STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)))	IN THE COURT OF COMMON PLEAS IN THE FIRST JUDICIAL CIRCUIT

Price Oulla and Bonnie Oulla, Plaintiffs, vs. Lisa Velazques; Harbison Community Association, Inc.; Cody Sox; and, Patton Seed Company d/b/a/ Super Sod; Defendants.	)	Civil Action No. 2014-CP-38-1590 **ORDER DENYING PLAINTIFFS' MOTION TO RECONSIDER**

This matter comes before the Court by way of Plaintiffs' Motion to Alter and/or Amend the Judgment pursuant to Rule 59(e), SCRCP filed August 12, 2016. Specifically, Plaintiffs ask this Court to reconsider its Order Granting Patten Seed Company's (d/b/a/ Super Sod) Motion for Summary Judgment that was filed on May 6, 2016.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded, and further finds there was no error of law or facts that were not appropriately considered. This Court finds that the Pleadings in this case raise no genuine issues of material fact.

Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under Rule 59(e), SCRCP, to reconsider this Court's August 2, 2016 Order. Furthermore, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
November 17, 2016

The Honorable R. Knox McMahon
Presiding Judge

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CLERK OF COURT
ORANGEBURG COUNTY

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CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	CIVIL ACTION NO. 2014-CP-38-01590
Price Oulla and Bonnie Oulla, Plaintiffs, v. Lisa Velazques, Harbison Community Association, Inc., Cody Sox, and Patten Seed Company, d/b/a Super-Sod, Defendants.	**ORDER GRANTING PATTEN SEED COMPANY D/B/A SUPER SOD'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on June 29, 2016 on Defendant Patten Seed Company, d/b/a Super Sod's ("Super Sod") Motion for Summary Judgment. At the hearing Super Sod was represented by Charles Williams, II, E. Raymond Moore, III, and Rogers E. Harrell, III. Plaintiff was represented by William Applegate and David Lail. Defendant Harbison Community Association ("Harbison") also appeared and separately argued its own Motion for Summary Judgment. Harbison was represented by Curtis Dowling and Matthew Gerrald. Defendant Lisa Velazques was represented by Mitch Griffith who opposed the Motion.

After consideration of the Motion, the arguments of counsel, the various memoranda and exhibits submitted by all parties, and after a review of the record, for the reasons set forth below, the Court hereby **GRANTS** Super Sod's Motion for Summary Judgment.

BACKGROUND FACTS

This case arises out of an automobile collision that occurred outside of Orangeburg, South Carolina, in the westbound lanes of Interstate 26 near Exit 154 when Defendant Lisa Velazques struck the Plaintiff's vehicle from the rear after he had slowed for traffic ahead. Although the Plaintiff was unable to remember the accident, Ms. Velazques testified that she did not see traffic had slowed in front of her until it was too late. Velazques offered no other explanation as to why she was unable to avoid the accident.

Super Sod is a seller of seed, sod, compost and nursery products farmed at locations around the southeast. It has a sod farm in Orangeburg. Super Sod delivers sod to its customers, but also sells sod to customers who pick it up after it has been harvested from one of Super Sod's fields.

Defendant Harbison's employees, Cody Sox and his co-worker, Corey Branham, picked up a load of sod consisting of two pallets on the morning of the accident. Sox directed Super Sod's field worker, Melvin Kearse, where and how to load the pallets on the Harbison trailer. Kearse complied with their instructions. The pallets were each wrapped in plastic .7 mil stretch wrap. Sox testified that he instructed Kearse to load the pallets over the trailer's two axles. Kearse complied with Sox's instructions. After loading, Sox checked his tires and hitch; made sure the trailer looked balanced and verified the weight was balanced. According to Sox, there were no loose materials on the trailer after the loading was completed and the sod appeared in a safe and stable condition to Sox.

Before traveling to Super Sod, Sox had verified that his trailer was adequate for the load. Sox acknowledged that he knew that he was required to secure his load. Sox testified that he had intended to bring tie down straps from Harbison's inventory, but, because of a miscommunication with his co-worker, they forgot to bring them. Sox then made a decision to proceed without tying down the load. It is undisputed that Super Sod did not sell or offer to give away a tarp to cover the sod or tie down straps for Sox to use on the Harbison trailer, and Super Sod does not provide or offer for sale any such tarps or tie down straps to its customers.

The Harbison truck and trailer safely left the field where they had picked up the sod. They safely traveled down Highway 301 reaching up to 50 mph and stopped at a gas/convenience/fast food store at the intersection of I-26 and Highway 301 where Sox and Branham purchased lunch. While there, Sox re-checked the load and noted that it was in the same condition in which it had

been loaded. No sod had spilled. The sod had not shifted. The stretch wrap covering the pallets was intact.

After leaving the convenience store, the Harbison truck and trailer were able to enter the interstate safely, navigating around the clover leaf entrance ramp on to I-26 without losing any sod. The Harbison trailer did not lose any portion of its load until Sox and Branham were forced to take evasive action only *after* merging on to I-26 west from Highway 301. Sox estimated he had traveled 3/10 of a mile on the interstate before the incident occurred. Sox testified that a tractor trailer veered into the Harbison truck and trailer's lane. The encroachment was so sudden that it caused Sox's companion, Branham, to utter an explicative. Sox drove off the road and on to the shoulder. Sox lost a portion of the sod from both pallets, but the pallets themselves were unmoved.

Sox promptly pulled over and stopped on the shoulder to call 911. While Sox and Branham waited, traffic continued to drive over and around the lost sod without incident. A fire engine eventually responded and blocked traffic in the right (slow) lane so that the sod could be cleaned from the roadway. While the exact time between when Sox lost the load and when the cleanup was finished is uncertain, Sox testified that before they learned that an accident had occurred behind them, the cleanup had been completed and the fire engine had moved out of the roadway and on to the shoulder. Based on the 911 call records, it appears at least 17 minutes passed between Sox's initial call and the first call regarding the Velazques/Oulla collision.

The interstate traffic behind the loss of sod was able to slow to a safe speed for over 15 minutes before the collision. While the distance between the collision and the spot where the Harbison trailer lost a portion of its load is not known with precision, the collision occurred far enough away that it was neither seen nor heard from where the sod had been lost. Velazques caused the accident when she struck Oulla at a high rate of speed. In her deposition, Velazques admitted fault for the accident.

There is no allegation much less any evidence of a relationship between Super Sod and the Plaintiff.

ANALYSIS

I. Summary Judgment Standard

Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c) SCRCP; *Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500,737 S.E.2d 512, (Ct. App 2012). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Accordingly, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). The Supreme Court has established that "'[t]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof.'" *Hanson v. Scalise Builders of S.C.*, 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007) (internal citations omitted).

II. Super Sod had no Legal Duty to the Plaintiff

Plaintiffs have pled a single cause of action against Super Sod, sounding in negligence.[1] (Compl. ¶¶ 26-31). To recover in negligence, the plaintiff must establish three elements: (1) that

[1] Although Plaintiffs also pled a cause of action for Loss of Consortium against all four defendants (Compl ¶¶ 39-40), "a loss of consortium claim cannot arise if no tort is committed against the impaired spouse." *Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 119, 512 S.E.2d 510, 522 (Ct. App. 1998). Thus, because Mr. Oulla's claims against Super Sod fails

the defendant owed the plaintiff a duty of care; (2) that by some act or omission, the defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage." *Underwood v. Coponen*, 367 S.C. 214, 217, 625 S.E.2d 236, 238 (2006); *Staples v. Duell*, 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct. App. 1997). Here, Plaintiffs' claim against Super Sod fails all three requisite elements: Super Sod had no legal duty to the Plaintiffs; Super Sod breached no duty; and Super Sod's conduct is not a proximate legal cause of the Plaintiff's injuries.

As an initial matter, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). "Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Johnson,* 401 S.C. at 504, 737 S.E.2d at 513-14 (citing *Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996)). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Id. (citing *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (3002). Thus, in the absence of a legal duty, summary judgment is appropriate.

Here, Super Sod had no relationship to the Plaintiff. There is no contract alleged by the Plaintiff. There is no "relationship, status or special circumstance" to support a duty. Further, South Carolina statutory law does not impose a duty on a loader of goods to "tie them down" or ensure that they are tied down. Thus, Super Sod had no legal duty to the Plaintiff, and Super Sod is entitled to summary judgment.

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as a matter of law, the Loss of Consortium cause of action must be dismissed as to Super Sod as well.

Plaintiff contends that both South Carolina statutory law and South Carolina common law impose a duty on Super Sod. Plaintiffs rely on Sections 56-5-4100 and 4110 of the South Carolina Code. However, those statutes do not impose a duty on a product seller or loader; rather, those sections address the responsibility of a vehicle ***operator*** to secure a load. Section 56-5-4110 provides:

> No person shall ***operate*** on any highway any vehicle with any load unless such load and any covering thereon is securely fastened so as to prevent such covering or load from becoming loose, detached or in any manner a hazard to other users of the highway.

S.C. Code Ann. § 56-5-4110 (Thompson-West Rev. 2006) (emphasis added). The previous section provides, in pertinent part:

> (A) No vehicle may be ***driven or moved*** on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle, except that sand, salt, or other chemicals may be dropped for the purpose of securing traction, and water or other substance may be sprinkled on a roadway in the cleaning or maintaining of the roadway by the public authority having jurisdiction.
>
> (B) Trucks, trailers, or other vehicles when loaded with rock, gravel, stone, or other similar substances which could blow, leak, sift, or drop must not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point; or, if the load is not level, unless the height of the sides of the load against all four walls does not extend above a horizontal line six inches below their tops, and the highest point of the load does not extend above their tops, when loaded at the loading point; or, if not so loaded, unless the load is securely covered by tarpaulin or some other suitable covering; or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping from the vehicle. This subsection also includes the transportation of garbage or waste materials to locations for refuse in this State.
>
> (C) The loader of the vehicle and the driver of the vehicle, in addition to complying with the other provisions of this section, shall sweep or otherwise remove any loose gravel or similar material from the running boards, fenders, bumpers, or other similar exterior portions of the vehicle before it is moved on a public highway.

S.C. Code Ann. § 56-5-4100 (Thompson-West Rev. 2006) (emphasis added) (subsections D-F omitted).

It is undisputed that Super Sod was not *operating* the Harbison truck and trailer and that Super Sod loaded the truck and trailer as directed by the Harbison employees. The load was not "loose gravel or similar material" within the contemplation of subsection (C) of 56-5-4100. Plaintiffs argue that subsection (C) bootstraps the requirements of an operator on to a loader by virtue of the language: "in addition to complying with the other provisions of this section." However, it is clear that the quoted language refers to the "driver's" obligations contained in the other sub paragraphs. The quoted language does not impose upon a vehicle loader the statutory duties of a driver. Rather, subsection (C) simply makes a loader responsible to sweep or remove "loose gravel or similar material from the running boards, fenders, bumpers, or other similar exterior portions of the vehicle." The evidence is undisputed here that there was no "loose material" on the trailer or that any loose material from the loading caused or contributed to the Plaintiff's accident.

Any contrary interpretation contravenes the "plain and ordinary" meaning of the statute, which the Court is bound to follow. *Tiller v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E. 2d 292, 298 (2005). Further, an expansive reading of the statute to impose liability on a loader would be in derogation of the common law and therefore the Court is not persuaded by the Plaintiffs' argument that these statutory provisions impose a concomitant duty on a loader in addition to an operator of a vehicle to secure the load. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E. 2d 693 (2012) (stating: "statutes in derogation of the common laws are to be strictly construed....Under this rule a Statute restricting the common law will 'not be extended beyond the clear intent of the legislature'"). Because South Carolina law imposes the statutory duty to secure cargo on the operator — not the loader — the Plaintiff cannot establish

that Super Sod owed a duty to him or that Super Sod breached any duty. Therefore, Super Sod is entitled to judgment as a matter of law.

Plaintiffs further argue that Super Sod had "assumed" a duty to the Plaintiffs because it loaded the sod. However, the Plaintiffs' argument fails for a number or reasons. First, Plaintiffs have not shown that Super Sod "undertook" to do anything with regard to the securement of the sod to the trailer. Rather, as the record makes clear, Sox asked if Super Sod had equipment that he could use to tie down his load. It is undisputed that Kearse, Super Sod's field worker, told Sox that he did not. Sox had intended to bring straps from Harbison, but because of a miscommunication, he forgot to bring them. After the sod was loaded, and after Kearse told him that Super Sod did not have straps with which to tie down his load, Sox made the decision to proceed without them. While Plaintiffs also point to the stretch wrap that Kearse used to wrap the sod pallets, it cannot reasonably be said that wrapping the sod is an "undertaking" within the contemplation of Section 56-5-4110's requirement to "securely fasten[] [the load] so as to prevent such covering or load from becoming loose [or] detached." Simply put, there has been no "undertaking" with respect to fastening the load to the trailer as the statute requires the operator to do.

Secondly, Super Sod undertook no duty, much less a duty to secure the load, with respect to the Plaintiff. Rather, Super Sod undertook a duty, if at all, to Harbison to place the sod on its trailer where Sox requested that the sod be placed. Under South Carolina law, one does not assume or undertake a duty to the public or community at large, as suggested by Plaintiffs. The Restatement (Second) of Torts explains:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (emphasis added).

South Carolina has adopted Section 323 and therefore one may incur liability if one undertakes an obligation to "another." *See Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500,737 S.E.2d 512, (Ct. App 2012). However, this "undertaking" does not extend to other unidentified third parties, such as Plaintiff in this case.

The Supreme Court has specifically declined to extend liability beyond those to whom the undertaking was made. In *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), a case relied upon by the Plaintiffs in their assertion of a duty against Super Sod, the Supreme Court wrote: "We *decline* to adopt the expanded liability of Restatement 2d of Torts 324A (1965). This section imposes a duty on 'one who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person.'" *Id.* at n.2 (emphasis added). Thus, although the Court held a duty might exist to those parties downstream from a dam that was monitored by the defendant, the duty found in that case would not extend to the community at large.

More recently in *Johnson*, the Court of Appeals again dealt with this very issue when a school employee sued an accounting firm alleging that it was negligent in its "undertaking" to investigate an alleged misappropriation of funds. In affirming summary judgment to the accounting firm, the Court, relying on Section 323, held that the relationship between the plaintiff and the accounting firm "does not fit within the parameters set forth in Section 323(a). Section 323(a) contemplates a party relying on the rendering of services to another for another's protection. Even assuming [accountant] acted voluntarily, he assisted the [police department] in its investigation. He did not render service to [plaintiff]; he assisted authorities." *Johnson*, 401

S.C. at 505, 737 S.E.2d at 514. The Court of Appeals specifically acknowledged that it was "[c]ognizant of Restatement (Second) of Torts section 324A, *although that section has not been adopted by our courts . . .*" *Id.* at n. 5 (emphasis added).

South Carolina has not adopted the Plaintiffs' position and the expansive undertaking liability of Restatement (Second) of Torts § 324A, under which a party undertaking a duty may be liable to someone beyond the party to whom the obligation is undertaken. Both the Supreme Court and the Court of Appeals have made clear that South Carolina does not follow this expansive view. This Court is constrained to follow the decisions of the Supreme Court and Court of Appeals. *Cf. Daniels v. City of Goose Creek*, 314 S.C. 494, 431 S.E. 2d 516 (Ct. App. 1993). Therefore, the Court finds that, as a matter of law, Super Sod did not have a legal duty to the Plaintiffs in this matter and thus summary judgment is appropriate.

CONCLUSION

As set forth above, Defendant Super Sod did not have a legal duty to the Plaintiffs. Therefore, Defendant Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment is hereby **GRANTED**.

SO ORDERED.

Hon. R. Knox McMahon
Presiding Judge, 1st Judicial Circuit

Lexington, South Carolina
26 July, 2016

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ORANGEBURG COUNTY, SOUTH CAROLINA