

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.

**REPLY 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 reply 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”). This appeal involves issues of fundamental public importance regarding commonly used indemnity agreements. The ICA’s opinion is a radical departure from existing precedent and public policy, which this Court should reverse without further delay.

The ICA erred in vacating in part and remanding in part the Circuit Court’s grant of partial summary judgment to Westlake on the counterclaims for breach of contract and express indemnity. First, the ICA erred in holding that the Agreement for On-Site Services (“AOS”) exclusively controls IPI’s duty to indemnify Westlake. The AOS, Purchase Order (“PO”) 45100044817, and terms and conditions (“T&Cs”) are incorporated into one agreement that must be construed as a whole to avoid inconsistencies and conflicts. 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 of the T&Cs as the ICA did in this action.

Second, the ICA 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

adequately 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. Also, 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.

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. IPI has neither pleaded as an affirmative defense to the counterclaims nor submitted any evidence of Westlake's sole negligence (ordinary or gross) or willful misconduct. Moreover, multiple courts have found that Westlake's negligence was less than fifty percent of the cause of the Railcar Release.

The Circuit Court correctly held the AOS and T&Cs construed as a whole require IPI to indemnify Westlake for Respondents' claims, liability, damage, loss, penalties, fines, cost, and expense of any kind whatsoever, sustained in connection with IPI's performance of services under 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.¹

¹ Westlake has responded fully to Respondents' argument that this Court should dismiss the appeal for lack of jurisdiction in a separate response to the motion to dismiss appeal that was previously filed. Westlake incorporates that response by reference rather than repeating its arguments in support of this Court's jurisdiction here.

II. ARGUMENT

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 Annuling The Remaining Terms And Conditions Of The T&Cs.

The ICA misconstrued the AOS and T&Cs and erred in holding that the AOS exclusively controls IPI's duty to indemnify Westlake. Respondents acknowledge that the AOS, PO 45100044817, and T&Cs are an integrated contract. Resp. Br. at 21. In addition, Respondents concede that effect must be given to all of the provisions in a contract. Resp. Br. at 18. Respondents' argument that the Circuit Court erroneously construed the AOS in a manner that rendered its priorities and order clause meaningless only highlights the weakness of their position. By its terms the priorities and order clause only applies *if* there are any inconsistencies or conflicts as a matter of Pennsylvania law. In this action, there are no such inconsistencies or conflicts.

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 AOS provides in relevant part:

If there are any terms or conditions in an Accepted Order which are inconsistent with or in conflict with this Agreement, the terms and conditions of the various documents constituting this Agreement shall control in the following priority and

order: the front of the Accepted Order; this Agreement; and then the reverse side terms and conditions of the Accepted Order.

J.A. 281 (emphasis added).²

Contrary to Respondents' argument, by its terms the priorities and order clause only applies *if* there are any inconsistencies or conflicts as a matter of Pennsylvania law. Moreover, the Court should apply the rules of contract construction, including those discussed above, to avoid any conflicts. Only where it is impossible to construe seemingly conflicting provisions consistent with one another, does the priorities and order clause in the Agreement come into play. The ICA erred because it ignored the rules of contract construction and found conflicts where no conflicts exist.

For example, the ICA erroneously 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. Moreover, as discussed further below, the parenthetical phrase "(including reasonable attorneys' fees)" immediately following the term "expenses" in the T&Cs merely provides a non-exhaustive list of examples of expenses – a term used in both the T&Cs and AOS. Given that the AOS language encompasses the supposed differences, no conflict exists. *See Fid.-Philadelphia Tr. Co. v. Philadelphia Transp. Co.*, 173 A.2d 109, 113–14 (Pa. 1961) (holding that the broad scope of the language, similar to that found in the AOS, was sufficient to include attorney's fees). The ICA noted *Fidelity-Philadelphia Trust* but refused to properly construe the Agreement in accordance with Pennsylvania law; noting instead that this may be an issue for the Circuit Court to resolve on remand. J.A. 20 n.9. Respondents' brief does not cite to *Fidelity-Philadelphia* or attempt to distinguish its holding. It is indistinguishable.

² An Accepted Order includes a Purchase Order. *See* J.A. 281.

Indeed, Respondents' argument that the ICA correctly held that the indemnity clauses of the AOS and the T&Cs materially and irreconcilably conflict "in various respects" is wholly unsupported. Respondents provide no caselaw or other authority to refute Westlake's argument that the plain meanings of the terms that the ICA found irreconcilable are in fact substantially similar. Respondents do not challenge Westlake's reliance on the dictionary definitions of terms such as "IN CONNECTION WITH," and "RELATED TO" in the Merriam-Webster Dictionary. Each of these terms is defined by reference to the other – "IN CONNECTION WITH" means "RELATED TO" and vice versa. Accordingly, based on their plain meaning there is no conflict.

Respondents' argument that the T&Cs' indemnity provision does not include language similar to the phrase "arising from any cause whatsoever (including without limitation, injuries resulting from the failure of or defect in any equipment instrument or device supplied by [Petitioners] or their employees to [IPI], its employees, agents or representatives at the request of [IPI], its employees, agents or representatives)" is equally meritless. J.A. 282. Respondents do not address the fact that the ICA 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." J.A. 282. Nor does Respondents' argument address *In re Linerboard Antitrust Litig.*, 443 F. Supp. 2d 703, 714 (E.D. Pa. 2006), where the Eastern District of Pennsylvania discussed the meaning of the term "including, without limitation" and held that such language 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)). Again, based on the plain meaning of these terms there is no conflict.

To the extent that Respondents argue that every instance of different wording creates a conflict, they are simply wrong. In *Cubic Automatic Revenue Collection Group v. Southeastern*

Pennsylvania Transportation Authority, No. 94cv3709, 1995 WL 262535, at *4–5 (E.D. Pa. Apr. 28, 1995), the court granted the defendant’s motion for partial summary judgment on a breach of contract claim involving an integrated contract consisting of an agreement and specifications. The agreement had an order of preference provision that provided that if the payment provisions of the agreement and the specifications conflicted, the payment provisions in the agreement would control. In that case, the court concluded that there was no need to resort to an order of preference provision contained in the agreement because the payment provisions at issue in the agreement and specifications were not contradictory. The court rejected the plaintiff’s argument that the use of different terms was significant and further found that the contract was unambiguous.

In this action as in *Cubic Automatic Revenue Collection Group*, the differences in wording between the AOS and T&Cs are insignificant and do not require resort to the priorities and order clause in the AOS. Moreover, the priorities and order clause 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. Thus, the ICA annulled the T&Cs in their entirety.

The ICA’s approach to the AOS and T&Cs creates conflict where none exists. It encourages litigation regarding *de minimis* differences in language, in contravention of established principles of contract construction meant to guard against the absurd result reached by the ICA. Accordingly, this Court should hold that the AOS and T&Cs control IPI’s duty to indemnify Westlake.

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.

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. The Circuit Court's findings of fact and conclusions of law are adequate 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.

Respondents do not dispute that "[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." Syl. Pt. 2, *Milmore v. Paramount Senior Living at Ona, LLC*, 247 W. Va. 68, 875 S.E.2d 206 (2022) (citation omitted).

Respondents' argument that the Circuit Court's order is deficient because it did not cite to every case in the appellate briefs is meritless. Respondents cite to no authority for this argument, which is nonsensical on its face. Even *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), only requires a circuit court to make findings of fact, "includ[ing] those facts which the circuit court finds relevant, determinative of the issues and undisputed." *Id.* at Syl. Pt. 3, *in part*. And, if the findings of fact are insufficient, the Court can still affirm on a separate legal issue. *Id.*, 484 S.E.2d at 235.

In any event, contrary to Respondents' argument, the ICA erred in holding that the Circuit Court provided no basis for its ruling based on Pennsylvania law. See Resp. Br. at 23; J.A. 29–30. Indeed, the Circuit Court made several correct conclusions regarding indemnification agreements under Pennsylvania law, including as follows:

5. “Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims.” *Lehman v. Smith*, 270 A.3d 1128 (Pa. Super. Ct. 2021), *reargument denied* (Feb. 15, 2022).

6. Under Pennsylvania law, provisions requiring indemnification of another party's negligence require “a clear and unequivocal agreement before a party may transfer its liability to another party.” *Bernotas v. Super Fresh Food Markets, Inc.*, 581 Pa. 12, 20, 863 A.2d 478, 482–83 (2004) (citing *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 588 A.2d 1, 7 (1991)).

7. Where an indemnification clause “precludes indemnification for injuries caused by [the indemnitees'] 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).

J.A. at 767.³

Respondents concede that Pennsylvania courts do not require a causal connection between the indemnitor's activities and the resulting injuries. Resp. Br. at 24. In fact, in *PPG Industries, Inc. v. Central Industrial Maintenance, Inc.*, No. 05cv1193, 2006 WL 2087529 (W.D. Pa. July 25, 2006), the Western District of Pennsylvania held that an indemnification provision in an agreement substantially similar to the AOS required the defendant contractor to indemnify PPG for a claim brought by a subcontractor's employee who was injured while working at the Natrium Plant. *Id.* at *2–3.

³ Respondents do not quarrel with any of the Pennsylvania cases cited by the Circuit Court.

Respondents’ attempt to distinguish *PPG Industries* misses the mark. The district court in *PPG Industries* held that the claim was within the scope of the AOS in that case because the employee was injured performing work required of the defendant indemnitee – *not because the work he was performing caused the injury*. The only time the word “cause” appears in *PPG Industries* is when the court quotes the “arising from any cause whatsoever” language from the AOS. *Id.* 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.

Respondents’ reliance on *Hershey Foods Corp. v. General Electric Service Co.*, 422 Pa. Super. 143, 619 A.2d 285 (1992), is misplaced. In *Hershey Foods* the issue was whether Hershey Foods appellant was entitled to indemnification from General Electric Service Co. (“GESCO”) under the terms of an indemnification provision in a contract between the parties for injuries that a GESCO employee sustained during his lunch break. The indemnification provision at issue provided among other things that “[GESCO] shall indemnify and hold harmless [Hershey] from and against all claims, damages, losses and expenses including attorneys’ fees arising out of or resulting from the performance of the Work” *Id.*, 619 A.2d at 287. The Court held that the injury to GESCO’s employee during his lunch break did not arise out of the performance of the electrical work under the agreement. *Id.* at 290.⁴ This action is readily distinguishable because, as

⁴ The court in *Hershey Foods* held that the indemnification provision in that case did unambiguously require indemnification even where Hershey Foods was partly negligent. *Id.* at 288.

discussed above, Respondents were performing services under PO 45100044817 at the time of the Railcar Release.

Respondents fail to address *Tidewater Field Warehouses v. Fred Whitaker Co.*, 88 A.2d 796 (Pa. 1952), where the Pennsylvania Supreme Court construed a provision in a lease which required the indemnitor to purchase and maintain 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.*” *Id.* at 797 (emphasis in original). The Court held:

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.

Respondents and the ICA refuse to acknowledge that similar to *Tidewater*, the AOS, PO45100044817, and T&Cs require IPI to obtain insurance policies. For example, 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. *See also* J.A. 369 (insurance provision on front page of PO 45100044817), J.A. 310 (insurance provision in T&Cs). Similar to *Tidewater*, the insurance provisions 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 they 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 Respondents, is readily 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. *Id.* at 189.

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 – other than its sole negligence (ordinary or gross) or willful misconduct – was intended. *See* J.A. 282 (indemnity provision in AOS), J.A. 310 (indemnity provision in T&Cs). Where an indemnification clause “precludes indemnification for injuries caused by [the indemnitee's] sole negligence . . . the negative inference to be drawn is that any injuries occurring by less than the sole fault of [the indemnitee] fall within the scope of the indemnification clause.” *Woodburn v. Consolidation Coal Co.*, 590 A.2d 1273, 1275 (Pa. Super. 1991). Also, in contrast to *Pittsburgh Steel*, in this action the insurance provisions in the AOS, PO 45100044817, and T&Cs make it clear that the parties did in fact intend that IPI insure Westlake. The concern expressed by the ICA that it is difficult to imagine that IPI intended to be an insurer simply is not well-founded.

Parties frequently allocate risk through indemnification and insurance provisions. To accept the ICA's baseless skepticism in these well accepted concepts would dramatically unsettle innumerable bargained for contracts. Accordingly, this Court should hold that there is a sufficient nexus between IPI's activities and the resulting injuries to trigger a duty to indemnify.

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.

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. As a threshold matter, Respondents waived this issue because IPI failed to plead Westlake’s sole negligence, willful misconduct, or gross negligence as an affirmative defense to Westlake’s counterclaim.

Respondents do not deny the ICA correctly held that sole negligence, gross, negligence, and willful misconduct are affirmative defenses on which IPI bears the burden of proof. J.A. at 46–51. In *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Tex. App. 1st Dist. 2002), which was cited by the ICA, the court held that claims that contractual exclusions, including in that case gross negligence and willful misconduct, preclude indemnification are affirmative defenses. In that case, the court found that the indemnitor pleaded by way of affirmative defense, “that indemnification was improper based on Nabor’s gross negligence or willful misconduct, i.e., a contract exclusion.” *Id.* at 126.⁵

In *XL Specialty Insurance Co. v. Kiewit Offshore Services, Ltd.*, 426 F. Supp. 2d 565 (S.D. Tex. 2006), which was also cited by the ICA, the court applied *Tesoro Petroleum*. In *XL Specialty*

⁵ The court in *Tesoro Petroleum* affirmed the district court’s grant of summary judgment to the indemnitee because the indemnitor failed to demonstrate a genuine issue of material fact relating to the specific element of causation necessary to maintain its affirmative defense. *Id.*

Insurance the court held that neither indemnitor raised the affirmative defenses at issue, including the indemnitee's sole negligence or gross negligence. Accordingly, those issues were waived. *Id.* at 576. *See also Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 138 P.3d 1201 (Ariz. Ct. App. 1st Div. 2007) (citing *Tesoro Petroleum* and holding that trial court correctly declined to address gross negligence argument because “Landlord has never asserted any claim of gross negligence against Grubb & Ellis, despite knowing that Grubb & Ellis was seeking indemnification ...”).

Contrary to Respondents' argument, Respondents' seventh affirmative defense, is insufficient to put Westlake on notice of any affirmative defense for Westlake's sole negligence, gross negligence or willful misconduct. The seventh affirmative defense states: “Defendants' damages, if any, were not proximately caused by any act or omission by Plaintiffs, but by the acts or omissions of other persons or entities for whose actions Plaintiffs are not legally responsible.” J.A. at 258. Respondents' affirmative defense does not reference “sole negligence, gross negligence, or willful misconduct” at all so as to put Westlake on notice of any affirmative defenses under the terms of the Agreement.⁶ In addition, while the affirmative defense specifically refers to Westlake, *i.e.*, Defendants, in connection with damages, it does not refer to Westlake in connection with the acts or omissions of *other persons or entities* for whose actions Respondents, *i.e.*, Plaintiffs are not legally responsible. In the context of this affirmative defense, other persons or entities means other than Westlake or Respondents. This conclusion is inescapable because the affirmative defense is in response to counterclaims for breach of contract and indemnification that expressly allege IPI's legal responsibility to Westlake. Because IPI never pleaded Westlake's sole negligence (ordinary or gross) or willful misconduct in accordance with West Virginia Rule of

⁶ It should be noted, that gross negligence is not a proper affirmative defense under the Agreement.

Civil Procedure 8(c) and instead affirmatively pleaded “acts or omissions of other persons or entities,” IPI cannot meet its burden on pleading these 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. Respondents cannot rely on the NTSB report because this Court recently held that the same NTSB report is not admissible. In *National Union Fire Insurance Co. of Pittsburgh, PA v. Westlake Chemical Corp.*, 249 W. Va. 575, 900 S.E.2d 1 (2024), this Court explained that 49 U.S.C. § 1154(b) (2018) “prohibits the admission into evidence or use of any part of an NTSB report in a civil action for damages resulting from a matter mentioned in the report.” *Id.* at 4. The Court further noted that “although there is a split of authority as to whether *factual* information contained in an NTSB report may be admitted into evidence in a civil action, *see Chiron [Corp. & PerSeptive Biosystems v. Nat’l Transp. Safety Bd.*, 198 F.3d 935, 940–41 (D.C. Cir. 1999), we have found no cases in which the NTSB’s findings relating to *causation* have been deemed admissible.” *Id.* at 4 n.5. Thus, this Court has found no cases supporting the admissibility of an NTSB report for the purpose it has been proffered by Respondents in this action – to show causation.

In addition, as a matter of law Ms. Bart’s testimony does not create a genuine issue of material fact regarding Westlake’s sole negligence (ordinary or gross) or willful misconduct. As discussed in Westlake’s opening brief, Ms. Bart’s testimony at best supports an inference that Westlake’s 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. J.A. 365–66, 494–95.

The snippets of Ms. Bart's testimony in Respondents' brief offer no evidence of Westlake's sole negligence (ordinary or gross) or willful misconduct. As a threshold matter, Respondents' citations to the Appendix Record are erroneous. For example, the discussion of a "back and forth" about whether to repair 1702 does not appear in the Joint Appendix at pages 492 through 493 but rather on 366 through 368. Placed in context, Ms. Bart testified as follows:

Q. ... [C]an you tell us whether or not Axiall hired AllTranstek and Rescar as its experts in tank car repairs and maintenance?

A. Certainly, we thought we were going above and beyond, hiring a consultant with the caliber of AllTranstek to oversee our maintenance practices and help us set up these inspection frequencies and help us comply with the regulations. We certainly did not have the engineering staff to do that ourselves.

Q. Did AllTranstek and Rescar have a good reputation in the industry?

A. They certainly did. Rescar had made this same repair to this railcar for us hundreds – literally hundreds – of times, successfully made this repair.

So we had no reason to think that they wouldn't make the repair, the internal corrosion repairs and the heat treatment that caused the failure – there was no reason to suspect that they wouldn't have made that repair successfully this time as well.

Q. AllTranstek and Rescar had this tank car, AXLX1702, in its facilities for roughly six months doing the inspection and repair work?

A. Yes. The extensiveness of the repair and the – the back and forth a little bit about if we were going to repair the car or just, you know, retire it, that went on for quite some time. This one was a little bit – this was longer than normal. I would agree to that. Six months was long.

Q. Did Axiall reasonably anticipate that AXLX1702 was as good as new and safe for use once it was returned by AllTranstek and Rescar after its inspections and repairs?

A. Right. We hired – yes, absolutely. We expected Rescar to repair – they told us they could repair the car back to normal.

AllTranstek was – should have inspected the repairs and made sure that they were done properly. That's what we paid them for.

So in all – in all of our knowledge, we thought the car was repaired successfully and back in service good as new.

J.A. 366–68.

Contrary to Respondents’ argument, 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. 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. J.A. 496–97. 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.

Respondents do not dispute that IPI’s president Mr. Taylor admitted that he does not know how the Railcar Release occurred. J.A. 322. Nor do Respondents dispute that Mr. Taylor testified that he 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. 323–25.

Respondents’ argument that Mr. Taylor’s testimony that he did not hear an alarm at the time of the Railcar Release and that he and IPI’s employees tried to exit through a freight gate that was locked and had to be opened by a security guard creates a genuine issue of material fact concerning Westlake’s sole negligence (ordinary or gross) or willful misconduct is specious. Mr. Taylor did not testify that Westlake did not sound an alarm but only that Mr. Taylor did not hear an alarm. J.A. 551. Mr. Taylor testified that he was told that there was a chlorine leak by one of his employees who had been told by other men. J.A. 501. Mr. Taylor did not know what other message was relayed to his employee, and he testified that it all happened in about twenty seconds before he began telling the IPI’s employees to get out. J.A. 504–05. When Mr. Taylor and others got to the freight gate, and it was not open, he instructed an employee to call the guard shack and the gate was opened. J.A. 508. Although Mr. Taylor testified that a few minutes passed before the

gate opened, he did not testify in the record cited by Respondents that they were supposed to evacuate through the freight gate. *See* J.A. 551–52. In any event, Mr. Taylor’s testimony does not tend to prove Westlake’s sole negligence (ordinary or gross) or willful misconduct regarding the Railcar Release as a whole.

Moreover, Respondents’ reliance on the deposition testimony of Paul Linder is misplaced.⁷ As discussed in Westlake’s opening brief, 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.

Respondents concede that under West Virginia’s comparative fault statute, W. Va. Code §§ 55-7-13a, 55-7-13d, “[t]he burden of ... proving comparative fault shall be upon the person who seeks to establish such fault.” Resp. Br. at 36. Respondents fail to appreciate the fact that, like sole negligence (ordinary or gross) and willful misconduct, comparative fault is an affirmative defense. As explained in Westlake’s opening brief, the comparative fault statute does not apply to Westlake’s counterclaims for breach of contract and indemnification. To the extent that the comparative fault statute may apply, however, the statute places the duty on IPI to give notice of any affirmative defense of other individuals’ comparative fault in this action.

In any event, Respondents wholly fail to address *Axiall Corp. v. AllTranstek LLC*, No. 966WDA2022, 2024 WL 2811827 (Pa. Super. June 3, 2024). In that case, 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. Axiall alleged that both

⁷ It should be noted, that Mr. Linder testified that he did not blame IPI for the Railcar Release. J.A. 636. The record does not indicate that Mr. Linder testified whether he blamed IPI for attempting to evacuate through the freight gate.

AllTranstek and Rescar agreed to and breached Axiall's T&Cs by negligently performing their respective work and inspect the same. A 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. 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.

In *Covestro, LLC v. Axiall Corp.*, No. 18c202, 2022 WL 16901387 (W. Va. Cir. Ct. Aug. 29, 2022), *amended by* 2022 WL 20512782 (Sept. 21, 2022), the Circuit Court considered *Axiall Corp.* and found as a matter of law that pursuant to the doctrine of collateral estoppel:

- (a) AllTranstek was negligent with respect to the August 27, 2016 chlorine release and 20 percent of the fault for the release is attributed to AllTranstek;
- (b) Rescar was negligent with respect to the August 27, 2016 chlorine release and 40 percent of the fault for the release is attributed to Rescar; and
- (c) Axiall was negligent with respect to the August 27, 2016 chlorine release and [40] percent of the fault for the release is attributed to Axiall.

Id., 2022 WL 16901387, at *7–8, *amended by* 2022 WL 20512782, at *1.

Although Respondents acknowledge *Covestro*, *see* Resp. Br. at 8 n.4, they make no attempt to distinguish this holding that as a matter of law Axiall is less than 50 percent at fault.

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. Respondents do not even address this issue in their brief, so in accordance with West Virginia Rule of Appellate Procedure 10(d) this Court should assume that Respondents agree with Westlake's view of this public policy issue. *See Freeland v. Marshall*, 249 W. Va. 151, 895 S.E.2d 6, 15 (2023) (considering the respondent's failure to respond to the petitioner's argument as confession of error) (citing 5 Am. Jur. 2d Appellate Review § 477 (2018)).

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"), including claims of negligence and that the defendants "fraudulently, deceitfully and willfully, wantonly and recklessly concealed from the workers that they were being exposed to unsafe levels of asbestos." *Id.*, 569 S.E.2d at 466. 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). *See Maxum Indem. Co. v. Westfield Ins. Co.*, No. 2:10cv428, 2011 WL 289270, at *7 (S.D. W. Va. Jan. 25, 2011) (holding that *Marlin* severely undermined the plaintiff's contention that public policy precluded indemnification).

The public policy in *Marlin* applies with equal force here.

III. 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 4th day of September 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2024, I filed the “*Reply 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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