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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2014-002710
Common Pleas Case No. 2012-CP-32-2816

FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,.....Appellant,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of whom Bryon J. Dolan and Lisa S. Dolan are the.................................Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

I. Are the arguments made by the Appellant to this court preserved for review, since they were not raised below?

II. May the Appellant both have this appeal and make a motion in a different appeal for the court to undo the subject order?

III. Did the master-in-equity err in concluding he could not proceed with trial of the foreclosure claim while an appeal of the denial of the new trial motion is pending with regard to Respondents' at-law claims, which have significant factual overlap?

IV. Did the master-in-equity err in declining to lift the appellate stay where the Appellant presented no factual material to the court tending to show a good reason to lift the stay?

V. Would wisdom caution against proceeding with the foreclosure trial while the appeal of the denial of the new trial motion is pending even if that were not required?

STATEMENT OF THE CASE

This is a case in which the Appellant (hereinafter "FV-I") seeks mortgage foreclosure and the Respondents (hereinafter "the Dolans") asserted both legal and equitable counterclaims. (R. pp. ___; complaint; answer and counterclaim.) FV-I moved to strike the Dolans' jury demand, and the Honorable Edgar W. Dickson, in deciding that the Dolans' breach of contract counterclaim is compulsory, ruled that "[i]f what the [Dolans] allege is true, then they are not in default of the note and mortgage, and [FV-I] thus cannot enforce the note or be granted foreclosure of the mortgage." (R. pp. ___; Order on Appellant's motion to strike jury demand and refer case.)

This case was bifurcated by consent order on the cusp of the jury trial, with the Dolans' at-law counterclaims tried to a jury on April 17, 2014, and the foreclosure claim and the Dolans' claim for an accounting referred to the Honorable James O. Spence, Master-in-Equity for Lexington County, to be tried later. (R. pp. ___; Order bifurcating case; transcript of trial pp. 14-24, 178-91.) The jury returned a verdict for FV-I on the at-law counterclaims, and the Dolans moved for an order granting them a new trial as to the claims subject of the jury trial (the Dolans' counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*). (R. pp. ___; jury verdict form; motion for new trial and supporting memorandum.)

The Dolans moved for reconsideration of the order denying their motion for a new trial. (R. pp. ___; order denying motion for new trial; motion to reconsider.) That motion was denied, and the Dolans appealed the orders denying the motion for a

new trial and motion to reconsider. (R. pp. ___; Order denying motion to reconsider; notice of appeal of orders denying motions for new trial and to reconsider.) That appeal is pending as Appellate Case No. 2014-001384. FV-I moved this court to dismiss that appeal, arguing that the orders were not immediately appealable. (R. pp. ___; motion to dismiss appeal in Appellate Case No. 2014-001384.) This court denied that motion. (R. pp. ___; order denying motion to dismiss appeal in Appellate Case No. 2014-001384.)

Along with its motion to this court to dismiss that appeal, FV-I moved in the lower court, before the master-in-equity, for a determination that the appeal did not stay the trial of the foreclosure claim. (R. pp. ___; motion to proceed with trial and memorandum in support.) Judge Spence held a hearing on FV-I's motion and requested memoranda from the parties on whether the Dolans ought to be required to post a bond in order for the stay to be in effect while their appeal is pending. (R. pp. ___; transcript of hearing on motion to proceed with trial.) Both parties submitted these memoranda. (R. pp. ___; Appellant's memorandum of law in support of bond requirement; Respondents' memorandum concerning issue of bond during appeal but before foreclosure claim is heard.)

Judge Spence denied FV-I's motion, ruling that the appellate stay prevents him from holding a trial of the foreclosure claim while the Dolans' appeal is pending, and he declined to impose any bond conditions on the Dolans for the stay to remain in effect. (R. pp. ___; order on motion to proceed with trial and on appeal bond issues.) FV-I did not move for reconsideration of that order but has directly appealed it to this court. That is this appeal.

STANDARD OF REVIEW

It is not clear what the applicable standard of review is here. Rule 241(d)(7), SCACR, provides that "[a]ny party aggrieved by the decision [to lift, impose, or modify an appellate stay, or to decline to do so] of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision." No standard for that review is stated in the Rule, and the undersigned knows of no case law that discusses what that standard is. Rule 241 does, however, shed some light in this area, as the Rule provides as follows:

> In determining whether an order should issue pursuant to this Rule [i.e., an order lifting, imposing, or modifying an appellate stay], the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

Rule 241(c)(2), SCACR.

ARGUMENT

I. FV-I makes arguments to this court that were never raised to, much less ruled upon by, Judge Spence.

FV-I's arguments are all new, in the sense that they were never made to the court below. At no point did FV-I ever argue to Judge Spence that the Dolans seeking money damages from FV-I at the jury trial prevents them from maintaining that there is significant factual overlap between their breach of contract counterclaim and FV-I's foreclosure claim, and FV-I never argued below, as it does to this court now, that "[a] potential award of monetary damages at some point in the future on the legal counterclaims would not form the basis of a defense to Appellant's right to

foreclose its mortgage in the bifurcated foreclosure trial." (Initial Brief of Appellant p. 10; R. pp. ____; motion to proceed with trial and memorandum in support; transcript of hearing on motion to proceed with trial; memorandum in support of bond requirement.) FV-I never argued below, as it does now, that the Dolans' "consent to bifurcate the case under Rule 42(b)(1), SCRCP, demonstrates their implicit view that the factual issues involved in the jury trial are distinct and will not result in inconsistent verdicts." (Initial Brief of Appellant p. 12; R. pp. ____; motion to proceed with trial and memorandum in support; transcript of hearing on motion to proceed with trial; memorandum in support of bond requirement.) FV-I never contended to Judge Spence, as it seems to do now, that bifurcation of the case means that the master is not bound by the jury's factual findings. (R. pp. ____; motion to proceed with trial and memorandum in support; transcript of hearing on motion to proceed with trial; memorandum in support of bond requirement.) In fact, FV-I's counsel stated the following at the hearing before Judge Spence:

> Your Honor, I am certainly – we're on the same page that we both believe that you are – Your – Your Honor would be bound by the facts from the – from the jury – the common finding – the facts from the jury.

(R. pp. ___; Transcript of hearing on motion to proceed with trial p. 10 ln. 14-18.)

FV-I's sole arguments below were that the denial of the Dolans' new trial motion was not appealable on the grounds that the directed verdict and jury verdict at trial did not constitute final judgments, such that an appeal would not lie, and that the master should impose bond conditions on the Dolans for the appellate stay to be in effect. (R. pp. ____; motion to proceed with trial and memorandum in support; transcript of hearing on motion to proceed with trial; memorandum in support of bond

requirement.) It has abandoned those arguments now, but they were its only arguments below. Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) (issue not argued in brief deemed abandoned); Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992) (same).

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772 (2004); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); State v. Rivers, Op. No. 5296 (S.C. Ct. App. filed Feb. 11, 2015) (Shearouse Adv. Sh. No. 6 at 67, 69). Here, the court need not reach the issue of whether Judge Spence ruled on the arguments FV-I now makes on appeal – FV-I never made them below. It cannot now prevail on appeal with an argument on which it never gave the lower court a chance to rule. Id.

II. FV-I should not be permitted both to have this appeal and to make a motion in a different appeal for the court to undo Judge Spence's order.

FV-I has sought the same relief it seeks in this appeal – to have Judge Spence's order undone – by motion in the Dolan's appeal, a motion which this court recently denied. FV-I, Inc. v. Dolan, App. Case No. 2014-001384 (S.C. Ct. App. Order filed February 13, 2015). The court should not permit it a second bite at the apple here.

Rule 241(d)(7), SCACR, which governs the process by which a party seeks to have a court lift, impose, or modify an appellate stay, provides that "[a]ny party aggrieved by the decision of the lower court, the administrative tribunal, or an

individual judge or justice may petition under this Rule for a review of that decision." The use of the word "petition" is telling. Rule 240, SCACR, governs "all motions or petitions filed in the appellate court" and certainly seems to embrace petitions pursuant to Rule 241(d)(7), SCACR. It specifically mentions that it applies to "petitions for supersedeas[.]" Rule 240(a), SCACR. This indicates that the process of seeking review of an order that lifts, imposes, or modifies a stay, or declines to do so, is the process under Rule 240, SCACR.

The Supreme Court has entertained an appeal from "a circuit court order requiring [a judgment creditor] to post a bond pursuant to S.C. Code Ann. § 18-9-130 (Supp. 2006) if it wishes to enforce its judgment during the pendency of respondent's (the judgment debtor's) appeal of an order denying respondent's Rule 60, SCRCP, motion to set aside the judgment." Stearns Bank Natl. Assn. v. Glenwood Falls, LP, 375 S.C. 423, 653 S.E.2d 274, 275 (2007). The propriety of using an appeal rather than a petition to seek this review was not discussed in the Stearns Bank opinion. Id.

It is plain, though, that FV-I should not be allowed to do *both*. To allow FV-I both to petition this court in the Dolans' appeal to undo Judge Spence's order and to appeal that order would be inconsistent with the principle that a party usually cannot seek the same result in the judicial system by multiple processes, often expressed with the metaphor that a party has only one "bite at the apple." See, e.g., Spruill v. Richland Cnty. Sch. Dist. 2, 363 S.C. 61, 65, 609 S.E.2d 524 (2005); Elam, 361 S.C. at 22; Simpson v. Simpson, 404 S.C. 563, 574, 746 S.E.2d 54, 60 (Ct. App. 2013).

It further appears that this court's order denying FV-I's motion in Appellate Case No. 2014-001384 is the law of the case and that FV-I is precluded from seeking

the result it asks for in this appeal. "[A] party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but *expressly rejected by the appellate court*." Bakala v. Bakala, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003) (emphasis added). The arguments FV-I raises in this appeal have been expressly rejected by this court. FV-I, Inc. v. Dolan, App. Case No. 2014-001384 (S.C. Ct. App. Order filed February 13, 2015). FV-I is not entitled to a second bite at that apple.

III. Judge Spence was right to conclude he could not proceed with trial of the foreclosure claim while the appeal of the denial of the new trial motion is pending with regard to the Dolans' at-law claims, which have significant factual overlap with the foreclosure claim.

This court, discussing the effect of an appeal in a family court case, has noted the following:

> When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241. If a stay exists, either automatically under Rule 241(a) or by supersedeas under Rule 241(c), the appealed order may not be carried out or enforced during the pendency of the appeal. This is the purpose of a stay under Rule 241—to determine whether the appealed *order* may be carried out or enforced—not to determine whether the *action* may proceed in the lower court while the appeal is pending.
>
> The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal...." Under Rule

> 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal, but is specifically allowed to proceed with matters not affected by the appeal. The rule states: "Nothing in these Rules shall prohibit the lower court ... from proceeding with matters not affected by the appeal." Rule 205, SCACR; see also Rule 241(a), SCACR ("The lower court ... retains jurisdiction over matters not affected by the appeal...."). Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a "matter[ ] affected by the appeal" under Rules 205 and 241(a).

Tillman v. Oakes, 398 S.C. 245, 254-55, 728 S.E.2d 45, 50-51 (Ct. App. 2012).

The master-in-equity's ruling and the continued application of the appellate stay to this case are entirely consistent with this court's reasoning in Tillman quoted above. "[T]he lower court may not act or issue orders that affect an issue on appeal." Arnal v. Fraser, 371 S.C. 512, 641 S.E.2d 419, 422 (2007). The trial of the foreclosure claim is a matter that is affected by the appeal. As Judge Spence ruled, even if Judge Dickson had been wrong (and he was not wrong) to rule that the merits of the Dolans' breach of contract claim necessarily implicate the merits of FV-I's foreclosure claim, on which FV-I cannot succeed if the Dolans prevail on the breach of contract claim, Judge Dickson's ruling is the law of the case. E.g., Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013). Further, the opening statements and closing arguments at the jury trial only buttress this conclusion, as they show that at the crux of the Dolans' breach of contract claim are factual issues about whether they were in default of the note and mortgage subject of

the foreclosure claim. (R. pp. ___; transcript of trial pp. 14-24, 178-91.) If the Dolans prevail in this appeal, have a new trial on the breach of contract claim, and win that claim at that trial, FV-I *cannot* prevail on the foreclosure claim, since the jury will have *necessarily* decided that a set of facts exist under which the Dolans are not in default of the note and mortgage. (R. pp. ___; Order on Appellant's motion to strike jury demand and refer case; transcript of trial pp. 14-24, 178-91.)

Also, as this court recognized in ruling on the motion to lift the appellate stay in Appellate Case No. 2014-001384, "if the jury had found the modification of the mortgage agreement to be valid, then [the Dolans] would have the right to seek post-trial relief to specifically enforce the modification and avoid foreclosure of the mortgage." FV-I, Inc. v. Dolan, App. Case No. 2014-001384 (S.C. Ct. App. Order filed February 13, 2015).

As to FV-I's argument that, essentially, bifurcation or consent to it eliminates the factual overlap between the foreclosure claim and the breach of contract claim, the Dolans point out that our Supreme Court has provided to the contrary. The Court has set out the analysis for determining the trial of legal and equitable issues in complaints and counterclaims as follows:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
>
> (2) If both are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid

> jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:
>
> > (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
> >
> > (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
> >
> > (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014); accord Johnson v. S.C. Natl. Bank, 292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987) (same, except for lack of discussion about jury trial waiver in paragraph (4)).

The cases FV-I cites in its argument about the effect of bifurcation dealt with bifurcation of a different sort, where bifurcation would result in two trials to a jury. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 108, 512 S.E.2d 510 (Ct. App. 1998); Fortune v. Gibson, 304 S.C. 279, 280-81, 403 S.E.2d 674, 675 (Ct. App. 1991).[1] What FV-I seems to gloss over is that, in a case involving both at-law claims and

[1] Although the Dolans view these cases as dealing with situations that are simply distinct and different from that present in this case, the Dolans do note that, if this court sees that differently, the Blackburn and Johnson decisions of the Supreme Court control over Creighton and Fortune to the extent of any inconsistency, since the decisions of the Supreme Court bind the Court of Appeals as precedent. S.C. Const. Art. V, § 9; Daniels v. City of Goose Creek, 314 S.C. 494, 497, 431 S.E.2d 256, 260 (Ct. App. 1993).

equitable claims in which a jury trial is held, the at-law claims are *always* going to be tried to one fact-finder (a jury) and the equitable claims are *always* going to be tried to a different fact-finder (a judge). See Blackburn, 407 S.C. at 330. Whether there is a bifurcation or not, the jury trial of the at-law claims will *always* be held before the judge decides the equitable claims if there factual issues common to both sets of claims. Id. Our law does not permit two juries to decide overlapping factual questions because their verdicts could be inconsistent. Creighton, 334 S.C. at 108; Fortune, 304 S.C. at 280-81. In a case bifurcated into a jury trial and a bench trial, though, the judge holding the bench trial is *not* the finder of fact as to the matters decided by the jury's verdict; rather, the jury is, and the judge is bound by the jury's verdict as to the factual questions it decided. Blackburn, 407 S.C. at 330; accord Johnson, 292 S.C. at 55-56. A look at paragraphs (4)(a) and (b) from the Wachovia v. Blackburn quotation above quickly reveals that the bifurcation of the trial of at-law and equitable claims certainly does not preclude there being factual issues common to both claims; otherwise, the Supreme Court would not have expressly spoken to how to deal with the order of trials in such a bifurcated action where there are overlapping factual issues. 407 S.C. at 330.

Our courts have never held that consent to bifurcation of the trial of an at-law claim from the trial of an equitable claim is an acknowledgement that there are no factual issues common to both claims. That would be inconsistent with Supreme Court precedent. Id.; accord Johnson, 292 S.C. at 55-56.

Further, as discussed above, it is the law of the case that there are significantly overlapping factual matters between the breach of contract claim subject of the appeal

and FV-I's foreclosure claim. FV-I cannot escape the binding nature of that determination. See Ulmer, 369 S.C. at 490; Cherry, 404 S.C. at 598 n. 3.

"If what the [Dolans] allege is true, then they are not in default of the note and mortgage, and [FV-I] thus cannot enforce the note or be granted foreclosure of the mortgage." (R. pp. ___; Order on Appellant's motion to strike jury demand and refer case.) If the Dolans' appeal did not affect the merits of the foreclosure claim, it would be difficult to imagine what would. Since the lower court may only proceed "with matters not affected by the appeal[,]" Rule 205, SCACR, the pendency of the appeal of the denial of the new trial motion stays the trial of FV-I's foreclosure claim.

IV. FV-I adduced no factual material in support of lifting the appellate stay.

FV-I adduced no factual material below tending to show why there might be a good reason to lift the appellate stay. It did not meet its burden to show why an order lifting the stay "is necessary to preserve jurisdiction of the appeal" – which is more likely to be a consideration in determining whether to impose a supersedeas where one would otherwise not exist – "or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

V. Wisdom would caution against proceeding with the foreclosure trial while the appeal of the denial of the new trial motion is pending even if that were not required.

Even if FV-I had made a proper and properly supported motion for a lift of the appellate stay, wisdom would still caution most strongly against granting such a motion. Lifting the appellate stay in this case would be fraught with the potential to cause major problems with the lower court's ability to deal fairly, efficiently, and lawfully with this case.

If the appellate stay were lifted, we would face the specter of this scenario: While the appeal is pending, the master-in-equity goes forward with the trial of the foreclosure claim. That trial is held with the master being bound to the jury's verdict that decided the Dolans are not entitled to relief on their breach of contract counterclaim. The master finds for FV-I on the foreclosure claim, a judgment of foreclosure is rendered, and the property subject of this case is sold. Afterward, the Dolans prevail on their appeal, and this court directs that a new jury trial be held. At that trial, the Dolans prevail on their breach of contract counterclaim, which necessarily decides, as Judge Dickson has ruled, that the Dolans "are not in default of the note and mortgage, and [FV-I] thus cannot enforce the note or be granted foreclosure of the mortgage." (R. pp. ___; Order on motion to strike jury demand and refer case.) This would result in judgments that are irreconcilable with one another.

It is safer and more efficient to leave the stay in effect and have the trial of the foreclosure claim only if and when it is appropriate following the conclusion of the appeal.

CONCLUSION

Judge Spence was right to rule as he did. His decision was what was required by law; however, even if it had not been, it would still have been the wise decision. This court should affirm it.

Respectfully submitted,

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February 16, 2015

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2014-002710
Common Pleas Case No. 2012-CP-32-2816

FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,.....Appellant,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of whom Bryon J. Dolan and Lisa S. Dolan are the.................................Respondents.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of respondents by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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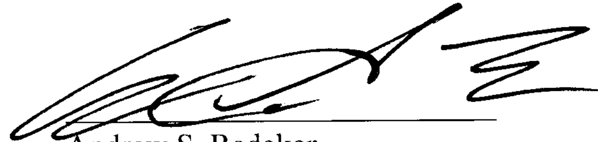
February 16, 2015



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February 16, 2015

VIA HAND DELIVERY (on Feb. 17)

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
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SC Court of Appeals

Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.
Common Pleas Case No.: 2012-CP-32-2816
Appellate Case No.: 2014-002710

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and one copy of the respondents' initial brief and designation of matter to be included in the record on appeal, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy to this office in the stamped and addressed envelope enclosed. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.

Andrew S. Radeker

ASR/

Enclosures

cc: Charles S. Gwynne, Jr., Esq.