

SWIM EVENT USE AGREEMENT INDEMNIFIES CITY'S NEGLIGENCE

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In an indemnification agreement, one party to a contract can agree to protect or “hold harmless” another party from liability claims or damages within the scope of the express language and terms of the contract indemnification clause. Accordingly, subject to basic contract law principles, an indemnified party may effectively shift liability for damages arising out of a personal injury claim to a party who agrees to assume responsibility for such losses in a valid and enforceable indemnification agreement. In addition, the contract may also require proof that the indemnified party is named a third party insured on an insurance policy which provides sufficient coverage by the party assuming responsibility for all losses specified in the agreement.

As illustrated by the case described herein, under limited circumstances, an indemnification agreement may be an effective risk management tool to limit or avoid agency liability for personal injuries arising out of a use permit for a sporting event or recreational activity. Like any contract or legal document, an indemnification agreement should be drafted and reviewed by local counsel to increase the likelihood, if challenged, that a reviewing court will uphold a contractual promise to “hold harmless.”

INDEMNIFY ALL CLAIMS

In the case of *Southwick v. City of Rutland*, 2011 VT 53 (5/20/2011), the issue before the Vermont supreme court was whether an indemnity clause in a use agreement between the City and Vermont Swim Association (VSA) included an "express intent to indemnify the City for the City's own negligence."

The written agreement at issue between the City of Rutland and Vermont Swim Association (VSA) granted use of a City facility to VSA for its annual swim meet. The facts of the case were as follows:

In July 2005, the City and VSA executed a written agreement that granted VSA use of Whites Pool, located in Whites Park, for VSA's annual swim meet, scheduled for August 5 and 6, 2005.

The agreement between the City and VSA included an indemnification clause stating that VSA “agree[d] to defend, indemnify and hold harmless Rutland ... from all claims for bodily injury or property damage arising from or out of the presence of [VSA], including its ... guests and others present because of the event or [VSA's] activities in or about Whites Park.”

The agreement also required VSA to procure liability insurance for the meet and to name the City as an additional insured entity.

During the swim meet, a child attending the swim meet, Addie Southwick, fell from a piece of playground equipment in Whites Park and sustained various injuries.

Addie's parents filed a complaint against the City, alleging "the City had negligently installed and maintained the equipment." Prior to trial, the City reached a settlement agreement with plaintiffs. The City then filed a third-party complaint against VSA asserting a claim for indemnity pursuant to the written agreement.

The trial court granted the City's motion for summary judgment based upon the indemnity clause in the use agreement and entered judgment for the City in the amount of \$700,000 on the indemnity claim against VSA. In so doing, the trial court held that "the plain meaning of this language unambiguously stated that VSA agreed to indemnify the City for all claims for bodily injury made by guests of VSA and others present because of VSA's swim meet or VSA's activities in or about Whites Park."

Because there was "no ambiguity in the language of the indemnification provision or the agreement as a whole," the trial court further emphasized that it was not necessary to apply technical rules of construction for contracts to interpret the parties' indemnification provision. On the contrary, in the absence of any ambiguity in the contract language the trial court determined that "the agreement should be read to mean exactly what it stated."

Accordingly, the trial court rejected VSA's argument that this clause indemnified the City only for VSA's own negligence, not the City's. In the opinion of the trial court, "there would have been no reason to include this provision at all if the parties' intention had been that VSA was to be liable for its own conduct only and not for the City's." The trial court also rejected VSA's claim that "the indemnity provision does not cover claims arising from the City's own negligence without express language to that effect" in the use agreement. In addition, the court granted the City summary judgment on its breach of contract claim against VSA. VSA appealed.

On appeal, VSA did not challenge the trial court's ruling with regard to the breach of contract for failure to purchase insurance and list the City as an additional insured party. Instead, VSA argued that the trial court had erred on the following two points:

- (1) the indemnity clause in the use agreement includes no express intent to indemnify the City for the City's own negligence and
- (2) the circumstances surrounding the use agreement demonstrate the need for express intent language to provide indemnity for the City's own negligence.

## CONTRACT INTENT

As is generally the case in judicial interpretation of all contracts, the state supreme court stated the "goal is to give effect to the intent of the parties as it is expressed in their writing" in order to "interpret the indemnification provision of this agreement."

When the contract language is unambiguous, we take these words to represent the parties' intent, and the plain meaning of this language governs its interpretation. We assume that parties included contract provisions for a reason, and we will not embrace a construction of a contract that would render a provision meaningless. We must instead enforce the contract as it is written.

Reviewing the contract language in this particular instance, the state supreme court noted that the indemnification clause in the agreement signed by the City and VSA read as follows:

Permittee [VSA] hereby agrees to defend, indemnify and hold harmless Rutland, ... its officers, trustees, agents, and employees, from all claims for bodily injury or property damage arising from or out of the presence of Permittee, including its employees, agents, representatives, guests and others present because of the event or Permittee's activities in or about Whites Park, including the entrances, lobbies and exits thereof, the sidewalks, streets and approaches adjoining the property or any portion of the property used by Permittee or any of the above stated.

Permittee shall be responsible for all costs of defense, including reasonable attorney's fees, and shall pay all fines or recoveries against Rutland. Permittee acknowledges that as a condition precedent to the execution of this Agreement by Rutland, Permittee agrees that it shall have no cause of action against Rutland for any damage, injury or loss to person or property, from cause [sic] whatsoever, except that which may result from the willful acts of Rutland.

Contrary to what the trial court had found to be the "plain language" of the indemnity clause, VSA reiterated its argument on appeal to the state supreme court that "the indemnity clause does not cover claims that stem from the City's negligence." Specifically, VSA contended that the language "claims ... arising from or out of the presence of [VSA]" did not cover an accident that resulted because of the City's negligence. In so doing, VSA claimed "this language is ambiguous and does not express a clear intent that VSA would indemnify the City for such injuries, as required by the circumstances surrounding the agreement's formation." Instead, VSA argued "the purpose of the indemnification clause is merely to protect the City from claims by third parties caused by VSA's negligence and to protect the City from claims VSA might have against it caused by the City's willful acts." The state supreme court rejected this argument.

#### PLAIN LANGUAGE

In the opinion of the state supreme court, "VSA cannot escape the plain language of its agreement with the City. According to the court, "[t]he intent of the parties could not be more apparent — the City was willing to allow VSA to use Whites Park as long as it was completely insulated from liability due to VSA's use." Moreover, the court found the "agreement allocated responsibility to VSA to purchase insurance to cover such losses."

The indemnification clause allocated responsibility to VSA for any negligence claims directly arising out of VSA's event at the City's park and pool facility. The

clause is expressly limited to causes of action arising out of the presence of VSA and its guests or employees and agents. It extended to any part of the park, not just the pool area, including sidewalks, streets, and approaches to the property. It barred actions by VSA against the City, unless the City committed a willful act.

As a result, the state supreme court found the trial court had properly applied “the most basic rule of contract construction — that the plain meaning of unambiguous language prevails” and correctly determined “the outcome of this case because the provision's words are clear.” In so doing, the supreme court noted “the City gains nothing by this detailed clause in the contract” if the court accepted VSA’s reading of the contract.

If we were to read the contract as VSA urges, VSA is already liable for its own negligence; if VSA is not indemnifying the City for the City's negligence, the clause has no purpose except to allocate the burden of buying insurance.

Accordingly, in the opinion of the state supreme court, the trial court had correctly concluded that “VSA's desired reading of the clause would render it a nullity [i.e. no effect, meaningless].” In so doing, “when the contract language is clear,” the state supreme court recognized the basic legal principle of contract interpretation that “the intent of the parties is taken to be what the agreement declares.” In this particular instance, the state supreme court concluded “the language of the indemnity clause is unambiguous” and, therefore, clearly reflected the intention of the parties “to cover all injuries and damages that might occur — as a result of either party's negligence.”

[T]he indemnification language in the instant contract is deliberately broad enough to cover all injuries and damages that might occur — as a result of either party's negligence — to those present because of VSA's swim meet in Whites Park without being so broad as to lose meaning altogether.

Contrary to VSA's contention, this language does not “at most” provide indemnity for claims caused by VSA and its guests, rather than claims made by them. No interpretive gymnastics are required to conclude that the indemnification clause language covers an accident of a child playing on the playground at Whites Park while attending the swim meet, even if the accident resulted from the City's negligence, because her claims arose out of her presence in Whites Park for VSA's swim meet.

## EQUAL BARGAINING POWER

In reaching this determination, the state supreme court acknowledged that “a contractual provision should not be construed to permit an indemnitee [in this case the City] to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties.” In particular, the court noted the “reluctance of courts to cast the burden of negligent actions upon those who were not actually at fault,” particularly in situations

where there is a “vast disparity in bargaining power and economic resources between the parties.”

In this particular instance, the state supreme court found “the agreement was the result of an arm's-length deal between the City and VSA, in which the facts suggest equal bargaining power.”

VSA gave the City representative a copy of an agreement used by VSA for its annual swim held at Dartmouth College in 2004. The City's representative used this agreement to prepare the agreement signed by VSA and the City, maintaining the Dartmouth Agreement's wording for both the indemnification clause and the requirement that VSA purchase liability insurance and name the City as an additional insured party.

Furthermore, there was no true disparity in bargaining power between the two contracting parties: not only did VSA bring a model contract to the City, but it also could have chosen to host its event elsewhere or to postpone the event. VSA had held its annual swim meet at other locations in previous years, and the City did not control all contracts with suitable local pool facilities. Lastly, the City has many other incentives to keep its playgrounds safe for children, so that allocating liability to VSA for claims arising out of the event it hosted at the park does not undermine other public policies related to premises liability.

## CONCLUSION

Having found equal bargaining power between VSA and the City and no public policy objections or ambiguity in the contract language, the state supreme court concluded “the terms and circumstances of the agreement between the City and VSA demonstrate that VSA contracted to indemnify the City for claims such as the ones resulting from this child's injury.” As a result, the state supreme court held the trial court properly granted summary judgment to the City and entered judgment for the City in the amount of \$700,000 on the City's indemnity claim against VSA.

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