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The State of South Carolina

Office of the Attorney General

Opinion No 86-96
P293

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September 9, 1986

The Honorable John G. Richards
Chief Insurance Commissioner
Department of Insurance
Post Office Box 100105
Columbia, South Carolina 29202-3105

Re: Opinion Request - South Carolina Tort Claims Act

Dear Mr. Richards:

You have requested the opinion of this office relative to the application of several provisions of the recently enacted comprehensive Tort Claims Act [Section 15-78-10, et. seq. of the Code of Laws of South Carolina, 1976 (as amended by R514 of 1986)]. You specifically questioned the interplay of the limitation found in § 15-78-60(a)(12) to the other exclusions within § 15-78-60(a) with regard to licensing decisions made by the Insurance Commission or its appointed hearing officers. In your request letter you emphasize the importance of your inquiry, not only to the Insurance Commission, but to other governmental agencies as well, and we note our agreement that the issue presented is important to the operation of state government.

Because of its novelty and significance, a brief explanation of the history of the Tort Claims Act is in order. Sovereign immunity has been the law in this state at least since 1820, and has barred recovery against the government in tort actions except in those few circumstances where the general assembly has expressly modified or waived the doctrine. McCall v. Batson, _____ S.C. _____, 329 S.E.2d 741, 747 (1985) [Chandler, J., concurring]; Young v. Commissioners of Roads, 2 Nott. and Mc.537, 11 S.C.L. 215 (1820). Constitutional recognition of this common law doctrine apparently occurred with the adoption of the Constitution of 1868 (Article XIV, § 4) and was reenacted with the Constitution of 1895 (Article XVII, § 2.) The current article provides:

> The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.[1]

The General Assembly in 1986, apparently acting pursuant to this express constitutional grant of authority, enacted for the first time a comprehensive tort claims act that provides for damage actions against the State, its agencies and political subdivisions. Additionally, the General Assembly apparently heeded the instruction of Justice Chandler in his concurring opinion in McCall wherein he advised:

> No doubt the legislature is empowered to act, there being no constitutional issue involved. Hopefully, even now, the General Assembly will act, and by the effective date provisions set out in the majority opinion, may do so prior to this decision's becoming law.
>
> Indeed, now pending in the judiciary committees of both Houses of the General Assembly are comprehensive Tort Claims Bills which address the wrongs and the inequities of sovereign immunity.

329 S.E.2d, at 748. The quoted language references the pending house bill (H. 2266) that ultimately became the State's first comprehensive tort claims law in 1986.

Admittedly, the General Assembly proceeded with guarded caution in opening for the first time the public's funds for the payment of individual claims and qualified its legislative enactment with limiting language in order that the economic effects of compensating individual victims of governmental torts would not undercut the operation of governmental policies and programs. Thus, the General Assembly expressly provided that at least during the formative years any ambiguities in the Act should be resolved in favor of protecting the public's funds and against the individual claimant.

> The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions and employees, while acting

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[1] The Minutes of the Constitution Review Committee (1966 through 1969) reflect the Committee's belief that this provision served to codify the General Assembly's authority to revise or modify the State's immunity from suit. See, Volume IV, Minutes of the Committee for the Revision to South Carolina Constitution of 1895, at 1016 and 1017.

> within the scope of official duty, must be liberally construed in favor of limiting the liability of the Section 15-78-20(f).[2]

Thus, the General Assembly's expressed intent to apply the remedies provided by the Tort Claims Act very narrowly is clear and any interpretation of that Act must be appropriately guided. Sutherland, Statutory Construction, Section 46.03.

Your specific inquiry relates to the application of various provisions of the Tort Claims Act that exclude certain governmental functions from the areas where the government may be liable in tort as they relate to the licensing functions of the Insurance Commission. You refer to the following provisions of § 15-78-60(a):

> The governmental entity is not liable for a loss resulting from:
>
> (1) legislative, judicial, or quasi-judicial action or inaction;
>
> (2) administrative action or inaction of a legislative, judicial, or quasi - judicial nature;
>
> (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or the failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
>
> (12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order or similar authority except when the power or function is exercised in a grossly negligent manner;
>
> (23) institution or prosecution of any judicial or administrative proceeding;....

Essentially your concern is whether the exception to the specific exclusion located in Section 15-78-60(a)(12), "except when the power or function is exercised in a grossly negligent manner" serves to limit the applicability of the several other enumerated exclusions to the tort remedy provided by the Act. With due

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[2] Incidentally, even without the aid of the General Assembly's expressed intent to resolve ambiguities in favor of the public and against the individual claimant, statutes waiving the government's immunity from suit have generally been strictly construed against the waiver and in favor of protecting the public's funds. See, e.g., Jeff Hunt Machinery Company v. South Carolina State Highway Department, 217 S.C. 423, 60 S.E.2d 859 (1950).

regard to the General Assembly's expression as to its intent, we believe that if a governmental decision appropriately comes within any of the twenty-six exclusions to liability identified in § 15-78-60(a), then the governmental entity is not liable for the loss. This is true even if one or more of the exclusions is determined to be inapplicable to the governmental activity.

Generally, an exception attached to a specific and distinct provision of an act operates only to limit the matter which directly precedes it. Sutherland, § 47.11. Thus, applying this ordinary rule of interpretation, an exception to an exclusion, such as that found in § 15-78-60(a)(12) operates only to limit the scope of the particular exclusion wherein it is attached and does not operate as a general exception to all provisions of the Act. Such a reading would appear to be a fair interpretation of the General Assembly's intent here since to read otherwise would ignore the General Assembly's intentional location of the exception as a part of § 15-78-60(a)(12). The specific positioning of the limiting language leads to the inevitable conclusion that the limitation operates only with reference to the exclusion and not to the entire Act.

Moreover, an analysis of the various exclusions lends additional support to the conclusion that each exclusion must stand on its own and that a distinct governmental policy is generally served by each exclusion.[3] For example, exclusions (1), (2) and (5), of § 15-78-60(a) appear to incorporate the discretionary immunity of the sovereign most recently identified in McCall v. Batson, supra.

> We hold that the abrogation of the rule [sovereign immunity] will not extend to legislative, judicial and executive acts by individuals acting in their official capacity. These discretionary activities cannot be controlled by threat of tort liability by members of the public who take issue with the decisions made by public officials. We expressly decline to allow tort liability for these discretionary acts. The exercise of discretion includes the right to be wrong.

329 S.E.2d, at 742; see also, Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) ["we therefore hold that persons...performing adjudicatory function within a[n] agency are

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[3] We realize that on many occasions more than one exclusion will operate to remove a particular governmental activity from the tort remedy provided by the Act and we believe this is an indication of the General Assembly's caution in exposing the public's funds to claims by individuals.

entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings [administrative] must seek agency or judicial review." 57 L.Ed.2d at 921.]

Similarly, agency decisions relating to whether or not an administrative prosecution should be initiated against a licensee are excluded from liability pursuant to § 15-78-60(a)(23). This exclusion derives at least in part from the traditional common law immunity applicable to prosecutorial discretion whether the prosecution is before an administrative or judicial forum. See, Butz v. Economou, 57 L.Ed.2d at 922:

> Because the legal remedies already available to the defendant in [an administrative proceeding] provide sufficient checks on agency zeal, we hold that...officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity....

The General Assembly apparently recognized with the provision of its exclusions (1), (2), (5) and (23) that "absolute immunity is necessary to assure that [administrative] judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz, 57 L.Ed.2d, at 919. Thus, as can be seen, each of the designated exclusions serves some governmental policy and extending the limitation incorporated in § 15-78-60(a)(12) to the other specific exclusions any time the government engages in a licensing function undercuts the General Assembly's intention to incorporate and preserve traditional common law immunities.

Since we believe that each exclusion separately enumerated in § 15-78-60(a) stands on its own then the appropriate inquiry is whether a particular licensing decision falls within any of the enumerated exclusions. Pursuant to South Carolina law, some licensing decisions engaged in by governmental agencies involved an exercise in discretion and often times are preceded by a fact finding or quasi-judicial hearing. See, e.g., § 1-23-310 et. seq. of the South Carolina Code [Administrative Procedures Act]; see, also, Brown v. DeBruhl, 468 F.Supp. 513 (D.C.S.C. 1979); Johnson v. Independent Life & Accident Insurance Company, 94 F.Supp. 959 (D.C.S.C. 1951). On the other hand, some licensing decisions are appropriately characterized as ministerial and do not involve the exercise of agency discretion or implicate the need for a hearing. For example, a fishing license is issued pursuant to § 50-9-410 et. seq. of the South Carolina Code and hunting licenses are issued pursuant to § 50-9-10 et. seq. The issuance of those licenses involves only the performance of a ministerial duty or function by the government. The exclusion of liability for a mandatory licensing decision that does not implicate any other specific exclusion in the Act would be governed by § 15-78-60(a)(12) and its attached exception.

However, licensing decisions of quasi-judicial nature or administrative decisions that relate to prosecutions are excluded from the remedies provided by the Act.

You have suggested that many of the licensing determinations made by the Insurance Commission involve the exercise of discretion and are often finalized only after an opportunity for a hearing, and we do not disagree with your suggestion; nevertheless, we will not undertake a blanket review of all the licensing functions of the Commission to ascertain what, if any, exclusions to the remedy provided by the Tort Claims Act may be applicable. Suffice to say that each licensing function and procedure would have to be independently examined to determine whether any of the various exclusions are applicable.

In conclusion, we advise that the exception or limitation attached to the exclusion found at § 15-78-60(a)(12) does not operate as a general limitation of the other separate and distinct exclusions when the governmental function involves licensing. Ordinarily, licensing determinations involving the exercise of discretion by the government and are quasi-judicial in nature are excluded from liability under the Act. Moreover, decisions relating to agency prosecutions are similarly excluded from the liability provisions of the Act.

Very truly yours,

Edwin E. Evans
Deputy Attorney General

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APPROVED BY:

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