To: Katherine G Rose, UF/IFAS Extension Charlotte County Extension Agent, Florida Sea Grant

From: Cheyanne Sharp, Summer Research Associate, National Sea Grant Law Center
(Supervised by Terra Bowling, NSGLC, Research Counsel II)

Re: Liability Associated with Eyes on Seagrass Volunteer Program (NSGLC-24-04-03)¹

Date: June 27, 2024

Advisory Summary
An extension agent at Florida Sea Grant (FSG) requested information regarding the organization’s potential liability relating to the Eyes on Seagrass volunteer program. This advisory memo first discusses FSG’s potential tort liability to 1) volunteers in Charlotte County who may be injured while participating in the Eyes on Seagrass program; and 2) volunteers who may be injured while participating in Eyes on Seagrass programs implemented by outside organizations. The advisory opinion also looks at potential liability for a nonprofit that has adopted FSG’s Eyes on Seagrass program. Finally, the memo looks at a volunteer’s potential liability if they cause harm to others while participating in an Eyes on Seagrass program.

Background
FSG is “a university-based program that supports research, education and outreach to conserve coastal resources and enhance economic opportunities for the people of Florida.”² The organization is a partnership between the State of Florida, the state’s universities, and the National Oceanic and Atmospheric Administration. The University of Florida (UF) is FSG’s host institution, but FSG is also intertwined with the research facilities of several other universities and laboratories throughout the state.

FSG has developed a citizen science monitoring program, Eyes on Seagrass, which is based in Charlotte County.³ Volunteers participating in Eyes on Seagrass follow FSG’s data collection protocol to monitor local seagrass populations, conducting in-water surveys and documenting seagrass health along with sediment and water quality. FSG has specifically developed the survey methods to be employed by volunteers so that the data can be used in seagrass health assessments. Volunteers must be competent in swimming and snorkeling to participate, but they receive additional training on how to follow FSG’s data collection protocol.

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They are also provided with special survey equipment, and they are assigned by FSG to survey sites. Even though some discretion and responsibility is left to the volunteers, such as utilizing their own underwater gear and facilitating their own transportation, FSG still largely controls the manner in which *Eyes on Seagrass* participation is performed.

An extension agent at FSG requested information regarding the organization’s potential liability relating to the *Eyes on Seagrass* program. Before participating, volunteers are required to sign a waiver developed by a UF clinical law professor for FSG’s use. A nonprofit organization has also adopted FSG’s *Eyes on Seagrass* program, training volunteers and conducting seagrass surveys in another county. FSG is looking to expand the program into other counties with additional hosts as well.

**FSG’s Potential Liability to Volunteers Injured in the Original Program**

*Summary:* Any potential tort claims against FSG arising out of *Eyes on Seagrass* would likely involve negligence. A Florida court would likely find that FSG owes a duty of care to its volunteers. The duty owed to the volunteers is to take “ordinary” care in conducting the volunteer program. This means running the program in a way that a reasonable person would recognize as not creating an unreasonable risk of injury or damage to a person or property. A volunteer who is injured while participating in *Eyes on Seagrass* might claim that the organization did not meet this duty by negligently designing or implementing the program, such as by providing inadequate training. Additionally, if a volunteer is injured by the conduct of an FSG employee or another volunteer, the injured party might sue FSG under vicarious liability. However, FSG would have reliable defenses to those claims. FSG may be able to use sovereign immunity as a bar to liability for its own negligence, but it is less likely that this defense would absolve FSG’s potential vicarious liability. Instead, a properly worded waiver would provide a stronger defense against FSG’s liability for the negligence of its employees and agents.

**Negligence**

Any potential claims resulting from volunteers being injured while participating in FSG’s *Eyes on Seagrass* program are likely to be based in negligence. Negligence involves conduct “which a reasonable and prudent man would know might possibly result in injury to persons or property.” There are four required elements of a negligence claim: 1) a legal duty of care owed to the plaintiff by the defendant; 2) the defendant’s breach of that duty; 3) a causal relationship between the defendant’s conduct and the plaintiff’s injury; and 4) proof of actual damages.

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4 If a volunteer sought to hold FSG liable for his or her injuries, the volunteer would have to bring suit against UF on FSG’s behalf, rather than against FSG itself, as FSG is not an independent entity. However, with this memo discussing potential injuries arising out of FSG’s program in particular, the associated liability will be referred to as FSG’s liability.


6 *Abad v. G4S Secure Sols. (USA), Inc.*, 293 So. 3d 26, 29 (Fla. Dist. Ct. App. 2020); *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007).
Duty and Breach

The existence of a duty of care is the only element of negligence that is a matter of law for the judge to decide, rather than a factual question for the jury. Florida uses a “foreseeable zone of risk” test to determine whether a duty exists. “Where a defendant’s conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.” The foreseeable zone of risk is context-specific and its scope is determined based on the nature of the defendant’s potentially harmful conduct.

For example, Florida’s Fourth District Court of Appeal held, and the Supreme Court of Florida later affirmed, that “a student can certainly be said to be within the foreseeable zone of known risks engendered by [a] university when assigning such student to one of its mandatory and approved internship programs.” Similarly, it could be argued that a volunteer is placed within a foreseeable zone of particular risks when participating in FSG’s Eyes on Seagrass program, as some associated risks may stem from volunteers conducting surveys in or under the water, being assigned to relatively remote aquatic locations, or being responsible for their own maritime transportation. If a court agreed that Eyes on Seagrass activities placed volunteers within a foreseeable zone of risk, FSG would owe a duty of care to its volunteers.

Once a legal duty of care has been established, “a defendant must exercise reasonable care under the circumstances,” or else the defendant will be in breach of that duty. What constitutes reasonable behavior will vary according to the particular facts of the case and requires consideration of the totality of the circumstances. Florida’s courts have yet to address the standard of care that organizations should be held to when developing and implementing volunteer programs. Nonetheless, continuing the investigation in the context of educational programs may provide some guidance on the subject.

Teachers and supervisors “are held to the standard of care of a person of ordinary prudence, charged with those duties, would exercise under the same circumstances.” In FSG’s case, in order to avoid breaching the duty of care owed to volunteers, the equivalent precautions might involve ensuring that potential survey locations do not introduce an excessive risk of danger, establishing safety procedures for volunteers to follow, or providing supervision and guidance during volunteer outings.

Overall, the best way to forecast and forestall all foreseeable risks associated with the Eyes on Seagrass program would be through a risk assessment process. According to UF’s Environmental Health and Safety department, the university utilizes the help of risk managers to identify and mitigate risks as necessary. If it has not done so already, FSG could minimize its exposure to liability by conducting a risk assessment and developing procedures and policies that attempt to prevent, or at least provide guidance on avoiding, each potential threat to its

8 Id. (quoting Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989)).
12 City Cab Co. of Orlando v. Green, 308 So. 2d 540, 541 (Fla. Dist. Ct. App. 1975).
volunteers. In the case of a negligence suit, these efforts would serve as evidence that FSG took reasonable efforts toward addressing all reasonably foreseeable dangers.

_Causation and Harm_
To establish the third element of a negligence claim, there must be “an actual causal connection between the negligent act and the injury.”\(^\text{15}\) Often referred to in Florida courts as proximate cause, this element “is concerned with whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury.”\(^\text{16}\) Although the concept is notoriously difficult for courts to precisely define, it involves “a natural, direct and continuous sequence” between the conduct and resulting injury.\(^\text{17}\) Since the type of harm that occurs is an integral aspect of the causation analysis, this element is also heavily dependent on the particular facts of the case presented.

Even if a defendant has acted negligently, a plaintiff cannot fully establish a cause of action without proof of suffering actual harm or damage.\(^\text{18}\) The general rule is that physical injury to one’s person or property is required to satisfy the final element of negligence.\(^\text{19}\)

_Vicarious Liability_
Under the doctrine of vicarious liability, an employer may be held liable for the negligence of its employee or agent, even if the employer itself owed no duty to the injured third party and had no fault in the injury.\(^\text{20}\) A state entity could be held liable for the tortious conduct of its employee or agent if the tort is committed within the scope of the employment or function, unless the tortfeasor “acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.”\(^\text{21}\)

Through vicarious liability, FSG could be held responsible for any negligent decision or conduct of an employee that ultimately injures a volunteer. Additionally, if Florida’s courts join other states in deciding that a volunteer is an agent of the organization they serve, then FSG could also be liable for an injury to a volunteer caused by another volunteer’s tortious conduct.\(^\text{22}\) Florida's Fifth District Court of Appeal hinted that this was a potential pathway to vicarious liability in _Special Olympics Florida, Inc. v. Showalter_, where it found that there was sufficient evidence for a jury to resolve the issue of agency when an organization’s volunteer assaulted the plaintiffs, and the plaintiffs brought suit against the organization on a vicarious liability theory.\(^\text{23}\)

“An employee acts within the scope of his employment only if his act is of the kind he is employed to perform, it occurs substantially within the time and space limits of employment and it is activated at least in part by a purpose to serve the master.”\(^\text{24}\) Through vicarious liability, employers can often be held responsible for the negligent decision or conduct of an employee or

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\(^{15}\) _Asgrow-Kilgore Co. v. Mulford Hickerson Corp._, 301 So. 2d 441, 444 (Fla. 1974).

\(^{16}\) _McCain_, 593 So. 2d at 502.


\(^{21}\) _Fla. Stat._ § 768.28(9)(a) (2024).

\(^{22}\) _Volunteer Liability, Nat'l Sea Grant L. Ctr._, https://nsgle.olemiss.edu/Volunteer.pdf (last visited June 27, 2024).


\(^{24}\) _Kane Furniture Corp. v. Miranda_, 506 So. 2d 1061, 1067 (Fla. Dist. Ct. App. 1987).
agent that ultimately injures someone; however, sovereign immunity may provide a defense for state institutions in certain circumstances, as outlined below.

**Potential Defenses**

**Sovereign Immunity**

The long-standing doctrine of sovereign immunity provides that a governmental entity cannot be sued without its consent, and it would likely protect FSG, a program housed at a state university, from liability in many circumstances. In Florida, “[t]he State and its subdivisions are shielded from civil liability unless sovereign immunity is waived by legislative enactment or constitutional amendment.” Under Florida Statute § 768.28, “the state, for itself and for its agencies or subdivisions,” has waived its sovereign immunity against tort claims resulting from employee conduct, but only where the tortious conduct is committed: 1) while acting within the scope of the employment and 2) without bad faith, malicious intent, or recklessness. Therefore, only if an employee’s tortious conduct fell outside the scope of employment or was accompanied by an unpermitted mental state would FSG be immune from vicarious liability and the burden would fall on the tortfeasor alone.

Florida’s courts have interpreted the state’s sovereign immunity waiver to include one more important exception. While governmental entities may be held liable in tort for their “operational” functions, they will still be immune from liability when the tortious conduct instead stems from their “discretionary” functions. The Supreme Court of Florida has explained that an operational function, which the waiver applies to, “is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.” In contrast, a protected discretionary function is one that involves a level of executive or legislative judgment and incorporates “fundamental questions of policy and planning.”

Using a test adopted from the Washington Supreme Court, Florida’s courts identify discretionary functions as: 1) involving “a basic governmental policy, program, or objective,” 2) being “essential to the realization or accomplishment” of that goal, 3) requiring the governmental agency’s “exercise of basic policy evaluation, judgment, and expertise,” and 4) being carried out under the agency’s “constitutional, statutory, or lawful authority.” Under these guidelines, many of FSG’s decisions pertaining to the development and implementation of the Eyes on Seagrass program would likely be considered discretionary functions essential to the organization’s duty to carry out its research-related governmental goals. Therefore, sovereign immunity should be a viable defense against negligence claims brought against FSG as the primary tortfeasor.

However, the tortious conduct of employees and agents committed within the course of

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26 This memo assumes that FSG is a part of UF, and, therefore, also a state entity subject to sovereign immunity. See *Plancher v. UCF Athletics Ass'n, Inc.*, 175 So. 3d 724, 726 (Fla. 2015) (finding that the University of Central Florida, another public state university, is an “undisputed … state agency or subdivision entitled to limited sovereign immunity”).
27 *Irwin*, 382 So. 3d at 770.
28 *Fla. Stat.* §§ 768.28(1), (9)(a).
29 *Com. Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1022 (Fla. 1979).
30 *Kaisner*, 543 So. 2d at 737.
31 *Id.*
32 *Id.* at 736 (quoting *Evangelical United Brethren Church of Adna v. State*, 407 P.2d 440, 445 (Wash. 1965)).
employment while following FSG’s instructions may be considered operational functions, falling within Florida’s sovereign immunity waiver and exposing FSG to vicarious liability.

**Waivers**

Florida’s courts have held that “clear and unequivocal exculpatory clauses,” or waivers, “which purport to release a party from liability for its own negligence are enforceable, even though such clauses are disfavored under the law.” Prior to 2015, Florida case law suggested that a waiver must specifically refer to “negligence” in order to release a party from liability for its negligent conduct; a clause that released a party from “any and all liability” was insufficient. However, the Supreme Court of Florida reversed course in 2015, holding that explicit references to “negligence” were not required for an effective waiver as long as there is “clear and unambiguous language indicating an intent to be relieved from liability in such circumstances.”

In *Sanislo v. Give Kids the World, Inc.*, a nonprofit that provided ill children and their families with free vacations required participants to sign a waiver. When a child’s mother was injured on the vacation and brought suit against the nonprofit, the Supreme Court of Florida held that the waiver was enforceable as a bar to liability. The signed form “released Give Kids the World and all of its agents, officers, directors, servants, and employees from ‘any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish’” and explicitly stated that the agreement extended to any damages, losses, or injuries occurring throughout the entirety of the trip. Given that waivers are unenforceable in the context of intentional torts and that the conduct involved was not inherently dangerous, the court could infer that the organization intended for the waiver to cover liability for negligence.

Based on *Sanislo*, a properly worded waiver would be another reliable defense to liability in any potential tort claims against FSG. *Sanislo* suggests that FSG’s waiver should explicitly refer to not only the organization as a whole, but also to its employees, agents, and volunteers, to avoid being held liable for its own potential negligence as well as vicariously liable for the negligence of its subordinates. The agreement should also state that liability in association with any damages, losses, or injuries arising throughout participation in the *Eyes on Seagrass* program will be waived, making it clear that the agreement extends to any and all potential negligence claims. An even safer option would be to refer explicitly to liability for all forms of “negligence,” which the Supreme Court of Florida itself agreed may be better practice for crafting exculpatory clauses and clarifying contractual intent.

**FSG’s Potential Liability to Volunteers Injured in Adopted Programs**

*Summary:* Any potential tort claims against FSG resulting from injuries to volunteers in *Eyes on Seagrass* programs adopted by outside organizations would also be rooted in negligence. FSG would likely owe a duty of care to volunteers in outside programs as well, but FSG’s liability

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34 Bender v. CareGivers of Am., Inc., 42 So. 3d 893, 894 (Fla. Dist. Ct. App. 2010).
36 Id. at 258–59.
37 Id. at 270–71.
38 Id. at 270.
39 Id. at 271.
40 Id. at 270; see also Steven B. Lesser, *How to Draft Exculpatory Clauses That Limit or Extinguish Liability*, Fla. B.J., Nov. 2001, at 10, 16–18.
could be diminished under comparative fault or extinguished if another party’s negligence superseded FSG’s conduct. Expanding Eyes on Seagrass could potentially expand FSG’s vicarious liability in the unlikely event that a court finds the nonprofit to be acting as an agent of FSG. While sovereign immunity is still likely to protect FSG here, FSG could also enter into an indemnity agreement with any organization that adopts Eyes on Seagrass to be held harmless under any potential scenario.

Negligence

Duty and Breach

Again, if any volunteers are injured in Eyes on Seagrass programs adopted by outside organizations, any potential tort claims against FSG arising from the incident would likely be rooted in negligence. FSG would owe outside volunteers a duty of care if those volunteers were still found to be within the foreseeable zone of risk emanating from FSG’s conduct of designing, implementing, and extending the program. If the outside organization adopts the exact same procedures and protocols used by FSG in the original program, then the outside volunteers would face the same risks inherent in participation, and it would be up to a judge to decide whether a duty of care existed.

Even if a court decides that FSG’s duty of care extends to volunteers in outside organizations, FSG would only be held liable for injuries to those volunteers if it failed to act reasonably in developing and sharing the program. As explained above, the best way for FSG to avoid breaching its duty of care to volunteers is to conduct a thorough risk assessment for the Eyes on Seagrass program. If FSG takes all reasonable efforts to identify and prevent against reasonably foreseeable risks to any volunteers who may participate in the program, then it is very unlikely that FSG will be found negligent in designing or implementing Eyes on Seagrass.

Causion and Harm

The third element of negligence, causation, would likely play a greater role under these circumstances than in the context explained above. Proximate causation can be broken down into two important elements: cause-in-fact and foreseeability. A defendant’s conduct is the factual cause of a plaintiff’s injury if the injury would not have occurred but for the wrongful conduct or the conduct was at least a substantial factor in bringing about the injury. If someone’s conduct is found to be the factual cause of another’s injury, that person will then only be held liable if the injury “ordinarily and naturally should have been regarded as a probable, not a mere possible, result of the negligent act.” Still, in this situation, whether an outside volunteer’s injury is a direct result of FSG’s potentially negligent program design and whether the type of injury is foreseeable to FSG will depend heavily on the facts of the case and the specific injury that arises.

If FSG negligently designed Eyes on Seagrass and the outside organization was also negligent in implementing or supervising the program, then both parties could be held liable for their role in any resulting injury as concurring causes. In this situation, Florida’s courts would apply the substantial factor test: multiple causes can be found to be factual causes of a single injury.

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41 McCain, 593 So. 2d at 503.
42 L.A. Fitness Intl, LLC, 980 So. 2d at 556.
44 Id.; Asgrow-Kilgoe Co., 301 So. 2d at 444.
45 Cone v. Inter Cnty. Tel. & Tel. Co., 40 So. 2d 148, 149 (Fla. 1949).
injury if “either one … would have been sufficient to cause the identical result” and each one played a material and substantial role in bringing about the injury.\textsuperscript{47} When there are multiple concurring causes, comparative fault can be used as an affirmative defense, reducing the amount of damages that any tortfeasor is liable for to correspond with their respective percentage of fault.\textsuperscript{48} The same principle will apply if the plaintiff’s own negligence\textsuperscript{49} or an unnamed third party’s negligence\textsuperscript{50} played a role in bringing about the injury.

However, even if FSG was found to be a cause of an outside volunteer’s injury, FSG would not be liable if there was an unforeseeable intervening event that interrupted the chain of causation and cut off FSG’s legal responsibility.\textsuperscript{51} In order to extinguish the original tortfeasor’s liability, an intervening cause must be entirely independent of, and not set into motion by, the original negligent conduct.\textsuperscript{52} For example, in Department of Transportation v. Anglin, the defendant’s allegedly negligent road design allowed for a puddle to accumulate on a roadway.\textsuperscript{53} When the plaintiff drove through the puddle, the car’s engine stalled, and the occupants got out to push the car out of the roadway.\textsuperscript{54} Then, as a result of another driver’s negligence, a passing car hit and injured the plaintiff.\textsuperscript{55} The court held that the other driver’s negligence was a superseding, intervening cause that cut off the defendant’s potential liability because the original alleged negligence merely set the scene for the subsequent tortfeasor’s negligent acts, rather than setting in motion a chain of events that led to the plaintiff’s injury.\textsuperscript{56}

Intervening causes would likely play a substantial role in whether FSG is ultimately held liable for any potential injuries to volunteers in outside organizations that adopt Eyes on Seagrass. If FSG was found to have negligently designed the program but still chose to share it with outside organizations and subject new volunteers to the zone of risk, then it would likely be held liable for any foreseeable, naturally resulting injuries resulting from those decisions. However, if the particular facts surrounding a volunteer’s injury revealed that it was instead the decisions or conduct of the outside organization, another third party, or the volunteer that led directly to the injury, then FSG’s potential liability might be severed. In that case, similar to Department of Transportation, it could be found that FSG expanding the program merely set the scene for the negligent conduct to occur, rather than triggering a chain of events that resulted in a volunteer’s injury.

\textbf{Vicarious Liability}

The relationship between FSG and the employees of outside organizations is much more attenuated than in the case of FSG employees, so it is much less likely that a court would hold FSG vicariously liable for their tortious conduct. However, another question to consider in this context is whether the outside organization itself could be considered an agent of FSG, enabling FSG to be held vicariously liable for the outside organization’s negligence. This would depend

\textsuperscript{47} Tieder v. Little, 502 So. 2d 923, 926 (Fla. Dist. Ct. App. 1987).
\textsuperscript{49} FLA. STAT. § 768.81(2).
\textsuperscript{50} Fabre v. Marin, 623 So. 2d 1182, 1186 (Fla. 1993).
\textsuperscript{51} Dept of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987).
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 897.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 897–98.
\textsuperscript{56} Id. at 898.
on how much control FSG retains over the outside organization regarding the way it conducts *Eyes on Seagrass*.\(^5^7\) For example, in *Holiday Inns, Inc. v. Shelburne*, Florida’s Fourth District Court of Appeal held that a hotel franchisor retained a right of control and could be held liable for the franchisee’s failure to implement appropriate security measures on the premises, since the franchisor otherwise mandated certain procedures within the hotel, provided training on security precautions, and monitored the franchisee for compliance.\(^5^8\) In contrast, since FSG likely will not be extending such a level of control over the outside organization’s internal procedures and regular operations, it is unlikely that a court would find the organization to be an agent of FSG.

**Potential Defenses**

*Sovereign Immunity*
As discussed in the previous sovereign immunity analysis, FSG would likely be immune from tort liability if a suit arose from its discretionary decisions regarding the design, implementation, or even expansion of the *Eyes on Seagrass* program.

*Contractual Indemnity*
Another defense for FSG to avoid liability for injuries to volunteers in outside programs would be an indemnity contract. “A contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.”\(^5^9\) If the outside organization agreed to indemnify UF/FSG, then UF/FSG would have a contractual safeguard holding it harmless and transferring liability to the outside organization if any volunteer injuries arose throughout the implementation of the adopted *Eyes on Seagrass* program. As with waivers, an indemnity contract must be carefully constructed to cover all potential claims within FSG’s realm of concern.

In Florida, “contracts of indemnification which attempt to indemnify a party against its own wrongful acts are viewed with disfavor,” but not necessarily unenforceable.\(^6^0\) Accordingly, a contract that attempts to relieve an entity of liability for its own negligence by transferring it to another entity will only be enforced if it makes that intention obvious through “clear and unequivocal terms.”\(^6^1\) For example, one Supreme Court of Florida case involved a lease agreement for scaffolding equipment, which stated:

The COMPANY shall have no responsibility, direction or control over the manner of erection, maintenance, use or operation of said equipment by the LESSEE. The LESSEE assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold the COMPANY harmless from all such claims.\(^6^2\)

The court held that the language in the contract merely demonstrated the company’s intention to be held harmless from any vicarious liability for the lessee’s negligent use of

\(^5^8\) *Id.*
\(^5^9\) *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999).
\(^6^0\) *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So. 2d 487, 489 (Fla. 1979).
\(^6^1\) *Id.*
\(^6^2\) *Id.*
the equipment. It did not clearly signal any intent to absolve the company of liability for its own “affirmative misconduct” or negligence in designing, manufacturing, or maintaining the equipment.

Similarly, in another case, the Supreme Court of Florida held that an overly-broad agreement to “indemnify … against any and all claims for any personal injury or loss of life” does not sufficiently reveal a specific intention to relieve liability for the indemnitee’s negligence. The court also clarified that specificity and clarity is required to permit indemnity for any degree of the indemnitee’s own negligence, even if both parties to the contract were jointly negligent and both contributed to the third party’s injury.

These cases provide a wealth of guidance for shaping an effective and enforceable indemnity contract. If FSG required outside organizations to sign such an agreement before adopting and participating in Eyes on Seagrass, it would likely serve as a viable defense against every aforementioned source of liability involving injuries to volunteers in outside organizations. The contract should make clear that the outside organization agrees to indemnify FSG for any claims of vicarious liability, despite any potential existence of any agency relationship. The agreement should also explicitly state that the outside organization assumes legal responsibility for any claims by volunteers and third parties arising out of or relating to the adopted Eyes on Seagrass program, even if those injuries are caused wholly or partly by FSG’s negligence.

Potential Nonprofit Liability to Volunteers Injured in Adopted Programs

Summary: A nonprofit organization that adopts FSG’s Eyes on Seagrass program could also be exposed to potential tort liability in the form of negligence claims. Like FSG, a nonprofit would likely owe a duty of care to its own volunteers, so it could be found negligent if it fails to take reasonable protective measures when implementing and supervising the adopted program. The nonprofit could also be held vicariously liable for the tortious conduct of its own employees or agents. Sovereign immunity probably would not extend to a nonprofit that adopts Eyes on Seagrass, but an enforceable waiver would be a reliable bar to liability if an injured volunteer sues the nonprofit. The nonprofit could also potentially escape full or partial financial responsibility, despite its own negligent role, if it was found to be acting as an agent of FSG or if comparative fault applied under the circumstances.

Negligence

If a volunteer is injured while participating in an Eyes on Seagrass program adopted by a nonprofit organization, the nonprofit may also face liability for negligence. A nonprofit would most likely owe a duty of care to its own volunteers as well, even though the nonprofit’s Eyes on Seagrass work would ultimately be for the benefit of FSG. The Supreme Court of Florida clarified this concept through the “undertaker’s doctrine”: “[w]henever one undertakes to provide

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63 Id.
64 Id.
66 Charles Poe Masonry, Inc., 374 So. 2d at 489–90; Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992).
a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service—i.e., the ‘undertaker’—thereby assumes a duty to act carefully and to not put others at an undue risk of harm.\textsuperscript{67} Therefore, while FSG has a responsibility to take all reasonable precautions in designing \textit{Eyes on Seagrass}, the nonprofit will also have its own separate duty to ensure that the adopted program is implemented and supervised safely in order to prevent against all foreseeable risks to its own participants.

\textbf{Vicarious Liability}

Like FSG, a nonprofit can also be held vicariously liable for the tortious conduct of its employee if the employee, while acting within the course of the employment, injures a volunteer.\textsuperscript{68} Similarly, if Florida’s courts decided to classify volunteers as agents of the organization they volunteer for, then a nonprofit could potentially be held vicariously liable for any injuries caused by its volunteers while participating in the adopted \textit{Eyes on Seagrass} program as well.\textsuperscript{69}

\textbf{Potential Defenses}

\textit{Waivers}

Since any nonprofit that adopts \textit{Eyes on Seagrass} faces potential liability for its own negligence as well as vicarious liability on behalf of its agents, nonprofits implementing the program should also require that volunteers sign a waiver constructed according to the guidelines suggested above for FSG. Since sovereign immunity is not a defense available to nonprofits as non-governmental entities, enforceable waivers will be an important defense shielding nonprofits from liability for injuries associated with \textit{Eyes on Seagrass}.

\textit{Agency with FSG}

As explained previously, a nonprofit that adopts \textit{Eyes on Seagrass} could potentially be viewed as an agent of FSG, depending on the level of control FSG exercises over the nonprofit when it comes to operating the program.\textsuperscript{70} In that case, if the nonprofit was found to be negligent in its implementation or supervision of the program, it could potentially escape financial responsibility for any damages that are due to injured volunteers. When a party is held vicariously liable for the conduct of its agent, “the vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor.”\textsuperscript{71} Although unlikely, if a court found that the nonprofit was acting as an agent of FSG, the injured party could legitimately pursue either the nonprofit, FSG, or both for the entire sum of damages, with the outcome depending on which party is more financially reliable.\textsuperscript{72}

\textit{Comparative Fault}

If another party’s negligence—for example, FSG’s—played a substantial role in bringing about the volunteer’s injury, the defense of comparative fault could apply and reduce the nonprofit’s

\footnotesize\textsuperscript{67} Clay Elec. Co-op., \textit{Inc. v. Johnson}, 873 So. 2d 1182, 1186 (Fla. 2003).
\footnotesize\textsuperscript{68} Kane Furniture Corp., 506 So. 2d at 1067.
\footnotesize\textsuperscript{69} Id.; see Special Olympics \textit{Fla., Inc.}, 6 So. 3d at 665.
\footnotesize\textsuperscript{70} Holiday Inns, \textit{Inc.}, 576 So. 2d at 332–33.
\footnotesize\textsuperscript{71} \textit{Am. Home Assurance Co.}, 908 So. 2d at 467–68.
\footnotesize\textsuperscript{72} \textit{Colle v. Atl. Coast Line R.R. Co.}, 14 So. 2d 422, 424 (Fla. 1943).
responsibility for damages. Additionally, if an intervening cause was found to supersede the nonprofit’s role in bringing about the volunteer’s injury, then the nonprofit’s potential liability could be cut off altogether.74

Potential Volunteer Liability to Another Injured Volunteer

Summary: If a volunteer’s conduct leads to another’s injury without being negligent or intentional, the acting volunteer would be immune from personal liability under Florida’s Volunteer Protection Act. Since the resulting damages would therefore be imputed to the organization hosting the Eyes on Seagrass program, the organization should consider purchasing protective liability insurance.

Accidental Injuries

The Florida Volunteer Protection Act (VPA) provides that any unpaid volunteer for a nonprofit or governmental entity will be considered an agent of the organization and will not be held personally responsible for any personal injury or property damage that arises if that volunteer was acting in good faith, reasonably, and within the scope of the volunteer duties.75 The VPA immunizes the volunteer from liability and transfers it to the host organization only if the damages are purely accidental, rather than resulting from the volunteer’s negligent or intentionally tortious conduct.76 If the volunteer’s conduct met the previously outlined elements of negligence or constituted an intentional tort as explained below, that individual would not be protected by the VPA and may be held responsible for the full extent of the resulting damages.

Liability insurance would be the best way for FSG and any nonprofits that adopt Eyes on Seagrass to avoid individually compensating an injured third party for any damages arising from such incidents. For FSG, this security is likely already in place through the State Risk Management Trust Fund mandated by Florida Statute § 284.30.77 Nonprofit organizations can purchase a commercial general liability policy, which protects against claims for personal injury, property damage, and advertising injury.78

Intentional Torts

A volunteer will usually be held solely responsible for his or her intentional torts that injure another volunteer, except under the narrow circumstances where that conduct falls within the course of the service and benefits the host organization in some way.79 It is very likely that a volunteer who intentionally injures another volunteer or third-party will be held fully responsible

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73 Fla. Stat. § 768.81(3).
74 Dep’t of Transp., 502 So. 2d at 898.
for the resulting damages, but the outcome will ultimately depend on the specific facts of the situation.

Conclusion
If any of FSG’s volunteers were injured while participating in Eyes on Seagrass, any potential claims brought against FSG would likely be rooted in negligence. These claims may allege FSG’s direct liability by negligently designing or implementing the program, or they could be based on vicarious liability if the tortious conduct of FSG’s employees or agents caused the injury. Sovereign immunity would likely bar the former claims, while a liability waiver would be a stronger defense to the latter claims.

Any nonprofit that adopts Eyes on Seagrass could also potentially face negligence claims by their own injured volunteers. The nonprofit would be expected to take its own reasonable precautions for implementing a safe program and protecting its volunteers. It could face potential vicarious liability on behalf of its own employees or agents as well. As such organizations are not protected by sovereign immunity, liability waivers would be an important risk management strategy.

Finally, a volunteer who negligently or intentionally injures another volunteer would be exposed to tort liability for their conduct. These volunteers will generally be held responsible for their own tortious acts, unless Florida’s courts decide that they are agents of the organizations they serve and that their conduct was committed in furtherance of their service to the organization. On the other hand, if an accident arises and a volunteer is injured by another’s non-tortious conduct, then the acting volunteer will be protected under Florida’s Volunteer Protection Act, and the host organization will instead be responsible for the resulting damages.
### Potential Liability of Florida Sea Grant (FSG)

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<thead>
<tr>
<th>Injury to FSG Volunteer</th>
<th>Injury to Nonprofit Volunteer</th>
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<tbody>
<tr>
<td><strong>Volunteer Injured by Negligent Design, Implementation, or Supervision of Eyes on Seagrass</strong></td>
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<tr>
<td>FSG would likely owe a duty of care to its own volunteers, so it should take all reasonable precautions to prevent against reasonably foreseeable risks to those volunteers (e.g., conduct a risk assessment) to avoid liability for negligence. (pp. 2–4)</td>
<td>FSG would likely owe a duty of care to outside volunteers as well, but, even if its program design was found to be unreasonable, its liability in these cases is more likely to be diminished by comparative fault or superseding causes. (pp. 7–8)</td>
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<tr>
<td>However, FSG could likely use sovereign immunity as a defense against claims of its own negligence. A waiver could also bar these suits. (pp. 5–6)</td>
<td>Even if FSG did not act negligently itself, there is a chance that it could be held vicariously liable for the outside organization’s negligent implementation or supervision of the program if a court found that the outside organization was acting as FSG’s agent. An indemnity agreement with the outside organization would hold FSG harmless if such a case arose. (pp. 8–10)</td>
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### Potential Liability of Nonprofit

<table>
<thead>
<tr>
<th>Injury to Nonprofit Volunteer</th>
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<tr>
<td><strong>Volunteer Injured by an Employee’s Conduct while Participating in Eyes on Seagrass</strong></td>
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<tr>
<td>A state governmental entity, like FSG, can be held liable for the tortious conduct of its employees if the tort is committed within the scope of the employment, unless the tortfeasor acted in bad faith. (pp. 4–5)</td>
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<td>It is less likely that FSG could use sovereign immunity as a defense against these tort claims because the decisions and conduct of FSG employees could be considered “operational” functions, which would fall within Florida’s waiver of sovereign immunity. However, a properly worded liability waiver could also make FSG immune from these vicarious liability claims. (pp. 5–6)</td>
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<tr>
<td><strong>Volunteer Injured by Another Volunteer’s Conduct while Participating in Eyes on Seagrass</strong></td>
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<td>If Florida’s courts join other states in deciding that a volunteer is an agent of the organization they serve, then FSG could also be held vicariously liable for an injury to a volunteer caused by another volunteer’s tortious conduct. As mentioned above, even if an agency relationship is found, FSG could only potentially be held vicariously liable for tortious volunteer conduct committed within the course of his or her service to the organization. (pp. 4-5)</td>
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<td>As with employees, a waiver disclaiming FSG’s vicarious liability on behalf of its agents and volunteers would probably be its best defense against these claims. (pp. 5–6)</td>
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<tr>
<td><strong>Third-Party Injured by Volunteer while Participating in Eyes on Seagrass</strong></td>
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