THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

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

Price Oulla and Bonnie Oulla, Appellants,

v.

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

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

APPELLANTS' REPLY BRIEF

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For the reasons stated in Appellants' Initial Brief and on the bases argued in Appellants' Reply Brief below, Appellants request that this Court reverse the trial court's grant of summary judgment and denial of Appellants' motion to amend the complaint.

I. APPELLANTS' INTERPRETATION OF S.C. CODE ANN. § 56-5-4100 IS THE ONLY ONE COMPATIBLE WITH THE TEXT, STRUCTURE, AND PURPOSE OF THE STATUTE

A. Appellants' Plain-Language Interpretation of S.C. Code Ann. § 56-5-4100 Follows from and Gives Effect to the Statute's Text and Structure

"Statutory construction must begin with the language of the statute." Jennings v. Jennings, 401 S.C. 1, 4, 736 S.E.2d 242, 243 (2012) (quoting Kofa v. U.S. I.N.S., 60 F.3d 1084, 1088 (4th Cir. 1995) (quotation marks omitted)). When read in its entirety, S.C. Code Ann. § 56-5-4100 clearly and unambiguously imposes duties on vehicle loaders.

S.C. Code Ann. § 56-5-4100(A) provides, in pertinent part, "[n]o vehicle may be driven or moved on any public highway unless the vehicle is so constructed or *loaded* as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle." This subsection of the statute is indisputably written in the passive voice. As the United States Supreme Court has noted, "the passive voice focuses on an event that occurs without respect to a specific actor" or actors. Dean v. United States, 556 U.S. 568, 572 (2009). This uncontroversial principle does not emanate from the highest court in the land; it is taught to eighth and ninth graders across the state of South Carolina.[1]

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[1] The South Carolina Department of Education's Standards and Indicators for Eighth Grade English Language Arts and English 1 both specify that the ability to identify and use passive verbs is a component of demonstrating command of the conventions of standard English grammar and usage. S.C. Dep't Educ., South Carolina College- And Career-Ready Standards and Indicators for Grade 8 (identifying and using passive verbs is a component of Standard 4: Demonstrate command of the conventions of standard English grammar and usage); S.C. Dep't Educ., South Carolina College- And Career-Ready Standards and Indicators for English 1 (same), available at

The plain language of S.C. Code Ann. § 56-5-4100(C) supplies the context to identify the actors who must comply with S.C. Code Ann. § 56-5-4100(A). S.C. Code Ann. § 56-5-4100(C) provides

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

This subsection is indisputably written in the active voice. And unlike subsection (A), subsection (C) focuses on acts—here, sweeping or otherwise removing—*and* specific actors—the drivers and loaders of vehicles.

S.C. Code Ann. § 56-5-4100(C) provides that the drivers and loaders of vehicles must comply with not only the requirements of subsection (C), but also "the other provisions of *this section* [that is, § 56-5-4100]." (emphasis added). This includes the duties imposed by § 56-5-4100(A). Because the language of the statute is plain, vehicle loaders have a statutory duty to load the vehicle in a manner that prevents the load from escaping from the vehicle. See Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (providing that "[w]hen the language of a statute is plain, unambiguous, and conveys a clear and definite meaning . . . the statutory terms . . . must be applied according to their literal meaning").

B. Super-Sod's Plain-Language Interpretation of S.C. Code Ann. § 56-5-4100 Ignores the Statute's Structure and Basic Rules of English Grammar

Super-Sod first argues that S.C. Code Ann. § 56-5-4100(A) applies only to vehicle "operators." (Respondent's Initial Brief at 13–15 (arguing that "Section 56-5-4100(A) prohibits the operator from driving a vehicle unless the vehicle is loaded or constructed in such a way that the load will not escape from the vehicle" and that the subsection (A) is "a prohibition against one

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https://ed.sc.gov/instruction/standards-learning/english-language-arts/support-documents-and-resources/ela-standards-by-grade-level/.

who would otherwise 'drive' the vehicle on any highway"). This argument is misguided for at least two reasons.

First, as discussed above, S.C. Code Ann. § 56-5-4100(A) is written in passive voice and does not refer to an actor or actors. There are several actors who could potentially fall under the passive-voiced ambit of S.C. Code Ann. § 56-5-4100(A). Because the passive verbs in subsection (A) include *be driven or moved* and *is constructed or loaded*, S.C. Code Ann. § 56-5-4100(A) could apply to anyone involved with driving, moving, loading, or even constructing vehicles that carry loads on public highways—unless there is a limiting principle.

Second, Super-Sod looks outside of S.C. Code Ann. § 56-5-4100 to reach its conclusion that S.C. Code Ann. § 56-5-4100(A) applies to operators. Specifically, Super-Sod turns to S.C. Code Ann. § 56-5-4110, which is a different section than the one at issue in this case. (Respondent's Initial Brief at 14). This interpretive move is problematic because it ignores the fact that S.C. Code Ann. § 56-5-4100(A) is written in the passive voice while S.C. Code Ann. § 56-5-4110 is written in the active voice and clearly applies only to the operators of vehicles. The two statutes are different, which is why Appellants have never claimed that S.C. Code Ann. § 56-5-4110 created a duty for Super-Sod.[2]

Super-Sod next argues that the prepositional phrase "in addition to complying with the provisions of this section" found in S.C. Code Ann. § 56-5-4100(C) modifies the noun "driver" instead of the auxiliary verb "shall." (Respondent's Brief at 18). To support this argument, Super-

[2] The lower court stated that Appellants relied on § 56-5-4110 to establish Super-Sod's duty. (Order Granting Super-Sod's Motion for Summary Judgment at 6 ("Plaintiffs rely on . . . [§] 4110 . . . .")). Respectfully, this statement is not supported by the record below. At no point in their briefing or arguments before the lower court did Appellants assert that Super-Sod violated § 56-5-4110.

Sod asserts that prepositional phrase placement "often creates ambiguities" that can only be resolved by the use of context clues. (Respondent's Brief at 18).

As a threshold matter, Appellants note that Super-Sod agrees that the phrase at issue is a prepositional phrase. (Respondent's Brief at 18). As such, the prepositional phrase must modify some noun or pronoun (*i.e.*, an adjectival prepositional phrase), or a verb, adverb, or adjective (*i.e.*, an adverbial prepositional phrase).

Super-Sod's opening salvo against Appellants' assertion that the prepositional phrase modifies the auxiliary verb "shall" is a footnote containing a joke from the movie Mary Poppins. (Respondent's Brief at 18 n.10 (Bert: "I knew a man with a wooden leg named Smith." Uncle Albert: "What was the name of his other leg?")). This joke supposedly highlights the confusing and sometimes humorous nature of prepositional phrase placement. But the issue here has nothing to do with prepositional phrases, as highlighted by Super-Sod's "fix" to Bert's line. "I knew a man named Smith who had a wooden leg," does not contain a single preposition, let alone a prepositional phrase. The issue with chimneysweep Bert's joke in Mary Poppins was always about the poor—albeit laugh-inducing—use of the English language, never the placement of a prepositional phrase.

In addition, Super-Sod mischaracterizes Appellants' point about the prepositional phrase' placement in § 56-5-4100(C). Appellants have not and do not concede that the statute would have been clearer if the General Assembly had placed the prepositional phrase at the beginning or the end of § 56-5-4100(C). Instead, Appellants simply noted that it could have been placed at the beginning or end and would carry the same meaning that it does in its current form. The General

Assembly could place this prepositional phrase at any location in § 56-5-4100(C) that would maintain proper grammar and the phrase would continue to modify the word "shall," not "driver."[3]

Super-Sod's final argument is that "[c]ontext matters" when it comes to determining what word a prepositional phrase modifies. (Respondent's Brief at 19). This argument also fails to pass muster.

In their Initial Brief, Appellants used the sentence *Sally and John, in addition to acting, can sing and dance* to highlight the fact that the adverbial prepositional phrase—*in addition to acting*—modifies the auxiliary verb *can* instead of *John*, which is the second half of the compound subject. (Appellants' Initial Brief at 13–14). As a counterargument, Super-Sod now presents the following two-sentence example: *John can act, but Sally cannot. Sally and John, in addition to acting, can sing and dance.* According to Super-Sod, "any reader" of these two sentences would understand that the phrase "in addition to acting" applies only to John. (Respondent's Brief at 20). To modify the proper noun *John*, the phrase *in addition to acting*, must be an adjectival prepositional phrase that describes the proper noun. *In addition to acting* does not do this.

Although context clues may help a reader "determine meanings of words and phrases," S.C. Dep't Educ., South Carolina College- And Career-Ready Standards and Indicators for English 1 at 2, context derived from outside of a sentence has absolutely nothing to do with determining which word a preposition modifies. If this were the case, it would be impossible to diagram a single, standalone sentence containing a prepositional phrase. It would also be impossible to conclusively state whether a prepositional phrase in a standalone sentence was adjectival or adverbial, and this part of the English language would be in a constant state of flux.

[3] As a brief but relevant aside, § 56-5-4100(C) already contains an adjectival prepositional phrase that modifies the word driver: *of the vehicle.*

In sum, Appellants present a grammatically sound and reasoned approach to plain-language statutory interpretation: (1) acknowledge that S.C. Code Ann. § 56-5-4100(A) is drafted in the passive voice and could apply to several actors, and then (2) turn to the plain language found within subsection (C) *of the same section* to determine which actors fall within the ambit of subsection (A)—the drivers and loaders of vehicles.

C. Secondary Canons of Statutory Construction Do Not Warrant a Different Interpretation

This Court need only refer to secondary canons of construction if it holds that S.C. Code Ann. § 56-5-4100's plain language is ambiguous. Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007) ("When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning."). Although Appellants contend the statute is not ambiguous, to the extent the Court reaches this conclusion, Appellants request that the Court disregard Super-Sod's proposed canons of statutory construction for the reasons set forth below.

First, Super-Sod argues that the Court should apply the rule of lenity and resolve any ambiguity in its favor because the statute is a criminal statute. (Respondent's Brief at 17). The rule of lenity is inapplicable here because the portion of the statute Appellants seek to apply to Super-Sod—§ 56-5-4100(A)—bears no criminal penalty. S.C. Code Ann. § 56-5-4100(E) ("Any person who violates the provisions of subsections (B), (C), or (D), is guilty of a misdemeanor and, upon conviction, must be fined one hundred dollars.").

Next, Super-Sod argues that the statute's legislative history confirms that subsection (A) does not apply to the loaders of vehicles. (Respondent's Brief at 20–21). This argument is not persuasive because the legislative history does not reveal whether the language is intended to apply

to drivers only, or loaders as well. The language of the statute is left to speak for itself because the prior version of what is now subsection (A) contains the exact same wording and passive-voice sentence structure at issue in this case. Compare S.C. Code Ann. § 56-5-4100 (eff. May, 1978 until Jan. 1, 1989) ("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 . . . .") (emphasis added), with S.C. Code Ann. § 56-5-4100(A) (same). Importantly, what changed in the statute is the addition of subsection (C), which clarifies that subsection (A) applies to both loaders and drivers.

Super-Sod also argues that this Court should "consider the title or caption" of § 56-5-4100 to understand the legislature's intent. (Respondent's Brief at 21–22 (quoting (Univ. of S. C. v. Elliott, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966)). However, Super-Sod fails to cite an applicable title or caption and misapplies the canon entirely. Instead of referring to the title or caption of the statute that contains the language at issue in S.C. Code Ann. § 56-5-4100(A), Super-Sod quotes the long-form title of the act that added § 56-5-4100(C) to § 56-5-4100, which is both irrelevant and at odds with how the Court applied this canon in Elliott. 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) (applying the caption of the actual section at issue in the case). The relevant portion of the title or caption of S.C. Code Ann. § 56-5-4100 is actually *Preventing escape of materials loaded on vehicles*, which makes Defendant's argument puzzling as the title almost exclusively focuses on loaders and indicates a legislative intent to make requirements on them, something the Respondent concedes was the intent in adding subsection (C). (Respondent's Brief at 22 ("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.)".

Finally, Super-Sod argues that it boils down to common sense and that the vehicle loader simply has no control over the requirements put forth in Paragraphs (A) and (B). This argument

goes to the heart of Super-Sod's deception and flaw of their interpretation. Super-Sod's business is set up so that it is the only entity that has any control over the proper and safe loading of their product. Because the fact that the pallets they sell weigh more than 2 tons per unit, they load them onto customers vehicles with forklifts that are expressly provided for that purpose and for their own commercial trucking deliveries. Customers, such as Harbison here, are unable to exert any control over the placement of the pallets and would be unable to move the pallets once loaded. Further, due to the size of the pallets, Super-Sod has commercial equipment designed to wrap the sod to keep the rolls of sod from coming loose. Accordingly, Super-Sod's argument fails as the loaders of vehicles have as much control over the variables at play in subsections (A) and (B) as they do in subsection (C).

In sum, in the event the Court deems it necessary to even look at secondary canons, this Court should consider only one secondary canon advanced by Super-Sod. But in using that canon to divine legislative intent, the Court should refer only to the relevant portion of S.C. Code Ann. § 56-5-4100's caption, not the language used by Super-Sod.

II. IF THIS COURT REJECTS APPELLANTS' STATUTORY INTERPRETATION, IT SHOULD EITHER (A) RECOGNIZE THAT LOADERS OF VEHICLES HAVE A COMMON LAW DUTY TO THIRD-PARTY DRIVERS ON PUBLIC HIGHWAYS, OR (B) HOLD THAT A JURY COULD FIND THAT A SUCH A DUTY EXISTS IN THIS CASE PURSUANT TO MILLER V. CITY OF CAMDEN

A. Super-Sod Ignores the Fact that the South Carolina Supreme Court Has Recognized Common Law Duties Independent of Contract under Analogous Special Circumstances

An affirmative legal duty to can be "created by statute, contract, relationship, status, property interest, or some other special circumstance." Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). One such special circumstance the Supreme Court has recognized is a common law duty to third parties who face a foreseeable risk of physical harm. See Dorrell v S.C. Dept. of Transp., 361 S.C. 312, 319–20, 605 S.E.2d 12, 15–16 (2004)

(collecting cases identifying common law duty of care to third parties independent of the duties assumed in contract based on general principles of common law negligence). In light of this precedent, Appellants assert that the facts of this case present one such analogous special circumstance that gives rise to an affirmative duty absent some obligation arising from statute, contract, status, or property interest.

Instead of addressing this argument, Super-Sod claims that Hendricks "does not support the proposition that foreseeability alone is enough to create a duty" and that Dorell "stands for the proposition that a contractual duty can give rise to a general duty in tort law that runs to third parties." (Respondent's Brief at 29). Appellants cite Hendricks because the "special circumstance" language noting common law duties independent of contractual or other relationships is a direct quote from that case, not for any proposition regarding foreseeability. Moreover, Super-Sod's claim regarding Dorrell is incorrect and misses the context in which Appellants cite the case.

The Supreme Court's holding of Dorrell identified a duty of care to third parties based on both contractual *and* common law duties: "In the present case, we hold that [the highway paver] owed a duty of care to the [third party] based on (1) the contractual relationship between [the highway paver] and SCDOT *and (2) a common law duty of care.*" Dorrell, 361 S.C. at 318, 605 S.E.2d at 15. Appellants cite Dorrell because it identifies several cases in which common law duties to exercise due care to others existed outside of a contractual relationship. E.g., Dorrell, 361 S.C. at 319, 605 S.E.2d at 15 ("Kennedy v. Columbia Lumber and Mfg. Co., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) (finding a homebuilder owes a legal duty 'to refrain from constructing housing that he knows or should know will pose serious risks of physical harm to foreseeable parties')").

The dangers posed by one who carelessly loads a vehicle that travels on highways are not unlike those dangers posed by one who carelessly paves a highway because the risk of *serious physical harm* to third-parties is equally foreseeable—and nearly identical. Importantly, Super-Sod's customers are not in a position to load the sod themselves, so they are reliant upon Super-Sod to make sure that it is loaded in a manner that does not present a danger to those on highways. Accordingly, Appellants simply argue that this Court should extend the duty recognized in Dorrell that the pavers of highways owe third-party users of highways to this analogous situation.

B. Super-Sod's Argument Against a Common Law Miller v. City of Camden Duty Highlights the Reason Why a Jury Should Make This Determination

In Miller v. City of Camden, the Court held that "a volunteer can be liable to third parties," and it is a question of fact for the jury to determine whether the defendant volunteered for the benefit of those third parties. 29 S.C. 310, 316, 494 S.E.2d 813, 816 (Toal, J., concurring and dissenting in part). Appellants argue that a jury should decide whether Super-Sod voluntarily undertook duties for the protection of third-party drivers that would give rise to a duty under Miller.

Super-Sod argues that it "did not assume any duty by merely following [the driver's] instructions as to where and how to place the pallets on [the] trailer." (Respondent's Brief at 23). But this argument ignores other evidence in the record that supports the inference that Super-Sod voluntarily undertook the tasks of wrapping the sod and safely loading it onto trailers to protect third-party drivers on public roadways. (See Appellants' Initial Brief at 19–21). Moreover, the question of whether the Super-Sod employee merely followed the driver's instructions is a disputed genuine issue of material fact. Super-Sod's employee testified that he denied the driver's request to remove sand from the middle of the trailer where he normally places sod loads. Kearse Dep. 40: 12-18.

Finally, Super-Sod notes that the Supreme Court has not adopted "the expansive undertaking liability of Restatement (Second) of Torts § 324A." (Respondents' Initial Brief at 26). This, however, is a red herring. At no point in their briefing or in their arguments below have Appellants ever relied on § 324A of the Restatement for support. (See, e.g., Plaintiffs' Motion to Alter or Amend Order Granting Super-Sod's Motion for Summary Judgment at 7 ("Plaintiffs are not asking the Court to apply Restatement § 324A, but rather are asking the Court to apply Miller.")).

For the above-mentioned reasons, the Court should reverse the circuit court's grant of summary judgment and allow a jury to decide whether Super-Sod has a common law duty to Appellants and other third-party drivers under Miller.

III. APPELLANTS TIMELY FILED THEIR MOTION TO AMEND THE COMPLAINT AND THE INTERESTS OF JUSTICE WARRANT GRANTING THE MOTION

A. There is No Support for Applying the Rule 60(b) Standard to Appellants' Timely Filed Rule 15(a) Motion to Amend a Complaint

Super-Sod argues that the "majority rule" supports applying the Rule 60(b) standard to Appellants' timely filed Rule 15(a) motion to amend the complaint. This is demonstrably false.

Every single case Super-Sod cites involves a situation where a plaintiff or plaintiffs attempted to amend the complaint only *after* entry of judgment or dismissal of the case. As such, these cases have no bearing on the facts presented here, where Appellants filed the motion to amend the complaint more than a month before the entry of summary judgment and long before a trial was ever set. (See Respondent's Brief at 37–39 (collecting cases)).

- Williams v. Citigroup Inc., 659 F.3d 208, 211 (2d Cir. 2011) (plaintiff did not move to amend until after the case was dismissed);
- Ahmed v. Dragovich, 297 F.3d 201, 205 (3d Cir. 2002) (motion to amend filed more than a month after the case was dismissed);

- Thorn v. Medtronic, Inc., 624 F. App'x 433, 434 (6th Cir. 2015) (plaintiff first moved to amend to add new claim following dismissal);

- Vicom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 773 (7th Cir. 1994) (plaintiff did not move to amend complaint until dismissal);

- First Nat. Bank of Louisville v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago, 933 F.2d 466, 468 (7th Cir. 1991) (plaintiff did not move to file amended complaint until after suit was dismissed);

- In re Netflix, Inc. Sec. Litig., 647 F. App'x 813, 816 (9th Cir. 2016) ("Plaintiffs did not seek leave to file an amended complaint until after the clerk entered judgment in Netflix's favor on September 27, 2013.");

- The Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1086 (10th Cir. 2005) (plaintiff did not file a motion to amend until after the trial court entered an order for summary judgment, a three-judge appellate panel issued a ruling on appeal, and the case had been heard by an *en banc* panel of the 10th Circuit Court of Appeals);

- Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telecommunications Network, Inc., 571 F. Supp. 2d 59, 62 (D.D.C. 2008) (plaintiff did not file for leave to amend complaint until after the court dismissed the case with prejudice);

- Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 83, 398 S.E.2d 628, 630 (1990) (plaintiff did not move to amend the complaint until after the court granted summary judgment to the defendant); and

- Johnson v. Bollinger, 86 N.C. App. 1, 7, 356 S.E.2d 378, 381 (1987) ("As plaintiff failed to take any action to amend his complaint either before or after its dismissal, he cannot now [on appeal] complain he lacked adequate opportunity to amend his complaint.").

Here, by contrast, Appellants filed their motion to amend the complaint on June 29, 2016, more than a full month before the lower court entered its Order granting summary judgment to Super-Sod until August 2, 2016. Although Super-Sod faults Appellants for failing to bring their motion to amend to the lower court's attention until after judgment was entered, Appellants did, in fact, bring their motion to the lower court's attention in the manner prescribed by the South

Carolina Rules of Civil Procedure when they filed it in the Orangeburg County courthouse well before judgment was entered.[4]

Because Appellants timely filed the Rule 15(a) Motion to Amend the Complaint, there is no support for holding it to the higher Rule 60 standard because the Court did not address the complaint before granting summary judgment.

B. Super-Sod Continues to Fail to Meet Its Burden to Demonstrate That It Will Be Prejudiced in the Manner Envisioned by Rule 15 or That the Amendment Would Be Futile

The crux of the new breach-of-implied-warranty cause of action in Appellants' proposed amended complaint is that the plastic wrap that Super-Sod used on the sod pallets was inadequate packaging within the meaning of S.C. Code Ann. § 36-2-314(2)(e). Super-Sod argues that it will be prejudiced by adding the breach-of-warranty claim, and that such a claim would be futile.

As a threshold matter, it is difficult to understand how Super-Sod could be unfairly prejudiced by Appellants' proposed amendment when there is currently more than a year left on the breach-of-warranty claim's six-year statute of limitations. See S.C. Code Ann. § 36-2-725(1) ("An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued."). Because Appellants could simply file a separate action containing only this claim, any claim of prejudice relating to the need to conduct additional discovery or hire new experts is unavailing. Indeed, one could argue that combining the causes of action would not only be less prejudicial than parallel actions, but also work to promote judicial economy.

Turning next to the issue of futility, Super-Sod's arguments mischaracterize Appellants' proposed cause of action. Super-Sod repeatedly asserts that the claim is futile because Super-Sod

[4] Due to the fact that the circuit court in Orangeburg has traveling judges and cases are not assigned to a single judge, a hearing on Appellants' motion to amend was independently set for the August 22, 2016 motions roster.

did not and "is not required to secure its product to trailers for customers." (Respondent's Brief at 36). But Appellants' proposed cause of action is not about securing pallets of sod to the truck. Instead, § 36-2-314(2)(e) requires, in relevant part, that goods should be adequately contained and packaged. The proposed cause of action alleges that the sod was not adequately contained or packaged. In light of the applicable law and the facts of the case, the proposed cause of action is by no means futile.

IV. WHETHER SUPER-SOD'S ACTIONS PROXIMATELY CAUSED APPELLANTS' INJURIES IS A QUESTION OF FACT FOR THE JURY

On appeal, Super-Sod argues that the lower court "correctly held Super-Sod's conduct was not a proximate cause of Appellants' injuries." (Respondent's Brief at 12). Although the court's order does contain a conclusory statement that "Super Sod's conduct [was] not a proximate legal cause of [Appellants'] injuries," the only other time the lower court used "proximate causation" was to note that it is an element of the tort of negligence. (Order Granting Super-Sod's Motion for Summary Judgment at 5). The order contains no analysis of proximate causation because the lower court's entire order was premised on the absence of duty, and "[i]f there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). To the extent Respondent is presenting proximate cause as an alternative reason to uphold the lower court's order, this Court is unable to say as a matter of law that proximate cause is absent in this case based on the record on appeal.

Furthermore, when the driver of the truck that pulled the trailer loaded by Super-Sod (Sox) and the driver's employer (Harbison) presented a motion for summary judgment to the lower court on the issue of proximate cause, the lower court denied their motion, finding that there were genuine issues of material fact that must be left to a jury. See August 2, 2016 Order Denying

Defendants Harbison Community Association, Inc. and Cody Sox's Motions for Summary Judgment at 2–4 (finding genuine issues of fact whether the secondary driver was negligent and the accident was a natural and probable consequence of the sod spill). Accordingly, and based on the evidence in the record that Super-Sod was in fact a cause of the sod spill, Super-Sod is in the same position as Harbison as it relates to proximate cause in this case. Therefore, if this Court were to hold that any proximate cause was limited to that of the secondary driver, it would contradict the lower court's holding on that issue, which has not been appealed. August 2, 2016 Order Denying Defendants Harbison Community Association, Inc. and Cody Sox's Motions for Summary Judgment at 4 ("The evidence, testimony, and affidavits before the Court reveal numerous genuine issues of material fact with regards to proximate cause. Because there are genuine issues of material fact on the issue of proximate cause and viewing the evidence and all inferences that can be reasonably drawn therefrom in the light most favorable to the Plaintiff, this issue is to be decided by a jury, not by the Court as a matter of law.").

In reaching its decision regarding Sox and Harbison, the lower court relied on the controlling precedent of Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013). The overriding principle in South Carolina is that proximate cause "is normally a question of fact for determination by the jury" and "[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." Gause, 403 S.C. at 150, 742 S.E.2d at 649 (quotations omitted). There is no bright-line rule of proximate cause in cases, such as this one, involving secondary accidents. See Gause, 403 S.C. 140, 742 S.E.2d 644 (involving a secondary accident, rear-end accident where genuine issues of material facts precluded a finding of summary judgment for the defendant who did not rear-end the plaintiff); Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962) (same) . The Court is to engage in the usual inquiry into whether reasonable minds could differ as to

whether the secondary accident was foreseeable as a natural and probable consequence of the initial accident. Almost always, a jury question will exist, as it did in Gause and Matthews.

In Gause, a police officer pulled over the driver of a vehicle suspected of drunk driving. The suspected drunk driver stopped in the left lane of traffic, and the police officer pulled directly behind him and turned on his blue lights. While the officer was filling out paperwork in his car, a second driver struck him from behind and he was injured. The police officer sued the owner of the car driven by the suspected drunk driver, and the owner argued that the suspected drunk driver's actions did not proximately cause the police officer's injuries. The Supreme Court held that there was sufficient evidence to present the proximate cause question to the jury because the suspected drunk driver remained in a lane of traffic instead of pulling off the road and it was reasonably foreseeable that another car would crash into the back of a police cruiser that was stopped in a lane of traffic. Gause, 403 S.C. 140, 742 S.E.2d 644.

In Matthews, the plaintiff came upon the scene of an accident involving a car driven by the defendant and exited her car to help a physician render aid to injured passengers. The defendant driver had already exited his car. Shortly thereafter, another car skidded down the highway and crushed plaintiff into the defendant driver's car. The plaintiff claimed that the defendant's negligence in leaving his car in the roadway proximately caused her bodily injuries. The Supreme Court rejected the defendant's argument that the second driver had broken the chain of causation and ultimately held that the question presented factual issues to be determined by a jury. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962).

This case does not involve an "exceptional" issue of proximate cause, but one where reasonable minds could differ as to whether Lisa Meyer[5] rear-ended Appellant Price Oulla during

[5] After the collision but before the deposition, Defendant Lisa Velazques changed her name to Lisa Meyer.

an active traffic slowdown as an ordinary and natural consequence of the sudden spillage of sod onto the highway. Lisa Meyer Dep. 36:4-6; 33:6; Michael A. Sutton, P.E. Aff. ¶ 8; Trooper Gleich Dep. Ex. 1 at ¶ 6[6] (stating that he "expected a crash to happen"), ¶ 9 (providing that "it doesn't take long for a crash to follow behind a spilled load or some other obstruction on the interstate"), ¶ 17 (providing that "if the sod hadn't spilled on the road," then this secondary accident would not have happened).

In addition, the driver testified that she was looking at the road, paying attention, and there was a "sudden" stoppage of traffic, which the jury could certainly infer was due to the lane blockage caused by the sod spill. Meyer Dep. at 35:18–37:13; 55:9–15; see also Trooper Gleich Dep. Ex. 1 at ¶¶ 19-20 (providing that "when we have travel blocked on the interstate due to a spilled load or a wreck, we send a cruiser a half a mile behind the end of the traffic to put blue lights on to warn other drivers of the sudden stop ahead so that they will have time to react," but in this instance, "the crash happened too fast and before a cruiser could get positioned to warn other drivers").

As the lower court held when it analyzed proximate cause as to Sox and Harbison, the facts of this case place it squarely under the umbrella of Matthews and Gause. Whereas the secondary accident in Matthews occurred fifteen to forty-five minutes after the original accident, 239 S.C. at 629–30, 124 S.E.2d at 326, the accident here occurred no more than seventeen minutes after the sod spill. Just like in Matthews, id., there is some evidence that authorities had assumed control over the scene and traffic when the collision occurred. Significantly, the facts presented in both Matthews and Gause include some evidence that the secondary driver could possibly have avoided the secondary accident. See Matthews, 239 S.C. at 632, 124 S.E.2d at 327; Gause, 403 S.C. at

[6] Trooper Gleich read his Affidavit into the record at his deposition on June 23, 2016 per S.C. Department of Public Safety policy.

168, 742 S.E.2d at 659 (noting that the secondary driver hit a stopped police car with flashing blue lights). Notwithstanding the existence of those facts, the Supreme Court held that the issue of proximate cause was a question of fact for the jury. Matthews v. Porter, 239 S.C. at 631, 124 S.E.2d at 327; Gause, 403 S.C. at 150–51, 742 S.E.2d at 649–50. If the facts presented in Matthews or Gause were insufficient for the Supreme Court to hold that there was no proximate cause as a matter of law, then respectfully, this Court must hold that proximate cause in this case presents a question for the jury, as the lower court held with respect to Sox and Harbison.

Super-Sod also argues that Newton v. S.C. Pub. Railways Comm'n, 319 S.C. 430, 462 S.E.2d 266 (1995), supports finding that its actions are too remote to be a proximate cause of Appellants' injuries. (Respondents' Initial Brief at 32). Newton, however, is factually distinguishable from this case.

In Newton, the plaintiff driver came to a complete stop at a railway crossing with a flashing signal that indicated a train was approaching. While properly stopped at the railway crossing, the plaintiff was rear ended by the defendant driver, who claimed he did not stop because he was aware that the signal had malfunctioned and had been falsely indicating an approaching train for several days. When the plaintiff made negligence claims against the Railway Commission for failing to maintain the signals, the Court found there was no proximate cause and held that "the accident occurred because of [the defendant driver's] failure to keep a proper lookout." Newton v. S.C. Pub. Railways Comm'n, 319 S.C. 430, 432, 462 S.E.2d 266, 267 (1995).

Unlike in Newton, where the plaintiff had properly stopped at a flashing railroad crossing and the defendant driver simply elected to drive through the stop he was familiar with, Appellant Price Oulla was forced to come to a sudden stop in the middle of a 70-mph highway in the middle of heavy traffic because of the spillage on the roadway and the secondary driver had no reason to know the highway would be stopped. In the first instance there is the equivalent of a stop sign,

and the second would be akin to an invisible wall. In sum, Newton is inapplicable here and the court should reject Defendant's arguments to the contrary.

Because the (1) lower court has acknowledged that there is a genuine issue of fact regarding whether the sod spill was a proximate cause of Appellants' injuries, and (2) the parties dispute whether the sod spill was due to Super-Sod's failure to properly load and wrap the sod, Appellants respectfully ask this Court to hold that proximate causation presents a case for the jury.

CONCLUSION

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

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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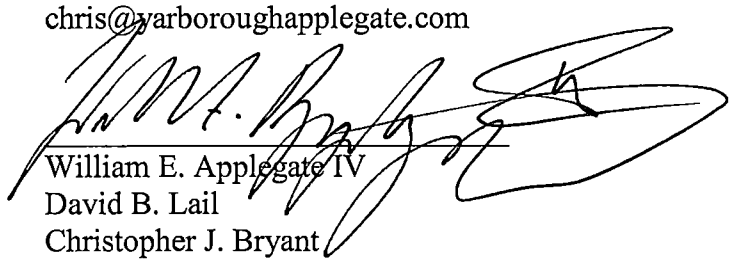

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April 26, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

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

Price Oulla and Bonnie Oulla, Appellants,

v.

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

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

PROOF OF SERVICE OF APPELLANTS' REPLY BRIEF

I certify that I have served the Appellants' Reply Brief on Defendants and Respondent above-named by depositing a copy of it in the United States Mail, postage prepaid, on April 26, 2018, addressed to their attorneys of record:

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April 26, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
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Re: Oulla v. Patten Seed Company d/b/a Super-Sod, *et al.*
Appellate Case No. 2017-000093
YA File No. 14-057

Dear Ms. Kitchings:

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

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

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

Sincerely,

Christopher J. Bryant

Enclosures as stated
cc: E. Raymond Moore, III, Esquire
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