THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. THOMAS COOPER, JR., Circuit Court Judge

Case No. 2016-CP-40-05001

Appellate 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

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APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

Appellant Tina Bessinger submits this Reply Brief in support of her arguments seeking reversal of the trial court orders granting summary judgment to Respondents.

I. RICHLAND COUNTY DID NOT HAVE EXCLUSIVE CONTROL OVER THE SUBJECT AREA WHICH CAUSED THE ACCIDENT.

Appellant contends that the accident was a result of the obstructed stop sign, **as well as**, obstructed visibility of the intersection between Longtown Road and Hunting Path Road. Respondents contend that because Richland County owned the right-of-way where the stop sign was located they are absolved of any and all liability. Appellant does not dispute that the stop sign is located in the right-of-way. However, the trees and shrubbery that obscured the stop sign, **as well as** the visibility at the intersection, were not located within the right-of-way, but rather within the neighborhood entrance owned, controlled and/or maintained by the Respondents which was beyond the control of Richland County.[1] Prior to the collision, Respondents had maintained the entrance, including the right-of-way and the area immediately adjacent to the stop sign, which included several ornamental flower beds and trees in the immediate vicinity of the stop sign.[2] Following the collision, Respondents removed the trees and underbrush which caused the obstruction of the stop and visibility of the intersection.[3] There is no question, or at least there exists a question of material fact, that the Respondents owned and/or asserted control of the real property where these and underbrush trees were located.

Respondents cite to *Stanley v. S.C. State Highway Department,* 249 S.C. 230, 153 S.E.2d 687 (1967) overruled by *McCall by Andrews v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985) for

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[1] *See* R. p. 290 (see specifically areas referenced on plats as "Buffer – Fairways Development" which contain the entrance in question).
[2] *See* R. p. 406, line 1—p. 407 line 12.
[3] *See* R. p. 271; *see also* R. p. 413, Line 24—p. 414, Line 23.

their position that Richland County is responsible for clearing "objections overhanging the right of way." *Id.* at 234, 153 S.E.2d at 689. However, there is nothing in the holding of *Stanley* which affirmatively alleviates the common law duty of owners and controllers of real property to maintain it. *See Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)("[o]ne who controls the use of property has a duty of care not to harm others by its use"). Further, Respondents Longcreek POA, Halcyon and Advantage are contractually obligated to maintain the real property.[4]

II. EVIDENCE EXISTS THAT THE SUBJECT TREES AND UNDERBRUSH ARE LOCATED ON RESPONDENT FAIRWAYS' PROPERTY.

Respondent Fairways also contends that "[a]ppellant has failed to establish that any obstruction, even if one existed, was caused by plants or growth from Fairways Development's property." This is patently false. Plaintiff has presented a deed and plats which reference the "buffer" area where the trees and underbrush were located at the time of the accident.[5] Respondent Halcyon president, David Peterson testified that the subject property is owned by Respondent Fairways and that Respondent Halcyon maintained this area as part of its agreement with Respondent LongCreek POA.[6] Photographs from 2011 show the subject trees on the subject property, and a witness testified that these trees were obstructing the stop sign on the day in question.[7] These trees were removed at the direction of Halcyon shortly after the incident in question.[8] In fact, Respondent Fairways has provided no evidence (testimony, plats, photographs, etc.) establishing that the subject trees and underbrush **were not** located on its property.

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[4] *See* R. p. 282; R. p. 247.
[5] *See* R. p. 290 (see specifically areas referenced on plats as "Buffer – Fairways Development" which contain the entrance in question).
[6] *See* R. p. 412, Lines 1-25; R. p. 415, Line 3—p. 416, Lines 1-8.
[7] *See* R. p. 259; *see also* R. p. 385, Lines 23-25.
[8] *See* R. p. 271; *see also* R. p. 413, Line 24—p. 414, Line23.

III. PUBLIC SAFETY PROVISIONS ARE NOT NECESSARY IN A CONTRACT TO CREATE A DUTY OF DUE CARE TO THIRD PARTIES.

Respondent Advantage contends that because its contract with Respondent LongCreek POA does not specifically reference "public safety measures," it does not owe a duty of due care to Appellant. Respondent Advantage cites to *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004) and *Johnson v. Sam English Gardening, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015) which hold that:

> A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care. This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs.

Dorrell at 318, 605 S.E.2d at 14-15, *Johnson* at 449, 772 S.E.2d at 552. However, Respondent Advantage misreads the holdings of these two cases to require that the contract to contain references to public safety to create a duty to the public. These holdings require only that an injury be **foreseeable** to a third party from the defendant's conduct.

There is evidence that Respondent Advantage had actual or constructive notice of the danger posed to motorists by the overgrown tree branches and underbrush at the entrance. The written contract between Respondent Halcyon and Respondent Advantage expressly states that Respondent Advantage had a specific duty to maintain the trees located "upon the premises of the LongCreek Plantation's entranceways and common areas,"[9] which would include the entranceway to Fox Meadow. In terms of pruning, the contract states:

> Plants should be shaped to enhance their appearance and preserve their natural appearance. Major pruning needs to be accomplished during the dormant (winter) season. Light pruning is required during the growing season to maintain proper

[9] *See* R. p. 247.

growth...*Prune trees* in a manner appropriate to their nature and individual growth characteristics. [10]

Additionally, per this contract, Respondent Advantage was required to conduct weekly walk-throughs with a representative of Respondent Halcyon and to discuss with Respondent Halcyon any problems that were noticed during the inspection or any complaints that were received.[11] Further, the Appellant testified that she saw landscapers trimming branches at the entrance to Fox Meadow on several occasions. Due to the safety concerns posed by the low hanging branches, she asked these individuals if they could also trim back the branches by the stop sign.[12] It is foreseeable that if Respondent Advantage failed to perform these contractual obligations that it could lead to the creation of a dangerous condition for motorists at the intersection. This is all that is required under South Carolina law to create a duty of due care to a foreseeable third party.

IV. EVIDENCE EXISTS THAT THE STOP SIGN AND VIEW OF THE INTERSECTION WERE OBSTRUCTED ON NOVEMBER 1, 2013.

Respondent Fairways contends that Jeanie Sharpe's testimony and the 2011 Google photos are not relevant as to the condition of the intersection on the date of the incident because Jeanie Sharpe testified from the perspective of a school bus driver, not a driver of a passenger vehicle, and the 2011 Google photos were taken two (2) years prior to the incident. Such a narrowly focused factual argument is not appropriate to support summary judgment. There exists ample evidence to create a question of material fact regarding the condition of the intersection on the day in question.

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[10] *See Id.*
[11] *See Id.*
[12] *See* R. p. 376, Lines 13-24.

Ms. Sharpe testified that she drove the intersection the same direction traveled as Ms. Edwards on the day of the incident hours before it occurred, and that at that time the stop sign was obstructed[13] and her visibility down Longtown Road was obstructed.[14] In addition, Ms. Sharpe testified that, like Ms. Edwards, she had driven a passenger vehicle through the intersection prior to November 1, 2013, and that the obstructions she witnessed at that time were the same or similar as she witnessed on November 1, 2013 while driving her school bus.[15]

Further, the conditions presented in the 2011 Google photographs were corroborated by Ms. Sharpe as being similar to the conditions existing on November 1, 2013. Ms. Sharpe even testified as to which trees in the 2011 Google photographs were obscuring the stop sign[16] and visibility of Longtown Road[17] on November 1, 2013.

V. EVIDENCE EXISTS CREATING A QUESTION OF MATERIAL FACT REGARDING PROXIMATE CASE.

Respondent Advantage contends that Appellant has provided no evidence that: (1) Ms. Edwards did in fact run the stop sign: (2) that Ms. Edwards ran the stop sign because she could not see it; and (3) Ms. Edwards did not see the sign because it was obscured by overgrown trees.

As to Ms. Edwards running the stop sign, Appellant presented a video recording from the inside of the school bus which depicted the suddenness and severity of the collision and Appellant's radio call to dispatch stating "This is bus 65, someone just ran out in front of me - we are right here at Longtown East."[18] She also presented the investigating officer's report of the

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[13] *See* R. p. 385, Lines 23-25, p. 395, Lines 19-21.
[14] *See* R. p. 396, Line 6—p. 398, Line 13.
[15] *See* R. p. 399, Lines 7-17.
[16] *See* R. p. 389 Line 1—p. 390 Line 4.
[17] *See* R. p. 391, Line 3—392 Line 9.
[18] *See* Video of the collision (attached separately and filed with original Record on Appeal).

collision.[19] As to Ms. Edwards running the stop sign because she could not see it, Ms. Edwards testified that she would not have disregarded a stop sign if she had seen it.[20] As to Ms. Edwards not being able to see the sign because it was obscured, there exists direct evidence that the sign was obscured on the day in question.[21] Given this evidence, and the fact that Ms. Edwards would not have knowingly disregarded a stop sign had she seen, a jury could logically conclude through circumstantial evidence that Ms. Edwards did not see the stop sign because it was obstructed.

CONCLUSION

For these reasons and for those set forth in Appellant's Initial Brief, Appellant respectfully requests reversal of the Trial Court order and that this case be remanded for a trial by jury.

Respectfully submitted,

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[19] *See* R. p. 223.
[20] *See* R. p. 371, Lines 7-8.
[21] *See* Section IV.

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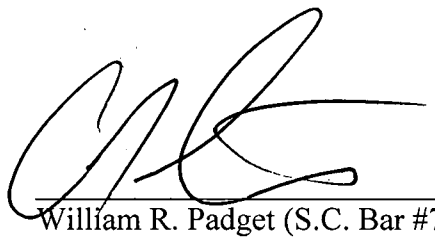
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCACR.



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