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

RECEIVED
AUG 16 2018
SC Court of Appeals

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

v.

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

APPELLANT'S BRIEF OF RESPONDENT-APPELLANT ANN BLANDIN

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STATEMENT OF ISSUES ON APPEAL

I. 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. (R. pp. 31-33). The City was served with the Summons and Complaint on June 30, 2015. (R. p. 24). 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. (R. p. 24). 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. (R. p. 26). The Court referred the case pursuant to Rule 53(b), SCRCP, to Charleston County Master-in-Equity, Mikell R. Scarborough, on April 5, 2016. (R. p. 2). A damages hearing was set for July 7, 2016, before Judge Scarborough. (R. p. 408). 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. (R. pp. 27-33). The Honorable J.C. Nicholson denied the City's 55(c) and 6(b) motions in an Order filed June 15, 2016. (R. p. 3). The City filed a Rule 59(e), SCRCP, motion to alter or amend on June 24, 2016. (R. pp. 49-50). Judge Nicholson denied the City's 59(e) motion in an order filed July 12, 2016. (R. p. 4).

Judge Scarborough heard testimony at the damages hearing on May 2, 2017. (R. p. 102). 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). (R. pp. 5-13). 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. (R. pp. 420-421). Blandin served her Notice of Appeal on August 1, 2017. (R. pp. 416-419).

FACTS

This action arises out of a serious motor vehicle collision that occurred on January 3, 2015, in the City of North Charleston. (R. p. 20, ¶ 3). On that day, Blandin was traveling north on McDowell Avenue in North Charleston. (R. p. 20, ¶ 3). She stopped at a stop sign at the intersection of McDowell Avenue and East Montague Avenue. (R. p. 20, ¶ 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. (R. p. 20, ¶ 3; p. 181, lines 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. (R. p. 20, ¶ 3). Blandin does not remember being struck by the City Police cruiser. (R. p. 181, lines 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. (R. p. 180, lines 9-20; p. 182, line 23 – p. 183, line 6). Blandin drove herself wherever she needed to go. (R. p. 186, line 24 – p. 187, line 9). Although retired, Blandin remained very active in her church and served as a secretary handling the majority of the church finances. (R. p. 183, lines 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. (R. p. 115; p. 185). Before the collision, Blandin

was able to do the peritoneal dialysis treatment by herself at home. (R. p. 130). Blandin would hang bags of fluid connected to the catheter during the night and would empty them later when she awoke the following morning. (R. p. 130).

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. (R. p. 115). Blandin also suffered fractures to several lower vertebrae in her back and sustained several broken ribs. (R. p. 115). A CT scan of Blandin's abdomen revealed internal bleeding around the catheter site. (R. p. 115).

Blandin was initially in the hospital from the day of the collision on January 3 to January 6, 2015. (R. p. 119; pp. 237-239). Less than a week later, on January 11, Blandin was admitted to MUSC, suffering confusion and fatigue. (R. p. 120). After returning to the hospital, an infection called peritonitis was found. (R. p. 120). 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. (R. p. 120). 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. (R. p. 122; pp. 237-239). She was released on January 28, 2015. (R. pp. 237-239).

Blandin again returned to the hospital because of confusion on February 19, 2015. (R. p. 124; pp. 240-250). Blandin's confusion was caused by a drop in her blood pressure as a result from the peritonitis infection. (R. p. 124). Due to her bedridden state, Blandin developed a pressure sore over the lower portion of her back, commonly referred to as a bedsore. (R. p. 125; pp. 240-250). Blandin had also developed anemia related to the infection. (R. p. 125; pp. 240-250). Blandin was released on March 5, 2015, after being in the hospital for two weeks. (R. p. 124; pp. 240-250).

Blandin was then admitted into the hospital at Trident Medical Center on March 13, 2015. (R. p. 126; pp. 285-352). This admission at Trident was due to her peritoneal dialysis treatment. (R. p. 128; pp. 285-352). Because Blandin could no longer continue her usual peritoneal dialysis while the peritonitis infection was present, doctors switched her treatment to hemodialysis. (R. p. 131). Trident discharged Blandin over a month later on April 14, 2015, resulting in a medical bill totaling $313,889.00. (R. p. 131; pp. 285-352).

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. (R. p. 132; pp. 251-264). 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. (R. p. 133; pp. 251-264). 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. (R. p. 147; pp. 353-403).

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. (R. p. 136; pp. 265-268). Blandin was still unable to walk on her own at this point. (R. p. 137; pp. 265-268). 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. (R. p. 138). 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. (R. p. 138). Blandin was released from MUSC on September 30, 2015, and the total medical bill for that visit was $115,997.04. (R. p. 139).

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. (R. p. 189). She also relied on Personal Care Transport as she was still wheelchair bound and was unable to drive herself. (R. p. 186). 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. (R. p. 190). Blandin incurred medical bills as a result of this wreck totaling $1,451,190.91. (R. p. 224; pp. 404-406; pp. 5-13). 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. (R. p. 183).

Blandin filed a Complaint against the City on June 15, 2015. (R. pp. 20-21). 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. (R. pp. 20-21, ¶ 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. (R. p. 21, ¶ 5). As a result of the collision, Blandin will also suffer pain for the rest of her life. (R. p. 21, ¶ 5).

The City was served with the Summons and Complaint on June 30, 2015. (R. p. 24). 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. (R. p. 24). The Affidavit of Service was filed on July 7, 2015. (R. p. 24). Leslie Mitchum is the Risk Manager for the City of North Charleston. (R. pp. 41-43). In an affidavit, Mitchum states that Beth Woodall, a legal assistant for the City, emailed Mitchum the Summons and Complaint on June 30,

2015. (R. pp. 41-43). 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. (R. p. 29). 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. (R. p. 29). 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. (R. p. 26).

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. (R. p. 2). On May 17, 2016, the City received notice of a damages hearing scheduled for July 7, 2016. (R. pp. 28-33). The City moved to set aside the default and to file late answer pursuant to Rules 6(b) and 55(c), SCRCP. (R. pp. 28-33).

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. (R. p. 3). 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. (R. pp. 48-50). 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." (R. p. 4). Additionally, the City is not a "state agency under SCRCP Rule 55(e)." (R. p. 4).

Judge Scarborough heard testimony at the damages hearing on May 2, 2017. (R. p. 102). 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). (R. pp. 5-13). 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. (R. pp. 420-422). 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. (R. pp. 423-425). Blandin served her Notice of Appeal on August 1, 2017. (R. pp. 416-419).

STANDARD OF REVIEW

I. 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 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 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.

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Respectfully submitted,

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August 14, 2018
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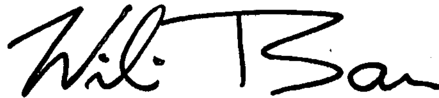
CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.



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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 ***Appellant's Brief of Respondent-Appellant Ann Blandin*** to:

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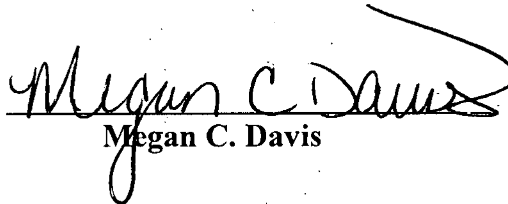

Megan C. Davis

August 15th, 2018
Hampton, South Carolina