**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**



DOCKET NO. 22-ICA-164

IPI, INC. and MATTHEW JOSEPH TAYLOR,
*Plaintiffs Below, Petitioners*

v.

AXIALL CORPORATION and EAGLE NATRIUM, LLC,
*Defendants Below, Respondents*

Appeal from the Order of the
Honorable Jeffrey D. Cramer, Judge
Circuit Court of Marshall County
Civil Action 18-C-14

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# RESPONDENTS' BRIEF

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## STATEMENT OF THE CASE

### A. Statement of Facts

This appeal arises from Petitioners' attempt to escape the contractual obligations IPI bargained for, benefitted from, and accepted for over a decade prior to instituting this litigation. The indemnification framework at issue is common-place and in accord with well-established Pennsylvania law. To accept Petitioners' mischaracterization would represent a radical departure from precedent and upend the bargained for allocation of risk throughout much of the Ohio Valley where contracts of this type are widespread.

IPI was a contractor that provided services at the Natrium Plant for many years. J.A. 2. The Plant has been in operation since the 1940s making chlorine and other products and providing work for hundreds of employees and many contractors in the tri-state region. IPI performed maintenance tasks on-site, including painting the outside of large tanks and applying special coatings on their interiors. J.A. 2.

Three documents formed the contractual framework that bound IPI when it worked at the Plant. The first was the Agreement for On-Site Services ("AOS") which was the predicate contract that vendors had to have in place before being awarded a purchase order ("PO"). J.A. 714–24. The second was a PO, which defined the scope of any given project. J.A. 2, 952–53. The third was the PO General Terms and Conditions ("T&Cs") incorporated into each PO. J.A. 2–3, 761–66, 952–55. Each PO, including the one pertinent to this case, provided that, "This order is contingent upon previously signed and returned Agreement for On-Site Services." J.A. 952.

IPI executed the AOS in 2007 when another company operated the Plant. J.A. 714, 724. Mr. Taylor signed the AOS as president. J.A. 724, 733. The AOS contained important obligations including:

1. No work could be performed at the Plant except through the PO process. J.A. 714.

2. IPI could bind itself to the obligations in the agreements in different ways, including "by Contractor undertaking to provide the Services," as IPI did in this case. J.A. 714.

3. IPI agreed to indemnify the "Buyer." The AOS uses the term "Buyer" regarding the indemnification obligation which includes both any operating entity as well as related and affiliated entities. J.A. 714.

4. The indemnification obligation was broad, allocating risk in a straightforward way for all claims except to the extent arising out of sole negligence or willful misconduct. J.A. 715.

In 2012 and 2013, the Plant was transferred to Eagle Natrium, LLC ("Eagle Natrium"), an entity indirectly owned by Axiall Corporation ("Axiall"). J.A. 756–59. IPI signed the consent transferring the AOS, understood that the AOS was being transferred, and was aware that it had to transfer the AOS in order to keep working at the Plant. J.A. 735–38. Eagle Natrium operated the Plant and at times relevant to the Complaint employed its people. J.A. 900–01, 905, 936.

IPI was notified of the applicable T&Cs after the transfer. J.A. 740, 760. They were also incorporated into each subsequent PO, including the ones associated with services being performed at the time of the Railcar Release and the Scrubber Release. J.A. 952–55. POs were critical for IPI, because without them, IPI could not get paid. J.A. 742–43. The T&Cs contained independent obligations for IPI, including:

1. The T&Cs were accepted by IPI if it undertook to provide the "materials, services or work" referenced in the PO. J.A. 761.

2. IPI assumed the risk of all damages, losses, costs and expenses, arising out of the services it provided pursuant to a PO. J.A. 763.

> 3. IPI agreed to indemnify the "Buyer," including the operating entity and all affiliated entities, for all claims of damage, including personal injury and damages sought by IPI's employees, except to the extent arising out of the sole negligence of the indemnitees. J.A. 763.

Mr. Taylor was president of IPI and also worked as a crew foreman on some jobs, including serving in that capacity at the Plant during the Railcar and Scrubber releases. J.A. 772–73, 800–01, 893, 897. IPI ceased working at the Plant in 2017 and sued in early 2018. J.A. 870, 2485.

Petitioners entered into, worked according to, and enjoyed the benefits of the contracts now in dispute for many years without expressing disagreement with their terms. Petitioners alleged a 20 year period of work at the Plant and "annual revenue in excess of One Million Five Hundred Thousand Dollars ($1,500,000.00+) for the work it performed in the Plant." J.A. 13. While these numbers are inflated, IPI performed substantial work at the Plant pursuant to the AOS for close to a decade before the Railcar Release and received significant renumeration. Only after Petitioners sued in 2018, and IPI was called upon to honor its indemnification agreements, did Petitioners repudiate the obligations they had long accepted and profited from.

**The Railcar Release**

On August 27, 2016, railcar AXL 1702 ("1702") experienced a crack, releasing 178,400 pounds of chlorine (the "Railcar Release"). J.A. 4, 932–933. 1702 had just been returned to service, and the release occurred after it was loaded for the first time and placed in a holding area. J.A. 4, 933–34. The car had just been inspected by AllTranstek, LLC ("AllTranstek"), a third party that provided railcar maintenance services. *Id.* Recommended repair work had been performed at a shopping facility operated by Rescar, Inc. ("Rescar"), a company owned by AllTranstek. *Id.* During the shopping process, another third party, Superheat GFH Services, Inc. ("Superheat"), performed specialized post weld heat treatments. *Id.* The failures of AllTranstek, Rescar and

Superheat, rather than any action by Respondents contributed to the rupturing of 1702. *Id.* The release resulted in a cloud of chlorine that moved south through the Plant.

Mr. Taylor has admitted that he does not know who is responsible for the Railcar Release. J.A. 4–5, 826–29. Petitioners also failed to disclose or otherwise put forth any proposed expert testimony regarding who was at fault. J.A. 4–5. In light of Mr. Taylor's admissions and the lack of any proposed expert testimony, the Circuit Court found that no competent evidence had been presented to indicate that Respondents were solely negligent or engaged in any willful misconduct in relation to the Railcar Release. J.A. 5.

On the day of the Railcar Release, Mr. Taylor and a work crew were painting Tank 24 on-site at the Plant pursuant to PO 4510044817. J.A. 772–73, 893, 952–53. The PO referenced the required AOS and incorporated the T&Cs. J.A. 952–53. Mr. Taylor was at Tank 24 when he learned of the release. J.A. 777–79. He then proceeded with his men to a "freight gate." J.A. 779–80, 784–85. While Mr. Taylor had an escape respirator, required safety equipment for all contractors, he states he was exposed to chlorine and went to the Plant's infirmary. J.A. 5, 785–86, 788. He was transported to a local emergency department and then to Ruby Memorial in Morgantown. Mr. Taylor was evaluated and released the same day from the Ruby Memorial Emergency Department, travelling back to the Plant that evening to get his truck. J.A. 5, 753–55, 1792–98, 1802. Mr. Taylor returned to work the following Monday, the release being the previous Saturday, and worked a 12.5 hour day. J.A. 5, 894.

**The Scrubber Release**

The indemnification obligation in relation to the Scrubber Release was not addressed by the Order on appeal. Nevertheless, by way of additional background on October 8, 2016, 48 pounds of chlorine exited the scrubber stack at the Plant at an elevation of approximately 60 feet (the

"Scrubber Release"). J.A. 916, 926, 929. A pipe carrying liquid chlorine to storage became restricted or plugged, with chlorine backing up into a vent line. J.A. 926. Because a float failed in the vent line, more chlorine reached the scrubber than it could remove. J.A. 924–26. As soon as an operator in the field saw green vapor coming out of the top of the scrubber stack, he radioed the control room and the circuit was shut down. J.A. 913.

When the Scrubber Release occurred, Mr. Taylor was working on Tank 11 pursuant to PO 4510056774. J.A. 800–01, 897, 954–55. Tank 11 was approximately 300 to 400 yards from the scrubber stack, perhaps more. J.A. 921. Although the release was miniscule compared to the Railcar Release (48 pounds versus 178,400 pounds), Mr. Taylor testified that he was, "in the middle of this fog that was as thick as the first one." J.A. 809. Upon becoming aware of the release, Mr. Taylor directed his men to leave, then got in a vehicle and drove north to an exit. J.A. 804. Before leaving the Plant, Mr. Taylor went to the guard house where the infirmary was located and cursed out the guard working there. J.A. 804–06. Mr. Taylor did not see any doctor, went to lunch instead, and then returned to work in the same location for the rest of the day. J.A. 815, 818–819.

Petitioners' recitation of the facts in their opening brief lacks fidelity to the record and reflects a brazen attempt to create prejudice through mischaracterization. One example is the claim that when Mr. Taylor "attempted to address the lack of a working alarm in cases of emergency," that his "appropriate concerns [ ] were met with laughter from Axiall officials." Pet'rs Br. at 5 citing J.A. 1330.[1] A review of the testimony relied upon by Petitioners for this proposition shows that during a large contractors' meeting Mr. Taylor was asked whether he had any input. Mr. Taylor stated that, "I made a comment that the alarm on their evacuation sounds a lot like the lunch

[1] J.A. 1330 cited by Petitioners is briefing they submitted to the Circuit Court below referencing Mr. Taylor's deposition at J.A. 1480.

bell. And I thought that sometimes when it goes off, I don't know whether to run or go to lunch and everybody in the meeting laughed except me." J.A. 1480. A fair reading of the record shows that Mr. Taylor was asked for input in the midst of a group of contractors. He cracked an apparent joke and people in the room laughed. Petitioners' brief transmogrifies this interaction into the vicious allegation that safety concerns raised by Mr. Taylor "were met with laughter from Axiall officials." Pet'rs Br. at 5. There is no reference in the relevant record to anything "officials" said or did in response to his statement. J.A. 1480.

Petitioners' brief deploys this cavalier approach to the record on many occasions. Petitioners claim that IPI employees were "trapped by a locked gate," and that no evacuation alarm sounded during the Railcar Release. Pet'rs Br. at 4. To the contrary, the record demonstrates that the evacuation alarm did sound for the entire plant and should have been audible to Mr. Taylor at Tank 24. J.A. 1763–64, 2210. Mr. Taylor apparently acknowledged this fact with his comments at the contractor's meeting. Given that the system is tested weekly at the Plant (J.A. 1768), this is a sound every long-time contractor knew well. Also, the facility has designated emergency gates that are always unlocked, which are identified on evacuation route maps located throughout the facility. J.A. 1766–67. Had Mr. Taylor gone to any of these, he would have been able to exit the facility simply by using a push-bar. *Id.* Instead, Petitioners disregarded these routes and went to the "freight gate," which was opened when an IPI employee called the guard house. J.A. 787–88.

Throughout Petitioners' brief, there is also much discussion of Mr. Taylor's alleged injuries, apparently in an attempt to sway the Court in its interpretation of the indemnification obligations. Petitioners omit, however, that Mr. Taylor was never admitted to any hospital, instead being released from the Ruby Memorial Emergency Department on the same day. J.A. 1798. Petitioners' account fails to note that Mr. Taylor was back at work on Monday, with the event

occurring on Saturday and the Plant being closed on Sunday. J.A. 894. Regarding his physical injuries, Mr. Taylor testified that he is not aware of any lingering physical effects from the releases and he has further acknowledged that no doctor has opined that he has any continuing physical ailments. J.A. 2240–41. Regarding his claimed psychological injuries, Mr. Taylor's initial psychiatric assessment related to them did not occur until January 18, 2018, over 16 months after the Railcar Release and by coincidence 11 days before he filed suit. C.J.A. 130, J.A. 2485.

Petitioners also mischaracterize the record in asserting that the Plant was supposedly indifferent to the needs of Mr. Taylor in relation to his medical care. Regarding the Railcar Release, Petitioners claim that "[a]fter waiting for nearly an hour to be treated at the Plant clinic, Mr. Taylor was transferred via ambulance to Reynolds Memorial." Pet'rs Br. at 4. The records show that Mr. Taylor's actual estimated time of exposure was 8:30 am and he was at the infirmary and having his vitals checked at 8:40 am, as soon as the nurse arrived. C.J.A. 38. Regarding the time to be transferred to the local ER, Mr. Taylor omitted the fact that he initially refused to go. C.J.A. 39.

Regarding the Scrubber Release, Petitioners assert that "Appellees refused to provide Mr. Taylor and his team with medical treatment," when the record shows something entirely different. Pet'rs Br. at 6. After his alleged exposure, Mr. Taylor went to the guard house where the clinic was co-located and accosted the guard working there. J.A. 804–06. Mr. Taylor admits he was "behaving erratically," was "pretty rude" cursing at the guard, and that while "I don't say [I] throwed my oxygen bottle, but I think I dropped it pretty hard." *Id.* Mr. Taylor demanded a breathing treatment which, after checking by telephone, the guard who was also an EMT was not authorized to give, but instead was offered a type of lozenge per the records. J.A. 805, 808. Mr. Taylor then left the guard house, but did not go to a doctor or the emergency room because he "felt

like it probably wasn't necessary maybe," went to lunch instead, and then returned to work on Tank 11 (where he had claimed exposure to chlorine) for the rest of the day. J.A. 815, 818–19.

Regarding Petitioners' claims of hundreds-of-thousands of dollars' worth of equipment damage, they have disclosed no expert to opine on the value of this equipment, either before or after this accident.[2] Petitioners' Secretary, Treasurer, and bookkeeper, Dawn Taylor, has further admitted that IPI has no idea what the relevant fair market values could be for the equipment. J.A. 727, 731, 749–51. Fair market values are a predicate for any recovery under applicable law, and IPI has zero evidence on this critical point. *See* Syl. Pt. 7, *Cato v. Silling*, 137 W. Va. 694, 720, 73 S.E.2d 731, 746 (1952).

Petitioners' allegation that the Railcar Release is the result of the "use of a defective 37 year old" railcar is a narrative crafted by counsel alone and unsupported by any evidence. Pet'rs. Br. at 29. Petitioners disclosed no expert to opine in relation to this allegation or any other aspect of liability. J.A. 4–5. Mr. Taylor has indicated he has no idea how or why either of the releases occurred. J.A. 826–29. As a means to create bias, Petitioners argue without any of the necessary foundation that a 2006 Federal Railway Advisory should have put the Plant on notice, but has nothing but his counsel's conjecture to support this argument. Pet'rs Br. at 36. Although the trial court was not required to consider the FRA Notice under Rule 56, to the extent the FRA Notice is considered, it found that safety concerns with ACF-200 stub-sills could be addressed through periodic inspection and modification of the tank cars at intervals determined by mileage and requalification inspection and maintenance dates. J.A. 1673. Far from disregarding this notice, the

[2] Petitioners disclosed one expert to discuss how chlorine can interact with certain metals, but he testified that he could not offer opinions about damages as they related to any specific piece of equipment. J.A. 992. Petitioners also disclosed an economist, but he testified that he was not, "opining relative to the damage of the equipment. I wouldn't have the ability to." J.A. 1018.

evidence shows that there was a robust inspection protocol in place, and that Axiall understood that 1702 was being inspected in compliance with all applicable requirements, as well as in accord with the available data. J.A. 1135–36, 2153.

Petitioners also incorrectly claim that a jury has found that Axiall was the "primary party at fault" for the Railcar Release during the course of another proceeding related to this incident. Pet'rs Br. at 6. Petitioners failed to make this jury verdict form a part of the record, and it is not contained within the Joint Appendix. Had it been, the jury verdict would reflect that in a separate case with different parties that AllTranstek (the company that inspected 1702 right prior to the event) was found 20% at fault, Rescar (the company that repaired the car immediately before the release) was found 40% at fault, and that Axiall was apportioned the remaining fault. Eagle Natrium was not a party to the case. Nothing within the verdict suggests "primary" liability, nor does it create any disputed issue of fact that Axiall or Eagle Natrium could be "solely" negligent or engaged in willful misconduct. In the context of Petitioners' repeated mischaracterizations, their recitation of their allegations as set forth in their Statement of the Case is not an accurate reflection of the record and should be viewed with skepticism.

**The Indemnification Provisions**

In order to do business at the Plant, all companies like IPI had to enter into an AOS, and this document anticipated the subsequent issuance of a PO and the incorporated T&Cs. J.A. 714, 761–66, 952–55. These documents created binding obligations upon IPI when it undertook to provide the services referenced in any PO. *Id.* In the case of any conflict among these documents, the AOS specified the order in which they control, including the front of the PO, the AOS, and then the T&Cs. J.A. 714.

The AOS contained a standard indemnification clause, including:

> Contractor assumes the risk of all damages, losses, costs and expenses, and agrees to indemnify, defend and hold harmless Buyer, their directors, officers, agents, and employees 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, their directors, officers, agents or employees, 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 Contractor, its employees, agents and representatives, 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 at the request of Contractor, its employees, agents or representatives), 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. The indemnification obligation of this Section 4 shall be deemed modified as required to exclude that degree of indemnification required aforesaid which is expressly prohibited by applicable law, statute or regulation, if any; but to the extent the aforesaid indemnification obligation is valid and enforceable, it shall remain in effect though modified. The indemnity obligations of Contractor hereunder shall survive the termination or expiration of this Agreement and of any applicable Accepted Order.

J.A. 715. The term "Buyer" was defined to include Eagle Natrium and Axiall. J.A. 714, 756–57.

The T&Cs in effect at the time of the Railcar Release contain independent indemnification obligations, including:

> Seller assumes the risk of all damage, loss, costs and expense, and agrees to indemnify, defend and hold harmless Buyer, its officers, employees and representatives, 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. This indemnity shall survive the termination or cancellation of this Purchase Order, or any part hereof.

J.A. 763. Here again, the term "Buyer" is defined to include Respondents. J.A. 761.

On the day of the Railcar Release and at the time it occurred, Mr. Taylor and his crew were working on Tank 24 at the Plant pursuant to PO 45100044817. J.A. 772–73, 893, 952–53. If it were not for this work, Mr. Taylor and other IPI personnel would not have been in the Plant, nor would there have been any potential for chlorine exposure.

### B. Procedural History

Mr. Taylor withdrew IPI personnel from the Plant in March of 2017. J.A. 870. A little less than a year later, IPI and Mr. Taylor sued three different corporate entities and one individual over the Railcar Release and other allegations, totaling nine different theories, ranging from strict liability to fraud. J.A. 11–36. After four years of litigation, dispositive motions were filed in May of 2022, seeking to dismiss most of Petitioners' affirmative claims and enforce the indemnification obligations to which Petitioners had long agreed as they pertained to the Railcar Release. J.A. 2485–92. After extensive briefing and argument (J.A. 666–2369, 2371–2454), the Court dismissed many of Petitioners' claims and found the indemnification obligations enforceable. J.A. 1–10, 2463–84.

## SUMMARY OF THE ARGUMENT

The Circuit Court properly analyzed the complimentary indemnification provisions to find both applicable and enforceable as to the relevant claims of IPI in relation to the Railcar Release. Petitioners waived the argument that a conflict between these provisions exists because they never raised it before the Circuit Court. Even if this Court analyzes this issue, the relevant language in the AOS and the T&Cs reflect independent indemnification provisions that overlap without conflict. The broader language of the AOS entirely encompasses that of the T&Cs, including the T&Cs references to "demands" and attorneys' fees. Even if a difference between the clauses were interpreted to exist, the provisions would still not be irreconcilable. Further, if a conflict were

somehow construed to be present, the AOS sets forth a prioritization of the documents which neutralizes any potential effect on enforceability.

The indemnification provisions are clear and unequivocal and similar language has been enforced under Pennsylvania law. It is well settled that a contract can require indemnification from an indemnitee's own negligence if its terms are clear and unequivocal. The terms of the AOS and T&Cs satisfy this requirement because they use "sole negligence" language. Pennsylvania courts have long held that indemnification clauses requiring indemnification except for sole negligence are unambiguous and enforceable. Petitioners fail to cite to any of these cases, instead referring the Court to the *Greer* opinion which addressed different and unrelated indemnification language found nowhere in the AOS and T&Cs.

Petitioners wrongly suggest that Pennsylvania law interprets the "arising out of" language to incorporate a proximate cause or "foreseeability" requirement as between the work an indemnitee is performing and claims that are encompassed by an indemnification obligation. Petitioners waived this argument as well by not raising it before the Circuit Court. In addition, this position is inherently wrong and ignores the broad language found in the AOS and T&Cs. The AOS requires indemnification for claims "arising out of" the "Agreement," the "Services," for injuries and damage "sustained in connection with performance of the Services" and "arising from any cause whatsoever." J.A. 715. The T&Cs require indemnification for claims "arising from or related to the subject matter of the Purchase Order." J.A. 763.

While it is undisputed that Petitioners were at the Plant pursuant to the AOS, T&Cs, and relevant PO, and were performing "services" at the time their claims arose, Petitioners argue that the indemnification obligations in these agreements should be invalidated because the alleged damages did not accrue as a proximate or "foreseeable" result of Petitioners undertaking to

maintain tanks at a chlorine plant. No Pennsylvania case cited by Petitioners supports this radical proposition. Persuasive authority suggests that the "arising out of" language places Petitioners' claims squarely within the framework of the agreed indemnification, particularly given that Petitioners would not have suffered the alleged injury absent their work at the Plant pursuant to the AOS, the PO, and the T&Cs. Moreover, courts applying Pennsylvania law on similar issues do not examine proximate cause, but instead ask whether a contractor was actually working pursuant to an agreement with an indemnification obligation at the time the claim arose. The Pennsylvania authority cited by Petitioners for their proximate cause concept, *Pittsburgh Steel Co.*, was decided on different grounds and did not interpret the "arising out of" language.

Petitioners reference to one part of the Circuit Court's Order regarding a "failure or defect" in equipment is irrelevant to the issues on appeal and harmless to the extent any error is found. The Circuit Court did not rely upon this finding in deciding that the indemnification obligations are enforceable. To the extent the portion of the AOS the subject of this argument has any relevance, it reinforces that Petitioners agreed to indemnify Respondents from and against their own negligence, except sole negligence.

The Circuit Court did not err in granting summary judgment because the undisputed facts showed that Respondents were not solely negligent and did not engage in willful misconduct in relation to the Railcar Release. The Circuit Court was well within its discretion when it declined to consider some of Petitioners' exhibits because they did not comply with Rule 56 and were otherwise unsupported by affidavit. Even if the Court were to find all of Petitioners' exhibits pertinent, they still cannot demonstrate a disputed issue of fact as to Respondents' sole negligence or willful misconduct. Petitioners have expressly admitted that they do not know how the Railcar Release happened, nor do they know who is responsible. J.A. 826. Petitioners have further

admitted that they are not aware of any facts to suggest that Respondents had any knowledge that the Railcar Release was going to occur. J.A. 827–29. Petitioners also failed to disclose any liability experts, let alone experts supporting the narrative created from whole cloth by counsel in Petitioners' briefing. Given this record, Petitioners cannot create a genuine issue of material fact as to Respondents' "sole negligence" or willful misconduct in relation to the Railcar Release. Based upon the foregoing this Court should affirm summary judgment as to the applicability and enforceability of the indemnification provisions.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary. The facts and legal arguments are adequately presented in the briefs and appendix record and oral argument would not significantly aid in the decisional process. W. Va. R. App. P. 18(a)(4). If the Court determines that oral argument is necessary, argument under West Virginia Rule of Appellate Procedure 19 is appropriate because the appeal involves assignments of error in the application of settled law.

## STANDARD OF REVIEW

This Court reviews a Circuit Court's entry of summary judgement *de novo.* Syl Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 733 (1994). "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the records, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 2, *Milmoe v. Paramount Senior Living at Ona, LLC*, 247 W. Va. 68, 875 S.E.2d 206, (2022) (quoting Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)).

## ARGUMENT

### I. The Circuit Court properly analyzed the complimentary indemnification provisions to find both applicable to the relevant claims of IPI and Petitioners have waived this issue in any event because it was never raised before the Circuit Court.

Petitioners' argument regarding purportedly conflicting indemnification provisions was never raised before the Circuit Court. While Petitioners seek to style it as an issue arising out of the Circuit Court's decision to find both indemnification clauses applicable, it is in fact an argument based on the incorrect proposition that the two overlapping indemnification provisions conflict. Because it was not raised below, Petitioners have waived this purported issue. [3]

Should the Court nonetheless analyze this assertion, the AOS and the T&Cs reflect independent indemnification obligations that overlap without conflict and which the Circuit Court properly found to apply to IPI and require indemnification. J.A. 7–10. Petitioners assert a "conflict" exists because the T&Cs include the word "demands" and also a parenthetical phrase regarding attorney's fees. Pet'rs Br. at 17–18. Beginning with the AOS, the relevant language references indemnification for, "claims, liability, damage, loss, penalties, fines, cost and expense ***of any kind whatsoever***. . ." J.A. 715. The language from the T&Cs is similar, requiring indemnification for "damages, claims, demands, expenses (including reasonable attorney's fees), losses or liabilities. . ." J.A. 763.

The phrasing in the AOS either encompasses or is consistent with the language of the T&Cs. Petitioners rely upon the supposed difference from the addition of the word "demands" and the inclusion of the attorney's fees parenthetical after the word "expense." Both "demands" and

[3] "Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Harlow v. E. Elec., LLC*, 245 W. Va. 188, 198, 858 S.E.2d 445, 455, n. 33 (2021) (quoting *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) (declining to consider Petitioner's fourth and fifth assignments of error, because he failed to preserve them and had not raised the issues with the circuit court).

"attorneys' fees" are reasonably referenced in the AOS, given the broad language of "claims, liability, damage, loss . . . cost and expense of any kind whatsoever." J.A. 1306. Given that the AOS language encompasses the highlighted and supposed differences belatedly raised by Petitioners, no conflict exists.

Pennsylvania law requires this conclusion. The fact that an indemnification obligation does not explicitly reference attorneys' fees, does not mean they are not owed. The Pennsylvania Supreme Court has found that a provision in a trust agreement requiring that a party, "reimburse the Trustee for all its expenditures, and to indemnify and save the Trustee harmless against any liabilities which it may incur in the exercise and performance of its powers and duties hereunder," was broad enough to include the payment of attorney's fees. *Fid.-Philadelphia Tr. Co. v. Philadelphia Transp. Co.*, 404 Pa. 541, 548, 173 A.2d 109, 113 (1961). The Court specifically held that the broad scope of the language, similar to that found in the AOS, was sufficient to include attorney's fees. *Id.* at 548–549, 173 A.2d at 113–14. Given this law, and the fact that the language of the AOS encompasses any slight variation in the T&Cs, no conflict exists.

Even if a difference between the clauses were found, it would still not mean that the provisions conflict or that they are unenforceable. Conflict suggests irreconcilability, and to the extent that an indemnification provision adds to the obligation, nothing need be reconciled. Even if a difference were interpreted to exist, it would only mean that one of the provisions creates a broader obligation, not that the two are in opposition. Without such a conflict or inconsistency, there is no prioritization of agreements and even if a prioritization were necessary, nothing would prevent the application of the overlapping obligations as found appropriate by the Circuit Court. Finally, to the extent any conflict could be interpreted to exist, the AOS resolves the issue by providing for an order of prioritization, with the front of the PO controlling, then the AOS, and

then the T&Cs. J.A. 714. Thus, even if a conflict were deemed to exist, it would have no impact upon the enforceability of these obligations. Because the provisions do not conflict, and because there is language specifically prioritizing the agreements to the extent they do, both are enforceable.

## II. The indemnification provisions are clear and unequivocal and similar language has routinely been enforced under Pennsylvania law.

The Circuit Court found that both indemnification provisions were valid and enforceable. J.A. 6–10. It is well settled in Pennsylvania that a contract can require indemnification from an indemnitee's own negligence, provided its terms are clear and unequivocal. *Perry v. Payne*, 217 Pa. 252, 66 A. 553 (1907); *Bernotas v. Super Fresh Food Markets, Inc.*, 581 Pa. 12, 20, 863 A.2d 478, 482–83 (2004) (citing *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 588 A.2d 1, 7 (1991)).

A textual examination of the indemnification clauses demonstrates that they encompass Petitioners' claims against Respondents. The AOS indemnification provision relates to, "all claims, liability, damage, loss, penalties, fines, cost and expense of any kind whatsoever" and expressly includes without limitation "death of or injury to persons or destruction of property involving Contractor, its employees, agents and representatives. . ." J.A. 715. The 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." *Id.* The only exception in the AOS relates to those, "arising out of the sole negligence or willful misconduct" of Respondents. *Id.* The T&Cs contain the exception of "sole negligence" only. J.A. 763.

Pennsylvania courts have repeatedly found that indemnification clauses requiring indemnification except for sole negligence are clear, unambiguous and enforceable. *Babcock &*

*Wilcox Co. v. Fischbach & Moore, Inc.*, 218 Pa. Super. 324, 328–29, 280 A.2d 582 584–85 (1971); *Woodburn v. Consolidation Coal Co.*, 404 Pa. Super. 359, 363–65, 590 A.2d 1273, 1275–77 (1991); *Bernotas*, 581 Pa. at 14, 863 A.2d at 479. In *Babcock & Wilcox Co.*, the clause at issue required indemnification from "any and all claims" except that, "This agreement shall not include injuries or damage due wholly to the negligence . . . of The Babcock & Wilcox Company. . ." 218 Pa. Super. at 325–26, 280 A.2d at 583. Addressing the question of whether the clause could be considered ambiguous, the Court held that the inclusion of the last sentence precluding indemnification for sole negligence meant that it was not, and that the language was clearly and unequivocally expressed. *Id.* at 328–29, 280 A.2d at 584.

Subsequent cases have reiterated the enforceability of indemnification clauses utilizing the sole negligence exception. In *Woodburn*, the Court analyzed a clause providing indemnification for "any and all claims and/or demands including all costs and expenses. . ." with the exception that indemnification would not apply to claims "caused by the sole negligence of Consol or INDUSTRIAL." 404 Pa. Super at 363, 590 A.2d at 1275. The court found that the language precluding indemnification for sole negligence made the clause clear, and that "the negative inference to be drawn is that any injuries occurring by less than the sole fault of Industrial fall within the scope of the indemnification clause." *Id.* at 363–64, 590 A.2d at 1275. The presence of the "sole negligence" language made the clause unambiguous and enforceable, particularly in light of the holdings of the *Perry v. Payne* and *Ruzzi v. Butler* standards. *Id.* at 363–366, 590 A.2d at 1275–76.

More recent case law has again demonstrated that the presence of the "sole negligence" language results in a finding of enforceability associated with the indemnification clause. *See Bernotas*, 581 Pa. at 15, 863 A.2d at 479–80. In *Bernotas*, a customer sued when she fell in a hole

at a store. A contractor and subcontractor had been at the location performing work. The indemnification agreement between the store and the contractor provided that the contractor would "assume entire responsibility and liability for any and all damage or injury of any kind. . . caused by the execution of the work provided for in this Contract. . . ," provided the store was not solely negligent. *Id.* at 14, 863 A.2d at 479. While the opinion focuses largely on a different issue about "pass through" indemnification as between the contractor and the subcontractor, as it pertains to the agreement between the store and the contractor, the clause was not only considered valid and enforceable, but so clearly so that it was "agreed the indemnification provision in Article XII was sufficiently specific to require Super Fresh to be indemnified unless it was solely negligent." *Id.* at 15, 863 A.2d at 480.

Petitioners fail to address any of the substantive law that found sole negligent exception provisions enforceable, instead citing to the *Greer* decision which analyzes different indemnification language. *See Greer v. City of Philadelphia* 568 Pa. 244, 246, 795 A.2d 376, 377 (2002). In *Greer*, the Pennsylvania DOT ("PennDOT") contracted with J.H. Green Electric Company ("Green") to do some interstate work. *Id.* at 245–46, 795 A.2d at 377. Green hired CTS to undertake traffic management responsibilities. The CTS subcontract contained a clause in which CTS agreed to indemnify and hold harmless PennDOT and Green as against:

> [C]laims, damages, losses and expenses. . . arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract. . . *but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor,* the Subcontractor's Sub Subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, *regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.*

*Id.* at 246, 795 A.2d at 377 (emphasis in the original). During the work associated with the contracts, Greer was injured while sitting in traffic. He sued various parties, including PennDOT

and Green, and CTS was then added as a party. After a verdict apportioning negligence to several parties, PennDOT and Green filed motions seeking indemnification from CTS. The trial court permitted indemnification, but the intermediate court of appeals reversed and the Pennsylvania Supreme Court agreed. In finding no right of indemnification as to PennDOT and Green from CTS, the Court focused upon the language "only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor. . ." and found that it "does not evince an intent to provide indemnification for damages due to the negligence of other unspecified parties, including an indemnitee." *Id.* at 249–50, 379–80.

The analysis in *Greer* is irrelevant to this appeal, because the language critical to that case is absent from the AOS and the T&Cs. There is no "only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor" language, nor anything like it. To the contrary, the IPI indemnification provisions provide for indemnification in several other contexts, including "arising from any cause whatsoever," and "except to the extent arising out of the sole negligence or willful misconduct" of Respondents. J.A.715. These clauses are completely different, and nothing in *Greer* undermines the applicable precedent found in *Babcock and Wilcox*, *Woodburn*, and *Bernatos*.

Petitioners also wrongly state that the Circuit Court found that Respondents were entitled to indemnification by IPI as a result of "Axiall's and Eagle Natrium's negligent conduct under these circumstances." Pet'rs Br. at 21. To the contrary, the Court found that no competent evidence had been presented to indicate that Respondents were solely negligent or engaged in willful misconduct, a fact not capable of dispute based upon Petitioners' admissions and lack of proposed expert testimony. J.A. 4–5, 826–29.

Pennsylvania case law has held that clauses like those in the AOS and T&Cs that include an exception for sole negligence are clear, unequivocal, and enforceable. This Court should not depart from established precedent or accept Petitioners' proposed redefinition of Pennsylvania law in relation to an agreement long accepted by Mr. Taylor and IPI.

## III. The language of the indemnification clauses in the AOS and T&Cs encompass Petitioners' claims.

Petitioners wrongly suggest that the "arising out of" language of the indemnification clauses should be interpreted to limit these obligations to those claims which are proximately related to the work performed by IPI. Pet'rs Br. at 23–29. Petitioners have waived this argument because it was not raised before the Circuit Court.[4] Should this Court nonetheless analyze it, the proposition is inherently wrong and ignores several aspects of the governing provisions. To begin with, the language of the AOS is broad, not only encompassing claims "sustained in connection with performance of the Services," but also "arising out of" the "Agreement," the "Services" and also "arising from any cause whatsoever." J.A. 715. Likewise, the language of the T&Cs is broader than the framework Petitioners suggest. J.A. 763.

In making their arguments, Petitioners seek to have this Court adopt a radical interpretation of "arising out of" that ignores the indemnification language in the AOS and incorporates a concept of proximate cause found nowhere in Pennsylvania law. To the contrary, Pennsylvania cases that address similar issues adopt a framework that would find the provisions in the AOS and T&Cs enforceable. Also, the great weight of persuasive authority suggests that referring to the "services"

[4] "Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." *Harlow v. E. Elec., LLC*, 245 W. Va. 188, 198, 858 S.E.2d 445, 455, n. 33 (2021) (quoting *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) (declining to consider Petitioner's fourth and fifth assignments of error, because he failed to preserve them and had not raised the issues with the circuit court).

of Petitioners, or the "subject matter of the Purchase Order," place Petitioners' alleged injuries and claims squarely within the framework of the agreed indemnification, particularly given that Petitioners would not have suffered any alleged injury absent their work at the Plant pursuant to the AOS and the related PO.

As a matter of initial importance, there is no dispute that the types of claims asserted by Petitioners come within the plain language of the indemnity provisions. Regarding Mr. Taylor, he alleges personal injuries based upon the claim that he inhaled chlorine during the Railcar Release. J.A. 16–17. This type of claim falls squarely within the "damages" provisions of the AOS and T&Cs, including those related to injuries to individuals. J.A. 715, 763. Petitioners' other allegations are also covered in the scope of the indemnification clauses, including damage to IPI's equipment. *Id.*

It is also undisputed that Petitioners' alleged injuries occurred *while they were performing services* under the terms of the relevant agreements. The day of the Railcar Release, Mr. Taylor and an IPI work crew were on-site and actively working on Tank 24. J.A. 775, 893. IPI performed this work pursuant to PO 4510044817. J.A. 5, 775, 893, 952–53. The PO required a previously signed and returned AOS and also incorporated by reference the T&Cs. J.A. 952–53. There is thus no dispute that the Railcar Release occurred while IPI was performing services that arose from and were related to the AOS and PO 4510044817.

### A. The scope of the independent indemnification obligations in the AOS and T&Cs are broad and cover Petitioners' claims.

The AOS provides for indemnity "from and against any and all claims, liability, damage, loss, penalties, fines, cost and expense of any kind whatsoever" in several different circumstances, including all such claims:

1. "arising out of this Agreement…";

2. "and/or the Services….";

3. "including, without limitation, for the death of or injury to persons or destruction of property involving Contractor, its employees, agents and representatives, sustained in connection with performance of the Services," and

4. "arising from any cause whatsoever…." J.A. 715.

The only limitation is the exception for the sole negligence or willful misconduct of the indemnitees. J.A. 715.

Regarding the definition of "Services," the AOS provides that, "This Agreement is intended to cover certain *on-site* services (the "Services") to be performed by Contractor, *at the Facility*…" J.A. 714 (Emphasis added). "Facility" is defined to include a "Buyer facility or facilities (the "Facility"). *Id.*

The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. *Robert F. Felte, Inc. v. White*, 451 Pa. 137, 143–44, 302 A.2d 347, 351 (1973). As is obvious from the language of the AOS, the indemnification provision was to be broad, encompassing not simply claims that were proximately related to Petitioners' work, but all claims of indemnification arising from the "Agreement," the "Services," "sustained in connection with the performance of the Services," and "arising from any cause whatsoever." J.A. 715. Had the parties intended to limit indemnification to claims proximately related to the Services, they would have said as much. They did not. In this context, there can be no doubt that Petitioners' claims which arose while they were in the Plant and providing services pursuant to the related AOS, PO, and T&Cs, are encompassed by these documents.

IPI owes Respondents indemnification under all four clauses of the related indemnification provision in the AOS, although Petitioners' analysis focuses primarily on the third clause regarding

claims "sustained in connection with performance of the Services." Nevertheless, the additional language regarding arising out of the "Agreement," the "Services" and "arising from any cause whatsoever," make clear that all of the claims are easily encompassed by the language of the AOS. The same is true with respect to the language of the T&Cs. It requires indemnification for claims "arising or allegedly *arising from or related to the subject matter* of this Purchase Order." J.A. 763. The subject matter of the PO was Petitioners' work on "#24 Condensate Tank," which was indeed ongoing at the time of the claims the subject of Petitioners' indemnification obligations. J.A. 772–73, 893, 952–53. Again, given that Petitioners were at the Plant providing "Services," and actually providing those "Services" at the time of the Railcar Release, their claims fall entirely within this broad language.

### B. Petitioners seek to have this Court adopt an interpretation of "arising out of" that incorporates a proximate cause requirement absent from Pennsylvania law and never raised before the Circuit Court.

Ignoring the broad reach and actual wording of the indemnification clauses in the AOS and T&Cs, Petitioners instead suggest that these obligations exist only when the injury or claim is proximately related to the work being performed by a contractor. In relation to the AOS, Petitioners argument appears focused on only one of the four clauses addressing the scope of indemnification, including "sustained in connection with performance of the Services. . ." J.A. 715.

Extensive persuasive authority, including from West Virginia, indicates that the "arising out of" language does indeed encompass Petitioners' claims and that their assertion that Pennsylvania law incorporates a proximate cause concept is unfounded. "The term 'arising out of' is 'broad and sweeping.'" *Cevasco v. Nat'l R.R. Passenger Corp.*, 606 F. Supp. 2d 401, 411 (S.D.N.Y. 2009) (internal citations omitted). The "arises out of" language "should be construed in accordance with [its] common and ordinary meaning as referring to a claim 'growing out of' or

having its 'origin in' the subject matter" of an agreement. *Vitty v. D.C.P. Corp*., 268 N.J. Super. 447, 453, 633 A.2d 1040, 1043 (App. Div. 1993) (finding the individual's injuries arose out of the performance of the contract, even if the injuries "resulted from a freak accident," because he was on duty and acting in the performance of his employment responsibilities).

An indemnification provision that contains "arising out of" or similar language indemnifies against damages and injuries which occur at one's work site, even if the cause of the injuries emanates "from a spatially distant source" or "originated from matters remote from the work at the site itself." *Cevasco,* 606 F. Supp. 2d at 412 (finding indemnification applied to the worker's injuries because they came into being because of the work at that site, "even if the chain of causation that led to the injuries began at another location."). "[T]he phrase 'arising out of [the indemnitor's] performance' is very broad and includes claims for any injuries sustained by the indemnitor's employees while on the job." *Hoffman Const. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 357 (Alaska 2001) (injuries held to "arise out of" steel work where the wind blew scraps of asbestos onto the work site). The "arising out of" language in indemnity agreements refers to "the scope of the employment of the person injured and the site of the occurrence. . . that is, not to the original cause of the injury." *Cevasco*, 606 F. Supp. 2d at 412 (internal quotations omitted).

When determining whether a particular injury falls within the scope of an indemnification clause, the court should consider "a connexity similar to that required for determining cause-in-fact: Would the particular injury have occurred but for the performance of work under the contract?" *Perkins v. Rubicon, Inc.*, 563 So. 2d 258, 259 (La. 1990). "Such a connexity is clearly established by showing that the injured [individual] was engaged in work under the contract at the time of his injury." *Id. See also, Wallace v. Sherwood Constr. Co.*, 1994 OK CIV App 82, 877

P.2d 632, 634 (1994) (finding the injuries arose out of the performance of the subcontract because the individual was on the job site performing duties required by the subcontract and but for this performance, he would not have been injured).

The circumstances in *Perkins*, cited above and by the Supreme Court of Appeals of West Virginia in 2015,[5] are similar to those surrounding the Railcar Release and Petitioners' claims. *See Perkins*, 563 So. 2d at 259. In *Perkins*, the employee of a contractor was working inside a tank at a plant 110 to 120 feet from a phosgene gas reactor. *Id*. The tank had been isolated for maintenance and was not being used. Plant employees, while engaged in work at the reactor, caused a release of phosgene gas, which Perkins then inhaled when it drifted over to his work site. *Id*.

The plant and the contractor had an indemnity agreement which provided that the contractor would bear the risks of injuries "arising out of" its performance of the contract and would indemnify the plant from all claims even if caused by the plant's negligence. *See Id*. at 258–59. The contractor argued that Perkins' presence and performance of his employment duties under the contract at the time of the accident was insufficient to find that the injuries arose out of the contractual work. The Court disagreed and concluded the contractor was obligated to indemnify the plant because Perkins would not have been present at the site to be injured but for the contractor's performance of the work under the agreement. *See Id*. at 259–60. Because the injuries from the gas inhalation arose from Perkins' work, the contractor was required to indemnify the plant. *Id*.

The concept of analyzing whether an indemnitor was performing work under the agreement to determine the enforceability of the obligation has been utilized by courts applying Pennsylvania law. *See Time Warner Ent. Co., L.P. v. Travelers Cas. & Sur. Co.*, No. CIV A. 97-6364, 1998 WL

[5] *See Elk Run Coal Co. v. Canopius U.S. Ins., Inc.*, 235 W. Va. 513, 519–20, 775 S.E.2d 65, 71–72 (2015).

800319 (E.D. Pa. Nov. 10, 1998). In *Time Warner*, a cable company hired Friendshuh to install cable. *Id.* One of Friendshuh's employees was assigned to assist, but was told to leave the worksite because he did not have a hard hat. *Id.* The Friendshuh employee went to a nearby warehouse owned by Time Warner where he used to work to buy or borrow one. *Id.* When he went up on a shelf in the warehouse to get a hard hat, he fell and claimed injury. *Id.*

The contract between Time Warner and Friendshuh required Friendshuh to indemnify Time Warner for claims "arising out of or resulting from the performance of the Work." *Id.* at 4. In determining whether indemnity was owed, the Court asked whether the injuries "arose" out of the "work" when the employee had left the worksite and was not providing services at the time of the event. *Id*. at 5. The Court did not inquire as to whether there was a proximate relationship to the work being performed, only the extent to which the injured individual was working pursuant to the agreement at the time accident. Applying this analysis to the present case indicates that IPI owes Respondents indemnification. There is no dispute that Petitioners were working on Tank 24 pursuant to the PO at the time of the Railcar Release. J.A. 772–73, 893, 952–53.

A similar logic has been employed in another Pennsylvania case that again declined to consider any "proximate cause" analysis, instead asking the simple question of whether the contractor was working at the time of the event that triggered the claim. *See Hershey Foods Corp., v. Gen Elec. Serv. Co.*, 422 Pa. Super. 143, 152, 619 A.2d 285, 290 (1992). In *Hershey*, a plant owner sought indemnification from GESCO, its contractor, pursuant to the terms of an electrical services contract. *Id.* at 145, 619 A.2d at 286. The agreement required indemnification in circumstances "arising out of" or "resulting from" the performance of the "Work" *Id.* One of GESCO's employees was fatally injured during his lunch break. *Id.* at 151, 619 A.2d at 289. Focusing on whether the decedent was performing work, as opposed to the presence or absence of

a proximate relationship to the work, the Court found that because the decedent was at lunch, no indemnification obligation existed. *Id.* at 152, 619 A.2d at 290.

In applying *Hershey* to the instant case, it is apparent that under the "arising out of" and related language, and leaving aside other relevant language from the AOS and T&Cs, that IPI owes Respondents indemnification. There is no dispute that Petitioners were engaged in work under the agreements at the time their claims arose. J.A. 772–73, 893, 952–53. Even Petitioners' brief admits this fact, stating Petitioners "were performing power washing and painting service on Condensate Tank 24," the work referenced in the PO, when the Railcar Release occurred. Pet'rs Br. at 3, J.A. 952.

The only Pennsylvania authority relied upon by Petitioners, the *Pittsburgh Steel Co.* opinion, for the proposition that the "arising out of" language incorporates some kind of proximate cause requirement, does not in fact stand for that proposition. Pet'rs Br. at 26; *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 404 Pa. 53, 60, 171 A.2d 185, 189 (1961). It was decided using the "clear and unequivocal" analysis within the framework of the *Payne* decision, discussed above. And, while the *Pittsburgh Steel* court found that the indemnification provision was not enforceable, this decision was only because its "broad general terms" were not clear enough "to show that indemnification for [ones] own negligence was intended." *Pittsburgh Steel Co.*, 404 Pa. at 60, 171 A.2d at 189. This case did not analyze the "arising out of" language, which is the essence of Petitioners' new argument related to the incorporation of a proximate cause requirement.

Petitioners' argument related to "but for" causation in the context of opinions regarding insurance is also inapplicable. Petitioners note in their briefing that the "arising out of" language is interpreted broadly in relation to insurance, given the liberal construction of policies in favor of coverage. Pet'rs Br. at 24–25. Petitioners then juxtapose the narrow construction of indemnity

provisions to suggest that the "arising out of" language should be interpreted to require proximate cause, also described by Petitioners as "foreseeability," "between the services performed and the injuries suffered." Pet'rs Br. at 27. This argument is a non-sequitur, and Petitioners cite no Pennsylvania authority that supports such a radical construction of this language. To the contrary, the *Time Warner* and *Hershey* opinions considered issues unrelated to proximate cause, instead asking whether the accident happened at the worksite and whether the employee was engaged in the work of the contract. All of these questions are answered in the affirmative for Petitioners, thus demonstrating that their claims under Pennsylvania and other persuasive law arise from the "performance of the Services" as set forth the AOS and the "subject matter of the Purchase Order" as set forth in the T&Cs. Thus, regardless of whether indemnification is owed under the three other clauses of the AOS, the indemnification provision of the T&Cs, or the portion of the AOS indemnification language related to claims and damages "sustained in connection with performance of the Services," IPI owes Respondents indemnification.

## IV. The issue pertaining to the Circuit Court's finding that the railcar was a "failure of or defect in any equipment" is irrelevant to the issues on appeal and is harmless to the extent found not well taken.

Of the two independent indemnification provisions at issue, the AOS contained a clause which outlined the scope of the obligation in four contexts, including arising out of the "Agreement", "and/or the "Services," and further "including without limitation" personal injury and property damages "sustained in connection with performance of the Services" and also "arising from any cause whatsoever." J.A. 715. The T&Cs contained its own broad indemnification language "arising from" or "related to" the "subject matter of the Purchase Order." J.A. 763. This is the critical language pertinent to this appeal. Following these phrases, there is another parenthetical also including a "without limitation" qualifier, that further indicated that the

indemnification obligation would also include defects "in any equipment, instrument or device" provided by "Buyer" to Contractor. This clause is not relevant to this appeal and was not relied upon by the Circuit Court in finding the indemnification provisions enforceable. In this context, should the Court determine that an error regarding this particular paragraph exists, it is harmless and not grounds for overturning the decision. *State ex. rel Cooper v. Caperton,* 196 W. Va. 208, 215, 470 S.E.2d 162, 169 (1996). Moreover, to the extent any issue were found to exist, it would only relate to the AOS, the agreement in which the underlying language is found.

Petitioners' argument that the inclusion of the "limited example" is "illustrative of the injuries contemplated by the parties to trigger IPI's indemnification obligation," should also be disregarded. Pet'rs Br. at 30. The language at issue is within a parenthetical phrase with a "without limitation" qualifier, following the broad, clear, and unequivocal language that the indemnification obligation (excepting sole negligence and willful misconduct) includes claims "arising from any cause whatsoever." J.A. 715. Moreover, to the extent the language informs the interpretation of the agreement, it reinforces that Petitioners were agreeing to indemnify Respondents from and against their own negligence, except sole negligence. To the extent a contractor is injured by defective equipment, instruments or devices supplied by the indemnitee, this encompasses the indemnitee's negligent provision of the same. Far from supporting Petitioners' argument that the indemnification obligation has to be proximately related to the work they performed, this language reinforces Respondents' position that the broad indemnification provisions in the AOS encompass Petitioners' claims.

## V. The Circuit Court did not err in granting summary judgment because the undisputed facts showed that Respondents were not solely negligent and did not engage in willful misconduct.

Petitioners fail to offer any persuasive argument that the Circuit Court erred in finding that Respondents were not solely negligent or engaged in willful misconduct.[6] As an initial matter, the Circuit Court did not "turn a blind eye" or "choose to categorically exclude" all of Petitioners' evidence. Rather, the trial court considered the evidence before it, including several of the records relied upon by Petitioners. And, taking all the relevant admissible information into consideration, the trial court properly found that there was not a genuine dispute regarding the existence of willful misconduct or sole negligence.

### A. The Circuit Court did not abuse its discretion by excluding exhibits which were not properly established.

The Circuit Court was well within its discretion to exclude inadmissible evidence when ruling on the applicability of the indemnification provisions. "[A] circuit court has considerable latitude under the West Virginia Rules of Evidence in determining whether to admit evidence as relevant under Rules 401, 402 and 403, and decisions concerning relevancy are reviewed under an abuse of discretion standard." *Craddock v. Watson*, 197 W. Va. 62, 66, 475 S.E.2d 62, 66 (1996) (citing *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995)). The "trial court is permitted broad discretion in the control and management of discovery." *Dantzic v. Dantzic*, 222 W. Va. 535, 541, 668 S.E.2d 164, 170, n. 6 (2008) (quoting Syl. Pt. 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 475 S.E.2d 555 (1996)). As such, under an abuse of discretion standard, an appellate court should only interfere when a circuit court's "rulings on discovery motions are clearly against the logic of the circumstances then before the court, and ***so arbitrary and***

[6] The indemnification provision in the AOS uses the terms "solely negligent" and "willful misconduct." J.A. 715. The T&Cs only reference "sole negligence." J.A. 763.

***unreasonable as to shock our sense of justice and to indicate a lack of careful consideration***." *Id.* (emphasis added). Thus, "[a] party challenging a circuit court's evidentiary rulings has an onerous burden." *Craddock,* 197 W. Va. at 66, 475 S.E.2d at 66 (quoting *Gentry,* 195 W. Va. at 518, 466 S.E.2d at 177).

Rule 56(c) of the West Virginia Rules of Civil Procedure provides that a trial court can consider "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," when ruling on a motion for summary judgment. W. Va. R. Civ. P. 56(c). "Evidentiary material not specifically authorized by the summary judgment rule may be considered by the trial court. . . *if* it is properly incorporated into an affidavit by reference." *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 433, 693 S.E.2d 789, 798, n. 15 (2010) (quoting 49 C.J.S. *Judgments* § 328 (2009) (emphasis in original)).

> Ordinarily, "[u]nsworn and unverified documents are not of sufficient evidentiary quality to be given weight in determining whether to grant a motion for summary judgment. Therefore, documents that do not state that they are made under oath and do not recite that the facts stated are true are not competent summary judgment evidence.

*Id.* Recently, the Supreme Court of Appeals of West Virginia affirmed the reasoning in *Ramey* through a published opinion. *Butner v. Highlawn Mem'l Park Co.,* 247 W. Va. 479, 881 S.E.2d 390 (2022).

> Accordingly, ***we hold that unsworn and unverified documents are not of sufficient evidentiary quality to be given weight in a circuit court's determination of whether to grant a motion for summary judgment.*** However, in its discretion the court ***may consider*** an unsworn and unverified document if it is self-authenticating under West Virginia Rule of Evidence 902 or otherwise carries significant indicia of reliability; if it has been signed or otherwise acknowledged as authentic by a person with first-hand knowledge of its contents; or if there has been no objection made to its authenticity.

*Id.* at 479, 881 S.E.2d at 403 (emphasis added). Therefore, a trial court is only required to consider the documents enumerated in Rule 56(c), and then ***may*** in its discretion, consider other documents which are proven to be authentic.

Here, Petitioners do not deny (because they cannot) that they failed to provide the necessary affidavits to support certain exhibits to their Response in Opposition to Summary Judgment briefing. Petitioners now seek to blame the Circuit Court for their own error and failure to create a genuine issue of material fact by claiming that all twelve of their exhibits were not considered. This is demonstrably untrue.[7] Many of the exhibits cited by Petitioners either were considered or are wholly irrelevant to the validity of the indemnification provisions.

First, the trial court considered and relied upon Mr. Taylor and Ms. Bart's deposition testimony while determining the validity of the indemnification provisions, as such testimony was under oath and verified. The trial court never stated that such testimony was disregarded, but rather was relied upon by all parties. In reality, such testimony simply does not create a dispute of material fact to warrant a jury trial, as discussed *infra* in Section B.

Second, while there is no indication that the Circuit Court excluded Mr. Taylor's medical records and bills, such evidence is not relevant to determining the validity of the indemnification provisions or if Respondents were solely negligent or engaged in willful misconduct. The medical bills and records may be relevant evidence to support a damages claim, but such exhibits do not evidence sole liability or provide any information regarding Respondents' purported knowledge at the time of the accident. Thus, the medical records and bills' alleged exclusion cannot support an abuse of discretion finding.

[7] The Court noted that "numerous exhibits" submitted by Petitioners did not meet the threshold requirements set by W. Va. R. Civ. P. 56(c). *See* J.A. 5, *Order Granting Counter-Plaintiff's Motion for Partial Summary Judgment Regarding Indemnification Related to the Railcar Release* at ¶ 11, n. 1. J.A. 5.

Third, while there is no evidence that the trial court specifically chose not to consider the Federal Railroad Administration Notice of Safety Advisory 2006-04 ("FRA Notice"), its exclusion would not amount to an abuse of discretion. Assuming *arguendo* that Petitioners would be able to establish the FRA Notice's authenticity under West Virginia Rule of Evidence 902, the trial court was still not required to rely on the exhibit. As explained in *Butner*, the trial court ***in its discretion*** can choose to consider other self-authenticating documents, which are not explicitly listed in W. Va. R. Civ. P. 56(c)—the trial court is not required to do so. Petitioners provide no evidence to support that this exclusion is "so arbitrary and unreasonable as to shock our sense of justice." *Craddock*, 197 W. Va. at 66, 475 S.E.2d at 66. Rather, Petitioners simply state, without support, that because the FRA Notice is self-authenticating, it should automatically be considered on summary judgment. Thus, Petitioners cannot meet their onerous burden to show the alleged exclusion of the FRA's Notice amounts to an abuse of discretion. Accordingly, Petitioners fail to raise a cognizable argument that the Circuit Court's determinations reflect such an abuse.

### B. Petitioners' evidence did not establish a genuine dispute regarding sole negligence and willful misconduct.

Assuming *arguendo* that Petitioners' exhibits were appropriately authenticated and otherwise proper to consider, the evidence is still insufficient to establish a dispute regarding sole negligence or willful misconduct. While this Court is to conduct a *de novo* review of the trial court's entry of summary judgment, the nonmoving party still must provide "some concrete evidence from which a reasonable. . . [finder of fact] could return a verdict in. . . [their] favor or other significant probative evidence tending to support the complaint." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995) (internal quotation marks omitted).

In their opening brief, Petitioners try to lessen the burden required to survive summary judgment, describing the requirements for a *prima facie* case of negligence. Pet'rs Br. at 35. The

question before this Court is not whether Petitioners made a threshold showing of negligence; the question is whether Petitioners supplied sufficient evidence to show a genuine dispute that Respondents were *solely* negligent or engaged in willful misconduct. This is different from simply alleging duty, breach, causation, and damages.

As thoroughly discussed in Respondents' trial court briefings, where an indemnification clause "precludes indemnification for injuries caused by [the indemnitee's] sole negligence . . . the negative inference to be drawn is that any injuries occurring by less than the sole fault of [the indemnitee] fall within the scope of the indemnification clause." *Woodburn*, 404 Pa. Super. at 364, 590 A.2d at 1275. Additionally, willful misconduct involves "[c]onduct committed with an intentional or reckless disregard for the safety of others, as by failing to exercise ordinary care to prevent a known danger or to discover a danger." MISCONDUCT, Black's Law Dictionary (11th ed. 2019). The evidence Petitioners proffered at the summary judgment stage, and again now, fails to support the necessary causation for sole negligence or the requisite *mens rea* for willful misconduct.

First, Petitioners have cherry picked Ms. Bart's deposition testimony in an attempt to argue Respondents' "total disregard" for the safety of 1702. Pet'rs Br. at 36. However, when Ms. Bart's testimony is reviewed in whole, it is clear Respondents acted reasonably and took ample steps to repair and maintain 1702 in a safe fashion. J.A. 1135–38, 2153. Axiall understood that its inspection protocols and procedures were up-to-date, in full compliance with applicable requirements, and based upon the best data available. *Id.* Respondents had no knowledge of 1702's alleged "wholly-defective condition" at the time of the Railcar Release and had "never had a failure like this before." J.A. 1135–36, 2153. Importantly, the Railcar Release occurred only a few minutes after the Plant had finished loading 1702 with liquid chlorine the ***first time*** since it had

come back from being maintained, inspected, and repaired by AllTranstek and Rescar. J.A. 1137–38.

The information known to Respondents at the time of the Railcar Release indisputably does not support a finding of willful misconduct or sole negligence. Respondents exercised reasonable care by having 1702 inspected, repaired, and maintained by third party specialists. Petitioners cannot logically contend that Respondents willfully disregarded a known safety threat when 1702 had just been repaired and inspected.

Similarly, Petitioners reliance on the FRA Notice is misplaced. While the notice indicates that cars of this model should be subject to enhanced procedures, the advisory guidance issued a decade before the Railcar Release ***does not*** support Petitioners' contention that Respondents knew of an actual defect in 1702. Respondents sought to comply with the regulations, not recklessly or intentionally "[fly] directly in the face" of them. Pet'rs Br. at 36, J.A. 1135–38, 2153.

Because Petitioners lack sufficient evidence to support a genuine dispute of material fact, they seek to enforce some form of strict liability based on the FRA Notice—*i.e.*, because the FRA Notice existed *and* because the Railcar Release ultimately occurred a decade later, Respondents should be liable. Pet'rs Br. at 36. This argument ignores Petitioners' burden of offering competent proof to establish a disputed fact regarding sole negligence or willful misconduct. To avoid Petitioners' duty to indemnify, more is required.

Finally, Petitioners argue that they can support a genuine dispute of material fact regarding sole negligence and willful misconduct without a liability expert. *See Petitioners' Opening Brief* at 37. This is wrong, particularly in the face of Petitioners' admissions. J.A. 826–29. The record shows that Petitioners admitted that they do not know how the Railcar Release occurred. J.A. 826.

> Q. As we sit here today, Mr. Taylor, you don't have any opinions on why that railcar released the contents of chlorine on August 27th, 2016?
>
> A. No, sir.
>
> Q. Okay. You don't know why it happened?
>
> A. No, sir.
>
> Q. You don't know what parties could be responsible for why it happened?
>
> A. No, sir.

*Id.* What's more, Mr. Taylor does not think that Respondents had reason to believe the Railcar Release would occur—necessary evidence to support a "sole negligence" or willful misconduct finding. J. A. 827–29.

> Q. . . .You are not aware of any facts to suggest that Axiall Corporation had any knowledge that that chlorine leak or release was going to occur prior to it occurring?
>
> A. No.

J. A. 827.

> A. I have no reason to believe that they knew . . . I mean, there's no way to predict the future.
>
> Q. Okay. Correct. And you're not aware of any facts ---
>
> A. No.
>
> Q. --- that would suggest that Eagle Natrium had any reason to believe this was going to occur?
>
> A. Yes, that's correct.

J.A. 829. How can Petitioners argue that a liability expert is not required, while simultaneously not knowing how the Railcar Release occurred? Without such expert opinion, there is nothing Petitioners can legitimately offer to support the alleged sole negligence or willful misconduct, other than mere assertions of counsel. Based on this record, including the admissions of Petitioners

and the lack of any proposed liability expert testimony, Petitioners cannot create a genuine issue of material fact on the issue of Respondents' sole negligence or willful misconduct in relation to the Railcar Release.

## CONCLUSION

Petitioners bid for, obtained, and performed substantial work for many years at the Plant, benefitting from the relationship and receiving significant income. After IPI withdrew, Petitioners filed suit and made a variety of claims relating to the Railcar Release that fell squarely within the indemnification provisions to which they had long agreed. Instead of honoring these obligations, Petitioners seek to upend established law by ignoring applicable precedent that has repeatedly enforced indemnity agreements using the "sole negligence" language. Further, Petitioners now seek to impose a radical redefinition of the phrase "arising out of" to include a proximate cause requirement found nowhere in Pennsylvania law. This Court should decline Petitioners' invitation to invalidate the bargained-for allocation of risks among the Parties, one which represents a common-place and well-established framework employed by many. So, too, should this Court uphold the Circuit Court's finding that there is no disputed material fact that Respondents were not solely negligent and did not engage in willful misconduct. The AOS refers to both and the T&Cs contains only the sole negligence exception. Where Petitioners have admitted they do not know who is responsible for the Railcar Release and further are unaware of any facts suggesting that Respondents knew such a release could occur, no other conclusion is possible. This is particularly true given Petitioners' failure to disclose any proposed expert testimony on liability. Based upon the foregoing, the Circuit Court's Order the subject of this appeal should be upheld.

Respectfully submitted on February 23, 2023.

**EAGLE NATRIUM, LLC, AXIALL CORPORATION, WESTLAKE CHEMICAL CORPORATION AND CHARLES ZEIGLER**

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 23, 2023, the forgoing "Respondents' Brief" was filed and served using the electronic File & ServeXpress system, which will send notification of such filing to counsel of record:

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