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Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma

Brenda Kimery

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I. INTRODUCTION

Much has been written about the tort liability problems of nonprofit corporations and their volunteers, especially since the early 1980's, when liability insurance became more expensive and harder to obtain. Despite increasing interest in the issue, little solid data exists that would allow the actual impact of tort liability to be quantified definitively. There has been some debate as to whether the threat is one of substance or merely perception. Nonetheless, efforts across the country have focused on reducing the liability exposure and the financial burden of losses on individual volunteers and not-for-profit organizations. From the point of view of nonprofit corporations, the liability question is two-fold: (1) What is the liability of nonprofit corporations for the actions of their volunteers? and (2) What is the personal liability of volunteers, directors, and officers acting on behalf of these organizations? The answers to these questions are dependent upon sparse case law and the relevant statutory provisions of the jurisdiction in which they are asked. Because few cases have been decided, and the analysis of the liability issue in each case is very fact specific, outcomes are uncertain and costs are unpredictable.

This comment addresses the issues of personal and vicarious liability which may be incurred by volunteers, directors, and officers of nonprofit corporations and by the corporate entity itself. It looks at ways the threat of liability
negatively impacts volunteers and nonprofits. It then proceeds to review statutory efforts and other means of controlling tort liability. The bulk of the article focuses on the personal liability of volunteers, directors, and officers and the vicarious liability of nonprofit corporations under Oklahoma law, highlighting recently enacted tort reforms. The article culminates with recommendations for managing the risk of utilizing volunteers for Oklahoma's nonprofit corporations.

II. VOLUNTEERISM AND NONPROFIT CORPORATIONS

"Americans of all ages, all stations in life, and all types of disposition, are forever forming associations... Nothing, in my view, deserves more attention than the intellectual and moral associations in America." When he visited this country during the 1830's, Alexis de Tocqueville was struck by the American propensity to associate, to come together for a variety of purposes. This willingness to exchange ideas, to work toward common goals, and to volunteer in the service of others is part of our history, our social institutions, and our system of government.

Traditionally, Americans formed small, local groups in their communities. Though membership in civic associations has diminished over the last generation, nonprofit organizations, especially nonprofit service agencies, have become increasingly prominent. Through these organizations, "volunteers donate their time and energy to such fields as social service, the arts, parks and recreation, health care, justice, religion, education, agriculture, and politics." Though there is great diversity in the purposes and structures of these organizations, they have common characteristics: they are voluntarily formed, and they depend upon volunteers for the labor and creativity needed to accomplish their goals. Additionally, "nonprofit organizations are not motivated to maximize profits[,]" they avoid private inurement by "refraining from distributing [any] profits to private parties[,]" and "they do not recoup the monetary value of the benefits they produce[.]"

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9. See id.
10. See id. at 19.
11. See Putnam, supra note 7, at 71.
12. See id.
13. See id.
14. Kahn, supra note 1, at 1433.
15. See Hartmann, supra note 1, at 72-73 (quoting testimony of Senator John Melcher at a Senate Hearing on the volunteer Protection Act of 1989, H.R. 911, "This country depends on volunteers to make things work, from town councils, libraries, school boards, fire departments, and hospital boards, to scout troops and little league baseball teams.").
17. Tremper, supra note 1, at 459.
A variety of labels have been applied to this growing segment of our economy, i.e., the independent sector, the third sector, and the voluntary sector. Whatever it is called,

[j]f it were to disappear from our national life, we would be less distinctly American. Its vitality is rooted in good soil—civic pride, compassion, a philanthropic tradition, a strong problem-solving impulse, a sense of individual responsibility and, despite what cynics may say, an irrepressible commitment to the great shared task of improving our life together.

One of the most distinctive and commendable features of our society, volunteerism embodies a profoundly important concept—namely that a good citizen of a decent society has a personal responsibility to serve the needs of others. In that simple age-old proposition lies the essential distinction between a brutalizing society and a caring and responsible one.

Volunteerism’s contribution to American life defies accurate measurement, as does the number of individuals who volunteer their time and services. *Time* and *Newsweek* magazines conducted surveys indicating that more than 80 million Americans are engaged in volunteering. Another nationwide survey said about half of the population renders volunteer services each year.

Encouraging volunteerism and the effective functioning of nonprofit organizations is an essential policy goal for two reasons. First, many individuals derive psychological, social and physical health benefits from the social contract inherent in volunteering. Second, our society needs the services thus provided, some at reduced cost or free of charge to the beneficiaries. A sort of partnership exists between government and nonprofits because of shared missions, and legislatively-mandated programs may be carried out by these groups under government grants or contracts. These organizations fill gaps and meet needs for which no broad base of support exists. In addition, “private nonprofit institutions—because of their strong constituencies and their tradition of independence—are an important check upon the excesses of government and a corrective to some of its worst deficiencies.”

But, no matter how altruistic the intentions of nonprofit organizations

21. See Gardner, supra note 19.
22. Id. at 5.
23. Nielsen, supra note 20, at 8.
25. See Tremper, supra note 1, at 410.
26. See Kahn, supra note 1, at 1436.
27. See generally Tremper, supra note 1.
28. See id. at 408.
31. See Avner Ben-Ner, *Who Benefits From The Nonprofit Sector? Reforming Law And Public Policy*
and their volunteers, their actions may cause harm to others, however inadver- 
tently. Historically, the charitable immunity doctrine protected charitable orga-
nizations from tort liability,32 but “allowed plaintiffs to recover damages from 
volunteers and other employees of those organizations.”33 However, beginning 
with the 1940’s, case law and a few state statutes began to erode the doctrine. 
By 1992, it was virtually abrogated by almost all of the states.34 In the absence 
of the charitable immunity exemption from tort liability, the doctrine of respon-
dead superior applies,35 making nonprofit organizations potentially liable for 
the torts of their volunteers in much of the same manner that employers can be 
vicariously liable for their employees’ actions.36

The imposition of vicarious liability was intended to encourage nonprofits 
to take precautions against causing injuries.37 The blanket immunity of the 
charitable immunity doctrine was considered undesirable in so far as it failed to 
deter risky and harmful behavior and denied compensation to those injured.38 
The increase in well-funded and socially-potent nonprofit organizations helped 
to undercut the public’s support for blanket immunity,39 as did the publicity 
given the wrongdoings of several large nonprofits.40 Because inexpensive lia-
ibility insurance was available,41 it was believed that these organizations could 
procure financial protection for the organization and for its volunteers.

By the 1980’s, several developments fueled nonprofits’ fears about tort 
liability: the general expansion of tort liability42 (including large judgments and 
settlements obtained by plaintiffs in highly publicized cases against nonprofits); 
an increase in personal liability (evidenced by a “marked increase in the number 
of suits against individuals acting for nonprofit organizations”);43 and changes 
in the availability and cost of liability insurance for nonprofits.

Though there has been considerable disagreement as to the causes of the 
so-called “liability insurance crisis,”44 there is agreement that increased rates 
and restricted coverage reduced the ability of nonprofit organizations to obtain 
affordable liability insurance.45 It seems clear that, in addition to other contrib-_
uting factors, the uncertainty of outcomes in the tort system created greater financial risk for nonprofits and insurers and higher rates for liability insurance for nonprofit organizations, their directors and officers, and their volunteers.\textsuperscript{46} Proposed solutions have run the gamut, calling for everything from insurance industry modifications to tort reform at the state level and federal volunteer immunity legislation.\textsuperscript{47}

III. THE THREAT OF TORT LIABILITY

A. In general

The fact is that few nonprofits, and even fewer volunteers, are sued.\textsuperscript{48} A 1988 Gallup survey concluded that “while there is a great deal of concern for the risk of liability, only one in twenty organizations report being sued on a directors and officers liability questions in the past five years.”\textsuperscript{49} Insurance claims experience indicates that losses sustained by nonprofit organizations are below average and that claims against volunteers are rare.\textsuperscript{50} Nonetheless, nonprofit organizations may not be able to absorb the costs incurred by accidental injury, or they may feel it is their duty to expend their donors’ funds for the purposes they intended, not for tort costs.\textsuperscript{51} “Many nonprofit organizations have reported that the threat of complete financial ruin created by the specter of personal liability has dissuaded individuals from contributing their services.”\textsuperscript{52}

It is the uncertainty that worries nonprofits and their directors, officers, and volunteers about their “susceptibility to,” or potential for, exposure.\textsuperscript{53} It’s the uncertainty created by a very few high profile damage awards against nonprofit corporations and their volunteers that cause them to curtail their activities and services rather than expand them for the benefit of their communities. The expense of legal defense, the disruption of services, and the public relations effect of negative publicity from being sued can be enormous, even if neither the organization nor its volunteers are found liable for the damage or injury claimed when they ultimately get their “day in court.”

If the specter of liability really interferes with individual altruistic proclivities and with the scope and variety of services provided by nonprofit corporations, the protections afforded by Oklahoma law bear scrutiny. Currently, the legal climate fails to inspire confidence and encourage the growth of this sector.

\textsuperscript{46} See Symposium, supra note 2, at 405.
\textsuperscript{47} See id. at 399; Kurtz, supra note 1, at 263; Tremper, supra note 1.
\textsuperscript{48} See Kurtz, supra note 1, at 292.
\textsuperscript{49} Id. at 269.
\textsuperscript{50} See Tremper, supra note 1, at 414.
\textsuperscript{51} See Developments, supra note 16, at 1692 ("[N]onprofit organizations may have to avoid activities that have even minimal accident costs, despite the fact that the overall benefits to be gained from such activities might greatly outweigh the harms. . . .") Moreover, requiring nonprofit “organizations to internalize all of their accident costs through full liability will drive them out of business even though they produce a net benefit for society.").
\textsuperscript{52} Developments, supra note 16, at 1692.
\textsuperscript{53} See Tremper, supra note 1, at 412-17.
at a time when nonprofits are being increasingly called upon to augment or replace social services, support education, and provide art and cultural programming in the face of declining government funding. 54

B. Cases

Two recent cases give credence to the concerns expressed by nonprofit organizations and volunteers.


Two volunteers on a Sea Scout outing were found liable for negligent supervision of six teenage Scouts when one was accidentally rendered quadriplegic in a pickup tackle football game with other Scouts. The Boy Scouts obtained summary judgment on a respondeat superior claim because they did not have direct control over the volunteers, and they received a directed verdict on the claim that they failed adequately to instruct the volunteers. 56 The jury found that the volunteers and the plaintiff were contributorily negligent, and awarded $7,032,917 in damages. Oregon has a $500,000 statutory cap on non-economic damages, so the jury award of $2,141,942 in non-economic damages will be reduced accordingly. Because the volunteers were covered under the Boy Scouts' insurance policy, the plaintiff will recover from the Scouts' liability insurer. 57

It is verdicts like this and an earlier one against the Boy Scouts in Albany that have caused organizations that use volunteers to reassess the adequacy of their liability insurance coverage. 58


This case involved a ten-year-old goalie in an organized youth soccer game who was injured by a "homemade" portable soccer goal, weighing 175 pounds, which fell on the plaintiff's face. Liability was attributed to the failure of the soccer club's members to anchor the goal to the ground by means of steel pins when it was moved during practice. The defendant soccer club claimed that the goal would not have overturned if the boy had not been swinging or hanging on it. Further, the club claimed it was impossible to insure that all the goals were properly anchored at all times because the soccer facility was so large.

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54. See Kahn, supra note 1, at 1433.
56. See id. at 139.
57. See id.
58. McMenamin, supra note 24 at 15.
The boy’s face was bruised and lacerated and he experienced dizziness and headaches. He also claimed problems concentrating on his schoolwork as a result of the accident. Despite the fact that the injured boy’s CT scans revealed no brain injuries and that his neurological examinations were normal, the soccer club settled with the boy’s family in the amount of $340,000.60

IV. CONTROLLING TORT LIABILITY

A. Liability insurance

“The possibility of liability deters individuals from volunteering to serve as officers, directors or other workers of exempt or governmental organizations (such as local charities or city commissions).”61 To remedy this, nonprofit organizations often provide directors’ and officers’ liability insurance or other liability insurance to protect its volunteers’ personal assets. Directors and officers (D&O) insurance, or errors and omissions coverage, insures against costs and losses associated with being sued for the actions of board members. Policies make direct payments to covered officers and directors, when they are not protected by the corporate indemnity, and reimburse the organization for any indemnification payments to directors and officers.62

1. Alternatives

The states’ efforts have neither successfully lowered liability insurance costs, nor quieted the fears of would-be volunteers. Immunity from tort liability fails to deter risky or harmful behavior on the part of nonprofit organizations and their volunteers, therefore consequent accident costs are imposed on individual tort victims. These problems point to a need to continue looking for tort solutions. The goals of preserving the deterrence and loss-spreading functions of the tort system, while providing a secure source of recovery for persons who are accidentally injured by the activities of nonprofit organizations, have spawned some creative solutions.

a. “Accident-cost subsidies”63

“Accident-cost subsidies” have been proffered as one means of easing the financial burden on nonprofits of acquiring liability insurance. This scheme purports to “link advantageous tort treatment to an organization’s production of

60. See id.
61. See Lawrence A. Jegen III, Certain Fringe Benefits to Volunteers Are Nontaxable, 37 RES GESTAE 126, 126 (1993) (describing a recent IRS regulation which appears to exclude liability insurance provided to volunteers by exempt or governmental organizations from taxable fringe benefits. “The possibility of the value of those fringe benefits being treated as gross income would be a further deterrent to those who would serve as volunteers.”).
63. Developments, supra note 16, at 1693.
external benefits." This tort solution would differentiate between nonprofits
based upon the extent to which they "gratuitously transfer to others . . . the
value of what they produce." State governments would enable charitable and
philanthropic nonprofits to buy private liability insurance by providing direct
financial grants to the organizations for that purpose, or by underwriting state-
wide nonprofit insurance pools. The extent to which their accident costs are
underwritten would be determined by the degree to which the organizations’
activities provide a benefit to the society. The major problem, admitted by the
author of this proposal, is the practical difficulty of measuring the precise level
of "externalized benefits" produced by nonprofits for the purpose of apportion-
ing accident-cost subsidies to them.

b. Exculpatory agreements

Another proposed solution advocates employing exculpatory agreements,
releases, or waivers, in the form of contracts, to exculpate volunteers of non-
profit corporations from potential tort liability. It has been suggested that these
agreements of express assumptions of risk could be especially useful to reduce
volunteer liability in youth activities that involve some degree of risk for injury.
The proponent is motivated by fear that growing concerns about volunteer tort
liability may create a climate where there "will be no supervised youth activi-
ties and greatly reduced opportunities for meaningful contact with caring
adults." The author’s thesis is “that the supposed benefits of tort liability are
outweighed by the costs, and that such liability is counterproductive when im-
posed on volunteers in organized youth activities.” Exculpatory agreements
entered into by the parents of the young participants would allow recovery for
accidental injuries sustained by their children through first-party health and
disability insurance and government-supported medical care. It is not contem-
plated that these agreements would exculpate intentional injuries. Prevailing
judicial attitudes toward these agreements have generally not been favorable, so
legislative approval in the form of statutory authorization would be necessary to
effectively use these devices to bar tort claims against volunteers and nonprofit
organizations.

B. Statutory protection

Statutory protection basically takes three forms: (1) indemnification; (2)
limited liability or partial immunity for nonprofit organizations; or (3) immunity
from personal liability for volunteers, directors and officers.

64. Id. at 1692.
65. Id.
66. See id. at 1694.
67. Joseph H. King, Jr., Exculpatory Agreements For Volunteers In Youth Activities—The Alternative To
68. Id. at 685.
69. See id. at 749.
70. See id. at 759.
1. Indemnification for individuals

Indemnification provides directors and officers with financial protection against expenses and liabilities incurred in connection with actual or threatened legal proceedings arising as a result of their service to the organization. The provisions generally encompasses the expenses and costs not covered by D&O insurance, including fines, penalties, punitive damage awards, and the cost of investigative matters. The majority of state indemnification statutes are based on the 1969 Model Business Corporation Act. A number of nonprofit indemnification statutes follow the act; others have singular provisions or none at all.\(^{71}\)

Indemnification statutes may be mandatory, providing full protection against a successful director’s defense costs; or permissive, by inclusion in charters or by-laws or by contract. Indemnification may or may not cover third-party or derivative actions.\(^{72}\)

Oklahoma’s indemnification statute\(^{73}\) gives corporations the power to indemnify “officers, directors, employees and agents ... against expenses, including attorneys’ fees, ... in connection with the defense or settlement of” any legal actions that arise “by reason of the fact that he [or she] was a director, officer, employee or agent of the corporation.”\(^{74}\) The provision applies only if the defending party “acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.”\(^{75}\)

The fact remains, however, that these issues would have to be litigated, and in doing so, considerable legal expenses would be incurred. These costs are subject to substantial deductibles, so they are rarely paid in full, and the list of claims not covered has expanded significantly.\(^{76}\) “The real problem facing nonprofits is their lack of resources which make both the risk of ‘going bare’ and the alternatives to insurance unpromising.”\(^{77}\)

2. Liability limitations for nonprofit organizations

In some states, new statutes were enacted to provide some degree of protection to nonprofits, and, in others, case law retains vestiges of old charitable immunity rules. Imposing statutory caps or limits on damages is another way states have limited tort costs for nonprofits.\(^{78}\)

The proposed Charitable Redress System (CRS)\(^{79}\) affords “prompt payment of unreimbursed pecuniary losses to a greater number of injured parties”

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71. See Kurtz, supra note 62, at 469.
72. See id.
74. OKLA. STAT. tit. 18, § 1031(B) (1991).
75. Id.
76. Kurtz, supra note 62, at 481-83.
77. Id. at 486-87.
78. See McMenamin, supra note 24 at 15 (damage caps or limits tend to benefit nonprofit organizations).
79. Tremper, supra note 1, at 404.
than does the tort system. It responds more quickly to the financial needs of an injured person, "reduc[ing] uncertainty in the recovery process and preserv[ing] a larger share of charitable resources for public benefit." This proposal resembles the states’ workers’ compensation systems, relying upon “first-party insurance as the primary mechanism for compensating individuals injured by charitable organizations.” By promptly making a standard form legal offer to pay specified economic losses and settlement costs (extending a CRS offer), many tort claims could be settled under this modified offer of judgment scheme without litigation. The organization, employees, and volunteers would be protected from non-economic losses and further liability to the injured party. Punitive damages would not be available for unintentional injuries.

Implementing the CRS proposal would require the modification of state insurance regulations in order to allow the victim’s insurance to pay first, on a no-fault basis, for its insured’s accident costs and for the organization’s insurer to compensate for those “losses in excess of the victim’s insurance benefits.” Organizations that qualify for inclusion in the CRS would include those that produce public benefits, operate for community betterment, and refrain from private inurement of profits.

Oklahoma’s offer of judgment procedure takes one step in this direction, providing for the shifting of attorney fees and costs after an offer of judgment is made, assuming the offer is rejected and a trial court renders a judgment that is less than the offer previously made.

3. Immunity for volunteers

In 1985, Congress considered, but did not pass, the Volunteer Protection Act. In 1989, President Bush introduced the Model State Volunteer Service Act in his “Points of Light” address. Both acts urged states to pass statutes shielding volunteers from liability. Congressman John Porter (R-Ill.), among other politicians, volunteer rights coalitions, and lobbyists, pressed for this legislation that would immunize volunteers from negligence liability.

Many states have enacted some kind of statutory immunity from personal

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80. Id. at 444.
81. Id. at 445.
82. Id.
83. See id. at 446.
84. See id. at 447.
85. Id. at 451.
86. See id. at 459.
87. See OKLA. STAT. ANN. tit. 12 § 1101.1 (B) (West 1996).
88. See Kurtz, supra note 1, at 270-72 (The Volunteer Protection Act offered an incentive in the form of a 1% increase in Federal Social Services Block Grant funds to the states who adopted legislation that complied with the bill.).
89. See id. at 270.
90. See Developments, supra note 16, at 1686-87; Kurtz, supra note 1, at 270-71 (Both the Model State Volunteer Act and the Volunteer Protection Act proposed a good faith standard for actions within the scope of duties for the nonprofit organization, and excluded willful and wanton misconduct.).
91. See Kurtz, supra note 1, at 269-70.
liability for individuals affiliated with nonprofit corporations. These statutes vary widely in scope and coverage, but discrimination, antitrust, and hazing generally constitute unprotected conduct. Two examples of the diversity of these statutory limitations on liability are found in Kansas and Georgia.

Kansas immunizes volunteers if the nonprofit organization they serve carries general liability insurance coverage, providing there is no willful or wanton misconduct. Neither the state code nor the insurance industry specifies the type or amount of liability insurance required. What is necessary to limit the personal civil liability of its volunteer directors and officers is maintaining "general-liability insurance coverage sufficient to cover the organization's activities." Kansas provides additional safeguards for directors and officers of incorporated nonprofits by allowing the inclusion of indemnification provisions in the articles of incorporation.

Georgia provides "public and private school volunteers with immunity from tort liability . . . for acts or omissions that occur either on school property or at a school-sponsored function" by an enactment that took effect on July 1, 1993.

V. THE STATE OF THE LAW IN OKLAHOMA

A. Personal liability

1. Volunteers

Volunteers can incur personal liability for their own actions, and they can incur vicarious liability for their organizations by virtue of their volunteer work. Most of the questions about individual volunteer liability are answered by the third part of Oklahoma's 1995 Tort Reform Law. The volunteer immunity statute defines three important terms: "volunteer," "charitable organization," and "not-for-profit corporation." A "volunteer" is a person who provides a service or other benefit of the person's "own free will without compensation . . . in money or other thing of value." A "charitable organization" includes groups, associations, "or any other person performing or purporting to perform acts beneficial to the public." A "not-for-profit corporation" is a

92. See Developments, supra note 16, at 1685.
93. See id. at 1686.
95. Engel, supra note 94, at 31.
96. Id. at 32.
99. See McMenamin, supra note 24, at 17.
103. OKLA. STAT. tit. 76, § 31(D)(2) (Supp. 1995).
corporation "formed for a purpose not involving pecuniary gain to its shareholders or members, paying no dividends or other pecuniary remuneration, ... and having no capital stock."  

The statute grants immunity from civil liability to volunteers of charitable organizations and not-for-profit corporations, as long as the volunteers act in good faith, within the scope of their official functions and duties, and do not cause damage or injury by gross negligence or willful and wanton misconduct. The immunity provided does not affect liability arising "from the operation of a motor vehicle, water craft, or aircraft in rendering the service ... as a volunteer." Immunity is not conferred "to any person for actions taken by the volunteer prior to or after the rendering of the service ..."  

Oklahoma’s volunteer immunity statute specifically states, "the doctrine of respondeat superior shall apply." This leaves nonprofits wondering what behavior is likely to be classified as within the scope of official functions and duties of their volunteers. As yet, no cases have been decided in this jurisdiction which would interpret the statute. As such, nonprofit corporations must look to corporate law for its corollary definitions and interpretations. The “scope of employment” inquiry has long been a key factor in determining whether an employer is vicariously liable for the actions of an employee. Though it may be true that "it should not be assumed that all nonprofit corporation problems fit neatly into the business corporate paradigm," nonprofit corporation law has no greater analogous model.

2. Directors and officers

The risk of liability of directors and officers is actually quite remote, but an unfavorable outcome is potentially disastrous due to the lack of material rewards in volunteer service. Under Oklahoma’s director immunity stat-

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105. See Charles W. Adams, Recent Developments In Oklahoma Law—Civil Procedure, 31 TULSA L.J. 753, 763 (1996) ("Since a plaintiff will ordinarily be looking to the employer for compensation, the immunity that the statute confers on the volunteer is unlikely to have any significant effect.").
106. See id.
108. OKLA. STAT. tit. 76, § 31(F) (Supp. 1995).
109. OKLA. STAT. tit. 76, § 31 (B) (Supp. 1995).
110. McMenamin, supra note 24, at 17 ("For some reason, jurors seem prone to find that any volunteer who causes harm to a person is acting in some way for the organization, and this makes the organization liable for the acts of the volunteer.").
111. See Roring v. Hoggard, 326 P.2d 812, 813 (Okla. 1958), quoted in Haco Drilling Co., Inc. v. Burchette, 364 P.2d 674, 677 (Okla. 1961) ("It is not essential to liability by the master that the servant be entitled to compensation for his work at the time of the action causing the damage; it is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied.").
112. See FISCHER & SCHWARZ, supra note 19, at 151.
113. See infra notes 172-83 and accompanying text.
114. McMenamin, supra note 24, at 16 ("Unfortunately, personal liability can be incurred by the board member for such things as unpaid tax withholding, mismanagement and perhaps improper spending of solicited funds ... ").
TORT LIABILITY OF NONPROFIT CORPORATIONS

ute,115 directors and officers are not "personally liable for damages resulting from: "1. any negligent act or omission of an employee . . . ; or 2. any negligent act or omission of another director."116 A director's intentional torts or grossly negligent acts or omissions are not covered.117 Section 867 118 confers immunity from:

monetary damages for breach of fiduciary duty119 as a director, providing that such immunity from liability shall not extend to: 1. any breach of the director's duty of loyalty to the corporation; or 2. any acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law; or 3. any transaction from which the director derived an improper personal benefit.120

Basically, directors and officers incur liability when they breach any of the duties which they owe their organizations by virtue of their positions.121 These duties include: (1) the duty of obedience to the purposes or "mission" of the organization;122 (2) a duty of care to discharge duties in good faith123 "with the necessary diligence and informed decision-making expected of a board of directors,"124 and (3) the duty of loyalty, which prohibits direct distributions to directors and officers and requires close scrutiny of potential conflict of interest transactions.125

B. Vicarious liability

1. The doctrine of respondeat superior

Ascertaining the vicarious liability of nonprofits is a more complicated endeavor. The controlling principle is that the master is liable for torts committed by the servant,126 regardless of the fault of the master.127 Three conditions must be met before liability can be imposed under the doctrine of respon-

116. OKLA. STAT. tit. 18, § 866(A) (1991). See subsection (C) for a further prohibition against the transfer of corporate assets to a director in order to allow the corporation to avoid paying a judgment.
117. See OKLA. STAT. tit. 18, § 866(B) (1991).
119. Id.
120. Id.
121. See Kurtz, supra note 62, at 459-60.
122. See id. (noting that the duty of obedience is predicated upon the belief that donors have a right to rely on an organization's faithfulness to its purpose, the duty of obedience includes an obligation to conduct activities lawfully and to comply with the law).
123. Id. at 3. See also FISCHMAN & SCHWARZ, supra note 19, at 161 ("The business judgment rule provides that directors shall not be liable for harm to the corporation of exercise of their judgment so long as they exercised care. The protection of the business judgment rule will only apply in the absence of fraud, illegality, or a disabling conflict of interest.").
124. Id. at 160 (noting that generally, the business judgment rule provides immunity for judgments that have a plausible basis of rationality, involve no conflict of interests, and are reasonably informed. There is little practical difference from applying a gross negligence standard of conduct.).
125. See Kurtz, supra note 62, at 450-51 (Disclosure of material facts of the proposed transactions and the nature of the conflict is required. The case law superimposes a fairness standard.).
126. See RESTATEMENT (SECOND) OF AGENCY § 219 (1957). See also Kahn, supra note 1, at 1438 n.31.
127. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 501-02 (5th ed. 1984). See also Kahn, supra note 1, at 1438.
deat superior: (1) there must have been an injury caused by the servant’s negligence; (2) there must be a master-servant relationship; and (3) the servant must have been acting within the scope of employment when the injury occurred.\(^{128}\)

The first element must be established before any respondeat superior inquiry becomes relevant. Once legally cognizable harm and causation are determined, an employer is vicariously liable only if the defendant employee was acting within the scope of his or her employment at the time the employee caused harm to the plaintiff.\(^{129}\)

A master-servant relationship also must be shown to exist “at the time and in respect to the very transaction out of which the injury arose”\(^{130}\) before the employer can be vicariously liable.\(^{131}\) In theory, if the employer consents to receiving the employee’s services, expects some benefit from them, and retains the right to control the physical conduct of the employee, it is likely that a valid master-servant relationship will be found to exist.\(^{132}\)

The part of the equation that is hardest to resolve is the issue of right-to-control.\(^{133}\) The court in *Tulsa County v. Braswell*\(^{134}\) restated the holding from *Clark v. First Baptist Church*\(^{135}\) that “[a]lthough several factors may be considered in determining whether an employee-employer relationship exists between two parties the most crucial factor is whether the employer was in possession of the right to control and supervise the employee’s work.”\(^{136}\) In reaching its decision that Tulsa county had the right to control and supervise employees of the county election board, the *Braswell* court found factors pertinent to hiring and supervision determinative. The employees were included in the county’s group health insurance program and retirement system, and were subject to the county’s policies on annual and sick leave accrual. The county also recruited and screened all election board employees. All these were considered methods of controlling the employees.\(^{137}\)

The analysis of right-to-control is fact specific and not clear-cut, as reasonable minds can disagree as to what constitutes control and the degree of control necessary to find it present. The rule stated in *Ries v. Cartwright*\(^{138}\) is

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128. See Kahn, supra note 1, at 1441-43.
129. See id. at 1439-40.
130. See Fairmont Creamery Co. v. Carsten, 55 P.2d 757 (Okla. 1936). See also Ellis & Lewis, Inc. v. Trimble, 57 P.2d 244, 245 (Okla. 1936) (for definitive elements to be considered in determining whether the nature of the relationship between parties is master-servant); Keith v. Mid-Continent Petroleum Corp., 272 P.2d 371, 376 (Okla. 1954).
131. See Kahn, supra note 1, at 1440-42.
132. Robert J. Winter, *Rodebush: Finding the Road to Strict Liability for the Intentional Torts of Employees*, 30 *TULSA L. J.* 375, 393 & n.56 (1994) (“[T]he law has consistently used the employer’s power over the employee as the ultimate justification for liability.”). See also Kahn, supra note 1, at 1440 (noting that the application to the volunteer situation has proven problematic in jurisdictions which have analyzed it).
134. 766 P.2d 341 (Okla. 1988).
137. See id. at 343.
"[w]here the evidence is conflicting or where reasonable men may differ in conclusions therefrom, the issue of master and servant or of principal and agent is one of fact for determination by the jury."139

2. The scope of employment

The difficulty lies in determining whether an employee’s tortuous actions fall within the scope of employment necessary to support a claim under respondeat superior. The court in Nelson v. Pollay140 stated that “[u]nder the doctrine of respondeat superior a principal or employer is generally held liable for those acts of an agent or employee which fall within the latter’s employment or authority. This rule rests on the premise that, when exercising delegated authority, the employee stands under the complete control of the employer.”141

Since Ada-Konawa Bridge Co. v. Cargo142 was decided in 1932, Oklahoma case law has deemed an employee’s actions to be within the scope of employment if the “acts are incidental to and in furtherance of the business of the employer.”143 Nail v. City of Henryetta144 held that “one acts within the scope of employment if engaged in work assigned, or if doing that which is proper, necessary and usual to accomplish the work assigned, or doing that which is customary within the particular trade or business.”145 The court in Mistletoe Express v. Culp147 also “observed that in order for an employer to be responsible for the tortuous acts of its employee, it must be shown that the act giving rise to the complaint ‘was done for the purpose of doing the work assigned.’”148 Additionally, the court in Fairmont Creamery Co. v. Carsten149 insisted that “competent evidence” be presented to support “not only that the relation of principal and agent existed but that the tortuous act was committed in the course of the employment.”150

In 1995, the court in Skinner v. Braums151 reiterated what has long been considered a limit on the scope of employment:

139. Id.
140. 916 P.2d 1369 (Okla. 1996).
142. 21 P.2d 1 (Okla. 1932).
143. Winter, supra note 132, at 386.
144. See id. at 386 n.85.
145. 911 P.2d 914 (Okla. 1995).
146. Id. at 917. See also Roring, 326 P.2d at 812; Brayton v. Carter, 163 P.2d 960, 962 (Okla. 1945); Retail Merchants Assoc. v. Peterman, 99 P.2d 130, 131-132 (Okla. 1940).
148. Id. at 16.
149. 55 P.2d 757 (Okla. 1936).
150. Id. See also Crews v. Garber, 73 P.2d 855 (Okla. 1937); Hill v. McQueen, 230 P.2d 483 (Okla. 1951); Allison v. Gilmore, Gardner, & Kirk, Inc., 350 P.2d 287, 292 (Okla. 1960) (where the court held “[w]e are impelled to conclude that there was nothing connected with the employment of the truck driver, King, whose duties were to drive the truck of the defendant and deliver gasoline, that would warrant his fighting with plaintiff and did not come within the scope of his employment”).
[1]Under the ‘going and coming’ rule, an employee going to and from work is ordinarily considered outside the scope of employment and the employer is not liable for his/her torts. The rule is ascribed to the theory that the employment relationship is suspended from the time the employee leaves until he or she returns. During the commute, it is assumed that the “employee does not render a service to the employer.”

Also, the *Mistletoe* court reiterated the rule that “scope of employment must be considered on an individual basis.” In *Empire Oil & Ref. Co. v. Fields*, the court stated that scope of employment was a question to be determined by the jury.

3. Intentional torts

The doctrine of respondeat superior was expanded to encompass liability for intentional torts committed by employees as early as 1932, with the *Ada-Konawa* decision. The employer in that case was held liable when his employee, a toll collector, intentionally shot the plaintiff for failure to pay the toll to cross the bridge. The Court reasoned that it was the duty of the toll collector to prevent use of the bridge without payment of the toll, thus, the shooting was committed in the course of employment. In contrast, in *Jackson v. Remington Park, Inc.*, the appellate court found no vicarious liability for the defendant racetrack and no liability for negligent hiring or retaining of the farrier who assaulted another in a dispute over a personal debt owed by the victim. Despite the fact that the incident occurred at the employee’s worksite, the racetrack had no actual knowledge that the farrier had any “dangerous quality,” and the motive for the assault was purely personal.

In 1993, in *Rodebush v. Oklahoma Nursing Homes*, the Oklahoma Supreme Court upheld a finding of vicarious liability against a nursing home when a nurse aide slapped a patient who became combative while being bathed. The employee’s actions were held to be within the scope of emp-

152. *Id.* at 924 n.7. See also *Anderson v. Falcon Drilling Co.*, 695 P.2d 521, 524 (Okla. 1985); *Haco Drilling Co. v. Burchette*, 364 P.2d 674, 677 (Okla. 1961) (recognizing the *Elias* rule “that a man’s employment does not begin until he has reached the place of his employment, and does not continue after he has gone”).

153. *Id.* at 15.

154. 73 P.2d 164, 167 (Okla. 1937).

155. See *id.* See also *Skinner*, 890 P.2d at 922 (where the court held that “issues of fact as to whether employer instructed employee to obtain supplies on her way to work precluded summary judgment as to whether employee was acting within scope of employment at time of accident”); *Nail*, 911 P.2d at 915 (where the court held that “the question of whether the police officer was acting within the scope of his employment when the appellee was injured is an issue for jury determination”).


157. See *id.* at 7.


159. See *id.* at 816-17.

160. See *id.*

161. 867 P.2d 1241 (Okla. 1993).

162. See *id.* at 1243.
ployment and incidental to his occupation as a nurse aide. In that case, the court acknowledged the general rule from *Hill v. McQueen* that "it is not within the scope of an employee's employment to commit an assault upon a third person," and that "scope of employment must be considered on an individual basis." The court went on to state:

However, this general rule does not apply when the act is one which is fairly and naturally incidental to the business, . . . [and is done] while the servant was engaged upon the master's business[,] although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business.

The court continued, further stating that "[a]n employee's act is within the scope of employment if it is incident to some service being performed for the employer or arises out of an emotional response to actions being taken for the employer."

The court relied on the following facts in finding vicarious liability: the plaintiff patient "was known to be particularly combative when being bathed[]" the aide "was carrying out an assigned task when the slapping occurred[]" and the aide apparently received inadequate training from his employer.

The decision has been criticized because the court's analysis failed to consider, explicitly, whether the nature of the employment at issue was likely to require the use of force and whether the employee's tortuous actions were reasonably foreseeable by the employer. If, as has been suggested, the *Rodebush* decision is construed to mean that reasonable foreseeability is not a prerequisite to finding an employer liable for an employee's actions, then the scope of employment inquiry may, in the future, focus predominantly on where and when the injury occurred.

**C. Translation from corporate to nonprofit law**

If nonprofit law is to follow corporate case law, two issues must be addressed. Volunteers differ from employees in two important ways: Volunteers are not compensated, and nonprofits may not exercise the same degree of control over volunteers as employers exert over their paid employees.

There is case law that addresses the issue of whether vicarious liability attaches when the servant was not entitled to compensation for work done at the

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163. See id. at 1246.
164. 230 P.2d 483 (Okla. 1951).
166. Id.
167. Id.
168. Id. at 1246.
169. Id.
170. For an analysis of *Rodebush*, see Winter, supra note 132, at 389-393.
171. Id.
172. Id.
time of the act causing injury. For example, the *Roring* court stated in its third syllabus:

It is not essential to liability by the master that the servant be entitled to compensation for the work at the time of the action causing the damage; it is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied.\textsuperscript{173}

The right to control issue\textsuperscript{174} with regard to volunteers has been dealt with in other jurisdictions.\textsuperscript{175} It is usually found to exist in the “nature of the agreement between the volunteer and the organization”\textsuperscript{176} and where the organization gives specific instructions to its volunteers.\textsuperscript{177}

Since Oklahoma’s Volunteer Immunity Statute\textsuperscript{178} makes it clear that vicarious liability under respondeat superior applies to nonprofit corporations and charitable organizations for the actions of their volunteers, it is expected that these two issues will not act to bar recovery for parties injured by volunteers.

In summary, a nonprofit corporation faces liability in tort for the negligence of its volunteers, provided that their “acts are incidental to and in furtherance of” the organization’s “business.”\textsuperscript{179} The “going and coming” rule precludes liability for actions occurring while traveling to and from the worksite,\textsuperscript{180} unless the individual is instructed or expected to do errands for the organization while en route.\textsuperscript{181} Liability for intentional torts attaches if the act giving rise to the complaint “was done for the purpose of doing the work assigned.”\textsuperscript{182} After the *Rodebush* decision, it is unclear to what extent the behavior of the individual must be reasonably foreseeable to the organization.\textsuperscript{183}

\textsuperscript{173} *Roring*, 326 P.2d at 812.
\textsuperscript{174} See *supra* text and accompanying notes 132-39.
\textsuperscript{176} *Kahn*, *supra* note 1, at 1440 n. 46 The Restatement (Second) of Agency states that “[o]ne who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services. . . .” This statement has been relied on extensively by courts in finding a master-servant relationship when there is no salary or other payment to the servant. *RESTATMENT (SECOND) OF AGENCY* § 255 (1957).
\textsuperscript{177} See *Kahn*, *supra* note 1, at 1441 n. 49. See, e.g., *Trinity*, 451 N.E.2d at 1102-03 (when an organization directs the way in which a volunteer performs a task, even if the volunteer does not assent, the right to control may be established by the volunteer actually following the proffered instructions); *Manor v. Hanson*, 356 N.W.2d 925, 926 (Wisc. Ct. App. 1984) (organization found to be master of volunteer driver even though it had never met with the driver after the initial orientation and had not control over the volunteer’s schedule).
\textsuperscript{178} OKLA. STAT. tit. 76, § 31 (Supp. 1995).
\textsuperscript{179} *Ada*, 21 P.2d at 7.
\textsuperscript{180} See *Elias*, 302 P.2d at 126.
\textsuperscript{181} See *Haco*, 364 P.2d at 677.
\textsuperscript{182} *Rodebush*, 867 P.2d at 1246.
\textsuperscript{183} See *Winter*, *supra* note 132.
TORT LIABILITY OF NONPROFIT CORPORATIONS

D. Tort reform

Tort reforms enacted by Oklahoma’s forty-fifth legislature address the issues of vicarious and personal liability of volunteers and nonprofits, as well as providing new caps on punitive damages and a new offer of judgment procedure. These changes went into effect August 25, 1995, but as no cases have been decided since then, it is impossible to predict accurately how they will be interpreted by the Oklahoma courts. To date, the Oklahoma judiciary has not been called upon to decide the issue of vicarious liability with regard to volunteers and nonprofits. In fact, little case law exists in any jurisdiction regarding this issue or the application of statutory immunity to volunteers.

1. Offer of judgment

Oklahoma’s 1995 Tort Reform Law also codified a new offer of judgment procedure. If a nonprofit is sued for personal injury or wrongful death and makes an offer to settle, a rejection potentially incurs consequences for the plaintiff. Even if he or she prevails at trial, unless awarded more than the settlement offer, the plaintiff will be subject to paying the defendant corporation’s attorney fees and litigation costs incurred after the settlement offer was made. The new procedure differs from the section it supersedes in that it authorizes recovery of attorney fees and costs. Likewise, rejection of a counteroffer made by the plaintiff may shift the plaintiff’s costs to the defendant. This type of procedure has also been called a “loser pays” provision.

Oklahoma’s version has come under criticism from the 1995 Chair of the Civil Procedure Committee of the Oklahoma Bar Association, to wit,

If an offer of judgment procedure was intended to weed out frivolous tort cases, it is apparent that it will not succeed, because the procedure will apply only if the defendant makes an offer of judgment for more than $100,000. Obviously, no defendant would offer $100,000 to settle a frivolous case.

It remains to be seen how much this new offer of judgment provision will be used. The previous procedure in section 1101 does not appear to have been used a great deal, judging by the small number of reported decisions listed under the section in the Oklahoma Statutes Annotated. The availability of attorney fees may increase the use of the offer of judgment procedure somewhat,
but other states with similar procedures, such as Florida, Indiana, and Nevada, did not see a deluge of offers of judgment after their statutes were adopted.\textsuperscript{194}

2. Punitive damages

Punitive damages have been traditionally allowable for conduct that rises to the level of gross negligence or willful and wanton disregard for the rights of others. Oklahoma's 1995 Tort Reform Law\textsuperscript{195} creates a three-tier system for punitive damages.\textsuperscript{196} The punitive damages statutory change imposes a higher evidentiary standard in personal injury cases, allowing a "clear and convincing" standard to replace the former "preponderance of the evidence" standard. It caps punitive damages based on the degree of culpability of the defendant's behavior. For actions found to be in "reckless disregard," punitive damages are capped at "$100,000 or the amount of actual damages, whichever is greater." If the jury finds the defendant acted intentionally and with malice, the punitive damages awarded cannot exceed "$500,000, twice the amount of the actual damages awarded, or the amount of the financial benefit to the defendant, whichever is greater." And, if the judge also makes a finding, "beyond a reasonable doubt, that a defendant acted intentionally and with malice in conduct that was life-threatening," there is no cap.\textsuperscript{197}

"In some ways, the new statute is more restrictive with respect to punitive damages than the prior statute, but punitive damages may also be greater in many circumstances under the new statute than they would have been under the prior statute."\textsuperscript{198} The punitive damage statute has been criticized out of concern that it will have a "chilling effect on people with legitimate complaints and discourage them from seeking justice in the courts, for fear they will be stuck with legal costs they cannot pay."\textsuperscript{199}

VI. RECOMMENDATIONS FOR NONPROFITS

A. Volunteers

Volunteers are the workforce of nonprofit corporations, and it seems everyone benefits from the nonprofit-volunteer relationship. But its equally true that volunteers can be a source of exposure to tort liability. The actions of volunteers can harm people, completely unintentionally, and the corporation may very well have to pay for the consequences. Hence, if nonprofit corporations are to be held liable under the control theory, they should develop the degree of control over their volunteers that the law presumes to exist.\textsuperscript{200}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{194} \textit{Id.} at 758.
\item \textsuperscript{195} 1995 Okla. Sess. Laws 287.
\item \textsuperscript{196} See OKLA. STAT. tit. 23, § 9.1 (Supp. 1995).
\item \textsuperscript{197} See Ervin, supra note 191.
\item \textsuperscript{198} See Adams, supra note 105, at 761.
\item \textsuperscript{199} \textit{Id.} at 761. See also Ervin, supra note 191 ("Senator Gene Stipe said the bill primarily is designed to protect big corporations who kill innocent people because of wanton disregard for their safety.").
\item \textsuperscript{200} See Kahn, supra note 1, at 1443 & n.64.
\end{enumerate}
\end{footnotesize}
Efforts to exercise effective control over the actions of volunteers start with a clear written statement of the organization’s mission and purposes and a job description for each duty and for each individual volunteer. Defining and committing these to writing defines the “scope of the official functions and duties of a volunteer” and makes clear both parties’ expectations. Policy and procedure manuals should be available, clear, and up-to-date at all times.

"[T]he non-profit organization can be held liable for improper selection, assignment, training and supervision of volunteers. The greatest area of liability concerns the failure to act upon notice of some wrongdoing or inadequacy of a volunteer." The temperament, education and skills, as well as the criminal background of each volunteer bears investigation. Nonprofits have a duty to exercise care in managing their volunteers, particularly when they will interact with the public. Proper training is an important step toward assuring safe activities, controlling the volunteer’s actions, and predicting his or her behavior. Supervising volunteers may be more problematic than supervising compensated employees because of the reduced impact of the threat of termination, the lack of the “gratitude factor” of compensated employees, and the variability of volunteers’ time schedules and work sites. Nonetheless, the doctrine of respondeat superior, which imposes liability on nonprofits for the actions of their volunteers, turns on whether the volunteer was acting in the “scope” of his or her role at the time of injury and the organizations’ duty of care with regard to its exercise of authority over its “servants.”

B. Directors and Officers

Directors and officers provide leadership to nonprofit organizations for a variety of personal and altruistic reasons. The service of competent and energetic people is invaluable to these organizations, and must be encouraged. But public-minded service carries with it legal obligations to be accountable to the community for the risks created by the activities engaged in and to the organization to maximize the productivity of limited resources and to minimize the associated risks and costs. The interests of providing public benefits and protecting the safety and well-being of the beneficiaries of an organization’s activities must be balanced by the board of directors and its officers.

As a means of relieving the “potential legal liabilities that board members fear,” it has been suggested that nonprofit corporations adopt a bifurcated board of directors: A board of director-managers responsible for day-to-day management and a board of advisors to supervise and oversee the management

201. See McMenamin, supra note 24, at 17-18.
202. Id. at 18.
203. Id.
204. See Kahn, supra note 1, at 1445.
205. See Fishman & Schwarz, supra note 19, at 151.
board.\textsuperscript{207} This approach places the advisory board in a better position to provide oversight to ensure that public responsibilities are met, to anticipate future problems more readily, and to focus on long range goals and planning. The managing board, the kind most commonly in place in nonprofits today, is left with a more manageable workload, allowing more efficient and effective use of the limited time and energy resources of volunteer directors and officers upon whom nonprofits depend for their on-going management.

Members of boards of directors must exercise reasonable diligence and care in carrying out their duties for the nonprofit organizations they serve. The test of whether their efforts are adequate turns on their acting in good faith. In order to perform their duties in good faith, using the appropriate standard of care, directors and officers should make efforts to stay informed about their organization's activities by conscientiously attending meetings and by learning and understanding their duties as leaders of their organizations. When they disagree with board decisions and actions, they should speak out and register their dissent to avoid incurring personal liability for those acts. It is the responsibility of each board member to avoid self-dealing, to know and obey relevant statutes, and to seek and rely on legal counsel.\textsuperscript{208}

\section*{VII. Conclusion}

Nonprofit corporations and the volunteers engaged in their service are vital to Oklahomans and to all Americans. The threat of tort liability exposure impinges on the organizations' viability and impedes the altruistic expression of millions of volunteers in this country. Recent tort reform efforts in Oklahoma clarified the issue for volunteers by granting them immunity from personal liability as long as they act in good faith, within the scope of their official functions and duties, and do not cause damage or injury by gross negligence or willful and wanton misconduct.\textsuperscript{209} Uncompensated members of the boards of directors of these organizations enjoy similar protection from liability, both for their own actions and for the actions of employees and other directors of the nonprofit corporation.

Respondeat superior is specifically invoked by Oklahoma’s Volunteer Immunity Statute.\textsuperscript{210} Thus, the corporation itself bears the brunt of responsibility for those who act for it on a voluntary basis, at least until the courts decide otherwise. As a result, volunteers can breathe easier as they engage in volunteer activities of their choosing. However, nonprofit corporations have to wonder about the scope of their vicarious liability and the extent of potential tort liability costs in the future.

\textit{Brenda Kimery}

\begin{footnotes}
\footnote{207. \textit{See id.} at 679.}
\footnote{208. \textit{See Engel, supra} note 94, at 29-30.}
\footnote{209. \textit{See OKLA. STAT. tit. 76, § 31} (Supp. 1995).}
\footnote{210. \textit{See id.}}
\end{footnotes}