IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-ICA-164

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IPI, INC. and MATTHEW JOSEPH TAYLOR,

Plaintiffs Below, Appellants,

v.

AXIALL CORPORATION and EAGLE NATRIUM, LLC,

Defendants Below, Appellees.

Appeal from a final order of the Circuit Court of Marshall County, West Virginia (18-C-14)

OPENING BRIEF OF APPELLANTS IPI, INC. AND MATTHEW JOSEPH TAYLOR

Counsel for Appellants, IPI, Inc. and Matthew Joseph Taylor,

Peter G. Markham (WVSB #9396)
Patrick C. Timony (WVSB #11717)
Zachary J. Rosencrance (WVSB #13040)
J. Tyler Barton (WVSB #14044)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia
Phone: (304) 347-1100
pmarkham@bowlesrice.com
ptimony@bowlesrice.com
zrosencrance@bowlesrice.com
tyler.barton@bowlesrice.com

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Appellees Axiall Corporation ("Axiall") and Eagle Natrium, LLC ("Eagle Natrium") exposed Appellants IPI, Inc. ("IPI") and Matthew Taylor to chlorine gas while IPI and Taylor were power washing and painting in Axiall's facility. IPI and Taylor sustained personal injuries and property damages, and they commenced this lawsuit against Axiall and Eagle Natrium. The Circuit Court of Marshall County awarded summary judgment[1] to Axiall and Eagle Natrium on IPI's and Taylor's personal injury and property damage claims, determining that certain boilerplate indemnification provisions reflect their agreement to indemnify Axiall and Eagle Natrium on the claims.

The circuit court committed reversible error on the indemnity issue, because:

1. The boilerplate indemnity provisions only provide indemnification to Axiall and Eagle Natrium for damages arising within the scope of IPI's and Taylor's power washing and painting services, not for damages stemming from a wholly unrelated chlorine gas leak, in another part of Axiall's facility, over which IPI and Taylor had no responsibility or control; and

2. The boilerplate indemnity provisions do not "clearly and unequivocally" authorize indemnification for the chlorine gas leak, as required by governing Pennsylvania law.

This Court should reverse the circuit court's award of summary judgment in favor of Axiall and Eagle Natrium, and permit IPI and Taylor to advance their personal injury and property damage claims.

[1] Additionally, in a separate order, the circuit court awarded summary judgment in Appellees' favor on many of Appellants' substantive claims below. Although Appellants identified this separate summary judgment in its initial Notice of Appeal, Appellants only appeal the circuit courts' award of summary judgment with respect to Appellees' counterclaims for indemnity.

STATEMENT OF THE CASE

I. Introduction

This appeal arises from two tortfeasors' attempts to escape liability and shift the financial burden for their own wrongful conduct through unclear and inapplicable boilerplate indemnification provisions. Appellees Axiall Corporation ("Axiall") and Eagle Natrium, LLC ("Eagle Natrium") (collectively "Appellees") used a defective railcar to store and transport toxic chlorine gas, which then cracked, leaked and exposed Appellants IPI, Inc. ("IPI") and Matthew Joseph Taylor[2] ("Mr. Taylor") (collectively "Appellants") to lethal quantities of chlorine gas. As Appellants performed pressure washing and painting services in an area several hundred yards away from the defective railcar, 178,400 pounds of chlorine gas disseminated through the plant and exposed Appellants. JA 1148. Through this exposure, Mr. Taylor suffered severe physical and emotional injuries and IPI sustained hundreds-of-thousands of dollars' in equipment damage.

Despite the undisputed fact that the chlorine gas leak bore no causal relationship to the services performed by Appellants, the circuit court errantly granted summary judgment in Appellees' favor, finding that they were entitled to indemnification from Appellants pursuant to an Agreement for On-Site Services, as well as Purchase Order 4510044817, incorporating by reference certain Terms and Conditions that were never bargained for. JA 1–10. As explained below, however, the disputed indemnification provisions are not "clear and unequivocal," as required under Pennsylvania law, and they do not even apply to Appellants' claims in the circumstances. This Court must reverse the circuit court's Order and remand for further proceedings.

[2] Although Mr. Taylor is named as an Appellant in this appeal, the indemnification provisions discussed below in no way oblige Mr. Taylor to personally indemnify Axiall and Eagle Natrium for his injuries. Instead, to the extent any indemnification obligation exists, such obligation is limited to Appellant IPI, only.

II. Relevant Facts

Located in Elkview, West Virginia, IPI is a small contracting business that provides, among other things, industrial painting and power washing services to businesses throughout West Virginia. JA 11–13. Mr. Taylor, as IPI's president, routinely works onsite for many of IPI's projects. JA 13. Through IPI's commercial relationship with Appellees', Mr. Taylor worked onsite at Appellees' Natrium Plant (the "Plant") in New Martinsville, West Virginia. JA 11. On the date of their injuries, Mr. Taylor and IPI agreed to "[p]ower wash and paint #24 Condensate Tank" pursuant to Purchase Order 4510044817. JA 1149.

A. The First Chlorine Gas Leak

For decades, Appellants maintained a positive commercial relationship with Appellees due to their consistently reliable and cost-effective performance of services in the Plant. JA 1323–324. This relationship soured in August of 2016 when the first of two chemical leaks caused Appellants to be exposed to toxic levels of chlorine gas (the "First Chlorine Gas Leak").

On August 27, 2016, Appellants were performing power washing and painting services on Condensate Tank 24. JA 1325. Contemporaneously, but unrelated to Appellants' services, Appellees were attempting to load hundreds-of-thousands of pounds of chlorine gas into a 1979 railcar (the "Railcar") for transport in an entirely different department of the Plant. JA 1324–325. The 37-year-old Railcar utilized ACF Industries ACT-200 stub underframe, which the Federal Railroad Administration advised—nearly a decade before the gas leak in 2006—was "prone to defects such as tank head cracks, pad-to-tank cracks, sill web cracks, and tank shell buckling that in some instances led to release of hazardous materials." JA 1325.

Prophetically, the Railcar had a crack "near the inboard end of the stub sill cradle pad." JA 1325. As Appellees filled the defective Railcar with chlorine gas, the Railcar's crack widened,

ruptured, and released 178,400 pounds of toxic chlorine gas throughout the Plant, which migrated to the area where Mr. Taylor and two of IPI's employees were working on aerial platforms nearly forty feet in the air. JA 1325. No emergency alarms or sirens were activated, and the trio found themselves aloft in the midst of a chlorine gas cloud. JA 1325.

Mr. Taylor was first alerted that he and his employees were being exposed to chlorine gas when he noticed, out of the corner of his eye, the gas cloud descend upon them. As Mr. Taylor described:

> [i]t's like falling out. And it's like – it's pretty huge. I mean, to sit there and witness that horrific size – I mean, it's all green. It seemed like the green, the chlorine gas itself was higher. . . . I was in fear. . . .

JA 1325. Mr. Taylor grabbed his escape respirator, returned to ground level, and directed his workers to apply their respirators. JA 1326. Mr. Taylor's action required him to remove his respirator to yell to IPI employees to apply their escape respirators. Resultingly, Mr. Taylor inhaled lethal chlorine gas. JA 1326.

Once Mr. Taylor got his employees' attention, they attempted to escape the Plant but were trapped by a locked gate, requiring them to wait before exiting. JA 1326. While being smothered by chlorine gas, Mr. Taylor realized the magnitude of the leak; he became fearful for his health and wellbeing. JA 1326. Exhausted from his exposure and inhalation of the lethal concentration of chlorine gas, Mr. Taylor stumbled out of the Plant, arrived at the Plant's clinic, and collapsed on a gurney. JA 1326.

After waiting for nearly an hour to be treated at the Plant clinic, Mr. Taylor was transferred via ambulance to Reynolds Memorial Hospital ("Reynolds") in Glen Dale, West Virginia. JA 1326–327. Mr. Taylor was suffering from chest tightness, vomiting, petechiae in his throat and

diaphoretic.[3] JA 1327. The treating physician, Dr. Chad Richmond, D.O., noted that "[t]he effects of chlorine exposure [were] significant and delayed. . . . The risk of chemical inhalation burns [was] significant." JA 1327. Because Dr. Richmond was incapable of adequately treating Mr. Taylor's injuries, he was life-flighted to Ruby Memorial Hospital ("Ruby") in Morgantown, West Virginia for further evaluation and treatment. JA 1327. In addition to the serious and ongoing physical injuries sustained by Mr. Taylor, the First Chlorine Gas Leak irreparably damaged hundreds-of-thousands of dollars' worth of IPI's equipment. JA 1327.

Despite the First Chlorine Gas Leak, Mr. Taylor and IPI sought to maintain IPI's long-standing business relationship in the Plant. JA 1328. Appellees conducted a safety meeting in the months following the First Chlorine Gas Leak and Mr. Taylor attempted to address the lack of a working alarm in cases of emergency. JA 1330. Mr. Taylor's appropriate concerns, however, were met with laughter from Axiall officials. JA 1330.

Relatedly, in the aftermath of the First Chlorine Gas Leak, Axiall filed a civil complaint in the Court of Common Pleas of Allegheny, Pennsylvania against AllTransek LLC ("AllTransek"), Rescar, Inc. ("Rescar"), and Superheat FGH Services, Inc. ("Superheat") (hereinafter referred to as the "Pennsylvania Action"). *See Axiall Corporation v. AllTranstek, LLC, et al.*, Civil Division No. GD-18-010944, in the Court of Common Pleas of Allegheny County, Pennsylvania; *see also* Order Denying Axiall Corporation's Motion for Summary Judgment on Covestro's Liability Case, *Covestro, LLC v. Axiall Corporation*, Civil Action Nos.: 18-C-202, 18-C-203 (Cir. Ct. Marshall Cty., Bus. Ct. Div. Aug. 29, 2022) (hereinafter referred to as "Business Court Order"). The Pennsylvania Action, like the instant dispute, arose out of the First Chlorine Gas Leak and

[3] "Petechiae are pinpoint, round spots that appear on the skin as a result of bleeding. The bleeding causes the petechiae to appear red, brown or purple. Petechiae commonly appear in clusters and may look like a rash." *See* Mayo Clinic, *Petechiae*, https://www.mayoclinic.org/symptoms/petechiae/basics/definition (last visited January 9, 2023).

AllTransek's, Rescar's, and Superheat's, alleged deficient repair of the Railcar. *See* Business Court Order at 2, ¶ 1. On October 14, 2021, the Pennsylvania Action's jury reached a verdict, concluding that Axiall was the primary party at fault, finding it negligent. *Id.* at 11–12, ¶ 29.

B. The Second Chlorine Gas Leak

On October 8, 2016—just 43 days after the First Chlorine Gas Leak—Appellants were again exposed to substantial amounts of chlorine gas while performing work at the Plant. JA 1328. Like the First Chlorine Gas Leak, the Second Chlorine Gas Leak resulted from circumstances that were completely disconnected from the services Appellants were contracted to perform. JA 1328. Specifically, Appellants were contracted to perform painting services on Tank 11 in the Plant's Caustic Department, which were likewise unrelated to the Second Chlorine Gas Leak. JA 1328. Hundreds of yards away, Appellees ignored critical safety alarms meant to alert the detection of chlorine backing up into an emergency vent line. JA 1328. Appellees ignored this alarm as a "false positive," and they allowed the backed-up chlorine to migrate from the Plant's chlorine department into the caustic department where Appellants were working. JA 1328.

Again, no alarms alerted Mr. Taylor and his employees of the Second Chlorine Gas Leak; rather, they became aware they were being exposed when Jay Jones, another IPI employee, smelled chlorine while working a manhole cover. JA 1329. As Mr. Taylor and his employees tried to flee the Second Chlorine Gas Leak, they again encountered a locked gate preventing their escape. JA 1330. Yet again, IPI's equipment was damaged as a result of its exposure to chlorine. Appellees refused to provide Mr. Taylor and his team with medical treatment following the Second Chlorine Gas Leak. JA 1330.

Enduring two chlorine gas leaks, the first of which almost killed Mr. Taylor, in the span of less than two months, irreparably damaged Mr. Taylor's psychological wellbeing. JA 112–14. As Mr. Taylor described:

> I would have dreams, nightmares of being trapped in the plant in a tank. Some of them – there would be a couple of reoccurring dreams that were similar. As dreams are bizarre, I would try to find my way out, couldn't get out. Wondering was I would be at the north gate trying to get out and looking back and seeing a cloud coming towards me and being fearful, and of course I would wake up.

JA. 1394–395. Dawn Taylor, Mr. Taylor's wife and owner of IPI, noticed Mr. Taylor changed from the gas leaks.

> He's [Mr. Taylor] very withdrawn. Very rarely goes out to eat or to a movie, very rarely talks to our kids. I mean, his relationship I believe with our kids have suffered over this just because he's so withdrawn, depressed. He'll come in from work, eat dinner, shower, go to bed, get up the next morning. A lot of times if they don't have work, I have to --- he'll stay in bed, you know, until --- Joey's always been a morning person up at 5:00 in the morning even if he didn't have to work. But now all he does come home and go to bed.
>
> . . . .
>
> A lot of times, you know, he would tell me the next morning, which I would know that something had happened because he woke up during the night and he would wake --- I would wake up, not by him actually like waking me up, but by him tossing and turning, or getting out of bed like to go downstairs getting a drink or whatever. And a lot of times he wouldn't be able to go back to sleep. So he would just go downstairs and sit in his office because he was afraid he would wake me up.
>
> . . . .
>
> [H]e's really withdrawn. He don't talk much. He doesn't --- every time he starts talking about the plant or, you know, if we discuss anything, he usually ends up having nightmares again. You know, they start back because I guess the subconscious mind won't let him – once he starts thinking about it, it stays in his mind or something.

JA 1983. Even Chuck Ziegler, a longtime Axiall employee who oversaw IPI and Mr. Taylor's work, even noticed material changes in Mr. Taylor's mental health. JA 1530.

Unable to understand what was happening, Mr. Taylor consulted with medical professionals. Dhashanini Nadarajah, M.D. diagnosed Mr. Taylor with PTSD and depression. CJA 119–21. As noted in the records, Mr. Taylor "reported he still constantly thinking and replaying the incident that happened at the chemical plant leak where he lost his job."[4] CJA 122. In filing an action against Appellees, Mr. Taylor sought to recover his damages for his physical injuries, his company's equipment and, most importantly, the damages to his mental health from the PTSD from the *two* chlorine gas leaks in Appellees' Plant. Appellees attempted to escape these damages through their reliance on two indemnification provisions.

C. The Indemnification Provisions

In the proceedings below, Axiall and Eagle Natrium argued that Appellants' claims regarding the First Chlorine Gas Leak, and the First Chlorine Gas Leak only, were subject to two separate, but equally inapplicable, indemnification provisions. First, Appellees directed the circuit court to an Agreement for On-Site Services (the "AOS") executed by IPI and PPG Industries, Inc. prior to Appellees' ownership of the Plant. JA 1036. Second, Appellees directed the circuit court to Purchase Order 4510044817 (the "Purchase Order")—the specific purchase order under which Appellants were performing work in the Plant. Axiall and Eagle Natrium insisted that their Purchase Order General Conditions ("Terms and Conditions"), which contains an additional indemnification provision, were incorporated into all of Axiall's purchase orders, including the Purchase Order here. JA 1037.

[4] Mr. Taylor worked with Dr. Nadarajah and Elizabeth Kent at WVUPC Behavioral Medical and Psychology for these conditions.

1. The Agreement for On-Site Services

In 2007, prior to Axiall's acquisition of the Plant, IPI entered into the AOS, which contains the following general indemnification provision:

> [IPI] . . . agrees to indemnify, defend and hold harmless [Axiall and Eagle Natrium] . . . ***from and against any and all claims, liability, damage, loss, penalties, fines, cost and expense of any kind whatsoever*** which may accrue to or be sustained by any Buyer . . . ***arising out of this Agreement and/or the Services***, including, without limitation, for the death of or injury to persons or destruction of property involving [IPI] . . . ***sustained in connection with performance of the Services***, arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device ***supplied by Buyer or their employees to Contractor***, its employees, agents or representatives), except the extent arising out of the sole negligence or willful misconduct of the Buyer or its employees acting within the scope of their employment.

JA 1306 (emphasis added).

The AOS defines its "Scope of Services" as "certain on-site services (the "Services") to be performed by [IPI], at the [Plant], per the performance schedule, the pricing therefor, and for [Axiall and Eagle Natrium] as shall be specified and described in an 'Accepted Order,' and as required by and in accordance with [the AOS]." JA 1305. An "Accepted Order" is defined by the AOS as, among other things, a "purchase order." JA 1305.

Importantly, the AOS explicitly contemplates potential inconsistencies and conflicts between its terms and conditions and those of Appellees' purchase orders:

> If there are any terms or conditions in [a purchase order] which are inconsistent with or in conflict with [the AOS], the terms and conditions of the various documents . . . shall control in the following priority and order: [(1)] the front of the [purchase order]; [(2)] [the AOS]; and, [(3)] then the reverse side terms and conditions of the [purchase order].

JA 1305.

2. Purchase Order 4510044817 and Axiall's General Terms and Conditions

In addition to the AOS, Axiall's Terms and Conditions contain a separate and conflicting indemnification provision, which is purportedly incorporated by reference into all of Axiall's purchase orders:

> 13.1 [IPI] . . . agrees to indemnify, defend and hold harmless [Axiall and Eagle Natrium] . . . from and against any and all damages, claims, ***demands***, expenses (***including reasonable attorneys' fees***), losses or liabilities of any nature whatsoever, and whether involving injury or damage to any person (including employees of Seller and Buyer) or property, and any and all suits, causes of action and proceedings thereon ***arising or allegedly arising from or related to the subject matter of this Purchase Order, except where such injury or damage was caused by the sole negligence of Buyer. . . .***

JA 1318 (emphasis added).

Axiall and Eagle Natrium maintain that the Purchase Order incorporated by reference this indemnification provision via the following language on the ***reverse-side*** of the Purchase Order: "**THIS PURCHASE ORDER IS SUBJECT TO, INCLUDES AND INCORPORATES HEREIN BY REFERENCE THE UNITED STATES PURCHASE ORDER GENERAL CONDITIONS FOR Eagle Natrium LLC LOCATED AT HTTP://WWW.AXIALL.COM/COMPANY.**" JA 1282–283 (emphasis in original).

III. Procedural History

A. IPI's and Mr. Taylor's Claims Against Axiall and Eagle Natrium

Appellants filed their Complaint on January 29, 2018, alleging five claims with respect to both chlorine gas leaks: (1) Count I for Strict Liability, (2) Count II for Res Ipsa Loquitur, (3) Count III for Premises Liability, (4) Count IV for Fraud, and (5) Count V for Negligent

Misrepresentation.[5] JA 23–26. For purposes of this appeal, however, these claims are only relevant to the extent they relate to the First Chlorine Gas Leak because, as explained below, Appellees only sought indemnification for Appellants' claims stemming from the First Chlorine Gas Leak.

On June 17, 2019, Appellees' amended their Answer to include, for the first time, a Counterclaim for, among other claims, Express Indemnity for Appellants' purported failure to indemnify Appellees in relation to the claims filed regarding the chlorine releases. JA 118–42. After being granted leave, Appellees' amended their counterclaim on September 24, 2021 to include a claim for breach of contract for Appellants' failure to indemnify them with respect to the First Chlorine Gas Leak pursuant to the AOS and the Purchase Order. JA 556–93.

B. Axiall's and Eagle Natrium's Motion for Partial Summary Judgment Regarding Indemnification

On May 23, 2022, Appellees' filed their Motion for Partial Summary Judgment Regarding Counter-Plaintiffs' Indemnification Claim Related to the Railcar Release and supporting Memorandum of Law, pursuant to Rule 56(c) of the *West Virginia Rules of Civil Procedure* ("Motion for Partial Summary Judgment"). JA 1032–140. Appellees' Motion for Partial Summary Judgment argued that (1) Pennsylvania substantive law governed the circuit court's interpretation of the AOS's and Purchase Order's indemnification provisions, (2) the AOS's and

[5] By Order dated September 8, 2022, the circuit court granted summary judgment in Appellees' favor on Counts I, II, IV, and V of Appellants' Complaint with regard to the First Chlorine Gas Leak. JA 2463–484. As such, the only remaining claim with respect to the First Chlorine Leak is Count III for Premises Liability.

Nevertheless, a separate civil action was filed by Covestro, LLC—which operated a plant neighboring the Natrium Plant—in the Business Court Division of the Circuit Court of Marshall County, West Virginia (the "Business Court Action"). *See Covestro, LLC v. Axiall Corporation*, Civil Action Nos.: 18-C-202, 18-C-203 (Cir. Ct. Marshall Cty., Bus. Ct. Div.). In the Business Court Action, the court found that Covestro's claim for negligence did not require expert testimony—given the Pennsylvania Action's finding of negligence on the part of Axiall—and could be established via the doctrine of res ipsa loquitor. *See* Business Court Order at 9–13. Appellants plan to move the circuit court for reconsideration of its rulings with respect to Counts II and V of their Complaint.

Purchase Order's indemnification provisions were "clear and unequivocal" under Pennsylvania law, (3) Appellants' claims fell squarely within the scope of the indemnification provisions, and (4) Appellants must reimburse Appellees for their costs and expenses related to the First Chlorine Gas Leak, including attorneys' fees related to this litigation. JA 1035–048.

Appellants timely filed their Response in Opposition to Appellees' Motion for Partial Summary Judgment ("Response") on June 21, 2022. JA 1147–322. In their Response, Appellants contended that (1) the AOS's and Purchase Order's indemnification provisions, by their relevant language, did not apply to the First Chlorine Gas Leak, (2) genuine issues of material fact concerning whether Appellees were solely negligent, grossly negligent, or acted with willful misconduct precluded summary judgment, and (3) Appellants' damages for the Second Chlorine Gas Leak were inextricably related to the damages they sustained from the First Chlorine Gas Leak. JA 1147–162. Appellees timely replied on July 5, 2022. JA 2100–153.

C. The Circuit Court's Order Granting Partial Summary Judgment

On September 12, 2022, the circuit court entered an Order granting Appellees' Motion for Partial Summary Judgment pursuant to Rule 56(c). JA 1–10. In its Order, the circuit court reached several erroneous legal conclusions. First, the circuit court summarily concluded, without explanation, that the language of the indemnity provisions were "clear and unequivocal" under Pennsylvania law. JA 7–8. In this regard, the circuit court impermissibly drew a negative inference that any injuries occurring by less than the sole fault of Appellees fell within the scope of the indemnification provisions where indemnification would be precluded for injuries caused by Appellees' sole negligence. JA 7. Importantly, though, the disputed indemnification provisions here were further limited by their explicit language that Appellants' claims arise from the services provided.

Second, the circuit court concluded that Appellants' claims with regard to the First Chlorine Gas Leak fell within the scope of the indemnity provisions because the damages Appellants sustained arose out of the services they performed at the Plant pursuant to the Purchase Order.[6] JA 8. Among the types of injuries explicitly set forth in the AOS's indemnification provision are "injuries resulting from failure of or defect in any equipment, instrument or device supplied by [Appellees] or their employees to [Appellants]." JA 3. In reliance on this language, the circuit court incorrectly found that the Railcar's defects constituted a "failure of or defect in any equipment, instrument, or device . . ." under the AOS. JA 8. This finding was made by the circuit court, notwithstanding the undisputed fact that Appellants work in the Plant had nothing to do with the Railcar.

Third, the circuit court concluded that the indemnification provisions' exceptions did not apply because Appellees were not "solely negligent" and did not engage in "willful misconduct" with regard to the First Chlorine Gas Leak. JA 8. However, as explained below, this finding was premature and multiple factual disputes regarding Appellees' conduct with regard to the First Chlorine Gas Leak should have precluded summary judgment in Appellees' favor.

Finally, the circuit court concluded that Appellants breached the AOS, Purchase Order, and Axiall's Terms and Conditions by bringing its claims against Appellees and by failing to indemnify, defend, and hold Appellees harmless from their claims related to the First Chlorine Gas Leak. JA 9.

[6] As explained below, the circuit court erroneously failed to examine which of the two conflicting indemnification provisions governed Appellants' claims below. This critical error carries significant consequences insofar as the indemnification obligations outlined by the two indemnification provisions impose very different duties on Appellants. For example, the indemnification provision set forth in Axiall's Terms and Conditions, which are apparently incorporated by reference into all of its purchase orders, requires reimbursement for attorneys' fees, whereas the AOS's indemnification provision does not provide as such. *See* JA 1318 (Axiall's Terms and Conditions); JA 1306 (AOS).

Based upon these findings and conclusions of law, the circuit court granted partial summary judgment in Appellees' favor with respect to their breach of contract and express indemnity counterclaims as they pertained to the First Chlorine Gas Leak. JA 9–10. The circuit court also found that there was no just reason for delay and that its Order constituted a final judgment as to the validity, applicability, and breach of Appellants' indemnification obligations under the AOS, the Purchase Order, and Axiall's Terms and Conditions as they related to the First Chlorine Gas Leak. In this regard, the circuit court stated that its Order was immediately appealable. JA 10. Appellants timely filed their Notice of Appeal on October 6, 2022.

SUMMARY OF THE ARGUMENT

The indemnification provisions set forth in the Agreement for On-Site Services, Purchase Order 450044817, and Axiall's Terms and Conditions are not "clear and unequivocal," as required by Pennsylvania law. As a prerequisite to the enforceability of any indemnity agreement contemplating indemnification for an indemnitee's own negligence, such an agreement must be stated in "clear and unequivocal" language. Yet, the disputed indemnification provisions here are reasonably susceptible to conflicting interpretations, at least one of which would not require indemnification under the circumstances of this case. This finding, as a matter of law, precludes the indemnification provisions' enforceability.

Notwithstanding the indemnification provisions' utter lack of clarity, they are inapplicable to Appellants' claims below. Appellants' injuries—extensive exposure to highly-toxic chlorine gas, without warning, from Appellees' use of a defective Railcar—did not "arise out of" the services Appellants agreed to perform at the Plant—power washing and painting an unrelated, empty chemical tank in a separate unit of the Plant. Instead, Appellants' injuries "arose out of" Appellees' continual use of an incurably defective railcar to store and transport chlorine gas,

despite the Federal Railroad Administration's decade-old warning that the Railcar was prone to such defects.

Yet, even if this Court were to find that Appellants' injuries "arose out of" the services they agreed to perform, still, genuine disputes of material fact as to whether Appellees acted with "sole negligence," "willful misconduct," or "gross negligence" should have precluded the circuit court from awarding summary judgment in Appellees' favor. As explicitly provided for in both indemnification provisions, Appellants are excluded from their indemnification obligation if Appellees acted with "sole negligence," "willful misconduct," or "gross negligence." Given the substantial evidence submitted by Appellants demonstrating genuine questions of fact—which the circuit court inappropriately excluded from its consideration—the circuit court should have permitted a jury, as the trier of fact, to consider these issues.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

IPI and Mr. Taylor do not believe that the circuit court's Order offers sufficient grounds for this Court to render a meaningful ruling on appeal. Specifically, Appellants aver that, pursuant to Rule 19(a) of the *West Virginia Rules of Appellate Procedure*, this case is suitable for oral argument because it involves assignments of error in the application of settled Pennsylvania law, involves the application of a narrow issue of law—that being indemnity, and involves an erroneous decision against the weight of the evidence submitted below. As such, because substantial disputed questions of law and fact are involved in this appeal, IPI and Mr. Taylor believe oral argument is necessary for this Court's disposition of this appeal.

STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994). A circuit court may award summary judgment under Rule

56(c) of the *West Virginia Rules of Civil Procedure* "only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 133 S.E.2d 770 (W. Va. 1963).

A circuit court's role "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Painter*, 451 S.E.2d at 758 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Additionally, all permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion. *Masinter v. WEBCO Co.*, 262 S.E.2d 433, 435 (1980) ("[W]e have viewed summary judgment with suspicion and have evolved the rule that, on appeal, the facts must be construed in a light most favorable to the losing party."). Thus, in this regard, summary judgment is inappropriate where the record taken as a whole leads a rational trier of fact to find for the nonmoving party. Syl. Pt. 4, *Painter*, 451 S.E.2d 755.

ARGUMENT

This Court should reverse the circuit court's decision to grant summary judgment in Appellees' favor with respect to their counterclaims for breach of contract and express indemnity because (1) the circuit court failed to properly examine which of the two conflicting indemnification provisions were applicable to Appellants' claims; (2) the disputed indemnification provisions are not "clear and unequivocal" as required by Pennsylvania law, (3) Appellants' injuries resulting from the First Chlorine Gas Leak do not fall within the scope of the indemnification provisions insofar as they do not arise from the services they performed at the Plant, and (4) genuine disputes of material fact regarding whether Appellees were "solely negligent," "grossly negligent," or engaged in "willful misconduct" preclude summary judgment.

I. The circuit court failed to properly examine which of the two conflicting indemnification provisions were applicable to Appellants' claims below.

As an initial matter, the circuit court summarily concluded that "[p]ursuant to the terms of the independently enforceable indemnification provisions in the AOS and the Terms and Conditions, IPI must indemnify, defend, and hold harmless [Axiall and Eagle Natrium] from all claims by [IPI and Mr. Taylor related to the [First Chlorine Gas Leak]." JA 8–9. This finding—that IPI's and Mr. Taylor's obligation to indemnify Axiall and Eagle Natrium arises from ***both*** the AOS and Axiall's Terms and Conditions—completely contravenes the explicit order of priority with respect to conflicting terms and conditions as set forth in the AOS.

While "[i]t is axiomatic in contract law that two provisions of a contract should be read so as not to be in conflict with each other if it is reasonably possible," *Keystone Fabric Laminates, Inc. v. Fed. Ins. Co.*, 407 F.2d 1353, 1356 (3d Cir. 1969), "[t]he fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties." *Mitch v. XTO Energy, Inc.*, 212 A.3d 1135, 1138–139 (Pa. Super. Ct. 2019). This purpose is achieved by taking the "whole instrument" together to arrive at contractual intent. *Maisano v. Avery*, 204 A.3d 515, 520 (Pa. Super. Ct. 2019). Effect must be given to all of the provisions in a contract, and "[a]n interpretation will not be given to one part of the contract which will annul another part of it." *Porter v. Chevron Appalachia, LLC*, 204 A.3d 411, 418–19 (Pa. Super. Ct. 2019).

By finding that Appellants' purported indemnification obligation arose from both the AOS and Axiall's Terms and Conditions, the circuit court erroneously construed the AOS in a manner that rendered its conflict provision meaningless. As explained above, to the extent a conflict exists between the terms and conditions of the AOS and the terms and conditions of any purchase order, the AOS explicitly provides the following priority and order with respect to their governance and

applicability: (1) "the front of the [purchase order];" (2) the AOS; and (3) "then the reverse side terms and conditions of the [purchase order]." JA 1305. The Purchase Order purportedly incorporates by reference Axiall's Terms and Conditions on its ***reverse side***. JA 1282–83. Thus, under the express, agreed-upon AOS, any portion of Axiall's Terms and Conditions that conflict with the AOS are preempted and inapplicable.

Here, the indemnification provisions of the AOS and Axiall's Terms and Conditions materially and irreconcilably conflict. The AOS requires indemnification for "claims, liability, damage, loss, penalties, fines, cost and expense. . . ." JA 1306. On the other hand, the Terms and Conditions require indemnification for "damages, claims, ***demands***, expenses (***including reasonable attorneys' fees***), losses or liabilities. . . ." JA 1318 (emphasis added). Thus, pursuant to the indemnification provision set forth in the Terms and Conditions, Appellants must reimburse Appellees for costs related to "demands" and for "reasonable attorneys' fees"—two obligations that are not contemplated under the AOS.

These two indemnifications cannot reasonably be reconciled. Yet, notwithstanding these irreconcilable conflicts, the circuit court failed to identify which of the two indemnification provisions governed Appellants' claims. This conclusion flies in the face of the express language of the AOS, which sets forth the priority and applicability of conflicting terms and conditions between the AOS and any purchase orders. This Court must reverse and find that the AOS sets forth the only potential indemnification obligation on the part of Appellants.[7]

[7] While Appellants maintain that the AOS is the only source of any potential indemnification obligation on their part, for purposes of their remaining arguments, Appellants assume that either indemnification provision could govern. Appellants do not waive or concede in any manner that the indemnification provision set forth in the Terms and Conditions and incorporated by reference into the Purchase Order govern their claims below.

II. The disputed indemnification provisions—which are reasonably susceptible to conflicting interpretations—are not "clear and unequivocal" under Pennsylvania law.

It is well-settled under Pennsylvania law that "if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in ***clear and unequivocal language***." *Ruzzi v. Butler Petro. Co.*, 588 A.2d 1, 4 (Pa. 1991) (emphasis added); *see also Bernotas v. Super Fresh Food Markets, Inc.*, 863 A.2d 478, 483 (Pa. 2004); *Greer v. City of Philadelphia*, 795 A.2d 376, 378 (Pa. 2002); *Perry v. Payne*, 66 A. 553, 557 (Pa. 1907). This is so because "assuming liability for the negligence of an indemnified party "is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation.'" *Greer*, 795 A.2d at 378 (quoting *Ruzzi*, 588 A.2d at 4). As the Supreme Court of Pennsylvania wisely stated in *Perry*, it would be "contrary to experience and against reason" for a contractor to agree to indemnify another for the other's negligence, when such indemnification would subject it to "uncertain and indefinite" liability. *Perry*, 66 A. at 555.

While Pennsylvania law does not require any "magic words" for such an indemnity provision to be "clear and unequivocal," *see Urban Redevelopment Auth. of Pittsburgh v. Noralco Corp.*, 422 A.2d 563, 566 (Pa. 1980), reviewing courts must remain mindful of their mandate to "strictly construe the scope of an indemnity contract against the party seeking indemnification." *Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.*, 264 F.3d 365, 371 (3d Cir. 2001) (applying Pennsylvania law).

The "clear and unequivocal" prerequisite was first set forth by the Pennsylvania Supreme Court in *Perry*, where the court stated "that a contract of indemnity against personal injuries,

should not be construed to indemnify against the negligence of the indemnitees, unless it is so expressed in unequivocal terms." *Perry*, 66 A. at 557. Several decades later, the Pennsylvania Supreme Court "reinvigorated" this rule in *Ruzzi*, holding that an agreement contemplating a property owner's indemnification of a contractor "from any and all liability for claims for loss, damage, injury or other casualty to person or property caused" by a renovation operation was not specific enough to require indemnification for the contractor's own negligence because "words of general import [were] used." *Ruzzi*, 588 A.2d at 5.

Eleven years later—in a case that is particularly instructive for purposes of the instant appeal—the Pennsylvania Supreme Court decided *Greer*, finding that another indemnification provision did not "clearly and unequivocally" contemplate indemnification of an indemnitee for their own negligence. *Greer*, 795 A.2d at 379 ("[T]he language of the indemnity provision in no way demonstrates an unambiguous intention by [the indemnitor] to provide indemnification for the negligence of the indemnitees, as required by the *Perry-Ruzzi* rule."). There, the court examined an indemnification provision which required the indemnitor to indemnify and hold the indemnitees harmless

> from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the [indemnitor's] [w]ork under this [agreement] . . . but only to the extent caused in whole or in part by negligent acts or omissions of the [indemnitor], . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Id. at 377 (emphasis omitted).

In an action brought against the indemnitor and indemnitees as co-defendants, a jury found both the indemnitor and the indemnitees to be partially negligent for their alleged conduct. *Id.* Following the jury's verdict, the indemnitees moved for judgment notwithstanding the verdict, arguing that they were entitled to indemnification by the indemnitor pursuant to the

aforementioned indemnification provision. *Id.* at 378. The trial court denied their motions, finding that the indemnitor "did not intend to assume liability for the negligence of [the indemnitees], absent specific language in the [agreement] to that effect." *Id.* Thereafter, the Commonwealth Court reversed the trial court's judgment, finding that the indemnification provision "limit[ed] [the indemnitor's] indemnification of [the indemnitees] only to the extent of [the indemnitor's] negligence, even if damages were caused in part by [the indemnitees'] negligence." *Id.*

However, the Pennsylvania Supreme Court reversed the Commonwealth Court's ruling, holding that "the language of the indemnity provision in no way demonstrate[d] an unambiguous intention by [the indemnitor] to provide indemnification for the negligence of the indemnitees[.]" *Id.* at 379. In support of its holding, the court reasoned that the disputed indemnification provision did "not 'put[] it beyond doubt by express stipulation' that [the indemnitor] intended to indemnify [the indemnitees] for their own negligence." *Id.* at 380 (quoting *Perry*, 66 A. at 557).

Similarly, here, the circuit court impermissibly found that Axiall and Eagle Natrium were entitled to indemnification by IPI and Mr. Taylor for injuries they sustained resulting from Axiall's and Eagle Natrium's negligent conduct under these circumstances. JA 8. The circuit court made this unfounded finding, notwithstanding the indemnification provisions' limitation to damages "arising out of [the AOS] and/or Services," which includes injuries "sustained in connection with performance of the Services," or arising out of the subject matter of the Purchase Order. JA 1306. Additionally, both indemnification provisions contain exceptions that ***categorically exclude*** indemnification arising out of the "sole negligence" or "willful misconduct" of Axiall and Eagle Natrium. JA 1306; JA 1318.

Far from "clear and unequivocal," the indemnification provisions are undefined in scope, are reasonably susceptible to multiple conflicting interpretations, and directly violate the *Perry*-

Ruzzi rule, which is intended to prohibit subjection to "uncertain and indefinite" indemnity liability. *Perry*, 66 A. at 555. By way of example, Appellees' reading of the indemnification provisions in the proceedings below would require indemnification simply because, but for Appellants' mere presence in their facility, they would not have suffered any injury. JA 2101–102. While Appellants vehemently maintain that this interpretation of the indemnification provisions is unquestionably wrong, another plausible reading would only require indemnification where some logical causal nexus between the injuries suffered and the services provided by IPI and Mr. Taylor exists. For example, had Mr. Taylor and his employees been injured from a sudden collapse of the aerial platforms provided to them by Axiall and Eagle Natrium, a causal nexus between their injuries and the services they agreed to perform would logically exist.

Given the conflicting interpretive conclusions with respect to the scope and force of the indemnification agreements, it cannot be said that IPI and Mr. Taylor "clearly and unequivocally" agreed to indemnify Axiall and Eagle Natrium for conduct that is wholly unrelated to the services provided by IPI and Mr. Taylor in the Plant. In clear contravention of Pennsylvania law, the circuit court improperly strained the scope of the disputed indemnification provisions to require indemnification for conduct that was not "clearly and unequivocally" contemplated in the AOS, Purchase Order, and Axiall's Terms and Conditions. Simply put, the language of the disputed indemnification provisions do not "put it beyond doubt" that IPI and Mr. Taylor intended to indemnify Axiall and Eagle Natrium for their own negligent conduct that was unrelated to the work IPI was contracted to perform, particularly under the horrific and gruesome circumstances of this case. Accordingly, because the scope and force of the disputed indemnification provisions are not "clear and unequivocal," but are reasonably susceptible to conflicting interpretations, the

circuit court erred in awarding summary judgment to Appellees regarding their claims for indemnification. This Court must reverse.

III. The AOS, Purchase Order, and Axiall's Terms and Conditions do not require indemnification because Appellants' injuries do not "arise from" the services they agreed to perform at the Plant.

Independent from the circuit court's improper and insufficient analysis with respect to the *Perry-Ruzzi* "clear and unequivocal" standard, the circuit court additionally erred in finding that Appellants' injuries were encompassed by the scope of the indemnification provisions where their injuries had no causal relation whatsoever to the services they were contracted to perform.

As explained above, the relevant language of the AOS's indemnity provision requires Appellants to indemnify and hold harmless Appellees from claims

> arising out of [the AOS] and/or the Services, including, without limitation, for the death of or injury to persons or destruction of property involving [Appellants] . . . ***sustained in connection with performance of the Services***, arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device ***supplied by [Appellees] . . . to [Appellants] . . . at the request of [Appellants]*** . . .) except to the extent arising out of the sole negligence or willful misconduct of the [Appellees]. . . .

JA 1306 (emphasis added). Similarly, Axiall's Terms and Conditions, which are incorporated by reference into all of its purchase orders, requires indemnification only from claims "arising or allegedly arising from or related to the subject matter of" the particular purchase order. JA 1318.

Without explanation, the circuit court concluded that Appellants' damages "arose out of the services being performed or otherwise being provided by IPI and Mr. Taylor pursuant to [Purchase Order] 4510044817, the incorporated Terms and Conditions and the AOS." JA 8. As explained below, however, the circuit court erred in reaching this conclusion for several reasons. First, the circuit court failed to construe the indemnification provisions in accordance with the applicable interpretive canons set forth under Pennsylvania law. Second, rather than appropriately

finding that IPI's and Mr. Taylor's injuries "arose from" Appellees' inexcusable use of a defective 37-year-old railcar to store and transport highly toxic chlorine gas, the circuit court erroneously found that Appellants' injuries stemmed from their performance of power washing and painting services in an entirely distinct area of the Plant several hundred yards away from the Railcar.

A. The circuit court failed to construe the disputed indemnification provisions in accordance with the applicable interpretive canons set forth under Pennsylvania law.

The "primary purpose in construing indemnity contracts like other contracts is to ascertain and give effect to the intention of the parties." *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. Ct. 2000). Yet, indemnity agreements must be narrowly construed, in light of the parties' intentions as evidenced by the entire contract. *Fox Park Corp. v. James Leasing Corp.*, 641 A.2d 315, 318 (Pa. 1994) (citing *Ruzzi*, 588 A.2d 1). Additionally, where an indemnification agreement is clear and unambiguous, courts must give effect to the agreement's plain language. *UPMC Health Sys. v. Metro. Life Ins. Co.*, 391 F.3d 497, 502 (3d Cir. 2004). Nevertheless, as explained above, indemnification agreements "must [be] strictly construe[d] . . . ***against the party seeking indemnification***." *Jacobs Construction*, 264 F.3d at 371 (emphasis added).

Without considering any of these governing interpretive canons, the circuit court summarily concluded that Appellants' damages "arose out of the services" they performed at the Plant. JA 8. Tellingly, the circuit court cited no authority explaining the meaning of "arising out of" as used in the AOS and Axiall's Terms and Conditions. Yet, several courts have interpreted the meaning of "arising out of" under Pennsylvania law in the context of insurance agreements. *See Time Warner Ent. Co., L.P. v. Travelers Cas. & Sur. Co.*, 1998 WL 800319, at *7–8 (E.D. Pa. Nov. 10, 1998); *Pa. Turnpike Comm'n v. Transcontinental Ins. Co.*, No. CIV. A. 94-5039, 1995

WL 465197, at *4–5 (E.D. Pa. Aug. 7, 1995); *Forum Ins. Co. v. Allied Sec., Inc.*, 866 F.2d 80, 82 (3d Cir. 1989); *McCabe v. Old Republic Ins. Co.*, 228 A.2d 901, 903 (Pa. 1967); *Mfrs. Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571, 573 (1961).

Each of these authorities state that the meaning of "arising out of" in an *insurance contract* under Pennsylvania law has been interpreted to be satisfied by "but for" causation, "i.e., a cause and result relationship," *see Goodville*, 170 A.2d at 573. In this regard, the test for "but for" causation under Pennsylvania law requires a showing that the damages would not have resulted but for the existence of the conduct triggering coverage under an insurance agreement. *See generally E.J. Stewart, Inc. v. Aitken Prods., Inc.*, 607 F. Supp. 883, 889 (E.D. Pa. 1985) ("Cause in fact or 'but for' causation provides that if the harmful result would not have come about but for the negligent conduct then there is a direct causal connection between the negligence and the injury.").

Yet, unlike insurance agreements—which are required to be liberally construed *in favor of coverage*—indemnification agreements must be strictly construed *against indemnification*. *See Jacobs Construction*, 264 F.3d at 371. Moreover, Pennsylvania courts have not had occasion to examine the meaning of "arising out of" or "arising from" in the context of an indemnification provision, and jurisdictions appear split on the proper construction of these phrases. *See generally* Conger, et al., *Construction Accident Litigation* § 7.5 (2d ed. 2022) (discussing cases relating to indemnification for injuries "arising out of" the "performance of work"); 3 *Bruner & O'Connor on Construction Law* § 10.26 (2022) (same). Nevertheless, the Pennsylvania Supreme Court has offered its guidance on this issue, indicating that indemnification language of this sort would not be so broadly construed. *See Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 171 A.2d 185, 189 (Pa. 1961).

In *Pittburgh Steel Co.*, the Pennsylvania Supreme Court considered whether an electrical contractor was required to indemnify a steel mill for injuries sustained by its subcontractor's employee resulting from the negligent operation of a crane by an employee of the steel mill. *Id.* at 186–87. The subcontractor's employee brought suit against the steel mill for his injuries. *Id.* at 187. After the steel mill obtained a settlement with the subcontractor's employee, the steel mill brought an action against the electrical contractor for express indemnity pursuant to their service contract. *Id.* The service contract contained an indemnification provision stating, in pertinent part, that the contractor "will indemnify, save harmless and defend [the steel mill] from all liability for loss, damage, or injury to person or property in any manner arising out of or incident to performance of this [service contract]. . . ." *Id.* at 186.

The steel mill argued that the electrical contractor was required to indemnify it for the subcontractor's employee's injuries pursuant to the service contract. *Id.* at 187. The Pennsylvania Supreme Court disagreed and held that the electrical contractor had no obligation to indemnify the steel mill. *Id.* at 189. The court reasoned that the steel mill "remained in possession of the premises," and its "employees continued working under its exclusive control;" to require indemnification would have, in effect, impermissibly made the electrical contractor an insurer for acts of negligence over which it had no control.[8] *Id.* Thus, the court concluded that it was "unreasonable to infer or conclude that the parties intended an indemnification of such magnitude" in the absence of "more direct and unequivocal language in the contract." *Id.*

Given the rules of strict and narrow construction with regard to indemnification provisions, as well as the Pennsylvania Supreme Court's analysis of the "arising out of" language set forth in

[8] The court's analysis in this respect is a clear recognition that agreements to insure and agreements to indemnify are not comparable and should not be construed in the same manner.

Pittsburgh Steel Co., it is clear that the use of "arising out of" in the context of an indemnification provision requires something more than a simple "but for" causation analysis. Otherwise, the result in *Pittsburgh Steel Co.*, and many subsequent cases like it, would have differed significantly and would have impermissibly shifted the role of numerous general contractors to be insurers. But for the electrical contractor's performance of its service contract with the steel mill, the subcontractor would not have performed its work in the plant and its employee would not have been injured. Yet, as the Pennsylvania Supreme Court wisely concluded, this result would have absurdly distorted the electrical contractor's role into one of an insurer.

This Court should reach the same conclusion and strictly construe the indemnification provisions here in a manner such that the phrase "arising out of" requires a greater causal nexus than that of a general "but for" test. In this regard, the appropriate construction of "arising out of" would be more akin to require some foreseeability—however minimal—between the services performed and the injuries suffered. Otherwise, the indemnification provisions would unreasonably require indemnification for Appellants' injuries, which were caused by the defective Railcar over which Appellants had no dominion, authority, or control.

B. Appellants' injuries did not "arise out of" the "services" they performed at the Natrium plant—pressure washing and painting unrelated chemical storage tanks.

Applying these interpretive canons to the disputed indemnification provisions and the factual circumstances surrounding Appellants' underlying claims, it is clear that IPI and Mr. Taylor did not agree to indemnify Axiall and Eagle Natrium when their injuries have no causal relationship whatsoever to the services they contracted to perform.

By way of further illustration, where an agreement requires a contractor to indemnify a business for injuries "arising out of or resulting from the performance of the work," the Superior

Court of Pennsylvania has held that, notwithstanding the contractor's presence at the job site, indemnification was not required where the injuries were unrelated to the performance of work. *Hershey Foods Corp. v. Gen. Elec. Serv. Co.*, 619 A.2d 285, 289–90 (Pa. Super. Ct. 1992). *Hershey* involved a contractor-electrician who was fatally injured while working in a Hershey plant.[9] *Id.* at 287. While on his lunch break, the decedent sat on a piece of equipment in the plant to eat a candy bar. *Id.* Soon thereafter, the equipment began operating while the decedent was still seated, and the decedent was struck in the back of his head by a cross bar, resulting in his death. *Id.*

The decedent's employer and Hershey had previously agreed that the employer would indemnify Hershey "against all claims, damages, losses and expenses including attorneys' fees *arising out of or resulting from the performance of the Work. . . .*" *Id.* at 289 (emphasis in original). Hershey argued that the decedent's presence at its facility during his lunch break necessarily meant that his injuries arose out of the performance of the work. *Id.* However, the Superior Court of Pennsylvania disagreed, finding that the decedent's conduct—eating a candy bar during his lunch break—was not clearly within the definition of "performance of the Work." *Id.* at 290. Thus, because the disputed contractual language was ambiguous with respect to the meaning of "performance of the Work," the Pennsylvania Superior Court construed the agreement against Hershey, as the party seeking indemnification. *Id.*

Similary, IPI's and Mr. Taylor's performance of power washing and painting services on a chemical tank in an area of the Plant several hundred yards away from the area where the First Chlorine Gas Leak manifested is wholly inconsequential to the injuries they sustained as a result of their prolonged exposure to toxic chlorine gas. To be sure, IPI and Mr. Taylor had no access,

[9] The decedent was employed by General Electric Services Company, a contracting company that Hershey hired to provide electrical services in its plant. *Hershey*, 619 A.2d at 286.

authority, or control over any aspect of Appellees' attempt to load the defective Railcar with chlorine gas. Eliminating the necessary event to trigger Appellants' indemnification obligation—the performance of power washing and painting services—Appellants still would have been injured simply from their mere presence at the Plant. Just as the court in *Hershey* found that a contractor's presence at a facility was insufficient to require indemnification, it cannot be said here that IPI and Mr. Taylor agreed to indemnify Axiall and Eagle Natrium for damages arising from their mere presence at the Plant at the time of the First Chlorine Gas Leak.

As such, Appellants' performance of power washing and painting services under the Purchase Order did not have a sufficient causal relationship to their injuries because, even if they were not performing "services" at the Plant at the time the First Chlorine Gas Leak occurred, they still would have been exposed simply due to their presence at the Plant. The AOS and Axiall's Terms and Conditions plainly do not require indemnification for injuries arising out of Appellants' "presence at the Plant." Appellants' injuries must arise out of the "services" they were contracted to perform—power washing and painting Tank 24. The circuit court's conclusion that Appellants' injuries arose out of the services being performed is patently incorrect, and this Court must reverse.

IV. The circuit court erred in concluding that Appellees' use of a defective 37-year-old chemical railcar to store fatally toxic quantities of chlorine gas constitutes a "failure of or defect in any equipment, instrument, or device" under the AOS.

Among other examples, the AOS's indemnification provision provides that "injuries resulting from failure of or defect in any equipment, instrument or device ***supplied by [Axiall and Eagle Natrium] . . . to [IPI and Mr. Taylor]***" require indemnification. JA 1306 (emphasis added). However, the circuit court completely misconstrued this language to mean that the defective Railcar fell within this narrowly tailored example. JA 8 ("The crack in [the Railcar] leading to the [First Chlorine Gas Leak], constitutes a 'failure of or defect in any equipment, instrument, or

device . . .' under the AOS."). No application of Pennsylvania law is necessary to illustrate the plain error of this finding.

Clearly, the defective Railcar was not "supplied by" Axiall and Eagle Natrium to IPI and Mr. Taylor for the services they were contracted to perform. The defective Railcar was not even contemplated to be included in the services provided by IPI and Mr. Taylor under the Purchase Order. JA 1282–283. Rather, at the time of the First Chlorine Gas Leak, the Railcar was being filled with chlorine gas to be stored and transported from the Plant. JA 1148–149. Accordingly, the circuit court clearly erred in finding that the defective Railcar constituted a "failure of or defect in any equipment, instrument, or device supplied by [Axiall and Eagle Natrium] . . . to [IPI and Mr. Taylor]. . . ."

Notwithstanding the circuit court's erroneous finding with respect to this language of the AOS's indemnification provision, the inclusion of this limited example is illustrative of the injuries contemplated by the parties to trigger IPI's indemnification obligation. Under Pennsylvania law, "the specific controls the general when interpreting a contract." *See Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 239 (3d Cir. 2020) (quoting *Dominic's Inc. v. Tony's Famous Tomato Pie Bar & Rest., Inc.*, 214 A.3d 259, 269 (Pa. Super. Ct. 2019)). Thus, the specific examples of the types of injuries requiring indemnification should have guided the circuit court's interpretation of the AOS's indemnification provision.

It is sensible that injuries resulting from any failure or defect in equipment provided by Axiall and Eagle Natrium would be of the sort that "arise out of" the AOS or the "services" IPI agreed to provide. In this same vein, when the meaning of the AOS's indemnification provision is properly gleaned from the entirety of the provision, it would be nonsensical to conclude that

injuries resulting from the release of chlorine gas from a defective railcar—of which IPI and Mr. Taylor had no authority, dominion, or control over—require indemnification from IPI.

V. The circuit court erred in awarding summary judgment where genuine disputes of material fact exist as to whether Appellees were "solely negligence," engaged in "willful misconduct," or were "grossly negligent."

The foregoing arguments are dispositive—the indemnification provisions are unclear, ambiguous, and otherwise are inapplicable to Appellants' claims below. However, despite the existence of several factual disputes, the circuit court determined that Axiall and Eagle Natrium were not "solely negligent" and did not engage in "willful misconduct" in relation to the First Chlorine Gas Leak. JA 8. To be sure, a finding that Axiall and Eagle Natrium were "solely negligent," engaged in "willful misconduct, or were "grossly negligent," would trigger the indemnification provisions' exceptions and would foreclose their applicability to Appellants' claims. JA 1306; JA 1318.

Yet, the circuit court's baseless conclusion ignores the abundance of evidence offered by Appellants demonstrating—at the very least, a genuine issue of material fact—that Axiall and Eagle Natrium were "solely negligent," engaged in "willful misconduct," or were "grossly negligent." Critically, the circuit court did not just "turn a blind eye" to the evidence submitted by Appellants, it deliberately chose to categorically exclude it from its consideration below. JA 5. Had the circuit court properly weighed this evidence, it would have reached the correct conclusion that sufficient factual disputes warranted a jury's consideration of whether Appellees' abhorrent conduct precludes the applicability of the indemnification provisions.

A. The circuit court abused its discretion in declining to consider the exhibits submitted by Appellants.

Without explaining which of Appellants' exhibits[10] it declined to consider—and its justification for their wholesale exclusion—the circuit court found that they "did not meet the threshold requirements for consideration as set forth in Rule 56 of the West Virginia Rules of Civil Procedure and as further discussed by the West Virginia Supreme Court of Appeals at [footnote] 15 in *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 693 S.E.2d 789 (2010)." JA 5. Presumably, the circuit court considered none of Appellants' exhibits and unilaterally excluded them from the record. This Court should find this plainly erroneous decision to be a clear abuse of the circuit court's discretion. *See McDougal v. McCammon*, 455 S.E.2d 788, 794 (W. Va. 1995) (explaining that the "abuse of discretion" standard applies to a circuit court's evidentiary rulings).

The circuit court's finding inappropriately narrows the scope of exhibits that Rule 56 permits to be attached to summary judgment briefing and distorts the standard for summary judgment exhibits set forth in *Ramey*. As delineated in Rule 56, "pleadings, ***depositions***, answers to interrogatories, and admissions on file, together with [sic] affidavits, if any" may be submitted in support of or against a motion for summary judgment. W. Va. R. Civ. P. 56(c) (emphasis added). Footnote 15 in *Ramey* makes clear, though, that this list is not exhaustive, and other materials may be submitted in support of or against summary judgment. *Ramey*, 693 S.E.2d at 797 n.15; *see also* Syl. Pt. 1, *Aluise v. Nationwide Mut. Fire Ins. Co.*, 625 S.E.2d 260 (W. Va. 2005) ("[A] trial court may consider any material that would be admissible or useable at trial.").

[10] In the proceedings below, Appellees argued that Exhibit 1 attached to Appellants' Response in Opposition to Appellees' Motion for Partial Summary Judgment—the National Traffic Safety Board Hazardous Material Accident Report addressing the First Chlorine Gas Lead—was inadmissible pursuant to 49 C.F.R. § 835.2. JA 2111. Although this argument is incorrect for a few reasons, even without it, Appellants vehemently maintain that sufficient questions of fact raised by the remaining exhibits—which are admissible—should have precluded summary judgment in Appellees' favor.

Ramey's only limitation—to the extent it may even be referred to as one—is that the authenticity of the documents submitted for review be established. *Ramey*, 693 S.E.2d at 797 n.15 (noting that "the authenticity of documents presented for the court's consideration at the summary judgment stage needs to be established" in determining whether an exhibit submitted would be admissible or useable at trial). As noted in Rule 902 of the *West Virginia Rules of Evidence*, several types of documents are "self authenticating," meaning "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required. . . ." W. Va. R. Evid. 902. These documents include "domestic public documents under seal" and "official publications." *See* W. Va. R. Evid. 902(5). Yet, as noted above, deposition transcripts are permissible for use at the summary judgment stage because they are taken under oath and the deponent's responses are relatively spontaneous. *See* Wright & Miller, *Federal Practice & Procedure* § 2722 (4th ed. 2022).

Appellants attached twelve exhibits to their Response in Opposition to Appellees' Motion for Partial Summary Judgment: (1) the Accident Report completed by the National Transportation Safety Board ("NTSB"), JA 1163–214; (2) the Deposition Transcript of Julie Bart ("Ms. Bart"), Axiall's corporate designee, JA 1215–224; (3) the Department of Transportation Federal Railroad Administration's ("FRA") Notice of Safety Advisory 2006–04, Notice No. 2, JA 1225–226; (4) the Deposition Transcript of Mr. Taylor, JA 1227–281; (5) Purchase Order 4510044817, 1282–283; (6) a Site Map of the Plant, CJA 4; (7) Tri-State Ambulance Record of Mr. Taylor's medical transport, JA 1285; (8) Reynolds Memorial Hospital's Records of Mr. Taylor's emergency visit, JA 1286–298; (9) Stat MedEvac Invoice of Mr. Taylor's medical transport to Ruby Memorial Hospital, JA 1299; (10) the Expert Report of Michael P. Castellani, Ph. D., JA 1300–304; (11) the AOS, JA 1305–315; and (12) Axiall's Terms and Conditions, JA 1316–321.

Each of these exhibits are undoubtedly permitted to be submitted in opposition to a motion for summary judgment. First, deposition transcripts are explicitly contemplated by Rule 56(c) as permissible to be utilized in opposing a motion for summary judgment. As such, Exhibits 2 and 4 attached to Appellants' Response in Opposition should have been considered by the circuit court.

Second, Rule 902 makes clear that "official publications" do not require evidence of authenticity as a prerequisite to admissibility. W. Va. R. Evid. 902(5). Exhibit 3 attached to Appellants' Response in Opposition—the FRA's Notice of Safety Advisory 2006–04, Notice No. 2—is self-authenticating as an "official publication" under Rule 902(5) as a publication issued by a public authority—namely, the FRA as a political subdivision of the United States. JA 1225.

Third, the distinctive characteristics of Exhibits 7 (the Tri-State Ambulance Record), 8 (the Reynolds Memorial Hospital Records), and 9 (the Stat MedEvac Invoice) are all sufficient to support a finding that they are what Appellants claimed they were. Each document bears Mr. Taylor's name, residential address, and other distinctive identifiers—such as the entities' corporate names, account/event numbers, and amounts due. As such, the authenticity of Exhibits 7, 8, and 9 were established by their own distinct characteristics under Rule 901(b)(4).

Finally, the AOS, Purchase Order, and Axiall's Terms and Conditions were of no consequence to the Court's determination of whether Axiall and Eagle Natrium were "solely negligent," engaged in "willful misconduct," or were "grossly negligent." It is unclear, however, how the circuit court could have considered the same documents—the AOS, Purchase Order and Terms and Conditions—which were attached to Appellees' Motion for Partial Summary Judgment, while simultaneously excluding them when attached to Appellants' Response in Opposition.

At sum, there was no justification for the circuit court to unilaterally and categorically exclude Appellants' exhibits from its consideration of Appellees' Motion for Partial Summary Judgment. Each of the exhibits attached to Appellants' Response in Opposition are explicitly allowable under Rule 56(c) of the *West Virginia Rules of Civil Procedure*, the West Virginia Supreme Court of Appeals' decision in *Ramey*, and Rules 901 and 902 of the *West Virginia Rules of Evidence*. This Court must find that the circuit court committed plain error and abused its discretion in failing to consider Appellants' exhibits.

B. The evidence submitted by Appellants sufficiently demonstrated genuine issues of material fact, precluding summary judgment.

The West Virginia Supreme Court of Appeals has conclusively stated that "[n]egligence . . . is a jury question when the evidence is conflicting or the facts are such that reasonable [people] may draw different conclusions from them." *Burgess v. Jefferson*, 245 S.E.2d 626, 628 (W. Va. 1978) (collecting cases). Additionally, to warrant jury consideration, a plaintiff need only "establish a *prima facie* case of negligence against the defendant," which may be made by circumstantial as well as direct evidence. Syl. Pt. 8, *Wehner v. Weinstein*, 444 S.E.2d 27 (W. Va. 1994) (quoting Syl. Pt. 2, *Burgess*, 245 S.E.2d 626).

To make this *prima facie* showing, a plaintiff must show "that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff." Syl. Pt. 1, *Parsley v. Gen. Motors Acceptance Corp.*, 280 S.E.2d 703 (W. Va. 1981). Indeed, a finding of negligence on the part of Appellees has already been made in the Pennsylvania Action, and was relied upon in the Business Court Action. *See* Business Court Order at 11–12, ¶ 29. Nevertheless, Appellees' certainly owed IPI and Mr. Taylor—as contractors performing services in the Plant—a duty to act reasonably in providing a safe work environment, free of the unreasonable risk of harm. The ample

conflicting evidence regarding Appellees' breach of that duty—taken together with the findings in the Pennsylvania Action and the Business Court Action—warranted the jury's consideration.

The deposition testimony of Ms. Bart regarding the Railcar—which the circuit court seemingly declined to consider—insightfully demonstrates Appellees' total disregard of the Railcar's dangerous condition. In response to whether Appellees knew of the Railcar's corrosive issues, Ms. Bart testified that it "did have extensive corrosion pitting inside the pressure-containing part of the car." JA 1220. Additionally, Ms. Bart—and, consequently, Axiall and Eagle Natrium—knew that the Railcar required extensive repair work that its other railcars did not require. JA 1222.

Notwithstanding Appellees' knowledge and disregard of the Railcar's wholly-defective condition, Appellees also failed to adequately inspect the Railcar on a frequent basis. JA 1223–224. Appellees' failure to inspect and maintain a reliably safe railcar—particularly given that it was used to store and transport highly volatile, toxic chlorine gas—also flew directly in the face of the FRA's 2006 safety advisory, which advised Appellees that "since 1990, FRA . . . ha[d] documented approximately eleven known defects on tanks cars built with the ACF 200 stub still design (ACF-200 tank cars)" and that "[t]hese defects included tank head cracks, pad to tank cracks, sill web cracks, and tank car buckling that in some instances led to hazardous material incidents." JA 1225.

Appellees suggested below that the alleged failures of AllTranstek, Rescar and Superheat, rather than any action by them, contributed to the First Chlorine Gas Leak. JA 1045. In this regard, Appellees argued—and the circuit court found—that Appellants could not create a genuine issue of material fact in the absence of expert testimony addressing liability.[11] JA 8. However,

[11] The circuit court made this finding, citing no authorities for the proposition that Appellants were required to submit liability expert testimony.

this conclusion misapprehends the dispositive issues. To be clear, Appellants are absolved of their obligation to indemnify Appellees if Appellees were "solely negligent," engaged in "willful misconduct," or were "grossly negligent." JA 1306; JA 1318. If Appellees were consciously aware that the Railcar was prone to the type of defects that unreasonably risked fatal injury to Mr. Taylor, yet deliberately ignored the actions required to adequately inspect, repair, and maintain the Railcar, then it is immaterial whether AllTranstek, Rescar and Superheat's conduct met the applicable standard of care.[12]

This is not, as Appellees suggested below, a case that involves the sort of complex issues requiring expert testimony.[13] The circuit court inappropriately exceeded its role at the summary judgment stage when it unilaterally disregarded all of the evidence submitted by Appellants and awarded summary judgment in Appellees' favor. The circuit court's role was "not 'to weigh the evidence and determine the truth of the matter but to determine whether there [was] a genuine issue for trial.'" *Painter*, 451 S.E.2d at 758. In this regard, the circuit court was required to draw all permissible inferences from the underlying facts in the light most favorable to Appellants. *See Masinter*, 262 S.E.2d at 435. Instead, the circuit court consciously chose to disregard all of the evidence offered by Appellants, and inexcusably accepted Appellees' version of the facts.

It is Appellees' use of the Railcar, despite having full knowledge of its propensity to be incurably defective in a manner that had the potential to injure Appellants, that constitutes their "sole negligence," "willful misconduct," and "gross negligence" in this case. Based upon the evidence submitted by Appellants, reasonable individuals could conclude that Appellees acted

[12] This question, whether AllTranstek, Rescar and Superheat's conduct comported with the applicable standard of care—is yet another question of fact for the jury, and not one the circuit court should have decided. Yet, Appellees did not file a notice of non-party fault with respect to AllTranstek's, Rescar's, and Superheat's conduct. Thus, at trial, these entities cannot even appear on the verdict form.

[13] To be sure, the court in the Business Court Action explicitly found that Covestro needed no expert to demonstrate Axiall's negligence via the res ipsa loquitor theory. *See* Business Court Order at 13, ¶ 33.

with "sole negligence," "willful misconduct," or "gross negligence" in its continual use of an incurably defective railcar to store and transport toxic chlorine gas. Because significant issues of material fact exist with regard to the sole negligence, willful misconduct, or gross negligence of any entity involved with the First Chlorine Gas Leak, the circuit court erred in awarding summary judgment to Appellees. This Court must reverse.

CONCLUSION

Based upon the foregoing arguments and authorities cited herein, this Court should reverse the circuit court's Order awarding summary judgment in Axiall's and Eagle Natrium's favor with respect to their counter-claims for breach of contract and express indemnity. The disputed indemnification provisions are not "clear and unequivocal," and are not otherwise applicable to IPI's and Mr. Taylor's injuries arising from the First Chlorine Gas Leak. As such, because Axiall and Eagle Natrium were not entitled to judgment as a matter of law, summary judgment was not warranted under Rule 56(c) of the *West Virginia Rules of Civil Procedure*.

Respectfully submitted by,

IPI, INC. and MATTHEW JOSEPH TAYLOR,

By Counsel

/s/ Patrick C. Timony
Peter G. Markham (WVSB #9396)
Patrick C. Timony (WVSB #11717)
Zachary J. Rosencrance (WVSB #13040)
J. Tyler Barton (WVSB #14044)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia
Phone: (304) 347-1100
pmarkham@bowlesrice.com
ptimony@bowlesrice.com
zrosencrance@bowlesrice.com
tyler.barton@bowlesrice.com

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-ICA-164

IPI, INC. and MATTHEW JOSEPH TAYLOR,

Plaintiffs Below, Appellants,

v.

AXIALL CORPORATION and EAGLE NATRIUM, LLC,

Defendants Below, Appellees.

Appeal from a final order of the Circuit Court of Marshall County, West Virginia (18-C-14)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **9th** day of **January 2023**, the foregoing ***Opening Brief of Appellants IPI, Inc., and Matthew Joseph Taylor*** was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel record.

William D. Wilmouth (WVSB #4075)
John Callcott (WVSB #9206)
Katherine R. Herrmann (WVSB #14067)
Post Office Box 751
Wheeling, West Virginia 26003-0751
Counsel for Appellees

/s/ Patrick C. Timony
Patrick C. Timony (WVSB #11717)