FILED
11: 18
JOSEPH M. RUCKI

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

COVESTRO, LLC
Plaintiff,

v.

Civil Action No.: 18-C-202
Presiding Judge: Wilkes
Resolution Judges: Carl and Nines

AXIALL CORPORATION,
ALLTRANSTEK, LLC, and
RESCAR COMPANIES,
Defendants,

and

AXIALL CORPORATION,
Third-Party Plaintiff,

v.

SUPERHEAT FGH SERVICES, INC.,
Third-Party Defendant.

---CONSOLIDATED WITH-----

AXIALL CORPORATION,
Plaintiff,

v.

Civil Action No. 18-C-203
Presiding Judge: Wilkes
Resolution Judges: Carl and Nines

ALLTRANSTEK LLC, RESCAR, INC.
t/d/b/a RESCAR COMPANIES, and
SUPERHEAT FGH SERVICES, INC.,
Defendants.

ORDER DENYING ALLTRANSTEK AND RESCAR'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF PLAINTIFF COVESTRO, LLC

This matter came before the Court this 18th day of November 2020 upon Defendants and Counterclaimants AllTranstek LLC and Rescar, Inc., t/d/b/a Rescar Companies's Motion for Summary Judgment of Defendants, AllTranstek LLC and Rescar, Inc. t/d/b/a Rescar Companies, On Claims of Plaintiff Covestro, LLC. Defendants and Counterclaimants AllTranstek LLC and Rescar, Inc., t/d/b/a Rescar Companies (hereinafter "Defendants" or "AllTranstek" or "Rescar"), by counsel, Michelle L. Gorman, Esq., and Plaintiff Covestro, LLC (hereinafter "Plaintiff" or "Covestro"), by counsel, Kevin M. Eddy, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This civil action consists of two consolidated cases[1] containing causes of action surrounding a chlorine leak at Plaintiff Axiall Corporation's facility, which produces chlorine and other products, in Marshall County, West Virginia. *See* Def's Reply to Mot. to Refer, p. 3; *see also* Def's Mem., p. 2. The chlorine formed a plume and entered Covestro, LLC's (hereinafter "Covestro" or "Plaintiff") facility property which is adjacent to Axiall's facility property. *See* Def's Mem., p. 2.

2. Axiall owns and operates a fleet of railroad tank cars used to transport chlorine from the facility. *See* Def's Mem., p. 2; *see also* Pl's Resp., p. 2. Defendant AllTranstek provided railroad tank car fleet management services to Axiall. *See* Def's Mem., p. 2.

[1] *See* Order of Court consolidating cases entered 2/28/19.

3. Defendant Rescar provided railroad tank car maintenance services to Axiall. *See* Def's Mem., p. 2. Axiall sent a railroad car, AXLX 1702, to Rescar in January 2016 for a five-year interim inspection and routine maintenance. *See* Pl's Resp., p. 3; *see also* Def's Mem., p. 2. AXLX 1702 was a pressurized railroad tank car used to transport chlorine. *See* Def's Mem., p. 2. Rescar provided services to the tank car and AllTranstek inspected Rescar's work. *Id.*

4. Covestro's Complaint, filed on or about August 24, 2018, asserts causes of action against AllTranstek and Rescar[2] for negligence, trespass, nuisance, and res ipsa loquitor[3]. *Id.* at 2-3.

5. On a prior day, AllTranstek and Rescar filed the instant Motion for Summary Judgment, seeking the Court to grant summary judgment in their favor and against Covestro. *See* Def's Mot., p. 2.

6. On or about August 13, 2020, Covestro filed its Response and Memorandum of Law in Opposition to Motion for Summary Judgment of AllTranstek and Rescar, arguing the instant motion should be denied because the Defendants owed a duty to the public, including Covestro, to properly test, repair, and inspect AXLX 172 pursuant to the Hazardous Materials Regulations (hereinafter "HMR"), and that even if there was no *prima facie* negligence, "the risk of harm to the public generally, was an obvious foreseeable risk". *See* Pl's Resp., p. 1. Also, the Response argued there is no requirement that the defendant own the instrumentality that trespassed or created a nuisance, and the relevant inquiry is whether the Defendants' negligent conduct caused, or contributed to the cause of, the chlorine release that entered Covestro's property. *Id.*

[2] The Court notes said Complaint also stated claims against Axiall.
[3] The Court notes Covestro withdrew its claims for res ipsa loquitor. *See* Stipulation to Withdraw, 10/11/18, attached to the instant motion as Exhibit D.

7. On or about August 21, 2020, AllTranstek and Rescar filed their Reply in Support of Motion for Summary Judgment of Defendants, AllTranstek LLC and Rescar, Inc., t/d/b/a Rescar Companies, to Plaintiff Covestro's Complaint, reiterating its argument that *Rousch v. Johnson*, 139 W. Va. 607, 611, 80 S.E.2d 857, 861 (1954) directs that Defendants cannot be held liable for Axiall's actions because they were independent contractors who turned over their completed work. *See* Reply, p. 2. Further, Defendants reiterate their position that they did not owe a duty to Covestro because there was no foreseeability. *Id.* at 3-4. Defendants also argue in the Reply that it was Axiall, not Defendants, who committed a trespass and caused a nuisance. *Id.* at 4-5. Finally, Defendants reiterate their position that no facts indicate an award of punitive damages is available to Covestro. *Id.* at 5-6.

8. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

9. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

10. Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins.*

Co. of New York, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

11. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

12. In this matter, AllTranstek and Rescar seek summary judgment in their favor and against Covestro as to Covestro's claims against them. *See* Def's Mot., p. 2. Specifically, AllTranstek and Rescar argue summary judgment should be granted in their favor because: 1) Defendants did not owe a duty to Covestro, so there cannot be a claim for negligence; and 2) Defendants did not commit a trespass or nuisance against Covestro. *See* Def's Mem., p. 9-11. Further, Defendants argue that there are no facts that support an award of punitive damages for Covestro. *Id.* at 12. Given the standards of law, and the court's analysis above, the Court will take up the motion's arguments in turn.

I. Duty

13. First, the Court addresses the argument that Axiall, not Defendants, owed a duty to Covestro, and therefore, Covestro cannot prevail in a negligence claim against Defendants. *See* Def's Mem., p. 9.

14. In *Wheeling Park Comm'n v. Dattoli*, the Supreme Court of Appeals held as follows:

> Our laws governing negligence claims are well-settled. This Court has explained that to prevail in a negligence suit "it is incumbent upon the plaintiff to establish, by a preponderance of the testimony, three propositions: (1) A duty which the defendant owes him; (2) A negligent breach of that duty; (3) injuries received thereby, resulting proximately from the breach of that duty." *Webb v. Brown & Williamson Tobacco Co.*, 121 W.Va. 115, 118, 2 S.E.2d 898, 899 (1939) (citations omitted). We held in syllabus point 1 of *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981), "In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." In other words, "[l]iability of a person for injury to another cannot be predicated on negligence unless there has been on the part of the person sought to be charged some omission or act of commission in breach of duty to the person injured." Syl. pt. 6, *Morrison v. Roush*, 110 W.Va. 398, 158 S.E. 514 (1931).
>
> In addition, this Court has recognized that "[n]egligence is the violation of the duty of taking care under the given circumstances. It is not absolute; but is always relative to some circumstances of time, place, manner, or person." Syl. pt. 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W.Va. 511, 23 S.E. 582 (1895). Significantly, [t]he ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? Syl. pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016).

15. Further, "[w]hen a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the

community, from which it is negligence to deviate." *Reed v. Phillips*, 452 S.E.2d 708, 712 (W. Va. 1994).

16. The same is true of municipal ordinances and regulations of administrative bodies. *Id.* Thus, "the violation of a statute adopted for the safety of the public is *prima facie* negligence in that it is the failure to exercise that standard of care prescribed by the legislature." *Id.*; *see also Gillingham v. Stephenson*, 551 S.E.2d 663, 670 (W. Va. 2001) (same).

17. The West Virginia Supreme Court of Appeals, in *Shaffer v. Acme Limestone Co., Inc.*, explained that the violation of a statute, ordinance or regulation is *prima facie* negligence: "when a statute imposes a duty on a person for the protection of others ... it is a public safety statute and a violation of such a statute is [*prima facie* evidence of negligence] unless the statute says otherwise." *Shaffer v. Acme Limestone Co., Inc.*, 524 S.E.2d 688, 702 (1999). Accordingly, "[a] member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant." *Id.*; *see also Hersh v. E-T Enters., P'ship*, 752 S.E.2d 336, 342 (W. Va. 2013) (same).

18. While having not specifically addressed whether the federal regulations governing pressurized tank cars hauling chlorine constitute regulations enacted for safety of the general public, West Virginia courts have consistently held that laws regulating railroads and railways, and motor vehicle transportation constitute public safety statutes. *See, e.g. Sommerville v. Pa. R. Co.*, 155 S.E.2d 865, 870-71 (W. Va. 1967); *Humphrey v. Virginian Ry.*, 54 S.E.2d 204, 211 (W. Va. 1948); *Shaffer*, 524 S.E.2d at 702.

19. In this matter, Defendants argue that "[r]egardless of whether or not a defendant could foresee potential harm", Defendants, as independent contractors, owe no duty of care to a third person, Covestro, after the work contracted for has been completed, turned over to the

contractee, and accepted, relying on *Roush v. Johnson*, 139 W. Va. 607, 80 S.E.2d 857 (1954). *See* Def's Mem., p. 10. Under *Rousch*, Defendants argue they "cannot be liable for any work on AXLX1702 because Axiall accepted the work". *Id.* Further, Defendants argue that even if they did contribute to the rupture, they could not have foreseen a rupture of AXLX 1702, while being loaded at Axiall's facility, would have caused damage to a neighboring facility. *Id.*

20. On the other hand, Covestro has proffered that Defendants owed a duty of care to Covestro because of foreseeability. *See* Pl's Resp., p. 12. Further, Covestro proffered that the Hazardous Materials Regulations (hereinafter "HMR") imposed a duty on Covestro and that Defendants owed a duty to the public, including Covestro, to properly test, repair, and inspect AXLX 1702 pursuant to the HMR, citing 49 CFR §171.1 et seq. *See* Pl's Resp., p. 1, 9.

21. The Court recognizes the law regarding liability and public safety statutes as outlined above. As sated, while having not specifically addressed whether the federal regulations governing pressurized tank cars hauling chlorine constitute regulations enacted for safety of the general public, West Virginia courts have consistently held that laws regulating railroads and railways, and motor vehicle transportation constitute public safety statutes. *See, e.g. Sommerville v. Pa. R. Co.*, 155 S.E.2d 865, 870-71 (W. Va. 1967); *Humphrey v. Virginian Ry.*, 54 S.E.2d 204, 211 (W. Va. 1948); *Shaffer*, 524 S.E.2d at 702. The Court considers that like regulations governing railroads and motor vehicles, these federal regulations are designed to protect the general public from risks associated with the transportation of hazardous materials, including chlorine. This purpose is specifically recognized in the federal hazardous materials transportation statute creating the regulations. *See* 49 USC § 5101 ("The purpose of this chapter [49 USC §§ 5101 et seq.] is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign

commerce."); 49 CFR § 171.1 ("Federal hazardous materials transportation law (49 USC 5101 et seq.) directs the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in commerce, as the Secretary considers appropriate."). Thus, Covestro has proffered evidence sufficient to show a genuine issues of material fact exists as to whether these federal regulations impose various specific duties on Rescar and AllTranstek for the protection of the general public. *See* Pl's Resp., p. 10.

22. Further, Covestro has proffered record evidence that shows that AXLX 1702 did not meet the specifications and requirements of applicable federal regulations following Rescar's repairs and AllTranstek's inspection. *See* Pl's Resp., p. 11. Covestro proffered AXLX 1702 had a pre-existing crack, heat damage from uncontrolled post-weld heat treating, shell buckling, and areas in its tank shell that were below the required minimum thickness, citing the NTSB Accident Report. *Id.*

23. Further, Covestro has proffered that the undisputed record evidence also establishes that Rescar and AllTranstek failed to repair and inspect AXLX 1702 according to the requirements of the Axiall Maintenance Manual, the AllTranstek Fleet Maintenance Procedures, and the Rescar Shop Procedures, as mandated by the HMR. *Id.* Among other things, Covestro proffered:

- Rescar violated the Axiall Maintenance Manual by failing to perform a stub sill inspection on AXLX 1702 in 2016;

- Rescar violated the Axiall Maintenance Manual and AllTranstek Fleet Maintenance Procedures by failing to ensure that AXLX 1702's tank shell met the minimum allowable service thickness and by failing to perform thickness measurements to verify shell integrity;

- Rescar violated the AAR Manual, the AllTranstek Fleet Maintenance Procedures, and Rescar Shop Procedures by failing to conduct hardness tests on AXLX 1702 after performing local post-weld heat treatments;

- Rescar violated the AAR Manual, the AllTranstek Fleet Maintenance Procedures, and the Rescar Shop Procedures by overheating the tank of AXLX 1702 during local post-weld heat treatment;

- Rescar violated the Rescar Shop Procedures by performing multiple local post-weld heat treatments in the same areas of AXLX 1702;

- Rescar violated the Rescar Shop Procedures by failing to properly inspect the heat affected areas of AXLX 1702 for heat damage;

- AllTranstek violated the Axiall Maintenance Manual when its inspector failed to perform in-process inspections and failed to inspect the inside of AXLX 1702 to ensure that the build-up welding was performed correctly and that the tank met the minimum thickness requirements for chlorine service;
- AllTranstek violated the Axiall Maintenance Manual and AllTranstek Fleet Maintenance Manual when its inspector did not perform an SS-3 inspection of AXLX 1702 and did not advise anyone that that Rescar had failed to perform such an inspection; and,

- AllTranstek violated the Axiall Maintenance Manual when it proclaimed AXLX 1702 fit for service when it did not meet the requirements of the HMR.

Id. at 11-12.

24. Thus, issues of material fact relating to how Rescar and AllTranstek breached their duties to comply with all requirements of the federal regulations, the Axiall Maintenance Manual, the AllTranstek Fleet Maintenance Procedures, and the Rescar Shop Procedures require denial of Rescar and AllTranstek's Motion for Summary Judgment. For this reason, the Court must deny the instant motion on Covestro's claim for negligence.

25. Aside from the record evidence that creates genuine issue of material fact that Defendants breached duties under the HMR, the Court also analyzes whether Defendants owed a duty to Covestro because harm was foreseeable. *See* Pl's Resp., p. 12.

26. "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Lockhart v. Airco Heating & Cooling,* 567

S.E.2d 619, 623 (W. Va. 2002). "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Id.* (quoting *Sewell v. Gregory*, 371 S.E.2d 82 (1988)). "Although foreseeability of risk is a primary consideration in determining the scope of a duty," "the existence of duty also involves policy considerations," including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Id.*

27. It appears undisputed that Axiall contracted with Rescar and AllTranstek to perform the testing, repairs, and inspections on Axiall's tank cars hauling hazardous materials, including AXLX 1702. *See* Pl's Resp., p. 13. Rescar and AllTranstek also knew that they were working on tank cars used to store and/or transport hazardous materials and in the case of AXLX 1702, knew that they were working on a pressure tank car that would be used to store and/or transport chlorine, a material designated under the federal regulations as "a gas poisonous by inhalation" (49 CFR § 173.115(c)) and a "corrosive material," meaning, *inter alia*, it "has a severe corrosion rate on steel or aluminum[.]" 49 CFR § 173.136(a).

28. In light of this knowledge, Rescar and AllTranstek knew that AXLX 1702 could rupture, and a large-scale chlorine release could occur, if they failed to meet the standard of care established in the federal regulations for the testing, repair, and inspection of AXLX 1702. *See* Pl's Resp., p. 13. Defendants would also foresee that a large-scale chlorine release would pose a risk to the property of the public. *Id.* at 13-14. Covestro proffered deposition testimony from multiple employees of Defendants who testified that certain procedures were even in place to prevent injury to persons or property. *Id.* at 14. Defendants had to specifically foresee that a

large-scale chlorine leak would pose a significant risk to Axiall, its neighbors, and the community when AXLX 1702 was loaded with chlorine. *Id.*

29. The Court notes it was AllTranstek who declared AXLX 1702 fit for service. As such, the risk of harm and the risk of corrosion, to the property of facilities adjacent to Axiall's plant is obviously a foreseeable risk if the Rescar Defendants failed to meet the standard of care in their work. *Id.*

30. For all of these reasons, Rescar and AllTranstek owed a duty of care to Covestro.

31. Rescar and AllTranstek cannot avoid their duties to Covestro by arguing that they could not have foreseen the specific harm that occurred in this case, *i.e.*, that they could not have "foreseen that a rupture of AXLX 1702, while being loaded at Axiall's Natrium facility, would have caused damage to a neighboring facility, *i.e.*, Covestro's facility." *See* Def's Mem., p. 10; *see also* Pl's Resp., p. 14. This argument is contrary to well established West Virginia law, which holds that the proper test is whether a person in the defendant's position would "anticipate ***that harm of the general nature of that suffered*** was likely to result[.]" *Sewell*, 371 S.E.2d at 85; *see* 57A AM JUR 2D NEGLIGENCE § 126 ("It is not a necessary element of negligence that one charged therewith should have been able to anticipate the precise injury sustained or the precise manner in which an accident occurred." ; "[I]t is sufficient that such person should have foreseen that the negligence would probably result in injury of some kind to some person, and he or she need not have foreseen the particular consequences or injury that resulted.").

32. As explained above, the rupture of a pressure tank car holding chlorine, and the subsequent damage to a neighboring facility, was clearly foreseeable to the Rescar Defendants. *See* Pl's Resp., p. 15. Further, it is the exact same harm the HMR was enacted to prevent. *Id.*

33. The Court also addresses Defendants' argument under *Roush*. Rescar and AllTranstek's argument that independent contractors owe no duty of care to a third person after work "has been completed, turned over to the contractee, and accepted by the contractee, though the injury results from the contractor's failure [to] property carry out his contract" is misplaced. First, Covestro has proffered there is a dispute as to whether Axiall "accepted" the work of AllTranstek and Rescar on AXLX 1702. *See* Pl's Resp., p. 15. Covestro proffered evidence in the form of deposition testimony that Axiall did not inspect the repairs performed on AXLX 1702 and asserts that it did not have the expertise to verify the Rescar Defendants' work. *Id.*

34. Second, the argument ignores the premise that "the contractor continues [to be] liable where the work is turned over by him in a manner so negligently defective as to be imminently dangerous to third persons."

35. Roush involved claims for negligence asserted against two companies involved in the installation of a compressor and cooler in the store building, which subsequently led to the electrocution death of another contractor. *Roush*, at 611, 861. On appeal, the defendants argued the trial court should have entered a directed verdict in their favor, asserting that where "the work contracted to be performed by it having been finished and accepted by the owner, the owner is substituted as the responsible party for any existing defects". *Id.* at 636, 873-74.

36. The West Virginia Supreme Court of Appeals found a number of exceptions to the general rule that an independent contractor's liability is substituted for that of the contractee where the work has been finished and accepted by the contractee. *Id.* at 636, 874. The West Virginia Supreme Court of Appeals specifically held that "the contractor continues liable where the work is turned over by him in a manner so negligently defective as to be imminently dangerous to third persons. *Id.* at 639, 875.

37. The Court also notes Covestro proffered a federal case from the Southern District of West Virginia, wherein the Court rejected the independent contractor defense in a train derailment case. *See Sigman v. CSX Corp.*, 2016 U.S. Dist. LEXIS 60718, at *82-83 (S.D. W. Va. May 5, 2016). Although this case is unpublished, the Court notes it as it applies to circumstances similar to those at issue here. The Court found the contractor, hired to inspect the tracks where the derailment occurred, fell squarely within the exception to the independent contractor rule – "where work performed and turned over is inherently and intrinsically dangerous, that is, so defective by reason of the independent contractor's negligence, as to be imminently dangerous to a third person...". *Id.* at *83.

38. Here, it has been alleged that Rescar and AllTranstek breached their duties to properly repair, test, and inspect AXLX 1702, causing AXLX 1702 to be imminently dangerous to third parties. *See* Pl's Resp., p. 16. Specifically, evidence from the NTSB Accident Report was proffered to the Court showing that when AXLX 1702 was turned over to Axiall, it had a pre-existing crack, heat damage from uncontrolled post-weld heat treating, shell buckling, and areas in its tank shell that were below the required minimum thickness. *Id.* at 16-17. It would be reasonable for a jury to conclude that these conditions caused or contributed to the rupture of AXLX 1702, and the release of over 178,000 pounds of liquid chlorine, which resulted in significant damage to the property of numerous property owners, including Covestro. *Id.* at 17. Rescar and AllTranstek's failure to properly repair, test, and inspect AXLX 1702 caused it to be so imminently dangerous to third parties that it ruptured almost immediately after being loaded with chlorine for the first time after Rescar worked on it and AllTranstek pronounced it fit for service. *Id.* Because of the imminent danger, the Court finds summary judgment should not be granted in favor of Defendants under *Roush*.

II. *Trespass*

39. Next, the Court examines Defendants' argument that they did not commit a trespass against Covestro. *See* Def's Mem., p. 11.

40. The West Virginia Supreme Court of Appeals has defined "trespass" as "an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property." *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 591-92, 34 S.E.2d 348, 352 (1945) (quoting 3 *Blackstone's Commentaries* 209). A defendant is liable for trespass "where there is an intentional intrusion, negligence, or some extrahazardous activity on the part of the alleged wrongdoer". *Bailey v. S. J. Groves & Sons Co.*, 159 W. Va. 864, 864, 230 S.E.2d 267, 268 (1976).

41. Defendants argue summary judgment as to trespass in their favor is appropriate because AllTranstek did not commit a trespass against Covestro, neither Defendant intentionally acted in any way to commit a trespass on Covestro's property as they did not intend to move the chlorine gas onto Covestro's property, and that it was Axiall's tank and chlorine. *See* Def's Mem., p. 11.

42. As an initial matter, the Court finds West Virginia law does not require the defendant to commit an intentional act (as stated above, in paragraph 42). Further, Defendants have proffered no case law stating there is a requirement that a defendant own the instrumentality that intruded on the plaintiff's property state a claim for trespass.

43. The Restatement of Torts directs that a defendant is liable for trespass if he negligently "causes a thing or third person so to enter" the property of another. Restatement (Second) of Torts § 165 (1965).

44. Covestro has shown, through the factual record that genuine issues of material

fact exist surrounding whether or not, as a result of Rescar and AllTranstek's negligence, AXLX 1702 had a pre-existing crack, heat damage from uncontrolled post-weld heat treating, shell buckling, and areas where the tank shell fell below the required minimum thickness, when Axiall filled AXLX 1702 with chlorine. *See* Pl's Resp., p. 18. The Court finds that record evidence has created genuine issue of material fact regarding whether this alleged negligence was the cause, or contributed to the cause, of the chlorine trespassing onto Covestro's property. *Id.*

III. *Nuisance*

45. Finally, the Court examines Defendants' argument that it did not commit a nuisance. *See* Def's Mem., p. 11. Instead, Defendants contend it was Axiall who committed the nuisance. *Id.*

46. The West Virginia Supreme Court of Appeals has defined nuisance as follows: A "nuisance" is anything which annoys or disturbs free use of one's property, renders its ordinary use or physical occupation uncomfortable, or interferes with a citizen's rights, either in his person, property, enjoyment thereof, or comfort. *Martin v. Williams*, 141 W. Va. 595, 93 S.E.2d 835 (1956).

47. A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby. *Id.*; *see also Mahoney v. Walter*, 157 W. Va. 882, 889, 205 S.E.2d 692, 697 (1974). A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land. Syl. Pt. 1, *Hendricks v. Stalnaker*, 181 W. Va. 31, 32, 380 S.E.2d 198, 199 (1989).

48. The *Restatement (Second) of Torts* § 822 (1979) requires a consideration of unreasonableness as part of the determination of liability. One is subject to liability for a private

nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:

> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Restatement (Second) of Torts § 822 (1979); *see also Hendricks*, at 201. fn 5.

49. Defendants argue it Axiall's loading of the chlorine, and the rupture on Axiall's property that created the nuisance to Covestro. *See* Def's Mem., p. 11-12. Defendants have proffered no authority stating that there is a requirement that the defendant must own the instrumentality that interfered with the plaintiff's property rights. *See* Pl's Resp., p. 18.

50. "All persons who join or participate in the creation or maintenance of a nuisance are liable jointly and severally for the wrong and injury done thereby." *West v. Nat'l Mines Corp.*, 285 S.E.2d 670, 678 (W. Va. 1981). Covestro has identified record evidence establishing Rescar and AllTranstek's duties under governing federal regulations, evidence that a reasonable jury might use to determine there was a breach of those duties, and evidence that any such breach of those duties caused, or contributed to the cause of, the chlorine release that entered Covestro's property. *See* Pl's Resp., p. 18-19. For these reasons, the Court cannot find summary judgment in favor of Defendants on the issue of nuisance, and the instant motion must be denied as to the same.

IV. Punitive Damages

51. Finally, the Court addresses Defendants' argument that no facts exist to support Covestro's claim for punitive damages. *See* Def's Mem., p. 12.

52. West Virginia law provides that a plaintiff must establish "by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." W. Va. Code § 55-7-29(a).

53. Punitive damages are appropriate "where there is evidence that a defendant acted with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." *Estate of Burns v. Cohen*, No. 5:18-cv-00888, 2019 U.S. Dist. LEXIS 102300 (S.D. W. Va. June 19, 2019) (citing *Karpacs-Brown v. Murthy*, 686 S.E.2d 746, 757 (2009) (denying a motion for summary judgment on the issue of punitive damages where the court found that the plaintiff had met its burden to produce sufficient evidence to create a genuine dispute of material fact as to whether the defendant "provided the appropriate standard of care, whether he was negligent, or whether he was grossly negligent")).

54. Wanton, willful, or reckless conduct occurs when "the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 821 n.26 (2009).

55. As in the Court's other Orders on the other motions for summary judgment in this matter, the Court finds and concludes that at this stage, there remains a genuine issue of material fact as to whether an award of punitive damages against the Covestro is appropriate.

56. For the same reasons set forth in this Court's Order Denying Defendant Superheat FGH Services, Inc.'s Motion for Summary Judgment, entered October 30, 2020, the Court determines it would be inappropriate to preclude a jury determination of an award of punitive damages at this stage. See Ord., 10/30/20, ¶47.

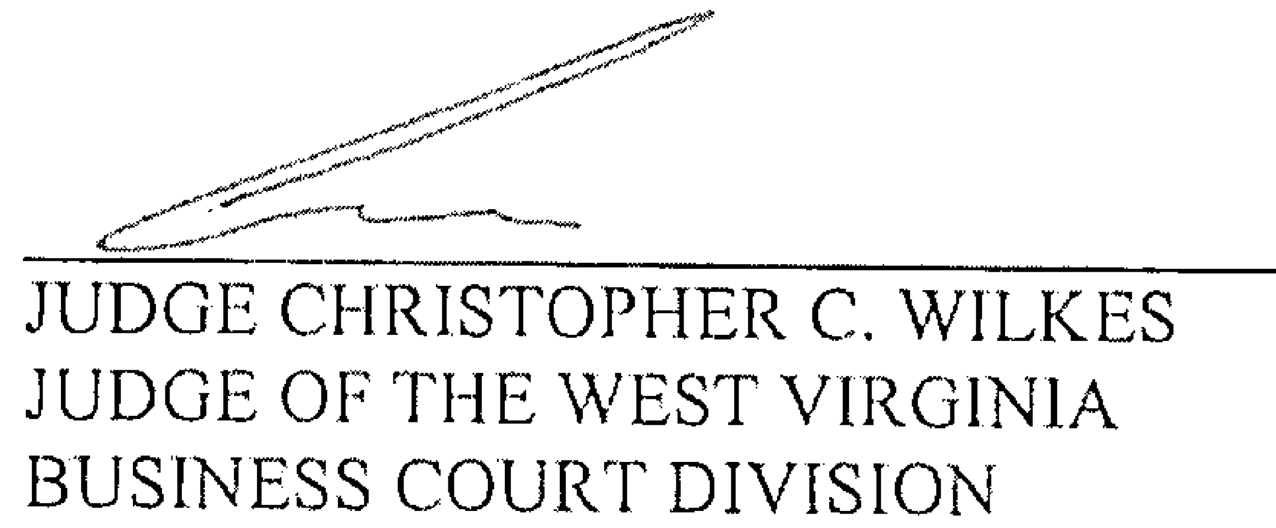
57. Here, the record contains sufficient evidence for a jury to find that Rescar and AllTranstek engaged in wanton and reckless conduct justifying an award of punitive damages. *See* Pl's Resp., p. 19. A jury could consider that in working on AXLX 1702, Rescar and AllTranstek knew that they were responsible for performing testing, repairs, and inspection of a pressure tank car that would be used to store and/or transport hazardous materials, specifically, over 178,000 pounds of chlorine. *Id.* A jury could consider that Rescar and AllTranstek knew that the storage and/or transportation of chlorine posed a significant risk to the life and property of the public. *Id.* A jury may conclude and consider that Defendants also knew that for protection of the public, they had duties under the federal regulations and numerous written procedures, including their own. *Id.* at 19-20. A jury may find that despite this knowledge, Rescar and AllTranstek knowingly violated and/or simply ignored detailed written procedures and standards that they were required by federal law to follow for the protection of the public. *Id.* at 20. Therefore, sufficient evidence exists for a jury to consider awarding punitive damages against Rescar and AllTranstek. Consequently, Defendants' request for summary judgment on Covestro's request for punitive damages is denied.

58. For all of these reasons, the Court finds the instant motion must be denied.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendants and Counterclaimants AllTranstek LLC and Rescar, Inc., t/d/b/a Rescar Companies's Motion for Summary Judgment of Defendants, AllTranstek LLC and Rescar, Inc. t/d/b/a Rescar Companies, On Claims of Plaintiff Covestro, LLC is hereby **DENIED**. The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested

copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



November 18, 2020
date of entry

JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION