

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

R. Knox McMahon, Circuit Court Judge
Civil Action No. 2014-CP-38-01590
Appellate Case No. 2017-000093

Price Oulla and Bonnie Oulla,

Appellants,

vs.

Lisa Velazques, Harbison Community
Association, Inc., Cody Sox, and Patten
Seed Company d/b/a Super-Sod, of which
Patten Seed Company d/b/a Super-Sod is

Respondent.

MOTION FOR LEAVE TO FILE MOTION IN THE COURT OF COMMON PLEAS
PURSUANT TO RULE 60, SCRCF

Appellants Price Oulla and Bonnie Oulla respectfully move for leave to file a motion in the Court of Common Pleas, pursuant to Rule 60(b), SCRCF, to vacate the order granting summary judgment to Respondent Patten Seed Company d/b/a Super-Sod (Super-Sod). The purpose of the motion would be to permit Appellants to re-file their motion to amend the complaint, pursuant to Rule 15, SCRCF, to assert a cause of action for breach of the UCC article 2 implied warranty of merchantability.

Appellants filed the motion to amend in the lower court prior to the lower court's grant of summary judgment, and again brought the motion to the lower court's attention while Appellants' motion to reconsider the grant of summary judgment was pending. The lower court, however, never ruled on the motion to amend the complaint.

The Court should issue a limited remand to the Court of Common Pleas to entertain the Rule 60(b) motion, and hold this appeal in abeyance until a decision on the motion is made by the lower court. Should the lower court grant the motion to amend, the proceeding on that cause of action could be stayed until this appeal is concluded, or, in the alternative, the action could proceed before the trial court on the amended complaint, with this appeal continuing to be held in abeyance until a subsequent final order is entered by the lower court. Should the lower court deny the motion, then any appeal from the denial could be consolidated with the appeal currently before the Court.

This procedure would be similar to that adopted by the Fourth Circuit in Fobian v. Storage Technology Corporation, 164 F.3d 887, 892 (4th Cir. 1999), which the Fourth Circuit described as the majority rule. The procedure would serve the interests of judicial economy, which is the basis for the requirement that leave be granted to file a Rule 60 motion when an appeal is pending. Hudson v. S.C. Dept. of Hwys. and Pub. Trans., 324 S.C. 245, 246, 478 S.E.2d 839, 840 (1996) (citing Rule 204, SCACR).¹

STATEMENT OF ISSUES

I. Whether the Court should grant leave to Appellants to file a Rule 60(b) motion in the lower court to vacate the order and allow Appellants to re-file their motion to amend the complaint.

II. If leave is granted, whether the limited remand procedure adopted by the Fourth Circuit in Fobian v. Storage Technology should guide these proceedings.

¹ In the alternative, the Court may decide that the lower court's order granting summary judgment was not a final, immediately appealable order pursuant to South Carolina Code section 14-3-330. The Court could find that Appellants' motion to amend the complaint, which was filed before Respondent's motion for summary judgment was argued or decided, is technically still pending before the lower court, and the appeal is premature. Should the Court so find, then it should dismiss this appeal without prejudice or hold it in abeyance until the lower court rules on the motion to amend.

STATEMENT OF THE CASE

This action arises out of a car wreck on I-26 near Orangeburg in which Appellant Price Oulla was rear-ended by lower-court defendant Lisa Velazques. Appellants allege that the collision occurred as the result of a traffic jam caused by the negligence of Respondent Super-Sod and lower-court defendant Harbison Community Association, Inc. (Harbison).

Super-Sod, a commercial sod dealer in Orangeburg, had sold Harbison pallets of sod contained in shrink wrap and loaded the pallets onto Harbison's trailer without tying down or otherwise securing the pallets to the trailer. Harbison's employee, lower-court defendant Cody Sox, began the trip back to Columbia, when the shrink wrap tore and the sod spilled onto I-26. The spillage blocked off one lane of traffic and caused traffic to back up a substantial distance.

Appellant Price Oulla was in the traffic jam when Velazques rear-ended him due to the sudden stoppage of traffic in front of her. Mr. Oulla suffered severe injuries and incurred substantial medical expenses.

Appellants brought this action against Velazques, Harbison, Sox, and Super-Sod on December 31, 2014. Appellant Price Oulla pleaded a cause of action against Super-Sod for negligence in various particulars, alleging that Super-Sod: (1) had breached a statutory duty to securely load the pallets of Sod to Harbison's trailer;² (2) had breached a common-law duty to not create a risk of harm to foreseeable plaintiffs like Appellant; and (3) had voluntarily assumed a duty to safely load the pallets. Appellant alleged that Super-Sod's breach of duty had proximately caused substantial personal injuries to Appellant.³

² The statutory duty arose from South Carolina Code section 56-5-4100(A) and (C).

³ Summons and Complaint, attached as Exhibit A. Appellant Bonnie Oulla, Mr. Oulla's wife, pleaded a cause of action for loss of consortium.

Super-Sod was timely served with the summons and complaint, and filed an answer to the complaint on February 20, 2015.⁴

On May 6, 2016, Super-Sod filed a motion for summary judgment, arguing: (1) that it had no statutory or common-law duty to Appellants; and (2) that any breach of duty did not proximately cause damage to Appellants. At approximately the same time, Harbison and Sox also filed a motion for summary judgment, arguing only the absence of proximate cause.

The hearing on both motions for summary judgment was scheduled for June 29, 2016. Approximately a week before the hearing, counsel for Appellants corresponded with counsel for Super-Sod and the other defendants seeking consent to move to amend the complaint to plead an additional cause of action for breach of the implied warranty of merchantability pursuant to South Carolina Code section 36-2-314. The factual basis for the cause of action was that the shrink wrap, which had caused the spillage, rendered the pallets of sod not merchantable. S.C. Code Ann. § 36-2-314(2)(e) (providing that goods must be adequately contained and packaged to be merchantable). Counsel for Super-Sod took the request for consent under advisement, but did not give consent prior to the hearing on Super-Sod's motion for summary judgment.

Before the hearing commenced on June 29, Appellants filed their motion to amend the complaint and served it by hand-delivery to all counsel at the courthouse.⁵

The Honorable R. Knox McMahon proceeded with the hearing and took the motions for summary judgment under advisement. At the end of the lengthy hearing, counsel for Appellants

⁴ Appellants have not included Super-Sod's answer for the Court's review, as its contents are not germane to this motion.

⁵ Motion to Amend the Complaint, entered June 29, 2016, Certificate of Service, attached as Exhibit B.

planned to inform Judge McMahon of the filing of the motion to amend. Judge McMahon, however, made it clear that the hearing was over and no further argument would be permitted.⁶

Before Judge McMahon ruled on the motions, the clerk of court scheduled a hearing on Appellants' motion to amend the complaint for August 23, 2016.

On August 2, 2016, the lower court entered Judge McMahon's separate orders granting summary judgment to Super-Sod and denying summary judgment to Harbison and Sox. The sole basis for granting summary judgment to Super-Sod was the conclusion that Super-Sod owed no statutory or common-law duty to Appellants. Judge McMahon did not address the issue of proximate cause.⁷ He did, however, rule that Harbison and Sox were not entitled to summary judgment on the issue of proximate cause, which again was the sole issue raised in their motion.⁸

Counsel for Appellants received written notice of entry of the orders on August 3, 2016. Appellants then timely served a motion to alter or amend and reconsider the order granting summary judgment to Super-Sod on August 12, 2016.⁹

The hearing on Appellants' motion to amend the complaint proceeded before the Honorable Diane S. Goodstein on August 23, 2016, as scheduled. At the hearing, Judge Goodstein opined that she had no authority to rule on the motion, as granting the motion would effectively overrule Judge McMahon's order granting summary judgment to Super-Sod on the entire case.

⁶ Letter from Applegate to Judge McMahon, dated August 23, 2016, attached as Exhibit C; Transcript of Summary Judgment Hearing, June 29, 2016, at 79:24–81:2, attached as Exhibit D.

⁷ Order Granting Super-Sod's Motion for Summary Judgment at 4–10, attached as Exhibit E.

⁸ Appellants settled with Harbison and Sox soon after their motion was denied. Harbison and Sox are no longer active parties to this action.

⁹ Motion to Alter or Amend Order Granting Summary Judgment to Super-Sod, attached as Exhibit F.

Judge Goodstein believed that jurisdiction to rule on the motion to amend the complaint was solely with Judge McMahon.¹⁰ The parties submitted proposed orders to Judge Goodstein to that effect, but she never issued an order.

Soon thereafter, the parties submitted memoranda and supplemental memoranda to Judge McMahon, both on the merits of the order granting summary judgment and on the efficacy of the motion to amend.¹¹

No hearing was held on the motion to reconsider, and on December 2, 2016 the Court entered an order denying Appellants' motion. The order did not address to any extent the outstanding motion to amend the complaint.¹²

Counsel for Appellants received written notice of entry of the order denying their motion on December 19, 2016, but did not receive a copy of the order until January 3, 2017. Counsel for Appellants immediately followed up with Judge McMahon by email about the outstanding motion to amend the complaint. Judge McMahon's law clerk sent counsel an email stating that Judge McMahon believed he did not have jurisdiction to rule on the motion to amend, as that particular motion had never been assigned to him and he was no longer assigned to the circuit where the action was pending.¹³

¹⁰ Transcript of Hearing on Motion to Amend Complaint, August 23, 2016, at 21:3–24:11, attached as Exhibit G.

¹¹ (a) Letter from Applegate to Judge McMahon, dated December 16, 2016, attached as Exhibit H; (b) Letter from Applegate to Judge McMahon, dated October 10, 2016, attached as Exhibit I; (c) Letter from Applegate to Judge McMahon, dated August 23, 2016, Exhibit C; (d) Plaintiffs' Memo in Support of Motion to Amend Complaint, attached as Exhibit J; (e) Letter from Moore to Judge McMahon, dated August 26, 2016, attached as Exhibit K; (f) Super-Sod's Supp. Memo in Opposition to Plaintiffs' Rule 59(e) Motion, attached as Exhibit L.

¹² Order Denying Plaintiffs' Motion to Reconsider, entered Dec. 2, 2016, attached as Exhibit M.

¹³ Emails with Judge McMahon's Law Clerk, January 3, 2017, attached as Exhibit N.

Appellants served their notice of appeal on January 12, 2017.

LAW AND ARGUMENT

The Court should grant leave to Appellants to file a motion in the lower court to vacate the order granting summary judgment for the limited purpose of allowing Appellants to file their amended complaint.¹⁴ While the motion to vacate would technically be a Rule 60(b) motion, it would be governed by the more liberal standards of Rule 15, SCRC.

If the Court grants leave, then the Court should adopt the procedure adopted by the Fourth Circuit in Fobian v. Storage Technology, issue a limited remand to the lower court to rule on the Rule 60(b) motion, and hold the appeal in abeyance until the lower court rules. If the lower court denies the Rule 60(b) motion, then Appellants could appeal from that order and the Court could consolidate that appeal with the current one. If the lower court grants the Rule 60(b) motion and reopens the record, the proceeding on that cause of action could be stayed until this appeal is concluded, or, in the alternative, the action could proceed before the trial court on the amended complaint, with this appeal continuing to be held in abeyance until a subsequent final order is entered by the lower court. See Link v. Sch. Dist. of Pickens Co., 302 S.C. 1, 5–6, 393 S.E.2d 176, 178–79 (1990) (holding that a partial grant of summary judgment may be appealed immediately pursuant to South Carolina Code section 14-3-330(1), or after final judgment in the lower court pursuant to section 14-3-330(2)).

I. The Court should grant leave to Appellants to file a Rule 60(b) motion in the lower court to vacate the order and allow Appellants to re-file their motion to amend the complaint.

¹⁴ Were the lower court to vacate the order granting summary judgment to allow the re-filing of the motion to amend the complaint, the lower court would not alter the grant of summary judgment to Super-Sod on the issues of statutory and common law duty. That matter would remain unaffected, held in abeyance in this appeal.

Leave of this Court is required before a party may file a Rule 60(b) motion in the lower court while an appeal is pending. Hudson, 324 S.C. at 246, 478 S.E.2d at 840; Rule 205, SCACR; Rule 60(b), SCRCRCP. Leave of Court would be the only procedure by which Appellants could have their motion to amend the complaint ruled upon by the lower court before this Court proceeds with the appeal. Having the lower court rule on the motion to amend before this appeal proceeds would serve the interests of judicial economy.

Further, without asking the Court to opine at this time on the merits of Appellants' proposed Rule 60(b) motion in the lower court, Appellants briefly set forth below that they have good-faith, legitimate arguments to make to the lower court that the case should be reopened with the amended complaint. Granting leave to Appellants to file the motion in the lower court would not be a frivolous or futile exercise. There is good cause to grant the leave requested.

A. The lower court failed to rule upon Appellants' motion to amend the complaint.

As stated above, Appellants did ask the lower court to consider the motion to amend the complaint, either separately from or as part of the Rule 59 motion filed after entry of summary judgment to Super-Sod. Yet, the lower court entered an order denying the Rule 59 motion without addressing the motion to amend the complaint,¹⁵ and never issued a separate order addressing the motion to amend.

The lower court's silence on the motion to amend in the Rule 59 order should not be construed as an implicit denial of the motion. Rather, Judge McMahon made it clear that he did not actually rule upon the motion to amend, as he believed he had no jurisdiction to do so.¹⁶ There

¹⁵ Order Denying Plaintiffs' Rule 59(e) Motion, Exhibit M.

¹⁶ Email from Judge McMahon's law clerk, dated January 3, 2017, Exhibit N.

was never any ruling on Appellants' motion to amend, even though it was filed, served, and brought to the attention of the lower court prior to entry of final judgment.

Should the Court deny Appellants' request for leave to file a Rule 60(b) motion below, then in this appeal the Court will need to engage in a determination whether the lower court's failure to rule constituted an abuse of discretion requiring reversal and remand. See, e.g., Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222 (1962) (holding that "the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion" requiring reversal); Ellison v. Ford Motor Co., 847 F.2d 297, 300–301 (6th Cir. 1988) (finding an abuse of discretion and reversible error in the lower court's entering judgment without first considering and ruling on a pending motion to amend) (citations omitted); see also, e.g., Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 227, 647 S.E.2d 488, 493 (Ct. App. 2007) (providing that the standard of review of a lower court's grant or denial of a Rule 15 motion to amend is abuse of discretion).

Instead of addressing, as part of this appeal, the lower court's failure to rule on the motion to amend the complaint along with the lower court's grant of summary judgment on Appellants' negligence claim, it would be more efficient to grant leave to Appellants to file a Rule 60(b) motion and have the lower court rule on the motion to amend in the first instance. As set forth below, a denial by the lower court could be appealed from, and this Court could then efficiently address both appeals by Appellants at the same time. If, on the other hand, the lower court grants the motion and reopens the case on Appellants' the breach-of-warranty claim, then this Court could hold this appeal in abeyance until a subsequent final judgment is entered by the lower court.

B. Appellants were compelled to file the notice of appeal and then seek leave to file the Rule 60(b) motion in the lower court.

Appellants are not seeking leave to unreasonably delay this appeal. Appellants were left without many options after the lower court denied their motion to reconsider the grant of summary judgment without ruling upon the motion to amend the complaint. The order denying reconsideration was probably a final judgment from which appeal had to be taken with thirty days. S.C. Code Ann. § 14-3-330; Rule 203(b)(1), SCACR; but see, infra, n. 1. Since the filing of a Rule 60 motion does not toll the time to appeal, Coward Hund Construction Co. v. Ball Corp., 336 S.C. 1, 5, 518 S.E.2d 56, 59 (Ct. App. 1999) (citation omitted), Appellants had no choice but to appeal and then file this motion for leave.

C. Leave should be granted now to prevent prejudice to Appellants that may arise out of any delay while the appeal is pending.

As noted above, granting leave would serve the interests of judicial economy, in allowing the lower court to rule on the motion to amend the complaint before this Court proceeds with any appellate decision-making. Further, granting leave now would prevent prejudice to Appellants later, who are required to file a Rule 60(b) motion “within a reasonable time,” and “not more than one year after the judgment, order or proceeding was entered or taken.” Rule 60(b), SCRCPP.¹⁷

While the appellate process in this case may not take a year, there is a reasonable chance that it could. If so, and Appellants were forced to wait until after an appellate decision is issued before filing a Rule 60(b) motion, Appellants’ motion would be untimely.

In addition to the merits and judicial economy, granting leave now would prevent any prejudice to Appellants that may arise from delay.

¹⁷ As explained above and below, a Rule 60(b) motion here would be governed by the standards of Rule 15, SCRCPP, not Rule 60(b)(1)–(3), SCRCPP, at least according to the Fourth Circuit. The one-year requirement applies to motions filed pursuant to Rule 60(b)(1)–(3). Despite that distinction, Appellants expect that the one-year deadline would be imposed in this situation.

D. Good cause to grant leave is present, as Appellants' proposed motion to amend the complaint is not frivolous or proposed in bad faith.

While Appellants are not seeking an advisory opinion from the Court on the merits of the proposed Rule 60(b) motion, they do wish to briefly explain that the motion would not be frivolous or in bad faith. Appellants have a good-faith, colorable argument to the lower court that the motion to amend the complaint should be granted. There is good cause for the Court to grant leave.

While the motion would technically be pursuant to Rule 60(b), the lower court would actually decide the motion under the liberal standards of Rule 15, SCRCPP. The more rigorous standards of Rule 60(b)—such as excusable neglect,¹⁸ newly discovered evidence,¹⁹ and fraud²⁰—would not govern the motion. Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 471 (2011) (providing that “[t]o determine whether vacatur is warranted...the court need not concern itself with either of [Rule 59 or Rule 60’s] standards,” but rather should consider the motion “under the same legal standard as a similar motion filed before judgment was entered” pursuant to Rule 15) (quotation omitted); see also Wright v. Cordesville Pentecostal Holiness Church, 310 S.C. 321, 322–23, 426 S.E.2d 772, 773 (1993) (relying on federal courts’ interpretations of the federal Rule 60(b) for interpretation of South Carolina’s Rule 60(b)); S.C. Tax Comm’n v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 2988) (finding it appropriate for South Carolina courts, in interpreting the South Carolina Rules of Civil Procedure, to look to federal courts’ interpretations of the Federal Rules of Civil Procedure when they are essentially the same).

¹⁸ Rule 60(b)(1), SCRCPP.

¹⁹ Rule 60(b)(2), SCRCPP.

²⁰ Rule 60(b)(3), SCRCPP.

Rule 15 provides that “leave shall freely be given when just so requires and does not prejudice any other party.” SCRCF, Rule 15(a). “The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998). “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” Ball v. Canadian American Exp. Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citation omitted). “Rule 15(a) has consistently been interpreted...to strongly favor amendments ‘where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed.’” Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 506, 369 S.E.2d 156, 158 (Ct. App. 1988) (citing 3 J. Moore, MOORE’S FEDERAL PRACTICE § 15.08 [2] at 15–49 (2d ed. 1987)).

Parties are permitted to file a motion for leave to amend the complaint at any time during the litigation, even after entry of final judgment, but first the judgment must be vacated to reopen the proceedings. See, e.g., Laber v. Harvey, 438 F.3d 404, 427 (4th Cir. 2006). Again, however, while a Rule 60(b) motion is technically required to reopen the proceedings and allow an amended complaint to be filed, the motion is decided pursuant to the liberal standard of Rule 15, not the more rigorous standards of Rule 60(b).

Given the liberality of Rule 15, SCRCF, Appellants would have a reasonable chance of prevailing on the motion in the lower court. Granting leave to Appellants to file their motion in the lower court would not be a futile exercise. That is not to suggest that the lower court will definitely rule in favor of Appellants, but Appellants are not asking for a shot at the impossible in an effort

to delay the appeal. There is good cause to grant leave, and Appellants should have the opportunity to present the matter to the lower court for a ruling.²¹

The parties have already briefed the Rule 15 issues to the lower court.²² Since Appellants are not seeking a ruling from this Court on the motion to amend the complaint, but only leave to file the motion in the lower court, Appellants do not believe it necessary or proper to fully argue the merits of the motion to amend here. Appellants therefore provide only a synopsis of their position.

The argument is that Respondent Super-Sod cannot demonstrate it would be prejudiced by lack of notice of the issues involved in a newly pleaded cause of action for breach of the implied warranty of merchantability under UCC article 2. That cause of action arises out of the same facts on which Appellants based their negligence claims: the shrink wrap was an inadequate method to package the pallets of sod for highway transport; the shrink wrap tore during transport; the tearing caused the sod to spill onto the highway; and the sod on the highway caused this car accident. The evidence giving rise to liability on the warranty claim is neither new nor different from the evidence giving rise to liability and damages under the negligence claim.

Super-Sod was doubtless on notice that the failure of the shrink wrap was a central issue to be litigated, long before Appellants filed their motion to amend the complaint. Breach of warranty merely presents a new theory as to why the failure of the shrink wrap entitles Appellants

²¹ Even under the standards of Rule 60(b), SCRCP, Appellants would have reasonable arguments to the lower court that the order granting summary judgment should be vacated for the limited purpose of issuing a ruling on the motion to amend the complaint. As discussed above, the lower court did not rule on the motion because the court could not decide which judge had jurisdiction to issue a ruling. The circumstances around the court's failure to issue a ruling should fall within the ambit of mistake and excusable neglect under Rule 60(b)(1).

²² Plaintiff's Memo in Support of Motion to Amend Complaint, filed August 23, 2016, Exhibit J; Super-Sod's Supp. Memo in Opposition, filed August 31, 2016, Exhibit L.

to an award of damages. There is no lack of notice. The motion is not proffered in bad faith. There is no prejudice as envisioned in Rule 15. Appellants should be permitted to seek a ruling to that effect in the lower court to preserve the warranty claim.

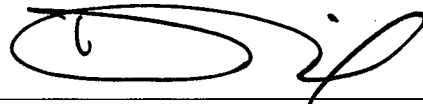
II. If leave is granted, then the limited remand procedure adopted by the Fourth Circuit in Fobian v. Storage Technology should guide these proceedings.

If leave is granted, then the Court should issue a limited remand to the lower court to entertain the Rule 60(b) motion, and hold this appeal in abeyance until a decision on the motion is made in the lower court. Should the lower court grant the motion, the proceeding on that cause of action could be stayed until this appeal is concluded, or, in the alternative, the action could proceed before the trial court on the amended complaint, with this appeal continuing to be held in abeyance until a subsequent final order is entered by the lower court. See Link, See Link, 302 S.C. at 5–6, 393 S.E.2d at 178–79. Should the lower court deny the motion, then any appeal from the denial could be consolidated with the appeal currently before the Court.

This procedure would be similar to that adopted by the Fourth Circuit in Fobian v. Storage Technology Corporation, 164 F.3d 887, 892 (4th Cir. 1999), which the Fourth Circuit described as “the majority rule and, as the commentators agree, the ‘more satisfactory procedure’ and ‘better’ view.” (quotations omitted). The procedure would serve the interests of judicial economy, which is the basis for the requirement that leave be granted to file a Rule 60 motion when an appeal is pending. Hudson, 324 S.C. at 246, 478 S.E.2d at 840 (citing Rule 204, SCACR).

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'W. Applegate IV', written over a horizontal line.

William E. Applegate IV
David B. Lail

February 1, 2017

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STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

PRICE OULLA and BONNIE OULLA,

Plaintiff(s)

vs.

LISA VELAZQUES, HARBISON COMMUNITY
ASSOCIATION, INC., CODY SOX, AND PATTEN
SEED COMPANY d/b/a SUPER-SOD,

Defendant(s)

Submitted By: DAVID B. LAIL, ESQUIRE

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IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 38- 1590

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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☒ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature:

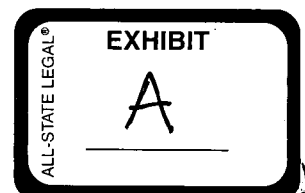
ATTEST: TRUE COPY

Wingy B. Clark

CLERK OF COURT

Date: 12-30-2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.



FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,)

Plaintiffs,)

vs.)

Lisa Velazques, Harbison Community)
Association, Inc., Cody Sox, and Patten)
Seed Company, d/b/a Super-Sod,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2014-CP-38-1590

SUMMONS
(Jury Trial Demanded)

FILED FOR RECORD
WILLIAM B. CLARK
CLERK OF COURT
ORANGEBURG, SC
2014 DEC 31 P 10:30

TO DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 291 East Bay Street, Floor 2, Charleston, SC 29401, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief sought therein.

SIGNATURE PAGE TO FOLLOW

ATTEST: TRUE COPY

Wingyi B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

YARBOROUGH APPELEGATE LLC

291 East Bay Street, Floor 2

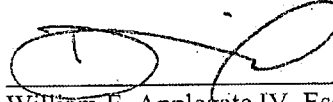
Charleston, SC 29401

843-972-0150 office

843-277-6691 fax

william@yarboroughapplegate.com

dlail@yarboroughapplegate.com



William E. Applegate IV, Esquire

David B. Lail, Esquire

AND

TATE JOHNSON LAW LLC

Tate Johnson, Esquire

6049 Winding Creek Blvd.

Liberty Township, OH 45011

ATTORNEYS FOR THE PLAINTIFF

12-30, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,)

Plaintiffs,)

vs.)

Lisa Velazques, Harbison Community
Association, Inc., Cody Sox, and Patten
Seed Company, d/b/a Super-Sod,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2014-CP-38- 1590

COMPLAINT
(Jury Trial Demanded)

FILED FOR RECORD
WITH IN CLERK
CLERK OF COURT
ORANGEBURG, SC
2014 DEC 31 P 0330

The Plaintiffs, Price Oulla and Bonnie Oulla, and the undersigned attorneys, complaining of the Defendants, jointly and severally, allege the following:

PARTIES, JURISDICTION, AND VENUE

1. The incidents that are the subject of this action occurred in Orangeburg County, South Carolina on July 22, 2014.

2. Plaintiffs Price Oulla and Bonnie Oulla are citizens and residents of Charleston County, South Carolina.

3. Upon information and belief, Defendant Lisa Velazques (hereinafter "Velazques") is a resident and citizen of Charleston County, South Carolina and was operating a motor vehicle on the highways of Orangeburg County, South Carolina on July 22, 2014 when she collided into the rear of Plaintiff Price Oulla's vehicle.

4. Upon information and belief, Defendant Patten Seed Company, d/b/a Super-Sod (hereinafter "Super-Sod") is a Georgia corporation that owns and operates a sod and seed company located on Five Chop Road in Orangeburg County, South Carolina.

ATTEST: TRUE COPY

Wingia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

5. Upon information and belief, Defendant Cody Sox is a citizen and resident of Lexington County, South Carolina.

6. Upon information and belief, Defendant Harbison Community Association, Inc. (hereinafter "Harbison") is a South Carolina corporation organized and existing under the laws of South Carolina and conducts business in Orangeburg County, South Carolina. Harbison was procuring sod from Defendant Super-Sod's Orangeburg County location on the date the incidents that are the subject of this action occurred.

7. Upon information and belief, Defendant Cody Sox was acting as an employee, agent, servant, and/or legal representative of Defendant Harbison and was at all times acting in the course and scope of his employment, agency and business with Defendant Harbison on the date the incidents that are the subject of this action occurred.

8. At all times relevant to the Complaint, Defendants Super-Sod and Harbison were, and continue to be, responsible for the acts and/or omissions of their employees, agents, and/or servants.

9. Defendants Super-Sod and Harbison had the right and/or power to direct and control their employees, agents, and/or servants while doing business for a fee and/or profit, and they are personally, jointly and severally liable for the acts and/or omissions committed herein.

10. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

FACTS

11. On July 22, 2014, Defendant Sox, driving a pick-up truck with a trailer in tow for Defendant Harbison, travelled to Defendant Super-Sod's business located on Five Chop Road in Orangeburg County, South Carolina to obtain a load of sod for Defendant Harbison.

12. Upon information and belief, Defendants Super-Sod and Sox loaded two pallets of sod onto the trailer and did not secure or attach the load to the trailer.

13. After the pallet loads of sod were placed on the trailer, Sox left Super-Sod on Five Chop Road and eventually merged onto Interstate 26 ("I-26"), and headed westbound through Orangeburg County towing an unsecured load.

14. While Defendant Sox was pulling the trailer for Defendant Harbison on I-26, the unsecured and unattached load of sod spilled onto the roadway creating a hazard to other drivers.

15. Upon information and belief, the spilled load of unsecured sod obstructed travel on I-26 in Orangeburg County causing a traffic jam.

16. Plaintiff Price Oulla was also travelling westbound on I-26 – behind Sox and the spilled load of sod on the roadway. As Mr. Oulla approached the traffic jam, he slowed his vehicle accordingly and was nearly stopped behind a line of backed-up traffic when Defendant Velazques collided into Mr. Oulla's vehicle.

17. Defendant Velazques, travelling directly behind Mr. Oulla, did not slow her vehicle down for the spilled sod traffic jam on I-26 and she collided into the rear of Mr. Oulla at a high rate of speed forcing Mr. Oulla to then collide with the vehicle in front of him.

18. Mr. Oulla sustained traumatic and permanent injuries in the collision.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS HARBISON AND SOX
(Negligence, Gross Negligence, Negligence *Per Se*)

19. Plaintiff realleges and reincorporates Paragraphs 1 through 18 above as if fully set forth herein verbatim.

20. At all times relevant to this Complaint, Defendant Sox was, upon information and belief, acting as an employee, agent, servant, and/or legal representative of Defendant Harbison and he was acting in the course and scope of his employment.

21. Defendant Harbison is vicariously liable for Defendant Sox's actions on July 22, 2014 and the consequences of those actions.

22. Defendant Sox at all times pertinent hereto had a duty to the general public, including Plaintiff, to properly secure his load of sod and operate his vehicle in a safe manner and in compliance with the statutory and common laws of South Carolina.

23. Defendant Sox breached his duty owed to Plaintiff by carelessly, negligently, and willfully operating a motor vehicle on a public roadway with an unsecured and unattached load of cargo that spilled onto the roadway, subsequently causing a collision.

24. Mr. Oulla was operating his vehicle in a safe, prudent, and reasonable manner at all times relevant to the Complaint.

25. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendants Harbison and Sox in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. In violating S.C. Code Ann. § 56-5-4100 et seq.;
- c. In failing to secure or attach a load of cargo during transport;
- d. In failing to prevent any of the load of cargo from dropping or otherwise escaping onto the roadway;
- e. In failing to maintain proper control of the vehicle;
- f. In failing to operate the vehicle in a safe manner;
- g. In failing to properly train and/or supervise employees and/or agents, and/or failing to have policies and procedures in place regarding how to properly load and secure cargo to prevent harm to others, including Plaintiff;

- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT SUPER-SOD
(Negligence, Gross Negligence, Negligence *Per Se*)

26. Plaintiff realleges and reincorporates Paragraphs 1 through 25 above as if fully set forth herein verbatim.

27. Upon information and belief, Defendant Super-Sod sold Defendant Harbison two pallets of sod from its business location on Five Chop Road in Orangeburg County and undertook the task of loading the sod onto the trailer being pulled by Defendant Sox.

28. Upon information and belief, Defendant Super-Sod knew that Defendant Sox would be transporting the loaded pallets of sod on South Carolina public roadways.

29. Defendant Super-Sod had a duty of care to the general public, including Plaintiff, to properly and safely load and secure the pallets of sod onto the trailer for transport.

30. Defendant Super-Sod breached its duty owed to Plaintiff by carelessly negligently, and willfully loading sod pallet loads of cargo onto a vehicle and not securing or attaching the cargo such that it spilled onto the roadway, subsequently causing a collision.

31. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Super-Sod in the following particulars:

- a. In failing to properly and safely load the sod pallets on the trailer;
- b. In failing to properly and safely distribute the weight of the sod pallets on the trailer;
- c. In failing to secure and attach the sod pallet loads to the trailer;

- d. In failing to use the proper tools and equipment to secure the sod pallet loads to the trailer;
- e. In failing to inspect the sod pallet loads on the trailer before it left Super-Sod's place of business and entered the public roadways;
- f. In failing to properly train and/or supervise employees and/or agents, and/or failing to have policies and procedures in place regarding how to properly load and secure cargo to prevent harm to others, including Plaintiff;
- g. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- h. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT VELAZQUES
(Negligence, Gross Negligence, Negligence *Per Se*)

32. Plaintiff realleges and reincorporates Paragraphs 1 through 31 above as if fully set forth herein verbatim.

33. Defendant Velazques at all times pertinent hereto had a duty to the general public, including Plaintiff, to operate her vehicle in a safe manner and in compliance with the statutory and common laws of South Carolina.

34. Defendant Velazques breached her duty owed to Plaintiff by carelessly, negligently, and willfully operating a motor vehicle on a public roadway and subsequently causing a collision when she collided into the rear of Mr. Oulla's vehicle.

35. Mr. Oulla was operating his vehicle in a safe, prudent, and reasonable manner at all times relevant to the Complaint.

36. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Velazques in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. Traveling too fast for conditions;
- c. Following too closely;
- d. Failing to maintain a proper lookout;
- e. Failing to keep the motor vehicle she was operating under control;
- f. Failing to apply her brakes;
- g. Failing to operate her vehicle in a safe manner;
- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

37. As a direct and proximate cause of the acts and omissions, or both, of all Defendants, and/or their employees, agents, and/or servants, Mr. Oulla was severely injured, and suffered great and permanent physical harm which has caused, and in the future will cause him to suffer one or more of the following elements of damage:

- a. Past and future physical pain and suffering;
- b. Loss of income;
- c. Loss of enjoyment of life;
- d. Substantial past expenses for medical services;

- e. Future medical expenses;
- f. Permanent injury to his body;
- g. Increased susceptibility to future injury;
- h. Mental anguish, emotional distress, shock, fear, and embarrassment;
- i. Incidental expenses related to time out of work and medical care; and
- j. Other particulars as discovery and the evidence at trial may show.

38. Plaintiff is informed and believes that he is entitled to judgment against all Defendants for the damages he has suffered and will suffer in the future.

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Loss of Consortium)

39. Plaintiff realleges and reincorporates Paragraphs 1 through 38 above as if fully set forth herein verbatim.

40. As a direct, foreseeable, and proximate result of the joint concurring negligent, grossly negligent, careless, wanton, and reckless acts and/or omissions of the Defendants and/or their employees, agents, and/or servants, as alleged above, Plaintiff Bonnie Oulla has been forced to endure substantial losses of the marital rights to company, society, cooperation, affection, assistance, fellowship, aid, and relations with her spouse. And, Plaintiff Bonnie Oulla has suffered and incurred expenses and costs, and other damages to be shown through discovery and trial.

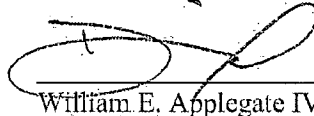
Plaintiffs are entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injuries to Plaintiffs, and for punitive damages to be determined by a jury.

WHEREFORE, Plaintiff prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendants for damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

YARBOROUGH APPEGATE LLC

291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150 office
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william@yarboroughapplegate.com
dlail@yarboroughapplegate.com



William E. Applegate IV, Esquire
David B. Lail, Esquire

AND

TATE JOHNSON LAW LLC

Tate Johnson, Esquire
6049 Winding Creek Blvd.
Liberty Township, OH 45011

ATTORNEYS FOR THE PLAINTIFFS

12-30, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
Price Oulla and Bonnie Oulla,)
Plaintiffs,)
vs.)
Lisa Velazques, Harbison Community)
Association, Inc., Cody Sox, and Patten)
Seed Company, d/b/a Super-Sod,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2014-CP-38-1590

**PLAINTIFFS' MOTION TO
AMEND COMPLAINT**

FILED FOR RECORD
MINIPEA B. CLARK
JAN 29 P 3 21
CLERK OF COURT
ORANGEBURG, SC

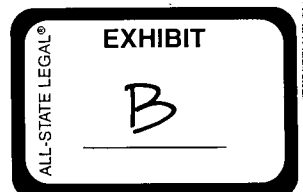
PLEASE TAKE NOTICE that Plaintiffs, by and through their undersigned attorneys, respectfully move this Court to allow the Plaintiffs to amend the pleadings by adding a cause of action against Patten Seed Company, d/b/a Super-Sod for Breach of the Implied Warranty of Merchantability. The proposed Amended Complaint is attached hereto as **Exhibit A**.

Amendments of pleadings are controlled by Rule 15, SCRCPP, which provides in pertinent part that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." A motion to amend is addressed to the sound discretion of the trial judge. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004); *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462 (Ct.App.2004). Leave to amend pleadings pursuant to Rule 15, SCRCPP, shall be liberally and freely given when justice so requires and does not prejudice any other party. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct.App.1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Tanner v.*

ATTEST: TRUE COPY

Winnifred B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC



Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999); *Lewis-Davis*, 360 S.C. at 232, 599 S.E.2d at 465. The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993); *Pruitt*, 330 S.C. at 489, 499 S.E.2d at 253. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct.App.1987).

In support of the motion, the Plaintiffs state the following:

1. Plaintiffs seek to amend the Complaint in order to add an additional cause of action against Patten Seed Company, d/b/a Super-Sod for Breach of the Implied Warranty of Merchantability.

2. This amendment, if ordered, will not prejudice the Defendants in their defense of this case.

For the reasons set forth above, Plaintiffs respectfully requests that the Court grant their Motion to Amend the Complaint.

SIGNATURE PAGE TO FOLLOW

YARBOROUGH APPELATE LLC

291 East Bay Street, Floor 2

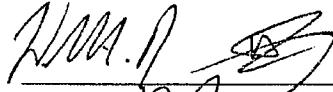
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William E. Applegate IV, Esquire

David B. Lail, Esquire

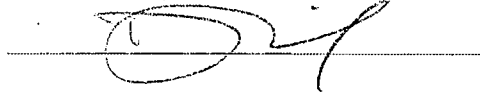
ATTORNEYS FOR THE PLAINTIFFS

6-29, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

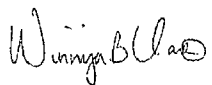
I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing, e-mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 29th day of June, 2016



Winnie B. Clark

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SC

FILED FOR RECORD
WINNIE B. CLARK
2016 JUN 29 PM 3:24
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,)

Plaintiffs,)

vs.)

Lisa Velazques, Harbison Community)
Association, Inc., Cody Sox, and Patten)
Seed Company, d/b/a Super-Sod,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

CASE NO. 2014-CP-38-1590

AMENDED COMPLAINT

(Jury Trial Demanded)

FILED FOR RECORD
WANDA B. OLARK
2015 JUN 29 PM 3:24
CLERK OF COURT
ORANGEBURG, SC

The Plaintiffs, Price Oulla and Bonnie Oulla, and the undersigned attorneys, complaining of the Defendants, jointly and severally, allege the following:

PARTIES, JURISDICTION, AND VENUE

1. The incidents that are the subject of this action occurred in Orangeburg County, South Carolina on July 22, 2014.

2. Plaintiffs Price Oulla and Bonnie Oulla are citizens and residents of Charleston County, South Carolina.

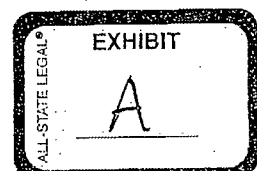
3. Upon information and belief, Defendant Lisa Velazques (hereinafter "Velazques") is a resident and citizen of Charleston County, South Carolina and was operating a motor vehicle on the highways of Orangeburg County, South Carolina on July 22, 2014 when she collided into the rear of Plaintiff Price Oulla's vehicle.

4. Upon information and belief, Defendant Patten Seed Company, d/b/a Super-Sod (hereinafter "Super-Sod") is a Georgia corporation that owns and operates a sod and seed company located on Five Chop Road in Orangeburg County, South Carolina.

ATTEST: TRUE COPY

Winnifred B. Olark

CLERK OF COURT
ORANGEBURG COUNTY, SC



5. Upon information and belief, Defendant Cody Sox is a citizen and resident of Lexington County, South Carolina.

6. Upon information and belief, Defendant Harbison Community Association, Inc. (hereinafter "Harbison") is a South Carolina corporation organized and existing under the laws of South Carolina and conducts business in Orangeburg County, South Carolina. Harbison was procuring sod from Defendant Super-Sod's Orangeburg County location on the date the incidents that are the subject of this action occurred.

7. Upon information and belief, Defendant Cody Sox was acting as an employee, agent, servant, and/or legal representative of Defendant Harbison and was at all times acting in the course and scope of his employment, agency and business with Defendant Harbison on the date the incidents that are the subject of this action occurred.

8. At all times relevant to the Complaint, Defendants Super-Sod and Harbison were, and continue to be, responsible for the acts and/or omissions of their employees, agents, and/or servants.

9. Defendants Super-Sod and Harbison had the right and/or power to direct and control their employees, agents, and/or servants while doing business for a fee and/or profit, and they are personally, jointly and severally liable for the acts and/or omissions committed herein.

10. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

FACTS

11. On July 22, 2014, Defendant Sox, driving a pick-up truck with a trailer in tow for Defendant Harbison, travelled to Defendant Super-Sod's business located on Five Chop Road in Orangeburg County, South Carolina to obtain a load of sod for Defendant Harbison.

12. Upon information and belief, Defendants Super-Sod and Sox loaded two pallets of sod onto the trailer and did not secure or attach the load to the trailer.

13. After the pallet loads of sod were placed on the trailer, Sox left Super-Sod on Five Chop Road and eventually merged onto Interstate 26 ("I-26"), and headed westbound through Orangeburg County towing an unsecured load.

14. While Defendant Sox was pulling the trailer for Defendant Harbison on I-26, the unsecured and unattached load of sod spilled onto the roadway creating a hazard to other drivers.

15. Upon information and belief, the spilled load of unsecured sod obstructed travel on I-26 in Orangeburg County causing a traffic jam.

16. Plaintiff Price Oulla was also travelling westbound on I-26 – behind Sox and the spilled load of sod on the roadway. As Mr. Oulla approached the traffic jam, he slowed his vehicle accordingly and was nearly stopped behind a line of backed-up traffic when Defendant Velazques collided into Mr. Oulla's vehicle.

17. Defendant Velazques, travelling directly behind Mr. Oulla, did not slow her vehicle down for the spilled sod traffic jam on I-26 and she collided into the rear of Mr. Oulla at a high rate of speed forcing Mr. Oulla to then collide with the vehicle in front of him.

18. Mr. Oulla sustained traumatic and permanent injuries in the collision.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS HARBISON AND SOX
(Negligence, Gross Negligence, Negligence *Per Se*)

19. Plaintiff realleges and reincorporates Paragraphs 1 through 18 above as if fully set forth herein verbatim.

20. At all times relevant to this Complaint, Defendant Sox was, upon information and belief, acting as an employee, agent, servant, and/or legal representative of Defendant Harbison and he was acting in the course and scope of his employment.

21. Defendant Harbison is vicariously liable for Defendant Sox's actions on July 22, 2014 and the consequences of those actions.

22. Defendant Sox at all times pertinent hereto had a duty to the general public, including Plaintiff, to properly secure his load of sod and operate his vehicle in a safe manner and in compliance with the statutory and common laws of South Carolina.

23. Defendant Sox breached his duty owed to Plaintiff by carelessly, negligently, and willfully operating a motor vehicle on a public roadway with an unsecured and unattached load of cargo that spilled onto the roadway, subsequently causing a collision.

24. Mr. Oulla was operating his vehicle in a safe, prudent, and reasonable manner at all times relevant to the Complaint.

25. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendants Harbison and Sox in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. In violating S.C. Code Ann. § 56-5-4100 et seq.;
- c. In failing to secure or attach a load of cargo during transport;
- d. In failing to prevent any of the load of cargo from dropping or otherwise escaping onto the roadway;
- e. In failing to maintain proper control of the vehicle;
- f. In failing to operate the vehicle in a safe manner;
- g. In failing to properly train and/or supervise employees and/or agents, and/or failing to have policies and procedures in place regarding how to properly load and secure cargo to prevent harm to others, including Plaintiff;

- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT SUPER-SOD
(Negligence, Gross Negligence, Negligence *Per Se*)

26. Plaintiff realleges and reincorporates Paragraphs 1 through 25 above as if fully set forth herein verbatim.

27. Upon information and belief, Defendant Super-Sod sold Defendant Harbison two pallets of sod from its business location on Five Chop Road in Orangeburg County and undertook the task of loading the sod onto the trailer being pulled by Defendant Sox.

28. Upon information and belief, Defendant Super-Sod knew that Defendant Sox would be transporting the loaded pallets of sod on South Carolina public roadways.

29. Defendant Super-Sod had a duty of care to the general public, including Plaintiff, to properly and safely load and secure the pallets of sod onto the trailer for transport.

30. Defendant Super-Sod breached its duty owed to Plaintiff by carelessly negligently, and willfully loading sod pallet loads of cargo onto a vehicle and not securing or attaching the cargo such that it spilled onto the roadway, subsequently causing a collision.

31. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Super-Sod in the following particulars:

- a. In failing to properly and safely load the sod pallets on the trailer;
- b. In failing to properly and safely distribute the weight of the sod pallets on the trailer;
- c. In failing to secure and attach the sod pallet loads to the trailer;

- d. In violating S.C. Code Ann. § 56-5-4100 et seq.;
- e. In failing to use the proper tools and equipment to secure the sod pallet loads to the trailer;
- f. In failing to inspect the sod pallet loads on the trailer before it left Super-Sod's place of business and entered the public roadways;
- g. In failing to properly train and/or supervise employees and/or agents, and/or failing to have policies and procedures in place regarding how to properly load and secure cargo to prevent harm to others, including Plaintiff;
- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT SUPER-SOD
(Breach of Implied Warranty of Merchantability)

32. Plaintiff realleges and reincorporates Paragraphs 1 through 31 above as if fully set forth herein verbatim.

33. Defendant Super-Sod is a "merchant" and the sod it sold to Defendant Harbison were "goods" as defined by the South Carolina Commercial Code, § 36-2-103 et seq.

34. In selling the sod to Defendant Harbison, Defendant Super-Sod impliedly warranted that it was merchantable, including that it was adequately contained and packaged, as set out in South Carolina Code § 36-2-314.

35. Defendant Super-Sod improperly hand-wrapped and packaged the sod with plastic in a way that allowed it to later tear under normal transport conditions.

36. Defendant Super-Sod did not exclude or modify the implied warranty of merchantability.

37. Defendant Super-Sod's implied warranty of merchantability flows to Plaintiffs pursuant to South Carolina Code § 36-2-318.

38. Defendant Super-Sod breached the implied warranty of merchantability in that the sod was, in fact, not merchantable, fit, suitable, or safe for use as set out above.

39. As a direct and proximate result of Defendant Super-Sod's breach of the implied warranty of merchantability, Plaintiffs suffered the injuries described above.

40. Due to Defendant Super-Sod's breach of the implied warranty of merchantability, Plaintiffs are entitled to recover consequential damages pursuant to South Carolina Code § 36-2-715, and actual and punitive damages as determined by a jury.

FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT VELAZQUES
(Negligence, Gross Negligence, Negligence *Per Se*)

41. Plaintiff realleges and reincorporates Paragraphs 1 through 40 above as if fully set forth herein verbatim.

42. Defendant Velazques at all times pertinent hereto had a duty to the general public, including Plaintiff, to operate her vehicle in a safe manner and in compliance with the statutory and common laws of South Carolina.

43. Defendant Velazques breached her duty owed to Plaintiff by carelessly, negligently, and willfully operating a motor vehicle on a public roadway and subsequently causing a collision when she collided into the rear of Mr. Oulla's vehicle.

44. Mr. Oulla was operating his vehicle in a safe, prudent, and reasonable manner at all times relevant to the Complaint.

45. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Velazques in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. Traveling too fast for conditions;
- c. Following too closely;
- d. Failing to maintain a proper lookout;
- e. Failing to keep the motor vehicle she was operating under control;
- f. Failing to apply her brakes;
- g. Failing to operate her vehicle in a safe manner;
- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

46. As a direct and proximate cause of the acts and omissions, or both, of all Defendants, and/or their employees, agents, and/or servants, Mr. Oulla was severely injured, and suffered great and permanent physical harm which has caused, and in the future will cause him to suffer one or more of the following elements of damage:

- a. Past and future physical pain and suffering;
- b. Loss of income;
- c. Loss of enjoyment of life;
- d. Substantial past expenses for medical services;
- e. Future medical expenses;
- f. Permanent injury to his body;
- g. Increased susceptibility to future injury;

- h. Mental anguish, emotional distress, shock, fear, and embarrassment;
- i. Incidental expenses related to time out of work and medical care; and
- j. Other particulars as discovery and the evidence at trial may show.

47. Plaintiff is informed and believes that he is entitled to judgment against all Defendants for the damages he has suffered and will suffer in the future.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Loss of Consortium)

48. Plaintiff realleges and reincorporates Paragraphs 1 through 47 above as if fully set forth herein verbatim.

49. As a direct, foreseeable, and proximate result of the joint concurring negligent, grossly negligent, careless, wanton, and reckless acts and/or omissions of the Defendants and/or their employees, agents, and/or servants, as alleged above, Plaintiff Bonnie Oulla has been forced to endure substantial losses of the marital rights to company, society, cooperation, affection, assistance, fellowship, aid, and relations with her spouse. And, Plaintiff Bonnie Oulla has suffered and incurred expenses and costs, and other damages to be shown through discovery and trial.

Plaintiffs are entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injuries to Plaintiffs, and for punitive damages to be determined by a jury.

WHEREFORE, Plaintiff prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendants for damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

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Liberty Township, OH 45011

ATTORNEYS FOR THE PLAINTIFFS

_____, 2016
Charleston, South Carolina



**YARBOROUGH
APPLEGATE**

ATTORNEYS AT LAW
August 23, 2016

William E. Applegate IV
william@yarboroughapplegate.com

Via e-mail and regular US Mail

The Honorable R. Knox McMahon
Lexington County Judicial Center
205 E. Main Street
Lexington, SC 29072

Re: Price Oulla and Bonnie Oulla v. Lisa Velazquez., *et al.*
C/A No.: 2014-CP-38-1590
Our File No. 14-057

Dear Judge McMahon:

I hope this letter finds you well. I am sending to you Plaintiffs' Motion to Amend Complaint in the above-referenced action, which proposes to add a cause of action for Breach of the Implied Warranty of Merchantability. This motion was presented to defense counsel on June 21, 2016, and filed in the Orangeburg Clerk of Court's office on June 29, prior to our hearing on Defendants' Motions for Summary Judgment. The motion hearing was set for August 23, before the Honorable Diane Goodstein. Within Plaintiffs' Motion to Alter or Amend Order Granting Patten Seed's Motion for Summary Judgment, I indicated that this motion was still outstanding. I attempted to provide this information to you at the hearing as well, but as you may recall this hearing went long and arguments were concluded prior to me being able to do so.

Counsel for Patten Seed and I appeared before Judge Goodstein this morning to argue Plaintiff's Motion to Amend Complaint and after hearing arguments from both sides, Judge Goodstein believed this issue was more properly in your jurisdiction and before you, based on the pending Motion for Summary Judgment/Motion to Alter or Amend. To ensure you have all of the information in front of you, enclosed are copies of Plaintiffs' Motion to Amend Complaint and Memorandum in Support of Motion to Amend Complaint, as well as Defendant Patten Seed's Memorandum in Opposition to Plaintiffs' Motion to Amend for your review and consideration of this matter.

Please let us know if you need any additional information or would like to schedule a hearing on this matter.

Sincerely,

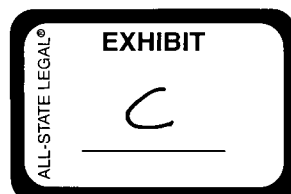


William E. Applegate IV

Enclosures

cc: Mark B. Tinsley, Esquire
E. Mitchell Griffith, Esquire
E. Raymond Moore, III, Esquire
Curtis W. Dowling, Esquire
Charles H. Williams, Esquire

291 East Bay Street / Floor 2 / Charleston, SC 29401 / Phone: 843.972.0150 / Fax: 843.277.6691
www.yarboroughapplegate.com



1 State of South Carolina)

In the Court
Of Common Pleas

2 County of Orangeburg)

3 Docket No. 2014-CP-38-01590

4
5
6 Bonnie Oulla and Price Oulla,)
Plaintiffs,)

7)
8 vs.)

Transcript of Record

9)
10 Government Employees Insurance)
Company, Harbison Community)
Association, Inc., Patten Seed)
11 Company, D/B/A Super Sod, Cody)
Sox, and Lisa Velazquez,)
12 Defendants.)

13 June 29, 2016
14 Orangeburg, South Carolina

15 B E F O R E:

16 The Honorable R. Knox McMahon, Judge.

17
18 A P P E A R A N C E S:

19 William E. Applegate, IV, Esquire
Attorney for the Plaintiffs

20 Curtis W. Dowling, Esquire
21 Ernest Mitchell Griffith, Esquire
Edward Raymond Moore, III, Esquire
22 Rogers E. Harrell, III, Esquire
Attorneys for the Defendants

23
24 Brenda J. Sigwald, Circuit Court Reporter
To The Honorable R. Knox McMahon
25 P.O. Box 206, Jackson, South Carolina 29831

1 that concept. If I'm a life guard and I undertake to
2 protect people at the pool, that's where my undertaking is,
3 not to another pool, not to the parking lot outside, not to
4 the public at large.

5 Thank you for your patience, Your Honor.

6 THE COURT: Brenda, you okay?

7 THE COURT REPORTER: Yes, sir.

8 THE COURT: With that being said, if y'all will
9 e-mail to my law clerk proposed orders. What period of
10 time you need Mr. Applegate?

11 MR. APPLGATE: Ten days, Your Honor.

12 THE COURT: Ten days enough? Y'all know how busy
13 you are, Mr. Griffith?

14 MR. APPLGATE: Should be able to do that, Your
15 Honor.

16 MR. GRIFFITH: Judge, I don't anticipate e-mailing
17 an order because it's either going to be granted or denied,
18 so mine's going to be --

19 THE COURT: All right. Mr. Dowling?

20 MR. DOWLING: I think I already e-mailed one, but
21 I'll look to see if it needs --

22 THE COURT: I knew that it had, but I thought I
23 would check.

24 MR. APPLGATE: I sincerely apologize, but I would
25 like TO hand just a couple of things up AND just make you

1 aware of two small things and I won't go into them. One,
2 just, there's a case of little precedential value because
3 it's a state court case here in South Carolina, the
4 accident happened in Charleston. The first accident took
5 place on 526; six and a half hours later another accident
6 took place. The same arguments were made that were made
7 here today. This motion was dismissed or denied and I was
8 just going to hand up the defendant's motion and the
9 denial, and I'd like to just hand that to the parties and
10 to you.

11 MR. MOORE: Since I haven't seen that, Your Honor,
12 I would just ask the chance to respond to it. And since
13 it's a trial court order, I'm not even sure it's been
14 published. I researched it.

15 MR. APPLGATE: It's not published.

16 MR. DOWLING: Your Honor, I just -- if he's got
17 something that's been briefed by --

18 THE COURT: I've already ended the hearing. I've
19 already ended the hearing. I've heard enough.

20 MR. APPLGATE: Yes, sir.

21 MR. DOWLING: Yes, sir.

22 THE COURT: You know, as Judge Goodstein taught me,
23 this is my judgeship and not other trial judges judgeship
24 and I make my own independent decisions.

25 MR. GRIFFITH: Thank you, Your Honor.

1 MR. APPLEGATE: Thank you, Judge.

2 MR. MOORE: Thank you, Judge.

3 * * * * * END OF TRANSCRIPT * * * * *

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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

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.

ATTEST: TRUE COPY

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014 ECP-38-01590

CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

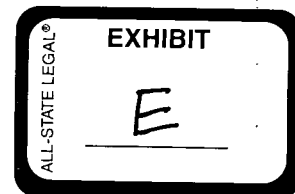
**ORDER GRANTING PATTEN SEED
COMPANY D/B/A SUPER SOD'S MOTION
FOR SUMMARY JUDGMENT**

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) SCRPC; *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.

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 of reasons. First, Plaintiffs have not shown that Super Sod “undertook” to do anything with regard to the securing 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 Kears, 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 Kears 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 Kears 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



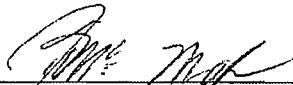
S.C. at 505, 737 S.E.2d at 514. The Court of Appeals specifically acknowledged that it was “[c]ognizant of Restatement (Second) of Torts section 324A, *although that section has not been adopted by our courts . . .*” *Id.* at n. 5 (emphasis added).

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.

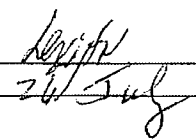
CONCLUSION

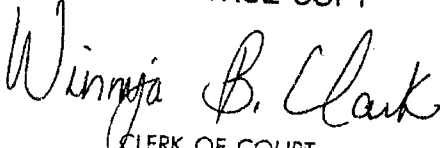
As set forth above, Defendant Super Sod did not have a legal duty to the Plaintiffs. Therefore, Defendant Patten Seed Company d/b/a Super Sod’s Motion for Summary Judgment is hereby **GRANTED**.

SO ORDERED.



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


_____, South Carolina
26 July 2016

ATTEST: TRUE COPY


CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA



**YARBOROUGH
APPLEGATE**
ATTORNEYS AT LAW

August 12, 2016

The Honorable Winnifa Brown-Clark
Orangeburg County Clerk of Court
PO Box 9000
Orangeburg, SC 29115-9000

Re: Price Oulla and Bonnie Oulla v. Lisa Velazquez., *et al.*
C/A No.: 2014-CP-38-1590
Our File No. 14-057

Dear Ms. Brown-Clark:

Enclosed please find the original and one copy of Plaintiffs' Notice of Motion and Motion to Alter or Amend Order Granting Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment in the above-referenced matter.

I would appreciate your filing the original and returning the clocked copy in the self-addressed, stamped envelope provided herewith.

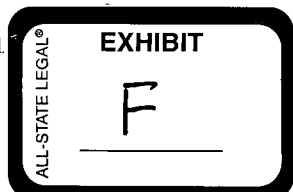
If you have any questions, feel free to contact me.

Sincerely,

Amy H. Johnson,
Paralegal to David B. Lail

Enclosures

cc: Mark B. Tinsley, Esquire
E. Mitchell Griffith, Esquire
E. Raymond Moore, III, Esquire
Curtis W. Dowling, Esquire
Charles H. Williams, Esquire
The Honorable R. Knox McMahon



STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,

Plaintiff,)

vs.)

Lisa Velazques, Harbison Community
Association, Inc., Cody Sox, and Patten Seed
Company, d/b/a Super-Sod,

Defendant.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

CASE NO.: 2014-CP-38-1590

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

David B. Lail, Bar No. 81074

Address:

Yarborough Applegate LLC

291 E. Bay St., Floor 2, Charleston, SC 29401

Phone: 843-972-0150 Fax 843-277-6691

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Other:

Defendant's Attorney:

E. Raymond Moore, III, Bar No. _____

Address:

Murphy & Grantland, PA

PO Box 6648, Columbia, SC 29260

Phone: 803-782-4100 Fax 803-782-4140

E-mail: ermoore@murphygrantland.com

Other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Order Granting Patten Seed Company Motion for
Summary Judgment

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

August 12, 2016

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	CASE NO. 2014-CP-38-1590
	)	
Price Oulla and Bonnie Oulla,	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' NOTICE OF MOTION AND
vs.	)	MOTION TO ALTER OR AMEND ORDER
	)	GRANTING PATTEN SEED COMPANY
Lisa Velazques, Harbison Community	)	D/B/A SUPER SOD'S MOTION FOR
Association, Inc., Cody Sox, and Patten	)	SUMMARY JUDGMENT
Seed Company, d/b/a Super Sod,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE that within ten days after service hereof, or as soon thereafter as counsel may be heard, Plaintiffs Price and Bonnie Oulla will move, pursuant to Rules 52(b) and 59(e), SCRCF, for alteration or amendment of the Order Granting Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment. The basis for the motion is that the Court erred as a matter of law in finding that Patten Seed Company d/b/a Super Sod (Super Sod) had no statutory or common law duty to Plaintiffs, and Super Sod's motion should be denied. Plaintiffs also respectfully request amendment of the Court's findings of fact in various respects.¹

Undersigned counsel received written notice of entry of the subject Order by email from counsel for Defendant Lisa Velazques on August 3, 2016.

¹ Plaintiffs filed a Motion to Amend the Complaint to plead a cause of action for breach of the UCC article 2 warranty of merchantability on June 29, 2016, before the Court entered the Order Granting Super Sod's Motion for Summary Judgment on the cause of action for negligence. The hearing on the Motion to Amend is scheduled to be heard on August 23, 2016.

FACTS

This case arises out of a chain of events that began at Super Sod's business in Orangeburg and ended in an automobile collision on I-26. On July 22, 2014, Defendant Cody Sox (Sox), an employee of Defendant Harbison Community Association, Inc. (Harbison), travelled from Columbia to Super Sod's business to purchase a load of sod for Harbison. Cody Sox Dep. 19:21-20:14, attached as Ex. A to Plaintiffs' Memo in Opposition. To transport the sod from Orangeburg to Columbia, Sox was driving a Harbison pick-up truck and pulling a flatbed trailer. Sox Dep. 20:3-10. This was Sox's first trip to Super Sod and his first time hauling sod. Sox Dep. 25:5-10.

Prior to making the trip, Sox called and ordered two pallets of sod for Harbison. Sox Dep. 23:11-14. Super Sod informed Sox that they would load the sod onto Sox's trailer. Sox Dep. 23:21-23. In addition to loading customer vehicles like Sox's with pallets of sod, Super Sod loads and ships sod from its locations in four states across the southeast using its own fleet of tractor trailers. Super Sod 30(b)(6) Dep. 11:9-21; 22:17-23, attached as Ex. B to Plaintiffs' Memo in Opposition. According to Super Sod, it loads approximately 800 pallets of sod per day from April to October. Super Sod 30(b)(6) Dep. 17:23-18:7. When doing sod business with customers like Sox, the sales price includes Super Sod's stacking the sod on pallets, wrapping the sod in plastic, and loading the 2,000 pound pallets of sod with a forklift onto customer's vehicles for transport on public roadways. Super Sod 30(b)(6) Dep. 25:17-27:2; 27:12-18.

When Sox arrived at Super Sod, he paid for the two pallets of sod and was directed a couple of miles down the road where the sod would be loaded. Sox Dep. 24:3-12. Next, Melvin Kearse, a 22-year Super Sod veteran employee, wrapped the sod with plastic and loaded the sod onto Harbison's trailer using a Super Sod forklift. Melvin Kearse Dep. 7:22-24; 44:2-3; 42:4-10; 15:24-16:1, attached as Ex. C to Plaintiffs' Memo in Opposition. Kearse testified that it is his

responsibility to: (1) properly wrap the sod in a way that it's not supposed to break during transport; and (2) safely load the sod onto the trailer and make sure it's balanced and not overloaded. Kearse Dep. 20:13-17; 31:12-19; 17:20-18:2; 28:7-18. Kearse further testified that he balances sod loads by placing pallets in the middle of the trailer, and if the sod puts too much weight on a trailer, he takes it off and has the customer come back later for loading. Kearse Dep. 33:18-21; 28:15-22. According to Kearse, there are situations where Super Sod will decide whether or not a load can be safely transported. Kearse Dep. 60:13-19. Likewise, Super Sod's 30(b)(6) witness, Joe Livingston, testified that Super Sod would not load a customer in "situations that would not be safe." Super Sod 30(b)(6) Dep. 35:19-36:10.

Nevertheless, Kearse ignored Super Sod's responsibilities for safely loading its product onto Sox's vehicle, and instead, testified that he loaded the sod with one pallet on the front of the trailer and one pallet on the back of the trailer. Kearse Dep. 40:19-41:8. Sox testified that he had not done any analysis on where the sod or any weight should have been placed on the trailer prior to having the sod loaded. Sox Dep. 51:17-22. Kearse also testified that he denied Sox's request to remove sand from the middle of Sox's trailer where he normally places sod loads because it was not his job. Kearse Dep. 40:12-18. Sox, who forgot to bring straps to secure the sod load, also asked Kearse if Super Sod had any straps, and was told no. Sox Dep. 72:16-20; 73:7-8. Both Sox and Kearse admit that they did not secure the pallets of sod to the trailer in any way before it left Super Sod and made its way to I-26 for the trip from Orangeburg to Columbia. Kearse Dep. 34:14-16; Sox Dep. 34:8-10; 63:14-16.

After stopping to pick up some fast food, and right after merging onto I-26 westbound, he reached about 48 or 50 miles per hour when a tractor-trailer began "swaying just a little bit" into Sox's lane and Sox "let off the gas and adjusted 3 to 4 feet to the right, trying to go into the

emergency lane.” Sox Dep. 20:19-25; 21:2-12. Next, Sox’s trailer loaded with unsecured sod began to sway and Sox pulled the Harbison truck off the interstate and came to a stop. Sox Dep. 21:12-16. Sox looked back and noticed that “a half a pallet of sod from the trailer had rolled off the back of it into the slow lane of I-26.” Sox Dep. 21:17-20. Sox testified that the plastic wrapping on one pallet of sod was ripped “at the top” and the other pallet of sod’s wrapping “was torn down about halfway from the top.” Sox Dep. 132:13-133:11; 50:18-20.

With sod obstructing the highway, Sox called 911 at 11:54 am to report the spill and he and his passenger waited in the truck for emergency personnel to arrive. Sox Dep. 21:23-22:8; 43:10-17.; CAD Call Information attached as Ex. D to Plaintiffs’ Memo in Opposition. Five minutes later at 11:59 am, West Middle Fire Department was notified of the sod spill and dispatched to the scene. CAD Call Information. West Middle Fire Department arrived at the spill location to help clear the sod from the road at 12:10 pm. CAD Call Information. *One minute later*, at 12:11 pm, 911 received a call from a motorist stating: “Where 301 enters, traffic was backed up. Another car hit another car and the car rolled over.” CAD Call Information; 911 call recording attached to Def. Harbison’s Memo in Support as Exs. H & I. Plaintiff Price Oulla was travelling westbound on I-26 – behind Sox and the spilled load of sod. Comp. ¶ 16. As Plaintiff approached the backed-up traffic due to the sod spill, he slowed his vehicle down and was rear-ended by Defendant Lisa Velazques (“Meyer”) who testified that that there was “an immediate stop of cars” and she was unable to stop in time. Lisa Meyer Dep. 36:4-6; 33:6, attached as Ex. E to Plaintiffs’ Memo in Opposition.

FINDINGS OF FACT THAT SHOULD BE AMENDED

Pursuant to Rule 52(b), SCRPC, Plaintiffs respectfully request that the Court amend various findings of fact set forth in the Order.

1. **“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.” Order at 1.**

The Court’s finding is not in view of the evidence in a light most favorable to Plaintiffs, the non-moving party. Ms. Velazques testified that that there was “an immediate stop of cars” and she was unable to stop in time. Lisa Meyer Dep. 36:4-6; 33:6. The distinction between this testimony and the Court’s finding is more than semantic. The “immediate stop of cars” is squarely within the scope of the risk posed by inadequately secured loads on the highway, and is therefore relevant to the issue of duty.

2. **There is evidence that the accident occurred before the sod was cleared from the highway.**

The timeline of events in the Court’s findings focus on the seventeen-minute time lapse between Sox’s initial 911 call about the sod spill and the first 911 call about Plaintiffs’ accident. The Court also finds that “[a] fire engine eventually responded and blocked traffic in the right (slow) lane so that the sod could be cleaned from the roadway.” Order at 3.

The Court should include findings that West Middle Fire Department arrived at the spill location to help clear the sod from the road at 12:10 pm. CAD Call Information. *One minute later*, at 12:11 pm, 911 received a call from a motorist stating: “Where 301 enters, traffic was backed up. Another car hit another car and the car rolled over.” CAD Call Information; 911 call recording. From this evidence a jury could conclude that the sod cleanup was still going on when Plaintiff was struck by Velazques, rendering this accident squarely within the scope of immediate risk posed by the sod spill that was caused by the unsafe loading and inadequate stretch-wrapping by Super Sod. See Trooper Gleich Dep. Ex. 1, at ¶¶ 19-20, attached to Plaintiffs’ Memo in Support as Ex. H (providing that “when we have travel blocked on the interstate due to a spilled load or a wreck,

we send a cruiser a half a mile behind the end of the traffic to put blue lights on to warn other drivers of the sudden stop ahead so that they will have time to react,” but in this instance, “the crash happened too fast and before a cruiser could get positioned to warn other drivers”).

3. The Court’s findings do not include the evidence that the stretch-wrapping provided by Super Sod ripped, which allowed the sod to spill onto the highway.

In discussing the spillage of the sod onto the highway, the Court finds simply: “Sox lost a portion of the sod from both pallets, but the pallets themselves were unmoved.” Order at 3. Because the evidence is to be viewed in the light most favorable to Plaintiffs, the discussion should include a finding that Sox testified the plastic stretch-wrapping on one pallet of sod was ripped “at the top” and the other pallet of sod’s wrapping “was torn down about halfway from the top.” Sox Dep. 132:13-133:11; 50:18-20. The ripping of the stretch-wrapping allowed the sod to spill onto the highway. Michael A. Sutton, P.E. Aff. ¶¶ 6 and 10, attached to Plaintiffs’ Memo in Opposition as Ex. F. This fact is important to the issue of Super Sod’s duty, because Super Sod performed the stretch-wrapping on its own accord, not at the direction of its customer, and did so with the safety of third parties like Plaintiff in mind. That is, Super Sod did this not only for the benefit of its customers, but also for the benefit of third parties. That implicates a jury question as to the existence of duty pursuant to Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997), as set forth below.

4. The Court finds that Super Sod’s employee “complied with Sox’s instructions” “to load the pallets over the trailer’s two axles.” Order at 2.

There is evidence in the record, however, that the employee disregarded his and Super Sod’s own knowledge about safely loading its product the Harbison trailer and loaded the sod not over the two axles, but rather with one pallet on the front of the trailer and one pallet on the back of the trailer. Kearse Dep. 40:19-41:8. There is evidence in the record that loading the trailer in

this manner was unsafe. Michael A. Sutton, P.E. Aff. ¶¶ 6-8, attached as Ex. F to Plaintiff's Memo in Opposition.

LAW AND ARGUMENT

In finding that Super Sod owed no duty to Plaintiffs as a matter of law, the Court focuses on: (1) whether a statutory duty was owed pursuant to South Carolina Code sections 56-5-4100 and -4110 [Order at 6-8]; and (2) whether Super Sod's wrapping of the sod was "an 'undertaking' within the contemplation of Section 56-5-4110" [Order at 8]; and that Super Sod could not have assumed a duty because South Carolina has not adopted Restatement (Second) of Torts § 324A [Order at 8-10].

Respectfully, the Court misinterpreted Code section 56-5-4100, which plainly provides that its loading requirements apply to both operators and loaders. Further, Super Sod's wrapping of the sod constituted an undertaking pursuant to common law, regardless whether Super Sod undertook any act to become a loader of the trailer "within the contemplation of Code section 56-5-4100." Furthermore, notwithstanding the Supreme Court's decision not to expressly adopt Restatement (Second) of Torts § 324A, the Supreme Court has found a jury question as to duty to a third party when there is evidence that the defendant undertook an act "for the benefit of third parties." Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815-16 (1997) (citations omitted). There is such evidence here. Plaintiffs are not asking the Court to apply Restatement § 324A, but rather are asking the Court to apply Miller.

Finally, the Court has not addressed the issue whether Super Sod negligently created the risk that the stretch-wrapping would fail under these circumstances. Negligent creation of risk is one of the five exceptions to the general principle that "[u]nder South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of

danger.” Johnson v. Jackson, 401 S.C. 152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012). The five exceptions are: “(1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant.” Id. Plaintiffs have argued, but the Court has not addressed, exception (4) from Johnson. Plaintiffs’ Memo in Opposition at 9, 11–13.²

A. Super Sod owed a duty to Plaintiff pursuant to South Carolina Code section 56-5-4100.

Section 56-5-4100(A) provides, in pertinent part:

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.....

This subsection of the statute is written in the passive voice, and neither includes nor excludes any particular class of persons against whom it is directed.

Instead, the persons against whom the entire statute is directed are identified in subsection (C), which provides:

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(C) (emphasis added). This plainly worded provision provides that the driver *and* the loader of the vehicle not only must comply with the requirements of subsection (C), but also must comply with the requirements of subsection (A), one of the “other provisions of

² In this Motion, Plaintiffs do not intend to re-argue all of their positions set forth in their Memo in Opposition or articulated at the hearing. Plaintiffs do not wish to waive any of those positions, however, and incorporate all previously raised arguments herein by reference.

this section.” See Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (providing that “[w]hen the language of a statute is plain, unambiguous, and conveys a clear and definite meaning...the statutory terms...must be applied according to their literal meaning”). It is clear that in drafting section 56-5-4100, the legislature contemplated that the vehicle would be driven after being loaded by the loader, and that the loader, in addition to the driver, should be responsible for the vehicle’s being so driven with the unsecured load. See Lincoln Gen. Ins. Co. v. Progressive No. Ins. Co., 406 S.C. 534, 538, 753 S.E.2d 437, 439 (Ct. App. 2013) (providing that “[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature”) (citation omitted). Here, Super Sod, as the loader of the trailer, had a statutory duty to comply with the requirement that the trailer be loaded in such a way “as to prevent any of its load from dropping...or otherwise escaping from the vehicle.” § 56-5-4100(A).

The Court, however, has held that section 56-5-4100(A) applies to operators only, not loaders. If that were correct, then South Carolina Code section 56-5-4110 would be superfluous and unnecessary. That section 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. This section plainly applies to operators only, and provides that the operator shall not operate his vehicle with an unsecured load. That is exactly how the Court has interpreted Code section 56-5-4100. Yet, if section 56-5-4100 were so limited, then section 56-5-4110 would be superfluous and unnecessary. The Court is supposed to assume that no statute is superfluous, and interpret statutes consistent with that principle of statutory construction. See generally CFRE, LLC v. Greenville Co. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (providing that “sections which are a part of the same general statutory law must be construed

together and each one given effect,” and that the Court “must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous”) (quotations omitted). The notion that the General Assembly did not intend section 56-5-4110 to be superfluous buttresses Plaintiffs’ interpretation of section 56-5-4100 that the obligations imposed therein apply to both operators and loaders. Such obligations include the passively worded obligations of section 56-5-4100(A).

Plaintiff, as a traveler on the highway, was doubtless within the class of persons that section 56-5-4100 was intended to protect from this type of harm...injury from a load falling off of a trailer on the highway. See, e.g., Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (standing for the principle that a statutory duty arises if the “essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered and that [the plaintiff] is a member of the class of persons the statute is entitled to protect”); cf. Rowe v. Frick, 250 S.C. 499, 504–05, 159 S.E.2d 47, 50 (1968) (providing generally that violations of traffic statutes constitutes negligence *per se* in actions by other drivers).

Super Sod did have a statutory duty to Plaintiff to securely load Harbison’s trailer, and the Court should amend its Order and deny Super Sod’s motion for summary judgment.

B. Super Sod owed Plaintiff a common law duty not to negligently create the risk of harm in failing to properly wrap the pallets, in failing to balance the pallets on the trailer, or in failing to ensure the load was secured to the trailer.

As noted above, the Court has not addressed Plaintiffs’ position on the principle that a common law duty to foreseeable plaintiffs arises on the part of someone who negligently creates a risk in the conduct of another. Johnson, 401 S.C. at 160, 735 S.E.2d at 668. As set forth in Plaintiffs’ Memo in Opposition, this principle is consistent with the basic law of torts that everyone has a common law duty to refrain from creating a risk of harm to foreseeable plaintiffs. See Carter

v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct. App. 1988) (providing generally that a duty exists “to protect others against the risk of harm from his actions,” and that a duty arises “with respect to a danger which is apparent to one in the position of the actor before the harm occurs”), rev’d on other grounds, 299 S.C. 439 (1989). This is also consistent with the general duty of due care that a party to a contract owes to foreseeable third-party plaintiffs, notwithstanding any contractual duties he or she may owe to a customer. See Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 319–20, 605 S.E.2d 12, 15–16 (2009) (identifying common law duty of care to third parties on behalf of paving contractor, independent of the duties it assumed in its contract with the DOT, based on general principles of common law negligence, and providing list of similar case law).

In this case, the Court could find that Super Sod had a general common law duty of care to ensure the safety of the load on the Harbison trailer, per Carter or Dorrell. The Court could also find that in wrapping the sod, per Johnson, Super Sod had a duty to refrain from creating a risk of harm to third parties like Plaintiff. Either way, Super Sod did have a common law duty to Plaintiff and other motorists to refrain from creating an unsafe condition on the Harbison trailer. Super Sod actively created the risk by inadequately stretch-wrapping, carelessly loading, and failing to secure the load before sending its customer off to traverse the highway with other motorists, including Plaintiff. Michael A. Sutton, P.E. Aff. ¶¶ 6-8.

It is undisputed that Super Sod’s employee is the one who wrapped the pallets of sod, and that the wrapping ultimately ripped, allowing the sod to spill onto the highway. Sox Dep. 50:18-20. There is a genuine issue of material fact whether Super Sod was negligent in inadequately wrapping the pallets. Michael A. Sutton, P.E. Aff. ¶¶ 6,7; Sox Dep. 132:13-133:11; 50:18-20. There is a genuine issue of material fact whether the failure of the wrapping was the cause of the

together and each one given effect,” and that the Court “must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous”) (quotations omitted). The notion that the General Assembly did not intend section 56-5-4110 to be superfluous buttresses Plaintiffs’ interpretation of section 56-5-4100 that the obligations imposed therein apply to both operators and loaders. Such obligations include the passively worded obligations of section 56-5-4100(A).

Plaintiff, as a traveler on the highway, was doubtless within the class of persons that section 56-5-4100 was intended to protect from this type of harm...injury from a load falling off of a trailer on the highway. See, e.g., Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (standing for the principle that a statutory duty arises if the “essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered and that [the plaintiff] is a member of the class of persons the statute is entitled to protect”); cf. Rowe v. Frick, 250 S.C. 499, 504–05, 159 S.E.2d 47, 50 (1968) (providing generally that violations of traffic statutes constitutes negligence *per se* in actions by other drivers).

Super Sod did have a statutory duty to Plaintiff to securely load Harbison’s trailer, and the Court should amend its Order and deny Super Sod’s motion for summary judgment.

B. Super Sod owed Plaintiff a common law duty not to negligently create the risk of harm in failing to properly wrap the pallets, in failing to balance the pallets on the trailer, or in failing to ensure the load was secured to the trailer.

As noted above, the Court has not addressed Plaintiffs’ position on the principle that a common law duty to foreseeable plaintiffs arises on the part of someone who negligently creates a risk in the conduct of another. Johnson, 401 S.C. at 160, 735 S.E.2d at 668. As set forth in Plaintiffs’ Memo in Opposition, this principle is consistent with the basic law of torts that everyone has a common law duty to refrain from creating a risk of harm to foreseeable plaintiffs. See Carter

v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct. App. 1988) (providing generally that a duty exists “to protect others against the risk of harm from his actions,” and that a duty arises “with respect to a danger which is apparent to one in the position of the actor before the harm occurs”), rev’d on other grounds, 299 S.C. 439 (1989). This is also consistent with the general duty of due care that a party to a contract owes to foreseeable third-party plaintiffs, notwithstanding any contractual duties he or she may owe to a customer. See Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 319–20, 605 S.E.2d 12, 15–16 (2009) (identifying common law duty of care to third parties on behalf of paving contractor, independent of the duties it assumed in its contract with the DOT, based on general principles of common law negligence, and providing list of similar case law).

In this case, the Court could find that Super Sod had a general common law duty of care to ensure the safety of the load on the Harbison trailer, per Carter or Dorrell. The Court could also find that in wrapping the sod, per Johnson, Super Sod had a duty to refrain from creating a risk of harm to third parties like Plaintiff. Either way, Super Sod did have a common law duty to Plaintiff and other motorists to refrain from creating an unsafe condition on the Harbison trailer. Super Sod actively created the risk by inadequately stretch-wrapping, carelessly loading, and failing to secure the load before sending its customer off to traverse the highway with other motorists, including Plaintiff. Michael A. Sutton, P.E. Aff. ¶¶ 6-8.

It is undisputed that Super Sod’s employee is the one who wrapped the pallets of sod, and that the wrapping ultimately ripped, allowing the sod to spill onto the highway. Sox Dep. 50:18-20. There is a genuine issue of material fact whether Super Sod was negligent in inadequately wrapping the pallets. Michael A. Sutton, P.E. Aff. ¶¶ 6,7; Sox Dep. 132:13-133:11; 50:18-20. There is a genuine issue of material fact whether the failure of the wrapping was the cause of the

spillage onto the highway. Sox Dep. 50:4-20; Michael A. Sutton, P.E. Aff. ¶¶ 6,10. Accepting, as the Court has in its Order on page 3, Sox's testimony that "the pallets themselves were unmoved," the jury could easily conclude that Super Sod had negligently stretch-wrapped the sod and that is why the sod spilled. Per Johnson, Super Sod had a duty not to negligently create that risk.

In addition, there is a genuine issue of material fact whether Super Sod loaded the trailer in such a manner as to render the trailer imbalanced and unsafe for travel. Michael A. Sutton, P.E. Aff. ¶¶ 6,7,10. While there is testimony that Super Sod's employee simply placed the pallets where Sox told him to place them, there is also evidence from which the jury could find that Super Sod and its employee were more experienced in loading trailers and should have refused to disregard their own expertise. Kearse Dep. 13:4-22; Super Sod 30(b)(6) Dep. 17:23-18:7; Sox Dep. 51:17-22. Super Sod retained ultimate authority over whether an unsafe load would leave its yard, and negligently failed to exercise that authority here, creating the risk that caused this wreck. Super Sod 30(b)(6) Dep. 36:11-19; 71:14-23.

Moreover, Super Sod actively participated in the loading of the Harbison trailer, yet took no measures to strap down or otherwise secure the load of pallets. Super Sod knew that Sox did not have any straps and was not planning to secure the load before entering the highway. Kearse Dep. 34:14-16; Sox Dep. 34:8-10; 63:14-16. In this regard, Super Sod acted in concert with Sox and Harbison in allowing the unsecured pallets to be hauled down I-26 at highway speed, without regard to the obvious danger posed. Super Sod was an active participant in negligently loading the trailer, and therefore its negligent conduct created the risk that caused the sod spill.

For these numerous reasons, pursuant to Johnson exception (4), Super Sod had a common law duty to not negligently create a risk of danger. 401 S.C. at 160, 735 S.E.2d at 668. There is at least a scintilla of evidence that Super Sod did negligently create a risk of danger, and the scope

of the risk included injury to those traveling the highway, including Plaintiff. The Court should therefore amend its Order and deny Super Sod's motion for summary judgment.

C. Restatement (Second) of Torts § 324A is inapposite. There is evidence that Super Sod undertook numerous acts in contemplation of the safety of third parties traveling the highway, such as Plaintiff, and whether Super Sod assumed a duty in doing so is a mixed question of law and fact to be resolved by the jury pursuant to Miller v. City of Camden.

There is a subtle but significant difference between the rule of Restatement (Second) of Torts § 324A, which the Miller Court declined to adopt, and the rule that the Miller Court did adopt. The rule of Restatement § 324A is that the volunteer has a duty to third parties, regardless whether he undertakes the act only for the benefit of a second party, if he "should recognize" the need to consider "the protection of a third person" while undertaking the act. Miller, 329 S.C. at 315, 494 S.E.2d at 815 n.2. The rule adopted in Miller is more limited, and provides that the volunteer assumes a duty to the third party only if he actually undertakes the act with the protection of such a third party in mind.

Here, there is evidence from which the jury could infer that Super Sod's stretch-wrapping the pallets of sod in plastic, "to add some stability to [the stack of sod], give it some additional stability as it's being handled, transported, whatever," was undertaken with the protection of traveling motorists on the highway in mind. Super Sod 30(b)(6) Dep. at 40:5-13. The jury could infer that the safety of other motorists was Super Sod's concern in this undertaking, not simply to maintain the goods on the trailer for the benefit of its customer. Moreover, Super Sod's sales price for sod includes Super Sod's acts of: (1) stacking the sod on pallets, (2) stretch-wrapping the sod in plastic, and (3) loading the 2,000 pound pallets of sod with a forklift onto customer's vehicles for transport on public roadways. Super Sod 30(b)(6) Dep. 25:17-27:2; 27:12-18. Super Sod's undertaking of these actions for which they charge customers, particularly stretch-wrapping to give

the sod stability during transport, is evidence of Super Sod's contemplation of the safety of third parties traveling the highway, such as Plaintiff.

There is also evidence that in loading customer vehicles, Super Sod reserved to itself ultimate authority whether to allow the customer leave with an unsafe load, with the protection of third-party motorists in mind. In its 30(b)(6) deposition, Super Sod testified that "we won't load something that we know is not safe, that we know is not safe, without a doubt." Super Sod 30(b)(6) Dep. 36:11-19. Super Sod further testified that it would refuse to participate in loading a customer's trailer if the trailer were unsafe for hauling a load. Super Sod 30(b)(6) Dep. 71:14-23. Highway safety is supposedly a concern of Super Sod, which is why Super Sod takes the step of pre-wrapping the pallets of sod before loading them onto customers' vehicles in the first place. Super Sod 30(b)(6) Dep. 39:22-40:17.

The Super Sod employee who loaded the Harbison trailer testified that he is trained to ensure that he "safely load each trailer." Kears Dep. 17:20-22. The employee also acknowledged that Super Sod can and will refuse to let a customer leave with an unsafe load. Kears Dep. 60:13-19. Yet, Super Sod allowed Sox to leave with a loaded trailer fully knowing that Sox did not have more than 4,000 pounds of sod safely strapped to his trailer. Sox Dep. at 73:3-8; 84:9-5.

This testimony is more than a scintilla of evidence from which the jury could infer that in stretch-wrapping the sod and loading the pallets, Super Sod acted "for the benefit of *third parties*." Miller, 329 S.C. at 315, 494 S.E.2d at 815 (emphasis in original). This presents a mixed question of law and fact as to whether Super Sod had a duty to Plaintiffs, which is a jury question pursuant to Miller. The Court should therefore amend its Order and deny Super Sod's motion for summary judgment.

CONCLUSION

Plaintiffs respectfully request that the Court amend its Order and deny Super Sod's motion for summary judgment. As a preliminary matter, the Court should amend its findings of fact to acknowledge the evidence that Ms. Velazques struck Plaintiff due to the immediacy of the stoppage of traffic, and the evidence from which the jury could conclude that the sod cleanup was still going on at the time of the accident. The Court should also include findings regarding the inadequate stretch-wrapping of the sod performed by Super Sod, which is essential to the issue of duty.

As to the issue of duty, the Court misinterpreted Code section 56-5-4100, which plainly provides that its loading requirements apply to both operators and loaders. To interpret the statute as applying only to operators would render companion section 56-5-4110 superfluous, which the Court must assume the General Assembly did not intend.

Further, there is evidence that Super Sod stretch-wrapped the sod and reserved ultimate authority over the safety of customers' loads with the safety of third parties in mind. This implicates the principle adopted by the Supreme Court in Miller that a duty will arise if a party undertakes an act "for the benefit of third parties." There is a mixed question of law and fact whether Super Sod did so here, rendering summary judgment improper. The fact that the Supreme Court has declined to adopt Restatement (Second) of Torts § 324A is inapposite.

Finally, the Court has not addressed the issue raised by Plaintiffs whether Super Sod negligently created the risk that the load was unsafe, particularly that the stretch-wrapping would fail under these circumstances. Negligent creation of the risk is one of the exceptions to the general principle that "[u]nder South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." Johnson v. Jackson, 401 S.C.

152, 160, 735 S.E.2d 664, 668 (Ct. App. 2012). Plaintiffs raised this argument in opposition to Super Sod's motion, but the Court has not addressed it. There is at least a scintilla of evidence that in stretch-wrapping the sod and loading the pallets onto the Harbison trailer, Super Sod negligently created the risk of harm that resulted in this accident. Summary judgment should therefore be denied on this ground.

For these reasons, Plaintiffs respectfully request that the Court amend its Order and deny Super Sod's motion for summary judgment.

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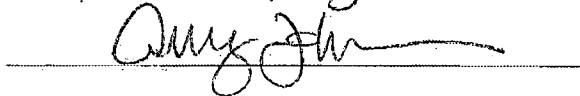
ATTORNEYS FOR THE PLAINTIFFS

8-12, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing, e-mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 12th day of August, 2016



STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	
	)	
Price Oulla,	)	CASE NO. 2014-CP-38-01590
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
Lisa Velazques,	)	
	)	
DEFENDANT.	)	

August 23, 2016

Orangeburg, South Carolina

B E F O R E:

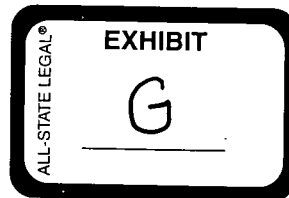
The Honorable Diane Goodstein

A P P E A R A N C E S:

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I N D E X

HEARING

-- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT

-- 34

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: All right.

2 MR. MOORE: Your Honor, Ray Moore for the defendant.
3 We had submitted a brief last week. I don't know if Your
4 Honor would like a courtesy copy.

5 THE COURT: We have -- I have it, and we have reviewed
6 it.

7 MR. MOORE: Thank you.

8 THE COURT: Yes. And you have one too?

9 MR. APPEGATE: Good morning, Your Honor. William
10 Applegate. I represent the Oulla family. I do have a
11 motion -- memorandum in support ---

12 THE COURT: Sure.

13 MR. APPEGATE: --- I would like to hand up.

14 THE COURT: Thank you.

15 MR. APPEGATE: I will go through it with you.

16 THE COURT: Okay.

17 MR. APPEGATE: But I just wanted you to have it.

18 THE COURT: Thank you.

19 MR. APPEGATE: There is a case on the back as well
20 that I will discuss.

21 THE COURT: Okay.

22 I am listening to you.

23 MR. APPEGATE: Okay. Good morning, Your Honor. May
24 it please the court.

25 This is a simple motion to amend our complaint under

1 Rule 15(a). The background, quickly, is -- and I know you
2 have seen theirs so you have some appreciation. But the
3 background is this is a personal injury case involving
4 negligence claims where Super-Sod here in Orangeburg is the
5 defendant.

6 Super-Sod the evidence shows grew sod, put it on a
7 pallet, wrapped it in plastic and loaded it on the back of a
8 trailer. When that customer who purchased that sod went out
9 onto the highway on 26 the plastic wrap tore, opened. The
10 sod flew out onto the highway and caused a stop of the
11 traffic right there in that 70-mile-a-hour zone.

12 And my client as he approached the slope of the traffic
13 got rear-ended by a women and subsequently had very
14 significant injuries, was in the hospital for three months,
15 and then has permanent brain injury.

16 So we filed a lawsuit against a couple of different
17 individuals including Super-Sod. That lawsuit was filed on
18 I guess in December of 2014.

19 We proceeded into discovery, and on May 5th of 2016 Mr.
20 Moore filed on behalf of Super-Sod a motion for summary
21 judgment arguing there was no duty by Super-Sod to my client
22 and that there -- it was also not foreseeable. Okay.

23 One of the other defendants also joined in a motion
24 filed -- a motion that was -- that there -- that it was not
25 foreseeable on their behalf either.

1 Okay, so on June 21st, 2016, you know, four or five
2 weeks after me receiving their motion I sent an amended
3 complaint and consent to Mr. Moore along with Mr. Griffith
4 of one of the defendants. And Mr. Dowling and one of the
5 other defendants, they didn't need to participate today; so
6 they are not here. They consented to my amendment of the
7 complaint at that time. I didn't hear anything from Mr.
8 Moore.

9 Two days later on June 23rd, 2016, I went to a
10 deposition with Mr. Moore, one of a trooper in the case.
11 After the deposition I asked Mr. Moore what do you want to
12 do, are you going to agree to my amended complaint.

13 And he said: Well, I tend to agree; I might consent; I
14 am not really sure, but I want to know that this is not
15 going to delay our motion for summary judgment.

16 And I said: I don't intend to move to continue; I need
17 to preserve my rights here as it relates to the amendment,
18 but we can go ahead and proceed with the motion for summary
19 judgment.

20 Okay. And then it was sort of left open he would get
21 back to me, but I never got a formal consent.

22 So five days later on June 29th I returned from
23 Charleston back to Orangeburg. At that point I filed --
24 went ahead and filed a motion for an amended complaint
25 because I hadn't heard back from Mr. Moore. So I went ahead

1 and filed my motion.

2 Then that afternoon we had our hearing on the motion
3 for summary judgment. The judge held it under advisement,
4 and on July 26 the motion was set for this hearing for today
5 on the motion to amend.

6 And on August 3rd Judge McMahan granted Super-Sod's
7 motion for summary judgment on the issue of duty. Okay.
8 And now we are here today.

9 I bring that up, importantly, Your Honor -- I know you
10 know the standard Rule 15(a) liberally allow an amendments
11 to the complaint unless there is some prejudice that can be
12 shown. That is the burden on the defendant to show there is
13 a prejudice.

14 When somebody moves for a motion to amend I think
15 importantly motions to amend are done up until and through
16 trial I mean if the evidence conforms to that.

17 So, importantly, in this case we took a deposition
18 and just recently really in March -- I think we got the
19 final transcript in July, the 30(b)(6) of Super-Sod who
20 testified that in fact they charge the clients when they
21 create this -- this pallet of sod to stack it, wrap it in
22 plastic and loaded it onto the back of the trailer's, they
23 charge that. That is part of the product service they
24 provide to the client. So my motion to amend is for a
25 breach of warranty of merchantability. Okay.

1 The importance of all of that, Your Honor, is that the
2 defendants, as I read their response, have argued that in
3 fact this case is over.

4 Importantly, it is not over. I filed a Rule 59 motion
5 with Judge McMahon. I made various good points. And like I
6 was extremely surprised. It is my first - not that that is
7 any big deal - but my first summary judgment ever granted in
8 a case where we had multiple affidavits and tons of genuine
9 issues of material fact. You know, this was granted.

10 I filed a Rule 59 motion, and that is still pending
11 with Judge McMahon. And I would not be surprised and
12 actually anticipate that he does reconsider his motion under
13 the things I pointed out in the thing.

14 But the other side of that is that right now that is
15 still open. So I am moving to amend now. The three cases
16 that were cited by Mr. Moore in his brief are cases where
17 specifically - and I laid this out to you in the brief - but
18 those are cases where judgment was entered and subsequent to
19 the judgment being entered plaintiffs file a motion to
20 amend. Completely different scenario than we have here.

21 So, importantly, we filed it timely. We filed it over
22 a month before the ruling was made for the motion for
23 summary judgment.

24 All right. Secondly, Your Honor, the defendants have
25 argued that -- that in essence that by you allowing this

1 amendment to go forward that this is some sort of reversal
2 of Judge McMahon's ruling, assuming he keeps it.

3 It is not at all. I mean this breach of a warranty of
4 merchantability is a completely different set up, completely
5 different duty that is set by statute and doesn't have any
6 reversal.

7 The negligence claims is where he now -- I mean he
8 analyzed duty as it related to these negligence claims and
9 to very specific facts and whether they should have in fact
10 tied this pallet of sod onto the back of the truck
11 themselves. Okay. And that is an analysis he did.

12 But whether a claim proceeds under a breach of warranty
13 of merchantability is completely different. And in this
14 case we in fact have -- we actually have -- and I put the
15 testimony in there for you to see, but we actually have very
16 good basis for this because it actually comes directly from
17 one of the same facts of the case but from the testimony of
18 the 36(b)(6) witness of Super-Sod.

19 Finally I think when we look at the test and the
20 analysis, again, liberally allowed, freely given, to amend
21 the complaint and whether there is any prejudice there is
22 absolutely not conceivable prejudice in this case based on
23 where we are.

24 There is a case that I handed up to you, Your Honor,
25 Stanley B. Kirkpatrick, a 2004 case Supreme Court. In that

1 case the defendants went as far as -- it is the same exact
2 facts as far as the timing of the motions -- motion for
3 summary judgment was filed, then a motion to amend was
4 filed, and later it was granted -- the motion for summary
5 judgment was granted.

6 In that case they had much more -- I think a stronger
7 argument. One, the amendment was outside of the statute of
8 limitations. And they argued this idea of prejudice because
9 of the time, that we would have to take additional time.

10 The court made it very clear - and that is sort of
11 really kind of Paragraph 3 on Page 4 of that opinion goes
12 through sort of showing good cause for the amendment and
13 that the burden is on the movement -- on the movant, in this
14 case Super-Sod.

15 But prejudice because of a timing issue, in this case
16 they haven't even taken any of the expert's deposition. In
17 fact the expert affidavit who actually testified that the
18 tearing of the sod, this tearing of the plastic wrap that
19 was done by Super-Sod, that affidavit was by an expert who
20 they have still not even deposed. There has only been a few
21 depositions in the entire case that have been taken.

22 It was done in a timely fashion. And really there is
23 not an argument in their brief or one that I can find just
24 under the law of any prejudice to them by proceeding with
25 the case at this point in time.

1 So I think, again, boiling it back down to the Rule
2 15(a), these amendments can be allowed at any time. We
3 filed it in a timely fashion. There is no prejudice to the
4 defendants for us to proceed at this time. And we hope that
5 the motion is granted.

6 THE COURT: Got it.

7 MR. APPEGATE: Thank you.

8 THE COURT: All right. Yes, sir.

9 MR. MOORE: May it please the court, Your Honor. Ray
10 Moore with Charles Williams for Super-Sod. Your Honor, as
11 we stated in our papers, the case is over as to Super-Sod
12 with the exception of the pending Rule 59(e) motion before
13 Judge McMahon.

14 Your Honor, Mr. Applegate has argued to you a few
15 moments ago that he had tons of issues of material fact and
16 that there are issues of proximate cause and duty. And I
17 would submit to Your Honor that those were considered
18 actually 40 minutes after they filed their motion to amend
19 in a lengthy hearing that lasted approximately two hours
20 upstairs.

21 Judge McMahon considered our argument, considered the
22 argument from Harbison and Sox, two of the codefendants, and
23 considered the argument from the third codefendant
24 Velazques.

25 Judge McMahon left the case pending against two

1 individual defendants and the corporate Harbison defendant
2 and saw fit to dismiss it as to us. That was a final
3 judgment.

4 And the judgment is within Judge McMahon's purview to
5 amend or reconsider under Rule 59(e), and he has that under
6 advisement.

7 But I would submit to Your Honor that you should not
8 permit the plaintiffs to drop a poison pill, a late filed
9 motion to amend, that was not raised to Judge McMahon.

10 They did not tell him, hey, we filed a motion
11 downstairs. That is precisely the reason that I brought
12 this up with Mr. Applegate before the motion.

13 Because if -- what we had intended to do was go forward
14 with the motion. If he was going to take a position that
15 the UCC claim or the second claim that was included in the
16 proposed amended complaint somehow changed the analysis for
17 summary judgment then we would have to discuss what to do
18 with the impending hearing. He told me it would not affect
19 the summary judgment, so we went forward.

20 Now he is trying to tell you that an issue he did not
21 raise to Judge McMahon you should use to circumvent Judge
22 McMahon's finding in the case. We submit that that is an
23 improper use of Rule 15.

24 The cases that -- the federal cases that we cited to
25 Your Honor are very clear that once a judgment is entered as

1 has been done here - Judge McMahon's order was dated I
2 believe July 29th and it was entered on the record on August
3 2nd - that finally ended the case except for what action
4 Judge McMahon may take or what action the Court of Appeals
5 or Supreme Court may take.

6 Those cases are very clear, and concededly they are
7 federal court cases; but I would point out to Your Honor
8 that all three of the rules that are in play here, Rule 15,
9 Rule 56 and Rule 59 all are virtually identical to the
10 federal rules.

11 And I would even note to Your Honor that the comments
12 in our rule book state that they are substantially similar
13 or identical to the federal rules, and for that reason we
14 believe those cases are persuasive.

15 The Kirkpatrick case that Mr. Applegate just handed
16 up -- and I haven't had time to review the whole thing, but
17 I quickly found Paragraph 2 on the second column on Page 3
18 that tells us the chronology that the court addressed here.
19 And the chronology that was addressed here is a motion to
20 amend the complaint was filed before the summary judgment.

21 Not only was my motion filed first; it was filed
22 approximately two months first, and it was heard thirty
23 minutes after they filed their motion without bringing it to
24 the attention of Judge McMahon.

25 It is not fair to go behind a circuit court judge, I

1 would submit, and have this poison pill sitting out there so
2 that when an expected adverse result comes you can come back
3 to a second judge.

4 And we have briefed the two-judge rule for Your Honor.
5 I think Your Honor is very familiar with that. And we
6 submit that the court should not go behind him.

7 Now the issue of prejudice, I think this motion is mute
8 and a nullity because the complaint is effectively gone.
9 But if the court reaches the issue of prejudice - which I
10 don't think you need to - if you do, it is hard to conceive
11 of more prejudice to a defendant in this case.

12 The case has been pending and litigated for nineteen
13 month. I know that Mr. Applegate handles significant cases
14 and that maybe eight depositions in a case is not
15 significant for him, but we have been through eight
16 depositions. There are no -- including depositions that if
17 he wanted to assert this issue. The depositions where there
18 was testimony that the rap was torn was nine months before
19 they filed the motion to amend. If that is the basis for
20 his claim, they have slept on it.

21 The wrap is gone. There is no ability to look at the
22 wrap, to test the wrap. We have gone on for 19 months. We
23 were facing an October trial date before Judge McMahon
24 ruled, and the issues had not been vetted.

25 If they want to tell the court that the product was not

1 merchantable, well, the issue of merchantability had not
2 been addressed at all. What does that even mean and in what
3 geographical area are we talking about merchantability? We
4 are talking about sod that was wrapped with plastic wrap.

5 There has been no testimony -- even the plaintiff's
6 expert hasn't established a standard to wrap sod when you
7 sell it to a customer. It is simply a convenience that
8 Super-Sod offers.

9 The prejudice here is hard to conceive of a more
10 difficult position, a more prejudicial position, without the
11 evidence to defend ourselves having gone on for 19 months
12 with no notice of a claim of implied warranty of
13 merchantability.

14 It doesn't even fit these facts, Your Honor. And I
15 think the court should not allow them to plant this poison
16 pill and bring a claim at this late date.

17 It is important to know too, Your Honor, that they
18 have -- they are glossing over it today, but the proposed
19 amended complaint was amended in two respects.

20 First, in Paragraph 31(d) they added a statute, and
21 that statute was expressly raised and ruled upon by Judge
22 McMahon. And it is contained in the order that we submitted
23 to Your Honor.

24 They did not bring to his attention the issue of the
25 motion to amend. And it has to be brought to his attention

1 in fairness to him if they intended for the case to go on
2 beyond his order.

3 Thank you, Your Honor.

4 THE COURT: All right.

5 Yes, sir.

6 MR. APPLGATE: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 MR. APPLGATE: I will try to be brief here.

9 I hope the court can appreciate that these are sort of
10 pretty standard procedural actions within a case and that
11 there was no attempt at a deceitful behavior and/or poison
12 pills or trying to get various different orders, so ---

13 THE COURT: I understand that. But let me ask you this
14 question. Because as the case stands now there is
15 absolutely nothing that would prevent the plaintiffs from
16 filing another cause of action - a new cause of action, I
17 gather if it wasn't brought - against Super-Sod.

18 Now whether or not there would be motions to dismiss
19 because it is an issue that should have been raised, wasn't
20 raised, those are whole different issues. Whether the
21 statute of limitations has run. Those are all different
22 issues. Obviously important issues, which is why you need
23 your motion to amend. And I get that.

24 But I am -- I do need to talk about the procedural
25 history in this case, because as I understand it there was

1 no motion to continue the motion for summary judgment so
2 that the two motions could be heard together.

3 Because obviously you would have anticipated that
4 counsel for the defense would have said, whoa, we haven't
5 even been served with a motion to amend, it is not ripe to
6 be heard.

7 So the question then becomes is it then incumbent upon
8 the plaintiff to move so that the motion to amend could be
9 heard at the same time or in some way to preserve the
10 ability to make the motion to amend viable in the event that
11 a motion for summary judgment is granted.

12 Because as I understand it -- and ya'll correct me if I
13 am wrong. But as I understand it the motion for summary
14 judgment had the effect of dismissing in toto with prejudice
15 Super-Sod, and I understand it has another -- the action
16 name is Patten Seed Company doing business as Super-Sod.
17 That it had the effect of dismissing this particular
18 defendant with prejudice is my understanding as opposed to
19 the one or two causes of action against this particular
20 defendant. Which would make this a lot easier.

21 But as I understand it, today this particular defendant
22 but for a Rule 59(e) motion which is pending, that this
23 defendant would be dismissed with prejudice. Is that --
24 is -- first of all is that correct?

25 MR. MOORE: Yes, Your Honor.

1 MR. APPLEGATE: I think with some caveats.

2 THE COURT: Okay.

3 MR. APPLEGATE: Yes, Your Honor.

4 THE COURT: All right.

5 MR. APPLEGATE: I am trying to go through your
6 different thought processes there. And I agree.

7 One, in part why I am a little confused by the issue or
8 the opposition is, yeah, we are within the statute, we file
9 a new complaint; okay, so we could file a new complaint.

10 But we are in litigation. Nothing has happened except
11 for two weeks ago this motion was granted. It is still not
12 final. Importantly, it is still not final. It is still out
13 there.

14 So there is no final judgment under the law that they
15 have been dismissed. So that -- I mean that is what -- that
16 is, as far as why we didn't do that, I will tell you it kind
17 of we attempted to do it but we didn't do it. And why ---

18 THE COURT: Let me ask you this question. In your
19 59(e) motion have you raised the issue that there was a
20 pending motion to amend at the time of the grant of the
21 motion for summary judgment have you raised that ---

22 MR. APPLEGATE: I put that in the motion.

23 THE COURT: Okay. Okay, so because that is before
24 Judge McMahon.

25 MR. APPLEGATE: I put that in the motion, Your Honor.

1 THE COURT: Okay.

2 MR. APPLGATE: And I will just be honest that I had
3 not been in that situation before ---

4 THE COURT: Yes.

5 MR. APPLGATE: So quite frankly I didn't know --
6 again, why I didn't do a continuance, because I had told the
7 other side I wouldn't continue it. So we had a mediation
8 the next week. I said I will let it go and we will go
9 forward.

10 I had the motion to amend the consent order and
11 everything sitting right here (motioning), and I picked it
12 up at the end of the hearing with Judge McMahon and said
13 Your Honor I need to address one more thing with you.

14 We had been arguing for two hours. At that point Judge
15 McMahon it was 6:30 at night. He said we are done; no more.
16 So that issue ended for me at that point in time.

17 So it wasn't any attempt to do anything more than -- I
18 wanted to tell him. But the issue, to be totally honest, is
19 I thought there was -- really it was a motion for summary
20 judgment that I thought would never even be considered in
21 any way, shape or form.

22 So as diligently as we argued it, I didn't think it was
23 an issue; and here I had this out -- out there anyway. So
24 that is kind of how that happened.

25 I think, importantly, to talk about the prejudice I

1 think it is an important issue. The nine months before, as
2 far as this deposition, that was a March 15th deposition.
3 March 15th of this year is when the deposition of the
4 30(b)(6) was taken in which we found out in fact they do
5 incorporate all of this into a product. Okay.

6 In the scheme of things, by the time I filed my motion
7 to amend it was not even that long after that. And he
8 also -- at that point I had no idea whether -- I mean I
9 would say ten percent max of my cases ever does anyone file
10 a motion for summary judgment.

11 So it wasn't until he filed a motion for summary
12 judgment on all of my causes of action for duty that, you
13 know, we responded and said okay, well, let's look through
14 and make sure we have got everything; oh, we have got this
15 new testimony.

16 Which we didn't receive the transcript until July 8th,
17 weeks after he had already filed and we had already argued.
18 But either way, I did that out of an abundance of caution.

19 So again, as far as the law is concerned we did it in a
20 timely fashion. The dismissal is not final. Motions to
21 amend can be done up until trial. They have not taken any
22 expert deposition for this case. None.

23 They never took -- they have only taken a few
24 depositions. My clients. And then I have gone and taken
25 three or four depositions. I mean so there is ---

1 THE COURT: I am not worried about ---

2 MR. APPLEGATE: Okay.

3 THE COURT: Let me just tell you I am not worried about
4 the prejudice problem.

5 MR. APPLEGATE: Okay.

6 THE COURT: So I am much more concerned -- I am much
7 more concerned about where we are today in terms of the
8 procedure.

9 MR. APPLEGATE: Right now they had -- you know, as of
10 two weeks ago they had -- you know, we have dates that are
11 still on the calendar. We have dates for all of the experts
12 they want to take for our probably late October, November
13 trial.

14 Everything was proceeding with them not knowing
15 whether -- I assume they didn't know whether they would have
16 gotten summary judgment granted two weeks ago or not.

17 And so nothing has changed except for two weeks of time
18 where we were in the discovery process. So here we are
19 moved through it.

20 As far as preserving the evidence, they still use this
21 shrink-wrap according to their 30(b)(6) witness. This
22 shrink wrap was not preservable ten days later. My client
23 is still treating. This is really -- if you think about it,
24 this is two years after a serious life-threatening injury.

25 THE COURT: Let me -- I am with you completely. I am

1 with ---

2 MR. APPLGATE: Okay.

3 THE COURT: Let me tell you what my concern is. My
4 concern is simply this. My concern is really two-fold.
5 Because there are about three different things that are
6 ongoing procedurally. The first thing that is ongoing
7 procedurally is that there is a motion for summary judgment
8 that has been granted on all the causes of action which were
9 filed and the court entered that order without -- without
10 knowledge of a motion to amend.

11 MR. APPLGATE: Okay.

12 THE COURT: And that motion was granted. Now pending
13 before that judge are your arguments to include: Eee,
14 Judge, there was out there a motion to amend; we want you to
15 consider the motion to amend; given where this case is at
16 this point we want you to consider the motion to amend.

17 And I think that is -- I think that is the more
18 appropriate place for this issue at this moment. And let me
19 tell you why.

20 The reason of the why is I come in here -- as I come in
21 today -- one of two things has happened. Either Super-Sod
22 is not a party to this matter or there is a Rule 59(e)
23 motion pending before Judge McMahon with a request for him
24 to alter dismissing with prejudice Super-Sod or Patten Seed
25 Company.

1 And my view is is that there is one of two things that
2 can happen at this point. Either Judge McMahon can with now
3 the knowledge of the motion to amend go back and, if you
4 will, re-create history with that knowledge and do one of
5 two things either reverse himself or incorporate the fact
6 that at the time that he heard the motion to -- the motion
7 for summary judgment that there was a motion to amend
8 pending, which you have done, which you have given him that
9 opportunity, or a subsequent action filed alleging that
10 ground.

11 What I am -- what I am uncomfortable with is that as I
12 view this case there is only one of two things that has
13 occurred. For me there is -- there is a nonparty. There is
14 a motion to amend against a non party. And I don't know how
15 to do that.

16 And your response back to me is it isn't a final order
17 because it is pending before Judge McMahon 59(e) with a
18 motion to amend issued raised before Judge McMahon.

19 That is before Judge McMahon. It would be very
20 difficult for me to make what is not so so. Because as I
21 look at the actions in this case at this moment the law of
22 the case is -- for me the law of the case is Super-Sod is
23 not a party.

24 MR. APPLEGATE: As to -- as to the causes of action
25 originally in the case -- I get what you are saying, but I

1 guess the problem is is ---

2 THE COURT: I don't know how ---

3 MR. APPELATE: --- if you think about it at trial ---

4 THE COURT: Here is the problem. I -- oh, I am with
5 you. And ---

6 MR. APPELATE: You could have dismissed ---

7 THE COURT: You are incorrect ---

8 MR. APPELATE: --- three cases at trial.

9 THE COURT: You are incorrect with when you say that
10 you can make a motion to amend up to trial; you can make a
11 motion to amend, believe it or not, beyond the trial.

12 MR. APPELATE: Exactly, so ---

13 THE COURT: When it is on appeal.

14 MR. APPELATE: So you could grant my motion.

15 THE COURT: The difference is -- the difference is is
16 there is a pending action. When it is on appeal there is a
17 pending action.

18 The concern that I have is that I cannot in the face of
19 another circuit court having granted a motion for summary
20 judgment which would dismiss this case with prejudice I
21 cannot assume anything other than at this moment as I come
22 in behind Judge McMahon that there is a case pending when
23 the only way there is a case pending is if he reverses
24 himself. That's it.

25 You are where you need to be. That motion to amend

1 needed -- you needed to do exactly what you did which was in
2 your Rule 59(e) motion allow him the opportunity to deal
3 with that.

4 But I do not believe it is appropriate for me to come
5 behind at this juncture when there has been an order issued
6 and a motion for summary judgment granted which would in
7 effect dismiss the case against Patten Seed Company. I
8 think that is -- I think that that is error for me to do
9 that at this point.

10 You are where you need to be in terms of -- in terms of
11 Judge McMahon.

12 MR. APPLEGATE: And, Your Honor, I will say just since
13 I ---

14 THE COURT: Sure.

15 MR. APPLEGATE: I think I -- I think I appreciate
16 where -- what position you are taking is. And the one thing
17 I guess I need to figure out is how -- I will tell you what
18 I've done is ---

19 THE COURT: And I will do ---

20 MR. APPLEGATE: In my motion ---

21 THE COURT: As you think -- I think the matter is -- I
22 generally believe that the matter is pending before Judge
23 McMahon.

24 MR. APPLEGATE: I guess in what I -- maybe you can give
25 me some guidance for this.

1 THE COURT: Okay. I don't know.

2 MR. APPELATE: I will tell you that what I did do was
3 I informed -- you know, but I don't know that it was much
4 more than a footnote fashion. I tried to -- the way I look
5 at it is this: Legally Mr. Moore files a motion for summary
6 judgment on the case as it stands for three causes of
7 negligence. It is his motion. So I respond to that motion.
8 And I have a motion to amend out there pending that didn't
9 have a date and I kind of have to just go with however the
10 court is going to do with that.

11 So that issue wasn't fully addressed at that point.
12 And so when I did my 59 motion I didn't fully go through
13 that argument because Mr. Moore hadn't been able to argue it
14 in front of Judge McMahon. I hadn't argued it in front of
15 Judge McMahon. I simply let him know hey this is out there,
16 you know, as part of, you know, my motion to reconsider.

17 So I guess, you know, where I would be considered is
18 that now we have a situation where you are ruling, oh, I
19 think it is -- you know, that I think it is in front of
20 Judge McMahon; but we haven't been able to articulate, you
21 know, the motion to amend to him.

22 I guess that's where ---

23 THE COURT: I understand that.

24 MR. APPELATE: --- I am feeling jammed up.

25 THE COURT: Yeah, I do understand that. My problem

1 is -- because here is what -- here is in effect what I would
2 be advocating if I at this point go behind Judge McMahon
3 when that was information that he did not have at the time
4 of the motion for summary judgment yet now has.

5 The problem is is that then what I am encouraging --
6 this is my head. I am encouraging as motions are filed and
7 judges if they have matters under advisement then I am
8 encouraging people to file other things behind that to undo
9 whatever that judge does that has a matter under advisement.
10 So if -- so that counsel then is encouraged to nullify
11 whatever a judge has under advisement while the judge has
12 that under advisement.

13 And I think that -- I believe that is violative of the
14 two-judge rule. And I think that -- and I think that at
15 this juncture I certainly cannot -- I am without the
16 authority to change an order that Judge McMahon has under
17 advisement under Rule 59(e). I can't -- there is nothing I
18 can do with that motion.

19 MR. APPLEGATE: Can I request then, Your Honor, that --
20 that in essence your position is that you cannot rule on
21 this and that we now submit these papers to Judge McMahon so
22 he understands exactly what is going on?

23 THE COURT: It's my understanding you have already done
24 that.

25 MR. APPLEGATE: No. Judge McMahon doesn't have his

1 memo. He doesn't have my memo. He doesn't have any of
2 this. Because we didn't ever put this motion in front of
3 him.

4 The only way it is in front of him is in my motion to
5 reconsider I footnoted and said hey there is this pending
6 thing out. But I didn't go through it in great detail.

7 THE COURT: I understand. Well, you know, you can --
8 in other words, I can't bless whatever you ---

9 MR. APPEGATE: Oh, I know; but ---

10 THE COURT: With regards to another ---

11 MR. APPEGATE: You are just ---

12 THE COURT: --- circuit court judge.

13 MR. APPEGATE: You are going to refrain from ruling;
14 you are not denying the motion, ---

15 THE COURT: Well ---

16 MR. APPEGATE: --- as I understand it.

17 THE COURT: I am with you. Irrespective of what I do
18 with the motion with regards to either granting it or
19 denying it, there is certainly -- if -- let's say Judge
20 McMahon chooses to reverse his decision. Even if I was to
21 deny the motion today, because the law of the case so far as
22 I am concerned in that it is before me is that Patten Seed
23 is a non party and I deny it on that basis, there is
24 absolutely nothing that would keep you from refiling a
25 motion to amend. There is absolutely nothing to do that.

1 And so the question is -- I am inclined -- here is my
2 concern. I believe that the appropriate mechanism would be
3 for me to refrain from making a determination, but there
4 ought be an order entered on this basis - and the reason is
5 is because I think it needs to be preserved in the event
6 that I am wrong and you need it at some point - I think
7 there needs to be an order that says that I am -- it is --
8 this is a matter that is pending, has been raised as a part
9 of a 59(e) motion before Judge McMahon, and that it would be
10 inappropriate for me to rule on it at this time.

11 Because if I was to rule on this motion at this time I
12 would deny the motion to amend because there is no case
13 against which a motion to amend can be made. Because in so
14 far as I am concerned Patten Seed has been dismissed with
15 prejudice; therefore, there is nothing for me to amend.
16 There is no case pending vis-a-vis my view.

17 However -- however, the issue regarding the motion to
18 amend has been raised before Judge McMahon as a part of the
19 Rule 59(e) motion and may or may within his discretion cause
20 him to hear that portion or to reverse or do whatever he may
21 choose to do.

22 But vis-a-vis today and me, is this is not a matter
23 that would be appropriate for me to rule on because it is
24 with him.

25 And if he chooses to either hear the motion to amend,

1 because it was a matter that was pending at the time of the
2 motion for summary judgment albeit he did not know, or if he
3 chooses to change his ruling for whatever reason, then your
4 motion to me clearly is viable.

5 If however -- if however he was to choose to not hear
6 the matter, not to grant your Rule 59(e) motion, then it is
7 then -- then there is nothing for me to hear; there is
8 nothing for me to amend; because there is no case pending.

9 And so these matters have to lie with Judge McMahon,
10 based on my view.

11 MR. APPLEGATE: So you believe at that point I just
12 have to file a new case?

13 THE COURT: I don't think -- you can file a new case at
14 any point. But I would tell you you need to leave it where
15 it is too.

16 But I think there is nothing to keep you from filing a
17 new case, move to consolidate, other than -- other than the
18 12 -- the Rule 12 motion that says you are supposed to bring
19 all causes of action that could be brought against the
20 defendant when you bring it against -- I don't want you to
21 get whipsawed that way either.

22 What I would do -- it has been 19 years since I have
23 practiced law and I wouldn't even began to imagine what you
24 brilliant lawyers would do this day. I am sure I would muck
25 it up, and you would do what is brilliant.

1 But I think you are entitled to have an order from me
2 in the event that that is error. You need that, I believe.
3 And you need to have my reasoning in an order and that I am
4 refraining from ruling on the basis that I have express.
5 And that if I was -- I am not ruling -- because I think it
6 is with Judge McMahon in your Rule 59(e) motion based on
7 what you are telling me.

8 But if I was to rule on it today that my ruling would
9 have -- I would have no alternative but to deny the motion
10 to amend because there is no case.

11 Having said that, the reason I don't want to rule on it
12 is because I don't want to affect what is pending before
13 Judge McMahon because in the event there is an argument on a
14 Rule 59(e) motion I don't think it would be fair to the
15 plaintiff for the argument to be made that the motion --
16 your pending motion to amend was denied. Do you see what I
17 am saying?

18 That is what -- in other words ---

19 MR. APPELATE: Your Honor, ---

20 THE COURT: --- that is why ---

21 MR. APPELATE: I am just I am concerned ---

22 THE COURT: --- I think I need to back off.

23 MR. APPELATE: --- because these are just -- they--
24 different causes of action. Like I don't -- you know, if
25 you grant the motion to amend which, you know, obviously I

1 believe should be done ---

2 THE COURT: Yes.

3 MR. APPLGATE: --- then I proceed with them on this
4 one cause of action. Let's assume Mr. Moore prevails, he
5 doesn't reconsider, then I don't get to go forward at trial
6 on my negligence cause of action; I am only going forward on
7 my breach of warranty of merchantability. And that just
8 seems like the proper procedure.

9 But now if I don't want to do that and I go ahead and
10 appeal so I can take them up altogether and I have to stay
11 one of the cases. But -- but since they are different
12 causes of action and since I have found out couldn't have --
13 couldn't have filed it because I didn't have enough
14 information, I found out that information in a deposition
15 and then amended my complaint, then ---

16 THE COURT: Listen ---

17 MR. APPLGATE: --- this is the proper way, you know.

18 THE COURT: You are hopping over -- here is what you
19 are hopping over. You are hopping over the motion for
20 summary judgment. You are so right, if that motion for
21 summary judgment hadn't have been filed or if those things
22 could have been heard together, you are so right.

23 MR. APPLGATE: Okay.

24 THE COURT: The problem is is that the motion for
25 summary judgment was filed, was heard. The judge wasn't on

1 notice. The judge ruled. It was -- it being the case --
2 the case was -- the defendant was dismissed. That's what
3 makes this a more difficult situation.

4 The reason I don't want to rule is because I don't want
5 to do anything that is going to impede Judge McMahon's
6 ability to deal with this matter fully.

7 MR. APPLEGATE: Okay.

8 THE COURT: With knowledge that there was pending yet
9 not ripe but pending a motion to amend.

10 MR. APPLEGATE: Okay.

11 THE COURT: I have been musing with that, and I
12 stand -- then -- then I am concerned that I do an injustice
13 towards one of these two parties.

14 If I rule today that you can amend I think that does
15 injustice to the defendant that has been dismissed, in my
16 opinion. There is nothing I can do. It would be out of my
17 hands completely. It is left up to Judge McMahon and the
18 appellant courts to bring that case back to life.

19 If there is a new case filed, that is a whole different
20 day and a whole different argument. If I was to rule on it
21 today I have to deny it. If I deny it then the question in
22 my mind is I have affected Judge McMahon's ability to
23 consider it, and that I do not want to do. Do you see what
24 I am saying?

25 So but in the event that I have messed up I think you

1 are entitled to an order.

2 MR. APPLGATE: Okay.

3 THE COURT: Okay?

4 MR. APPLGATE: Thank you.

5 THE COURT: Cool? Yes? Got it?

6 MR. MOORE: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. MOORE: Would you like for us to prepare a proposed
9 order, Your Honor?

10 THE COURT: Yeah, did -- you got it? Did I confuse you
11 sufficiently? Did I make any sense at any point in time?

12 MR. MOORE: We will submit my best understanding. And
13 I am sure we will be able to work it out if -- thank you.

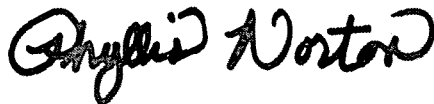
14 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned case, relative to appeal, in the Court for Orangeburg County, South Carolina, on August 23, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

A handwritten signature in black ink that reads "Phyllis Norton". The signature is written in a cursive, flowing style.

PHYLLIS NORTON, CVR

Date: August 30, 2016

Certified Transcript Provided For: Yarborough Applegate
Certification Reference #083016 Cert. Copy



**YARBOROUGH
APPLEGATE**

ATTORNEYS AT LAW

William E. Applegate IV
william@yarboroughapplegate.com

December 16, 2016

The Honorable R. Knox McMahon
Lexington County Judicial Center
205 East Main Street
Lexington, SC 29072

Re: Oulla v. Harbison Community Association, Inc., *et al.*
C/A No. 2014-CP-38-1590
YA File No. 14-057

Dear Judge McMahon:

It has come to our attention that you may not have received the correspondence and copies of pending motions in the above-referenced matter that we addressed to your office. I apologize for any miscommunication, and for your convenience, I enclose Plaintiff's Motion to Amend Complaint and Plaintiff's Motion to Alter or Amend Order Granting Patten Seed Company's Motion for Summary Judgement for your consideration.

Again, I greatly appreciate the Court's time in reviewing this matter and am available to provide any additional information or to appear at the Court's convenience to assist in the resolution of these motions. Please let us know how you would like us to proceed.

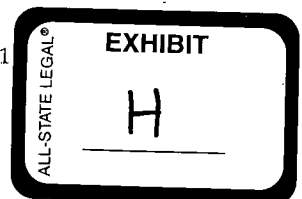
Sincerely,



William E. Applegate IV

Enclosures

cc: E. Raymond Moore, III, Esquire
E. Mitchell Griffith, Esquire
Mark B. Tinsley, Esquire





**YARBOROUGH
APPLEGATE**
ATTORNEYS AT LAW

William E. Applegate IV
william@yarboroughapplegate.com

October 10, 2016

The Honorable R. Knox McMahon
Lexington County Judicial Center
205 E. Main Street
Lexington, SC 29072

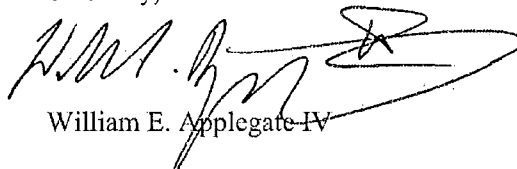
Re: Oulla v. Harbison Community Association, Inc., *et al.*
C/A No. 2014-CP-38-1590
YA File No. 14-057

Dear Judge McMahon:

I hope this letter finds you well. I am writing to follow up on the status of Plaintiffs' Motion to Amend the Complaint and Plaintiffs' Motion to Reconsider your grant of summary judgment in favor of Super Sod. I have been reluctant to follow up with you on this matter, as I appreciate how much time you have spent on our case and that your schedule is very busy. However, the case is currently at the front of the trial roster in Orangeburg, and your rulings could have a substantial impact on how we proceed at this time. Accordingly, it would be a great help if we could get rulings from Your Honor on these matters. As it relates to the Motion to Amend the Complaint, we had a hearing before Judge Goodstein wherein she ruled that Your Honor had retained jurisdiction over the motion due to your presiding over the Motion for Summary Judgment in this case. I believe we have sent all the materials to your office for your review and are willing to appear again before you if the Court would like to hear any additional argument related to either the Motion to Amend the pleadings or the Motion for Reconsideration. Once we have rulings in this matter, the parties will be able to proceed through litigation and to a trial in an expeditious manner.

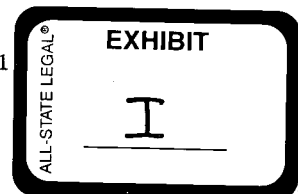
Again, I greatly appreciate the Court's time in reviewing this matter and am available to provide any additional information or to appear at the Court's convenience to assist in the resolution of these motions. Please let us know how you would like us to proceed.

Sincerely,



William E. Applegate IV

cc: The Honorable R. Knox McMahon, Richland County Judicial Center
E. Raymond Moore, III, Esquire
E. Mitchell Griffith, Esquire
Mark B. Tinsley, Esquire
Tate Johnson, Esquire



STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,)

Plaintiffs,)

vs.)

Lisa Velazques, Harbison Community)
Association, Inc., Cody Sox, and Patten)
Seed Company, d/b/a Super Sod,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2014-CP-38-1590

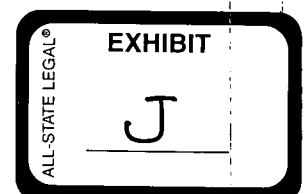
**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION TO AMEND
COMPLAINT**

FILED FOR THE COURT
JULY 23, 2014
CLERK OF COURT
ORANGEBURG, SC

Plaintiffs Price and Bonnie Oulla, by and through their undersigned counsel, respectfully submit the following Memorandum in Support of Plaintiffs' Motion to Amend Complaint. Rule 15, SCRCF, provides that leave to amend shall be freely give when justice requires and does not prejudice any other party. For the reasons set forth below, Plaintiffs request that this Court GRANT Plaintiffs' motion.

BACKGROUND

This case arises out of a chain of events that began at Super Sod's business in Orangeburg and ended in an automobile collision on I-26. On July 22, 2014, Super Sod sold two pallets of improperly plastic wrapped sod weighing 2,000 pounds each to a customer and then loaded the sod onto the customer's trailer without balancing or securing the load. Because Super Sod improperly hand-wrapped the sod with plastic and failed to balance and secure the load, the trailer swayed and the plastic ripped under normal driving conditions causing the sod to spill onto the westbound lanes of I-26. The sod spill obstructed interstate travel and caused traffic to back-up. Plaintiff Price Oulla approached the slowed traffic due to the sod spill and was struck from behind



by another vehicle at a high rate of speed. Plaintiff was transported from the scene by helicopter and suffered catastrophic injuries including a traumatic brain injury.

PROCEDURAL FACTS

On December 31, 2014 Plaintiffs filed a Complaint against Defendant Patten Seed Company, d/b/a Super Sod ("Super Sod") asserting negligence claims. Super Sod served its Answer on February 18, 2015, and thereafter, written discovery commenced.

On March 15, 2016, counsel for Plaintiffs took the deposition of Super Sod's 30(b)(6) witness, Joe Livingston. Mr. Livingston testified on various topics set forth in Plaintiffs' 30(b)(6) Notice of Deposition including: Super Sod's policies and procedures relating to *selling* and *packaging* sod:

3. Super-Sod's policies and procedures relating to:
 - a. Selling sod;
 - b. Packaging sod; and
 - c. Loading sod on customer vehicles.

Plaintiffs received a copy of Super Sod's 30(b)(6) transcript on March 30, 2016.¹ Super Sod's 30(b)(6) testimony revealed that the *sales price* of its sod includes Super Sod's *stretch wrapping the sod in plastic*, in addition to stacking the sod on pallets, and loading the 2,000 pound pallets of sod with a forklift onto customer's vehicles for transport on public roadways. See Super Sod 30(b)(6) Dep. 25:17–27:2; 27:12–18, attached as **Exhibit A**.

On May 10, 2016, Plaintiff received a copy of Super Sod's motion for summary judgment where Super Sod argued that there was "no duty under South Carolina law for a company in Patten

¹ Because the witness requested to read and sign the transcript, his changes and corrections were eventually sent to the court reporter on April 27, 2016. Plaintiffs received a copy of the Super Sod 30(b)(6) witness's errata sheet on July 15, 2016 (sixteen days after Plaintiffs' Motion to Amend Complaint was filed).

Seed Company, d/b/a Super Sod's position to secure a load for a vehicle operator as alleged in the Complaint, See SC Code Ann. §§ 56-5-4100 to 4110" and that "the cause of Plaintiff's injuries was due to a rear end collision caused by co-Defendant Velazques"

On June 21, 2016, Plaintiffs' counsel emailed counsel for all defendants asking for consent to file an Amended Complaint and included a copy of a Consent Order in addition to the proposed Amended Complaint as attachments to the email. See Plaintiffs' Counsel's Email, attached as **Exhibit B**. Plaintiffs' Amended Complaint contained an additional cause of action against Super Sod for breach of the implied warranty of merchantability with regards to the *sale* of sod that was *packaged* with plastic stretch wrap by Super Sod. Counsel for Super Sod never replied to the email.

On June 23, 2016, by affidavit, Plaintiffs' expert gave the opinion that Super Sod improperly packaged and wrapped the sod in plastic such that it ripped, spilled on the interstate, created a dangerous condition, and was a proximate cause of the collision injuring Plaintiff. See Michael A. Sutton, P.E. Aff. ¶¶ 6, 7, and 10, attached as **Exhibit C**.

Also on June 23, 2016, at the deposition of an investigating officer, Trooper Gleich, Plaintiffs' counsel again asked counsel for Super Sod whether or not he would consent to the Amended Complaint. Counsel for Super Sod indicated that he was considering giving his consent to the amendment, but did not give a definite answer because he didn't want Plaintiffs to then argue that the upcoming summary judgment hearing on June 29, 2016 was premature due to an Amended Complaint. Plaintiffs' counsel made clear and ensured Super Sod's counsel that the pending motion for summary judgment would go forward regardless of whether or not consent to the amendment was given and that Plaintiffs would maintain their right to file a motion to amend the Complaint.

On June 29, 2016, still with no response from Super Sod's counsel on consenting to the Amended Complaint, counsel for Plaintiffs filed the instant motion to amend and also went forward with the hearing on the motion for summary, consistent with the June 23, 2016 conversation between Plaintiffs' counsel and Super Sod's counsel.

On July 12, 2016, the parties unsuccessfully mediated the case. On July 26, 2016, the parties received an email from the court setting the hearing on Plaintiffs' motion to amend. On August 2, 2016, an order was entered granting summary judgment and Plaintiffs received written notice of the order on August 3, 2016. On August 12, 2016, Plaintiffs served their Motion to Alter or Amend Order Granting Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment, it was filed on August 16, 2016 and is currently still pending.

LAW AND ARGUMENT

Amendments of pleadings are controlled by Rule 15, SCRPC, which provides in pertinent part that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Leave to amend pleadings pursuant to Rule 15, SCRPC, shall be liberally and freely given when justice so requires and does not prejudice any other party. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999). "Rule 15(a) has consistently been interpreted by the federal courts to strongly favor amendments 'where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues

will not be unduly delayed.” *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 506, 369 S.E.2d 156, 158 (Ct. App. 1988) *citing* 3 J. Moore, *Moore's Federal Practice* Section 15.08 [2] at 15–49 (2d ed. 1987).

“It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice.” *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004) *citing* *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999). Rule 15(a) strongly favors amendments and the court is encouraged to freely grant leave to amend. *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

First, Super Sod argues that Plaintiffs’ Motion to Amend was untimely filed. However, Rule 15(a) contains no such restriction, and instead, it provides that “leave shall freely be given when just so requires and does not prejudice any other party.” SCRCF, Rule 15(a). As a threshold matter, Plaintiffs’ Motion to Amend Complaint was filed over a month before summary judgment had been entered in Super Sod’s favor. However, the cases cited by Super Sod, as well as the hornbook law, all involve motions to amend a complaint filed after either a judgment or dismissal had already been entered. *See* Super Sod’s Memo. at 8-9: “. . . once judgment has been entered or an appeal taken, the filing of an amendment cannot be allowed until the judgment is set aside or vacated” *Wright & Miller* 6 Fed Prac. & Proc. Civ § 1489 (3d Ed.) (emphasis added); “. . . once judgment is entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated” *Cooper v. Shumay*, 780 F.2d 27, 29, (10th Cir. 1985); *Vesely v. Armslist, LLC*, 762 F.3d 661 (7th Cir. 2014) considering a “post judgment Rule 15(a) motion for leave to amend”; and *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991) considering a motion to amend filed after a “previously entered judgment”. The

authority cited in support of Super Sod's position is inapplicable to this case because Plaintiffs' Motion to Amend was filed before judgment was entered, not after.

In *Stanley v. Kilpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004), the defendant filed a motion for summary judgment on a § 1983 claim and *later* the plaintiff filed a motion to amend the complaint to add state causes of action – a filing timeline identical to this case. In *Stanley*, the defendant argued that it would be prejudiced because the statute of limitations on the state claims had passed and that depositions would have to be retaken. *Id.* at 174-75, 592 S.E.2d at 298-99. The South Carolina Supreme Court disagreed with defendant's prejudice argument and found that the trial court erred by not allowing plaintiff's amendment to add the additional causes of action. The Court held that the facts giving rise to the new claims were not different from the facts giving rise to the original claims. *Id.* Here, the statute of limitations on Plaintiffs' claims have not passed, the same facts give rise to Plaintiffs' additional cause of action, and there is no prejudice with regards to discovery as discussed below.

Second, Super Sod contends that granting Plaintiffs' Motion to Amend would "effectively reverse" Judge Mc Mahon's order granting Super Sod's motion for summary judgment. This argument is flawed. Permitting Plaintiffs to amend the Complaint and add a cause of action for breach of the implied warranty of merchantability in no way "effectively reverses" Judge McMahon's order granting summary judgment. Summary judgment was granted in Super Sod's favor on Plaintiffs' negligence claims – specifically that Super Sod owed no duty of care to Plaintiffs. However, an additional cause of action for breach of the implied warranty of merchantability is not based upon the duty analysis of a negligence claim – it is quite different. Instead, a cause of action for breach of the implied warranty of merchantability is established by the South Carolina Commercial Code, specifically § 36-2-314, and based upon a merchant's *sale*

of a particular good that proximately causes injuries. There simply is no similarity between the duty analysis of a negligence claim, as conducted by Judge McMahon, and the existence of a breach of an implied warranty of merchantability claim.

Third, Super Sod argues that an “undue delay” prejudices Super Sod and warrants denial of Plaintiffs’ Motion to Amend. This argument is not supported by the law or the facts of this case. “Delay in seeking leave to amend pleadings, regardless of the length of the delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice.” *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 508, 369 S.E.2d 156, 159 (Ct. App. 1988) *citing* 3 J. Moore, *Moore’s Federal Practice* Section 15.80[4] (2d ed. 1987). The question here is prejudice.

Super Sod only references the discovery completed and the stretch wrap not being preserved as prejudicial matters. The “undertaking of additional discovery does not establish *per se* prejudice.” *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 236, 754 S.E.2d 714, 719 (Ct. App. 2014), *reh’g denied* (Mar. 10, 2014). Super Sod states “numerous” depositions have been taken and experts have been identified. However, *no* experts (liability or damages) have even been deposed yet in this case and many fact witness depositions remain to be taken.² In reality, discovery is still ongoing and Super Sod has not established the level of prejudice required to preclude the amendment of a Complaint “when justice so requires.” SCRCP, Rule 15(a). Super Sod also argues that “the stretch wrap has been destroyed and no photographs, testing, or other data related to the stretch wrap are available.” However, Super Sod’s 30(b)(6) witness has testified that it still wraps its sod by hand with .7 mil plastic as it did on the day of the incident giving rise to this lawsuit. *See* Super Sod 30(b)(6) Dep. 65:3-14; 16:1-4 attached as **Exhibit A**.

² Further no medical providers have been deposed yet in a case where Plaintiff Price Oulla suffered a traumatic brain injury and has over \$726,000 in *past* medical bills alone.

Finally, Super Sod argues that Plaintiffs' Motion to Amend was filed for an improper purpose. Instead of meeting its burden of establishing the prejudice necessary to overcome a Rule 15(a) motion to amend, which overwhelmingly favors amendments, Super Sod attempts to cloak Plaintiffs' filing with impropriety and describe it as "egregious" and a form of "gamesmanship." This, like Super Sod's other arguments and the legal support for them, is also misguided. Super Sod cites an unpublished 2009 case from Pennsylvania to assert that Plaintiffs' Motion to Amend was filed for an improper purpose -- "to build in 'a parachute' to delay and convolute the impending judgment in the case." *See* Super Sod's Memo. at 11-12. However, the court in *Prescod v. Bucks Cty.* denied the plaintiff's amended claims primarily because of the doctrine of futility -- the amended claims did not state a cause of action -- "Here, Plaintiffs' amendments are futile because the Voting Rights Act precludes § 1983 and § 1985 remedies." *Prescod v. Bucks Cty.*, No. CIV.A.08-3778, 2009 WL 3617751, at *4-5 (E.D. Pa. Nov. 2, 2009). Unlike *Prescod*, Plaintiffs' amended claim is not futile and it does state a cause of action -- one based upon Super Sod's 30(b)(6) testimony in this case. Because Super Sod has not, and cannot, establish prejudice, "leave shall be freely given as justice so requires" so that Plaintiffs' claim for breach of the implied warranty of merchantability can be tried on the merits.

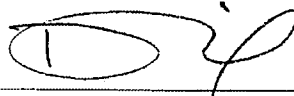
CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court to GRANT Plaintiffs' Motion to Amend Complaint.

SIGNATURE PAGE TO FOLLOW

YARBOROUGH APPLGATE LLC

291 East Bay Street, Floor 2
Charleston, South Carolina 29401
843-972-0150 office
843-277-6691 fax



William E. Applegate IV, Esquire
David B. Lail, Esquire

ATTORNEYS FOR THE PLAINTIFFS

CLERK OF COURT
ORANGEBURG, SC

2016 JUL 23 PM 12:21

FILED FOR RECORD
WILLIAM E. APPLGATE

8-23

, 2016

Charleston, South Carolina

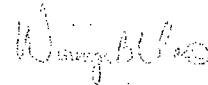
CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing, e-mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 23rd day of August, 2016



ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY

FILED FOR RECORD
MINNIE B. CLARK
JAN 10 23 PM 12 21
CLERK OF COURT
ORANGEBURG, SC

Exhibit A

Super Sod 30(b)(6) Deposition

WITNESSES

[Handwritten signature]

CLERK OF COURT
ORANGEBURG COUNTY, SC

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ORANGEBURG COUNTY

4 DEPOSITION OF JOE LIVINGSTON

5 PRICE OULLA and BONNIE OULLA,
6 Plaintiffs,

7 vs.

CASE NO. 2014-CP-38-1590

8 LISA VELAZQUES, HARBISON COMMUNITY ASSOCIATION,
9 INC., CODY SOX, and PATTEN SEED COMPANY, d/b/a
10 SUPER-SOD,
11 Defendants.

12 DEPONENT: JOE LIVINGSTON

13 DATE: MARCH 15, 2016

14 TIME: 11:00 AM

15 LOCATION: LANIER & BURROUGHS
16 ORANGEBURG, SOUTH CAROLINA

17 REPORTED BY: ANNE BOULEY MEYER, RPR
18 CLARK & ASSOCIATES, INC.
19 P.O. Box 73129
20 Charleston, SC 29415
21 843-762-6294
22 WWW.CLARK-ASSOCIATES.COM
23 Office@clark-associates.com
24
25

Clark and Associates Inc.

1 A P P E A R A N C E S

2

3 ON BEHALF OF PLAINTIFF:

4 YARBOROUGH APPLGATE
5 BY: WILLIAM APPLGATE
6 291 East Bay Street
7 Charleston, SC 29401

8
9 ON BEHALF OF DEFENDANT PATTEN SEED COMPANY d/b/a
10 SUPER-SOD:

11 MURPHY & GRANTLAND
12 BY: E. RAYMOND MOORE, III
13 P.O. BOX 6648
14 Columbia, SC 29260

15
16 ON BEHALF OF DEFENDANT HARBISON COMMUNITY
17 ASSOCIATION and CODY SOX:

18 BARNES ALFORD STORK & JOHNSON
19 BY: CURTIS W. DOWLING
20 P.O. Box 8448
21 Columbia, SC 29202

22 ON BEHALF OF DEFENDANT LISA VELAZQUES:

23 GRIFFITH SADLER & SHARP
24 BY: E. MITCHELL GRIFFITH
25 P.O. Drawer 570
Beaufort, SC 29901

ALSO PRESENT:

26 KIRBY D. SHEALY, III, ESQUIRE
27 On behalf of Harbison Community
28 Association

29 DAVID GROVE
30 Executive Director, Harbison Community
31 Association

32

1	INDEX	
2	EXAMINATION	
3	BY MR. APPELATE	4
	BY MR. DOWLING	58
4	BY MR. GRIFFITH	64
	BY MR. APPELATE	78
5		
	CERTIFICATE OF REPORTER	81
6	DEPONENT CORRECTION SHEET	82

7		
8	EXHIBITS	
9	Exhibit No. 1 - Notice of deposition	5

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1 JOE LIVINGSTON,
2 having been first duly sworn, was examined and
3 testified as follows:

4 MR. MOORE: Before we get started,
5 Mr. Joe Livingston is with Patten Seed and has been
6 designated pursuant to the 30(b)(6) notice dated
7 February 18, 2016, to respond to topics 1, as it
8 relates to corporate structure and ownership,
9 company business, 2, 3, 4, 5, 8, and 9.

10 The remaining topics deal with the
11 company's financials, which Mr. Livingston is not
12 designated on. And which, pursuant to our
13 correspondence agreement, you will reserve the
14 right to inquire on those topics later if you need
15 to, and if you file a motion to compel and succeed
16 on that.

17 MR. APPELEGATE: Okay. Thank you, Ray.

18 MR. MOORE: Thank you.

19 EXAMINATION

20 BY MR. APPELEGATE:

21 Q. Good morning, Mr. Livingston. Thank you for
22 coming here today. Again, my name is William
23 Applegate. I'm going to ask you some questions
24 today related to this notice of deposition.

25 Let me start by marking this as Exhibit 1 to

Clark and Associates Inc.

1 A. The forklift driver will put four to five
2 wraps around the entire pallet.

3 Q. And that's a continuous wrap?

4 A. Yes.

5 Q. And the purpose of wrapping the pallet is to
6 secure the sod to the wooden pallet structure?

7 MR. MOORE: Object to the form, but you
8 can answer.

9 A. The pallet, as I mentioned earlier, is
10 stacked by the machine. And it's a very stable
11 stack, first of all, but we add some stability to
12 it by -- some additional stability to it by
13 stretch-wrapping.

14 Q. Right. And that's because you've got these
15 small pickups that are not sort of commercial
16 operations that are going to be transporting these
17 goods, correct?

18 MR. MOORE: Object to the form, but you
19 can answer.

20 A. It's a variety of people that -- I don't
21 know that I would term it quite that way, but it's
22 just a variety of people that come pick up.
23 Everything from a customer, homeowner like you or
24 me, to a small commercial entity.

25 Q. Right. These small pickups may be a variety

1 the trailer.

2 That overhead from hiring the employees who
3 do all that to the equipment, et cetera, that's all
4 included in the ultimate price and sale of the sod,
5 correct?

6 MR. MOORE: Object to the form, but you
7 can answer.

8 A. I'm not quite sure I follow your question on
9 that.

10 Q. Okay. Do y'all calculate -- when you come
11 up with a price per pallet, I assume you add in the
12 various elements of overhead into that price per
13 pallet?

14 A. Yeah. I mean, standard business practice
15 would take into account any and all costs of the
16 business when considering pricing of the product.

17 Q. Right. So if you have somebody who comes to
18 do a small pickup and purchases a pallet of sod, a
19 single pallet of sod, and they spend \$240 on a
20 pallet of sod, you have included in the costs all
21 of the overhead it took to grow the sod, all the
22 way up through loading it onto their trailer,
23 correct?

24 A. We certainly would include cost of
25 production and sales and any overhead involved

1 throughout the company.

2 Q. For example, a customer like myself, or some
3 residential user, doesn't have the ability to come
4 out and cut the sod and load it onto the pallet,
5 correct?

6 A. Correct.

7 Q. That's part of the service you provide?

8 A. That's right.

9 Q. And they don't have the product or the
10 ability to shrink-wrap the pallet?

11 MR. MOORE: Object to the form, but you
12 can answer.

13 A. I wouldn't be able to tell you whether
14 somebody's got shrink wrap with them, of course.
15 But, you know, that's something that we do for
16 them.

17 Q. Right. And that's a service you provide,
18 and you ultimately charge your clients for that
19 service?

20 A. It would be included in the cost of
21 production.

22 Q. And these individual small pickups, they
23 also don't have the ability to load a 2000-pound
24 pallet onto their vehicle?

25 MR. MOORE: Object to the form, but you

1 can answer.

2 A. Typically not.

3 Q. Right. And so back to what we were
4 discussing earlier is that Super-Sod is engaged in
5 the process of loading five or six, or four to five
6 different groups of small pickups a day where
7 they're loading these large 2000-pound pallets onto
8 small trailers, and/or into trucks; is that
9 correct?

10 A. We do load a variety of conveyances I would
11 say.

12 Q. And as you're in that business of loading
13 people with your product, you understand these
14 individuals are -- they leave your Super-Sod
15 property with heavy loads of your product,
16 materials, and are driving those over the public
17 highways?

18 A. I understand that, yes.

19 Q. Okay. And let me go to your understanding
20 of how a trailer would work. You said earlier, if
21 I had trailer what would I do.

22 You understand that if you have -- and let
23 me ask you. I think you probably have seen this,
24 but let me just make sure for the record.

25 You've seen a copy of the trailer that was

1 There may have been a couple other things,
2 but they escape me at the moment.

3 Q. What research did you come up with on the
4 shrink wrap itself? When you say you researched
5 it, did you just ask what kind we use or?

6 A. I looked into what kind we use. Tried to
7 find out when we started using it, if anybody knew
8 where we had gotten the first stretch wrap we used.
9 Again, it was so long ago that that knowledge is
10 gone I guess at this point.

11 Q. Are there various gauges of shrink wrap?

12 A. Yes.

13 Q. What gauge did y'all use?

14 A. We use .7 mil.

15 Q. Why do you use .7 instead of a higher gauge?

16 A. Again, that was the determination we made
17 long ago that nobody remembers why. I'm sorry.

18 Q. If you used, let's say, a .8 or .9, is that
19 a tougher shrink wrap?

20 MR. MOORE: Object to the form, you can
21 answer.

22 A. It is my understanding that a higher number
23 is, for lack of a better term, a thicker shrink
24 wrap.

25 Q. Right. Is a .7 about the lowest gauge you

1 middle of a field. So it's not a practical device
2 for us.

3 Q. So you just -- that would be the reason why
4 y'all haven't moved to those, it's not practical?

5 A. I'm sorry?

6 Q. It's not practical for your purposes to use
7 one of those commercial grade?

8 A. I would say that's -- yes. Right.

9 Q. Okay. Thank you.

10 MR. MOORE: We will reserve.

11 (The deposition was concluded at
12 1:05 p.m.)

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1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, Anne Bouley Meyer, Registered
5 Professional Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby certify
7 that the witness in the foregoing deposition was by
8 me duly sworn to testify to the truth, the whole
9 truth and nothing but the truth in the
10 within-entitled cause; that said deposition was
11 taken at the time and location therein stated; that
12 the testimony of the witness and all objections
13 made at the time of the examination were recorded
14 stenographically by me and were thereafter
15 transcribed by computer-aided transcription; that
16 the foregoing is a full, complete and true record
17 of the testimony of the witness and of all
18 objections made at the time of the examination; and
19 that the witness was given an opportunity to read
20 and correct said deposition and to subscribe the
21 same.

22 Should the signature of the witness not
23 be affixed to the deposition, the witness shall not
24 have availed himself/herself of the opportunity to
25 sign or the signature has been waived.

26 I further certify that I am neither
27 related to nor counsel for any party to the cause
28 pending or interested in the events thereof.

29 Witness my hand, I have hereunto
30 affixed my official seal on 25th day of March, 2016
31 at Charleston, Charleston County, South Carolina.

32

33

34 Anne Bouley Meyer
35 NCRA
36 REGISTERED PROFESSIONAL REPORTER
37 My Commission expires
38 February 5, 2023

39

40

Clark and Associates Inc.

FILED FOR RECORD
WYNNEA B. CLARK
JUL 23 P 12 21
CLERK OF COURT
ORANGEBURG, SC

Exhibit B

Plaintiffs' Counsel's Email

ATTEST: TRUE COPY

Wynne B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

David Lail

From: William Applegate
Sent: Tuesday, June 21, 2016 3:55 PM
To: ermoore@murphygrantland.com; Mark Tinsley (mark@goodingandgooding.com); Mitch Griffith; curtis@basjlaw.com; David Lail
Cc: Amy Johnson
Attachments: Amended Complaint.pdf; CO Amend Complaint.pdf

Counsel,

I am planning to file an amended complaint and wanted to ask you all if you consent to please sign the attached CO. Let me know if you do not consent so I can file my motion. Thanks. William

William E. Applegate IV
YARBOROUGH APPELGATE LLC
291 East Bay Street, Second Floor
Charleston, South Carolina 29401
william@yarboroughapplegate.com
o. (843) 972-0150 / c. (843) 834-1368
f. (843) 277-6691

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,)

Plaintiffs,)

vs.)

Lisa Velazques, Harbison Community)
Association, Inc., Cody Sox, and Patten)
Seed Company, d/b/a Super-Sod,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

CASE NO. 2014-CP-38-_____

AMENDED COMPLAINT
(Jury Trial Demanded)

The Plaintiffs, Price Oulla and Bonnie Oulla, and the undersigned attorneys, complaining of the Defendants, jointly and severally, allege the following:

PARTIES, JURISDICTION, AND VENUE

1. The incidents that are the subject of this action occurred in Orangeburg County, South Carolina on July 22, 2014.

2. Plaintiffs Price Oulla and Bonnie Oulla are citizens and residents of Charleston County, South Carolina.

3. Upon information and belief, Defendant Lisa Velazques (hereinafter "Velazques") is a resident and citizen of Charleston County, South Carolina and was operating a motor vehicle on the highways of Orangeburg County, South Carolina on July 22, 2014 when she collided into the rear of Plaintiff Price Oulla's vehicle.

4. Upon information and belief, Defendant Patten Seed Company, d/b/a Super-Sod (hereinafter "Super-Sod") is a Georgia corporation that owns and operates a sod and seed company located on Five Chop Road in Orangeburg County, South Carolina.

5. Upon information and belief, Defendant Cody Sox is a citizen and resident of Lexington County, South Carolina.

6. Upon information and belief, Defendant Harbison Community Association, Inc. (hereinafter "Harbison") is a South Carolina corporation organized and existing under the laws of South Carolina and conducts business in Orangeburg County, South Carolina. Harbison was procuring sod from Defendant Super-Sod's Orangeburg County location on the date the incidents that are the subject of this action occurred.

7. Upon information and belief, Defendant Cody Sox was acting as an employee, agent, servant, and/or legal representative of Defendant Harbison and was at all times acting in the course and scope of his employment, agency and business with Defendant Harbison on the date the incidents that are the subject of this action occurred.

8. At all times relevant to the Complaint, Defendants Super-Sod and Harbison were, and continue to be, responsible for the acts and/or omissions of their employees, agents, and/or servants.

9. Defendants Super-Sod and Harbison had the right and/or power to direct and control their employees, agents, and/or servants while doing business for a fee and/or profit, and they are personally, jointly and severally liable for the acts and/or omissions committed herein.

10. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

FACTS

11. On July 22, 2014, Defendant Sox, driving a pick-up truck with a trailer in tow for Defendant Harbison, travelled to Defendant Super-Sod's business located on Five Chop Road in Orangeburg County, South Carolina to obtain a load of sod for Defendant Harbison.

12. Upon information and belief, Defendants Super-Sod and Sox loaded two pallets of sod onto the trailer and did not secure or attach the load to the trailer.

13. After the pallet loads of sod were placed on the trailer, Sox left Super-Sod on Five Chop Road and eventually merged onto Interstate 26 ("I-26"), and headed westbound through Orangeburg County towing an unsecured load.

14. While Defendant Sox was pulling the trailer for Defendant Harbison on I-26, the unsecured and unattached load of sod spilled onto the roadway creating a hazard to other drivers.

15. Upon information and belief, the spilled load of unsecured sod obstructed travel on I-26 in Orangeburg County causing a traffic jam.

16. Plaintiff Price Oulla was also travelling westbound on I-26 — behind Sox and the spilled load of sod on the roadway. As Mr. Oulla approached the traffic jam, he slowed his vehicle accordingly and was nearly stopped behind a line of backed-up traffic when Defendant Velazques collided into Mr. Oulla's vehicle.

17. Defendant Velazques, travelling directly behind Mr. Oulla, did not slow her vehicle down for the spilled sod traffic jam on I-26 and she collided into the rear of Mr. Oulla at a high rate of speed forcing Mr. Oulla to then collide with the vehicle in front of him.

18. Mr. Oulla sustained traumatic and permanent injuries in the collision.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS HARBISON AND SOX
(Negligence, Gross Negligence, Negligence *Per Se*)

19. Plaintiff realleges and reincorporates Paragraphs 1 through 18 above as if fully set forth herein verbatim.

20. At all times relevant to this Complaint, Defendant Sox was, upon information and belief, acting as an employee, agent, servant, and/or legal representative of Defendant Harbison and he was acting in the course and scope of his employment.

21. Defendant Harbison is vicariously liable for Defendant Sox's actions on July 22, 2014 and the consequences of those actions.

22. Defendant Sox at all times pertinent hereto had a duty to the general public, including Plaintiff, to properly secure his load of sod and operate his vehicle in a safe manner and in compliance with the statutory and common laws of South Carolina.

23. Defendant Sox breached his duty owed to Plaintiff by carelessly, negligently, and willfully operating a motor vehicle on a public roadway with an unsecured and unattached load of cargo that spilled onto the roadway, subsequently causing a collision.

24. Mr. Oulla was operating his vehicle in a safe, prudent, and reasonable manner at all times relevant to the Complaint:

25. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendants Harbison and Sox in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. In violating S.C. Code Ann. § 56-5-4100 et seq.;
- c. In failing to secure or attach a load of cargo during transport;
- d. In failing to prevent any of the load of cargo from dropping or otherwise escaping onto the roadway;
- e. In failing to maintain proper control of the vehicle;
- f. In failing to operate the vehicle in a safe manner;
- g. In failing to properly train and/or supervise employees and/or agents, and/or failing to have policies and procedures in place regarding how to properly load and secure cargo to prevent harm to others, including Plaintiff;

- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT SUPER-SOD
(Negligence, Gross Negligence, Negligence *Per Se*)

26. Plaintiff realleges and reincorporates Paragraphs 1 through 25 above as if fully set forth herein verbatim.

27. Upon information and belief, Defendant Super-Sod sold Defendant Harbison two pallets of sod from its business location on Five Chop Road in Orangeburg County and undertook the task of loading the sod onto the trailer being pulled by Defendant Sox.

28. Upon information and belief, Defendant Super-Sod knew that Defendant Sox would be transporting the loaded pallets of sod on South Carolina public roadways.

29. Defendant Super-Sod had a duty of care to the general public, including Plaintiff, to properly and safely load and secure the pallets of sod onto the trailer for transport.

30. Defendant Super-Sod breached its duty owed to Plaintiff by carelessly negligently, and willfully loading sod pallet loads of cargo onto a vehicle and not securing or attaching the cargo such that it spilled onto the roadway, subsequently causing a collision.

31. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Super-Sod in the following particulars:

- a. In failing to properly and safely load the sod pallets on the trailer;
- b. In failing to properly and safely distribute the weight of the sod pallets on the trailer;
- c. In failing to secure and attach the sod pallet loads to the trailer;

- d. In violating S.C. Code Ann. § 56-5-4100 et seq.;
- e. In failing to use the proper tools and equipment to secure the sod pallet loads to the trailer;
- f. In failing to inspect the sod pallet loads on the trailer before it left Super-Sod's place of business and entered the public roadways;
- g. In failing to properly train and/or supervise employees and/or agents, and/or failing to have policies and procedures in place regarding how to properly load and secure cargo to prevent harm to others, including Plaintiff;
- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT SUPER-SOD
(Breach of Implied Warranty of Merchantability)

32. Plaintiff realleges and reincorporates Paragraphs 1 through 31 above as if fully set forth herein verbatim.

33. Defendant Super-Sod is a "merchant" and the sod it sold to Defendant Harbison were "goods" as defined by the South Carolina Commercial Code, § 36-2-103 et seq.

34. In selling the sod to Defendant Harbison, Defendant Super-Sod impliedly warranted that it was merchantable, including that it was adequately contained and packaged, as set out in South Carolina Code § 36-2-314.

35. Defendant Super-Sod improperly hand-wrapped and packaged the sod with plastic in a way that allowed it to later tear under normal transport conditions.

36. Defendant Super-Sod did not exclude or modify the implied warranty of merchantability.

37. Defendant Super-Sod's implied warranty of merchantability flows to Plaintiffs pursuant to South Carolina Code § 36-2-318.

38. Defendant Super-Sod breached the implied warranty of merchantability in that the sod was, in fact, not merchantable, fit, suitable, or safe for use as set out above.

39. As a direct and proximate result of Defendant Super-Sod's breach of the implied warranty of merchantability, Plaintiffs suffered the injuries described above.

40. Due to Defendant Super-Sod's breach of the implied warranty of merchantability, Plaintiffs are entitled to recover consequential damages pursuant to South Carolina Code § 36-2-715, and actual and punitive damages as determined by a jury.

FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT VELAZQUES
(Negligence, Gross Negligence, Negligence *Per Se*)

41. Plaintiff realleges and reincorporates Paragraphs 1 through 40 above as if fully set forth herein verbatim.

42. Defendant Velazques at all times pertinent hereto had a duty to the general public, including Plaintiff, to operate her vehicle in a safe manner and in compliance with the statutory and common laws of South Carolina.

43. Defendant Velazques breached her duty owed to Plaintiff by carelessly, negligently, and willfully operating a motor vehicle on a public roadway and subsequently causing a collision when she collided into the rear of Mr. Oulla's vehicle.

44. Mr. Oulla was operating his vehicle in a safe, prudent, and reasonable manner at all times relevant to the Complaint.

45. The collision, injuries, and damages described in this Complaint were the direct, foreseeable and proximate result of the negligent and careless, willful, wanton, reckless, and grossly negligent acts or omissions of Defendant Velazques in the following particulars:

- a. Driving a motor vehicle in such a manner as to indicate a willful, wanton, reckless, grossly negligent, and negligent disregard for the safety of others, in violation of S.C. Code Ann. § 56-5-2920;
- b. Traveling too fast for conditions;
- c. Following too closely;
- d. Failing to maintain a proper lookout;
- e. Failing to keep the motor vehicle she was operating under control;
- f. Failing to apply her brakes;
- g. Failing to operate her vehicle in a safe manner;
- h. Failing to use the degree of care and caution that a reasonable person would have used under the circumstances then and there prevailing; and
- i. In such other and further particulars as the evidence at trial may show.

All of which acts and omissions, or both, were the actual, direct and proximate cause of the damages and injuries claimed herein.

46. As a direct and proximate cause of the acts and omissions, or both, of all Defendants, and/or their employees, agents, and/or servants, Mr. Oulla was severely injured, and suffered great and permanent physical harm which has caused, and in the future will cause him to suffer one or more of the following elements of damage:

- a. Past and future physical pain and suffering;
- b. Loss of income;
- c. Loss of enjoyment of life;
- d. Substantial past expenses for medical services;
- e. Future medical expenses;
- f. Permanent injury to his body;
- g. Increased susceptibility to future injury;

- h. Mental anguish, emotional distress, shock, fear, and embarrassment;
- i. Incidental expenses related to time out of work and medical care; and
- j. Other particulars as discovery and the evidence at trial may show.

47. Plaintiff is informed and believes that he is entitled to judgment against all Defendants for the damages he has suffered and will suffer in the future.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Loss of Consortium)

48. Plaintiff realleges and reincorporates Paragraphs 1 through 47 above as if fully set forth herein verbatim.

49. As a direct, foreseeable, and proximate result of the joint concurring negligent, grossly negligent, careless, wanton, and reckless acts and/or omissions of the Defendants and/or their employees, agents, and/or servants, as alleged above, Plaintiff Bonnie Oulla has been forced to endure substantial losses of the marital rights to company, society, cooperation, affection, assistance, fellowship, aid, and relations with her spouse. And, Plaintiff Bonnie Oulla has suffered and incurred expenses and costs, and other damages to be shown through discovery and trial.

Plaintiffs are entitled to judgment against Defendants, jointly and severally, for the above-described actual damages and injuries to Plaintiffs, and for punitive damages to be determined by a jury.

WHEREFORE, Plaintiff prays for the following:

- i. A trial by jury;
- ii. Judgment against Defendants for damages pled herein in an amount to be determined by the jury;
- iii. For the costs of this action; and
- iv. For such other and further relief as this court deems just and proper.

YARBOROUGH APPLGATE LLC

291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150 office
843-277-6691 fax
william@yarboroughaplegate.com
dlail@yarboroughaplegate.com

William E. Applegate IV, Esquire
David B. Lail, Esquire

AND

TATE JOHNSON LAW LLC

Tate Johnson, Esquire
6049 Winding Creek Blvd.
Liberty Township, OH 45011

ATTORNEYS FOR THE PLAINTIFFS

_____, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Price Oulla and Bonnie Oulla,)

Plaintiffs,)

vs.)

Lisa Velazques, Harbison Community)
Association, Inc., Cody Sox, and Patten)
Seed Company, d/b/a Super-Sod,)

Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2014-CP-38-1590

**CONSENT ORDER TO AMEND THE
COMPLAINT**

IT APPEARING to the Court, upon motion of the Plaintiffs and with the consent of the Defendants, that the parties have agreed to allow Plaintiffs to amend their Complaint. It is therefore,

ORDERED, ADJUGDED AND DECREED, that the Plaintiffs are granted leave to amend their Complaint

IT IS SO ORDERED.

PRESIDING JUDGE
FIRST JUDICIAL CIRCUIT

Orangeburg, South Carolina

Dated: _____.

WE CONSENT:

William Applegate IV, Esquire
Yarborough Applegate LLC
291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150 office
843-277-6691 fax

ATTORNEYS FOR THE PLAINTIFFS

WE CONSENT:

E. Mitchell Griffith, Esquire
Griffith Sadler & Sharp, PA
PO Drawer 570
Beaufort, SC 29901
843-521-4242 office
843-521-4247 fax
mgriffith@griffithsharp.com

And

Mark B. Tinsley, Esquire
Gooding and Gooding, PA
P.O. Box 1000
Allendale, SC 29810
2937 Concord Church Rd. (29810)
803-854-7676
mark@goodingandgooding.com

ATTORNEYS FOR DEFENDANT LISA VELAZQUES

WE CONSENT:

E. Raymond Moore, III, Esquire
Murphy & Grantland, PA
PO Box 6648
Columbia, SC 29260
803-782-4100 office
803-454-1235 direct
803-782-4140 fax
ernmoore@murphygrantland.com

*ATTORNEYS FOR DEFENDANT PATTEN SEED
COMPANY d/b/a SUPER SOD*

WE CONSENT:

Curtis W. Dowling, Esquire
Barnes Alford Stork & Johnson LLP
PO Box 8448
Columbia, SC 29202
803-799-1111 office
803-254-1335 fax
curtis@basjlaw.com

*ATTORNEYS FOR DEFENDANTS HARBISON
COMMUNITY ASSOCIATION AND CODY SOX*

FILED FOR RECORD
WINNIE B. CLARK
2011 AUG 23 P 12:21
CLERK OF COURT
ORANGEBURG, SC

Exhibit C

Michael A. Sutton, P.E. Affidavit

ATTEST: TRUE COPY

Winnie B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Price Oulla and Bonnie Oulla,

Plaintiffs,

vs.

Lisa Velazques, Harbison Community
Association, Inc., Cody Sox, and Patten
Seed Company, d/b/a Super-Sod,

Defendants.

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

CASE NO. 2014-CP-38-1590

AFFIDAVIT OF MICHAEL A. SUTTON, PE

PERSONALLY APPEARED before me Michael A. Sutton who, being duly sworn, deposes
and says that:

1. I am over the age of 18 and competent to execute this Affidavit.
2. I am an accident reconstructionist for Accident Research Specialists, PLLC ("ARS"). A
copy of my Curriculum Vitae is attached as Exhibit A.
3. ARS's services have been retained in the above-captioned matter to provide Plaintiff
technical expertise in crash reconstruction.
4. In forming the opinions contained herein, I have reviewed the following documents
associated with the collision that injured Price Oulla:
 - a) 7-22-2014 Traffic Collision Report
 - b) CAD Log (Oulla 06184-06185)
 - c) Lisa Velazques Recorded Statement
 - d) Cody Sox deposition transcript and exhibits 1-4 (Harbison Community
Association, Inc. employee and driver of the truck towing the trailer load of sod)
 - e) Lisa Meyer (Velasques) deposition transcript and exhibit 1 (driver of Toyota that
collided with Price Oulla)

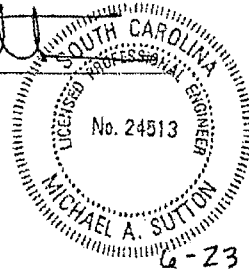
- f) Melvin Kearsse deposition transcript and exhibits 1-3 (Super-Sod employee that wrapped the pallets of sod and then loaded the cargo onto Harbison Community Association, Inc.'s trailer)
 - g) Joe Livingston deposition transcript and exhibit 1 (Super-Sod 30(b)(6) witness)
 - h) David Grove deposition transcript and exhibit 1 (Harbison 30(b)(6) witness)
 - i) Dash cam video of Trooper Gleich
 - j) Fire and police reports (Harbison 0006-0013)
 - k) Pallet specs (Pages from D Patten's ATIs, RRFs, to P's 1st 05-08-15)
 - l) Google aerial images (5)
 - m) Photos from Tate Johnson
 - n) Statements of Mr. Branham, Lynch, Shealy, and Sox
 - o) Truck and trailer specs (Pages from D Harbison, Sox ATIs, RRFs 07-24-15)
 - p) Bosch CDR Report Lexus
5. In forming the opinions contained herein, I also personally inspected and performed an analysis of the crash scene.
6. The first in the chain of events that resulted in the collision that injured Price Oulla occurred at Super-Sod on July 22, 2014. Super-Sod employee Melvin Kearsse improperly hand-wrapped the sod with plastic in a way that allowed it to later tear under normal driving conditions. Failing to properly wrap sod to keep it securely on the pallet for transport is dangerous. Then, Kearsse improperly loaded the sod onto the Harbison trailer by not distributing the weight of the load for safe trailering. Kearsse loaded a pallet of sod weighing between 2,000-2,200 pounds on the back of the trailer at the direction of Cody Sox. Heavy cargo should be placed at the front of a trailer, not the back. Placing heavy cargo at the back of a trailer creates trailer sway and is dangerous. Next, neither Kearsse nor Sox secured the load of sod to the trailer, which is dangerous.

7. As a result of improperly wrapping the sod, improperly loading the sod, improperly balancing the load, and not securing the sod to the trailer, the sod was allowed to spill onto the interstate during transport. The spilled sod on the interstate created a hazardous condition for other motorists.
8. Because of the spilled load of sod, travel on the interstate was obstructed and vehicles were forced to slow suddenly and stop. Stopping on an interstate is dangerous and secondary collisions are a natural and probable consequence of an obstructed highway.
9. Price Oulla was travelling I-26 westbound and came to a stop because of the spilled sod. Lisa Velasques came upon the stopped traffic on I-26 due to the spilled sod, failed to stop, and collided with Oulla's vehicle. The impact propelled Oulla's vehicle into the vehicle in front of him. As a result of the violent collision, Oulla suffered severe injuries.
10. It is my opinion that Super-Sod's failure to properly wrap the sod, properly load the sod with the weight safely distributed, and failure to secure the load of sod to the trailer that was spilled onto the interstate, was a proximate cause of the collision resulting in Price Oulla's injuries.
11. It is my opinion that Harbison Community Association, Inc. employee Sox's failure to properly load and secure the sod to the trailer that was spilled onto the interstate was a proximate cause of the collision resulting in Price Oulla's injuries.
12. All opinions set forth herein are made to a reasonable degree of certainty in the field of accident reconstruction.

FURTHER AFFIANT SAYETH NOT

Michael A. Sutton

Michael A. Sutton, PE



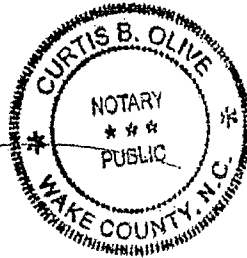
6-23-16

Sworn and subscribed to before me
This 23rd day of June, 2016.

Curtis B. Olive

Notary Public for North Carolina

My commission expires: 02-15-2019



MICHAEL A. SUTTON, PE

Accident Research Specialists, PLLC 1631 NW Maynard Road, Suite 101, Cary, NC 27513 (919) 467-8134

PROFESSIONAL ENGINEER

North Carolina #19847
South Carolina #24513
Alabama #28549-E

EMPLOYMENT

CONSULTING ENGINEER

FEBRUARY 2001 TO PRESENT

Accident Research Specialists, PLLC

Cary, North Carolina

Technical investigation and analysis of accidents and failures involving vehicles and machinery. Areas of work and expertise include accident reconstruction, engineering analysis, technical investigation, failure analysis, standards research, and laboratory testing in the areas of mechanical and automotive engineering and machine design, applied to vehicle accidents (commercial vehicle/heavy trucks, automobiles, motorcycles, marine vessels including commercial, recreational and personal watercraft, bicycles, pedestrian/vehicle, and aircraft), heavy equipment accidents, construction accidents, and product failures and testing. Testify in State and Federal Courts; qualified as an expert in accident reconstruction, mechanical engineering, failure analysis, and heavy truck braking systems.

CONSULTING ENGINEER

FEBRUARY 1989 TO FEBRUARY 2001

Accident Reconstruction Analysis, Incorporated

Raleigh, North Carolina

Technical investigation and analysis of accidents and failures involving vehicles and machinery. Areas of work and expertise same as listed above.

TECHNICIAN

AUGUST 1987 TO FEBRUARY 1989

Accident Reconstruction Analysis, Incorporated

Raleigh, North Carolina

Assist engineers with investigations and testing of accidents and failures

ENGINEERING CO-OP

JANUARY 1986 TO AUGUST 1987

Carolina Power & Light Company

New Hill, North Carolina

Worked in the reactor engineering division during the construction and initial start-up of the Shearon Harris Nuclear Power Plant.

EDUCATION

MASTER OF ENGINEERING

1996

North Carolina State University

Raleigh, North Carolina

Concentration in Mechanical Engineering-Dynamics, Vibrations and Acoustics

BACHELOR OF SCIENCE, MECHANICAL ENGINEERING

1988

North Carolina State University

Raleigh, North Carolina

*Magna Cum Laude, Dean's List 1984, 1985, 1987, 1988, Pi Tau Sigma
National Honorary Mechanical Engineering Fraternity, Outstanding*

Accident Research Specialists, PLLC

FORENSIC ENGINEERS

College Students of America.

MEMBERSHIPS

Society of Automotive Engineers

American Society of Mechanical Engineers

American Society of Materials

TRAINING

Society of Automotive Engineers - *Fundamentals of Vehicle Dynamics*

Society of Automotive Engineers - *Tire and Wheel Safety Issues*

Society of Automotive Engineers - *The Tire as a Vehicle Component*

Society of Automotive Engineers - *Braking Performance of Heavy Commercial Vehicles*

Society of Automotive Engineers - *Motor Vehicle Accident Reconstruction*

American Society of Materials - *Principles of Failure Analysis*

OSHA - *Construction Safety and Health*

Society of Automotive Engineers - *Occupant and Vehicle Kinematics in Rollovers*

PUBLICATIONS

"Expert Testimony Regarding the Speed of a Vehicle: the Status OF North Carolina Law and the State of the Art"

"The Critical Role of the Accident Reconstructionist in Trucking Cases"

"Speed Testimony - The Brewing Battlefield"

INSTRUCTOR

Headlines Produce Change: OSHA'S Updated (and Improved) Construction Crane and Derrick Standard

North Carolina Trucking Association: Setting Course for Safety

Accident Research Specialists, PLLC
FORENSIC ENGINEERS

August 26, 2016

SENT VIA US MAIL AND EMAIL

The Honorable R. Knox McMahon
Lexington County Judicial Center
205 E. Main Street
Lexington, SC 29072

RE: Price Oulla and Bonnie Oulla v. Lisa Velazques, Harbison Community Association, Inc. Cody Sox, and Patten Seed Company, d/b/a Super-Sod
Case No.: 2014-CP-38-01590
Selective Claim No.: 21454625
Cincinnati Ins Claim #: 2417955
Date of Loss: July 22, 2014
Insured: Patten Seed Company Inc dba Super Sod
Our File No.: 1295-0070

Dear Judge McMahon:

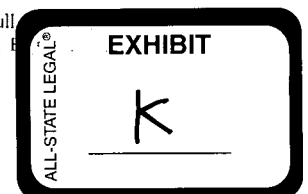
I am writing in response to Plaintiffs' counsel's letter to you in this matter dated August 23, 2016, which addressed, for the first time to Your Honor, the Plaintiffs' Motion to Amend in this matter. This motion was filed by Plaintiff's counsel immediately before the hearing on the Motions for Summary Judgment before Your Honor on June 29, 2016.

Plaintiffs' counsel had raised the issue to me of a potential amendment prior to the hearing before Your Honor. At that time, I asked him what effect, if any, this proposed amendment would have on Super Sod's pending motion for Summary Judgment which had already been scheduled for a hearing before Your Honor on June 29, 2016. I was given reassurance that the proposed Motion to Amend would have no effect on the Motion for Summary Judgment, and that the hearing on the Motion for Summary Judgment before Your Honor would not need to be continued. I was surprised when the filed Motion to Amend was given to me in the courtroom moments before Your Honor's hearing.

However, because of Mr. Applegate's assurance that the Motion for Summary Judgment was ripe for a hearing, we went forward with the full Summary Judgment hearing. During this lengthy hearing, the Plaintiffs had ample opportunity to raise any conceivable basis for the Court to deny Super-Sod's Motion for Summary Judgment, including, if they so desired, that the Motion was premature.

Telephone 803-782-4100 • Facsimile 803-782-4140
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260

J. R. Murphy John M. Grantland Ron B. Diegel* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull
Alice P. Adams Tim J. Newton Chris A. Majure Robert M. Peele, III Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson
*Member-American Board of Trial Advocates



SENT VIA US MAIL AND EMAIL

The Honorable R. Knox McMahon
Lexington County Judicial Center
August 26, 2016
Page 2

It is our position that the hearing was not premature, we were provided assurances by the Plaintiffs it was not premature and there was never any argument that it was premature. As Your Honor is aware, this issue of a Motion to Amend was not raised at that hearing, nor was it argued in the Plaintiff's Memorandum in Opposition of Super Sod's Motion for Summary Judgment.

We do not believe that Rule 59 is a proper vehicle to raise matters to the trial court that were not raised before judgment was entered. We are providing a **Supplemental Memorandum In Opposition to Plaintiffs' Motion to Alter or Amend Order Granting Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment**. In that regard, we believe that the Motion to Amend is moot and the Motion to Reconsider should be considered on its own merits, as previously briefed, and denied.

In our view, the Plaintiffs' proposed motion was filed at the last minute, and not raised to Your Honor at the hearing, to give the Plaintiff a "parachute" to circumvent the imminent summary judgment.

Thank you for your consideration in this matter.

Very truly yours,



E. Raymond Moore, III

ERM/hws

cc: William E. Applegate IV
David B. Lail
Tate Johnson
Mitchell Griffith
Mark B. Tinsley
Curtis W. Dowling
Charles H. Williams

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.

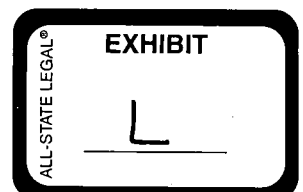
**Patten Seed d/b/a/ Super Sod's Supplemental
Memorandum In Opposition to Plaintiffs'
Motion to Alter or Amend Order Granting
Patten Seed Company d/b/a Super Sod's Motion
for Summary Judgment**

Patten Seed Company d/b/a Super Sod ("Super Sod") submits this Supplemental Memorandum in Opposition to the Plaintiff's Rule 59(e) Motion to Alter or Amend Order Granting Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment.

Supplemental Argument

The Plaintiffs' Motion to Amend is untimely because judgment has been entered in favor of Super Sod. This Court granted Super Sod's motion for summary judgment on July 26, 2016. The Court's order was entered on August 2, 2016. On August 12, 2016, Plaintiffs served their Motion to Reconsider the Order Granting Summary Judgment pursuant to Rule 59(e), and provided a copy to this Court.

After nearly nineteen months of litigation, nearly two months after Super Sod's Motion for Summary Judgment was filed and just minutes before this Court held the hearing on the Motion for Summary Judgment on June 29, 2016, Plaintiffs filed - for the first time - a Motion to Amend the Complaint. The Plaintiffs then argued in opposition to two Motions for Summary Judgment, both from Defendants Harbison and Sox and from Super Sod, without informing the Court of their Motion to Amend the Complaint or requesting a continuance.



The Motion to Amend included a proposed Amended Complaint that, as it relates to Super Sod, was modified in two respects: (1) the proposed Amended Complaint included a reference to Section 56-5-4100 of the South Carolina Code as a particular basis to support Plaintiffs' negligence cause of action (proposed Am. Compl. ¶ 31. d.); and (2) the proposed Amended Complaint added a cause of action for breach of an implied warranty of merchantability. (proposed Am. Compl. ¶¶32-40).

Both at the hearing before this Court and in their Memorandum in Opposition to the Motion for Summary Judgment, Plaintiffs raised and argued that Section 56-5-4100 imposed a legal duty on Super Sod to secure sod sold to its customers' vehicles and trailers and that the duty extended to "members of the travelling public." In opposition, Super Sod argued both that it had no legal duty to the plaintiff, by virtue of that statute or otherwise, and that its conduct was not the proximate cause of the Plaintiffs' injuries. This Court granted summary judgment, holding that Super Sod did not owe a duty to the Plaintiffs. (Order at p. 4-10). In its Order, this Court specifically addressed the application of Section 56-5-4100, the statute the plaintiffs now seek to add to their Complaint. (*Id.* at 6-8).

On the other hand, Plaintiffs did not argue, either in their Memorandum or in the oral argument to the Court, that summary judgment was premature or otherwise improper because they had filed a Motion to Amend, or that the proposed Amended Complaint contained an additional cause of action that might preclude summary judgment. Further, Plaintiffs informed counsel for Super Sod prior to the hearing on Super Sod's Motion for Summary Judgment that their proposed Motion to Amend had no bearing on the immediate hearing on Super Sod's Motion for Summary Judgment, and that hearing should go forward without delay.

On August 23, 2016, the Plaintiff's Motion to Alter or Amend its Complaint was heard before the Honorable Diane S. Goodstein. In that hearing, Judge Goodstein determined that, because this Court had granted Summary Judgment as to Plaintiff's claims against Super Sod, and Plaintiffs' present Rule 59(e) Motion was still pending before this Court, consideration of the Plaintiffs' Motion to Amend the Complaint, if any, was for this Court in conjunction with the present Rule 59(e) Motion.

After over a year and a half of litigation, the case was ripe for summary judgment on June 29, 2016, and this Court heard and evaluated the arguments and ruled on July 26, 2016. Because the Plaintiffs' failed to raise the Motion to Amend to the Court, or to move for a continuance, and because the Amendment would prejudice Super Sod and be futile, the Motion to Reconsider should be denied and the Motion to Amend be denied as Moot.

FACTUAL BACKGROUND¹

This case arose out of a rear end automobile collision that occurred outside of Orangeburg on I-26 near Exit 154 in the westbound lanes when Defendant Velazques² struck the plaintiff's vehicle from the rear after he had slowed for traffic ahead. (Exhibit A — Velazques dep., p. 41:11-15).

Super Sod-

Super Sod is a seller of seed, sod, compost, and nursery products farmed at locations around the southeast, including its farm in Orangeburg. (Exhibit C — Livingston dep., pp. 10-

¹ The testimony cited below was provided to the Court with Super Sod's Memorandum in Support of its Motion for Summary Judgment, filed June 28, 2016. For the sake of brevity, the record is not reproduced herewith. However, if the Court desired, the undersigned will provide additional courtesy copies.

11:11-16). Defendant Cody Sox and his co-worker, Corey Branham, from co-Defendant Harbison Community Association (“Harbison”) in Irmo, picked up a load of sod consisting of two pallets on the morning of the accident. (Exhibit D — Sox dep. p. 23:19-20). Sox directed Super Sod’s field worker, Melvin Kears, where and how to load the pallets on the Harbison trailer. (Exhibit D — Sox dep. p. 69:6-8). Kears complied with Harbison’s instructions. (Exhibit E — Kears dep., p. 37:20-25). The load consisted of two pallets of centipede sod, wrapped with stretch wrap. (Exhibit D — Sox dep. p. 29:21-24). Sox did not have tie down straps with him, although he had intended to bring them with him from Irmo before he came. (Exhibit D — Sox dep. p. 26:3-7). According to Sox, when he left the field with the sod, the trailer did not have any loose dirt, grass or other materials and it appeared to him to be safe for transport. (Exhibit D — Sox dep. p. 34:9-22; pp. 123:19-124:7).

There was no allegation in the case and there was no evidence of a relationship between Super Sod and the Plaintiff — contractual or otherwise — or between Super Sod and co-Defendant Velasquez, the driver of the vehicle that struck Plaintiff’s vehicle.

Loading-

Super Sod’s sole involvement was that its employee, Melvin Kears, loaded Harbison’s trailer with two pallets of sod. The sod was pre-wrapped in plastic .7 mil stretch wrap. (Exhibit C — Livingston dep. p. 65:14). It was undisputed that Kears’s regular practice is to wrap the stretch wrap four to five times to the top of a pallet, then two to three wraps back down the pallet from the top. (Exhibit E — Kears dep. p. 30:22-25). There is no evidence that Kears varied from this practice in this instance. Harbison did not save the wrap after the incident. (Exhibit D

² Defendant Velasquez has reverted to her maiden name, Meyer, since the accident. For ease of reference, she is referred to herein by the name she used at the time of the accident and at the time suit was brought.

— Sox depo. p. 121:11-18). It was undisputed that the Harbison trailer was loaded in accordance with Sox's instructions. (Exhibit D — Sox dep. p. 69:6-8). Sox testified that he instructed Kearse to load the pallets over the trailer's two axles. (Exhibit D — Sox dep., pp. 69:4-70:8). Kearse complied with the instructions given to him. (*Id.*; Exhibit E — Kearse dep. p. 37:20-25). After loading, Sox checked his tires and hitch; made sure the trailer looked balanced and verified the weight was balanced. (Exhibit D — Sox dep. pp. 33:23-34:5).

Securement-

Before traveling to Super Sod, Sox verified that his trailer was adequate for the load. (Exhibit D — Sox dep. p. 35:4-13; p. 96:23-25). It was undisputed that Super Sod did not sell or offer to provide a tarp to cover the sod or tie down straps for Sox to use on the Harbison trailer. 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. (Exhibit D — Sox dep. p. 26:3-7, pp. 71:22-72:11). He did not request that Super Sod tie down his load. (Sox dep. p. 71:13-15). Sox then made a decision to proceed without tying down the load. (Exhibit D — Sox dep. p. 63:10-12).

Initial Travel and Load Check-

It was undisputed that the Harbison truck and trailer safely left the field where the sod was picked up; that 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. (Exhibit D — Sox dep. pp. 90:13-94:24). It was also undisputed that while stopped, Sox checked the load and noted that it was in the same condition in which it had been loaded. (Exhibit D — *Id.*; p. 136:4-9). No sod had spilled. The sod had not shifted. The stretch wrap covering the pallets was intact. (*Id.*) It was undisputed that, after leaving the

convenience store, the Harbison truck and trailer were able to enter the interstate safely, navigating around the tight clover leaf entrance ramp on to I-26 without losing any sod. (*Id.*)

Tractor Trailer Incident-

It was undisputed that the Harbison trailer did not lose any portion of its load until Sox and Branham were forced off the road *after* merging on to I-26 west from Highway 301 without incident. (Exhibit D — Sox dep. p. 101:20-23). Sox estimated he had traveled 3/10 of a mile onto the interstate before the incident occurred. (Exhibit D — Sox dep. pp. 104:25-105:3). It was undisputed that a tractor trailer veered into the Harbison truck and trailer's lane. (Exhibit D — Sox dep. p. 21:2-22:8; p. 76:2-4; p. 105:9-13). It was undisputed that the encroachment caused Sox to take sudden and evasive action and to run off the road and on to the shoulder. (Exhibit D — Sox depo. pp. 103:14-104:11; p. 118:8-24). It was undisputed that Sox lost a portion of the sod from both pallets. (Exhibit D — Sox depo. pp. 117:19-118:2). The pallets themselves were unmoved. (Exhibit D — Sox dep. pp. 128:13-129:4).

Cleanup by First Responders-

Sox promptly pulled over and stopped on the shoulder of the interstate after losing the sod. It was undisputed that Sox promptly called 911. (Exhibit D — Sox dep. pp. 21:23-22:8). It was undisputed that while Sox and his partner waited, traffic continued to drive over the lost sod without incident. (Exhibit D — Sox dep. p. 42:19-20). A fire engine eventually responded and blocked traffic in the right (slow) lane so that the sod could be cleaned from the roadway. (Exhibit D — Sox dep. p. 22:2-5). 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. (Exhibit D — Sox dep. pp. 109:25-111:1). 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.

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.³ 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. (Exhibit D — Sox dep. p. 47:24-25, p. 135:12-14; Exhibit F — Gleich dep. p. 59:8-12).

Ms. Velazques admitted that she was at fault for the accident. (Exhibit A — Velazques dep., p. 42:4-6). Velazques struck Oulla at a high rate of speed. (Exhibit A — Velazques dep., p. 41:15). It was undisputed that Velazques was not looking at the road in front of her at the time her car rear-ended the Plaintiff's vehicle. (Exhibit A — Velazques dep., p. 33:21-22; p. 54:17-18).

ARGUMENT

I. AMENDMENT OF THE PLEADINGS AFTER JUDGMENT HAS BEEN ENTERED IS IMPROPER.

Summary Judgment has been entered, effectively ending the case against Super Sod in the trial Court. This Court has limited jurisdiction to reconsider his decision pursuant to Rule 59(e) now that the Plaintiffs' have filed their Motion to Reconsider. However, it would be improper to amend a Complaint that has been dismissed, because the proposed Amendment was not asserted until after Judgment was entered in favor of Super Sod.

³ Based on 911 call records.

A. Plaintiff's Motion to Amend Complaint is improper because it was not Raised Before the Court Prior to Judgment

The Court should not consider Plaintiff's Motion to Amend its Complaint as part of the Plaintiff's Motion to Alter or Amend its Order Granting Super Sod's Motion for Summary Judgment because the amendment was not raised or otherwise presented to the Court prior to the hearing on Super Sod's Motion for Summary Judgment.

The Plaintiffs argued in opposition to two Motions for Summary Judgment, both from Defendants Harbison and Sox and by Super Sod, without informing the Court of their Motion to Amend the Complaint or requesting a continuance. The Plaintiffs had ample time and opportunity to raise this issue prior to the Court's ruling granting Super Sod's Motion for Summary Judgment and failed to do so.

Because the Plaintiffs' failed to raise their Motion to Amend their Complaint prior to the Court's granting of Summary Judgment as to the Plaintiffs' claims against Super Sod, the Plaintiff is barred from raising that issue for the first time via a Rule 59(e) Motion. See *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (citing *Hickman v. Hickman* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App. 1990) holding that "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment but did not.").

In *Stevens*, the Supreme Court affirmed the decision of the Circuit Court, which, after granting Summary Judgment, declined consideration of a new issue raised for the first time in its 59(e) motion. There, the Court found the Circuit Court relied on "well-settled precedent" to determine that the new issues were not properly preserved for consideration via Rule 59(e). *Id.* at 567.

B. The Motion to Amend is Improper Because Judgment Has Already Been Entered in Super Sod's Favor.

This Court's July 26th Order Granting Summary Judgment was entered August 2, 2016 and ends the case as to Super Sod. The Complaint cannot be "amended" now because it is a nullity. Although South Carolina does not have a reported appellate decision addressing the intersection of Rules 15, 56, and 59, federal courts have construed the parallel Federal Rules of Procedure in addressing post judgment amendments.⁴

Most courts faced with the problem have held that once judgment has been entered or an appeal taken, *the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60*. The party may move to alter or amend the judgment within [10 days under Rule 56 South Carolina Rules of Civil Procedure] after its entry under Rule 59(e) or, [move] under Rule 60(b) for relief from a judgment or order. This approach appears sound. *To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy of favoring finality of judgments and the expeditious termination of litigation.*

Wright & Miller 6 Fed. Prac. & Proc. Civ. §1489 (3d Ed.) (emphasis added).

As the Tenth Circuit succinctly held: "The final judgment precludes plaintiff from amending his complaint as of right pursuant to Rule 15(a). . . . As the district court correctly determined, once judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to [Rule 59(e) or 60(b)]." *Cooper v. Shumay*, 780 F.2d 27, 29 (10th Cir. 1985) (internal citations omitted). More recently, the Seventh Circuit Court of

⁴ Because the South Carolina Rules of Civil Procedure are based on the Federal Rules of Civil Procedure, federal courts' interpretation of those Rules is persuasive. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (citing H. Lightsey & J. Flanagan, *South Carolina Rules of Civil Procedure*, (2d. 1985)); *See also Maybank v. BB&T Corp.*, __ S.C. __, __ S.E.2d __, 2016 WL 3188923 (2016) (stating: "In construing the [SCRCP] our Court looks for guidance to cases interpreting the federal rules."). *Beach Company v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (relying on federal law to interpret Rule 13 SCRCP because the language of the rules was the same). *Unisun Insurance v. Hawkins*, 342 S.C. 537, 537 S.E.2d

Appeals held that a post judgment motion to amend was premature, even though a Rule 59(e) motion had been filed but not granted. There the Court explained, “[Plaintiff] mistakenly claims that the *only* requirement for consideration of a post judgment Rule 15(a) motion for leave to amend is a timely filing of a motion to reconsider under Rule 59(e), which he did. But it is ‘well settled that after a final judgment, a plaintiff may amend a complaint under Rule 15(a) only with leave of court after a motion under Rule 59(e) and Rule 60(b) has been made *and the judgment has been set aside or vacated.*’” *Vesely v. Armslist, LLC*, 762 F.3d 661 (7th Cir. 2014) (emphasis in original) (citations omitted). Similarly, the Second Circuit upheld the denial of a post judgment motion to amend, explaining that “[u]nless there is valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint.” *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F. 2d. 240, 245 (2d Cir. 1991).

Here, the Plaintiffs’ Motion to Reconsider is pending, but the Order granting Summary Judgment still stands.

II. EVEN IF THE COURT HAD NOT ALREADY GRANTED SUMMARY JUDGMENT, PLAINTIFFS’ MOTION TO AMEND SHOULD BE DENIED.

While Rule 15 provides that amendments should be “freely given when justice so requires and does not prejudice any other party,” in this instance, given the age of the case, the fact that extensive discovery has been completed, the imminent trial, the fact that Super Sod had filed its Motion for Summary Judgment nearly two months prior to the hearing, and because of the prejudice to Super Sod, the Motion to Amend should be denied even if it were procedurally proper.

559 (Ct. App. 2000) (stating: “In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.”).

A. The Undue Delay Prejudices Super Sod and Warrants Denial of the Motion to Amend

Plaintiffs waited nearly nineteen months to file the Motion to Amend and proposed Amended Complaint. Super Sod's Motion for Summary Judgment, outlining deficiencies in Plaintiffs' Complaint, had been filed for two months before Plaintiffs' filed their Motion to Amend. Numerous depositions had been taken, including the depositions of Super Sod's management and employees. Experts had already been identified by all parties. The parties were preparing for an October trial date, which was discontinued based on Judge McMahon's Order. Further, the stretch wrap that surrounded the sod, and the presumed basis of Plaintiffs' claim for breach of warranty, has been destroyed and no photographs, testing, or other data related to the stretch wrap are available. It is hard to conceive of a more prejudicial position to allow such an amendment.

While no appellate decision in South Carolina addresses the propriety of a motion to amend after summary judgment has been filed, once again, federal cases are instructive.⁵ Even if this Court has discretion to consider a Rule 15 motion to amend a complaint after a motion for summary judgment has been *filed but not granted*, "Courts highly disfavor motions to amend filed after a summary judgment motion has already been filed." *Prescod v. Bucks County*, 2009 WL 3617751 (E.D. Pa. 2009) (citation omitted).

When a plaintiff files a motion to amend after the filing of defendants' motion for summary judgment, the timing "raises the inference that the plaintiff is attempting to bolster his legal position and therefore avoid summary judgment – by amending the complaint. This is an unacceptable reason to amend."... Further, courts have held that "permitting such an amendment at this stage would change the focus of that portion of the litigation, thereby prejudicing the defendants."

⁵ See Footnote 4 above.

Id. (internal citations omitted). Here, the facts are even more egregious since the Motion to Amend was filed on the same day and only minutes before the hearing on the Motion for Summary Judgment. Plaintiffs, no doubt recognizing the likelihood of summary judgment, attempted to build in a “parachute” to delay and convolute the impending judgment in the case. The Court should not permit such posturing⁶ to further delay a case that dragged on for over a year and a half. Here, not only has Super Sod filed its Motion for Summary Judgment, but the motion has already been granted.

III. EVEN IF THE COURT WERE TO CONSIDER THE MOTION TO AMEND, THE AMENDMENT WOULD BE FUTILE.

Despite the liberal standard of Rule 15, where a motion to amend asserts a futile cause of action, denial is proper. *Jennings v. Jennings*, 389 S.C. 190 697 S.E.2d 671 (Ct. App. 2010); see also *McCarthy v. Cliffs Communities, LLC*, 2015 WL 4945391 (Ct. App. 2015). Here the amendment is futile. As this Court has already held, the statute that the plaintiffs seek to add to their complaint does not impose a legal duty on Super Sod. Further, the claim for breach of implied warranty of merchantability cannot succeed because there is no “implied warranty” that unsecured cargo will not come loose during transport. Defendant Harbison knew that Super Sod had not sold or given him tie down straps, because, as Sox testified, he asked for them and Super Sod told him they were not available. Defendant Harbison did not rely on Super Sod to strap the sod to the trailer. Defendant Harbison intended to bring its own straps but simply forgot. There can be no “warranty” implied for straps when they are specifically not part of the sale.

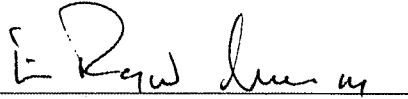
CONCLUSION

Because this Court previously granted Summary Judgment to Super Sod and because the Entry of Judgment has not been set aside, the present Motion to Amend is not proper.

⁶ See *Huxfield Cemetery Ass’n v. Elliott*, 388 S.C. 565, 574, 698 S.E.2d 591, 596 n.4 (2010).

Additionally, the Motion to Amend is Moot because the Plaintiffs failed to raise this issue prior to the entry of Summary Judgment. Further, even assuming Judgment had not already been entered, the Court should deny the motion because it was not made until the case had been pending for nineteen months and the summary judgment motion had been pending for two months. Therefore, Super Sod respectfully requests that the Court deny the Plaintiffs' Motion to Reconsider.

MURPHY & GRANTLAND, P.A.



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*Attorneys for Defendant Patten Seed Company, d/b/a
Super-Sod*

Columbia, South Carolina
August 26, 2016

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2014-CP-38-01590

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., attorneys for the Defendant Patten Seed Company, d/b/a Super-Sod, do hereby certify that on **August 26, 2016**, I have served a copy of the foregoing **Patten Seed d/b/a/ Super Sod's Supplemental Memorandum In Opposition to Plaintiffs' Motion to Alter or Amend Order Granting Patten Seed Company d/b/a Super Sod's Motion for Summary Judgment** in connection with the above-referenced case placing same in the U.S. mail, postage paid to:

William E. Applegate IV, Esquire
David B. Lail, Esquire
Yarborough Applegate, LLC
291 East Bay Street, Floor 2
Charleston, South Carolina 29401

and

Tate Johnson, Esquire
Tate Johnson Law LLC
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Curtis W. Dowling, Esquire
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Attorneys for Lisa Velazques

Mr. Charles H. Williams
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Orangeburg, SC 29116-1084
Attorneys for Patten Seed Company d/b/a Super-Sod


Helene W. Sessler

Columbia, South Carolina

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

Price Oulla and Bonnie Oulla,) Civil Action No. 2014-CP-38-1590
)
Plaintiffs,)

vs.)

**ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER**

Lisa Velazques; Harbison Community)
Association, Inc.; Cody Sox; and, Patton)
Seed Company d/b/a/ Super Sod;)
Defendants.)

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.

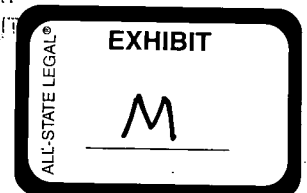
IT IS SO ORDERED.

Columbian, South Carolina
November 18th, 2016

[Signature]
The Honorable R. Knox McMahon
Presiding Judge

ATTEST: TRUE COPY

Winnif B. Clark
CLERK OF COURT
ORANGEBURG COUNTY



From: McMahon, R. Knox Law Clerk (Anna Marsh) <KMcmahonlc@sccourts.org>
Sent: Tuesday, January 03, 2017 10:24 AM
To: William Applegate; McMahon, R. Knox; mark@goodingandgooding.com; Mitch Griffith; Amy Johnson
Cc: E. Ray Moore, III; Goodstein, Diane S.; Goodstein, Diane S. Law Clerk (George B. Smythe)
Subject: RE: Oulla v. Velasquez

Mr. Applegate:

Judge McMahon said that the Motion to Amend Complaint was not before him when he was assigned to the First Circuit in June. Additionally, he stated that he is not assigned to the First Circuit so he does not have the jurisdiction to hear the motion. I have copied Judge Goodstein and her law clerk on this email to make them aware of his position.

Hope everyone had a good New Year's holiday.

Best,

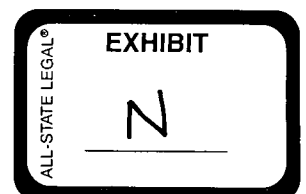
Anna Barber Marsh
Law Clerk to the Honorable R. Knox McMahon
205 East Main Street
Lexington, South Carolina 29072
Phone: 803.785.8239
Fax: 803.785.8444

From: William Applegate [mailto:william@yarboroughapplegate.com]
Sent: Tuesday, January 03, 2017 9:58 AM
To: McMahon, R. Knox Law Clerk (Anna Marsh); McMahon, R. Knox; mark@goodingandgooding.com; Mitch Griffith; Amy Johnson
Cc: E. Ray Moore, III
Subject: Oulla v. Velasquez

Dear Judge McMahon,

I hope you are well. We have just now received from defense counsel a copy of your recent Order denying Plaintiff's Motion to Alter or Amend. We were not, however, provided any ruling on the Motion to Amend the Complaint that was filed prior to the hearing on the Motion for SJ based on initial pleadings. As you may recall from my letters, at the hearing on the Motion to Amend Judge Goodstein referred the motion to you and requested we send all of the filings to you for a decision. We did so but are happy to resend if you do not have them. We are also happy to appear before you if you would like to hear oral argument but if you have already ruled on the matter, we simply need a copy of the Order. Thank you again for your assistance and Happy New Year. William

William E. Applegate IV
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f. (843) 277-6691





YARBOROUGH APPLEGATE

ATTORNEYS AT LAW

February 1, 2017

William E. Applegate IV
william@yarboroughapplegate.com

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

FEB 02 2017

SC Court of Appeals

Re: Oulla v. Patten Seed Company d/b/a Super-Sod, *et al.*
Appellate Case No. 2017-000093
YA File No. 14-057

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Appellants' Motion for Leave to File Motion in the court of Common Pleas Pursuant to Rule 60, SCRCP in the above-referenced case. Also enclosed are the proof of service, an extra copy, and this firm's check for the filing fee. I would appreciate your filing the original and returning the extra file-stamped copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving counsel of record for the Respondent and counsel of record for the other defendants in the underlying case.

I appreciate your assistance in this matter. Please feel free to contact me if you need additional information or I may otherwise be of assistance.

Sincerely,

Amy H. Johnson,
Paralegal to William E. Applegate IV

Enclosures

cc: E. Raymond Moore, III, Esquire
Curtis W. Dowling, Esquire
Matthew G. Gerrald, Esquire
E. Mitchell Griffith, Esquire
Kelly D. Dean, Esquire
Mark B. Tinsley, Esquire