

Vermont Supreme Court Upholds Municipal Indemnity Agreement

In July 2005, the City of Rutland and Vermont Swim Association (VSA) executed a written agreement that granted VSA use of Whites Pool in Rutland for VSA's annual swim meet. 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. *Southwick v. City of Rutland*, 2011 VT 53.

During the swim meet, Addie Southwick fell from a piece of playground equipment in Whites Park and sustained injury. Southwick's parents brought suit against the City, alleging that the City had negligently installed and maintained the equipment. After the City asserted its claim against VSA for indemnity and the Southwicks added a claim against VSA, the City moved for summary judgment against VSA on two grounds: for enforcement of the indemnity clause in the agreement, and for breach of contract for failing to procure insurance naming the City as an additional insured, as required by the agreement. Rutland Superior Court granted the City summary judgment on its indemnity claim and on its breach of contract claim against VSA. Prior to trial, the City reached a settlement agreement with the Southwicks, and the Superior Court dismissed with prejudice the Southwicks' claims against the City and VSA. Based on the summary judgment ruling for the City's indemnity claim against VSA, the Superior Court entered judgment for the City against VSA in the amount of \$700,000.

VSA appealed to the Vermont Supreme Court, arguing that the Superior Court incorrectly interpreted and applied the indemnity provision contained in the agreement between the City and VSA. The indemnification clause provided:

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.

The Supreme Court found that this 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 and barred actions by VSA against the City, unless the City committed a willful act. The Supreme Court noted that "The 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. Indeed, the agreement allocated responsibility to VSA to purchase insurance to cover such losses.” The language of the indemnity clause was unambiguous and “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.”

The *Southwick* decision should have far-reaching benefits for municipalities in the area of contractual risk transfer. Contractual risk transfer is the concept of shifting the risk of legal liability to the party to a contract that is better able to control and manage that risk. In this case, as sponsor and overseer of the swim meet, VSA was in a better position than the City to manage the liability risks associated with the swim meet. With this indemnification and hold harmless clause in the parties’ contract, the City transferred responsibility to VSA for negligent acts, errors, and omissions and required VSA to reimburse the City for damages and costs arising out of VSA’s presence at Whites Park, regardless of which party was at fault. Municipalities that make their grounds, buildings, and facilities available to outside groups should make appropriate provision for risk transfer through written contracts and lease arrangements.

A copy of the decision is available at <http://info.libraries.vermont.gov/supct/current/op2010-128.html>.

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