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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge
Joseph M. Strickland, Master-in-Equity

Appellate Case No.: 2021-000539
Case No.: 2020-CP-40-3674

Ammon L. “Treigh” SullivanRespondent,

v.

Richland County School District One and
South Carolina Department of Education Defendants,

Of which, South Carolina Department of Education, isAppellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Appellant fail to preserve the issues on appeal?
- II. Did the trial court act within its discretion in denying to set aside the entry of default under Rule 55(c)?
- III. Did the trial court act within its discretion in entering default judgment against Appellant?

STATEMENT OF THE CASE

This is an appeal from the Orders of the Circuit Court denying Appellant's motion to set aside entry of default and thereafter entering a Default Judgment against Appellant. (Order of Judge L. Casey Manning, dated January 13, 2021, and Order of Judge Joseph M. Strickland, dated May 11, 2021).

The within action was filed by Respondent on August 3, 2020, in Richland County Court of Common Pleas, State of South Carolina alleging a single cause of action as against Appellant, South Carolina Department of Education, for Negligence. On October 26, 2020, Respondent filed a Motion for Entry of Default Against Defendant South Carolina Department of Education. An Order on Entry of Default was entered by the Court on October 29, 2020.

On November 2, 2020, Appellant filed a Notice of Motion and Motion to Set Aside Entry of Default and Motion to Dismiss. The motion was fully briefed by all parties, and a hearing was held on the motion on November 19, 2020, before the Honorable L. Casey Manning. After considering the written and oral arguments, Judge Manning issues his order dated January 13, 2021, denying Appellant's motion. Appellant filed a Notice of Motion and Motion to Alter or Amend Order or Motion to Reconsider on January 25, 2021. On January 26, 2021, Judge Manning issued an Order Denying [Appellant's] Motion to Alter or Amend Order Motion to Reconsider. The matter was then referred to the Master-in-Equity for a hearing on damages.

A hearing on damages was held before Judge Joseph M. Strickland, Master-in-Equity, on April 7, 2021. On May 11, 2021, Judge Strickland issued an Order on Damages and awarded Respondent judgment in the amount of \$37,721.13 against Appellant.

Appellant filed its Notice of Appeal on May 19, 2021.

FACTS¹

Respondent began his employment with Richland County School District One (hereinafter “Richland One”) in or around August 2010 when he was hired as a teacher, athletics director, and head football coach at Dreher High School. Prior to beginning his employment at Richland One, Respondent had spent several years at Lexington School District One (hereinafter “Lexington One”) where he had served as a teacher aid; Respondent had begun his employment at Lexington One during the 2006-2007 school year.

Upon beginning at Richland One, Respondent met with human resources personnel to confirm his prior years of service credit of a “Step 4” with corresponding pay. However, Richland One advised that he would be deemed a new teacher and classified as “Step 0.” Although Respondent questioned this determination, no further action was taken to rectify his service credit discrepancy. Respondent began the 2010-2011 school year as a “Step 0.”

In or around January 2015, Plaintiff received his Bachelor’s +18, which should have provided him an increase in pay based upon the education supplement. In or around May 2016, Plaintiff received his Master’s, which should have provided him an increase in pay based upon the education supplement. In or around December 2018, Plaintiff received his Master’s +30, which should have provided him an increase in pay based upon the education supplement. Upon information and belief, Respondent’s pay was not adjusted in accordance with the Richland One Salary Guide for Teachers in 2015, 2016, and 2018, respectively.

On August 29, 2019, Appellant updated Respondent’s years of service to reflect him having thirteen (13) years of experience as compared to the previous nine (9) years it had showed. Specifically, Appellant updated Respondent’s years of service to include his four (4)

¹ The facts recited herein are taken from Respondent’s Complaint for the purposes of this appeal.

years of experience at Lexington One. Upon information and belief, Appellant and Richland One ignored the applicable regulation(s) Regulation despite Respondent raising cause for concern as to his years of experience as of 2010 as well as Lexington One's affirmation that Respondent had four (4) years of experience within its District.

In September 2019, Richland One retroactively paid Respondent a sum of money to address a discrepancy in his pay from January 2019 through September 2019, and then adjusted his salary moving forward. Upon information and belief, this September 2019 adjustment was to address Respondent having received his Master's +30 in December 2018, which was to include an increase in pay pursuant Richland One's Salary Guide for Teachers.

STANDARD OF REVIEW

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial [court].” *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 490-91, 713 S.E.2d 335, 337 (Ct. App. 2011) (citing *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)). “The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Id.* “An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support.” *Id.*

ARGUMENT

I. THE APPELLANT FAILED TO PRESERVE ISSUES ON APPEAL.

“Where an issue is neither raised nor ruled upon by the trial court, and is not raised in a post-trial motion, the issue is not preserved for appellate review.” *U.S. Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 465 S.E.2d 759, 763 (Ct. App. 1995).

Much like in *Campbell*, Appellant only filed a motion to set aside pursuant Rule 55(c) and a subsequent Rule 59(e) motion – both prior to the default judgment being entered. *Campbell v. City of North Charleston*, 431 S.C. 454, 461, 848 S.E.2d 788, 792 (Ct. App 2020). Appellant did not file any motions following the Order on Damages, but instead immediately appealed. *Supra*. While the Court in *Campbell* opined that the issue of whether the court erred in refusing to set aside the default was properly before the Court, it should reason that Appellant is constrained to the arguments it made at that time. Specifically, there is a longstanding preservation requirement that the losing party “must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *Id.* Appellant has failed to do so.

In its motion to set aside default, Appellant set forth three (3) arguments: (1) that Rule 55(e), SCRCF, precluded a default; (2) Respondent failed to state a cause of action upon which relief may be granted; and (3) that it had shown “good cause.” In his Order, Judge Manning ruled that Appellant had failed to establish “good cause” and that the *Wham* factors were otherwise moot.²

Appellant then filed its motion to reconsider where it again identified similar arguments as before: (1) that Rule 55(e), SCRCF, precluded a default; (2) no claim upon which relief may be granted; and (3) “good cause.” The Rule 59(e) motion to reconsider was absent any mention

² Neither Rule 55(e), SCRCF, nor *Frow* were addressed in this Order.

to *Frow*.³ Appellant’s motion to reconsider also lacked specificity as to its arguments of the *Wham* factors.⁴ On January 26, 2021, Judge Manning entered an Order denying Appellant’s motion to reconsider without further substantive holding, and referred the matter to the Master-in-Equity.

When argument is made before trial judge but not addressed in final order, Rule 59(e) motion is necessary to preserve for appellate review. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003). Appellant’s argument as to *Frow*, if any, was not addressed in the Order entered January 13, 2021, and was not at all addressed in Appellant’s Rule 59(e) motion. Moreover, Appellant’s argument as to *Frow* (only set forth in the motion to set aside default) and *Wham* lacked specificity.⁵ *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (finding that for an issue to be preserved for appellate review, it must have been: “(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity”). Accordingly, Appellant’s argument(s) as to *Frow* and *Wham* are not preserved for appellate review; all that is preserved are those arguments specified in Appellant’s Rule 59(e) motion filed January 25, 2021.⁶

³ Appellant admits that the prior order provided no analysis on *Frow* yet it failed to file a Rule 59(e) motion as to such arguments. [Appellant Brief, p. 19].

⁴ Respondent maintains that analysis of the *Wham* factors is moot as there is no “good cause.” *Infra*.

⁵ The motion *only* provides: “Additionally, even if the entry of default is not set aside, the application of the *Frow* doctrine will not allow the entry of default judgment against SCDE until the case is fully adjudicated against the Defendant School District. *See, Frow v. De La Vega*, 82 U.S. (15 Wall) 552 (1872).” The motion to reconsider does not list the *Wham* factors.

⁶ Nor did the Order on Damages address *Frow*, *Wham*, or any of Appellant’s arguments for that matter, even assuming *arguendo* the Court reviewed that Order for substantive rulings by the court for preservation purposes. *See, Blake v. Cannon*, 312 S.C. 135, 439 S.E.2d 302 (Ct. App. 1993).

Appellant also seeks to set forth arguments, or implications, as to Judge Strickland's findings, which are also not preserved and should be ignored on appeal. Appellant first insinuates that Judge Strickland "expressed doubt" as to whether he was permitted to enter default judgment. [Appellant Brief, p. 4]. Respondent takes exception to that recollection and does not recall Judge Strickland indicating as such, but would rely on the transcript of that hearing. Notwithstanding, Judge Strickland's Order on Damages does not substantively address these alluded to arguments of Appellant and holds that such arguments had previously been ruled on by Judge Manning and referred to him for a hearing on damages. Again, Appellant failed to file a Rule 59(e) motion in response to this Order to preserve any such argument(s).

Finally, on March 31, 2021, Appellant filed a Memorandum in Opposition to Plaintiff's Motion for Default Judgment. This filing came more than two (2) months after the Order Denying Defendant South Carolina Department of Education's Motion to Alter or Amend Order or Motion to Reconsider, and was provided to Judge Strickland in anticipation of the damages hearing. Notably, the record is absent a "Motion for Default Judgment" and Appellant's memorandum did not accompany a motion filing. Accordingly, the document and arguments set forth therein were also not preserved, the memorandum is ripe to be stricken from the record, and should not be included in the record on appeal.

Based on the foregoing, Appellant failed to preserve its argument on appeal as to *Frow* and *Wham*, and at-best preserved only those arguments identified with specificity in its Rule 59(e) motion filed January 25, 2021.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT’S MOTION TO SET ASIDE ENTRY OF DEFAULT.

Appellant first argues that the circuit court erred in entering default based upon Rule 55(e), SCRCF. Appellant, both in its Initial Brief and before the lower court, insinuates that Rule 55(e), SCRCF, bars a default against a state agency. Such a conclusion is misguided.

In its entirety, Rule 55(e), SCRCF provides:

Judgment Against the State and Certain Other Parties. No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof, against minors, incompetents, or parties to a suit for divorce or annulment of marriage or against a party upon whom service of summons was made by publication, and who did not subsequently make an appearance in the action, or in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.

Rule 55(e), SCRCF (emphasis added). Similarly, Rule 55(d), FRCP provides:

Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Rule 55(d), FRCP. In both instances, a default judgment is not barred as against the State of South Carolina and/or the United States, but only requires that the claimant establish the claim to the satisfaction of the court.

Appellant points out, and Respondent does not disagree, that it is a state agency otherwise subject to Rule 55(e), SCRCF. However, that is not a ‘free pass’ on being subject to default. Rather, it just qualifies, if at all, the manner in which a default is obtained. Stated differently, the requirement of Rule 55(e) does not overzealously change the requirements of Rule 55(b), which permits the court may conduct a hearing or order as it deems necessary in order to enter judgment. Rule 55(b), SCRCF. Appellant’s suggestion that “Rule 55(e) provides that a default judgment cannot be entered against the State or its agencies without a showing that a plaintiff

will prevail as a matter of law on the merits” is simply a misstatement of law and is not codified anywhere in South Carolina law. [Appellant Brief, p. 12].

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Garvin v. State*, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005). “A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.” *Id.* The first question of statutory interpretation is whether the statute is clear on its face. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citations omitted). Moreover, “[w]here the statutes language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning.” *Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citations omitted). Such analysis also applies to court rules. Here, the rule could not be any clearer: default shall be entered if the claimant establishes relief by evidence satisfactory to the Court; that was done three (3) times over.

The cases cited by Appellant are no more persuasive to its argument. First, *Campbell*, does not address Rule 55(e), SCRCP aside from noting that “the City was not a state agency under the rule. *Campbell*, 431 S.C. at 459. Second, *Burr* involved criminal proceedings, and qualified that the “‘presumption-against-defaulting’ the government is especially strong when the movant is seeking criminal habeas relief...” *Burr v. United States*, 2010 WL 11674099, *3 (D.S.C. 2010). *Sun* was again a criminal conviction case. *Sun v. U.S.*, 342 F.Supp.2d 1120 (N.D. Ga. 2004).

a. Good Cause⁷

Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is “good cause.” *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (quoting Rule 55(c), SCRCP). The “good cause” 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.” *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888. Whether good cause is established is within the sound discretion of the court. *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408, 409 (Ct. App. 1994).

“This standard requires a party seeking relief from an entry of default...to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” *Id.* Only after the party has set forth a reasonable explanation should the Court consider the *Wham* factors. *Id.* (emphasis added).

Appellant avers that it has shown “good cause” through the affidavit of Cathy Hazelwood, Deputy Superintendent of Legal Affairs, an attorney licensed to practice law in South Carolina. In pertinent part, Appellant argues that “extraordinary circumstances encountered by SCDE personnel primary due to the ongoing COVID-19 pandemic” caused the failure to timely file an answer. [Appellant Brief, p. 16]. Curiously, the argument made by Appellant closely resembles that set forth in *Campbell*. *Campbell*, 431 S.C. at 454.

In its motion and supporting Affidavit, Appellant admitted: (1) the Summons and Complaint was properly served; (2) the Complaint was sent to the South Carolina Insurance Reserve Fund (“IRF”) as is normal procedure; (3) that on September 15, 2020, Appellant’s

⁷ Appellant’s arguments as to good cause are set forth in Section III of its argument.

Deputy Superintendent of Legal Affairs received notice that the IRF was denying coverage⁸; (4) that approval to employ associate counsel was approved and forwarded to the Attorney General on September 17, 2020; (5) that Appellant “regrettably did not take the necessary action to obtain an extension of time from Respondent’s counsel; (6) “as a result of oversight and miscommunication internally, the Summons and Complaint was not forwarded to outside counsel until after an email was received from [Respondent’s] Counsel on October 29, 2020, with a copy of the Order of Entry of Default”; and (7) Appellant did not file its Motion to Set Aside until November 2, 2020. [Affidavit of Cathy L. Hazelwood, pp. 1-2].

Campbell easily disposes of this as “good cause.” *Id.* In *Campbell*, the City of North Charleston move to set aside an entry of default arguing its “failure to forward an e-mail to its risk manager was an administrative ‘mistake from inadvertence,’ which satisfied the ‘mere’ good case standard.” *Id.* The City further argued that it had satisfied the *Wham* factors, and further that it was “good public policy for the State of South Carolina to be heard on the merits.” *Id.* The Court held that the circuit court did not abuse its discretion by finding the City’s failure to forward an internal e-mail was not good cause warranting the court to set aside the entry of default. *Id.* (citing *Roche* wherein the Supreme Court held that failure to forward a summons and complaint after receiving it did not constitute inadvertence or excusable neglect. *Roche v. Young Bros. of Florence*, 318 S.C. 207, 210-12 (1995)). Moreover, in *Campbell*, as in the instant matter, it was not disputed that the complaint was properly served and that it failed to forward the complaint, but only that the failure was “out of character.” *Id.*; see also Affidavit of Cathy L. Hazelwood, ¶ 8.

⁸ This response by the IRF was still within Defendant’s thirty (30) days to answer or otherwise plead.

Moreover, here, Appellant’s argument that COVID-19 caused the inadvertence is counterintuitive as Appellant was able to timely forward the Summons and Complaint to the IRF only days after receipt; it is nonsensical to think that the pandemic did not interfere with its submission to the IRF seeking coverage but later interfered with its ability to forward to outside counsel once it was returned. Appellant also received the denial from the IRF within the timeline to answer or otherwise plead, or certainly to have requested an extension of time.

Even more, this “inadvertence” was carried out by an attorney – Hazelwood. While not directly representing Appellant in the lower court matter, her knowledge as an attorney is influential. “In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default.” *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211, 223 (Ct. App. 2011); *see also, Williams*, 312 S.C. 373, 440 S.E.2d at 409.

Based on the foregoing, the trial court did not abuse its discretion by finding that Appellant failed to establish “good cause.”

b. Wham factors

“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.” *Id.* at 607-08, 681 S.E.2d at 888 (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d499, 501-02 (Ct. App. 1989)). The *Wham* factors are considered only if a satisfactory explanation for the default has been shown. Moreover, “the trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.” *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888.

Here, the trial court determined that Appellant had failed to establish “good cause” thus analysis of the *Wham* factors was not necessary, nor were specific findings required to be made. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 639 (Ct. App. 1995) (“The trial judge will not be reversed for failing to make specific findings of fact on the record for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.”). Appellant further failed to preserve any argument(s) on appeal as to the *Wham* factors even assuming the Court was inclined to find “good cause.” *Supra*.

III. THE CIRCUIT COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENT AGAINST APPELLANT.

As already set forth, a default judgment against the State only requires a claimant establishes his claim to relief by evidence satisfactory to the Court. Rule 55(e), SCRCF (emphasis added). Moreover, this determination is within the sound discretion of the trial court.

Appellant first argues that it has “numerous meritorious defenses.” [Appellant Brief, p. 9]. Such arguments, though, are only relevant if *Wham* factors are being considered. *Supra*. Appellant alternatively argues that Respondent is unable to state a cause of action for which relief may be granted. [Appellant Brief, pp. 12-15]. The trial court, in its discretion, rightfully rejected these arguments.

In both the Order entered January 13, 2021, as well as the Order entered January 26, 2021, Judge Manning held that Appellant had failed to establish “good cause,” held Appellant in default, and referred the case to the Master-in-Equity for a hearing on damages. Similarly, in the Order entered May 11, 2021, which was not subjected to a Rule 59(e) motion, Judge Strickland also held that he was not persuaded by Appellant’s arguments. Judge Strickland further made findings of fact in his Order on Damages as to the communications between Respondent and

Appellant, the failure of Appellant to advise Respondent, and the damages Respondent suffered as a result.

Negligence requires: (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty by the defendant, (3) that the breach was the proximate and cause in fact of the plaintiff's injury, and (4) damages caused by the breach. *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). “[A]n affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance.” *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656–57 (2006) (emphasis added); *Carson v. Adger*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1996). “The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant’s own policies and guidelines.” *Madison ex rel. Bryant*, 638 S.E.2d at 659.

In its ‘standard of review,’ Appellant cites *Masters* for the proposition that only well-pled facts are to be treated as true. *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (1984). This is correct; however, Appellant never argues that Respondent’s facts are not well-pled. Rather, Appellant avers only that the complaint fails to state a cause of action under the guise that there was no duty. Respondent’s Complaint is well-pled. Not only does Respondent set forth a detailed factual timeline of events dating back to 2006, but the Complaint further pled the basis of the duty, the breach, damages, and that such damages were a proximate cause of the breach. Although Appellant does not like the outcome of the pleadings as pled, the arguments it makes on appeal are not those contemplated under *Masters* but instead arguments waived as a result of default.

Appellant has failed to cite any law that supports its suggestion that S.C. Code Reg. § 43-57 “does not give rise to a private right of action based upon application of the public duty rule.” In *Jensen*, the Court explained the public duty rule and the six factor test used in determining whether the duty rule applies; Appellant fails to set forth any argument or provide any analysis that would suggest the public duty rule applies. *Jensen v. Anderson County Dep’t of Social Services*, 304 S.C. 195, 199-200, 403 S.E.2d 615, 617 (1991) (citations omitted). The Regulations establish a duty as articulated by *Madison* and further supported by *Jensen. Id.* The Regulations were enacted to mandate accountability on the part of Appellant to maintain records for those within its purview – i.e. certified teachers. As a State educator, Respondent falls squarely within the entitled persons the Regulation identifies and is not merely a member of the general public as suggested. Not only does S.C. Code Reg. § 43-57.2 provide that Respondent’s teaching aid experience was to count as credit, but S.C. Code Reg. § 43-57 specifically requires that Appellant was to “maintain records indicating the work experience for which persons are entitled.” S.C. Code Reg. § 43-57. Appellant cannot reasonably be arguing that it was not aware Respondent had worked at Lexington One for several years as a teaching aid and that it was not obligated to maintain such records. As such, Appellant’s argument that Respondent needed to submit the Verification Form is a red-herring for two reasons: (1) it possessed the information and should have been actively documenting his records as of the 2006-2007 school year; and (2) even assuming it needed a Verification Form to update such records it was aware of the same yet failed to notify Respondent of such at any point in time. Because of this failure (i.e. breach), Respondent was underpaid for years.

Finally, Appellant's proposition that S.C. Code Reg. § 53-57 and/or § 43-57.2 cannot establish a duty on its part would render the regulations as hollow legislation in that it would mandate something that they could not be held accountable for failing to do.

Appellant's arguments under S.C. Code Ann. § 15-78-60(12) also miss the point. The negligence claim did not involve licensing powers or functions. Respondent was licensed at all relevant times. *See e.g.*, S.C. Code Reg. § 43-51. Rather, the negligence arises from a failure to properly maintain records and otherwise inform Respondent of the purported need for documentation despite his inquiry(ies). Moreover, "[t]he 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." *City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 549-50, 677 S.E.2d 574, 581 (2009); *see, Proctor v. Dept. of Health and Env. Control*, 368 S.C. 279, 292, 328 S.E.2d 496, 503 (Ct. App. 2006); *see also, Steinke*, 336 S.C. at 393, 520 S.E.2d at 152; *see also, Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) (opining only that the statutory cap is self-executing). Because Appellant is in default and failed to answer or otherwise plead, it waived its affirmative defenses, if any. Notwithstanding, the Act remains inapplicable here. *See, Steinke*, 336 S.C. at 393-94, 520 S.E.2d at 152-53.

CONCLUSION

For the reasons stated, this Court should affirm the trial court's entry of default and default judgment against Appellant.

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Respectfully Submitted,

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