No. 25-ICA-16

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., *et al.*,

Defendants Below/ Petitioners,

vs.

WESTLAKE CHEMICAL CORPORATION, *et al.*

Plaintiffs Below/ Respondents.

From the Circuit Court of Marshall County, West Virginia, Business Court Division
No. 19-C-59, the Honorable Judge Christopher Wilkes

RESPONDENTS' BRIEF

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COUNTERSTATEMENT OF THE CASE

I. COUNTERSTATEMENT OF FACTS

A. The Insurers' All-Risk Property Policies

The Policies[1] at issue are all part of a commercial property insurance program that Axiall Corporation ("Axiall") purchased from the Insurers[2] for substantial premiums. The program originated with Axiall's predecessor-in-interest, Georgia Gulf Corporation, in the 1990s and was subsequently renewed each year through the 2015-2016 policy period. *See* Joint Appendix ("JA") at JA000165, JA003941, JA001760, JA004493, JA002571, JA005437. In exchange for placement of the 2015-2016 renewal, Axiall paid the Insurers a total premium of $11,170,603. JA000138, JA001568-1569.

In their Brief, the Insurers focus exclusively on the Policies' exclusions (Brief at 4-6) and fail to address the fact that the Policies provide Westlake with broad, comprehensive "all risk" first-party property coverage. Each Policy contains an "Insuring Agreement" stating:

> Subject to the terms, conditions and exclusions herein contained, ***this Policy insures***, within the limits of liability set forth herein, the property and interest as hereinafter set forth and defined ***against All Risks of Direct physical loss or damage*** occurring anywhere during the period of this Policy and including whilst in transit by any means within the territorial limits herein, ***except as hereinafter excluded***. JA000140-141, JA00596 (emphasis added).

In other words, the Policies expressly provide broad coverage for ***all*** risks (or causes of loss), except for those risks or causes of loss ("perils") that are expressly excluded. JA000140-141, JA00596, JA001770, JA001810, JA001877, JA001944, JA002027-2028, JA002155, JA002449-50, JA002527. Moreover, the Policies provide coverage for damage caused by sudden and accidental causes of loss. JA000142, JA002575, JA002650.

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[1] The twelve Insurers issued thirteen insurance policies to Westlake, which with the exception of Endorsement No. 19 that appears in only one of the thirteen policies, contain identical terms. The policies are referred to herein collectively as the "Policies."

[2] "The Insurers" refers to the Petitioners. The Petitioners' Brief will be cited herein as "Brief at __."

B. The August 27, 2016 Tank Car Rupture and Chlorine Release

On August 27, 2016, Westlake's[3] tank car, numbered AXLX1702, suddenly ruptured at Westlake's Marshall County, West Virginia production facility (the "Natrium Plant") and released 90 tons of liquefied chlorine (the "Tank Car Rupture"). JA000166, JA005449. The chlorine vaporized upon contact with the air and formed a vapor cloud that combined with any moisture it encountered to form harmful acids (including hydrochloric and hypochlorous acid), which inundated portions of the Natrium Plant, damaging certain property and equipment at the Natrium Plant. JA000166, JA005449.

Approximately eight months prior to the Tank Car Rupture, in January 2016, Westlake took AXLX1702 out of service and transported it from the Natrium Plant to the DuBois, Pennsylvania facility of third-party railcar maintenance contractors, Rescar, Inc. and AllTranstek, LLC (the "Maintenance Vendors"). JA005453, JA005518. The Maintenance Vendors performed repairs over the course of approximately six months and then returned AXLX1702 to the Natrium Plant in June 2016, where it sat unused for approximately two months, until the morning of August 27, 2016. JA005453. On that morning, AXLX1702 was loaded with liquefied chlorine for the first time since returning from the Maintenance Vendors' facility. *Id.* After it was loaded, AXLX1702 was moved approximately thirty to forty yards along the railroad track to clear the railcar loading zone. *Id.* The Tank Car Rupture occurred shortly after AXLX1702 was moved. *Id.*

The Insurers correctly note that the National Transportation Safety Board ("NTSB") conducted an investigation into the Tank Car Rupture that took several years, with a final report of the investigation issued on February 11, 2019. JA009860-9910. However, the Insurers misrepresent the NTSB's conclusions to this Court in the same manner that they misrepresented them to the trial court[4] below – a misrepresentation that the trial court found significant.[5]

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[3] "Westlake" refers to Respondents Westlake Chemical Corporation and Axiall, collectively.
[4] The "trial court" refers to The Circuit Court of Marshall County, West Virginia, Business Division.
[5] The Insurers' reliance on the NTSB report in connection with this action is improper and violates Federal law, which prohibits the admission into evidence or use of any part of the report in a civil action for damages

Specifically, the Insurers claim that the NTSB concluded that the Maintenance Vendors' faulty workmanship was the "probable cause" of the Tank Car Rupture and chlorine release. Brief at 2. This claim is supported by a misleadingly selective quotation from the NTSB's February 11, 2019 report. *Id.* In fact, the NTSB's "Probable Cause" finding reads as follows:

> The National Transportation Safety Board determines that ***the probable cause of the chlorine release was an undetected preexisting crack near the inboard end of the stub sill cradle pad, that propagated to failure with the changing tank shell stresses during the thermal equalization of the car after loading with low temperature chlorine.*** Contributing to the failure was Axiall Corporation's insufficiently frequent stub sill inspection interval that did not detect the crack, the low fracture resistance of the nonnormalized steel used in the tank car construction, and the presence of residual stresses associated with Rescar Companies' tank wall corrosion repairs and uncontrolled local postweld heat treatment. JA009868 (emphasis added).

The Insurers' Brief only quotes the underlined portion of the paragraph above and attempts to characterize it as the NTSB's sole probable-cause conclusion. Brief at 2. In reality, the NTSB considered the "[Maintenance Vendors'] tank wall repairs and uncontrolled local postweld heat treatment" as only "contributing to the failure." JA009868. The NTSB's actual "probable cause" conclusion states that "the probable cause of the chlorine release was an undetected preexisting crack…." *Id*. Moreover, with respect to this preexisting crack, the NTSB states: "the cause of the preexisting crack could not be determined…." JA009903. Thus, the NTSB's actual conclusion regarding the cause of the Tank Car Rupture – on which the Insurers relied in an attempt to satisfy their burden of proof regarding the "faulty workmanship" exclusion – squarely undermines their "faulty workmanship" defense, because that conclusion identifies a preexisting crack of unknown origin, and not "faulty workmanship," as the probable cause of the Tank Car Rupture. The trial court – in two separate footnotes in its Faulty Workmanship Opinion[6] – noted the NTSB's actual

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resulting from a matter mentioned in the report. 49 U.S.C. § 1154(b). However, since the Insurers have repeatedly relied on and mischaracterized this report both to the trial court and to this Court, Westlake must correct the Insurers' misrepresentations, especially because the NTSB's conclusions completely undermine the Insurers' coverage defense based on the so-called "faulty workmanship" exclusion.

[6] "Faulty Workmanship Opinion" refers to the trial court's November 19, 2021, Order Granting Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense and Denying Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty

conclusion regarding the "probable cause" of the Tank Car Rupture. This demonstrates the significance of the NTSB's conclusion to the trial court's ruling regarding the non-applicability of the "faulty workmanship" exclusion.[7] JA0011391-11392.

C. Lawsuit Against Third-Party Contractors

On August 24, 2018, Axiall sued the Maintenance Vendors in Pennsylvania (the "Pennsylvania Action") and in West Virginia (the "West Virginia Action"). JA000170, JA006090-6091. The West Virginia Action was subsequently consolidated with another action filed in West Virginia by Covestro, LLC, the owner of a manufacturing plant adjacent to the Natrium Plant that claimed to also have sustained damage at its facility as a result of the Tank Car Rupture.[8] JA000170. In the Pennsylvania Action, Axiall asserted Pennsylvania-law claims of negligence, breach of contract, and breach of warranty against the Maintenance Vendors. JA007532-7534. On October 14, 2021, a jury trial concluded with a verdict in the Pennsylvania Action. *Id.* The Pennsylvania trial court entered its final judgment on August 10, 2022.

D. The Insurance Claim

In the Section of their Brief titled "Respondents' Insurance Claim," the Insurers largely omit any discussion of the parties' sixteen-month collaborative adjustment process that preceded

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Workmanship Exclusion.

[7] As mentioned in FN 5 *supra*, federal law prohibits parties from introducing the NTSB report into evidence in civil litigation. However, Westlake submitted expert evidence for the trial court's consideration regarding the cause of AXLX1702's rupture that is functionally identical to the NTSB's conclusions regarding the preexisting crack. *See* JA000166, JA005444-5473. Westlake also provided to the trial court the sworn deposition testimony of the Insurers' expert tasked with performing a root cause analysis on the failure of AXLX1702, who admitted that he could not point to any "substantive disagreement on fundamentals" between his own root-cause conclusions and the NTSB's conclusions, and that he also could not point to any substantive disagreement with Axiall's view regarding the cause of the Tank Car Rupture. JA000171, JA006128-6129. The Insurers' only factual submission to the trial court in support of their claim that the Maintenance Vendors' negligence was the "probable cause" of the Tank Car Rupture was the misleadingly incomplete quotation of the NTSB report discussed *supra*.

[8] One of the Petitioners in this action – Insurer HDI – also insures Covestro. Tellingly, while denying coverage to Westlake for the Tank Car Rupture, HDI paid Covestro millions of dollars on Covestro's coverage claim for property damage at the Covestro facility arising from the same incident. JA000188, JA007055-7056. Covestro's HDI property insurance policy contains the same three exclusions that are at issue in this appeal, and yet HDI never even reserved rights regarding the potential applicability of these exclusions to Covestro's coverage claim, let alone denied coverage to Covestro. *See* JA000188, JA006965-7033, JA007055-7056.

Westlake's submission of a formal proof of loss. Brief at 6-7. Specifically, the Insurers gloss over all the interactions between the parties that were consistent with the Tank Car Rupture being a covered loss, occurring between the date of the incident in August 2016 and May 2018, and the Insurers assert that "[o]n May 22, 2018, Westlake ***first*** submitted a claim purportedly above the Polic[ies'] property damage deductible for $5,746,231." *Id.* at 6 (emphasis added). In describing Westlake's May 2018 submission in this way, the Insurers conflate a "claim" with a "proof of loss" in order to make it appear as though the Insurers initially reserved rights with respect to the exclusions at issue in a timely manner, and only after Westlake "first" submitted its claim. *Id.* To the contrary, the Insurers did not reserve their rights regarding coverage, or even mention the potential applicability of the three exclusions at issue to Westlake, for at least sixteen months after the claim was first noticed to the Insurers – and then only after the Insurers' own technical experts and adjustment team estimated it would cost between $220 and $404 million dollars to remedy the damage to the Natrium Plant from the Tank Car Rupture.[9] JA000181-182. Upon receipt of that significantly increased damage estimate, the Insurers immediately hired coverage counsel and began asserting the three policy exclusions at issue for the first time, even though their assertions were based on facts they had known about from the earliest days of the claim. *Id.* For a complete discussion of the history of Westlake's claim, see Westlake's Petitioners' Brief submitted in appeal no. 25-ICA-17, which is incorporated herein by reference.

II. PROCEDURAL HISTORY

Westlake does not take issue with the Insurers' recitation of the procedural history.

SUMMARY OF THE ARGUMENT

The trial court correctly held that none of the Insurers' three coverage-defeating exclusions preclude coverage for the damage to the Natrium Plant caused by the Tank Car Rupture. The trial

[9] Although the trial court did not rely on the fact that the Insurers failed to raise any of the three exclusions as even potentially applicable to Westlake's Tank Car Rupture claim until their own technical experts' estimate of the total damage gave the Insurers sticker shock and caused them to replace their adjustment team and hire outside coverage counsel, the Insurers' misleading recounting of the parties' course of dealings in their Brief shows just how worried the Insurers are about the impact the correct timeline of the parties' course of dealings will have on this Court.

court interpreted and applied the language of these exclusions according to their plain meaning, in a manner consistent with the principles of Georgia insurance law, which include requirements that courts must: (1) construe exclusions strictly against the insurer and in favor of coverage, and hold insurers to the burden of proving that the facts of the claim come within the exclusion; (2) read an insurance contract as a whole, giving effect to all provisions; (3) interpret insurance provisions from the standpoint of a policyholder's reasonable expectations; (4) interpret words in insurance policies in the context of surrounding words and phrases; and (5) reject interpretations that render coverage illusory. The Insurers' selective reading of the three policy exclusions at issue – which construes certain words out of context and ignores other words (and, indeed, entire sections) – violates each one of these Georgia insurance law principles.

Specifically, with respect to the Insurers' so-called "corrosion" exclusion,[10] the trial court correctly held that its plain language applies only to gradually occurring corrosion as an excluded ***cause of loss***, not to corrosion as the type of damage resulting from a covered causal event. The trial court held that corrosion was the type of damage to Natrium Plant equipment, but that the causes of that damage were the Tank Car Rupture, the subsequent release of chlorine, and the chemical attack of chlorine-related acids upon certain types of materials at the Plant. The trial court correctly found that Westlake's "all risk" Policies do not contain express exclusions for any of these causes of loss and, therefore, the damage they cause to insured property is covered.[11]

With respect to the so-called "faulty workmanship" exclusion, the trial court correctly held

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[10] The Policies do not contain a "corrosion" exclusion; rather, they contain an industry-standard "wear and tear" exclusion that identifies "corrosion" as a type of non-fortuitous wear and tear that is an excluded cause of loss. It is commonly understood in the first-party property insurance industry that "corrosion" exclusions are different from "wear and tear" exclusions that include corrosion. The very cases the Insurers cite in support of their argument demonstrate this well-established distinction.

[11] In addition to their argument that the Policies contain a "broad" corrosion exclusion (as discussed *infra*, they do not), the Insurers also complain that the trial court incorrectly found that the "ensuing loss exception" to the wear-and-tear exclusion was triggered. This Court need not reach this additional and secondary argument because the trial court correctly rejected the Insurers' argument the Policies contain a broad or "absolute" "corrosion exclusion," and instead correctly applied the unambiguous language of the wear-and-tear exclusion to find that it did not exclude coverage for corrosion as a form of damage resulting from the Tank Car Rupture. That ends the inquiry regarding the wear-and-tear exclusion.

that the Insurers failed to meet their burden to show that the facts of Westlake's claim are encompassed within this exclusion. The trial court recognized that, although the Maintenance Vendors' faulty repair work was a contributing factor to the Tank Car Rupture, the rupture itself was caused by a pre-existing crack of unknown origin, not faulty workmanship. The trial court further held that, even if the Insurers were able to sustain their burden to prove that the "faulty workmanship" exclusion applied in the first instance, Westlake had met its burden to prove that the "ensuing loss" exception to that exclusion preserves Westlake's coverage because there was no dispute that multiple, non-excluded causes of loss – the rupturing of the tank car upon loading of liquid chlorine, the release of 90 tons of chlorine into the open air, the interaction of the chlorine with moisture to form corrosive acids – ensued months after completion of the faulty repair work, and those ensuing, covered perils caused the damage to the Natrium Plant at issue.

Finally, the trial court correctly held that the "pollution and contamination" exclusions in Endorsement No. 1 to all Policies and Endorsement No. 19 to the AIG-US policy – when viewed in the context of their language as a whole – are properly interpreted to exclude coverage for impairment of the environment (land, air, and water), and not to exclude coverage for damage to operating equipment at a manufacturing plant resulting from an industrial accident like the Tank Car Rupture. Moreover, Endorsement No. 1 expressly provides that if insured property (such as the tank car and chlorine product contained therein) is lost or damaged from a covered peril, such as the sudden rupture of a tank car, then even if seepage, pollution or contamination ensues as a result, there is coverage for any damage caused by such seepage, pollution or contamination.

Having correctly concluded that the Tank Car Rupture was a covered cause of loss and that none of the Insurers' coverage-defeating exclusions applied, and because there is no dispute that the Insurers have never paid Westlake anything for its claim, the trial court correctly found that the Insurers breached their Policies and entered judgment in favor of Westlake in the amount of $2,150,000,[12] along with pre-judgment interest. The trial court also correctly concluded that

[12] In its related appeal at Docket No. 25-ICA-17, Westlake appeals the trial court's limitation of Westlake's contract damages to only $2,150,000, due to an incorrect application of Pennsylvania's doctrine of collateral

the Insurers failed to satisfy Georgia law's requirements to sustain their claim of setoff of the judgment in the Pennsylvania Action against the breach-of-contract damages they owed to Westlake.

Accordingly, Westlake respectfully requests that this Court affirm the trial court's rulings that none of the Insurers' proffered policy exclusions apply to the Tank Car Rupture and that the Insurers have breached their insurance contracts by denying coverage for Westlake's loss, and further that the Insurers are not entitled to any setoff against the damages they owe to Westlake.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal is suitable for argument pursuant to Rule 19 because it concerns claims of error in the application of settled law. *See* W. Va. R. App. P. 19(a)(1).

STANDARD OF REVIEW

"[T]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." *Horace Mann Ins. Co. v. Adkins*, 215 W. Va. 297, 300, 599 S.E.2d 720, 723 (W. Va. 2004) (internal punctuation omitted). When reviewing issues committed to the discretion of the trial court, such as an award of pre-judgment interest, West Virginia appellate courts "usually apply an abuse of discretion standard."[13] *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (W. Va. 1995). "Under the abuse of discretion standard, [the court] will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Id.*

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED GEORGIA'S PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

The Insurers begin the Argument section of their Brief with a purported recitation of the

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estoppel and an incorrect application of Georgia's bad-faith claims-handling standard.

[13] The Insurers fail to acknowledge the abuse of discretion standard of review with respect to an award of pre-judgment interest, despite recognizing that, under the applicable Georgia statute, the trial court's determination of whether to award pre-judgment interest is discretionary.

"Georgia insurance contract principles" that govern the interpretation of the Policies. *See* Brief at 13. The Insurers' presentation of these principles, however, is incomplete in at least five respects.

First, although they do point out that Westlake has the burden to establish the application of an exception to a Policy exclusion, the Insurers neglect to inform the Court that, under Georgia law, it is their burden in the first instance to prove the application of any Policy exclusion – and this burden is high, because under Georgia law exclusions are construed strictly against the insurer and in favor of coverage. *See Nationwide Mut. Fire Ins. Co. v. Erwin*, 525 S.E.2d 393, 395 (Ga. Ct. App. 1999) ("Where an insurance company seeks to invoke an exclusion contained within its policy, it has the burden of showing that the facts came within the exclusion.") (internal citation omitted); *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 544 S.E.2d 156, 157 (Ga. 2001) ("[E]xclusions will be strictly construed against the insurer and in favor of coverage.").

Second, the Insurers neglect to inform the Court that under Georgia law, insurance contracts must be interpreted by reading the entire contract as a whole, giving effect to each provision, and doing so in a way that harmonizes the contract's provisions with each other. *See York*, 544 S.E.2d at 157. This Georgia insurance-contract principle is especially important in light of the fact that the Insurers' arguments depend on plucking certain words and phrases out of context and then asking this Court to ignore the parts of the Policies that render the Insurers' proffered interpretation unreasonable.

Third, the Insurers neglect to inform the Court that under Georgia law, "insurance contracts are to be construed in accordance with the reasonable expectations of the insured where possible[.]" *Richards v. Hanover Ins. Co.*, 299 S.E.2d 561, 563 (Ga. 1983). Ignoring this principle permits the Insurers to argue that, in essence, Westlake paid millions of dollars in premiums for all-risk property insurance that would never provide coverage for a fortuitous, sudden and accidental tank rupture and resulting release of the very chemical (chlorine) produced by the Natrium Plant, which was a primary purpose for buying the coverage.

Fourth, the Insurers neglect to inform the Court that under Georgia law, "[w]ords, like people, are judged by the company they keep. [This is the doctrine of] [*n*]*oscitur a sociis*."

Anderson v. Se. Fid. Ins. Co., 307 S.E.2d 499, 500 (Ga. 1983). Disregarding this doctrine is essential to the Insurers' strained reading of certain exclusionary language, without reference to surrounding words and phrases.

Fifth, the Insurers neglect to inform the Court that Georgia law does not permit interpretations of exclusions that have the effect of rendering express coverage illusory. *See Isdoll v. Scottsdale Ins. Co.*, 466 S.E.2d 48, 50 (Ga. Ct. App. 1995); *Hurst v. Grange Mut. Cas. Co.*, 470 S.E.2d 659, 663 (Ga. 1996); *see also Homelife Comms. Grp., Inc. v. Rosebud Park, LLC*, 633 S.E.2d 423, 425 (Ga. Ct. App. 2006).

The trial court correctly cited to and applied these Georgia insurance contract interpretative principles in reaching its conclusion that none of the three exclusions that are the subject of the Insurers' appeal applied to Westlake's coverage claim in this case. *See*, *e.g.*, JA011382.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE WEAR-AND-TEAR EXCLUSION DID NOT BAR WESTLAKE'S CLAIM

A. The Policies Contain a Limited Wear-and-Tear Exclusion, Not a Broad Corrosion Exclusion as the Insurers Contend

The Insurers represent to this Court, as they did to the trial court below, that the Policies contain a "Corrosion Exclusion [that] is broad[.]" Brief at 14. This is incorrect. The Policies do not even contain a stand-alone "corrosion" exclusion, let alone a "broad" one. Rather, each of the Policies contains an insurance-industry-standard[14] wear-and-tear exclusion that includes

[14] Although the trial court's conclusions regarding the "corrosion" exclusion – as well as the other exclusions at issue – are grounded in the plain, unambiguous language of the Policies, interpreted pursuant to the principles of Georgia insurance law, the undisputed record in this case regarding the origin and drafting of the relevant Policy language reinforces the trial court's conclusions. The record shows that all of the exclusions at Sections 3.A-3.D are standard insurance-industry exclusions that property insurers require to be included in all of the "all risk" property policies that they issue, according to their own internal underwriting guidelines. JA000162, JA003397, JA003818-3819, JA001884, JA004907-4908, JA003904, JA003920-3922, JA005201-5204, JA002650, JA005251, JA005260. For example, the Allianz underwriting guidelines specify that every "all risk" property policy that Allianz issues must include a "War and Civil War" exclusion, a "Nuclear Incidents/ Nuclear Energy Risks" exclusion, a "Gradually operating causes, e.g. wear and tear" exclusion, and an "Error in construction/design, poor workmanship, faulty materials/ inherent defect" exclusion – that is, the same exclusions that appear in paragraphs A through D of the "Perils Excluded" provision of the Policies. JA000162-163, JA002650-2651. Allianz underwriter Carlos Carrillo – who personally underwrote all of the policies that Allianz issued to Axiall and its predecessor from 2002 through 2014 and supervised the Allianz underwriter who underwrote the 2015-

"corrosion" as one of several kinds of non-fortuitous, gradually operating wear and tear that constitutes an excluded cause of loss under the Policies.

Section 3.C in the "Perils Excluded" section of the Policies – which is the source of the Insurers' contention that the Policies include a "broad" "corrosion exclusion" – reads as follows:

> This policy does not insure against loss, damage or expense caused by or resulting from…:
>
> C. Loss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, but not excluding resultant physical loss or damage from a covered peril…. JA000144, JA000598-599.

The word "corrosion" is not defined anywhere in the Policies. *Id.* However, when one applies Georgia's *noscitur a sociis* doctrine to the term "corrosion" within the context of 3.C, it is clear that "corrosion" contemplates a kind of gradually occurring, non-accidental "wear and tear" or "deterioration as a cause of loss."[15] The term "corrosion" does not appear in its own paragraph or exclusion in the Policies. Instead, it is grouped in a paragraph with other words and phrases –

2016 Allianz Policy – testified that "[i]f a policy does not have those exclusions, we will require them to be included." JA000163, JA002577. Mr. Carrillo also identified paragraph C of the "Perils Excluded" section of the Policies as the standard "gradually operating causes, e.g. wear and tear" exclusion mandated by the Allianz underwriting guidelines. JA000163, JA002578. Notably, even as they complain to this Court that the trial court relied on "extrinsic evidence" to come to its conclusions regarding the non-applicability of the at-issue exclusions to Westlake's claim, the Insurers neglect to mention that they opened the door to consideration of "extrinsic evidence" when they argued to the trial court that these exclusions were drafted either by Westlake or its broker. *See, e.g.,* JA009965. This argument was premised on the Insurers' misleading narrowing of the relevant history of the Policies to just the 2015-2016 renewal year, purposely ignoring the fact that the relevant exclusionary language dated back to the origins of the Policies in the 1990s and early 2000s. *See id.* It also entailed ignoring the Insurers' own underwriting manuals and admissions. *See id.* Because the complete record of the insurance industry's drafting of the Policy exclusions is of no help to the Insurers, they have decided, for this appeal, to abandon their own "extrinsic evidence" argument and to accuse the trial court of impermissibly relying on "extrinsic evidence."

[15] *See Anderson*, 307 S.E.2d at 500; *Rountree v. Encompass Home & Auto Ins. Co.*, 501 F. Supp. 3d 1351, 1360 (S.D. Ga. 2020). The Insurers argued below that, under Georgia law, there must first be a finding of ambiguity before a court can employ the *noscitur a sociis* doctrine. This is incorrect. In *Anderson*, the Supreme Court of Georgia did not first declare that the policy was "ambiguous" before applying *noscitur a socciis*. Rather, the Court cited the doctrine of *noscitur a socciis*, deployed that doctrine to analyze the context of the relevant phrase both in the subparagraph in which it appeared and within the context of the broader policy and, as a result of this analysis, found that "the common element of the first two exclusions can be seen to inform the third, in precisely the same manner in which the third term of the third exclusion can be seen to inform the first and critical term…." *Anderson*, 307 S.E.2d at 500. Only after it had conducted this analysis did the Court note that "ambiguity in a document should be construed against its draftsman." *Id.*

"wear and tear," "rust," "erosion," "depletion," and "gradual deterioration" – that all describe a gradual, naturally occurring, and non-fortuitous process.[16] Put another way, all of the words in Section 3.C reflect a theme, and that theme is types of wear and tear that occur gradually over time, as opposed to a sudden and accidental event, causing damage to covered property.

The fact that the words in Section 3.C all reflect a common theme and must be interpreted with respect to this common theme is further corroborated when one considers the entirety of Section 3 and the other lettered paragraphs in that Section – 3.A, 3.B, 3.D, and 3.E. Notably, at no point in their Brief do the Insurers quote, cite, or discuss the entirety of Section 3. This omission is strategic: placing the exclusion at 3.C in its proper context – as required by Georgia law – squarely undermines the Insurers' contention that 3.C constitutes a "broad" "corrosion exclusion."

Section 3 consists of an opening sentence and five lettered paragraphs, A through E.[17] JA000598-599. Each of the exclusions in paragraphs A through E lists a single thematic type of "peril" – or causative event – that is an excluded cause of loss, which is then broken out into examples of the theme that the exclusion encompasses. *See id.* Paragraph A is a war exclusion that encompasses civil war, rebellion, revolution, etc. *Id.* Paragraph B is a nuclear exclusion that encompasses nuclear reaction and nuclear radiation. *Id.* Paragraph D is a so-called "faulty workmanship" exclusion (also at issue in this appeal, and discussed *infra* at Section III), and encompasses related perils such as latent defect, faulty materials, errors or omissions in plan or specification design, etc. *Id.* Paragraph E is a mysterious disappearance exclusion, which

[16] One of the Insurers' Rule 30(b)(7) witnesses on underwriting issues – Robert Sidor of XL – explained that the insurance-industry standard "wear-and-tear" exclusion – of which Section 3.C is an example – is meant to exclude coverage for "normal wear and tear. Things just deteriorate due to normal conditions." JA000148, JA004467-68. Mr. Sidor agreed that "corrosion" in Section 3.C referred to "inevitable" corrosion "that almost always happens, and so you can't have insurance for something that is definitely going to happen." *Id.* Mr. Sidor contrasted this type of corrosion with a "fortuitous event." *Id.* There is no dispute in this case that the fortuitous event of the Tank Car Rupture caused the corrosion damage at issue in Westlake's claim. JA000167, JA003551, JA001878, JA003761.

[17] There are additional paragraphs in Section 3 – F through M – that relate to Business Interruption insurance that is not at issue in this case. JA000598-599. However, even these paragraphs obviously refer to causes of loss and not to types of damage, e.g., "Earthquake in the State of California and Japan," "Infidelity or dishonesty," etc. *See id.*

encompasses "mysterious disappearance loss" or "shortage." *Id.* In this same manner, Paragraph C is a wear-and-tear exclusion that encompasses types of gradually operating wear and tear, like rust, corrosion, erosion, depletion, or gradual deterioration. *See id.* at JA000148, JA004467-4468, JA002961, JA003761-3763. The thematic nature of each paragraph in Section 3 is apparent when all of the paragraphs in this "Perils Excluded" section are read together, which is why the Insurers attempt to present Section 3.C in a vacuum and out of context.

Westlake's interpretation of the wear-and-tear exclusion, which is grounded in the plain language of Section 3 of the Policies, is the same as that of a Georgia federal court that recently had occasion to interpret similar policy language. *See Rountree v. Encompass Home & Auto Ins. Co.*, 501 F. Supp. 3d 1351 (S.D. Ga. 2020). Importantly, *Rountree* rejected the very interpretation the Insurers advanced below and espouse again for purposes of this appeal. The Insurers ignore the *Rountree* decision, focusing instead in their Brief on non-Georgia court decisions.[18]

In *Rountree*, the policy at issue was an all-risk property policy just like the Policies here, and the relevant exclusion excluded losses "caused by or consisting of (1) Wear and tear, aging, marring, scratching or deterioration; ... (3) Rust or other corrosion...." *Rountree*, 501 F. Supp. 3d at 1354. The insurer in *Rountree* argued that the word "deterioration" in the exclusion should be understood broadly to encompass all types of deterioration, regardless of the cause. The court disagreed:

> While the word "deterioration" may have a broad dictionary definition, its meaning within the policy is informed by the words surrounding it …. Here, deterioration is accompanied by the words "wear and tear, aging, marring," and "scratching." ***Taken as a whole, this exclusion contemplates an impairment to property that occurs with normal and reasonable use over time.*** For example, the threshold of a front door would deteriorate over time as entrants stepped through it and the door is opened and closed. That is the sort of damage the provision excludes, but that is not the sort of damage that occurred here. *Id.* at 1360 (emphasis added) (internal citations omitted).[19]

[18] As discussed further *infra*, the Insurers' non-Georgia cases are all either factually distinguishable, inconsistent with Georgia law, or actually support Westlake's position.

[19] Notably, the *Rountree* court did not first make a determination that the policy was ambiguous before interpreting the word "deterioration" in context. In fact, the *Rountree* court, like the trial court here, found the language to be unambiguously consistent with the policyholder's interpretation.

In reaching its conclusion, the court noted that the *Rountree* insurer's broad definition "would in effect exclude any conceivable loss from coverage … a fire, flood, earthquake, or even bomb would cause deterioration." *Id*. at 1359-60.

The *Rountree* court's reasoning is directly applicable here.[20] Pursuant to that reasoning, the Insurers' interpretation of "corrosion" as including all forms of corrosion damage, regardless of its cause, is entirely inconsistent with the other words in Section 3.C and the theme of 3.C generally. Moreover, like in *Rountree*, the Insurers' overbroad interpretation would effectively eliminate large swaths of coverage expressly provided for in the Policies.[21]

Once the correct interpretation of the wear-and-tear exclusions at Section 3.C is applied to the facts of this case, it becomes clear that the Insurers cannot meet their burden to prove that 3.C applies to Westlake's claim. The Insurers admitted below that the Tank Car Rupture was a fortuitous event: a sudden and accidental rupturing of a tank car, and consequent chlorine release. JA000167, JA001878, JA003761. As the trial court correctly determined, neither tank ruptures nor chlorine releases are identified in the Policies as excluded perils, and thus they are covered causes of loss. JA011383, JA000146, JA001878, JA002701, JA002034, JA003551, JA001946. Under Georgia law, the Insurers have the burden of showing that the facts of a claim fall within an

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[20] The policy at issue in *Rountree* had a wear and tear exclusion and a separate, stand-alone corrosion/rust exclusion. *Rountree*, 501 F. Supp. 3d at 1354. Here, of course, there is no separate, stand-alone corrosion exclusion, only a wear and tear exclusion that includes "corrosion" as a type of wear and tear. This fact makes *Rountree* especially applicable: even though the *Rountree* court analyzed the word "deterioration" and not corrosion, its reasoning was grounded in the fact that "deterioration" appeared in the same exclusion as "wear and tear." This reasoning is therefore directly applicable to "corrosion," as that word is used in the Insurers' Policies, since "corrosion" is only found in the same company as "wear and tear," "erosion," "depletion," etc.

[21] For example, the Policies provide express coverage – with an independent limit of liability of $250,000,000 – for "each and every loss occurrence and in the annual aggregate in respect of Flood…." JA000143, JA000586. Much of the damage that would result from the flooding of a chemical-manufacturing plant like Natrium would take the form of corrosion damage caused by water infiltration. The Insurers' overly broad interpretation of "corrosion" would functionally eliminate coverage for damage resulting from flood, without there being any express language in the Policy supporting such a result. This result was specifically rejected by the court in *Rountree.* Moreover, it is a black-letter principle of Georgia law that interpretations of insurance policy exclusions that have the effect of rendering express coverage illusory are impermissible. *See Isdoll* 466 S.E.2d at 50; *Hurst*, 470 S.E.2d at 663; *Homelife Communities Group*, 633 S.E.2d at 425.

exclusion. *See Erwin*, 525 S.E.2d at 395. Moreover, courts applying Georgia law are required to construe policy exclusions narrowly. *See York*, 544 S.E.2d at 157; *Hurst*, 470 S.E.2d at 663. Because Section 3.C on its face only applies to non-fortuitous, gradually operating, causes of loss – and because there is no dispute that the Tank Car Rupture involved the exact opposite – a fortuitous, sudden, accidental rupture of a railcar tank and consequent chlorine release – the Insurers cannot meet their burden to show that this loss falls within the exclusion of Section 3.C.

Moreover, the Insurers' interpretation of 3.C directly violates Georgia principles of insurance contract interpretation, which instruct that "[i]n construing an insurance contract, a court must consider it as a whole, give effect to each provision, and interpret each provision to harmonize with each other." *York*, 544 S.E.2d at 157. The Insurers' proffered interpretation is impermissibly limited to focusing on the single word, "corrosion" taken out of context, and ignoring the rest of Section 3.C and the entirety of Section 3.

B. The Trial Court Correctly Found That All of the Perils Excluded in Section 3 Identify Excluded *Causes of Loss*, Not Excluded Types of Damage

The Insurers' selective quotation of Section 3.C out of context is meant to obscure another key point; namely, when one reviews the entirety of Section 3, it is clear that each lettered paragraph in that section refers only to ***causes of loss*** and not, as the Insurers would have this Court believe, to both causes of loss and types of damage resulting from other causes. This is readily apparent from the language of the opening sentence of Section 3, which contains the critical phrase "caused by or resulting from." This language clearly expresses that the Policies exclude loss, damage, and expense "caused by or resulting from" the perils listed in the lettered paragraphs, including Section 3.C. *See* JA000144, JA000598-599. No reasonable reading of this prefatory language could mean, as the Insurers contend, that the listing of causal events in Section 3.C following "caused by or resulting from" includes a listing of types of damage resulting from non-listed causes, such as a sudden and accidental tank rupture. A review of each of the lettered paragraphs in context renders this conclusion logically inescapable.

It is nonsense to say that "war" (Section 3.A) or "nuclear reaction" (Section 3.B) or "faulty

workmanship" (Section 3.D) or "mysterious disappearance" (Section 3.E) are types of property damage. Each of these "perils" is unambiguously only a cause of loss or damage, and not a type of damage resulting from some unrelated causal event. However, Section 3.C contains certain words – wear and tear, rust, corrosion, etc. – that, when taken out of context and in a vacuum, may possibly refer to either a cause of loss or a type of damage. Yet, in proper context within the relevant Policy language taken as a whole, it is clear that these words, like every other exclusion in Section 3 and pursuant to the prefatory "caused by or resulting from" language of the opening sentence of Section 3, can only reasonably be interpreted to refer to causes of loss. Under Georgia's *noscitur a sociis* doctrine, these words must be interpreted in accordance with the company they keep.[22]

In light of the foregoing, the trial court correctly concluded that:

> [T]he other itemized exclusions in Section 3 are all causative events, and not types of resulting damage (war, nuclear reaction, radiation or radioactive contamination, etc.) Upon the Court's review of Section 3 as a whole, it is clear that each of the paragraphs (3.A, 3.B, 3.C, etc.) refers only to causes of loss and not to both causes of loss and types of damages resulting from other causes. Stated another way, "corrosion" describes the damage resulting from the tank car rupture and consequent chlorine release, which are perils that are not expressly excluded under the Policies and are therefore covered. JA011382-11383.

The Insurers fault the trial court for not "applying" the "unambiguous"[23] language of the

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[22] This analysis of the plain language of the Policies pursuant to Georgia insurance-contract principles is further corroborated by the fact that Section C of the "Perils Excluded" section evolved over the life of the relevant property insurance program. Up until the 2001-2002 policy year, the paragraph read as follows: "Loss or damage from wear and tear or gradual deterioration, but not excluding resultant physical loss or damage." JA000165, JA005408. Then, during the placement of the 2001-2002 renewal, the Insurers inserted "rust, corrosion, erosion, depletion" into the list of excluded, gradually operating causes of loss in Section 3.C, resulting in the version of the wear-and-tear exclusion that was included in all subsequent renewals through 2015-2016. *Id.* at JA000165-166; *compare id.* at JA003975 *with id. at* JA005408. Crucially, the Insurers did not request at this time – or at any time during the life of the Policies – that "corrosion" be made into its own separate, stand-alone exclusion that covered all corrosion, and no Insurer requested that "corrosion" be defined to include both a cause of loss and a type of resulting damage. Instead, the Insurers merely modified the existing wear and tear exclusion to include additional types of (to use Allianz's phrase) "gradually operating causes" of loss, like wear and tear. *See also id.* at JA000163, JA002578. Although the trial court did not rely on these undisputed facts in coming to its conclusions regarding the wear and tear exclusion, they support and reinforce the Court's plain-language analysis.

[23] The Insurers' presentation of how courts applying Georgia law find "ambiguity," and what follows from that finding, is incorrect throughout their Brief. The Insurers use the term "ambiguous" as a synonym for

"corrosion exclusion." In fact, the trial court did apply the unambiguous language of Section 3.C in concluding that this section did not apply to Westlake's claim. However, the trial court's interpretation of that unambiguous language – properly grounded in a review of the entirety of Section 3 – differs from the Insurers' interpretation, which is improperly restricted to focusing solely on the word "corrosion" in a vacuum out of context.[24]

C. The Trial Court Correctly Disregarded the Insurers' Non-Georgia Cases

The Insurers cited a number of non-Georgia cases in the briefing below before the trial court, and they cite most of these same cases in their Brief. These cases are all either inapposite or they actually support Westlake's position. The trial court committed no error by disregarding these cases, which have no precedential or persuasive value for a court applying Georgia law (unlike the *Rountree* decision discussed *supra*).

Most of the cases relied on by the Insurers involve entirely different policy wording and thus are inapplicable to the present case. One of these decisions – *Bishop v. Alfa Mut. Ins. Co.*, 796 F. Supp. 2d 814 (S.D. Miss. 2011) – does not even involve an all-risk policy. Instead, the policy in *Bishop* provided coverage only if the loss was "caused by any one of certain specifically listed perils...." *Id.* at 817. The following Insurer-cited cases, while involving all-risk policies, address exclusionary language significantly different from Section 3.C in Westlake's Policies:

- *Ramaco Resources, LLC v. Federal Insurance Co.*, 545 F. Supp. 3d 344, 353 (S.D.W. Va. 2021) and *Gilbane Build. v. Altman*, No. 04AP-664, 2005 WL 534906, at *3 (Ohio Ct.

"unintelligible." This is inconsistent with Georgia law. Under Georgia law, "if a provision of an insurance contract is susceptible of two or more constructions, even when the multiple constructions are all logical and reasonable, it is ambiguous…." *Hurst*, 470 S.E.2d at 663. If a court applying Georgia law does find that the relevant policy provision is susceptible to more than one reasonable, logical construction or interpretation, that necessarily means that the provision is ambiguous and must be construed against the insurer and in favor of coverage. *See Am. So. Ins. Co. v. Golden*, 373 S.E.2d 652, 653 (Ga. Ct. App. 1988) ("Contracts of insurance are to be construed strictly against the insurer and in favor of the insured when language contained therein is susceptible to two or more constructions."). What follows from this is that, if this Court finds Westlake's interpretation of Section 3.C – or any of the at-issue exclusions – to be logical and reasonable, then this Court must construe these exclusions in Westlake's favor, because if Westlake's interpretations are reasonable then it does not matter if the Insurers' interpretations are also reasonable: either they are not, in which case these exclusions unambiguously conform to Westlake's interpretation, or they are, in which case Georgia law requires a finding of ambiguity and construction against the Insurers and in favor of coverage.

[24] It is also inconsistent with the record in this case and their own admissions, as noted in FN 13 *supra*.

App. March 8, 2005) both involve a policy with a standalone corrosion/rust exclusion and a separate, additional wear-and-tear exclusion. Also, in *Ramaco*, the damage itself that was at issue was not corrosion damage, which is the damage at issue here. *See Ramaco*, 545 F. Supp. 3d at 353. *Ramaco* therefore has no bearing on the question of whether Section 3.C applies to causes of loss or types of damage.

- *Lantheus Medical Imaging, Inc. v. Zurich American Insurance Company*, 255 F. Supp. 3d 443, 446, 459-62 (S.D.N.Y. 2015), dealt with an exclusion that referred to "evaporation," "corrosion," ***and*** "wear and tear" with the reference to "wear and tear" appearing at the end of the exclusion, which is significantly different from the wear-and-tear exclusion at Section 3.C. Each of the lettered paragraphs in Section 3, including 3.C, begin with a word that defines the theme for the rest of the paragraph. Also, as in *Ramaco*, the "corrosion" in *Lantheu*s was not the type of damage at issue, as it is in this case, and so *Lantheus* is silent on the question of whether 3.C applies to both causes of loss and types of damage. *See id.* at 457.

The only case that the Insurers discuss in their Brief that actually addresses the question of whether an exclusion like the one at Section 3.C applies to causes of loss or types of damage[25] is fundamentally inconsistent with principles of Georgia law: *TravCo Insurance Co. v. Ward,* 736 S.E.2d 321 (Va. 2012). In *TravCo*, the Supreme Court of Virginia found that, under Virginia law, there is no distinction between a loss caused by corrosion and corrosion as the type of damage at issue within the context of a property-policy exclusion. *See TravCo*, 736 S.E.2d at 328. However, four years after *TravCo* was decided, a federal court applying New Jersey law rejected *TravCo*'s reasoning as incompatible with key principles of New Jersey insurance law to which Georgia insurance law also adheres. *See Nat'l Mfg. Co. v. Citizens Ins. Co. of Am.*, No. 13-314, 2016 WL 7491805, at *7 (D.N.J. Dec. 30, 2016). Specifically, the *National Manufacturing* court found that "New Jersey law supports a finding that there *is* a difference between the cause of a loss and the loss itself." *Nat'l Mfg.*, 2016 WL 7491805, at *7 (emphasis original). The court based its decision on *Simonetti v. Selective Ins. Co*, 859 A.2d 694 (N.J. Super. Ct. 2004), which had interpreted a mold exclusion and had found that "[m]old can be both a loss and a cause of loss." *Simonetti*, 859

[25] The Insurers also cite *In re Chinese Manufactured Drywall Products*, 759 F. Supp. 2d 822, 846 (E.D. La. 2010) in support of their argument on the cause of loss/type of damage question, but they do not discuss this case in any detail, and it is clear why: the Louisiana court in this case assessed whether losses "caused by" corrosion were excluded under the terms of eight different home insurance policies; however, it never identified the specific language of the various exclusions at issue that it was considering. It is impossible, therefore, to apply this case's reasoning or conclusions to the case at bar.

A.2d at 699. The *Simonetti* court reasoned that the language of the policy at issue, specifying that "loss caused by … mold" was excluded, supported this conclusion. *Id.* The *Simonetti* court further found that if the insurer "had intended to exclude not only losses caused by mold, but also mold itself, it could have easily expressed that intention." *Id.* The *Simonetti* court then noted that under New Jersey insurance-contract-interpretation law, it was required to "interpret coverage provisions broadly and to construe exclusions and limitations narrowly … [and] to construe this policy language against the drafter, in favor of the insured, and in accordance with the insured's reasonable expectations." *Id*. The *National Manufacturing* court applied *Simonetti*'s reasoning to an exclusion providing that the insurer would "not pay for loss or damage caused by or resulting from ... [r]ust or other corrosion." *Nat'l Mfg.*, 2016 WL 7491805, at *8. It held that:

> [i]f [the insurer] wanted to exclude corrosion as both a cause of loss and as a type of loss itself, it could have certainly written the policy that way. Because this Court is required to construe coverage broadly, exclusions narrowly, and resolve ambiguities in favor of the insured, the Court finds the Corrosion Exclusion excludes only those losses caused by or resulting from corrosion, not corrosion itself. *Id.*

The New Jersey principles of insurance law that guided the *National Manufacturing* and *Simonetti* courts are identical to Georgia principles of insurance law. *Compare Nat'l Mfg. and Simonetti with York*, 544 S.E.2d at 157 ("[E]xclusions will be strictly construed against the insurer and in favor of coverage."); *Richards*, 299 S.E.2d at 563 ("[I]nsurance contracts are to be read in accordance with the reasonable expectations of the insured where possible[.]"); *and Golden*, 373 S.E.2d at 653 ("Contracts of insurance are to be construed strictly against the insurer and in favor of the insured when language contained therein is susceptible to two or more constructions. Where the insurer grants coverage to an insured, it must define any exclusions in its policy clearly and distinctly."). The result here should therefore be the same as in *National Manufacturing*, not *TravCo*.[26]

The Insurers' remaining "corrosion" cases support Westlake's position, not the Insurers'

[26] *In re Chinese Manufactured Drywall* and *Bishop* discussed *supra*, rely on the court's reasoning in *TravCo* in reaching their conclusions; and can be disregarded for the same reasons.

position. First, in *Pioneer Chlor Alkali Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.,* 863 F. Supp. 1226 (D. Nev. 1994), the policyholder argued that "corrosion" in the context of its policy meant taking "a long time," and that the corrosion at issue in its claim – which occurred over "twenty or more years" – did not take a sufficiently long time. *Pioneer*, 863 F. Supp. at 1235-36. The court understandably found this interpretation and application to be unreasonable and consequently denied the policyholder's motion for summary judgment. *Id*. By contrast, here, the corrosion happened instantaneously. *See* JA000167-168. Moreover, Westlake's position is not that "corrosion" as used in Section 3.C must take a long time to occur; rather, Westlake's position is that under the plain language of Section 3.C (as well as Georgia case law, undisputed evidence regarding the drafting and underwriting of the Policies, and the dictionary definition of "corrosion"[27]), "corrosion" applies only to non-fortuitous, gradually operating corrosion occurring during normal plant operations. *See Rountree*, 501 F. Supp. 3d at 1360.

Second, in *Bettigole v. American Employer's Insurance Co.*, 567 N.E.2d 1259, 1261 (Mass. Ct. App. 1991), the policyholder argued that there was an intervening cause between the relevant damage and the corrosion that it conceded caused its loss. The court acknowledged that this intervening-cause argument was supported in Massachusetts law – that indeed there were "paradigm" cases for this argument. *Id.* But the court found that "[t]he present case does not approach the paradigm. The chloride ions are not a covered risk distinct from and anterior to the corrosion, as was the vandalism or burst pipe in relation to the offending water [in the paradigm cases]; the chloride is the very agent of the corrosion." *Id.*

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[27] In support of their argument that the plain meaning of "corrosion" includes both gradually occurring processes and instantaneous occurrences, the Insurers purport to cite the Merriam-Webster definition of "corrosion." Brief at 16. The Insurers' citation is misleadingly incomplete, however. Merriam-Webster defines "corrosion" simply as the process of "corroding," but it then defines "corroding" as (1) "to eat away ***by degrees*** as if by gnawing" or (2) "to weaken or destroy ***gradually***." https://www.merriam-webster.com/dictionary/corroding (last visited March 24, 2025) (emphasis added). Thus, the complete dictionary definition of this key term shows that even considering the word "corrosion" out of the context of the rest of Section 3.C includes the concept of a gradual process, which is squarely at odds with the instantaneous corrosion of equipment at the Natrium Plant that occurred on the day of the Tank Car Rupture. There is no factual dispute in this case that the corrosion resulting from the Tank Car Rupture was instantaneous. *See* JA000150, JA004535, JA004802-4804, JA004838.

The key "paradigm" case that the *Bettigole* court considered was *Standard Electric Supply Co. v. Norfolk & Dedham Mutual Fire Insurance Co.*, 307 N.E.2d 11 (Mass. Ct. App. 1974). *Standard* involved water damage from a burst pipe. *Standard*, 307 N.E.2d at 12. The insurer in *Standard* denied coverage on the basis of an exclusion for "water which has come through the ground." *Id.* The policy at issue in *Standard*, like the policy at issue here, was an "all risk" policy. *Id.* The *Standard* court first noted that "[t]he 'risk' comprehended in an 'all risk' policy has been characterized as: a fortuitous event – a casualty; losses by any accidental cause … due to some fortuitous circumstance or casualty…." *Id.* (internal punctuation and citations omitted). In light of the fact that "all risk" policies are meant to cover accidents or "fortuitous events," the *Standard* court observed that:

> [i]n context, therefore, it does not seem to us that (or it is at least doubtful whether) the exclusion … on which the defendant relies, refers to water damage caused by an accident. The interpretation of the defendant insurer which isolates the exclusion and looks only at its text – even though we were to consider it a warranted interpretation – cannot be said best to effectuate the main manifested design of the parties. *Id.* at 13 (internal punctuation and citations omitted).

Here, as in the "paradigm" case on which *Bettigole* depends – *Standard* – the cause of loss was indisputably an accident or "fortuitous event" – exactly the sort of event that *Standard* says "all risk" policies like the ones at issue here are meant to cover. Specifically, that cause of loss was the rupturing of the tank car – a not-expressly excluded, and therefore covered, cause of loss under Westlake's Policies. The rupturing of the tank car is nearly identical as a cause of loss to the burst pipe at issue in *Standard*, and nothing like the "ions" that the policyholder relied on in *Bettigole*. Therefore, to the extent these Massachusetts cases – *Bettigole* and *Standard* – have any application here, they support Westlake's position.

III. THE TRIAL COURT CORRECTLY FOUND THAT THE FAULTY WORKMANSHIP EXCLUSION DID NOT BAR WESTLAKE'S CLAIM

A. The Insurers Have Not Met Their Burden to Show That the Facts of Westlake's Claim Come Within the Faulty Workmanship Exclusion

Under Georgia law, the Insurers have the burden to show that the facts of Westlake's claim come within the "faulty workmanship" exclusion. *See Erwin*, 525 S.E.2d at 395. The Insurers

have failed to meet this burden. Both in the trial court below and again before this Court, the Insurers present an inaccurate and misleading account of both the sequence of events leading up to the Tank Car Rupture and the undisputed technical findings regarding the root cause of the Tank Car Rupture. The trial court correctly determined that the "faulty workmanship" exclusion did not apply because there was no evidence that anyone's "faulty workmanship" was the cause of the Tank Car Rupture (notwithstanding the fact that the Maintenance Vendors' negligence was a contributing factor to the Tank Car Rupture).

In the trial court, the Insurers' only evidentiary support for their contention that the facts of Westlake's claim fall within the "faulty workmanship" exclusion was the representation that the NTSB determined that the Maintenance Vendors' welding and post-weld heat-treatment work on AXLX1702 was the "probable cause" of the Tank Car Rupture. The Insurers make the same representation to this Court. Brief at 2. As the trial court noted multiple times in its Faulty Workmanship Order, this representation is false. In fact, the NTSB found that a preexisting crack of unknown origin caused the Tank Car Rupture, not the "faulty workmanship" of the Maintenance Vendors, which the NTSB considered to be a contributing factor.[28] JA009868.

A mischaracterization of the NTSB report is the Insurers' only factual submission in an attempt to meet their burden on the "faulty workmanship" exclusion. However, the Insurers also made below – and make again to this Court – the legal argument that Axiall's allegations in the Pennsylvania Action that the Maintenance Vendors performed negligent work on AXLX1702 "conclusively establish" a connection between faulty workmanship and the Tank Car Rupture. The trial court correctly rejected this argument, holding that:

> [E]ven if it was the maintenance vendors' allegedly negligent maintenance or repair work which caused a defective condition in the tank car wall by weakening it and making it more susceptible to stress, Section 3.D. would bar Plaintiffs from

[28] As Westlake points out *supra* at FN 5, the Insurers may not rely on the NTSB report in any way in this action, pursuant to federal statute. However, their root-cause expert has conceded that he does not disagree with the NTSB's conclusions, and Westlake's technical experts have reached the same conclusion regarding the root cause of the Tank Car Rupture and the preexisting crack. JA000171, JA006128-6129. It is therefore not disputed in this case that the Tank Car Rupture was precipitated by the presence of a preexisting crack of unknown origin in the wall of the railcar tank.

> recovering for this defective condition, the cost that Plaintiffs would have incurred to remedy the negligent repair work and render the tank car safe for continued use, but would not bar Plaintiffs from recovering in the subsequently resulting additional covered losses. This subsequently resulting additional covered loss was the tank car's sudden rupture after it was loaded at the Natrium Plant with 90 tons of liquid chlorine, and the consequent escape of that chlorine into the Natrium Plant where it combined with water to form acids that caused damage to equipment and property at the Natrium Plant. The Policies do not expressly exclude Tank Car ruptures or releases of liquids or chemicals or chemical attacks of acid upon metal equipment. Therefore, those causes of loss are covered. JA011392-11393.

In the course of rendering this holding, the trial court noted in a footnote that – contrary to the Insurers' misrepresentation – "an NTSB Report found that a preexisting crack of unknown origin caused the tank car rupture, not the faulty workmanship of the maintenance vendors, which the NTSB considered to be, at most, a contributing factor." *Id.* at JA009868.

On appeal, the Insurers cannot point to any errors in the trial court's factual findings regarding the sequence of the Tank Car Rupture or its root cause. Nor can they point to any error in the trial court's correct observation that the "all risk" Policies at issue in this case do not contain express exclusions for tank car ruptures, chlorine spills, chlorine vapor clouds, or chemical attacks, thereby rendering each of these events a covered peril resulting from[29] the Maintenance Vendors' negligent work (and prior to that work, at root, the preexisting crack of unknown origin). The Insurers merely reassert their false representation regarding the NTSB's conclusions, and insist that the trial court failed to enforce the "unambiguous" terms of the "faulty workmanship" exclusion.

As with their "corrosion" exclusion argument, the Insurers use the term "unambiguous" with respect to the "faulty workmanship" exclusion as synonymous with "intelligible." Their argument boils down to this: because the words in the "faulty workmanship" exclusion are

[29] As discussed in the next section, the "faulty workmanship" exclusion contains an "ensuing loss" exception that preserves coverage for any "resultant physical loss or damage from a covered peril" that flows from faulty workmanship. Even if the Insurers were able to meet their burden that the "faulty workmanship" exclusion applies here – and they plainly cannot – the ensuing loss exception would preserve coverage, given that Westlake's claimed damage is not the mis-repaired tank car, but rather the damage to equipment at the Natrium Plant that resulted from multiple additional, non-excluded and therefore covered, causes of loss that followed the Maintenance Vendors' negligent repair work.

intelligible and can be understood, and because there is no dispute in this case that the Maintenance Vendors' work was negligent, the "faulty workmanship" exclusion applies. The trial court was correct to reject this argument. With respect to the "faulty workmanship" exclusion (unlike the "corrosion" exclusion, *see supra* at Section III), there is no dispute between the parties regarding meaning or interpretation. Rather, there is a dispute regarding whether the facts of Westlake's claim are such that the "faulty workmanship" exclusion is triggered. It is the Insurers' burden to prove that the facts trigger this exclusion in the first instance, and the trial court correctly found that the undisputed facts regarding the cause of the Tank Car Rupture do not support a finding that the exclusion has been triggered. The Insurers have failed on appeal to demonstrate otherwise.

B. The Trial Court Correctly Held That the Faulty Workmanship Exclusion's Unambiguous "Ensuing Loss" Exception Preserves Coverage for "Resultant Physical Loss or Damage" from the Covered Perils of a Tank Car Rupture and Chlorine Release

Even if the Insurers were able to satisfy their burden to show that the facts of Westlake's claim trigger the "faulty workmanship" exclusion in the first instance (and they are not), an ensuing loss exception in the "faulty workmanship" exclusion preserves coverage for all of the damage to the Natrium Plant that ensued from the resulting covered perils of a tank car rupturing, chlorine spilling out and forming a chlorine vapor cloud, and chlorine vapor combining with water to form corrosive acids that damaged various pieces of equipment at the Natrium Plant.

The Insurers' arguments against the application of the ensuing loss exception are premised on a misleadingly truncated factual account of the sequence of events before and after the Tank Car Rupture. Under the Insurers' accounting, the rupture of AXLX1702's tank wall was part of a single, continuous event starting with the Maintenance Vendors' repair work. Brief at 2, 21-22. Indeed, the Insurers appear to imply that AXLX1702 ruptured almost immediately after being repaired, when they assert in their Brief that "[t]he Incident occurred minutes after the tank car was loaded for the first time after having been taken out of service for corrosion repairs and other maintenance." Brief at 2. This is incorrect.

The actual sequence of events was as follows: (1) A preexisting crack of unknown origin

existed in the tank wall of AXLX 1702; (2) in January of 2016, AXLX1702 was taken out of service and transported from the Natrium Plant in West Virginia to the Maintenance Vendors' facility in DuBois, Pennsylvania, where the Maintenance Vendors performed welding and post-weld heat-treatment work on it for approximately six months, completing their work and returning the tank car back to the Natrium Plant in June of 2016; (3) AXLX1702 sat unused at the Natrium Plant for approximately two months, until August 27, 2016, when it was loaded with 90 tons of liquefied chlorine at a temperature of -9°F; (4) after loading, AXLX1702 was moved approximately thirty to forty yards along the track in order to clear the tank-car loading zone; (5) AXLX1702's tank shell ruptured in the location of the preexisting crack shortly after being moved; (6) the 90 tons of liquefied chlorine spilled out of the rupture crack, forming a chlorine vapor upon making contact with the air; (7) the chlorine vapor formed a chlorine cloud that traveled downwind, inundating parts of the Natrium Plant, some of which were hundreds of yards from the tank car; (8) the chlorine vapor cloud interacted with water and moisture it encountered to form acids, including hydrochloric and hypochlorous acid, that made contact with, and damaged, a substantial number of pieces of equipment at the Plant; and (9) the damage was in the form of corrosion of certain metal surfaces and components. JA005449-5453.

As is clear from this sequence, at least five additional causes of loss occurred between the Maintenance Vendors' negligent work and the property damage at the Natrium plant for which Westlake is seeking coverage. That these causes of loss do not form a singular, continuous cause of loss with the Maintenance Vendors' negligent repairs is apparent from the fact that there was a two-month gap between the Maintenance Vendors' work in Dubois, Pennsylvania and AXLX1702's rupture in Marshall County, West Virginia. It is also apparent from the fact that AXLX1702 only ruptured after it was loaded with liquefied chlorine and was moved down the track. Had AXLX1702 ruptured before being filled with chlorine or before being moved, the damage for which Westlake is claiming coverage would never have occurred. This makes the loading of the rail car with liquid chlorine, the moving of the rail car, and the movement of the chlorine vapor cloud throughout the plant, along with the chemical reaction of the chlorine with

water, separate, independent ensuing causes of Westlake's loss.

The "faulty workmanship" exclusion contains an industry-standard[30] "ensuing loss exception," which states: "This exclusion does not apply to resultant physical loss or damage not otherwise excluded…." JA000598-599. In light of the undisputed sequence of events surrounding the Tank Car Rupture discussed *supra*, the trial court correctly held:

> Because the tank car rupture/chlorine release is not an excluded peril from the Policies, and because the tank car rupture/chlorine release is therefore a covered peril that ensued, or resulted, from any alleged faulty workmanship on the part of the maintenance vendors, the Court finds Section 3.D of the Policies preserves coverage for all the damages these covered perils caused. JA011393-11394.

On appeal, the Insurers can point to no error in the trial court's factual findings regarding this sequence of events, nor can they point to any express exclusions in the Policies for the causes of loss that occurred between the conclusion of the Maintenance Vendors' faulty weld repairs in June of 2016 and the Tank Car Rupture on August 27, 2016. Therefore, the trial court's holding regarding the applicability of the ensuing loss exception in the "faulty workmanship" exclusion must be upheld (although this Court need not reach this conclusion, because, as discussed *supra*, the Insurers have not met their initial burden to prove that the "faulty workmanship" exclusion was triggered in the first place).

C. The Trial Court Correctly Disregarded the Insurers' Non-Georgia Faulty Workmanship Cases

As with their "corrosion" argument, the Insurers cited a number of non-Georgia "faulty workmanship" cases in the briefing below, most of which they again cite on appeal. Like the

[30] As was the case with respect to the "corrosion" exclusion issue, the trial court's resolution of the "faulty workmanship" issue is grounded in a reading of the plain language of the "faulty workmanship" exclusion and its attendant ensuing loss exception, and applying the undisputed facts regarding Westlake's claim to this reading. However, also as with the "corrosion" exclusion, the trial court's conclusions are corroborated by the fact that the Insurers did not raise the "faulty workmanship" exclusion as even potentially applicable to Westlake's claim until sixteen months into their adjustment of Westlake's claim, when their own adjustment team and technical experts reported to the Insurers that their estimate of Westlake's property damage from the Tank Car Rupture had increased significantly to the range of $220-$404 million. Notably, the Insurers were informed immediately upon Westlake's submission of the claim in August of 2016 that the Tank Car Rupture was at least partially attributable to the Maintenance Vendors' faulty repairs. JA000172.

Insurers' "corrosion" cases, all of their "faulty workmanship" cases are either inapposite or they actually support Westlake's position. In any event, these cases have no precedential value for a court applying Georgia law.

For instance, *Kroll Construction Co. v. Great American Insurance Co.*, 594 F. Supp. 304, 308 (N.D. Ga. 1984)[31] and *U.S. Industries, Inc. v. Aetna Casualty & Surety Co.*, 690 F.2d 459, 462 (5th Cir. 1982) stand for the proposition that courts interpret "faulty workmanship" exclusions narrowly, and do not permit what the Insurers are attempting here: a conflation between the cost of making good faulty workmanship and the cost of every negative consequence flowing from the faulty workmanship that would not have happened "but for"[32] the faulty workmanship. *See Kroll*, 594 F. Supp. at 308 ("[t]he policy-exclusion language did not provide an exception for all losses or damages stemming from faulty workmanship … rather, it simply excepted the cost of making good faulty workmanship or materials, leaving covered the cost incurred after the faulty work was 'made good.'"); *U.S. Indus.*, 690 F.2d at 462 ("faulty workmanship" exclusion: "A defect in workmanship is a defect in the way some part of the (insured property) is constructed; the clause excludes coverage for damages 'resulting from defects in the product caused by faults in the construction process.... ***It is the quality of the product which is excluded from coverage***, and not damage to the product caused by negligence during the construction process.'") (emphasis added).

The Insurers' other faulty-workmanship cases[33] actually support Westlake's position rather than the Insurers' position.[34]

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[31] It should be noted that the language of the policy exclusion in *Kroll* is different than that in Section 3.D. In *Kroll*, the relevant provision excluded "[t]he cost of making good any faulty or defective workmanship or material..." and did not include an ensuing loss provision. *Kroll*, 594 F. Supp. at 305.

[32] And here, of course, there is no dispute that the "but for" cause of the Tank Car Rupture was the preexisting crack of unknown origin, and not the Maintenance Vendors' negligent repairs, which were at most a contributing factor.

[33] The Insurers also cite to *Taja Investments LLC v. Peerless Ins. Co.*, 196 F. Supp. 3d 587 (E.D. Va. 2016) (reviewing the terms of a building and construction policy) and *Acme Galvanizing v. Fireman's Fund Ins. Co.*, 221 Cal. App. 3d 170 (Cal. Ct. App. 1990) (assessing a latent defect exclusion), which both involve completely different policy language and thus are wholly inapposite.

[34] The applicability of the ensuing loss provision is underscored by the court's decision in *Drury Co. v. Missouri United School Insurance Counsel*, 455 S.W.3d 30 (Mo. Ct. App. 2014). *Drury* involved an "all risk" policy that contained a faulty workmanship exclusion with an ensuing loss exception, like Westlake's

In *TMW Enterprises, Inc. v. Federal Insurance Co.*, 619 F.3d 574 (6th Cir. 2010), the Sixth Circuit explained how ensuing loss exceptions in faulty-workmanship exclusions operate:

> The 'ensuing loss' clause … fairly could be construed as a causation-in-fact-breaking link in coverage exclusions, establishing that independent, non-foreseeable losses caused by faulty construction are covered. While the faulty workmanship exclusion applies to loss or damage 'caused by or resulting from' the construction defect, the 'ensuing loss' provision clarifies that the insurance company could not use the exclusion to avoid coverage for losses remotely traceable to an excluded cause.…***The clause establishes that chronologically later-in-time damages 'caused' by 'a peril not otherwise excluded' remain covered…***.Thus, if, on the one hand, the damage came 'natural[ly] and continuous[ly]' from the faulty workmanship, 'unbroken by any new, independent cause,' the exclusion applies and the ensuing loss provision does not. But if, on the other hand, the later-in-time loss flows from a non-foreseeable and non-excluded cause, it is covered. ***In this instance, because defective wall construction naturally and foreseeably leads to water infiltration***, ***the language of the exclusion, not the exception to the exclusion, ought to apply***." *Id.* at 578-79 (some internal citations omitted) (emphasis added).

Applying *TMW*'s explanation of how an ensuing loss exception is triggered leads to the inescapable result that the ensuing loss exception in Section 3.D of Westlake's Policies applies to the facts of Westlake's claim. Indeed, the damage for which Westlake is claiming here did not come "naturally and continuously … unbroken by any new, independent cause" from the Maintenance Vendors' negligent weld repair work on AXLX1702, like the water infiltration that resulted from the faulty construction of exterior walls in *TMW*.[35] Here, the trial court found that

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Policies. *Drury*, 455 S.W.3d at 33. In *Drury*, faulty workmanship on a roof resulted in damage caused by rain and ice. *Id.* The insurer had denied coverage on the grounds that the faulty workmanship exclusion applied. *Id.* The court rejected this argument, finding that the damage clearly fell within the scope of the ensuing loss exception of the faulty workmanship exclusion, because "the covered peril of 'loss by rain, snow, [or] sleet' ensued. *Id.* at 37. "Because Drury sustained an ensuing loss from the precipitation, MUSIC is liable for that ensuing loss under the plain language of the policy regardless of whether [the] workmanship was faulty." *Id*.

[35] The same is also true of *National Railroad Passenger Corp. v. Arch Specialty Ins. Co.*, 124 F. Supp. 3d 264 (S.D.N.Y. 2015), *aff'd in part, rev'd in part sub nom. Nat'l R.R. Passenger Corp. v. Aspen Specialty Ins. Co.*, 661 F. App'x 10 (2d Cir. 2016), which the Insurers cite for the same proposition. There, the court held that damage caused by the presence of chloride in brackish flood water was not an ensuing loss under a policy's sub-limit for a "flood." *Id.* at 274. As the court explained, contrary to the facts at issue here, "the damage from the flood did not give rise to a different type of peril; rather, one aspect of the flood of brackish seawater—the inundation of salt—was left behind and it caused damage." *Id.* Consistent with this analysis, a subsequent New York case, which the Insurers ignore, held that the ensuing loss exception did apply where a contractor's faulty workmanship in a shower installation led to water discharge from a

there were multiple new, independent causal events taking place between the Maintenance Vendors' negligent work and the Tank Car Rupture that occurred more than two months after this work had been completed.[36]

Similarly, in *H.P. Hood v. Allianz Global Risks U.S. Insurance Co.*, 39 N.E.3d 769 (Mass. Ct. App. 2015), the Massachusetts court canvassed cases interpreting ensuing loss exceptions to faulty workmanship exclusions and found as follows:

> Some cases emphasize that such provisions provide coverage only with regard to property damage that is 'wholly separate' from the damage directly caused by the excluded event without a break in the chain of causation. Other cases hold that there can be coverage even as to damage that is not wholly separate and independently caused, where that damage is different in kind… On the particular facts of this case, Hood cannot prevail under any reasonable interpretation of the resulting loss language…Whatever else can be said about the case before us, it is not one where an excluded occurrence involving initial property damage led to other property damage of a different kind." *Id.* at 774 (internal citations omitted).

Applying *H.P. Hood* here, it is clear that the ensuing loss exception in Section 3.D of Westlake's Policies is triggered under either of the two interpretive models that the *H.P. Hood* court describes. The property damage for which Westlake is claiming – corrosion damage to equipment at the Natrium Plant – is "wholly separate" from the damage that the Maintenance Vendors did to AXLX1702 – namely, the weakening of a tank car wall with improper welding and post-weld heat treatment. Moreover, this is precisely a case where an excluded occurrence involving initial property damage – the Maintenance Vendors' negligent work on the tank wall of AXLX1702 – was followed by a series of independent causal events that led to other property

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plumbing system that caused water damage throughout a house. *Ewald v. Erie Ins. Co. of N.Y.*, 214 A.D.3d 1382, 1386 (N.Y. App. Div. 2023). There, as here, coverage was available because faulty workmanship gave rise to an ensuing loss from a covered peril.

[36] The correctness of the trial court's conclusion on this point is plainly evident when one considers that, if the tank car had ruptured prior to being filled with 90 tons of chlorine or had ruptured after it had been filled and after it had left the Natrium Plant, then the damage for which Westlake is claiming would never have occurred. It follows that filling the tank car with ultra low-temperature liquefied chlorine and moving the tank car after it had been filled to a location from which the chlorine could inundate the Plant – acts that Westlake personnel performed, that had nothing to do with anything the Maintenance Vendors did, and that were obviously "later in time" relative to the Maintenance Vendors' work that was completed more than two months earlier – are each precisely the types of "new, independent, non-excluded" causes that *TMW* contemplates as triggering an ensuing loss exception.

damage of a different kind – corrosion damage to Natrium Plant equipment.[37]

IV. THE TRIAL COURT CORRECTLY FOUND THAT THE "POLLUTION AND CONTAMINATION" EXCLUSIONS DO NOT BAR WESTLAKE'S CLAIM

A. The Trial Court Correctly Followed Georgia Insurance Policy Interpretation Principles in Applying Endorsement Nos. 1 and 19

The Insurers argue that the trial court failed to follow Georgia principles of insurance law by refusing to apply the clear and unambiguous language of Endorsement No. 1 and Endorsement No. 19 as written. To the contrary, that is exactly what the trial court did in ruling that the so-called "contamination" exclusion language in these endorsements did not apply to Westlake's claim. In their briefing before the trial court and before this Court, the Insurers seek to brush aside policy language that contradicts their interpretation of these endorsements. Nonetheless, guided by well-established Georgia principles of insurance contract interpretation, the trial court properly construed the language of the applicable exclusions in both Endorsement No. 1 and Endorsement No. 19 in the context of the endorsements and the Policies as a whole. *See York*, 544 S.E.2d at 157 ("In construing an insurance contract, a court must consider it as a whole, give effect to each provision, and interpret each provision to harmonize with each other.").

B. The Trial Court Correctly Interpreted Endorsement Nos. 1 and 19 Based on the Plain, Unambiguous Language of the Policies Considered as a Whole

The exclusion in Endorsement No. 1 provides, in relevant part, that "…this Policy does not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever." JA000154-155, JA000618-619. The Insurers argue that that this is a "broad" "contamination" exclusion that bars coverage for any damage to any type of insured property arising from the Tank Car Rupture and chlorine cloud, regardless of whether the event causing the damage was a sudden and accidental, covered peril or, alternatively, was an event of seepage and

[37] The last case the Insurers cite in support of their "faulty workmanship" argument – *Peek* – does not actually involve a "faulty workmanship" exclusion or any of the relevant policy language at issue here. Rather, it involves a "latent defect" exclusion. *See Peek v. Am. Integrity Ins. Co. of Fla.,* 181 So. 3d 508, 511 (Fla. App. Ct. 2015). This case also relies on *TravCo*, which is inapposite as discussed *supra* at 18.

pollution of land, air or water requiring remediation pursuant to environmental regulations.

When the snippet of language that the Insurers pluck out of the entirety of Endorsement No. 1 is read in context – as the trial court correctly did below – it is clear that the phrase "seepage and/or pollution and/or contamination" refers to types of environmental impairment, and not to physical loss or damage to operating equipment at the Natrium Plant arising from a chemical attack resulting from a sudden industrial accident, such as the Tank Car Rupture.

As the trial court noted, the terms "seepage and/or pollution and/or contamination" are not defined anywhere in the Policies. JA0011371, JA000154-155, JA000579-651. Indeed, this phrase is found only in Endorsement No. 1. Accordingly, the trial court properly looked to the other uses of the phrase "seepage and/or pollution and/or contamination" in Endorsement No. 1 to elucidate the intended meaning of that phrase. In doing so, the trial court observed that Endorsement No. 1 also contains a related "Authorities Exclusion" which clearly indicates that the terms "seepage," "pollution," and "contamination," are all deemed forms of "environmental impairment because they follow the word "including," which means that they are encompassed within the meaning of "environmental impairment," and not outside that meaning, as the Insurers contend:

> This Policy does not cover expenses, fines, penalties or court costs, incurred or sustained by the Insured or imposed on the Insured at the order of any government agency, court or other authority, in connection ***with any kind or description of environmental impairment, including seepage or pollution or contamination*** from any cause. JA0011370 (emphasis added).

The trial court also looked further at the entirety of Endorsement No. 1 and observed that the endorsement includes a section addressing coverage for "Pollutant Cleanup and Removal (Land & Water)," which further confirmed that the undefined term "seepage and/or pollution and/or contamination" as used in Endorsement No. 1 referred unambiguously to environmental impairment of land, air or bodies of water "and not operating equipment or other property at the Natrium Plant" as a result of an industrial accident like the Tank Car Rupture. *Id*. Likewise, with respect to Endorsement No. 19 – which is found in only one of the thirteen Policies at issue[38] – the

[38] There was a disputed issue of fact as to whether Endorsement No. 19 was properly part of the AIG-US

trial court again turned to the language of the endorsement "in its entirety," as well as looking to its context in the Policy as a whole and determined that it too was clearly intended to address environmental pollution or contamination. JA0011371-11372. As an initial matter, the trial court noted that Endorsement No. 19 added to the AIG-US Policy does not state that it deletes and replaces or otherwise supersedes the coverage provided via the exceptions to Endorsement No. 1 (which are discussed below). In fact, as the trial court recognized, Endorsement No. 19 says the exact opposite, providing that "[a]ll other terms, conditions, and exclusions of this policy remain unchanged." JA011371-11372.[39] Moreover, in a discussion that the Insurers completely ignore in their Brief, the trial court noted that Endorsement No. 19 contains other provisions – including "Debris Removal Exclusion" and "Authorities Exclusion" sections – that expressly reference environmental pollution and contamination of land and water, as well as governmental fines and penalties in connection therewith. JA011372.

Remarkably, the Insurers contend that the trial court committed reversible error by analyzing the policy language of the endorsements at issue in their entirety, as required by Georgia law. Brief at 28-29. For example, even though the "Authorities Exclusion" in Endorsement No. 1 contains the only other usage of the undefined phrase "seepage and/or pollution and/or contamination" anywhere in the Policies, the Insurers contend that the trial court should have

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policy. JA008719. However, that issue was rendered moot by the trial court's ruling that, even if properly part of the AIG-US Policy, Endorsement No. 19 did not bar coverage for Westlake's claim. JA0011371-11372.

[39] The trial court noted that its interpretation of Endorsement No. 19 – which was grounded in plain-language interpretation of the whole of the relevant Policy language – was consistent with AIG's admission that the scope of the exclusion in AIG's Endorsement No. 19 was no broader than the scope of Endorsement No. 1. The Insurers completely omit the trial court's discussion of AIG's admission and instead attack the trial court for also noting that the broker involved in placing the policies testified in agreement with AIG's representative (and with the plain language of the endorsement) that Endorsement No. 19 does not operate to exclude anything that would be otherwise covered under the terms of Endorsement No. 1. Brief at 29 (asserting trial court relied on "self-serving testimony" of the third-party broker). Notably, this testimony was not the basis of the trial court's interpretation of the scope of Endorsement No. 19. Rather, this testimony confirms that all parties agreed that Endorsement No. 19 has no broader exclusionary effect than that of Endorsement No. 1. JA011371-11372. Further, this testimony does not address the meaning of Endorsement No. 1, and so the Insurers have no basis to complain about the Court's reference to this testimony with respect to its interpretation of Endorsement No. 1.

disregarded the language of the Authorities Exclusion provision because it is "separate and distinct" from the exclusion paragraph on which the Insurers rely. *Id.* Notably, the Insurers do not dispute that the phrase "seepage and/or pollution and/or contamination" refers to forms of "environmental impairment" in Endorsement No. 1's Authorities Exclusion provision. *See id.* at 28. Rather, the Insurers argue the trial court – and this Court – should put on blinders and ignore whatever policy language is inconsistent with the Insurers' proffered interpretation of the Policies. The Court should reject the Insurers' strained attempt to avoid basic principles of Georgia insurance policy interpretation. *See York*, 544 S.E.2d at 157.

Finally, the Insurers purport to cite a number of cases for the proposition that "similar exclusions" are not limited to the environmental context. However, none of the cases the Insurers cite address the policy language or facts here at issue. Specifically, the Insurers' cases all involve the interpretation and application of the "absolute pollution exclusion" found in commercial general liability ("CGL") insurance policies dealing with coverage for third-party liabilities. *See Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 425 (Ga. 2016) (CGL policy's exclusion with express definition of "pollutant" encompassed a claim for bodily injury arising out of lead paint ingested by child; *Nationwide Prop. & Cas. Ins. Co. v. Hampton Ct., L.P.*, No. 1:23-cv-4726, 2024 WL 4520943, at *5 (N.D. Ga. Oct. 17, 2024) (holding that mold falls within the definition of "pollutant" under a CGL policy); *Evanston Ins. Co. v. Sandersville R.R. Co.*, No. 5:15-cv-247, 2016 WL 5662040, at *5 (M.D. Ga. Sept. 29, 2016) (claim for bodily injury claim arising from exposure to welding fumes excluded pursuant to CGL policy's definition of "pollutant"); *Owners Ins. Co. v. Farmer*, 173 F. Supp. 2d 1330, 1333 (N.D. Ga. 2001) (CGL policy excluded coverage because diesel fuel fell within the policy's definition of "pollutant").[40] By contrast, the Policies at

[40] The case law cited by the Insurers from jurisdictions outside of Georgia – all of which is unpublished – is likewise inapposite. *See U.S. Fid. & Guar. Co. v. Jones Chems., Inc.*, 194 F.3d 1315, 1315 (6th Cir. 1999) (applying Ohio law to interpret a CGL policy's pollution exclusion which contained an express definition of "pollutant" to claims for bodily injury from chlorine exposure); *Atl. Cas. Ins. Co. v. Zymblosky*, No. 1167 MDA 2916, 2017 WL 3017728, at *4 (Pa. Super. Ct. July 17, 2017) (under Pennsylvania law a "total pollution exclusion endorsement" in CGL policy with express definition of "pollutants" barred coverage for bodily injury claims from chlorine exposure); *Gulf Ins. Co. v. City of Holland*, No. 1:98CV774, 2000 WL 33679413, at *4 (W.D. Mich. Apr. 3, 2000) (under Michigan law, exclusions in boiler and

issue here are first-party property policies, which do not contain the "absolute pollution exclusion." Moreover, even in the context of a broadly-worded pollution exclusion in a businessowners liability policy, a court applying Georgia law recently held that "the pollution exclusion clause … ***may not apply to certain damages that are not related to environmental damage***." *See Recytech USA, Inc. v. Grane Insurance Co.*, --- F. Supp. 3d ---, 2024 WL 5162408, at *11 (N.D. Ga. Sept. 30, 2024) (emphasis added). Thus, under these circumstances, the trial court properly analyzed the Policies' unique exclusion language in connection with the facts of Westlake's claim.

C. The Trial Court Correctly Held, in the Alternative, That an Exception to the Exclusion in Endorsement No. 1 Is Applicable

After ruling that the "seepage and/or pollution and/or contamination" exclusion of Endorsement No. 1 "clearly and unambiguously does not apply to Westlake's claim" from the Tank Car Rupture and chlorine release, the trial court held, in the alternative, that "even if the rupture of the tank car on August 27, 2016 resulted in 'seepage and/or pollution and/or contamination,' . . . any physical loss or damage caused thereby is not excluded – but rather is expressly covered – under the unambiguous, plain language of [an] exception to the exclusion." JA011370-11371. Specifically, the second exception to the exclusionary language of Endorsement No. 1 expressly states:

> However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination. JA000618.

Contrary to the Insurers' contention on appeal, the trial court unequivocally found that the burden of proof had been met in establishing the application of this exception language in Endorsement No. 1. Applying the plain language of this exception to the undisputed facts of the loss, the trial court found that (a) both the tank car and the chlorine product therein constituted types of "insured property" covered by the Policies; and (b) both the insured tank car and the insured chlorine

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machinery and auto policies including express definitions of "pollutants" excluded claims for property damage from chlorine release).

product were "the subject of direct physical loss or damage" from a peril that the Insurers had agreed to cover under their Policies, namely: "[t]he sudden and accidental rupture of the tank car." JA011371. The trial court correctly interpreted the language of the exception referring to insured property "for which this company has paid or agreed to pay" as referring to property that the Insurers had agreed to cover under the terms and conditions of their Policies in connection with a covered peril. *See id.* The Insurers appear to no longer dispute that this is the correct interpretation of the exception, and the Insurers instead simply argue that the exception cannot apply because they have not "paid or agreed to pay" for the damage to the tank car and the loss of chlorine product. Of course, the Insurers cannot bootstrap their way out of coverage by simply refusing to pay for a loss that is indisputably covered. Indeed, the Insurers have not explained why their Policies do not cover the damaged tank car or the loss of the chlorine product that was released out of the ruptured tank car. Therefore, to the extent that the exclusionary language of Endorsement No. 1 may apply, coverage is restored pursuant to the exception contained therein.[41]

V. THE TRIAL COURT CORRECTLY FOUND THE INSURERS BREACHED THE POLICIES AND GRANTED WESTLAKE'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING COUNT I (DECLARATORY JUDGMENT) AND COUNT II (BREACH OF CONTRACT) AND FOR PRE-JUDGMENT INTEREST

The trial court correctly held that Westlake satisfied the elements of a claim for breach of contract under Georgia law. Specifically, the trial court held that "[b]ecause a valid and enforceable contract exists, . . . and because the rupture is a covered cause of loss to which no exclusions applied, that resulted in damages to Plaintiffs, all the elements of [sic] for breach of contract . . . under Georgia law have been established." JA000060. As set forth above, the trial

[41] As with their "corrosion" and "faulty workmanship" exclusion arguments, the Insurers argue once again that the trial court did not find that the policy language of Endorsement Nos. 1 and 19 was ambiguous – implicitly arguing that any unambiguous exclusionary language in a policy must *a priori* be understood to mean what the Insurers say it means. In fact, the trial court simply found that the exclusions at issue clearly and unambiguously did *not* apply to Westlake's claim pursuant to their plain language. JA011371. Nevertheless, even if the trial court – or this Court – were to find that any of the exclusions at issue here were susceptible to more than one reasonable interpretation, that would simply mean that the exclusion was ambiguous, in which case Georgia law requires that the exclusions be construed against the Insurers and in favor of coverage. *See Hurst*, 470 S.E.2d at 663; *Golden*, 373 S.E.2d at 653.

court correctly found that the Wear-and-Tear Exclusion, the Faulty Workmanship Exclusion, and the Contamination Exclusions do not apply to Westlake's claim. Thus, by failing to provide coverage for Westlake's claim, the Insurers breached their Policies, and Westlake is entitled to damages resulting from the Insurers' breach, as well as a declaratory judgment regarding the Insurers' breach of contractual obligations.

A. The Trial Court Correctly Held that Westlake Satisfied All Conditions Precedent to Coverage Under the Policies

In opposition to Westlake's breach of contract motion, the Insurers argued, for the first time, that they had not breached the Policies because Westlake failed to comply with a "proof of loss" condition in the Policies that purportedly required Westlake's "cooperation" during the adjustment process. JA012502-12526. As an initial matter, the trial court correctly concluded that this argument should be discarded as untimely because the Insurers failed to raise it as an Affirmative Defense or during the numerous rounds of summary judgment briefing below. JA000060-61. Where – as is the case here – a defendant fails to assert an affirmative defense, such failure "results in the waiver of the defense and its exclusion from the trial of the case." *Nellas v. Loucas*, 156 W. Va. 77, 81, 191 S.E.2d 160, 163 (W. Va. 1972); *Investors Loan Corp. v. Long*, 152 W. Va. 673, 679, 166 S.E.2d 113, 117 (W. Va. 1969) (holding that where "an affirmative defense which should be pleaded" is not, "that defense is waived."). The Insurers argue that they adequately pled this issue in their Sixteenth and Seventeenth Affirmative Defenses, but neither of those Defenses references or discusses any purported "duty to cooperate." JA007370.

In any event, the trial court correctly determined that, as a factual matter, Westlake did not breach any duty to cooperate with the Insurers throughout the adjustment process. Specifically, the Insurers base their entire "cooperation" defense on allegations that Westlake failed to provide two pieces of information: (1) photographs depicting the Natrium Plant's condition prior to the Tank Car Rupture and chlorine release and (2) preliminary materials prepared by Exponent relating to their initial assessment of equipment at risk of imminent failure as a result of the Tank Car Rupture. Brief at 34. However, it is undisputed that the Insurers received the requested

photographs five months before they informed Westlake that they were denying coverage, which they did with no reference to any breach of a "cooperation" provision. JA004148-4155, JA008042. Furthermore, the Insurers have identified no information from the preliminary materials prepared by Exponent that was required for their coverage determination. In fact, as the Insurers themselves acknowledge, immediately upon receiving notice of the claim they hired their own consultant, ED&T, which conducted its own testing on various equipment and developed its own proposals for replacing the damaged equipment. JA012508. Under these circumstances, the Insurers cannot establish that the trial court's ruling that they breached their insurance contracts is inappropriate based on a theory of Westlake's alleged failure to comply with a condition precedent.

B. The Trial Court Properly Exercised its Discretion in Determining that Pre-Judgment Interest is Appropriate

The trial court also properly exercised its discretion in determining that Westlake is entitled to pre-judgment interest in connection with its breach of contract claim. As an initial matter, the Insurers misrepresented the standard of appellate review that applies to the Court's consideration of this issue. As the Insurers acknowledge in their Brief, "[a]n award of pre-judgment interest under O.C.G.A. § 13-6-13 is discretionary." Brief at 36. Both Georgia and West Virginia courts review a trial court's determination regarding pre-judgment interest under an abuse of discretion standard. *See Hensley v. W. Va. Dep't of Health & Human Resources*, 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (W. Va. 1998) ("In reviewing a circuit court's award of prejudgment interest, we usually apply an abuse of discretion standard."); *CRS Sirrine, Inc. v. Dravo Corp.*, 445 S.E.2d 782, 790 (Ga. App. 1994) (analyzing a trial court's decision on pre-judgment interest under an abuse of discretion standard). "Under the abuse of discretion standard, [the court] will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Hensley*, 508 S.E.2d at 621. Because the Insurers have identified no clear error in the trial court's judgment with respect to pre-judgment interest, the trial court's determination may not be disturbed on appeal.

Citing a lone arbitration award, *Electrolux Home Products, Inc. v. Mid-South Electronics,*

Inc., No. 1:11-cv-03377, 2011 WL7139107, at *9 (Arbitration Award) (N.D. Ga. Oct. 4, 2011), the Insurers argue that Westlake is not entitled to pre-judgment interest because certain issues have been "hotly contested" and because of supposed delays in the adjusting process caused by Westlake. Brief at 36. In *Electrolux*, however, an arbitration panel denied the award of pre-judgment interest because it also found that the delays arose in substantial part from Electrolux's "lack of responsiveness." *Id.* at *9. Here, by contrast, the Insurers' investigation spanned years, and no one contends that Westlake demonstrated anything akin to a "lack of responsiveness" such that it could be at fault for these delays. Indeed, in *Delta Air Lines, Inc. v. Swissport USA, Inc.*, the court rejected arguments similar to those the Insurers now assert and held that pre-judgment interest was appropriate under O.C.G.A. § 13-6-13. No. 11-1544, 2012 WL 6763569, at *6-7 (S.D.N.Y. Dec. 27, 2012) ("Surely, had Swissport agreed to pay Delta's full expenses when it assumed the defense of the claims, Delta would have submitted timely documentation of such expenses and the issue would not be before this Court."). Here, where the Insurers have withheld coverage for more than eight (8) years[42] based on unambiguously inapplicable Policy exclusions, the trial court did not abuse its discretion in determining that pre-judgment interest is appropriate.

VI. THE TRIAL COURT PROPERLY DENIED THE INSURERS' MOTION FOR SETOFF

A. The Insurers Fail to Satisfy the Mutuality of Obligation Requirement for Setoff Under Georgia Law

As the Insurers recognize, Georgia law imposes certain requirements on a party seeking to reduce the amount of damages it owes based on the doctrine of setoff. Specifically, "[b]etween the parties themselves, any mutual demands existing at the time of the commencement of the suit may be set off." O.C.G.A. § 13-7-5. Here, the Insurers do not seek to offset any "mutual demands" between themselves and Westlake, but instead they seek to set off the damages they owe as a result of their breach of the Policies against any amount that Westlake may ultimately recover from the

[42] In appeal no. 25-ICA-17, Westlake challenges only the date on which the trial court ruled that pre-judgment interest would begin to accrue.

defendants in the Pennsylvania Action.[43] Indeed, the Insurers do not challenge the trial court's finding that the requirements of § 13-7-5 are not satisfied. Brief at 38. Instead, the Insurers argue that § 13-7-1 *et seq.* describes only a "type of setoff" and that a separate Section – § 9-13-75 – provides a basis on which the trial court should have exercised its discretion to set off the judgment in the Pennsylvania Action against the damages that Westlake seeks in this litigation. *Id.*

O.C.G.A. § 9-13-75 provides that "[o]ne ***judgment*** may be set off against another, on motion, whether in the hands of an original party or an assignee. The balance on the larger is collectable ***under execution***." (emphasis added). Thus, § 9-13-75 plainly contemplates a situation where opposing parties each hold mutual judgments that they are seeking to execute against one another, which is plainly not the case here. This statute provides no basis for the setoff order the Insurers seek, reducing the amount of ***damages*** that they owe Westlake based on a ***judgment*** entered against a third party in a separate proceeding.

This situation, where the Insurers seek to lessen their breach-of-contract damages, is instead governed by Title 13 of the Georgia Code, which is titled "Contracts" and provides for the setoff of opposing parties' mutual obligations that have not yet resulted in the entry of judgments. However, Title 13 provides that setoff is only permissible under certain circumstances, *i.e.* "mutual demands existing at the time of the commencement of the suit" "between the parties themselves," O.C.G.A. § 13-7-5, that the Insurers do not even assert to have taken place here. Thus, the trial court properly denied the Insurers' Motion for Setoff.

B. Principles of Subrogation Apply to Any Rights the Insurers May Have with Respect to the Pennsylvania Verdict

In denying the Insurers' Motion for Setoff, the trial court correctly observed that subrogation, not setoff, is the appropriate means for the Insurers to pursue the relief they seek, particularly in light of certain policy provisions that specifically set forth the means by which the Insurers may pursue the recovery of covered amounts from liable third parties. JA012652-12653.

[43] The Insurers' contention that these two amounts consist of the "same damages" is rebutted fully in Westlake's Petitioners' Brief in appeal no. 25-ICA-17.

Citing an opinion of the Ohio Court of Appeals, the Insurers argue on appeal, as they did below, that the concept of subrogation is "inapposite" to the present case because "[s]ubrogation and setoff are two conceptually distinct rights." *Masenheimer v. Disselkamp*, No. CA2002-08-200, 2003 WL 435785, at *2 (Ohio Ct. App. Feb. 24, 2003). However, *Masenheimer* is plainly distinguishable because it involved a policy that included a provision that "clearly grants [the insurer] a right of setoff." *Id.* at *3. The Insurers have never identified such a provision in the Policies, and none exist. To the contrary, the only provisions in the Policies addressing this situation are those governing the Insurers' right to subrogation, which the Insurers concede they have made no attempt to exercise. The trial court properly denied the Insurers' Motion for Setoff.

CONCLUSION

For the reasons set forth above, Westlake respectfully requests that, with respect to the issues presented in this appeal, this Court affirm the trial court's Orders.[44]

[44] The Insurers contend that the trial court's decision to strike portions of their Seventeenth Affirmative Defense, which asserts the exclusions discussed herein, is improper with respect to Sections 3.C and 3.D. Brief at 30-31. As to Section 3.C, the Insurers argue that Defense No. 17 should be preserved to the extent there are factual questions regarding the scope of preexisting corrosion at the Natrium Plant (if any) versus corrosion caused by the Tank Car Rupture. Brief at 31. An insurer asserting the application of a policy exclusion bears the burden of showing that the facts come within that exclusion, s*ee Erwin*, 525 S.E.2d at 395, and Westlake has no objection to the preservation of their Seventeenth Defense as to 3.C for this, and only this, narrow purpose. As to 3.D, the Insurers argue that the Seventeenth Defense should be preserved to the extent the trial court acknowledges that "the exclusion may apply to the costs of the defective repair work." Brief at 31. This argument is moot, as Westlake is not seeking to recover the hypothetical costs of remedying the Maintenance Vendors' faulty repair work performed on AXLX1702.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April 2025, a true and correct copy of the foregoing Respondents' Brief was served via e-mail and overnight mail, postage prepaid, on the following:

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