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

Price Oulla and Bonnie Oulla, ...Appellants,

vs.

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.

REPLY TO RESPONDENT'S RETURN TO MOTION FOR LEAVE TO FILE MOTION IN THE COURT OF COMMON PLEAS PURSUANT TO RULE 60, SCRCP

Appellants wish to briefly set forth a few points in reply to Respondent's return to Appellants' motion for leave to file a Rule 60 motion in the lower court. Appellants do not intend to repeat the arguments set forth in the motion.

First, most of Respondent's argument goes to the merits of the proposed motion to the lower court. Appellants respectfully submit that the legal issue whether the motion would be governed by the standard of Rule 60, SCRCP, or the standard of Rule 15, SCRCP, should be determined in the first instance by the lower court. The same is true to the ultimate issue whether, under either standard, the motion to amend the complaint should be granted or denied on the merits. This Court should not wade too far into the merits of the motion at this stage.

Importantly, Appellants are employing the procedural step of the motion to this Court for leave because Appellants had no other functional way to pursue the motion to amend. Rule 60(b) provides that "[d]uring the pendency of an appeal, leave to make the motion must be obtained from the appellate court." The case is on appeal because Appellants had to file their notice of appeal within thirty days after learning of entry of the lower court's entry of a purported final judgment: denial of the motion to alter or amend the order granting summary judgment to Respondent. This is similar to the posture of Fobian v. Storage Technology Corporation, 164 F.3d 887, 892 (4th Cir. 1999), where under federal rules the appellants were allowed to file the Rule 60 motion in the lower court without leave from the Fourth Circuit, but the lower court could not rule on the motion without jurisdiction first being conferred by the Fourth Circuit. Without opining on the substance of the Rule 60 motion, the Fourth Circuit conferred limited jurisdiction on the lower court to consider the motion. Id. That is all Appellants are asking this Court to do here.

Second, to the extent the Court does consider the merits, Respondent is incorrect that Appellants have not raised at least a colorable claim under the standard of Rule 60(b).[1] Return of Respondent at 8–10. Appellants have highlighted that the lower court's failure to rule on the motion to amend arose out of the court's inability to decide which individual judge should rule on the motion. Judge Goodstein determined that she could not rule on the motion because it was Judge

[1] Appellants maintain, however, that the proper standard for the proposed motion below is under Rule 15, SCRCP. Motion for Leave at 11–15. Contrary to Respondent's argument on pages 16–17 of the Return, the Fourth Circuit has not limited its holdings in Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 471 (2011) and Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006), that a post-judgment motion to vacate for the purpose of entertaining a motion to amend is to be considered under the more liberal standard of Rule 15. The cases cited distinguished those opinions on procedural facts, but did not limit the holdings.

McMahon's to decide.[2] Yet, Judge McMahon believed that he did not have jurisdiction to rule on the motion, either.[3] The problem was not that the lower court was unaware of Appellants' motion to amend or lacked jurisdiction to entertain it, but rather that the court failed to identify an individual judge to rule on it. Such an error should fall within the ambit of "mistake, inadvertence, surprise, or excusable neglect" contemplated in Rule 60(b)(1), SCRCP.

Third, Respondent is incorrect that Appellants did not raise the motion to amend to the lower court in a reasonable time. In filing the motion to amend, Appellants were seeking to add a cause of action for breach of the implied warranty of merchantability, based on the defective packaging (shrink wrapping) of the goods sold by Super Sod. The facts giving rise to this cause of action were not apparent until Appellants deposed Respondent in March 2016 and had a chance to review the transcript, which was not received until March 30, 2016. See Appellants' Memorandum in Support of Motion to Amend Complaint, attached to Appellants' Motion for Leave as Exhibit J, at 2. Respondent filed its motion for summary judgment on the original causes of action just over a month later, on May 10, 2016. Respondent's argument that Appellants decided to pursue this new cause of action "[a]fter a year and a half of litigation," when "the case was ripe for summary judgment," is an unfair characterization. Return at 6–7.

Less than two months later, on June 29, 2016, Appellants filed the motion to amend, and the lower court scheduled a hearing on the motion before the order granting summary judgment to Respondent was entered. Appellants then briefed and argued the motion to amend to Judge

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[2] Order of Judge Goodstein, entered September 28, 2016, attached to Return of Respondent as Exhibit 5. Counsel for Appellants was unaware that this order had ever been issued or entered, and was aware only that proposed orders had been circulated.

[3] Email from Judge McMahon's law clerk, dated January 3, 2017, attached to Appellants' Motion for Leave as Exhibit N and referenced in the Motion in footnote 16.

Goodstein, and briefed it to Judge McMahon, well before the final judgment was entered on December 2, 2017 (more than five months after Appellants filed the motion to amend). The Rule 59 cases cited by Respondent are inapposite, as Appellants have not even filed such a motion. Return at 18–20. The important fact is that two judges were aware of and considered the motion to amend long before final judgment, but declined to rule on it because neither thought they were the proper individual judge to issue the decision. The proper way for this error to be addressed is pursuant to a Rule 60(b) motion, which the Court should allow Appellants to file before this appeal proceeds.

CONCLUSION

Appellants respectfully request that the Court grant leave to Appellants to file a Rule 60(b) motion in the lower court, for the purpose of entertaining Appellants' motion to amend the complaint, and hold this appeal in abeyance until the lower court rules.

Respectfully submitted,

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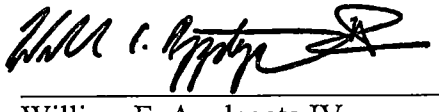

William E. Applegate IV
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February 21, 2017

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PROOF OF SERVICE

The undersigned employee of Yarborough Applegate LLC hereby certifies that on February 21, 2017 she served, via first-class U.S. mail, postage paid, copies of Appellants' Reply to Respondent's Return to Motion for Leave to File Motion in the Court of Common Pleas Pursuant to Rule 60, SCRCP, upon all counsel of record at their respective mailing addresses set forth below:

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February 21, 2017

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February 21, 2017

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

Re: Oulla v. Patten Seed Company d/b/a Super-Sod, *et al.*
Appellate Case No. 2017-000093
YA File No. 14-057

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies each of Appellants' Reply to Return to Motion for Leave and Proof of Service of Reply to Return in the above-referenced case. I would appreciate your filing the original. Also enclosed is an extra copy of each that I would appreciate your clocking and returning to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving counsel of record for the Respondent and counsel of record for the other defendants in the underlying case.

I appreciate your assistance in this matter. Please feel free to contact me if you need additional information or I may otherwise be of assistance.

Sincerely,

Amy H. Johnson,
Paralegal to William E. Applegate IV

Enclosures
cc: E. Raymond Moore, III, Esquire
Curtis W. Dowling, Esquire
Matthew G. Gerrald, Esquire
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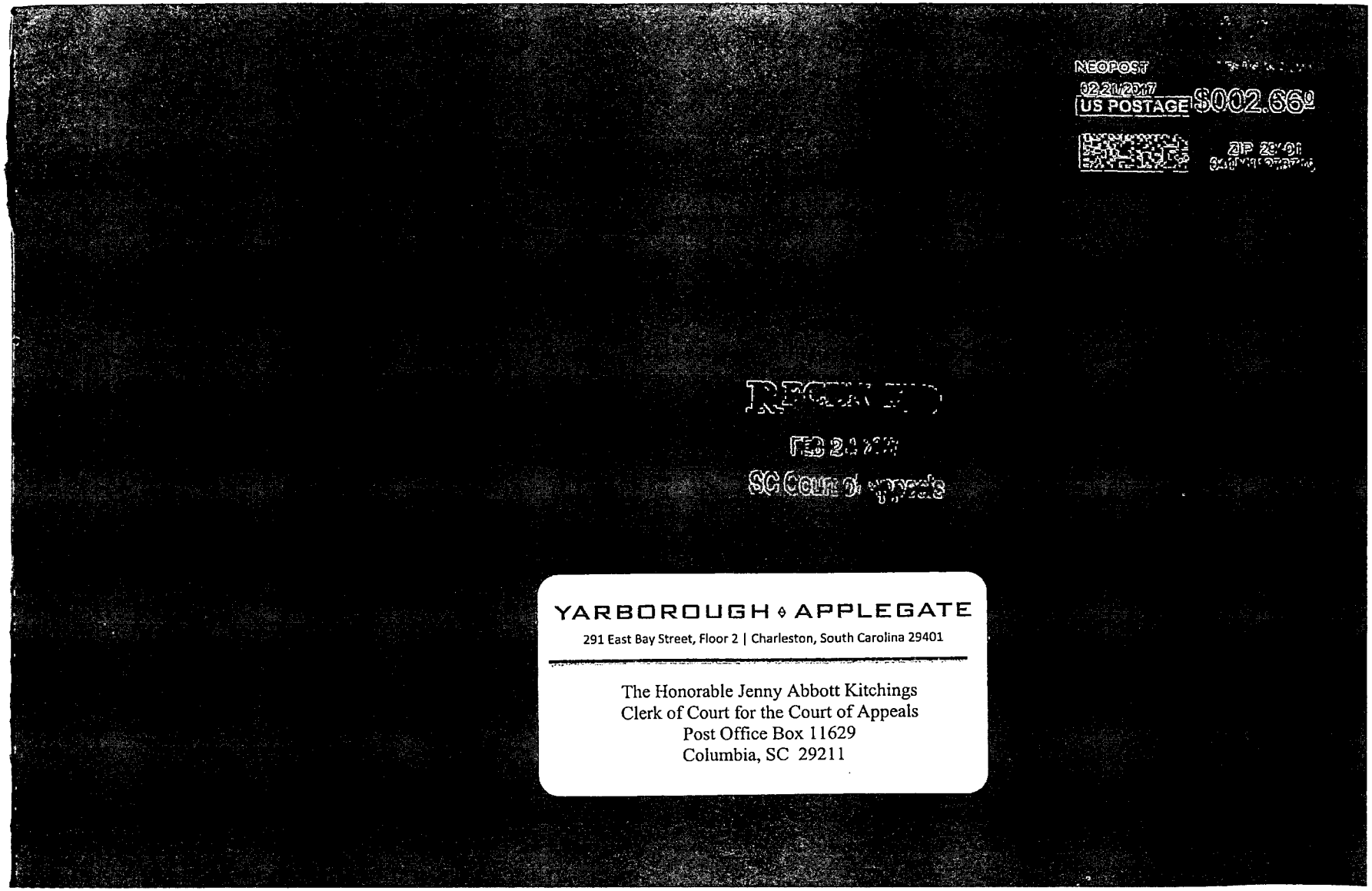
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