THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon,
The Honorable James B. Jackson, Jr.
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.

RESPONDENT'S INITIAL BRIEF

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2. Whether the Circuit Court correctly held that one who loads a vehicle at the direction of the vehicle operator does not voluntarily assume a common law duty to the motoring public.

3. Whether the Circuit Court correctly found that Super-Sod's action of loading sod onto a customer's trailer in compliance with the instructions given by the customer was not a proximate cause of a subsequent accident that was remote in time and place from Super-Sod's conduct and took place after three intervening acts of negligence from three different persons.

4. Whether the Circuit Court correctly exercised its discretion when it denied Appellants' Rule 15(a) Motion to Amend after Plaintiff failed to raise the Motion to Amend to the Circuit Court Judge's attention prior to entry of summary judgment and when the amendment would both prejudice the Respondent and be futile.

STATEMENT OF THE CASE

This case arises out of a rear-end accident that took place on I-26 near Orangeburg, South Carolina when Lisa Velazques failed to slow down for traffic and rear-ended a vehicle operated by Appellant Price Oulla. Approximately seventeen minutes before the accident, Cody Sox, an employee of co-defendant Harbison Community Association, Inc. ("Harbison"), was driving on I-26 when an unidentified John Doe tractor-trailer swerved into Sox's lane of travel, causing him to take sudden evasive action. When he did so, some sod that was on the Harbison trailer fell into the roadway.

Earlier that morning, Sox had picked up the sod from Respondent Patten Seed Company d/b/a Super-Sod ("Super-Sod"). When Sox picked it up, he directed Super-Sod's employee where and how he wanted the sod pallets loaded onto the Harbison trailer. Much like the proverbial

horseshoe nail that lost the war, Appellants contend Super-Sod caused the accident when it loaded the sod onto the Harbison trailer in compliance with Sox's direction.

Appellants filed the original Summons and Complaint on December 31, 2014. On May 5, 2016, Super-Sod filed a Notice of Motion and Motion for Summary Judgment on the grounds that it owed no duty to Appellants and, even if it did owe a duty, its conduct did not proximately cause Appellants' accident. (Notice of Mot. and Mot. for Summ. J.). Likewise, Harbison and its employee Sox filed their own Motion for Summary Judgment on the grounds that Velazques' intervening negligence was not foreseeable by and was not chargeable against Harbison. (Mot. for Summ. J. of Harbison Community Ass'n, Inc. and Cody Sox).

The Circuit Court scheduled a hearing on both motions for June 29, 2016 before the Honorable Judge R. Knox McMahon. Immediately before the afternoon hearing, Appellants filed a Motion to Amend their Complaint without notifying Judge McMahon. (Pl.s' Mot. to Amend Compl.)[1] (June 29, 2016 Hearing Tr.). By that date, the case was already a year-and-a-half old. (Compl. filed Dec. 31, 2014). Fact discovery was complete. The trial date had already been pushed back once via an amended scheduling order so the parties would have time for expert discovery. (Consent Scheduling Order, ¶ 2, dated Jan. 21, 2016); (June 10, 2016 Consent Scheduling Order).

Appellants neither moved for a continuance nor objected to the summary judgment hearing proceeding as scheduled. They argued both motions without notifying Judge McMahon that they had filed the Motion to Amend. In fact, before filing the Motion to Amend, counsel for Appellants

[1] Plaintiff hand delivered the Motion to Amend at 3:24 pm to the Clerk of Court. The hearing on the motions was scheduled to begin at 4:00 pm.

confirmed to counsel for Respondent that he did not want to postpone the summary judgment hearing. (Aug. 23, 2016 Hearing Tr. 5:9-19).

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 claim. (Appellants' Mot. to Am., Prop. Am. Compl., ¶ 31(d)). Second, the proposed Amended Complaint added a cause of action for breach of an implied warranty of merchantability. (Appellants' Mot. To Am., Prop. Am. Compl., ¶¶ 32-40).

Both at the hearing and in their Memorandum in Opposition to the Motion for Summary Judgment, Appellants argued Section 56-5-4100 imposed a legal duty on Super-Sod to secure its customers' vehicles and trailers and that the duty extended to "members of the traveling public." (Pl.s' Mem. in Opp. To Def.s' Mot. for Summary J. pp. 8-10); (June 29, 2016 Hearing Tr. 28:21-29:18). 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 denied Harbison and Sox's Motion for Summary Judgment.[2] Judge McMahon granted Super-Sod's Motion for Summary Judgment, finding Super-Sod owed no duty to Appellants and, even if it did, Super-Sod's conduct was not the proximate cause of the accident. The Circuit Court also ruled there was no special relationship between Appellants and Super-Sod. (July 26, 2016 Order, p. 5). It also decided there was no contract creating a duty owed by Super-

[2] After their Motion was denied, Harbison and Sox settled with Appellants. The case remains pending against Velazques in the lower court.

Sod to Appellants. (July 26, 2016 Order, p. 5). Thus, there was no "relationship, status or special circumstance" to support a duty. (July 26, 2016 Order, p. 5).

Specifically addressing Section 56-5-4100, Judge McMahon held the relevant provisions of the statute only extended duties to the operator of a vehicle on a public highway. (July 26, 2016 Order, pp. 6-7). Because Super-Sod did not operate any vehicle involved in the accident, the statute did not create any duty owed by Super-Sod to Appellants. Even if a duty existed, the facts are far too remote – and the intervening acts far too many – to attribute any legal fault to Super-Sod. Therefore, the Circuit Court properly granted summary judgment and should be affirmed.

After entry of summary judgment, Appellants filed a Rule 59(e) motion. While that Motion was pending before Judge McMahon, the Honorable Diane Goodstein held a hearing on the Motion to Amend. Because the Circuit Court had already granted Super-Sod's Motion for Summary Judgment and Appellants filed a Rule 59 motion before the hearing on the Motion to Amend took place, Judge Goodstein held it was for Judge McMahon to decide whether that Motion had been timely raised to the Trial Court. (Sept. 16, 2016 Order). After Judge McMahon denied the Rule 59 Motion, Appellants appealed. While that appeal was pending, Appellants sought leave from this Court to file a Rule 60 Motion, which this Court granted. The Circuit Court, Judge James B. Jackson, Jr., then held a hearing on that Motion on June 6, 2017. On July 14, 2017, Judge Jackson entered an Order Denying Plaintiffs' Motion for Relief from Judgment.

Applying Rule 60's mistake, inadvertence or excusable neglect standard, Judge Jackson found no basis to set aside the summary judgment and allow the Motion to Amend. In particular, Judge Jackson held the "Motion for Summary Judgment was filed after significant discovery and well in advance of the hearing." (July 14, 2017 Order, p. 5). Moreover, Appellants' counsel acknowledged to the Court that he communicated to Respondent's counsel that the proposed

Motion to Amend the Complaint would not result in a continuance of the summary judgment hearing. (July 14, 2017 Order, p. 5). Judge Jackson also found Appellants failed to bring the Motion to Amend to Judge McMahon's attention at the summary judgment hearing. (July 14, 2017 Order, p. 6). Therefore, Appellants failed to meet their burden of showing mistake, inadvertence or excusable neglect.

Judge Jackson also considered the proposed Amended Complaint under Rule 15, finding that even under the lighter Rule 15 burden that the amendment would have prejudiced Super-Sod due to the age of the case, the stage of discovery, and the lack of physical evidence available. Ultimately, Judge Jackson held, "It is hard to conceive of a more prejudicial position to allow such an amendment." (July 14, 2017 Order, p. 7). Moreover, Judge Jackson found the amendment would be futile. As to Appellants' additional statutory duty argument, he noted that Judge McMahon considered that duty in the Order Granting Super-Sod's Motion for Summary Judgment and rejected Appellants' suggested reading of the statute. (July 14, 2017 Order, p. 8). As to the implied warranty of merchantability, he held there was no implied warranty that unsecured cargo would not come loose during transport, and the circumstances of the transaction between Super-Sod and Harbison did not require Super-Sod to secure its product to customer's vehicle. (July 14, 2017 Order, p. 8). For all of these reasons, Judge Jackson exercised his discretion and denied the Motion to Amend. The second appeal followed.

STATEMENT OF FACTS

At 12:11 p.m. on July 22, 2014, 911 operators received a call regarding a rear-end accident on I-26. (CAD call information; 911 Recording). It was uncontested the subject accident occurred when co-defendant Lisa Velazques struck the rear of Appellant's vehicle at a high rate of speed.

(Meyer Dep. 41:11-15).[3] Velazques offered no explanation of why she was unable to stop in time, but she admitted that she was programming her GPS at some point prior to the accident. (Meyer Dep. 33:8-22).

A. Harbison orders sod from Super-Sod but chooses to transport the sod itself.

Earlier that week, Harbison employees had ordered two pallets of sod from Super-Sod for a landscaping project. (Sox Dep. 20:3-7). Although Harbison knew that Super-Sod provided delivery services, Harbison did not ask Super-Sod to deliver the pallets because of the additional cost of delivery. (Sox Dep. 128:1-12). After receiving the order, Super-Sod informed Harbison when the sod would be ready for pickup. Harbison sent two employees – Cody Sox and Corey Branham – to pick up the sod in Orangeburg. (Sox Dep. 20:8-10).

B. Harbison's employee Cody Sox travels to Orangeburg, pays for the sod, and directs Super-Sod's employee how to place the sod on the Harbison trailer.

Sox and Branham drove a Harbison maintenance truck with a John Deere double-axle trailer to Orangeburg. (Sox Dep. 20:8-10). Sox and Branham went into Super-Sod's office and completed the purchase. (Sox Dep. 20:10-13). Then, they drove down the road approximately two miles to pick up the recently purchased pallets of sod. (Sox Dep. 20:3-18). The pallets of sod were pre-wrapped in plastic .7 mil stretch wrap, wrapped four to five times to the top of the pallet, then two to three wraps back down the pallet from the top. (Kearse Dep. 30:22-25).

Once at the loading site, Sox directed the Super-Sod employee to place the pallets centered over the double axle of the trailer. (Sox Dep. 20:15-18; 69:4-70:1). At Sox's direction, the Super-Sod employee loaded one pallet in front of the double axle and one pallet behind the double axle. The loads were centered over the double axle and centered in the trailer. There is no evidence that

[3] After the accident, Velazques changed her last name to Meyer. Because the caption refers to her as Lisa Velazques, Respondent refers to her by that name for the sake of consistency.

Super-Sod made any representations that the pallets were safely stowed for transport, and the testimony is undisputed that Super-Sod's employee loaded the trailer as directed by Sox. (Sox Dep. 33:17-20).

C. Sox and Branham inspect the load, realize they have forgotten tie down straps, and decide to transport the load anyway.

After directing the Super-Sod employee how and where to load the pallets, Sox and Branham inspected the trailer, checked the hitch, and made sure the load was balanced. (Sox Dep. 34:2-25). They also confirmed that the trailer bed was clean and free of debris. (Sox Dep. 34:2-25). Sox acknowledged the sod appeared in a safe and stable condition after it was loaded. (Sox Dep. 34:2-5). He also acknowledged that he knew he was required to secure his load. (Sox Dep. 61:23-62:12)

Before leaving to drive to Super-Sod, Sox had researched the weight of pallets of sod and confirmed the Harbison trailer was adequate for the job. (Sox Dep. 35:4-13). Sox had intended to bring straps to tie down the load. (Sox Dep. 71:18-73:16). However, he and Branham each thought the other was bringing the straps. (Sox Dep. 71:18-73:16). Therefore, they did not have any straps with them when they arrived at Super-Sod's Orangeburg office at approximately 11:00 a.m. (Sox Dep. 20:3-18; 72:6-16). Sox asked Super-Sod if it had straps available and was told that Super-Sod did not have any. (Sox Dep. 72:16-73:8). Sox admits he did not ask Super-Sod to tie down the load. (Sox Dep. 70:12-14). Despite knowing the load was not tied down, Sox decided to leave Super-Sod's property and drive on the roadway without tying down or otherwise securing the load. (Sox Dep. 63:10-12).

D. Sox and Branham drive down the road, stop at a gas station for food, re-check the trailer, and continue onto I-26.

Sox and Branham left the sod farm, including a drive of approximately one mile down a dirt road, without incident. (Sox Dep. 90:10-91:15). Next, they drove down Highway 301,

reaching speeds of fifty miles per hour, then stopped at a gas station near I-26 to get something to eat. (Sox Dep. 20:19-22; 91:3-9). While at the gas station, Sox confirmed that the load had not shifted and the pallets and stretch wrap were intact. (Sox Dep. 93:18-22; 136:4-9). After getting food, they got back on Highway 301 and took the cloverleaf ramp onto I-26.

The onramp to I-26 was a "tight" onramp. (Sox Dep. 100:2-15). Nonetheless, Sox successfully merged onto I-26, established himself in the right-hand lane, and none of the sod shifted during the process. (Sox Dep. 101:20-23). Sox safely established the vehicle in the right-hand lane on I-26 and passed the other entrance ramp onto I-26. (Sox Dep. 101:13-23; 104:12-24).

E. A John Doe tractor trailer veers into the Harbison vehicle's lane, causing Sox to take evasive action and sod to spill onto the roadway.

Sox testified that after travelling up I-26 for at least three tenths of a mile and reaching a speed of approximately fifty miles an hour – a speed that Cox had already driven with the sod earlier on Highway 301 – Branham noticed a blue tractor-trailer veering into their lane of travel. (Sox Dep. 104:24-105:3). The blue tractor-trailer veered into Sox's lane far enough that, if Sox had not taken evasive action, the vehicles would have collided. (Sox Dep. 118:8-21). The shift was so sudden that Branham was scared and yelled out an expletive. (Sox Dep. 50:21-51:12; 124:8-19).

Sox took evasive action and swerved into the emergency lane or shoulder of the interstate. When he did so, he felt the trailer sway. He pulled over to the side of the interstate and saw that some sod had fallen off the back of the trailer. (Sox Dep. 128:13-17). He estimated approximately half of a pallet of sod had fallen into the right-hand lane. (Sox Dep. 39:10-13). The force from the evasive maneuver had torn the .7 mil stretch wrap. (Sox Dep. 132:9-14). Although sod was in the right-hand lane, the left-hand lane continued to move, and some cars in the right-hand lane

drove over the sod without incident. (Sox Dep. 21:20-22). No cars were struck by the sod when it fell into the roadway. (Sox Dep. 21:20).

F. Sox calls 911; the fire department arrives and temporarily blocks the slow lane while sod is removed from the roadway; then the fire department opens both lanes.

At 11:54 am, Sox called 911 and the operator dispatched a fire engine and a fire truck. (Sox Dep. 21:23-22:8; CAD Call Information, 911 recording). While Sox and Branham waited for a fire truck, traffic continued to drive over the lost sod without incident. (Sox Dep. 42:19-20). The fire truck arrived approximately five minutes later. (Sox Dep. 110:7-15). Fire department personnel blocked the right-hand lane of traffic while the sod was removed from the roadway. (Sox Dep. 22:1-8). After the sod was removed from the roadway, the firemen moved the fire truck off to the side of the road, leaving all lanes of travel open. (Sox Dep. 47:2-6; 110:7-15; 111:8-22). Traffic resumed flowing in both the right and left-hand lanes. (Sox Dep. 111:8-22).

G. Lisa Velazques rear ends Appellant Price Oulla.

The interstate traffic behind the spilled sod was able to slow to a safe speed for over fifteen minutes before the collision.[4] (Sox Dep. 110:7-15; 111:8-22). It is unknown exactly how far back Oulla and Velazques were from the spilled sod, but it is undisputed that the distance was great enough that Sox did not hear the subsequent collision, and he was too far ahead to see the collision despite the fact that this stretch of I-26 was relatively straight and level. (Sox Dep. 117:1-5). An

[4] Appellants claim there was only a six-minute gap in time between when Sox called 911 to report the spilled sod and the first call regarding Appellants' accident. (Appellant's Br. p. 5). It is not clear how they reach this conclusion. The first call from Sox regarding sod in the roadway took place at 11:54 a.m. (911 Call, 2014-07-22 at 11.54.42.wav). The first call regarding the subsequent automobile collision took place at 12:11 – approximately 17 minutes later. (911 Call, 2014-07-22 at 12.11.24.wav). Regardless, the length of time between the two events is not material to Super-Sod's position on either the "duty" issue or the "proximate cause" issue.

RV that was towing another vehicle was able to safely slow ahead of Oulla's own vehicle before Velazques rear ended Oulla. (Traffic Collision Report Form).

Velazques admitted she was at fault for causing the accident. (Meyer Dep. 42:4-6). The evidence is undisputed that the accident occurred during daytime hours on a sunny and clear day. (Meyer Dep. 32:19-21). Velazques also admitted she was programming her GPS while driving down I-26 in the moments before the collision. (Meyer Dep. 33:8-25).

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007) (citation omitted). "The plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof." *Id.* at 357, 650 S.E.2d at 71 (citation omitted). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.* at 355, 650 S.E.2d at 70. However, the question of whether a party owes a duty is a legal question for the court. *Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 504, 737 S.E.2d 512, 513-14 (Ct. App. 2012) (citation omitted).

A denial of a motion to amend under Rule 15 or a motion under Rule 60(b) "is within the sound discretion of the trial court." *See Bowman v. Bowman*, 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct. App. 2004) (citation omitted) (holding Rule 60(b) motion is subject to abuse of discretion review); *Sullivan v. Hawker Beechcraft Corp.*, 197 S.C. 143, 153, 723 S.E.2d 853, 840 (Ct. App. 2012) (citation omitted) (holding Rule 15 motion is subject to abuse of discretion review). Because

both motions are subject to "the sound discretion of the trial court," they "will rarely be disturbed on appeal. The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Sullivan.*, 397 S.C. at 153, 723 S.E.2d at 840 (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)); *see also Bowman*, 357 S.C. at 151, 591 S.E.2d at 656 ("On review [of denial of a Rule 60(b) motion], we are limited to determining whether the trial court abused its discretion in granting or denying such a motion.") (citation omitted).

ARGUMENT

To recover in negligence, a plaintiff must establish three elements: (1) that the defendant owed the plaintiff a duty of care; (2) that by some act or omission, the defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage." *Underwood v. Coponen*, 367 S.C. 214, 217, 625 S.E.2d 236, 238 (2006); *Staples v. Duell*, 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct. App. 1997). Here, Appellants' claim against Super-Sod fails all three requisite elements: Super-Sod had no legal duty to the Appellants; Super-Sod breached no duty; and Super-Sod's conduct is not a proximate legal cause of the Appellants' injuries.

As an initial matter, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). "Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Johnson,* 401 S.C. at 504, 737 S.E.2d at 513-14 (citing *Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996)).

"An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.* (citing *Hendricks v. Clemson Univ.*, 353

S.C. 449, 456, 578 S.E.2d 711, 714 (3002). Thus, in the absence of a legal duty, summary judgment is appropriate.

The Circuit Court correctly held Super-Sod did not owe any duty to Appellants. Super-Sod had no prior relationship with the Appellants, and no statute, contract, status, property interest or other special circumstance exists to create a duty on the part of Super-Sod. Although Appellants rely on South Carolina Code Section 56-5-4100 as a source of a statutory duty, the statute applies by its plain language to only an operator of a vehicle. Even if the statute could be read as applying to Super-Sod, the undisputed facts show Super-Sod did not violate the statute because it did not drive or move any vehicle on a public highway. Super-Sod also did not assume any duty to Appellants and it owed no general duty in tort to Appellants.

The Circuit Court also correctly held Super-Sod's conduct was not a proximate cause of Appellants' injuries. Super-Sod loaded two pallets of sod onto Harbison's trailer in accordance with Sox's instructions. Appellants' injuries are separated in time and space from Super-Sod's conduct, and three intervening acts of negligence by three different persons took place between when Super-Sod loaded the trailer and when Appellants' vehicle was rear ended. The intervening steps are too many and Appellants' injuries are far too remote for Super-Sod's actions to be a legal, proximate cause.

The Circuit Court properly denied Appellants' Motion to Amend the Complaint. Applying the heightened Rule 60 standard, Appellants did not show mistake, inadvertence, excusable neglect, or any of the other required factors to justify reopening the case to allow the amendment. Even applying the lighter Rule 15 standard, the Circuit Court exercised its discretion and found the proposed amendment would be prejudicial. Therefore, the motion was properly denied.

I. THE CIRCUIT COURT CORRECTLY READ SECTION 56-5-4100(A) AS ONLY APPLYING TO ACTIONS OF A DRIVER, NOT A VEHICLE LOADER, BECAUSE THE STATUTE PROHIBITS THE "OPERATION" OF A VEHICLE ON THE ROADWAYS UNDER CERTAIN CIRCUMSTANCES.

The Circuit Court applied South Carolina Code § 56-5-4100(A) according to its plain language. An operator – here Cody Sox – has two obligations. First, Section 56-5-4100(A) prohibits the operator from driving a vehicle on a public highway unless the vehicle is loaded or constructed in such a way that the load will not escape from the vehicle. Secondly, Paragraph (B) provides that operators may not drive a vehicle on a public highway unless it meets certain criteria to prevent loose materials from falling off. The Paragraphs provide:

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

S.C. Code Ann. § 56-5-4100(A) and (B) (emphasis added). Thus, an operator may not drive a motor vehicle on a public highway unless the vehicle is either constructed or loaded in such a way that its substance will not escape the vehicle and fall onto the roadway.

The next section in the Code requires that an operator – here, Sox – must make sure the load is secured, i.e. properly tied down:

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

S.C. Code Ann. § 56-5-4110 (emphasis added). Thus, the operator may not drive a motor vehicle on a public highway unless the load – in addition to being properly loaded – is properly secured.[5]

The Circuit Court properly found the requirements of Section 56-5-4100 (A) and (B) and Section 56-5-4110 could not be applied to Super-Sod. It is undisputed that Super-Sod did not ***operate*** the Harbison truck and trailer. Super-Sod is not alleged to have "driven or moved" or "operate[d] on any highway" the truck and trailer. Super-Sod's only interaction with the Harbison vehicle consisted of loading the trailer as Sox directed when the truck and trailer ***were located on private land***. Sox is the only person who drove, moved, or operated the Harbison truck and trailer on any highway.

In stark contrast to the provisions described above, the General Assembly added Paragraph (C) to Section 56-5-4100 to apply to a loader in addition to an operator.[6] Unlike the above-cited

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[5] It is worth noting that the General Assembly differentiates the placement of a load from tying down a load. Section 4100 (A) and (B) deal with the placement of a load and construction of a vehicle. Section 4110 addresses tying down a load. Here, it is undisputed that Harbison's employee knew he needed to tie down the sod and chose not to. Appellants do not argue – nor could they based on the plain language of Section 4110 – that Super-Sod had a duty to tie down the load.

[6] The legislative history is discussed below in part I.C.

provisions, Paragraph (C) addresses conduct that takes place ***before*** a vehicle is moved on a public highway:

> (C) The loader of the vehicle and the driver of the vehicle, in addition to complying with the other provisions of this section, shall sweep or otherwise remove any loose gravel or similar material from the running boards, fenders, bumpers, or other similar exterior portions of the vehicle before it is moved on a public highway.

S.C. Code Ann. § 56-5-4100(C). Thus, the loader – who still has access to a vehicle ***before*** it is moved on a public highway – is obligated to sweep away any loose debris after loading a vehicle. This obligation is shared with a driver, and the statute clarifies that the driver must confirm that the debris has been swept away in addition to not operating the vehicle on any public highway unless the vehicle is constructed or loaded in such a way that the load will not spill.

A. Appellants' statutory interpretation argument is unavailing because the evidence is undisputed that Super-Sod did not violate Paragraphs (A) or (B) even if those paragraphs could be read as applying to Super-Sod.

Ignoring for the moment the structure of Section 56-5-4100, Appellants argue the loader is obligated to not only sweep away debris ***before*** a vehicle is moved on a public highway, but also that the loader must comply with Paragraphs (A) and (B) in Section 56-5-4100. Assuming that Appellants' isolated reading of a particular portion of Paragraph (C) is correct – which it is not – Appellants gain nothing for their efforts to establish a claim against Super-Sod.

Appellants' argument is unavailing because it is undisputed that Super-Sod did not violate Paragraphs (A) or (B) of Section 56-5-4100. Paragraphs (A) and (B) – unlike Paragraph (C) – only prohibit a person from ***driving*** or ***moving*** a vehicle ***on a public highway*** under certain circumstances.[7] It is undisputed Super-Sod did not drive or move Harbison's truck and trailer.

[7] Paragraph (A) states in relevant part "No vehicle may be ***driven*** or ***moved*** on any public highway unless . . . ." Likewise, Paragraph (B) states in relevant part, "Trucks, trailers, or other vehicles . . . must not be ***driven or moved*** on any public highway unless . . . ."

Therefore, even if Paragraphs (A) and (B) applied to Super-Sod – which they do not – then the only duty they would create would be a duty on the part of Super-Sod not to drive or move a vehicle that is not properly constructed or loaded on any public highway. Because it is undisputed that Super-Sod did not drive or move the vehicle – either on private land or on a public highway – Super-Sod did not breach this duty. Thus, Appellants' entire argument fails because – even if Paragraphs (A) or (B) placed a duty on a loader – Super-Sod did not breach that duty.

Unlike Paragraphs (A) and (B), Paragraph (C) places certain obligations on the loader and operator ***before*** the vehicle can be moved on any highway. While Paragraphs (A) and (B) are stated in the negative ("No vehicle may be driven" or "must not be driven") as a prohibition against one who would otherwise "drive" the vehicle on any highway, Paragraph (C) is stated as an affirmative duty that must be completed before the vehicle is moved ("shall sweep"). However, Appellants do not contend Super-Sod violated Paragraph (C). In fact, the evidence is undisputed that when Sox departed, the trailer and running boards were clean and free of debris. (Sox Dep. 34:9-11) ("Q. Was the bed of the trailer clean and free of debris? A. Yes."). Therefore, Appellants' reliance on Section 56-5-4100 – even if Paragraphs (A) and (B) could be read as applying to Super-Sod – fails to show Super-Sod owed a duty that it violated. Because Super-Sod did not move or drive the vehicle, it did not violate any duties set forth in Paragraphs (A) or (B). Because the trailer was clean and free of debris, Super-Sod did not violate Paragraph (C). Therefore, Appellants fail to point to any duty owed by Super-Sod to Appellants that Super-Sod violated.

B. The Circuit Court correctly refused to read Paragraph (C) outside of its context to extend duties to the loader of a vehicle.

Our Supreme Court has cautioned that particular statutes or statutory provisions must not be read in isolation. *See e.g.*, *Beaufort County v. South Carolina State Election Com'n*, 395 S.C. 366, 374, 718 S.E.2d 432, 436 (2011) ("We must reject petitioners' invitation to view the statute

and budget provisos in isolation, a position which violates our rules of statutory construction."). Glaringly absent from Appellants' brief is a recitation of the relevant provisions of Section 56-5-4100 in its entirety. When Paragraph (C) is read in that context, as it must be, the legislative intent is clear.

Section 56-5-4100 is a criminal statute, stating that any person violating the provisions of the statute "is guilty of a misdemeanor . . .." Therefore, the statute must be construed "strictly with any ambiguity to be resolved" against application of the statute. *State v. Breech*, 308 S.C. 356, 359, 417 S.E.2d 873, 875 (1992). Unless Paragraph (A) of the statute plainly and unambiguously applies to the loader, it cannot be construed as creating a duty on the loader.[8] Moreover, the statute is in derogation of the common law, which also requires giving the statute a strict construction. *See Grief v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012) ("[S]tatutes in derogation of the common law are to be strictly construed. Under this rule a Statute restricting the common law will not be extended beyond the clear intent of the legislature.") (quotation and internal citations omitted)). Thus, the prohibitions set forth in Paragraphs (A) and (B) cannot be applied to a loader unless the statute clearly requires such an application. It does not.

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[8] Appellants argue that, because the Uniform Act Regulating Traffic on Highways is a "comprehensive" regulation of traffic on the highways, the Court should apply Paragraph (A) to a loader because "a truly comprehensive statute would address not only the duties of truck drivers, but also the loaders who place materials for transport onto trailers." (Appellants' Br. p. 16). Thus, according to Appellants' logic, the Court should read Paragraph (A) as applying to loaders or it would otherwise "undermine the comprehensiveness" of the statute's reach. This argument is strained at best. The scope of a statute can only extend to one whose actions could fall within the prohibition set forth in the statute. Arguing that a loader cannot drive or move a vehicle on any highway unless the vehicle is properly constructed or loaded is like saying a pedestrian cannot drive a vehicle left of center. Even if the Court were to read the statute as applying to the loader – or the fictitious statute applying to a pedestrian – there would not be a scenario in which the loader – or the pedestrian – would violate the statute. The argument is logically flawed.

As discussed above, Paragraphs (A) and (B) place prohibitions on one who would otherwise move or drive a vehicle on a public highway.[9] Because the prohibitions apply to the movement of a vehicle on a public highway, they can logically only apply to the driver or operator, not a loader. To avoid this plain reading of the statute, Appellants focus on a prepositional phrase in Paragraph (C): "The loader of the vehicle and the driver of the vehicle, *in addition to complying with the other provisions of this section*, shall sweep or otherwise remove any loose gravel or similar material from the running boards . . .." S.C. Code Ann. § 56-5-4100(C). Appellants conclude – without a clear explanation of why – that the phrase "in addition to complying with the provisions of this section" is an adverbial phrase modifying the word "shall." However, the phrase could just as easily modify "driver." Read in isolation, the intent of the prepositional phrase may seem unclear. However, when read in context, the meaning is absolutely clear.

The choice of where to place a prepositional phrase within a sentence often creates ambiguities in the English language.[10] Context routinely avoids what could otherwise be an ambiguity. Once Section 56-5-4100(C) is read in its full context, any possible ambiguity as to the phrase is resolved and it becomes clear that it applies only to the driver.[11]

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[9] Use of the word "moved" in the statute ensures that it encompasses not only a motor vehicle but also any attached trailer or other item that cannot be "driven."

[10] The use of prepositional phrase placement creating ambiguity is often the source of jokes. For example, in the movie Mary Poppins, Bert the chimney sweep states, "I knew a man with a wooden leg named Smith," to which another character responds, "What's the name of his other leg?" The ambiguity could be removed by simply placing the phrase at the end of the sentence: "I knew a man named Smith who had a wooden leg."

[11] Because the statute must be strictly construed, any ambiguity must be resolved in favor of finding that the prepositional phrase does not apply to a loader.

Appellants concede that, if the General Assembly had clearly wanted to make the loader comply with Paragraphs (A) and (B), it could have simply placed the prepositional phrase at the beginning or end of the sentence:

> *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 . . . .
>
> Or
>
> 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.*

(Appellants' Br. p. 14); S.C. Code Ann. § 56-5-4100(C). However, despite this patent defect in their argument, Appellants fail to address why the General Assembly would choose to place the prepositional phrase immediately after "the driver of the vehicle" if it intended to apply the prepositional phrase to the loader as well. If that were the General Assembly's intent, then – as Appellants admit – the General Assembly could have easily communicated that intent by ***placing the prepositional phrase elsewhere in the sentence.***

The explanation for the placement of the prepositional phrase becomes apparent when the lens is zoomed out to encompass the language of Paragraphs (A) and (B). Paragraphs (A) and (B) can apply only to a driver because a vehicle is only "driven or moved on any highway" by a driver. S.C. Code Ann. § 56-5-4100 (A) and (B). Thus, while the loader has the job of sweeping the floorboards and other portions of the vehicle, the driver has this task "in addition to complying with the other provisions of this section" that must be satisfied in order to legally "operate" or "move" the vehicle on any highway. The reason the General Assembly included the prepositional phrase is to ensure that drivers understand that the job of sweeping away debris from the vehicle

before it is moved on a highway does not rest solely with the loader but is also a personal responsibility of the driver.

Context gives the prepositional phrase clarity. In the same way, context would give meaning to the examples provided in Appellants' brief. For example, Appellants use the sentence "Sally and John, in addition to acting, can sing and dance," and argue that "in addition to acting" modifies both Sally and John. However, if that sentence were immediately preceded with the sentence, "John can act, but Sally cannot," then any reader would understand the phrase "in addition to acting" to apply only to John. Context matters.[12]

Read in context, the prepositional phrase in Paragraph (C) applies only to a driver. Paragraphs (A) and (B) prohibit a vehicle from being "driven or moved" on any highway. Only a driver can violate Paragraph (A) or (B) because only a driver will drive or move a vehicle on a highway. Therefore, the only logical reading of the prepositional phrase in Paragraph (C) obligates the driver to comply with Paragraphs (A), (B) and (C) and with Section 56-5-4110. The loader – Super-Sod – is not required to comply with Paragraphs (A) or (B).[13]

C. The legislative history of Section 56-5-4100 confirms that a loader of a vehicle is only subject to the requirements of Paragraph (C).

If there were any doubt as to whether the Circuit Court correctly read Paragraph (C) in conformity with its context within the overall statute, the legislative history removes that doubt.

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[12] Appellants' argument that the Circuit Court's reading of Paragraph (C) renders Section 56-5-4110 superfluous completely ignores the language of Section 56-5-4110. That section deals with tying down or otherwise securing a load. In addition to making sure a vehicle is properly constructed and loaded (per Section 56-5-4100), the driver must ensure that the load is properly tied down (per Section 56-5-4110). Nothing in the Circuit Court's reading renders any portion of the statutes superfluous.

[13] Once again, even if Paragraphs (A) and (B) applied to Super-Sod, the evidence is undisputed that Super-Sod did not violate Paragraphs (A) or (B) because it did not drive or move a vehicle on any highway.

Prior to 1988, the statute was not broken up into separate paragraphs and there were no obligations placed on the loader of a vehicle. The prior version of the statute provided:

> No vehicle shall be ***driven or moved on any public highway*** unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand, salt or other chemicals may be dropped for the purpose of securing traction, and water or other substance may be sprinkled on a roadway in the cleaning or maintaining of such roadway by public authority having jurisdiction. Any person ***operating*** a vehicle from which any glass or objects have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon such public highway, shall immediately cause the public highway to be cleansed of all such glass or objects and shall pay any costs therefor.

S.C. Code Ann. § 56-5-4100 (Eff. May 5, 1978 until Jan. 1, 1989) (emphasis added). Nothing in the prior version of the statute placed obligations on the loader of the vehicle. Rather, the statute's prohibitions and affirmative obligations all applied to the driver – one who would drive or move the vehicle on a public highway.

In 1988, the General Assembly amended Section 56-5-4100. The title of the Act stated in relevant part:

> [T]o amend Section 56-5-4100, relating to spilling loads on highways, so as to provide, among other things, that trucks, trailers, or other vehicles, when loaded with certain items which could blow, leak, sift, or drop, must not be driven or moved on any highway except under certain conditions, ***that the loader of the vehicle and driver shall sweep or otherwise remove any loose gravel or similar material from the running boards, fenders, bumpers, or other similar exterior portions of the vehicle before it is moved on a public highway***, and that any person who violates certain provisions of this Section is guilty of a misdemeanor . . . . .

Sess. 107 (1987-1988), Act. No. 532 (emphasis added).

"It is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature . . . ." *University of South Carolina v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966). The 1988 Amendment ***added*** Paragraph (C), and for the first time required

the "loader" to perform certain acts. Specifically, the loader must "sweep or otherwise remove any loose gravel or similar material from the running boards, fenders, bumpers, or other similar exterior portions of the vehicle ***before it is*** moved on a public highway." S.C. Code Ann. § 56-5-4100(C) (emphasis added).

The language of the title evinces the intent in amending § 56-5-4100. By adding Paragraph (C), the Legislature intended both the driver and the loader to "sweep or otherwise remove any loose gravel" or other similar material. However, the Act's title does not indicate that the "loader" would be required to perform the pre-existing obligations set out in what became Paragraph (A). Nothing in the title of the Act suggests the General Assembly intended to make the loader responsible for the pre-existing obligations in the statute. To the contrary, the title and legislative history indicate the General Assembly only intended to require the loader to sweep away debris "before" the vehicle is moved on a public highway.

Common sense further supports the Circuit Court's reading of the statute. Before the vehicle is moved, the loader has the ability to clean the sides of the vehicle. Therefore, Paragraph (C) addresses something that is within the loader's control. Paragraph (C) addresses conduct that must take place "before" the vehicle is moved on the public highway, i.e., while the vehicle is still accessible to the loader.

In contrast, Paragraphs (A) and (B) specifically address the operation of a vehicle "on any highway." In other words, Paragraphs (A) and (B) deal with what is done with a vehicle after it is outside of the loader's control. In fact, Paragraphs (A) and (B) deal, in part, with the construction of a vehicle – "unless the vehicle is constructed or loaded as to prevent any of its load from dropping . . . ." It borders the absurd to read Paragraph (C) as requiring a loader to comply with the vehicle construction requirements in Paragraph (A) and (B).

When read in context, in light of the legislative history, and in light of the real world limitations on what a loader can and cannot do, the only reasonable reading of Sections 54-5-4100 and 4110 is that the loader is obligated to sweep off any debris, and the driver is prohibited from driving the vehicle on any highway unless the vehicle is properly constructed or loaded so that its contents will not spill into the roadway and the driver must secure his load. The loader is unable to prevent a driver from violating Paragraphs (A) or (B) and is incapable – without becoming a driver himself – of violating Paragraphs (A) or (B). Therefore, the Circuit Court properly applied the statute as written and held Super-Sod did not owe any legal duty to Appellants.

II. THE CIRCUIT COURT CORRECTLY HELD SUPER-SOD DID NOT ASSUME ANY DUTY BY MERELY FOLLOWING SOX'S INSTRUCTION AS TO WHERE AND HOW TO PLACE THE PALLETS ON HARBISON'S TRAILER.

The evidence is undisputed that Super-Sod's employee loaded the pallets of sod onto the trailer as directed by Harbison's employee Cody Sox. Sox chose where the pallets would be placed on the trailer and directed Super-Sod's employee to place the pallets so that the weight would be balanced and centered over the rear axle. Sox explained that this was how he was always taught to load a trailer. (Sox Dep. 69:4-70:1).[14] Therefore, there is no evidence Super-Sod undertook

[14] Appellants list various actions that Super-Sod takes when it delivers sod itself. Those actions are wholly irrelevant here because Harbison elected to transport the sod itself rather than having Super-Sod deliver the sod. Axiomatically, any undertakings Super-Sod may perform when it transports sod do not constitute undertakings where Super-Sod is not transporting sod.

Likewise, Appellants list a series of alleged undertakings that they claim Super-Sod has done in ***other*** situations. Once again, a prior undertaking in connection with a different customer does not create a general duty to all customers. *See e.g., Langan Const. Co., Inc. v. Dauphin Island Marina, Inc.*, 294 Ala. 325, 328, 316 So.2d 681, 684 (rejecting rule that one who has voluntarily undertaken a task in the past is therefore under a duty to repeat such tasks in similar situations in the future). It is undisputed that Super-Sod did not undertake to advise Sox regarding the loading of the vehicle. In fact, Sox admits that he never asked Super-Sod to tie down the load for him. (Sox Dep. 70:12-14).

any duty other than to follow Sox's direction as to how to load the pallets onto the trailer. Such a duty cannot be construed as undertaking a general duty to the motoring public.

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

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

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

South Carolina has adopted Section 323 and therefore a party may incur liability if that party undertakes an obligation to "another." *See Johnson*, 401 S.C. at 505, 737 S.E.2d at 514. However, this undertaking does not extend to other unidentified third parties, such as Appellants in this case.

Sections 323 and 324A of the Restatement reflect the difference between an undertaking that creates a duty to an individual and an undertaking that creates a broader duty. The Supreme Court has recognized this dichotomy and specifically declined to extend liability beyond those to whom the undertaking was made by rejecting Section 324A. In *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), a case cited by the Appellants, the Supreme Court specifically explained: "We *decline* to adopt the expanded liability of Restatement 2d of Torts 324A (1965). This section imposes a duty on 'one who undertakes . . . to render services to another which he

should recognize as necessary for the protection of a third person.'" *Id.* at n.2 (emphasis added). Thus, although the Supreme Court held a duty might exist to those parties downstream from a dam that was monitored by the defendant, the duty found in that case would not extend to the community at large. Importantly, the Supreme Court found the relevant question is not whether the defendant assumed a general duty to monitor the water levels. Instead, the inquiry was limited to whether the defendant assumed a duty ***to the downstream property owners.*** *Id.* at 315, 494 S.E.2d at 815 (emphasis in original). The evidence in *Miller* raising the question of whether a duty was undertaken as to the downstream landowners included the defendant's participation in meetings with the South Carolina Land Resource Commission discussing inspection reports for the dam and formulating an emergency plan for the notification of the appropriate officials in the event of an imminent dam failure. The defendant also agreed to have its employees listed on the Land Resource Commission's emergency notification form as personnel assigned to monitor the dam. *Id.* at 313, 494 S.E.2d at 815. There is no comparable evidence in this case.

More recently in *Johnson*, this Court again dealt with this very issue when a school employee sued an accounting firm alleging that it was negligent in its "undertaking" to investigate an alleged misappropriation of funds. In affirming summary judgment to the accounting firm, this Court, relying on Section 323, held that the relationship between the plaintiff and the accounting firm "does not fit within the parameters set forth in Section 323(a). Section 323(a) contemplates a party relying on the rendering of services to another for another's protection. Even assuming [accountant] acted voluntarily, he assisted the [police department] in its investigation. He did not render service to [plaintiff]; he assisted authorities." *Johnson*, 401 S.C. at 505, 737 S.E.2d at 514. This Court specifically acknowledged that it was "[c]ognizant of Restatement (Second) of Torts

section 324A, *although that section has not been adopted by our courts . . .*" *Id.* at n. 5 (emphasis added).

South Carolina has not adopted the Appellants' position and the expansive undertaking liability of Restatement (Second) of Torts § 324A, under which a party undertaking a duty may be liable to someone beyond the party to whom the obligation is undertaken. Both the Supreme Court and this Court have made clear that South Carolina does not follow this expansive view. Instead, the relevant inquiry is whether Super-Sod assumed a duty ***to the Appellants***, and not whether Super-Sod undertook a duty to its customer, Harbison. Thus, even if Super-Sod undertook a duty, the duty was only owed to Harbison, not Appellants.

In the classic case of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 100 (1928), Justice Benjamin Cardozo famously held, "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do." (citations omitted). South Carolina's Supreme Court has accepted this principle. *See e.g., Doe ex rel. Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 858 (2001) (quoting *Palsgraf*). In *Palsgraf*, two train station employees assisted a passenger onto a train. One employee helped pull the passenger on while another employee pushed the passenger from the station platform. During the process, the employees knocked a package out of the customer's hand. Unbeknownst to the employees, the package contained fireworks that subsequently exploded. The plaintiff was standing across the train platform and was struck by scales that were knocked loose by the concussion of the explosion. *Id.* at 340-41, 162 N.E. at 99.

Although often cited as a proximate cause case, the New York Court of Appeals' decision in *Palsgraf* actually relied on a lack of legal duty owed to the plaintiff. The Court of Appeals held that a breach of a duty owed to one individual or class cannot be transferred to another

unforeseeable class of claimants. *Id.* at 346, 162 N.E. at 101 ("The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another."). Rather, a plaintiff "sues for breach of a duty owing to himself." *Id.* at 346.

Here, even if Respondent owed a duty to Harbison, its duty did not extend to Appellants. Sox was in control of the Harbison truck and trailer, and Harbison was Super-Sod's customer. Therefore, Super-Sod's duty was to load the trailer in accordance with Sox's instructions. Super-Sod did not undertake – or have authority to decide – how the load should be placed on the trailer or whether to tie down the load. Those decisions rested with Sox. Therefore, Super-Sod's duties only ran to Harbison and Sox and only extended to situating the pallets on the trailer as directed by Sox. Super-Sod did not volunteer to load the trailer for the benefit of society at large. Rather, it loaded the trailer for the benefit of its own customer and subject to its customer's direction and satisfaction. Therefore, even if Super-Sod violated some duty to Harbison – which the undisputed evidence shows it did not – that breach does not transfer to creating a duty owed to Appellants.

Appellants also appear to argue that foreseeability, in and of itself, can create a duty to third parties. This is not the law in South Carolina. Were it so, then the entire body of jurisprudence surrounding common law negligence would rest solely on the question of foreseeability. While that is certainly one element of a negligence analysis, it is only one of them. The duty prong in our traditional analysis is not subsumed by foreseeability alone. Our Supreme Court has specifically rejected this very contention. In *South Carolina State Ports Authority v. Booz-Allen Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986), the Georgia Ports Authority commissioned Booz-Allen & Hamilton, a consulting firm, to create a report comparing the Savannah port with the Charleston port for commercial traffic. The report was highly favorable to the Savannah port and contained false facts concerning the Charleston port. The report was

disseminated to potential port customers, causing reduced port traffic in the Charleston port. *Id.* at 375, 346 S.E.2d at 325.

The South Carolina State Ports Authority, the Pilots Association, and two chapters of the local port union filed suit against Booz-Allen asserting a claim for negligence. The Supreme Court held a duty ran to the commercial competitor – the State Port Authority – because Booz-Allen undertook to objectively compare the attributes of the two commercial competitors for the purpose of giving one a market advantage over the other. *Id.* at 376-77, 346 S.E.2d at 326. However, the Supreme Court refused to find a duty running to those who relied on shipping traffic in the Charleston port for commercial profit. Specifically, the Supreme Court held, "Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability. ***Foreseeability itself does not give rise to a duty.***" *Id.* at 376, 346 S.E.2d at 325 (citations omitted) (emphasis added). The Supreme Court then explained: "The concept of duty in tort liability must not be extended beyond reasonable limits." *Id.* (citation omitted).

The Supreme Court reached a similar result in *Huggins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003). In that case, a victim of identity theft sued the credit card company that issued a card to an identity thief in the victim's name. The Supreme Court explained the law of duty:

> Duty arises from the relationship between the alleged tortfeasor and the injured party. In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care. ***In the absence of a duty to prevent injury, foreseeability of that injury is an insufficient basis on which to rest liability.*** The concept of duty in tort liability will not be extended beyond reasonable limits.

Id. at 333, 585 S.E.2d at 277. The Supreme Court acknowledged that the identity theft may have been avoidable had the credit card company taken additional steps. *Id.* at 334, 585 S.E.2d at 277 ("[W]e are certain that some identity theft could be prevented if credit card issuers carefully

scrutinized credit card applications."). Nonetheless, the Court held the credit card company did not owe a duty to the victim because there was no preexisting relationship between the credit card company and the customer, holding "Even though it is foreseeable that injury may arise by the negligent issuance of a credit card, foreseeability alone does not give rise to a duty." *Id.*

There is no pre-existing relationship between Super-Sod and Appellants. Therefore, Appellants' argument that the mere foreseeable risk of harm creates a duty fails.[15] Super-Sod denies the injuries to Appellants were foreseeable.[16] However, even if Appellants' injuries were foreseeable, foreseeability alone is not enough. Appellants must first satisfy their burden of proving Super-Sod owed them a duty. Because no such duty existed, the Circuit Court properly granted summary judgment.

III. THE CIRCUIT COURT PROPERLY FOUND THAT SUPER-SOD'S ACTIONS DID NOT PROXIMATELY CAUSE APPELLANTS' INJURIES.

Even if Super-Sod owed a duty, its conduct was not a proximate cause of Appellants' injuries. ***Three intervening acts of negligence*** took place between Super-Sod's conduct and Appellants' accident: (1) Cody Sox decided to drive the Harbison truck and trailer without tying

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[15] Appellants' reliance on *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004) is misplaced. That case, like other cases under South Carolina jurisprudence, stands for the proposition that a contractual duty can give rise to a general duty in tort law that runs to third parties. *See e.g.*, *McCullough v. Goodrich & Pennington Mortgage Fund, Inc.*, 373 S.C. 43, 48, 644 S.E.2d 43, 46 (2007) (citing *Dorell* for the proposition that "***Where there is such a contractual basis for a legal duty to a third party***, this Court has determined that the tortfeasor's liability exists independently of the contract and rests upon the common law duty to exercise due care to foreseeable plaintiffs.") (emphasis added). In this case, there is no contractual basis giving rise to an independent tort duty. Appellants also cite *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003), but that case found the university owed no duties to a student athlete and does not support the proposition that foreseeability alone is enough to create a duty.

[16] See Argument III, below

down the load;[17] (2) the unidentified operator of the blue tractor trailer veered into the Harbison truck's lane, forcing Sox to take evasive action; (3) despite other vehicles being able to safely slow down for over fifteen minutes, Lisa Velazques failed to keep a proper lookout and rear-ended Appellants' vehicle at a high rate of speed. Put simply, the intervening acts are far too many and Appellants' injuries are far too remote to have been proximately caused by Super-Sod's mere loading of the trailer at its customer's direction.

The term "proximate cause" includes both (1) causation in fact and (2) "legal cause." *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). The concept of "legal cause" requires courts to "draw lines" that end the relationship that may exist "in fact" between one party's conduct and a specific harm that another party may eventually suffer. These "lines" limit liability that might otherwise extend responsibility for arguably wrongful conduct "for all time."

The problem of "causation in fact" without these limits is quintessentially illustrated in the above-cited case of *Palsgraf, supra*. Chief Justice Cardozo explained that "wrong is defined in terms of the *natural* or *probable*, at least when unintentional" and held that the negligent conduct could not reach the harm alleged. *Palsgraf*, 248 N.Y. at 345 (emphasis added).

Just as in *Palsgraf*, under South Carolina law "***[l]egal cause*** is proved by establishing foreseeability. . . . A plaintiff . . . proves legal cause by establishing the injury in question occurred as a ***natural*** and ***probable*** consequence of the defendant's negligence." *Bramlette*, *supra* (emphasis added) (citations omitted). "[L]iability cannot rest on mere possibilities. [An] actor cannot be charged with that which is unpredictable or that which could not be expected to happen."

[17] Sox and Branham stopped at a truck stop to get food before driving onto I-26. This stop gave Sox another opportunity to procure straps to tie down the load prior to the accident, but he did not.

Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d 671, 675-66 (1978) (emphasis added). Further, liability is not founded where one party fails to anticipate another's negligence. *See, e.g., Still v. Blake*, 255 S.C. 95, 102, 177 S.E.2d 469, 473 (1970) (holding a defendant had no duty to anticipate that a driver would drive negligently).

South Carolina's appellate courts have defined what is and what is not "natural," "probable" and "expected" for decades. In one case, the Supreme Court explained:

> *A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible*, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. *If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior defective condition, such subsequent act or condition is the proximate cause.*

Driggers v. City of Florence, 190 S.C. 309, 2 S.E.2d 790, 791 (1939) (citation omitted) (emphasis added). Thus, the Supreme Court held that *a prior and remote cause does not support liability* where the prior "cause" simply furnished the condition that made the injury possible.

More recently, the Supreme Court answered the question again, this time in a strikingly similar scenario, holding that proximate legal cause does not extend beyond the tortious conduct of one driver who rear-ends another. *Newton v. South Carolina Pub. Ry. Comm'n*, 319 S.C. 430, 462 S.E.2d 266 (1995). In *Newton*, the plaintiff driver was injured when she was struck from behind by another driver after she had come to a stop for a railroad crossing signal. However, the signal had malfunctioned and was improperly signaling a coming train where there was none. The plaintiff sued the Railroad Commission, alleging that its negligence caused her to stop and therefore caused the other driver to injure her.

The Supreme Court held the negligence of the second driver, and not the Railway Commission's alleged negligence, was the proximate legal cause of the collision. The Court explained: "[T]he accident occurred because of [the following driver's] failure to keep a proper lookout." *Id.* at 432, 462 S.E.2d at 267. The Court further held that "[the following driver's] superseding negligence is not a natural and probable consequence of the Commission's negligence in failing to repair the malfunctioning crossing signal" and that "the negligence of [the trailing driver] in failing to watch the roadway before the crossing [was] not chargeable against the Commission." *Id.*

Under *Newton's* authority, a party who remotely causes traffic to slow is not liable for collisions that occur behind the initial slowdown. The accident in *Newton* may be said to be even "more proximate" to the alleged negligence of the Railway Commission than the collision in this instance is to Super-Sod's conduct because the *Newton* collision occurred only one step removed from the conduct of the Railway Commission. Here, Super-Sod's action, which does not constitute "negligence" at all, occurred several "remote" intervening steps from the collision itself, with three of those intervening steps being separate torts committed by three different individuals. Super-Sod cannot be charged with anticipating Velazques' inattention, that a fire engine would block a lane of traffic to clean up disintegrating sod, that the Harbison trailer would lose a portion of its load, that a truck would run the Harbison truck and trailer off the road, or that Sox would not properly secure the load after it was loaded as he directed. The appellate courts of this State have held no duty for one in Super-Sod's position to anticipate another's negligence – much less to anticipate ***three*** separate acts of negligence by three separate individuals.

Thus, under *Newton*, Super-Sod's action cannot be the proximate legal cause of the Appellants' injuries. Super-Sod's conduct is simply too remote. Appellants allege no more than

"negligence in the air" against Super-Sod. While Super-Sod's conduct does not rise even to that, such "negligence in the air . . . will not do." Just as *Palsgraf* held the Railroad's conduct too remote to establish liability to a person waiting on a nearby train platform, so too does the Court's holding in *Newton* establish that Super-Sod's conduct is too remote, and thus not a proximate legal cause, to support a negligence claim here.

IV. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION UNDER RULE 60 AND RULE 15 TO DENY APPELLANTS' MOTION TO AMEND.

The Circuit Court evaluated Appellants' Motion to Amend under both the Rule 60 "mistake, inadvertence, surprise, or excusable neglect" standard and the lighter Rule 15(b) standard. Under both standards, the Circuit Court found the Motion was improper because it was untimely, it was prejudicial, it was futile, and it was not raised to the Trial Judge prior to the entry of summary judgment. As discussed below, the Circuit Court properly applied the stricter Rule 60 standard to the motion. However, this Court need not evaluate whether the heightened Rule 60 burden applies here because the Circuit Court also found Appellants' Motion failed to satisfy the Rule 15 standard. Because significant discovery had already taken place and Appellants' proposed Amended Complaint would have prejudiced Super-Sod, the Circuit Court properly exercised its discretion and denied the Motion.

A. The Circuit Court properly exercised its discretion under Rule 15 when it denied Appellants' Motion to Amend because the amendment would have prejudiced Super-Sod and the amendment was futile.

"[T]he decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Sullivan*, 397 S.C. at 153, 723 S.E.2d at 840 (quoting *Berry*, 328 S.C. at 450, 492 S.E.2d at 802). On a motion to amend, "the party opposing the motion has the burden of establishing prejudice." *Holland ex rel. Knox v.*

Morbank, Inc., 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014). The Circuit Court below found Super-Sod would be prejudiced by the amendment. Because the procedural history and timeline of the case supports the Circuit Court's finding, the Circuit Court did not abuse its discretion and its decision to deny the motion to amend must be affirmed.

"Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Id.* (citing *Ball v. Canadian Am. Exp. Co., Inc.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994)). In *Holland*, this Court affirmed the denial of a motion to amend based on a finding of prejudice. This Court found prejudice because the amendment: (1) would require the hiring of new rebuttal experts and the taking of additional depositions; (2) would result in an inevitable delay shortly before trial; and (3) was not filed until two years after the initial filing of the complaint. *Id.* at 236, 754 S.E.2d at 719. These are the same forms of prejudice the Circuit Court found in this case.

The Circuit Court here explained the various forms of prejudice that would have resulted to Super-Sod from Appellants' proposed Amended Complaint:

> Plaintiffs waited eighteen 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 15, 2016 to October 10, 2016. Super-Sod's Motion for Summary Judgment, outlining deficiencies in the Plaintiffs' theories of recovery, had been filed for two months before Plaintiffs filed their Motion to Amend. Numerous depositions had been taken, including the depositions of Super-Sod's management and employees. Experts had already been identified by all parties 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.

(July 10, 2017 Order Denying Plaintiffs' Motion for Relief from Judgment, p. 7). Thus, the very forms of prejudice that this Court found supported a denial of a motion to amend in *Holland* apply here.

The prejudice in this case is even greater than the prejudice at issue in *Holland* because Appellants sought to add an entirely new cause of action based on warranty liability. Adding a warranty claim fundamentally changes the nature of the litigation, changing from a negligence analysis to a product liability analysis. The legal issues require development of different facts, new and different experts, and evidence of what passes without objection in the trade, among other things. *Cf. Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 538-39 462 S.E.2d 321, 326 (Ct. App. 1995) (explaining "there is an important theoretical basis for separating and maintaining the difference between negligence and strict liability law in the products liability context; namely, the underlying analysis necessary to reach each legal conclusion giving rise to liability are qualitatively different in that the social policy determination as to product defect in strict liability is not the equivalent of a determination of duty in negligence law.") (citation omitted). While the focus for 18 months of litigation had been the conduct of the various parties, the addition of a warranty claim would have shifted the focus to the product itself. Questions that had not been presented to either fact or expert witnesses thus far would have been necessitated, such as the precise condition of the product as sold, the nature of the warranty, the expectation of the parties, whether goods such as this "pass without objection in the trade," including an analysis of the relevant industry and a study of the product itself. Adding all of these new factors to a case - with trial imminent - would have significantly prejudiced Super-Sod.

The Circuit Court also found the proposed amendments would be futile. *See Jennings v. Jennings*, 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010) (holding denial of a motion to amend is

proper when the amendment is futile). First, the amendment to assert Section 56-5-4100 was futile because the Circuit Court had already heard arguments regarding the statute and held Paragraph (A) of the statute does not apply to Super-Sod as a loader. Even if Paragraph (A) did apply, the undisputed evidence shows that Super-Sod did not move or drive the Harbison vehicle on any public highway. Therefore, the amendment to add the statutory violation was futile.

Secondly, the claim for breach of implied warranty of merchantability could not succeed because there was no implied warranty that the unsecured cargo would not come loose during evasive maneuvers taken at highway speeds by a driver during transport. Sox admitted he intended to bring tie downs and simply failed to do so. His expectation was not for Super-Sod to provide them. He intended to provide them himself. When he forgot, he was clearly told they were not available. It could not be said that the basis of the bargain included load securement. He then made a conscious decision to drive the Harbison vehicle back to Columbia without tie downs. (Sox Dep. 63:5-12).

Comment 10 of the implied warranty of merchantability statute states that the "adequately contained [and] packaged" language "applies only where the nature of the good and of the transaction require a certain type of container, package or label." S.C. Code. Ann. § 36-2-314 official cmt. 10 (emphasis added). Super-Sod is not required to secure its product to trailers for customers. Sox knew this, and that is why he intended to bring his own straps to tie down the load. Therefore, the nature of the transaction did not require the sod to be wrapped in any particular fashion and Appellants' proposed amendment to assert a merchantability claim would be futile. As the Circuit Court held in its July 10, 2017 Order, "There can be no 'warranty' implied for load securement when it is specifically not part of the sale." (July 10, 2017 Order Denying Plaintiffs' Motion for Relief from Judgment, p. 8). The undisputed testimony showed that Sox specifically

asked Super-Sod if it sold tie downs and Super-Sod informed him that it did not. (Sox Dep. 73:3-5). Therefore, securing the load was specifically not part of the sale and the merchantability claim would be futile.

The Circuit Court correctly rejected Appellants' untimely Motion to Amend. Even applying the relaxed Rule 15 standard, Appellants' Motion would have been highly prejudicial to Super-Sod and would have been futile. Therefore, the Circuit Court properly exercised its discretion in denying the Motion.

B. The Circuit Court properly adopted the majority rule and applied the heightened Rule 60 standard to Appellants' motion.

Although the Appellants fail the lighter burden under Rule 15, their Motion was actually subject to the heightened requirements of Rule 60(b), SCRCP. 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 that it later addressed. The Motion to Amend was never properly raised before the judgment was entered. Subsequent attempts to raise it after judgment were ineffective.

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.[18] As explained by leading commentators on the Federal Rules:

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[18] 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, SCRCP, (2d. 1985)); *See also Maybank v. BB&T Corp.*, 416 S.C.541, 566, 787 S.E.2d 498, 511 (2016) ("In construing the [SCRCP] our Court looks for guidance to cases interpreting the federal rules."). *Beach Company v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (relying on federal law to interpret Rule 13 SCRCP because the language of the rules was the same). *Unisun Insurance v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000) ("In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.").

> 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.[19]

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[19] *See Williams v. Citigroup*, 659 F.3d 208, 213 (2nd Cir. 2011) (holding 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

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. Therefore, the heightened Rule 60 burden applies where, as here, a party fails to bring a motion to amend to the Court's attention until after judgment has been entered.

C. The Circuit Court correctly found Appellants failed to satisfy the heightened Rule 60 burden because their motion to amend was not brought to the Circuit Court judge's attention before entry of summary judgment in favor of Super-Sod.

A court may vacate a judgment under Rule 60(b) only in narrow circumstances. SCRCP Rule 60(b). While the decision to grant or deny a Rule 60(b) motion lies within the discretion of the trial judge,[20] the criteria are narrow and provide only five bases, none of which the Appellants have asserted here:

(1) mistake, inadvertence, surprise, or excusable neglect;

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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 ligation.' (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.'"). Our sister state of North Carolina is in accord with this rule. *See Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 90, 398 S.E.2d 628, 634 (N.C. App. 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 (N.C. App. 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).

[20] *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.").

(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) SCRCP. 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.

Rather than acknowledging Rule 60, Appellants relied on Rule 15 grounds despite the fact that judgment was entered against them before they raised the issue. Because the Motion to Amend was never brought to the attention of the Trial Court until after judgment was entered, a Rule 60 analysis was appropriate. Further, none of the Rule 60 criteria applied.

There was no "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 acknowledged 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. Further, there was no assertion of newly acquired evidence to warrant setting aside the judgment, 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).

Appellants did not contend any other basis under Rule 60(b) to set aside the summary judgment to allow the amendment. There was no fraud, misrepresentation or other misconduct that would support vacatur under Rule 60(b)(3). 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. (Aug. 23, 2016 Hearing Tr. 5:9-19). Appellants had the opportunity, if they so chose, to move to continue that hearing so that they could raise the motion to amend issue. (Aug. 23, 2016 Hearing Tr. 5:9-19). Instead, Appellants elected to go forward with the scheduled hearing. Finally, Rule 60(b) subsections (4) & (5) are not applicable and Appellants did not set forth any basis to vacate the judgment under these subsections.

Because Appellants fail to satisfy the Rule 60 burden – or even the lighter Rule 15 burden – the Circuit Court properly denied their Motion to Amend. Under Rule 60, Appellants did not bring the Motion to Amend to the Circuit Court's judge's attention until after entry of the summary judgment order. This failure was not the result of mistake, inadvertence, surprise, or excusable neglect nor any of the other Rule 60(b) bases. Even if Appellants could satisfy the Rule 60(b) burden, the Circuit Court properly exercised its discretion and found the proposed amendment adding an entirely new cause of action when trial was imminent and fact discovery was already complete would have been prejudicial. Thus, the Motion to Amend was properly denied.

CONCLUSION

For the above-stated reasons, the Circuit Court's orders granting Super-Sod's Motion for Summary Judgment and denying Appellants' Motion to Amend the Complaint should be affirmed. Super-Sod owed no duty to Appellants. Super-Sod had no special relationship with Appellants and no statute, undertaking, or common law rule created a duty on the part of Super-Sod to Appellants. Moreover, as a separate ground, Super-Sod's action of loading the Harbison trailer as directed by Harbison's employee Cody Sox does not constitute a proximate cause of Appellants' injuries. Too many intervening acts – acts intervening in time and space, and acts of intervening negligence by three different individuals – separate Super-Sod's conduct from the ultimate collision that caused Appellants' injuries. Therefore, the Circuit Court properly granted summary judgment.

The Circuit Court also acted within its discretion by denying Appellants' Motion to Amend the Complaint. Like the motion at issue in *Holland*, Appellants' untimely motion was filed a year-and-a-half into the life of the case when trial was imminent and fact discovery was complete. The parties had already named experts, and the proposed amendment would have required Super-Sod to hire one or more new experts and reopen fact discovery. Moreover, the amendment was futile. Therefore, the Circuit Court properly found the amendment prejudicial. Even if the Appellants were able to satisfy their Rule 15 burden, the appropriate standard should be the heightened standard under Rule 60. Appellants failed to satisfy the heightened Rule 60 burden because there was no "mistake, inadvertence, surprise or excusable neglect." For all of these reasons, the Circuit Court's order should be affirmed.

Respectfully submitted,

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Columbia, South Carolina
April 2, 2018

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeal

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon,
The Honorable James B. Jackson, Jr.
Civil Action No. 2014-CP-38-01590
Appellate Case No. 2017-000093

Price Oulla and Bonnie Oulla, ... Appellants,

v.

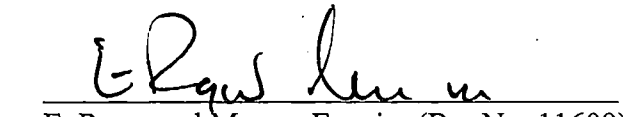
Lisa Velazques; Harbison Community Association, Inc.; Cody Sox; and, Patten Seed Company d/b/a Super Sod, ... Defendants.

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

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on April 2, 2018, 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.

Respectfully submitted,



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April 2, 2018

HAND DELIVERED
Jenny A. Kitchings
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

RE: Price Oulla and Bonnie Oulla v. Lisa Velazques, Harbison Community Association, Inc. Cody Sox, and Patten Seed Company, d/b/a Super-Sod
Case No.: 2014-CP-38-01590
Appellate Case No.: 2017-000093
Date of Loss: July 22, 2014
Our File No.: 1295-0070

Dear Ms. Kitchings:

Enclosed please find Respondent's Initial Brief, Respondent's Designation of Matter to Be Included in the Record on Appeal, and the Proof of Service in the above-referenced matter. I would appreciate it if you would file the original and return three clocked copies with our courier who hand delivered same.

By copy of this correspondence, I am serving same on opposing counsel of my communication with the Court.

Very truly yours,

E. Raymond Moore, III

ERMIII/hws
Enclosures
cc: William E. Applegate, IV
David B. Lail