Not For Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MARIE AUGUSTINE HARRIS,	)	**S. Ct. Civ. No. 2008-082**
	)	Re: Super. Ct. Civ. No. 389/2004
Appellant/Plaintiff,	)	
	)	
v.	)	
	)	
RAFAEL GARCIA, M.D., MAXWELL MARTIN d/b/a D & D APOTHECARY HALL PHARMACY, ERNEST ROPER, JOHN DOE,	)	
	)	
Appellees/Defendants.	)	
	)	

Appeal from the Superior Court of the Virgin Islands
Argued: October 21, 2009
Filed: January 14, 2010

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **THOMAS K. MOORE**, Designated Justice.[1]

ATTORNEYS:

Gertrude LeCointe, Esq.
St. Croix, U.S.V.I.
Attorney for Appellant

Wilfredo A. Geigel, Esq. (argued)
Eugenio W.A. Geigel-Simounet, Esq.
St. Croix, U.S.V.I.
Attorneys for Appellees

OPINION OF THE COURT

Hodge, Chief Justice.

Appellant Marie Harris (hereafter "Harris") appeals from a September 24, 2008 Superior Court order denying her motion for reconsideration of the Superior Court's October 3, 2007

[1] Associate Justice Maria M. Cabret has been recused from this matter. The Honorable Thomas K. Moore sits in her place by designation pursuant to title 4, section 24(a) of the Virgin Islands Code.

order dismissing Harris's action against Rafael Garcia (hereafter "Garcia"), Maxwell Martin (hereafter "Martin"), Ernest Roper (hereafter "Roper"), and John Doe (hereafter "Doe") (collectively "Appellees") for failure to submit proof of subject matter jurisdiction. For the reasons that follow, we shall reverse the Superior Court's denial of reconsideration and vacate its dismissal order.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 3, 2004, Harris suffered a severe allergic reaction after taking medication prescribed by Garcia and purchased from D & D Apothecary, a Frederiksted, St. Croix pharmacy owned by Martin. Harris filed suit against Garcia, Martin, and two pharmacists—Roper and Doe—employed by Martin in the Superior Court on July 28, 2004. The Appellees collectively filed their answer on November 3, 2004, and discovery began shortly afterward. On March 27, 2007, the Superior Court, observing that the matter had remained dormant for over one year, *sua sponte* ordered the parties to move forward with the case within thirty days or else it would dismiss the matter. On May 16, 2007 the Appellees filed a motion to dismiss Harris's action for failure to prosecute, which Harris opposed on May 25, 2007. The Superior Court denied the Appellees' motion in a June 14, 2007 order, but, finding that there was no evidence in the record demonstrating that Harris had complied with the procedures in the Medical Malpractice Act, codified as 27 V.I.C. §§ 166 *et seq*. (hereafter "the Act"), required Harris to, within thirty days, submit proof of compliance with the Act's requirements to satisfy the court's concerns about its subject matter jurisdiction. However, Harris did not submit this proof until August 10, 2007, almost a month after the deadline the Superior Court imposed in its June 14, 2007 order.

The Appellees filed a motion to dismiss Harris's action on September 10, 2007 on the basis that "[t]he time for filing the motion to comply with th[e] [June 14, 2007] Order has long

come and gone and the dead line (sic) has now been exceeded by thirty days without [Harris] making any filing." Harris did not file an opposition to the Appellees' September 10, 2007 motion. On October 3, 2007, the Superior Court granted the Appellees' motion and dismissed Harris's action for lack of subject matter jurisdiction. Harris filed a "motion for reconsideration" of the October 3, 2007 order on November 9, 2007, in which she argued that the Superior Court made a mistake of fact when it found that she did not submit proof of compliance with the Act, specifically stating that she made her filing on August 10, 2007 and served it on Appellees on August 28, 2007.[2] The Appellees, although conceding that Harris served them with these documents, nevertheless opposed reconsideration on the basis that Harris failed to comply with the June 14, 2007 order.[3] On February 27, 2008, Harris, noting that the Superior Court had not yet ruled on her November 9, 2007 motion, filed a "motion for ruling" which reiterated her request for reconsideration of the October 3, 2007 order.

The Superior Court denied Harris's motion for reconsideration on September 24, 2008. In its September 24, 2008 order, the Superior Court, construing Harris's motion as arising under Local Rule of Civil Procedure 7.3,[4] found that Harris's November 9, 2007 motion was untimely because it was not filed within ten days after entry of the October 3, 2007 order. The Superior Court further found that even if her motion was properly before the Court, Harris had failed to show an intervening change in controlling law, the availability of new evidence, or that failure to

[2] To show that service had been effectuated, Harris attached a delivery confirmation letter, signed by a representative from Appellees' counsel's law office, that the filing was served by hand delivery on August 28, 2007.

[3] Appellees' opposition did not expressly specify how Harris failed to comply with the June 14, 2007 order.

[4] The District Court's Local Rules of Civil Procedure, as well as the Federal Rules of Civil Procedure, apply to proceedings in the Superior Court of the Virgin Islands to the extent that they are not inconsistent with the procedural rules promulgated by the Superior Court or the Legislature. *See Phillips v. People*, S.Ct. Crim. No. 2007-037, 2009 WL 707182, at *8 (V.I. Mar. 12, 2009); Super Ct. R. 7.

grant reconsideration would result in a manifest injustice. Harris subsequently filed her notice of appeal of the September 24, 2008 order on October 8, 2008.

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees [and] final orders of the Superior Court . . . ." V.I. CODE. ANN. tit. 4, § 32(a). Since the Superior Court entered its order denying Harris's motion for reconsideration on September 24, 2008, and Harris's notice of appeal was filed on October 8, 2008, the notice of appeal as to the order denying reconsideration was timely filed. *See* V.I.S.CT.R. 5(a)(1) ("[T]he notice of appeal required by Rule 4 shall be filed with the Clerk of the Superior Court within thirty days after the date of entry of the judgment or order appealed from . . . ").[5]

The standard of review for this Court's examination of the Superior Court's application of law is plenary, while the trial court's findings of fact are reviewed for clear error. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). "The appropriate standard of review for the denial of a motion to reconsider is generally abuse of discretion but, if the trial court's denial was based upon the interpretation or application of a legal precept, then review is plenary." *Lucan Corp., Inc. v. Robert L. Merwin & Co., Inc.*, S.Ct. Civ. No. 2007-015, 2008 WL 901492, at *2 (V.I. 2008).

[5] The Appellees argue in their brief that this Court lacks jurisdiction over this appeal because Harris did not file her motion for reconsideration of the Superior Court's October 3, 2007 order until November 9, 2007. "Supreme Court Rule 5(a)(4) provides that, in order to toll the time to appeal from the underlying order, a party making a motion for reconsideration must file that motion within ten days after entry of the order to be reconsidered." *Bernhardt v. Bernhardt*, S.Ct. Civ. No. 2007-132, 2009 WL 1077925, at *2 (V.I. Apr. 17, 2009). However, it is readily apparent that Harris intends to only appeal the Superior Court's September 24, 2008 order denying reconsideration and does not wish for this Court to review the correctness of the October 3, 2007 order. Significantly, Harris did not identify the October 3, 2007 order as an order appealed from in her notice of appeal—although she did identify the September 24, 2008 order—and has only discussed the October 3, 2007 order in the context of the September 24, 2008 order. Consequently, this Court has jurisdiction to consider Harris's appeal of the September 24, 2008 order.

B. The Superior Court Erred in Denying Harris's Motion as Untimely

Although Harris primarily argues on appeal that the Superior Court should have applied equitable principles to waive LRCi 7.3's requirement that a litigant file a motion for reconsideration within ten days, it is well established that "the function of the motion, not the caption, dictates which rule applies." *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988). Accordingly, the fact that Harris expressly invoked LRCi 7.3 both in her "motion for reconsideration" and on appeal does not, in and of itself, result in LRCi 7.3 governing the disposition of Harris's motion. *See Ruiz v. Jung*, S.Ct. Civ. No. 2008-035, 2009 WL 3568182, at *3 (V.I. Oct. 19, 2009) (quoting *Lucan Corp., Inc.*).

Harris's November 9, 2007 and February 27, 2008 motions, though captioned respectively as a "motion for reconsideration" and a "motion for ruling," possess the formal trappings and serve the purpose of a motion to set aside a judgment provided for by Superior Court Rule 50, which expressly provides that

> [f]or good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. *Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications.*

Super. Ct. R. 50 (emphasis added). Since Superior Court Rule 50 governs Harris's motions and expressly incorporates Federal Rules of Civil Procedure 59 to 61, Superior Court Rule 7, by its own terms, precludes application of LRCi 7.3 to Harris's motions. *See* Super. Ct. R. 7 ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, *to the extent not inconsistent therewith*, by the Rules of the District Court . . . .") (emphasis added).

"If a motion for reconsideration" arising under Superior Court Rule 50 "is brought within

ten days of the order to be reconsidered, the motion is to be treated as a Federal Rule 59(e) motion to alter or amend judgment. If the motion is brought after ten days, however, the trial court should consider the motion to reconsider as one brought pursuant to Federal Rule 60(b)." *Ruiz*, 2009 WL 3568182, at *3. *Compare Chavayez v. Buhler*, S.Ct. Civ. No. 2007-060, 2009 WL 1810914 (V.I. June 25, 2009) (construing motion for reconsideration filed within ten days of judgment under Fed. R. Civ. P. 59(e)) *with Lucan Corp., Inc.*, 2008 WL 901492, at *3 (construing motion for reconsideration filed sixteen days after entry of judgment under Fed. R. Civ. P. 60(b)). Accordingly, because Harris's motions were not filed within ten days of entry of the October 3, 2007 order dismissing her action, Rule 60(b) governs their disposition. *Ruiz*, 2009 WL 3568182, at *4. Rule 60, unlike Rule 59 and LRCi 7.3, does not impose a rigid filing requirement, but instead "applies a reasonable time standard." *Lucan*, 2008 WL 901492, at *3 (citing Fed. R. Civ. P. 60(b)(6)). "What constitutes a 'reasonable time' under Rule 60(b) is to be decided under the circumstances of each case." *Id.* (quoting *Delzona Corp. v. Sacks*, 265 F.2d 157, 159 (3d Cir. 1959)).

Here, Harris's "motion for reconsideration" was filed thirty-seven days after the Superior Court's October 3, 2007 order, a time period which courts have generally characterized as reasonable when the basis for the motion is not a mistake of law. *See United States v. Silva*, 26 Fed.Appx. 544, 546 (7th Cir. 2001) (characterizing forty-eight days as a reasonable time to move for relief under Fed. R. Civ. P. 60(b)); *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380, 1385-86 (10th Cir. 1981) (explaining that, while Rule 60(b)(1) motions alleging mistake of law must be filed within thirty days, Rule 60(b) motions based on other grounds may be filed later); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 154 (1st Cir. 1980) (explaining that, in order to prevent Rule 60(b) from serving as a substitute for an appeal, a Rule 60(b)(1) motion based on

the trial court's erroneous application of law cannot exceed the time allowed for an appeal) (collecting cases); *Medunic v. Lederer*, 533 F.2d 891, 894 (3d Cir. 1976) (holding that thirty-four days constitutes reasonable time to move to set aside a default judgment); *In re Air South Airlines, Inc.*, 249 B.R. 112, 116 (Bankr. D.S.C. 2000) (holding that motion to set aside default judgment filed after thirty-seven days is "reasonable time" for purposes of Rule 60(b)); *Merchant v. Nanyo Realty, Inc.*, 1998 Guam 26 ¶ 8 (Guam 1998) (holding that Rule 60(b)(6) motion filed thirty-two days after ruling was filed within a "reasonable time"). Given that Harris's motions requested relief cognizable under Rule 60(b) and the lack of precedent that treats thirty-seven days after judgment as unreasonable when the litigant seeks relief on a ground other than mistake of law, this Court concludes that the trial court abused its discretion in denying Harris's motion as untimely. *Lucan*, 2008 WL 901492, at *3.

C. The Superior Court's Denial of Harris's Motion as Untimely Was Not a Harmless Error

Although the Superior Court abused its discretion in denying Harris's motion as untimely, Federal Rule of Civil Procedure 61, which applies to Harris's motion pursuant to Superior Court Rule 50, expressly states that, when determining whether to vacate or otherwise disturb a judgment, the reviewing court "must disregard all errors and defects that do not affect any party's substantial rights." Accordingly, this Court must determine, based on the facts of the case, whether the Superior Court's denial of reconsideration constituted a harmless error. To determine if the error is harmless, this Court considers whether the Superior Court could have properly denied Harris's motion on the merits even if it had not erroneously denied it as untimely. *See Baldwin v. Credit Based Asset Servicing and Securitization*, 516 F.3d 734, 738 (8th Cir. 2008).

We cannot find that the Superior Court's error was harmless in this case because Harris

demonstrated that she was entitled to relief from the October 3, 2007 order dismissing her action for lack of subject matter jurisdiction. In her November 9, 2007 motion and accompanying exhibits, Harris provided clear proof showing that the October 3, 2007 order was premised on the Superior Court's erroneous belief that she had never submitted evidence of compliance with the Act, even though Harris had filed the requested documents with the Superior Court on August 10, 2007—a month prior to Appellees' September 10, 2007 motion to dismiss and almost two months before the Superior Court entered its October 3, 2007 dismissal order—and served them on Appellees' counsel on August 28, 2007. Significantly, Appellees conceded in their November 21, 2007 opposition to Harris's motion for reconsideration that Harris had filed and served those documents in August 2007. Accordingly, we find that the erroneous denial of Harris's motion as untimely cannot constitute harmless error because the Superior Court could not have denied Harris's November 9, 2007 motion on other grounds without also abusing its discretion.[6] *See Rivera-Mercado v. General Motors Corp.*, S.Ct. Civ. No. 2007-026, 2009 WL 1044585, at *2 (V.I. Apr. 14, 2009) (reversing denial of motion based on trial court's failure to consider affidavits filed by plaintiff, as demonstrated by trial court's "patently incorrect" finding that affidavits had never been filed). Consequently, we reverse the Superior Court's September 24, 2008 order denying reconsideration and, therefore, vacate the Superior Court's October 3,

[6] While the Superior Court noted in its September 24, 2008 order denying reconsideration that "[n]owhere in the motion does [Harris] address the thirty (30) day time limit set by the Court nor did [Harris] request an extension of time to respond to the [June 14, 2007] Order," (J.A. at 64), Harris was not required to address this issue given that the Superior Court had expressly dismissed her action for want of subject matter jurisdiction, and not for failure to prosecute. Notably, the Appellees' September 10, 2007 motion, though captioned as a "motion to dismiss for failure to comply with court order," expressly argued that dismissal was warranted because Harris had purportedly failed to prove subject matter jurisdiction, and not because Harris had filed proof of subject matter jurisdiction out of time.

2007 order dismissing Harris's action.[7]

III. CONCLUSION

Since the Superior Court should have construed Harris's "motion for reconsideration" as a motion for relief from judgment arising under Superior Court Rule 50, and thirty-seven days is not an unreasonable time to bring a mistake of fact to a trial court's attention through such a motion, the Superior Court erred in applying LRCi 7.3 to deny the motion as untimely. Furthermore, because Harris demonstrated that she was entitled to relief from judgment by proving that the pertinent documents were filed prior to Appellees' motion to dismiss, the Superior Court's error was not harmless. Accordingly, this Court reverses the Superior Court's September 24, 2008 order and vacates the October 3, 2007 order dismissing Harris's complaint.

Dated this 14th day of January, 2010.

FOR THE COURT:

_____/s/_____
RHYS S. HODGE
Chief Justice

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

[7] Although Appellees' counsel, for the first time at oral arguments, argued that a plaintiff in a medical malpractice action should be required to submit proof of compliance with the Act along with its complaint, this Court declines to consider an argument raised for the first time at such a late stage in the proceedings. *See Northern Mariana Islands v. Castro*, No. 04-0029-GA, 2008 WL 4058444, at *8 (N. Mar. I. Aug. 22, 2008) ("[W]e refuse to 'reward quick-thinking counsel by entertaining grounds brought to [the court's] attention for the first time at oral arguments'. . . . We do not endorse litigation by ambush and find that [litigants] should not be allowed to hide issues or deny the opposing party the right to respond.") (quoting *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 714 (6th Cir. 2001)). Likewise, because this Court may consider the correctness of the Superior Court's October 3, 2007 order only to the extent necessary to review its September 24, 2008 order denying reconsideration, the issue of whether the Superior Court may *sua sponte* require a plaintiff to provide proof of the Act's compliance is also not properly before this Court.