STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity
J.C. Nicholson, Jr., Circuit Judge

Case No. 2015-CP-10-3392
Appeal No. 2017-001628

Ann M. Blandin,

Respondent-Appellant,

v.

City of North Charleston,

Appellant-Respondent.

INITIAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT CITY OF NORTH CHARLESTON

HOOD LAW FIRM, LLC
Robert H. Hood, Jr. (SC #13491)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630

LAW OFFICES OF J. BRADY HAIR
J. Brady Hair (SC# 9040)
Derk Van Raalte IV (SC # 9286)
2500 City Hall Lane North
P.O. Box 61896
Charleston, South Carolina 29419
Phone: (843) 843-572-8700
Facsimile: (843) 843-745-1082

Attorneys for the Appellant-Respondent
City of North Charleston

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

ARGUMENT 2

THE TRIAL COURT CORRECTLY APPLIED THE TORT CLAIMS ACT $300,000 LIMITATION ON LIABILITY TO THE DEFAULT DAMAGES AWARD BECAUSE THE MONETARY STATUTORY CAP IN S.C. CODE §15-78-120 IS SELF-EXECUTING 2

A. STANDARD OF REVIEW 2

B. THE MONETARY CAP ON LIABILITY AS PROVIDED IN § 15-178-120(A) OF THE TORT CLAIMS ACT IS NOT AN AFFIRMATIVE DEFENSE 2

CONCLUSION 6

TABLE OF AUTHORITIES

CASES **PAGE**

Catawba Indian Tribe v. State, 372 S.C. 519, 642 S.E.2d 751 (2007) 2

Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008) 2

Niver v. S.C. Dep't of Hwys. & Pub. Transp.,
302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990) 4, 5

Parker v. Spartanburg Sanitary Sewer Dist.,
362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) ..... passim

Steinke v. S.C. Dep't of Labor, Licensing & Regulation,
336 S.C. 373, 520 S.E.2d 142 (1999) 4, 5

Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994) 4, 5

STATUTES

Tort Claims Act

S.C. Code Ann. § 15-78-20 3

S.C. Code Ann. § 15–78–60 5

S.C. Code Ann. §15-78-70 2

S.C. Code §15-78-120 ..... passim

STATEMENT OF THE ISSUE ON APPEAL

Appellant/Respondent City of North Charleston would restate the issue in this appeal as:

> Did the Trial Court correctly apply the Tort Claims Act $300,000 limitation on liability, S.C. Code §15-78-120(a), to the default damages award because the monetary statutory cap is self-executing?

STATEMENT OF THE CASE

This action arises out of an automobile accident that occurred on January 3, 2015, at the intersection of E. Montague Ave. and McDowell Ave. in the City of North Charleston. The automobile driven by Plaintiff Ann M. Blandin disregarded a stop sign and was struck by a patrol car owned by the City of North Charleston.

The Plaintiff commenced this action with the filing of a summons and complaint on June 15, 2015. [ROA ___; Complaint.] The City of North Charleston did not timely file an answer, and an Entry of Default was filed on November 10, 2015. [ROA ___; Entry of Default.] The City of North Charleston did file a Motion to Set Aside Entry of Default, pursuant to Rule 55(c), SCRCP, on May 19, 2016, along with an Answer in which the City asserts the limitation of liability established in S.C. Code Ann. §15-78-120. [ROA ___, ___; Motion, Answer ¶ 11.] The Trial Court denied the motion and a corresponding motion to reconsider which orders are the subject of the primary appeal in the matter and separately briefed. [ROA ___, ___; Orders.]

A damages hearing was held on May 2, 2017. The Trial Court found that Plaintiff incurred damages in the amount of $5,250,000[1], but applied the monetary cap set by § 15-78-120(a) and directed entry of judgment for Plaintiff in the amount of $300,000. [ROA ___; Order/Judgment on Damages, entered June 23, 2017.] The Plaintiff served a notice of appeal on August 1, 2017.

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[1] $1,000,000 for medical expenses and $4,250,000 for past and future pain and suffering and permanent injury.

ARGUMENT

The Trial Court correctly applied the Tort Claims Act $300,000 limitation on liability to the default damages award because the monetary statutory cap in S.C. Code §15-78-120 is self-executing.

A. Standard of Review

The question presented by Plaintiff's appeal is whether the monetary cap on liability, as set forth in § 15-178-120(a)(1), is an affirmative defense? The Trial Court answered the question in the negative, holding that the monetary cap automatically applies regardless of whether it has been asserted as an affirmative defense.

Interpretation of a statute is a question of law, which is subject to de novo review on appeal. Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). The City, as Appellant/Respondent, maintains that the Trial Court correctly answered the question under the express terms of the Tort Claims Act and the precedent of Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005), wherein this Court held that "the monetary statutory cap is self-executing."[2]

B. The monetary cap on liability as provided in § 15-178-120(a) of the Tort Claims Act is not an affirmative defense.

The Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. §15-78-70. As Plaintiff alleges in her complaint, the Defendant City of North Charleston is a political subdivision. [ROA ___; Complaint ¶ 1.] Accordingly, Plaintiff's exclusive remedy lies in the Tort Claims Act which includes monetary caps on liability as found in S.C. Code Ann. § 15-78-120(a), which provides:

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[2] As preserved in the primary appeal, the City maintains that the Trial Court abused its discretion in denying the motion to set aside the entry of default. To the extent that the City

> (a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:
>
> (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

After the Trial Court awarded Plaintiff damages in the amount of $5,250,000, the Trial Court had to address the issue of whether the judgment should be lowered to the cap of $300,000 as provided in § 15-78-120(a). The Plaintiff argued that the monetary cap could not be applied because it is an affirmative defense which was lost when the City did not timely answer. The Trial Court held that the statutory cap operates by law and does not have to be pled as an affirmative defense, relying upon Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 283–84, 607 S.E.2d 711, 715 (Ct. App. 2005). [ROA ___; 6/23/17 Order, p. 7.]

In Parker v. Spartanburg Sanitary Sewer Dist., the sewer district did not plead the Tort Claims Act statutory cap as an affirmative defense in its answer, and the trial court refused to reduce the amount of damages post-verdict to the statutory monetary cap. On appeal, the Court of Appeals held that the sewer district did not need to plead the statutory cap as an affirmative defense in its answer, and the trial judge erred in denying the request for a reduction in the jury's verdict to conform to the monetary statutory cap set forth in the Tort Claims Act. In so holding, the Court stated that "the monetary statutory cap is self-executing":

> There is absolutely no verbiage articulated within the South Carolina Tort Claims Act, sections 15–78–10 to—200 of the South Carolina Code, mandating that a governmental entity plead the monetary statutory cap included within section 15–78–120. The Tort Claims Act is imbued with public policy considerations limiting and qualifying liability of governmental entities. ***We conclude that the monetary statutory cap is self-executing*** and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000.

607 S.E.2d at 716 (emphasis added).

The public policy considerations referred to by the Court include the predominant concern for the financial hardship of exposing governmental entities to unlimited liability, as specifically articulated by the General Assembly in the Tort Claims Act:

> .... The General Assembly further finds that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities. Thus, while total immunity from liability on the part of the government is not desirable, see *McCall v. Batson*, neither should the government be subject to unlimited nor unqualified liability for its actions. The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions....

S.C. Code Ann. § 15-78-20(a). Based on these findings, the General Assembly declares the public policy to be "that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." Id. The General Assembly also mandates that the limitations on liability "must be liberally construed in favor of limiting the liability of the State." §15-78-20(f).

Section 15-78-120(a) clearly and emphatically declares that "no person shall recover" more than $300,000 for a single occurrence. Nothing in that statutory provision or any other provision of the Tort Claims Act supports any logical conclusion that the limitation on recovery must be pled as an affirmative defense. Nonetheless, Plaintiff argues the burden of establishing a limitation upon liability is upon the City as an affirmative defense based on language found in several appellate opinions: Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994); Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Niver v. S.C. Dep't of Hwys. & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990). While each of these opinions includes language stating a general proposition that the burden of establishing a limitation on liability is an affirmative defense, none of these cases hold that the monetary cap of § 15-178-120(a) is an affirmative defense.

In Niver, the Court of Appeals similarly stated: "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." 395 S.E.2d at 730. However, in the same paragraph the Court identified the "limitations," which it was addressing, as exceptions under §15-78-60(5) and (15). At no point did the Court discuss the monetary caps as an affirmative defense.

In Strange v. SC. Dept. of Hwys. & Pub. Transp., the Supreme Court stated: "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." 445 S.E.2d at 440. However, the question before the Court was whether the state agency bore the burden of establishing discretionary immunity as an affirmative defense, not whether the monetary cap was an affirmative defense.

In Steinke, the Supreme Court also stated: "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." 520 S.E.2d at 152 (citing Strange, supra.) As the Court of Appeals specifically noted in Parker v. Spartanburg Sanitary Sewer Dist., "the question of whether the statutory cap is an affirmative defense which is waived if not pled was not discussed [in Steinke]." 607 S.E.2d at 714. In fact, the monetary caps had not even been reinstated when that case was filed. The Court simply was reciting a general proposition as background to the questions presented regarding several exceptions to the waiver of sovereign immunity contained in § 15–78–60.

The provisions of the Tort Claims Act, the articulated public policy, and the Court's reasoning in Parker fully support the Trial Court's application of the statutory monetary cap as self-executing. However, the Trial Court's application of the statutory monetary cap is proper for

the additional reasoning found in Parker, where the Court of Appeals held that "the Sewer District did not need to plead the Tort Claims Act statutory cap as an affirmative defense in its answer because Parker already conceded the Tort Claims Act applied to her claim. Parker expressly set forth in her complaint that she brought her cause of action pursuant to the Tort Claims Act." 607 S.E.2d at 715. Likewise, this Plaintiff also explicitly invoked the application of the Tort Claims Act in her complaint. [ROA ___; Complaint ¶1.] Accordingly, the Trial Court properly applied the monetary cap.

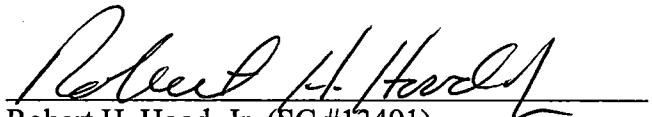
CONCLUSION

WHEREFORE, based on the arguments presented in the primary appeal, the Defendant City of North Charleston requests that the Court reverse the judgment, set aside the entry of default, and remand to allow the City to fully defend on the merits and responsively plead to Plaintiffs Complaint, including asserting any and all appropriate affirmative defenses under the Tort Claims Act.

In the alternative, based on the foregoing arguments in this cross appeal, the Defendant City of North Charleston requests that the Court affirm the judgment entered in the amount of $300,000 as limited by the provisions of §15-178-120(a)(1).

Respectfully submitted,

HOOD LAW FIRM, LLC



Robert H. Hood, Jr. (SC #13491)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630

LAW OFFICES OF J. BRADY HAIR
J. Brady Hair (SC# 9040)
Derk Van Raalte IV (SC # 9286)
2500 City Hall Lane North
P.O. Box 61896
Charleston, South Carolina 29419
Phone: (843) 843-572-8700
Facsimile: (843) 843-745-1082

Attorneys for the Appellant/Respondent
City of North Charleston

May 25, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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J.C. Nicholson, Jr., Circuit Judge

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Ann M. Blandin,

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v.

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Certificate of Service

The undersigned certifies that on this 25th day of May 2018, a copy of the Initial Respondent's Brief of Appellant-Respondent City of North Charleston was served on Counsel for all the parties by depositing a copy in the U.S. Mail, with sufficient first class postage, addressed to the following counsel at the addresses listed below:

Lawrence C. Kobrovsky, Esquire
Post Office Box 1726
Charleston, SC 29402-1726

John E. Parker, Esquire
William F. Barnes, III, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
P.O. Box 457
Hampton, SC 29924

William J. Horvath, Esquire
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413

Hood Law Firm, LLC

Robert H. Hood, Jr. (SC #13491)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435 / Facsimile: (843) 722-1630

Attorneys for the Appellant/Respondent
City of North Charleston

May 25, 2018
Charleston, South Carolina

HOOD
LAW FIRM
LLC

ROBERT H. HOOD, JR.
Managing Partner
(SC & NC)
DIRECT DIAL: (843) 577-1219
EMAIL: bobbyjr.hood@hoodlaw.com

May 25, 2018

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Ann M. Blandin v. City of North Charleston
C/A No. 2015-CP-10-3392, Charleston CP
Appellate Case No. 2017-001628
HLF File No. 236.136

Dear Ms. Kitchings:

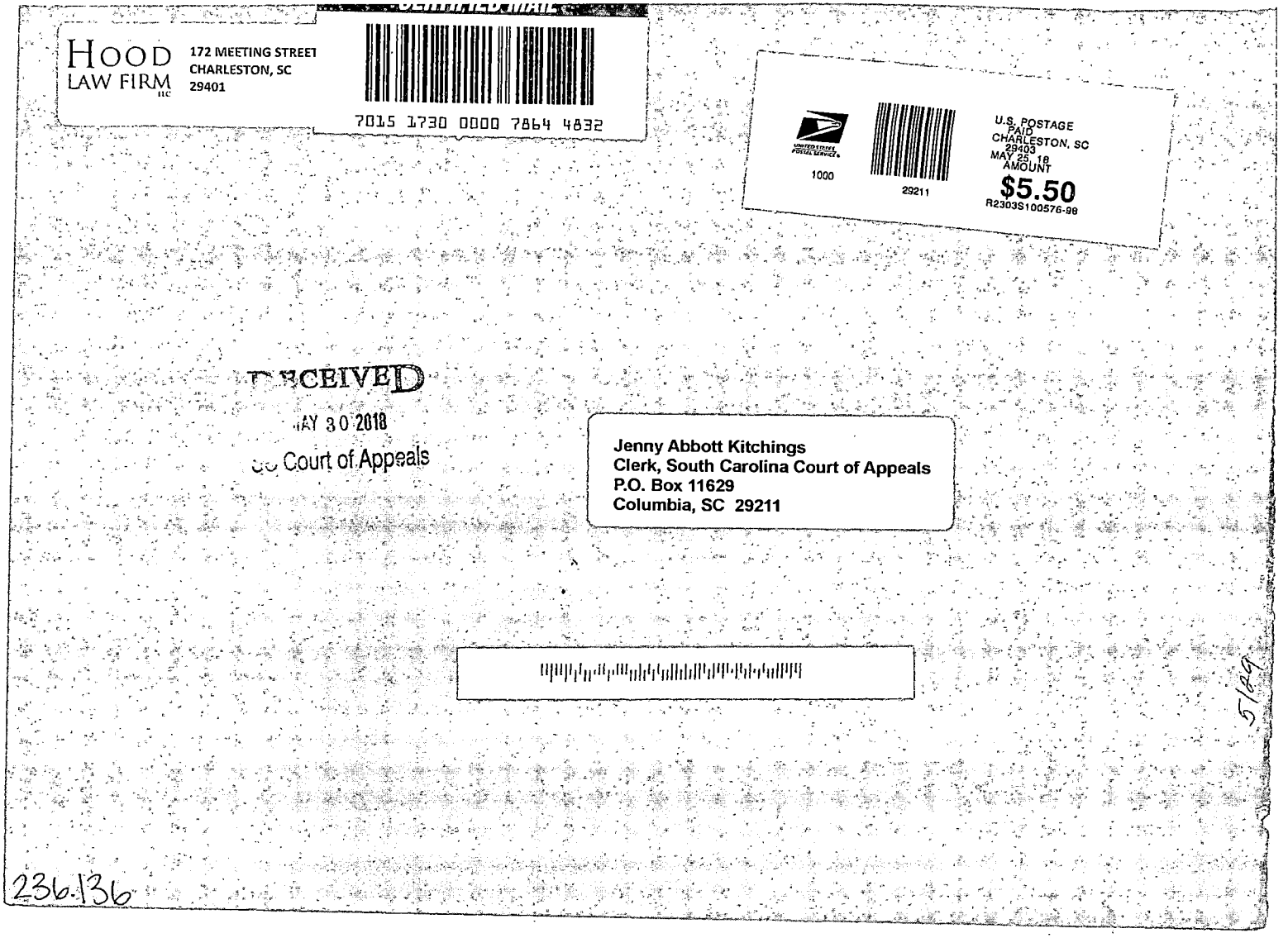
Enclosed please find the original and one (1) copy of the Initial Respondent's Brief of Appellant-Respondent City of North Charleston in the above-referenced matter, along with the Certificate of Service. I am serving all counsel of record with a copy. Please return a clocked-in copy in the envelope provided.

Kind regards,

Yours truly,

Robert H. Hood, Jr.

RHHjr/spc
Enclosure(s)
cc: J. Brady Hair, Esquire/Derk Van Raalte, Esquire
John E. Parker, Esquire/William F. Barnes, III, Esquire
Lawrence C. Kobrovsky, Esquire
William J. Horvath, Esquire


HOOD
LAW FIRM LLC
172 MEETING STREET
CHARLESTON, SC
29401
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Court of Appeals
Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
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