No. 25-ICA-17

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

WESTLAKE CHEMICAL CORP., *et al.*,

Petitioners,

vs.

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

Respondents.

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

PETITIONERS' BRIEF

Petitioners, **by Counsel**:

Jeffrey V. Kessler (WVSB # 2026)
Berry, Kessler, Crutchfield, Taylor & Gordon
514 7th Street
Moundsville, WV 26041
Tel: (304) 845-2580
jkessler@bkctg.com

John M. Sylvester (*pro hac vice*)
David R. Osipovich (*pro hac vice*)
Travis L. Brannon (WVSB # 12504)
Jessica L.G. Moran (*pro hac vice*)
Lukus P. Freeman (*pro hac vice*)
K&L Gates LLP
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-6500
john.sylvester@klgates.com
david.osipovich@klgates.com
travis.brannon@klgates.com
jessica.moran@klgates.com
lukus.freeman@klgates.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ASSIGNMENTS OF ERROR

The Circuit Court of Marshall County, West Virginia, Business Division (the "trial court") committed the following reversible errors.[1]

1. The trial court erred[2] by failing to properly apply two requirements of the doctrine of collateral estoppel – namely, that the decided issue in the prior case must be identical to one presented in the later case, and that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the decided issue in the prior case. Specifically:

a. The trial court found that the issue of the quantum of property damage at issue in this case had been decided by a jury in a prior case (the "Pennsylvania Case"); however, the decided issue in the Pennsylvania Case involved, not a finding of the quantum of property damage, but rather a finding that certain parties not involved in the present case were liable for certain damages under a theory of liability not present in this case and under state law different from the state's law that governs this case.

b. Even if the issue of the quantum of property damage had been decided in the Pennsylvania Case, Westlake could not possibly have had a full and fair opportunity to litigate that issue in the Pennsylvania Case: The Pennsylvania court precluded all insurance-related evidence

[1] This case is an insurance coverage action where the Petitioners – Westlake Chemical Corporation and Axiall Corporation ("Axiall") (collectively, "Westlake") – seek insurance recovery from their insurers: Respondents National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company (referred to collectively as "the Insurers").

[2] *See* Order Granting Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plan Damages Verdict (the "Collateral Estoppel Order"). JA000001-14.

from the Pennsylvania jury's consideration, including the Insurers' admissions against interest made in this case that the relevant property damage exceeded $100 million.

2. The trial court also erred[3] by misapplying the legal standard under Georgia law for insurer bad faith and dismissing Westlake's Georgia bad-faith claims as a matter of law where the record includes facts supporting bad faith or, at a minimum, there are material disputed issues of fact regarding the Insurers' bad faith.

3. Finally, the trial court erred[4] in concluding that pre-judgment interest began to accrue from the date judgment was entered in the Pennsylvania Case (August 10, 2022), rather than thirty days after the issuance of the partial proof of loss for the insurance claim at issue in this case (June 21, 2018). This error stems from the trial court's collateral estoppel error discussed *supra.*

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Insurers' All Risk Property Policies

In exchange for premium payments in excess of $11 million, Axiall purchased commercial, "all risk" property insurance coverage for the period November 19, 2015 through November 19, 2016, comprised of 13 separate insurance policies issued by the Insurers (the "Policies"). *See* Joint Appendix ("JA") at 000580-1507. The Policies collectively provided Axiall with $650 million in total limits of liability for property damage losses, excess of a $3.75 million deductible for property damage losses applicable at the Natrium Plant. JA000580, JA000588. Both Axiall and Westlake

[3] Order Granting Insurers' Motion for Summary Judgment Concerning Bad Faith Claims (the "Bad Faith Order").

[4] Order Granting Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) of Plaintiffs' Complaint and for Pre-Judgment Interest.

Chemical Corporation (which automatically became an insured entity under the Policies when it acquired Axiall and became its parent) have insurable interests in the property insured under the Policies, including the manufacturing facility located in Marshall County, West Virginia (the "Natrium Plant"). JA000585. The Policies provide broad coverage for all causes of loss that are not expressly excluded by the Policy language, and are governed by Georgia law. JA000596, JA000141.

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

On August 27, 2016, a railroad tank car cracked open shortly after being filled with 90 tons of liquefied, compressed chlorine at the rail car loading rack of the Natrium Plant (the "Tank Car Rupture"). JA005449. The rupture caused the entire load of chlorine to escape from the tank and, upon contact with the atmosphere, form a large chlorine-vapor cloud that migrated through the Natrium Plant and beyond the borders of the Plant along the Ohio River valley. JA005644-5645.

This was the first time that Westlake loaded the tank car since it had returned from the custody of Rescar, Inc. ("Rescar"), AllTranstek, LLC ("AllTranstek") and Superheat, FGH Services, Inc. ("Superheat") (collectively, the "Maintenance Vendors"). JA005453. During the period preceding the Tank Car Rupture, the Maintenance Vendors had performed welding repairs and post-weld heat treatment on the tank car. JA005453. Petitioners and Respondents in the present action agree that the Maintenance Vendors' work on the tank car was negligent.

Axiall filed suit against the Maintenance Vendors in Pennsylvania state court. *See* JA005611-5625. In the Pennsylvania Case, Axiall brought claims for breach of warranty and breach of contract against AllTranstek and Rescar, as well as negligence claims against all of the Maintenance Vendors, due to their failure to use reasonable care and adhere to the standard of care during their work on the tank car. *See id.*

On October 14, 2021, the jury in the Pennsylvania Case returned a verdict against the

Maintenance Vendors and awarded Axiall, *inter alia*, $5,900,000 in damages associated with the damage to the Natrium Plant and equipment caused by the Maintenance Vendors' negligence, breach of warranty obligations, and breach of contract. JA007532-7534. The Pennsylvania trial court entered its final judgment on August 10, 2022.

C. Exponent's 2016 Analysis

Shortly after the Tank Car Rupture, Axiall's outside counsel responsible for handling Westlake's interactions with the National Transportation Safety Board retained an engineering consultant, Exponent Inc. ("Exponent"), for the purpose of performing a root cause analysis. *See generally* JA005447. Exponent was also tasked with advising Westlake regarding any mitigation steps that Axiall should consider undertaking immediately, and assessing whether there were any risks of imminent failures or other immediate concerns regarding the integrity of certain equipment at the Natrium Plant that had been damaged but had not yet failed. *See* JA008164-8165. As part of its discharge of these duties, Exponent visited other manufacturing facilities neighboring the Natrium Plant – specifically, facilities owned by Covestro, Air Products, and Elementis – to observe and provide feedback regarding the property damage claimed by those entities as a result of the chlorine vapor cloud having entered their property. *See* JA008160-8161. Exponent's retention at this time did not include or result in a comprehensive analysis of all of the property damage that the Tank Car Rupture caused at the Natrium Plant. JA008160. Exponent did subsequently perform such a comprehensive analysis after Westlake retained it to do so in 2018. JA008168.

D. The Initial Collaborative Claim Adjustment Process

Westlake promptly gave the Insurers notice of the Tank Car Rupture on or about August 30, 2016. JA006248. On that same day, the lead claims adjuster designated under the Policies, Jon Carnahan of Cunningham Lindsey n/k/a Sedgwick ("Cunningham Lindsey"), informed the

Insurers that the Tank Car Rupture involved a massive release of chlorine throughout the Plant that combined with water to form hydrochloric acid, resulting in corrosion damage to metal surfaces, particularly stainless steel, and to various equipment, especially electronic equipment. JA006479.

Cunningham Lindsey contacted Axiall and made arrangements for a site visit on September 14, 2016. JA004672. Engineering Design & Testing Corp. ("ED&T"), the technical consultant retained by the Insurers to investigate the claim, reported observing substantial corrosion on equipment at the Natrium Plant caused by the Tank Car Rupture and resulting chlorine release. JA004542-4547, *see also* JA006474-6479. Based on multiple, detailed reports from their adjusters and consultants, the Insurers knew from the very outset of the loss that the property damage at issue arose from a chemical attack by the chlorine vapor cloud that formed following the escape of liquid chlorine as a result of the Tank Car Rupture, which caused instant corrosion to stainless steel and aluminum equipment and components. JA004674-6479.

Each Insurer's claims handler reviewed their respective policy language and provisions after receiving notice of the loss. *See, e.g.,* JA003547. Likewise, the Insurers' lead claim adjuster, Jon Carnahan, reviewed the Policies' language and provisions soon after Westlake gave notice. JA002527, JA002544-2545, JA003547. With full knowledge of the circumstances of the Tank Car Rupture and the nature of the resulting chlorine-induced corrosion damage to property at the Natrium Plant, neither the Insurers nor any of their representatives identified or communicated to Westlake any potential coverage issues with respect to its coverage claim, which is significant, given the requirement codified in the Insurers' own internal claims-handling manuals that any coverage issues and potentially applicable exclusions had to be promptly communicated to the policyholder. *See* JA006486-6494, JA002493, JA002933-2934, JA004361-4362, JA002191-

2192, JA002401, JA001852, JA003421.

For the first 16 months following the Tank Car Rupture, the Insurers' adjustment team, Cunningham Lindsey and ED&T, worked cooperatively with Westlake and its technical consultants to investigate the Tank Car Rupture, including its cause, the resultant property damage at the Natrium Plant, and options for repair and/or replacement of damaged property and equipment. JA000174-179. Jon Carnahan told Westlake in February of 2017 that the Insurers' adjustment team's preference was that "ED[&]T work with [Westlake's] appointed expert during the investigation vs separately investigating, which would take more time and possibly create differences, that could be avoided, by working together along the way." JA004691. ED&T was already familiar with the Natrium Plant because it had visited the Plant on multiple occasions in connection with a prior, recent insurance claim. JA004542.

In the course of this collaborative investigation that the Insurers specifically requested, the Insurers' adjustment team and Westlake agreed that Westlake should engage a metallurgist to analyze certain samples of exposed property and equipment in order to assess the damage caused by the Tank Car Release, rather than analyzing every single piece of equipment located in the affected areas of the Natrium Plant, which would be practically impossible, cost prohibitive, and cause unnecessary business income loss to Westlake for which the Insurers could potentially be liable. JA004758-4764, JA004769. Accordingly, ED&T drafted the protocols for the metallurgical sampling, and worked with Westlake to identify the categories of affected equipment. JA004585, JA004760. By the fall of 2017, this collaborative process resulted in a detailed damage-assessment plan. JA004768-4769. At no time during this extensive, collaborative claim investigation and adjustment process did the Insurers ever suggest to Westlake that there may not be coverage because of the application of any exclusions in their Policies. *See*

JA006486-6494, JA002493, JA002933-2934, JA004361-4362, JA002191-2192, JA002401, JA001852, JA003421.

During the first sixteen (16) months of the adjustment process – despite knowing that the claim involved corrosion damage, chlorine contamination, and the negligence of the Maintenance Vendors – the Insurers never once raised with Westlake the potential application of either the "corrosion" exclusion, the "pollution/contamination" exclusions, or the "faulty workmanship" exclusion (or any other basis for limiting or denying coverage) in their Policies. *See* JA006486-6494, JA002493, JA002933-2934, JA004361-4362, JA002191-2192, JA002401, JA001852, JA003421.

Moreover, during this 16-month period, the Insurers' internal claim notes and communications are devoid of any indication that any Insurer believed coverage for the damage at the Natrium Plant caused by the Tank Car Rupture was barred or limited by any exclusion in the Policies, or any other consideration (for example, the insufficiency of proof of damage or concerns about some of the claimed damage being "preexisting"). JA001852, JA003421. The few entries discussing coverage that do appear in the Insurers' claim notes reflect the Insurers' understanding that the Tank Car Rupture claim was covered by their Policies, and that the purpose of the ongoing investigation was a matter of determining the monetary value of Westlake's loss. JA007384.

E. The Insurers Reverse Course in Their Handling of the Tank Car Rupture Claim and Begin Asserting Coverage Defenses After They Learn of the Magnitude of the Loss

In December 2017, after the metallurgical analysis of samples had been completed and bids for certain repair and replacement work had been obtained, ED&T reported to the Insurers its estimate of the costs to repair or replace Plant equipment damaged by the Tank Car Rupture. JA004619-4623, JA006482-6484. ED&T felt pressured by the Insurers to develop and communicate an Order of Magnitude estimate in mid-December 2017, because the Insurers wanted

the estimate for purposes of setting reserves before calendar year-end. JA004620-21.

ED&T's estimate of covered damage at the Natrium Plant was submitted to the Insurers in the form of a "high-low" range of "Order of Magnitude." The total low-range number was $220 million. The total high-range number was $404 million. JA004619-4623, JA006482-6484. Westlake considered the ED&T high-range figure of $404 million to be too high, and its own assessment was that the appropriate number was roughly in the middle of ED&T's range – approximately $300 million. JA000409-410, JA005195. Regardless, ED&T's Order of Magnitude range was supported by the testing results and other information that the parties had jointly developed and implemented from August 2016 to December 2017, as well as the following observations by ED&T:

- "…[T]he metallurgical data confirm that the samples taken outside the chlorine release were absent any corrosion or significant presence of chlorine. However, most all of the samples taken from the exposed locations showed indications of chlorine related corrosion, as well as the presence of chlorine."
- "…ED&T concurs that all field instruments and electronic components will require replacement as a result of chlorine exposure due to the release."

JA006483, JA004619-4623. Moreover, earlier in the adjustment process, ED&T had already concluded that all stainless-steel lagging and banding within the affected area would have to be replaced because of corrosion damage caused by the chlorine release from the Tank Car Rupture. JA004768.

After receiving ED&T's $220 million to $404 million estimate on December 15, 2017, the claims representative for the lead Insurer – National Union Fire Insurance Company of Pittsburgh, Pa. ("AIG") – referred to it as "outrageous" and, in light of the magnitude of the estimate and AIG's percentage shares of the total under AIG's two policies in the program, emailed to his superior: "We have two [policies in this program]: 14.5[%] and 11.5[%]! Ouch!" JA002192, JA007386, JA006509, JA003444. As of the date of this internal communication, no Insurer or

Insurer representative had communicated to Westlake that any exclusion in the Policies applied to the claim. JA003622-23.

Shortly after receiving their own adjustment team's $220 million - $404 million range for the amount of property damage caused by the Tank Car Rupture, the Insurers sidelined Jon Carnahan and replaced him with Roe Vaughn as lead adjuster. JA002200-2201, JA006518, JA003644-3645. The Policies expressly provide that Jon Carnahan was to be the adjuster with respect to all claims made under the Policies. JA000611. Notwithstanding this provision, the Insurers did not seek permission from, or consult with, Westlake when they replaced Mr. Carnahan. JA002208.

Also, within two days of receiving their own adjustment team's $220-$404 million estimate, the Insurers for the first time retained outside coverage counsel. JA003622, JA003634. Shortly thereafter, the Insurers replaced their technical consultant ED&T with new, more aggressive consultants, whom the Insurers' claim handlers referred to as "enhanced" consultants. JA003641-3642, JA003886-3887. Prior to receiving their first adjustment team's $220 million-$404 million valuation, there is no indication that the Insurers had any concerns regarding the first team's qualifications or expertise to evaluate the scope of damage at the Plant.

The Insurers' second team was retained through the Insurers' outside coverage counsel. During discovery in this litigation, the Insurers asserted that the second team of consultants were performing work on behalf of the Insurers in anticipation of litigation, notwithstanding the fact that this anticipation was never communicated to Westlake. *See, e.g.*, JA008345-8383.

Within a few weeks after retaining outside coverage counsel, the Insurers issued their first reservation of rights letter since the claim-adjustment process had begun approximately 17 months earlier. In this letter, the Insurers informed Westlake that coverage may be precluded for the Tank

Car Rupture due to the application of multiple policy exclusions. JA006486-6494. It was in this letter that the Insurers first asserted the potential application of the "faulty workmanship" exclusion, "corrosion" exclusion, and "pollution/contamination" exclusions – which they had not raised in any form prior to the retention of their outside coverage counsel.[5] *See id.*

The Insurers would ultimately deny the entirety of Westlake's claim on the basis of these three exclusions, take the position that the Tank Car Rupture caused zero damage at the Plant (despite even the second team's internal valuation of the damage as being in excess of $100 million), and preemptively sue Westlake in Delaware state court for a declaratory judgment of no coverage, but not until their second adjustment team would spend another 14 months preparing for litigation against Westlake under the guise of adjusting Westlake's claim. *Compare id. with* JA004148-4155. As discussed *infra*, the trial court below correctly held that none of the Insurers' exclusions apply to Westlake's claim and that the Insurers breached their Policies in denying and not paying the claim.

F. The Insurers' Subsequent Conduct Through Their "Enhanced" Team of Technical Consultants and Their Ultimate Denial of Westlake's Claim on the Basis of Their Exclusion Defenses

During the 14 months that their "enhanced" second team of technical consultants investigated the claim, the Insurers demanded that Westlake respond to over a hundred voluminous requests for information, produce hundreds of thousands of pages of Natrium Plant documents, and permit the Insurers' "enhanced" technical consultants to conduct multiple additional inspections of the Natrium Plant, during which they took samples and photographs of the damaged property. JA006520-6540. All of this activity took place during a period when the Insurers were

[5] In internal communications prior to his being sidelined, Jon Carnahan told the Insurers that the "corrosion" exclusion did not exclude coverage for corrosion resulting from sudden and accidental events like the Tank Car Rupture. *See* JA004504.

anticipating litigation with Westlake, unbeknownst to Westlake. *See also* JA008345-8383.

On May 22, 2018, Westlake submitted a partial proof of loss to the Insurers, which provided a summary of Westlake's incurred costs to date and an estimate of Westlake's near-term expected future costs based on the original collaborative adjustment process with the first team of adjusters (per the terms of the Policies, payment was due thirty days thereafter). JA005728-5729. By letter dated January 28, 2019, the Insurers refused to pay for any costs identified in Westlake's May 22, 2018 Partial Proof of Loss. JA006542-6548. However, in the same communication in which they conveyed their refusal to pay, the Insurers reiterated that their adjustment and technical investigation remained "ongoing." JA006543.

Throughout the claim adjustment process, Westlake repeatedly expressed its serious concerns with the Insurers' seeming drastic change of course in adjusting Westlake's claims. For example:

- In March 2018, Westlake responded to the Insurers' initial reservation of rights letter, notifying the Insurers that "Westlake is surprised and troubled that more than one and a half years after the incident, the Insurers are asserting for the first time multiple bases on which they may now seek to preclude or limit coverage for Westlake's claim." JA008595.
- In a November 9, 2018 letter, Westlake informed the Insurers that: "Contrary to your statement, Insurers did not 'properly and timely advise[] Westlake of the involved coverage issues and reserved rights ....' In fact, throughout the entire adjustment process, Insurers never raised any purported 'coverage issues' nor sought to reserve rights until January 18, 2018 – well over a year after Westlake notified the Insurers of its claim. Up until that time, Insurers' representatives who visited the plant on multiple occasions consistently agreed with, and approved of, Westlake's proposed course of action in responding to the loss. Insurers' approach to adjusting Westlake's claim suddenly changed – with the assertion of 'coverage issues' and retention of a completely new set of consultants – only after a December 13, 2017 meeting. In any event, as discussed in prior correspondence and below, the purported 'coverage issues' that Insurers have sought to raise have no bearing on the present loss. Needless to say, Westlake is more than justified in its frustration with Insurers' sudden assertion of 'coverage issues,' retention of new consultants, and endless requests for additional information and documentation." JA008498-502.

Then, on March 20, 2019, Westlake submitted another Proof of Loss for damage from the Tank Car Rupture in an amount of $278,505,078. JA005195. Westlake submitted this Proof of Loss at

the Insurers' request, as conveyed to Westlake by the Insurers' "enhanced" adjuster Roe Vaughn. JA006767-6768. Mr. Vaughn previously informed a Westlake representative that the Insurers would not make a determination on Westlake's claim until Westlake had provided the Insurers with a full estimate of its claim. *Id.*[6]

In the cover letter accompanying its March 2019 proof of loss, Westlake wrote: "After the Insurers have had an opportunity to review this proof of loss, Westlake proposes that the insurers and Westlake schedule a meeting to discuss the adjustment and potential resolution of this claim." JA005195. After receiving Westlake's proof of loss on March 20, 2019, the Insurers' loss adjuster indicated that he would share it with the Insurers and get their response. JA006939.

The Policies provide a period of 30 days for the Insurers to pay Westlake's claim upon the Insurers' acceptance of a submitted proof of loss. *See, e.g.*, JA000612. However, the Insurers did not respond to Westlake's March 20, 2019 proof of loss by paying the claim, nor by indicating that they needed additional information for their investigation, nor by agreeing to meet with Westlake as Westlake requested. JA003691. Instead, on April 9, 2019, the Insurers responded to Westlake's Proof of Loss by filing a declaratory judgment lawsuit against Westlake in Delaware state court and sending Westlake a letter denying coverage that enclosed a copy of the as-filed Delaware state court complaint. JA4148-4155, JA004199-4233. In so doing, the Insurers unilaterally terminated their investigation of Westlake's claim and refused any obligation to pay any amount towards the claim on the basis of the three exclusions that the trial court has now found are unambiguously inapplicable to the claim.

---

[6] The principal claims handler for lead Insurer AIG, Mark Handy, had asked Roe Vaughn to find out how much money Westlake was seeking for the claim so that the Insurers could determine how they would respond to the claim. JA008402-8405. This exchange suggests that the Insurers' coverage decision was not based on their contractual obligations under the Policies and Georgia law, but instead on the amount of the claim and the Insurers' own business interests.

G. The Insurers' "Enhanced" Adjustment Team Estimates $115 Million in Property Damage Caused by the Tank Car Rupture

Even after hiring coverage counsel and "enhanced" technical experts and reserving rights based on three inapplicable exclusions, the Insurers estimated the property damage at the Plant to be in excess of $100 million. But Westlake did not uncover this fact until it won certain discovery battles in the trial court below.

During the claim adjustment process, Westlake repeatedly requested that the Insurers disclose the results of their second set of technical consultant's investigative activities. For example, in a September 7, 2018 letter, the Insurers indicated that their second set of "enhanced" technical consultants had been working to "identify and quantify the level of any loss-related damage, as opposed to that which was pre-existing or attributable to other unrelated causes" and stated that the "Insurers will advise Westlake of the results of that analysis in due course." JA008493-8496. In response, Westlake requested that the Insurers "[p]lease provide the data and the results of that analysis at your earliest convenience." JA008502. The Insurers never provided the results of their "enhanced" consultant's investigative activities at any time after they had changed course of the adjustment process in December 2017 until such information came to light in discovery in this case, after discovery motion practice. *See* JA008506-8507.

Specifically, discovery in the trial court below revealed that that the Insurers' "enhanced," second adjustment team internally reported that that the Tank Car Rupture caused approximately $115 million worth of property damage to the Natrium Plant. JA006915, JA006918. In response to this estimate, the Insurers with some of the largest shares of the liability immediately raised their reserves for the claim. JA006915. For example, XL raised its reserves ten-fold – from approximately $700,000 to approximately $7 million – based on the assumption that the Tank Car Rupture caused at least $115 million-worth of property damage. JA006918, JA000185-186.

In sum: even as they told Westlake that no part of its claim was covered and claimed that Westlake had not established the existence of any covered damage resulting from the Tank Car Rupture, internally the Insurers were setting reserves based on total loss estimates of the claim as high as $115 million.[7] It is worth reiterating: the Insurers initially attempted to hide these facts from disclosure even in discovery in the trial court below; Westlake only uncovered them after prevailing on several motions to compel discovery. *See, e.g.,* JA008506-8507.

H. The Insurers' Inconsistent Positions Regarding Coverage for this Loss

1. One Insurer, HDI, paid another policyholder for a nearly identical claim arising from the same incident

Covestro, LLC maintains an industrial manufacturing facility directly to the south of the Natrium Plant. JA006944. As a result of the Tank Car Rupture and consequent chlorine release, Covestro "experienced damage to stainless steel piping, tanks, and other equipment." JA006965-6966. According to Covestro, the chlorine also caused corrosion to "stainless steel bolts, valves, cladding, control boxes, gutters, doors, ductwork, and other instruments which will require cleaning, repairing, and/or replacement." JA006945. At the time of the Tank Car Rupture, HDI-Gerling America Insurance Company ("HDI") – one of the 12 Respondent Insurers in this case – insured ***both*** Covestro and Westlake. *See* JA006968, JA001453.

The HDI policies issued to Axiall and to Covestro each contain "faulty workmanship," "corrosion," and "contamination" exclusions. JA008528-8530. However, even as HDI took the position (along with all the other Insurers) that these exclusions applied to eliminate all of Westlake's coverage for the Tank Car Rupture, it took exactly the opposite position as to Covestro. Specifically, HDI accepted coverage for the property damage at the Covestro plant totaling $7.7

[7] The Insurers' internal Claims Handling Manuals direct their claims handlers to set reserves on claims based on the probable ultimate outcome of the case. JA003492-3495.

million that resulted from the exact same Tank Car Rupture as Westlake's claim, notwithstanding the "faulty workmanship," "corrosion," or "contamination" exclusions in the Covestro policy. JA008522-8523. Westlake's claim and Covestro's claim were substantially the same: same exact cause of loss resulting from the same exact event subject to substantially the same policy exclusions. The only real difference is that Covestro's claim was in the single-digit millions of dollars (given its farther distance from the tank car at the time of the Rupture), whereas Westlake's claim is in the hundreds of millions of dollars.

2. The Insurers paid a prior Axiall insurance claim involving alleged corrosion damage and did not deny coverage based on the corrosion exclusion defense raised here

During the course of adjusting a prior loss at Axiall's Lake Charles Facility relating to a reboiler, Cunningham Lindsey reported to the Insurers that "corrosion was found under the insulation, which created a leak" in that piece of equipment. JA007105. This claim ultimately settled and was paid by the Insurers. JA007133. That settlement defined "Settled Claims" to include "any related corrosion under insulation." JA007136. So the Insurers paid a prior, smaller claim involving "corrosion" damage notwithstanding the "corrosion" exclusion, but then took the position with respect to the Tank Car Rupture claim (after having hired coverage counsel and a second adjustment team) that the "corrosion exclusion" excluded all claims related to corrosion in any way.

II. PROCEDURAL HISTORY

Following the Insurers' commencement of litigation on April 9, 2019 by their filing of a declaratory judgment action in Delaware, Westlake promptly filed its Complaint against the Insurers in Marshall County, West Virginia, on April 10, 2019. The Delaware action was subsequently stayed in deference to this action.

In a February 17, 2021 Scheduling Order, the trial court established an accelerated schedule

for the resolution of summary judgment motions on the issue of coverage for Westlake's claim with later briefing on issues other than questions of Policy interpretation. Pursuant to the trial court's order, the parties' filed their respective motions for summary judgment on coverage issues on September 16, 2021. Both the Insurers and Westlake filed affirmative motions for summary judgment on the Insurers' three coverage-defeating exclusion defenses – the faulty workmanship, corrosion, and pollution/contamination exclusions. On November 19, 2021, the trial court issued three orders denying the Insurers' motions for summary judgment and granting Westlake's motions for summary judgment on each of these three coverage-defeating defenses.[8] Specifically, the trial court held that based on the plain and unambiguous language of these exclusions, none of them applied to preclude coverage for Westlake's claim. The Insurers appealed the trial court's November 19th Orders to the Supreme Court of Appeals of West Virginia on December 17, 2021. After briefing and oral argument, on January 25, 2024, the Supreme Court of Appeals of West Virginia dismissed the Insurers' appeal on the basis that it lacked jurisdiction over the trial court's interlocutory orders.

On November 23, 2021, the Insurers filed two additional motions for summary judgment – (i) a Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible, and (ii) a Motion for

[8] The trial court also entered an order on November 19, 2021 that granted the Insurers' Motion for Partial Summary Judgment Concerning Enforcement of Asbestos Exclusions. However, the Insurers' assertion of the asbestos exclusion was not a coverage-defeating defense. *See* Nov. 19, 2021 Order Denying Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' Asbestos Exclusion Defense and Granting Defendants' Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions, JA007454-7463. Rather, the asbestos exclusion is only relevant in the event that Westlake incurs extra costs in the course of repairs for the abatement of asbestos-containing materials that might be damaged or disturbed. JA007461. To date, Westlake has not incurred any such repair costs and, as it has previously indicated, Westlake does not intend of make a claim for costs, if any, due to the abatement of asbestos materials. JA007461-7462.

Summary Judgment Concerning Bad Faith Claims. On March 3, 2022, the trial court granted the Insurers' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict (the "Collateral Estoppel Order"). Westlake subsequently filed a Rule 59(e) Motion to Alter or Amend the Court's Collateral Estoppel Order, which the trial court denied. On May 8, 2024, the trial court granted the Insurers' Motion for Summary Judgment Concerning Bad Faith Claims (the "Bad Faith Order").

Finally, on September 3, 2024, Westlake filed a Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) of Plaintiffs' Complaint and for Pre-Judgment Interest. On December 10, 2024, the trial court granted Westlake's Motion and ordered the Insurers to pay Westlake pre-judgment interest accruing from the date that the Pennsylvania trial court entered final judgment in the Pennsylvania Case (August 10, 2022) (the "December 10th Order").

On January 10, 2025, Westlake filed a timely notice of appeal with this Court challenging the trial court's Collateral Estoppel Order, Bad Faith Order, and its December 10th Order with respect to the date that the trial court determined pre-judgment interest began to accrue.

SUMMARY OF THE ARGUMENT

In the proceedings below, the trial court correctly found that: (1) the Insurers breached their contracts of insurance; (2) none of the three exclusions ("corrosion," "faulty workmanship," and "contamination") the Insurers relied on to entirely deny coverage apply; and (3) the Insurers owe Westlake millions of dollars in damages plus pre-judgment interest. *See* November 19, 2021 Orders Granting Westlake's Motion for Partial Summary judgment Regarding the "Corrosion," "Faulty Workmanship," and "Contamination" Exclusions; December 10th Order. JA000001-64.

However, the trial court erred when, as a matter of law, it limited Westlake's damages resulting from the Insurers' breach of contract from hundreds of millions to approximately $3

million and dismissed Westlake's Georgia bad faith claim. Both the issue of Westlake's damages resulting from the Insurers' breach and the issue of whether the Insurers committed the tort of bad faith under Georgia law should have been decided by a West Virginia jury.

The sole basis for the trial court's limitation of Westlake's damages as a matter of law is its finding that the Pennsylvania doctrine of collateral estoppel prevents Westlake from seeking damages against the Insurers in this case that are in excess of the jury award for property damage in the Pennsylvania Case. This ruling, however, suffers from two flaws, both of which constitute reversible error.

First, the Pennsylvania trial court did not instruct the jury in the Pennsylvania Case to ascertain the quantum of physical damage that the Tank Car Rupture caused at the Natrium Plant. Rather, the Pennsylvania jury was instructed, and in compliance with its instructions found, that the Maintenance Vendors were liable to Axiall for $5.9 million in damages under Pennsylvania theories of tort and contract liability, taking into account that Axiall was itself (according to the jury) 40% negligent with respect to the Tank Car Rupture. Pennsylvania collateral estoppel law – just like West Virginia collateral estoppel law (and every other jurisdiction's collateral estoppel law) – requires that the decided issue forming the predicate of the estoppel is ***identical*** to an issue in the later case. *See Century Indem. Co. v. OneBeacon Ins. Co.*, 173 A.3d 784, 805 (Pa. Super. Ct. 2017). Not just similar, not just related, not just arising out of the same context: ***identical***. Here, there is no identity between the Pennsylvania jury's damages verdict and any issue at stake in the instant case. There is no dispute that this case involves insurance-contract liability under Georgia law, not tort and maintenance-contract liability under Pennsylvania law. And there cannot be any dispute that the Pennsylvania jury never made a factual finding regarding the amount of physical damage the Tank Car Rupture caused at the Plant, as the record is devoid of any evidence

of such a finding. Therefore, there is no identity between the Pennsylvania jury's verdict and issues in this case pertaining to the quantum of physical damage, or pertaining to the measure of Westlake's damages resulting from the Insurers' breach of their insurance contracts. A finding of collateral estoppel cannot apply in the absence of identity of issues, and the trial court's ruling should be reversed since here the requisite identity does not exist.

Second, even if the Pennsylvania jury had made a finding regarding the quantum of physical damage that the Tank Car Rupture caused at the Natrium Plant (*i.e.* if there was identity of issues), collateral estoppel would not apply in the present case because Westlake never had any opportunity to include in the Pennsylvania Case all of the evidence discovered in this case (in certain instances, only after the Insurers initially withheld evidence and Westlake needed to move to compel discovery) related to the quantum of physical damage the Tank Car Rupture caused at the Natrium Plant. The Pennsylvania trial court precluded all insurance-related evidence from that case. Westlake therefore had no opportunity to present evidence of the Insurers' internal estimates of the amount of physical damage caused to the Natrium Plant, which ranged into the hundreds of millions of dollars. Pennsylvania law requires that for collateral estoppel to apply, the estopped party must have had a full and fair opportunity to litigate the relevant issue in the prior case. *Id.* That did not happen here; therefore, again collateral estoppel cannot apply.

With respect to the Georgia bad faith claim that it dismissed as a matter of law, the trial court erred by misapplying the Georgia bad-faith summary judgment standard. Under Georgia law, the question of bad faith can be resolved on summary judgment only where there is "no evidence of unfounded reason for the nonpayment, or if the issue of liability is close." *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d 130, 135 (Ga. Ct. App. 2021). The trial court misapplied this standard, concluding that because the record contained disputed evidence that the

Insurers may have had some reason to deny the claim, this meant that there was "no evidence of unfounded reason." This holding conflates the absence of evidence of bad faith with the presence of evidence supporting a reasonable claims-handling process. Under Georgia law, summary judgment is inappropriate where there is evidence of insurer bad faith, regardless of whether there is also evidence that, in addition to bad faith, an insurer had something other than bad faith as a rationale for a coverage decision. The record in this case is replete with evidence that the Insurers' complete denial of coverage was made in bad faith, predicated on inapplicable policy exclusions (which the trial court correctly determined were unambiguously inapplicable), in conflict with their own adjuster's and technical experts' recommendations and valuations, and in conflict with their own internal reserves in excess of $100 million. Under Georgia law, this evidence easily clears the summary judgment bar and entitles Westlake to a West Virginia jury trial on its bad faith claim.

With respect to pre-judgment interest, the trial court correctly exercised its discretion in concluding that Westlake is entitled to pre-judgment interest given the approximately eight years the Insurers have delayed paying its valid insurance claim. However, the trial court erred in concluding that pre-judgment interest began to run from the date that the Pennsylvania judgment became final, rather than thirty days after Westlake first submitted a proof of loss to the Insurers, which the Insurers refused to cover. Georgia law is clear that pre-judgment interest runs from the date of the breach. *See* Ga. Code § 13-6-13.

For these reasons, and as discussed in detail below, the trial court's Collateral Estoppel Order, Bad Faith Order, and December 10th Order regarding pre-judgment interest should be reversed.

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).

ARGUMENT

I. STANDARD OF REVIEW

In reviewing an order granting summary judgment as a matter of law, this Court's review is "*de novo*." *Heartwood Forestland Fund IV, LP v. Hoosier*, 781 S.E.2d 391, 395 (W. Va. 2015). However, that review – like the trial court's – is guided by the principles of West Virginia Rule of Civil Procedure 56, which provides that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.* (citing *Coleman Estate v. R.M. Logging, Inc.*, 664 S.E.2d 698, 703 (W. Va. 2008)). In that regard, when reviewing an order granting a motion for summary judgment, "any permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion." *Coleman Estate*, 664 S.E.2d at 703-04 (citing *Mueller v. Am. Elec. Power En. Servs.*, 589 S.E.2d 532, 535 (W. Va. 2003) (same)); *Heartwood*, 781 S.E.2d at 395 n.4 ("[T]his Court considers the evidence in the light most favorable to the nonmovant.").

II. THE TRIAL COURT ERRED IN FINDING COLLATERAL ESTOPPEL

A. The Relevant Legal Standard

When a party to a West Virginia action seeks to preclude re-litigation of an issue decided in a prior litigation, the West Virginia court applies the law of the jurisdiction where the prior decision was made. *Jordache Enter., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 513 S.E.2d 692, 701, 703 (W. Va. 1998) (applying New York collateral estoppel law and explaining that "the full faith and credit clause generally requires the courts of this State to give the New York judgment at least the res judicata effect which it would be accorded by New York courts."); *Cortez v. Murray*, No. 17-0662, 2018 WL 2447285, at *7 n.24 (W. Va. May 31, 2018) (citing *Jordache*,

513 S.E.2d at 703 in applying Texas law). Here, Pennsylvania collateral estoppel law applies, since the relevant prior action for collateral estoppel purposes was the Pennsylvania Case.

Under Pennsylvania law, "collateral estoppel applies only when **all** of the following elements are satisfied: (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment." *Century Indem. Co. v. OneBeacon Ins. Co.*, 173 A.3d 784, 805 (Pa. Super. Ct. 2017) (emphasis in original); *PennEnergy Resources, LLC v. MDS En. Dev., LLC*, 325 A.3d 756, 775 (Pa. Super. Ct. 2024) (citing *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998)).[9]

Here, the trial court held that Westlake was estopped from seeking damages resulting from the Insurers' breach of their insurance contracts that were in excess of the Pennsylvania jury's verdict. *See generally* Collateral Estoppel Order, JA000001-14. That verdict held the Maintenance Vendors responsible for $5.9 million in "property damage" as a result of the Maintenance Vendors' conduct taking into account Axiall's own negligence with respect to the Tank Car Rupture. JA007534, JA007694-7708, JA007712-7725. The trial court Order fails to meet both the "identity" and the "full and fair opportunity" requirements under Pennsylvania

[9] This Court's prior rulings demonstrate that the elements for collateral estoppel in West Virginia are the same as Pennsylvania's for present purposes. *See Franchesca I. v. Thomas L.*, No. 22-ICA-292, 2023 WL 2861732, at *2 (W. Va. App. Ct. April 10, 2023) ("Collateral estoppel will bar a claim if four conditions are met: (1) ***The issue previously decided is identical to the one presented in the action in question***; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) ***the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action***.") (emphasis added) (internal citations omitted).

collateral estoppel law.

B. There Is No Issue Resolved in the Pennsylvania Case That Is Identical To An Issue In This Case

Under Pennsylvania law, the threshold element for the application of collateral estoppel requires that the issue decided in the earlier litigation must be "identical" to the issue subject to estoppel in the present litigation – not merely related, or similar, or arising out of the same context, but ***identical***. *See PennEnergy Res.*, 325 A.3d at 776-77 (citing the RST 2d of Judgments § 27). This strict standard requires that the facts, legal arguments, and theories of liability surrounding the issue in the prior case are exactly the same as in the present case. *See PennEnergy Res.*, 325 A.3d at 776-77 (holding that collateral estoppel did not apply where two cases involved only related – not identical – parties, and only similar – not identical – contracts); *Grossman v. Rosen*, 623 A.2d 1, 2-3 (Pa. Super. Ct. 1993) (holding that two cases arising out of the exact same factual scenario did not involve identical issues for collateral estoppel purposes because they involved differently-situated defendants and therefore different theories of liability); *Safeguard Mut. Ins. Co. v. Williams*, 345 A.2d 664, 668-69 (Pa. 1975) (holding that collateral estoppel did not apply despite overlapping conduct in both cases because legal issues were not "identical").[10]

Here, the trial court's collateral estoppel holding conflated the quantum of physical ***damage***

[10] The trial court cites to only one decision regarding the standard for determining whether an issue is "identical" for collateral estoppel purposes under Pennsylvania law, *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995). Collateral Estoppel Order at 9. *Balent*, however, discusses the elements of collateral estoppel only in *dicta* explaining that "[c]ollateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action despite the fact that it is based on a cause of action different from one previously litigated." *Balent*, 669 A.2d at 313. *Balent* – an eminent domain case – did not actually analyze collateral estoppel but simply distinguished between *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). *See id.* The court applies the doctrine of *res judicata* to preclude a subsequent action between the same two parties with the only difference between the two actions being that the plaintiff asserted a different claim for relief based on the defendant's conduct. *Id.*

resulting from the Tank Car Rupture with the ***tort and maintenance-contract damages resulting from the Maintenance Vendors' conduct*** that the Pennsylvania jury awarded Axiall in the Pennsylvania Case. The Pennsylvania jury was never tasked with, and therefore never found, the quantum of physical damage at the Natrium Plant *per se*, irrespective of any theory of liability. Rather, they were tasked with awarding damages, if any, arising from the Maintenance Vendor's specific conduct that led to the Tank Car Rupture, and asked to take Axiall's potential contributory negligence into account.[11]

More specifically, the trial court concluded that Westlake's claim for "physical loss or damage to insured property at the Natrium Plant" is the "***same damages*** Axiall sought in the Pennsylvania action, and the question of the amount of those damages was answered by the Pennsylvania jury…Whether the context is the entity who caused the damage or a dispute regarding the insurance carriers' paying for the damage, the amount of damage that occurred that day does not change." Collateral Estoppel Order at 8, JA000008. The trial court here is correct that the quantum of physical damage that the Tank Car Rupture caused at the Plant is the same regardless of any theory of liability. The trial court's conclusion, however, is incorrect for the simple reason that the Pennsylvania jury was never asked to determine the quantum of physical damage and so never did. Rather, the Pennsylvania jury was tasked with determining the Maintenance Vendors' tort and maintenance-contract liability, under Pennsylvania law, as a result

[11] In the summary judgment briefing below, the Insurers relegated the substantive discussion of the "identical" element to a passing footnote that reserved their right to present an argument on this issue in reply, only if Westlake objected to its application. *See* Collateral Estoppel Brief at 10, n.9, JA007407. In their Reply, the Insurers raised – for the first time – a number of factual and legal issues on the identity factor that then formed the basis for the trial court's Collateral Estoppel Order. Because these issues were first raised in Reply, Westlake did not have an opportunity to correct them prior to the Court's decision on that Motion. Westlake then filed a Motion to Alter or Amend the Decision under Rule 59(e) bringing these issues to the Court's attention. The trial court denied that Motion, which constitutes a separate error.

of their conduct that ***resulted in*** physical damage at the Plant. Just as in *Grossman v. Rosen*, 623 A.2d 1 (Pa. Super. Ct. 1993), this case and the Pennsylvania Case are based on the same damage-causing event, but the two cases involve different defendants and different theories of liability regarding responsibility for the damage that the single damage-causing event caused. As the Superior Court of Pennsylvania explained:

> Appellant's action against [the attorney in the second action] is not barred by principles of collateral estoppel. Collateral estoppel, or issue preclusion, operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit…. Here, the parties are not identical to the ones in the prior federal litigation. The defendant in the prior action was A. Grossman, the principal; the defendant in the instant action is Paul R. Rosen, the attorney. Because of the relationship between A. Grossman and Paul R. Rosen, ***the issues pertaining to liability will also be different***. Therefore, the trial court erred when it held that the present action was barred by principles of collateral estoppel….

Grossman, 623 A.2d at 2-3 (emphasis added) (refusing to apply collateral estoppel in two separate litigations brought by an accounting firm relating to a letter sent by Rosen on behalf of Grossman purporting to wind down the accounting firm).

The trial court's error is predicated on the verdict form in the Pennsylvania Case. The verdict form asked the Pennsylvania jury to "state the amount of ***damages*** sustained by Axiall Corporation ***as a result of the [Maintenance Vendor] defendants' conduct.***" JA007534 (emphasis added). That is, it asked the jury to ascertain the Maintenance Vendors' liability as a result of their specific conduct under the specific theories of liability – tort and maintenance-contract liability under Pennsylvania law – at issue in that case. The verdict slip then provided different categories of loss or damage that gave rise to an award of damages to Axiall Corporation as a result of certain conduct by the Maintenance Vendors. *Id.* The trial court's error was in focusing on a line item in the verdict slip that reads "Damage to Natrium plant and equipment" in isolation from the rest of the slip or the jury instructions that explained to the jury how to fill out the slip. The verdict slip did not in fact ask that the Pennsylvania jury make a factual determination

as to the monetary value of the total amount of property damage that the Tank Car Rupture caused at the Natrium Plant in isolation from the specific theories of liability at issue in that case. *See id.*[12]

Review of the Pennsylvania trial court's instructions to the Pennsylvania jury makes it abundantly clear that the Pennsylvania jury was not charged with making a determination of "damage"[13] at the Natrium Plant, and therefore did not make it. Specifically, the Pennsylvania trial court instructed the Pennsylvania jury that "[i]n order for you to arrive at a verdict on Axiall's claims against AllTranstek, Rescar and Superheat, you must resolve the following factual questions by a preponderance of the evidence":

> First, whether or not the contracts between Axiall and AllTranstek and Rescar contained an express warranty. Second, whether or not AllTranstek and Rescar breached any warranty. Third, whether or not AllTranstek and Rescar's breach of any warranty resulted in damage to Axiall. Fourth, whether or not AllTranstek and

[12] The trial court also referred to certain statements that Westlake made during the proceedings below regarding the scope of the damage at Natrium Plant and the fact that certain information related to the scope of that damage was produced in both the Pennsylvania Case and in the instant case. Collateral Estoppel Order at 8-10. However, the trial court's reliance on this evidence suffers from the same flawed conflation between damage and damages as discussed in footnote 13, *infra*. Moreover, under Pennsylvania law, "the fact that the same or similar evidence may be adduced on the trial of entirely different and distinct issues in two different cases is not sufficient to make adjudication of an issue in one case conclusive of a different issue in a second case." Pa. Standard Practice 2d § 65:110.

[13] The concept of "damage" and "damages" are distinct, and that distinction is dispositive as to the collateral estoppel requirement that the issues in the two litigations be "identical." "Damage" refers to actual, physical damage, and its determination is a purely factual question. *See* Black's Law Dictionary (12th ed. 2024) "Damage" ("1. Loss or injury to person or property; esp. physical harm that is done to something or to part of someone's body…2. By extension, any bad effect on something."). In contrast, "damages" refers to a party's entitlement to compensation for "damage" caused by another party's conduct where that other party is legally liable for the damage pursuant to some theory of liability. *See* Black's Law Dictionary (12th ed. 2024) "Damages" ("Money claimed by, or ordered to be paid to, a person as compensation for loss or injury….") (*quoting* Frank Gahan, The Law of Damages 1 (1936) ("Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong."). Here, while the "damage" involved in the Pennsylvania Case and this action may be the same, the "damages" legally owed by the Maintenance Vendors and the Insurers under separate legal theories of liability are not.

> Rescar otherwise breached their contracts with Axiall. Fifth, whether or not any breach of that contract by AllTranstek and Rescar caused damages to Axiall. Sixth, whether or not Atranstek and Rescar were negligent in the performance of their services to Axiall, and if so, whether or not that negligence was a cause of the rupture of AXLX 1702. Eighth, whether or not Axiall was negligent in its duties as a tank car owner. If so, whether or not that negligence was a cause of the rupture of AXLX 1702. ***And ninth, if you find a breach of warranty and/or breach of contract and/or negligence on the part of the defendants that resulted in the rupture of AXLX 1702, you must determine the appropriate amount of damages….***
>
> The defendants deny Axiall's claim. ***In addition, as a defense, the defendants claim that Axiall was negligent and that Axiall's own negligence was a factual cause in bringing about Axiall's damages….***
>
> ***I will now instruct you on damages***….If you find Alltranstek or Rescar's negligence or breach of contract or warranty or Superheat's negligence caused damage to Axiall's property, you must then determine an amount of money damages that you find will fairly and adequately compensate Axiall for all the damage that it sustained as a result. The amount you award today must compensate Axiall completely for damages sustained in the past as well as damages Axiall will sustain in the future. If you find Alltranstek or Rescar was negligent or breached its contract or warranty with Axiall, or that Superheat was negligent, Axiall is entitled to be compensated for the harm done to its property and recover other incurred losses. If the property was not a total loss, but some harm is partially repairable and some harm is permanent, damages may include the reasonable cost of repairs in addition to the reduction in market value of the property. However, where goods or personalty are of such character that their market value cannot compensate for their loss, replacement cost is the appropriate measure of damages. Axiall is also entitled to be reimbursed for incidental costs or losses reasonably incurred because of damage to their property of, such as lost profits or fees paid to engineers and other professionals to evaluate the damages and to develop a plan to remediate it….Axiall claims that each of the defendants' negligence has contributed to its damage. Axiall must prove that the conduct of any defendant who you have found to be negligent was a factual cause in bringing about Axiall's damages.

JA007703-7708 (emphasis added).

Most notable about these jury instructions is what they do not instruct the jury to do: ascertain the amount of physical damage that the Tank Car Rupture caused at the Natrium Plant. Rather, these instructions tell the jury to answer nine questions, every single one of which is related to the particular theories of liability that were at issue in the Pennsylvania Case and that are not

present in the instant case. Only after answering these nine questions, and based on their answers to these nine questions, could the Pennsylvania jury determine a damages amount that would compensate Axiall for the Maintenance Vendors' conduct, taking into account Axiall's own negligence.

Whereas the Pennsylvania jury was instructed to determine, under Pennsylvania law, the amount of legal damages that Axiall should be awarded against the Maintenance Vendors under Pennsylvania negligence, breach of contract, and breach of warranty theories of liability, there is no dispute that the "damages" question in the present case is a question of the Insurers' contractual liability under Georgia contracts of insurance that provide coverage even for loss resulting from Axiall's own negligence.

In sum, although this case and the Pennsylvania Case both involve the same underlying accident that resulted in the same physical damage to the Natrium Plant, there is no identity between the issue of Westlake's insurance-related damages in this case and any issue decided in the Pennsylvania Case. The jury in the Pennsylvania Case were not charged with and did not determine the question of how much property damage the Tank Car Rupture caused at the Plant. The question they ***were*** charged with – deciding the amount of legal damages resulting from the Maintenance Vendors' conduct under theories of Pennsylvania tort and maintenance-contract liability – has no bearing whatsoever on the present case.

C. Westlake Did Not Have a Full and Fair Opportunity To Litigate the Quantum of Physical Damage at the Natrium Plant in the Pennsylvania Case

If the Pennsylvania jury had been charged with determining the quantum of physical damage that the Tank Car Rupture caused at the Plant, the doctrine of collateral estoppel would still be inapplicable to its damages verdict, because Westlake did not have the opportunity to present all of the evidence it developed in this case from the Insurers' internal documents and

admissions against interest.

Specifically, discovery in this case uncovered (after significant discovery motions practice in which Westlake prevailed) the following insurance-related evidence regarding damage to the Natrium Plant as a result of the Tank Car Rupture:

- ED&T – the Insurers' first technical consultant who worked on a prior claim at the Natrium Plant as well as the Tank Car Rupture claim – told the Insurers' claims handlers in an internal email that he "kn[e]w for a fact" that there was no corrosion on certain equipment prior to the Tank Car Rupture, but after the Tank Car Rupture observed "extensive pitting and rusting had taken place…." JA004632.

- ED&T drafted the metallurgical sampling and testing protocol and actively participated in developing the process that Westlake used to assess the scope of damage that the Tank Car Rupture caused. JA004585, JA004760.

- ED&T informed the Insurers in December 2017 that they estimated the Tank Car Rupture caused between $220 million and $404 million worth of damage to equipment at the Natrium Plant. JA004619-4623, JA006484.

- In 2018, the Insurers hired a second team of "enhanced" technical experts to perform additional sampling and testing at the Natrium Plant in order to develop a revised estimate of the cost of repairing and/or replacing damage caused by the Tank Car Rupture, and these new experts informed at least one Insurer that the scope of the chlorine-release-related damage would cost at least $115 million. JA007789.

- Following this revised $115 million estimate, a number of the Insurers increased their reserves for Westlake's claim. For example, XL raised its reserve ten-fold – from approximately $750,000 to approximately $7.5 million. JA000186.

None of this evidence was part of the Pennsylvania Case, because the judge in that case precluded "any evidence regarding any parties' insurance coverage." JA007748. Therefore, Westlake did not have "a full and fair opportunity to litigate" in the Pennsylvania Case the full amount of the damages it sustained as a result of the Insurers' breach of their Georgia insurance Policies.

As discussed *supra*, the Pennsylvania jury was not tasked with determining as a purely factual matter the dollar amount of property damage that the Tank Car Rupture caused to the Natrium Plant, and so they did not make such a determination. However, if they had been tasked with making that determination, then the evidence of the Insurers' own valuations of the cost to

repair and/or replace property damage caused by the Tank Car Rupture, which constitute admissions regarding the nature, scope, and extent of that damage, some of which are highlighted above, would be highly relevant to making that determination. *See also* JA000168-170, JA000179-180, JA000185. This point becomes particularly salient when one considers the arguments that the Maintenance Vendors in the Pennsylvania Case made on the issue of Axiall's damages in that case. Specifically, the Maintenance Vendors argued that: (1) the method by which Axiall arrived at its assessment of damaged equipment – including the sampling and testing that Axiall conducted as part of that assessment – was flawed; and (2) Axiall had not performed any remaining "useful life analysis" as part of its assessment of the damaged equipment. JA007837-7859. Because the Pennsylvania court precluded all parties from offering any evidence related to insurance matters, Axiall could not inform the Pennsylvania jury, as it would inform a West Virginia jury in this case, that: (1) the Insurers' technical experts – working cooperatively with Axiall/Westlake for the first 16 months of the adjustment process – were jointly responsible for the method Axiall used in arriving at its damage assessment; and (2) the Insurers' Policies are "replacement-cost" policies that cover Axiall/Westlake for the cost of replacing damaged equipment "new for old," without consideration of the remaining useful life of the damaged equipment. *See* JA008573.

III. THE TRIAL COURT ERRED IN GRANTING THE INSURERS' MOTION FOR SUMMARY JUDGMENT CONCERNING BAD FAITH CLAIMS UNDER GEORGIA LAW

In dismissing Westlake's Georgia bad-faith claim on summary judgment as a matter of law, the trial court erred in two respects.[14] First, the trial court's Bad Faith Order misapplied the

[14] To the extent the Bad Faith Order also grants summary judgment in the Insurers' favor on the basis that no Georgia court previously interpreted the exact policy provisions on which the Insurers relied, such a decision too would be in error. Throughout this litigation, including in this appeal, the Insurers contend that the policy exclusions on which they rely "clearly and unambiguously"

standard for establishing bad faith under Georgia law.[15] Second, the trial court erred in concluding that there were no genuine disputes of fact relating to the Insurers' mishandling of Westlake's claim.

A. The Trial Court Misapplied the Georgia Bad Faith Standard

The trial court stated in its Bad Faith Order that "even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith," "when there is no evidence of unfounded reason for the nonpayment, *or* if the issue of liability is close, the court should disallow imposition of bad faith penalties." Bad Faith Order at 9-10, JA000034-35. This is an accurate statement of Georgia law. However, having correctly stated the standard, the trial court misapplied it.

The trial court concluded that because there was some evidence that certain additional information may have aided the Insurers in the determination of the amount of damage resulting from the Tank Car Rupture, there was a "reasonable question as to [the Insurers'] liability in regard to coverage." *Id.* Thus, the trial court held that summary judgment on the Insurers' bad faith claim was appropriate notwithstanding its own acknowledgment of a material factual dispute, and despite the fact that the information at issue did not relate to the question of ***whether*** there was coverage, but rather only related to the question of ***how much*** coverage was due. *Id.*

Moreover, in so holding, the trial court misapplied the very standard it had correctly set out

---

preclude coverage for Westlake's claim. However, in their Motion for Summary Judgment, the Insurers took a different position – that the exclusions' application in this case is such a close call that it precludes a finding of bad faith as a matter of law.

[15] To prevail on a claim for an insurer's bad faith under OCGA § 33-4-6, the insured must prove (1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer within 60 days prior to filing suit, and (3) that the insurer's failure to pay was motivated by bad faith. Because the trial court's Bad Faith Order depends entirely on the third prong of this test, Westlake only addresses that issue here.

earlier. The existence of (disputed) facts supporting a reasonable basis for the Insurers' coverage decision does not qualify as "no evidence of unfounded reason for the nonpayment," where – as in this case – there is copious evidence of unfounded reasons for the nonpayment.

Under Georgia law, a policyholder is not entitled to recover for a claim of bad faith if the insurer had "any reasonable grounds to contest the claim…." *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d 130, 135 (Ga. Ct. App. 2021) (citing *Lee v. Mercury Ins. Co. of Ga.*, 808 S.E.2d 116, 133 (Ga. 2017)). Contrary to the Bad Faith Order, the Georgia Court of Appeals has recognized that the question of an insurer's bad faith is normally one of fact for the jury. *See id.* ("Ordinarily the question of bad faith is one for the jury."); *Binns v. Metro. Atlanta Rapid Transit Auth.*, 301 S.E.2d 877, 878 (Ga. 1983) ("The question of the insurer's good faith (or lack thereof) is one of fact for the jury…."); *Atl. Am. Life Ins. Co. v. Morris*, 241 S.E.2d 463, 464 (Ga. Ct. App. 1978) ("The existence, or not, of bad faith is a jury question."); *Bituminous Cas. Corp. v. Mowrey*, 244 S.E.2d 573, 579 (Ga. Ct. App. 1978) ("The question of good or bad faith of the insurer is for the jury."). Accordingly, courts applying Georgia law will deny an insurer's motion for summary judgment where the insurer's conduct is the subject of disputed issues of material fact. *Amaya v. State Farm Fire & Cas. Co.*, No. 1:23-cv-00414-LMM, 2024 WL 4005215, at *3-4 (N.D. Ga. Jun. 24, 2024) (citing *Montgomery* and denying summary judgment when "[c]onstrued in the light most favorable to Plaintiff, the evidence could support a jury's finding that Defendant acted in bad faith by delaying or refusing to pay claims covered under the Policy."); *Tooker v. Amco Ins. Co.*, No. 1:09-cv-1466, 2010 WL 11601876, at *5 (N.D. Ga. Dec. 1, 2010) (denying motion for summary judgment on bad faith claim because there was factual question as to whether plaintiff's conduct "provided defendant a reasonable basis to contest plaintiff's claim"); *Moss v. State Farm Fire & Cas. Co.*, No. 7:08-CV-33, 2010 WL 11519635, at *6 (M.D. Ga. Mar. 30, 2010)

("Here, upon view of the entire record, the Court finds there exists a genuine issue of material fact as to whether or not [the insurer] unreasonably failed to properly investigate Plaintiff's alleged loss and unreasonably failed to adequately reimburse plaintiff for his alleged losses" thus precluding award of summary judgment for insurer). Only where there is "***no evidence of unfounded reason for the nonpayment***" or where the issue of liability under the policy is "close," can the court decide as a matter of law that bad faith penalties are not allowed. *See Montgomery*, 859 S.E.2d at 135 (emphasis added).

In contravention of this Georgia-law standard, the trial court's Bad Faith Order erroneously concluded that because there was ***some*** disputed evidence as to the reasonableness of the length of the Insurers' investigation that "there is ***no evidence of unfounded*** reason for the nonpayment." *See* Bad Faith Order at 8-10, JA000034-36 (emphasis added) (citing *Montgomery*, 859 S.E.2d at 135). This is a misapplication of the Georgia standard articulated above and the general principles governing Rule 56 motions, both of which require that any disputed material fact be resolved by the finder of fact. Here, as explained below, extensive material disputes of fact preclude a finding in the Insurers' favor on summary judgment.

B. The Record Is Replete With Evidence of the Insurers' Bad Faith

Granting summary judgment in favor of the Insurers on the question of bad faith necessarily involved the resolution of material disputes of fact in the Insurers' favor. The trial court erred by resolving material disputes of fact in the Insurers' favor with respect to two issues.

1. Material disputes of fact preclude a finding as to the Insurers' motivation for delaying their investigation and denying coverage

The record is replete with evidence that the Insurers' refusal to pay Westlake's claim was motivated by bad faith – and not any good faith attempt by the Insurers to investigate and adjust the loss as required under the Policies and Georgia law. Specifically, the evidentiary record shows:

- From the outset of the loss in August 2016, the Insurers were aware of the key facts of the Tank Car Rupture that they later cited as the bases for invoking various policy exclusions and refusing to pay Westlake's claim.

- The Insurers never raised with Westlake any of the exclusions – or any other defense to coverage – at any time during the first 16 months of the adjustment process, during which time the original adjustment team was estimating a loss in the range of $10 million to $15 million, was acting as if Westlake's claim was covered, and was making plans for repair and/or replacement of the damaged property.

- The Insurers' own first team of technical consultants and loss adjustors proposed a process of working cooperatively with Westlake and its technical consultants on the assessment of the scope and extent of damage and the method of remediation of the damage.

- After the results of that technical assessment were discussed among Westlake and the Insurers' first team of consultants, those consultants reported their findings to the Insurers in December 2017, and provided an order of magnitude estimate of the loss of $220 million to $404 million, which greatly exceeded the amount the Insurers were expecting (which prior to this point was approximately $10 million to $15 million).

- Upon receiving the $220 million to $404 million loss estimate, the Insurers immediately and drastically changed the course of the investigation by retaining outside counsel, who in turn retained a second team of "enhanced" adjusters and technical experts and by issuing a reservation of rights letter asserting for the very first time certain exclusions in the Policies that the trial court later concluded unambiguously did not apply.

- The Insurers second team of adjusters and consultants then conducted an "investigation" ostensibly for the purpose of adjusting the claim but really for the purpose of obtaining pre-litigation discovery from Westlake even as they assured Westlake that their adjustment process was "ongoing." The Insurers refused to share the results of their second team's "investigation" despite Westlake's repeated requests.

- After Westlake provided a proof of loss in March 2019 and requested a meeting to discuss the claim, the Insurers preemptively sued Westlake in a foreign jurisdiction in an effort to avoid litigating the coverage issues in West Virginia.

- Despite informing Westlake that its claim was not covered at all in their denial letter and lawsuit, the Insurers internally maintained claim reserves that estimated that the value of the loss was in excess of $100 million.

- Despite refusing to provide coverage to Westlake for the Tank Car Rupture, one of the Insurers, HDI, actually paid the claim of a neighboring landowner resulting from the very same accident and for the very same type of damage and involving substantially similar policy language, without raising any coverage defenses.

These facts and many others in the record could well support a jury finding that the Insurers raised

their coverage defenses and refused to pay Westlake's claim only after they were informed that the extent of the claim may be in the hundreds of millions of dollars. This is a classic example of bad faith, where an insurer makes a coverage determination based on the dollar amount of the claim and its own business interests rather than the facts of the claim, the needs of their policyholder, the terms of their contracts, and applicable law.

None of the aforementioned facts are addressed beyond a cursory acknowledgment in the trial court's Bad Faith Order. *See* Bad Faith Order at 21-23, JA000046-48. Instead, the Order focuses on two facts – (1) the disparity between the initial damages estimate and the amount requested by Westlake in the March 2019 proof of loss; and (2) the Insurers' claim that they did not obtain photographs showing the pre-loss condition of the plant until November 2018 – in stating that the trial court "cannot conclude that the Defendants changed course solely based upon EDT&T's estimate," and thus had a reasonable basis to continue investigating. *Id.*

In reaching this conclusion, the trial court erred in two respects. First, the trial court ignored the facts outlined above regarding the improper motivations for the Insurers' about-face change of position regarding coverage, which preclude the entry of summary judgment. *See generally id.* Second, the trial court drew all inferences from those disputed facts in the Insurers' favor, and not in the non-movant (Westlake's) favor, as it was required to as a matter of law. *See generally id.*

2. Material disputes of fact preclude a finding that the Insurers relied on the advice of their experts in denying Westlake's claim

Under Georgia law, it is reasonable for an insurer to deny a claim based on the advice of technical consultants. *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d at 135 (Ga. Ct. App. 2021). However, such an excuse only applies if there is no evidence that the advice "is in the nature of mere pretext for an insurer's unwarranted prior decision to [deny the claim]."

Wallace v. State Farm Fire Cas. Co., 539 S.E.2d 509, 511 n. 6 (Ga. Ct. App. 200); *Montgomery*, 859 S.E.2d at 135 (explaining that one of the exceptions to the foregoing rule arises when "the advice is in the nature of mere pretext for an insurer's unwarranted prior decision to [deny the claim]"); *SAGU LLC v. Grange Ins. Co.*, No. 1:19-cv-203 (WLS), 2022 WL 1624814, at *6 (M.D. Ga. Mar. 30, 2022) (denying motion for summary judgment on bad faith claim where "there is evidence in the record that would enable a finder of fact to find that the advice of Defendant's independent consultants was either patently wrong or a mere pretext for the Defendant's prior decision to deny the claim."). The trial court concluded here that, simply because the Insurers "retained ED&T, Failure Analysis & Prevention, Inc., Telecordia, and Werlinger & Associates to provide technical assistance" and those technical advisors provided recommendations to the Insurers, that summary judgment was appropriate. Bad Faith Order at 23-25, JA000048-50.

As explained above, material disputed facts indicate that the Insurers' purported reliance on the advice of this "enhanced" technical team was nothing more than a pretext for their decision to deny Westlake's claim once they learned the potential magnitude of the loss amount. Further underscoring the pretextual nature of the Insurers' alleged reliance, some of the Insurers' own representatives admitted during depositions in this case that the Insurers' decision to deny coverage was ***not*** based on the Insurers' technical consultants' findings, but instead based on their exclusion defenses, *see, e.g.,* JA002998-2999, which have been held to be unambiguously inapplicable. Also, multiple Insurer witnesses admitted that they had never seen the "enhanced" experts' presentation on their investigation prior to preparing for depositions in connection with this litigation (and thus, could not possibly have relied on that presentation in deciding to deny coverage). *See, e.g.,* JA008564-65, JA008581-8582.

Moreover, the Insurers were well aware from the outset of Westlake's loss of the facts on

which they later based their exclusion defenses. Specifically, almost immediately after the Tank Car Rupture occurred, the Insurers' adjustor informed the Insurers that the Tank Car Rupture released chlorine that contaminated the Natrium Plant and caused significant corrosion damage. JA004675. At the same time, the Insurers were informed that the tank car had failed following faulty repair work performed on it by third-party vendors, and they immediately hired subrogation counsel to explore a subrogation claim on behalf of the Insurers against those Maintenance Vendors. Despite knowing the foregoing almost immediately after the accident occurred, the Insurers did not identify exclusions to Westlake as potential coverage defenses because they realized at the time that these exclusions did not apply in the context of a catastrophic industrial accident. It was not until January 18, 2018 – more than sixteen months after the loss but only three weeks after receiving ED&T's $220 million to $404 million estimate – that the Insurers sent a letter to Westlake, ghost-written by their newly hired coverage counsel, asserting these exclusions for the first time.

Thus, at the least, a material dispute of fact as to whether the Insurers' so-called reliance was pretextual precludes summary judgment on this question. *See SAGU LLC*, 2022 WL 1624814, at *6 (holding summary judgment not appropriate where there was some evidence, given competing expert opinions, that the reliance on the insurer's expert was mere pretext). In resolving this issue in the Insurers' favor, the trial court's Bad Faith Order is in error.

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT PRE-JUDGMENT INTEREST BEGAN TO ACCRUE FROM THE DATE OF THE JURY VERDICT IN THE PENNSYLVANIA LITIGATION (AUGUST 10, 2022) AS OPPOSED TO THIRTY DAYS AFTER THE DATE WESTLAKE SUBMITTED ITS PARTIAL PROOF OF LOSS (JUNE 21, 2018)

Because Westlake prevailed on its breach of contract claim, it is likewise entitled to pre-judgment interest as a matter of Georgia law. Under Georgia law, in all contract cases, the non-breaching party may, at the court's discretion, be entitled to recover pre-judgment interest from

the time of the breach until recovery. Ga. Code § 13-6-13; *PHA Lighting Design, Inc. v. Kosheluk*, No. 1:08-cv-01208, 2010 WL 11493311, at *3 (N.D. Ga. Dec. 21, 2010) (awarding pre-judgment interest under Ga. Code § 13-6-13 on summary judgment motion for damages); *Travelers Cas. & Sur. Co. of Am. v. Chase Building Grp., LLC*, No. 1:09-cv-730, 2010 WL 11508706, at *3 (N.D. Ga. Jan. 15, 2010) (awarding pre-judgment interest on summary judgment for breach of indemnity agreement).

Here, the trial court properly exercised that discretion and awarded Westlake pre-judgment interest. However, the trial court erred in concluding, as a matter of law, that Westlake's claim for pre-judgment interest began to run from the date that the Pennsylvania court entered final judgment in the Pennsylvania litigation rather than when Westlake submitted its first partial proof of loss that the Insurers refused to pay. As noted, above, pre-judgment interest runs from the time of the breach. *See* Ga. Code § 13-6-13. That breach occurred when the Insurers first refused to pay Westlake's valid claim for coverage (*i.e.*, June 21, 2018).

CONCLUSION

For the reasons set forth above, Westlake respectfully requests that this Court reverse the trial court's Collateral Estoppel Order and Bad Faith Order, as well as the trial court's ruling regarding the date on which pre-judgment interest begins to run. This Court should then remand this case to the trial court for jury trial on the amount of Westlake's breach-of-contract damages, as well as a determination as to whether the Insurers breached their duty of good faith and fair dealing in their handling of Westlake's loss and, if so, the amount of bad-faith damages to which Westlake is entitled under Georgia law.

PETITIONERS, **by Counsel**:

Dated: March 10, 2025

/s/ Jessica L.G. Moran
John M. Sylvester (*pro hac vice*)
David R. Osipovich (*pro hac vice*)
Travis L. Brannon (WVSB # 12504)
Jessica L.G. Moran (*pro hac vice*)
Lukus P. Freeman (*pro hac vice*)
K&L Gates LLP
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-650
john.sylvester@klgates.com
david.osipovich@klgates.com
travis.brannon@klgates.com
jessica.moran@klgates.com
lukus.freeman@klgates.com

Jeffrey V. Kessler (WVSB # 2026)
Berry, Kessler, Crutchfield, Taylor & Gordon
514 7th Street
Moundsville, WV 26041
Tel: (304) 845-2580
jkessler@bkctg.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2025, a true and correct copy of the foregoing Petitioners' Brief was served via e-mail and overnight mail, postage prepaid, on the following:

Counsel for Respondents:

Jeffrey M. Wakefield
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
jwakefield@flahertylegal.com

James A. Varner, Sr.
Debra T. Varner
Varner & Van Volkenburg, PLLC
360 Washington Ave.
Clarksburg, WV 26301
javarner@vv-wvlaw.com
dtvarner@vv-wvlaw.com

Myles A. Parker
Alexandra F. Markov
Justin M. Sumrall
Jacob Stutzman
Carroll Warren & Parker PLLC
4270 I-55 N. Frontage Road
Jackson, MS 39211
Telephone: (601) 592-1010
Facsimile: (601) 592-6060
mparker@cwplaw.com
amarkov@cwplaw.com
jsumrall@cwplaw.com
jstutzman@cwplaw.com

/s/ Jessica L.G. Moran

Counsel for Petitioners Axiall Corporation and Westlake Chemical Corporation