FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4005001

Tina Bessinger
PLAINTIFF(S)

LongCreek Development LLC
Advantage Services Inc
DEFENDANT(S)

Submitted by: _____ Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

2017 OCT -2 AM 10:59
RICHLAND COUNTY
CLERK OF COURT

RECEIVED
OCT 19 2017
SC Court of Appeals

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2126 **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the 2 day of Oct, 20 17 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

Carl David Hiller

Karl Stephen Brehmer
Mark Steven Barrow

Anthony W. Livoti
Brandon Robert Gottschall

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2016-CP-40-05001

Tina Bessinger,

Plaintiff,

v.

LongCreek Plantation Property Owners Association, Inc., LongCreek Development, LLC, Fairways Development, LLC, Advantage Services, Inc., and Halcyon Real Estate Services, LLC,

Defendants.

ORDER GRANTING ADVANTAGE SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on September 5, 2017, on Defendant Advantage Services, Inc.'s (hereinafter "Advantage Services") Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Plaintiff was represented by Carl Hiller, Esquire, and Bill Padget, Esquire, and Advantage Services was represented by Anthony Livoti, Esquire. Both Plaintiff and Advantage Services submitted memoranda, depositions, and exhibits in support of their respective positions. Based on the pleadings on file, memoranda, deposition transcripts, and exhibits, along with the arguments of counsel, the Court grants Advantage Service's Motion for Summary Judgment.

FACTUAL BACKGROUND

This case arises out of an automobile accident. On November 1, 2013, a vehicle accident occurred between the Plaintiff and another driver who is a non-party to this action. Plaintiff is a bus driver for Richland School District Two and was driving on Longtown Road in the LongCreek Plantation development in Blythewood, South Carolina. Plaintiff was travelling on Longtown Road toward Blythewood Middle School to pick up children to drop them off at home. As Plaintiff neared the intersection of Longtown Road and Hunting Path Road at the entrance of the Fox Meadow subdivision, another driver, Amber Edwards, pulled out of the

subdivision in front of the Plaintiff and caused a severe collision. Plaintiff alleges injuries from that accident.

LongCreek Plantation Property Owners Association, Inc. (hereinafter "LongCreek POA") is the homeowners association for LongCreek Plantation. LongCreek Development and Fairways Development are entities that were, at one time, responsible for the development of LongCreek Plantation. Halcyon Real Estate Services, LLC (hereinafter "Halcyon") is a company that manages the LongCreek POA. LongCreek POA, through Halcyon, had a contract with Advantage Services to provide landscape services in the LongCreek Development.

In her Complaint, Plaintiff alleges that Amber Edwards failed to yield the right of way to Plaintiff because Edwards' view of the stop sign was obstructed by an overgrown tree and/or shrubbery. In her deposition, Plaintiff testified that visibility of the stop sign was obscured at the intersection due to limbs hanging from trees on the sides of the road at the intersection of Hunting Path and Longtown Road. However, Plaintiff had no evidence of whether the trees were the actual cause of Edwards disregarding the stop sign. The other driver, Amber Edwards, also testified and has no memory of the accident and cannot say whether she did or did not disregard the stop sign. Although she did say that she would have obeyed a stop sign if she had seen it, she doesn't know what she did or didn't do at the intersection as she has no memory of the accident. Jeannie Sharpe, another Richland School District Two bus driver, testified she drove through this neighborhood regularly before the accident happened and believed the trees were an obstruction to the stop sign and created poor visibility at the intersection. However, Ms. Sharpe did not witness the accident, does not know how the accident happened, or whether Ms. Edwards even disregarded the stop sign. No other witnesses testified regarding how the accident happened or whether the alleged obstruction of the stop sign was the cause of the accident.

David Peterson is the president of Halcyon. Halcyon is responsible for monitoring the common areas for the LongCreek POA, which includes the entrance of the Fox Meadow subdivision where the accident occurred. He testified that at the time of the accident, Halcyon contracted with Advantage Services for landscape maintenance within the LongCreek Subdivision. This contract required Advantage Services to edge areas with walkways and curbs, provide chemical applications, replant flowers in plant beds, and to trim the shrubs on an as-needed basis. The contract does reference "pruning" of trees and shrubs. The contract does not require Advantage Services to trim or manage the trees in the common areas or entrances. According to Peterson, Advantage Services only trimmed trees at the specific direction of Halcyon and Peterson never requested or directed Advantage Services to trim trees at this intersection to the entrance of Fox Meadow.

Plaintiff claims that Advantage Services' contract with Halcyon created a duty to trim trees at this intersection. Plaintiff further claims that because there is evidence that trees obstructed a view of the stop sign, there is a genuine issue of material fact that Advantage Services breached a duty to Plaintiff and is liable to her for her injuries.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to a judgment as a matter of law." Rule 56, *South Carolina Rules of Civil Procedure*. Rule 56(c) mandates the entry of summary judgment when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Baughman v. AT&T*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991).

II. Advantage owes no independent duty to Plaintiff

Based on the law and the facts in this case, the Court finds that Advantage Services owned no independent duty to the Plaintiff. In a negligence cause of action, a plaintiff must show (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). To sustain a negligence cause of action, the Plaintiff must primarily establish that the defendant owed a duty of care to the plaintiff. *Steinke v. S.C. Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) (citations omitted); "The 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." *Id.* at 387, 520 S.E.2d at 149 (citations omitted).

A "duty" is an obligation to conform to a particular standard of conduct toward a particular individual or the public at large. *See Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977) (*abrogated on other grounds by Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011)); *S.C. State Ports Auth. V. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986). The tortfeasor's duty arises from his relationship to the injured party. *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E.2d 424 (1984). "It is essential to liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care. Where this relationship is 'too attenuated,' a duty will not

arise." *Ravan v. Greenville County*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993) (internal citations omitted).

"Ordinarily, the common law imposes no duty on a person to act. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). "[F]ailure to take steps to benefit others or to protect them from harm not created by his own wrongful act" will not impose liability. *Id.* (*citing Sharpe v. S.C. Dept. of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987) (Bell, J., concurring)).

As to Defendant Advantage Services, Plaintiff claims that Advantage, as the landscaper, had a duty to use reasonable care to trim trees in this common area and keep the area around the stop sign in a safe condition, and breached that duty by failing to maintain the trees which allegedly obstructed Ms. Edwards' view of the stop sign. However, viewing all the evidence in the light most favorable to the Plaintiff, the Court finds there is no independent duty that Advantage Services owed to the Plaintiff in this situation. Advantage Services' only duty arose from its contract with Halcyon and the LongCreek POA. It did not owe, or assume, any independent duty to the Plaintiff. Without a duty, an essential element of Plaintiff's claim against Advantage Services fails and Advantage Services is entitled to summary judgment.

III. Advantage Services owed no duty of care to the Plaintiff because the scope of their duty was defined solely by contractual relationships arising from their agreement with Halcyon.

If Advantage Services did owe a duty to Plaintiff, that duty could only arise out of its contract with Halcyon and the LongCreek POA. Plaintiff was not a party to that contract, nor was she a third-party beneficiary of that contract. Therefore, the Court finds Advantage's contract did not create any duty to Plaintiff and is Advantage is entitled to summary judgment.

Though South Carolina courts have allowed tort liability to a third party as a result of contractual obligations, the duty involved flows directly from contracts made for the benefit of the third party. *Johnson v. Sam English Gardening, Inc.*, 412 S.C. 433, 448-49, 772 S.E.2d 544, 552 (Ct. App. 2015) *reh'g denied* (June 18, 2015), *cert. denied* (Oct. 8, 2015). Additionally, while South Carolina courts have determined that there is a common-law duty to exercise due care in the performance of a contract, the duty only extends to avoid damage or injury, created directly by the tortfeasor, to a foreseeable third-party. *See Dorrell v. South Carolina Dept. of Trans.*, 361 S.C. 312, 605 S.E.2d 12 (2004); *Landry v. Hilton Head Plantation Property Owners Ass'n Inc.*, 317 S.C. 200 (1994); *Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 133, 212 S.E.2d 925, 926 (1975) (*abrogated* on other grounds by *Dorrell*, 361 S.C. 312 (2004)).

Plaintiff refers to *Dorrell* to support the proposition that a tortfeasor can be held liable to a foreseeable third party. In *Dorrell,* the contractor that plaintiff sought to hold liable was a road contractor and its contract contained specific provisions that addressed safety issues to be undertaken by the contractor. The court there held that if the contractor breached those provisions, then it could potentially be liable to a third-party because those contractual provisions were specifically intended to address public safety. As such, the plain language of the contract specifically referenced the safety of the public and the tortfeasor was liable for a foreseeable third-party injury. *Id.* However, the Court finds *Dorell* to be clearly distinguishable from the facts in this case.

Unlike the contract in *Dorrell*, the contract Advantage Services had with Halcyon and LongCreek POA has no such public safety provisions. The contract calls for Advantage Services to provide basic landscaping services for the neighborhood. The contract also called for Advantage Services to make regular inspections of the neighborhood with Halcyon and Plaintiff points to this as a contractual obligation of Advantage to protect the public. However, in

reviewing the contract language, such inspection was for the benefit of the parties to the agreement to ensure Advantage Services was complying with the agreement. Unlike the company in *Dorrell* who had contracts that specifically referenced public safety measures, Advantage Services' contractual obligations do not include maintaining the entrances or common areas for safety purposes. The scope of duty owed by Advantage Services is defined by its contract with Halcyon and is limited to edging grass areas, cleaning grass clippings, and pruning to enhance and preserve the natural appearance of the neighborhood. As such, this situation is distinguishable from the one on *Dorell* and Advantage Services owes no affirmative contractual duty to the general public at large, including the Plaintiff. Rather, the only duty owed by Advantage Services arises from its contract with Halcyon. *See e.g., Parada v. City of N.Y.*, 205 A.D.2d 427, 428, 613 N.Y.S.2d 630, 631 (1994) (finding action against landscaper properly dismissed when plaintiff alleged plantings "dangerously diminished the range of motorists' vision at the accident scene," but landscaper's contract did not impose upon them any duty to plaintiff as a member of the public).

Plaintiff argues that the contract between Advantage and Halcyon should be read to impose a more expansive duty. However, such a reading is not supported by the record. David Peterson, the president of Halycon, testified Advantage only trimmed trees and shrubs at the specific direction of Halcyon and he never directed Advances Services to go into Fox Meadow to prune or trim trees at this or any other entrance. Peterson testified that Advantage Services had no duty or responsibility to trim trees or shrubs without specific direction from him and he never directed Advantage Services to perform any tree trimming activities at this area. Advantage Services was not under any ongoing duty to cut, prune, or trim the trees whether for aesthetic or safety reasons.

Plaintiff has failed to prove Advantage Services owed her a legal duty of care, and therefore any actionable negligence. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010) (citing *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007)). Plaintiff has failed to establish any duty owed to her by Advantage Services, whether based on common law or the contract. Any relationship between Plaintiff and Advantage Services is much too attenuated to create a reasonable duty of care. The contract between Advantage Services and Halcyon was not created for the benefit of the Plaintiff or other third parties, and does not contain any provisions that specifically create a duty owed to the Plaintiff. Plaintiff has failed to establish a duty existed that was breached by Advantage Services and Defendant is entitled to summary judgment.

The Court also finds an additional reason Advantage Services owes no duty to the Plaintiff. The other Defendants in this case have also moved for summary judgment arguing that they also owed no duty to Plaintiff, chiefly relying on *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006). In *Underwood,* the S.C. Court of Appeals affirmed the grant of summary judgment to a private landowner who was alleged to have failed to trim a tree that contributed to the plaintiff's accident. The plaintiff there claimed that the property owner failed to trim a tree and the tree obstructed the other motorist's view of the stop sign, which caused the accident. The trial court granted summary judgment to the landowner and the court of appeals affirmed. The plaintiff argued that because the property owner had occasionally trimmed trees on his property, he owed a duty to the plaintiff to trim the tree to keep it from obstructing a motorists' view of the stop sign. The court of appeals rejected that argument and affirmed the grant of summary judgment to the landowner, holding that the landowner's occasional trimming of the tree did not create a duty to the plaintiff for which he could be held liable. *Id.* at 219, 625 S.E.2d at 239.

The same holds true here. Because these Defendants, as landowners and managers of the property, would not owe a duty under *Underwood,* Advantage Services, as their landscape contractor would not owe a duty either.

IV. Even assuming Advantage Services owed a duty under its contract, Plaintiff has no evidence that an alleged breach of this duty was the proximate cause of the accident.

Negligence is not actionable unless it is a proximate cause of the injury. *Hanselmann v McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980). In establishing proximate cause, the Plaintiff has the burden of proving the injury would not have occurred "but for" the defendant's alleged negligence and that the plaintiff's injury was foreseeable. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715, 721 (S.C. App. 1996). Proximate cause is typically a determination to be made by the jury. However, when the evidence is susceptible of only one inference, proximate cause becomes a matter of law for the court. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88-89 (S.C. 1998). An act of omission is not the proximate cause if it does no more than furnish the condition by which the injury is made possible. *Driggers v. City of Florence*, 190 S.C. 309, 2 S.E.2d 790 (1939).

In the present case, Plaintiff suggests the accident occurred when Ms. Edwards ran the stop sign because of an inability to see the sign due to the alleged overgrown trees. However, in viewing all the evidence in the light most favorable to the Plaintiff, there is simply no testimony or evidence that Edwards even ran the stop sign. Plaintiff does not know how the accident occurred, whether Edwards ran the stop sign, or even what Edwards did to cause the accident. No other witnesses have testified whether Edwards disregarded the stop sign or stopped at it and then pulled out in front of Plaintiff. Even assuming that Advantage Services owed a duty to Plaintiff and breached that duty, there is no evidence this breach was the proximate cause of the accident. It would be pure speculation that the cause of Ms. Edwards' pulling into the path of

Plaintiff was because she couldn't see the stop sign due to some breach of a duty by Advantage Services. Liability cannot rest on mere possibilities. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). Plaintiff bears the burden of proof of proving that Advantage Services' breach of a duty is the proximate cause of Plaintiff's injuries. Here there is no such proof and Plaintiff's claim fails as a matter of law.

CONCLUSION

For the reasons stated above, this Court concludes that Plaintiff cannot establish Advantage Services owed a duty to the Plaintiff, and therefore has failed to make a sufficient showing of an essential element of her claim. Even assuming she can establish that such a duty was owed, Plaintiff cannot establish that such a breach was the proximate cause of her injuries.

IT IS THEREFORE ORDERED, that based upon the above, Defendant Advantage Service's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

The Honorable G. Thomas Cooper, Jr.
Fifth Judicial Circuit

Columbia, South Carolina
September 22, 2017