**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.; ABACO MACHINES USA, INC.; ISLAND TILE AND MARBLE, LLC d/b/a VIRGIN ISLANDS GRANITE & MARBLE; the GOVERNMENT OF THE VIRGIN ISLANDS, COMMISSIONER ALBERT BRYAN, acting in his capacity as the Commissioner of the U.S. Virgin Islands Department of Labor; and ANGEL E. DAWSON, acting in his capacity as the Commission of the U.S. Virgin Islands Department of Finance,** Defendants. | **JURY TRIAL DEMANDED** |

**REISSUED MEMORANDUM OPINION**

This matter is before the Court on Defendant Island Tile and Marble LLC d/b/a Virgin Islands Granite and Marble's Motion to Reconsider Memorandum Opinion, filed on July 11, 2011.[1] The Motion requests that the Court reconsider its Memorandum Opinion, dated June 27, 2011, which granted Plaintiff Beryl Bertrand's Motion for the Court to reconsider its decision to dismiss Island Tile from this case. Having reviewed the Motion, the Court will deny the Motion for essentially the same reasons as stated in its June 24, 2011 Memorandum Opinion. The Court however, recognizes that the issues raised in this appeal involve a controlling question of law in

[1] Plaintiff Beryl Bertrand is represented by Paul Platte, Esq., of Roger, Townsend & Thomas, P.C. Defendant Island Tile and Marble is represented by W. Mark Wilczynski, Esq., of the Law Office of W. Mark Wilczynskyi. Defendant Abaco Machines USA, Inc. is represented by Michael Fitzsimmons, Esq. Defendant Mystic Granite and Marble, Inc. is represented by Carl Beckstedt, Esq. of Bryant Barnes Beckstedt & Blair LLP.

which there is a substantial ground for difference of opinion, and that the immediate appeal from this Order may materially advance the ultimate termination of the litigation.[2]

## STATEMENT OF FACTS

The Court will not restate the facts in this case because the procedural and factual history have been thoroughly discussed in previous opinions.[3] In its Order dated June 24, 2011, the Court granted the Plaintiff's Motion for Reconsideration of an Order dismissing Island Tile as a Defendant. Island Tile has filed with the Court, a Motion for Reconsideration of the Court's Order.

## DISCUSSION

### I. RULE 54(B) WAS THE CORRECT STANDARD TO APPLY TO THE PLAINTIFFS MOTION FOR RECONSIDERATION.

In its Memorandum Opinion, the Court applied Federal Rule of Civil Procedure 54(b) to the Plaintiff's Motion for Reconsideration. That rule allows this Court to at any time, revise an Order that adjudicates fewer than all claims and fewer than all parties in an action.[4] This Court's March 30, 2010 Order dismissing Island Tile from the litigation, did not adjudicate the claims as to all the parties. Notwithstanding this fact, Island Tile argues that the Court erred in applying Rule 54(b) and should have instead applied Superior Court Rule 50 to the Plaintiff's Motion for Reconsideration.

Island Tile relies on *Beachside Assocs., LLC v. Fishman* in support of its argument.[5] In *Beachside*, when considering whether reconsideration was proper, the Supreme Court of the Virgin Islands ultimately applied Superior Court Rule 50 to an Order that was not a final order.[6] However, in reaching the decision, the Court noted that while the Order was not a final judgment because Beachside's action remained pending against several other Defendants, the collateral Order doctrine applied, thus giving the Supreme Court jurisdiction to hear the matter.[7] The effect of the collateral order doctrine applying to a non-final judgment in *Beachside* allowed the

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[2] Pursuant to V.I. Code Ann. Tit. 4 § 33 (1997), "Whenever the Superior Court Judge, in making a civil action or order not otherwise appealable by this section , is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the Judge shall so state in the Order."

[3] *See, e.g., Bertrand v. Cordiner Enterprises, Inc.*, No. ST-08-CV-457, 2011 WL 3046521, (V.I. Super June 24, 2011); *see also Bertrand v. Cordiner Enterprises, Inc.*, No. ST-08-CV-457, 2010 WL 2507305, (V.I. Super June 2, 2010).

[4] Federal Rule of Civil Procedure 54(b) states that ". . . any order or other decision, however designated, that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all 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 an liabilities."

[5] 53 V.I. 700 (2010).

[6] *Beachside Assocs.*, 53 V.I. at 715.

[7] *See Beachside Assocs.*, 53 V.I. at 707-12 (noting that the Order that was before the Court on appeal did not terminate the litigation on the merits and thus was not a final order, but the Court would nevertheless exercise jurisdiction to hear the appeal pursuant to the collateral order doctrine).

Supreme Court to treat the non-final judgment as a final judgment for the purposes of hearing the interlocutory appeal. As such, the Court applied Superior Court Rule 50, which incorporates Federal Rules 59 and 61 - two rules that can provide relief from a final judgment.

In this case, like *Beachside*, the order at issue is not a final judgment. The Order was not final because while granting a stipulation of dismissal between Island Tile and Mrs. Bertrand, it did not resolve the remaining claims as to the remaining parties left in the litigation. Thus, absent a determination that the collateral order doctrine would apply to the Order at issue,[8] the proper standard for reconsideration remains Rule 54(b) which allows the Court to revise an Order such as the one at issue, at any time. Therefore, the Court will deny Island Tile's Motion for Reconsideration as to the Court's decision to apply Rule 54(b) in deciding the Plaintiff's Motion for Reconsideration.

## II. THE COURT PROPERLY CONSIDERED THE NEW EVIDENCE PRESENTED BY THE PLAINTIFF

Island Tile argues that the Court erred in its Memorandum Opinion granting the Plaintiff's Motion for Reconsideration, by assuming as true, the new evidence presented by Plaintiff. Virgin Islands Local Rule of Civil Procedure 7.3 governs motions for reconsideration.[9] It provides that a motion to reconsider shall be based on: (1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice.[10]

Here, Bertrand moved the Court to reconsider its March 30, 2010 order based on the availability of new evidence. As correctly pointed out by the Plaintiffs, the Plaintiff's burden was to support its motion for reconsideration by identifying new evidence[11] for the Court to consider, and it did so here. As alluded to in this Court's June 27, 2011 memorandum opinion, the Plaintiff discovered the new evidence for the first time, after deposing Island Tile, its bookkeeper, and Michael P. Cordiner.[12] In other words, the new evidence presented by the Plaintiff was not evidence that was previously available and thus it could not have previously been presented to the Court.[13] Moreover, the new evidence was not based upon mere conclusory

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[8] The collateral order doctrine would not apply to the Order granting dismissal between Mrs. Bertrand and Island Tile. Neither party has argued that the collateral order doctrine would have applied to this Order.

[9] Superior Court Rule 7 states that "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, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence."

[10] LRCi 7.3.

[11] *See e.g. Club St. Croix Homeowners Ass'n v. Shell Oil Co.,* Civil No. 2003-181, 2008 WL 501254, at *3 (D. Virgin Islands, February 9, 2008) (denying Motion for Reconsideration because Plaintiff failed to meet its burden to identify any intervening change in the law, new evidence, or clear error.)

[12] In the document entitled "Plaintiff's Motion for Leave of Court to File Motion for Reconsideration Out of Time, Motion for Reconsideration, and Memorandum of Law," filed on April 5, 2011, the Plaintiff provided the Court with a transcript of the depositions and other documents that it uncovered during the discovery process.

[13] *In re Infant Sherman*, 49 V.I. 452, 459 (2008) (*quoting Bostic v. ATT of the V.I.*, 312 F. Supp. 2d 731, 733, 45 V.I. 553 (D.V.I. 2004)("[A] motion for reconsideration should not be granted, absent highly unusual circumstances … [and] may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

statements made by the Plaintiff.[14] Instead, the new evidence was based on sworn testimony and documents uncovered during the discovery process. Furthermore, the evidence had to be considered in the light most favorable to the Plaintiff, the non-moving party, pursuant to Fed. R. Civ. P. 12(b)(6). Finally, in support of its original Motion for Reconsideration, the Plaintiff provided the Court with documentation that purported to support its claims.[15] The new evidence submitted was sufficiently reliable and was considered in a proper manner in the Court's memorandum opinion. The Court will, therefore, deny Island Tile's Motion for Reconsideration on this ground.

## III. THE COURT HAD AUTHORITY TO RECONSIDER ITS DECISION TO GRANT THE STIPULATION FOR DISMISSAL

Next, Island Tile argues that the Court committed clear error by reconsidering its decision to grant the stipulation to dismiss between Island Tile and Bertrand, stating further that the decision to reconsider undermined important issues of finality.

As alluded to in the Court's June 24, 2011 Memorandum Opinion, at the time that Mrs. Bertrand agreed to dismiss Island Tile from the lawsuit, she had no indication, and no way of knowing, that Island Tile had not been truthful in its representation that it was insured under the WCA at the time of the accident. A stipulation to dismiss, although agreed to by the parties, does not take effect until it is granted by a Court Order. Under Local Rule 7.3, a party may file a motion asking the Court to reconsider one of its Orders.[16] That is exactly what occurred here as Mrs. Bertrand asked the Court to reconsider its Order, since Island Tile may have been uninsured at the time of the accident. It would have been unreasonable for the Court to expect the Plaintiff to have uncovered Island Tile's apparent reporting and payment deficiencies without the opportunity to engage in the discovery process. Given these unique circumstances, the Court believes that it was correct that it had the proper authority to reconsider its decision and will deny Island Tile's Motion for Reconsideration on this ground.

## IV. THE COURT DID NOT ERR IN ITS INTERPRETATION OF THE WORKERS COMPENSATION ACT

In its June 27, 2011 Memorandum Opinion, the Court held that in order to be an insured employer, an employer must comply with all of the statutory provisions of the Workers Compensation Act and since Island Tile failed to comply with the required provisions, it was uninsured. Island Tile argues that the Court erred in holding that invalidation of WCA coverage necessarily flows from any reporting error.

The Court's position remains unchanged from its position in its memorandum opinion, requiring that an employer must comply with all of the statutory provisions of the WCA to be

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[14] *See In re Hartlage*, 54 V.I. 446 (2010) (affirming the Superior Court's denial of Plaintiff's motion for reconsideration based upon newly discovered evidence in part because the only new evidence presented were conclusory statements based on either hearsay or conjecture).

[15] *Id.* at 453 (affirming the Superior Court's denial of Plaintiff's motion for reconsideration in part because the Plaintiff failed to provide the Court "with any documents which might have permitted the Superior Court to judge the credibility of his assertions.").

[16] LRCi 7.3.

considered insured under the WCA. As alluded to in the memorandum opinion, Section 272(c) of Title 24 requires 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."[17] Whether done intentionally or unintentionally, Island Tile failed to adequately report the number and type of its employees and therefore did not pay the required sum. The Court is satisfied that Section 272(c) is clear in setting forth the conditions that must be met for an employer to be considered uninsured; Island Tile has met those conditions with its reporting and payment deficiencies. As such, the Court will deny Island Tile's Motion for Reconsideration on this ground.

Island Tile further argues that WCA coverage invalidation is a suitable remedy only where the statute explicitly provides for invalidation as a remedy for failure to comply. To support its argument, Island Tile cites section 277 of Tile 24 which states, inter alia, that "every employer who fails to insure as provided in this chapter, or who fails to make such payments as required by this chapter shall be fined not more than $500 and imprisoned not more than six months, or both, which shall be in addition to any interest, penalties, or other remedies provided for in this chapter."[18]

The key portion in section 277(a) is the phrase ". . . or other remedies provided for in this chapter."[19] One of the other remedies provided for in the chapter is found in section 272 which as previously mentioned, 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."[20] Island Tile could face penalties under both sections 272 and 277 of Tile 24 for its reporting and payment deficiencies. Accordingly, the Court will deny Island Tile's Motion for Reconsideration on this ground.

## CONCLUSION

In conclusion, the Court will deny Island Tile's Motion for Reconsideration on all grounds presented. However, the Court does recognize that the issues raised in this appeal involve a controlling question of law in which there is a substantial ground for difference of opinion, and that the immediate appeal from this Order may materially advance the ultimate termination of the litigation. Therefore, the Court will certify this issue for appeal to the Supreme Court of the Virgin Islands and will direct the parties to request an expedited appeal.

DATED: June 21, 2012

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 6/22/12

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[17] VI Code Ann. Tit. 24 § 272(c) (1997).
[18] *Id.* § 277(a). The statute lays out additional penalties in the provisions that follow.
[19] *Id.*
[20] *Id.* § 272(c).