IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Case No.: 2017-001628

Ann M. Blandin .... Respondent-Appellant,

v.

City of North Charleston .... Appellant-Respondent,

RESPONDENT-APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT CLEARLY ABUSE ITS DISCRETION IN FAILING TO SET ASIDE THE ENTRY OF DEFAULT WHEN TWO EMPLOYEES OF THE CITY RECEIVED THE PLEADINGS?

II. DID THE LOWER COURT COMMIT REVERSIBLE ERROR WHEN IT REDUCED THE JUDGMENT TO THE LIMITATION OF LIABILITY CONTAINED IN THE TORT CLAIMS ACT WHEN IT IS AN AFFIRMATIVE DEFENSE THAT THE CITY DOES NOT HAVE?

STATEMENT OF THE CASE

This appeal arises from a judgment in favor of Respondent-Appellant, Ann M. Blandin ("Blandin") for damages resulting from a motor vehicle collision on January 3, 2015, involving a vehicle driven by Blandin and a City of North Charleston Police cruiser.

Blandin filed a Complaint against the City of North Charleston ("City") in the Charleston County Court of Common Pleas on June 15, 2015. (Summons & Complaint). The City was served with the Summons and Complaint on June 30, 2015. (Aff. of Service). City of North Charleston Mayor, R. Keith Summey, was served via Sandy Brown, an Administrative Assistant to the Clerk of Council, who was authorized to accept service on behalf of the City. (Aff. of Serv.). The City failed to file an Answer or appear as required by Rule 12, SCRCP, within the required time, and the Court entered default for the City on November 10, 2015, over four months after service. (Entry of Default). The Court referred the case pursuant to Rule 53(b), SCRCP, to Charleston County Master-in-Equity, Mikell R. Scarborough, on April 5, 2016. (Order of Reference 04/05/16). A damages hearing was set for July 7, 2016, before Judge Scarborough. (Def. Ltr. to Scarborough 06/01/16). On May 19, 2016, nearly eleven months after service of the Summons and Complaint following the Entry of Default and Order of Reference, the City filed a motion for relief from an entry of default pursuant to Rule 55(c) and to file a late answer pursuant to Rule 6(b), SCRCP. (Mot. to Set Aside Entry of Default). The Honorable J.C. Nicholson denied the City's 55(c) and 6(b) motions in an Order filed June 15, 2016. (Order 06/15/16). The City filed a Rule 59(e), SCRCP, motion to alter or amend on June 24, 2016. (Mot. to Reconsider). Judge Nicholson denied the City's 59(e) motion in an order filed July 12, 2016. (Order 07/12/16).

Judge Scarborough heard testimony at the damages hearing on May 2, 2017. (Tr. p. 1). Following the damages hearing, the Court entered a judgment against the City in the amount $5,250,000.00 but reduced judgment to $300,000.00 pursuant to the South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-120(a). (Judg. And Order). Following the entry of the judgment, the City did not file a Rule 60(b), SCRCP, motion and instead served a Notice of Appeal on July 28, 2017. (City Not. of App.). Blandin served her Notice of Appeal on August 1, 2017. (Blandin Not. of App.).

FACTS

This action arises out of a serious motor vehicle collision that occurred on January 3, 2015, in the City of North Charleston. (Compl. ¶ 3). On that day, Blandin was traveling north on McDowell Avenue in North Charleston. (Compl. ¶ 3). She stopped at a stop sign at the intersection of McDowell Avenue and East Montague Avenue. (Compl. ¶ 3). While stopped, she looked both ways and there was no traffic approaching from either direction which posed a danger to her crossing East Montague Avenue. (Compl. ¶ 3; Tr. p. 80, ll. 6 – 14). Blandin was almost across East Montague Avenue when she was struck by a North Charleston Police cruiser being operated by a City employee at an unlawfully high rate of speed without flashing lights or other audible warning devices as required by law. (Compl. ¶ 3). Blandin does not remember being struck by the City Police cruiser. (Tr. p. 80, ll. 6 – 14).

Prior to the collision, Blandin was a self-sufficient 70-year-old who lived by herself. Blandin grew up in Charleston and worked as a social worker for the housing authority for twenty-one years. (Tr. p. 79, ll. 9 – 20; p. 81, l. 23 – p. 82, l. 6). Blandin drove herself wherever she needed to go. (Tr. p. 85, l. 24 – p. 86, l. 9). Although retired, Blandin remained very active in her church and served as a secretary handling the majority of the church finances. (Tr. p. 82, ll. 13-18). Prior

to the collision, Blandin had a kidney disease that required peritoneal dialysis treatment, essentially a bag that filtered her blood every night. This was achieved through a catheter which was inserted in her abdominal wall. (Tr. pp.14; 84). Before the collision, Blandin was able to do the peritoneal dialysis treatment by herself at home. (Tr. p. 29). Blandin would hang bags of fluid connected to the catheter during the night and would empty them later when she awoke the following morning. (Tr. p. 29).

After the collision, EMS transported Blandin to MUSC hospital. She suffered a cerebral concussion which rendered her unconscious and caused the loss of some of her memory surrounding the accident. (Tr. p.14). Blandin also suffered fractures to several lower vertebrae in her back and sustained several broken ribs. (Tr. p. 14). A CT scan of Blandin's abdomen revealed internal bleeding around the catheter site. (Tr. p. 14).

Blandin was initially in the hospital from the day of the collision on January 3 to January 6, 2015. (Tr. p. 18; Ex. 3). Less than a week later, on January 11, Blandin was admitted to MUSC, suffering confusion and fatigue. (Tr. p. 19). After returning to the hospital, an infection called peritonitis was found. (Tr. p. 19). Peritonitis is an inflammation and infection of the lining of the abdominal cavity that resulted from the injury to the abdominal area revealed in the CT scan after the crash. (Tr. p. 19). Blandin was treated with antibiotics through the catheter into the abdomen, and was sent home to continue the antibiotic treatment. Blandin, still bedridden and unable to walk, returned to the hospital on January 27, 2015, for abdominal pain. (Tr. p. 21; Ex. 3). She was released on January 28, 2015. (Ex. 3).

Blandin again returned to the hospital because of confusion on February 19, 2015. (Tr. p. 23; Ex. 4). Blandin's confusion was caused by a drop in her blood pressure as a result from the peritonitis infection. (Tr. p. 23). Due to her bedridden state, Blandin developed a pressure sore over

the lower portion of her back, commonly referred to as a bedsore. (Tr. p. 24; Ex. 4). Blandin had also developed anemia related to the infection. (Tr. p. 24; Ex. 4). Blandin was released on March 5, 2015, after being in the hospital for two weeks. (Tr. p. 23; Ex. 4).

Blandin was then admitted into the hospital at Trident Medical Center on March 13, 2015. (Tr. p. 25; Ex. 11). This admission at Trident was due to her peritoneal dialysis treatment. (Tr. p. 27; Ex. 11). Because Blandin could no longer continue her usual peritoneal dialysis while the peritonitis infection was present, doctors switched her treatment to hemodialysis. (Tr. p. 30). Trident discharged Blandin over a month later on April 14, 2015, resulting in a medical bill totaling $313,889.00. (Tr. p. 30; Ex. 11).

Following the treatment at Trident, Blandin was again admitted to MUSC on April 18, 2015, for problems with the peritoneum and the relevant peritonitis infection. (Tr. p. 31; Ex. 5). While Blandin was in the hospital this time, she received further treatment for her bedsore which developed into osteomyelitis, an infection in the bones underlying the bedsore. (Tr. p. 32; Ex. 5). Blandin was transferred on May 3, 2015, to White Oak Nursing Facility. Blandin remained at White Oak Nursing Facility until July 1, 2015, undergoing long term antibiotic treatment for the osteomyelitis. (Tr. p. 46; Ex. 12).

After being released from White Oak Nursing facility, Blandin returned to MUSC on August 22, 2015, with a high white blood cell count and was discharged three days later on August 25, 2015. (Tr. p. 35; Ex. 8). Blandin was still unable to walk on her own at this point. (Tr. p. 36; Ex. 8). She returned to MUSC on September 14, 2015, for confusion and, upon arrival, doctors had to rely upon speaking with Blandin's daughter, Corona, because she could not articulate. (Tr. p. 37). Blandin had low blood pressure. The doctors performed surgery to replace her central line which allowed doctors to access her veins so she could get fluids. Ultimately, she was found to be in septic

shock. (Tr. p. 37). Blandin was released from MUSC on September 30, 2015, and the total medical bill for that visit was $115,997.04. (Tr. p. 38).

Throughout her many admissions and discharges to various hospitals over nine months, Blandin had to rely on nurses who would come two to three times a week to wash her, and exercise her legs. (Tr. p. 88). She also relied on Personal Care Transport as she was still wheelchair bound and was unable to drive herself. (Tr. p. 85). Due to the collision, Blandin went from living by herself and being entirely self-sufficient at age 70, to needing to live in a nursing home and requiring assistance to do simple tasks. (Tr. p. 89). Blandin incurred medical bills as a result of this wreck totaling $1,451,190.91. (Tr. p. 123; Ex. 31; Judg. And Order). Since the collision with the City Police Cruiser, Blandin has not been to her church in almost two years due to her inability to drive and walk. (Tr. p. 82).

Blandin filed a Complaint against the City on June 15, 2015. (Compl.). The Complaint alleges that the City's employee was negligent in several particulars: in traveling at an excessive and unlawful rate of speed; in failing to use flashing lights and audible warning signals; in failing to keep a proper lookout; in failing to keep the automobile under proper control; in violating S.C. CODE ANN. § 56-5-1520; and in violating S.C. CODE ANN. § 56-5-760. (Compl. ¶ 4 (a)-(f)). The Complaint alleges the collision caused Blandin to suffer severe and permanent injuries which caused her to incur expenses for medical treatment. (Compl. ¶ 5). As a result of the collision, Blandin will also suffer pain for the rest of her life. (Compl. ¶ 5).

The City was served with the Summons and Complaint on June 30, 2015. (Aff. of Service). City of North Charleston Mayor, R. Keith Summey, was served via Sandy Brown, an Administrative Assistant to the Clerk of Council, who was authorized to accept service on behalf of the City. (Aff. of Service). The Affidavit of Service was filed on July 7, 2015. (Aff. of Service).

Leslie Mitchum is the Risk Manager for the City of North Charleston. (Mitchum Aff.). In an affidavit, Mitchum states that Beth Woodall, a legal assistant for the City, emailed Mitchum the Summons and Complaint on June 30, 2015. (Mitchum Aff.). Mitchum then emailed the Summons and Complaint to Karen Helms, the City's Claims and Insurance Coordinator, and requested that Helms send the pleadings to the City's liability claims handler. (Mot. to Set Aside Entry of Def. p. 2). Although the email with the Summons and Complaint is currently in Helms' inbox, she provided no explanation for why she did not receive the email or did not notice receiving the email. (Mot. to Set Aside Entry of Def. p. 2). Thus, the City did not answer within the time required by the South Carolina Rules of Civil Procedure.

On November 10, 2015, four months after service of process was accomplished on the City, the Honorable Julie J. Armstrong, Charleston County Clerk of Court, entered default against the City pursuant to Rule 55(a), SCRCP, based on the accompanying affidavit that no answer or other responsive pleading was filed as required by Rule 12, SCRCP. (Entry of Def.).

On April 5, 2016, the Honorable Thomas L. Hughston, Jr., entered an Order referring the matter to the Judge Scarborough, pursuant to Rule 53(b), SCRCP, to take testimony and determine damages on Blandin's claims. (Order of Reference). On May 17, 2016, the City received notice of a damages hearing scheduled for July 7, 2016. (Mot. to Set Aside Default). The City moved to set aside the default and to file late answer pursuant to Rules 6(b) and 55(c), SCRCP. (Mot. to Set Aside Entry of Def.).

Following a hearing on the City's motion on June 14, 2016, the Honorable J. C. Nicholson, Jr., denied the City's motion to set aside default and for a late answer. (Order filed June 15, 2016). On June 24, 2016, the City moved pursuant to Rule 59(e), SCRCP, to reconsider the Court's June 15, 2016 Order denying the motion to set aside default and for a late answer. (Mot. to Reconsider).

In an Order filed July 12, 2016, the Court denied the motion to reconsider. The trial court held that "failure to forward an email does not amount to good cause shown for failure to timely file an Answer." (Order filed July 12, 2016). Additionally, the City is not a "state agency under SCRCP Rule 55(e)." (Order filed July 12, 2016).

Judge Scarborough heard testimony at the damages hearing on May 2, 2017. (Tr. p. 1). Following the damages hearing, the trial court entered a judgment against the City in the amount $5,250,000.00 but reduced judgment to $300,000.00 pursuant to the South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-120(a). (Judg. And Order). Following the entry of the judgment, the City did not file a Rule 60(b), SCRCP, motion and instead served a Notice of Appeal on July 28, 2017. (City Not. of App.). Although not included in the City's Notice of Appeal, this Court granted the City leave to file an Amended Notice of Appeal that included the June 15, 2016 and July 12, 2016 Orders related to the Motion for Relief from Entry of Default. (City Amd. Not. of App.). Blandin served her Notice of Appeal on August 1, 2017. (Blandin Not. of App.).

STANDARD OF REVIEW

I. SETTING ASIDE ENTRY OF DEFAULT

"The decision whether to set aside an entry of default lies solely within the discretion of the trial court." Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (citing Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)). "The trial court's decision ***will not be disturbed on appeal absent a clear showing of an abuse of discretion***." Id. at 606-07, 681 S.E.2d at 888 (citing Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988)) (emphasis added). "An abuse of discretion occurs when the judge issuing the order was controlled by some

error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Id. at 607, 681 S.E.2d at 888.

II. LIMITATION OF LIABILITY

"[T]he burden of establishing ***a limitation upon liability*** or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." Strange v. SC. Dept. of Hwys. & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994) (emphasis added).

ARGUMENT

I. THE CITY DOES NOT SATISFY ITS BURDEN TO SHOW THAT THE LOWER COURT CLEARLY ABUSED ITS DISCRETION IN DENYING ITS RULE 55(C), SCRCP, MOTION TO SET ASIDE THE ENTRY OF DEFAULT

A. The City did not file a 60(b) motion and as such its 55(c) appeal is not properly before the court.

Following the judgment, the City filed its Notice of Appeal instead of filing a 60(b) motion. "[A] direct appeal does not lie from a default judgment." Winesett v. Winesett, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985). Winesett involved an appeal from a family court order terminating alimony that was entered by default. Id. In dismissing the appeal the Supreme Court noted that "a default judgment may not be appealed to this Court." Id. at 334, 338 S.E.2d at 341. "The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion." Id. at 334, 338 S.E.2d at 341.

Sundown further supports the dismissal of the City's appeal. "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c)." Sundown, 383 S.C. at 608, 681 S.E.2d at 888.

Here, the City did not file a 60(b) motion and instead chose to file a Notice of Appeal. The Court should hold the City's appeal of that Order is unappealable. Under Winesett and Sundown, the proper procedure for challenging a default judgment is to file a Rule 60(b) motion, and then appeal from that order if the motion is not granted, which the City has not done. Rather than following this established procedure, the City improperly attempts to appeal the Judgment-Order. Allowing the City's appeal to proceed in this manner rather than from a Rule 60(b) denial allows the City to argue whether good cause existed to set aside the entry of default under Rule 55(c), which is a lower standard than the more rigorous 60(b) after a judgment has already been entered. See Sundown, 383 S.C. at 608, 681 S.E.2d at 888-89 ("The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default."). As a result, the City's appeal is unappealable.

B. The City has not satisfied its burden of showing a clear abuse of discretion warranting reversal

Even if the City does not have to file a 60(b) motion, the City fails to satisfy its burden that the trial court ***clearly abused*** its discretion in failing to set aside the entry of default. In the City's Rule 55(c) motion, it states that Leslie Mitchum, the City's Risk Manager, received the pleadings from Beth Woodall, a legal assistant for the City,. Mitchum then sent the pleadings via e-mail to the City's Claims and Insurance Coordinator with a request requested that the pleadings be sent to the City's liability claims handler. (Mot. to Set Aside Entry of Def. p. 2). The City's Claims and Insurance Coordinator provided has no explanation for why she did not receive this email or did not notice receiving the email, even though the email with the pleadings is currently in her inbox. (Mot. to Set Aside Entry of Def.).

The South Carolina Supreme Court has held that losing a summons and complaint is not a sufficient ground to set aside an entry of default. Roche v. Young Bros. Inc. of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995). In Roche, Plaintiff was injured at a Days Inn motel. Id. at 898. Plaintiff's attorney notified Defendant of the pending claim by certified letter, return receipt requested and addressed to the Days Inn. Id. at 899. J.N. Young, Vice President of Young Brothers Inc., signed the return receipt that accompanied the Summons and Complaint. Id. Neither Defendant nor its insurance carrier responded to the Complaint. Id. Plaintiff signed an affidavit of default and the Clerk of Court entered the default pursuant to Rule 55(a), SCRCP. Id. The Summons and Complaint, however, never reached either Edward Young, the registered agent, or Harold Coker, the general manager of the corporation. Id. at 900. J.N. Young testified that he places the mail on a secretary's desk and she distributes the mail. Id.

The trial court denied Defendants' motion to set aside default and held that the default was not the result of inadvertence or excusable neglect as losing the pleadings within a corporation is not a ground to set aside a default judgment. Id. at 899. On appeal, this Court reversed the default decision by the trial judge on the basis that service was not proper as the Plaintiff failed to prove J.N. Young was an agent for Ed Young. Id. The South Carolina Supreme Court granted certiorari and reversed the Court of Appeals decision, agreeing with the Circuit Court that service was proper and the default was not the result of inadvertence or excusable neglect. Id. at 900. The South Carolina Supreme Court reinstated the entry of default. Id. at 901. The City has not met its burden of showing a clear abuse of discretion and the trial court's order should be affirmed.

The Supreme Court's decision in White Oak Manor, Inc. v. Lexington, 407 S.C. 1, 753 S.E.2d 537 (2014), provides further support that losing the pleadings is not grounds to set aside default. In White Oak Manor, Plaintiff brought a declaratory judgment action seeking to

adjudicate contractual obligations between insured and insurer with regards to a medical malpractice action brought against the insured. Id. The trial court entered a default judgment against the Defendant after it failed to answer. Id. Defendant pled that it replied promptly after discovering the default, it presented evidence of a meritorious defense, and that Plaintiff would suffer no prejudice if the relief was granted. Id. at 542. The trial court denied the motion to set aside the entry of default. Id. at 537. After this Court reversed, the Supreme Court granted certiorari. Id. The Supreme Court held that the trial court's finding that Defendant failed to show good cause sufficient to set aside a default did not constitute an abuse of discretion. Id.

The Supreme Court further held Plaintiff substantially complied with the service-of-suit clause in the policy and noted that Defendant in fact received the pleadings but lost them. Id. at 542. Defendant argued that the trial court erred in relying on the Supreme Court's holding in Roche, that losing the pleadings is never a ground to set aside a default judgment. Id. at 542-43. The Supreme Court acknowledged the standard under a Rule 60(b) motion is more rigorous than "good cause" under Rule 55(c), however, it found no error in the trial court's holding that losing the complaint was not "good cause." Id. at 543. The Supreme Court held the trial court properly acted within its discretion in concluding that losing a complaint was not a satisfactory explanation for failing to timely respond. Id. Based on the Supreme Court's holding in Roche and White Oak Manor, the City's loss of the pleadings contention does not satisfy its burden to show that the trial court committed a clear abuse of discretion in denying its motion for relief from default.

Rule 55(c) requires the City to put forth a satisfactory explanation for the default and why vacating the default would serve the interests of justice. See Sundown, 383 S.C. at 607, 681 S.E.2d at 888 ("This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry

would serve the interests of justice."). While the City has put forth an explanation for the default even three employees received the pleadings, the City fails to show why vacating the default would serve the interests of justice other than taxpayers should not bear the costs for a default. The City seeks to utilize protections it is not afforded as a governmental subdivision/municipal corporation. Rule 55(e), upon which the City relies, specifically omits governmental subdivisions from the prohibition that default cannot be entered against "the State of South Carolina or an officer or agency thereof . . . ." Despite this purported limitation, default can still be entered against the State or an officer or agency if the claimant "establishes his claim to relief by evidence satisfactory to the Court." The City seeks to use the protections of Rule 55(e) despite the clear omission of governmental subdivisions/municipal corporations from the rule. A comparison of Rule 4(d)(4)-(6)[1] to Rule 55(e) indicates that South Carolina law does not disfavor defaults against government subdivisions despite the City's arguments to the contrary. The City has not shown that the trial court clearly abused its discretion in denying the City's Rule 55(c) Motion.

Only after the City has put forth a satisfactory explanation for the default and how it would serve the interests of justice does the Court even weigh the Rule 55(c) factors.[2] Id. at 607-608, 681 S.E.2d at 888 ("Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted."). Despite three employees from the City having possession of the pleadings, the City did not move for relief from the default for nearly eleven months. Additionally, from Blandin's standpoint, the

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[1] The City is a municipal corporation that is served pursuant to Rule 4(d)(6), SCRCP.

[2] The Orders before the Court relate to Rule 55(c) rather than the more rigorous 60(b) standard.

City does not have a meritorious defense as the evidence supports that the City Police Cruiser was operating at a high rate of speed without lights and sirens as required by law. Finally, Blandin will be prejudiced if the default is vacated. She is currently seventy-four years old and in poor health due the serious injuries she sustained in this collision. Vacating the judgment will require the parties to engage in full discovery and put Blandin through possibly a second trial when, based on the judgment entered by the trial court, her damages are substantial. For these reasons, the City fails to satisfy its burden that the lower court clearly abused its discretion in failing to grant relief from entry of default.

II. THE LIMITATION UPON LIABILITY CONTAINED IN THE TORT CLAIMS ACT DOES NOT APPLY AS IT IS AN AFFIRMATIVE DEFENSE THAT THE CITY DOES NOT HAVE AS IT CAN ONLY CROSS-EXAMINE BLANDIN'S WITNESSES

The lower court committed reversible error in applying the limitation upon liability contained in the Tort Claims Act when it reduced the judgment to $300,000.00. The Supreme Court and this Court have repeatedly held that the limitation upon liability contained in the Tort Claims Act is an affirmative defense that the governmental entity has the burden of establishing. See Strange v. SC. Dept. of Hwys. & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994) ("[T]he burden of establishing a ***limitation upon liability*** or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.") (emphasis added); see also, Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) ("The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense."); Niver v. S.C. Dep't of Hwys. & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990) ("The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense."). These

affirmative defenses rest on the governmental entity to prove the limitation upon liability or exception to the waiver of immunity by a preponderance of the evidence no different than a private individual or entity. See Cole v. S.C. Elec. & Gas, Inc., 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003) ("When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence.").

The disjunctive "or" in the above cases create two categories of affirmative defenses - (1) a limitation upon liability or (2) an exception to the waiver of immunity contained in S.C. CODE ANN. § 15-78-60. Both categories must be pled and proven as affirmative defenses based on South Carolina law. For example, in Pike v. S.C. Dept. of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000), the Supreme Court held that "when a governmental entity asserts the affirmative defense of discretionary immunity under the Tort Claims Act, the burden of proof is on the governmental entity and this burden is one of persuasion by a preponderance of the evidence." Id. at 232, 540 S.E.2d at 91.

The Supreme Court revisited long standing default law in Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013). On appeal, Hulsey, a party in default, contended the lower court imposed "unduly restrictive limitations on evidence presented at the damages hearing." Id. at 113, 744 S.E.2d at 577. Hulsey urged the Supreme Court to re-examine its decision in Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978), in light of the adoption of Rule 55. Id. at 113-14, 744 S.E.2d at 577.

Throughout the damages hearings, Hulsey sought to call witnesses and present evidence. Id. at 114, 744 S.E.2d at 577. Hulsey also sought to engage in discovery so that he could fully prepare for cross-examination, but this was denied by the trial court. Id. The Supreme Court noted that

Howard allowed damages to be determined in one of three ways: (1) "in an ex parte proceeding, denying the defendant any right to participate; (2) after a full adversary contest, including the right of the defendant to produce evidence in rebuttal and mitigation; or (3) with defense counsel's participation limited to cross-examination and objection to plaintiff's evidence." Id. at 114, 744 S.E.2d at 578. After re-examining Howard, the Supreme Court reaffirmed the third procedure that limits default participation to cross-examination and objection to plaintiff's evidence. Id. at 116, 744 S.E.2d at 578. "If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default." Id. at 116, 744 S.E.2d at 578-79.

Since the City is in default and does not have any affirmative defense other than the opportunity to cross-examine witnesses and object to evidence at damages hearings, it cannot assert an affirmative defense of the limitation upon liability contained in § 15-78-120(a).

In reducing the judgment to the cap contained in § 15-78-120(a), the lower court incorrectly relied on Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005). Parker related to an automobile collision that involved a van owned by the Spartanburg Sewer District. Id. at 279, 607 S.E.2d at 713. The Sewer District did not plead the Tort Claims Act in its answer. Id. On the first day of trial, the Sewer District filed an amended answer, essentially asserting the limitation upon liability. Id. The trial judge stated the amended answer could not be filed without permission of the Court. Id. at 280, 607 S.E.2d 713. The Sewer District then moved to amend its answer to conform to the evidence, which the trial court denied. Id. The jury returned a verdict for $450,000.00. Id. The Sewer District moved to reduce the amount to the limitation upon liability but the trial court denied that motion. Id. In reversing the trial court, this Court noted that there is nothing in the South Carolina Tort Claims Act "mandating that a governmental entity plead

the monetary statutory cap included within section 15-78-120." Id. at 285, 607 S.E.2d at 716. This Court also held that the trial court abused its discretion in denying the Sewer District's motion to amend its answer. Id. at 287, 607 S.E.2d at 717.

Parker is easily distinguished from this case as Parker did not involve a defendant in default that has no right or ability to assert an affirmative defense. Additionally, the Sewer District sought to amend its Answer and assert the limitation upon liability as an affirmative defense, which this Court held was an abuse of discretion. There is a distinction between the trial court refusing to permit a party to amend its pleading under the liberal Rule 15 standard and a party not having any affirmative defense.

Given the Supreme Court's directive in Limehouse, the elemental question is how does an affirmative defense apply that the City has a burden of pleading and proving when it is not allowed to present a defense? Based on the requirements the Supreme Court and this Court held in Strange, Steinke, and Niver, it is the City's obligation to plead and prove the limitation on liability as an affirmative defense by a preponderance of the evidence. By reducing the judgment to the limitation upon liability contained in § 15-78-120(a), the lower court afforded the City a protection not available to a private individual or entity and carved out different rules for a governmental entity in default. For example, a governmental entity cannot assert a discretionary immunity affirmative defense as found in S.C. CODE ANN. § 15-78-60 when it is in default and has no affirmative defense. If so, there would be no consequence for default against a governmental entity for either a limitation upon liability or an exception to the waiver of immunity – both of which the Supreme Court has held are affirmative defenses that must be pled by the Defendant. A governmental subdivision, such as the City, is treated the same as a private individual and is liable for its torts in the same manner and to the same extent as a private individual. See S.C. CODE ANN. § 15-78-40.

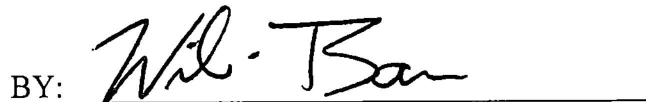
The Supreme Court in Limehouse said there must be a consequence against a defendant in default for failing to timely answer or otherwise plead. By allowing the City to assert an affirmative defense – a limitation of liability – that it has the burden of pleading and proving by a preponderance of the evidence, there is no consequence for the City's default. The lower court committed reversible error in reducing the judgment to the limitation upon liability contained in S.C. CODE ANN. § 15-78-120(a).

CONCLUSION

For these reasons, the lower court's decision finding that the City did not meet its burden to establish clear abuse of discretion on the Rule 55(c), SCRCP, motion should be affirmed. The lower court's Order reducing the judgment to the Cap contained in the Tort Claims Act should be reversed as it is an affirmative defense that the City does not have.

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.



April 20, 2018
Hampton, South Carolina

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Case No.: 2017-001628

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SC Court of Appeals

Ann M. Blandin .... Respondent-Appellant,

v.

City of North Charleston .... Appellant-Respondent,

CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Counsel for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within ***Respondent-Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal*** to:

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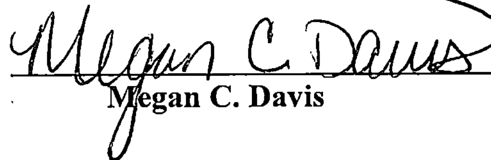
Deborah Harrison Sheffield, Esquire
Hood Law Firm, LLC
Post Office Box 1508
Charleston, SC 29402

Attorneys for Appellant-Respondent



Megan C. Davis

April 20th, 2018
Hampton, South Carolina

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SC Court of Appeals

Re: ***Ann Blandin v. City of North Charleston***
Appellate Case No.: 2017-001628

Dear Ms. Kitchings:

Please find enclosed the original and two copies of ***Respondent-Appellant's Initial Brief***, ***Designation of Matter to be Included in the Record on Appeal***, and ***Certificate of Service*** in the above-referenced matter. Please file the originals and return clocked-in copies of each in the envelope provided.

By copy of this letter, Respondent-Appellant's Initial Brief and Designation of Matter are being served on all counsel of record.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: Robert H. Hood, Jr., Esquire
Deborah Harrison Sheffield, Esquire
Lawrence C. Kobrovsky, Esquire

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