

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.

FILED  
2020 DEC 30 AM 8:37  
JOSEPH M. RUCKI

**ORDER DENYING ALLTRANSTEK AND RESCAR'S  
MOTION TO RECONSIDER AND/OR AMEND ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT**

This matter came before the Court this 29<sup>th</sup> day of December 2020 upon Defendants and Counterclaimants AllTranstek L.L.C. and Rescar, Inc., t/d/b/a Rescar Companies's Motion of Defendants, AllTranstek, L.L.C. and Rescar Companies, to Reconsider and/or Amend Order Denying Motion for Summary Judgment With Respect to Plaintiff Axiall Corporation's Punitive Damages Claim and Request for Clarification. 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 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<sup>1</sup> 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. for Summ. J., p. 4.

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

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<sup>1</sup> *See* Order of Court consolidating cases entered 2/28/19.

3. 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.

4. 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.

5. 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.

6. On November 19, 2020, the Court entered its Order Denying AllTranstek and Rescar's Motion for Summary Judgment to Plaintiff's Complaint. *See* Ord., 11/19/20.

7. On December 1, 2020<sup>2</sup>, AllTranstek and Rescar filed the instant Motion of Defendants, AllTranstek, L.L.C. and Rescar Companies, to Reconsider and/or Amend Order Denying Motion for Summary Judgment With Respect to Plaintiff Axiall Corporation's Punitive

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<sup>2</sup> A review of the case file indicates the motion was time-stamped as filed the Clerk on December 1, 2020.

Damages Claim and Request for Clarification, seeking clarification of Paragraph 51 of the Court's November 19, 2020 Order and seeking reconsideration of the Court's ruling on punitive damages, arguing post-accident conduct should not be considered and therefore, the Court should enter judgment in favor of Defendants on Axiall's punitive damages claim. *See* Def's Mot., p. 2; *see also* Def's Mem., p. 2.

8. On or about December 15, 2020, Axiall filed its Response and Memorandum in Opposition to Motion of Defendants AllTranstek LLC and Rescar Companies to Reconsider and/or Amend Order Denying Motion for Summary Judgment with Respect to Plaintiff Axiall Corporation's Punitive Damages Claim and Request for Clarification, joining in the request for clarification as to Paragraph 51 of the Court's November 19, 2020 Order, but arguing the motion to reconsider the Court's ruling regarding punitive damages should be denied because the Court correctly found that a jury should determine whether punitive damages are appropriately awarded against the Rescar Defendants, and that the Rescar Defendants' pre- and post- accident conduct could support such a finding. *See* Pl's Resp., p. 2, 9.

9. On or about December 22, 2020, Defendants filed their Reply Memorandum of Defendants, AllTranstek L.L.C. and Rescar Companies, In Support of Motion to Reconsider and/or Amend Order Denying Motion for Summary Judgment With Respect to Plaintiff Axiall Corporation's Punitive Damages Claim and Request for Clarification, reiterating its contention that post-accident conduct should not be considered, and that "[t]hus, there is no basis to support Axiall's claim for punitive damages". *See* Reply, p. 4.

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

#### **CONCLUSIONS OF LAW**

11. This matter comes before the Court upon a motion to reconsider and/or amend order brought pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Rule 59(e) simply states that “[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment”. W. Va. R. Civ. P. 59. As an initial matter, applying Rule 6 of the West Virginia Rules of Civil Procedure, the Court finds that the instant motion, filed December 1, 2020, was timely brought, as it seeks to amend the Court’s Order entered by the Circuit Clerk on November 19, 2020.

12. Further, the West Virginia Supreme Court of Appeals has provided guidance on when a trial court should grant a Rule 59(e) motion to alter or amend. Specifically, in syllabus point 2 of *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals said:

A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Syl. pt. 1, *Acord v. Colane Company*, 228 W.Va. 291, 719 S.E.2d 761 (2011); *see also* *Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351, 356 (2012).

13. Further, a motion to alter or amend judgment may be used to correct manifest errors of law or fact or to present newly discovered evidence. *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011).

14. In the present case, none of the grounds for reconsideration are present. The Court, after review of the pleadings and the court file, finds there are no manifest errors of law or fact to be corrected. It is apparent from the review of the record that the Court considered all the matters before the Court, including a totality of circumstances that would support a

determination that summary judgment should not be granted, precluding a jury determination of punitive damages, and issued its decision.

15. The Court considered the totality of all the information provided by Defendants in support of its argument in the underlying motion for summary judgment that there are no facts that indicate that punitive damages are available to Axiall. *See* Ord., 11/19/20, ¶58.

16. The Court notes that it made the same finding regarding jury consideration of an award of punitive damages in the other motions for summary judgment filed in the instant civil action. In fact, the Court referred to the Court's October 30, 2020 Order Denying Defendant Superheat FGH Services, Inc.'s Motion for Summary Judgment and stated that for the same reasons set forth in that Order, the Court determines it would be inappropriate to preclude a jury determination of an award of punitive damages. *Id.* at ¶63.

17. The Court cited evidence of record that was proffered to it in briefing in paragraphs 64 and 65 of the November 19, 2020 Order. *Id.* at ¶64-65. Defendants, in the instant motion, seek a reconsideration of the assertion in Paragraph 64 that Mr. Standish included every cable involved in the 2016 LPWHT's in his illustration, except Cable #9, the cable assigned to the critical crack origin area, to which the Court cited to pages 27 and 28 of Axiall's Response to the underlying motion for summary judgment. *See* Def's Mot., p. 4-5; *see also* *Id.* at ¶65. However, Defendants were able to respond to pages 27 and 28 of Axiall's Response in their Reply.

18. Further, Defendants allege Axiall did not argue in its briefing that Mr. Standish misrepresented information to the NTSB in his chart, and that "the Court apparently reached this conclusion on its own". *See* Def's Mot., p. 5. However, on page 3 of Axiall's Response to the underlying motion for summary judgment, Axiall proffered the following:

There is ample evidence of record to demonstrate that despite knowing that AXLX1702 was going to be used to transport chlorine (an important but very hazardous chemical) throughout North America, the Rescar Defendants failed to take appropriate measures to ensure that the work they did on AXLX1702 was done properly. Then, after discovering that it had not done the work properly, Rescar misrepresented the quality of its work to the National Transportation Safety Board. Based on this evidence, a jury could certainly find that the Rescar Defendants' conduct was outrageous, thereby warranting an award of punitive damages.

19. Further, the Court's determination in Paragraph 66 of the November 19, 2020 Order was contained verbatim in Paragraph 74 of Axiall's proposed order on the underlying motion for summary judgment. For these reasons, the Court finds Defendants' arguments that Plaintiff made no such argument to be completely without merit.

20. The Court declines to reconsider or alter or amend its determination with regard to its ruling on punitive damages. Indeed, based on a totality of the evidence, the Court finds a jury could reasonably determine that Rescar and AllTranstek disregarded a risk it knew or should have known was highly likely to result to harm to others. The Court finds that the Rescar Defendants' request for summary judgment on Axiall's request for punitive damages was properly denied, and declines to alter said denial.

21. Additionally, the Court considers the parties' request for clarification as to Paragraph 51 of its November 19, 2020 Order. Paragraph 51 reads as follows:

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.

*See Ord., 11/19/20, ¶51.*

22. The Court hereby does AMEND and clarify that due to a typographical error, and determines that Paragraph 51 should read as follows:

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 does not support a finding of summary judgment in favor of Defendants.

(emphasis added).

### CONCLUSION

**WHEREFORE**, it is hereby **ORDERED** and **ADJUDGED** that Defendants and Counterclaimants AllTranstek L.L.C. and Rescar, Inc., t/d/b/a Rescar Companies's Motion of Defendants, AllTranstek, L.L.C. and Rescar Companies, to Reconsider and/or Amend Order Denying Motion for Summary Judgment With Respect to Plaintiff Axiall Corporation's Punitive Damages Claim and Request for Clarification 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.

December 29, 2020  
date of entry

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