Smith's claims measure Bentz's professional performance as she handled Smith's separate, underlying personal injury claim against the Government of the Virgin

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[36] *See Houston*, 872 F. Supp. at 832. *See also State ex rel. Draper v. Wilder*, 145 Ohio St. at 455-56, 62 N.E.2d at 159-60.
[37] *Smith*, 2017 V.I. LEXIS at *12-*13.
[38] *Id.* at *9-*12.

Islands, the elements at issue in the present case remain those which sound in professional legal malpractice, breach of contract, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and negligence law, not the Virgin Islands Tort Claims Act. As a result, the Court can only address facts and legal principles which discuss legal malpractice liability in the context of the claims Smith has brought forth thus far and which discuss and measure legal malpractice liability, not personal injury liability. To do otherwise would result in a change in "the status quo" and either an extension or a reduction in one party's legal rights, therein modifying and not clarifying the Order.[39]

In the Opinion, the Court determined that Smith's legal malpractice-related claims were not ripe for adjudication.[40] When making this determination, the Court conducted its analysis in three steps: First, it established that the Supreme Court of the Virgin Islands treats justiciability issues, such as ripeness, mootness, and standing, as "claims processing rules" owing to our Court's status as a non-Article III court.[41] Second, the

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[39] *See Shinitzky*, 82 So. 3d at 1013, 36 Fla. L. Weekly at __ (establishing motions for clarification do not change the status quo); and *Rivard*, 75 Wash.2d at 418, 451 P.2d at 679 (establishing that modifications extend or reduce parties' original rights).

[40] *Smith*, 2017 V.I. LEXIS at *12-*14 (When addressing the ripeness of Smith's professional legal malpractice claim, the Court found: "Accordingly, because Smith's claim is not fully fit for review until legal malpractice damages are determinable, and because the parties will not endure discernible hardship resulting from the delay of a judicial decision, Smith's claim will be better decided later. . . ." And when addressing the ripeness of Smith's remaining breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and negligence claims, the Court also found them "not fully fit for review" due to the contingency of damages from the same unfiled personal injury claim and found "that no hardship to the parties will result from the delay of the adjudication of these claims," therein rendering them prudentially unripe as well.).

[41] *Id.* at *8-*9. *See Simon v. Joseph*, 59 V.I. 611, 629-30 (V.I. 2013) (holding neither the Virgin Islands Supreme Court "nor the Superior Court are Article III courts;" holding "in the territorial courts, ripeness . . . [is] a non-jurisdictional, judicially-created doctrine" and therefore operates as a claims-processing rule; and holding the plaintiff's professional legal malpractice claims, there, were unripe because the plaintiff's underlying criminal convictions had not been set aside); *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564, (V.I. 2012) ("The doctrine of standing, in the federal courts, has two sources, a 'prudential' or claims

Court delineated the difference between prudential ripeness and constitutional ripeness and applied the test for prudential ripeness owing to this Court's status as a non-Article III court.[42] Third, when applying the two-pronged, prudential ripeness test to Smith's legal malpractice-related claims, the Court found they failed the first prong: they were not "fit" for adjudication.[43] In coming to this conclusion, the Court had to assess the facts

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processing aspect reflecting the needs of all courts to control the presentation of claims in the litigation to assure full and fair exploration of the issues raised, and a constitutional component based on the Article III case and controversy requirement, which restricts the scope of federal court jurisdiction. Early in [the Supreme Court's] jurisprudence, we described some of the case and controversy doctrines, including standing, as jurisdictional. However, in our more recent consideration of the case and controversy doctrines, we have recognized these doctrines as judicially-imposed restraints on our authority because Virgin Islands courts are not Article III courts and thus not subject to the same constitutional constraints on jurisdiction. Because we are not an Article III court and 4 V.I.C § 32, which sets out [the Supreme Court's] jurisdiction over appeals from the Superior Court, does not include a case or controversy requirement, we now overrule any language in our older opinions indicating that standing is jurisdictional. Instead, standing, like mootness, functions in the courts of the Virgin Islands as a claims processing rule. . . .") (citations, parentheticals, and quotation marks omitted).

[42] *Smith*, 2017 V.I. LEXIS at *10, footnotes 44 and 45. *See also Simmonds v. INS*, 326 F.3d 351, 356-361 (2d. Cir. 2003) (explaining the differences between constitutional ripeness and prudential ripeness rules and purposes).

[43] *Smith*, 2017 V.I. LEXIS at *10-*12 (explaining Smith's legal malpractice claim was not "fit for adjudication" because his separate, underlying, and yet-to-be filed personal injury claim had the potential of resulting in too many contingent factual scenarios that would impact damages for his instant legal-malpractice-related claims and listing the following as possible resulting factual scenarios: (1) Smith applies for permission to file a late VITCA claim, it is granted, and he loses at trial; (2) Smith applies for permission to file a late VITCA claim, it is granted, and he wins at trial; (3) Smith applies for permission to file a late VITCA claim, it is denied, and his instant legal malpractice claims are rendered ripe for judicial adjudication). *Cf. Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 646-54 (3d Cir. 1990) (affirming the district court's finding unripe the plaintiff's request for a declaratory judgment against a supplier of its products for damages the plaintiff *could* incur *if* the plaintiff was found liable in a separate product defect lawsuit because the liability of the plaintiff was only one of many possible outcomes of the separate, underlying product defect lawsuit; finding the plaintiff's possible liability in the separate, underlying product defect lawsuit was *too contingent* to render his declaratory judgment ripe; and simultaneously finding the plaintiff's claim for direct damages was ripe because these direct damages did not depend upon "future contingencies or events yet to happen," like a separate, underlying products defect lawsuit, but because the defendant supplier had a duty to pay consequential damages under the U.C.C. and independent of a product defect lawsuit). *See also Westport Ins. Corp. v. Howell*, No. 05-351, 2005 U.S. Dist. LEXIS 8733, *4, *6 (E.D. Pa. May 10, 2005) (finding the plaintiff-insurance company's request for a declaration, to establish the insured and insurer's rights under an insurance policy covering legal malpractice claims, was unripe because "no judgment or settlement on an underlying claim [existed, therein rendering] any imposition of liability . . . not . . . sufficient . . . to warrant a declaration [which would be based on] the theoretical contingency that liability in the underlying claim will [or would] actually be imposed" and therein rendering any court action on the matter an advisory opinion). *See also Gonzalez v. Nat'l Union Fire Ins. of Pittsburgh*, No. CV – 11 – 20 – BU – DLC, 2012 U.S. Dist. LEXIS 80848, *2, *4 (D. Mont. June 11, 2012) (finding the plaintiff's claim was unripe due to the plaintiff's asking the court to

giving rise to Smith's present legal malpractice-related claims. Necessarily, those facts focused on Bentz's handling, *as a legal professional*, of Smith's separate, underlying, and yet-to-be filed personal injury claim arising under the VITCA. Most pointedly, the *contingency and indeterminancy* of the personal injury claim, as opposed to the *adjudication* of the personal injury claim, were the pivotal factors in the Court's finding Smith's present claims unripe.[44] When assessing the contingency and indeterminancy of Smith's personal injury claim in the Opinion, the Court pointed to different hypothetical situations that *could* develop upon Smith filing *or* not filing a claim under the VITCA. The Court found the *variety* of situations that *could* develop rendered Smith's present legal malpractice-related claims against Bentz too contingent and indeterminant to deem ripe.

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determine coverage under an insurance contract "in advance of a determination of liability in [an] underlying case," therein rendering any judgment an unripe advisory opinion due to the fact that another "judgment in favor of the plaintiff's class remain[ed] a contingent future event that may or may not occur as anticipated. . . ."). *See also Interstate Fire & Cas. Co. v. McMurry Constr. Co.*, No. 6:16 – CV – 841 – Orl – 41TBS, 2017 U.S. Dist., LEXIS 2950, *7 (M.D. Fla. Mar. 2, 2017) (finding the insurer-plaintiff's request for declaratory judgment, which asked the court to find it was not obligated to indemnify the defendant, was not prudentially ripe because "there ha[d] been non resolution of the [defendant's] underlying [construction negligence] claim," therein presenting the court with an "abstract question").

[44] *Smith*, 2017 V.I. LEXIS at *10-*12. *See generally*, 13B C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3532 (3d ed. 2008). As the court in *Himes v. Johnson* noted, the "ripeness doctrine generally precludes . . . [adjudication of] . . . cases involving 'uncertain or contingent events that may not occur as anticipated, or indeed may not occur at all." 772 F.Supp. 678, 680 (D. Me. 1991) (quoting 13B C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3532.2 (3d ed. 2008) (finding the plaintiff's challenge to the constitutionality of his city's ordinance regulating massage establishments was unripe because he failed to apply for a license under the ordinance and, therefore, had not been turned down, therein not suffering from actual or threatened damages that could be redressed by a court because the necessary legal action that could lead to damages had not been taken by the plaintiff). *See also A/S J Ludwig Mowinckles Rederi v. Tidewater Const. Corp.*, 559 F.2d 928, 929-933 (4th Cir. 1977) (stating that "[a]n important factor in considering ripeness is whether resolution of the tendered issue is based upon events or determinations which may not occur as anticipated" when finding that a vessel's owner's suit seeking indemnification from a pier's operator and the pier's designer-builder was not ripe because the survivors of the employees who were killed in the vessel-pier collision at issue had not yet obtained any determination as to whether the vessel's owner or the pier's designer-builder were liable for the employees' deaths).

Accordingly, the Court now makes clear that the intent of its Opinion was to find Smith's legal malpractice-related claims unripe for present adjudication owing to the variety of contingencies that could still develop vis-à-vis Smith's underlying personal injury claim yet to be filed under the VITCA.

Regarding Smith's request for guidance or advice as to whether the Court "expects him to file a motion for permission to file a late claim in his malpractice case or in a new, separate lawsuit,"[45] the Court must deny the motion. Virgin Islands courts have routinely refused to issue advisory opinions or premature adjudication.[46] Here, by asking the Court to make a determination as to whether Smith should file a personal injury claim under the VITCA as part of the present legal malpractice case or as part of a separate lawsuit, Smith asks "for the court's advice and opinion, without taking a position one way or the other."[47]

Motion for Reconsideration

Motions for reconsideration are governed by Virgin Islands Rule of Civil Procedure 6-4(a) and (b). Subsection (a) authorizes parties to file motions requesting the

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[45] Pl.'s Mot. Clarification Recons. 5.

[46] *Chiang v. Turnbull*, 43 V.I. 49, 70 (V.I. Terr. Ct. 2000) (affirming the trial court's finding the plaintiffs' claim unripe, therein refusing to declare a newly proposed statute invalid due to its purported violation of the Equal Protection clause, because the "statute" was only *proposed* legislation at that point and any ruling would constitute an advisory opinion on future law); *Moore v. Abramson*, No. 2012-0096, 2014 U.S. Dist. LEXIS 30335, (D. V.I. Mar. 10, 2014), *3-*4 (finding the plaintiffs' request to remove a candidate's name from any future ballots to be unripe because the claim requested the court to remove the individual's name from *future* ballots in particular; finding such action to be premature adjudication; and reasoning it was better for the court to avoid "entangling [itself] in abstract disagreements").

[47] *State ex rel. Draper v. Wilder*, 145 Ohio St. at 455-56, 62 N.E.2d at 159-60 (Ohio 1945). *See also U.S. ex rel. Brzozowski v. Randall*, 281 F.Supp. 306, 309-10 (E.D. Pa. 1968) (finding a party's motion, which requested the court to make a "determination as to whether the attorney who represented him during . . . criminal proceedings should be named as a party defendant" in a civil proceeding, was "more appropriately a matter for counsel to determine").

Court to reconsider a ruling which does not amount to a final order or decision.[48]

Subsection (b) provides the Court with the power to grant a motion for reconsideration as long as it is based on:

> (1) intervening change in controlling law;
> (2) availability of new evidence;
> (3) the need to correct clear error of law; or
> (4) failure of the court to address an issue specifically raised prior to the court's ruling.
>
> Where ground (4) is relied upon, a party must specifically point out in the motion for reconsideration where in the record of the proceedings the particular issue was actually raised before the court.[49]

Generally, "[a] motion for reconsideration is not a second bite of the apple. . . . [Instead, it serves] to focus the parties on the original pleadings as the 'main event' and to

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[48] *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS at 46 (Rule 6-4(a)) ("Except as provided in Rules 59 and 60 relating to final orders or judgments, a party may file a motion asking the court to reconsider its order or decision. . . .").

[49] *Id.* at 46 (Rule 6-4 (b)) (August 16, 2017). "[E]ffective March 31, 2017, this Court adopted the Virgin Islands Rules of Civil Procedure, which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal Rules of Civil Procedure that had been applicable through former [Virgin Islands] Superior Court Rule 7." *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, *11 (V.I. July 14, 2017). Prior to the enactment of the new Rules of Civil Procedure in 2017, no specific Virgin Islands Rule authorized the Court to consider motions for reconsideration. Instead, the Court invoked Virgin Islands Superior Court Rule 7 to evaluate motions for reconsideration under a rule statement provided by Local Rule of Civil Procedure of the District Court of the Virgin Islands (LRCi) 7.3. Case law, over time, developed in response to LRCi 7.3's elements. As a result, when the Rules Advisory Committee wrote the Note to Rule 6-4(b) of the new Virgin Islands Rules of Civil Procedure, quoted above, it incorporated the case law that developed under the old civil procedure rules regime into the present civil procedure rules regime. In fact, the Note to Rule 6-4(b) highlights that the new grounds largely mirror the old grounds used to launch a motion for reconsideration, as the latter were articulated by the Virgin Islands Supreme Court in *Martin v. Martin*, 58 V.I. 620, 629 (V.I. 2013) and *Beachside Assocs. LLC v. Fishman*, 53 V.I. 700, 701 (V.I. 2010). Those grounds were: "(1) an intervening change in controlling law; (2) newly available evidence; or (3) a need to correct clear error of law or prevent manifest injustice." From there, the Note continues: "As an example of the third factor [of the old rule], this Rule lists "failure of the court to address an issue specifically raised by a party prior to the court's ruling on pending matters." It is this verbiage which forms the new Rule 6-4(b)'s fourth base upon which a motion for reconsideration is grounded. *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS at 46 (Note to Rule 6-4(b)). As a result, case law from the old rules regime, which addresses "clear error of law" or "manifest injustice" or "failure of the court to address an issue specifically raised prior to the court's ruling," will be used when considering a motion for reconsideration based upon Rule 6-4(b)(3) and (4), as language in the cases allows.

prevent parties from filing a second motion with the hindsight of the [C]ourt's analysis covering issues that should have been raised in the first set of motions."[50] As a result, when determining whether to grant or deny such a motion, the Court operates with "the common understanding that reconsideration is an 'extraordinary' remedy not to be sought reflexively or used as a substitute for appeal."[51] For these reasons, motions for reconsideration must be based on one of the grounds delineated in Rule 6-4(b).

When assessing a motion for reconsideration based on the "availability of new evidence,"[52] the Court may not grant the motion where the highlighted evidence is "not newly discovered."[53] More precisely, the Court may grant a motion on this basis so long as the moving party brings forth evidence that was unknown, such that it could not have benefitted from knowledge imparted by the evidence[54] and could not have included it in their initial arguments as the Court made its original determination.[55]

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[50] *In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008) (affirming a superior court's decision to deny a plaintiff's motion for reconsideration, purportedly based on "manifest injustice" yet substantively based on "new evidence," therein denying the plaintiff's request to unseal the adoption records regarding her son dating from 1968, because the plaintiff's motion for reconsideration espoused new arguments and used socio-legal evidence she could and should have presented at the time of the original decision).
[51] *Id.* 49 V.I. at 458.
[52] *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS at 46 (Rule 6-4 (b)(2)).
[53] *Sherman*, 49 V.I. at 458.
[54] *See Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 616-17 (V.I. 2012) (affirming a trial court decision to grant a motion for reconsideration based on the "availability of new evidence," therein rejoining a defendant who was originally dismissed earlier in the action due to the plaintiff and the defendant entering a stipulation of dismissal based on the defendant's purportedly having qualified as an insured employer under the V.I. Workers' Compensation Act because: (1) the plaintiff brought forth previously unknown evidence revealed in the discovery process which showed the employer was not an insured employer under the V.I. Workers' Compensation Act and (2) ruling against the plaintiff, in this instance, would have constituted an abuse of discretion).
[55] *In re Hartlage*, 54 V.I. 446, 453 (V.I. 2010) (affirming a trial court's decision to deny a motion for reconsideration, purportedly based on "manifest injustice" yet substantively based on "new evidence," therein denying a plaintiff's request to file a late claim under the Virgin Islands Tort Claims Act, where the motioning party brought forth affidavits executed by the plaintiff and his sister which asserted the government had knowledge of his injury (as required by the VITCA) and where the Supreme Court rationalized its decision to affirm the trial court by stating "where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration" because the moving party "should

When assessing a motion for reconsideration based on "the need to correct clear error of law,"[56] the court may grant the motion when its prior decision applied an incorrect legal precept or failed to conduct proper legal analysis using the correct legal precept.[57] In the past, Virgin Islands courts granted motions for reconsideration, which the moving party based on the need "to correct 'clear error'[58] or 'manifest injustice'" or both.[59] When doing so, Virgin Islands courts held that a motion for reconsideration based on these grounds is appropriately granted "when [the initial decision] overlooked dispositive factual or legal matters presented to it."[60] Furthermore, when assessing these types of motions for reconsideration, the Court looks for the moving party to offer the

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have presented that argument and evidence with [his] original petition. . . ." at the time of the Court's original decision). *See also Martin*, 58 V.I. at 630 (affirming a trial court's decision to deny a motion for reconsideration based on new evidence, thereby allowing a wife to keep a marital home gifted to the couple by a husband's father when they were married, where the motioning party brought forth evidence that was "irrelevant or may well have been considered by the [superior] court" because the evidence was not unknown to the motioning party at the time of the original decision). *See also Sherman*, 49 V.I. at 457-459.

[56] *In re Adoption of the V.I. Rules of Civil Procedure*, 2017 V.I. Supreme LEXIS at 46 (Rule 6-4 (b)(3)).

[57] *See Beachside Assocs. LLC v. Fishman*, 53 V.I. at 706, 713-715, 716-718 (affirming, in part, and vacating and remanding, in part, a trial court's denial of a motion for reconsideration because, in denying the motion, the trial court (1) correctly applied the law when finding no good cause existed for extending service of process but (2) incorrectly applied the law after finding no good cause existed and then failing to complete the second step required by the rule, which prescribed the court to assess whether any additional factors warranted granting a permissive extension of time to effectuate service of process).

[58] *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS at 46 (Rule of Civil Procedure 6-4(b)(3).

[59] *O'Neal v. PMST, LLC*, No. ST – 12 – CV – 388, 2012 V.I. LEXIS 62, *1-*4 (V.I. Super. Ct. December 3, 2012) (quoting *Castillo v. Kmart Corp.*, No. 2001-CV-0133, 2007 U.S. Dist. LEXIS 96544, at *2-*3 (D. V.I. July 6, 2007) (denying the defendant's motion for reconsideration based on correcting clear error or preventing manifest injustice, therein affirming its original order granting the plaintiff leave to amend her complaint by adding a defendant (the motioning party) to the suit, because: (1) the rule applied by the court gave the court the discretion to waive technical requirements when altering the original pleadings; (2) during the Court's initial consideration of the matter, the plaintiff made several legal arguments and factual allegations that could establish the defendant's liability; and (3) the court's use of the rule when considering the plaintiff's legal and factual arguments showed the court had not overlooked dispositive factual or legal matters presented to it).

[60] *Id.* at *1.

specific legal authority it claims the Court either failed to apply correctly or failed to apply in totum in its original decision.[61]

Here, Smith's motion for reconsideration asks the Court whether "filing a motion for permission to file a late [personal injury] claim [under the VITCA] is a prerequisite for the Court to adjudicate his [present legal] malpractice [claims] and whether [the permissibility of] the late filing . . . can be resolved as an issue of law."[62] Smith appears to ground his request in the following assertion: "trial courts may reconsider their decisions when dispositive factual or legal matters might reasonably have led to a different result."[63]

As a preliminary matter, Smith presents no argument premised on the first, second, or fourth bases enumerated in Virgin Islands Rule of Civil Procedure 6-4(b). In fact, looking at the plain language of his motion, Smith does not explicitly ground his motion for reconsideration on any basis upon which a motion for reconsideration rests as enumerated in Rule 6-4(b). He does, though, contend reconsideration is appropriate

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[61] *See Jefferson v. Grande Bay Resort Condominium Association, Inc.*, No. 2010-97, 2010 U.S. Dist. LEXIS 146841, *4 (highlighting, when denying a motion reconsideration, "[p]laintiff has offered no [legal] authority to . . . show that the relief granted could not or should not have been given" in the court's original decision). *Accord Blue Mountain Mushroom Co. v. Monterey Mushroom*, 246 F.Supp.2d 394, 399 (E.D. Pa. 2002) (granting a motion for reconsideration based on clear error of law because the "court overlooked other dispositive arguments presented by the defendant's counsel" and noting in its holding "[w]hile this court previously examined the legal issues in the case, the [d]efendant has correctly presented, to this court, different authority under Pennsylvania contract law which applies. . . .") and *Sanofi-Aventis U.S., LLC v. Great Am. Lines, Inc.*, No. 10 – 2023 (MAS (TJB), 2016 U.S. Dist. LEXIS 112171, *14-*16 (D. N.J. Aug. 22, 2016) (stating that the court found the "[p]laintiff ha[d] not met its burden on a motion for reconsideration [because the plaintiff] ha[d] not explained how the [c]ourt's holding in relation to [the p]laintiff's breach of implied contract of bailment claim against MVP is a clear error of law. . . . [and stating the] plaintiff ha[d] not cited to any case law in support of its position").
[62] Pl.'s Mot. Clarification Recons. 5.
[63] *Id.*

"when dispositive . . . legal matters might reasonably have led to a different result."[64] In doing so, Smith invokes case law from the old civil procedure rules regime, which is now folded into the Virgin Islands Rules of Civil Procedure, and indicates an intent to ground his motion for reconsideration in Rule 6-4(b)'s third element: a "need to correct clear error of law."[65] Therefore, we will address it by denying Smith's motion for reconsideration.

As case law interpreting Virgin Islands Rule of Civil Procedure 6-4(b)(3) illustrates, the Court looks to Smith (1) to specify the legal precept it should have applied or (2) to show how the correct legal precept was applied incorrectly in its earlier Opinion (i.e., legal authority which would enable the Court to rule for the first time on his personal injury claim in the context of his legal malpractice-related claims or to rule his legal malpractice-related claims ripe). However, Smith offers no statute, case law, or any other legal authority the Court could and should apply to his present legal malpractice-related claims in place of the ripeness doctrine case law invoked in the Court's original Opinion. Nor does he point to and explain how the legal authority used in the Opinion was applied incorrectly or incompletely. In short, he makes no substantive argument that enables the Court to reconsider and find his legal malpractice claims ripe for consideration under the bases provided in Rule 6-4(b)(3).

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[64] *Id* (In full, Smith states: "Pursuant to common law, trial courts may reopen and revise their interlocutory orders at any time prior to the entry of final judgment. . . . Furthermore, trial courts may reconsider their decision when dispositive factual or legal matters might reasonably have led to a different result.") (citing *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596 (V.I. 2012) and *Cabrita Point Dev. Inc. v. Evans*, 52 V.I. 968 (D. V.I. 2009)).
[65] *In re Adoption of the V.I. Rules of Civ. Procedure*, 2017 V.I. Supreme LEXIS at 46 (Rule 6-4 (b)(3)).

Instead, Smith asks the Court to reconsider a separate, underlying, personal injury claim, which has not been filed with any court, thus asking the Court to reconsider an issue it never addressed. Simultaneously, he offers the Court no legal authority which would empower it to make a determination regarding a claim, which is not within its jurisdiction, so that it could render ripe his present legal malpractice-related claims, which are properly within its jurisdiction. Accordingly, because Smith failed to point to an error of law in the Court's original Opinion addressing ripeness, the accompanying order will deny the motion for reconsideration.

Dated: January 29, 2018

ATTEST: Estrella George

Clerk of Court __/__/__

by: __________
Lori Boynes-Tyson
Court Clerk Supervisor 1/30/18

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR
COURT OF THE VIRGIN
ISLANDS