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SC Court of Appeals

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,

v.

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

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

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in finding that the loader of a vehicle owes no statutory duty to drivers on public highways to ensure that the load does not escape the vehicle when S.C. Code Ann. § 56-5-4100 specifically establishes such a duty?
2. Did the circuit court err in holding that the loader of a vehicle that will travel on a public highway does not owe a common law duty to third-party drivers on public highways, where (A) those drivers were foreseeable and (B) the vehicle loader voluntarily undertook certain tasks for the purpose of protecting those drivers?
3. Did the circuit court abuse its discretion when it denied a Rule 15(a) motion to amend the complaint, where (A) the nonmoving party will not be prejudiced in the manner envisioned by Rule 15 and (B) the proposed amendment is not futile?

STATEMENT OF THE CASE

This case arises out of an automobile collision that took place after some pallets of sod ripped open and suddenly spilled from a flatbed trailer into the middle of I-26 and caused a pileup. Appellant filed suit against Respondent Super-Sod, which, as part of its customary business, had wrapped the pallets of sod and loaded the sod on the trailer for its customer to transport over the public highways of South Carolina.

Relevant Historical Background

Super-Sod is a company with operations in Georgia, South Carolina, North Carolina, and Florida. Super-Sod 30(b)(6) Dep. 11:7–11. Super-Sod grows sod and then uses heavy machinery to cut, roll, and load the sod onto pallets. Super-Sod 30(b)(6) Dep. 11:22–14:7. Super-Sod then either (1) loads the pallets of rolled sod onto its own trailers to transport to its customers throughout the southeast, or (2) loads the pallets of sod directly onto its customers' vehicles. Super-Sod 30(b)(6) Dep. 11:16–21, 16:14–24. If Super-Sod is loading the pallets on to customer's vehicles or trailers and not loading them on their own covered commercial trucks for transport, it wraps the pallets in a plastic stretch wrap "to enhance the stability of the pallet" for transport. Super-Sod 30(b)(6) Dep. 70:13–71:1, 17:8. The forklift operators at Super-Sod's Orangeburg location load about 800 pallets of sod onto vehicles every day. Super-Sod 30(b)(6) Dep. 18:6–7.

Super-Sod acknowledges that it is "required by law" to ensure that it transports its cargo safely. Super-Sod 30(b)(6) Dep. 19:16–18. In addition, Super-Sod claims that its forklift operators receive on-the-job training to ensure that they properly balance the loads that they place onto customers' trailers. Super-Sod 30(b)(6) Dep. 31:7–23. It is important to properly balance a trailer because an improperly balanced trailer may cause trailer sway which is dangerous for the vehicle

driver and other motorists. See Affidavit of Michael A. Sutton, PE ¶¶ 6–10; see also Super-Sod 30(b)(6) Dep. 30:1–6.

Melvin Kearse has worked at Super-Sod's Orangeburg location for about 22 years. Melvin Kearse Dep. 7:22–23. Throughout that time, he has worked as a forklift operator loading tractor trailers, pickup trucks, and personal, open trailers. Melvin Kearse Dep. 17:3–11. As a Super-Sod forklift operator, Kearse has a particularly designated forklift that he uses on a daily basis. Melvin Kearse Dep. 16:1.

Kearse testified that he understood the importance of balancing a trailer, but he also testified that Super-Sod never trained him how to properly balance a trailer weight and that he does not check the tongue weight or tire pressure of loaded trailers. Melvin Kearse Dep. 21:22–25, 28:7–9, 22:1–3. Kearse also testified that he was never trained about the danger of placing a pallet too far back on a trailer. Melvin Kearse Dep. 22:18–22.

In addition to loading the pallets, Kearse wraps the pallets of sod prior to loading as a part of his job. Melvin Kearse Dep. 28:3. Kearse has never received any training on how to wrap the pallets. Melvin Kearse Dep. 32:11–16. Instead, he taught himself by watching how other Super-Sod employees wrapped the pallets. Melvin Kearse Dep. 32:23. Kearse describes his method of wrapping the pallets as follows: "Got to put the wrap, go around. Keep going around. And then you go up to the four [rolls of sod] on top and keep going around. You just go around until where you think you [are] comfortable and you know it's wrapped real good." Melvin Kearse Dep. 29:21–25.

Facts

On July 22, 2014, Cody Sox, an employee of a Columbia-area HOA, drove a pickup truck with a flatbed trailer from Columbia to Orangeburg to purchase and pick up two pallets of sod

from Super-Sod, each weighing roughly one ton. Cody Sox Dep. 19:21-20:14; Sox Dep. 20:3-10; Super-Sod 30(b)(6) Dep. 23:7-10. This was Sox's first trip to Super-Sod and his first time hauling sod. Sox Dep. 25:5-10.

Prior to making the trip, Sox called and ordered two pallets of sod. Sox Dep. 23:11-14. At that time, Super-Sod informed Sox that they would load the sod onto Sox's trailer. Sox Dep. 23:21-23. When Sox arrived at Super-Sod, he paid for the two pallets of sod and was directed a couple of miles down the road to where Kearse would load the sod onto his trailer. Sox Dep. 24:3-12.

Kearse wrapped the sod with plastic and loaded the sod onto Sox's trailer using a Super-Sod forklift. Melvin Kearse Dep. 7:22-24; 44:2-3; 42:4-10; 15:24-16:1. Despite acknowledging that he usually loaded sod in the middle of a trailer, Kearse testified that he loaded one pallet in the front and one pallet in the back of Sox's trailer. Kearse Dep. 40:19-41:8. Sox asked Kearse if Super-Sod had any straps to tie down the pallets, and Kearse told him no. Sox Dep. 72:16-20; 73:7-8. Kearse admitted that he did not secure the pallets of sod to the trailer in any way before Sox left Super-Sod and made his way to I-26. Kearse Dep. 34:14-16.

Shortly after Sox left Super-Sod, he merged into traffic on I-26 W at the cloverleaf interchange for US-301. Sox Dep. 20:25–21:1. As he merged into traffic off the onramp and began accelerating, Sox adjusted his vehicle to avoid a semi-truck in the fast lane. Sox Dep. 21:2-12. Sox's trailer began to sway back and forth. Sox Dep. 21:12-16. Sox pulled over and came to a stop. Sox Dep. 21:12-16. When Sox looked back, he noticed that "a half a pallet of sod from the trailer had rolled off the back of it into the slow lane of I-26." Sox Dep. 21:17-20. Sox testified that the plastic wrapping on one pallet of sod was ripped "at the top" and the other pallet of sod's wrapping "was torn down about halfway from the top." Sox Dep. 132:13-133:11; 50:18-20.

Sox called 911 at 11:54 am to report the spill and he and his passenger waited in the truck for emergency personnel to arrive. Sox Dep. 21:23-22:8; 43:10-17.; CAD Call Information. Six minutes later, 911 received a call from a motorist stating: "Where 301 enters, traffic was backed up. Another car hit another car and the car rolled over." CAD Call Information; 911 call recording. Appellant Price Oulla had been driving west on I-26 and had just stopped due to the spilled sod. As he came to a stop, he was hit at high impact and his car rolled over.

Procedural History

On December 31, 2014, Oulla filed a lawsuit against several defendants, including Super-Sod. Complaint. The Complaint asserts a cause of action for negligence against Super-Sod for failure to properly and safely package, load, and secure the pallets of sod onto the trailer. Complaint ¶¶ 26–31. The Complaint asserts, in relevant part, that Super-Sod's actions or inactions were the proximate cause of Oulla's injuries. Complaint ¶ 31.

On May 6, 2016, Super-Sod filed a Motion for Summary Judgment. On June 29, 2016, Oulla filed a Motion to Amend the Complaint to add a breach of implied warranty of merchantability cause of action against Super-Sod. On that same day, the trial court heard Super-Sod's Motion for Summary Judgment.

Before it considered Oulla's motion to amend—but more than a month after Oulla filed that motion—the trial court entered an Order granting Super-Sod's Motion for Summary Judgment. The trial court held that Super-Sod did not owe a statutory or common law duty to Oulla—and by extension, other users of public roadways—to safely package, load, and secure the sod it sells. Order Granting Defendant Super-Sod's Motion for Summary Judgment at 4–10 (Aug.

2, 2016). Oulla filed a Rule 59(e) Motion to Reconsider, which the trial court denied. Order Denying Plaintiffs' Motion to Reconsider.

Oulla then filed a Rule 60(b) Motion to Vacate the Entry of Summary Judgment and Amend the Complaint. Oulla argued that the Rule 15(a), SCRCP standard should apply because he filed his motion to amend well before the court granted the motion for summary judgment. Plaintiff's Motion for Relief from Judgment (April 6, 2017). The circuit court denied Oulla's motion. Order Denying Plaintiffs' Motion for Relief from Judgment (July 14, 2017).

Oulla subsequently appealed the trial court's grant of summary judgment and its denial of Oulla's motion to vacate the entry of summary judgment and amend the complaint. Notice of Appeal (Aug. 8, 2017); Notice of Appeal (Jan. 17, 2017). This Court consolidated both appeals.

STANDARDS OF REVIEW

Whether the law recognizes a particular duty is a question of law. Ellis by Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). Similarly, the proper interpretation of a statute is a question of law. CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Appellate courts determine questions of law *de novo*. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008).

In some circumstances, the question of whether a duty arises depends on the existence of particular evidence. Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997). If the appellate court can draw more than one inference from the evidence, a genuine issue of material fact exists and summary judgment should be reversed. Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997).

The decision to grant a Rule 15(a) motion to amend is within the discretion of the trial judge and will be overturned for abuse of or failure to exercise discretion. Patton v. Miller, 420 S.C. 471, 804 S.E.2d 252 (2017), reh'g denied (Sept. 27, 2017).

SUMMARY OF THE ARGUMENT

The statutory language of S.C. Code Ann. § 56-5-4100(C) plainly states that the duties of § 4100, in its entirety, apply to both the loaders and drivers of vehicles. The lower court erroneously exempted vehicle loaders from the duties imposed by S.C. Code Ann. § 56-5-4100(A) based on a misinterpreted adverbial prepositional phrase. To the extent the Court finds that the statutory text is ambiguous, both (1) the statute's underlying policy of providing a comprehensive safety regulation and (2) the interpretive principle against statutory surplusage support the conclusion that S.C. Code Ann. § 56-5-4100(A) applies to both loaders and drivers of vehicles.

If the Court finds that no statutory duty exists, the common law imposes a duty on vehicle loaders like Super-Sod in at least two ways. First, the common law imposes a duty on persons whose actions create a foreseeable risk to third parties. See Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 319–20, 605 S.E.2d 12, 15–16 (2004) (identifying common law duty of care to third parties independent of the duties assumed in contract based on general principles of common law negligence and providing list of similar case law). The common law also imposes a duty on individuals who undertake a voluntary service for the protection of others. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

Here, improperly secured cargo created a foreseeable risk to Oulla and other third-parties on public highways. Moreover, the evidence supports an inference that Super-Sod undertook the voluntary service of applying a safety wrapping and loading the cargo for the protection of third-party drivers on public highways. For these reasons, the Court should hold that Super-Sod had a common law duty to Oulla and reverse the lower court's grant of summary judgment.

Finally, the circuit court abused its discretion when it denied Oulla's timely filed Motion to Amend. As a threshold matter, Super-Sod failed to meet the burden of establishing the type of

prejudice envisioned by Rule 15(a)—a lack of notice that a new issue is to be tried and the lack of an opportunity to refute it. Super-Sod was aware of the fundamental allegations that form the thrust of the proposed cause of action and had a motivation to refute them since the outset of the case in the ordinary course of defending the negligence claim.

In addition, the circuit court's holding that the Motion to Amend would be futile is flawed because it improperly and erroneously relies on the earlier holding in the Order granting summary judgment—which related to Super-Sod's statutory and common law *negligence* duties—to discard Oulla's proposed third-party breach of implied warranty of merchantability claim. Because Super-Sod is not prejudiced within the meaning of Rule 15 and the proposed claim is not futile, the circuit court abused its discretion when it denied the Motion to Amend.

For these reasons, the Oullas ask this Court to reverse the circuit court's grant of summary judgment for Super-Sod and denial of their Motion to Amend the Complaint.

ARGUMENT

The circuit court's Order granting summary judgment rests entirely on its holding that the law recognizes no duty of a loader of a commercial vehicle to third-party drivers on public highways.[1] Appellants argue that both statutory and common law duties exist. In addition, Appellants argue that the circuit court abused its discretion when it held that Respondent Super-Sod would be prejudiced by the Motion to Amend the Complaint and that the proposed amendment to add a breach of warranty cause of action would be futile.

I. VEHICLE LOADERS OWE A STATUTORY DUTY TO DRIVERS ON PUBLIC ROADWAYS TO LOAD THE VEHICLE IN A WAY THAT PREVENTS THE LOAD FROM ESCAPING FROM THE VEHICLE.

The circuit court held that S.C. Code Ann. § 56-5-4100(A), which creates statutory duties to prevent loads from falling from vehicles onto public roadways, applies only to vehicle drivers. Order Granting Defendant Super-Sod's Motion for Summary Judgment at 6–7. But the plain and unambiguous statutory language shows that S.C. Code Ann. § 56-5-4100 applies not only to vehicle drivers, but also to vehicle loaders. In addition to the plain text of the statute, multiple canons of statutory constructions support this conclusion.

A. The Statutory Language of S.C. Code Ann. § 56-5-4100 Plainly and Unambiguously Applies to Vehicle Loaders

"When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning." Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007). When read in its entirety, S.C. Code Ann. § 56-4100 clearly and

[1] Although the trial court's Order granting summary judgment contains the conclusory statements that Super Sod breached no duty and that Super Sod's conduct was not a proximate cause of Oulla's injuries, it contains no analysis regarding these topics. This is because "[i]f there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000).

unambiguously imposes duties on vehicle loaders. The trial court based its statutory interpretation on a fundamental grammatical error.

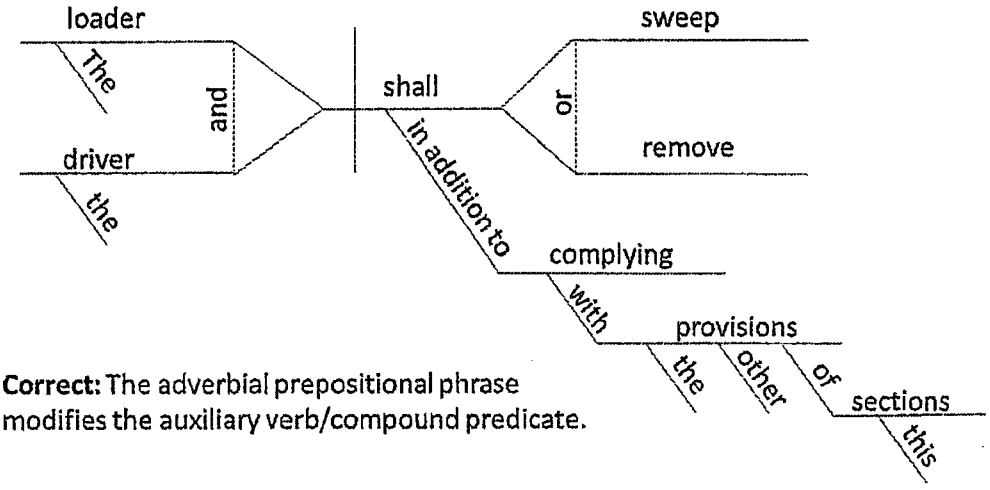
S.C. Code Ann. § 56-5-4100(A) provides, in pertinent part, "[n]o vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle." This subsection of the statute is written in the passive voice, and neither includes nor excludes any class of persons toward whom it is directed. But subsection (C) identifies the persons toward whom the entire statute is directed—loaders and drivers.

S.C. Code Ann. § 56-5-4100(C) provides

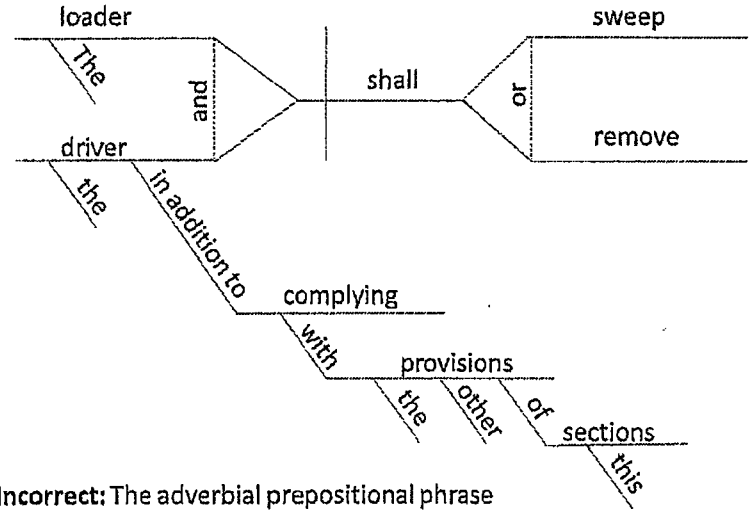
> The loader of the vehicle and the driver of the vehicle, in addition to complying with the other provisions of this section, shall sweep or otherwise remove [various materials] from [various] exterior portions of the vehicle before it is moved on a public highway.

Subsection (C) consists, in relevant part, of (1) a compound subject—*loader and driver*; (2) a compound predicate with an auxiliary verb—*shall sweep or remove*; and (3) an adverbial prepositional phrase—*in addition to complying with the other provisions of this section.* The adverb prepositional phrase modifies the compound predicate. In other words, subsection (C) provides that the driver *and* the loader of the vehicle must comply not only with the requirements of subsection (C), but also with "the other provisions of [§ 56-5-4100]." This includes the duties imposed by § 56-5-4100(A). Because the language of the statute is plain, vehicle loaders have a statutory duty to load the vehicle in a manner that prevents the load from escaping from the vehicle. See Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (providing that "[w]hen the language of a statute is plain, unambiguous, and conveys a clear and definite meaning . . . the statutory terms . . . must be applied according to their literal meaning").

The circuit court held that the adverbial prepositional phrase in § 56-5-4100(C)—*in addition to complying with the other provisions of this section*—refers only to the driver. Order Granting Defendant Super-Sod's Motion for Summary Judgment at 7 ("[I]t is clear that the [adverbial prepositional phrase in subsection (C)] refers to the 'driver's' obligations contained in the other subparagraphs."). As shown in the sentence diagrams below,[2] this is simply incorrect.



Correct: The adverbial prepositional phrase modifies the auxiliary verb/compound predicate.

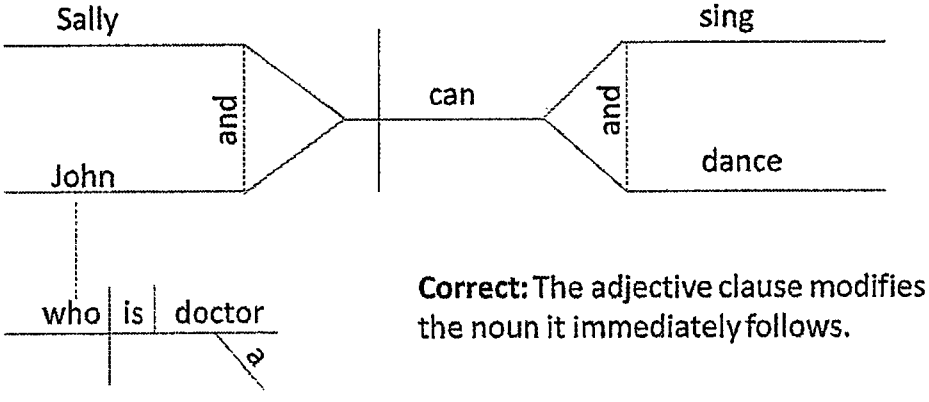


Incorrect: The adverbial prepositional phrase does not modify the second half of a compound subject.

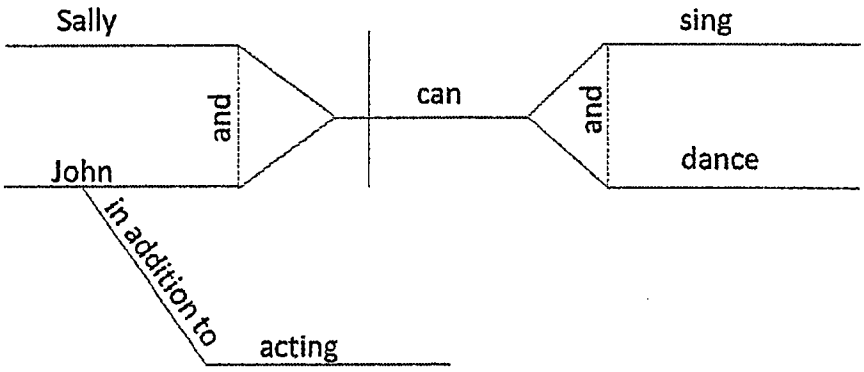
[2] These sentence diagrams are simplified for clarity. Other appellate courts have used sentence diagrams to clarify statutory grammar. E.g., United States v. Rentz, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc) (Gorsuch, J.) (diagramming a portion of 18 U.S.C. § 924(c), which contains a "bramble of prepositional phrases").

The circuit court's interpretive misstep may stem from the fact that the drafters placed the adverbial prepositional phrase directly after "the driver of the vehicle." Writers often place adjective clauses in the same location.

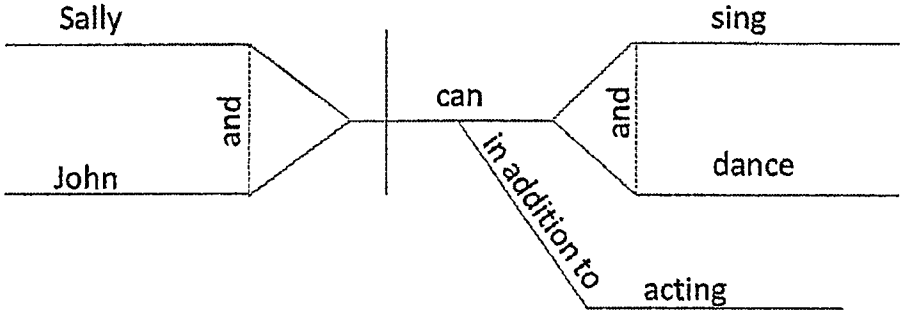
Take, for example, the following sentence: *Sally and John, who is a doctor, can sing and dance.* Like § 56-5-4100(C), this sentence consists of a compound subject—*Sally and John*—and a compound predicate with an auxiliary verb—*can sing and dance.* But unlike § 56-5-4100(C), this example contains an adjective clause—*who is a doctor.* This adjective clause modifies only *John.*



Now consider the following sentence: *Sally and John, in addition to acting, can sing and dance.* This sentence has the same compound subject and predicate as the previous example, but the commas now bracket an adverbial prepositional phrase—*in addition to acting.* There is no grammatically correct scenario in which this adverbial prepositional phrase—*in addition to acting*—modifies *John.* Instead, it modifies the auxiliary verb with the compound predicate—*can sing and dance.* This is the same structure observed in § 4100(C).



Incorrect: The adverbial prepositional phrase does not modify the second half of a compound subject.



Correct: The adverbial prepositional phrase modifies the auxiliary verb/compound predicate.

To be sure, the General Assembly may have spared some confusion if it had placed the adverbial prepositional phrase at the beginning or the end of § 56-5-4100(C):

- *In addition to complying with the other provisions of this section*, the loader of the vehicle and the driver of the vehicle shall sweep or otherwise remove [various materials] from [various] exterior portions of the vehicle before it is moved on a public highway.

- The loader of the vehicle and the driver of the vehicle shall sweep or otherwise remove [various materials] from [various] exterior portions of the vehicle before it is moved on a public highway, *in addition to complying with the other provisions of this section.*

But the legislature's decision to place the adverb prepositional phrase in the middle of the sentence does not change the fact that the plain words of § 56-5-4100(C) state that both vehicle loaders and

vehicle drivers must comply with § 56-5-4100 *in its entirety*. Accordingly, the circuit court erred when it held that § 4100(A) applied only to drivers. For this reason, this Court should reverse the circuit court's grant of summary judgment.

B. Exempting Loaders from Statutory Obligations Would Undermine the Comprehensiveness of the Statute's Reach and its Effectiveness in Promoting Safety on Public Highways

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Provisions should be given a reasonable construction, consistent with the purpose and policy of the Act." Jackson v. Charleston Cty. Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994).

S.C. Code Ann. § 56-5-4100(A) is found within the Uniform Act Regulating Traffic on Highways, S.C. Code Ann. § 56-5 10 *et seq*. The Uniform Act Regulating Traffic on Highways traces its roots back to an act passed in 1938—An Act to Prescribe the Equipment, Size and Weight Limitations of Motor Vehicles and Equipment of Other Vehicles on the Highways of This State; to Provide Liability in Certain Cases of Illegal Operations and to Otherwise Regulate the Use of the Said Highways; to Provide for the Enforcement of the Provisions of the Act, and to Prescribe Penalties for Violations Thereof, Act No. 845, approved April 29, 1938, 40 St. at Large, p. 1719.

The Supreme Court held that the purpose of the 1938 act was to provide "comprehensive regulation of truck traffic on the highways of the State." Hall v. Burg, 206 S.C. 173, 175–76, 33 S.E.2d 401, 401–02 (1945). It logically follows that the Uniform Act Regulating Traffic on Highways shares an identical purpose—comprehensive regulation of truck traffic on the highways.

By definition, a comprehensive regulation would address all or nearly all elements or aspects relevant to truck traffic on the public highways. Oxford Living Dictionary (US), https://en.oxforddictionaries.com/definition/us/comprehensive. With regard to safety, this means a truly comprehensive statute would address not only the duties of truck drivers, but also the

loaders who place materials for transport onto trailers. If this Court were to exempt loaders from obligations under this statute when the General Assembly has made no such express exemption, the Court would undermine the comprehensiveness of the statute's reach and its effectiveness in promoting safety on public highways. Accordingly, the Court should interpret S.C. Code Ann. § 56-5-4100(A) to apply to loaders of vehicles.

C. S.C. Code Ann. § 56-5-4100(A) is Superfluous If It Does Not Apply to Vehicle Loaders

"In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Courts presume that "[t]he General Assembly obviously intended the [statute] to have some efficacy, or the legislature would not have enacted it into law." State v. Sweat, 379 S.C. 367, 382, 665 S.E.2d 645, 654 (Ct. App. 2008), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010). Accordingly, courts read the statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." Id. at 37, 665 S.E.2d at 651.

Like § 56-5-4100, § 56-5-4110 is found in Article 33 of the Uniform Act Regulating Traffic on Highways. Article 33 is titled "Size, Weight, and Load," and generally addresses those issues with respect to safety. Accordingly, the statutes should be read together so as not to render either superfluous.

S.C. Code Ann. § 56-5-4110 provides that "[n]o person shall operate on any highway any vehicle with any load unless such load and any covering thereon is securely fastened so as to prevent such covering or load from becoming loose, detached or in any manner a hazard to other users of the highway." By its plain language, § 56-5-4110 applies only to operators—that is, vehicle drivers. In no uncertain terms, the statute admonishes drivers to not operate vehicles with loads that become loose, detached, or present a hazard to other users of the highway.

The circuit court held that § 56-5-4100(A) does not apply to vehicle loaders. But if § 56-5-4100(A) applies only to drivers, its admonition that "[n]o vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle" would be entirely subsumed by § 56-5-4110. Indeed, because § 56-5-4110 covers not just loads, but also load coverings; its broad scope would make § 56-5-4100(A) superfluous if § 4100(A) applies only to drivers.

The plain language of the statute, its purpose, and the canon against surplusage all support the statutory interpretation that S.C. Code Ann. § 56-5-4110(A) applies to both loaders and drivers. Here, Super-Sod, as the loader of the trailer, had a statutory duty to comply with the requirement that the trailer had to be loaded in such a way "as to prevent any of its load from dropping . . . or otherwise escaping from the vehicle." § 56-5-4100(A). Oulla, as a traveler on the highway, was doubtless within the class that S.C. Code Ann. § 56-5-4100 was intended to protect from this type of harm—injury from a load falling off of a trailer on the highway. See, e.g., Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (standing for the principle that a statutory duty arises if the "essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered and that [the plaintiff] is a member of the class of persons the statute is entitled to protect"). Accordingly, the Court should reverse the circuit court's grant of summary judgment.

II. AN INDIVIDUAL WHO LOADS A VEHICLE THAT WILL TRAVEL ON PUBLIC HIGHWAYS OWES A COMMON LAW DUTY TO THIRD-PARTY DRIVERS ON PUBLIC HIGHWAYS

The circuit court held that Super-Sod owed no common law duty to Oulla, a third-party driver on the public highways. But the common law imposes a duty on persons whose actions create a foreseeable risk to third parties. It also imposes a duty on individuals who undertake a voluntary service for the protection of others. Here, improperly secured sod created a foreseeable risk to Oulla and other third-parties on public highways. Moreover, the evidence supports an

inference that Super-Sod undertook the voluntary service of wrapping and loading the sod for the protection of third-party drivers on public highways. For these reasons, this Court should hold that Super-Sod had a common law duty to Oulla and reverse the circuit court's grant of summary judgment.

A. A Vehicle Loader Owes a Duty to Third-Party Drivers Because Risk Of Serious Physical Harm to Drivers Is Foreseeable

The Supreme Court has recognized a common law duty to third parties who face a foreseeable risk of physical harm. See Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 319–20, 605 S.E.2d 12, 15–16 (2004) (identifying common law duty of care to third parties independent of the duties assumed in contract based on general principles of common law negligence and providing list of similar case law). This is an example of one such "special circumstance" that gives rise to an affirmative duty absent some obligation arising from statute, contract, status, property interest, or special relationship. Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003).

The Oullas squarely presented this argument to the circuit court in their Brief in Opposition of Super-Sod's Motion for Summary Judgment. Brief at 11, (citing Dorrell and additional cases for this proposition). But the circuit court did not address this argument. Instead the circuit court stated—without analysis—that there was no "special circumstance to support a duty." Order Granting Defendant Super-Sod's Motion for Summary Judgment at 5 (internal quotation mark omitted). In light of the common law duty to foreseeable third parties that the Supreme Court has already recognized, this conclusory statement is simply incorrect.

Here, it is foreseeable that pallets of sod that are improperly loaded into an open trailer pose a risk of harm to drivers on the public highways. Indeed, Super-Sod itself guards against such foreseeable dangers when it packages and loads sod shipments that it transports itself. See

Super-Sod 30(b)(6) Dep. 11:9-21; 22:17-23 (noting that Super-Sod packages, loads, and *transports* sod throughout the southeastern United States with its own fleet of trailers); Kearse Dep. 20:13-17; 31:12-19; 17:20-18:2; 28:7-18 (noting precautions taken to load sod pallets onto trailers in a balanced way and wrap the sod so that it does not spill during transport). Because the risk to third-party drivers on public highways is readily foreseeable, the Court should hold that Super-Sod owed Oulla a duty of care and reverse the circuit court's grant of summary judgment.

B. Because Evidence in The Record Supports the Inference that Super-Sod Undertook a Voluntary Service for the Protection of Third Parties, A Common Law Duty Exists

In Miller v. City of Camden, the Supreme Court held that the common law imposes a duty on a volunteer who undertakes to render services for the protection of others. 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). The Court held that "a volunteer can be liable to third parties," and it is a question of fact for the jury to determine whether the defendant volunteered for the benefit of third parties. Id., 329 S.C. at 316, 494 S.E.2d at 816 (Toal, J., concurring and dissenting in part). If the appellate court can draw more than one inference from the evidence, a genuine issue of material fact exists and summary judgment should be reversed. Id., 329 S.C. at 315, 494 S.E.2d at 815. In Miller, the evidence supported the inference that the defendant voluntarily undertook the duty to monitor dam levels for the protection of those individuals downstream. Id. 329 S.C. at 315, 494 S.E.2d at 815 ("We find more than one inference can be drawn from this evidence."). Based on the available evidence in this case, a jury could infer that Super-Sod (1) voluntarily undertook the tasks of wrapping the sod and safely loading it onto trailers to (2) protect third party drivers on public roadways.

Several pieces of evidence, considered individually or as a whole, support the inference that Super-Sod voluntarily undertook the tasks of wrapping and loading the sod:

- Super-Sod wraps the sod in plastic and loads the 2,000 pound pallets of sod with a forklift onto customers' vehicles for transport on public roadways. Super-Sod 30(b)(6) Dep. 25:17 – 27:2; 27:12-18.

- Nothing in the record suggests that Super-Sod was required to wrap the sod. In fact, the record indicates that Super-Sod did not wrap the sod for every customer. Kearse Dep. 49:22–50:7 (noting that he did not wrap pallets before placing them onto an open trailer with a top and back that was strapped). Super-Sod could have simply loaded unwrapped sod pallets onto the trailers of individuals who came to pick it up and placed the onus on them to ensure that the sod did not shift, fall, or roll off the trailer mid-transport.

- Super-Sod was under no obligation to load the sod; it could have required purchasers to load the sod or employ some third party to do it for them.

Based on the above, a factfinder could infer that Super-Sod voluntarily undertook the acts of wrapping and loading the sod.

There are also several pieces of evidence that support the inference that the reason why Super-Sod wrapped and loaded the sod in the way it elected to was to protect third-party drivers on public highways:

- Melvin Kearse, a Super-Sod employee for more than two decades, acknowledged that because the sod is placed on pallets in rolls, it could roll off onto the highway if not properly wrapped. Kearse Dep. 45:20–46:24.

- Kearse acknowledged that he did not wrap pallets when a customer picking up sod had tops and straps to place on the trailer. Kearse Dep. 49:122–50:7.

- Kearse also testified that it is his responsibility to: (1) properly wrap the sod in a way that it's not supposed to break during transport; and (2) safely load the sod onto the trailer and make sure it's balanced and not overloaded. Kearse Dep. 20:13-17; 31:12-19; 17:20-18:2; 28:7-18.

- Kearse further testified that he balances sod loads by placing pallets in the middle of the trailer, and if the sod puts too much weight on a trailer, he takes it off and has the customer come back later for loading. Kearse Dep. 33:18-21; 28:15-22.

- Super-Sod's 30(b)(6) witness, Joe Livingston, testified that Super-Sod would not load a customer in "situations that would not be safe." Super-Sod 30(b)(6) Dep. 35:19-36:10.

Based on the above, a factfinder could infer that Super-Sod undertook the tasks of wrapping and loading the sod in a particular manner for the purpose of protecting third-party drivers on public highways.

Finally, the issue of causation is not presently before this Court because the circuit court did not reach it. But the fact that there is sufficient evidence to make an inference that the very issues Super-Sod sought to avoid by wrapping the sod and loading the trailer—spilled sod and an imbalanced trailer—directly, foreseeably, and proximately caused the collision, injuries, and damages alleged in the complaint lends additional support to finding a duty under Miller. See, e.g., Sox Dep. 20:19-25; 21:2-12 (noting that trailer began to sway); Kearse Dep. 40:12-18 (noting that Kearse loaded the trailer in the front and rear instead of the usual location in the middle); Sox Dep. 132:13-133:11; 50:18-20 (noting that wrap tore and sod spilled from the trailer to I-26). For the above-mentioned reasons, the Court should reverse the circuit court's grant of summary judgment and allow a jury to decide whether Super-Sod has a common law duty to Oulla under Miller.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION TO AMEND THE COMPLAINT.

The Oullas filed a Motion to Amend their Complaint to add a cause of action for breach of implied warranty of merchantability pursuant to S.C. Code Ann. §§ 36-2-314(e) and 36-2-318 more than a month before the circuit court granted Super-Sod's motion for summary judgment. Because the circuit court did not review the motion before granting summary judgment, the Oullas re-filed their motion to amend the complaint as a Rule 60(b) Motion to Vacate the Entry of

Summary Judgment and Grant the Motion to Amend the Complaint. When the circuit court finally heard the Motion to Amend the Complaint, it held that the Rule 15(a) standard applied.[3]

The circuit court abused its discretion when it denied the Motion because (1) Super-Sod failed to meet the burden of establishing the type of prejudice envisioned by Rule 15; (2) the circuit court based its decision, in part, on the unrelated and erroneous holding relating to Super-Sod's duties with respect to negligence; and (3) the circuit court ignored evidence that the sod was not adequately contained or packaged within the meaning of S.C. Code Ann. § 36-2-314(e)(2).

A. Super-Sod Will Not Be Prejudiced in the Manner Envisioned by Rule 15

Rule 15 provides that "leave [to amend pleadings] shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998). Here, Super-Sod had notice of the new claim and an ample opportunity to refute it.

The crux of the new cause of action in the proposed amended complaint is that the plastic wrap used on the sod pallets was inadequate packaging within the meaning of S.C. Code Ann. § 36-2-314(e)(2). Although the cause of action is new, the allegation that the packaging was inadequate is not. See, e.g., Sox Dep. at 138:19–21. ("Q: If the wrap around the sod had not torn, would your incident have taken place? A: No."). Therefore, Super-Sod had sufficient notice of the claim.

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[3] It does not appear that the proper standard of review in this scenario—that is, Rule 15(a) or Rule 60(b)—has been squarely placed before South Carolina appellate courts. It cannot be disputed that the lower court would have reviewed the motion to amend under Rule 15(a), SCRCP's standard if it had considered the case before it granted summary judgment. Counsel for Oulla believe that the Rule 15(a) standard is indeed the correct standard, and does not contest that here. To the extent the Court requests briefing on the two standards, Appellants' counsel will gladly do so.

In a similar vein, Super-Sod has had an opportunity to refute the assertion that it used inadequate packaging. As noted above, the assertion that the packaging was inadequate has been present in this case since its inception. Super-Sod had more than enough opportunity to refute allegations of inadequacy in the context of the existing tort claims. This could have included naming experts to testify that Super-Sod adhered to industry standards (*i.e.*, its actions were reasonable) or that the plastic wrap it used should not have torn under reasonably foreseeable circumstances. Super-Sod did not name such experts, but its failure to do so does not translate into the lack of an opportunity to refute the claim.

The circuit court's finding of prejudice focuses on the fact that "the stretch wrap that surrounded the sod had been destroyed and no photographs, testing, or other data related to the stretch wrap was available." Order Denying Plaintiffs' Motion for Relief from Judgment at 7. The circuit court's concern that it is "hard to conceive of a more prejudicial position to allow such an amendment" is misplaced. Id. As a preliminary matter, Super-Sod's 30(b)(6) witness testified that Super-Sod still wraps its sod by hand with the same .7 mil plastic shrink wrap that it used when it sold the subject sod. See Super Sod 30(b)(6) Dep. 65:3-14; 16:1-4. To the extent testing of the shrink wrap is needed or its use as an exhibit is desired, there should be no issue of being able to locate relevant product for use in this litigation. Furthermore, based on discovery in the case, the stretch wrap had been destroyed prior to the original lawsuit so the timing of the motion on that issue was irrelevant.

In addition, any disadvantage Super-Sod might face from the absence of the abovementioned materials would be an evidentiary one also present throughout the case in its defense of the negligence claims. Accordingly, Super-Sod would not be prejudiced within the meaning of Rule 15(a).

B. The Circuit Court Erroneously Held That the Proposed Cause of Action Would be Futile

To be futile, the proposed cause of action must have no chance of surviving summary judgment. See Salvo v. Hewitt, Coleman & Assocs., Inc., 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979). Here, the circuit court failed to establish that the proposed cause of action would not survive summary judgment.

The proposed cause of action was the breach of an implied warranty to a third-party beneficiary. Motion to Amend Complaint at 2. There is no dispute that Super-Sod was the seller of the subject goods: the sod, which was loaded onto pallets in rolls. There is no dispute that the sale was a UCC article 2 transaction between Super-Sod and Harbison, giving rise to the implied warranty of merchantability. S.C. Code Ann. § 36-2-314(2)(e) plainly provides that goods must be adequately contained and packaged to be merchantable. Further, S.C. Code Ann § 36-2-318 plainly provides that natural persons "who may be expected to . . . be affected by the goods" are third-party beneficiaries of the contract for the sale of goods, and may enforce the implied warranty of merchantability.

Here, Super-Sod's shrink wrap was used to wrap and contain and package the goods: the sod. There is evidence, including an expert affidavit, that the shrink wrap failed in its role and that the failure was a proximate cause of the subject car accident. Affidavit of Michael A. Sutton, PE ¶¶ 6–10. In light of the applicable law and the facts of the case, the proposed cause of action is by no means futile.

The circuit court concluded that the proposed cause of action would be futile on at least three clear misapprehensions. First, the circuit court stated that the "implied warranty statute" did not impose a legal duty on Super-Sod because "the circuit court already held that Super-Sod owed no duty to [Oulla]." Order Denying Plaintiffs' Motion for Relief from Judgment at 8. This

assertion is simply incorrect. Even if the order granting summary judgment were correct in its holdings regarding the absence of statutory and common law duties, the court conducted that analysis only within the context of negligence. The legal framework used to analyze a negligence claim and a breach of warranty claim are entirely different, so the circuit court's prior holding cannot support this holding.

Second, the circuit court held that the proposed claim cannot succeed because there is "no 'implied warranty' that unsecured cargo will not come loose during transport." Order Denying Plaintiffs' Motion for Relief from Judgment at 8. The circuit court subsequently focused on who did or did not possess or utilize "tie down straps to secure the sod." Id. This appears to be a fundamental misunderstanding of the proposed cause of action. Because § 36-2-314(e), in relevant part, provides only that goods should be adequately contained and packaged, any discussion of securing the pallets of sod to the truck is completely irrelevant to this cause of action.

Third, the circuit court again misapplied a prior negligence holding to the proposed breach of implied warranty claim. The circuit court correctly noted that the adequate container and packaging requirement "applies only where the nature of the goods and of the transaction require a certain type of container, package or label." S.C. Code Ann. § 36-2-314(e), Comment 10. The Court then erroneously and improperly relied on the order involving the existence of statutory or common law duties in the negligence framework to hold that a certain type of container or packaging was not required for rolled sod under S.C. Code Ann. § 36-2-314(e). Order Denying Plaintiffs' Motion for Relief from Judgment at 8 ("As [the order granting summary judgment] explained, Super-Sod is not required to secure its product to the freight trucks of its customers."). The circuit court applied a holding pertaining to one area of the law to an entirely different area of

the law, effectively comparing apples to oranges. This simply cannot be the rationale behind holding that the proposed cause of action is futile.

As shown above, the proposed cause of action is not futile, and Super-Sod will not be prejudiced within the meaning of Rule 15. Accordingly, this Court should reverse the circuit court's denial of the Oullas' Motion to Amend the Complaint.

CONCLUSION

For the abovementioned reasons, Appellants ask this Court to reverse the circuit court's grant of summary judgment to Super-Sod. Appellants also request that this Court reverse the circuit court's denial of their Motion to Amend the Complaint.

Respectfully submitted,

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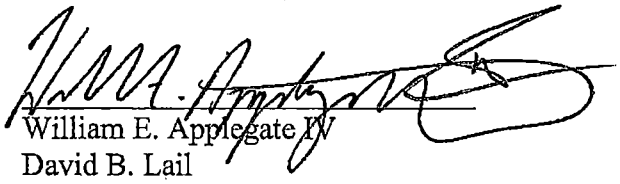

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January 29, 2018

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SC Court of Appeals

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,

v.

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

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

PROOF OF SERVICE OF INITIAL BRIEF OF APPELLANTS

I certify that I have served the Initial Brief of Appellants on Defendants and Respondent above-named by depositing a copy of it in the United States Mail, postage prepaid, on January 29, 2018, addressed to their attorneys of record:

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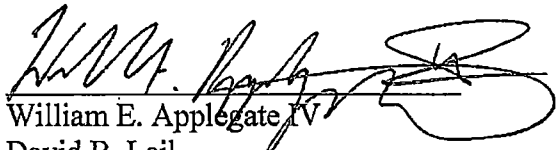

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January 29, 2018

Via hand delivery and regular US Mail
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 one copy each of Appellants' Initial Brief, Appellants' Designation of Matter to be Included in the Record on Appeal, Proof of Service of Initial Brief of Appellants, and Proof of Service of Appellants' Designation of Matter in the above-referenced case. I would appreciate your filing the originals. 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,

William E. Applegate IV

Enclosures as stated
cc: E. Raymond Moore, III, Esquire
E. Mitchell Griffith, Esquire
Kelly D. Dean, Esquire
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