

IN THE STATE OF SOUTH CAROLINA

In the 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

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SC Court of Appeals

Price Oulla and Bonnie Oulla, Appellants,

v.

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

Of Whom Patten Seed Company d/b/a Super Sod is the.....Respondent.

**RETURN TO APPELLANTS' MOTION FOR LEAVE TO FILE MOTION IN THE
COURT OF COMMON PLEAS PURSUANT TO RULE 60, SCRPC**

Appellants' Motion for Leave to File Motion in the Court of Common Pleas pursuant to the Rule 60, SCRPC ("Motion for Leave" or "Appellants' Motion") should be denied because they have failed to set forth any proper basis under Rule 60 to vacate the judgment.¹ Without any controlling authority, Appellants argue that this Court should permit the circuit court to hear a motion to amend the complaint ("Motion to Amend") under the guise of a Rule 60 motion that was never timely raised to the circuit court, and therefore, was never addressed by the circuit court.

¹ Respondents do not oppose Appellants' Motion for Extension of Time to Serve and File Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, served contemporaneously with the instant Motion.

Furthermore, Appellants do not assert any basis for relief as required under Rule 60. Rather, the sole basis for Appellants' argument for vacatur of the judgment is that the circuit court below did not address their untimely Motion to Amend.

Appellants never raised their Motion to Amend to the trial court until after Summary Judgment had been entered. Rule 60(b) is not a proper vehicle to raise issues that were never properly raised prior to judgment. Rule 60(b) is designed to permit courts to vacate judgments only in narrow instances of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misrepresentation; (4) void judgments; or (5) judgments that have been satisfied, released, etc. See Rule 60(b) SCRPC. Appellants make no claim that would satisfy any criteria under Rule 60(b). Instead, relying only on the clear minority position among other courts, Appellants suggest that this Court should permit the lower court to engage in a Rule 15 inquiry despite the fact that judgment has been entered against them and the issue was never properly raised. Such a construction of the South Carolina Rules of Civil Procedure would be contrary to principles of *res judicata* and finality of judgments and would contravene nearly a century of precedent from our appellate courts holding that issues must be "timely raised and ruled upon."² Furthermore, such a holding would encourage the practice of bringing claims raising various theories *seriatim*, and promote "judge shopping" in hopes of keeping cases alive after an adverse judgment has been entered.

Finally, the instant Motion for Leave should be denied because the Motion to Amend would be futile and amendment at such a late date would be extremely prejudicial to Respondents.

² See *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 188 (1939) ("[A]ll that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower Court and passed upon by that Court.")

STATEMENT OF THE CASE

This case arose out of a rear end automobile collision that occurred outside of Orangeburg in the westbound lanes of I-26 near Exit 154 when codefendant Lisa Velazques struck the Appellants' vehicle from the rear after he had slowed for traffic ahead on the interstate. (Ex. 1, Velazques Dep., p. 41:11–15). The accident occurred in broad daylight and Ms. Velazques offered no other explanation as to why she was unable to see traffic slowing ahead until it was too late to avoid the accident.

That same morning, and long before the accident, Cody Sox, a Harbison Community Association (“Harbison”) employee, picked up a load of sod that same morning at Super Sod. (Ex. 2, Sox Dep., p. 23:19-20). Before traveling to Super Sod, Sox verified that his trailer was adequate for the load. (Ex. 2, Sox Dep., p. 35:4–13; 96:23–25). Sox directed Super Sod’s field worker where and how to load the pallets on the Harbison trailer. (Ex. 2, Sox Dep., p. 69:6–8). The load consisted of two pallets of centipede sod, wrapped with stretch wrap. (Ex. 2, Sox Dep., p. 29:21–24). Sox did not have tie down straps with him, although he had intended to bring them with him. (Ex. 2, Sox Dep., p. 26:3–7). Super Sod’s sole involvement was that its employee loaded Harbison’s trailer with two pallets of sod. The sod was wrapped in plastic .7 mil stretch wrap. (Ex. 3, Livingston Dep., p. 65:14). The Harbison trailer was loaded in accordance with Sox’s instructions. (Ex. 2, Sox Dep., p. 69:6–8). After loading, Sox checked his tires and hitch; made sure the trailer looked balanced and verified the weight was balanced. (Ex. 2, Sox Dep., pp. 33:23-34:5).

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. The sod appeared in a safe and stable condition to Sox after it was

loaded. Sox knew that he was required to secure his own load. (Ex. 2, Sox Dep., pp. 61:23–62:12). 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. (Ex. 2, Sox Dep., pp. 26:3–7; 71:22–72:11). Sox asked Super Sod’s employee if he had tie down straps and was told no. (Ex. 2, Sox Dep., pp. 72:16–20; 73:7–8). He did not request that Super Sod tie down his load. (Ex. 2, Sox Dep., p. 71:13–15). Sox then made a decision to proceed without tying down the load. (Ex. 2, Sox Dep., p. 63:10–12).

The Harbison truck and trailer safely left the field where the sod was picked up; 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 his co-worker purchased lunch. (Ex. 2, Sox Dep., pp. 90:13–94:24). While there, Sox checked the load and noted that it was in the same condition in which it had been loaded. (Ex. 2, Sox Dep., p. 136:4–9). No sod had spilled. The sod had not shifted. The stretch wrap covering the pallets was intact. (Ex. 2, Sox Dep., p. 136:4–9). 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. (Ex. 2, Sox Dep., p. 136:4–9).

Once on the interstate, a tractor trailer veered into the Harbison truck and trailer’s lane. (Ex. 2, Sox Dep., pp. 21:2–22:8; 76:2–4; 105:9–13). The encroachment was so sudden that it caused Sox’s companion, Branham, to exclaim “Oh S—t.” (Ex. 2, Sox Dep., p. 124:8–21). Sox took sudden and evasive action running off the road and on to the shoulder. (Ex. 2, Sox Dep., pp. 103:14–104:11; 118:8–24). Due to the sudden evasive maneuver, Sox lost a portion of the sod from both pallets. (Ex. 2, Sox Dep., pp. 117:19–118:2). 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. (Ex. 2, Sox Dep., p. 101:20–23). Sox estimated he had traveled 3/10 of a mile onto the interstate before the incident occurred. (Ex. 2, Sox Dep., pp. 104:25–105:3). Sox promptly pulled over and stopped on the shoulder of the interstate after losing the sod and called 911. (Ex. 2, Sox Dep., pp. 21:23–22:8). Traffic continued to drive over the lost sod without incident. (Ex. 2, Sox Dep., p. 42:19–20). A fire engine eventually responded and blocked traffic in the right (slow) lane of the interstate so that the sod could be cleaned from the roadway. (Ex. 2, Sox Dep., p. 22:2–5).

The interstate traffic behind the loss of sod slowed 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. (Ex. 2, Sox Dep., pp. 47:24–25; 135:12–14; Ex. 4, Gleich Dep., p. 59:8–12).

Ms. Velazques admitted that she was at fault for the accident. (Ex. 1, Velazques Dep., p. 42:4–6). Velazques struck Oulla at a high rate of speed. (Ex. 1, 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 Appellants' vehicle. (Ex. 1, Velazques Dep., pp. 33:21–22; 54:17–18).

PROCEDURAL BACKGROUND

Appellants filed their Complaint on December 31, 2014,³ and the case was litigated for 19 months before Judge McMahon signed his order granting summary judgment on July 26, 2016.

³ Contrary to Appellants claim that the original Complaint alleged that Super Sod had breached a statutory duty (Appellants' Motion, p. 3), the original Complaint did not state such an allegation against Super Sod. (Appellants' Motion, Ex. A). This allegation was included in the proposed Amended Complaint (Appellants' Motion, Ex. B, p. 40, ¶ 31(d)).

Super Sod filed its Motion for Summary Judgment on May 6, 2016. The parties argued the Motion before Judge McMahon on June 29, 2016.

The afternoon before the hearing, at 3:24 pm, Appellants filed a Motion to Amend. (Appellants' Motion, Ex. B). The proposed Amended Complaint was modified in two respects. First, the proposed Amended Complaint included a reference to Section 56-5-4100 of the South Carolina Code as a particular basis to support Appellants' negligence cause of action (Appellants' Motion to Amend, Ex. B, p. 40, ¶ 31(d)). Second, the proposed Amended Complaint added a cause of action for breach of an implied warranty of merchantability. (Appellants' Motion for Leave, Ex. B, pp. 41–40, ¶¶ 32–40).

Both at the hearing before Judge McMahon and in their Memorandum in Opposition to the Motion for Summary Judgment (the “Memorandum”), Appellants argued that South Carolina Code § 56-5-4100 imposed a legal duty on Super Sod to secure sod 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 Appellants, by virtue of that statute or otherwise, and that its conduct was not the proximate cause of the Appellants' injuries. Judge McMahon granted summary judgment, holding that Super Sod did not owe a duty to the Appellants. (Appellants' Motion, Ex. E, p. 52). In his Order, Judge McMahon specifically addressed the application of Section 56-5-4100 (Appellants' Motion, Ex. E, p. 57–59).

However, Appellants did not argue, either in their Memorandum or in the lengthy oral argument to the Court, that summary judgment was premature or otherwise improper because they had just filed a Motion to Amend, or that the proposed Amended Complaint contained an

additional cause of action that might preclude summary judgment.⁴ After a year and a half of litigation, the case was ripe for summary judgment. Judge McMahon heard and evaluated the arguments and ruled. After Judge McMahon's ruling, Appellants filed their Rule 59(e) Motion. On November 18, 2016, Judge McMahon denied that Motion without a hearing. Judge McMahon's Order denying the Rule 59(e) motion was entered on December 2, 2016.

In the interim, on August 23, 2016, the parties appeared before Judge Goodstein related to the Motion to Amend. Judge Goodstein heard argument from Appellants and determined that the issue was properly before Judge McMahon because of the pending Rule 59(e) Motion. Judge Goodstein issued her written order on September 16, 2016. That Order was entered September 28, 2016.⁵ Judge Goodstein ruled that, because of the pending Rule 59(e) Motion, jurisdiction over the matter remained with Judge McMahon and that "the status of the Motion to Amend would be determined by his ruling." (Ex. 5, Appellants' Motion for Leave, p. 2). Appellants thereafter provided Judge McMahon with the Motion to Amend and significant briefing related to the Motion to Amend prior to his denial of their Rule 59(e) Motion. However, Appellants had never raised the issue to him, much less provided the memoranda to him, before Judge McMahon granted Summary Judgment. It was only after the judgment had been entered against them that the Appellants attempted to raise the issue.

⁴ Appellants have not cited to any reference in the record where they raised the Motion to Amend prior to judgment. Appellants attached only portions of the transcript of record before Judge McMahon (Appellants' Motion, Ex. D), but those portions do not include a reference to the Motion to Amend. The transcript is 96 pages and not included herewith for the sake of brevity. It does not contain such a reference. The entire record will be provided, if necessary, for the Court's analysis.

⁵ Appellants mistakenly state in their Motion for Leave that Judge Goodstein "never issued an order." (Appellants' Motion, p. 6). A copy of Judge Goodstein's Order is attached hereto at Exhibit 5.

ARGUMENT

I. APPELLANTS' MOTION FOR LEAVE SHOULD BE DENIED BECAUSE THEY HAVE NOT SET FORTH A BASIS FOR RELIEF UNDER RULE 60, SCRPC.

A. Appellants have not set Forth a Proper Basis to Vacate the Judgment Below.

Because the Appellants have failed to set forth a valid basis to vacate the judgment under Rule 60, the Court should not grant Appellants' Motion for Leave. A court may vacate a judgment under Rule 60(b) only in narrow circumstances. SCRPC Rule 60(b). While the decision to grant or deny a Rule 60(b) motion lies within the discretion of the trial judge,⁶ the criteria are narrow and provide only five bases, none of which the Appellants have asserted here:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b) SCRPC. A party seeking to set aside a judgment has the burden of presenting evidence entitling him to the requested relief. Auto Owners Ins., Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009) aff'd in part, rev'd in part, 405 S.C. 584, 748 S.E.2d 781; McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), aff'd 395 S.C. 85, 716 S.E.2d 887.

Here, Appellants do not argue that any of the enumerated criteria apply; thus this Court should not grant leave for the circuit court to consider a motion under Rule 60. Rather, Appellants

⁶ See Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 483 (2004) ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge.").

rely solely on the argument that the Motion to Amend should have been heard, despite the fact that judgment was entered against them before they raised the issue. This is not a sufficient basis to grant leave for the circuit court to consider a Rule 60 motion.

(i) There is no mistake, inadvertence, surprise, or excusable neglect.

Appellants do not argue that there was some “mistake, inadvertence, surprise or excusable neglect” in responding to the Motion for Summary Judgment or any other aspect of the case. Respondent’s Motion for Summary Judgment was filed after significant discovery and well in advance of the hearing. Appellants briefed the issues and presented affidavits and other exhibits. Appellants acknowledge communications in advance of the hearing with Respondent’s counsel that the proposed (though not filed) Motion to Amend would not result in a continuance of the June 29, 2016 hearing before Judge McMahon. Appellants do not claim they mistakenly thought the Motion to Amend had been filed or mistakenly believed Respondent had consented to the Motion to Amend. While Appellants were “extremely surprised” at the resulting judgment against them (Appellants’ Motion, Ex. G, p. 86, lines 4–9), this is not the “surprise” contemplated by Rule 60(b)(1).

Footnote 21 of Appellants’ Motion makes passing reference to “mistake and excusable neglect” in the circuit court’s “failure to issue a ruling” on the Motion to Amend. As an initial matter, the circuit court’s “failure” was no failure at all, because the Motion to Amend was never properly raised before it.⁷ However, even if the court had “mistakenly” failed to rule on the Motion to Amend, Appellants do not trigger the Rule 60(b)(1) requirements in order to make a “correction.” Although not addressed in this state, at least one Fourth Circuit decision construed Rule 60(b)(1) as providing relief from legal errors, but only in situations in which “the mistake

⁷ See *infra* Section II.

was clear on the record, and involved a plain misconstruction of the statute on which the action was grounded.” Compton v. Alton S.S. Co., 608 F.2d 96, 104–05 (4th Cir. 1979); see also, § 2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.) (“[R]elief will not be granted under Rule 60(b)(1) merely because a party is unhappy with the judgment. The party must make some showing justifying the failure to avoid the mistake or inadvertence.”). Therefore, the action of the lower court does not constitute the “mistake,” “inadvertence,” or “excusable neglect” contemplated by Rule 60(b)(1). Judge McMahon did not make a mistake of law or mistakenly overlook an issue that was properly raised to him before judgment was entered. Rather, Appellants did not raise their amended complaint issue before or during the hearing. In fact, Appellants waited until after the circuit court signed an order granting Respondent’s motion for summary judgment before bringing the Motion to Amend to the Judge’s attention. Appellants admit that they “planned to inform Judge McMahon of the filing of the motion to amend,” but never did. (Appellants’ Motion, pp. 4–5). “Planning” to raise an issue is not equivalent to actually raising the issue. Therefore, Appellants have simply not set forth any legitimate basis for the circuit court to consider vacating the judgment under subsection (1).

(ii) There is no asserted newly discovered evidence.

Appellants do not assert that they have acquired some new evidence that warrants vacating the judgment below, much less evidence that could not have been acquired with reasonable diligence during the 18 months this case was litigated prior to the summary judgment hearing. Cf. Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct App. 2008) (outlining elements to vacate judgment under Rule 60(b)(2) and determining criteria unmet).

(iii) There is no asserted fraud, misrepresentation, or other misconduct.

Appellants have not set forth any nefarious conduct that would support vacatur under Rule 60(b)(3). There was no chicanery that brought the parties to this juncture. Even on the issue of the Motion to Amend itself, as Appellants' counsel acknowledged at the hearing before Judge Goodstein, Respondent verified with Appellants *before* the summary judgment hearing that the proposed Motion to Amend would not affect the hearing. Appellants had the opportunity, if they so chose, to move to continue that hearing so that they could raise the motion to amend issue. (Appellants' Motion, Ex. G, p. 86, lines 9–19). The issue was on the table; there was no subterfuge. Instead, Appellants elected to go forward with the scheduled hearing. There is nothing for the circuit court to consider under Rule 60(b)(3).

(iv) The judgment is not void and has not been satisfied.

Rule 60(b) subsections (4) & (5) are not applicable and Appellants have not set forth any basis to vacate the judgment under these subsections.

B. An Untimely Motion to Amend is not a Sufficient Basis to Vacate a Judgment Under Rule 60 SCRPC.

Judge McMahon's July 26th Order Granting Summary Judgment was entered August 2, 2016, ending the case in the circuit court as to Super Sod, with the exception of the Rule 59(e) Motion. The Motion to Amend was never properly raised before the judgment was entered. Subsequent attempts to raise it after judgment were ineffective. The Complaint could not thereafter be "amended" because it was, and is, a nullity.

Although South Carolina does not have a reported appellate decision addressing the intersection of Rules 15, 59, and 60, federal courts have construed the parallel Federal Rules of

Civil Procedure for post-judgment amendments.⁸ As explained by leading commentators on the Federal Rules:

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 59 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).

Among federal courts, the *clear majority* holds that if a party seeks to amend a complaint after judgment, the party must *first* satisfy the more stringent Rule 59(e) or 60 standard before the court will evaluate the proposed amendment under the more liberal Rule 15 standard to amend complaints. See Fisher v. Kadant, Inc., 589 F.3d 505 (1st Cir. 2009) (explaining “[i]n the instant case, the plaintiffs did not file a motion to amend their complaint until December 4, 2008. That was well after November 19, 2008, when the district court entered judgment. Consequently, the district court lacked authority to entertain the motion to amend under the aegis of Rule 15(a) without first setting aside the judgment under some rule geared to the accomplishment of that task, say, Rule 59(e) or Rule 60(b).”); Williams v. Citigroup, 650 F.3d 208, 213 (2nd Cir. 2011) (holding

⁸ 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, SCRPC, (2d. 1985)); See also Maybank v. BB&T Corp., 416 S.C.541, 566, 787 S.E.2d 498, 511 (2016) (“In construing the [SCRPC] 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 SCRPC because the language of the rules was the same). Unisun Insurance v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000) (“In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.”).

that the standards developed for evaluating post judgment motions place a significant emphasis on the “value of finality and repose,” and that it would be contradictory to entertain a motion to amend a complaint under the liberal Rule 15 standard after judgment is entered; however, a court *could* consider the nature of the proposed amendment when deciding whether to vacate a judgment, but the court may use its discretion exactingly when the movant had an opportunity to assert the amendment earlier, but waited until after judgment before requesting leave); Ahmed v. Dragovich, 297 F.3d 201, 208–09 (3rd Cir. 2002) (“Although Rule 15 vests the District Court with considerable discretion to permit amendment ‘freely...when justice so requires,’ the liberality of the rule is no longer applicable once judgment has been entered. At that stage, it is Rules 59 and 60 that govern the opening of final judgments.”); Thorn v. Medtronic, Inc., 624 Fed. Appx. 433, 435 (6th Cir. 2015) (“When a party seeks to amend a complaint after an adverse judgment, it...must shoulder a heavier burden. Instead of meeting only the modest requirements of Rule 15; the claimant must meet the requirements for reopening a case established by Rules 59 or 60.”); Vicom, Inc. v. Harbridge Marchant Serv., Inc., 20 F.3d 771, 784 n.13 (7th Cir. 1994) (“We note...that we have stated on previous occasions that ‘the presumption in favor of liberality in granting motions to amend [under Rule 15(a)] is reversed after judgment has been entered.’” (citing First Nat’l Bank v. Continental Ill. Nat’l Bank, 933 F.2d 466, 486 (7th Cir. 1991)); In re Netflix, Inc. v. Securities Litigation, 647 Fed. Appx. 813, 816 (9th Cir. 2016) (“Here, because Plaintiffs have not cleared the high bar necessary to warrant relief under Rules 59 or 60, the district court had no need to even consider Plaintiff’s Rule 15 motion.”); The Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1087 (10th Cir. 2005) (“This court has repeatedly and unequivocally held that ‘once judgment is entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed R. Civ. P. 59(e) or 60(b)’ ‘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 favoring finality of judgments and the expeditious termination of litigation.’ (citation omitted) Moreover, even though Rule 15(a) states that ‘leave [to amend] shall be freely given when justice so requires,’ ‘this presumption is reversed in cases, such as here, where a plaintiff seeks to amend a complaint after judgment has been entered and a case has been dismissed.’” (citation omitted)); Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telecomm. Net., Inc., 571 F. Supp. 2d 59, 61 (D.D.C. 2008) (“Once a final judgment has been entered, a motion to amend a complaint under Rule 15(a) should not be granted ‘unless the plaintiff “first satisfies Rule 59(e)’s more stringent standard” for setting aside that judgment.’”).

One of the leading cases addressing the intersection of these Rules is the Fisher case from the First Circuit Court of Appeals. The facts of this case are analogous to those in Fisher because there the movant argued that “they made a passing request for leave to amend in the event that the court found the complaint wanting.” Fisher, 589 F.3d at 509. The district court did not refer to the request for leave to amend the complaint when it granted defendants’ motion to dismiss; however, the district court later ruled that because the movant’s “had initially raised the possibility of amending the complaint before dismissal,” then the post-judgment motion for leave to amend should be treated “as a Rule 15(a) motion to amend the pleadings before judgment.” In response, the First Circuit held that:

For present purposes, then, the controlling question is whether a contingent request to amend a complaint, contained in an opposition to a motion to dismiss, trumps the final judgment rule and reinstates the liberal standard of Rule 15(a) for the purpose of adjudicating a motion for post-judgment relief, the object of which is to put into play a new version of the complaint. We hold that it does not.

Id. (emphasis added). The facts in Fisher were even more in favor of amendment than those here because there was at least a reference to a possible amendment made to the trial court, even if only a “passing” reference. Here Appellants did not even make a “passing reference” to Judge

McMahon regarding a possible amendment before judgment was entered. Instead, Appellants concede that they “planned to inform Judge McMahon of the filing of the Motion to Amend,” but did not. (Appellants’ Motion, p. 5). Indeed, in this case the record from the hearing is silent as to *any* reference to the Motion to Amend. However, as the First Circuit Court of Appeals held, the Rule 15 standard is inapplicable even in such a case, and Appellants would still be required to satisfy the more stringent Rule 60 standard *before* reaching a Rule 15 analysis.

The courts of our sister state of North Carolina, interpreting nearly identical rules of civil procedure, follow the reasoning of the majority of federal circuits. See *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 90, 398 S.E.2d 628, 634 (1990) (“[O]nce judgment is entered amendment of the complaint is not allowed unless the judgment is set aside or vacated under Rule 59 or Rule 60.”); *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987) (holding that after dismissal of plaintiff’s complaint, the trial court was no longer empowered to grant plaintiff leave to amend under Rule 15(a) unless plaintiff were to first reopen the case under Rules 59(e) or 60).

The majority position makes the most sense and is in accord with South Carolina’s policy favoring finality of judgments, giving them *res judicata* effect. Allowing vacatur on a Rule 15 standard would be contrary to the policy favoring finality and would create uncertainty for litigants who may be exposed to *seriatim* amendments.⁹

⁹ While Appellants “expect that the one year deadline [applicable to Rule 60(b)(1-3)] would be imposed,” there is no such limitation under Rule 60 for vacating judgments because of a proposed amendment. This speaks to the fact that the Rule 60(b) analysis should not be collapsed into a single analysis under the Rule 15 standard. Opening the door to this practice would mean that such motions could be brought subject only to the more ambiguous “reasonable time” limit.

Not only does this position make the most sense, but the cases that Appellants rely on from the Fourth Circuit are distinguishable from the present case. Further, the Fourth Circuit has limited those holdings. Appellants primarily rely on Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) and Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462 (4th Cir. 2011). In Katyle, the Fourth Circuit addressed a “futile” proposed third amended complaint and affirmed the district court’s analysis in disallowing the amendment. The Katyle court noted that in considering the amendment, the court “need not concern itself with [Rule 59 or 60 FRCP’s] legal standards” because the proposed amendment did not even reach the lower threshold of Rule 15. 367 F.2d at 471. Thus, the court did not have to reach a more stringent Rule 59 or 60 analysis.

In Laber, the Fourth Circuit held a *pro se* litigant’s post judgment amendment should be considered under a Rule 15(a) analysis where there had been “no significant discovery” prior to summary judgment and the defendant “made no argument that it would be prejudiced if . . . [leave to amend was granted].” Laber, 438 F.2d at 428. Here, however, substantial discovery had taken place in the 18 months the case was litigated prior to the summary judgment hearing. Further, as indicated below, Super Sod has argued and demonstrated extreme prejudice. Therefore the holding in Laber is not persuasive.

Two other cases from the Fourth Circuit limit any broad pronouncement that the Court need only consider the liberal standards of Rule 15 in considering a post judgment motion to amend. First, In Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., the Fourth Circuit held that “[a]lthough Rule 15(a) indicates leave to amend should ‘be freely granted when justice so requires,’ the rule does not afford plaintiffs a tool to engage in the litigation of cases one theory at a time.” 974 F.2d 502 (4th Cir. 1992). The court explained, “[t]rying cases one claim at a time is both unfair to the opposing party and inefficient for the judicial system. . . .

We will not allow Rule 15(a) to afford Omni an avenue to escape the consequences of its earlier decision in how to litigate this case.” Id. at 506.

More recently, the Fourth Circuit again limited the rule the Appellants propose here. See Calvary Christian Center v. City of Fredericksburg, Va., 710 F.3d 536 (4th Cir. 2013). There, the Fourth Circuit held that the district court had not abused its discretion in denying a church’s post judgment motion to amend its complaint. The Fourth Circuit explained that while the church sought amendment under Rule 15, “its argument fails to account for the fact that when the district court ruled on its motion, the complaint that [church] sought to amend had already been dismissed and that the order of dismissal had become final and unappealable.” The Court noted that it was improper to consider such an amendment under the Rule 15 standard because the Appellant had not made a Rule 60 motion in the district court. Appellants failed to make such a motion here as well, and contrary to Appellants’ suggestion, the Fourth Circuit in Calvary Christian Center did not deem it appropriate to remand the case to the district court for the purpose of a Rule 60 motion. None of the cases cited by Appellants suggests the procedure that they attempt to advance here – to obtain leave from the Court of Appeals to remand for a Rule 60 motion that was never previously made to the trial court so that the court can consider a motion to amend that was never brought to the court’s attention until after the judgment.

Furthermore, the Fobian v. Storage Technology Corp. case that Appellants suggest is proper guidance does not extend Rule 15(a) so far as Appellants would have this court extend it. 164 F.3d 887 (4th Cir. 1999). That case dealt with a traditional Rule 60 motion that was originally brought in the district court and was denied by the district court on the basis that it lacked jurisdiction. That case did not involve a post judgment motion to amend at all. Rather, the plaintiffs there sought relief from the judgment based on “newly discovered evidence, fraud,

misrepresentation, and other misconduct.” Fobian, 164 F.3d at 889. The case simply stands for the proposition that the district court does indeed have jurisdiction to consider a post-appeal Rule 60 motion in federal court, a rule that deviates from practice in our courts based on the following language from SCRCF Rule 60: “During the pendency of an appeal, leave to make the motion must be obtained from the appellate court.”

II. THE COURT SHOULD DENY APPELLANTS’ MOTION FOR LEAVE BECAUSE THE MOTION TO AMEND WAS NEVER PROPERLY RAISED TO THE TRIAL COURT.

Appellants argue that this Court should permit the circuit court to consider their Rule 15 Motion to Amend under the rubric of a Rule 60 motion to vacate. However, such a procedure would be contrary to the long line of cases that hold a matter must *first* be raised to the lower court in order to obtain post judgment relief. The circuit court did not consider the Motion to Amend in considering the Rule 59(e) motion *because this issue was not argued or otherwise presented to the court prior to the Summary Judgment.*

After 18 months of litigation and nearly two months after Super Sod’s Motion for Summary Judgment was filed, Appellants filed – for the first time – their Motion to Amend mere minutes before the summary judgment hearing was set to start. At the hearing Appellants argued in opposition to two Motions for Summary Judgment, one by Harbison and Sox and the other by Super Sod, without informing Judge McMahon of their Motion to Amend and without requesting a continuance. Further, the Motion to Amend was not raised by the Appellants in their Memorandum in Opposition to Super Sod’s Motion for Summary Judgment. Appellants had ample time and opportunity to raise this issue prior to the court’s ruling granting Super Sod’s Motion for Summary Judgment. However, Appellants failed to do so.

The South Carolina Supreme Court has held that “a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (1990) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier.”) (citing Natural Res. Def. Counsel, Inc. v. U.S.E.P.A., 705 F. Supp. 698, 701 (D.S.C. 1989)). Similarly, in Patterson v. Reid, the Court of Appeals held that a defendant could not argue waiver as a basis to deny a new trial *nisi additur* when the defendant failed to make a waiver argument prior to its 59(e) motion. 318 S.C. 183, 456 S.E.2d 436. The Patterson case involved a negligence claim arising out of a car accident. Id. at 184, 456 S.E.2d at 437. The Plaintiff was awarded \$500 in damages; however, the trial judge granted plaintiff’s motion for a new trial *nisi additur* and awarded damages of \$7,600. Id. Defendant moved to amend the judgment, claiming that plaintiff had waived her right to move for a new trial *nisi additur*. Id. The trial judge denied defendant’s motion. Id.

The defendant in Patterson claimed that, in closing argument, plaintiff’s attorney stated “I will not argue with your verdict.” Id. According to defendant, this was a waiver of plaintiff’s right to move for a new trial *nisi additur*. The Court of Appeals stated that “[i]nitially, we question whether [defendant] properly preserved the issue.” Id. at 185, 456 S.E.2d at 437. The Court noted that defendant’s memorandum in opposition to plaintiff’s motion for a new trial “only calls the court’s attention to the jury statement but does not specifically assert or argue waiver as a basis to deny the additur.” Id. According to the Court, “[defendant] does not *argue* waiver until she files a Rule 59(e) motion. A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.” Id. (emphasis added).

Similarly to Patterson, Appellants here did not “argue” their proposed amended complaint until their 59(e) motion. Even the Rule 59(e) motion itself contained no more than a “passing reference” that they had filed the Motion to Amend (Appellants’ Motion, Ex. F, p. 65 n. 1.) Appellants did not file their Motion to Amend until minutes before the summary judgment hearing was set to commence. Furthermore, Appellants did not address the amended complaint issue in their Motion in Opposition to Super Sod’s Motion for Summary Judgment, and more importantly, Appellants failed to even mention the amended complaint issue until *after* the summary judgment hearing had ended.

III. EVEN IF THE COURT WERE TO CONSIDER THE MOTION TO AMEND, IT SHOULD BE DENIED

Appellants argue at pages 11–14 of their Motion that they have a “good faith, colorable argument to the lower court that the motion to amend the complaint should be granted.” Recognizing that this Court is not now deciding that issue on its merits, nevertheless, the procedural history of this case and the merits of the proposed amendment militate against granting leave to file a Rule 60 motion in the trial court.

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 extensive discovery that had been completed, the two scheduling orders that had been entered,¹⁰ the imminent trial, 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 Court should not grant leave for the Appellants to now present their Motion to Amend to the circuit court.

¹⁰ Ex. 6, Scheduling Order of January 21, 2016 and Amended Scheduling Order of June 1, 2016.

A. The Undue Delay Prejudices Super Sod and Militates in Favor of Denial of Appellants' Motion.

Appellants waited 18 months to file the Motion to Amend and proposed Amended Complaint. The original Scheduling Order in the case had already been amended to push back the trial date from June 15th, 2016 to October 10, 2016. (Ex. 6, Scheduling Orders). Super Sod's Motion for Summary Judgment, outlining deficiencies in the Appellants' theories of recovery, had been filed for two months before Appellants' 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 and the parties were preparing for an imminent trial. Defending against a new warranty theory with less than three months to prepare a defense would have been extremely prejudicial. Further, the stretch wrap that surrounded the sod had been destroyed and no photographs, testing, or other data related to the stretch wrap was available. It is hard to conceive of a more prejudicial position to allow such an amendment.

While no reported appellate decision in South Carolina has addressed the propriety of a motion to amend after summary judgment has been filed, once again, federal cases are instructive.¹¹ "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."

¹¹ See *infra* note 8.

Id. (internal citations omitted). Here, the facts are even more egregious because the Motion to Amend was filed on the same day and only minutes before the hearing on the Motion for Summary Judgment. Based on these facts, this late amendment would have been prejudicial and the Court should not grant leave for the circuit court to consider the motion.

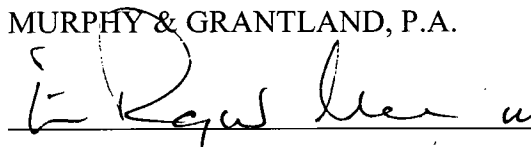
B. The Proposed Amendment would be Futile and Militates in Favor of Denial of Appellants' Motion.

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). Here the proposed amendment is futile. First, the statute that the Appellants sought to add to their complaint did not impose a legal duty on Super Sod. In fact, the circuit court made this ruling in part because the Respondent argued this position as part of the basis for its Motion for Summary Judgment. Further, the claim for breach of implied warranty of merchantability cannot succeed because there was no "implied warranty" that unsecured cargo will not come loose during transport. The sod purchaser, Harbison and its employee Sox, 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. Harbison and Sox did not rely on Super Sod to strap the sod to the trailer. Sox intended to bring its own straps but simply forgot. There can be no "warranty" implied for load securement when they are specifically not part of the sale. There was no "warranty" that the sod would withstand the sudden and evasive maneuver that the defendant took to avoid a collision. Thus, the Court should not grant leave for Appellants to now raise this issue to the trial court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Appellants' Motion for Leave to file Motion in the Court of Common Pleas pursuant to Rule 60, SCRPC.

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*Attorneys for Defendant Patten Seed Company d/b/a
Super Sod*

Columbia, South Carolina
February 13, 2017

Exhibit 1

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

DEPOSITION OF LISA ANNE MEYER

PRICE OULLA AND BONNIE OULLA,

Plaintiffs,

vs. CASE NO. 2014-CP-38-1590

LISA VELAZQUES, HARBISON
COMMUNITY ASSOCIATION, INC.,
CODY SOX, AND PATTEN SEED
COMPANY, D/B/A SUPER-SOD,

Defendants.

DEPONENT: LISA ANNE MEYER

DATE: SEPTEMBER 30, 2015

TIME: 10:00 AM

LOCATION: YARBOROUGH APPELATE LAW FIRM
CHARLESTON, SOUTH CAROLINA

REPORTED BY: CHERIE J. ANDERSON, RMR, RPR, CRR
NCRA REGISTERED MERIT REPORTER
CLARK & ASSOCIATES, INC.
P.O. Box 73129
Charleston, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 Q What specifically do you remember as you sit
2 here right this second?

3 A Just basically getting out of the vehicle -- I
4 mean, driving down the highway, there was a sudden
5 stop of cars, and I hit my brakes to try to stop.
6 And I didn't stop in time. And then I only remember
7 getting out of the vehicle and going to the hospital.

8 Q When the crash occurred, you were trying to
9 set your GPS, correct?

10 A It might have been before that. I had just,
11 you know, looked over, because I don't constantly
12 stare at the GPS while I'm setting it. I keep my
13 eyes on the road, and I'll just look over and hit
14 something real quick and then I look back at the
15 road. So it takes me a while to program it.

16 Q But when this crash took place --

17 A Uh-huh.

18 Q -- on this day, you were trying to set your
19 GPS, correct?

20 A Before the accident.

21 Q You weren't looking at the road --

22 A Not at the time of the accident, no.

23 Q Was there anything impeding your view out of
24 your window that day?

25 A No.

1 and trying to get on with, I guess, his life. You
2 know, repair his life, I guess.

3 Q Had you been paying attention and watching
4 that road closely, you could have stopped your car,
5 couldn't you?

6 A I was paying attention to the road. Like I
7 said, there was a sudden stop --

8 MR. GRIFFITH: Objection.

9 A -- and I could not stop in time.

10 Q So what do you think? That you were driving
11 too close to the car in front of you?

12 A No. I had like a car space in between us or
13 two car spaces.

14 Q Were you just driving too fast?

15 A I was driving the limit.

16 Q But you weren't driving in a way where you
17 could stop your vehicle if something happened, were
18 you?

19 A Not in a sudden stop like that, no.

20 Q Did you call and report this to your insurance
21 company or did they call you?

22 A I called them after the accident.

23 Q And we talked about you gave a recorded
24 interview?

25 A Yes.

1 Q Now, you were of sound mind when you gave that
2 interview, correct?

3 A Yes.

4 Q And as we discussed, you told your insurance
5 company at that time it was your fault, correct?

6 A Yes. I thought -- I believed it was.

7 Q And at some point, you understood that there
8 were serious injuries related to this, correct?

9 A Not at the time. I did not know that there
10 was serious injuries when I reported it.

11 Q But at a later date, you found out from the
12 insurance company there were serious injuries related
13 to this, correct?

14 A Yes.

15 Q You thought that your insurance company was
16 going to protect you, correct?

17 A Yes.

18 Q You thought your insurance company was going
19 to pay the other driver, correct?

20 A Yes.

21 Q And that's what you expected them to do?

22 A Yes.

23 MR. APPLEGATE: Let me take a quick break.

24 (A recess was taken.)

25 Q Ma'am, I hate to repeat this. Let me ask you

1 A I do. I always keep my eyes on the road.

2 Q So you've never taken your eyes off the road?

3 A No.

4 Q So when you adjusted your GPS on the date of
5 the accident, you're adjusting it and programming it,
6 you're doing that and you're also at the same time
7 keeping your eyes on the road?

8 A My GPS is set up right here close to where I
9 could see my vision [sic].

10 Q All right.

11 A And I could go back and forth like seconds. I
12 don't constantly keep my eyes off the road, no.

13 Q Well, now it's constantly. You said never
14 take your eyes off the road. So now do you take your
15 eyes off the road some?

16 A I guess you would say maybe that time.

17 Q That time, you took your eyes off the road?

18 A Yes.

19 Q I know we have the recording from the
20 interview, and I believe one of the last questions
21 Mr. Applegate was -- you were truthful at the time of
22 your statement, correct?

23 A Yes.

24 Q And you're being truthful today, correct?

25 A Yes.

Exhibit 2

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

DEPOSITION OF CODY T. SOX

PRICE OULLA AND BONNIE OULLA,

Plaintiffs,

vs.

CASE NO. 2014-CP-38-1590

LISA VELAZQUES, HARBISON
COMMUNITY ASSOCIATION, INC.,
CODY SOX, AND PATTEN SEED
COMPANY, D/B/A SUPER-SOD,

Defendants.

DEPONENT: CODY T. SOX

DATE: SEPTEMBER 30, 2015

TIME: 1:00 PM

LOCATION: YARBOROUGH APPLGATE LAW FIRM
CHARLESTON, SOUTH CAROLINA

REPORTED BY: CHERIE J. ANDERSON, RMR, RPR, CRR
NCRA REGISTERED MERIT REPORTER
CLARK & ASSOCIATES, INC.
P.O. Box 73129
Charleston, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 54 heading towards Columbia on 26.

2 Right after getting off the ramp and making
3 our way into the slow lane of I-26, we started
4 building up speed, and I got to about 48 or 50 miles
5 an hour when a large semi with a -- some -- it was a
6 blue-colored trailer began swaying just a little bit,
7 taking over our lane a little. Nothing major, but it
8 moved over in our lane enough where we would have
9 struck the back of it.

10 I then let off the gas and adjusted 3 to
11 4 feet to the right, trying to go into the emergency
12 lane so we wouldn't hit this trailer. And at that
13 time, our trailer began to sway, almost fishtail a
14 little bit. I kept it under control in the slow lane
15 and then pulled the vehicle off into the emergency
16 lane.

17 At that time, I looked back and noticed that
18 there was -- half a pallet of sod from the trailer
19 had rolled off the back of it into the slow lane of
20 I-26. No cars were hit. The left lane of traffic
21 kept moving. The right lane slowed, and people
22 actually drove over some of the sod.

23 I called -- I made sure Corey was okay. I
24 called 911. They dispatched me over to the trooper's
25 line, which at the time, the phone went dead. I

1 called back and -- to dispatch, and they dispatched
2 two fire engines -- or a fire engine and another
3 emergency fire truck; it was a large F-250,
4 something -- that style truck, to the scene, where
5 they blocked the slow lane for about 40 to 50 yards,
6 40, 50 -- yeah, 40, 50 yards, so that we could then
7 remove the sod from the road and traffic could
8 continue.

9 Q Let me pause you right here. All right.
10 We're going to come back to that point after where
11 the fire truck came. Okay.

12 Let me try to just go back and ask you a
13 couple detailed questions about your morning. Okay?

14 A Okay.

15 Q Back to the beginning, the first thing you did
16 when you arrived at work -- and that was around
17 8:00 --

18 A 6:30.

19 Q 6:30. Okay. You-all had a meeting with the
20 crew?

21 A Yes.

22 Q And do you know specifically at all what was
23 discussed that day?

24 A The group was supposed to work on concrete,
25 and me and Corey were supposed to go pick up the sod.

1 Q And Corey, again, he was another maintenance
2 worker, but you were in charge of him?

3 A Yes.

4 Q And so as far as any kind of direction related
5 to your task for the morning, that direction was
6 provided by -- you were the leader of that --

7 A Yes.

8 Q -- event.

9 Had you ordered the sod yourself?

10 A Yes.

11 Q And so you had called the Super-Sod, the local
12 Super-Sod, and asked them to place an order for two
13 pallets?

14 A Yes.

15 Q Did you ask for it to be specifically prepared
16 in any manner?

17 A No.

18 Q Tell me what you ordered.

19 A I ordered two pallets of Centipede grass or
20 sod.

21 Q And how did you expect to pick it up?

22 A They instructed me that I could bring a
23 trailer down and they would load it on.

24 Q Was there any discussions at that time about
25 how it was going to be loaded or what you-all were

1 or anything of that nature?

2 A Yes.

3 Q Did you grab any type of straps or bungee
4 cords or any other kind of --

5 A No.

6 Q -- devices that you could use to tie down?

7 A No.

8 Q So we're going back to Super-Sod. You make
9 your payment; they tell you where to go; you go a
10 mile and a half down the road. Correct?

11 A Yes.

12 Q You get there, hand them your payment slip?

13 A Yes.

14 Q And who did you speak to there?

15 A It was a black gentleman. I do not know his
16 name.

17 Q Do you recall what he looked like at all?

18 A Skinny, about 5'8. He was sitting on the
19 actual piece of equipment that loaded the tractor --
20 or loaded the sod.

21 Q What was that piece of equipment? Do you
22 know?

23 A I don't know the name of it.

24 Q And I'm guessing; I'm not good with this,
25 either: Would it be like a front loader with the

1 A Yes.

2 Q And what did they do? Did Super-Sod drive up
3 on there?

4 A Super-Sod drove up on there all the way to the
5 actual back of the trailer.

6 MR. TINSLEY: Can he mark that where he just
7 pointed?

8 Q I'm going to get you to follow-up on that
9 question and mark where -- I guess the first question
10 is, where did they drive to on here? Did they just
11 drive so the wheels were still on these sort of wheel
12 racks?

13 A Yes.

14 Q And then where did they drop the first pallet
15 of sod? Can you do an approximate? Put like a
16 number 1 for the first pallet.

17 A (The witness writes.)

18 Q And they also put a second pallet on there?

19 A Yes.

20 Q Where did they put the second pallet of sod?

21 A The second pallet of sod was placed behind the
22 first pallet, but before they placed the second
23 pallet, they used their machine to push the first
24 pallet over the axle.

25 Q So is the way it was set up was that the two

1 Q Did the wrapping go down to around the part of
2 the wood?

3 A I don't recall.

4 Q Once it was loaded on there, did you then
5 close the rear of the trailer?

6 A Yes.

7 Q Was that you or was that Corey?

8 A It was both of us.

9 Q And were there any other conversations you had
10 with any employees of Super-Sod at that time?

11 A Yes.

12 Q What were the conversations at that time?

13 A We asked how -- if we needed to take a certain
14 route to leave the loading area.

15 Q And they directed you out of the facility?

16 A Yes.

17 Q Did they tell you that the pallets were safely
18 stowed on the trailer and safe for you to transport
19 as they were?

20 A I don't recall.

21 Q Before you left, did you do anything else?

22 A No.

23 Q Can you tell me everything you did do at that
24 time to make sure that the two newly loaded pallets
25 of sod were secure on this trailer before getting

1 back out onto the road?

2 A We checked the tires on the trailer, checked
3 the hitch, and made sure the trailer looked balanced;
4 there was no weight disproportionate to one side or
5 the other.

6 Q Did you attempt to use any type of rope or
7 string or bungee to tie these pallets down?

8 A No.

9 Q Was the bed of the trailer clean and free of
10 debris?

11 A Yes.

12 Q Other than the pallets?

13 A Yes.

14 Q And had you cleaned it prior to use this day
15 or --

16 A Yes.

17 Q So as you arrived, the bed was completely
18 clean?

19 A Yes.

20 Q You placed the pallets. Was there any debris
21 left around the pallets at that time?

22 A No.

23 Q And again, they placed them, again, somewhat
24 over the axles; is that correct?

25 A Yes.

1 Q Did you know how much weight you were
2 carrying?

3 A No, not approximately.

4 Q Did you do any analysis to make sure that this
5 was a proper weight compared to the load you had in
6 the truck and the load on the trailer?

7 A Yes.

8 Q What was your analysis?

9 A We -- the trailer was able to carry
10 4,000 pounds -- or 14,000 pounds. And we were told
11 that -- I looked up on the internet that the two
12 stacks of sod did not equal 4,000 -- or
13 14,000 pounds.

14 Q And before we move on to the next part of the
15 trip, just to verify, neither you nor anyone from
16 Super-Sod did anything to fasten or secure these
17 pallets onto the trailer before you left?

18 A No.

19 Q You didn't try to test the strength of the
20 wrap or determine whether these rolls of sod were
21 safely on the top of the pallet?

22 A No.

23 Q Did you see anyone from Super-Sod test or
24 manipulate the sod in any way, shape, or form to make
25 sure that it was securely in the wrapping?

1 believe you were half a mile away from the on-ramp?

2 A Yes.

3 Q How far back at that point was the rolls of
4 sod?

5 A 10 yards from our trailer.

6 Q And how far did that go? I think you said
7 50 feet?

8 A It's 30 to 40 feet of small rolls. I guess
9 two or three rolls at a time were in piles.

10 Q At that time once you looked back, saw the
11 rolls in the highway, you guys exited the vehicle?

12 A Yes.

13 Q Did you make a call before you exited the
14 vehicle or after?

15 A I was calling as we were exiting the vehicle.

16 Q And what phone were you using then?

17 A I believe it was the work phone, the Harbison
18 phone.

19 Q How many cars ran over the sod?

20 A Two or three.

21 Q And then had you put on your flashers?

22 A Yes, as well as my light bar that's on top of
23 the work truck.

24 Q And so traffic continued to move --

25 A Yes.

1 A One other fireman, yes.

2 Q How long did that take?

3 A It took maybe five minutes.

4 Q Did you-all put it all back on the trailer?

5 A No. We threw it into the grass on the side of
6 the interstate.

7 Q And then what did you do at that point?

8 A We then gave the fireman our license-plate
9 information.

10 Q And then what?

11 A And then the fireman turned around and went
12 the opposite direction.

13 Q Did you have a conversation with him at that
14 time?

15 A Other than give him the information for our
16 vehicle, no.

17 Q And so he took your information. Did he go to
18 write you a ticket or was he going to respond to the
19 other incident?

20 A They started talking on the radio and then
21 went the opposite direction. We didn't exactly know
22 what was going on. Somebody yelled, there's a --
23 there's another incident. And that's all they did.

24 Q Did you hear it? Did you hear the crash?

25 A No.

1 vehicle under proper control, correct?

2 MR. DOWLING: Object to the form.

3 A Could you repeat the question?

4 Q You agree that day you did not keep your
5 vehicle under proper control?

6 A I don't understand the question.

7 Q Well, on the day of the accident, you did not
8 keep your vehicle under control?

9 A Yes.

10 Q You agree with that?

11 A Yes.

12 Q You have a duty to anticipate making evasive
13 maneuvers, maneuvers while you're out on the road,
14 correct?

15 A Yes.

16 Q And as part of that duty to anticipate, you
17 had a duty to make sure that your load was fastened,
18 correct?

19 A I don't know.

20 Q Well, you understand what the law is in
21 South Carolina, correct?

22 A Yes.

23 Q And you understand the law requires you to
24 make sure that every load is fastened so that nothing
25 can fall off in the event of an evasive maneuver, in

1 the event that your trailer does begin to wobble?

2 MR. DOWLING: Object to the form.

3 Q Correct?

4 A Correct. Yes.

5 Q And you understand that, under the law, you
6 violated that, correct?

7 MR. DOWLING: Object to the form.

8 A Can you repeat it?

9 Q That you violated the law by not fastening the
10 load. You understand that?

11 A Yes.

12 Q Have you thought about what you could have
13 done differently that day to have avoided this
14 accident?

15 A Yes.

16 Q What was that?

17 A) I could have stayed in the lane and tried to
18 drive straight and drive out of the wobble of the
19 trailer.

20 Q Would that have kept the sod on the trailer?

21 A I don't know.

22 Q Could you have fastened the load?

23 A Yes.

24 Q Could you have researched and made sure that
25 you were actually putting the load on in a way that

1 is consistent with the trailer's use, meaning made
2 sure that the weight of the load was appropriate for
3 that trailer?

4 A Yes.

5 Q Would you agree with me that you really made a
6 conscious decision not to secure the load before you
7 left Super-Sod?

8 MR. DOWLING: Object to the form.

9 A Could you repeat that?

10 Q You made a decision not to secure that load
11 before you left Super-Sod?

12 A Yes.

13 Q Had you had bungees and lines available to
14 you, you had no intent on using them?

15 A No.

16 Q Can you go back and tell me about your family.
17 Tell me the names of your family members, cousins,
18 and that kind of thing in South Carolina.

19 A I have several. Parents are Tim and Cheryl
20 Sox. I have two brothers, Luke and Cooper Sox.

21 Q Where do Tim and Cheryl live?

22 A West Columbia.

23 Q And where do your brothers live?

24 A Luke lives in Charleston; Cooper lives in West
25 Columbia.

1 the trailer, and then you said they used their
2 machine to push them forward. Is that correct?

3 A Yes.

4 Q Did you have any direction or give any
5 direction on where to put the pallets?

6 A Yes.

7 Q What did you tell them?

8 A Over the two axles.

9 Q And how come you said you wanted them over the
10 two axles?

11 A You wanted -- I wanted to distribute the
12 weight over the tires of the trailer instead of
13 having it on one end or the other.

14 Q And how did you know that that's how you
15 wanted to load the trailer?

16 A That's how I loaded trailers before in my
17 life.

18 Q And who taught you that?

19 A Various people.

20 Q And I guess I'm wondering where you got that
21 training from.

22 A Coworkers, family members, other
23 construction-type people.

24 Q And so it was you who directed where that
25 pallet should be?

1 with?

2 A Nothing.

3 Q Well, knowing that you could have fastened it
4 down, why didn't you take something? You didn't have
5 any straps at Harbison?

6 A Yes, we had straps at Harbison.

7 Q And you didn't think to take them?

8 A We -- could you repeat the question?

9 Q You didn't think to take straps with you? I
10 mean, you're going to -- I moved my daughter to
11 school a couple weeks ago. I took some straps to
12 make sure that the bed stayed in the trailer I had.
13 You didn't think to take straps with you that you
14 were going to be carrying a load back up the
15 interstate?

16 MR. DOWLING: Object to the form.

17 A Could you, I guess, explain a little?

18 Q Well, I was trying to explain it. You knew
19 you were going to be going to pick up a load or at
20 least two pallets of sod?

21 A Yes.

22 Q You knew at Harbison you had straps that could
23 strap down things that were going to be transported
24 on the trailer; is that correct?

25 A Yes.

1 Q And you didn't think to pick up the straps to
2 take with you to strap it down?

3 A No.

4 Q Did that cross your mind before you left?

5 A Yes.

6 Q Why didn't you take some straps?

7 A We had a miscommunication between employees.

8 Q And what was that?

9 A I thought I was -- or I thought Corey was
10 grabbing the straps, and Corey thought I was grabbing
11 the straps.

12 Q So you had planned on taking straps?

13 A Yes.

14 Q And just miscommunication, forgot to take them
15 altogether?

16 A Yes.

17 Q When you got to Orangeburg, why didn't you
18 turn around and go back to Columbia and tell
19 Super-Sod, we can't do it today; we'll be back
20 tomorrow?

21 A I don't know.

22 Q Why didn't you just run into Orangeburg and/or
23 Bowman, I guess, and go to the hardware store and
24 pick up some straps?

25 A I don't know.

1 Q Would that have been a safe thing to do?

2 A Yes.

3 Q Did you ask Super-Sod if they had any straps?

4 A Yes.

5 Q And what did they tell you?

6 A No.

7 Q So they had none that they could give you?

8 A Not that I recall.

9 Q So at that time, once it was loaded up, you
10 were aware that you didn't have any straps on; is
11 that correct?

12 A Yes.

13 Q And did that give you any cause for concern?

14 A No.

15 Q Why not? I mean, obviously you meant to take
16 straps; you meant to use them; but once you forgot
17 them and didn't have them, there was no concern on
18 your part?

19 MR. DOWLING: Object to the form.

20 A Could you explain?

21 Q Sure. You meant to take straps, correct?

22 A Yes.

23 Q You meant to use straps; is that correct?

24 A Yes.

25 Q When you got to Orangeburg, you realized you

1 A No.

2 Q What caused the sway, in your opinion?

3 A The -- our movement to not strike the truck
4 moving into our lane.

5 Q So the truck passed you and then pulled in
6 front of you?

7 A It -- no.

8 Q Go ahead and explain it to me then. I heard
9 you, but I didn't quite understand it the first time.

10 A The way -- the truck had a sway to it -- the
11 actual tractor-trailer.

12 Q So the tractor-trailer truck had a sway,
13 correct?

14 A Yes.

15 Q I misunderstood that. I thought you said you
16 had the sway when you passed, so I'm clear on that
17 now. Go ahead. I'm sorry to interrupt.

18 A The tractor-trailer truck had a sway as it
19 passed us, and the trailer portion of the load came
20 over into our lane, crossed the dotted white line
21 into our lane where, if we continued at our speed, we
22 would have struck the back of the trailer.

23 Q And so at that point, you slowed to avoid
24 hitting that tractor-trailer?

25 A Yes.

1 A Yes.

2 Q How far do you believe you had to travel on
3 that Highway 301 or Five Chop Road before you came to
4 the gas station?

5 A It was -- I don't recall.

6 Q So more than a couple of miles?

7 A I'm not sure.

8 Q Was it at least over 1 mile?

9 A Yes.

10 Q And after you were loaded, you pulled out of
11 the field, correct?

12 A Yes.

13 Q And the field is not paved, obviously,
14 correct?

15 A Yes.

16 Q And you were pulling the trailer with two
17 pallets on it at that time, correct?

18 A Yes.

19 Q And you got out of the field with no problem
20 to the pallets, correct?

21 A Yes.

22 Q You got on the dirt road that led to
23 Highway 301, correct?

24 A Yes.

25 Q And traveled down the dirt road. No problems

1 with the pallets or with the sod, correct?

2 A Correct. Yes.

3 Q Then you get on to Highway 301 or Five Chop
4 Road, and you travel at least a mile to the gas
5 station right before the interstate, correct?

6 A Yes.

7 Q And at that time, you said you got to 50 miles
8 per hour on Highway 301, correct?

9 A Yes.

10 Q And at that point, no problem with the sod?

11 A No.

12 Q And then you stopped at a Subway and a chicken
13 restaurant that's right there before you get on the
14 exit, correct?

15 A Yes.

16 Q And where did you park?

17 A In the gas -- it was like a truck stop or
18 whatever in a -- one of those kind of areas.

19 Q Was it a longer slot for like a
20 tractor-trailer --

21 A Yes.

22 Q -- where you would not have to back your
23 trailer out?

24 A Yes.

25 Q And when you stopped there, you got out, both

1 you and Corey?

2 A Yes.

3 Q Got out of the vehicle; is that right?

4 A Yes.

5 Q Both of you went in, in other words?

6 A Yes.

7 Q Neither of you stayed in the car?

8 A No.

9 Q And you saw the sod as you walked past into
10 the restaurant?

11 A Yes.

12 Q And there was nothing wrong with the sod at
13 that point?

14 A No.

15 Q The pallets were both right where they had
16 been loaded?

17 A Yes.

18 Q And both had the plastic wrap around them,
19 correct?

20 A Yes.

21 Q Now, you made a statement earlier when
22 Mr. Applegate was asking about the plastic wrap that
23 the plastic wrap didn't go all the way to the top.
24 But it did cover the top rolls of sod, correct?

25 MR. APPLEGATE: Object to the form.

1 A Could you --

2 Q Yeah. You recall that the plastic wrap went
3 all the way to the top of the sod load, correct?

4 MR. APPLEGATE: Object to the form.

5 A Yes.

6 Q And in fact, there are a few courses of rolled
7 sod at the very top that are kind of bunched, not
8 quite like a pyramid but like a ziggurat where the
9 top couple layers or layer doesn't cover the whole
10 bottom. Do you understand what I'm saying?

11 A Yes.

12 Q It's not a perfect cube?

13 A Yes.

14 MR. APPLEGATE: Object to the form.

15 Q And those top courses were wrapped, correct?

16 MR. APPLEGATE: Object to the form.

17 A I don't recall.

18 Q Well, at any rate, you and Corey get out of
19 the vehicle at the gas station, and the sod is on the
20 back of the trailer just as it was loaded with no
21 problems, correct?

22 A Yes.

23 Q Plastic wrap hasn't been ripped?

24 A No.

25 Q None of the rolls of sod are missing?

1 A No.

2 Q And you haven't lost any or had any become
3 displaced?

4 A No.

5 Q And there was still no debris or grass or dirt
6 on the trailer?

7 A No.

8 Q How long were you inside the restaurant?

9 A Five minutes.

10 Q And as I understand it, neither of you ate
11 there; it was just order and go?

12 A Yes.

13 Q So you placed your order, come back out. Did
14 you-all both order at the same place or did you order
15 at different counters?

16 A I don't recall.

17 Q When you came back out, did you pass by the
18 sod again?

19 A Yes.

20 Q Did you inspect the sod?

21 A Yes.

22 Q And when you came back out and inspected the
23 sod, were you satisfied that it was okay as is?

24 A Yes.

25 Q You know there was a convenience store in this

1 Q No trouble turning --

2 A No.

3 Q Do you know how much you were pulling at that
4 point?

5 A No.

6 Q You said you looked it up before the trip. I
7 believe you said you checked the internet to make
8 sure that you could safely pull the load of sod with
9 that trailer?

10 A Yes.

11 Q Where did you look that up?

12 A On the internet.

13 Q It's a big place. Where did you look on the
14 internet? What address? What --

15 A I don't recall.

16 Q It wasn't Super-Sod, was it?

17 A No.

18 Q And this place, was it related to some other
19 sod company or was it related to how to safely use a
20 trailer? I mean, I don't know what kind of search
21 you conduct to find this information out.

22 A Could you repeat the question?

23 Q Yeah. Bad question. Did you just put in a
24 Google search for how much does sod weigh?

25 A Yes.

1 Q How did you verify that?

2 A We had another truck come down with a trailer,
3 and we asked them if they had seen any sod anywhere
4 else, and they said no.

5 Q And that other truck -- I thought I had their
6 names. The other truck was Mr. Shealy and Mr. Lynch?

7 A Yes.

8 Q And they came down 26, got off on the opposite
9 side, and then came back on and retraced your path?

10 A Yes.

11 Q And saw that there was no sod?

12 A Yes.

13 Q You were asked some questions about the whole
14 merge and yielding issue, and I want to make sure
15 that I understand. I think I understand it
16 correctly. But this incident of losing the sod, that
17 didn't occur while you were merging into traffic, did
18 it?

19 A No.

20 Q You had safely merged and were in the right
21 lane of I-26 coming back towards Columbia before this
22 incident ever occurred, correct?

23 A Yes.

24 Q I'm going to mark as Exhibit 2 -- do you mind
25 if I stand over your shoulder, Mr. Sox?

1 I-26 is at the bottom right of the photo?

2 A Yes. Yes.

3 Q And then tracing that up, you were able to
4 safely get onto I-26 without losing any load and
5 merge at the point where this entrance ramp enters
6 I-26, correct?

7 A Yes.

8 Q And then you were able to pass underneath the
9 overpass?

10 A Yes.

11 Q And when you passed under the overpass, you
12 still safely had your load; is that correct?

13 A Yes.

14 Q And you were able to travel whatever this
15 distance is. And how far down beyond the overpass
16 were you before the tractor-trailer, the blue
17 tractor-trailer, began to encroach upon your lane?

18 MR. APPLEGATE: Pardon me one second. Ray, I
19 just need to ask you a question. I see this thing
20 is marked. What is that mark based on?

21 MR. MOORE: Based on photographs.

22 MR. APPLEGATE: Is that from the --

23 MR. MOORE: Excuse me?

24 MR. APPLEGATE: Is that from the incident
25 report, the GPS coordinates?

1 MR. MOORE: No.

2 MR. APPLEGATE: I see there's areas you've
3 marked for what happened.

4 MR. MOORE: Yes, it's based on photographs.

5 MR. APPLEGATE: Okay. And this is just what
6 you generated?

7 MR. MOORE: Yes.

8 MR. APPLEGATE: Thank you. Go ahead.

9 (The last question is read back by the court
10 reporter.)

11 A I was actually past the other entrance ramp.

12 Q Yeah. Okay. That's what I want. So even
13 without looking at Exhibit 2, you recall that there
14 are two entrance ramps that head towards Columbia
15 within a very close proximity?

16 A Yes.

17 Q And so you entered on the furthest -- I always
18 think of I-26 as running north and south, but that
19 you were on the furthest-east entrance ramp?

20 A Yes.

21 Q And not only did you safely enter on the
22 furthest-east ramp, but before the incident occurred,
23 you had already passed the western entrance ramp?

24 A Yes.

25 Q And how far past the western entrance ramp

1 were you before the incident occurred?

2 A Not very far. Within 3/10 of a mile is an
3 estimate.

4 Q Do you recall a speed-limit sign in that area?

5 A I do not recall.

6 Q Do you recall an interstate marker in that
7 area?

8 A I do not recall.

9 Q Just hold that for a moment, please.

10 The blue tractor-trailer that encroached on
11 your lane, when was the first time that you observed
12 it?

13 A As it was beside us, on my driver's-side door.

14 Q So you never observed it behind you as you
15 were merging?

16 A No.

17 Q You don't know if it was in the right or the
18 left lane as you were merging onto I-26?

19 A No.

20 Q Did you observe any traffic in the right lane
21 as you were merging onto I-26?

22 A No.

23 Q When you merged onto I-26, on the entrance
24 ramp, did you have to adjust your speed in order to
25 fit yourself into traffic?

1 Q After your incident was over and you were
2 waiting on the officers to come back and talk to you,
3 were you able to see down to where the accident scene
4 was?

5 A No.

6 Q If you put that down, just look at that
7 photograph, I want to point something out to you. Do
8 you see the sign down here --

9 A Yes.

10 Q -- on I-26 towards Columbia?

11 A Yes.

12 Q Do you see a vehicle right in front of that
13 sign?

14 A I can't make that out on the picture.

15 Q Can you tell if that's where you came to rest
16 after this incident while you were waiting for the
17 officers to come back and talk to you?

18 A No, I can't.

19 Q Did you count the number of rolls that you
20 lost?

21 A No.

22 Q The half a load is based just on an estimate?

23 A Yes.

24 Q And did you lose them evenly from each one or
25 was there more lost from one pallet or the other?

1 A There was more lost from the back pallet than
2 the front.

3 Q And are you able to approximate what
4 percentage of each pallet you lost?

5 A The pallet 1, which was closest to the truck,
6 probably lost -- I can't give an exact number, but it
7 lost less than what pallet 2 lost.

8 Q When you were in the right lane before the
9 tractor-trailer encroached on your lane, were you
10 traveling in the center of that lane as near as you
11 could?

12 A Yes.

13 Q And you said the tractor-trailer encroached on
14 your lane 3 to 4 feet. Did I hear that correctly?

15 A No.

16 Q How far into your lane did the tractor-trailer
17 encroach?

18 A It encroached enough where our front left
19 quarter panel would have caught that back, I guess,
20 step-like bumper they have on the back of the
21 trailer, and I moved over 3 to 4 feet.

22 Q Did you move over 3 to 4 feet or 3 to 4 feet
23 into the shoulder?

24 A I moved over 3 to 4 feet.

25 Q So at that point you would have still been

1 Q Did you believe that you were going to have
2 any trouble losing it, losing part of the load?

3 A No.

4 Q As you sit here today, do you think you would
5 have ever had any trouble with that load if a truck
6 hadn't veered into your lane?

7 A No.

8 Q I want to talk a little bit more about the
9 truck veering into your lane. I think you were very
10 kind earlier in your testimony when you described
11 Mr. Branham making a verbal announcement. All right.
12 What did he say?

13 A "Oh, shit."

14 Q He said that when the truck veered into your
15 lane; is that right?

16 A Yes.

17 Q And I don't mean to be flippant or suggest
18 that's inappropriate at all. Was he scared?

19 A Yes.

20 Q Were you scared?

21 A I don't know.

22 Q What did you think could happen?

23 A When -- when that happened, it was just like
24 react to it. It wasn't like oh, no. It was, all
25 right, I need to move out of the path of -- he's

1 A No.

2 Q So somebody's done something to make this so
3 you can see that whole road; is that correct?

4 A Yes.

5 Q That's not the way the road actually looks
6 from an aerial view, correct?

7 A Correct.

8 Q So in looking at this, you could not see the
9 collision area from where you were; is that what
10 you've testified to?

11 A Yes.

12 Q That was one of those bad questions. Could
13 you see the collision area from where you were?

14 A No.

15 Q And when you merged onto I-26, you had to go
16 over the interstate and then come around that
17 little -- what I believe Mr. Moore referred to as the
18 cloverleaf?

19 A Yes.

20 Q One of the cloverleaves?

21 A Yes.

22 Q And that would have been the first entrance or
23 the first on-ramp, and then the second one would be
24 down here where Collision Area is written, correct?

25 A Yes.

1 Q And you stayed in the right lane the entire
2 time; is that correct?

3 A Yes.

4 Q And as I understood, Mr. Moore asked you
5 several times that when you looked at the load at
6 lunch, when you stopped at the filling station for
7 lunch, the load looked like it had not moved,
8 correct?

9 A Yes.

10 Q Did you get your lunch to go?

11 A Yes.

12 Q Were you-all eating at the time that this
13 truck came by you?

14 A No.

15 Q What happened to lunch?

16 A Lunch was sitting next to me. Corey may have
17 been eating, may have -- at that exact point, I don't
18 know if he was physically putting something in his
19 mouth.

20 Q Had you started to eat lunch or reached down
21 to get your food or anything?

22 A No.

23 Q And you were a good half mile on the
24 interstate by now?

25 A Yes.

Exhibit 3

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

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

Exhibit 4

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

4 DEPOSITION OF TROOPER ROBERT GLEICH

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
 SUPER-SOD,

10 Defendants.

11
12 DEPONENT: TROOPER ROBERT GLEICH
13 1391 MIDDLETON STREET
 ORANGEBURG, SC 29115

14
15 DATE: JUNE 23, 2016

16 TIME: 11:05 A.M.

17
18 LOCATION: LANIER & BURROUGHS, LLC
 ORANGEBURG, SC

19
20 REPORTED BY: RUTH L. MOTT, RPR, CRR
21 CLARK & ASSOCIATES, INC.
 P.O. Box 73129
22 Charleston, SC 29415
 843-762-6294
23 WWW.CLARK-ASSOCIATES.COM
 Ruth@clark-associates.com

1 Oulla vehicle came to rest, correct?

2 A. Yes.

3 Q. Based now on reviewing the dash cam
4 video, are you able to estimate the distance
5 between the sod vehicle and the Oulla vehicle?

6 MR. GRIFFITH: Object to the form.

7 A. No, because the only problem is I don't
8 know if we could, in the point that we turn
9 around, I don't know exactly where the sod
10 vehicle was. If we can say that the sod vehicle
11 was down there by the sign, then we can probably
12 get a distance, but I don't think the sod vehicle
13 was that far down.

14 Q. Where was it on the video?

15 A. It could have been that section that I
16 turned around. I'm thinking the sod vehicle was
17 between those three lanes as if he was merging
18 over onto the two lane section so somewhere near
19 the end of the three to the two.

20 Q. Do you remember that specifically?

21 A. No.

22 Q. You think that where this dash cam video
23 does the 180 that the sod vehicle may have been
24 in the shoulder and caused the trooper, whoever
25 it was, to do the turn?

Exhibit 5

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

ORDER

FILED FOR RECORD
 MINNIE B. CLARK
 2016 SEP 28 P 12:13
 CLERK OF COURT
 ORANGEBURG, SC

This matter came before me on Plaintiffs’ Motion to Amend Complaint. The hearing on Plaintiff’s Motion to Amend was held on August 23, 2016 in Orangeburg.

PROCEDURAL BACKGROUND

Plaintiff’s original complaint was filed on December 31, 2014. On May 10, 2016 Defendant Patten Seed Company d/b/a Super Sod (“Super Sod”) served its Motion for Summary Judgment and it was subsequently scheduled for a hearing on June 29, 2016. On June 21, 2016, Plaintiffs requested consent from counsel to amend its complaint to add an additional cause of action for breach of implied warranty of merchantability. Defendant indicated a willingness to consent but did not confirm consent to the amendment. On June 29, 2016, Plaintiff filed its Motion to Amend Complaint. Subsequent to filing the Motion to Amend, the parties argued Defendant’s Motion for Summary Judgment before the Honorable R. Knox McMahon who held the motion under advisement. Judge McMahon was not informed that the motion to amend has been filed. The hearing on Plaintiff’s Motion to Amend was then set for hearing on August 23, 2016 in Orangeburg. On August 2, 2016, Judge McMahon’s grant of summary judgment was entered in favor of Defendant Super Sod and on August 12, 2016, Plaintiffs filed their Motion to

Wingfield

Alter or Amend Order Granting Defendant's Motion for Summary Judgment which remains under advisement.

MOTION TO AMEND COMPLAINT

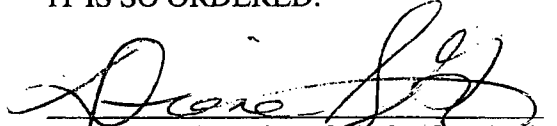
Present for the Plaintiffs were William Applegate and David Lail. Present for Defendant Super Sod Patten Seed Company d/b/a Super-Sod were E. Raymond Moore, III and Charles Williams. Based on the arguments and submissions of counsel, the Court finds that the matter of Plaintiffs' Motion to Amend lies with the Honorable R. Knox McMahon because he presided over Defendant's Motion for Summary Judgment and has Plaintiffs' Motion to Alter or Amend Order Granting Defendant's Motion for Summary Judgment before him at this time.

Plaintiffs seek to amend the complaint to add a cause of action for breach of implied warranty of merchantability. Defendant opposed the motion on the grounds that judgment had been entered in this case, that Plaintiffs' Motion to Alter or Amend Order Granting Defendant's Motion for Summary Judgment is currently before the Honorable R. Knox McMahon, and the amendment at this late date would be prejudicial. Because Plaintiffs' Motion to Alter or Amend Order Granting Defendant's Motion for Summary Judgment is pending before Judge McMahon, jurisdiction remains with Judge McMahon. Judge McMahon's order will address the motion to amend. Irrespective of how Judge McMahon decides Plaintiffs' Motion to Alter or Amend Order Granting Defendant's Motion for Summary Judgment, the status of the motion to amend will be determined by his ruling. Therefore this Judge refrains from hearing the motion to amend. The court finds that this is a more appropriate way to proceed regarding the issues involving the motion to amend.

CONCLUSION

For the foregoing reasons, the Court refrains from hearing the Plaintiffs' Motion to Amend Complaint filed June 29, 2016 which is included in the Motion to Alter or Amend pending before Judge McMahon.

IT IS SO ORDERED.


The Honorable Diane Schafer Goodstein


 South Carolina
September 16, 2016

Exhibit 6



State of South Carolina
The Circuit Court of the First Judicial Circuit

Edgar Warren Dickson
Judge

Post Office Box 1949
151 Docket St., Suite 207
Orangeburg, SC 29116-1949
Phone: (803) 535-2187
Fax: (803) 535-2188
edicksonj@sccourts.org

MEMORANDUM

To:

William E. Rapplegate, IV

From:

Judge Dickson

Subject:

Enclosed Order signed by Judge Dickson

Date:

11/21/16

Please have the enclosed Order that has been signed by Judge Dickson filed in the appropriate Clerk of Court's Office and serve copy(ies) on opposing counsel or pro se defendant(s).

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

CONSENT SCHEDULING ORDER

PURSUANT TO RULE 16 of the South Carolina Rules of Civil Procedure, and with the written consent of all parties involved, by and through their undersigned counsel, the following parties' first request for a Scheduling Order is hereby adopted as follows:

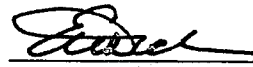
1. Mediation to be conducted on or before April 15, 2016. All persons necessary to settle all claims shall personally attend mediation.

2. Trial not before June 15, 2016.

The deadlines contained herein, except for the "trial not before" date, may be extended by consent of all the parties without leave of Court. If the parties do not consent, a Motion to Amend shall be filed and the deadlines may be extended by the Court for good cause shown.

AND IT IS SO ORDERED.

January 21, 2016
Orangeburg, South Carolina



Edgar W. Dickson
Chief Administrative Judge

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
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.

CONSENT SCHEDULING ORDER

FILED FOR RECORD
JUL 10 2016
CLERK OF COURT

PURSUANT TO RULE 16 of the South Carolina Rules of Civil Procedure, and with the written consent of all parties involved, by and through their undersigned counsel, the following parties' second request for a Scheduling Order is hereby adopted as follows:

1. Mediation to be conducted on or before July 15, 2016. All persons necessary to settle all claims shall personally attend mediation.
2. Trial not before October 10, 2016.

The deadlines contained herein, except for the "trial not before" date, may be extended by consent of all the parties without leave of Court. If the parties do not consent, a Motion to Amend shall be filed and the deadlines may be extended by the Court for good cause shown.

AND IT IS SO ORDERED.

Jewel, 2016
Orangenburg, South Carolina

Edgar W. Dickson
Edgar W. Dickson
Chief Administrative Judge

ORANGEBURG
CLERK OF COURT
ATTEST: TRUE COPY

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeal

RECEIVED

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

FEB 13 2017

SC Court of Appeals

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

Appellate Case No. 2017-000093

Price Oulla and Bonnie Oulla, Appellants,

v.

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

Of Whom Patten Seed Company d/b/a Super Sod is the Respondent.

PROOF OF SERVICE

I certify that I have served the Return to Appellants' Motion for Leave to File Motion in the Court of Common Pleas Pursuant to Rule 60, SCRPC by depositing a copy of it in the United States Mail, postage prepaid, on February 13, 2017, addressed to the attorneys of record, William E. Applegate IV, Esquire and David B. Lail, Esquire, 291 East Bay Street, Floor 2, Charleston, SC 29401; E. Mitchell Griffith, PO Drawer 570, Beaufort, SC 29901; Mark B. Tinsley, PO Box 1000, Allendale, SC 29810; Curtis W. Dowling, PO Box 8448, Columbia, SC 29202.

Respectfully submitted,



E. Raymond Moore, Esquire
Rogers E. Harrell, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent

February 13, 2017

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED

FEB 13 2017

SC Court of Appeals

Re: Oulla v. Patten Seed Company d/b/a Super-Sod, et al.
Appellate Case No.: 2017-000093
M&G File No.: 1295-0070

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Respondent's Return of Appellants' Motion for Leave to File Motion in the Court of Common Pleas pursuant to Rule 60, SCRCP in the above-referenced matter. Also enclosed are the proof of service and an extra copy. I would appreciate your filing the original and returning the clocked extra copy to me by way of the courier who delivered same.

By copy of this letter, I am serving same on all counsel of record.

I appreciate your assistance in this matter. Please feel free to contact me if you need any additional information.

Very truly yours,



E. Raymond Moore, III

ERMIII/hws

Enclosures

cc: William E. Applegate, IV, Esquire
Curtis W. Dowling, Esquire
E. Mitchell Griffith, Esquire
Mark B. Tinsley, Esquire