IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-002181

Tina Bessinger ..... Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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II. **The Circuit Court properly held that Respondent Advantage Services, Inc. was entitled to summary judgment on Appellant's negligence claim against it because Appellant failed to present a genuine issue of material fact on the causation element of her claim.**

STATEMENT OF THE CASE

This appeal follows an Order of the Circuit Court granting Respondent Advantage Services, Inc. summary judgment on Appellant's negligence claim against it. On November 1, 2013, Appellant Tina Bessinger was involved in an automobile accident with a non-party to this action, Amber Edwards. (R. p. 59 ¶ 9). As Appellant's vehicle neared the intersection of Longtown Road and Hunting Path Road at the entrance of the Fox Meadow subdivision, Edwards pulled out of the subdivision in front of Appellant and caused a severe collision. (R. p. 59 ¶ 9). Appellant alleges that Edwards failed to yield the right of way to Appellant because Edwards' view of the stop sign was obstructed by an overgrown tree and/or shrubbery. (R. p. 59 ¶ 11). However, Edwards testified that she has no memory of the accident and cannot say whether she did or did not disregard the stop sign. (R. p. 363, lines 4-6, 19-25; p. 364, lines 1-15; p. 473, lines 24-25; p. 365, lines 1-6).

Advantage Services, Inc. ("Advantage Services") had a contract with Halcyon Real Estate Services, LLC ("Halcyon"), the company that manages the LongCreek development property, to provide landscape services in the LongCreek Development. (R. pp. 247-49). The LongCreek Development includes the Fox Meadow subdivision. This contract required Advantage Services to provide various landscaping and irrigation services. (R. pp. 247-49). Appellant alleges that this contract created a duty for Advantage Services to trim

trees at the accident intersection and that Advantage's failure to trim the trees at this intersection resulted in an obstructed view of the stop sign for Amber Edwards. (R. p. 59 ¶ 11; p. 208). Appellant further alleges that an obstructed view caused Amber Edwards to ignore the stop sign and pull into Appellant's path, which resulted in the accident. (R. p. 59 ¶ 11). As a result, on August 18, 2016, Appellant filed a complaint in the Richland County Court of Common Pleas naming Advantage Services as a defendant, among others. (R. pp. 37-45).[1]

Discovery revealed the following undisputed facts: (1) Appellant does not know why Edwards pulled out in front of her; (2) Edwards has no memory of the day of the accident; (3) Appellant produced no other witnesses to the accident; and (4) Advantage Services had never trimmed the trees at this intersection as part of the scope of its landscaping work. (R. p. 377, lines 1-15; p. 480, lines 1-4; p. 363, lines 19- 25; p. 364, lines 1-15; p. 411, lines 4-17; p. 495, lines 16-21; p. 496, lines 14-22). Applying these facts to the causation and duty elements of Appellant's negligence cause of action, Advantage Services moved for summary judgment on May 30, 2017. (R. pp. 100-12). The other three Respondents also filed motions for summary judgment. (R. pp. 162-63; pp. 468-69). On August 31, 2017, Appellant filed an opposing memorandum as to all the Respondents' motions for summary judgment. (R. pp. 197-212).

The Honorable Judge G. Thomas Cooper, Jr. held a hearing on all the Respondents' motions for summary judgment on September 5, 2017. After considering the arguments of all parties, Judge Cooper granted Advantage Services' Motion for Summary Judgment in a written Order dated September 22, 2017. (R. pp. 4-13). In its Order, the Circuit Court

[1] Appellant filed an amended complaint on October 10, 2016.

held that Advantage Services was entitled to summary judgment on Bessinger's negligence claim against it because: (1) Advantage Services owed no independent duty to Bessinger either under the common law or under Advantage's contract with Halcyon; and (2) even if Advantage Services had such a duty, Bessinger failed to present any evidence beyond mere speculation that the alleged breach of such duty by Advantage Services was a proximate cause of the accident. (R. pp. 7-13).

Appellant filed her Notice of Appeal on October 19, 2017. By its Order filed November 9, 2017, this Court subsequently dismissed the appeal for Appellant's failure to provide proof of filing of the Notice of Appeal with the Circuit Court. The Appeal was reinstated by Order filed December 8, 2017.

STATEMENT OF FACTS

I. The November 1, 2013 Accident

On November 1, 2013, Appellant was involved in a two-vehicle accident. (R. p. 59 ¶ 9). Appellant was a bus driver for Richland School District Two and was driving a school bus at the time of the accident, traveling northbound on Longtown Road to pick up students from Blythewood Middle School. (R. p. 59 ¶ 9; p. 475, line 24- p. 476, line 4; p. 477, lines 15-24; p. 478, lines 6-15). As Appellant approached the intersection of Longtown Road and Hunting Path Road at the entrance of the Fox Meadow subdivision, Amber Edwards pulled out in front of Appellant. (R. p. 59 ¶ 9; p. 478, lines 12-20). The bus driven by Appellant collided with Edwards' vehicle. (R. p. 59 ¶ 9). Appellant alleges she suffered injury as a result of the accident. (R. p. 59 ¶ 10).

Appellant testified that she did not see Ms. Edwards before the impact between the two vehicles. (R. p. 478, lines 18-25; p. 479, lines 4-6). Concerning the cause of the

accident, Appellant testified in her deposition that she did not know what caused Edwards to pull out in front of her:

> Q. Do you know whether the limbs had anything to do with this accident occurring?
> A. No, sir, I don't.
> Q. Okay. All you know is is that this car came straight out in front of you, correct?
> A. Yes, sir.
> Q. You don't know whether she couldn't see the stop sign because of the limbs or whether she was texting or she just wasn't paying attention, correct?
> A. Correct.
> Q. So you can't say with any degree of certainty that the limbs had anything to do with this accident in any way whatsoever, correct?
> A. Not to my knowledge, I can't say that.
>
> ***
>
> Q. Correct? So the net result is you don't know whether the limbs did or did not have anything to do with this accident.
> A. Correct.

(R. p. 377, lines 1-15; p. 480, lines 1-4).

Following the collision, Ms. Edwards was in a coma for eight days. (R. p. 363, line 24 – p. 364, line 3). In her deposition, Ms. Edwards testified that she had no recollection of anything from the day of the collision, either before or after collision, including the Fox Meadow intersection, whether she saw a stop sign at the intersection, or whether she stopped at the stop sign. (R. p. 363, lines 4-6; p. 363, line 19 – p. 364, line 15; p. 473, lines 24-25; p. 365, lines 1-6). Appellant has presented only two witnesses to the accident – herself and Ms. Edwards – neither of whom are able to say with any certainty that: (1) Ms. Edwards failed to stop at the stop sign; or (2) trees and/or shrubbery obscuring the stop sign at the intersection caused Ms. Edwards to pull in front of Appellant.[2] Nevertheless,

[2] Jeannie Sharpe, another Richland School District Two bus driver, testified that she drove through the Fox Meadow subdivision and believed the trees at this intersection were an obstruction and created poor visibility (R. p. 485, lines 19-23; p. 381, lines 2-4), as did

Appellant alleges in her Complaint that "Ms. Edwards failed to yield the right of way as a direct and proximate result of the stop sign at the intersection being obstructed from Ms. Edwards' view by an overgrown tree and/or shrubbery." (R. p. 59 ¶ 11).

II. Advantage Services' Landscape Contract

Halcyon provides management services to LongCreek Plantation Property Owners Association, Inc. ("LongCreek POA") for the LongCreek Development, including the Fox Meadow subdivision. (R. p. 492, lines 5-25; p. 405, lines 1-5). Halcyon, on behalf of LongCreek POA, entered into a "Landscaping & Irrigation Maintenance Agreement" with Advantage Services. (R. pp. 247-49). Under the terms of the contract, Advantage Services is to provide, upon the premises of LongCreek Plantation's entranceways and common areas, the following services: (1) lawn mowing; (2) edging; (3) grass clipping removal; (4) chemical treatments; (5) pruning; (6) irrigation system maintenance; and (7) litter removal. (R. pp. 247-49). Under the terms of the contract, plants should be pruned "to enhance their appearance and preserve their natural appearance." (R. p. 248). Noticeably, there is no requirement in the contract that plants be pruned for any safety reasons. (*See* R. p. 248).

Moreover, the President of Halcyon, David Peterson, testified that Advantage Services was not responsible under the contract for trimming trees in the common areas or entrances unless specifically requested to do so by Halcyon. (R. p. 409, line 7 – p. 411, line 3). Mr. Peterson testified in his deposition that he did not recall, prior to November

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Melissa Crook, a resident of the Fox Meadow subdivision (R. p. 498, lines 16-18; p. 418, line 22 – p. 419, line 13). However, neither Ms. Sharpe or Ms. Crook witnessed the accident or know how the accident happened. (R. p. 386, lines 1-5; p. 487, line 16 – p. 488, line 2; p. 488, line 11 – p. 489, line 12). As the Circuit Court recognized in its order granting summary judgment, no person who was deposed in this case can testify as to how the accident happened or whether the trees had any impact on Ms. Edwards pulling in front of Appellant. (R. p. 5).

2013, ever requesting anyone at Advantage Services to prune or trim any trees at the entrance of Fox Meadow near the accident intersection or ever having any conversations with anyone at Advantage Services concerning any trees that needed to be trimmed or pruned at that entrance. (R. p. 411, lines 4-17). Specifically, Mr. Peterson testified that Advantage Services' scope of work under the contract did not include the trimming and maintenance of trees at the Fox Meadow entrance location. (R. p. 496, lines 14-22).

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard that governs the circuit court under Rule 56(c), SCRCP. *Nelson v. Piggly Wiggly Center, Inc.*, 390 S.C. 382, 387-88, 701 S.E.2d 776, 779 (Ct. App. 2010). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP.

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery 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 that party will bear the burden of proof at trial." *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). "In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

ARGUMENT

The Circuit Court properly granted Advantage Services summary judgment on Appellant's negligence claim against it because Appellant failed to raise a genuine issue of material fact on two essential elements of her claim – duty and proximate causation. In a negligence cause of action, the plaintiff must show that (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. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). Appellant has failed to show that Advantage Services owed her an independent duty under either the common law or Advantage Services' contract with Halcyon. In addition, Appellant has failed to show that the alleged breach – "allowing the tree and/or shrubbery on the Property to obstruct the view of the stop sign" – was the actual and proximate cause of Appellant's injury. Therefore, Advantage Services is entitled to summary judgment on Appellant's sole claim against it, and the ruling of the Circuit Court should be affirmed.

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT ADVANTAGE SERVICES BECAUSE APPELLANT FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT ON THE DUTY ELEMENT OF HER NEGLIGENCE CLAIM.

"An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The plaintiff bears the burden of establishing that the defendant owed a duty of care to her. *Steinke*, 336 S.C. at 387, 520 S.E.2d at 149 (citations omitted); *Doe v. Marion*, 361 S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d

245 (2007). The existence of a duty owed is a question of law for the courts. *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001). In a negligence action, if no duty exists, the defendant is entitled to 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); *Marion*, 373 S.C. at 400, 645 S.E.2d at 250.

A. Advantage Services did not owe any common law duty to Appellant.

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)); *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986). "Generally, there is no common law duty to act." *Dennis by Evans v. Timmons*, 313 S.C. 338, 342, 437 S.E.2d 138, 141 (Ct. App. 1993). "[A] person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct." *Id.*

"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). A duty may arise from the defendant's relationship to the injured party. *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 316 S.E.2d 424 (1984). However, "[i]t 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). It is the relationship between the parties, not the potential "foreseeability of

injury," that determines whether the law will recognize a duty in a given context. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 50 n.3, 644 S.E.2d 43, 47 n.3 (2007); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co.*, 355 S.C. 614, 586 S.E.2d 586, 588 (2003); *Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 535 (D.S.C. 2014). This ensures that the concept of duty in tort liability is not extended beyond reasonable limits. *South Carolina State Ports Auth.*, 289 S.C. at 376, 346 S.E.2d at 325-26 ("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....The concept of duty in tort liability must not be extended beyond reasonable limits." (internal citations omitted)).

As to Respondent Advantage Services, Plaintiff claims that Advantage Services had a duty to use reasonable care to maintain the area around the stop sign in a safe condition and breached that duty by "failing to maintain the tree and/or shrubbery on the Property which [allegedly] obstructed Ms. Edwards' view of the stop sign." (R. p. 62 ¶¶ 25-26). However, there is no independent duty that Advantage Services owed to the Appellant in this situation. As the case law below demonstrates, neither the relationship of the parties nor the circumstances of the situation imposed a common law duty upon Advantage Services' to act.

In a factually similar case, *Underwood v. Coponen*, the South Carolina Court of Appeals affirmed the grant of summary judgment to a private landowner who allegedly failed to trim a tree that contributed to the plaintiff's automobile accident. 367 S.C. 214, 216, 625 S.E.2d 236, 237 (Ct. App. 2006). In *Underwood*, a driver ran a stop sign at an intersection and collided with another vehicle in the intersection. *Id.* The plaintiff claimed

that the adjacent property owner was negligent in failing to trim a tree, and the tree's limbs obscured the other motorist's view of the stop sign, which caused the accident. *Id.* The trial court granted summary judgment to the landowner and the Court of Appeals affirmed. *Id.* The Court held that while a landowner has a duty to protect others from "defective or unsound trees" on his property, no such duty applied because the landowner's tree was not unsafe or defective but merely obscured the stop sign. *Id.* at 217–18, 625 S.E.2d at 238.[3] "The tree limb did not fall and injure [the plaintiff]." *Id.* at 218., 625 S.E.2d at 238.

Nevertheless, the plaintiff there argued that a duty existed because the landowner voluntarily undertook to act. 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 obscuring motorists' views of the stop sign. *Id.* at 218, 625 S.E.2d at 238. In response to this argument, the Court of Appeals quoted the Restatement (Second) of Torts, which provides:

> 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

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[3] In her Memorandum in Opposition to the Motions for Summary Judgment, Appellant cites *Staples v. Duell*, 329 S.C. 503, 509, 494 S.E.2d 639, 642 (Ct. App. 1997) and *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987) in an attempt to prevent the application of *Underwood's* holding to the instant action. (*See* Plaintiff's Memorandum in Opposition, pp. 8, 11). However, both the cases cited by Appellant dealt with unsound trees that fell and injured persons, rather than sound trees that merely obscured a stop sign as is alleged in this case and as was dealt with in *Underwood*. *See Staples v. Duell*, 329 S.C. 503, 508, 494 S.E.2d 639, 641–42 (Ct. App. 1997) (addressing issue of duty where "dangerous condition caused by the dead pine tree" on roadway and stating that "when a tree is in an urban area, and **may fall into a city street**, the landowner now has a duty of reasonable care") (emphasis added); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 283, 356 S.E.2d 123, 125 (Ct. App. 1987) (addressing situation of decayed tree limb falling on car and holding that landowner in urban area has duty to "exercise reasonable care to prevent an unreasonable risk of harm from **defective or unsound trees** on his premises") (emphasis added).

> 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.

Id. (quoting Restatement (Second) of Torts § 323(a) (1965)). The Court of Appeals rejected the plaintiff's argument, and held that the landowner's occasional trimming of the tree did not create a duty for which he could be liable even if his failure to do so "increased the risk that the sign would be obstructed" because neither the at-fault motorist nor the plaintiff relied on the landowner to trim the tree. *Id.* at 218–19, 625 S.E.2d at 239.

Like the landowner in *Underwood*, Advantage Services as the landscaper owed no duty to Appellant. Relying on the facts and reasoning of the *Underwood* case, there is even less of a basis here to find that Advantage Services had a duty to Appellant. First, the Restatement section quoted in *Underwood* requires an undertaking before a duty attaches. Restatement (Second) of Torts § 323(a) (1965); *see also Dennis*, 313 S.C. at 342, 437 S.E.2d at 141 ("Even where there is no duty to act, if an act is voluntarily undertaken, the actor assumes a duty to use due care."). Here, Advantage Services never undertook to trim the trees at the intersection. (R. p. 413, lines 2-10; p. 493, lines 2-10 (stating that another company, Sox and Freeman, was awarded the contract to provide tree trimming at this intersection and other locations)). Also, Advantage Services is not the landowner and had no authority to trim the trees unless specifically requested to do so by Halcyon. (R. p. 410, lines 1-7; p. 496, lines 14-22; p. 497, lines 4-17). Moreover, like the plaintiff and at-fault motorist in *Underwood*, neither the Appellant nor Edwards had a basis to rely on Advantage Services to trim the trees. Appellant testified that she never actually witnessed any landscapers trimming the trees. (R. p. 481, line 23 – p. 482, line 7; p. 483, line 25 – p.

484, line 2).[4] Edwards also had not witnessed any tree trimming at this intersection, having never been to the neighborhood before. (*See* R. p. 361, lines 14-21). Thus, Advantage Services never undertook any action to trim the trees upon which Appellant or Edwards relied, and therefore Advantage Services owed no common law duty to Appellant.

Advantage Services also did not create the alleged safety hazard at the Fox Meadow entrances, as they neither planted the trees, nor were responsible for the ongoing maintenance of them. (R. p. 413, lines 11-23; p. 415, lines 4-9).[5]

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[4] To the extent Appellant contradicts herself during her deposition testimony and says she had seen people cutting the trees at the Fox Meadows entrance, Appellant states: "I don't know who they were." (R. p. 376, lines 19-20). In his deposition, David Peterson testified that Advantage Services scope of work did not include trimming the trees at the Fox Meadow entrance, but another company, Sox and Freeman, was awarded a contract to provide tree trimming services at this and other locations. (R. p. 493, lines 21-25; p. 413, lines 2-10; p. 496, lines 14-22). However, Appellant admits in her deposition testimony, as cited above, that she doesn't know if she ever saw anyone trimming the trees at this intersection:

> Q: Based on your testimony, I understood – and correct me if I'm wrong. I think you said you asked the landscapers to trim the trees. Sometimes they would, sometimes they wouldn't. And so trees were trimmed a couple of times. Is that your recollection?
>
> A: Between – yes. Well, I would ask them to do it because I'd see them cutting the grass or whatever. **But did they ever actually cut them? I don't think so.**

(R. p. 481, line 23 – p. 482, line 7) (emphasis added).

[5] Appellant's allegation against Advantage Services is that Advantage Services was negligent by omission "for failing to maintain the tree and/or shrubbery" at the intersection. (*See* R. pp. 62-63 ¶¶ 26-28). To the extent Appellant's Complaint alleges that Advantage Services was negligent by the affirmative act of "planting" trees or shrubbery at the intersection, such allegation is unsupportable by the evidence presented. Appellant's own witness, Melissa Crook, testified that no new trees had been planted and the landscaping at the intersection had been the same from 2003 until the accident. (R. p. 501, line 14 – 502, line 2). Advantage Services did not begin providing landscaping services to the subdivision until 2007. (R. pp. 247-49). Thus, during the time prior to the accident when Advantage

Therefore, 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 Appellant. Because there was no duty owed by Advantage Services to Appellant, the Circuit Court properly granted Advantage Services summary judgment, and this Court should affirm that decision.

B. Advantage Services did not owe any contractual duty to Appellant.

Advantage Services entered into a landscaping contract with Halcyon and the LongCreek POA under which it owned certain limited duties to those entities. However, Appellant was not a party to that contract, nor was she a third-party beneficiary of that contract. Therefore, Advantage Services also did not owe any contractual duty to Appellant and 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,

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Services provided landscaping services to the subdivision, the landscaping remained the same at that intersection and no new trees were planted. (*See also* R. p. 413, lines 6-23).

In her Memorandum in Opposition to the Respondents' Motions for Summary Judgment, Appellant argued that duty to a third party may arise out of a contract despite lack of privity. (*See* R. p. 208-10). However, all of the cases cited by Appellant to support such argument involved situations where the defendants, acting under their contracts, had affirmatively created a hazardous condition. *See Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 320, 605 S.E.2d 12, 16 (2004) (paver added pavement and increased the shoulder drop off to twelve inches); *Edward's of Byrnes Downs v. Charleston Sheet Metal Co.*, 253 S.C. 537, 540–41, 172 S.E.2d 120, 121 (1970) (roof installer began roof installation but left unfinished/uncovered roof for several weeks allowing for water intrusion); *Terlinde v. Neely*, 275 S.C. 395, 396, 271 S.E.2d 768, 768 (1980) (home builder improperly built foundation of house). In the current action, Advantage Services did not affirmatively create a hazardous condition.

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*, 361 S.C. 312, 605 S.E.2d 12; *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)). Here, the contractual language does not evidence an intent to create a benefit for a third party, and Advantage Services did not directly create the condition at the intersection.

In a factually distinguishable case, *Johnson v. Sam English Grading, Inc.*, the plaintiff brought a negligence action against a grading company for an accident that occurred where the plaintiff attempted to avoid a piece of movable equipment and was involved in a vehicular accident. 412 S.C. at 448-49, 772 S.E.2d at 552. Despite the contract calling for flagmen and warning signs to be used on the road, the grading company did not provide either, in violation of its contractual duties. *Id.* at 443, 772 S.E.2d at 549. In addition, employee testimony indicated the purpose of the flagman and the warnings signs was for public safety. *Id.* Due to this language in the contract and company understanding, the Court found "it was foreseeable the public and the Company's equipment could have an accident without the warning signs and flagman in place." *Id.* at 449, 772 S.E.2d at 552.

Further, in *Dorrell*, the South Carolina Supreme Court found a contract established a duty of care for a paving company to similarly provide adequate warnings to the public. The Court analyzed several provisions of the contract that specifically required the company to "provide all safeguards, safety devises and protective equipment and take any other needed actions as it determines . . . to be reasonably necessary to protect the life and

health of employees on the job and the safety of the public," as well as to "conduct work in such a manner as to provide for and insure the safety and convenience of the traveling public." *Dorrell*, 361 S.C. at 319, 605 S.E.2d at 15. The Court found because the plain language of the contract specifically referenced the safety of the public, the paving company owed a duty to motorists who drove through the work area. *Id.*; *but see Allen v. Choice Hotels Int'l, Inc.*, 276 F. App'x 339, 343 (4th Cir. 2008) (finding no duty and distinguishing case from *Dorrell* because defendant did not create the risk).

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. (R. pp. 247-49). As such, Advantage Services owes no affirmative contractual duty to the general public at large, including the Appellant. Rather, the only duties owed by Advantage Services arise from its contract with Halcyon. Although the contract contains a provision related to pruning of trees, this does not create any duty to the general public or specifically to Appellant. *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); *see also McCullough*, 373 S.C. at 49, 644 S.E.2d at 47 (holding that no duty created through contract where plaintiff was not an identifiable third-party beneficiary of contract and had only an "attenuated beneficial relationship to a contract for services").

Unlike the companies in *Johnson* and *Dorrell* who had contracts that specifically referenced public safety measures, Advantage Services' contractual requirements do not

include maintaining the entrances or common areas for safety purposes, but rather aesthetic purposes. (R. pp. 247-49). The scope of duty owed by Advantage Services is defined by its contract with Halcyon and is limited, in part, to edging grass areas, cleaning grass clippings, and pruning to enhance and preserve the natural appearance. (R. p. 248).

Furthermore, even if Advantage Service's contract could be read to impose such a duty, Advantage only trimmed trees and shrubs at the specific direction of Halcyon. (R. p. 409, line 7 – p. 411, line 3; p. 497, lines 4-7). David Peterson testified he never directed Advantage Services to go into Fox Meadow to prune or trim the entrance's trees. (R. p. 411, lines 4-17; p. 495, lines 16-20; p. 497, lines 19-20). Plaintiff claims that Advantage Services was negligent in failing to trim and prune trees and shrubs at this intersection and that Advantage Services' failure to do so caused the accident. However, David Peterson testified that Advantage Services was not 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. (R. p. 247-49); (R. p. 496, lines 14-22; p. 497, lines 4-21). Advantage Services was not under any ongoing duty to cut, prune, or trim the trees whether for aesthetic or safety reasons. Thus, no duty to Appellant arose under Advantage Services' contract with Halcyon and the LongCreek POA.

Under the facts of this case, Appellant has failed to prove Advantage Services owed her a legal duty of care, and therefore failed to set forth any actionable negligence. *See Nelson*, 390 S.C. at 391, 701 S.E.2d at 781 (citing *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007)). Appellant 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, affirmative duty for Advantage Services to act for the benefit of Appellant. The contract between Advantage Services and Halcyon was not created for the benefit of the Appellant or other third parties and does not contain any provisions that specifically create a duty owed to Appellant as a member of the public. As a result, Appellant has failed to establish that Advantage Services owed her any duty, and summary judgment granted to Advantage Services should be affirmed.

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT ADVANTAGE SERVICES BECAUSE APPELLANT FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT ON THE CAUSATION ELEMENT OF HER NEGLIGENCE CLAIM.

"Negligence is not actionable unless it is a proximate cause of the injuries." *Hanselmann v McCardle*, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980) (citation omitted); *Bishop*, 331 S.C. at 88, 502 S.E.2d at 83. Proximate cause requires proof of both causation in fact and legal cause. *Oliver v. S.C. Dep't of Highways and Public Transportation*, 309 S.C. 313, 422 S.E.2d 128 (1992). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Bishop*, 331 S.C. at 88, 502 S.E.2d at 83. 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. *Id.* at 88-89, 502 S.E.2d at 83; *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 416, 717 S.E.2d 765, 771 (Ct. App. 2011). Moreover, 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, 791 (1939).

In the present case, Appellant suggests the accident occurred because Ms. Edwards ran a stop sign due to her inability to see the sign because overgrown trees blocked the

sign. (R. p. 59 ¶11). This theory of causation requires evidence of three things: (1) evidence Ms. Edwards did in fact run the stop sign; (2) evidence that Ms. Edwards ran the stop sign because she could not see it; and (3) evidence that Ms. Edwards did not see the stop sign because it was obscured by overgrown trees. Without evidence of all three, Appellants' theory of causation fails as a matter of law, and Appellant cannot show that the breach of any alleged duty by Advantage Services caused the accident. However, Appellant has not provided evidence of any part of her theory of causation.

Appellant has presented only two witnesses to the accident – herself and Ms. Edwards. Appellant testified in her own deposition that she did not know what caused Edwards to pull out in front of her. (R. p. 377, lines 1-15; p. 480, lines 1-4). Following the collision, Ms. Edwards was in a coma for eight days. (R. p. 363, line 24 – p. 364, line 3). Ms. Edwards testified in her deposition that she has no recollection of anything from the day of the collision, including whether she saw a stop sign at the intersection or whether she stopped at the stop sign. (R. p. 363, lines 4-6; p. 363, line 19 – p. 364, line 15; p. 473, lines 24-25; p. 365, lines 1-6; p. 371, lines 2-14). Therefore, Appellant has presented no witnesses to the accident who can testify as to what caused Ms. Edwards to pull in front of Appellant.[6]

[6] To the extent Appellant relies on a video from the interior of the bus to support her theory of causation, it does not show Ms. Edwards' vehicle, much less whether Ms. Edwards' vehicle ran a stop sign due to Ms. Edwards' inability to see the stop sign due to overgrown trees. (*See* Bus video (attached separately as a CD to Record on Appeal and filed therewith)). To the extent Appellant relies on the accident report to support her theory of causation, it merely states that Ms. Edwards "failed to yield the right of way and was struck." (*See* R. p. 223). To the extent Appellant relies on the deposition testimony of Jeannie Sharpe and Melissa Crook, their testimony merely establishes that they believed the trees at this intersection were an obstruction and created poor visibility. (*See* R. p. 485, lines 19-23; p. 381, 2-4; p. 498, lines 16-18; p. 418, line 22 – p.419, line 13). Neither Ms. Sharpe nor Ms. Crook witnessed the accident or know how the accident happened. (R. p.

Without testimony from a witness to the accident stating that Edwards ran the stop sign, Appellant's accusation regarding the cause of the accident is mere speculation. Moreover, without testimony from Edwards as to why she pulled in front of Appellant and whether her view of the stop sign was indeed obstructed, overgrown trees is merely a possibility as to the cause of the accident. *See McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) ("When the cause of a plaintiff's injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries."). Liability cannot rest on mere possibilities. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978); *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 420, 440 S.E.2d 887, 889 (Ct. App. 1994) ("Although causation may be established by circumstantial evidence, and is usually a question for the jury, it nonetheless must be based on probabilities not mere possibilities." (internal citations omitted)). Conjecture and speculation do not create any genuine issue of material fact. *McKnight*, 385 S.C. at 390, 684 S.E.2d at 571.

Additionally, to the extent that the stop-sign in this matter was obstructed, it would have done no more than furnish a condition that allegedly led to this accident and would not be a direct cause of the Appellant's injuries. The one inference that can be made from the available evidence is Ms. Edwards failed to keep a proper lookout for traffic, and that is the proximate cause of the accident.

386, lines 1-5; p. 487, line 16 – p. 488, line 2; p. 488, line 11 – p. 489, line 12; p. 499, line 21 – p. 500, line 6; p. 503, line 17 – p. 504, line 11). As the Circuit Court recognized in its order granting summary judgment, no person who was deposed in this case can testify as to how the accident happened or whether the trees had any impact on Ms. Edwards pulling in front of Appellant. (R. p. 5).

CONCLUSION

For the reasons stated above, Appellant cannot establish that Advantage Services owed a duty to Appellant either under the common law or Advantage Services' contract with Halcyon. As shown above, Appellant also cannot establish that the alleged breach by Advantage Services was a proximate cause of the accident. Therefore, Appellant has failed to raise a genuine issue of material fact on two essential elements of her claim, and Advantage Services is entitled to judgment as a matter of law. Respondent Advantage Services respectfully requests that this Court affirm the Circuit Court's grant of summary judgment in Advantage Services' favor.

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Columbia, South Carolina
July 3, 2018

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-002181

Tina Bessinger ..... Appellant,

v.

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

CERTIFICATE

I, Anthony W. Livoti, Esquire, attorney for Respondent Advantage Services, Inc., certify that Respondent Advantage Services, Inc.'s Final Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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