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
2019 OCT 30 PM 2:21
JOSEPH M. RUCKI

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,

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

v.

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

**ORDER DENYING DEFENDANT SUPERHEAT FGH SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court this 30th day of October 2020 upon Defendant Superheat FGH Services, Inc.'s Motion for Summary Judgment. 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 cases[1] containing causes of action surrounding a chlorine leak at the Defendant Axiall Corporation's (hereinafter "Plaintiff" or "Axiall") facility, which produces chlorine and other products, in Marshall County, West Virginia. *See* Def's Mem., p. 2. Axiall alleges 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 the Complaint, Axiall contends the fracture of the tank shell was caused by Defendants AllTranstek, LLC, Rescar, Inc. t/d/b/a Rescar Companies, and Superheat FGH Services, Inc. (hereinafter "Defendant" or "Superheat"). *Id.*

2. Further, it is alleged that Rescar, Inc. t/d/b/a Rescar Companies' ("Rescar") provides railroad tank car maintenance services including, among other things, mechanical repair, exterior painting, interior coating, and cleaning. *See* Pl's Resp., p. 3. Superheat, as a subcontractor to Rescar, provided remote local post weld heat treatment ("LPWHT") operations and monitoring services to Rescar, including at Rescar's facility located in DuBois,

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

Pennsylvania. *Id.* On October 8, 2015, Rescar and Superheat entered into a contract pursuant to which Superheat was to provide these remote services for a period of three years. *Id.* at 4.

3. Relevant to the instant motion, Axiall asserted one cause of action for Negligence against Superheat. *Id.* at 3.

4. Superheat filed the instant Motion for Summary Judgment, seeking summary judgment as to the negligence cause of action in the Complaint, arguing: 1) Axiall failed to establish Superheat owed any duty to it; 2) Superheat did not breach any duty that arose out of its contract with Rescar; 3) Axiall has attempted to place statutory duty upon Superheat but fails because there is no evidence of record to establish that Superheat was to adhere to the Hazardous Materials Regulations ("HMR") or AAR Manual of Standards and Recommended Practices ("MSRP") in relation to repairs to tank car AXLX 1702; and 4) Axiall failed to prove that an action or inaction of Superheat was the proximate cause of the subject incident. *Id.* at 14, 15, 19, 27. In addition, Superheat alleges it is entitled to summary judgment in its favor on Axiall's claim for punitive damages. *Id.* at 32.

5. On August 17, 2020, Axiall filed its Response and Memorandum in Opposition to Motion for Summary of Superheat FGH Services, Inc., arguing the instant motion should be denied because the duties Superheat owed to Axiall in connection with its work on the tank car are established by common law and flow from the duties enumerated in its contract with Rescar and applicable federal regulations, and because its expert evidence and facts within the record demonstrate causation by demonstrating Superheat's work on tank car AXLX 1702 was a concurrent cause of the rupture of that car. *See* Pl's Resp., p. 1. In addition, Axiall's Response argues that there exists ample evidence of record that a jury could use to conclude that Superheat's conduct was "outrageous", entitling Axiall to punitive damages. *Id.*

6. Superheat filed its Reply and Memorandum in Response to Axiall Corporation's Memorandum in Opposition to Superheat's Motion for Summary Judgment, arguing the Response misconstrues and mischaracterizes evidence of record in order to create a genuine issue of material fact. *See* Reply, p. 2.

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. In this matter, Superheat filed the instant Motion for Summary Judgment, seeking summary judgment as to the negligence cause of action in the Complaint, arguing: 1) Axiall failed to establish Superheat owed any duty to it; 2) Superheat did not breach any duty that arose out of its contract with Rescar; 3) Axiall has attempted to place statutory duty upon Superheat but fails because there is no evidence of record to establish that Superheat was to adhere to the Hazardous Materials Regulations ("HMR") AAR Manual of Standards and Recommended Practices ("MSRP") in relation to repairs to tank car AXLX 1702; and 4) Axiall failed to prove that an action or inaction of Superheat was the proximate cause of the subject incident. *See* Def's Mem., p. 14, 15, 19, 27. In addition, Superheat alleges it is entitled to summary judgment in its favor on Axiall's claim for punitive damages. *Id.* at 32. The Court will take up the arguments in turn.

### a. Duty

12. First, the Court analyzes Superheat's arguments as to duty. With regard to the necessary element of duty, Superheat has alleged that: 1) Axiall failed to establish Superheat owed any duty to it; 2) Superheat did not breach any duty that arose out of its contract with Rescar; and 3) Axiall has attempted to place statutory duty upon Superheat but fails because

there is no evidence of record to establish that Superheat was to adhere to the Hazardous Materials Regulations ("HMR") or AAR Manual of Standards and Recommended Practices ("MSRP") in relation to repairs to tank car AXLX 1702. *See* Def's Mem., p. 14, 15, 19.

13. The Court first addresses Superheat's arguments that: 1) Axiall failed to establish Superheat owed any duty to it; and 2) Superheat did not breach any duty that arose out of its contract with Rescar. *See* Def's Mem., p. 14, 15. Specifically, Superheat argues that "there is no evidence that Superheat owed or breached a duty to Axiall" and in an attempt to establish Superheat's duty of care, Axiall "ignores the clear evidence that Superheat met its contractual obligations to Rescar", entitling it to summary judgment. *Id.* at 14.

14. West Virginia law governing negligence claims is well-settled. To establish a prima facie claim for negligence, the West Virginia Supreme Court of Appeals has held the plaintiff must prove the following elements: (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); *cited by Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016). When the plaintiff's evidence, considered in the light most favorable to him, fails to establish a *prima facie* right of recovery, the trial court should direct a verdict in favor of the defendant. *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 787 S.E.2d 546 (2016).

15. Regarding the element of duty, in order to prove actionable negligence, there must be shown a duty on the part of the person charged with negligence and a breach of such duty. Syl. Pt. 2, *Atkinson v. Harman*, 151 W. Va. 1025, 1025, 158 S.E.2d 169, 171 (1967).

16. The West Virginia Supreme Court of Appeals 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).

17. In addition, the West Virginia Supreme Court of Appeals 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); *cited by Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016).

18. Superheat's arguments that Axiall failed to establish Superheat owed any duty to it and Superheat did not breach any duty that arose out of its contract with Rescar both surround Superheat's contention that Superheat did not breach any duty that may have arisen out of its contract with Rescar. *See* Def's Mem., p. 15. As an initial matter, the Court notes that said contract is between Rescar and Superheat only; it is undisputed that Axiall is not a party to this contract.

19. Axiall proffered evidence in the form of deposition testimony and answers to discovery requests that Superheat, as a subcontractor to Rescar, provided remote local post weld heat treatment (hereinafter "LPWHT") operations and monitoring services to Rescar, including at Rescar's facility located in DuBois, Pennsylvania. *See* Pl's Resp., p. 3-4; *see also* Pl's Resp., Ex. N. It was further proffered to the Court that LPWHT was required on areas of tank cars that had been welded to eliminate stresses in the metal caused by the welding. On October 8, 2015, Rescar and Superheat entered into the aforementioned Superheat/Rescar contract pursuant to which Superheat was to provide these remote services for a period of three years. *See* Pl's Resp., p. 4; *see also* Pl's Resp., Ex. Q. The Superheat/Rescar Contract provided that Superheat's services were to include:

> Supply of all heat treatment equipment including, but not limited to:
> -Wrapping Specification Sheet's (WSS) for Local Post Weld Heat Treatment (LPWHT) per the requirements of [Rescar] procedure, RSP-014. [Rescar] agrees to supply most current copy of said procedure to [Superheat] at all times
> -Off site remote monitoring of all heat treatment cycles
> -On-site or off-site training of all [Rescar] staff engaged in heat treatment
> -6Wi heat treatment consoles complete with cables, heaters, insulation and consumables; thermocouple attachment units (TAU)
> -Site visits to ensure all equipment is in safe working condition

*Id.*

20. Further, pursuant to the parties' contract, Superheat retained the right to inspect Rescar's worksite if concerns of damaged equipment arose. *Id.* Additionally, Axiall proffered evidence in the form of deposition testimony that Superheat characterized the Rescar DuBois facility as a self-wrap site, meaning that Rescar personnel physically prepared the car for heat treatment using Superheat equipment. *See* Pl's Resp., p. 4; *see also* Pl's Resp., Ex. K. Further, Axiall proffered evidence in the record in the form of the Superheat/Rescar contract indicated that Superheat owned the equipment used by Rescar during the heat treatment process, including the

heat treatment consoles with cables, heaters, thermocouple attachment units and other consumables. *See* Pl's Resp., p. 5; *see also* Pl's Resp., Ex. Q.

21. Axiall proffered evidence in the form of deposition testimony from multiple witnesses that Superheat monitored the LPWHT cycles remotely and was able to terminate the heat treatment process at any time. *See* Pl's Resp., p. 6; *see also* Pl's Resp., Ex. N, X. In doing so, the Superheat employee would advise Rescar technicians of non-standard operations and confirm that the temperature readings on a LPWHT run met Rescar's requirements. *See* Pl's Resp., p. 6; *see also* Pl's Resp., Ex. Z. Axiall proffered evidence in the form of deposition testimony that Rescar employees would create hand-drawn diagrams showing the placement of heating pads on the tank cars, as well as the tank shell thickness and tank shell material type. *See* Pl's Resp., p. 5; *see also* Pl's Resp., Ex. W. Rescar would send these hand-drawn diagrams to Superheat and Superheat would use those hand-drawn diagrams to create a computer-generated Wrapping Specification Sheet ("WSS"), which was required to match Rescar's diagram. *Id.* The process of setting up a tank car for LPWHT is referred to as a "wrap". *See* Pl's Resp., p. 5.

22. Axiall has proffered evidence that due to a lack of adequate training and poor equipment maintenance, Superheat considered the number of aborted LPWHT cycles at Rescar DuBois to be above the normal amount. It was also proffered that Superheat identified Rescar DuBois as a site that experienced a high number of non-standard operations and recommended more formal training for Rescar personnel for an additional charge. Rescar declined this additional training.

23. Axiall has alleged that the inadequate training Rescar employees received in LPWHT led to multiple heating cycles of Rescar's welds. Axiall has proffered that Rescar's and AllTranstek's expert, Randal Dull, conceded the failure of AXLX1702 was, in part, the result of a

pre-existing crack caused by welding done at Rescar DuBois in 2010. Axiall has further proffered that Superheat's expert Thomas Eagar agreed and conceded that stresses in the shell of AXLX1702 caused by and moved through the metal during the 2016 weld repairs and LPWHT at Rescar DuBois also contributed to the catastrophic failure.

24. The Court considers that Superheat argues that its obligation under the contract was to simply monitor the temperatures reached during the LPWHT process. *See* Def's Mem., p. 16. However, the Court finds evidence has been adduced which could lead to a genuine issue of material fact for a jury to determine if, in fact, Superheat completed the entirety of its contract obligations in a negligent manner. It would be too narrow of an interpretation for the Court to determine monitoring of the temperatures was the sole obligation of Superheat, as that does not comport with the description contained in the Contract proffered to the Court nor the other evidence proffered to the Court. Further, the Court finds it is reasonably foreseeable that if Superheat was negligent in what it did, harm could occur to Axiall.

25. Put another way, although Superheat alleges that it satisfactorily performed all of its obligations under the Superheat/Rescar Contract, the Court finds, based on the evidence of record, a reasonable jury could conclude that Superheat failed to fulfill not only its contractual obligations, but that the tank car rupture was reasonably foreseeable given Superheat's alleged failure to perform those obligations.

26. Accordingly, Superheat's request for summary judgment on the issue of Superheat's contractual duty to Axiall is denied.

27. Next, the Court analyzes the issue of statutory duty. Superheat's contention is that Axiall has attempted to place statutory duty upon Superheat but fails because there is no evidence of record to establish that Superheat was to adhere to the Hazardous Materials Regulations

("HMR") or AAR Manual of Standards and Recommended Practices ("MSRP") in relation to repairs to tank car AXLX 1702. *See* Def's Mem., p. 19. Specifically, Superheat argues Axiall relies on the Hazardous Materials Regulations (hereinafter "HMR"), 49 C.F.R. parts 171 through 180, as well as the Federal Hazardous Materials Transportation Act ("FHMTA"). *Id.*

28. Specifically, Superheat claims that it is neither a "hazmat employer" nor a "tank car facility" as those phrases are defined by the HMR. *Id.* In support of its argument, Superheat further alleges that it is "undisputed" that it performed no work on AXLX1702. *Id.* However, the Court finds this fact is not undisputed.

29. The Federal Hazardous Materials Transportation Act ("FHMTA") defines "hazmat employer" as a person who "[d]esigns, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs or tests a package, container, or packaging component that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous materials in commerce." 49 USCS § 5102(4). The HMR's definition of "hazmat employer" uses an almost identical definition to that in the FHMTA, *i.e.*, a person who "designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs or tests a package, container, or packaging component that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous materials in commerce." 49 CFR §171.8.

30. Furthermore, while the FHMTA does not specifically define "tank car facility," the FHMTA broadly states that it applies to any person who maintains or repairs a container used in transporting hazardous material in commerce. 49 USCS § 5103(b)(A)(iii).

31. The HMR defines a "tank car facility" as one that:

> manufactures, repairs, inspects, tests, qualifies, or maintains a tank car to ensure that the tank car conforms to this part and subpart F of part 180 of this subchapter, that alters the certificate of construction of the tank car, that ensures the continuing qualification of a tank car by performing a function prescribed in parts 179 or 180

> of this subchapter, or that makes any representation indicating compliance with one or more of the requirements of parts 179 or 180 of this subchapter.

49 CFR §179.2(a)(10).

32. Part 180 of the HMR addresses the qualification and maintenance of tank cars, and is "applicable to any person who manufactures, fabricates, marks, maintains, repairs, inspects, or services tank cars to ensure continuing qualification." 49 CFR §180.501(a).

33. Upon review of the record in this case, this Court determines that, at the very least, genuine issue of material fact remains, and a jury could conclude that Superheat falls under the definition of a "hazmat employer" for the purposes of its repair work on AXLX 1702. *See* Pl's Resp., p. 22. This same repair work on AXLX1702 could also render Superheat a "tank car facility." *Id.*

34. The Court finds and concludes that a jury must consider the disputed facts of material fact as to whether Superheat repairs or maintenance on tank car AXLX 1702 to determine whether it does, in fact, fit in those definitions. *Id.* at 24. Because Superheat could have a duty to comply with both the FHMTA and the HMR, Superheat's request for summary judgment on the issue of statutory duty is denied.

**b. Proximate Cause**

35. Next, the Court considers Superheat's argument as to proximate cause. With regard to the necessary element of proximate cause, Superheat alleged that Axiall failed to prove that an action or inaction of Superheat was the proximate cause of the subject incident. *See* Def's Mem., p. 27.

36. "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred." Syl. Pt. 1, *Mays v. Chang*, 213 W. Va. 220, 222, 579 S.E.2d 561, 563 (2003); (quoting Syllabus Point 5, *Hartley v. Crede*, 140

W.Va. 133, 82 S.E.2d 672 (1954), *overruled on other grounds, State v. Kopa,* 173 W.Va. 43, 311 S.E.2d 412 (1983)).

37. In West Virginia, "questions of proximate cause are often fact-based issues reserved for jury resolution." *Id.* at 24. A jury must determine issues such as causation "when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." *Id.* (quoting Syllabus Point 2, *Evans v. Farmer*, 148 W. Va. 142 (1963)). While the burden is on the plaintiff to present proof of negligence, "such showing may be made by circumstantial as well as direct evidence." *Wehner v. Weinstein*, 191 W. Va. 149, 156 (1994) (quoting Syllabus Point 2, *Burgess v. Jefferson*, 162 W. Va. 1 (1978)).

38. Under West Virginia law, "[w]here two or more persons are guilty of negligence which occurs in point of time and place, and together proximately cause or contribute to the injuries of another, such persons are guilty of concurrent negligence and recovery may be had against both or all of them." *Kodym v. Frazier*, 186 W. Va. 221, 225, 412 S.E.2d 219, 223 (1991).

39. '(W)hether the negligence of two or more persons is concurrent and taken together proximately causes or contributes to the injury of another person is, as to all matters of fact, a question for jury determination.' Syl. Pt. 7, *Burdette v. Maust Coal & Coke Corp.*, 159 W. Va. 335, 336–37, 222 S.E.2d 293, 295 (1976) (*quoting Evans v. Farmer*, 148 W.Va. 142, 156, 133 S.E.2d 710, 718 (1963)).

40. In this case, Axiall has proffered evidence which, when viewed in the light most favorable to the plaintiffs, could support a jury's finding that Superheat negligently caused, or was a concurrent cause, of the chlorine leak at the center of this litigation. Axiall has produced sufficient evidence, including expert evidence, to support this conclusion. *See* Pl's Resp., p. 24.

Axiall has cited conclusions of Dr. Kennett, Dr. Guyer, and Mr. Hybinette to support its contention that Superheat's failure to provide adequate training to Rescar personnel performing LPWHT and to monitor the LPWHT could be a concurrent cause of Axiall's harm. *Id.* at 25-27.

41. For this reason, Superheat's request for summary judgment on causation is denied.

**c. Punitive Damages**

42. Finally, the Court considers Superheat's argument regarding Axiall's claim against it for punitive damages. Superheat alleges it is entitled to summary judgment in its favor on Axiall's claim for punitive damages because there exists no evidence to suggest that Superheat performed its contractual obligations to Rescar with "actual malice or a reckless and outrageous indifference to health, safety and welfare of others" and because there is no evidence that Superheat acted with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others during the LPWHT of AXLX 1702". *See* Def's Mem., p. 32-33.

43. West Virginia law states 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).

44. "Punitive damage instructions are legitimate only 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 to appear or where the legislature so authorizes." Syl. Pt. 7, *Michael v. Sabado,* 192 W.Va. 585, 453 S.E.2d 419 (1994); Syl. Pt. 8, *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746, 749 (2009).

45. 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.*, 224 W. Va. 160, 190 n.26, 680 S.E.2d 791, 821 n.26 (2009).

46. The parties do not dispute the standard for punitive damages; however, Superheat alleges there is no evidence that satisfies this heightened standard that warrants the imposition of punitive damages. *See* Def's Mem., p. 32.

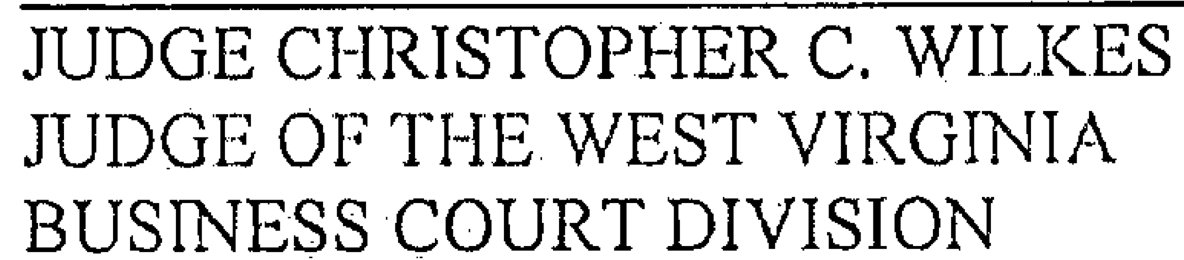
47. At this stage, however, the Court finds genuine issue of material facts remain as to whether or not there is evidence of record that could justify an award of punitive damages against Superheat, including Superheat's alleged knowledge and indifference of the inadequate LPWHT procedures being utilized by Rescar on tank cars. A jury could determine that Superheat disregarded a risk that it knew or should have known was highly likely to result in harm to others. At this stage, the Court denies the motion for summary judgment on this ground, but at the time of the conclusion of Plaintiffs' case-in-chief at trial, the Court may conclude whether or not a jury can consider the issue of punitive damages, if a sufficient showing has been made.

48. Consequently, Superheat's request for summary judgment on Axiall's request for punitive damages is denied.

49. In conclusion, for all of these reasons, the Court finds the instant motion must be denied.

## CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant Superheat FGH Services, Inc.'s Motion for Summary Judgment 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.



October 30, 2020
date of entry

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