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 TO PLAINTIFF'S COMPLAINT

This matter came before the Court this 17th 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, to Plaintiff's Complaint. 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 Axiall Corporation (hereinafter "Plaintiff" or "Axiall"), by counsel, Antoinette C. Oliver, 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. 4.

2. Axiall owns and operates a fleet of railroad tank cars used to transport chlorine from the facility. *See* Def's Mem., p. 4. Defendant AllTranstek provided railroad tank car fleet management services to Axiall. *Id.* AllTranstek railroad tank car fleet management services, including the monitoring of fleet movement, ensuring equipment condition, managing regulatory requirements, and auditing repair mileage activity. *See* Pl's Resp., p. 5. Since 2010, Axiall, and

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

its predecessor PPG, utilized AllTranstek to "take over the responsibility of inspecting the maintenance and repair of Axiall's tank car fleet". *Id.*; *see also* Pl's Omnibus Resp., p. 6. Axiall also retained AllTranstek for its expertise in drafting and updating necessary maintenance procedures. *Id.* at 5.

3. Defendant Rescar provided railroad tank car maintenance and repair services to Axiall. *See* Def's Mem., p. 4; *see also* Pl's Resp., p. 6. Rescar provides railroad tank car maintenance services, including mechanical repair, exterior painting, interior coating, and cleaning. *See* Pl's Resp., p. 6.

4. Axiall sent a railroad car, AXLX 1702, to Rescar in January 2016 for a five-year inspection. *See* Pl's Resp., p. 10; *see also* Def's Mem., p. 4. AXLX 1702 was a pressurized railroad tank car used to transport chlorine. *See* Def's Mem., p. 4. Rescar provided services to the tank car and AllTranstek inspected Rescar's work. *Id.* at 4-5.

5. Axiall's Complaint, filed on or about August 24, 2018, asserts causes of action against AllTranstek and Rescar[2] for breach of express warranty, breach of contract, negligence, and declaratory judgment – duty to indemnify. *Id.* at 5.

6. 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 Axiall. *See* Def's Mot., p. 2.

7. On August 17, 2020, Axiall filed its Omnibus Response and Memorandum in Opposition to Covestro LLC's Motion for Partial Summary Judgment on Counts IV and VII of Its Complaint and In Opposition to Motion for Summary Judgment of Defendants AllTranstek LLC and Rescar, Inc. T/D/B/A Rescar Companies on Claims of Plaintiff Covestro, LLC,

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[2] The Court notes said Complaint also stated claims against Defendant Superheat FGH Services, Inc.

explaining its business relationship with both AllTranstek and Rescar and explaining its use of the type of tank car AXLX 1702 was, arguing Defendants were at fault, not it, for the rupture, and arguing it was not engaged in an abnormally dangerous activity. *See* Pl's Omnibus Resp., p. 4-5, 7, 11-29.

8. On or about August 18, 2020, AllTranstek and Rescar filed their Supplemental Brief in Support of Motion for Summary Judgment of Defendants, AllTranstek LLC and Rescar, Inc., t/d/b/a Rescar Companies, to Plaintiff Axiall's Complaint, to supplement the instant motion as a result of discovery that had occurred subsequent to the filing of the instant motion.

9. On September 3, 2020, Axiall filed its Response and Memorandum in Support of Axiall Corporation's Opposition to Motion for Summary Judgment Filed By AllTranstek and Rescar Companies, explaining its business relationship with both AllTranstek and Rescar and explaining its use of the type of tank car AXLX 1702 when, arguing evidence of record shows a contract existed, factual and legal issues preclude the gist of the action doctrine from barring the negligence claim, numerous facts in the record show AllTranstek and Rescar did not fulfill their contractual obligations, genuine issues of material fact preclude summary judgment on causation, punitive damages are a question for the jury, and it was not engaged in an abnormally dangerous activity. *See* Pl's Resp., p. 15-30.

10. On or about September 10, 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, on Plaintiff Axiall's Complaint, arguing the Response made numerous mischaracterizations of their arguments and undisputed facts in this matter. *See* Reply, p. 2.

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

STANDARD OF LAW

12. 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).

13. 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).

14. 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

15. In this matter, AllTranstek and Rescar seek summary judgment in their favor and against Axiall as to Axiall'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) No executed contract existed between Axiall and AllTranstek or between Axiall and Rescar; 2) Axiall had knowledge of defects with the type of railcar AXLX 1702 was; 3) the gist of the action precludes Axiall from recovering on a claim for negligence; 4) Axiall's breach of warranty claim fails against AllTranstek because AllTranstek did not perform work on the tank car; 5) Axiall's claim for breach of express warranty relies on the contract and is simply a claim for breach of contract; 6) Axiall's own negligence was the cause of the chlorine spill. *See* Def's Mem., p. 5-19. Further, the motion argues that there are no facts that support an award of punitive damages for Axiall. *Id.* at 19-20. Given the standards of law, and the court's analysis above, the Court will take up the motion's arguments in turn.

Existence of a Contract

16. First, the Court addresses the argument that no contract existed between Axiall and AllTranstek or between Axiall and Rescar. *See* Def's Mem., p. 5. Defendants argue it is simply a purchase order and purchase order general conditions which do not constitute contracts between Axiall and AllTranstek or between Axiall and Rescar. *Id.* Defendants allege there was no signed agreement constituting a contract. *Id.* at 6.

17. However, Plaintiff Axiall has pointed to evidence in the record that shows the purchase orders were transmitted to Defendants and that the purchase orders states that by using the purchase order, Rescar agreed to the terms and conditions as posted on Axiall's website. *See* Pl's Resp., p. 16. The Court notes no evidence was proffered showing Defendants could not

access said terms and conditions or that they requested a copy of the same and were not provided one. *Id.*

18. Axiall also showed that the terms and conditions, expressly incorporated by reference[3] into the Purchase Orders, included the following language:

> THIS PURCHASE ORDER IS SUBJECT TO, INCLUDES AND INCORPORATES HEREIN BY REFERENCE THE UNITED STATES PURCHASE ORDER GENERAL CONDITIONS (CURRENT AS OF THE DATE OF THIS PURCHASE ORDER) FOR AXIALL, LLC LOCATED AT HTTP://WWW.AXIALL.COM/COMPANY. IF YOU ARE UNABLE TO ACCESS THIS WEB SITE, PLEASE CONTACT THE BUYER NAMED IN THE PURCHASE ORDER TO HAVE THESE GENERAL CONDITIONS FAXED TO YOU. AXIALL, LLC EXPRESSLY REJECTS ANYTHING IN YOUR DOCUMENTS THAT IS INCONSISTENT WITH AXIALL, LLC'S PURCHASE ORDER GENERAL CONDITIONS. **EXCEPTIONS, IF ANY, MUST BE RECEIVED BY AXIALL, LLC IN WRITING WITHIN TEN DAYS OF THE DATE OF THIS PURCHASE ORDER OR BY THE PURCHASE ORDER DELIVERY DATE, WHICHEVER IS THE EARLIEST; OTHERWISE, THESE PURCHASE ORDER GENERAL CONDITIONS ARE DEEMED ACCEPTED BY YOU.**

19. The Terms and Conditions specifically dictate that the Purchase Orders will be deemed accepted by the seller by: "(iii) not being rejected by the Seller, in writing within ten (10) calendar days after receipt by Seller; or (iv) Seller undertaking to provide materials, services or work." (*Id.*). *See* Pl's Resp., p. 16-17.

20. As expressly stated in the plain language of the Purchase Orders, AllTranstek and Rescar had an opportunity to communicate any rejection of Axiall's Terms and Conditions within ten (10) days of receipt of them. Axiall proffered there is no evidence of record to establish that

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[3] Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship. *State ex rel. U-Haul Co. v. Zakaib*, 752 S.E.2d 586, 597 (W. Va. 2013). While the parties must have had knowledge of and assented to the incorporated terms, a party's failure to read a duly incorporated document will not excuse the obligation to be bound by its terms. *Id.* Additionally, the West Virginia Supreme Court has determined that terms found on a website can be incorporated by reference as long as those terms are readily accessible. *See W. Va. CVS Pharm., LLC v. McDowell Pharm.*, 796 S.E.2d 574, 590 (W. Va. 2017) (rejecting the argument that the incorporation of the AAA rules into an arbitration agreement was invalid as the agreement only made a "general reference" to the rules and they were "readily accessible" on the AAA website).

either AllTranstek or Rescar contacted Axiall regarding any exceptions to its Terms and Conditions within the prescribed ten-day period, or at any point prior to performing work on AXLX1702. *Id.* at 17-18.

21. Further, the Court considers performance. Defendants' failure to communicate any rejection of these terms, at any time, was relied upon by Axiall and was objectively confirmed when both AllTranstek and Rescar began performing their respective duties under the contracts – i.e. performing maintenance, repairs, and inspections on Axiall's fleet. *Id.* at 18.

22. Therefore, Defendants' failure to object, coupled with their performance of the work, demonstrates that there were enforceable contracts between the parties. Because of this, Defendants' assertion that there is no contract between the parties because they did not sign the Purchase Orders is meritless. *See Ely v. Phillips*, 109 S.E. 808 (W. Va. 1921) (observing that under West Virginia law mutual assent, though generally manifested by the signature of all parties, may be shown where one party waives requiring signatures of other parties by accepting performance or by otherwise indicating that the signature of all parties is not a prerequisite to a valid contract).

23. The Court considers the fact that happened here, as the Defendants performed the work described in the purchase orders and had done so *for years*. It is well-settled West Virginia law that contracts may dictate the manner of acceptance. *Smith v. 21st Century Natural Fuels, LLC*, No. 3:14-12507, 2016 U.S. Dist. LEXIS 50410, *24 (S.D. W. Va. April 14, 2016) (citing Restatement (Second) of Contracts §§ 50, 58); *see also* Restatement (Second) of Contracts § 30(2) ("Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.").

24. Further, "acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror . . .." *Cook v. Heck's Inc.*, 342 S.E.2d 453, 458 (W. Va. 1986) (citing *First Nat. Bank of Gallipolis v. Marietta Mfg. Co.*, 153 S.E.2d 172, 176 (W. Va. 1967)); *see also* Restatement (Second) of Contracts § 50; *Pertee v. Goodyear Tire & Rubber Co.*, 861 F. Supp. 523, 526 (S.D.W. Va. 1994), *aff'd sub nom. Pertee v. Goodyear Tire & Rubber Co.*, 67 F.3d 296 (4th Cir. 1995)(applying West Virginia law and ruling elevator company accepted offer by performing elevator maintenance requested).

25. Where an offer invites acceptance by either promise or performance, "the tender or beginning of the invited performance . . . is an acceptance by performance." Restatement (Second) of Contracts § 62(1). "Such an acceptance operates as a promise to render complete performance." *Id.* at § 62(2).

26. For these reasons, a contract existed under Axiall's terms when Defendants performed the work requested by the Purchase Orders within the parameters of the parties' longstanding relationship. Therefore, the Defendants' request for summary judgment on this issue is denied.

Gist of the Action Doctrine

27. Next, the Court examines the argument surrounding the gist of the action doctrine. *See* Def's Mem., p. 15. As an initial matter, the Court found above that ample evidence of record demonstrates that the Rescar Defendants are parties to contracts with Axiall. Defendants, in an alternative argument, allege that if there is a contract, Axiall should not recover on a claim of negligence because of its contract claim due to the gist of the action doctrine. *Id.*

28. Under the gist of the action doctrine, recovery in tort will be barred when any of the following factors is demonstrated:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. In sum, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract.

Tri-State Petroleum Corp. v. Coyne, 240 W. Va. 542, 555, 814 S.E.2d 205, 218 (2018).

29. The gist of the action doctrine does not prevent plaintiffs from asserting both breach of contract and negligence claims against the same defendants but recognizes that when a duty exists **independently** of a written agreement, the plaintiff's tort claims can survive along with contract claims. *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love*, 746 S.E.2d 568, 577 (2013) ("whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract.").

30. Courts have found these independent duties to exist in numerous cases. *Tri-State Petroleum Corp. v. Coyne*, 814 S.E.2d 205, 218 (2018) (finding that the standards of good faith and fair dealing did not stem solely from the parties' agreements, but also from the larger social policy "requiring fair dealing and solicitude from a majority shareholder to minority shareholders in a joint venture."); *Dunlap v. Cottman Transmission Sys., LLC*, 754 S.E.2d 313, 318-219 (2014) (recognizing that tortious interference with contract and tortious interference with business expectancy are intentional torts predicated on the common law duty which does not arise from the contract itself, but is a common law corollary of the contract).

31. Defendants claim Axiall's negligence claims as alleged against Rescar and AllTranstek arise from a breach of contractual terms rather than violations of social policies. *See* Def's Mem., p. 16. However, Axiall contends that the existence of contracts does not bar Axiall's negligence claims, because both AllTranstek and Rescar owe an independent societal duty of care

to Axiall (and the general public) that is separate and apart from their contractual obligations. *See* Pl's Resp., p. 19-20. Specifically, Axiall argues that even if the Terms and Conditions did not apply, the Rescar Defendants were still required to perform their work to the standard of care applicable to those who perform maintenance work on railcars that transport hazardous chemicals.[4] *Id.* at 21.

32. Further, Axiall has proffered that its negligence claim specifically alleges that the Rescar Defendants deviated from the standard of care applicable to those who perform maintenance work on railcars which carry highly toxic chemical substances:

> a) In ***failing to use ordinary care*** in the fulfillment of their work on or in connection with the railroad tank car;
>
> b) In failing to ***comply with the standard of care in the industry*** in performing their work on or in connection with the railroad tank car;
>
> c) In the case of Rescar, in ***failing to perform repair work with the minimal level of care required*** in order to prevent the railroad tank car's shell rupturing upon first post-repair use; and
>
> d) In the case of AllTranstek, in ***failing to employ the reasonable care required to recognize that Rescar's repairs were faulty***, and that the railroad tank car was not fit for return to chlorine service.

(Compl. ¶55) (emphasis added); *see also* Pl's Resp., p. 21.

33. This language is distinct from Axiall's breach of contract claims, which allege that the duties breached by the Rescar Defendants were defined by the parties' contracts. *See* Pl's Resp., p. 21.

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[4] *See Gen. Motors Corp. v. Johnson*, 137 F.2d 320, 322 (4th Cir. 1943) (although this case is not one involving "gist of the action doctrine", the court states that "[t]he over-whelming weight of authority is to the effect that the manufacturer of a truck, like the one here in question, owes a duty to the public, ***irrespective of contract***, to use reasonable care in its manufacture and to make reasonable inspection of the construction in the plant where the truck was manufactured.) (emphasis added).

34. Further, the evidence of record demonstrates that the Rescar Defendants knew that the railcar would be used to transport chlorine, that chlorine was a dangerous substance, and that a reasonable person or entity would know a leak in the railcar could cause serious damage to person or property. *Id.* at 22.

35. Given the foregoing, the Court finds the gist of the action doctrine does not bar the negligence claim in this action. The Court acknowledges and notes that double recovery will not be allowed. For these reasons, summary judgment cannot be granted in Defendants' favor on the basis of the gist of the action doctrine.

Contractual Obligations

36. Next, the Court analyzes Defendants' argument that Axiall's claims for breach of contract, breach of warranty and declaratory judgment fail. *See* Def's Mem., p. 17. These claims all involve whether AllTrastek and/or Rescar fulfilled their contractual obligations to Axiall.

37. Defendants argue that Axiall's claims against AllTranstek for breach of contract, breach of warranty and declaratory judgment fail because AllTranstek did not perform any work on the chlorine car. *Id.*

38. However, the Court considers the evidence proffered by Axiall showing work conducted by AllTranstek. As an initial matter, it does not appear disputed that AllTranstek performed the work of inspection on cars, including AXLX 1702.

39. Additionally, Axiall proffered that Defendants admit that:

a. "[George] Kociola of AllTranstek performed an inspection of the work" performed by Rescar on AXLX1702; and

b. "Mr. Kociola reviewed the car file, prepared a report of his inspection, and then provided the report to Byron Martin and Mark Sinclair at Axiall."

See Pl's Resp., p. 23.

40. Further, Axiall pointed to evidence in the record that demonstrates that Mr. Kociola admitted that Axiall's Maintenance Manual, which dictated the parameters of his inspection on AXLX1702, stated that he was required to perform in-process inspections of the work performed by Rescar (including the weld repairs and LPWHT) and that these inspections were not completed. *Id.*; *see also Id.* at 11. The Court notes Defendants even state in their memorandum that Julie Bart with PPG/Axiall asked AllTranstek to analyze the fleet of cars with ACF-200 underframes in 2007. *See* Def's Mem., p. 7.

41. The Court finds that at the very least, these record facts demonstrate genuine issue of material fact remains for a jury to determine to what extent Axiall performed work on tank car AXLX 1702.

42. Alternatively, Defendants allege that even if the warranty applies to AllTranstek, AllTranstek did not breach said warranty because "in warranting Rescar's work as Axiall alleges, [it] fulfilled the warranty in that AXLX1702 had been sent to Rescar for five-year interim inspection and no issues that could have been seen from the five-year interim inspection were seen that could have caused the exterior crack and chlorine spill". *See* Def's Mem., p. 18.

43. However, Axiall has presented evidence that Mr. Kociola of AllTranstek admitted in his deposition testimony that he failed to conduct in-process inspections of the work performed on AXLX 1702 which he was required to do. *See* Pl's Resp., p. 11. In fact, Mr. Kociola/AllTranstek performed the final inspection on the tank car and declared it fit for service.

Id. In the tank car's first use after this declaration, the rupture and leak at the heart of this litigation ensued. *Id.* at 12.

44. While Defendants continue to characterize the five year inspection "was really just for cleaning" (*See* Def's Mem., p. 18), the Court finds that at the very least, genuine issues of material fact remain as to whether AllTranstek's work breached the warranty in the contract. For these reasons, summary judgment will not be granted in favor of Defendants as to the claims for breach of contract, breach of warranty and declaratory judgment.

Causation

45. Next, Defendants allege Axiall's own negligence was the cause of the chlorine spill. *See* Def's Mem., p. 18.

46. However, the facts of record create a genuine issue as to whether the Rescar Defendants' negligence, or any conduct by Axiall, caused AXLX1702 to rupture. Defendants' claim that they are entitled to summary judgment on the issue of causation is plainly contradicted by facts of record.

47. In support of this allegation of Axiall's own negligence causing the rupture, Defendants argue that "Axiall knew, or should have known, that there were defects with non-normalized steel cars like AXLX1702 and thus Axiall should have shortened the qualification schedule to below the ten year minimum to allow for more frequent inspections". *Id.* at 19.

48. Specifically, Defendants allege Axiall had knowledge of defects with tank car AXLX 1702 being a non-normalized steel car with an ACF 200 stub sill underframe design. *See* Def's Mem., p. 7-8. Specifically, Defendants argue Axiall knew there were industry-wide issues/defects with these types of cars, and "did not take any precautions to address these latent defects". *Id.* at 8. It appears undisputed by the parties that AXLX was a pressure tank car made

of non-normalized steel and was equipped with an ACF-100 stub sill underframe design. *Id.* at 7; *see also* Pl's Resp., p. 8.

49. Defendants cite evidence of the record, including testimony from Julie Bart, manager of railcar maintenance at Axiall until October 2013, that Axiall was aware of a 2006 Federal Railroad Administration (FRA) safety advisory on ACF-200 tank cars showing defects including longitudinal weld cracks located in the pad to sill area. *See* Def's Mem., p. 7. Further, Defendants cite a 2010 Association of American Railroads (AAC) maintenance advisory directed to car owners like Axiall. *Id.* at 8. Defendants proffered to the Court that this advisory stated there had been an increasing number of stub sill related defects on tank cars, and that "tank car owners, repair shops and railroads are asked to inspect these structures when personnel are performing maintenance or during normal car inspection events". *Id.* Defendants further cited testimony from Julie Bart that railroads were phasing non-normalized steel cars out of service and railcars were no longer constructed out of non-normalized steel after 1988. *Id.*

50. In response, Axiall contends in April 2017 (after the incident at the heart of this litigation), the AAR promulgated a rule phasing out service cars manufactured from non-normalized steel for the transportation of toxic inhalation hazardous material, and that pursuant to this rule, such cars were not required to be removed from service until July 2019. *See* Def's Mem., p. 9. With regard to the 2006 FRA Advisory, Axiall points out that it did not include a modification for pressure cars like AXLX 1702, no modification has ever been approved for pressure cars equipped with the ACF 200 stub sill design, and Axiall was not permitted to implement a design modification for pressure cars without regulatory approval. *Id.* Further, the use of pressure cars equipped with the ACF 200 stub sill design continues to be authorized. *Id.*

The Court notes Axiall points out that there is no evidence of record showing that AllTranstek recommended Axiall take cars with ACF-200 stub sills out of service. *Id.*

51. The Court considers that Axiall has pointed out much evidence of record creating genuine issue of material fact surrounding any justification for the use of a non-normalized steel car with an ACF 200 stub sill underframe design in 2016. Accordingly, the Court finds Defendants' contentions regarding Axiall's purported knowledge regarding issues or defects with tank car AXLX 1702 being a non-normalized steel car with an ACF 200 stub sill underframe design supports a finding of summary judgment in favor of Defendants.

52. Next, the Court analyzes Defendants' argument regarding a five-year versus ten-year inspection period for the qualification of AXLX 1702. *See* Def's Mem., p. 9-11, 19. Like its previous argument, Defendants assert that while the government mandate for a tank qualification is ten years, an owner of a tank car can set another shorter interval time period based off information of the car. *Id.* at 10. Defendants appear to argue that because of potential issues with AXLX 1702 being a non-normalized steel car with an ACF 200 stub sill underframe design, Axiall should have shortened the inspection period.

53. In support, Defendants aver that Axiall had cars such as AXLX1702 go to shops such as Rescar for a five-year chlorine interior inspection, and then every ten years those cars would go to shops like Rescar for a federally mandated qualification that would include the interior and a structural qualification. *Id.* at 9-10. Defendants contend that the five-year inspection did not include a structural qualification, and the "real reason for the five-year interim inspection was for cleaning the interior of the car".. *Id.* at 10.

54. In response, Axiall avers that in January of 2016, AXLX went to the Rescar facility for a five-year interim inspection, the scope of which was determined by Axiall's

Maintenance Manual and Axiall's Shopping Instructions. *See* Pl's Resp., p. 10. Specifically, Axiall avers that Rescar's work included cleaning, thickness testing, build-up welding for corrosion repair, LPWHT, and hardness testing. *Id.* Further, Axiall alleged that Axiall's Maintenance Manual required an SS-3 inspection of the stub sill during a five-year interim inspection, and that said inspection was not performed. *Id.* at 11.

55. Axiall also contends that but the ten (10) year inspection period is established by regulation and incorporated into Axiall's Maintenance Manual, which AllTranstek was involved in drafting. *Id.* at 25. Moreover, Axiall's Maintenance Manual required a five (5) year interim inspection, which included an SS-3 inspection of the stub sill, which Axiall has proffered evidence from the record in the form of deposition testimony that this SS-3 inspection was not done. *Id.*; *see also Id.* at 11.

56. Because of the evidence proffered by Axiall, the Court finds Defendants' arguments regarding a five year versus ten-year inspection period for the qualification of AXLX 1702 does not necessitate the finding of summary judgment in favor of Defendants.

57. Further, the Court notes there are causation allegations regarding the application of the treatment which go to proximate cause. For all of these reasons, the Court finds that it is clear that genuine issue of material fact remain regarding causation in this matter. The cause of the rupture of AXLX1702 is a question for the jury to decide at trial, not this Court to determine on summary judgment. Therefore, summary judgment on this issue is denied.

Punitive Damages

58. The Court next examines Defendants argument that there are no facts indicate that punitive damages are available to Axiall. *See* Def's Mem., p. 19.

59. 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).

60. 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")).

61. 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).

62. There remains a genuine issue of material fact as to whether an award of punitive damages against the Rescar Defendants is appropriate.

63. 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.

64. Here, Testimony from both AllTranstek and Rescar employees confirm that they knew that negligent performance of their work could result in a catastrophic release of a hazardous substance, and that certain procedures were in place to prevent injury to persons and property due to the improper maintenance of the railcars. They were aware of that hazardous nature of the transport of chlorine. LPWHT of weld repaired areas was required to eliminate stresses in the metal which could cause catastrophic failure. However, a jury could determine that Rescar or AllTranstek did not make an effort to determine whether all areas which required post weld heat treatment actually received it. Further, it may be determined that the critical area of AXLX1702 where the crack propagated was never successfully post weld heat treated.

65. Axiall proffered that within days after the catastrophe, Defendant Superheat discovered this failure to post weld heat treat and so informed Rescar. Further, it was proffered that an employee of Rescar, Jay Standish, "taking liberties", manufactured an illustration of the bottom AXLX1702's shell which he submitted to the NTSB. Mr. Standish included every cable involved in the 2016 LPWHTs in his illustration, except Cable #9, the cable assigned to the critical crack origin area. *See* Pl's Resp., p. 27-28.

66. Thus, a jury could determine that Rescar, after discovering that it had not done the work properly, misrepresented the quality of its work to the National Transportation Safety Board.

67. Based on this evidence, a jury could reasonably determine that Rescar and AllTranstek disregarded a risk that it knew or should have known was highly likely to result in harm to others. *See Peters*, 224 W. Va. at 190, n.26. Consequently, the Rescar Defendants' request for summary judgment on Axiall's request for punitive damages is denied.

Abnormally Dangerous/Hazardous Activity

68. Finally, the Court addresses Defendants supplemental argument set forth in their supplemental brief that Axiall was engaged in an abnormally dangerous activity in the production, storage, and transportation by railcar of chlorine. *See* Defs' Suppl. Brief, p. 4.

69. The Court directs that this argument was raised and rejected in the Court's Order Denying Covestro's Motion for Partial Summary Judgment entered October 29, 2020. See Ord., 10/29/20, ¶¶12-35(applying the factors of Restatement §520 to the production, storage, and transportation by railcar of chlorine). The Court incorporates the same analysis into the instant Order and finds summary judgment shall be denied as to AllTranstek and Rescar on this basis.

70. Further, the Court addresses the argument contained in Axiall's Response that the Court should ignore the summaries of opinions by experts Connelly and McCartney which were part of Defendants' supplemental brief. *See* Pl's Resp., p. 32. Defendants proffered in their Supplemental Brief that since the filing of their initial motion, the discovery that occurred included that "AllTranstek and Rescar, along with the other parties, have since disclosed experts, produced expert reports, and conducted some expert depositions". *See* Defs' Suppl. Brief, p. 2.

71. Axiall's argument that the Court should ignore the opinions of these experts goes to Defendants' position that Axiall was engaged in an abnormally dangerous/hazardous activity. *See* Pl's Resp., p. 36. Since the Court has found this argument to be precluded and denied by the analysis contained in a prior order, the Court finds this argument regarding Defendants' experts to be moot.

72. 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, to Plaintiff's Complaint 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 17, 2020
date of entry

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