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,

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 COVESTRO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court this 29th day of October 2020 upon Plaintiff Covestro, LLC's Motion for Partial Summary Judgment on Counts IV and VII of the Complaint Asserted Against Defendant Axiall Corporation. 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 "Defendant" or "Axiall") facility, which produces chlorine and other products, in Marshall County, West Virginia. *See* Def's Reply to Mot. to Refer, p. 3; *see also* Pl's Mem., p. 1. The chlorine formed a plume and entered Covestro, LLC's (hereinafter "Covestro" or "Plaintiff") facility property which is adjacent to Axiall's facility property. *See* Pl's Mem., p. 1, 9.

2. Covestro's Complaint asserts three causes of action against Axiall: Count I (negligence); Count IV (trespass); and Count VII (nuisance). *Id.* Relevant to the instant motion are Count IV (trespass) and Count VII (nuisance).

3. Covestro filed the instant Motion for Partial Summary Judgment on Counts IV and VII of the Complaint Asserted Against Defendant Axiall Corporation, seeking summary judgment as to the trespass and nuisance causes of action in its Complaint, arguing no genuine issue of material fact remains as to those claims because Axiall was engaging in an abnormally

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

hazardous activity when it was engaged in the production, storage, and transportation by railcar of chlorine. *Id.*

4. On August 17, 2020, Axiall filed its Omnibus Response and Memorandum in Opposition to Covestro LLC's Motion for Partial Summary Judgment on Counts IV and VII of Its Complaint and In Opposition to Motion for Summary Judgment of Defendants AllTranstek LLC and Rescar, Inc. T/D/B/A Rescar Companies on Claims of Plaintiff Covestro, LLC, arguing the instant motion should be denied because Axiall was not engaged in an abnormally dangerous activity and at a minimum, genuine issue of material fact exists. *See* Pl's Resp., p. 1.

5. Covestro filed its Reply Memorandum of Law in Support of Its Motion for Partial Summary Judgment on Counts IV and VII of Its Complaint Against Defendant Axiall Corporation reiterating its contention that Axiall engaged in an abnormally dangerous activity when it was engaged in the production, storage, and transportation by railcar of chlorine. *See* Reply, p. 1.

6. On September 18, 2020, Axiall filed Axiall Corporation's Motion for Leave to File Sur-Reply in Opposition to Covestro LLC's Motion for Partial Summary Judgment on Counts IV and VII of Its Complaint, which this Court granted. Axiall caused said Sur-Reply to be filed in the case file, averring that Covestro did not show Axiall was engaged in an abnormally dangerous activity. *See* Sur-Reply, p. 1.

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, Plaintiff seeks summary judgment in its favor as to certain claims asserted against Axiall in Covestro's Complaint: Count IV (trespass); and Count VII (nuisance).

See Pl's Mem., p. 1. Given the standards of law, and the court's analysis above, the Court will take up Covestro's arguments in turn.

12. With regard to both Count IV (trespass); and Count VII (nuisance), Covestro argues it is entitled to summary judgment in its favor because no genuine issue of material fact remains because Axiall engaged in an abnormally dangerous or hazardous activity. *See* Pl's Mem., p. 1.

13. With regard to trespass, the West Virginia Supreme Court of Appeals has defined "trespass" as "an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property." *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 591-92, 34 S.E.2d 348, 352 (1945) (quoting 3 *Blackstone's Commentaries* 209). A defendant is liable for trespass "where there is an intentional intrusion, negligence, or some extrahazardous activity on the part of the alleged wrongdoer". *Bailey v. S. J. Groves & Sons Co.*, 159 W. Va. 864, 864, 230 S.E.2d 267, 268 (1976).

14. Therefore, Covestro argues in the instant motion that the only issue for the Court related to the instant motion is to determine if "Axiall's unauthorized intrusion onto Covestro's property was a result of an abnormally dangerous activity". *See* Pl's Mem., p. 12.

15. With regard to nuisance, the West Virginia Supreme Court of Appeals has defined nuisance as follows: A "nuisance" is anything which annoys or disturbs free use of one's property, renders its ordinary use or physical occupation uncomfortable, or interferes with a citizen's rights, either in his person, property, enjoyment thereof, or comfort. *Martin v. Williams*, 141 W. Va. 595, 93 S.E.2d 835 (1956).

16. A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with

thereby. *Id.*; *see also Mahoney v. Walter*, 157 W. Va. 882, 889, 205 S.E.2d 692, 697 (1974). A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land. Syl. Pt. 1, *Hendricks v. Stalnaker*, 181 W. Va. 31, 32, 380 S.E.2d 198, 199 (1989).

17. 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); *see also Hendricks*, at 201. fn 5.

18. As with the cause of action for trespass, the motion indicates that the only issue for the Court related to the instant motion on the issue of nuisance is to determine if "Axiall's interference with Covestro's property rights was the result of an abnormally dangerous activity". *See* Pl's Mem., p. 19. With regard to both of these determinations, Covestro argues in its motion that the production, storage, and transportation by railcar of chlorine constitutes an abnormally dangerous activity. *Id.* Therefore, the Court will the address the issue of whether or not the production, storage, and transportation by railcar of chlorine constitutes an abnormally dangerous activity regarding both Count IV (trespass); and Count VII (nuisance).

19. In *Peneschi v. National Steel Corp. v. Koppers Co., Inc.*, 170 W.Va. 511, 295 S.E.2d 1 (1982), the West Virginia Supreme Court of Appeals adopted the *Restatement of Torts 2d* [1976] formulation of the doctrine of strict liability for abnormally dangerous activities. *See*

Evans v. Mutual Min., 199 W.Va. 526, 485 S.E.2d 695 (1997); *Foster v. City of Keyser*, 202 W. Va. 1, 9–10, 501 S.E.2d 165, 173–74 (1997).

20. *Restatement (Second) of Torts* § 519 (1976) provides that: (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm; and (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. *Restatement (Second) of Torts* § 520 (1976) states that in determining whether an activity is abnormally dangerous, six factors are to be balanced. The factors are:

> a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> b) likelihood that the harm that results from it will be great;
>
> c) inability to eliminate the risk by the exercise of reasonable care;
>
> d) extent to which the activity is not a matter of common usage;
>
> e) inappropriateness of the activity to the place where it is carried on; and
>
> f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts, § 520; *cited by Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 257, 685 S.E.2d 219, 230 (2009).

21. Comment f of § 520 the Restatement offers the following guidance on what makes an activity abnormally dangerous:

> For an activity to be abnormally dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one. In general, abnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. In determining

> whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

Restatement (Second) of Torts § 520 (1977).

22. The Court will consider the factors in turn.

23. First, the Court considers the "existence of a high degree of risk of some harm to the person, land or chattels of others". Restatement (Second) of Torts § 520 (1977). As an initial matter, the Court notes it must consider the risk of harm in Axiall's activity, not determine if the substance of chlorine itself is dangerous. *See* Def's Resp., p. 15, 18. If the Court were to conflate the two, then all activities involving any dangerous item would/could be subject to strict liability. *Id.* at 19.

24. So, with regard to the activity of producing, loading, and/or transporting chlorine, the Court finds that factor (a) weighs in Axiall's favor. The Court does not determine that the day to day activities of Axiall creates a risk of a rupture of a chlorine tank car causing a large scale[2] chlorine release and plume. *See In re Flood Litig.*, 216 W. Va. 534, 545, 607 S.E.2d 863, 874 (2004) (finding the day to day activities of Defendants did not necessarily create a high risk

[2] The Court notes Covestro's Memorandum asserts that the rupture resulted in "the release of over 178,000 pounds of chlorine". *See* Pl's Mem., p. 2.

of flash flooding). The Court considers Axiall's averment that the risk associated with the production, loading, and transportation of chlorine performed at the Axiall facility can be nearly eliminated through the exercise of reasonable care. *See* Def's Resp., p. 22. The Court notes Axiall proffered an Affidavit of Jerry Mullens in support of this contention. *Id.*; *see also* Def's Resp., Ex. W. For these reasons, the Court weighs factor (a) in Axiall's favor.

25. Second, the Court considers the "likelihood that the harm that results from it will be great". Restatement (Second) of Torts § 520 (1977). Axiall proffers that the few and rare prior instances of chlorine releases, and the fact that the prior chlorine releases that did occur were very minor, support the contention that the likelihood for harm resulting would be "extremely low". *See* Def's Resp., p. 23. The Court notes that it is not whether the chlorine event of August 27, 2016 at the heart of this litigation specifically caused great harm but is the likelihood of harm that results from Axiall's production, storage, and transportation activities generally. *Id.* The Court does not find that a showing was made that grave harm likely to occur as a result of the regular activity conducted by Axiall when reasonable care is exercised. *Id.* For these reasons, the Court finds that factor (b) must weigh in Axiall's favor.

26. Third, the Court considers "the inability to eliminate the risk by the exercise of reasonable care". Restatement (Second) of Torts § 520 (1977). The Court considers the evidence proffered by Axiall in the form of affidavits and deposition testimony creating a showing of the ability to mitigate and eliminate some risk by exercising due care. See Def's Resp., p. 22. For example, Axiall proffered the deposition testimony of Mr. Hirschfield which discussed Axiall's specific safety programs and equipment available at the Axiall facility which can minimize the potential for chlorine releases. Id.; see also Def's Resp., Ex. X.

27. Indeed, it is not required that absolutely all risks of an activity be eliminated in order for an activity to escape categorization as abnormally dangerous, instead the chief consideration is "the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions in advance and has exercised all reasonable care in his operation". *Bowers v. Wurzburg*, 207 W. Va. 28, 36, 528 S.E.2d 475, 483 (1999). Certainly, the Court opines that it is reasonable that any increased risk of chlorine leaks resulting from Axiall's production, storage, and transportation activities can be mitigated and greatly reduced by the exercise of due care. *See In re Flood Litig.*, 216 W. Va. 534, 545, 607 S.E.2d 863, 874 (2004) ("...we are convinced that any increased risk of flooding which results from Defendant's extractive activities can be greatly reduced by the exercise of due care."). For these reasons, the Court finds that factor (c) must weigh in Axiall's favor.

28. Fourth, the Court considers the "extent to which the activity is not a matter of common usage". Restatement (Second) of Torts § 520 (1977). Axiall has proffered that while the storage and transportation of liquid chlorine is not common for an average person, that such activities are is prevalent in society. *See* Def's Resp., p. 23; *see also* Def's Resp., Ex. W. The Court agrees that such activities are more common in West Virginia and the Ohio Valley region. *See* Def's Resp., p. 23; *see also In re Flood Litig.*, 216 W. Va. 534, 545, 607 S.E.2d 863, 874 (2004) ("In addition, extractive activities such as coal mining and timbering are common activities in southern West Virginia."). The Court also notes that Covestro itself is a neighboring plant/facility engaged in the manufacture of hazardous chemicals. *See* Def's Resp., p. 24. Further, the Court considers Axiall has proffered it is common-in-the-industry for liquid chlorine to be briefly held in a railcar at a specialized facility located in an industrial and rural area. *Id.* at 25. For these reasons, the Court finds that factor (d) must weigh in Axiall's favor.

29. Fifth, the Court considers the "inappropriateness of the activity to the place where it is carried on". Restatement (Second) of Torts § 520 (1977). Regarding the location, Axiall has averred that its facility in Marshall County is the "quintessentially appropriate place" for the loading, production and storage of chlorine, because it is located, rural industrial area. *See* Def's Resp., p. 24. Further, Axiall avers its facility in Marshall County has specialized equipment to deal with chlorine leaks if they occur, as well as detailed contingency plans and employees who are trained to deal with chlorine leaks. *Id.*

30. The Court also considers the appropriateness of Axiall's plant location in that it is located amid other industrial plants and facilities along the Route 2 area of Marshall County, such as Covestro and others. *Id.* The Court also considers the appropriateness of the transportation of liquid chlorine by railcar and eventually, along railroads, and the Court notes that this method of transportation is common and has not been challenged as inappropriate by Covestro. For these reasons, the Court finds that factor (e) must weigh in Axiall's favor.

31. Finally, sixth, the Court considers the "extent to which its value to the community is outweighed by its dangerous attributes". Restatement (Second) of Torts § 520 (1977). In *In re Flood Litig.*, the Supreme Court considered this factor relating to the value of the coal mining and extractive activities industries and concluded as follows: "[W]e are unable to conclude that the great economic value of some of these extractive activities, such as coal mining, is outweighed by their dangerous attributes". 216 W. Va. 534, 545, 607 S.E.2d 863, 874 (2004).

32. Likewise, the Court considers the economic benefit of the chemical production facilities more common in the northern part of our state. Specifically, Axiall has proffered that its Marshall County facility employs 413 employees. *See* Def's Resp., p. 25. This Court does not find that that economic value is outweighed by its dangerous attributes, given the amount of

dangerous attributes that can be mitigated, as discussed above. For these reasons, the Court finds that factor (f) must weigh in Axiall's favor.

33. The Court notes and considers that the West Virginia Supreme Court of Appeals has held that the "accumulation and use of combustible gas for a private purpose" is an abnormally dangerous activity that gives rise to strict liability without a showing of negligence for any injury proximately caused by such activity. *Peneschi v. National Steel Corp.*, 170 W.Va. 511, 515, 295 S.E.2d 1, 5 (1982); *cited by Foster v. City of Keyser*, 202 W. Va. 1, 9, 501 S.E.2d 165, 173 (1997). The Court's consideration of *Peneschi* and related cases, including *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E.2d 165 (1997) and *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 685 S.E.2d 219 (2009), in relation to the six factors from the Restatement, does not support an extension or expansion of this finding to support a designation of the production, storage, and transportation of chlorine as an abnormally dangerous activity that gives rise to strict liability without a showing of negligence for any injury proximately caused by such activity.

34. The Court considers the Supreme Court's conclusion on this issue in *Foster*, wherein it held:

> For us to approve of the circuit court's application of strict liability...in the instant case would require us to rather sharply alter our existing law, which we are reluctant to do without a strong reason. We do not perceive that such a reason exists under the circumstances of the instant case. We believe that the combination of the high standard of care which must be observed in the transmission of natural gas...coupled with the availability of the doctrine of *res ipsa loquitur* in appropriate cases to a party seeking to prove negligence in the conduct of such transmission...should ordinarily make it unnecessary to apply the doctrine of strict liability in cases involving explosions caused by leaking natural gas transmission lines.

Foster v. City of Keyser, 202 W. Va. 1, 11, 501 S.E.2d 165, 175 (1997).

35. Likewise, the Court does not find that the circumstances presented in the instant motion support a finding that the production, storage, and transportation of chlorine constitute an abnormally dangerous activity. To do so would be to sharply deviate from existing law in West Virginia. The Court notes the availability of the doctrine of *res ipsa loquitur* in appropriate cases to a party seeking to prove negligence involving such an event, if appropriate.

36. For all of these reasons, the Court finds the instant motion must be denied.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff Covestro, LLC's Motion for Partial Summary Judgment on Counts IV and VII of the Complaint Asserted Against Defendant Axiall Corporation 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 29, 2020
date of entry

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

A Copy Teste:
Joseph M. Rucki, Clerk
By Deanna Crouse Deputy