

FILED

**IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

2023 JAN 24 PM 2:04

**AXIALL CORPORATION and  
WESTLAKE CHEMICAL  
CORPORATION,**

JOSEPH M. RUCKI

**Plaintiffs,**

**vs.**

**Civil Action No.: 19-C-59  
Presiding Judge Wilkes  
Resolution Judges Carl and Nines**

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA., *et al.*,**

**Defendants.**

**ORDER DENYING PLAINTIFFS' RULE 59(e) MOTION TO ALTER OR AMEND THE  
COURT'S MARCH 3, 2022 ORDER GRANTING DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT TO ENFORCE THE PENNSYLVANIA JURY'S  
NATRIUM PLANT DAMAGES VERDICT AND APPLY NATRIUM PLANT  
PROPERTY DAMAGE DEDUCTIBLE**

This matter came before the Court this 24th day of January 2023. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation, by counsel, have filed Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's March 3, 2022 Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, David R. Osipovich, Esq., and Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty

Underwriting Services, Inc., and HDI-Gerling America Insurance Company (hereinafter “Defendants” or “Insurers”), by counsel, Debra Tedeschi Varner, Esq., 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 matter surrounds an insurance coverage dispute involving Defendants’ alleged failure to cover Westlake for property damage at its Marshall County, West Virginia plant caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling.

2. The thirteen insurance policies at issue in this matter (the “Policies”) are all part of a commercial property insurance program that Axiall purchased from the Insurers.

3. 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. *See* Ord., 3/3/22. On October 14, 2021, the jury in the Pennsylvania action reached a verdict, and the verdict slip in that action directed the jury to state amount Axiall suffered in damages to the Natrium plant and equipment. *Id.* The jury rendered the following verdict:

Damage to Natrium plant and equipment:	<u>\$5,900,000.00.</u>
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*See Id.*; *see also* Def’s Mot. for Partial Summ J., Ex. A.

4. On or about November 23, 2021, Defendants filed Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible, arguing because there is no dispute the damages Plaintiffs seek in the instant matter for alleged "physical loss or damage to insured property at the Natrium Plant", are the same damages Axiall sought in the Pennsylvania action, the verdict should be enforced here, and Plaintiffs' claim for damage to the Natrium plant and equipment should be determined to be \$5.9 million as a matter of law, prior to the application of the appropriate deductible, under the elements of Pennsylvania law for collateral estoppel. *See* Defs' Mot. for Partial Summ J., 2-4. Further, Defendants argue they are entitled to judgment as a matter of law that the applicable deductible is \$3.75 million pursuant to the terms of the Policy. *Id.* at 4.

5. This motion was fully briefed and on March 3, 2022, this Court entered an Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible, determining collateral estoppel applies to the related Pennsylvania action's verdict. *See* Ord., 3/3/22.

6. It is from this Order that Plaintiffs file the instant motion to alter or amend. On or about March 17, 2022, Plaintiffs filed the instant Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's March 3, 2022 Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible, seeking the March 3, 2022 be altered to deny the "enforcement" of the Pennsylvania verdict under the doctrine of collateral estoppel. *See* Pls' Mot., p. 1. In the alternative, Plaintiffs seek an amendment of the March 3, 2022 Order to adjust the damage amount. *Id.* at 2. Specifically, Plaintiffs aver the \$5,905,147.00 that the

Pennsylvania jury awarded was the actual costs incurred number as of March 19, 2019, and Plaintiffs allege that the actual costs incurred that was current as of April 2021 is \$10,950,138.00. *See* Pls' Mem., p. 19. Finally, Plaintiffs also argue in the alternative that should the instant motion be denied, that the Court state that the March 3, 2022 Order is a final judgment as to Count II of Westlake's Complaint (Breach of Contract) under West Virginia Rule of Civil Procedure 54(b), so that Westlake may appeal the collateral estoppel decision to the Supreme Court of Appeals of West Virginia. *See* Pls' Mot., p. 2.

7. On or about April 1, 2022, Defendants filed their Defendants' Response in Opposition to Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's March 3, 2022 Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible, arguing the instant motion should be denied because it fails to demonstrate "any clear error or any obvious injustice caused by the [March 3, 2022] Order". *See* Defs' Resp., p. 1-2. Further, Defendants contend, with regard to Plaintiffs' alternative argument, that the Pennsylvania jury was presented evidence via testimony at trial that the Plaintiffs' incurred costs as of September 2021 were approximately \$10.9 million, and the jury in the Pennsylvania action considered that evidence and instead chose to award the amount of \$5,900,000.00. *Id.* at 5-6, 17. Finally, Defendants urge the Court to deny Plaintiffs' request for 54(b) certification because Plaintiffs have not demonstrated the requirements of Rule 54(b) are present. *Id.* at 17-18. Specifically, Defendants argue final judgment as to Count II (Breach of Contract) would be inappropriate at this juncture because there has "been no judgment or other finding in this matter that Plaintiffs have met their burden to demonstrate their claim is covered by the Policy [contract]" and that therefore, the Order is not final and conclusive to "the entirety of Count II". *Id.* at 18.

8. On or about April 15, 2022, Plaintiffs filed their Reply in Support of Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's March 3, 2022 Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible, arguing Defendants' Response "doubles down on the same factual and legal mischaracterizations advanced in [their] initial summary judgment briefing on the collateral estoppel issue". See Reply, p. 1.

9. Meanwhile, on December 17, 2021, Defendants filed a Notice of Appeal from the summary judgment orders in this civil action entered on November 19, 2021. On January 21, 2022, this Court was provided with a copy of the Scheduling Order entered by the West Virginia Supreme Court of Appeals wherein the Supreme Court placed said appeal on the docket as No. 21-1016 in accord with Rule 5(b) of the Rules of Appellate Procedure.

10. In accordance with the West Virginia Supreme Court of Appeals decision in *Antero Res. Corp. v. Irby*, No. 21-0119, 2022 WL 1682290 (W. Va. May 26, 2022), wherein in the West Virginia Supreme Court of Appeals recognized that the undersigned, in that matter, "did not have our specific leave to consider the motion for relief from judgment that Antero filed after initiating its appeal before this Court. We, therefore, find no error in the circuit court's recognition that it was divested of jurisdiction and unable to consider Antero's motion." *Antero Res. Corp. v. Irby*, No. 21-0119, 2022 WL 1682290, at \*2 (W. Va. May 26, 2022).

11. Therefore, at a status conference, the undersigned, taking into consideration the directive and law iterated in *Antero Res. Corp. v. Irby*, No. 21-0119, 2022 WL 1682290 (W. Va. May 26, 2022), informed counsel it would hold the Order disposing of the instant motion unless it had specific leave to enter said order from the West Virginia Supreme Court of Appeals.

12. On January 23, 2023, counsel in this civil action provided the undersigned with an Order from the West Virginia Supreme Court of Appeals wherein the Supreme Court granted the parties' joint motion for leave to remand this matter to this Court for consideration of the instant motion.

13. The Court finds the issue ripe for adjudication.

### **CONCLUSIONS OF LAW**

This matter comes before the Court upon a motion to alter judgment brought pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Rule 59(e) simply states that “[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment”. W. Va. R. Civ. P. 59. The Court finds that the instant motion to alter or amend was timely filed, within ten days of the entry of judgment, as required by W.Va.R.Civ.P. 59(e).

A circuit court's consideration of a motion brought pursuant to Rule 59(e) is discretionary in nature. *See, e.g., Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995); *Stillwell v. City of Wheeling*, 201 W.Va. 559, 604, 558 S.E.2d 598, 603 (2001).

The reconsideration of a prior ruling pursuant to Rule 59(e) “**is an extraordinary remedy which should be used sparingly.**” *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 57, 717 S.E.2d 235, 244 (2011)(emphasis added).

Further, the West Virginia Supreme Court of Appeals has provided guidance on when a trial court should grant a Rule 59(e) motion to alter or amend. Specifically, in syllabus point 2 of *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals said:

A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening

change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Syl. pt. 1, *Acord v. Colane Company*, 228 W.Va. 291, 719 S.E.2d 761 (2011); *see also* *Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351, 356 (2012).

Also, a motion to alter or amend judgment may be used to correct manifest errors of law or fact or to present newly discovered evidence. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011).

W.Va.R.Civ.P. 59(e) is not an appropriate instrument for presenting new legal arguments, factual contentions, or claims that could have previously been argued. *Mey*, 228 W. Va. at 56, 717 S.E.2d at 243. Even in circumstances where a party intends to rely upon newly discovery evidenced, the party “must produce a legitimate justification for not presenting the evidence during the earlier proceeding.” *Mey*, 228 W.Va. at 57, 717 S.E.2d at 244, quoting *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996).

In the present case, none of the grounds for reconsideration are present. The Court, after review of the pleadings and the court file, finds there are no manifest errors of law or fact to be corrected. It is apparent from the review of the record that the Court considered all the matters before the Court, including the available case law regarding Pennsylvania collateral estoppel, the entirety of the Pennsylvania action’s Verdict Slip, attached to the underlying motion as an exhibit, the fact that the verdict slip (which, the Court notes was adopted from a proposed verdict slip Axiall filed) expressly directed the jury to determine the monetary amount of damages to the Natrium plant and equipment as a result of the chlorine release/tank car rupture, the fact that the amount the jury awarded for damage to the Natrium plant and equipment in the Pennsylvania case is contained in insurance claim documentation submitted to Defendants in this matter, the

fact that the Pennsylvania jury also considered evidence that damage to the Natrium plant and equipment allegedly was \$278,000,000.00 (minus a deduction for corrections in both cases), the fact that the amount the Pennsylvania jury chose represented and was evidenced by actual costs incurred for damage to the plant and equipment, and the fact that in both cases, evidence in the record showed Westlake considered damages in the two actions to be the same.

Specifically, the Court analyzed and considered that, with regard to the record, counsel for Westlake stated that damages in the two actions are the same, including at a hearing before Discovery Commissioner Judge Clawges, the fact that in this matter, Plaintiffs acknowledged in an interrogatory response that the two matters involve identical alleged damage to the plant and equipment, and the fact that Westlake's 30(b)(7) witness testified at deposition in this case that the damages claim made to the Defendant Insurers in this matter in March 2019 and a later version "are being used as part of the damage claim in the other case", that the same damage estimates were used in both actions, that vendor fees for preparing estimates in both cases were charged only to the insurance claim, and that Exponent was used in both litigations to provide expert opinions concerning alleged damages. *See* Defs' Resp., p. 7-8; *see also* Ord. 3/3/22.

Plaintiffs did not present new evidence not previously available to the Court coming to light, or any change in controlling law on the issue of contribution since the entry of this Court's March 3, 2022 Order. Instead, in the instant motion, Plaintiffs relied on many of the same cases it discussed in its Response to the underlying motion. Plaintiffs simply did not demonstrate a clear error of law upon which to alter or amend a judgment regarding the Court's conclusion that collateral estoppel applies to the Pennsylvania action verdict, because all four of the collateral estoppel factors were met given the identical issue of determining the monetary amount of

damage to the Natrium plant and equipment as a result of the August 2016 tank car rupture/chlorine release event.

For all of these reasons, the Court finds Plaintiffs have presented no clear error in the Court's findings in its March 3, 2022 Order regarding the applicability of collateral estoppel to the Pennsylvania jury verdict. This Court has rejected Plaintiffs' arguments contained in the instant motion when granting the underlying motion for partial summary judgment. Although Plaintiffs reiterate their position, Plaintiffs' arguments in the instant motion simply do not demonstrate a clear error of law upon which to alter or amend a judgment.

Accordingly, the Court declines to reconsider or alter or amend its determinations contained in its March 3, 2022 Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible. Therefore, the Court finds the instant motion must be DENIED.

Finally, the Court considers the parties' representations as to Plaintiffs' requested Rule 54(b) certification as final as to Count II of the Complaint (Breach of Contract). *See* Pls' Mot., p. 2; *see also* Pls' Mem., p. 20. The Court considers that Defendants' object to this request, arguing the requirements of Rule 54(b) have not been met because there has "been no judgment or other finding in this matter that Plaintiffs have met their burden to demonstrate their claim is covered by the Policy" and therefore, the Order is not final and conclusive to "the entirety of Count II". *See* Pls' Resp., p. 17-18.

Rule 54(b) of the West Virginia Rules of Civil Procedure governs judgment upon multiple claims or involving multiple parties. Rule 54(b) provides, in pertinent part: "When more than one claim for relief is presented in an action...or when multiple parties are involved,

the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment”. W. Va. R. Civ. Proc. 54.

Generally, an order qualifies as a final order when it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991). A judgment may properly be certified under subdivision (b) only if completely disposes of at least one substantive claim. *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996).

The Court considers that there are pending issues in this case remaining over whether or not coverage exists under the Policies. As a result, a complete adjudication of whether or not there was a breach of the Policies (breach of contract), as claimed in Count II, cannot be deemed final at this time. As a result, the Court agrees with Plaintiffs and finds that it would be impossible for the March 3, 2022 Order to be final and conclusive as to the entirety of Count II regarding breach of the Policies at this time. Further, a review of the requests for relief in the underlying motion for partial summary judgment reveal it did not seek a determination of summary judgment as to Count II. Instead, it simply requested that a decision from another jurisdiction regarding damages be given full faith and credit and have the same force here that it had in the other jurisdiction. *See* Def's Mot. for Partial Summ. J., p. 3. As Plaintiffs did not request summary judgment as to Count II, and the parties have represented that there is still a pending issue in this matter as to whether or not there is coverage under the Policies which are the contract at the heart of Count II, the Court cannot exercise its discretion and declare a final judgment as to the entirety of Count II at this time, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Rule 59(e) Motion to Alter or Amend the Court's March 3, 2022 Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible is hereby DENIED. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



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