THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Appeal No. 2020-001679

RECEIVED
Jun 02 2021
SC Court of Appeals

Elizabeth McCrabb, ... Respondent,

v.

Christine Baxter, ...Appellant.

BRIEF OF APPELLANT

MCANGUS GOUDELOCK AND COURIE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITY

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO SHOW HER ALLEGED INJURIES WERE CAUSED BY THE 2017 ACCIDENT?

II. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE EVIDENCE THE COURT RELIED ON, IN PART, IS INADMISSIBLE?

STATEMENT OF THE CASE

Appellant Christine Baxter, Defendant below ("Baxter" or "Defendant"), appeals from the Circuit Court's grant of summary judgment in favor of Respondent Elizabeth McCrabb, Plaintiff below ("McCrabb" or "Plaintiff"). McCrabb filed a Summons and Complaint on October 24, 2019 in the Charleston County Circuit Court alleging that, on October 26, 2017, at approximately 7:30 in the evening, Baxter negligently rear-ended her vehicle at the intersection of SC-61 and St. Andrews Boulevard, causing McCrabb injuries. (Complaint, filed Oct. 24, 2019, R. pp. 13-17).

Baxter timely answered, denying McCrabb's allegations and raising affirmative defenses. (Defendant Christine Baxter's Answer to Plaintiff's Complaint, filed Nov. 19, 2019, R. pp. 18-22). Baxter filed an Amended Answer on May 27, 2020, raising additional defenses. (Defendant Christine Baxter's Amended Answer to Plaintiff's Complaint, filed May 27, 2020, R. pp. 25-29).

McCrabb's underinsured motorist carrier, Travelers, entered an appearance pursuant to S.C. Code 83-77-160, and denied the allegations in the Complaint. (Notice of Appearance and Conditional Answer (Underinsured Motorist), filed March 25, 2020, R. pp. 23-24).

McCrabb moved for summary judgment on May 26, 2020. (Notice of Motion and Motion for Partial Summary Judgment on the Issue of Liability, filed May 26, 2020, R. pp. 30-31). She later filed a Memorandum in Support. (Memorandum in Support of Plaintiff's Motion for Partial summary Judgment on the Issue of Liability, filed June 10, 2020, R. pp. 32-36). Baxter filed an opposition. (Defendant's Memorandum in

Opposition to Plaintiff's Motion of Summary Judgment, filed June 19, 2020, R. pp. 60-65).

Without holding any hearing, the Circuit Court granted McCrabb partial summary judgment in a Form 4 Order filed July 6, 2020, (Form 4 Order, filed July 6, 2020, R. pp. 10-12), followed by a written order filed July 13, 2020. (Order Granting Partial Summary Judgment on the Issue of Liability, filed July 13, 2020, R. pp. 5-9) ("July 13 Order"). In the July 13 Order, the Court held that there was "no genuine dispute regarding the facts about how the collision took place," and noted that Baxter had testified under oath that she believed she was at fault in the collision and that she believed she was "responsible for the injuries that were caused to [Plaintiff] by that collision."

Baxter moved for reconsideration, (Motion to Reconsider the Grant of Plaintiff's Motion for Partial Summary Judgment, filed July 15, 2020, R. pp. 66-67), and later filed a Memorandum in Support, (Defendant's Memorandum in Support of Motion for Reconsideration, filed Nov. 4, 2020, R. pp. 68-72), in which Baxter argued, among other things, that McCrabb had not proven her injuries were proximately caused by any breach by Baxter and, as a result, summary judgment should not have been granted. In addition, Baxter asserted that the Court's ruling was based, in part, on inadmissible evidence that contained hearsay and/or legal conclusions by a lay witness. McCrabb opposed the motion.

The Court denied Defendant's Motion to Reconsider in a Form 4 Order, filed December 18, 2020. (R. pp. 2-4). Baxter timely appealed to this Court.

STATEMENT OF THE FACTS

Plaintiff alleged in her Complaint that she was injured in an automobile accident that occurred on October 27, 2017, at around 7:30 p.m. McCrabb alleges she was stopped at the intersection of SC-61 and St. Andrews Blvd, and that Baxter was traveling in the same direction and was behind McCrabb. Baxter's vehicle struck McCrabb's vehicle from behind, which McCrabb alleges caused her "to suffer severe and permanent injuries requiring extensive medical treatment, pain injections and long-term physical therapy." (Complaint, R. p. 15, ¶¶ 7-12).

Plaintiff submitted a "FR-10" form, filled out by Police Officer David J. Britten, with her Memorandum in Support that indicates Baxter contributed to the accident but that McCrabb did not. (R. pp. 38-39). Plaintiff also submitted photographs of vehicles involved in an accident. (R. pp. 40-47).

McCrabb served Requests to Admit on Baxter, seeking an admission or denial that: 1) Baxter "was solely at fault in the collision with Plaintiff Elizabeth McCrabb", 2) Baxter "rear-ended Plaintiff Elizabeth McCrabb's vehicle," and 3) "Plaintiff Elizabeth McCrabb is not liable in any way for the collision between Defendant's car and Plaintiff's car." Baxter denied all three Requests to Admit. (R. pp. 81-83). Following correspondence with Plaintiff's counsel, Defense counsel revised the response to Request to Admit No. 2 only, from "Denied" to "Admit," thereby admitting only that Baxter rear-ended McCrabb's vehicle. (R. pp. 86-88).

Baxter, who is a retired schoolteacher, was deposed on May 14, 2020. Baxter was asked if the collision was her fault, to which she responded, "Yes." (R. p. 50, lines 7-9). Baxter was asked whether she "believed" McCrabb "was at fault in any way for the

collision," to which Baxter responded, "No." (R. p. 50, lines 10-12). Plaintiff's counsel then asked whether Baxter "believed that 100 percent of the fault in the collision belongs to you," to which Defense counsel objected but Baxter ultimately answered, "Yes." (R. p. 50, line 14 – p. 51, line 21).

Plaintiff's counsel presented Baxter with responses to Plaintiff's Requests to Admit, asking whether she personally had answered these on her own, to which Baxter responded, "No." (R. p. 53, line 22 – p. 54 line 23). Plaintiff's counsel then proposed that Baxter answer the Requests to Admit "as we're sitting here in the deposition" and elicited responses that Baxter believed she was "solely at fault in the collision" with McCrabb, (R. p. 55, line 4 – p. 56, line 2), and that she rear-ended McCrabb's vehicle, (R. p. 56, lines 13-16). When asked to "admit"[1] that McCrabb was not liable at in any way for the collision," Baxter responded, "Well, to the best of my ability, she wasn't." (R. p. 56, lines 17-25). Not satisfied with Baxter's response, Plaintiffs' counsel asked the question multiple times until he elicited the response "I admit" from Baxter. (R. p. 57, lines 2-19).

Then Plaintiff's counsel moved to McCrabb's injuries. When asked point-blank "Do you believe that you are responsible for the injuries that were caused to Mrs. McCrabb by that collision," over objection, Baxter responded, "Um, yes. Admit." (R. p. 57, line 22 – p. 58, line 1). However, when asked what her understanding "if any" was of McCrabb's injuries, Baxter responded, "Very little." (R. p. 58, lines 2-4). Nonetheless, Plaintiff's counsel proceeded to question Baxter about the extent and causation of

[1] Plaintiff's counsel queried, "Do you know what the word 'admit' means?" and, "do you know what the word 'deny' means," to which Baxter responded "Yes." (R. p. 55, lines 15-21). However, there is no indication that Baxter understood the legal ramifications of responding to formal Requests to Admit.

McCrabb's alleged injuries, concluding with the question, "*If* Ms. McCrabb's headache condition was caused by the collision with your vehicle, do you accept responsibility for those injuries," which, again over objection, Baxter answered, "Yes." (R. p. 58, line 5 – p. 59, line 5) (emphasis added).

STANDARD OF REVIEW

In reviewing a grant of summary judgment, a reviewing court "applies the same standard that governs the trial court. The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

ARGUMENTS

The Circuit Court erred in granting summary judgment to Plaintiff because she failed to meet her burden of demonstrating there are no material facts in dispute and because the Circuit Court relied, at least in part, on inadmissible evidence. Summary judgment is appropriate only "when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), SCRCP." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). "Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed

factual issues." *Madison*, 371 S.C. at 134, 638 S.E.2d at 655. In addition, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

I. The Circuit Court erred in granting summary judgment because Plaintiff failed to show her alleged injuries were caused by the 2017 accident.

Summary judgment was improper in this case for a number of reasons. First, summary judgment should have been denied because McCrabb, as the moving party, failed to meet her "burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact." *Standard Fire Ins. Co. v. Marine Contr. & Towing Co.*, 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). A moving party "who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though [her] adversary does not come forward with opposing materials." *Id.*; *see also Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("In general, if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied even if no opposing evidentiary matter is presented"); *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 366, 563 S.E.2d 331, 335-336 (2002) (moving party not entitled to summary judgement where it failed to demonstrate no genuine facts in dispute).

In order to prove her negligence claim, McCrabb bears the burden of proving three essential elements:

> (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty by a negligent act or omission, i.e. the failure to exercise care of a reasonable man in the circumstances; and (3) damage proximately resulting from the breach of duty.

Snow v. Columbia, 305 S.C. 544, 545, 409 S.E.2d 797, 798 (Ct. App. 1991). A plaintiff has the burden of proving each and every element. *Id.* at 556, 409 S.E.2d at 803. "If the plaintiff fails to prove any one of these elements, the action will fail." *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 720 (Ct. App. 1996). Here, even assuming, solely for the sake of argument, that McCrabb can prove duty and breach, she cannot prove her alleged injuries were caused by any breach of duty attributable to Baxter. She has put forward no evidence on causation other than Baxter's equivocal and uninformed deposition testimony.

In other words, summary judgment should have been denied because McCrabb failed to present any probative or reliable evidence that the accident caused her alleged injuries. "Negligence is not actionable unless it proximately causes the plaintiff's injury." *Madison*, 371 S.C. at 146, 638 S.E.2d at 662. "It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence." *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). Indeed, "[w]ith regard to *liability* for a negligent act, proximate cause is the efficient, or direct, cause – the thing which brings about the injuries complained of. [citation omitted] Negligence is not actionable *unless* it is a proximate cause of the injuries, and it may be deemed a proximate cause *only* when without such negligence the injury would not have occurred or could have been avoided." *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) (emphases added); *see also Hanselmann v. McCardle*, 275 S.C. 46, 49, 267 S.E.2d 531, 533 (1980) ("A plaintiff must plead and *prove* not only that he has been injured and the defendant's fault, but also the causal connection between

the two"). Patently, a key part of the liability phase of any case is establishing whether the defendant proximately caused the plaintiff's injuries.

In order to establish proximate cause, a plaintiff must "provide evidence that [defendant's] breach of duty … was a cause in fact of the damages and was a legal cause." *Winthrop Univ. Trs. v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 163, 791 S.E.2d 152, 163 (Ct. App. 2016). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251, 253 (1991), *quoting Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). "Legal cause is proved by establishing foreseeability." *Whitlaw*, 306 S.C. 51, 410 S.E.2d 251. "The standard by which foreseeability is determined is that of looking to the 'natural and probable consequences' of the complained of act." *Young v. Tide Craft, Inc*., 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978).

Here, McCrabb has provided absolutely no probative or reliable evidence that her alleged injuries are causally related to the October 26, 2017 accident and/or by any action or inaction on Baxter's part. The only evidence submitted by McCrabb was Baxter's equivocal and uninformed agreement to the hypothetical posed by Plaintiff's counsel, that "*if* Ms. McCrabb's headache condition was caused by the collision," she would "accept responsibility for those injuries." (R. p. 58, line 2 – p. 59, line 5) (emphasis added). There simply is no evidence—just Plaintiff's counsel's suggestion—that McCrabb's alleged injuries were *in fact* caused by the 2017 accident. As a result, summary judgment was improper and the Circuit Court's grant of same must be overturned.

Furthermore, preceding Plaintiff's counsel's inquiry as to proximate cause, Baxter testified that she had "[v]ery little" understanding of what Plaintiff's injuries were. (R. p. 58, lines 2-4). Nonetheless, Plaintiff's counsel proceeded to question Baxter about the extent and causation of McCrabb's alleged injuries, which Baxter answered to the best of her ability as a lay person. This equivocal and uninformed testimony is woefully inadequate to establish that any action or inaction on the part of Baxter proximately caused McCrabb's alleged injuries. *See Richardson's Rests. v. Nat'l Bank of S.C.*, 304 S.C. 289, 296, 403 S.E.2d 669, 673 (Ct. App. 1991) (judgment reversed where plaintiff "failed to prove it was damaged by any act or omission of" defendant, because "[t]here is no liability if there is no actual damage. It is elementary law that there is no such thing as 'negligence in the air'").

In addition, "[t]he question of proximate cause is ordinarily a question of fact for determination by the jury. [citation omitted] Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." *Ballou v. Sigma Nu Gen'l Frat.*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986); *Vinson*, 324 S.C. at 402, 477 S.E.2d at 721 ("Ordinarily, the question of proximate cause is one of fact for the jury"). And, while the issue of proximate cause normally is determined based on the "particular facts and circumstances of each case," *Ballou*, 291 S.C. at 147, 352 S.E.2d at 493, the case of *Vinson v. Hartley* is instructive. There, the defendant's vehicle struck the plaintiff's vehicle as the defendant was making a U-turn. The plaintiff, who did not need an ambulance, left the scene.[2] The plaintiff in *Vinson*, like McCrabb here, alleged

[2] Although Plaintiff's Complaint asserts that she was "transported by Charleston County EMS to St. Francis Hospital Emergency Department," (Complaint, R. p. 15, ¶ 11), she testified at her deposition that the EMT "suggested that if I were to go, if I could go in my

injuries from the accident related to conditions for which he had received extensive prior treatment, but submitted no medical records from the accident to support that claim. 324 S.C. at 396-397, 477 S.E.2d 715 at 719. More specifically, while the plaintiff claimed dental injuries from the accident and presented evidence of a cracked partial, he did not prove that any of those injuries were caused by the automobile accident. Consequently, the jury found in favor of the defendant, a determination this Court upheld on appeal. In the instant case, McCrabb has presented absolutely no evidence that her alleged injuries were caused by the 2017 automobile accident but, instead, her medical history shows that McCrabb has been treated for her alleged injuries over a long period of time pre-dating the accident.

II. The Circuit Court erred in granting summary judgment because the evidence the court relied on, in part, is inadmissible.

In addition, summary judgment was improper because the evidence relied on, in part, by the Circuit Court is inadmissible as both containing hearsay and a lay person's legal conclusions. First, the July 13 Order relies on the police "collision report" and "police records," containing hearsay. In *South Carolina DMV v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 (2011), the Supreme Court held that an investigating officer's impressions "as conveyed through … [an] Incident Report constituted quintessential hearsay." 391 S.C. at 146, 705 S.E.2d at 430. Concomitantly, S.C. Code Ann. § 56-5-1290 provides that "[n]one of the reports required by Sections 56-5-1260 to 56-5-1280 may be evidence of the negligence or due care of either party at the trial of any action at law to recover damages," although "law enforcement officers may refer to these reports

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own car, it would be less expensive, so that's what we did." While Plaintiff's deposition transcript is not in the record, she can hardly deny she testified thusly.

when testifying in order to refresh their recollection of events." Section 56-5-1270 covers written reports of certain motor vehicle accidents by law enforcement officers. S.C. Code Ann. § 56-5-1270. Thus, the orders at issue here rely, at least in part, on inadmissible hearsay and must be reversed.

Second, the Circuit Court's grant of summary judgment is improper because it relies, as evidence of liability, on statements made by Baxter that are plainly legal conclusions elicited by Plaintiff's counsel. Any agreement by Baxter, who is a retired schoolteacher, that the collision was solely her fault, (R. p. 50, lines 7-9), is a legal conclusion that she is not qualified to make. Similarly, her other opinions, regarding degrees of fault and proximate cause, (R. p. 50, lines 10-12; p. 51, lines 17-21; p. 55, line 7 – p. 57, line 19; p. 58, line 2 – p. 59, line 5), cross the line between factual admissions and legal conclusions. While Plaintiff's counsel elicited responses from Baxter that she understood what the terms "admit" and "deny" mean in lay terms, (R. p. 55, lines 15-21), there is no indication that Baxter understood the legal ramifications of responding to formal Requests to Admit. Pursuant to Rule 36(b), SCRCP, "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." The very purpose of requests for admission is to determine certain matters and thereby limit the issues needed to be addressed at trial. "An answer to a request under Rule 36 is unlike a statement of fact by a witness made in the course of oral evidence at a trial, or in oral pre-trial depositions, or even in written answers to interrogatories. *It is on the contrary a studied response, made under sanctions against easy denials, to a request to assert the truth or falsity of a relevant fact point out by the request for admission …*" *Airco Indus. Gases, Inc. Div. of BOC Group, Inc. v*

Teamsters Health & Welfare Pens Fund, 850 F.2d 1028, 1036 (3rd Cir. 1988).[3] Thus, whatever Plaintiff's counsel thought he was eliciting from Baxter at her deposition, her responses to the Requests to Admit stand and, if anything, the fact that her deposition testimony is in conflict with her responses to Requests to Admit Nos. 1 and 3 creates a dispute over a material fact, further confirming that summary judgment was improperly granted here. Patently, acknowledging that her vehicle collided with and rear-ended McCrabb's vehicle does not equate to being at fault or to being solely liable for all the injuries McCrabb alleges she suffered as a result of the collision.

There is no probative, admissible evidence regarding proximate cause. Preceding Plaintiff's counsel inquiry as to proximate cause, Baxter testified that she had "[v]ery little" understanding of what McCrabb's injuries were. (R. p. 58, lines 2-4). Nonetheless, Plaintiff's counsel proceeded to question Baxter about the extent and causation of McCrabb's alleged injuries, which Baxter answered to the best of her ability as a lay person. Given that Baxter did not know what injuries McCrabb was claiming were caused by the accident, Baxter's response has virtually no probative value. Furthermore, any statements made by Baxter as to her degree of culpability in causing the accident or McCrabb's alleged injuries are inadmissible because they contain legal conclusions that Baxter, as a lay person, is not qualified to make. *See Shields v. S.C. Dep't of Highways & Public Transp.*, 303 S.C. 439, 443, 401 S.E.2d 185, 188 (Ct. App. 1991) ("As a general rule, a witness will not be permitted to state a conclusion, or opinion of law …"), *citing* 32 C.J.S. *Evidence* § 453 at 91 (1964).

[3] Our Rule 36 "is the language of current Federal Rule 36, as well as substantially the language of Circuit Court Rule 89." Rule 36, SCRCP, Notes; *see also Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 649, 579 S.E.2d 151, 156 (Ct. App. 2003) (the federal rule on requests "for admissions is substantively similar to our rule").

CONCLUSION

For all the reasons stated herein, this Court should reverse the grant of summary judgment and remand to the Circuit Court for further proceedings.

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June 2, 2021

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant Christine Baxter complies with Rule 211(b), SCACR. The undersigned also certifies that this Reply Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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June 2, 2021

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PROOF OF SERVICE

I certify that I have served the 1) final **Brief of Appellant** Christine Baxter; 2) the final **Reply Brief of Appellant**; and 3) a bound copy of the **Record on Appeal** on the other parties to this appeal by emailing and mailing a copy of each document addressed to their attorneys of record as follows:

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VIA S.C. COURTS E-FILING & U.S. MAIL
The Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Elizabeth McCrabb v. Christine Baxter
Civil Action No.: 2019CP1005613 (Charleston)
Date of Incident: October 27, 2017
Carrier Claim No.: H2J5957
MGC File No.: 20527.19544
Appeal No.: 2020-001679

Dear Ms. Kitchings:

Enclosed for filing please find the original and one bound copy of: 1) the final Brief of Appellant Christine Baxter; 2) the final Reply Brief of Appellant; and 3) the Record on Appeal in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service for both final briefs and the Record on Appeal. These are also being filed electronically.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Helen F. Hiser

Enclosures
cc: Michael T. Cooper, Esq. (via email and U.S. Mail)
Jessica L. Salerno, Esq. (via email and U.S. Mail)