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 THE ISSUE OF MEASURE OF DAMAGES

This matter came before the Court this 29th day of August 2022 upon Axiall Corporation's Motion for Summary Judgment on the Issue of Measure of Damages. 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., p. 1. 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., p. 1, 2.

2. On April 14, 2022, Axiall filed the instant Axiall Corporation's Motion for Summary Judgment on the Issue of Measure of Damages, moving for partial summary judgment that Covestro is not entitled to recover damages. *See* Def's Mot., p. 1-2. Axiall argues Covestro's damages model seeks replacement cost of property that was allegedly damaged, and the correct measure of damage would be reduction in value of damaged property. *Id.* at 2.

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

3. 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 the Issue of Measure of Damages, wherein they joined the relief requested in the instant motion seeking partial summary judgment on Covestro's damages claim, agreeing that Covestro is not entitled to replacement costs for allegedly damaged property. *See* Partial Joinder, p. 2, 3. However, they averred they do not agree that Pennsylvania law would have permitted the jury to apply replacement costs as the appropriate measure. *Id.*

4. On or about May 20, 2022, Covestro filed Plaintiff Covestro LLC's Memorandum of Law in Opposition to Axiall's Motion for Partial Summary Judgment on the Issue of Measure of Damages, arguing that Axiall's arguments misconstrue West Virginia law and Covestro's claimed damages. *See* Covestro's Resp. to Mot., p. 1. Covestro argues Axiall is applying an overly restriction definition of "repair" wherein Axiall avers it can only mean to "fix or clean what is already existing" on the property, and it cannot mean "replacing damaged components". *Id.* at 3. Covestro argues that in order to restore the Covestro Plant to its condition prior to the incident, Covestro must replace certain component parts in repairing that were damaged by the chlorine release incident, which cannot be fixed or cleaned, and nothing in the *Jarrett* case[2] or its progeny precludes Covestro from seeking these types of repair costs. *Id.* at 6.

5. On May 31, 2022, Axiall filed Axiall Corporation's Rebuttal Memorandum to Covestro's Memorandum of Law in Opposition to Axiall's Motion for Partial Summary Judgment on the Issue of Damages, reiterating its position that Covestro should not be able to seek replacement costs for damaged property. *See* Axiall's Reply to Covestro's Resp., p. 1-2. Further, Axiall avers Pennsylvania law has a "carve out" for special value to the owner, in a

[2] *Jarrett v. E.L. Harper & Sons, Inc.*, W. Va. 399, 235 S.E.2d 362 (1977).

situation where an item has a peculiar value to an owner, but little or none in the general market. *Id.* at 5-6.

6. 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 that Rescar/AllTranstek complain that Axiall argued for, and the Pennsylvania court agreed, that Axiall was entitled to replacement costs in its damages, but that Rescar/AllTranstek do not argue the Pennsylvania carve out for items with peculiar value to their owner, described above, apply in this West Virginia case. *See* Axiall's Reply to Partial Joinder, p. 2-3.

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

STANDARD OF LAW

8. Motions for partial 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 motion, Axiall moves for partial summary judgment that Covestro is not entitled to recover damages and argues Covestro's damages model seeks replacement cost of property that was allegedly damaged, and the correct measure of damage would be reduction in value of damaged property. *See* Def's Mot., p. 1-2.

12. Both Axiall and Covestro agree that the measure of damage to non-residential property is controlled by *Jarrett v. E.L. Harper & Sons, Inc.*, W. Va. 399, 235 S.E.2d 362 (1977); *see also* Syl. Pt. 3, *Brooks v. City of Huntington*, 234 W. Va. 607, 768 S.E.2d 97 (2014).

13. In *Jarrett*, the plaintiff property owners brought suit against a contractor that destroyed the water well on their property. *Jarrett*, 235 S.E.2d at 365. The plaintiffs sought to recover, *inter alia*, their costs to replace that well with a new well. *Id.* at 363. After reviewing its prior holdings, the Supreme Court of Appeals abolished its prior rules differentiating between the

measures of damages for injury to real property that are temporary or permanent. It then adopted the following rule regarding the measure of damages for real property:

> When realty is injured the owner may recover the cost of repairing it plus his expenses stemming from the injury including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover the money equivalent of its lost value plus his expenses resulting from the injury including loss of use during the time he has been deprived of his property.

Jarrett, 235 S.E.2d at 365.

14. *Jarrett*'s change to the law was the elimination of a distinction of whether the injury to the property is temporary or permanent. *Id. Jarrett* found the plaintiffs were entitled to recover the costs incurred for replacing the damaged well on their property with a new well:

> Here, given the present state of our law, we have a temporary, repairable, replaceable injury for which plaintiffs are entitled to compensation for their expenditures of money and labor. Their property appears now to be in as good condition as it was before the injury. But they are entitled to and must be allowed to develop their case for consequential damages.

Id.

15. This Court considers that the Supreme Court in *Jarrett*, as well as *Manley v. Brown*, 11 S.E. 505 (W. Va. 1922) (*quoted by Jarrett*), stated the underlying purpose of the "repair the property" language is to restore the property to its condition prior to the damage. This is why the plaintiff in *Jarrett* was entitled costs incurred for replacing their original water well on their property with a new water well, after their original well was "destroyed by…a contractor building a sewer for a public service district". *Jarrett v. E. L. Harper & Son, Inc.*, 160 W. Va. 399, 399–400, 235 S.E.2d 362, 363 (1977).

16. Here, Covestro has alleged that in order to restore its plant to its condition prior to the August 2016 chlorine release incident, Covestro must replace certain component parts that

were damaged by the incident and cannot be fixed or cleaned. *See* Covestro's Resp. to Mot., p. 6. Covestro has proffered its expert report as Exhibit C to its Response and has proffered that its damages expert, Scott C. Sambuco, P.E., NCARB detailed the damage to the plant and the cost to remedy the damage. *Id.* at 2. Specifically, Covestro proffered Sambuco opined that certain component parts at the plant, namely metal jacketing over the insulation on piping and tanks, electrical control boxes, panels, gutters and downspouts, doors and door frames and hinges, HVAC ductwork, valves, process equipment (air compressors, blenders, tanks, mixers, and vessels), instrumentation control panels, boiler jacketing, vents, and tote bins, sustained damage, much of which would need to be replaced. *Id.* at 2-3. The Court finds Covestro's claimed damages do not run afoul of West Virginia law on property damage as outlined by *Jarrett* and its progeny, and finds summary judgment would be inappropriate at this time.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Axiall Corporation's Motion for Partial Summary Judgment on the Issue of Measure of Damages 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