**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 AXIALL CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON COVESTRO'S LIABILITY CASE**

This matter came before the Court this 29th day of August 2022 upon Axiall Corporation's Motion for Summary Judgment on Covestro's Liability Case. 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 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. to Partial Joinder, p. 1, 6. 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.* The leak created a large gas cloud that travelled south to the neighboring Covestro Plant and other lands. *See* Compl.; *see also* Covestro's Resp. to Partial Joinder, p. 6-7. In its Complaint, Covestro asserted claims for negligence, trespass, and nuisance against each of the Defendants. *See* Covestro's Resp. to Partial Joinder, p. 7.

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

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

Pennsylvania, wherein Axiall filed suit against AllTranstek, Rescar, and Superheat. *See* Defs' Mem., p. 4; *see also* Covestro's Resp. to Partial Joinder, p. 8. This Pennsylvania action arises out of the same August 2016 incident and the same repair work on AXLX 1702. *See* Covestro's Resp. to Partial Joinder, Ex. J (PA Complaint).

3. On October 14, 2021, the jury in the Pennsylvania action reached a verdict. *See* Covestro's Resp. to Partial Joinder, p. 10.

4. On April 14, 2022, Axiall filed the instant Axiall Corporation's Motion for Summary Judgment on Covestro's Liability Case, arguing the Court should grant summary judgment on Covestro's trespass and nuisance claims, because since the Court found the production, storage, and transportation of chlorine is not abnormally dangerous, Covestro has not presented evidence in the record that Axiall's conduct that caused Covestro's harm was intentional and unreasonable. *See* Def's Mot., p. 2. Further, with respect to the other claim, negligence, Axiall argues it is entitled to summary judgment in its favor because Covestro is required to introduce expert testimony in support of its liability claims, and has not designated a liability expert[2] and cannot introduce expert opinion or analysis in evidence and cannot prove its negligence claim. *Id.*

5. On or about May 19, 2022, Rescar and AllTranstek filed Partial Joinder With Memorandum in Support of AllTranstek LLC and Rescar Companies to Axiall Corporation's Motion for Summary Judgment on Covestro's Liability Case, wherein they joined the relief requested in the instant motion with respect to Covestro's failure to produce expert witnesses on liability. *See* Partial Joinder, p. 2. However, they averred they do not join in Axiall's assertions that the Pennsylvania Court "recognized that the jury's findings on negligence and findings on

[2] The Court notes Axiall alleges Covestro originally designated a liability expert, but de-designated her prior to the close of expert discovery. *Id.*

comparative negligence are irrelevant to the eventual judgment", which Axiall averred will be entered on Axiall's Pennsylvania breach of contract (and not negligence) claims, against Rescar and AllTranstek. *See* Partial Joinder, p. 2-3. AllTranstek and Rescar therefore asked the Court "to enter judgment in their favor on Covestro's failure to produce expert witnesses on liability". *Id.* at 3.

6. On or about June 1, 2022, Covestro filed Plaintiff Covestro, LLC's Memorandum of Law in Opposition to AllTranstek LLC and Rescar Companies' Partial Joinder to Axiall's Motion for Summary Judgment on Covestro's Liability Case, disagreeing with Axiall, AllTranstek, and Rescar's assertion that Covestro needs an expert to establish its negligence claim against them, because the Pennsylvania case, via the doctrines of collateral estoppel and *res ipsa loquitor*, already determined negligence and Axiall, AllTranstek, and Rescar also breached statutory duties under the federal Hazardous Materials Regulations for the storage and transportation of chlorine which creates a *prima facie* case of negligence. *See* Covestro's Resp. to Partial Joinder, p. 1, 11-12, 15. Further, Covestro alleges that Axiall is not entitled to summary judgment on any of Covestro's claims and the Court should deny AllTranstek and Rescar's Joinder. *Id.* at 1-2.

7. On or about May 20, 2022, Covestro filed Plaintiff Covestro LLC's Memorandum of Law in Opposition to Axiall's Motion for Summary Judgment on Covestro's Liability Case, arguing that Axiall's arguments that Covestro cannot carry its burden on its trespass and nuisance claims because there is no evidence Axiall intentionally caused the chlorine release and that Covestro cannot carry its burden on the negligence claim because it has not identified a liability expert fail. *See* Covestro's Resp. to Mot., p. 1. First, Covestro argues intent is not required to establish trespass or nuisance, instead, the claims can be based on negligent conduct

of the defendant. *Id.* Further, Covestro argues it does not need an expert to establish its negligence claim for the reasons[3] stated in its Response to AllTrasntek and Rescar's partial joinder. *Id.* For these reasons, Covestro avers Axiall's motion should be denied. *Id.* at 1-2, 20.

8. On May 31, 2022, Axiall filed Axiall Corporation's Rebuttal Memorandum to Covestro's Response to Axiall's Motion for Summary Judgment on Liability, disputing Covestro's Opposition arguments. Axiall argued against the application of collateral estoppel and res ipsa loquitor. *See* Axiall's Reply to Covestro's Resp., p. 2-4. Further, Axiall avers neither the Pennsylvania action nor this action involved causes of action founded on a finding that Axiall breached federal hazmat violations. *Id.* at 4-5. Finally, Axiall reiterates its position that Covestro needs to establish intent for its trespass and nuisance claims. *Id.* at 5.

9. On May 31, 2022, Axiall filed Axiall Corporation's Combined Rebuttal Memorandum to Rescar/AllTranstek's Partial Joinders in Axiall's Summary Judgment Motions on Covestro's Liability Case and Measure of Damages, arguing under the election of remedies doctrine, it may elect to recover its damages in the Pennsylvania action from findings it obtained of breach of contract or causation as a result of the breaches against Rescar and AllTranstek. *See* Axiall's Reply to Partial Joinder, p. 2.

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

## STANDARD OF LAW

11. 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

[3] *See, supra*, ¶6.

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).

12. 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).

13. 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

14. In this motion, Axiall argues the Court should grant summary judgment on Covestro's trespass and nuisance claims, because since the Court found the production, storage, and transportation of chlorine is not abnormally dangerous, Covestro has not presented evidence in the record that Axiall's conduct that caused Covestro's harm was intentional and

unreasonable. *See* Def's Mot., p. 2. Further, with respect to the other claim, negligence, Axiall argues it is entitled to summary judgment in its favor because Covestro is required to introduce expert testimony in support of its liability claims, and has not designated a liability expert[4] and cannot introduce expert opinion or analysis in evidence and cannot prove its negligence claim. *Id.* The Court will take up the issues in turn.

**Trespass and Nuisance**

15. First, the Court examines Axiall's argument the Court should grant summary judgment on Covestro's trespass and nuisance claims, because since the Court found the production, storage, and transportation of chlorine is not abnormally dangerous, Covestro has not presented evidence in the record that Axiall's conduct that caused Covestro's harm was intentional and unreasonable. *See* Def's Mot., p. 2. Axiall argues there is no evidence in the record that Axiall acted intentionally with regard to the tank car rupture incident. *See* Def's Mem., p. 2, 5. Axiall avers there is no evidence that it intended to cause the intrusion of chlorine onto Covestro's property. *Id.* at 5.

16. On the other hand, Covestro's position is that intent is not required to establish trespass or nuisance, instead, both claims can be established based on negligent conduct of the defendant. *See* Covestro's Resp. to Axiall's Mot., p. 1, 10. Both Axiall and Covestro cite *Hendricks v. Stalnaker*, 181 W. Va. 31, 380 S.E.2d 198 (1989) and the Restatement (Second) of Torts Sec. 822 (1979) (cited by *Hendricks*). *See* Def's Mem., p. 5; *see also* Covestro's Resp. to Axiall's Mot., p. 10. The Court notes *Hendricks* and the Restatement Sec. 822 are the only authority Axiall presents in its motion to support its argument that Covestro must show intentional conduct. *See* Def's Mem., p. 5.

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[4] The Court notes Axiall alleges Covestro originally designated a liability expert, but de-designated her prior to the close of expert discovery. *Id.*

17. The Court's review of *Hendricks* reveals that the Supreme Court plainly held the following: "Private nuisance" is a substantial and unreasonable interference with the private use and enjoyment of another's land; that includes conduct which is intentional and unreasonable, negligent or reckless, or which results in an abnormally dangerous condition or activities in an inappropriate place. *Hendricks v. Stalnaker*, 181 W. Va. 31, 380 S.E.2d 198 (1989); *see also Bansbach v. Harbin*, 229 W. Va. 287, 290, 728 S.E.2d 533, 536 (2012); *In re Flood Litig.*, 216 W. Va. 534, 543, 607 S.E.2d 863, 872 (2004) (In *Hendricks,* we defined a private nuisance to include "conduct that is intentional and unreasonable, negligent or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place." *Hendricks,* 181 W.Va. at 33–34, 380 S.E.2d at 200 (citations omitted)).

18. Further, the *Restatement (Second) of Torts* § 822 (1979) requires a consideration of unreasonableness as part of the determination of liability. One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:

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

*Restatement (Second) of Torts* § 822 (1979) *cited in n. 5 by Hendricks v. Stalnaker*, 181 W. Va. 31, 34, 380 S.E.2d 198, 201 (1989).

19. The West Virginia Supreme Court of Appeals, in *Bansbach v. Harbin*, calling *Hendricks* its "seminal decision in the area of private nuisance law", described *Hendricks* as follows:

> In *Hendricks,* we were asked to decide whether the digging of a water well which would in turn prevent an adjacent landowner from developing a septic system due to health department regulations constituted a private nuisance. Finding a need to clarify what

> constituted a private nuisance, we turned to the treatise definition which categorizes the legal wrong as "includ[ing] conduct that is intentional and unreasonable, **negligent** or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place." 181 W.Va. at 33–34, 380 S.E.2d at 200–01 (citing, *inter alia,* W. Prosser, *Handbook of the Law of Torts* § 87 at 580, § 89 at 593 (4th ed. 1971)).

*Bansbach v. Harbin*, 229 W. Va. 287, 290–91, 728 S.E.2d 533, 536–37 (2012)(emphasis added).

20. Covestro has pled that the chlorine release incident constituted a trespass and private nuisance that was caused by Defendants' negligent conduct. *See* Covestro's Resp. to Axiall's Mot., p. 10. That is enough to defeat the instant motion. Further, the Pennsylvania jury's decision has established negligence on behalf of Axiall. *Id.* at 10-11.

21. The Court notes that Axiall argues Covestro has not presented evidence in the record that Axiall's conduct that caused Covestro's harm was intentional and unreasonable. *See* Def's Mot., p. 2. Notwithstanding the Court's decision on whether intentional conduct is needed to be presented, the Court certainly opines that evidence of "unreasonable" conduct has been shown in the record.

22. For these reasons, the Court finds record evidence provides sufficient evidence to defeat summary judgment here. The Court cannot conclude that no genuine issue of material fact remains as to Covestro's establishment of a trespass and private nuisance claim. The Court will not grant Axiall's motion for summary judgment as to trespass and nuisance.

**Negligence Claim – Need for Expert Testimony**

23. Next, the Court addresses Axiall's contention that on the other claim, negligence, Covestro is required to introduce expert testimony in support of its liability claims, and has failed to do by the relevant discovery deadline. *See* Def's Mem., p. 2. The Court notes that AllTranstek and Rescar also aver in their partial joinder that they agree that proving Covestro's

negligence claims requires expert testimony, because whether AllTranstek and Rescar fell below the applicable standard of care involves highly complex matters that are beyond the common knowledge and experience of the average juror. *See* Partial Joinder, p. 2. Covestro, on the other hand, avers its negligence claim does not require expert testimony. *See* Covestro's Resp. to Axiall's Mot., p. 11.

24. Covestro argues its negligence claim does not require expert testimony because collateral estoppel applies to the Pennsylvania jury's negligence findings (that Axiall was negligent). *See* Covestro's Resp. to Axiall's Mot., p. 11. This Court agrees. This Court has rejected Axiall's election of remedies argument in its other summary judgment orders, and incorporates those findings here. The Court finds Axiall's negligence in the tank car rupture incident has been proven in the Pennsylvania case and applied to the instant civil action via the application of the doctrine of collateral estoppel. Because negligence has been established in this way, this Court cannot conclude that Covestro must present expert testimony to support its claim of negligence.

25. Further the Court examines the applicability of the doctrine of *res ipsa loquitor*. *Res ipsa loquitur* means "in the absence of evidence to the contrary … the mere fact that a damage-causing event occurs ... suffices for liability[. W]hen the essentials of [*res ipsa loquitur*] are present, evidence of negligence is supplied." *Foster v. City of Keyser*, 501 S.E.2d 165, 178 (W. Va. 1997) (internal citations omitted). Where *res ipsa loquitur* applies, "negligence need not be proven," rather, "negligence is presumed until the defendant rebuts the presumption." *Id.* (citation omitted).

26. *Res ipsa loquitur* applies if three elements are met: "(a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes,

including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff." *Foster*, 501 S.E.2d at 185.

27. Here, the Court examines the first element, that the event is of a kind which ordinarily does not occur in the absence of negligence. *Foster*, 501 S.E.2d at 185. The August 2016 chlorine release/tank car rupture incident is not an event that happens in the absence of negligence. Although Axiall is in the business of routinely storing and transporting chlorine, it is not a normal occurrence, in the absence of negligence, for one of its railcars to rupture and release the entirety of its chlorine load. The Court finds the first element is met.

28. The Court next examines the second element, that other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence. *Foster*, 501 S.E.2d at 185. Here, Covestro had no participation in the repair, or maintenance or loading of the tank car. Indeed, Covestro was an adjacent, neighboring plant. For this reason, the Court finds the second element is met.

29. Finally, the Court examines the third element, that the indicated negligence is within the scope of the defendant's duty to the plaintiff. *Foster*, 501 S.E.2d at 185. Here, Axiall owed a general duty to the public, including neighboring Covestro, of ordinary care. *See* Covestro's Resp. to Axiall's Mot., p. 14. It has been further alleged by Covestro that Axiall had a duty to the public under the federal hazardous materials regulations to properly test, repair, and inspect the tank car. *See* Covestro's Resp. to Axiall's Mot., p. 17. The Court notes that Axiall points out in its Reply to Covestro's Response that Axiall and Rescar shared in the responsibility of the incident, as determined by the Pennsylvania jury. *See* Axiall's Reply, p. 3-4. However, the Court finds this does not change the fact that the Pennsylvania jury concluded Axiall was

also 40% negligent/at fault, and for the purposes of *res ipsa loquitor*, this indicated negligence causing the rupture was within the scope of Axiall's duty to neighboring Covestro.

30. Further, the Court considers Axiall's Reply argument that the doctrine of *res ipsa loquitor* cannot be invoked "if defendant does not have control or management of the premises or operations where the accident occurred, or where there is divided responsibility, and the unexplained accident may have been the result of causes over which the defendant had no control", *citing Laurent v. United Fuel Gas Co.*, 101 W. Va. 499, 133 S.E. 116 (1926), syl. pt. 1 (negligence could not be presumed against a gas company for a gas explosion, where the plumbing was controlled by the dwelling's occupant, or the explosion could have been caused by accumulation in a defective cooking range). *See* Axiall's Reply, p. 3. Axiall further urges that the doctrine of *res ipsa loquitor* "is intended to be employed in instances where it is quite obvious that the defendant retains complete control over the instrument causing damage", *quoting Cunningham v. W. Va.-American Water Co.*, 193 W. Va. 450, 456, 457 S.E.2d 127, 133 (1995). *Id.*

31. The Court considers that *Foster* specifically has held that predicating liability upon whether a defendant had "complete control" over a dangerous activity is circular and unhelpful: "If complete control were present, there would be no damages resulting in a lawsuit." *Foster v. City of Keyser*, 202 W. Va. 1, 16, 501 S.E.2d 165, 180 (1997)(citations omitted). Further, it held that an "exclusive control" requirement of *res ipsa loquitur* does not connote that such control must be individual and the defendant singular, and we stated that *res ipsa loquitur* can be applicable to multiple defendants. *Id.*

32. The *Foster* Court found that a focus on a party's actual "control" of a dangerous instrumentality can be a misleading and unhelpful approach to ascertaining whether the rule

of *res ipsa loquitur* may be applied to the party to create a permissible inference of the party's negligence. *Id.* at 17, 181.

33. The Court agrees with Covestro that negligence has been established via the doctrine of res ipsa loquitor, such that Covestro need not establish it using expert testimony. For this reason, Axiall Corporation's Motion for Summary Judgment on Covestro's Liability Case is denied as to this argument.

## CONCLUSION

**WHEREFORE**, it is hereby **ORDERED** and **ADJUDGED** that Axiall Corporation's Motion for Summary Judgment on Covestro's Liability Case 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.

August 29, 2022
date of entry

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