

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-183

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WESTLAKE CHLOR-VINYLS CORPORATION, formerly known as AXIALL CORPORATION, and WESTLAKE NATRIUM LLC, formerly known as EAGLE NATRIUM, LLC,
Petitioners,

v.

IPI, INC., and MATTHEW JOSEPH TAYLOR,
Respondents.

**BRIEF OF PETITIONERS WESTLAKE CHLOR-VINYLS CORPORATION
AND WESTLAKE NATRIUM LLC**

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I. INTRODUCTION

Petitioners Westlake Chlor-Vinyls Corporation, f/k/a Axiall Corporation (“Westlake Chlor-Vinyls”), and Westlake Natrium LLC, f/k/a Eagle Natrium LLC (“Westlake Natrium”) (collectively, “Westlake”) submit this brief in support of their appeal from a final decision of the Intermediate Court of Appeals (“ICA”) affirming in part, vacating in part and remanding the Circuit Court’s order granting Westlake’s motion for partial summary judgment on counterclaims for breach of contract and express indemnification against Respondent IPI, Inc. (“IPI”) for claims brought by IPI and Respondent Matthew Joseph Taylor arising out of a release of 178,400 pounds of chlorine caused by a crack in railcar AXL 1702 (“1702”) at Westlake’s facility in Natrium, West Virginia (the “Natrium Plant”) on Saturday, August 27, 2016 (the “Railcar Release”). The ICA erred in holding that the Agreement for On-Site Services (“AOS”) exclusively controls IPI’s duty to indemnify Westlake. The ICA further erred in holding that the Circuit Court did not adequately explain its decision concerning the nexus required for indemnification. Finally, the ICA erred in holding that if the Circuit Court determines that there is a sufficient nexus, it will need to determine whether there are genuine issues of material fact concerning sole negligence, willful misconduct, or possibly gross negligence.

The Circuit Court correctly held the AOS and terms and conditions (“T&Cs”) construed as a whole require indemnification for any and all claims, liability, damage, loss, penalties, fines, cost, and expense of any kind whatsoever, sustained in connection with performance of services under Purchase Order (“PO”) 45100044817 arising from any cause whatsoever, except in the case of Westlake’s sole negligence or willful misconduct, which is not present here. Therefore, the Court should reverse the ICA’s opinion insofar as it vacated and remanded the Circuit Court’s order and instruct the ICA to affirm partial summary judgment for Westlake in all respects.

II. ASSIGNMENTS OF ERROR

The ICA erred in vacating in part and remanding the Circuit Court's grant of partial summary judgment to Westlake on the counterclaims for breach of contract and express indemnity.

A. The ICA erred in holding that the AOS exclusively controls IPI's duty to indemnify Westlake because the AOS, PO 45100044817, and T&Cs are incorporated into one agreement that must be construed as a whole to avoid inconsistencies and conflicts and because the priorities and orders clause in the AOS requires that terms and conditions be prioritized and ordered without annulling the remaining terms and conditions of the T&Cs.

B. The ICA erred in holding that the Circuit Court did not adequately explain its decision concerning the nexus required for indemnification because, not only did the Circuit Court explain its decision, the plain language of the indemnity clause in the AOS applies to Respondents' claims and costs and expenses of any kind whatsoever for personal injuries or property damages involving Respondents sustained in connection with IPI's performance of the services arising from any cause whatsoever and the plain language of the indemnity clause in the T&Cs applies to the claims and expenses including reasonable attorneys' fees for personal injuries or property damages arising or allegedly arising from or related to the subject matter of PO 45100044817.

C. The ICA erred in holding that if the Circuit Court determines that there is a sufficient nexus between IPI's activities and the resulting injuries to trigger a duty to indemnify, it will need to determine whether there are genuine issues of material fact regarding sole negligence, willful misconduct, or possibly gross negligence because IPI has neither pleaded as an affirmative defense to the counterclaims nor submitted any evidence of Westlake's sole negligence or willful misconduct and a Pennsylvania jury has found that Westlake's negligence was less than fifty percent of the cause of the Railcar Release in a verdict that has been upheld on appeal.

III. STATEMENT OF THE CASE

A. Statement of Facts

The Natrium Plant has been in operation since the 1940s making chlorine and other products and providing work for hundreds of employees and many contractors in the tri-state region. IPI is a contractor that provided services at the Natrium Plant for many years beginning in 2007. IPI performed maintenance tasks on-site, including painting the outside of large tanks and applying special coatings on their interiors. IPI claims it collected more than \$1,500,000.00 annual revenue for work performed at the Natrium Plant. J.A. 68.

Three documents form the contract that bound IPI when it worked at the Natrium Plant. The first is the AOS, which is the predicate contract that vendors must have in place before being awarded a PO. J.A. 281–91. The second is the PO that is incorporated into the AOS, which defines the scope of any given project. J.A. 281, 369–70. The third is the T&Cs that are incorporated into each PO. J.A. 308–13. The AOS provides that if there are any terms or conditions that are inconsistent or in conflict with the AOS, the terms and conditions of the documents shall control in the following priority and order: the front of the PO, the AOS, then the T&Cs. J.A. 281.¹

The AOS, which was signed by Mr. Taylor as IPI’s president, was executed when PPG Industries, Inc. (“PPG”) owned and operated the Natrium Plant in 2007. JA. 291. The AOS contains a standard indemnification clause in section 4, including:

Contractor assumes the risk of all damages, losses, costs and expenses, and agrees to indemnify, defend and hold harmless Buyer, their directors, officers, agents, and employees from and against any and all claims, liability, damage, loss, penalties, fines, cost and expense of any kind whatsoever which may accrue to or be sustained by any Buyer, their directors, officers, agents or employees, arising out of this Agreement and/or the Services, including, without limitation, for the death of or injury to persons or destruction of property involving Contractor, its employees, agents and representatives, sustained in connection with performance of the

¹ An integration clause in the AOS confirms that the parties’ agreement consists of the AOS, POs, and T&Cs. See J.A. at 290.

Services, arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device supplied by Buyer or their employees to Contractor, its employees, agents or representatives at the request of Contractor, its employees, agents or representatives), except to the extent arising out of the sole negligence or willful misconduct of the Buyer or its employees acting within the scope of their employment. The indemnification obligation of this Section 4 shall be deemed modified as required to exclude that degree of indemnification required aforesaid which is expressly prohibited by applicable law, statute or regulation, if any; but to the extent the aforesaid indemnification obligation is valid and enforceable, it shall remain in effect though modified. The indemnity obligations of Contractor hereunder shall survive the termination or expiration of this Agreement and of any applicable Accepted Order.

J.A. 282.

On the same page, in the next section 5 the AOS further contains a standard clause requiring contractors to maintain insurance, which reads in relevant part:

Contractor, at its own expense, shall effect and maintain, and at all times keep current, insurance in the amounts and types hereinafter set forth during the progress of any of the Services with insurance companies approved by PPG and shall submit certificates to PPG, evidencing such. A complying insurance certificate must be provided to PPG within ten (10) days of the Effective Date and prior to any Service being performed, and complying certificates for renewals prior to the expiration date of the then insurances; **Contractor acknowledges and agrees that the aforesaid obligation to provide complying certificates to PPG is a material precondition to Contractor's receipt of any payment from PPG or the applicable Buyer for the Services. . . .** Contractor shall not be relieved of any liability that falls within applicable deductibles, it being specifically understood that Contractor shall be solely responsible to pay all claims wholly or partly falling within any deductible and shall hold harmless and indemnify Buyer therefrom.

J.A. 282.

The insurance clause specifically requires workers' compensation or workplace safety insurance, and other applicable social insurance, employer's liability insurance, comprehensive (commercial) general liability insurance ("CGL") for bodily injury and property damage, automobile liability insurance. The insurance clause further provides among other things that the certificates of insurance evidencing the insurance coverages shall stipulate that any applicable

Buyer shall be named as an additional insured under the insurance. J.A. 282–83. Finally, the insurance clause provides:

It is understood neither PPG nor any other Buyer in any way represents that the types or the limits of insurance, hereinabove specified, are sufficient or adequate to protect Contractor's interests or liabilities. Contractor agrees to, and hereby does, waive subrogation against Buyer under all such insurance, and all policies of insurance which Contractor must furnish shall contain an endorsement whereby the carrier waves any and all rights of subrogation against buyer.

J.A. 283.

In 2012 and 2013, the Natrium Plant was transferred to Eagle Natrium, an entity indirectly owned by Axiall. IPI executed a consent transferring the AOS to Eagle Natrium, understood that the AOS was being transferred to Eagle Natrium, and was aware that it had to transfer the AOS to Eagle Natrium in order to keep working at the Natrium Plant. J.A. 303–04.²

In August 2016, Eagle Natrium and IPI entered PO 4510044817. The front page of PO 4510044817 states: “Contractor must have on file with Purchasing Department: One (1) copy of certificate of insurance showing carrier, type of coverage, limits of coverage and Axiall LLC as an additional named insured, one (1) copy of Workman’s Comp Certificate, Natrium Intoxicant Screening letter (if applicable) and current West Virginia Contractor’s License or letter stating that they are exempt from the contractor’s license requirement. J.A. 369. The back page of PO 4510044817 states in bold capital letters: **“THIS PURCHASE ORDER IS SUBJECT TO, INCLUDES AND INCORPORATES HEREIN BY REFERENCE THE UNITED STATES PURCHASE ORDER GENERAL CONDITIONS FOR Eagle Natrium LLC LOCATED AT [HTTP://WWW.AXIALL.COM/COMPANY](http://www.axiall.com/company).”** J.A. 370.³

² The AOS contains a clause in section 14 indicating that with such consent the AOS and all POs shall bind and inure to the benefit of the successors and assigns of the respective parties. J.A. 290. Accordingly, the term “Buyer” includes successors such as Eagle Natrium, LLC (“Eagle Natrium”) and Axiall Corporation (“Axiall”) and now Westlake.

³ Although PO 4510044817 was not signed by a representative of IPI, the ICA correctly held that it was accepted as a contract nonetheless because the T&Cs stated that a PO could be accepted by failing to object in writing to its terms within ten days or by performing under the PO. In addition, the ICA noted a long history of the parties using POs that

The T&Cs in effect at the time of the Railcar Release also contain an indemnification clause in section 13 that states as follows:

Seller assumes the risk of all damage, loss, costs and expense, and agrees to indemnify, defend and hold harmless Buyer, its officers, employees and representatives, from and against any and all damages, claims, demands, expenses (including reasonable attorneys' fees), losses or liabilities of any nature whatsoever, and whether involving injury or damage to any person (including employees of Seller and Buyer) or property, and any and all suits, causes of action and proceedings thereon arising or allegedly arising from or related to the subject matter of this Purchase Order, except where such injury or damage was caused by the sole negligence of Buyer. This indemnity shall survive the termination or cancellation of this Purchase Order, or any part hereof.

J.A. 310.

On the same page in the next section 14 the T&Cs likewise contain an insurance clause that reads:

For work or services done for Buyer on premises designated by Buyer, Seller shall furnish Buyer, prior to commencement of the work or services, certificates of insurance showing that Seller has Worker's Compensation, Employer's Liability, and Comprehensive General Liability (including automobiles) coverages in the minimum amounts and form as may be specified by Buyer, which coverages shall not be allowed to change or expire until all services or work have been completed and accepted.

J.A. at 310.

The Railcar Release occurred on August 27, 2016. At that time, 1702 experienced a crack that caused the release of 178,400 pounds of chlorine. 1702 had just been returned to service, and the release occurred after it was loaded for the first time and placed in a holding area. The car had just been inspected by AllTranstek, LLC ("AllTranstek"), a third party that provided railcar maintenance services. Recommended repair work had been performed at a shopping facility

incorporated the T&Cs by reference. J.A. 10 (citing *Westinghouse Elec. Co. v. Murphy, Inc.*, 228 A.2d 656 (Pa. 1967)). See *Axiall Corp. v. AllTranstek LLC*, No. 966 WDA 2022, 2024 WL 2811827, at *8–9 (Pa. Super. June 3, 2024) (holding that contractor's actions in performing under purchase orders established acceptance of Axiall's offers, thereby forming contracts).

operated by Rescar, Inc. (“Rescar”), a company owned by AllTranstek. During the shopping process, another third party, Superheat GFH Services, Inc. (“Superheat”), performed specialized post weld heat treatments. The failures of AllTranstek, Rescar and/or Superheat contributed to the rupturing of 1702. J.A. 349–51. The release resulted in a cloud of chlorine that moved south through the Natrium Plant. J.A. 505–06.

At the time of the Railcar release on August 27, 2016, Mr. Taylor and his crew were painting Tank 24 at the Natrium Plant pursuant to PO 45100044817. J.A. 319. The Natrium Plant has designated emergency gates that are always unlocked, which are identified on evacuation route maps located throughout the facility. Had Mr. Taylor gone to any of these, he would have been able to exit the facility simply by using a push-bar. Instead, Mr. Taylor proceeded with his men to a “freight gate,” which was opened when an IPI employee called the guard house. J.A. 508–09. While Mr. Taylor had an escape respirator, which is required safety equipment for all contractors, he states he was exposed to chlorine and went to the Natrium Plant’s infirmary. J.A. 506, 509. He was transported to a local emergency department and then to Ruby Memorial in Morgantown. Mr. Taylor was evaluated and released the same day from the Ruby Memorial Emergency Department, travelling back to the Natrium Plant that evening to get some personal items. J.A. 320. Mr. Taylor returned to work the following Monday, the release being the previous Saturday, and worked a 12.5 hour day. J.A. 327. Mr. Taylor has admitted that he does not know who is responsible for the Railcar Release. J.A. 322.

As a matter of public record, a Pennsylvania jury has found that Westlake’s negligence was 40%, Rescar’s negligence was 40%, and AllTranstek’s negligence was 20% of the cause of the Railcar Release in a verdict that has been upheld on appeal, *See Axiall Corp. v. AllTranstek LLC*, No. 966 WDA 2022, 2024 WL 2811827 (Pa. Super. June 3, 2024).

B. Procedural History

On January 29, 2018, IPI and Mr. Taylor filed a complaint against Axiall, Eagle Natrium, Westlake Chemical Corporation (“Westlake Chemical”), and Charles Zeigler in the Circuit Court of Marshall County. The complaint contains several claims for personal injury and property damage related to two chlorine gas releases, the larger of which is the Railcar Release.⁴ A.R. 62–91. Axiall and Eagle Natrium pleaded counterclaims against IPI for breach of contract and express indemnification based on the AOS, PO 4510044817, and T&Cs. J.A. 186–245.

On May 23, 2022, Axiall, Eagle Natrium, Westlake, and Mr. Zeigler filed a motion for partial summary judgment on the claims in the complaint. Axiall and Eagle Natrium also filed a motion for partial summary judgment on their counterclaims for breach of contract and express indemnification related to the Railcar Release. J.A. 262–417.

On September 8, 2022, the Circuit Court entered an Order Granting in Part and Denying in Part Defendants’ Motion for Partial Summary Judgment on the claims in the complaint. Among other things, the Circuit Court granted summary judgment in favor of Westlake Chemical and Mr. Zeigler and dismissed all claims against them with prejudice. The Circuit Court also granted summary judgment in favor of Westlake on several claims but denied summary judgment on claims for premises liability, property damage, and personal injury to Mr. Taylor. The Circuit Court noted that nothing in its September 8 Order should be construed to alter, amend, or determine the interpretation of the separate order Granting Counter-Plaintiffs’ Motion for Partial Summary Judgment Regarding Indemnification Related to the Railcar Release. *See* J.A. 60.

On September 12, 2022, the Circuit Court entered an Order Granting Counter-Plaintiffs’ Motion for Partial Summary Judgment Regarding Indemnification Related to the Railcar Release.

⁴ A subsequent smaller scrubber release (the “Scrubber Release”) is not at issue on appeal.

Specifically, the Circuit Court entered judgment in favor of Westlake on the breach of contract and express indemnification counterclaims related to the Railcar Release. The Circuit Court found no just reason for delay and further that its order constitutes a final judgment as to the validity, appealability, and breach of IPI's contract and indemnity obligations in the AOS, PO, and T&Cs as they relate to the Railcar Release and that the Order is immediately appealable. J.A. 770.

IPI appealed to the ICA. *See* J.A. 1. Following briefing and oral argument the ICA issued a signed opinion on January 30, 2024. The ICA affirmed the Circuit Court insofar as it determined that IPI is subject to binding and enforceable indemnity agreements, that such agreements are governed by Pennsylvania law, and that the indemnity language of the AOS is sufficiently clear and unequivocal to permit indemnification for at least some degree of negligence. The ICA, however, vacated and remanded the case for the Circuit Court to reconsider and develop its ruling on the scope of the applicable indemnity provision, in particular the nexus required for indemnification and its application to the facts of this case. The ICA instructed that if the Circuit Court decides on remand that there is a sufficient nexus between the work being performed by IPI and the injuries and losses that resulted from the Railcar Release to apply the indemnification clause, then the Circuit Court must further address whether there are genuine issues of material fact pertaining to sole negligence, gross negligence, or willful misconduct. In that regard, the Circuit Court was instructed to consider the ability to authenticate documents without affidavits, the effect, if any, of West Virginia's comparative fault statute, and the burden of proof. Finally, the ICA instructed that it may also be necessary to rule on the admissibility of the NTSB accident report under 49 U.S.C. § 1154(b) (2018) and 49 C.F.R. § 835.2 (1999). J.A. 54.

The ICA issued its mandate thereafter on March 1, 2024. *See* J.A. 2. This appeal timely followed on March 29, 2024.

IV. SUMMARY OF THE ARGUMENT

The ICA erred in holding that the AOS exclusively controls IPI's duty to indemnify Westlake. The AOS, PO 45100044817, and T&Cs are incorporated into one agreement that must be construed as a whole to avoid inconsistencies and conflicts wherever possible such as here. In addition, the priorities and orders clause in the AOS requires that terms and conditions be prioritized and ordered without annulling the remaining terms and conditions as the ICA did.

The ICA further erred in holding that the Circuit Court did not adequately explain its decision concerning the nexus required for indemnification. Not only did the Circuit Court explain its decision, the plain language of the indemnity clause in the AOS applies to Respondents' claims and costs and expenses of any kind whatsoever for personal injuries or property damages involving Respondents sustained in connection with IPI's performance of the services arising from any cause whatsoever. Further, the plain language of the indemnity clause in the T&Cs applies to the claims and expenses including reasonable attorneys' fees for personal injuries or property damages arising or allegedly arising from or related to the subject matter of PO 45100044817 at issue here.

Finally, the ICA erred in holding that if the Circuit Court determines that there is a sufficient nexus between IPI's activities and the resulting injuries to trigger a duty to indemnify, it will need to determine whether there are genuine issues of material fact regarding sole negligence, willful misconduct, or possibly gross negligence. IPI has neither pleaded as an affirmative defense to the counterclaims nor submitted any evidence of Westlake's sole negligence or willful misconduct and a Pennsylvania jury has found that Westlake's negligence was less than fifty percent of the cause of the Railcar Release in a verdict that has been upheld on appeal. Therefore, the Court should reverse the ICA's opinion insofar as it vacated and remanded the Circuit Court's order and instruct the ICA to affirm partial summary judgment for Westlake in all respects.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should hear oral argument under West Virginia Rule of Appellate Procedure 18 and 20(a) because oral argument will aid the decisional process and this appeal involves issues of fundamental public importance regarding indemnification agreements. In addition, the Court should issue a signed and published opinion. See W. Va. R. App. P. 22.

VI. ARGUMENT

A. Standard of Review

This Court reviews a circuit court's entry of summary judgment *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, 756 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary that a circuit court must apply, and that standard states, “[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.” *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815, 820 (2005) (quoting *Painter*, 451 S.E.2d at 756, Syl. Pt. 2). “Summary judgment is appropriate if, from the totality of the evidence presented ... the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329, 333 (1995). “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.” *Id.*, 459 S.E.2d at 337 (citations omitted). See also Syl. Pt. 1, *Zaleski v. W. Va. Physicians’ Mut. Ins. Co.*, 220 W. Va. 311, 647 S.E.2d 747 (2007) (“Appellate review of a partial summary judgment order is the same as that of a summary judgment order, which is *de novo*.” (citation omitted)).

B. The ICA Erred in Vacating in Part and Remanding the Circuit Court’s Grant of Partial Summary Judgment to Westlake on the Counterclaims for Breach of Contract and Express Indemnity.

- 1. The ICA erred in holding that the AOS exclusively controls IPI’s duty to indemnify Westlake because the AOS, PO 45100044817, and T&Cs are incorporated into one agreement that must be construed as a whole to avoid inconsistencies and conflicts and because the priorities and orders clause in the AOS requires that terms and conditions be prioritized and ordered without annulling the remaining terms and conditions of the T&Cs.**
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The ICA misconstrued the AOS and T&Cs and erred in holding that the AOS exclusively controls IPI’s duty to indemnify Westlake. The AOS, PO 45100044817, and T&Cs are incorporated into one agreement that must be construed together as a whole to avoid inconsistencies and conflicts. In addition, even if there are inconsistencies and conflicts, the priorities and orders clause in the AOS requires that terms and conditions, rather than documents, be prioritized and ordered without annulling the remaining terms and conditions of the P&Cs.

Under applicable Pennsylvania contract law principles,⁵ the interpretation of a contract is a question of law. *Vinculum, Inc. v. Goli Techs., LLC*, 310 A.3d 231, 242 (Pa. 2024).

In interpreting a contract, the ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement. When construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties’ understanding. This Court must construe the contract only as written and may not modify the plain meaning under the guise of interpretation.

Stephan v. Waldron Elec. Heating & Cooling LLC, 100 A.3d 660, 665 (Pa. Super. 2014) (citation omitted). See *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1259 (Pa. 2015) (holding that when a contract is clear and unambiguous, Pennsylvania binds the parties to the intent contained within the writing itself).

⁵ The AOS provides that the AOS, POs, and the relations and rights of the parties shall be governed by Pennsylvania law. J.A. 290. The T&Cs also specifies that Pennsylvania law shall apply. J.A. 312. The ICA correctly affirmed the Circuit Court’s holding that Pennsylvania law applies to the indemnification clause. J.A. 17.

“[N]ot every term of a contract must always be stated in complete detail.” *Helpin v. Trs. of Univ. of Pa.*, 969 A.2d 601, 611 (Pa. Super. 2009), *aff’d*, 10 A.3d 267 (Pa. 2010). Rather, the terms of an offer may be incorporated by reference into the parties’ agreement if the party receiving the offer is provided reasonably conspicuous notice of the terms. *See Chilutti v. Uber Techs., Inc.*, 300 A.3d 430, 449 (Pa. Super. 2023) (*en banc*).

Pennsylvania law recognizes the principle of “incorporation by reference” where “the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.” *Jesmar Energy, Inc. v. Range Res.-Appalachia, LLC*, No. 17-928, 2018 WL 1471978, at *5 (W.D. Pa., Mar. 26, 2018) (quoting *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 760–61 (3d Cir. 2016)).

A contract must be construed as a whole to avoid ambiguities and inconsistencies and to give effect to all of the terms. *Commonwealth, Dep’t of Transp. v. Manor Mines, Inc.*, 565 A.2d 428 (Pa. 1989). *See Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 463-64 (Pa. 2015) (“the entire contract should be read as a whole ... to give effect to its true purpose”) (citation omitted). The court must construe all provisions of an agreement together and give effect to each. *Lesko v. Frankford Hosp.-Bucks Cnty.*, 15 A.3d 337, 342 (Pa. 2011). The court “will not interpret one provision of a contract in a manner which results in another portion being annulled.” *Id.* (citation omitted).

If a contract contains terms that might appear conflicting, Pennsylvania courts read the document as a whole and construe conflicting clauses as consistent with one another, if possible. “Clauses in a contract should not be read as independent agreements thrown together without any consideration of their combined effect.... ‘Terms in one section of the contract should not be

interpreted in a manner which nullifies other terms.” *Brown v. Cooke*, 707 A.2d 231, 233 (Pa. Super., 1998) (citation omitted). “[W]hen specific or exact provisions seem to conflict with broader or more general terms, the specific provisions are more likely to reflect the intent of the parties.” *Musko v. Musko*, 697 A.2d 255, 256 (Pa. 1997).

In this action, the applicable Pennsylvania contract law principles demonstrate that as a matter of law the intent of the parties is that the AOS, PO 45100044817, and T&Cs together form one agreement. Specifically, the AOS provides that each PO issued against the AOS is incorporated by reference into the AOS and made a part thereof with the same force and effect as though set forth in full in the AOS and with the signatures affixed to the AOS. J.A. 281. Similarly, PO 45100044817 provides that it is subject to, includes, and incorporates by reference the T&Cs. J.A. 370. An integration clause in the AOS confirms that the parties’ agreement consists of the AOS, POs, and T&Cs. *See* J.A. at 290. Under Pennsylvania law, the ICA should have construed the documents constituting the parties’ agreement together as a whole to avoid inconsistencies and conflicts and to give effect to each document without annulling any portion – let alone all T&Cs.

Properly construed, the terms and conditions of the indemnity clause in the AOS are not inconsistent and do not conflict with the indemnity clause in the T&Cs. Beginning with the AOS, the relevant language references indemnification for ...

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

J.A. 282.

The language from the T&Cs is substantially similar, requiring indemnification for ...

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

J.A. 310.

Instead of construing these indemnity clauses as a whole to avoid inconsistencies and conflicts, the ICA completely ignored Pennsylvania contract law principals. Citing to no law whatsoever, and without regard to the express incorporation provisions contained in the AOS and PO 45100044817 and the integration clause of the AOS, the ICA identified a handful of truncated differences in wording between the AOS and T&Cs and erroneously found them to be inconsistencies and conflicts without any attempt to construe the agreement as a whole to avoid ambiguities and inconsistencies and conflicts.

For example, the ICA relied upon the supposed difference from the addition of the word "demands" and the inclusion of the attorney's fees parenthetical after the word "expense" in the T&Cs. J.A. 19–20. Both "demands" and "attorneys' fees" are reasonably referenced in the AOS, given the broad language of "claims, liability, damage, loss . . . cost and expense of any kind whatsoever." J.A. 282. Given that the AOS language encompasses the supposed differences, no conflict exists.

Pennsylvania law requires this conclusion. The fact that an indemnification obligation does not explicitly reference attorneys' fees, does not mean they are not owed. The Pennsylvania Supreme Court has found that a provision in a trust agreement requiring that a party, "reimburse

the Trustee for all its expenditures, and to indemnify and save the Trustee harmless against any liabilities which it may incur in the exercise and performance of its powers and duties hereunder,” was broad enough to include the payment of attorney’s fees. *Fid.-Philadelphia Tr. Co. v. Philadelphia Transp. Co.*, 173 A.2d 109, 113 (Pa. 1961). The Court in that case specifically held that the broad scope of the language, similar to that found in the AOS, was sufficient to include attorney’s fees. *Id.* at 113–14. Given this law, and the fact that the language of the AOS encompasses any slight differences in language in the T&Cs, no inconsistencies or conflicts exist.

In addition, the ICA isolated the phrase “sustained in connection with performance of the Services” in the AOS and concluded that the T&Cs do not contain similar language. As discussed below, however, the phrase “sustained in connection with performance of the Services” in the AOS is substantially similar to the phrase “arising or allegedly arising from or related to the subject matter of this Purchase Order.” The phrase “in connection with” in the AOS means “in relation to (something): for reasons that relate to (something).” *IN CONNECTION WITH*, Merriam-Webster Dictionary. The term “related to” means connected with. *See RELATE TO*, Merriam-Webster Dictionary. The term “Services” in the AOS refers to services specified and described in a PO. J.A. 282. Accordingly, these provisions in the AOS and T&Cs are substantially similar.

Also, the ICA isolated the phrase “arising from any cause whatsoever ...” in the AOS and determined that the T&Cs do not contain similar language. The ICA, however, overlooked the phrase “of any nature whatsoever” in the T&Cs, which is substantially similar to this phrase in the AOS and another phrase in the AOS, “of any kind whatsoever.”

Inconsistency and conflict suggest irreconcilability, and to the extent that more specific language clarifies an indemnification obligation, nothing need be reconciled. Even if a difference were interpreted to exist, it would only mean that one of the clauses creates a broader obligation,

not that the two are in opposition. Without an inconsistency or conflict, there is no need to invoke the priorities and orders clause in the AOS. Even if a prioritization and ordering was necessary, it should have been limited to prioritization and ordering of any terms and conditions that are wholly irreconcilable without annulling the remaining terms and conditions of the T&Cs.

The ICA compounded its error by misapplying the priorities and order provision of the AOS. Even if there are inconsistencies and conflicts, the priorities and orders clause in the AOS requires that terms and conditions, rather than documents, be prioritized and ordered without annulling the remaining terms and conditions of the T&Cs. J.A. 281. The ICA's holding that the AOS exclusively controls indemnification thus violates the order of prioritization language because once the ICA found what it determined to be an inconsistency or conflict it ordered and prioritized the documents rather than any irreconcilably inconsistent and conflicting terms and conditions, resulting in annulment of the T&Cs in their entirety.

In contrast to the ICA's errors, the Circuit Court properly reviewed Pennsylvania law regarding contracts and indemnification agreements and concluded:

IPI entered into binding and enforceable contracts, including independent obligations, as reflected in the AOS and Terms and Conditions as incorporated in PO 4510044817. The indemnification provisions in the AOS and Terms and Conditions explicitly provide the scope of the duty to indemnify – any and all claims, liability, damages, loss, penalties, fines, cost, and expense of any kind whatsoever, sustained in connection with performance of the Services arising from any cause whatsoever, except in circumstances of sole negligence or willful misconduct (under the AOS) or sole negligence (under the Terms and Conditions). The language of the indemnity provisions in the AOS and Terms and Conditions are clear and unequivocal.

J.A. 767–68.

Accordingly, this Court should reverse the ICA's opinion insofar as the ICA vacated and remanded the Circuit Court's order on this issue and hold that the AOS and T&Cs control IPI's duty to indemnify Westlake.

2. **The ICA erred in holding that the Circuit Court did not adequately explain its decision concerning the nexus required for indemnification because, not only did the circuit court explain its decision, the plain language of the indemnity clause in the AOS applies to Respondents' claims and costs and expenses of any kind whatsoever for personal injuries or property damages involving Respondents sustained in connection with IPI's performance of the services arising from any cause whatsoever and the plain language of the indemnity clause in the T&Cs applies to the claims and expenses including reasonable attorneys' fees for personal injuries or property damages arising or allegedly arising from or related to the subject matter of PO 45100044817.**
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The ICA further erred in holding that the Circuit Court did not adequately explain its decision concerning the nexus required by the indemnity provisions to permit meaningful appellate review.⁶ The ICA's reliance on *Meagan S. v. Terry S.*, 242 W. Va. 452, 836 S.E.2d 419, 424 (2019), is misplaced. *Meagan S.* was not decided in the context of a summary judgment motion but rather in the context of review of a final order of a family court, where the findings of fact were reviewed under a clearly erroneous standard. *Id.* at Syl. Pt. 1. In the context of a summary judgment motion, this Court has held: "Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. Pt. 3, *Fayette Cnty. Nat'l Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997), *overruled on other grounds*, *Sostaric*

⁶ The ICA correctly held that the agreements at issue clearly and unequivocally provide that Westlake is entitled to defense and indemnity for injuries by their concurrent or shared negligence where injuries and losses to other parties have not been caused by the sole negligence of Westlake. J.A. 22. In reaching this holding, however, the ICA erroneously determined that the language in the AOS that provides in part that Westlake is indemnified for liability "arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device supplied by [Westlake or its] employees to [IPI], its employees, agents or representatives at the request of [IPI], its employees, agents or representatives)" is not applicable to this action because 1702 was not supplied to, or requested by, IPI. J.A. 27. As discussed below, the phrase "including without limitation" in the parenthetical clause does not limit the antecedent phrase "arising from any cause whatsoever." Instead, the parenthetical phrase merely provides a non-exhaustive list of examples without limiting the antecedent phrase "arising from any cause whatsoever," which is controlling.

v. Marshall, 234 W. Va. 449, 766 S.E.2d 396 (2014). Although the Court in *Lilly* determined that the summary judgment findings by the circuit court did not rise to the level required, the Court declined to remand the case because summary judgment could be affirmed on the record before it based on a separate legal issue. *Id.*, 484 S.E.2d at 237. See *Milmore v. Paramount Senior Living at Ona, LLC*, Syl. Pt. 2, 247 W. Va. 68, 875 S.E.2d 206 (2022) (“[t]his court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason, or theory assigned by the lower court as the basis for its judgment.”) (citation omitted).

In this action, consistent with *Lilly*, the Circuit Court made factual findings sufficient to permit meaningful appellate review. Specifically, the Circuit Court found in relevant part:

On Saturday, August 27, 2016, railcar AXL 1702 (“1702”) experienced a crack, releasing approximately 178,400 pounds of chlorine (the “Railcar release”). The Railcar Release occurred shortly after 1702 had been loaded with liquid chlorine for the first time after being returned to service at the Natrium Plant. 1702 had been inspected by AllTranstek, LLC (“AllTranstek”), a third party that provided railcar maintenance services. The Railcar Release occurred after 1702 was put back in service for the first time since returning from the care of AllTranstek and Rescar, third-party maintenance vendors who had charge of 1702 in order to repair and inspect it. In addition, during the shopping and repair process, Superheat GFH Services, Inc. (“Superheat”) performed specialized post weld heat treatments at areas adjacent to or in proximity to the crack.

Mr. Taylor does not know who is responsible for the Railcar Release. Counter-Defendants did not put forth any proposed expert testimony regarding who was responsible for the Railcar Release. ...

At the time of the Railcar Release, Mr. Taylor and an IPI work crew were performing work at the Natrium Plant on Tank 24 pursuant to PO 4510044817, which referenced the AOS and incorporated the Terms and Conditions.

J.A. 764–65.

Based on these findings the Circuit Court properly concluded as a matter of law in relevant part:

Where an indemnification clause “precludes indemnification for injuries caused by [the indemnnities’] sole negligence ... the negative inference to be drawn is that any injuries occurring by less than the sole fault of [the indemnitee] fall within the scope of the indemnification clause.” *Id.* at 1275. *See also Hershey Foods Corp. v. Gen. Elec. Serv. Co.*, 422 Pa. Super. 143, 149, 619 A.2d 285, 288–89 (1992); *DiPietro v. City of Philadelphia*, 344 Pa. Super. 191, 496 A.2d 407 (1985) (it is not contrary to public policy for a party to contract for indemnification of its own torts, but contract language must be clear and unequivocal).

IPI entered into binding and enforceable contracts, including independent obligations, as reflected in the AOS and Terms and Conditions as incorporated in PO 4510044817. The indemnification provisions in the AOS and Terms and Conditions explicitly provide the scope of the duty to indemnify – any and all claims, liability, damages, loss, penalties, fines, cost, and expense of any kind whatsoever, sustained in connection with performance of the Services arising from any cause whatsoever, except in circumstances of sole negligence or willful misconduct (under the AOS) or sole negligence (under the Terms and Conditions). The language of the indemnity provisions in the AOS and Terms and Conditions are clear and unequivocal.

Counter-Plaintiffs were not solely negligent and did not engage in willful misconduct in relation to the Railcar Release to warrant exception to the valid and independent indemnity provisions in the AOS and Terms and Conditions.

Pursuant to the AOS and the Terms and Conditions, IPI had, and continues to have, a duty to indemnify, defend and hold harmless Counter-Plaintiffs from Counter-Defendants’ claims related to the Railcar Release.

To the extent Counter-Defendants incurred any type of damages related to the Railcar Release, all such damages arose out of the services being performed or otherwise being provided by IPI and Mr. Taylor pursuant to PO 4510044817, the incorporated Terms and Conditions and the AOS.

Counter-Defendants’ claims associated with the Railcar Release and prosecuted in this cause of action are within the scope of the indemnity language within the AOS and Terms and Conditions.

J.A. 767–68 (emphasis added).

The Circuit Court’s findings of fact and conclusions of law are sufficient to allow meaningful review and support the grant of summary judgment to Westlake given the broad language in the indemnification clauses properly construed together as a whole.

Indeed, a Pennsylvania federal court has construed an indemnification provision substantially similar to the AOS to require a contractor to indemnify Westlake's predecessor PPG without regard to the fault of the contractor. In *PPG Industries, Inc. v. Central Industrial Maintenance, Inc.*, No. 05cv1193, 2006 WL 2087529 (W.D. Pa. July 25, 2006), the court granted PPG's motion for partial summary judgment because there was no genuine issue of material fact and under the applicable law the defendant contractor was liable to indemnify PPG based on the express language of the indemnification provision in an agreement substantially similar to the AOS. Applying West Virginia law,⁷ the court held that the indemnification provision was plain and unambiguous. *Id.* at *1. The court found that the defendant contractor was required to indemnify PPG for a claim brought by a subcontractor's employee who was injured while working at the Natrium Plant. The court reasoned that during the course of performance of their agreement, PPG requested the defendant to provide transportation services to remove hazardous waste from its Natrium Plant to a waste treatment facility of a non-party located in Ohio. The defendant hired an independent contractor also a non-party in that case, to transport the hazardous materials to Ohio. Edward Coburn, who was an employee of the independent contractor, sustained serious chemical burn injuries to his left eye while unloading materials from a truck in Ohio. The court held that the claim of the independent contractor's employee was within the scope of the indemnification agreement in the AOS even though there was no indication that the defendant contractor in any way caused the injuries. *Id.* at *2. The court reasoned as follows:

⁷ Unlike the AOS in this action, which was entered into in 2007, the AOS at issue in *PPG Industries* does not appear to have had a governing law provision. In a prior opinion in *PPG Industries*, the court applied choice of law rules and held that West Virginia law supplied the prima facie standard of proof for indemnification action because West Virginia imposes a less stringent evidentiary burden on an indemnitee. *PPG Indus., Inc. v. Cent. Indus. Maint., Inc.*, No. 05cv1193, 2006 WL 752982 (W.D. Pa. Mar. 22, 2006). The court summed up the conflict, which had nothing to do with how either Pennsylvania or West Virginia would construe the indemnification clause as follows: "Pennsylvania law expressly states that a showing of a reasonable possibility of liability is insufficient for indemnification claims to proceed, while West Virginia specifically accepts that 'reasonable possibility' as prima facie proof in an indemnity action, in the interest of promoting settlement." *Id.* at *4.

Mr. Coburn was injured performing work required of defendant CIM under its agreement with PPG and the applicable contract documentation and work orders. CIM agreed to an explicit and very broad indemnity clause that included the terms “claim,” “liability,” “loss,” and “damages.” The applicable indemnification clause states as follows:

Indemnification: [Defendant CIM] assumes the risk of all damage, loss, costs and expense, and agrees to **indemnify** and hold harmless PPG, its officers, agents, and employees from and against any and all liability, damage, loss, cost and expense which may accrue to or be sustained by PPG, its officers, agents or employees, arising out of this Agreement, including for the death of or injury to persons or destruction of property involving [CIM], its employees, agents and representatives, sustained in connection with performance of services hereunder, arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device supplied by PPG or its employees to [CIM], its employees, agents or representatives at the request of [CIM], its employees, agents or representatives) except to the extent arising out of the sole negligence or willful misconduct of PPG or its employees acting within the scope of their employment.

Id. at *3.

This action is indistinguishable from *PPG Industries*. The AOS contains an explicit and very broad indemnity clause that is substantially similar to the AOS construed in *PPG Industries*. J.A. 282. In addition, the T&C’s contain an equally explicit and equally broad indemnity clause that applies to “any and all damages, claims, demands, expenses (including reasonable attorneys’ fees), losses or liabilities of any nature whatsoever, ... and any and all suits, causes of action and proceedings thereon arising or allegedly arising from or related to the subject matter of this Purchase Order.” J.A. 310. Like the AOS in *PPG Industries*, this Court should construe the AOS and T&Cs to apply to the claims brought by Respondents sustained in connection with the performance of and related to services under PO 45100044817 regardless of whether IPI caused the claimed personal injuries and property damage and whether or not they were caused by failure of or defect in any equipment, instrument or device supplied by Westlake or its employees to the

IPI, its employees, agents or representatives at their request. As the court held in *PPG Industries*, the very broad and explicit indemnity provisions require this result.

As noted above, the ICA erroneously determined that the language in the AOS that provides in part that Westlake is indemnified for liability “arising from any cause whatsoever (including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device supplied by [Westlake or its] employees to [IPI], its employees, agents or representatives at the request of [IPI], its employees, agents or representatives)” is not applicable to this action because 1702 was not supplied to, or requested by, IPI. The ICA’s footnote 13 regarding IPI’s acknowledgement that the claims to be indemnified do not have to arise from its own negligence, either in whole or in part, where they involve “any equipment, instrument or device” supplied by Westlake at IPI’s request, demonstrates a fundamental misunderstanding of the phrase “including without limitation” by both the ICA and IPI.

Contrary to the ICA’s holding and IPI’s acknowledgement, the phrase “including without limitation” in the parenthetical clause does not limit the antecedent phrase “arising from any cause whatsoever.” Instead, the parenthetical phrase merely provides a non-exhaustive list of examples without limiting the antecedent phrase “arising from any cause whatsoever,” which is controlling. In *In re Linerboard Antitrust Litig.*, 443 F. Supp. 2d 703, 714 (E.D. Pa. 2006), the Eastern district of Pennsylvania held that the terms of a contract containing the phrase “including, without limitation” precluded the conclusion that a list was exhaustive because the plain meaning of the phrase is “to contain as part of something” or “indicates a partial list.” *Id.* (citing Black’s Law dictionary 766 (7th ed. 1999)). See *Krepps v. NIIT (USA), Inc.*, No. 11c8787, 2014 WL 273780, at *3–4 (N.D. Ill. Jan. 24, 2014) (holding that “given the oceanic phrase, ‘including, without limitation,’ the Agreement was subject to being interpreted as providing that those contracts

specifically listed ... were not the only ones NIIT contemplated it would be acquiring). Indeed, it has been recognized that “even without the additional if not redundant language of “‘without limitation,’” *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 207 (5th Cir. 1996), the term “including” is one of expansion rather than limitation. *See, e.g., Fed. Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13, 17 (1st Cir. 1985); *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1202–03 (6th Cir. 1996). *See* INCLUDE, Black’s Law Dictionary (11th ed. 2019) (“To contain as a part of something. The participle *including* typically indicates a partial list But some drafters use phrases such as *including without limitation* and *including but not limited to* – which mean the same thing”). The ICA’s construction of the phrase “including without limitation” as a limitation rather than an expansion of the antecedent phrase “arising from any cause whatsoever” is error.⁸

In addition, *Darrow v. Keystone 5, 10, 25, \$100 Stores, Inc.*, 74 A.2d 176 (Pa. 1950), which is cited in the ICA’s footnote 14 is inapposite and readily distinguishable from this action. The term “due to said occupancy” at issue in *Darrow* is substantially different from the phrase “sustained in connection with the performance of the Services, arising from any cause whatsoever” contained in the AOS in this action. Specifically, the prepositional phrase “due to” means “as a result of: because of.” DUE TO, Merriam-Webster Dictionary. Accordingly, the phrase “due to occupancy” means as a result of occupancy, or because of occupancy. By contrast, the phrase “in connection with” means “in relation to (something): for reasons that relate to (something).” IN CONNECTION WITH, Merriam-Webster Dictionary. Thus, the phrase “sustained in connection

⁸ Because the parenthetical phrase “(including without limitation, injuries resulting from failure of or defect in any equipment, instrument or device supplied by [Westlake or its] employees to [IPI], its employees, agents or representatives at the request of [IPI], its employees, agents or representatives)” does not limit the antecedent phrase “arising from any cause whatsoever,” the Circuit Court’s conclusion that “[t]he crack in 1702 leading to the Railcar Release constitutes a ‘failure of a defect in any equipment, instrument, or device ...’ under the AOS” simply does not impact the proper analysis of the indemnity clauses.

with the performance of Services, arising from any cause whatsoever” in this action means sustained in relation to the performance of the services, arising from any cause whatsoever, or for reasons that relate to the performance of the services, arising from any cause whatsoever. The critical difference between “due to” and “in connection with” is that the former means because of something, and the latter only means some relationship. In this action, the subsequent phrase “arising from any cause whatsoever” makes it clear that the antecedent phrase “in connection with the performance of services” does not require a causal connection. The term “due to said occupancy” in *Darrow* is also readily distinguishable from the phrase “arising or allegedly arising from or related to the subject matter of this Purchase Order” in the T&Cs. As discussed above, the phrase “in connection with” in the AOS means “in relation to (something): for reasons that relate to (something).” IN CONNECTION WITH, Merriam-Webster Dictionary. Construed consistently with the AOS, the term “related to” means connected with the subject matter of PO 45100044817. See RELATE TO, Merriam-Webster Dictionary. Thus, similar to the AOS, the term “related to” in the T&Cs does not require a causal connection but only some relationship.

In any event, in *Tidewater Field Warehouses v. Fred Whitaker Co.*, 88 A.2d 796 (Pa. 1952), the Pennsylvania Supreme Court distinguished *Darrow* as follows:

... [W]e find three indemnity clauses in the agreements. The warehouse agreement provides that Whitaker agrees to indemnify Tidewater ‘of and from all fines, penalties, suits, taxes, claims, demands, actions or causes of actions of any kind or nature of anyone whomsoever by reason of the occupancy of the said demised premises by [Tidewater].’ A clause substantially similar to that one is also found in the lease. If those two clauses were the only provisions on the subject, this case would be ruled by *Darrow v. Keystone 5, 10, 25, \$1.00 Stores, Inc.*, supra, where we held that a clause covering damage due to occupancy does not indemnify a party against his own negligence.

A third provision was, however, included in the lease which stated: ‘[Whitaker], throughout the term of this lease agreement, shall maintain and pay for at its own cost and expense the following: Adequate liability insurance for injuries to any person, except employes of [Tidewater], on or about the demised premises and *does hereby assume and agree to pay all damages to property or persons upon the*

demised premises and to save [Tidewater] harmless therefrom.' (Italics added.)

That paragraph clearly and specifically covers all damages however caused. It is not, as Whitaker contends, limited to claims arising by reason of occupancy. In fact, if we were to so treat it, it would become mere surplusage since the two paragraphs discussed above fully cover that subject. This clause was obviously intended to have a real effect on the rights and duties of the parties. A reading of it in its context reveals that the only effect it can have is to protect Tidewater against any suit for damages which might arise during the term of the lease. No other interpretation of that clause is possible.

Id. at 797–98 (emphasis in original).

To be clear, this action is distinguishable from *Tidewater* insofar as the holding in *Tidewater* relied on the phrase “by reason of the occupancy of the said demised premises” for the same reason that this action is distinguishable from the holding in *Darrow* regarding the phrase “due to said occupancy.” The phrase “by reason of the occupancy of the said demised premises” in *Tidewater* is similar to the phrase “due to said occupancy” in *Darrow*. The phrase “by reason of” means “because of: due to.” BY REASON OF, Merriam-Webster Dictionary. The phrases “in connection with” and “related to” in this action simply do not require a causal connection.

Significantly, this is similar to *Tidewater* and distinguishable from *Darrow* because, similar to *Tidewater*, the AOS and T&Cs require IPI to obtain insurance policies. Specifically, on the same page of the indemnity clause in the very next section 14 the AOS contains an insurance clause that in bold letters provides, among other things: **“Contractor acknowledges and agrees that the aforesaid obligation to provide complying certificates to PPG is a material precondition to Contractor's receipt of any payment from PPG or the applicable Buyer for the Services.”** J.A. 282. The insurance clause specifically requires workers’ compensation or workplace safety insurance, and other applicable social insurance, employer’s liability insurance, comprehensive (commercial) general liability insurance (“CGL”) for bodily injury and property damage, automobile liability insurance. The insurance clause further provides that the certificates

of insurance evidencing the insurance coverages shall stipulate that any applicable Buyer shall be named as an additional insured under the insurance. J.A. 282–83. In addition, the front page of PO 45100044817 states: “Contractor must have on file with Purchasing Department: One (1) copy of certificate of insurance showing carrier, type of coverage, limits of coverage and Axiall LLC as an additional named insured, one (1) copy of Workman’s Comp Certificate, J.A. 369. The T&Cs likewise contain an insurance clause immediately following the indemnity clause that requires IPI to produce certificates of insurance for “Worker’s Compensation, Employer’s Liability, and Comprehensive General Liability (including automobiles) coverages in the minimum amounts and form as may be specified by Buyer, which coverages shall not be allowed to change or expire until all services or work have been completed and accepted.” J.A. at 310. Similar to *Tidewater*, the insurance clauses in the AOS, PO 45100044817, and T&Cs are intended to have a real effect on the rights and duties of the parties. A reading of these provisions in their context reveals that the only effect it can have is to protect Westlake against any suit for damages which might arise during the term of AOS and PO 4510044817. No other interpretation of these provisions is possible.

Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc., 171 A.2d 185 (Pa. 1961), which is cited by the ICA, is similarly distinguishable. In *Pittsburgh Steel Co.*, the Court concluded that there was no clearly expressed or unequivocal language in the indemnity provision to show that indemnification for the plaintiff indemnitee’s own negligence was intended. The Court reasoned that under the construction contended for by the plaintiff the indemnitors would be made insurers for acts of negligence over which they had or could have no control. The Court held that without more direct and unequivocal language in the contract it was unreasonable to infer or conclude that the parties intended an indemnification of such magnitude. *Id.* at 189. *See also Perry v. Payne*, 217 Pa. 252, 66 A.2d 553, 557 (1907).

In contrast to *Pittsburgh Steel*, in this action there is clearly expressed and unequivocal language in the indemnity provisions to show that indemnification for Westlake's own negligence was intended. As discussed further below, the AOS contains a provision requiring indemnification "except to the extent arising out of the sole negligence or willful misconduct of [Westlake] or [its] employees acting within the scope of their employment." J.A. 282. The corresponding provision of the T&Cs similarly requires indemnification "except where such injury or damage was caused by the sole negligence of [Westlake]. J.A. 310. Under Pennsylvania law, "[w]here an indemnification clause "precludes indemnification for injuries caused by [the indemnitee's] sole negligence . . . the negative inference to be drawn is that any injuries occurring by less than the sole fault of [the indemnitee] fall within the scope of the indemnification clause." *Woodburn v. Consolidation Coal Co.*, 590 A.2d 1273, 1275 (Pa. Super. 1991). Also, in contrast to *Pittsburgh Steel*, in this action the insurance clauses in the AOS, PO 45100044817, and T&Cs make it clear that the parties did in fact intend that IPI insure Westlake by maintaining workers' compensation or workplace safety insurance, and other applicable social insurance, employer's liability insurance, CGL insurance for bodily injury and property damage, and automobile liability insurance in minimum amounts and forms as may be specified by Westlake and with Westlake named as an additional insured. The concern expressed by the ICA that it is difficult to imagine that IPI intended to be an insurer simply is not well-founded.

Accordingly, this Court should reverse the ICA's opinion insofar as the ICA vacated and remanded the Circuit Court's order on this issue and hold that the Circuit Court properly determined that there is a sufficient nexus between IPI's activities and the resulting injuries to trigger a duty to indemnify.

3. **The ICA erred in holding that if the Circuit Court determines that there is a sufficient nexus between IPI's activities and the resulting injuries to trigger a duty to indemnify, it will need to determine whether there are genuine issues of material fact regarding sole negligence, willful misconduct, or possibly gross negligence because IPI has neither pleaded as an affirmative defense to the counterclaims nor submitted any evidence of Westlake's sole negligence or willful misconduct and a Pennsylvania jury has found that Westlake's negligence was less than fifty percent of the cause of the Railcar Release in a verdict that has been upheld on appeal.**

The ICA erred in holding that if the Circuit Court determines that there is a sufficient nexus between IPI's activities and the resulting injuries to trigger a duty to indemnify, the Circuit Court will need to determine whether there are genuine issues of material fact regarding sole negligence, willful misconduct, or possibly gross negligence. IPI has neither pleaded nor submitted any evidence of Westlake's sole negligence (ordinary or gross) or willful misconduct. In addition, as a matter of public record a Pennsylvania jury has found that Westlake's negligence was less than fifty percent of the cause of the Railcar Release, and the verdict has been upheld on appeal. Again, although this Court held in *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997), *overruled on other grounds*, *Sostaric v. Marshall*, 234 W. Va. 449, 766 S.E.2d 396 (2014), that the summary judgment findings by the circuit court did not rise to the level required, the Court declined to remand the case because summary judgment could be affirmed on the record before it based on a separate legal issue. *Id.*, 484 S.E.2d at 237. *See Milmore v. Paramount Senior Living at Ona, LLC*, Syl. Pt. 2, 247 W. Va. 68, 875 S.E.2d 206 (2022) (“[t]his court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason, or theory assigned by the lower court as the basis for its judgment.”) (citation omitted).

The ICA carefully reviewed cases from other jurisdictions and adopted their reasoning that exclusions in indemnity contracts such as sole negligence, gross negligence, and willful

misconduct are affirmative defenses on which the indemnitor bears the burden of proof. For example, in *XL Specialty Insurance Co. v. Kiewit Offshore Services, LTD*, 426 F. Supp. 2d 565 (S.D. Tex. Mar. 30, 2006), which was cited by the ICA, the district court held that because the indemnitors did not plead the affirmative defenses of the indemnitees' sole negligence or gross negligence under the terms of an indemnification agreement, those affirmative defenses were waived. *Id.* at 575. See also *Grubb & Ellis Mgmt. Servs., Inc. v. B.C., L.L.C.*, 138 P.3d 1210, 1215–16 (Ariz. 2007) (holding that the trial court correctly declined to address the indemnitor's gross-negligence argument because it was an affirmative defense that not asserted despite knowing that the indemnitee was seeking indemnification under an indemnification agreement that excepted gross negligence or willful misconduct). Accordingly, the ICA correctly held that IPI bears the burden of proof on sole negligence, gross, negligence, and willful misconduct. J.A. at 46–51.

In this action, however, IPI cannot meet its burden because Respondents never pleaded Westlake's sole negligence (ordinary or gross) or willful misconduct as affirmative defenses to the counterclaim for indemnification. See J.A. at 246–61. Indeed, instead of alleging the sole negligence (ordinary or gross) or willful misconduct of Westlake, Respondents' seventh and seventeenth affirmative defenses clearly contemplate "acts or omissions of other persons or entities" for whose actions Respondents' disclaim responsibility J.A. at 258, 259.182. 183. Because IPI never pleaded Westlake's sole negligence (ordinary or gross) or willful misconduct in accordance with West Virginia Rule of Civil Procedure 8 (c) and instead affirmatively pleaded "acts or omissions of other persons or entities," IPI cannot meet its burden on this affirmative defense as a matter of law.

In any event, IPI cannot meet its burden of persuasion on these affirmative defenses as a matter of law. Assuming *arguendo* that IPI's exhibits were appropriately authenticated and

otherwise proper to consider, the evidence is still insufficient to establish a genuine issue of material fact regarding sole negligence (ordinary or gross) or willful misconduct on the part of Westlake in relation to the Railcar Release. Under Pennsylvania law, “[w]here an indemnification clause “precludes indemnification for injuries caused by [the indemnitee’s] sole negligence . . . the negative inference to be drawn is that any injuries occurring by less than the sole fault of [the indemnitee] fall within the scope of the indemnification clause.” *Woodburn v. Consolidation Coal Co.*, 590 A.2d 1273, 1275 (Pa. Super. 1991).

“Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others.” NEGLIGENCE, Black’s Law Dictionary (11th ed. 2019) (citation omitted). Gross negligence involves “a lack of even slight diligence or care. The difference between *gross negligence* and *ordinary negligence* is one of degree and not of quality.” *Id.*, NEGLIGENCE, gross negligence. By contrast willful misconduct involves “misconduct committed voluntarily and intentionally.” *Id.* at MISCONDUCT, willful misconduct. Because the indemnity clauses do not except “gross negligence” apart from the exception for “sole negligence,” any proof of gross negligence would have to satisfy the exception for “sole negligence.”

None of the evidence submitted by IPI or discussed by the ICA creates a genuine issue of material fact regarding Westlake’s sole negligence (ordinary or gross) or willful misconduct regarding the Railcar Release. Mr. Taylor, who is IPI’s president, admitted that he does not know how the Railcar Release occurred. J.A. 322.

Q. As we sit here today, Mr. Taylor, you don't have any opinions on why that railcar released the contents of chlorine on August 27th, 2016?

A. No, sir.

Q. Okay. You don't know why it happened?

A. No, sir.

Q. You don't know what parties could be responsible for why it happened?

A. No, sir.

J.A. 322. In addition, Mr. Taylor does not think that Respondents had reason to believe the Railcar Release would occur—necessary evidence to support a “sole negligence” or willful misconduct finding. J. A. 323–24.

Q. . . . You are not aware of any facts to suggest that Axiall Corporation had any knowledge that that chlorine leak or release was going to occur prior to it occurring?

A. No.

J. A. 323.

A. I have no reason to believe that they knew . . . I mean, there's no way to predict the future.

Q. Okay. Correct. And you're not aware of any facts ---

A. No.

Q. --- that would suggest that Eagle Natrium had any reason to believe this was going to occur?

A. Yes, that's correct.

J.A. 325.

The ICA erroneously opined that the Circuit Court should have considered the deposition testimony of Paul Linder to the effect that Westlake did not place any blame on IPI for the Railcar Release. Evidence that Westlake did not blame IPI is wholly irrelevant to the issue here of whether Westlake is solely negligent or committed willful misconduct regarding the Railcar Release. Even if that evidence is considered, however, the fact that Westlake does not blame IPI does not tend to show what persons or entities, if any, are to be blamed for the Railcar Release or any level of culpability.

Although the ICA faulted the Circuit Court for not indicating whether Julie Bart's deposition or the NTSB report was considered in ruling on summary judgment, as a matter of law

neither Ms. Bart's testimony nor the NTSB report creates a genuine issue of material fact regarding Westlake's sole negligence (ordinary or gross) or willful misconduct. Viewed in the light most favorable to IPI, Ms. Bart's testimony at best supports an inference that Westlake was not solely negligent but rather that its conduct was only one factor contributing to the probable cause of the Railcar Release along with other factors attributed to other entities, including 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. For example, during Ms. Bart's deposition, Respondents' counsel had her read portions of the NTSB report as follows:

Q. ... I'm going to move on to page 37, which is the "Probable Cause" section. I'm going to be looking at Section 3.2. And if –

A. ... "Findings." Okay. "Findings" and "Probable Cause." I understand now.

Q. I'm referring to Section 3.2. I'm going to read this into the record. It says, "Contributing to the failure was Axial 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."

Did you see that sentence?

A. Yes.

Q. Do you agree with the portion of the sentence where it says, "Contributing to the failure was Axial Corporation's insufficient inspection interval"?

A. Like I said before, it's real easy to come back and say, "Yeah, you should have inspected it every day," or "You should have inspected it every year."

I mean, we had no data to change our interval because we hadn't seen any failures prior to this. So we had no reason to change our interval, shorten out our interval, based off the data that we had. Like you said, we had – we thought we had a sufficient inspection interval. But it's easy to come back and say, "Sure, you didn't."

Q. So do you think that the inspection interval was sufficient.

...

A. Again, based on the number of failures we have had, which was zero, yeah, we thought we – we thought we were doing good. We thought we haven't had any failures. We're inspecting – we were changing the tires before the tires failed, the car analogy. We hadn't had a flat, so our interval was correct.

J.A. 365–66, 494–95.

Manifestly, the 2006 safety advisory, cannot create a genuine issue of material fact regarding Westlake's sole negligence (ordinary or gross) or willful misconduct regarding the Railcar Release. The 2006 safety advisory contains only general information from the Federal Railroad Administration, which did not see the need for further regulatory or enforcement action. J.A. 496–97. Obviously, the 2006 safety advisory did not discuss any enforcement action in connection with the Railcar Release, which occurred ten years later in 2016, let alone ascribe fault to any person or entity. In any event, Ms. Bart testified that Axiall relied on Rescar and AllTranstek to comply with and meet the needs of the government regulations. J.A. 362–63.

In *Axiall Corporation v. AllTranstek LLC*, No. 966WDA2022, 2024 WL 2811827 (Pa. Super. June 3, 2024), the Pennsylvania Superior Court applied Pennsylvania law and held that the indemnity provision in Axiall's T&Cs applied to claims brought in connection with the Railcar Release. In that case, Axiall filed its complaint against AllTranstek and Rescar, among others on August 24, 2018. Axiall alleged that the Railcar Release caused third party claims as well as millions of dollars of damage to its own property. Axiall alleged that both AllTranstek and Rescar agreed to and breached Axiall's T&Cs by failing to properly perform their respective work and inspect the same. Additionally, Axiall alleged that AllTranstek and Rescar were negligent in their respective work on 1702. The NTSB report was considered in evidence. The case was ultimately tried by a jury, and the jury returned a verdict in favor of Axiall on its contract and tort claims.

Specifically, on Axiall's claim for negligence, the jury apportioned 40% fault to Axiall contributorily, 20% fault to AllTranstek, and 40% fault to Rescar. The jury awarded \$12,800,000.00 in damages. *Id.* at *3. Subsequently, the trial court declared that AllTranstek and Rescar were contractually bound to indemnify, defend, and hold Axiall harmless from all damages and entered an unreduced verdict based on the jury's finding in favor of Axiall on its breach of contract and breach of warranty claims. *Id.* at *4. On appeal, the Pennsylvania Superior Court agreed with the trial court that the plain language of indemnity provision in the T&Cs provided for vendors, such as AllTranstek and Rescar, to assume the risk of damages, losses, costs, and expenses arising from work performed under Axiall's purchase orders. In addition, the indemnity provision provided for vendors to indemnify Axiall for claims, demands, and damages asserted by third-parties, including reasonable attorney's fees incurred in defense of such claims. *Id.* at *24.⁹

There is nothing Petitioners can legitimately offer to support the alleged sole negligence or willful misconduct, other than mere assertions of counsel. Based on this record, including the admissions of Respondents and the lack of any proposed liability expert testimony, Respondents cannot create a genuine issue of material fact on the issue of Westlake's sole negligence, gross negligence, or willful misconduct in relation to the Railcar Release.

The ICA also erred in holding that the Circuit Court should also consider the possible effect, if any of West Virginia's comparative fault statute, W. Va. Code §§ 55-7-13a, 55-7-13d. Although West Virginia procedural law may apply, West Virginia's comparative fault statute places no duty on Westlake to give notice of other individuals in this action. West Virginia's comparative fault statute is limited to actions seeking damages for personal injury, property

⁹ Although Respondents were not parties to the Pennsylvania litigation, the jury's finding of Rescar's and AllTranstek's negligence in connection with the Railcar Release is irrefutable evidence that Westlake did not commit sole negligence or willful misconduct. Respondents were aware of this litigation and referenced it, albeit incorrectly, in their briefing below.

damage, or wrongful death where recovery is predicated on principles of comparative fault. W. Va. Code § 55-7-13a. “Defendant” is defined to include “any person against whom a claim is asserted including a counter-claim defendant, cross-claim defendant or third-party defendant.” W. Va. Code § 55-7-13b. Defendants including counter-claim defendants, not plaintiffs or counter-claim plaintiffs, are directed to give notice to invoke the West Virginia comparative fault statute. W. Va. Code § 55-7-13d (2). Thus, similar to the affirmative defenses of sole negligence and willful misconduct, West Virginia’s comparative fault statute operates like an affirmative defense that could only place an additional pleading requirement on Respondents, who are the counterclaim defendants.

In this action by contrast, Westlake’s counterclaims are for breach of contract and indemnification not personal injury, property damage, or wrongful death. Moreover, recovery under the indemnification clauses is not predicated on principles of comparative fault. As counter-claim plaintiffs, Westlake is not required to invoke West Virginia’s comparative fault statute to enforce the indemnification clauses in the AOS and T&C’s.

The Circuit Court properly found that the Railcar Release occurred shortly after 1702 had been loaded with liquid chlorine for the first time after being returned to service at the Natrium Plant. 1702 had just returned to service, and the Railcar Release occurred after it was loaded for the first time and placed in a holding area. The car had just been inspected by AllTranstek, a third party that provided railcar maintenance services. Recommended repair work had been performed at a shopping facility operated by Rescar, a company owned by AllTranstek. *Id.* During the shopping process, another third party, Superheat GFH Services, Inc. (“Superheat”), performed specialized post weld heat treatments. J.A. 764. These findings support the legal conclusion that

the Railcar Release was not caused by Westlake's sole negligence (ordinary or gross) or willful misconduct. The Circuit Court specifically found:

Mr. Taylor does not know who is responsible for the Railcar Release. Counter-Defendants did not put forth any proposed expert testimony regarding who was responsible for the Railcar Release. No competent evidence has been presented to indicate that Counter-Plaintiffs were solely negligent or engaged in any willful misconduct in relation to the Railcar Release.

J.A. 764–65 (footnotes omitted).

Accordingly, the Circuit Court correctly held that Westlake was not solely negligent and did not engage in willful misconduct in relation to the Railcar Release to warrant exception to the valid indemnity clauses in the AOS and T&Cs and further that there is no genuine issue of material fact that IPI has breached the valid and enforceable indemnity clauses applicable to the Railcar Release. J.A. 768–69.

Finally, the ICA erred in instructing the Circuit Court that if it decides on remand that the indemnification language covers gross negligence, it must decide whether indemnification for gross negligence violates West Virginia public policy, and, if not, whether there is a genuine issue of material fact regarding gross negligence. The Circuit Court did not address this issue, which was not properly raised by Respondents. In *Haynes v. Antero Resources Corporation*, No. 15-1203, 2016 WL 6542734 (W. Va. Oct. 28, 2016), this Court made it clear a party has an obligation to preserve all of its claims, explaining that “[a] skeletal ‘argument’, really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs hunting for truffles buried in briefs.” *Id.* at *3 (citations omitted). The concept expressed in *Haynes*, that judges are not pigs hunting for truffles applies equally to issues not properly raised or decided by the Circuit Court:

With regard to West Virginia Code § 55-2-1, *et seq.*, although petitioner mentions it in his opening brief to this Court and in his reply to Antero's response, he fails to cite to the record on appeal when or how he raised this issue before the circuit court. Further, neither the November 18, 2015, order, nor the March 24, 2015, order mention this statute. As we stated previously, we are not pigs hunting for truffles.

Id.

In any event, in *Marlin v. Wetzel County Board of Education*, 212 W. Va. 215, 569 S.E.2d 462 (2002), this Court concluded that a contract mandated indemnification for all claims arising from a general contractor's performance of a construction contract with the Wetzel County Board of Education (the "Board"). *Id.*, 569 S.E.2d at 465. During renovations under the contract, several of the contractor's employees were exposed to asbestos dust. *Id.* at 466. The workers filed suit against the Board and the contractor asserting that both defendants were negligent and that they had fraudulently, deceitfully and willfully, wantonly and recklessly concealed the fact that the workers were being exposed to unsafe levels of asbestos. *Id.* The Board demanded indemnification and, after the contractor's insurer refused to provide coverage, filed a complaint for declaratory relief. The Court reviewed the indemnification provision and concluded that the provision "clearly shifted legal responsibility for some measure of the plaintiff-workers' alleged tort liability from the Board to [the contractor.]" *Id.* at 469. The Court reached this conclusion notwithstanding the fact that the plaintiffs had asserted claims alleging more than ordinary negligence. In resolving the dispute, the Court reasoned that indemnification clauses are encouraged in West Virginia, inasmuch as such agreements

serve our goals of encouraging compromise and settlement by reducing settlement discussions to bilateral discussions, by encouraging adequate levels of insurance, and by allowing the parties to a contract to allocate among themselves the burden of defending claims.

Id. at 468 (citations omitted).

VII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the ICA's opinion insofar as the ICA vacated and remanded the Circuit Court's grant of summary judgment and instruct the ICA to enter summary judgment for Westlake Chlor-Vinyls and Westlake Natrium in all respects.

Respectfully submitted this 1st day of July, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2024, I filed the ***Brief of Petitioners Westlake Chlor-Vinyls Corporation and Westlake Natrium LLC*** via the File and ServeXpress system upon the following counsel of record:

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