

**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**

FILED
2022 AUG 30 AM 9:57
MARSHALL COUNTY
WEST VIRGINIA

**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 AXIALL CORPORATION'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON THE COLLATERAL ESTOPPEL EFFECT OF CERTAIN JURY
FINDINGS IN THE ALLEGHENY COUNTY VERDICT AND ASSOCIATED COURT
RULINGS**

This matter came before the Court this 29th day of August 2022 Axiall Corporation's Motion for Partial Summary Judgment on the Collateral Estoppel Effect of Certain Jury Findings in the Allegheny County Verdict and Associated Court Rulings. The parties 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 cases¹ containing causes of action surrounding a chlorine leak at the Axiall Corporation's (hereinafter "Defendant" or "Axiall") facility, which produces chlorine and other products, in Marshall County, West Virginia. *See* Compl.; *see also* Covestro's Resp., p. 3. The chlorine release occurred after railroad tank car AXLX 1702, owned by Axiall, sustained a crack causing the tank shell to rupture after it was loaded with liquid chlorine. *Id.* In its Complaint, Axiall² contends the fracture of the tank shell was caused by Defendants AllTranstek, LLC ("hereinafter AllTranstek"), Rescar, Inc. t/d/b/a Rescar Companies (hereinafter "Rescar"), and Superheat FGH Services, Inc. (hereinafter "Superheat"). *Id.* In Civil Action No. 18-C-203 of these consolidated civil actions, Axiall pled claims against Rescar and AllTranstek including negligence, breach of contract, and breach of

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

² The Court notes Axiall is a Defendant and Third-Party Plaintiff in Civil Action No. 18-C-202 and a Plaintiff in Civil Action No. 18-C-203. *See, infra*, ¶¶4, 17.

warranty. *See* Axiall's Mem., p. 3. Axiall also pled a negligence claim against Superheat. *Id.* Axiall seeks collateral estoppel findings in the instant motion concerning Axiall's claims in Civil Action No. 18-C-203. *Id.*

2. There also exists a civil action referred to by the parties as "the Pennsylvania action" or "the Pennsylvania matter", which is Axiall Corporation v. AllTranstek, LLC, et al., Civil Division No. GD-18-010944, in the Court of Common Pleas of Allegheny County Pennsylvania, wherein Axiall filed suit against AllTranstek, Rescar, and Superheat. *See* Defs' Mem., p. 1-2; *see also* Covestro's Resp., p. 1. This Pennsylvania action arises out of the same August 2016 incident and the same repair work on AXLX 1702. *See* AllTranstek and Rescar's Resp., Ex. B (PA Complaint).

3. On October 14, 2021, the jury in the Pennsylvania action reached a verdict. *See* Covestro's Resp., p. 7, 8.

4. On April 14, 2022, Axiall filed the instant Axiall Corporation's Motion for Partial Summary Judgment on the Collateral Estoppel Effect of Certain Jury Findings in the Allegheny County Verdict and Associated Court Rulings, moving the Court for partial summary judgment on the collateral estoppel effect of certain jury findings in the Pennsylvania action. *See* Def's Mot., p. 1-2. Specifically, Axiall seeks partial summary judgment relying upon applying collateral estoppel to the Pennsylvania jury's verdict/findings related to Axiall's contract-related claims, and not Axiall's negligence claims or AllTranstek or Rescar's affirmative defenses. *Id.*; *see also* Def's Mem., p. 3. Axiall argues that under the fifth factor of collateral estoppel, the negligence findings are not essential to the Pennsylvania judgment, because under the election of remedies doctrine, Axiall will choose to receive its damages (awarded by the jury) under its contract-related causes of action. *See* Def's Mem., p. 4-5.

5. On a prior day, Rescar and AllTranstek filed Response of AllTranstek LLC and Rescar Companies in Opposition to Axiall's Motion for Partial Summary Judgment on the Collateral Estoppel Effect of Certain Jury Findings in the Allegheny County Verdict and Associated Court Rulings, averring Axiall is asking "this Court to selectively apply only the favorable portions of the Pennsylvania jury's verdict and ignore the negligence verdict where it found Axiall contributorily negligent and caused 40% of its own damages". See AllTranstek and Rescar's Resp., p. 2. They argue the Pennsylvania jury's verdict on the contract related questions is not sufficiently firm to be given collateral estoppel effect. *Id.* at 10. This is because, they argue, the jury never found the terms and conditions/purchase orders were enforceable contracts, due to Axiall objecting to a special interrogatory that would have asked the jury to decide the same. *Id.* at 12. They argue that due to Axiall's objection to the special interrogatories, the Pennsylvania jury did not apportion the \$12.8 million entire verdict amount between the different claims. *Id.* at 14.

6. On a prior day, Covestro filed Plaintiff Covestro, LLC's Memorandum of Law in Opposition to Axiall's Motion for Partial Summary Judgment on the Collateral Estoppel Effect of Certain Jury Findings in the Allegheny County Verdict and Associated Court Rulings, averring that Axiall cannot have it both ways by urging this Court to give certain Pennsylvania jury findings (contract-related) collateral estoppel effect and ignore the jury's findings related to negligence and apportionment. See Covestro's Resp., p. 2. Further, Covestro argues Axiall's entire argument rests upon the election of remedies doctrine, and that Axiall is wrong about its argument, that there is no election of remedy to be made, and even if Axiall could elect to receive a remedy based upon breach of contract claims, the jury's findings regarding negligence would still be essential to Axiall's award of damages and declaratory judgment that Axiall is

entitled to contractual indemnification, because the findings and declaratory judgment in Axiall's favor could not be made if Axiall were found to be solely negligent, so the jury had to consider and render a verdict on Axiall's negligence in order for there to be a contract remedy in this matter. *Id.* at 3, 18.

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

STANDARD OF LAW

8. 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).

9. 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).

10. 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

11. As an initial matter, the Court notes that in Civil Action No. 18-C-203 of these consolidated civil actions, Axiall pled claims against Rescar and AllTranstek including negligence, breach of contract, and breach of warranty. *See* Axiall’s Mem., p. 3. Axiall also pled a negligence claim against Superheat. *Id.* Axiall seeks collateral estoppel findings in the instant motion concerning Axiall’s claims in Civil Action No. 18-C-203. *Id.* Additionally, Axiall has averred in the briefing on the instant motion, as well as on the briefing on the Second Motion to Dismiss of Defendants of AllTranstek, LLC and Rescar, Inc. that it “intends to move to dismiss Civil Action No. 18-C-203” if “Rescar and AllTranstek do not challenge jurisdiction or venue on appeal in the [Pennsylvania action]”. *Id.* at 6. With that in mind, the Court addresses the instant motion as follows:

12. In this matter, Axiall seeks partial summary judgment in its favor, seeking the doctrine of collateral estoppel apply and preclude the contract related jury verdict findings in the Pennsylvania case, and that this Court find that collateral estoppel does not apply to the Pennsylvania jury’s negligence and apportionment of liability jury verdict determinations³. *See* Axiall’s Mot., p. 2; *see also* Covestro’s Resp., p. 2.

³ Specifically, Axiall argues the jury’s findings on Questions 1, 2, 3, 4, and 5 (except as to Superheat in Questions 1, 2, and 5) should not be given collateral estoppel effect, and that the jury’s findings in Questions 6, 7, 8, 9, 10, 11, 12,

13. However, AllTranstek and Rescar oppose this type of application of collateral estoppel in this case, averring that Axiall “asks this Court to selectively apply only the favorable portions of the Pennsylvania jury’s verdict and ignore the negligence verdict where it found that Axiall was contributorily negligent and caused 40% of its own damages”. *See* AllTranstek and Rescar’s Resp., p 2. AllTranstek and Rescar argue Axiall seeks partial summary judgment relying solely on applying collateral estoppel to the Pennsylvania verdict, but only to certain findings related to Axiall’s contract-related claims, not Axiall’s negligence claims or AllTranstek and Rescar’s affirmative defenses. *Id.* at 11; *see also Id.* at 14. The Court notes AllTranstek and Rescar argue the Pennsylvania jury’s verdict on the questions of Interrogatory Nos. 6-13, the contract-related questions, is not sufficiently firm to be given collateral estoppel effect in the action in the consolidated cases at bar, noting the Pennsylvania court later molded the verdict to include a right of indemnification under the terms and conditions, but averring the decision is not yet final until the court rules after a hearing set for July 21-22, 2022. *Id.* at 6-7; *see also Id.* at 10, 17. AllTranstek and Rescar urge this Court to deny the instant motion seeking to apply collateral estoppel to certain findings in the Pennsylvania action. *Id.* at 17.

14. On the other hand, Covestro argues Axiall recognizes the preclusive effect of the jury verdict by asking this Court to find that collateral estoppel applies to the Pennsylvania jury’s findings such that Axiall is entitled to summary judgment on its cross-claims and countersuit against Rescar and AllTranstek, while in the same motion, asking this Court to ignore the jury’s findings related to the Defendants’ negligence and apportionment of liability and instead conclude these findings should not be given collateral estoppel effect, and argues “Axiall cannot have it both ways”. *See* Covestro’s Resp., p. 2. Further, Covestro argues Axiall’s election of

13, and 14 should be given collateral estoppel effect. *See* Axiall’s Mot., p. 2. Additionally, Axiall avers the Court’s February 16, 2022 rulings on Axiall’s motion to mold the verdict also should be given collateral estoppel effect. *Id.*

remedies argument is “wrong” because there is no election of remedies to be made, and even if there were, the jury’s findings of negligence are still essential to Axiall’s award of damages the declaratory judgment that Axiall is entitled to contractual indemnification. *Id.* at 2-3. For these reasons, Covestro asks this Court to deny the instant motion pertaining to the jury’s findings 1-5 in the Pennsylvania action. *Id.* at 3, 19.

15. Here, the Court does not find Axiall’s arguments persuasive that collateral estoppel effect should be given to the jury’s contract related findings, but not the jury’s negligence findings. As an initial matter, Axiall does not argue the first four factors of collateral estoppel application, rather, Axiall’s motion challenges factor five, that the determination in the prior proceeding was essential to the judgment. *See* Axiall’s Mem., p. 4 *citing* *Selective Way Ins. Co. v. Hospitality Group Services, Inc.*, 119 A.3d 1035, 1042 (Pa. Super. 2015). Specifically, Axiall argues element five does not apply to the Pennsylvania jury’s findings on negligence and apportionment of responsibility. *See* Axiall’s Mem., p. 4. Axiall argues this is because in order to avoid double recovery, Axiall will elect to receive its damages in Pennsylvania by electing to receive its damages only on its breach of contract there. *Id.* at 5. As a result, Axiall argues the jury’s findings as to the negligence and apportionment of responsibility questions will not be included in or inform the judgment, except as to Superheat, and should not be given collateral estoppel effect in the case at bar. *Id.* at 5-6.

16. The Court disagrees with Axiall’s election of remedies proposition. The Court finds there is no election of remedy to be made. The election of remedies doctrine is intended “to prevent double recovery for a single injury.” *Gamesa Energy USA, LLC v. Ten Penn Ctr. Assocs., L.P.*, 217 A.3d 1227, 1234 (Pa. 2019) (citation omitted). It precludes a plaintiff from recovering damages on two different theories of liability for the same injury. *Id.* at 1235 (citation

omitted). “The purpose of the doctrine of election of remedies is *not to prevent recourse to any remedy*, or to alternative remedies, but to prevent double recoveries or redress for a single wrong.” *Id.* at 1234 (quoting 25 Am.Jur.2d Election of Remedies § 3). The doctrine solely operates as a bar to pursuing “alternative forms of relief on a given claim” following legal resolution of that claim. *Id.* at 1239 (citing, e.g., *Pittsburgh Union Stock Yards Co. v. Pittsburgh Joint Stock Yards Co.*, 163 A. 668, 669 (Pa. 1932) (“party invoking contract's binding arbitration provision could not later seek court's merits review of unfavorable judgment; the election, once made, was irrevocable”); *Wedgewood Diner, Inc. v. Good*, 534 A.2d 537 (Pa. 1987) (“plaintiff recovering breach of contract damages against one defendant was barred from pursuing rescission of the same contract against a second defendant”); *Umbelina v. Adams*, 34 A.3d 151 (Pa. Super. 2011) (“despite unsuccessful claim for rescission, plaintiff could not recover damages on breach of warranty claim where it made pretrial election to abandon breach claim and pursue only rescission”); *McCausland v. Wagner*, 78 A.3d 1093 (Pa. Super. 2013) (“plaintiff who pleaded claims seeking both contract damages and rescission was barred from pursuing rescission claim after accepting settlement for damages”)).

17. It does not appear that there is any potential for double recovery in the Pennsylvania action. Regardless, in the event that Axiall could elect its remedy in the Pennsylvania action, the Court finds the jury’s findings regarding negligence were plainly essential to the award of damages and the finding related to declaratory judgment. First of all, if Axiall could elect to receive damages for AllTranstek and Rescar’s breach of contract, as opposed to their negligence, that would not somehow undo the jury’s findings in the Pennsylvania case regarding negligence and apportionment of fault, or render them not “essential”. In deciding whether a prior determination was “essential to the judgment,”

Pennsylvania courts evaluate “the context of the claim” and if the issue “affected the decision or damages rendered in the prior proceeding.” *Pitney Rd. Partners, LLC v. Murray Assocs. Architects, P.C.*, 2014 WL 10575406, at *6 (Pa. Super. Sept. 18, 2014). “The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment.” *Zarnecki v. Shepegi*, 532 A.2d 873, 879 (Pa. Super. 1987)(citation omitted).

18. It has been proffered that in the Pennsylvania action, the issue of the Defendants’ respective negligence was unequivocally recognized by them as important and necessary to the resolution of the Pennsylvania action. Defendants extensively litigated the questions of negligence and fault for the Chlorine Release at every phase of the Pennsylvania Action: the parties specifically alleged the issues of negligence and comparative/contributory negligence in their pleadings, it was in dispositive motions, and it was argued throughout trial. *See Covestro’s Resp.*, p. 16. Also, it was specifically identified as being so essential or critical that it was included in the jury instructions and verdict slip. *Id.*

19. Second, and more importantly, the negligence and apportionment findings plainly affected the decision regarding the breach of contract claim. This is because Axiall’s breach of contract claim against AllTranstek and Rescar was predicated entirely on their alleged negligence. *Id.* at 17. This is because the indemnification provision at issue provides that Axiall was entitled to indemnification only if the injury or damage was not caused by the sole negligence of Axiall. *Id.* at 18. Therefore, the Pennsylvania court could not have entered a declaratory judgment in Axiall’s favor and ruled that AllTranstek and Rescar were contractually bound to indemnify Axiall from any damages, demands, losses or liabilities caused by the rupture and release of the tank car at issue on August 27, 2016 without the jury’s findings that

Axiall was negligent, but that negligence was only 40% of the factual cause of the chlorine release. *Id.* Also, the Court notes the same conduct was the basis for both the negligence and contract claims, that by failing to competently provide the services they were contracted to provide to Axiall, AllTranstek and Rescar caused the tank car rupture and resulting damage to Axiall's property and third party property. *Id.* at 17.

20. Nonetheless, for the reasons explained above, because the Pennsylvania Court could not have been entered declaratory judgment in Axiall's favor without the jury's findings of Defendants' negligence and apportionment of liability, these findings – regardless of whether Axiall purports to elect contract remedies – were essential to the verdict in the Pennsylvania Action. Accordingly, the instant motion must be denied. The Court has found that collateral estoppel applies in its other summary judgment orders. The Court declines to repeat the analysis here. In this order, the Court denies Axiall's request for collateral estoppel to be applied to the breach of contract related claims in the Pennsylvania action, but not to the negligence and apportionment claims in the Pennsylvania action.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Axiall Corporation's Motion for Partial Summary Judgment on the Collateral Estoppel Effect of Certain Jury Findings in the Allegheny County Verdict and Associated Court Rulings 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.

8-29-22

date of entry



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