THE FINE PRINT OF PROTECTION: GOVERNMENTAL IMMUNITY IN SOUTH CAROLINA

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I. INTRODUCTION

The South Carolina Tort Claims Act ("SCTCA") generally waives the state's sovereign immunity from tort liability, allowing plaintiffs to sue the state, its agencies, and political subdivisions to recover damages in tort actions.[1] However, this waiver is not absolute; the Act carves out forty specific

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1. *See* S.C. CODE ANN. § 15-78-20 (2005).

exceptions to the waiver of sovereign immunity,[2] allowing the government to retain its immunity and avoid liability under certain circumstances. The listed exceptions apply to a wide variety of situations including, for example, losses resulting from the government's holding of an election,[3] imposition of a quarantine,[4] or creation of a nuisance.[5]

Of the forty listed exceptions where sovereign immunity still applies, two—the exceptions for the exercise of licensing powers and the supervision or control of students, patients, inmates, prisoners, and clients—contain a gross negligence standard, where immunity is waived in cases where the government has acted with gross negligence.[6] Thus, if a plaintiff attempts to sue a state agency to recover for losses flowing from a negligent decision regarding licensing, the agency can obtain an immediate dismissal based on its sovereign immunity. However, if the plaintiff alleges that the agency's decision was grossly negligent, the agency will have to defend itself on the merits and may, if the plaintiff prevails, be liable for damages.

None of the other thirty-eight listed exceptions for which the Act provides that sovereign immunity is retained contain a gross negligence standard.[7] Nevertheless, over the last few decades, South Carolina appellate courts have read the gross negligence standard into several of these listed exceptions when adjudicating tort claims against governmental entities.[8] This Note argues that these decisions have erroneously applied the Act and that they should be overruled judicially when the next occasion arises, or legislatively, as soon as possible.

Part II of this Note traces the origins of the SCTCA and describe its legislative history and provisions. Part III describes how recent cases from South Carolina's appellate courts have grafted the gross negligence standard from two exceptions onto other exceptions where the SCTCA indicates that no such standard should exist. Part IV uses principles of statutory interpretation, analysis of legislative intent, other states' precedent, implications on common law immunities, and public policy to demonstrate why these South Carolina cases have been decided erroneously and should be overruled.

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2. S.C. CODE ANN. § 15-78-60 (2005 & Supp. 2024).
3. § 15-78-60(24).
4. § 15-78-60(18).
5. § 15-78-60(7).
6. § 15-78-60(12); § 15-78-60(25).
7. *See* § 15-78-60.
8. *See, e.g.*, Jackson v. S.C. Dep't of Corr., 301 S.C. 125, 127–28, 390 S.E.2d 467, 469 (S.C. Ct. App. 1989); Duncan v. Hampton Cnty. Sch. Dist. 2, 335 S.C. 535, 554, 517 S.E.2d 449, 453 (S.C. Ct. App. 1999); Etheredge v. Richland Sch. Dist. 1, 330 S.C. 447, 463, 499 S.E.2d 238, 246 (S.C. Ct. App. 1988), *rev'd*, 341 S.C. 307, 534 S.E.2d 275 (2000).

II. BACKGROUND

Under the doctrine of sovereign immunity, a governmental entity cannot be sued without its consent.[9] The doctrine originated in England in 1788 in the case of *Russell v. Men of Devon*, where an injury caused by a county employee's negligence was held not to be actionable.[10] The justification for sovereign immunity stems from the idea that "the King can do no wrong."[11]

Subsequently, the doctrine crossed the seas and was adopted by each state of the newly formed United States following the Revolutionary War.[12] While there may be numerous reasons for the adoption of sovereign immunity by the states, the prevailing justification is that the new states were financially unable to respond to claims for damages resulting from negligence by governmental entities.[13] The doctrine was first applied in 1812 in Massachusetts[14] and was later applied in South Carolina in 1820.[15]

State courts applied sovereign immunity more or less without exception throughout the first half of the twentieth century.[16] However, over time, the doctrine of sovereign immunity faced criticism and challenges by various courts and legislatures.[17] In 1946, the United States Congress enacted the Federal Tort Claims Act ("FTCA"), waiving the federal government's sovereign immunity and allowing it to be held liable for its torts.[18] Various states quickly followed suit, enacting their own tort claims acts and accepting liability under certain circumstances.[19] State tort claims acts varied in that

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9. *Sovereign Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/sovereign_immunity [https://perma.cc/6S83-PGL6].

10. *See* Russell v. Men of Devon (1788) 100 Eng. Rep. 359, 362; 2 T.R. 667, 673 (KB) ("[I]t is better than an individual should sustain an injury than the public suffer an inconvenience.").

11. *See* James Kemp, *Torts - Sovereign Immunity - The Government's Liability for Tortious Conduct Arising from Proprietary Functions*, 20 DEPAUL L. REV. 302, 303 (1971).

12. *See* McCall v. Batson, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J., concurring).

13. *Id.*

14. *Id.*

15. *See* Young v. Comm'rs of Roads, 11 S.C.L (2 Nott & McC.) 537–38 (1820).

16. *See McCall*, 329 S.E.2d at 746 (observing that Florida was the first state to abrogate sovereign immunity in 1957).

17. "We recognize that the doctrine of sovereign immunity has been assailed on many fronts and has been abolished or modified in more than one-half of the states either by judicial decision or by statute." Belton v. Richland Mem'l Hosp., 263 S.C. 446, 450–51, 211 S.E.2d 241, 243 (1975).

18. *Federal Tort Claims Act*, UNITED STATES HOUSE OF REPRESENTATIVES, https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act [https://perma.cc/ZRE5-M7G9]; 28 U.S.C § 2674.

19. *See* Gary Wickert, *State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT, & LEHRER, S.C, https://www.mwl-law.com/wp-content/uploads/2

some absolutely waived sovereign immunity, while others adopted limited waivers for certain types of claims or general waivers with defined exceptions.[20]

South Carolina was one of the last states to abolish sovereign immunity with respect to tort suits, doing so only after South Carolina courts had repeatedly expressed reservations about the doctrine.[21] The South Carolina Supreme Court detailed its concerns about the soundness and fairness of the doctrine in 1975 in *Belton v. Richland Memorial Hospital*, but it declined to abolish the doctrine itself, instead deferring to the South Carolina General Assembly.[22] The South Carolina Supreme Court did, however, note that sovereign immunity was falling out of favor but declined to abolish the doctrine judicially, noting that "this field should be left to the legislature."[23] By 1985, the South Carolina legislature had enacted "a hodge podge of statutes dealing with isolated subjects and certain amounts of immunity," but had still failed to address sovereign immunity as a whole.[24]

Following the legislature's failure to address the issue consistently,[25] the South Carolina Supreme Court finally abolished sovereign immunity in tort cases in 1985 in *McCall v. Batson*.[26] To do so fairly and efficiently, the South Carolina Supreme Court held that the abrogation of sovereign immunity would not extend to the immunity of legislative, judicial, or executive bodies or to discretionary acts by individuals acting in their official capacity.[27] Additionally, to allow the legislature to prepare state and local governmental

018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf [https://perma.cc/2GAQ-7PSH] (Jan. 13, 2022) (scroll to "Page 2").

20. *See id.* (scroll to "Page 7" and then "Page 8") (noting that Alaska allows "any person or corporation having a tort claim to bring an action against the State[,]" while Arkansas provides for waiver of sovereign immunity when certain conditions are met).

21. *See, e.g.*, McKenzie v. City of Florence, 234 S.C. 428, 435, 108 S.E.2d 825, 828 (1959) (recognizing that many courts viewed sovereign immunity as "archaic and outmoded"). *But see, e.g.*, Shea v. State Dep't of Mental Retardation, 279 S.C. 604, 607, 310 S.E.2d 819, 820 (S.C. Ct. App. 1983) (noting that "abrogation of immunity of state and local governments has resulted in a mélange of constitutional, legislative, and judicial action throughout the nation").

22. *Belton*, 263 S.C. at 451–52, 211 S.E.2d at 243; *see also* Boyce v. Lancaster Cnty. Nat. Gas. Auth., 266 S.C. 398, 402, 223 S.E.2d 769, 770 (1976) (declining to abolish sovereign immunity while recognizing that it had been "assailed on many fronts and ha[d] been abolished or modified in more than one-half of the states").

23. *Boyce*, 266 S.C. at 402, 223 S.E.2d at 770.

24. Sam Hodges, *Drinking Age of 21 Backed*, THE STATE (S.C.), Jan. 23, 1985, at 3-C.

25. *See* McCall v. Batson, 285 S.C. 243, 245, 329 S.E.2d 741, 742 (1985) (noting that the South Carolina legislature had carved out some exceptions that created a "scattered patchwork of sovereign liability that lack[ed] continuity, logic, or fairness").

26. *Id.* at 246, 329 S.E.2d at 742–43.

27. *Id.* at 245, 329 S.E.2d at 742 (declining to allow tort liability for discretionary acts to avoid members of the public bringing suit for disagreements with the decisions of public officials).

entities for their new tort liability, the court delayed implementation of its April 1985 decision until July 1, 1986.[28]

McCall thus forced the South Carolina legislature to take action regarding sovereign immunity before the decision became effective.[29] A bill to enact the South Carolina Tort Claims Act was first introduced in the South Carolina House of Representatives on January 29, 1985.[30] It was later introduced in the South Carolina Senate on May 30, 1985.[31] After various objections, revisions, and the work of a conference committee, the South Carolina Tort Claims Act ("SCTCA") was ratified on May 28, 1986, with an effective date of July 1, 1986.[32]

The South Carolina Tort Claims Act provides a limited waiver of sovereign immunity, allowing governmental entities, including state, county, and municipal entities, in South Carolina to be held liable for their torts in certain situations.[33] The Act serves as the exclusive remedy for any tort committed by an employee of a governmental entity.[34] To avoid subjecting governmental entities to unlimited or unqualified liability for their actions, the Act carved out various exceptions and limitations to its waiver of sovereign immunity.[35] One such limitation is the cap on damages, which restricts the maximum recovery against a governmental entity to $300,000 for a single occurrence.[36]

Additionally, the Act initially delineated twenty-six exceptions to the waiver of sovereign immunity in which immunity would be preserved.[37] Since the Act was passed in 1986, it has been amended to add an additional fourteen exceptions, for a total of forty exceptions to the waiver of sovereign immunity, more than in most states' tort claims acts.[38] The listed exceptions vary widely,

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28. *Id.*

29. *See* Dean A. Eichelberger, *Torts*, 38 S.C. L. REV. 213, 233 (1986).

30. S.C. LEGISLATURE, https://www.scstatehouse.gov/billsearch.php?billnumbers=2266&session=106&summary= [https://perma.cc/P39V-GMYG].

31. *Id*.

32. *Id.*

33. *See* S.C. CODE ANN. § 15-78-40 (2005); *see also Understanding the SC Tort Claims Act*, MUN. ASS'N OF S.C., https://www.masc.sc/uptown/03-2019/understanding-sc-tort-claims-act [https://perma.cc/GAK8-FGDE].

34. S.C. CODE ANN. § 15-78-20(b) (2005).

35. *See* § 15-78-20(a); S.C. CODE ANN. § 15-78-60 (2005).

36. S.C. CODE ANN. § 15-78-120(a)(1) (2005).

37. South Carolina Tort Claims Act, No. 463, § 1, 1986 S.C. Acts 3007–10 (1986).

38. Wickert, *supra* note 19 (scroll to "Page 6" and through "Page 40") (providing general information on the exceptions included in various states' tort claims acts); S.C. CODE ANN. § 15-78-60.

ranging from general[39] to extremely specific.[40] Some, such as the retained immunity from claims arising from discretionary functions[41] and tax collection,[42] mirror those found in other states' tort claims acts[43] as well as the FTCA.[44] Importantly, for purposes of this Note, two of the forty listed exceptions in which immunity is retained include a gross negligence standard that waives the immunity if the state engaged in the identified act in a grossly negligent manner.[45] These two items concern the exercise of licensing powers or functions[46] and the exercise of a responsibility or duty relating to the care, custody, and control of a student, inmate, or client.[47] As discussed below, even though the gross negligence standard appears in only two of the forty circumstances in which the State retains its immunity, courts have applied this gross negligence limitation to some additional listed circumstances, a topic discussed in the following Part.

III. SOUTH CAROLINA APPELLATE COURTS' EXPANSIVE INTERPRETATION OF THE SCTCA'S WAIVER OF SOVEREIGN IMMUNITY IN CASES OF GROSS NEGLIGENCE

South Carolina's appellate courts have held that if a governmental entity invokes an exception to the waiver of sovereign immunity as a defense against a tort claim and that waiver-exception includes the gross negligence standard, then sovereign immunity does not apply, and the action may proceed.[48] South Carolina courts have applied this concept inconsistently, with some attaching

39. For example, a governmental entity is not liable for a loss resulting from, "legislative, judicial, or quasi-judicial action or inaction[.]" S.C. CODE ANN. § 15-78-60(1).

40. For instance, a governmental entity avoids liability for the "[n]otification of any public school student's parent, legal guardian, or other person . . . of the student's suspected use of alcohol, controlled substance, prescription, or nonprescription drugs by any school administrator, principal, counselor, or teacher if such notification is made in good faith." S.C. CODE ANN. § 15-78-60(28).

41. *See* § 15-78-60(5).

42. § 15-78-60(11).

43. *See* Wickert, *supra* note 19 (scroll to "Page 12") (listing Florida as having a discretionary function exception and Georgia as having an exception for collection of taxes).

44. *See* 28 U.S.C §§ 2860(a), (c).

45. *See* S.C. CODE ANN. §§ 15-78-60(12), -(25).

46. *See* § 15-78-60(12).

47. *See* § 15-78-60(25).

48. *See*, *e.g.*, Rakestraw v. S.C. Dep't of Highways & Pub. Transp., 323 S.C. 227, 232, 473 S.E.2d 890, 893 (S.C. Ct. App. 1996) (holding that the trial court erred in granting summary judgment because a genuine issue of fact remained as to whether the state entity had acted in a grossly negligent manner).

the gross negligence standard from one exception to another,[49] in other words, reading a gross negligence standard into an exception that does not contain it. Others allow the exceptions containing the gross negligence standard to trump other asserted exceptions,[50] essentially negating the immunity provided by an exception not limited by a gross negligence standard. A minority of trial courts have taken the more extreme step of interpreting prior case law to mean that the gross negligence standard should be permanently grafted onto another exception that does not contain it.[51] Most commonly, although not exclusively, the gross negligence standard has been applied to the waiver-exceptions for claims arising from the exercise of discretionary functions[52] and for claims arising from regulatory inspection powers or functions.[53]

The South Carolina Court of Appeals first attached the gross negligence standard to an exception which does not already include it in *Jackson v. South Carolina Department of Corrections*.[54] In that case, the South Carolina Department of Corrections ("SCDC") asserted immunity from a wrongful death action relating to the death of an inmate, relying upon two of the exceptions to the waiver of sovereign immunity.[55] Specifically, SCDC relied upon the exception for the exercise of discretionary functions (exception 5 in the SCTCA's forty-item list found in section 15-78-60(5)),[56] and the exception for custody or control of an inmate (exception 25 in the list found in section 15-78-60(25)),[57] arguing that SCDC was immune from suit arising from its decision to transfer another inmate, who later killed the decedent, to general population.[58] While exception 25 provides that immunity is waived where the entity is grossly negligent in the care, custody, or control of an inmate,[59] exception 5 provides that the government is immune from claims arising from the exercise of discretionary functions.[60]

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49. *See, e.g.*, Steinke v. S.C. Dep't of Lab. Licensing, & Regul., 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999); Duncan v. Hampton Cnty. Sch. Dist. 2, 335 S.C. 535, 543–44, 517 S.E.2d 449, 453 (S.C. Ct. App. 1999).

50. *See, e.g.*, Etheredge v. Richland Sch. Dist. 1, 330 S.C. 447, 463, 499 S.E.2d 238, 246 (S.C. Ct. App. 1988), *rev'd*, 341 S.C. 307, 534 S.E.2d 275 (2000).

51. *See, e.g.*, Beattie *ex rel.* Est. of Beattie v. S.C. Pub. Emp. Benefit Auth., No. 2019-CP-40-04559, 2020 S.C. C.P LEXIS 5010, at *8 (Ct. Com. Pl. Mar. 27, 2020).

52. *See, e.g.*, *Duncan*, 335 S.C. at 543–44, 517 S.E.2d at 453 (attaching the gross-negligence standard to the discretionary functions waiver-exception).

53. *See, e.g.*, Staubes v. City of Folly Beach, 339 S.C. 406, 417, 529 S.E.2d 543, 548 (2000) (reading a gross negligence standard into the exception for regulatory inspection powers).

54. *See* 301 S.C. 125, 128, 390 S.E.2d 467, 468–69 (S.C. Ct. App. 1989).

55. *See id.* at 127–28, 390 S.E.2d at 468–69.

56. *Id.*

57. *See id.* at 126–28, 390 S.E.2d at 468–69.

58. *Id*.

59. S.C. CODE ANN. § 15-78-60(25) (2005).

60. § 15-78-60(5).

SCDC contended that even if its act of transferring the assaulting inmate was grossly negligent so as to defeat its immunity under exception 25, it was still immune under exception 5 because the decision was discretionary.[61] The South Carolina Court of Appeals held, without providing its reasoning, that exception 5 must be read in light of exception 25, so SCDC could not assert immunity if it exercised its discretion in a grossly negligent manner.[62] This case marked the first case in which the court applied the gross negligence standard from one exception to another, yet it offered no explanation or reasoning for this significant expansion of liability for the government.[63]

Twice more, the South Carolina Court of Appeals applied this analysis to claims against governmental entities without providing a reasoning or justification for doing so.[64] In *Etheredge v. Richland School District One*, a school district asserted immunity under multiple SCTCA waiver-exceptions[65] after a student was shot by another student.[66] The court, citing *Jackson*, concluded that exception 25, which concerns the custody and control of students as well as inmates, subsumed the other exceptions and that the school district could not claim immunity under any of the other exceptions if it was grossly negligent for purposes of exception 25.[67]

Subsequently, in *Duncan v. Hampton County School District 2*, an action was brought against a school district after a disabled student was left unsupervised by teachers on school grounds and was sexually assaulted by another disabled student.[68] Like SCDC in *Jackson*, the school district asserted discretionary immunity under exception 5 of the SCTCA.[69] In *Duncan*, the South Carolina Court of Appeals held that exception 5 must be read in light of exception 25, concerning the care, custody, and control of students.[70] Thus, according to the court, the proper analysis was whether the school district exercised its discretion in a grossly negligent manner.[71] In both *Etheredge* and *Duncan*, the South Carolina Court of Appeals, with no stated justification,

61. *Jackson*, 301 S.C. at 127–28, 390 S.E.2d at 469.

62. *Id.*

63. *See id.*

64. *See* Etheredge v. Richland Sch. Dist. 1, 330 S.C. 447, 463, 499 S.E.2d 238, 246 (S.C. Ct. App. 1988), *rev'd*, 341 S.C. 307 534 S.E.2d 275 (2000); Duncan v. Hampton Cnty. Sch. Dist. 2, 335 S.C. 535, 543–44, 517 S.E.2d 449, 453 (S.C. Ct. App. 1999).

65. The school district asserted the exceptions for adoption or enforcement of policies, the exercise of discretion, entry upon the entity's property where permitted by law, the criminal acts of a third party, and the custody or control of a student. *See Etheredge*, 330 S.C. at 463–67, 517 S.E.2d at 246–47.

66. *Id.* at 448–49, 499 S.E.2d at 239.

67. *Id.* at 466–67, 517 S.E.2d at 248 (citing *Jackson*, 301 S.C. at 128, 390 S.E.2d at 469).

68. *See Duncan*, 335 S.C. at 539–41, 517 S.E.2d at 451–52.

69. *Id.* at 543, 517 S.E.2d at 453.

70. *Id.* at 554, 517 S.E.2d at 453 (citing *Jackson*, 301 S.C. at 128, 390 S.E.2d at 469).

71. *Duncan*, 335 S.C. at 544, 517 S.E.2d at 453.

subjected governmental entities to liability by prohibiting them from asserting immunity under exception 5, which contains no gross negligence standard, by holding that exception 5 must be read in light of exception 25.[72]

The South Carolina Supreme Court finally offered reasoning for attaching the gross negligence standard from one exception to another in *Steinke v. S.C. Department of Labor, Licensing, and Regulation*, after allowing defense counsel to argue against the precedent of *Jackson* and *Etheredge*.[73] In that case, the plaintiffs filed a wrongful death action against the South Carolina Department of Labor, Licensing, and Regulation ("SCLLR") after their children were killed when an elevator used to carry bungee jumpers fell over one hundred feet to the ground with the children inside.[74] SCLLR had previously issued a permit for the elevator before the installation of a new winch and cable system, which was responsible for the accident.[75] The plaintiffs alleged that SCLLR had been grossly negligent in failing to revoke or suspend the license that it had issued for the elevator and in failing to inspect the elevator after receiving reports that the winch and chain system was unsafe.[76]

In its defense, SCLLR asserted two pertinent exceptions[77] to the waiver of sovereign immunity: exception 12, which relates to licensing and contains the gross negligence standard, and exception 13, which relates to inspection powers and does not contain the gross negligence standard.[78] The South Carolina Supreme Court held that when both of these exceptions apply, "a governmental entity may be liable if it is grossly negligent in licensing or inspecting a particular device or activity."[79] The court acknowledged that the SCTCA must be liberally construed to limit liability of governmental entities.[80] However, the court reasoned that the legislature could not have intended to allow SCLLR to be held liable for gross negligence in licensing, while simultaneously allowing it escape all liability because its alleged

72. *See id.*; *Etheredge*, 330 S.C. at 463, 517 S.E.2d at 246.

73. *See* Steinke v. S.C. Dep't of Lab., Licensing, & Regul., 336 S.C. 373, 397 n.4, 520 S.E.2d 142, 154–55, 154 n.4 (1999).

74. *Id.* at 382, 520 S.E.2d at 146–47.

75. *Id.* at 383, 520 S.E.2d at 147.

76. *See id.*

77. SCLLR also asserted that it was immune under SCTCA section 15-78-60(5) (exercise of discretion), section 15-78-60(4) (adoption or enforcement, or failure to do so, of a law or regulation), and section 15-78-60(20) (acts or omissions of non-employees, including criminal acts); however, the trial court only instructed the jury on the discretionary function exception. *Id.* at 397-98, 520 S.E.2d at 154–55. The South Carolina Supreme Court briefly addressed these exceptions stating that the same reasoning applied, and it would be nonsensical to allow SCLLR to escape liability when it had acted grossly negligent under another exception. *Id.*

78. *See id.* at 393–97, 520 S.E.2d at 152–54.

79. *Id.* at 396, 520 S.E.2d at 154.

80. *Id.* at 393, 520 S.E.2d at 152.

omissions also concerned its related inspection powers.[81] The court explained that allowing SCLLR to assert immunity under the inspection exception would render the gross negligence standard in the licensing exception essentially meaningless, particularly given the close relationship between licensing and inspection powers.[82] As a result, the court concluded that SCLLR could be held liable if it was grossly negligent in either the licensing or the inspection of the elevator.[83] In sum, the South Carolina Supreme Court in *Steinke* expanded the gross negligence standard to both licensing and inspection, reasoning that allowing immunity for inspection would undermine the legislative intent behind the licensing exception.

Conversely, the South Carolina Supreme Court declined to attach the gross negligence standard from one exception to another in *Plyler v. Burns*.[84] There, the plaintiff filed various claims against the Horry County Probate Court relating to its handling of her conservatorship.[85] The probate court claimed immunity under exception 1 (legislative, judicial, or quasi-judicial action or inaction), exception 2 (administrative action or inaction of a legislative, judicial, or quasi-judicial nature), and exception 3 (execution or implementation of court orders).[86] None of these three provisions require that immunity is waived in cases of gross negligence, but the plaintiff argued that the court should read the gross negligence language from exceptions 12 and 25 into the exceptions asserted by the probate court, which the Court declined to do.[87] Instead, the court held that both sections containing the gross negligence standard did not apply to the facts of the case and "should not be utilized as a means to interject a gross negligence standard into . . . this case."[88]

In direct contravention of the South Carolina Supreme Court's holding in *Plyler*, some courts have ventured as far as permanently reading the gross negligence standard from exception 25 into exception 5, which concerns the exercise of discretionary functions, even when exception 25 does not apply to the facts of the case.[89] One example is *Beattie v. the South Carolina Public Employee Benefit Authority*, where the plaintiff sued the South Carolina Public Employee Benefit Authority ("PEBA") for denying coverage for the Plaintiff's son's substance abuse treatment a few months before her son died

81. *Id.* at 398, 520 S.E.2d at 155.
82. *See id.*
83. *See id.*
84. *See* Plyer v. Burns, 373 S.C. 637, 653, 647 S.E.2d 188, 197 (2007).
85. *See id.* at 644, 647 S.E.2d at 192.
86. *Id.* at 651–52, 647 S.E.2d at 196.
87. *Id.*
88. *Id.* at 653, 647 S.E.2d at 197.
89. *See* Beattie *ex rel.* Est. of Beattie v. S.C. Pub. Emp. Benefit Auth., No. 2019-CP-40-04559, 2020 S.C. C.P LEXIS 5010, at *7–8 (Ct. Com. Pl. Mar. 27, 2020).

of a drug overdose.[90] PEBA asserted immunity under exception 5 for its exercise of discretion in denying coverage.[91] Strangely, the Richland County Court of Common Pleas, citing *Jackson*, held that exception 5 must be read in light of exception 25, which concerns governmental caretaking, custody, and control of various persons such as inmates and students.[92] Reading the gross negligence language of exception 25 into exception 5, the *Beattie* court concluded that, under the SCTCA, "if a government entity's or employee's discretion is exercised in a grossly negligent manner, then the governmental entity involved is liable for its torts as if it were a private individual."[93] Not only did PEBA not assert exception 25 as a defense,[94] it is plainly inapplicable to the facts of the case, given that PEBA did not have any duty to supervise, protect, control, confine, or maintain custody of the plaintiff's son.[95]

IV. WHY SOUTH CAROLINA'S APPELLATE COURTS HAVE ERRED IN ATTACHING THE SCTCA'S EXPRESS GROSS NEGLIGENCE EXCEPTION ONTO PROVISIONS OF THE ACT THAT DO NOT CONTAIN THAT EXCEPTION

The misapplication of the gross negligence standard contradicts the principles of statutory construction, which prioritize legislative intent and the plain meaning of statutory language.[96] Courts are required to interpret the SCTCA in a way that limits governmental liability, as directed by the Act itself.[97] By improperly attaching the gross negligence standard onto exceptions that do not expressly contain it, the courts have undermined both the statutory framework and the legislative intent to provide broad immunity to governmental entities. Additionally, the imposition of the gross negligence standard onto various exceptions would weaken long-standing common law immunities that were expressly preserved in *McCall* and the SCTCA. Finally, this line of reasoning directly contravenes public policy concerns regarding the expansion of governmental liability, as detailed in the Act.

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90. *Id.* at *1–2.

91. *Id.* at *7.

92. *Id.* at *7–8.

93. *Id.* at *8.

94. PEBA asserted only the exceptions under SCTCA sections 15-78-60(5) and 15-78-60(20). *Id.* at *6–7. The Court held that section 15-78-60(20) could not be properly asserted as the argument required consideration of facts outside of the pleadings. *Id.*

95. *See id.* at *1–2, *7–8 (where PEBA's only involvement with plaintiff's son was its denial of coverage for a substance abuse treatment program).

96. *See, e.g.*, S.C. Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018) (describing principles that guide statutory interpretation by South Carolina courts).

97. S.C. CODE ANN. § 15-78-20(f) (2005).

A. Statutory Construction

It is contrary to the basic tenets of statutory construction for a gross negligence standard to be appended onto each listed exception to the waiver of sovereign immunity when the legislature clearly did not intend such a construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."[98] South Carolina courts have routinely held that the court should not impose another meaning if the statute's language is clear and unambiguous.[99] Additionally, courts should not resort to "subtle or forced construction to limit or expand the statute's operation," but should instead rely on the words' plain or ordinary meaning.[100] Finally, to determine legislative intent surrounding a statute, statutes that are part of the same Act must be read together.[101]

As noted by the South Carolina Supreme Court, "[t]he Legislature clearly intended to limit government liability through the Tort Claims Act."[102] The SCTCA explicitly mandates that its provisions establishing limitations on and exemptions to liability be liberally construed in favor of limiting the liability of the state.[103] This statutory language unquestionably instructs courts to interpret any ambiguities in favor of restricting governmental liability rather than expanding it. The South Carolina Supreme Court has specifically held that courts *must* construe section 15-78-60, and therefore, the exceptions to the waiver of sovereign immunity contained therein, liberally in the interest of the governmental entities.[104]

The South Carolina Supreme Court applied this liberal construction to the requirement that a plaintiff file a verified claim to extend the statute of limitations under the SCTCA in *Vines v. Self Memorial Hospital.*[105] In that case, the plaintiff argued that she substantially complied with the provisions of the SCTCA because the defendant hospital was on notice of her claims, and she had completed claims forms.[106] The Supreme Court summarily rejected this argument, concluding that if the "legislature intended that unverified notice suffice to invoke the extended statute of limitation . . . it could have so provided."[107] In support of its refusal to allow for unverified notice, the

98. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

99. *E.g.*, *id.*

100. Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992).

101. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C 520, 522, 377 S.E.2d 569, 570 (1989).

102. Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009).

103. S.C. CODE ANN. § 15-78-20(f) (2005).

104. Baker v. Sanders, 301 S.C. 170, 173, 391 S.E.2d 229, 231 (1990).

105. Vines v. Self Mem'l Hosp., 314 S.C. 305, 307–08, 443 S.E.2d 909, 910–11 (1994).

106. *Id.* at 307, 443 S.E.2d at 910.

107. *Id.* at 308, 443 S.E.2d at 911.

Supreme Court referenced the requirement for a liberal construction of the Act in favor of limiting liability of governmental entities.[108] Similarly, if the Legislature had intended gross negligence to apply broadly across all exceptions to the SCTCA, it could and likely would have explicitly stated so. The fact that only two of the forty waiver-exception provisions contain the gross-negligence carve-out suggests the legislature's deliberate choice to retain immunity completely in the thirty-eight other listed contexts.

Associate Justice James E. Moore addressed this issue in his dissent to the *Steinke* opinion.[109] Justice Moore disagreed with the majority's conclusion that the gross negligence standard must be read into any other applicable exceptions to liability.[110] Referencing the requirement that the SCTCA be construed in favor of limiting the liability of governmental entities, Justice Moore observed that "it is inconsistent to conclude that a lesser degree of immunity must prevail when more than one exception to liability may apply."[111] Justice Moore suggested that, to properly read the exceptions to liability in light of the rule of construction mandated by the SCTCA, one must conclude that the greater immunity would be incorporated.[112] Following that logic, an exception without the gross negligence standard would trump an exception containing the standard.

As the *Steinke* court pointed out, "we also must presume in construing a statute that the Legislature did not intend to perform a futile thing."[113] Allowing exceptions containing a gross negligence standard to control effectively nullifies other exceptions in overlapping situations, which could not have been the legislature's intent. For example, the court's current interpretation nullifies exception 5 in instances where exception 25 applies. Exception 25 contains clear and specific language indicating the legislature's intent to hold governmental entities liable for the grossly negligent exercise of responsibilities or duties involving "the supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client . . . ."[114] However, exception 5 clearly expresses the legislature's intent to preserve absolute governmental immunity for the exercise of discretion.[115] In reading the two exceptions together, it is clear that the legislature intended

108. *Id.*

109. Steinke v. S.C. Dep't of Lab., Licensing, & Regul., 336 S.C. 373, 406, 520 S.E.2d 142, 159 (1999) (Moore, J., dissenting).

110. *Id.* at 407, 520 S.E.2d at 159.

111. *Id.*

112. *Id.* However, Justice Moore stated that he did not believe a merging was necessary at all and it was proper to allow the jury to consider the exceptions individually and determine which to apply. *Id.*

113. *Id.* at 396, 520 S.E.2d at 154.

114. S.C. CODE ANN. § 15-78-60(25) (2005).

115. § 15-78-60(5).

Exception 25 to apply to non-discretionary conduct, while Exception 5 governs discretionary actions.

Exception 25 encompasses all of the responsibilities or duties of a government entity exercising control over an inmate, student, or client.[116] Not all of these responsibilities and duties involve the exercise of discretion, where a government actor weighs competing alternatives and makes a conscious choice between them.[117] For instance, a South Carolina Department of Social Services worker may fail to conduct a thorough investigation of child abuse allegations through lack of effort. Such a failure would fall under exception 25, as it reflects non-discretionary conduct—simply neglecting a duty—not a deliberate choice between alternatives. Under this construction, exception 5 would govern only in cases where discretion was exercised—such as choosing between foster care placements or deciding not to make a finding of abuse or neglect.

This interpretation ensures that both exceptions retain their distinct roles, preventing either from becoming a nullity. Exception 5 governs a narrow set of circumstances within the broader framework of exception 25, preserving immunity only where discretion is exercised. This balance aligns with statutory construction principles and the legislature's intent, maintaining accountability for grossly negligent conduct while protecting the common law principle of discretionary immunity in appropriate cases.

The Massachusetts Tort Claims Act and courts' interpretation of it is instructive.[118] That statute delineates ten exceptions[119] to its waiver of sovereign immunity, one of which indicates that suits for gross negligence may nevertheless be maintained if the governmental action consisted of allowing the release, parole, furlough, or escape of any person.[120] In *Brum v. Town of Dartmouth*, the Massachusetts Supreme Court addressed the plaintiff's argument that if gross negligence can be established in the release of an individual, the other exceptions in the statute could not operate to bar the claim.[121] Even without a statutory mandate to construe the Act liberally to avoid governmental liability, the Massachusetts Supreme Court held that "[t]he immunities provided by § 10 operate in the alternative; even if one

116. *See* § 15-78-60(25).

117. *See* Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992).

118. Massachusetts, like South Carolina, includes a gross negligence exception in one of its waivers to sovereign immunity. MASS. ANN. LAWS ch. 258 § 10(i) (LEXIS through 2024 Legis. Sess.).

119. *Id.* ch. 258 § 10. While including far fewer exceptions than the SCTCA, the Massachusetts Tort Claims Act includes similar exceptions such as for discretionary functions, assessment and collection of taxes, and inspections. *Id.* ch. 258 §§ 10(b), (d), (f).

120. *Id.* ch. 258 § 10(i).

121. 704 N.E.2d 1147, 1155–56 (Mass. 1999).

immunity contains an exception that would permit a claim to be brought, that claim is barred if any of the other immunities apply."[122] By adopting the approach taken by the Massachusetts courts, South Carolina courts would better uphold the legislative intent to limit the liability of government entities.

Given the statutory directive to interpret the SCTCA in a manner that limits government liability, as well as judicial confirmation of this principle, the Act's language allowing for gross negligence claims should be construed narrowly. The courts' general reluctance in other situations to expand the scope of liability beyond what the legislature has clearly articulated supports the argument that any ambiguities or gaps in the SCTCA should be resolved in favor of limiting liability, not expanding it through the imposition of the gross negligence standard onto other exceptions of the waiver of sovereign immunity.

B. Preservation of Common Law Immunities

In exceptions 1, 2, 5, and 23 of the SCTCA, the General Assembly preserved governmental entities' common law immunities including discretionary immunity, judicial immunity, and legislative immunity.[123] Imposition of the gross negligence standard onto any of these exceptions serves to "undercut[] the General Assembly's intention to incorporate and preserve traditional common law immunities."[124] Gross negligence has no place in the framework of these immunities, which were designed to shield decisions made in the course of certain types of governmental functions.[125] Introducing a gross negligence standard would fundamentally alter the scope of these immunities, transforming them into something unrecognizable from their common law origins and undermining the very balance the legislature sought to maintain. In short, grafting a gross negligence standard onto these exceptions threatens to erode the long-standing protections that governmental entities rely on to function effectively and independently.

1. Discretionary Immunity

The SCTCA's exception to the waiver of sovereign immunity for the exercise of discretion has been more frequently subjected to the attachment of

122. *Id.* at 1156.

123. *See* S.C. CODE ANN. §§ 15-78-60(1), (2), (5), (23) (2005).

124. South Carolina Tort Claims Act, 86–96 Op. S.C. Att'ys Gen. 5 (1986).

125. "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz v. Economou, 438 U.S. 478, 512 (1978).

the gross negligence standard than any of the other exceptions.[126] Discretionary immunity applies in situations where a government official, faced with alternatives, weighs competing considerations and makes a conscious choice between them.[127] Common law discretionary immunity can be traced back as early as *Marbury v. Madison*, in which the United States Supreme Court held that a writ of mandamus could not be contemplated if it required the court to question "how the executive, or executive officers, perform duties in which they have a discretion."[128] This absolute immunity for discretionary functions prevents the conduct of a governmental official that is within his official duties from becoming the basis of civil liability, even if the conduct is on the outer perimeter of his duties.[129] The justifications for this immunity include negating the risk that "these officials would begin to make decisions based on, or become unduly influenced by, a fear of liability" preventing a wave of lawsuits that could hinder officials in performing their normal duties, and maintaining separation of powers.[130]

The FTCA incorporates discretionary immunity for federal employees.[131] Assistant Attorney General Francis Shea, testifying in support of the FTCA, explained that the discretionary immunity included in the Act was intended to prevent "'the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act' to be 'tested through the medium of a damage suit in tort.'"[132] Not only does the FTCA provide for discretionary immunity, over half of the states have codified discretionary immunity in their own waivers of sovereign immunity.[133]

When it abolished sovereign immunity in *McCall v. Batson*, the South Carolina Supreme Court expressly preserved common law discretionary immunity, holding that "discretionary activities cannot be controlled by threat

126. *See, e.g.*, Jackson v. S.C. Dep't of Corr., 301 S.C. 125, 127–28, 390 S.E.2d 467, 469 (S.C. Ct. App. 1989); Duncan v. Hampton Cnty. Sch. Dist. 2, 335 S.C. 535, 544, 517 S.E.2d 449, 453 (S.C. Ct. App. 1999); Etheredge v. Richland Sch. Dist. 1, 330 S.C. 447, 463, 499 S.E.2d 238, 246 (S.C. Ct. App. 1998); Doe v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 179 (4th Cir. 2010); Beattie *ex rel.* Est. of Beattie v. S.C. Pub. Emp. Benefit Auth., No. 2019-CP-40-04559, 2020 S.C. C.P. LEXIS 5010, at *7–8 (Ct. Com. Pl. Mar. 27, 2020).

127. Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992).

128. Marbury v. Madison, 5 U.S. 137, 170 (1803).

129. William R. Casto, *Governmental Liability for Constitutional Torts: Proposals to Amend the Federal Tort Claims Act*, 49 TENN. L. REV. 201, 212 (1982).

130. Mark C. Niles, "*Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. LAW. REV. 1275, 1307 (2002).

131. 28 U.S.C. § 2680(a).

132. Niles, *supra* note 130, at 1302 (quoting Dalehite v. United States, 346 U.S. 15, 27 (1953)).

133. Wickert, *supra* note 19 (scroll to "Page 6" through "Page 40") (detailing the exceptions to each state's waiver of sovereign immunity including the exceptions for discretionary immunity).

or [sic] tort liability by members of the public who take issue with the decisions made by public officials."[134] Despite the court's description of sovereign immunity as "archaic and outmoded" and its elimination of the long-standing doctrine, the court was careful to preserve discretionary immunity, clearly valuing the immunity while simultaneously exposing governmental entities for liability in other areas.[135]

Following the South Carolina Supreme Court's lead, the South Carolina General Assembly codified discretionary immunity in the SCTCA.[136] This decision demonstrates clear legislative intent to preserve the pre-existing common law immunity, which did not allow claims for the grossly negligent exercise of discretion.[137] Had the legislature intended such a significant departure from the common law, it would have explicitly stated so in the statute. The absence of explicit language suggests a deliberate choice to maintain the broader immunity without the constraint of gross negligence.

In light of the fundamental role discretionary immunity plays in preserving the ability of governmental entities to make decisions without the fear of constant litigation, the frequent judicial imposition of a gross negligence standard is both erroneous and inconsistent with the intent behind the immunity. The fact that, even when sovereign immunity was abolished, discretionary immunity was deliberately preserved underscores its critical importance to governmental functions. Given its roots in protecting decision-making grounded in professional judgment, it is implausible that the legislature intended for discretionary immunity to be undermined by a gross negligence exception. To attach such a standard would negate the very protections that discretionary immunity was designed to uphold.

2. Judicial Immunity

While South Carolina courts have not addressed the imposition of the gross negligence standard onto the exceptions granting judicial immunity, a discussion of the doctrine of judicial immunity is warranted. The United States Supreme Court has long held that judges are immune from suits for damages in the interest of the proper administration of justice.[138] The Court has explained that "a judge is absolutely immune from liability for his judicial

134. 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985).

135. *Id.* at 245–46, 329 S.E.2d at 742.

136. S.C. CODE ANN. § 15-78-60(5) (2005).

137. *See* Niles, *supra* note 130, at 1306 (describing the common law discretionary function regime as protecting officials from liability absent some "malicious purpose"); *see also* Long v. Seabrook, 260 S.C. 562, 569, 197 S.E.2d 659, 662 (1973) (noting that in a tort suit against a public official whose duties are discretionary, it be must be shown that the official was "guilty of corruption, or bad faith, or influenced by malicious motives, before a recovery can be had[]").

138. Stump v. Sparkman, 435 U.S. 349, 355–56 (1978).

acts even if his exercise of authority is flawed by the commission of grave procedural errors."[139] A judge can be held liable only if they perform a nonjudicial act or act in the complete absence of all jurisdiction.[140] This immunity applies even to those judges accused of acting maliciously and corruptly and "is not for the protection or benefit of [the] malicious or corrupt judge, but for the benefit of the public, whose interest is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[141]

In *McCall v. Batson*, the South Carolina Supreme Court expressly stated that the abrogation of sovereign immunity would not extend to judicial acts.[142] Additionally, the SCTCA specifically codified judicial immunity in exception 1 which provides that a governmental entity will not be liable for a loss resulting from "legislative, judicial, or quasi-judicial action or inaction."[143] It is highly improbable that the General Assembly intended to render judicial immunity inapplicable in instances of gross negligence when the United States Supreme Court has ruled, and South Carolina courts have upheld, that judges enjoy absolute immunity even for malicious and corrupt acts.[144]

Consider the admittedly unlikely scenario in which a disbarred attorney brings a claim under the SCTCA against the South Carolina Supreme Court justices for the revocation of the attorney's license due to alleged misconduct. In response, the justices' attorneys file motions to dismiss on the grounds of judicial immunity, citing exception 1, which grants immunity for judicial action and inaction.[145] If the disbarred attorney argues that the justices' revocation of his license to practice law falls under the licensing exception to the waiver of sovereign immunity, would a court be willing to attach the gross negligence standard from the licensing exception to exception 1?[146] If so, the absurd result of allowing a suit for damages against a South Carolina Supreme Court justice who performed a judicial act within their jurisdiction[147] would ensue, in direct contravention of the long-established doctrine of judicial

139. *Id.* at 359.

140. Mireles v. Waco, 502 U.S. 9, 11–12 (1991).

141. Bradley v. Fisher, 80 U.S. 335, 349 n.16 (1871) (quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)).

142. McCall v. Batson, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985).

143. S.C. CODE ANN. § 15-78-60(1) (2005).

144. *See* McEachern v. Black, 329 S.C. 642, 650, 496 S.E.2d 659, 663 (S.C. Ct. App. 1998) (citing *Bradley* and *Stump* and holding that a judge was immune from suit even if he maliciously pursued an action against the plaintiff).

145. S.C. CODE ANN. § 15-78-60(1).

146. The jurisdiction of the South Carolina Supreme Court over the discipline, suspension, and disbarment or attorneys has been expressly granted by the legislature. S.C. CODE ANN. § 40-5-10 (2011).

147. The jurisdiction of the South Carolina Supreme Court over the discipline, suspension, and disbarment of attorneys has been expressly granted by the legislature. § 40-5-10.

immunity. Such a precedent could destabilize judicial independence by opening the door to retaliatory claims, weakening the judiciary's capacity to engage in impartial decision-making.

3. Legislative Immunity

Similar to judicial immunity, legislative immunity, which is codified in the same exception to the waiver of sovereign immunity,[148] has not necessarily been subjected to the attachment of the gross negligence standard but provides an example of a persistent common law immunity that the General Assembly could not have intended to limit. The origins of legislative immunity can be traced back to the struggles of the English Parliament in the sixteenth and seventeenth centuries.[149] The immunity was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation," and protects legislators from hindrances to the discharge of their duties for the public good.[150] The South Carolina Court of Appeals has held that "any restriction[s] being placed on a legislator's ability to exercise legislative discretion, including the fear of personal liability" would compromise the public good.[151]

As with the earlier discussed immunities, legislative immunity was preserved in *McCall v. Batson*,[152] and, subsequently, in the SCTCA.[153] Imposing a gross negligence standard and allowing legislators to be liable for the exercise of their official duties would thus be similarly inappropriate. Undeniably, a legislator's actions are unlikely to fall under either exception containing a gross negligence standard. Nevertheless, if the situation presented itself, could a South Carolina court truly hold that a legislator is not entitled to the longstanding, widespread immunity that has been consistently upheld since the founding of our Nation? Such a ruling would not only disrupt the established principles of legislative immunity but could also set a troubling precedent, potentially deterring legislators from making bold or necessary decisions out of fear of personal liability. Ultimately, any attempt to erode this immunity could challenge the foundational principles of democratic governance, where lawmakers benefit from the freedom to exercise their discretion and judgment without the chilling effect of potential lawsuits.

148. S.C. CODE ANN. § 15-78-60(1).

149. Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

150. *See id.* at 372–73.

151. S.C. Pub. Int. Found. v. Courson, 420 S.C. 120, 125, 801 S.E.2d 185, 187 (S.C. Ct. App. 2017).

152. 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985).

153. S.C. CODE ANN. § 15-78-60(1).

C. Public Policy Concerns

In its enactment of the SCTCA, the South Carolina General Assembly expressed its general policy decision to protect governmental entities from excessive litigation, ensuring that public resources and decision-making are not unduly hampered by liability concerns.[154] In section 15-78-20, the General Assembly specifically declared its public policy objectives:

> 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 . . . neither should the government be subjected 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.[155]

An important concern relating to the imposition additional liability on governmental entities is the impact on public resources. Expanded liability depletes already scarce public resources. For example, the South Carolina Department of Transportation ("SCDOT"), one of South Carolina's frequently sued governmental entities, is engaged in over one hundred lawsuits each year.[156] In a span of three years, SCDOT paid out over $10 million in settlements.[157] Additionally, it cost SCDOT approximately $569,290 for its staff to assist attorneys handling the lawsuits over that three-year period.[158] These are funds which could have been used to repair and construct roadways.

While holding government entities liable in some situations outweighs the need to preserve public funds, the cumulative financial burden of litigation can divert critical resources away from essential public projects and services, like infrastructure maintenance and development. Increased liability risks diminishing the quality of public services, ultimately affecting the well-being and safety of South Carolina residents. This not only applies to SCDOT but

154. *See* S.C. CODE ANN. § 15-78-20(a).

155. *Id.*

156. Sara Familian, Analyzing of Tort Claims and Lawsuits Against South Carolina Department of Transportation Through Classification and Regression Tree Analysis, at 2–3, (Ph.D. dissertation, Clemson University, 2011), https://open.clemson.edu/cgi/viewcontent.cgi?article=1866&context=all_dissertations [https://perma.cc/VPD5-FW65] (click on "Download" on top right of web page).

157. *Id.* at 3.

158. *Id.* at 117.

would be applicable to notoriously underfunded agencies like the South Carolina Department of Social Services[159] and the South Carolina Department of Corrections where limited budgets are already stretched to address critical needs.[160] Expanding liability would mean further straining these agencies' capacities to serve vulnerable populations, protect public safety, and uphold necessary standards across the state.

Thus, attaching the gross negligence standard from one exception to another exacerbates the problem by further expanding governmental liability. This expansion threatens to overwhelm already stretched public resources, undermining the legislature's intent to limit liability and protect essential public services.

V. CONCLUSION

The South Carolina appellate courts have erred in holding that the State and its subdivisions and agencies may be liable for gross negligence under the circumstances described in exceptions 12 and 25, even when other provisions within that section apply. Therefore, the South Carolina Supreme Court should overturn these decisions at the next opportunity, or the South Carolina Legislature should amend the SCTCA to clarify that the gross negligence standard in exceptions 12 and 25 will not apply to a claim if any other exceptions of section 15-78-60 also apply to the same claim. At the very least, the South Carolina Supreme Court should clarify that the gross negligence standard should only apply when an exception containing it is actually applicable to the case. This would ensure consistency in the interpretation of the Act and prevent the overextension of liability. The preferable solution, however, is for the Court to directly overturn this line of precedent, restoring the proper interpretation of the SCTCA and ensuring that liability is limited as the legislature intended.

159. *See* Mary Green, *With Federal Funds Gone, DSS Seeks Money to Support Child Care*, WRDW/WAGT (Dec. 2, 2024, 9:19 AM), https://www.wrdw.com/2024/12/02/with-federal-funds-gone-dss-seeks-money-support-child-care/ [https://perma.cc/8F6D-4FM6].

160. *See* Anne Emerson, *Public Safety Concerns at South Carolina Department of Corrections After Budget Slashed*, ABC NEWS 4 (Feb. 27, 2024, 8:25 PM), https://abcnews4.com/news/local/public-safety-concerns-at-south-carolina-department-of-corrections-after-budget-slashed-south-carolina-prisons-state-funding-general-assembly-abc-news-4-wciv-2024# [https://perma.cc/2P6L-G3M4].