

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.

Appeal from an Opinion of the
Intermediate Court of Appeals of
West Virginia (No. 22-ICA-164)
affirming in part, vacating in part,
and remanding a final order of the
Circuit Court of Marshall County
(Civil Action No. 18-C-14)

	BRIEF OF RESPONDENTS IPI, INC. AND MATTHEW JOSEPH TAYLOR	

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ASSIGNMENTS OF ERROR

Respondents IPI, Inc. (“IPI”) and Matthew Taylor (“Mr. Taylor”) sued Petitioners Axiall Corporation and Eagle Natrium, LLC (now known as Westlake Chlor-Vinyls Corporation and Westlake Natrium, LLC, respectively) (hereinafter collectively referred to as “Petitioners”) for personal injuries and property damages they sustained after being exposed to chlorine gas in Petitioners’ chemical plant in New Martinsville, West Virginia (the “Plant”). Pursuant to Purchase Order No. 4510044817 (the “Purchase Order”) and an Agreement for On-Site Services (the “AOS”), Respondents were on site pressure washing and painting a condensate tank in the Plant. Contemporaneously, several hundred yards away, in an entirely different area of the Plant, Petitioners were loading hundreds-of-thousands of pounds of chlorine into a defective railcar. The railcar had a preexisting crack. It ruptured and released approximately 178,000 pounds of chlorine gas throughout the Plant, including the area where Mr. Taylor and two of IPI’s employees were working. The chlorine gas leak had no relationship whatsoever to the services IPI and Mr. Taylor agreed to perform in the Purchase Order and the AOS.

Citing the AOS and the Purchase Order (which incorporated by reference certain general terms and conditions (the “T&C’s”)), Petitioners filed counterclaims against IPI. The counterclaims allege that IPI breached its contractual obligations and were obligated to indemnify and hold harmless Petitioners from Respondents’ lawsuit. The Circuit Court of Marshall County, West Virginia, awarded Petitioners a partial summary judgment on the counterclaims. However, in a thorough, unanimous, and reported decision, the West Virginia Intermediate Court of Appeals (the “ICA”) determined that the circuit court erred in awarding Petitioners partial summary judgment. *IPI, Inc. v. Axiall Corp.*, 249 W. Va. 544, 897 S.E.2d 572 (2024). Although agreeing with the circuit court that the duty to indemnify is controlled by the indemnity provision in the

AOS, the ICA correctly recognized that the indemnity provision may not apply to the facts. The ICA vacated and remanded the action to the circuit court to, among other things, “more adequately consider 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.” *Id.* at 572.

As threshold matter, Respondents believe this Court lacks subject matter jurisdiction. The ICA’s Opinion is not appealable to this Court because it remanded the case back to the circuit court with instructions to further assess the scope of the indemnity provision, and if necessary, to consider whether there are genuine issues of material fact regarding the existence of sole negligence, gross negligence, and willful misconduct on the part of Petitioners.¹ See Syl. Pt. 2, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990) (“Ordinarily, a judgment of reversal rendered by an intermediate court which remands a cause for further proceedings in conformity with the opinion of the court is not final and, therefore, not appealable to a higher appellate court, so long as judicial action in the lower court is required.”).

Notwithstanding the jurisdictional issue, the ICA decided Respondents’ appeal correctly, because:

- I. Any indemnity obligation is governed exclusively by the indemnity provision in the AOS rather than the indemnity provision in the T&C’s, as their provisions are conflicting and inconsistent, and, in such circumstances, the AOS states that its provision controls.
- II. The circuit court did not adequately analyze or explain its decision that IPI’s services fell within the scope of the indemnity provision to permit meaningful appellate review.

¹ Respondents have filed, contemporaneously herewith, a Motion to Dismiss Appeal. It sets forth in greater detail the reasons why dismissal of this appeal is appropriate. To avoid redundancy, Respondents hereby incorporate the arguments set forth in their Motion to Dismiss Appeal as if fully stated herein.

- III. The circuit court failed to determine whether there is a triable issue that Petitioners were “solely negligent,” “grossly negligent,” or had committed “willful misconduct,” circumstances that would foreclose any potential duty to indemnify.

Pursuant to W. Va. Code § 51-11-10(c), this Court should enter an order **DENYING** Petitioners’ appeal and **AFFIRMING** the ICA’s judgment.

STATEMENT OF THE CASE

I. Relevant Facts

Located in Elkview, West Virginia, IPI is a small business that provides, among other things, industrial painting and power washing services to businesses throughout West Virginia. Mr. Taylor is IPI’s president. JA 68. He routinely works onsite for many of IPI’s projects. JA 68. Through IPI’s commercial relationship with Petitioners, Mr. Taylor worked onsite at the Petitioners’ Natrium Plant (the “Plant”) in New Martinsville, West Virginia. JA 419. On the date of their injuries, Mr. Taylor and IPI agreed to “[p]ower wash and paint #24 Condensate Tank,” pursuant to the Purchase Order. JA 420, 553.

A. The First Chlorine Gas Leak

For decades, IPI maintained a positive commercial relationship with Petitioners. This relationship soured in August of 2016, however, when the first of two chemical leaks caused Respondents to be exposed to toxic levels of chlorine gas (the “First Chlorine Gas Leak”).²

On August 27, 2016, Respondents were performing power washing and painting services on Condensate Tank 24. JA 419. At the same time Mr. Taylor and other IPI employees were performing these services, the Petitioners were attempting to load hundreds-of-thousands of

² Shortly after returning to work in the Plant, Respondents were, yet again, exposed to another chlorine gas leak in the Plant (the “Second Chlorine Gas Leak”). JA 72–73. The Second Chlorine Gas Leak is not at issue in this appeal because Petitioners only sought indemnification from IPI with respect to the First Chlorine Gas Leak.

pounds of chlorine into a 1979 railcar (the “Railcar”). JA 419. The chlorine loading occurred in an entirely different department of the plant, hundreds of yards away from where Mr. Taylor and IPI’s employees were working. JA 420. The 37-year-old Railcar utilized ACF Industries ACT-200 stub underframe. JA 419, 450. In 2006, the Federal Railroad Administration advised that this underframe was “prone to defects such as tank head cracks, pad-to-tank cracks, sill web cracks, and tank shell buckling that in some instances led to release of hazardous materials.” JA 419, 452.

The Railcar had a preexisting crack “near the inboard end of the stub sill cradle pad.” JA 419, 443. As Petitioners filled the defective Railcar with chlorine, the Railcar’s preexisting crack widened, ruptured, and released 178,400 pounds of toxic chlorine gas throughout the Plant. JA 419–420, 478–479. The toxic chlorine gas then migrated to the area where Mr. Taylor and two of IPI’s employees were working. At that time, Mr. Taylor and IPI’s employees were working on aerial platforms approximately forty feet in the air. JA 420, 506–507. Unable to hear the Plant emergency system, Respondents found themselves aloft in a cloud of chlorine gas. JA 420, 551.

Mr. Taylor noticed, out of the corner of his eye, the gas cloud descend upon them. As Mr. Taylor testified:

[i]t’s like falling out. And it’s like – it’s pretty huge. I mean, to sit there and witness that horrific size – I mean, it’s all green. It seemed like the green, the chlorine gas itself was higher. . . . I was in fear. . . .

JA 552. At that time, Mr. Taylor grabbed his escape respirator, returned to ground level, and directed his workers to apply their respirators. JA 501–503. To do this, Mr. Taylor had to remove his respirator and yell to IPI employees to apply their respirators. JA 506–507. Resultingly, Mr. Taylor inhaled toxic chlorine gas in the process. JA 421.

Once Mr. Taylor got his employees’ attention, they attempted to escape the Plant but were trapped by a locked gate. JA 421, 508. Smothered by chlorine gas, Mr. Taylor realized the

magnitude of the leak; he became fearful for his health and wellbeing. JA 508. Exhausted from the exposure and inhalation of the chlorine gas, Mr. Taylor stumbled out of the Plant, arrived at the Plant's clinic, and collapsed on a gurney. JA 421, 509.

After waiting for nearly an hour to be treated at the Plant clinic, Mr. Taylor was transferred via ambulance to Reynolds Memorial Hospital ("Reynolds") in Glen Dale, West Virginia. JA 421, 510–511. There, medical professionals observed that Mr. Taylor had suffered from chest tightness, vomiting, petechiae in his throat and diaphoretic.³ JA 421, 567. The treating physician noted that "[t]he effects of chlorine exposure [were] significant and delayed. . . . The risk of chemical inhalation burns [was] significant." JA 565. Because the physician was incapable of adequately treating Mr. Taylor's injuries, he was life-flighted to Ruby Memorial Hospital in Morgantown, West Virginia for further evaluation and treatment. JA 570. In addition to the serious and ongoing physical injuries sustained by Mr. Taylor, the First Chlorine Gas Leak destroyed hundreds-of-thousands of dollars' worth of IPI's equipment. JA 422, 512–550.

Mr. Taylor filed this action against Petitioners, seeking to recover his damages for his physical injuries, his company's equipment and, most importantly, the damages to his mental health from the PTSD from the *two* chlorine gas leaks in the Plant. Petitioners attempted to escape these damages through their reliance on two boilerplate indemnification provisions that have no relationship to the chlorine gas leaks that occurred in other parts of the Plant.

³ "Petechiae are pinpoint, round spots that appear on the skin as a result of bleeding. The bleeding causes the petechiae to appear red, brown or purple. Petechiae commonly appear in clusters and may look like a rash." See Mayo Clinic, *Petechiae*, <https://www.mayoclinic.org/symptoms/petechiae/basics/definition> (last visited January 9, 2023).

B. The Indemnification Provisions

In the circuit court, Petitioners argued that Respondents' claims regarding the First Chlorine Gas Leak, *and the First Chlorine Gas Leak only*, were subject to two separate indemnification provisions. JA 265–278. First, Petitioners directed the circuit court to the Agreement for On-Site Services (the “AOS”) executed by IPI and PPG Industries, Inc. prior to Petitioners' ownership of the Plant. JA 266. Second, Petitioners directed the circuit court to Purchase Order 4510044817 (the “Purchase Order”)—the specific purchase order under which Respondents were working. JA 267. Petitioners further insisted that their Purchase Order General Conditions (the “T&C's”), which contain yet another indemnification provision, were incorporated into all of their purchase orders, including the Purchase Order at issue here. JA 267. Contrary to the AOS's explicit instruction that its provisions control in the event of inconsistencies, Petitioners maintain that both indemnification clauses, read conjunctively, form the scope of IPI's duty to indemnify them in this case. Pets.' Brief at 12–17.

1. The Agreement for On-Site Services

In 2007, prior to Westlake Chlor-Vinyls' acquisition of the Plant, IPI entered into the AOS, which contains the following indemnification provision:

[IPI] . . . agrees to indemnify, defend and hold harmless [Petitioners] . . . ***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 . . . ***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 [IPI] . . . ***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), 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.

JA 282 (emphasis added).

The AOS defines its “Scope of Services” as “certain on-site services (the “Services”) to be performed by [IPI], at the [Plant], per the performance schedule, the pricing therefor, and for [Petitioners] as shall be specified and described in an ‘Accepted Order,’ and as required by and in accordance with [the AOS].” An “Accepted Order” is defined by the AOS as, among other things, a “purchase order.” JA 281.

Important here, the AOS explicitly contemplates potential inconsistencies and conflicts between its terms and conditions and those of Petitioners’ purchase orders:

If there are any terms or conditions in [a purchase order] which are inconsistent with or in conflict with [the AOS], the terms and conditions of the various documents . . . shall control in the following priority and order: [(1)] the front of the [purchase order]; [(2)] [the AOS]; and, [(3)] then the reverse side terms and conditions of the [purchase order].

JA 281.

2. Purchase Order 4510044817 and Petitioners’ General Terms and Conditions

The T&C’s contain a separate and conflicting indemnification provision. It provides:

13.1 [IPI] . . . agrees to indemnify, defend and hold harmless [Petitioners] . . . 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. . . .***

JA 310 (emphasis added).

Petitioners maintain that the Purchase Order incorporated by reference this indemnification provision via the following language on the ***reverse-side*** of the Purchase Order: “**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.AXIAL.COM/COMPANY.” JA 369–370 (emphasis in original).

II. Procedural History

A. IPI’s and Mr. Taylor’s Claims Against Petitioners

Mr. Taylor and IPI filed their Complaint on January 29, 2018, alleging five claims with respect to two chlorine gas leaks: (1) Count I for Strict Liability, (2) Count II for Res Ipsa Loquitur, (3) Count III for Premises Liability, (4) Count IV for Fraud, and (5) Count V for Negligent Misrepresentation.⁴ JA 66–84. For purposes of this appeal, however, these claims are only relevant to the extent they relate to the First Chlorine Gas Leak because, as explained below, Petitioners only sought indemnification for Respondents’ claims stemming from the First Chlorine Gas Leak.

On June 17, 2019, Petitioners amended their Answer to include, for the first time, a Counterclaim for, among other claims, Express Indemnity for Respondents’ purported failure to indemnify Petitioners in relation to the claims filed regarding the chlorine releases. After being granted leave, Petitioners amended their counterclaim on September 24, 2021, to include a claim

⁴ By Order dated September 8, 2022, the circuit court granted summary judgment in Petitioners’ favor on Counts I, II, IV, and V of Respondents’ Complaint with regard to the First Chlorine Gas Leak. As such, the only remaining claim with respect to the First Chlorine Leak is Count III for Premises Liability.

Nevertheless, a separate civil action was filed by Covestro, LLC—which operated a plant neighboring the Natrium Plant—in the Business Court Division of the Circuit Court of Marshall County, West Virginia (the “Business Court Action”). *See Covestro, LLC v. Axiall Corporation*, Civil Action Nos.: 18-C-202, 18-C-203 (Cir. Ct. Marshall Cty., Bus. Ct. Div.). In the Business Court Action, the court found that Covestro’s claim for negligence did not require expert testimony—given the Pennsylvania Action’s finding of negligence on the part of Axiall—and could be established via the doctrine of res ipsa loquitur. *See Business Court Order* at 9–13. Respondents plan to move the circuit court for reconsideration of its rulings with respect to Counts II and V of their Complaint.

for breach of contract for Respondents' failure to indemnify them with respect to the First Chlorine Gas Leak pursuant to the AOS and the Purchase Order. JA 186–245.

B. Petitioners' Motion for Partial Summary Judgment Regarding Indemnification

On May 23, 2022, Petitioners filed a Motion for Partial Summary Judgment on their counterclaim for indemnification. JA 262–417. Petitioners' Motion for Partial Summary Judgment argued that (1) Pennsylvania substantive law governed the circuit court's interpretation of the AOS's and Purchase Order's indemnification provisions, JA 271; (2) the AOS's and Purchase Order's indemnification provisions were "clear and unequivocal" under Pennsylvania law, JA 271–273; (3) Respondents' claims fell squarely within the scope of the indemnification provisions, JA 274–276; and (4) Respondents must reimburse Petitioners for their costs and expenses related to the First Chlorine Gas Leak, including attorneys' fees related to this litigation, JA 276–277.

Respondents timely filed their Response in Opposition to Petitioners' Motion for Partial Summary Judgment ("Response") on June 21, 2022. JA 418–593. In their Response, Respondents showed that (1) the AOS's and Purchase Order's indemnification provisions, by their relevant language, did not apply to the First Chlorine Gas Leak, JA 424–429; (2) genuine issues of material fact concerning whether Petitioners were solely negligent, grossly negligent, or acted with willful misconduct precluded summary judgment, JA 429–432; and (3) Respondents' damages for the Second Chlorine Gas Leak were inextricably related to the damages they sustained from the First Chlorine Gas Leak, JA 432. Petitioners timely replied on July 5, 2022. JA 594–762.

C. The Circuit Court's Order Granting Partial Summary Judgment

On September 12, 2022, the circuit court entered an Order granting Petitioners' Motion for Partial Summary Judgment pursuant to Rule 56(c). JA 761. In its Order, the circuit court reached

several erroneous legal conclusions. First, the circuit court summarily concluded, without explanation, that the indemnity provisions were “clear and unequivocal” under Pennsylvania law and that they applied to the facts of this case so as to impose an obligation on the part of IPI to indemnify Petitioners for Respondents’ claims. JA 767–768. In this regard, the circuit court impermissibly drew a negative inference that any injuries occurring by less than the sole fault of Petitioners fell within the scope of the indemnification provisions where indemnification would be precluded for injuries caused by Petitioners’ sole negligence. JA 768. Importantly, though, the disputed indemnification provisions here were further limited by their explicit language that Respondents’ claims arise from the services provided.

Second, the circuit court concluded that Respondents’ claims with regard to the First Chlorine Gas Leak fell within the scope of the indemnity provisions because the damages Respondents sustained arose out of the services they performed at the Plant pursuant to the Purchase Order.⁵ JA 768. Among the types of injuries explicitly set forth in the AOS’s indemnification provision are “injuries resulting from failure of or defect in any equipment, instrument or device supplied by [Petitioners] or their employees to [Respondents].” JA 577. In reliance on this language, the circuit court incorrectly found that the Railcar’s defects constituted a “failure of or defect in any equipment, instrument, or device . . .” under the AOS. JA 768. This finding was made by the circuit court, notwithstanding the undisputed fact that Respondents’

⁵ As explained below, the circuit court erroneously failed to examine which of the two conflicting indemnification provisions governed Respondents’ claims below. This critical error carries significant consequences insofar as the indemnification obligations outlined by the two indemnification provisions impose very different duties on Respondents. For example, the indemnification provision set forth in Axiall’s Terms and Conditions, which are apparently incorporated by reference into all of its purchase orders, requires reimbursement for attorneys’ fees, whereas the AOS’s indemnification provision does not provide as such.

services in the Plant had nothing to do with the Railcar. They were pressure washing and painting a tank hundreds of yards away in a differed area of the Plant.

Third, the circuit court concluded that the indemnification provisions' exceptions did not apply because Petitioners were not "solely negligent" and did not engage in "willful misconduct" with regard to the First Chlorine Gas Leak. JA 768. However, this finding was premature and multiple factual disputes regarding Petitioners' conduct with regard to the First Chlorine Gas Leak should have precluded summary judgment in Petitioners' favor.

Finally, the circuit court concluded that Respondents breached the AOS, Purchase Order, and the T&C's by bringing its claims against Petitioners and by failing to indemnify, defend, and hold Petitioners harmless from their claims related to the First Chlorine Gas Leak. JA 768–769.

Based upon these findings and conclusions of law, the circuit court granted partial summary judgment in Petitioners' favor with respect to their breach of contract and express indemnity counterclaims as they pertained to the First Chlorine Gas Leak. The circuit court also found that there was no just reason for delay and that its Order constituted a final judgment as to the validity, applicability, and breach of Respondents' indemnification obligations under the AOS, the Purchase Order, and the T&C's. JA 770. In this regard, the circuit court stated that its Order was immediately appealable. Respondents timely appealed. JA 770.

D. The Intermediate Court of Appeals' Opinion

On appellate review, the ICA made three unanimous findings with respect to the circuit court's erroneous and deficient order, which should be affirmed by this Court. First, the ICA correctly held that IPI's duty to indemnify Petitioners was, and is, defined and controlled exclusively by the AOS, not by a Frankenstein blend of the AOS, Purchase Order and T&C's

(which the ICA correctly concluded were “inconsistent and in conflict in various respects”). JA 18–22.

Second, and most importantly, even though the ICA held that the indemnification clause of the AOS was sufficiently clear and unambiguous to provide indemnity for at least *some* degree of Petitioners’ own negligence, JA 22–28, the ICA correctly held that the circuit court failed to adequately explain its decision *concerning the causal nexus required by the indemnification clause to permit meaningful appellate review*. JA 28–33. To this end, the ICA observed that (1) “the [circuit] court concluded that the indemnification agreements applied to the facts of this case without any citation or analysis of the authorities from Pennsylvania and other jurisdictions referenced by the parties,” JA 29–30; (2) the circuit court failed to discuss “the rules of construction to be applied in construing those indemnity provisions,” JA 30; and (3) on remand, the circuit court “should more fully develop its analysis of the applicable law and relevant facts,” JA 30. Additionally, the ICA noted “significant areas and issues” of Pennsylvania law for the circuit court to consider on remand, including, *inter alia*: (1) the ICA’s doubt that “IPI intended to be an insurer for claims arising from causes completely unrelated to the work it was hired to perform, and over which it had no control,” JA 30–31; and (2) the principle of Pennsylvania law that ambiguities in indemnity agreements must be construed against the drafter (in this case, Petitioners as PPG’s successors in interest), JA 31–32. The ICA also noted the circuit court’s error in finding that the Railcar’s defects constituted a “failure of or defect in any equipment, instrument, or device” under the AOS. JA 32.

Finally, the ICA properly instructed the circuit court, on remand, to re-examine whether there are genuine issues of material fact concerning Petitioners’ sole negligence or willful misconduct, whether the AOS’s indemnification clause applied to Petitioners’ gross negligence,

and whether there is a genuine issue of fact concerning the existence of gross negligence. JA 34–53.

This Court should dismiss Petitioners’ appeal because it lacks jurisdiction insofar as the ICA’s Opinion—which remanded the case back to the circuit court to complete several tasks that will be determinative of Petitioners’ indemnity claims—is not a final, appealable order. Notwithstanding the jurisdictional issue, this Court should affirm the ICA’s Opinion and remand this case to the circuit court to consider the ICA’s instructions and to address the deficiencies identified by the ICA in the order granting Petitioners’ summary judgment on their indemnity counterclaim.

SUMMARY OF THE ARGUMENT

In its comprehensive, well-reasoned, and unanimous Opinion, the ICA correctly determined that (1) IPI’s duty to indemnify Petitioners is governed exclusively by the AOS’s indemnity provision, (2) the circuit court failed to adequately explain its decision concerning the causal nexus required by the AOS’s indemnity provision to permit meaningful appellate review, and (3) the circuit court must re-examine whether any genuine issues of material fact exist concerning Petitioners’ sole negligence, willful misconduct, or gross negligence.

Petitioners now appeal the ICA’s Opinion. They ask this Court to endorse the circuit court’s erroneous and inadequate interpretation of the indemnification provisions in the AOS and the T&C’s. These provisions are conflicting, inconsistent, and inapplicable; reading them together would make the victims of Petitioners’ tortious conduct financially responsible, not only for the personal injuries and property damage Respondents (the victims) sustained, but also for Petitioners’ attorneys’ fees and defense costs. The ICA *unanimously rejected this flawed*

interpretation. This Court, likewise, should reject Petitioners' arguments and affirm the ICA's unanimous Opinion. There are four reasons why.

First, as an initial matter, Petitioners' appeal is not appropriate jurisdictionally because the ICA affirmed in part, vacated in part, and remanded this case back to the circuit court with instructions to address several deficiencies in its order granting Petitioners summary judgment. Because judicial action of the circuit court in conformity with the ICA's Opinion is required on remand, the ICA's Opinion is not final and, therefore, not appealable to this Court. *See* Syl. Pt. 2, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990); Syl. Pt. 2, *Foster v. Foster*, 221 W. Va. 426, 655 S.E.2d 172 (2007) (quoting Syl. Pt. 2, *Paxton*, 184 W. Va. 237, 400 S.E.2d 245).

Second, the ICA correctly determined that IPI's duty to indemnify Petitioners is defined and controlled exclusively by the AOS. This is because, as the ICA explained, "the language of the two indemnity provisions [the AOS and the T&C's] [is] inconsistent and in conflict in various respects." JA 19. Consistent with the plain language of the AOS's prioritization clause, which states that, in the event of a conflict, the terms of the AOS prevail over the terms of the T&C's, the ICA correctly concluded that the AOS's indemnity provision, exclusively, governs any indemnification obligation. JA 21–22.

Third, the ICA correctly concluded that the circuit court failed to adequately explain its decision concerning the nexus required by the AOS's indemnity language to permit meaningful appellate review. The ICA directed the circuit court to several controlling Pennsylvania authorities that, if followed, undermine the circuit court's conclusion that the indemnity provisions apply to Respondents' claims arising from the First Chlorine Gas Leak. Ignoring these authorities, the circuit court summarily concluded that IPI was obligated to indemnify Petitioners simply because Respondents were performing work in the Plant, even though Respondents' services bore no causal

relationship whatsoever to the defective Railcar or the First Chlorine Gas Leak. The ICA correctly held that the circuit court's conclusion contravened binding Pennsylvania law. It remanded this case for the circuit court to consider the authorities identified by the ICA.

Finally, the ICA correctly concluded that, if the circuit court determines that there is a sufficient nexus between the services Respondents were performing in the Plant and the source of Respondents' injuries (the defective Railcar), then it would need to further consider whether any genuine issues of fact precluded summary judgment in Petitioners' favor with respect to their potential sole negligence, willful misconduct, or gross negligence. Indeed, Respondents proffered significant evidence of Petitioners' sole negligence to the circuit court, including evidence that the Petitioners did not place any blame on IPI for the First Chlorine Gas Leak. JA 636. The circuit court disregarded all of Respondents' evidence and improperly acted as a fact finder, giving Respondents' evidence zero weight in assessing Petitioners' motion for summary judgment. The ICA sagely remanded these issues to the circuit court for reconsideration and to give it an opportunity to "articulate what materials and issues it considered, and why those materials did not raise material issues of fact." JA 45.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The ICA's Opinion is not appealable to this Court. *See* Syl. Pt. 2, *Paxton*, 184 W. Va. 237, 400 S.E.2d 245. Notwithstanding, the ICA's thorough and unanimous decision provides substantial grounds and justification for this Court to affirm the ICA's judgment. *IPI, Inc. v. Axiall Corp.*, 249 W. Va. 544, 897 S.E.2d 572 (W. Va. App. 2024). Accordingly, this appeal may be resolved by memorandum decision dismissing this appeal or affirming the judgment of the ICA. To the extent this Court has questions and believes oral argument may be necessary, IPI and Mr. Taylor welcome the opportunity to participate.

STANDARD OF REVIEW

As explained in Respondents' Motion to Dismiss Appeal, this Court does not have jurisdiction to adjudicate this appeal. Petitioners appeal a decision by the ICA to remand this case to the circuit court to correct several deficiencies in its summary judgment order, including the circuit court's failure to adequately explain the legal basis for its conclusion that the indemnity provision applies to the facts of this case and the circuit court's failure to explain why the evidence submitted by Respondents does not illustrate genuine issues of material fact precluding indemnity. The ICA's Opinion, therefore, is not a final, appealable order, and this case must be remanded to the circuit court for further proceedings.

To the extent this Court finds that it does have jurisdiction to adjudicate this appeal, a circuit court's entry of summary judgment is generally reviewed *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994). To this end, a circuit court may award summary judgment under Rule 56(c) of the *West Virginia Rules of Civil Procedure* "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." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 133 S.E.2d 770 (W. Va. 1963). Indeed, a circuit court's role "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Painter*, 451 S.E.2d at 758 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). All permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion. *Masinter v. WEBCO Co.*, 262 S.E.2d 433, 435 (1980) ("[W]e have viewed summary judgment with suspicion and have evolved the rule that, on appeal, the facts must be construed in a light most favorable to the losing party.").

Significantly, “[a]lthough [the] 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.” *W. Va. Dep’t of Health and Human Resources v. Payne*, 231 W. Va. 563, 569, 746 S.E.2d 554, 560 (2013) (quoting Syl. Pt. 3, *Fayette Cnty. Nat’l Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997)).

ARGUMENT

This Court should dismiss this appeal because, under the principle articulated by this Court in Syllabus Point 2 of *Paxton v. Crabtree*, the ICA’s Opinion does not constitute a final, appealable order and, therefore, this case must be remanded to the circuit court to complete further proceedings in accordance with the ICA’s instructions. However, to the extent this Court believes that it has jurisdiction, this Court should affirm the ICA’s unanimous Opinion affirming in part, vacating in part, and remanding the circuit court’s order.

I. The ICA’s decision to affirm in part, vacate in part, and remand the circuit court’s deficient order is not reviewable on appeal because further judicial action in the circuit court in conformity with the ICA’s Opinion is required.

Respondents have moved this Court to dismiss Petitioners’ appeal pursuant to Rule 31 of the *West Virginia Rules of Appellate Procedure*. Respondents hereby incorporate the arguments made in their motion to dismiss herein, and respectfully request this Court to dismiss Petitioners’ appeal because this Court lacks jurisdiction under W. VA. CODE § 58-5-1 insofar as the ICA’s Opinion is not a final order or judgment. Therefore, for the reasons set forth in Respondents’ Motion to Dismiss Appeal, this Court should dismiss Petitioners’ appeal and remand this case to the circuit court to complete the tasks directed to it by the ICA.

II. The ICA correctly held that the AOS governs IPI’s duty to indemnify Petitioners because the indemnity provisions in the AOS and the T&C’s conflict and the plain language of the AOS mandates prioritization of the AOS’s indemnity provision.

In the proceedings below, the circuit court summarily concluded that “[p]ursuant to the terms of the independently enforceable indemnification provisions in the AOS and the Terms and Conditions, IPI must indemnify, defend, and hold harmless [Petitioners] from all claims by [IPI and Mr. Taylor related to the [First Chlorine Gas Leak].” JA 768–769. This finding—that IPI’s and Mr. Taylor’s obligation to indemnify Petitioners arises from **both** the AOS and the T&C’s—contravened the explicit order of priority governing conflicting terms and conditions as set forth in the AOS. The ICA recognized this, and properly held that the AOS’s indemnity clause exclusively governed and defined IPI’s duty to indemnify Petitioners.

While “[i]t is axiomatic in contract law that two provisions of a contract should be read so as not to be in conflict with each other if it is reasonably possible,” *Keystone Fabric Laminates, Inc. v. Fed. Ins. Co.*, 407 F.2d 1353, 1356 (3d Cir. 1969), “[t]he fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties.” *Mitch v. XTO Energy, Inc.*, 212 A.3d 1135, 1138–139 (Pa. Super. Ct. 2019). This purpose is achieved by taking the “whole instrument” together to arrive at contractual intent. *Maisano v. Avery*, 204 A.3d 515, 520 (Pa. Super. Ct. 2019). Effect must be given to all of the provisions in a contract, and “[a]n interpretation will not be given to one part of the contract which will annul another part of it.” *Porter v. Chevron Appalachia, LLC*, 204 A.3d 411, 418–19 (Pa. Super. Ct. 2019).

By finding that IPI’s purported indemnification obligation arose from both the AOS and the T&C’s, the circuit court erroneously construed the AOS in a manner that rendered its conflict provision meaningless. As explained above, to the extent a conflict exists between the terms and

conditions of the AOS and the T&C's of any purchase order, the AOS explicitly provides the following priority and order with respect to their governance and applicability: (1) "the front of the [purchase order];" (2) the AOS; and (3) "then the reverse side terms and conditions of the [purchase order]." JA 576. The Purchase Order incorporates by reference the T&C's on its **reverse side**. JA 553–554. Thus, under the express, agreed-upon AOS, any portion of the T&C's that conflict with the AOS are preempted and inapplicable.

Here, the indemnity clauses of the AOS and the T&C's materially and irreconcilably conflict "in various respects," as the ICA put it. For example, as the ICA observed, the AOS contains language obligating IPI to indemnify Petitioners from "any and all claims, liability, damage, loss, penalties, fines, cost and expenses of any kind whatsoever." JA 577. Contrastingly, the T&C's include an additional term ("demands") and an illustrative parenthetical after the term "expenses" indicating that attorney fees are included. As the ICA discerned, the AOS does not expressly refer to attorney fees. JA 310.

The ICA also observed that the AOS refers to claims "arising out of this Agreement and/or the Services . . .," JA 577, while the T&C's refer to claims "arising or **allegedly** arising from or **related to** the subject matter of this Purchase Order. . . ." JA 310. The ICA correctly determined that the phrase "related to" was not superfluous, and noted that the scope of the indemnity obligation under the T&C's was arguably broader than the scope of the indemnity obligation under the AOS. JA 20. This presents a clear conflict.

The ICA also observed that the AOS contained language referring to injury, death, or property damage involving IPI and its employees "sustained in connection with performance of the Services," JA 577, and that the T&C's indemnity obligation did not contain similar "sustained in" language. JA 310.

The ICA also noted that the AOS's indemnity provision contained language "arising from any cause whatsoever (including without limitation, injuries resulting from 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). . .," JA 577, and that the T&C's indemnity clause did not include any language of the sort and did not refer to defects or failures in equipment, instruments or devices supplied by Petitioners. JA 310.

Finally, the ICA correctly identified that the AOS included exclusionary language that IPI's duty to indemnify would not apply if Petitioners engaged in "willful misconduct," JA 577, but the T&C's indemnity clause did not include this exclusionary language regarding willful misconduct. JA 310. Simply put, the provisions conflict.

In light of these several inconsistencies, the ICA appropriately concluded that the AOS and T&C's are inconsistent and conflicting. JA 21–22. Following the explicit priority established by the AOS, the ICA correctly reasoned that the AOS's indemnity clause controls the issue. JA 21.

Petitioners argue that "the ICA completely ignored Pennsylvania contract law principals" and, in essence, annulled the T&C's in their entirety. Pets.' Brief at 12–17. In reality, what the ICA did is follow the parties' express contract. Petitioners want this Court to ignore this critical and binding requirement in the AOS, which was drafted by Petitioners' predecessor in interest. They argue that the ICA "identified a handful of truncated differences in wording between the AOS and the T&C's 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." Pets.' Brief at 15.

But, under Pennsylvania law, courts “should give meaning to all its words and phrases and adopt a construction that avoids surplusage.” *Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, 414 F. Supp. 2d 508, 515 (M.D. Pa. 2005) (citing *Tenos v. State Farm Ins. Co.*, 716 A.2d 626, 631 (Pa. Super. 1998)). Petitioners suggest that this Court treat the AOS, the Purchase Order, and the T&C’s as one, singular contract between the parties. It is; but some provisions have priority under the terms of the contract.

There are two different indemnity provisions at issue here. One of them (the T&C’s) refers to attorneys fees. JA 589. The other (the AOS) does not. J.A. 577. This presents a conflict. One of the indemnity provisions (the T&C’s) refers to “demands.” JA 589. The other (the AOS) does not. JA 577. This presents a conflict. One of the indemnity provisions (the AOS) refers to claims “arising out of [the AOS] and/or the Services,” JA 577, while the other (the T&C’s) refers to claims “arising or allegedly arising from or related to the subject matter of this Purchase Order. . . .” JA 589. Clearly, Petitioners did not intend the phrase “related to” to mean “arising from” or “arising out of.” Otherwise, the phrase “related to” would be superfluous and meaningless. This presents a conflict. One of the indemnity provisions (the AOS) refers to injury, death, or property damage involving Respondents “sustained in connection with the performance of the Services. . . .” JA 577. The other (the T&C’s) does not contain language similar to the “sustained in” language set forth in the AOS. JA 589. This presents a conflict. One of the indemnity provisions (the AOS) requires indemnity for “injuries resulting from 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.” JA 577. The other (the T&C’s) does not require indemnity for such injuries. JA 589. This presents a conflict.

The indemnity provisions in the AOS and the T&C's cannot be reconciled. Notwithstanding these irreconcilable conflicts, the circuit court failed to identify which of the two indemnification provisions governed Respondents' claims and, instead, applied both of them. This flies in the face of the express language of the AOS, which sets forth the priority and applicability of conflicting terms and conditions between the AOS and any purchase orders. This Court should affirm the ICA's conclusion that the AOS exclusively governs the indemnity issue.⁶

III. The ICA correctly determined that the circuit court's order inadequately explained its decision that Respondents' injuries and claims fell within the scope of the indemnity provisions.

As explained above, the relevant language of the AOS's indemnity provision requires IPI to indemnify and hold harmless Petitioners from claims

arising out of [the AOS] and/or the Services, including, without limitation, for the death of or injury to persons or destruction of property involving [Respondents] . . . ***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 [Petitioners]*** . . . ***to [Respondents]*** . . . ***at the request of [Respondents]*** . . .) except to the extent arising out of the sole negligence or willful misconduct of the [Petitioners]. . . .

JA 577. Similarly, the T&C's, which are incorporated by reference into all of its purchase orders, requires indemnification only from claims "arising or allegedly arising from or related to the subject matter of" the particular purchase order. JA 310.

Without explanation, and without reference to any Pennsylvania interpretive canons applicable to these sorts of indemnity provisions, the circuit court summarily concluded that Respondents' damages "arose out of the services being performed or otherwise being provided by

⁶ Although Respondents maintain that the AOS is the exclusive source of any potential indemnity obligation on their part, for purposes of their remaining arguments, Respondents assume that either indemnification provision could govern. Respondents do not waive or concede in any manner that the indemnification provision set forth in T&C's and incorporated by reference into the Purchase Order govern their claims below.

IPI and Mr. Taylor pursuant to [Purchase Order] 4510044817, the incorporated Terms and Conditions and the AOS.” JA 768. On appeal, the ICA carefully scrutinized the circuit court’s deficient order and directed it to binding tenets of Pennsylvania law that, if followed, would have guided it to a different conclusion. The ICA correctly recognized that the circuit court provided *no basis* for its ruling based on Pennsylvania law. This Court should affirm the ICA’s Opinion.

As the ICA astutely noted, “*it is difficult . . . to imagine that IPI intended to be an insurer for claims arising from causes completely unrelated to the work it was hired to perform, and over which it had no control.*” JA 30–31 (emphasis added). After all, under Pennsylvania law, the primary purpose of contract interpretation is to give effect to the intention of the parties, *see Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. Ct. 2000), and, in reviewing indemnity agreements, the Supreme Court of Pennsylvania has frequently observed that it will not assume that parties have agreed to act as insurers and expose themselves to potentially devastating liability unrelated to their own actions. *See Perry v. Payne*, 66 A. 553, 555 (Pa. 1907); *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 171 A.2d 185, 189 (Pa. 1961).

Indeed, it is well-settled under Pennsylvania law that “if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee’s own negligence, they must do so in *clear and unequivocal language.*” *Ruzzi v. Butler Petro. Co.*, 588 A.2d 1, 4 (Pa. 1991) (emphasis added); *see also Bernotas v. Super Fresh Food Markets, Inc.*, 863 A.2d 478, 483 (Pa. 2004); *Greer v. City of Philadelphia*, 795 A.2d 376, 378 (Pa. 2002); *Perry v. Payne*, 66 A. 553, 557 (Pa. 1907). This is so because “assuming liability for the negligence of an indemnified party “is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation.”” *Greer*, 795 A.2d

at 378 (quoting *Ruzzi*, 588 A.2d at 4). As the Supreme Court of Pennsylvania wisely stated in *Perry*, it would be “contrary to experience and against reason” for a contractor to agree to indemnify another for the other’s negligence, when such indemnification would subject it to “uncertain and indefinite” liability. *Perry*, 66 A. at 555.

Also, Pennsylvania law mandates that indemnity agreements be strictly construed against the indemnitee (in this case, Petitioners) and ambiguities be resolved against the drafter (again, in this case, Petitioners), especially where the drafter is also the indemnitee. *Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.*, 264 F.3d 365, 371 (3d Cir. 2001) (applying Pennsylvania law); *El v. Southeastern Penn. Trans. Auth.*, 297 F. Supp. 2d 758, 762 (E.D. Pa. 2003) (“Pennsylvania law has long acknowledged that indemnity clauses are construed most strictly against the party who drafts them especially when that party is the indemnitee.”); *Bernotas*, 863 A.2d at 482 (“It is well settled in Pennsylvania that provisions to indemnify for another party’s negligence are to be narrowly construed. . . .”); *Ruzzi*, 588 A.2d at 7; *Ratti*, 758 A.2d at 703 (noting that Pennsylvania law “requires [courts] to strictly construe such [an] agreement against its drafter”).

In footnote 15 of its Opinion, the ICA wisely noted “that in jurisdictions where indemnity clauses are narrowly construed against the indemnitee, such as Pennsylvania, courts frequently require some causal connection between the indemnitor’s activities and the resulting injuries.” JA 30 (citing Marc M. Schneier, Contractual Indemnity, Chapter 8.C, *Construction Accident Law* (ABA 1999)). While this principle has not yet been explicitly adopted by Pennsylvania courts, the Pennsylvania Supreme Court has implicitly offered its guidance on this issue, indicating that indemnification language of this sort would not be as broadly construed as Petitioners suggest. *See Pittsburgh Steel Co.*, 171 A.2d at 189.

In *Pittsburgh Steel Co.*, the Pennsylvania Supreme Court considered whether an electrical contractor was required to indemnify a steel mill for injuries sustained by its subcontractor's employee resulting from the negligent operation of a crane by an employee of the steel mill. *Id.* at 186–87. The subcontractor's employee brought suit against the steel mill for his injuries. *Id.* at 187. After the steel mill obtained a settlement with the subcontractor's employee, the steel mill brought an action against the electrical contractor for express indemnity pursuant to their service contract. *Id.* The service contract contained an indemnification provision stating, in pertinent part, that the contractor “will indemnify, save harmless and defend [the steel mill] from all liability for loss, damage, or injury to person or property in any manner arising out of or incident to performance of this [service contract]. . . .” *Id.* at 186.

The steel mill argued that the electrical contractor was required to indemnify it for the subcontractor's employee's injuries pursuant to the service contract. *Id.* at 187. The Pennsylvania Supreme Court disagreed and held that the electrical contractor had no obligation to indemnify the steel mill. *Id.* at 189. The court reasoned that the steel mill “remained in possession of the premises,” and its “employees continued working under its exclusive control,” to require indemnification would have, in effect, impermissibly made the electrical contractor an insurer for acts of negligence over which it had no control.⁷ *Id.* Thus, the court concluded that it was “unreasonable to infer or conclude that the parties intended an indemnification of such magnitude” in the absence of “more direct and unequivocal language in the contract.” *Id.*

Given the rules of strict and narrow construction with regard to indemnification provisions, as well as the Pennsylvania Supreme Court's analysis of the indemnity language set forth in

⁷ The court's analysis in this respect is a clear recognition that agreements to insure and agreements to indemnify are not comparable and should not be construed in the same manner.

Pittsburgh Steel Co., it is clear that indemnity provisions of the sort at issue here require some causal nexus greater than a simple “but for” causation analysis. Otherwise, the result in *Pittsburgh Steel Co.*, and many subsequent cases like it, would have differed significantly and would have impermissibly shifted the role of numerous general contractors to be insurers. But for the electrical contractor’s performance of its service contract with the steel mill, the subcontractor would not have performed its work in the plant and its employee would not have been injured. Yet, as the Pennsylvania Supreme Court wisely concluded, this result would have absurdly distorted the electrical contractor’s role into one of an insurer.

By way of further illustration, where an agreement requires a contractor to indemnify a business for injuries “arising out of or resulting from the performance of the work,” the Superior Court of Pennsylvania has held that, notwithstanding the contractor’s presence at the job site, indemnification was not required where the injuries were unrelated to the performance of work. *Hershey Foods Corp. v. Gen. Elec. Serv. Co.*, 619 A.2d 285, 289–90 (Pa. Super. Ct. 1992). *Hershey* involved a contractor-electrician who was fatally injured while working in a Hershey plant.⁸ *Id.* at 287. While on his lunch break, the decedent sat on a piece of equipment in the plant to eat a candy bar. *Id.* Soon thereafter, the equipment began operating while the decedent was still seated, and the decedent was struck in the back of his head by a cross bar, resulting in his death. *Id.*

The decedent’s employer and Hershey had previously agreed that the employer would indemnify Hershey “against all claims, damages, losses and expenses including attorneys’ fees *arising out of or resulting from the performance of the Work. . . .*” *Id.* at 289 (emphasis in original).

⁸ The decedent was employed by General Electric Services Company, a contracting company that Hershey hired to provide electrical services in its plant. *Hershey*, 619 A.2d at 286.

Hershey argued that the decedent’s presence at its facility during his lunch break necessarily meant that his injuries arose out of the performance of the work. *Id.* However, the Superior Court of Pennsylvania disagreed, finding that the decedent’s conduct—eating a candy bar during his lunch break—was not clearly within the definition of “performance of the Work.” *Id.* at 290. Thus, because the disputed contractual language was ambiguous with respect to the meaning of “performance of the Work,” the Pennsylvania Superior Court construed the agreement against Hershey, as the party seeking indemnification. *Id.*

Without considering any of these governing principles of law, the circuit court summarily concluded that Respondents’ damages “arose out of the services” they performed at the Plant. The circuit court reached this erroneous decision through its wholesale adoption of Petitioners’ incorrect argument that a “but for” test should have been employed to determine whether Respondents’ claims and injuries fell within the scope of the indemnity provisions.

As the ICA explained, however, the circuit court’s deficient order cited no authority explaining this erroneous decision. JA 29–30. And, the authorities cited by the ICA in its comprehensive discussion upend the circuit court’s conclusion. As the ICA acknowledged, the circuit court’s conclusions of law were so deficient that it could not meaningfully review them on appeal. JA 33. Neither can this Court.

Petitioners’ own brief illustrates the deficiencies of the circuit court’s order. Indeed, the authorities cited by Petitioners in their Opening Brief were not even cited in the circuit court’s order granting them summary judgment on their indemnity counterclaim, or, frankly, in their briefing on their motion for summary judgment. In their Opening Brief, Petitioners rely heavily on *PPG Industries, Inc. v. Central Industrial Maintenance, Inc.*,⁹ a federal decision out of the

⁹ No. 05cv1193, 2006 WL 2087529 (W.D. Pa. July 25, 2006).

Western District of Pennsylvania. Pets.’ Brief at 21–22. They claim that the instant case “is indistinguishable from *PPG Industries*.” JA at 22. Unfortunately, no citation or analysis of the *PPG Industries* decision can be found in the circuit court’s order. It also cannot be found in Petitioners’ briefing below. If, in fact, this case is indistinguishable from *PPG Industries* (it is not, as explained *infra*), then how can it be said that the circuit court’s order adequately analyzed applicable Pennsylvania law if *PPG Industries* was not even cited in the circuit court’s order or in Petitioners’ briefing below? It cannot.

And yet, this case is distinguishable from *PPG Industries* because, as Petitioners point out, in *PPG Industries*, the injuries sustained by Mr. Coburn were directly related to the services his employer was hired to perform. That is, his employer—an independent contractor who was a non-party in the case—was hired to transport hazardous materials from the Natrium Plant to a waste treatment facility in Ohio, and the source of Mr. Coburn’s injuries was the “work required of [his employer’s contractor] under its agreement with PPG and the applicable contract documentation and work orders.” See *PPG Industries, Inc.*, 2006 WL 2087529, at *3. While Mr. Coburn was unloading the hazardous materials from the truck (the hazardous materials his employer contracted to transport), he sustained chemical burns to his left eye.

Clearly, there was a causal nexus between Mr. Coburn’s injuries and the services his employer and its contractor agreed to perform. Contrastingly, here, the source of Respondents’ injuries had absolutely nothing to do with the services IPI was hired to perform in the Plant. Instead, the toxic chlorine gas emanated from a defective railcar hundreds of yards away from them in an entirely different area of the plant. Had the First Chlorine Gas Leak emanated from the condensate tank Respondents were painting and pressure washing, this case would be more akin to *PPG Industries*. Instead, because the First Chlorine Gas Leak arose from a defective railcar that

Respondents were not onsite to perform services on, this case is easily distinguishable from *PPG Industries*.

Petitioners also rely on several other decisions and dictionary definitions that were not cited in the circuit court's order or in their briefing below. See Pets.' Brief at 23–24 (citing *In re Linerboard Antitrust Litig.*, 445 F. Supp. 2d 703 (E.D. Pa. 2006); *Krepps v. NIIT (USA), Inc.*, No. 11c8787, 2014 WL 273780 (N.D. Ill. Jan. 24, 2014); *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996); *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13 (1st Cir. 1985); *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198 (6th Cir. 1996)). But, again, fatal to Petitioners' argument that the circuit court's order adequately explained its decision to grant them summary judgment, none of these authorities were cited in the circuit court's order, nor were they cited in Petitioners' briefing below.

The dictionary definitions offered by Petitioners do not help their case, they hurt it. Petitioners cite the Merriam-Webster Dictionary definition of “in connection with” in support of their argument that no causal relationship between the services performed by Respondents and the source of their injuries was required. Pets.' Brief at 24–25. Indeed, Merriam-Webster defines “in connection with” as “in relation to (something): for reasons that relate to (something).” IN CONNECTION WITH, Merriam-Webster Dictionary. Merriam-Webster defines “relate to” as “to connect (something) with (something else).” RELATE TO, Merriam-Webster Dictionary. Merriam-Webster defines “connect” as “to place or establish in relationship.” CONNECT, Merriam-Webster Dictionary. Merriam-Webster defines “relationship” as “the state of being related or interrelated.” RELATIONSHIP, Merriam-Webster Dictionary.

The question then becomes what is it that must be “connected” or “related”? Under the AOS, the “somethings” that must be “connected” or “related” are (1) “injur[ies] to persons” or

“destruction of property” and (2) the “performance of the Services.” But, here, Respondents’ claims had nothing to do with painting and pressure washing Condensate Tank #24. The only thing Respondents’ injuries and property damage were “connected to” or “related to” was the defective Railcar used by Petitioners to load and transport toxic chlorine hundreds of yards away. There is no relationship between the services Respondents agreed to perform and the injuries they sustained as a result of the First Chlorine Gas Leak.

In light of the binding Pennsylvania authorities cited in the ICA’s Opinion and discussed above, this Court should affirm the ICA’s Opinion remanding this case to the circuit court for further development on the issue as to whether the indemnity language in the AOS requires a causal nexus greater than the “but for” standard proposed by Petitioners. Otherwise, under Petitioners’ interpretation of the relevant indemnity provisions, Respondents would be unreasonably required to indemnify Petitioners for their own injuries, which were caused by the defective Railcar over which Respondents had no dominion, authority, or control, in clear defiance of Pennsylvania law.

IV. The ICA correctly concluded that, on remand, the circuit court should reconsider whether any genuine issues of material fact concerning Petitioners’ “sole negligence,” “willful misconduct,” or “gross negligence” preclude summary judgment on the indemnity claim.

Despite the existence of several factual disputes, the circuit court determined that Petitioners were not “solely negligent” and did not engage in “willful misconduct” in relation to the First Chlorine Gas Leak. JA 768. The circuit court’s erroneous conclusion ignores the abundance of evidence offered by Respondents demonstrating—at the very least, a genuine issue of material fact—that Petitioners were “solely negligent,” engaged in “willful misconduct,” or were “grossly negligent.” Critically, the circuit court did not just “turn a blind eye” to the evidence submitted by Respondents, it deliberately chose to categorically exclude it from its consideration

below. Had the circuit court properly weighed this evidence, it would have concluded, as the ICA suggested in its Opinion, that factual disputes appear to warrant a jury's consideration of whether Petitioners' conduct precludes the applicability of the indemnity provisions.¹⁰

The circuit court also failed to consider the effect of West Virginia's comparative fault statute on Respondents' indemnity defenses. After all, Petitioners failed to file any notices of non-party fault with respect to any third parties Petitioners contend were at fault for the First Chlorine Gas Leak. Consequently, at trial, the jury will only be permitted to apportion fault to either (1) Petitioners or (2) Respondents. Accordingly, as detailed below, this Court should affirm the ICA's remand of this case to the circuit court to consider whether genuine issues of material fact exist concerning sole negligence, willful misconduct, or gross negligence.

A. The circuit court ignored critical evidence proffered by Respondents concerning Petitioners' sole negligence, willful misconduct, and gross negligence.

Without explaining which of Respondents' exhibits¹¹ it declined to consider—and its justification for their wholesale exclusion—the circuit court found that they “did not meet the threshold requirements for consideration as set forth in Rule 56 of the West Virginia Rules of Civil

¹⁰ Petitioners argue that Respondents failed to plead their sole negligence, willful misconduct, or gross negligence. This argument is unavailing. In Respondents' Reply to Petitioners' counterclaim, Respondents asserted that Petitioners indemnity damages “were not proximately caused by any act or omission by [Respondents], but by the acts or omissions of other persons or entities for whose actions [Respondents] are not legally responsible.” JA 258. The “other persons or entities” referred to are Petitioners.

¹¹ In the proceedings below, Petitioners argued that Exhibit 1 attached to Respondents' Response in Opposition to Petitioners' Motion for Partial Summary Judgment—the National Traffic Safety Board Hazardous Material Accident Report addressing the First Chlorine Gas Leak—was inadmissible pursuant to 49 C.F.R. § 835.2. Although this argument is incorrect for a few reasons, even without it, Respondents vehemently maintain that sufficient questions of fact raised by the remaining exhibits—which are admissible—should have precluded summary judgment in Petitioners' favor.

Procedure and as further discussed by the West Virginia Supreme Court of Appeals at [footnote] 15 in *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 693 S.E.2d 789 (2010).” JA 765. Presumably, the circuit court considered none of Respondents’ exhibits and unilaterally excluded them from the record.¹² This Court should find this to be a clear abuse of the circuit court’s discretion. See *McDougal v. McCammon*, 455 S.E.2d 788, 794 (W. Va. 1995) (explaining that the “abuse of discretion” standard applies to a circuit court’s evidentiary rulings).

The circuit court’s finding inappropriately narrows the scope of exhibits that Rule 56 permits to be attached to summary judgment briefing and distorts the standard for summary judgment exhibits set forth in *Ramey*. As delineated in Rule 56, “pleadings, **depositions**, answers to interrogatories, and admissions on file, together with [sic] affidavits, if any” may be submitted in support of or against a motion for summary judgment. W. Va. R. Civ. P. 56(c) (emphasis added). Footnote 15 in *Ramey* makes clear, though, that this list is not exhaustive, and other materials may be submitted in support of or against summary judgment. *Ramey*, 693 S.E.2d at 797 n.15; see also Syl. Pt. 1, *Aluise v. Nationwide Mut. Fire Ins. Co.*, 625 S.E.2d 260 (W. Va. 2005) (“[A] trial court may consider any material that would be admissible or useable at trial.”).

Ramey’s only limitation—to the extent it may even be referred to as one—is that the authenticity of the documents submitted for review be established. *Ramey*, 693 S.E.2d at 797 n.15 (noting that “the authenticity of documents presented for the court’s consideration at the summary judgment stage needs to be established” in determining whether an exhibit submitted would be admissible or useable at trial). As noted in Rule 902 of the *West Virginia Rules of Evidence*, several types of documents are “self authenticating,” meaning “[e]xtrinsic evidence of authenticity

¹² Indeed, the ICA noted that the circuit court “did not indicate what documents submitted by IPI did not meet ‘the threshold requirements for consideration’ under Rule 56 and *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 693 S.E.2d 789 (2010).” JA 36.

as a condition precedent to admissibility is not required. . . .” W. Va. R. Evid. 902. These documents include “domestic public documents under seal” and “official publications.” *See* W. Va. R. Evid. 902(5). Yet, as noted above, deposition transcripts are permissible for use at the summary judgment stage because they are taken under oath and the deponent’s responses are relatively spontaneous. *See* Wright & Miller, *Federal Practice & Procedure* § 2722 (4th ed. 2022).

Relevant to liability, Respondents attached four exhibits to their Response in Opposition to Petitioners’ Motion for Partial Summary Judgment: (1) the Accident Report completed by the National Transportation Safety Board (“NTSB”); (2) the Deposition Transcript of Julie Bart (“Ms. Bart”), Axiall’s corporate designee; (3) the Department of Transportation Federal Railroad Administration’s (“FRA”) Notice of Safety Advisory 2006–04, Notice No. 2; and (4) the Deposition Transcript of Mr. Taylor. Additionally, the ICA observed another critical piece of evidence relevant to the issues of sole negligence, willful misconduct, or gross negligence: the deposition transcript of Mr. Linder, a 30(b)(7) designee of Petitioners. JA 43–44.

The evidence submitted by Respondents was undoubtedly permitted to be submitted in opposition to a motion for summary judgment. First, deposition transcripts are explicitly contemplated by Rule 56(c) as permissible to be utilized in opposing a motion for summary judgment. As such, the deposition transcripts of Mr. Taylor, Ms. Bart, and Mr. Linder should have been considered by the circuit court.

Second, Rule 902 makes clear that “official publications” do not require evidence of authenticity as a prerequisite to admissibility. W. Va. R. Evid. 902(5). Accordingly, the 2006 Safety Advisory is self-authenticating as an “official publication” under Rule 902(5) as a publication issued by a public authority—namely, the FRA as a political subdivision of the United

States. Likewise, the NTSB report is also self-authenticating as an “official publication” under Rule 902.

In sum, there was no justification for the circuit court to unilaterally and categorically exclude Respondents’ exhibits from its consideration of Petitioners’ Motion for Partial Summary Judgment. Each of the exhibits attached to Respondents’ Response in Opposition are explicitly allowable under Rule 56(c) of the *West Virginia Rules of Civil Procedure*, the West Virginia Supreme Court of Appeals’ decision in *Ramey*, and Rule 902 of the *West Virginia Rules of Evidence*. This Court should affirm the ICA’s remand of this case to the circuit court for it to explain why these documents do not create genuine issues of material fact.

B. The ICA correctly determined that the circuit court should reconsider why the evidence submitted by Respondents does not create genuine issues of material fact.

The West Virginia Supreme Court of Appeals has conclusively stated that “[n]egligence . . . is a jury question when the evidence is conflicting or the facts are such that reasonable [people] may draw different conclusions from them.” *Burgess v. Jefferson*, 245 S.E.2d 626, 628 (W. Va. 1978) (collecting cases). Additionally, to warrant jury consideration, a plaintiff need only “establish a *prima facie* case of negligence against the defendant,” which may be made by circumstantial as well as direct evidence. Syl. Pt. 8, *Wehner v. Weinstein*, 444 S.E.2d 27 (W. Va. 1994) (quoting Syl. Pt. 2, *Burgess*, 245 S.E.2d 626).

To make this *prima facie* showing, a plaintiff must show “that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff.” Syl. Pt. 1, *Parsley v. Gen. Motors Acceptance Corp.*, 280 S.E.2d 703 (W. Va. 1981). Petitioners owed IPI and Mr. Taylor—as contractors performing services in the Plant—a duty to act reasonably in providing a safe work

environment, free of the unreasonable risk of harm. The ample conflicting evidence regarding Petitioners' breach of that duty warranted the jury's consideration.

The deposition testimony of Ms. Bart regarding the Railcar—which the circuit court seemingly declined to consider—insightfully demonstrates Petitioners' total disregard of the Railcar's dangerous condition. In response to whether Petitioners knew of the Railcar's corrosive issues, Ms. Bart testified that it “did have extensive corrosion pitting inside the pressure-containing part of the car.” JA 491. Additionally, Ms. Bart—and, consequently, Petitioners—knew that the Railcar required extensive repair work that its other railcars did not require. JA 491. Ms. Bart also testified about Petitioners' awareness of the 2006 Safety Advisory and Petitioner's actions to comply with it, and the contents of the NTSB Report. JA 491–494. She also testified that the Railcar was so badly corroded that it took longer than usual to repair and that there was a “back and forth” about whether to repair it or just to retire it from service. JA 492–493.

Notwithstanding Petitioners' knowledge and disregard of the Railcar's wholly-defective condition, they also failed to adequately inspect the Railcar on a frequent basis. Petitioners' failure to inspect and maintain a reliably safe railcar—particularly given that it was used to store and transport highly volatile, toxic chlorine gas—also flew directly in the face of the 2006 Safety Advisory, which advised Petitioners that “since 1990, FRA . . . ha[d] documented approximately eleven known defects on tanks cars built with the ACF 200 stub still design (ACF-200 tank cars)” and that “[t]hese defects included tank head cracks, pad to tank cracks, sill web cracks, and tank car buckling that in some instances led to hazardous material incidents.” JA 496.

During his deposition, Mr. Taylor testified that he did not hear an alarm when the First Chlorine Gas Leak occurred 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. JA 551–552. As the ICA noted, a jury

reasonably might find that no alarm was sounded and that Mr. Taylor and IPI's employees were unable to escape using a route they were supposed to use.

Finally, Mr. Linder, Petitioners' 30(b)(7) designee, testified that Petitioners did not place any blame on IPI for the First Chlorine Gas Leak. JA 636. This is relevant because to be entitled to indemnity, the jury must assess whether Petitioners were "solely negligent." Under West Virginia's comparative fault statute, "the trier of fact must consider the fault of all persons who contributed to the alleged damages regardless of whether immunity or some other principle of law would prevent such a person from being named as a party to the suit." Syl. Pt. 2, *State ex rel. March-Westin Co. v. Gaujot*, 879 S.E.2d 770 (W. Va. 2022) (citing W. Va. Code § 55-7-13d(a)(1) & (2)). Moreover, "[f]ault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault." *Id.* Under the comparative fault statute, "[t]he burden of . . . proving comparative fault shall be upon the person who seeks to establish such fault." W. Va. Code § 55-7-13d(d).

In this case, Petitioners never identified any non-parties they thought might be at fault. Accordingly, those non-parties cannot appear on the verdict form unless Respondents settled with them (they did not). Thus, other than Petitioners, the only parties in this case who might be at fault, and therefore appear on the verdict form, would be IPI and Mr. Taylor. But, as explained above, Petitioners—through their corporate designee, Mr. Linder—do not place any blame on IPI for the First Chlorine Gas Leak; and, how could they? The ICA correctly observed that the record contained no evidence that either Mr. Taylor or IPI were at fault for causing the First Chlorine Gas Leak. A reasonable jury could find that Petitioners were solely negligent, especially in light of the fact that only Petitioners and Respondents will appear on the verdict form. The ICA correctly

determined that, on remand, the circuit court should address the effect of the West Virginia comparative fault scheme as it may relate to summary judgment on Petitioners' indemnity claim.

In support of Petitioners' argument that the evidence presented by Respondents below did not create genuine issues of material fact, Petitioners direct this Court to Mr. Taylor's deposition transcript. Pets.' Brief at 31–32. They cite snippets of Mr. Taylor's deposition during which he testified that he didn't know why the First Chlorine Gas Leak happened, and that he was not aware of facts suggesting that Petitioners had any knowledge that the First Chlorine Gas Leak was going to occur. Pets.' Brief at 31–32. Of course Mr. Taylor did not know how the First Chlorine Gas Leak occurred. That information was in the province of Petitioners and, as explained above, was elicited through the testimony of Ms. Bart and Mr. Linder. The fact that Mr. Taylor did not know how the First Chlorine Gas Leak occurred does not mean that there is no triable issue on that point, particularly where the cause of the First Chlorine Gas Leak was established by Respondents through the testimony of Petitioners' own representatives.

Simply put, Respondents submitted substantial evidence to the circuit court that should have precluded summary judgment on the issue of Petitioners' sole negligence, willful misconduct, or gross negligence. Instead of examining both parties' evidence to determine whether a triable issue was present, the circuit court categorically disregarded all of Respondents' evidence. In essence, the circuit court improperly acted as a fact finder, giving no credence to Respondents' evidence, but, instead, making all inferences in Petitioners' favor. The ICA correctly remanded this case to the circuit court for it to reconsider these issues and enter an order that could permit meaningful appellate review. This Court should affirm that decision.

CONCLUSION

Based upon the foregoing arguments and authorities cited herein, this Court should dismiss Petitioners' appeal for lack of subject matter jurisdiction because the ICA's Opinion is not a final, appealable order. Notwithstanding, the ICA's comprehensive and unanimous Opinion correctly concluded that (1) the AOS's indemnity provision exclusively governs any indemnity obligation, (2) the circuit court failed to adequately explain its decision concerning the causal nexus required by the indemnity provision, and (3) the circuit court must reconsider whether genuine disputes of material fact preclude summary judgment on Petitioners' indemnity claims. If this Court finds it has jurisdiction, it should affirm the ICA's Opinion and remand this case to the circuit court to complete the tasks pursuant to the ICA's instructions.

Respectfully submitted by,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-183

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.

Appeal from an Opinion of the
Intermediate Court of Appeals of
West Virginia (No. 22-ICA-164)
affirming in part, vacating in part,
and remanding a final order of the
Circuit Court of Marshall County
(Civil Action No. 18-C-14)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **15th** day of **August 2024**, the foregoing ***Brief of Respondents IPI, Inc., and Matthew Joseph Taylor*** was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel record.

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