IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-ICA-164

ICA EFiled: Mar 15 2023
02:46PM EDT
Transaction ID 69453767

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)

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

STATUTES

CASES

OTHER AUTHORITIES

ARGUMENT[1]

Appellees have attempted to shift blame for Appellants' injuries at every stage of this litigation; they not only claim that their use of a defective 37-year-old railcar to store and transport toxic chlorine was blameless, but also ask Appellants to foot the bill for their defense of this action under two general, boilerplate indemnification provisions. The standard for reviewing such language under Pennsylvania law—*which Appellees do not even discuss in their brief*—not only advises this Court against this result, but mandates the opposite result for three reasons. First, the scope of the disputed indemnification language does not clearly and unequivocally cover Appellants' injuries. No matter how much Appellees proclaim that the "sole negligence" exception is "clear and unequivocal," the unavoidable result is that the scope of Appellants' indemnification obligation is wholly ambiguous. Second, Appellees' interpretation of the indemnification provision is incompatible with binding Pennsylvania authority. Finally, summary judgment was not warranted where the admissible and self-authenticating evidence introduced by Appellants demonstrated genuine issues of material fact as to the apportionment of liability, which is a jury question. For these reasons, this Court must reverse the circuit court's erroneous decision with respect to indemnification.

---

[1] Appellants wish to briefly address Appellees' assertion that their recitation of the facts "lacks fidelity to the record" and attempts "to create prejudice through mischaracterization." *See* Appellees' Br. at 5. The factual record below speaks for itself. In any event, Appellees' tone-deaf—and unsupported—suggestion that Mr. Taylor "cracked an apparent joke," having just been exposed to hundreds-of-thousands of pounds of toxic chlorine gas, is just one of many examples of Appellees' indifference to the serious, and potentially fatal, circumstances of the First Chlorine Gas Leak. As Mr. Taylor's deposition transcript makes perfectly clear, "everybody in the meeting laughed" at Mr. Taylor's input, "except [him]." JA 1480. Appellees' recitation of the facts "lacks fidelity to the record," and is demonstrably indifferent to the seriousness of this case.

Additionally, Appellees draw the Court's attention to the fact that Appellants' referred to Axiall as the "primary party at fault" based upon the apportionment of fault set forth in an order of the Business Court Division. The Business Court Order, which indicates that Axiall was assigned 40% negligence, Rescar was assigned 30% negligence, and AllTranstek was assigned 20% negligence, clearly stated that Axiall was the primary party at fault. *See* Order Granting Covestro, LLC's Motion for Partial Summary Judgment on the Jury Verdict Reached in Pennsylvania, *Covestro, LLC v. Axiall Corporation*, Civil Action Nos. 18-C-202, 18-C-203 (Cir. Ct. Marshall Cty., Bus. Ct. Div. Aug. 29, 2022).

I. The "sole negligence" exceptions set forth in the indemnification provisions are irrelevant; it is the scope of Appellants' purported indemnification obligation that is not "clear and unequivocal."

As written, the scope of the disputed indemnification provisions fails to require indemnification from Appellants under the circumstances alleged in this action "beyond doubt by express stipulation." This is an unavoidable prerequisite to the enforceability of any indemnity agreement providing for indemnification for one's own negligence. *See Ruzzi v. Butler Petro. Co.*, 588 A.2d 1, 3–4 (Pa. 1991); *Perry v. Payne*, 66 A. 553, 555–56 (Pa. 1907). Indeed, "no words of general import can establish such indemnification." *Ruzzi*, 588 A.2d at 4. Yet, the dilemma precluding the enforceability of the disputed indemnification provisions here is that the scope of Appellants' indemnification obligation does not apply, and is not "clearly and unequivocally" expressed such that there is no doubt as to its applicability. For this reason alone, the Court should reverse the circuit court's decision on indemnity.

Appellees argue that the inclusion of the phrase "except to the extent arising out of the sole negligence or willful misconduct of the Buyer or its employees acting within the scope of their employment," renders the indemnification provisions clear and unambiguous. *See* Appellees' Br. at 17–21. This conclusion is nonsensical and does not address Appellants' argument that *the scope of the disputed indemnification provisions* is not "clear and unequivocal." *See* Appellants' Opening Br. at 21 ("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.").

To be sure, Appellants have never taken the position that the "sole negligence" exception, alone, renders the indemnification provisions unclear and ambiguous. Rather, Appellants have

always maintained that the scope of the indemnification provisions—which governs the obligations Appellants owe as indemnitors—is unclear and ambiguous. This is the reason Appellants did not, and need not, address the irrelevant authorities cited by Appellees for the proposition that "sole negligence" exceptions are enforceable.

Nevertheless, Appellees' inaccurate construction of the scope of Appellants' indemnification obligation only underscores the indemnification provisions' ambiguity. Appellees assert that Appellants' indemnification obligation "extends to claims and damages arising from the 'Agreement,' the 'Services,' those 'sustained in connection with performance of the Services,' *and also* 'arising from any cause whatsoever.'" *See* Appellees' Br. at 17 (emphasis added). In this regard, Appellees splinter the language of the AOS's indemnification provision into four independent and separate classes of indemnification obligations. A plain reading of the AOS's indemnification provision, however, reveals a patently different result.

> Under the AOS, Appellants must indemnify for claims and damages
>
> > 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 [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). . . .

JA 1306 (emphasis added). When read in its proper perspective, this language reveals a general, indefinite, and uncertain obligation to indemnify for claims and damages "arising out of [the AOS] and/or the Services."

The next phrase—"*including, without limitation*"—cannot be ignored by the Court. It is indicative of the parties' intent that the subsequent language be illustrative, though not exhaustive, of the kind or class of claims and damages subject to Appellants' indemnification obligation. *See McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801, 805 (Pa. 1996) ("It is widely accepted that

general expressions such as '***including, but not limited to***' that precede a specific list of included items should not be construed in their widest context, ***but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples***."); *Northway Vill. No. 3, Inc. v. Northway Props., Inc.*, 244 A.2d 47, 50 (Pa. 1968) ("The ancient maxim 'noscitur a sociis' summarizes the rule that the meaning of words may be indicated or controlled by those words with which they are associated. Words are known by the company they keep."); *see also Post v. St. Paul Travelers Ins. Co.*, 691 F.3d 500, 520 (3d Cir. 2012) (applying the principles set forth in *McClellan* and *Northway Vill. No. 3, Inc.* to "duty to defend" contract language).

The AOS's indemnification provision provides the following as *an example* of the sorts of claims and damages that might trigger Appellants' indemnification obligation: claims and damages "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[.]" JA 1306. Critically, as explicitly set forth under this example, such claims and damages must be "*sustained in connection with performance of the Services*." Likewise, the parenthetical language immediately following this example is not, as Appellees insist, a separate indemnification obligation, but is a further *example* of the class of claims and damages that might trigger Appellants' indemnification obligation. It, too, begins with the phrase "including without limitation," and follows with "injuries resulting from failure of or defect in any equipment, instrument or device supplied by Buyer or their employees to Contractor. . . ."

The issue Appellants' raise in this regard is similar to the issue decided by the court in *IU N. Am., Inc. v. Gage Co.*, No. CIV.A. 00-3361, 2002 WL 1277327 (E.D. Pa. June 4, 2002). There, the court considered whether an indemnity provision that included language of general import

followed by specific examples was "clear and unequivocal" under the *Perry-Ruzzi* rule. *Id.* at *5. The indemnity provision at issue broadly and generally required the defendant to indemnify and save the plaintiff harmless from and against claims and liabilities "arising in the regular course of their business consistent with past practice and custom." *Id.* at *1–2. Following this broad and general language, the indemnity provision contained a list of specific items and examples for which indemnity might have been required.[2] *Id.*

Id. at *1–2.

In construing this indemnity provision, the court began with the *Perry-Ruzzi* rule that "in order for an indemnity provision which covers losses due to the indemnitee's own negligence to be enforceable, the parties must contract 'in clear and unequivocal language.'" *Id.* at *5 (citing *Ruzzi*, 588 A.2d at 7). In this regard, the court explained that words of "general import" cannot establish such an indemnification obligation. *Id.* The court identified the "arising in the regular course of their business consistent with past practice and custom" clause as "general language"

---

[2] This list included the following:

> (a) all trade accounts payable of [the plaintiff] which have not been paid or discharged prior to the Closing Date if such accounts payable are properly due and payable consistent with [the plaintiff's] past practices;
>
> (b) all other accrued liabilities of the types listed on the April Balance Sheet of [the plaintiff] which have not been paid or discharged prior to the Closing Date; provided, however, that [the defendant] do[es] not assume any liabilities of [the plaintiff] with respect to federal, state or local income or franchise taxes imposed upon [the plaintiff];
>
> (c) all liabilities and obligations of [the plaintiff] under open orders and blanket and system selling contracts and similar types of sales arrangements and in respect of the leases, contracts, commitments and agreements referred to in Exhibit D attached hereto and incorporated herein or entered into by [the plaintiff] between the date hereof and the Closing Date not in violation of the provisions of section 6; and;
>
> (d) all liabilities and obligations of [the plaintiff] under the pension, profit sharing, welfare, severance and vacation plans and other personnel policies and practices set forth on Exhibit I attached hereto and incorporated herein.

IU N. Am., Inc., 2002 WL 1277327 at *1–2.

which was followed by "four specific situations, recited above, in which [the defendant] must indemnify [the plaintiff]." *Id.* at *6.

Importantly, the court then applied the principle set forth in *McClellan*, stating that "general expressions that either follow or precede 'a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples.'" *Id.* (quoting *McClellan*, 686 A.2d at 805–06). The claims for which the plaintiff sought indemnification were products liability claims stemming from third-party individuals' exposure to asbestos from products sold by the plaintiff and defendant. *Id.* at *2. However, the defendant argued, and the court agreed, that the scope of the indemnity provision explained above did not "clearly and unequivocally" establish indemnification for product liability claims because they were "not of the same general kind or class as the four enumerated situations. . . ." *Id.* at *6.

With these authorities in mind, Appellees' construction of the indemnification provisions cannot be correct. Courts assessing whether an indemnification provision is "clear and unequivocal" must be 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). "[A]ssuming 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 v. City of Philadelphia*, 795 A.2d 376, 378 (Pa. 2002) (quoting *Ruzzi*, 588 A.2d at 4).

Appellants' uncertain and indefinite indemnification obligation purports to extend to claims and damages "arising out of [the AOS] and/or the Services[.]" JA 1306. While this general

phraseology, alone, is insufficient to satisfy the *Perry-Ruzzi* "clear and unequivocal" test, the parties attempted to illustrate the sorts of claims and damages that would fall within this category. In this regard, the AOS's indemnification provision explains that claims and damages "sustained in connection with performance of the Services," and "injuries resulting from failure of or defect in any equipment, instrument or device supplied by Buyer . . . to Contractor" would be of the sort so as to trigger Appellants' indemnification obligation.

Simply put, the indemnity provisions do not clearly and unequivocally apply to the injuries sustained by Appellants during the First Chlorine Gas Leak. At best, they are ambiguous and unclear as to whether the injuries Appellants suffered fall within the scope of the indemnity obligation intended by the parties. Appellants did not agree to perform services on the Railcar at the time of their injuries. As the Purchase Order makes clear, Appellants were only at Appellees' facility to power wash and paint Condensate Tank #24. Consequently, the indemnity provisions are inapplicable to the losses sustained by Appellants. Each provision requires that the damage arise from or relate to the performance of services or subject matter of the purchase order. Distilled to its core, Appellees argue that Appellants' mere presence at their facility was sufficient for the indemnity obligation to arise. However, the damages Appellants sustained *are untethered to* the bargained-for work IPI agreed to performed. It cannot be said that Appellants clearly and unequivocally agreed to indemnify Appellees for their harmful conduct.

Had the parties desired to include an indemnification obligation as broad and sweeping as Appellees' suggest, they would have indicated as such in the express language of the AOS. Instead, they clearly desired to limit the obligation by including the aforementioned examples, which, under Pennsylvania law, limit the scope of the obligation to circumstances of the same general kind or class as those mentioned. *See Post*, 691 F.3d at 520 (quoting *McClellan*, 686 A.2d

at 805); *IU N. Am., Inc.*, 2022 WL 1277327 at *6. Insofar as the language of the indemnification provisions do not put the scope of Appellants' indemnification obligation "beyond doubt by express stipulation," the indemnification provisions clearly violate the *Perry-Ruzzi* rule, and this Court should find them unenforceable.

II. Appellees' interpretation of the indemnification provisions, which relies on non-binding, unpersuasive authorities, calls for a result wholly inconsistent with Pennsylvania decisions under similar circumstances.[3]

Appellants are not Appellees' insurer. Yet, Appellees largely rely on non-binding, unpersuasive authorities to support their unfounded attempt to expand the language of the indemnification provisions to put them in that position. *See* Appellees' Br. at 24–26 (citing *Cevasco v. Nat'l R.R. Passenger Corp.*, 606 F. Supp. 2d 401 (S.D.N.Y. 2009);[4] *Vitty v. D.C.P. Corp.*, 633 A.2d 1040 (N.J. App. Div. 1993); *Hoffman Const. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346 (Alaska 2001); *Perkins v. Rubicon*, Inc., 563 So. 2d 258 (La. 1990)). Additionally, Appellees contort the holdings of two Pennsylvania authorities which, when read in their proper context, plainly support Appellants' position that no duty to indemnify Appellees is owed. *See* Appellees' Br. at 26–28 (citing *Time Warner Ent. Co., L.P. v. Travelers Cas. & Sur.*

[3] Appellees contend that Appellants have waived their argument concerning the interpretation of the "arising out of" language of the indemnification provisions. *See* Appellees' Br. at 21. However, Appellants clearly argued that the scope of indemnification provision required a showing that Appellants' injuries "arise out of the purchase order," and that Appellees advocated "for an exceptionally broad interpretation of [that] provision." JA 2444. This issue was adequately preserved in the record, and Appellants did not waive it.

Appellants also did not waive their argument that the circuit court failed to consider which of the two conflicting indemnification provisions were applicable. This argument falls squarely within Appellants' broader argument that the indemnification provisions are inapplicable. As such, this issue is properly before this Court on appeal.

[4] Not only is the *Cevasco* decision non-binding and unpersuasive, it should not be followed by this Court for an additional reason—the decision is merely a federal district court's wholesale adoption of a magistrate judge's "report and recommendation," to which no objections were filed. 606 F. Supp. 2d 401, 404 (S.D.N.Y. 2009). As stated in the decision, because no objections were filed, the district court was permitted to adopt the report and recommendation upon satisfaction that no clear error on the face of the record was committed. *Id.* Thus, the *Cevasco* court's review of the magistrate judge's report and recommendation is not a sufficient authority to weigh against the ample binding Pennsylvania authorities cited by Appellants.

Co., No. CIV A. 97-6364, 1998 WL 800319 (E.D. Pa. Nov. 10, 1998); *Hershey Foods Corp. v. Gen. Elec. Serv. Co.*, 619 A.2d 285 (Pa. Super. 1992)). Indeed, Appellees do not cite a single Pennsylvania decision that examined comparable indemnity language and found that a duty to indemnify was owed.

Appellees argue that Appellants' "assertion that Pennsylvania law incorporates a proximate cause[5] concept is unfounded." *See* Appellees' Br. at 24. Appellees then cite four non-binding authorities from New York, New Jersey, Alaska, and Louisiana to rebut Appellants' proposed interpretation of the indemnification provisions. The principles of District of Columbia law applied in the *Cevasco* decision are inapposite to the applicable interpretive canons under Pennsylvania law. Under District of Columbia law, when an indemnity provision is "broad and comprehensive," the parties are categorically presumed to have intended that the provision be "all-embracing" in the absence of any expressed limitations. *Cevasco*, 606 F. Supp. 2d at 410 (quoting *Princemont Constr. Corp. v. Baltimore & Ohio R.R.*, 131 A.2d 877, 878 (D.C. 1957)). Pennsylvania law, however, applies no such presumption and, instead, explicitly precludes any "'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). This Court should disregard the *Cevasco* decision.

Likewise, the *Vitty* decision involved indemnification language that is distinguishable from the disputed provisions here insofar as it contains no limitation language, but only required indemnification for claims and damages "arising out of [a] License." 633 A.2d at 1041–42.

[5] As an initial matter, this statement is deceiving. Appellants' did not suggest that the Court employ a "proximate cause" concept in construing the indemnification provisions. Rather, Appellants' position is that the language of the disputed indemnification provisions, when read in conjunction with the applicable interpretive canons set forth under Pennsylvania law, clearly demonstrates an intent by the parties that some causal connection greater than the "but for" standard argued by Appellees is necessary to trigger Appellants' indemnification obligation.

Importantly, though, the court did recognize that it was "obliged to construe the clause in a manner consistent with its essential purpose and with the objects the parties were striving to achieve." *Id.* at 1042. The court then explained that a "*substantial nexus* between the property damage or injury alleged in the claim and the activities encompassed in the [License]" was required to be shown.[6] *Id.* at 1043 (emphasis added). Yet, because the parties clearly did not intend to limit the scope of the License's indemnity provision, the court found that the License's indemnity provision was applicable.[7] *Id.* at 1043–44 (contrasting the disputed indemnity provision with the provision at issue in *McCabe v. Great Pac. Century Corp.*, 56 A.2d 234 (N.J. App. Div. 1989), which limited indemnity to claims resulting from an "act or omission" relating to the subject matter of the contract).

The indemnity language at issue in *Perkins*, which Appellees cite as a purportedly similar case to the instant matter, is also easily distinguishable. There, a maintenance contractor entered a service agreement with the owner of an industrial plant to provide maintenance services at the plant. *Perkins*, 563 So. 2d at 258. The parties' service agreement contained an indemnity provision, which required the maintenance contractor to "indemnify and hold [the plant owner] harmless from all claims, suits, actions, losses and damages for personal injury, including death

[6] The *Vitty* court ultimately found that the injuries involved a "reasonably foreseeable event *within the contemplation of the parties when they entered the [License]*," and held that indemnification was required. *Vitty*, 633 A.2d at 1043 (emphasis added). Yet, as explained above, the parties clearly did not contemplate any limitation of the scope of the indemnity provision in the License, as it broadly required indemnification for injuries "arising out of [the] License." *Id.* at 1041–42. Here, on the other hand, the parties clearly contemplated a limitation of the indemnification provisions when they included specific examples of the sorts of claims and damages that would trigger Appellants' indemnification obligation.

[7] The *Vitty* court also recognized that jurisdictions "have wrestled with the problem of whether work-connected injuries . . . fall within the purview of an indemnification agreement," and have given the issue "uneven treatment." 633 A.2d at 1044 (collecting cases). The court then explained that "resolution of the issue depends in large part upon the wording of the particular agreement and the nature of the risks assumed by the indemnitor." *Id.*

and property damage, even though caused by the negligence of [the plant owner], arising out of [the maintenance contractor's] performance of the work contemplated by this agreement." *Id.*

An employee of the maintenance contractor was injured by the plant's employees while he was performing work on a cylindrical tank about 110 to 120 feet from a phosgene gas reactor. *Id.* at 259. Plant employees working on the phosgene gas reactor accidentally caused the release of phosgene gas, which was subsequently inhaled by the maintenance contractor's employee as it drifted over to his work site. *Id.*

While the factual circumstances of Appellants' injuries are similar to those at issue in *Perkins*,[8] the scope of Appellants' indemnification obligation is nowhere near as broad as those owed by the maintenance contractor. Again, the language at dispute in *Perkins* broadly required indemnification for claims and damages "for personal injury, . . . even though caused by the negligence of [the plant owner], arising out of [the maintenance contractor's] performance of the work contemplated by [the] agreement." *Id.* at 258. Here, the scope of Appellants' indemnity obligation is limited to the examples set forth in the AOS's indemnity provision, which explain that injuries "sustained in connection with performance of the Services" would trigger Appellants' indemnification obligation. The parties further illustrated the class of claims and damages that might trigger Appellants' indemnification obligation by stating that "injuries resulting from failure of or defect in any equipment, instrument or device supplied by [Appellees] . . . to [Appellants]"

[8] Appellees also cite a decision from the West Virginia Supreme Court of Appeals, which they contend involved similar circumstances to those surrounding the First Chlorine Gas Leak. *See* Appellees' Br. at 26 (citing *Elk Run Coal Co. v. Canopius U.S. Ins., Inc.*, 775 S.E.2d 65 (W. Va. 2015)). However, the *Elk Run* decision involved the interpretation of four insurance policies to determine whether coverage was applicable. *See Elk Run*, 775 S.E.2d at 70. As explained later in the *Elk Run* decision, insurance contracts "are to be strictly construed against the insurance company and in favor of the insured." *Id.* at 74 (quoting Syl. Pt. 4, *Nat'l Mut. Ins. Co. v. McMahon & Sons*, 356 S.E.2d 488 (W. Va. 1987)). For this reason, the West Virginia Supreme Court of Appeals concluded that the insurance policy required coverage. *Id.* ("[W]e conclude that the circuit court erred in . . . finding that Elk Run was not entitled to coverage under the Canopius policy."). On the other hand, indemnity agreements providing for indemnification for one's own negligence are fundamentally inapposite to insurance contracts, and must be strictly construed against the party seeking indemnification. *See Jacobs Constructors*, 264 F.3d at 371.

would trigger Appellants' indemnity obligation. This Court should not be persuaded by the *Perkins* decision insofar as the indemnification provision at issue there is entirely incompatible with the disputed language here.

Notwithstanding Appellees' reliance on these unpersuasive and non-binding authorities, Appellees also misconstrue the holdings of two Pennsylvania decisions, both of which found that no duty to indemnify was owed. *See Time Warner*, 1998 WL 800319; *Hershey Foods Corp.*, 619 A.2d 285. Appellees suggest that the *Time Warner* decision only analyzed "the extent to which the injured individual was working pursuant to the agreement at the time [of the] accident."[9] Appellees' Br. at 27. However, this misstatement ignores the court's express inquiry into whether there was a "connection" between *the source* of the individual's injuries and the work defined under the applicable agreement. *See Time Warner*, 1998 WL 800319 at *5 ("This court cannot find any connection between the condition of the Lower Bucks Warehouse and the Work defined in the Agreement.").

The *Time Warner* decision involved an agreement between Time Warner and Friendshuh for the construction of a cable television system, which also contained an indemnification provision. *Id.* at *1. The indemnification provision provided, in pertinent part, that Friendshuh was required to "indemnify . . . [Time Warner] . . . from and against all claims . . . arising out of or resulting from the performance of Work under [the] Agreement . . . , regardless of whether or not it [was] caused in part by a party indemnified hereunder." *Id.* at *3. While on the job, an employee of Friendshuh was climbing a utility pole and splicing cable without wearing a hard hat. *Id.* at *1. Friendshuh noticed that the employee was not wearing a hard hat and ordered him to

[9] Appellees did not offer a pincite to the specific portion of the *Time Warner* decision for this unfounded assertion. This is because the *Time Warner* decision does not stand for this proposition.

retrieve one. *Id.* The employee then went to a Time Warner facility to buy or rent a hat, but fell and was injured while climbing the shelving unit where the hard hats were stored. *Id.*

Time Warner filed a declaratory judgment action seeking, among other things, an order finding Friendshuh contractually obligated to indemnify Time Warner for the employee's injuries under their agreement. *Id.* The court disagreed however, finding the indemnification provision inapplicable because the employee's injuries did not arise out of or result from the performance of the work, as defined under the agreement. *Id.* at *3. The court reasoned that the employee's injuries "were caused by the condition of the shelving at the [Time Warner facility], or some other condition existing at the [Time Warner facility], where he went to obtain a hard hat." *Id.* at *5. The court concluded that it could not "find any connection between the condition of the [Time Warner facility] and the Work as defined in the Agreement." *Id.*

Similarly, there is no connection between the defective Railcar's release of toxic chlorine gas—which, to be sure, Appellants were not contracted to perform work on—and the "Services" defined under the AOS and Purchase Order 4510044817. The AOS defines "Services" as those "specified and described in an "Accepted Order," and as required by and in accordance with [the AOS]." JA 1305. An "Accepted Order" is defined in the AOS as "a Buyer purchase order in the form of purchase orders, EDI orders, PPG's Corporate Purchasing Card or verbal orders (confirmed via written or electronic order) issued to Contractor for the Services. . . ." JA 1305. Purchase Order 4510044817 undisputedly describes the work as "[p]ower wash and paint #24 Condensate Tank." JA 1282. Appellees cannot, and do not, dispute that the "Services" Appellants agreed to perform have *no connection* with the disputed Railcar. Just as the court found no "connection" between the source of the employee's injuries and the contractually-defined "work"

under the agreement in *Time Warner*, so too this Court should find no connection between the "Services" and the source of Appellants' injuries here.

Like the *Time Warner* decision, the *Hershey* decision also found a disputed indemnity provision unenforceable as ambiguous. Yet, Appellees cherry-pick language from that decision and distort it in such a fashion to render its holding unrecognizable. As explained in Appellants' Opening Brief, the *Hershey* decision involved an electrician's death when he was struck by a cross bar while seated on a piece of equipment and eating a candy bar on his lunch break. *Hershey*, 619 A.2d 285, 287. While the court considered the fact that the electrician was not in the process of performing electrical work when the accident occurred, the court's ultimate holding was that "the contract language [was] ambiguous with respect to" whether the electrician's conduct fell within the definition of "performance of the Work." *Id.* at 290. Due to this ambiguity, the court was required to construe the language against the indemnitee, Hershey, under Pennsylvania law. *Id.*

Appellees contend that Appellants' active performance of power washing and painting services at the time of the First Chlorine Gas Leak, alone, is sufficient to trigger their duty to indemnify Appellees. Appellees' Brief at 28. But, again, the specific language of the AOS's indemnity provision suggests that the parties intended that the meaning of "arising out of [the AOS] and/or the Services" be more strictly construed to only involve injuries of the same class as those that might be "sustained in connection with performance of the Services," and "resulting from failure of or defect in any equipment, instrument or device supplied by [Appellees] . . . to [Appellants]." At the very least, just as the court in *Hershey* found the disputed language ambiguous as to whether the electrician's conduct fell within the indemnity provision's scope, this Court should find the AOS's indemnification provision ambiguous as to whether Appellants' injuries trigger their indemnification obligation.

In any event, to the extent that any questions remain regarding the applicability and enforceability of the AOS's indemnification provision, the Pennsylvania Supreme Court's decision in *Pittsburgh Steel* answers them in Appellants' favor. Appellees suggest that this Court should disregard the *Pittsburgh Steel* decision because "[i]t was decided using the 'clear and unequivocal' analysis within the framework of the *Payne* decision[.]" Appellees' Brief at 28. While the Pennsylvania Supreme Court ultimately held that the contract at issue did not clearly and unequivocally provide for indemnification for the indemnitee's own negligence, it still relied on several factors—discussed in Appellants' Opening Brief and below—to reach that conclusion. *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 171 A.2d 185, 189 (Pa. 1961).

The court explained that the indemnitee "remained in possession of the premises," that the indemnitee's "employees continued working under its exclusive control," and that the indemnitee's interpretation of the contract would, in effect, unreasonably place the indemnitor in the position of an "insurer." *Id.* Thus, the court concluded that the parties did not intend an indemnification of such magnitude in the absence of "more direct and unequivocal language in the contract." *Id.*

In light of these authorities, Appellants' juxtaposition of the narrow construction of indemnity provisions against the indemnitee-drafter with the broad construction of insurance contracts in favor of coverage makes perfect sense. Indemnity agreements are fundamentally different from insurance agreements, particularly where the indemnitee is the party seeking indemnification. This Court should reach the same conclusion as those reached in *Time Warner*, *Hershey*, and *Pittsburgh Steel*, and strictly construe the indemnification provisions here in a manner such that the AOS's indemnification provision requires a greater causal nexus than that suggested by Appellees. In this regard, the appropriate construction requires some causal

connection between the services performed by Appellants 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.

The work Appellants were contracted to perform—power washing and painting services on Condensate Tank #24—in no way arose out of, was related to, or connected to the source of harm causing their injuries, the Railcar. In fact, Appellants were nowhere near the Railcar, had no dominion or control over it, and were not directed or otherwise required to have any involvement with the Railcar. Accordingly, this Court should reverse the circuit court's finding that Appellants' owe Appellees a duty to indemnify for the injuries they sustained resulting from Appellees' use of the defective Railcar to store and transport toxic chlorine.

III. The circuit court erroneously and inconsistently found that no genuine issues of material fact with regards to the "sole negligence," "willful misconduct," and "gross negligence" exceptions existed, precluding summary judgment on indemnity.

While the arguments explained above are dispositive, the circuit court should not have entered summary judgment because Appellants' admissible and self-authenticating exhibits attached to their Response in Opposition to Appellees' Motion for Summary Judgment demonstrated genuine issues of material fact as to whether Appellants acted "solely negligent,"[10]

[10] Notwithstanding the genuine issues of material fact explained above, the circuit court's finding that Appellees were not "solely negligent" is also inconsistent with findings it made with respect to its separate ruling that genuine issues of material fact precluded summary judgment on Appellants' premises liability, as well as Appellants' claims for property damage and personal injuries arising out of the First Chlorine Gas Leak. JA 2463–464; JA 2474; JA 2480. These two conflicting legal conclusions are illogical and cannot be reconciled under West Virginia law. Pursuant to W. Va. Code § 55-7-13D, it is the province of a jury, not a judge to assess percentages of fault. The statute also makes clear that the fault of a nonparty may only be considered "if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault." *See* W. Va. Code § 55-7-13D(a)(2). Critically, though, Appellees did not file a notice of non-party fault. Consequently, AllTranstek, Rescar, and Superheat could not appear on a verdict form for the jury to apportion fault.

with "willful misconduct," or "grossly negligent."[11] A reasonable jury could have concluded that Appellees were "solely negligent," engaged in "willful misconduct," or were "grossly negligent" without the aid of expert testimony. Thus, it was not in the circuit court's province to "weigh" the evidence on this point. As explained in greater detail below, this Court must reverse.

Appellees contend that the circuit court "was well within its discretion to exclude inadmissible evidence when ruling on the applicability of the indemnification provisions." *See* Appellees' Br. at 31. In this regard, Appellees' frame Appellants' argument on this point as an attempt to shift blame to the circuit court for their purported error in failing to attach "necessary" affidavits to support the exhibits attached to their Response in Opposition to Summary Judgment briefing. Appellees' Br. at 33.

This argument misses the mark because, aside from the deposition transcripts attached to Appellants' Response in Opposition to Appellees' Motion for Summary Judgment—which are permissible for use at the summary judgment stage because they are taken under oath and the deponent's responses are relatively spontaneous[12]—the remaining exhibits attached are "self-authenticating" and do not require an affidavit to establish their admissibility. *See* W. Va. R. Evid. 902; W. Va. R. Evid. 902(5).

In any event, Appellees—like the circuit court—turned a blind eye in their brief to the highly relevant and factually unfavorable exhibits Appellants attached to their Response in Opposition. The factual portions[13] of the NTSB Accident Report clearly establish genuine issues

[11] Under Pennsylvania law, indemnity for one's own "gross negligence" will not be read into an indemnity provision unless it is "specifically manifested." *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695 (Pa. Super. Ct. 2000).

[12] *See* Wright & Miller, *Federal Practice & Procedure* § 2722 (4th ed. 2022).

[13] While the "probable cause" and opinion portions of NTSB accident reports are generally inadmissible in civil litigation, the factual portions of these reports are admissible. *See In re Air Crash at Charlotte, N.C. on July 2,*

of material fact as to Appellees' sole negligence, willful misconduct, or gross negligence. The NTSB Accident Report explained that the Railcar "was equipped with an ACF Industries, Incorporated ACF-200 stub sill underframe design, which the Federal Railroad Administration has previously noted in a 2006 safety advisory[14] as being prone to defects . . . that in some instances has led to release of hazardous materials." JA 1170. The NTSB Accident Report also noted that the Railcar was comprised of "Association of American Railroads Tank Car (AAR TC)-128 grade B *nonnormalized* carbon steel." JA 1178 (emphasis added). However, since 1989, pressure tank car shells have been required to be fabricated from normalized steel, which undergoes a heat treatment process that refines its microstructure to enhance mechanical properties. JA 1178. The NTSB Accident Report conclusively established these facts, and Appellants cannot, dispute them.

Notwithstanding these serious and industry-known safety concerns, , Appellees continued to use the outdated, defect-prone Railcar and only required a "hazardous materials (HM)-201 tank car qualification inspection" every 10 years.[15] JA 1181. At the time of the First Chlorine Gas Leak in August of 2016, the Railcar was not due for another (HM)-201 inspection until 2020. JA 1182. Julie Bart, Axiall's corporate representative, testified that they "thought [they] were inspecting [the Railcar] at an appropriate interval," JA 1223, and that they "had no data to change [their] interval, shorten [the] interval, based off the data that [they] had." JA 1224.

However, there is no dispute that Appellees were on notice of the Railcar's proclivity for defects of the sort that caused the First Chlorine Gas Leak. Yet, Appellees inspected and

1994, 982 F. Supp. 1071, 1076–77 (D.S.C. 1996) (citing "the 'general rule [ ] that the factual findings of . . . NTSB reports are admissible if based on trustworthy sources, while evaluative conclusions are not admissible").

[14] The Federal Railroad Administration's Notice of Safety Advisory 2006—04 was attached to Appellants' Response in Opposition to Appellees' Motion for Summary Judgment. JA 1215–224.

[15] As explained in the NTSB report, Appellants' inspection regime was based on the federally required *maximum* 10-year interval. JA 1171.

maintained the Railcar in a manner consistent with more up-to-date railcars that were less prone to defects. *This* is the genuine, and ultimate, dispute of material fact regarding Appellees' "sole negligence," "willful misconduct," or "gross negligence": Did Appellees adequately inspect and maintain the Railcar in sufficient intervals in light of the widely-known industrial and safety risks associated with the Railcar?

"Negligence . . . 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) (emphasis added). 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). The evidence submitted by Appellants at the summary judgment stage—which the circuit court declined to consider in an abuse of its discretion—could be viewed by a reasonable jury as establishing that Appellees acted "solely negligent," with "willful misconduct," or "grossly negligent" with respect to the First Chlorine Gas Leak. The circuit court erred when it impermissibly assumed the role of the jury[16] in conclusively weighing the evidence and found that the indemnity exceptions did not apply. This Court must reverse that decision.

[16] Appellees also maintain that summary judgment was warranted because Appellants did not proffer a liability expert. *See* Appellees' Br. at 36–37. In this regard, Appellees question how Appellants can argue that a liability expert is not required, while simultaneously not knowing how the First Chlorine Gas Leak occurred. Appellees' Br. at 37. The answer to this misleading and flippant question is actually quite simple. This is not a case that involves the sort of complex issues requiring expert testimony. Indeed, 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. The NTSB Accident Report, the FRA Notice, and Ms. Bart's testimony are all sufficient to create a genuine issue of material fact that Appellees were solely negligent, engaged in willful misconduct, or were grossly negligent. A jury is perfectly capable of making this determination, and the circuit court's decision to grant summary judgment due to Appellants' decision to proceed in this action without a liability expert was an inappropriate act of weighing evidence. *See Painter v. Peavy*, 451 S.E.2d 755, 758 (W. Va. 1994) ("The circuit court's function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'").

CONCLUSION

Based upon the foregoing arguments and authorities, as well as those set forth in Appellants' Opening Brief, 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 they do not apply to IPI's and Mr. Taylor's injuries arising from the First Chlorine Gas Leak because those injuries did not arise from, were not connected and were not related to the performance of power washing and painting services on Condensate Tank #24. Further, genuine issues of material fact should have precluded summary judgment on the indemnification provisions' applicability. The circuit court erred in awarding Axiall and Eagle Natrium summary judgment under Rule 56(c) of the *West Virginia Rules of Civil Procedure*. This Court should correct the circuit court's error by reversing its Order.

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 **15th** day of **March 2023**, the foregoing ***Reply 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. Wilmoth (WVSB #4075)
John Callcott (WVSB #9206)
Ashley V. Faulkner (WVSB #14058)
Post Office Box 751
Wheeling, West Virginia 26003-0751
Counsel for Appellees

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