ALAN WILSON
ATTORNEY GENERAL

October 20, 2011

Mr. Henry E. Kodama
State Forester
South Carolina Forestry Commission
P.O. Box 21707
Columbia, SC 29221

Dear Mr. Kodama:

We received your letter requesting an opinion of this office concerning liability of the South Carolina Forestry Commission (the "Commission") in situations where the Commission sponsors or co-sponsors activities involving public participation, such as hunting events. By way of background, you state that the Commission currently asks participants to sign a liability waiver. You ask us whether the Commission should continue to do so. You further request this office to review the Commission's current liability waiver for sponsored public events or, in the alternative, to draft a waiver for participants to sign.

Law/Analysis

Your question relates to the common law tort of "negligence." In order to prove the State's liability to an injured third party, a plaintiff would have to prove each of the following elements: (1) the State owed a duty of care to the particular third party; (2) the State breached that duty; and (3) the State's negligent acts proximately caused the injury to the third party. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999) [quoting Andrews v. Piedmont Air Lines, 297 S.C. 367, 377 S.E.2d 127, 128 (1989)]; Estate of Cantrell, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990). The South Carolina Supreme Court recently explained that:

> [a]n essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007). Without a duty, there is no actionable negligence. Id. A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law. Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 104, 551 S.E.2d 579, 582 (2001). When the duty is created by statute, we refer to this as a "special duty," whereas when the duty is founded on the common law, we refer to this as a legal duty arising from "special circumstances." See id. at 109-10, 551 S.E.2d at 585 (explaining that this Court restricts the term special duty to those arising

> from statutes, whereas a legal duty arising from a "special circumstance" is created under the common law).

Platt v. CSX Transp., Inc., 388 S.C. 441, 697 S.E.2d 575, 577 (2010).

Where there is no duty owed the plaintiff, however, there can be no negligence by the defendant. See Hill v. Broad River Power Co., 151 S.C. 280, 148 S.E. 870 (1929). A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law. Arthurs, 551 S.E.2d at 582. When the duty is created by statute, it is referred to as a "special duty," whereas when the duty is founded on the common law, this is a legal duty arising from "special circumstances." Edwards v. Lexington County Sheriff's Dept., 386 S.C. 285, 688 S.E.2d 125, 128, 688 S.E.2d 125 (2010); see Arthurs, 551 S.E.2d at 585 [explaining that the term special duty is restricted to those arising from statutes, whereas a legal duty arising from a "special circumstance" is created under the common law].

We note the "public duty" rule in South Carolina holds that public officials are generally not liable to individuals for their negligence in discharging public duties, because the duty is owed to the public at large rather than to anyone individually. Arthurs, 551 S.E.2d at 582; Tanner, 521 S.E.2d at 158. The "public duty" rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public. Summers v. Harrison Construction, 298 S.C. 451, 381 S.E.2d 493, 496 (Ct. App. 1989). The public duty rule denies an essential element of the plaintiff's negligence claim: the showing of a duty of care to the individual. Arthurs, 551 S.E.2d at 582. Public officials, employees, and government entities are thus insulated from liability for the negligent performance of their official duties "by negating the existence of a duty towards the plaintiff." Id. The Arthurs Court stated that "[w]hen, and only when, the plaintiff relies upon a statute as creating the duty does the [public duty rule] come into play." Id., 551 S.E.2d at 582.

An exception to the general rule exists when the statutory duty is owed to individuals, as determined by a six-factor test, which assesses whether: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within that class; (5) the public officers know or should know of the likelihood of harm to the class if he fails in his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office. Jensen v. Anderson County Dep't of Social Services, 304 S.C. 195, 403 S.E.2d 615, 617 (1991) [holding that the state's Child Protection Act, which required state and local officials to carry out various training, monitoring, reporting, and investigative responsibilities did impose on local officials to whom instances of alleged child abuse had been reported a special duty to investigate and intervene but did not impose on state officials a special duty to protect particular children]; see also Brady Development Co. v. Town of Hilton Head Island, 312 S.C. 73, 439 S.E.2d 266 (1993) [holding that the town's development standards ordinance was intended to protect the public from over-development, not to protect homeowners from deprivation of water and other services]; Rayfield v. S.C. Dept. of Corrections, 297 S.C. 95, 374 S.E.2d

910 (Ct. App. 1988) [holding that a state statute requiring prison and parole officials to keep records of prisoners' habits and deportment and to prepare adequate reports concerning parole candidates did not create a special duty to protect particular members of the public against crimes committed by released prisoners].We note the Arthurs Court recognized that "courts are reluctant to find a special duty."Arthurs, 551 S.E.2d at 583.

Still, should it be determined the State[1] owes a particular duty of care to the injured person and that the government, through its actions or inactions, breached that duty of care, proximately causing injury to the third party, a state agency may not be liable because of the immunities reinstituted by the South Carolina Tort Claims Act (the "Act"), §§15-78-10 *et seq.* The Act does not create causes of action, but removes the common law bar of sovereign immunity in certain circumstances to the extent provided by the Act. Arthurs, 551 S.E.2d at 583. The Arthurs Court noted that "[s]ince the public duty rule is not grounded in immunity but rather in duty . . . it has not been affected by enactment of [the Act]." Id. The Court explained that:

> [the Act] and "public duty rule" are not incompatible and we retain the rule. When the negligence plaintiff's cause of action against a governmental entity is founded upon a statutory duty, then whether that duty will support the claim should be analyzed under the rule. On the other hand, where the duty relied upon is based upon the common law, *e.g.* the duty to warn in Rogers v. South Carolina Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995), then the existence of that duty is analyzed as it would be were the defendant a private entity. Id.
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> In addition, many "duties" appear to be limited or eliminated by what are termed "Exceptions to waiver of immunity" in S.C. Code Ann. §15-78-60 (Supp. 2000). Thus, even if negligence (including breach of a duty) is shown, the governmental entity may not be liable because of the immunities reinstituted by [the Act]. Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach [the Act] immunities issue.

Arthurs, 551 S.E.2d at 583.

The Act is "the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents, except as provided in §15-78-70(b)." Richardson v. City of Columbia, 340 S.C. 515, 532 S.E.2d 10, 13 (Ct. App. 2000); see §15-78-20 (b) ["while acting within scope of official

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[1]Section 15-78-30(c) defines the "State" as:

> the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities and technical colleges.

duty" . . . the State, its political subdivisions, and employees are immune from liability and suit for any tort except as waived by the Act]. Moreover, we note the Act expressly includes within its scope claims for government torts committed by volunteers, since "employee" as that term is used in the Act includes, pursuant to §15-78-30 (c), any "persons acting on behalf or in service of a governmental entity in the scope of official duty . . ." The Act next modifies or waives, at least to a limited extent, the bar of sovereign immunity. Pursuant to §15-78-40, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." See City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 677 S.E.2d 574, 581 (2009); see also §15-78-20 (a) ["Liability for acts or omissions under this chapter [the Act] is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty"]; §15-78-70 (b) ["Nothing in this Chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm or a crime involving moral turpitude"]. The Act then crafts several exceptions to this limited waiver of sovereign immunity, and in those instances where one or more of the exceptions apply, sovereign immunity bars the damage action. Section 15-78-60; cf. Varn v. South Carolina Department of Highways and Public Transportation, 311 S.C. 355, 428 S.E.2d 895 (Ct. App. 1993).

In drafting the Act, the General Assembly proceeded with caution, expressly recognizing the need to protect the financial integrity of public programs and to ensure that limited public monies be used to support the general public needs as opposed to the needs of particular individuals; thus, the General Assembly found "[t]he provisions of [the Act] establishing limitations on and exemptions to the liability of the State . . . must be liberally construed in favor of limiting the liability of the State." Id., see §15-78-20 (f); see also Rice v. School District of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994) [Act contains numerous exceptions to its waiver of sovereign immunity, and such exceptions must be construed liberally in favor of limiting liability of state and its political subdivisions]; §15-78-20 (a) ["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"]. Yet, "[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity under [the Act] is upon the governmental entity asserting it as an affirmative defense." Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188, 195-96 (2007).

Axiomatic, many of the forty (40) exemptions to the limited waiver of sovereign immunity found in §15-78-60 reflect these legislative concerns. The Act provides a statutory backdrop for any discussion of governmental tort liability in South Carolina. For example, one exemption from liability contained in §15-78-60 (16) provides the governmental entity is not liable for a loss caused by:

> maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or

> supervision within a reasonable time after actual notice of the defect or condition.

If injuries resulted from an action involving the maintenance, security, or supervision of the public property, then the claim could be resolved under the Act. If the injuries resulted from anything other than the maintenance, security, or supervision of the public property, a court would look at any other exemptions from liability found in the Act, including §15-78-60 (26) ["failure to supervise or control areas open for public hunting or activities thereon. . . ." If no other exemptions would apply, then a court may hold the state entity liable in the same manner as a private individual under the same circumstances, but still subject to the limitations upon liability and damages contained in the Act.

Moreover, we note that outside of the limitations and exemptions contained within the Act, the same common law defenses to a negligence claim as private parties, *e.g.*, "assumption of risk," may bar a claim; but any analysis would depend upon the particular facts. Contracts which seek to release a party from liability have been upheld by the courts of this State. See Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281 S.E.2d 223, 224 (1981) [finding plaintiff's action against speedway for injuries sustained during a race was barred by "waiver and release" voluntarily signed by plaintiff prior to entering the race track]; Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155, 157–58 (1964) [holding it was not violative of public policy for telephone company to legally limit its liability by contract for negligence in the publication of a paid advertisement in the yellow pages of its telephone directory]. Because releases of liability for ordinary negligence involving parties are valid as a general proposition, it is not contrary to the purposes of the Act to allow the use of liability releases as a precondition for participation in sponsored events and activities.

In McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (2005), the South Carolina Court of Appeals discussed exculpatory language in the liability waiver. McCune sued the shooting range ("Range") for negligence after she was struck in the eye during paintball competition. She alleged the face mask provided by Range offered no protection and was not properly fitted. Before playing, McCune signed a general waiver releasing Range from liability from all known or unknown dangers for any reason with the exception of gross negligence on the part of the Range. The trial court granted Range summary judgment, finding the waiver was sufficient to show McCune assumed the risks associated with playing paintball. Id., 612 S.E.2d at 463-64. The Court of Appeals recognized that, ". . . notwithstanding the general acceptance of exculpatory contracts, '[s]ince such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon.'" Id., 612 S.E.2d at 465 [citing Pride, 138 S.E.2d at 157]. The Court held that "[a]n exculpatory clause will never be construed to exempt a party from liability for his own negligence 'in the absence of explicit language clearly indicating that such was the intent of the parties.'" McCune, 612 S.E.2d at 465 [quoting South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 322 S.E.2d 453, 458 (Ct. App. 1984)].

The McCune Court determined the release at issue explicitly and unambiguously limited Range's liability. McCune signed the release, acknowledging the following pertinent clauses:

> 1. The risk of injury from the activity and weaponry involved in paintball is significant, including the potential for permanent disability and death, and while particular protective equipment and personal discipline will minimize this risk, the risk of serious injury does exist;
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> 2. I KNOWINGLY AND FREELY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE of those persons released from liability below, and assume full responsibility for my participation; and, . . .
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> 4. I, for myself and on behalf of my heirs ... HEREBY RELEASE AND HOLD HARMLESS THE AMERICAN PAINTBALL LEAGUE (APL), THE APL CERTIFIED MEMBER FIELD, the owners and lessors of premises used to conduct the paintball activities, their officers, officials, agents, and/or employees ("Releasees"), WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, except that which is the result of gross negligence and/or wanton misconduct. . .
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> I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

McCune, 612 S.E.2d at 465. The agreement was then signed by McCune and dated the date of the incident. Id. Because the agreement was voluntarily signed by McCune in exchange for being allowed to participate in the activity and stated that (1) McCune expressly assumed the risks, whether known or unknown; and (2) she released Range from liability, even from injuries sustained because of Range's own negligence, the Court said the agreement was sufficient to limit the liability of Range to McCune. McCune, 612 S.E.2d at 465-66.

The McCune Court further held the agreement did not contravene public policy, noting that "[i]f these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest." Id., 612 S.E.2d at 466 [quoting Huckaby, 281 S.E.2d at 224].

The McCune Court also specifically noted the signed release did not preclude recovery for a cause of action involving gross negligence.[2] The Court made it clear that "this opinion should not be

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[2]South Carolina courts have defined gross negligence in a number of ways. Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do. Clyburn v. Sumter County School District # 17, 317 S.C. 50, 451 S.E.2d 885 (1994);

construed as creating an indefensible position for all injuries sustained during inherently dangerous recreational activities." Id., 612 S.E.2d at 467 [citing Adams v. Roark, 686 S.W.2d 73, 75-76 (Tenn. 1985) (recognizing, in an action to recover for injuries sustained by a motorcyclist at a drag way, that an agreement to contract against liability for gross negligence is unenforceable); Murphy v. North American River Runners, Inc., 186 W.Va. 310, 412 S.E.2d 504, 510 (1991) (stating, in an action to recover for injuries sustained during a whitewater rafting accident, "a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention")]. The McCune Court in *dicta* thus clearly indicated that a pre-injury release against liability for gross negligence may be deemed unenforceable. McCune, 612 S.E.2d at 467; see also Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149, 152-53 (Ct. App. 2003) [finding exculpatory clause that relieved "any persons in any restricted area" from all liability was overly broad and against public policy, because the clause relieved all potential defendants from any and all liability, no matter the circumstances giving rise to the injury].

We find it significant that while many states uphold exculpatory agreements in the context of simple negligence, they refuse to enforce such agreements which limit liability for gross negligence. See, *e.g.*, Farina v. Mt. Bachelor, Inc., 66 F.3d 233, 235-36 (9th Cir.1995) [discussing Oregon law]; City of Santa Barbara v. Superior Court, 41 Cal.4th 747, 161 P.3d 1095, 1102-03 (2007); McFann v. Sky Warriors, Inc., 268 Ga. App. 750, 603 S.E.2d 7, 14 (2004); Boucher v. Riner, 68 Md. App. 539, 514 A.2d 485, 488 (1986); Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass. App. 17, 687 N.E.2d 1263, 1265 (1997); Lamp v. Reynolds, 249 Mich. App. 591, 645 N.W.2d 311, 314 (2002); Beehner v. Cragun Corp., 636 N.W.2d 821, 827 (Minn. App. 2001); Schmidt v. United States, 912 P.2d 871, 874 (Okla. 1996); Conradt v. Four Star Promotions, Inc., 45 Wash. App. 847, 728 P.2d 617, 621 (1986); cf. 8 S. Williston, Contracts §19:23, pp. 291-97 (4th ed. 1998) ("[a]n attempted exemption from liability for a future intentional tort or crime or for a future willful or grossly negligent act is generally held void, although a release exculpating a party from liability for negligence may also cover gross negligence where the jurisdiction has abolished the distinction between degrees of negligence and treats all negligence alike").

Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988). Gross negligence is a relative term which means the absence of care that is necessary under the circumstances. Hicks v. McCandlish, 221 S.C. 410, 70 S.E.2d 629 (1952); Moore v. Berkeley County School District, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1997). It connotes the failure to exercise a slight degree of care. Wilson v. Etheredge, 214 S.C. 396, 52 S.E.2d 812 (1949); Grooms v. Marlboro County School District, 307 S.C. 310, 414 S.E.2d 802 (Ct. App. 1992). Gross negligence is the failure to exercise slight care. Anderson v. Ballenger, 166 S.C. 44, 164 S.E. 313 (1932); Doe v. Orangeburg County School District No. 2, 329 S.C. 221, 495 S.E.2d 230 (Ct. App. 1997), *aff'd*, 335 S.C. 556, 518 S.E.2d 259 (1999). Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence. Jackson v. South Carolina Dep't of Corrections, 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990). Gross negligence involves a conscious failure to exercise even the slightest care. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002).

In Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005), for example, the Kentucky Supreme Court addressed the validity of an exculpatory contract for exemption from future liability for negligence, whether ordinary or gross negligence, *i.e.*, a pre-injury release. While Hargis held that such agreements were not invalid *per se*, it also stated that "such contracts are disfavored and are strictly construed against the parties relying upon them." Id. at 47. More than simply construing the release strictly against the drafter, Hargis provided that the release must contain utmost clarity in order to be enforceable. Its wording must be "so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable." Id.

> The wording of the release must be "so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable." 57A Am.Jur.2d, Negligence §52 (2004) (citations omitted). Specifically, a pre-injury release will be upheld only if (1) it explicitly expresses an intention to exonerate by using the word "negligence;" or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision. Id. at § 53 (citations omitted). "Thus, an exculpatory clause must clearly set out the negligence for which liability is to be avoided." Id. (citations omitted).

Hargis, 168 S.W.3d at 47.

Finally, we note that pursuant to S.C. Code Ann. §48-23-200, the Commission "may make such rules and regulations as it deems advisable for the protection, preservation, operation and maintenance, and for the most beneficial service to the general public, of the State forests in this State." Such regulations for "South Carolina Forestry Commission Lands" can be found in 24 S.C. Code Ann. Regs. 55-1 (Supp. 2010), which state, in relevant part:

> 1. Entry onto South Carolina Forestry Commission lands is done wholly and completely at the risk of the individual. The State of South Carolina nor the South Carolina Forestry Commission accepts any responsibility for acts, omissions or activities or conditions on these lands which cause or may cause personal injury or property damage. . . .

Conclusion

In conclusion, we note it appears that liability generally would not arise against the Commission where actions are consistent with State law. Moreover, the Tort Claims Act provides the exclusive remedy for tortious acts of individuals acting within the scope of their official duties. Of course, no one can guarantee that the State will not be sued, nor can we absolutely assure you that liability will not be found against the Commission for the acts of these individuals. We do caution that any advice relative to

the potential civil liability of a government agency is, of necessity, very general and subjective, since liability considerations most often depend upon the factual vagaries of each incident. Potential liability discussions are never fully exhaustive of the myriad theories of liability that can be crafted. Anyone can file a suit if he or she is so motivated, and only a court can ultimately determine liability. Although the general body of case law set forth above draws a reasonably clear line between liability and non-liability, we cannot determine, within the scope of an opinion, whether specific factual circumstances might create a liability. See Op. S.C. Atty. Gen., August 24, 2006 ("[O]nly a court, not this Office may serve as a finder of fact and conclusively determine the outcome of a factual issue"). Mindful of these qualifications, we cautiously advise that there are certainly factual situations involving injuries during Commission-sponsored events which may expose the Commission, and thus the taxpayers, to damage awards. Finally, a voluntary release wherein there is an express assumption of the risk and in which the terms unambiguously limit liability with respect to the Commission could possibly be sufficient to limit liability in any action for civil liability. The terms of the release submitted with your letter appear adequate for the purpose for which it was designed. We advise that any release precluding recovery for a cause of action involving gross negligence may be deemed unenforceable as against public policy. You may wish to contact the South Carolina Budget and Control Board which deals with tort claims issues and may be of some further guidance. An opinion of this office cannot function as a format to address risk management issues. See Ops. S.C. Atty. Gen., June 25, 2001, November 22, 1999.

If you need anything further, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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