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

The Honorable Mikell R. Scarborough, Master-In-Equity

Appellate Case No.: 2017-001628

Corona Campbell as Personal Representative of the
Estate of Ann M. Blandin, ... Respondent-Appellant,

-v-

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

RESPONDENT-APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Respondent-Appellant moves the Court for Rehearing and/or to Alter Opinion number 5478 published July 22, 2020, which affirms the lower court's reduction of the judgment to the limitation upon liability contained in S.C. Code Ann. § 15-78-120.

The Court holds that the Tort Claims Act's limitation upon liability is not an affirmative defense but is, instead, self-executing. The Court relies on its own decision in *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005). However, as early as 1990, this Court held the limitation upon liability in the Tort Claims Act was 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.") (emphasis added). Following this Court's decision in *Niver*, the Supreme Court issued opinions stating that the limitation of liability was not self-executing but was, instead, an affirmative defense. *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***."). *Strange* and *Steinke* are binding precedent from the Supreme Court that the limitation upon liability contained in S.C. Code Ann. § 15-78-120[1] is an affirmative defense. To the undersigned's knowledge, no precedent from the Supreme Court exists that states the limitation upon liability is self-executing. The Court's Opinion fails to even address *Niver*, *Strange*, or *Steinke*, which were cited in Blandin's brief, or to reconcile how the limitation upon liability can be self-executing but also an affirmative defense that the governmental entity has the burden of proving. *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.").

Even following the *Parker* decision, this Court and the Supreme Court have continued stating that the limitation upon liability is an affirmative defense. *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 549–50, 677 S.E.2d 574, 581 (2009) ("The burden of establishing

[1] Blandin submits that the limitation upon liability referenced in these cases addresses the limits imposed by § 15-78-120. A portion of § 15-78-120's title includes "Limitation on liability".

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.") (internal citation omitted); *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 315, 743 S.E.2d 109, 112–13 (Ct. App. 2013) ("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.") (internal citation omitted); *Curiel v. Hampton Cty. E.M.S.*, 401 S.C. 646, 650, 737 S.E.2d 854, 856 (Ct. App. 2012) (quoting *Proctor v. Dept. of Health and Envtl. Control*, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006)) ("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."). As it is well established that the limitation upon liability contained in the Tort Claims Act is an affirmative defense, this Petition for Rehearing should be granted and the lower court's decision to reduce the judgment should be reversed.

The Court holds that, since Blandin brought her case pursuant to the Tort Claims Act, she is bound by the self-executing cap. (Op. p. 8). A governmental entity is liable only for its torts under the Act. S.C. Code Ann. § 15-78-60(a) ("This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity."). This is not a situation like in *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43,45 (1995) where the Appellants argued the Act did not apply but had conceded it did apply. Here, Blandin acknowledges the Act governs this action but maintains Supreme Court precedent mandates that the limitation upon liability is an affirmative defense that the defendant must plead and prove. This Petition for Rehearing should be granted on the basis that simply alleging the Act applies does not result in the application of the limitation upon liability.

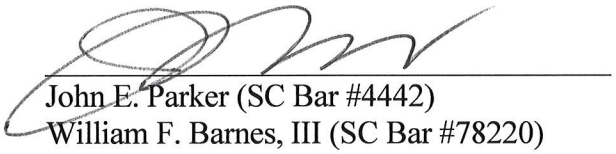
CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be granted and the lower court's decision to reduce the judgment should be reversed.

Lawrence C. Kobrovsky, Esquire
198 Rutledge Ave., Suite 7
Charleston, SC 29403
Phone: (843) 853-3703
kobrovskyl@bellsouth.net

-And-

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



John E. Parker (SC Bar #4442)
William F. Barnes, III (SC Bar #78220)
101 Mulberry Street East
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111
jparker@pmped.com
wbarnes@pmped.com
Attorneys for Respondent-Appellant

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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., Attorneys for the Respondent-Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within the ***Respondent-Appellant's Petition for Rehearing*** to:

Robert H. Hood, Jr., Esquire
Debroah H. Sheffield, Esquire
Hood Law Firm, LLC
Post Office Box 1508
Charleston, SC 29402

J. Brady Hair, Esquire
Derk Van Raalte, Esquire
Hair & Van Raalte
Post Office Box 61896
Charleston, SC 29419

Megan C. Davis
Megan C. Davis

August 21, 2020
Hampton, South Carolina

PMPED
PETERS | MURDAUGH | PARKER | ELTZROTH | DETRICK
ATTORNEYS AT LAW

August 21, 2020

John E. Parker
Direct Dial: (803) 914-2004
Email: jparker@pmped.com
Paralegal: mdavis@pmped.com

Via U.S. Mail & Email: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

Re: ***Corona Campbell v. City of North Charleston***
Appellate Case No.: 2017-001628

Dear Ms. Kitchings:

Please find enclosed for filing Respondent-Appellant's Petition for Rehearing in the above-referenced case. Also, enclosed is our firm's check in the amount of $50.00 for the filing fee.

If you have any questions, please let us know.

With kind regards, I am

Sincerely,

John E. Parker

JEP/mcd
Enclosures as stated

cc: Robert H. Hood, Jr., Esquire
Deborah Harrison Sheffield, Esquire
Lawrence C. Kobrovsky, Esquire
J. Brady Hair, Esquire, Esquire
Derk Van Raalte, IV, Esquire