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10 Association and Bradley Brauer

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 RICHARD GAYER, an individual,  
14 Plaintiff,

15 vs.

16 WILLO NEIGHBORHOOD  
17 ASSOCIATION, a nonprofit corporation,  
18 and BRADLEY BRAUER, President,  
19 Defendants.

No. CV2008-029900

**DEFENDANTS WILLO  
NEIGHBORHOOD ASSOCIATION  
AND BRADLEY BRAUER'S RULE  
12(b)(6) MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT**

**Oral Argument Requested**

(Assigned to the Honorable Craig A.  
Blakey, II)

20 Pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure, Defendants  
21 Willo Neighborhood Association (“the Association”) and Bradley Brauer, by and through  
22 their undersigned counsel, ask this Court to dismiss Plaintiff’s Complaint in its entirety  
23 on the basis that Plaintiff’s Complaint fails to state a claim upon which relief can be  
24 granted. This Motion is supported by the following Memorandum of Points and  
25 Authorities.

26 **I. FACTS FROM PLAINTIFF’S COMPLAINT.**

A motion to dismiss for failure to state a claim attacks the legal sufficiency of the Complaint while assuming all of its allegations as true. *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 519, 591 P.2d 1005, 1007 (App. 1979). As set forth in the Complaint, Plaintiff has sued Defendants for declaratory relief that a vote amending the

1 Association's By-Laws violated A.R.S. §10-3722 and 10-11023(A) and, accordingly,  
2 Plaintiff asks this Court to enjoin the Association from recognizing the amended By-  
3 Laws as valid by setting aside the vote.

4 The Association is a non-profit corporation whose purpose is to promote  
5 and support the Willo Neighborhood Conservation Plan (the Willo historic  
6 neighborhood).<sup>1</sup> Bradley Brauer is the Association's President.

7 **II. PLAINTIFF CANNOT MAINTAIN A CLAIM AGAINST DEFENDANT BRAUER.**

8 **A. Plaintiff has No Legal Basis to Sue Defendant Brauer as an Individual.**

9 Plaintiff has sued Defendant Brauer individually in his capacity as  
10 President of the Association.<sup>2</sup> However, Plaintiff has stated no legal basis for suing this  
11 Defendant individually and has made no allegations or claims for relief against Defendant  
12 Brauer, nor can he. All requested relief pertains to the corporation and not this individual  
13 Defendant.

14 **B. Defendant Brauer is Exempt from Liability Pursuant to the Volunteer**  
15 **Protection Act of 1997.**

16 Furthermore, as a volunteer of the Association, Defendant Brauer is exempt  
17 from liability under the Volunteer Protection Act of 1997 ("the Act"), 42 U.S.C.A.  
18 §14501 *et seq.* (copy attached). Congress enacted this legislation to encourage volunteer  
19 participation in nonprofit organizations by protecting volunteers from liability. §14501.

20 Under §14503(a) of the Act, a volunteer of a nonprofit organization is not  
21 liable for any harm caused by an act or omission if 1) the volunteer was acting within the  
22 scope of the volunteer's responsibility, 2) the volunteer was licensed, certified, or  
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24 <sup>1</sup> The Association is not a homeowner's, condominium, or planned community association.

25 <sup>2</sup> Technically, Bradley Brauer was not the President of the Association at the time of the vote,  
26 which occurred at the June 12, 2008, membership meeting. Then-President Robert Cannon stepped down  
as President at the end of that meeting and Mr. Brauer became President of the Association the following  
day, June 13, 2008.

1 authorized by appropriate authorities where applicable, 3) the harm was not caused by  
2 willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious,  
3 flagrant indifference to the rights of the person allegedly harmed, and 4) the harm was not  
4 caused by the volunteer operating a motor vehicle or other type of vehicle.

5 As to subsection (a)(1) of the Act, Plaintiff's claims against Defendant  
6 Brauer relate to his alleged actions or omissions committed on behalf of the Association  
7 as a volunteer acting within the scope of his responsibility as the Association's President.  
8 As to subsection (a)(3), Plaintiff has not pled that Defendant Brauer acted with willful or  
9 criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant  
10 indifference to his rights. Finally, subsections (a)(2) and (4) are inapplicable to this case.  
11 Subsection (a)(2) pertains to licensing or certification of volunteers and subsection (a)(4)  
12 pertains to harm occurring while a volunteer was operating a vehicle. Plaintiff has made  
13 no allegations that would fall under either of these two subsections.

14 Further, Arizona has its own statutes protecting volunteers, which are found  
15 at A.R.S. §§12-981 to -982.<sup>3</sup> Under Arizona's statutes, a volunteer is immune from civil  
16 liability in any action based upon that volunteer's act or omissions resulting in damage or  
17 injury if (1) the volunteer acted in good faith and within the scope of his official functions  
18 and duties or (2) the damage or injury was not caused by willful, wanton, or grossly  
19 negligent misconduct. Plaintiff has made no allegations that Defendant Brauer has  
20 caused any damage or injury by acting outside the scope of his official functions or duties  
21

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22  
23 <sup>3</sup>Arizona's statutes protecting volunteers are arguably inapplicable. First, the statutes are found  
24 under Chapter 7 of Title 12, which deals with "Special Actions and Proceedings in Which the State is a  
25 Party." Clearly, the State is not a party to this action. Additionally, even assuming the Arizona statutes  
26 apply to Arizona volunteers generally, the federal law preempts Arizona law to the extent Arizona law is  
inconsistent with, or less restrictive than, the federal law. 42 U.S.C.A. §14502(a). Under the federal law,  
a state may enact additional liability protections to volunteers, but may not limit their protection. *Id.*  
Thus, the expanded protection found in the federal legislation applies to volunteers in the State of  
Arizona.

1 or while engaged in willful, wanton, or grossly negligent misconduct. Thus, to the extent  
2 it applies, Defendant Brauer is also immune from civil liability under Arizona law.

3 Based on Arizona and/or federal law, Defendant Brauer cannot be liable in  
4 his individual capacity and Plaintiff has stated no legal basis to sue Defendant Brauer  
5 individually. Accordingly, Plaintiff's Complaint against Defendant Brauer should be  
6 dismissed in its entirety.

7 **III. PLAINTIFF CANNOT MAINTAIN THIS ACTION AGAINST THE ASSOCIATION,  
8 WHICH MUST BE BROUGHT BY A MINIMUM OF 10% OF THE MEMBERSHIP OR 50  
MEMBERS.**

9 Plaintiff has sued the Association to set aside its act of amending its By-  
10 Laws pursuant to a membership vote. Because Plaintiff is challenging the Association's  
11 power to act in the manner in which it did, Plaintiff's lawsuit is controlled by A.R.S. §10-  
12 3304, which governs the validity of actions against non-profit corporations.

13 Under §10-3304(B)(1), actions brought by members of a non-profit  
14 corporation that challenge the corporation's power to act in a certain manner must be  
15 brought by at least ten percent (10%) of the voting power or by at least fifty (50)  
16 members, unless a lesser percentage is provided in the articles of incorporation. Here,  
17 taking Plaintiff's allegations as true with regard to the number of members in the  
18 Association (numbers the Association disputes), the Association would have had  
19 potentially 2,700 members under the prior version of its By-Laws. Thus, a challenge to  
20 the Association's act requires either 10% of that number – 270 members – or, at the very  
21 least, 50 members.

22 In any event, Plaintiff is the only member of the Association who is suing,  
23 which does not constitute 10% of the number of members nor does it constitute 50  
24 members. Because Plaintiff has no legal basis to sue the Association to enjoin or set  
25 aside its Act of conducting the vote to amend the By-Laws or recognizing the vote as  
26

1 valid, this Court should dismiss Plaintiff's Complaint against the Association and  
2 Defendant Brauer in its entirety.

3 **IV. PLAINTIFF HAS FAILED TO STATE A CLAIM AGAINST THE ASSOCIATION**  
4 **BECAUSE THE ASSOCIATION HAS NOT VIOLATED ANY STATUTE.**

5 Plaintiff claims that the Association violated A.R.S. §§10-3722 and 10-  
6 11023(A) by permitting the By-Laws to be amended by 143 votes of the membership.  
7 However, the Association violated neither statute.

8 **A. A.R.S. §10-3722 Allows Corporations to Define their Quorum and**  
9 **Voting Requirements.**

10 Section 10-3722 provides as follows (emphasis added):

11 Unless chapters 24 through 40 of this title [Sections 10-3101  
12 et seq. through 10-31701 et seq.] or the articles of  
13 incorporation provide for a higher or lower quorum the  
14 bylaws may provide the number or percentage of members  
15 entitled to vote, present or represented by proxy, or the  
16 number or percentage of votes entitled to be cast by  
17 members present or represented by proxy, that shall  
18 constitute a quorum at a meeting of members. In the  
19 absence of that provision, members, present or represented  
20 by proxy, holding one-tenth of the votes entitled to be case,  
21 shall constitute a quorum.

22 Thus, the requirement that a corporation must have 10% of its voters to  
23 constitute a quorum only comes into play if the articles of incorporation or the by-laws do  
24 not control the quorum and voting requirements.

25 **B. The Association's By-Laws Set the Association's Quorum and Voting**  
26 **Requirements.**

Here, the Association's By-Laws provided the number of members required  
for a quorum and the number or percentage of members entitled to vote. The applicable  
section of the Association's By-Laws in effect at the time of the vote provided as follows  
(emphasis added):

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Article II. Membership.

Section 4. Quorum, Voting and Proxies at Meetings of the Membership.

At any regular or special meeting of the Membership, a quorum shall consist of the Members present. On matters other than the election of the Board of Directors, voting shall be determined by a majority vote of the Members present. Each Member shall have one vote, and there shall be neither voting by proxy nor cumulative voting.

Thus, as stated in the Association's By-Laws that were in effect on the date of the vote, a quorum consisted of the number of members present and the result of the vote was determined by a majority vote of those members. Plaintiff never alleges that the Association violated this provision – rather, he alleges, without merit, that the Association was somehow required to have at least 10% of 2,700 alleged members to constitute a quorum. However, no such quorum requirement existed because, on the date of the vote, the Association's By-Laws provided for a lower quorum and voting requirement.

C. **The Association Met the Requirements of A.R.S. §10-11023.**

Plaintiff's argument that the Association violated A.R.S. §10-11023 is equally unavailing. Section 10-11023 governs the process under which a non-profit corporation may make changes to its quorum or voting requirements, and states in pertinent part (emphasis added):

The adoption or amendment of a bylaw that adds, changes or deletes a greater quorum or voting requirement for members shall meet the same quorum requirement and shall be adopted by the same vote and classes of members required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

Here, the quorum and voting requirements "then in effect" were a quorum of members present and a majority vote of the members present. (See By-Law's Article II, Section 4, Quorum, Voting and Proxies at Meetings of the Membership, set forth

1 above.) The “proposed” quorum and voting requirements were a quorum of ten percent  
2 (10%) of all members and a majority vote of the members present.<sup>4</sup>

3 Plaintiff has made no allegation that the Association failed to meet the  
4 greater of these two requirements. Rather, Plaintiff attempts to impose a third standard –  
5 ten percent (10%) of what Plaintiff alleges to be “2700 persons of voting age” living  
6 within what Plaintiff calls the Association’s “Service Area.” This has never been a  
7 standard under the Association’s By-Laws, nor is it a standard imposed by Arizona law.

8 Accordingly, Plaintiff’s claim fails to state a claim upon which relief can be  
9 granted.

10 **V. DEFENDANTS ARE ENTITLED TO RECOVER THEIR ATTORNEYS’ FEES AND**  
11 **COSTS FROM PLAINTIFF.**

12 This is the third lawsuit<sup>5</sup> that Plaintiff has pursued against the Willo  
13 Neighborhood Association and/or one or more of its officers or members. In June 2006,  
14 Plaintiff sued the Association, its then-President, and its then-Custodian of Records,  
15 alleging violations of Arizona statutes, the Association’s By-Laws, and Arizona common  
16 law based on the Association’s refusal to provide Plaintiff with copies of alleged ballots  
17 pertaining to a street-improvement project. See Maricopa County Superior Court Cause

18 \_\_\_\_\_  
19 <sup>4</sup> The applicable By-Laws provision, as amended June 12, 2008, states:

20 Article II. Membership.

21 Section 4. Quorum, Voting and Proxies at Meetings of the Membership

22 At any regular or special meeting of the Membership, a quorum shall consist of  
23 ten percent (10%) of all of the members. On matters other than the election of  
24 the Board of Directors, voting shall be determined by a majority vote of the  
25 members present. Each member shall have one vote, and there shall be neither  
26 voting by proxy nor cumulative voting. Members not voting at the meeting may  
vote by absentee ballot, as set forth in Article III, Section 9 of the By-Laws.

<sup>5</sup> In June 2007, Plaintiff brought a fourth lawsuit against former Board-Member Jeanne Lindsay,  
which was ultimately dismissed due to Plaintiff’s lack of service. See Maricopa County Superior Court  
Cause No. CV2007-010856.

1 No. CV2006-009197. In that case, Defendants were successful in obtaining a complete  
2 dismissal of Plaintiff's Complaint and this Court awarded Defendants their attorneys'  
3 fees. Plaintiff appealed to the Arizona Court of Appeals, which affirmed the trial court's  
4 dismissal of the case and awarded Defendants their attorneys' fees and costs incurred on  
5 appeal. Plaintiff thereafter filed a Petition for Review to the Arizona Supreme Court,  
6 which that Court denied.

7 In January 2007, Plaintiff sued then Board-Member Michael Carter for  
8 slander. See Maricopa County Superior Court Cause No. CV2007-000544. In that case,  
9 Defendant obtained summary judgment against Plaintiff.

10 Plaintiff has again brought an unwarranted lawsuit against the Association  
11 and its current President Bradley Brauer. Under A.R.S. §12-349, this Court shall assess  
12 reasonable attorneys' fees and expenses against a party who brings a claim without  
13 substantial justification (*i.e.*, a claim that constitutes harassment, is groundless, and is not  
14 made in good faith) or is brought primarily for harassment. Similarly, pursuant to §12-  
15 314.01, this Court shall award reasonable attorneys' fees in any contested action upon  
16 clear and convincing evidence that the claim constitutes harassment, is groundless, and is  
17 not made in good faith. Finally, §12-341 provides that the successful party to a civil  
18 action shall recover from his adversary all costs incurred.

19 Based upon Plaintiff's baseless allegations in this case, and as evidenced by  
20 Plaintiff's baseless allegations made against the Willo Neighborhood Association and its  
21 leaders in past cases, Defendants ask this Court to find that Plaintiff's case was brought  
22 without substantial justification in that it constitutes harassment, is groundless, and is not  
23 made in good faith, or was brought primarily for harassment, and to award them their  
24 attorneys' fees and costs incurred pursuant to §§12-12.341.01 and/or -12-349. Further,  
25 Defendants seek their costs under §12-341.

26

1 VI. CONCLUSION

2 Based on the above, Defendants ask this Court to dismiss Plaintiff's claims  
3 in their entirety against Defendant Bradley Brauer and the Willo Neighborhood  
4 Association. Further, Defendants ask this Court to award Defendants their attorneys' fees  
5 and costs incurred pursuant to A.R.S. §§12-314, 12-341.01, and/or 12-349.

6 Dated this 13<sup>th</sup> day of March, 2009.

7 SCHNEIDER & ONOFRY, P.C.

8  
9 By Luane Rosen  
10 Jon D. Schneider  
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14 Attorneys for Defendants Willo  
15 Neighborhood Association and Bradley  
16 Brauer

17 COPY of the foregoing delivered this  
18 13<sup>th</sup> day of March, 2009, to:

19 The Honorable Craig A. Blakey, II  
20 Maricopa County Superior Court  
21 201 W. Jefferson  
22 Phoenix, AZ 85003-2205

23 COPY mailed this same date to:

24 Richard Gayer  
25 526 W. Wilshire Drive  
26 Phoenix, AZ 85003  
Plaintiff, Pro per

By Janet Kuchte

**C**

Effective: [See Notes]

United States Code Annotated Currentness  
Title 42. The Public Health and Welfare  
Chapter 139. Volunteer Protection

→ § 14501. Findings and purpose

(a) Findings

The Congress finds and declares that--

- (1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;
- (2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;
- (3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;
- (4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;
- (5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;
- (6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and
- (7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because--
  - (A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;
  - (B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;
  - (C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and
  - (D)(i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and
  - (ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) Purpose

The purpose of this chapter is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

CREDIT(S)

(Pub.L. 105-19, § 2, June 18, 1997, 111 Stat. 218.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1997 Acts. Section 7 of Pub.L. 105-19 provided that:

"(a) **In general.**--This Act [enacting this chapter and provisions set out as notes under this section] shall take effect 90 days after the date of enactment of this Act [June 18, 1997].

"(b) **Application.**--This Act applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date."

Short Title

1997 Acts. Section 1 of Pub.L. 105-19 provided that: "This Act [enacting this chapter and provisions set out as notes under this section] may be cited as the 'Volunteer Protection Act of 1997'."

LIBRARY REFERENCES

American Digest System

States k18.15.

Torts  130.

Key Number System Topic Nos. 360, 379.

Corpus Juris Secundum

CJS Torts § 93, Defenses in General -- Privilege or Immunity.

RESEARCH REFERENCES

Encyclopedias

15 Am. Jur. 2d Charities § 189, Effect of Statutory Provisions.

42 U.S.C.A. § 14501, 42 USCA § 14501

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**Effective: June 18, 1997**

United States Code Annotated Currentness  
Title 42. The Public Health and Welfare  
Chapter 139. Volunteer Protection

**→ § 14502. Preemption and election of State nonapplicability**

(a) Preemption

This chapter preempts the laws of any State to the extent that such laws are inconsistent with this chapter, except that this chapter shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.

(b) Election of State regarding nonapplicability

This chapter shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation--

(1) citing the authority of this subsection;

(2) declaring the election of such State that this chapter shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

CREDIT(S)

(Pub.L. 105-19, § 3, June 18, 1997, 111 Stat. 219.)

LIBRARY REFERENCES

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States k18.15.

Torts  130.

Key Number System Topic Nos. 360, 379.

Corpus Juris Secundum

CJS Torts § 93, Defenses in General -- Privilege or Immunity.

42 U.S.C.A. § 14502, 42 USCA § 14502

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Effective: June 18, 1997

United States Code Annotated Currentness  
Title 42. The Public Health and Welfare  
Chapter 139. Volunteer Protection

→ § 14503. Limitation on liability for volunteers

(a) Liability protection for volunteers

Except as provided in subsections (b) and (d) of this section, no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if--

- (1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;
- (2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;
- (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
- (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to--
  - (A) possess an operator's license; or
  - (B) maintain insurance.

(b) Concerning responsibility of volunteers to organizations and entities

Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) No effect on liability of organization or entity

Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) Exceptions to volunteer liability protection

If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

- (1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.
- (2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same

extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e) Limitation on punitive damages based on actions of volunteers

(1) General rule

Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) Construction

Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f) Exceptions to limitations on liability

(1) In general

The limitations on the liability of a volunteer under this chapter shall not apply to any misconduct that--

(A) constitutes a crime of violence (as that term is defined in section 16 of Title 18) or act of international terrorism (as that term is defined in section 2331 of Title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) Rule of construction

Nothing in this subsection shall be construed to effect subsection (a)(3) or (e) of this section.

CREDIT(S)

(Pub.L. 105-19, § 4, June 18, 1997, 111 Stat. 219.)

## HISTORICAL AND STATUTORY NOTES

### References in Text

The Hate Crimes Statistics Act, referred to in subsec. (f)(1)(B), is Pub.L. 101-275, Apr. 23, 1990, 104 Stat. 140, as amended, and is set out as a note under section 534 of Title 28.

### LIBRARY REFERENCES

#### American Digest System

Torts  130.

Key Number System Topic No. 379.

#### Corpus Juris Secundum

CJS Torts § 93, Defenses in General -- Privilege or Immunity.

### RESEARCH REFERENCES


#### Encyclopedias

41 Am. Jur. Trials 1, Social Worker Malpractice for Failure to Protect Foster Children.

### NOTES OF DECISIONS

#### Preemption 1

##### 1. Preemption

The Volunteer Protection Act (VPA), conditionally providing that no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity, does not preempt only state law, but also precludes federal claims such as those arising under the Fair Labor Standards Act (FLSA); the text of the statute cannot be interpreted to prevent its application to federal law, though its central focus is preemption of state law. Armendarez v. Glendale Youth Center, Inc., D.Ariz.2003, 265 F.Supp.2d 1136. Labor And Employment  2222

42 U.S.C.A. § 14503, 42 USCA § 14503


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**Effective: June 18, 1997**

United States Code Annotated Currentness  
Title 42. The Public Health and Welfare  
 Chapter 139. Volunteer Protection

**→ § 14504. Liability for noneconomic loss**

(a) General rule

In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b) of this section.

(b) Amount of liability

(1) In general

Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) Percentage of responsibility

For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

CREDIT(S)

(Pub.L. 105-19, § 5, June 18, 1997, 111 Stat. 221.)

LIBRARY REFERENCES

American Digest System

Torts  130.

Key Number System Topic No. 379.

42 U.S.C.A. § 14504, 42 USCA § 14504

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**Effective: June 18, 1997**

United States Code Annotated Currentness  
Title 42. The Public Health and Welfare  
Chapter 139. Volunteer Protection

**→ § 14505. Definitions**

For purposes of this chapter:

(1) Economic loss

The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) Harm

The term "harm" includes physical, nonphysical, economic, and noneconomic losses.

(3) Noneconomic losses

The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) Nonprofit organization

The term "nonprofit organization" means--

(A) any organization which is described in section 501(c)(3) of such title and exempt from tax under section 501(a) of Title 26 and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(5) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) Volunteer

The term "volunteer" means an individual performing services for a nonprofit organization or a governmental

entity who does not receive--

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation, in excess of \$500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

CREDIT(S)

(Pub.L. 105-19, § 6, June 18, 1997, 111 Stat. 221.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Hate Crimes Statistics Act, referred to in par. (4), is Pub.L. 101-275, Apr. 23, 1990, 104 Stat. 140, as amended, and is set out as a note under section 534 of Title 28.

42 U.S.C.A. § 14505, 42 USCA § 14505

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