

In the Circuit Court of Marshall County, West Virginia

COVESTRO, LLC,
Plaintiff,

v.

Case No. CC-25-2018-C-202
Judge Christopher C. Wilkes

AXIALL CORPORATION, ET AL,
ALLTRANSTEK LLC,
Superheat FGH Services, Inc.,
Rescar Companies,
Defendants

PRETRIAL CONFERENCE ORDER

CAME the parties, in a Pretrial Conference held pursuant to this Court's prior Order on the 16th day of October, 2023, commencing at 10:00 a.m. remotely[1].

1. R. Booth Goodwin, Esq. and Jayme L. Butcher, Esq. appeared for the Plaintiff, Coverstro, LLC, Mitchell L. Gorman, Esq., Mark D. Shepard, Esq., Daniel A. Leister, Esq., and Thomas P. Mannion, Esq. appeared for the Defendants, AllTranstek, LLC and Rescar Companies, and Bradley Whalen, Esq., William D. Wilmoth, Esq., Antoinette C. Oliver, Esq., and Jeffrey V. Kessler, Esq. appeared for Axiall Corporation.

2. Conference was had regarding the structure of today's hearing. The undersigned advised all counsel that oral argument would be heard at this hearing, the motions would be taken under advisement, and an Order would be issued this week. Conference was also had regarding the letter to the Court filed by Mr. Goodwin, and there being no objection, the Court took up the pending motions in the order listed in Mr. Goodwin's letter/bench brief.

3. The Court heard oral argument by counsel regarding the following previously filed motions:

- a. Axiall's Motion for Partial Summary Judgment Regarding Damages;
- b. Rescar and AllTranstek's Motion *in Limine* to Preclude Plaintiff From

Introducing Speculative Damages Evidence and Testimony Regarding

Unincurred Replacement Costs;

- c. Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Regarding the Damages Award in the Pennsylvania Action;
- d. AllTranstek and Rescar's Motion for Partial Summary Judgment on Plaintiff's Claim for Punitive Damages Against Defendants;
- e. Rescar and AllTranstek's Motion *in Limine* to Preclude Undated Photographs;
- f. Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Concerning Covestro's Insurance Adjuster's Statement Regarding Restoration;
- g. Plaintiff Covestro LLC's Motion *in Limine* to Preclude Cumulative Expert Testimony Proffered By Rescar and AllTranstek; and
- h. AllTranstek and Rescar's Motion to Continue Trial.

4. The parties rested on their written arguments on the following previously filed motions:

- a. Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Regarding Insurance Payments;
- b. Plaintiff Covestro LLC's Motion *in Limine* No. to Preclude Evidence and Argument to Covestro's Wealth or Status;
- c. Plaintiff Covestro LLC's *in Limine* to Preclude Defendants From Introducing Evidence or Making Argument Refuting Their Negligence; and
- d. Plaintiff Covestro LLC's Motion *in Limine* to Limit the Testimony Proffered By Defendants Rescar and AllTranstek's Expert, Howard Silverstone.

5. The Court will address the aforementioned motions in turn.

Axiall's Motion for Partial Summary Judgment Regarding Damages

6. First, regarding Axiall's Motion for Partial Summary Judgment Regarding Damages, the Court finds said motion is hereby DENIED.

7. 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).

8. 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).

9. In this motion, Axiall seeks the application of the jury's findings on damages against the Defendants in the Pennsylvania action to the damages claimed by Covestro in the following three alternative ways: that Covestro be awarded actual replacement costs, that Covestro be awarded approximately 2% of its claimed damages, because that's the percentage of claimed damages Axiall was awarded in Pennsylvania, or that the Court cap Covestro's damages

at \$5.9 million, the amount awarded in the Pennsylvania action. *See* Mot. for Partial Summ. J., 10/9/23, p. 3-4. The Court notes it heard oral argument on this motion from Mr. Whalen, Mr. Goodwin, and Mr. Shepard.

10. Here, the Court finds Axiall's position meritless. The Court cannot conclude no genuine issue of material fact remains regarding Covestro's damages claim. Axiall argues that because this Court found collateral estoppel effect should be given to the Pennsylvania Court's jury findings regarding apportionment of fault as to the conduct of AllTranstek, Rescar, and Axiall, this Court should likewise award damages that correlate to the damages Axiall was awarded by the Pennsylvania jury. *See* Mot. for Partial Summ. J., 10/9/23. But, unlike the conduct issue between these Defendants decided by the Pennsylvania jury, Covestro's damages are not identical to Axiall's damages in the Pennsylvania action. Simply put, the damage claims are different. Axiall, in the Pennsylvania case, sought to recover against AllTranstek and Rescar, parties it had contracted with to service its railcar, and Rescar's subcontractor Superheat. *See* Covestro's Resp., p. 8. Here, Covestro, a nearby facility, asserts claims for property damage. Covestro only asserts claims for negligence, trespass and nuisance against Axiall, AllTranstek, and Rescar for the August 2016 release.

11. Further, this Court also cannot speculate as to the reasoning behind the Pennsylvania jury's amount/award, and attempt to limit the Covestro in the same manner. *Id.* at 9.

12. For all of these reasons, the Court finds Axiall's Motion for Partial Summary Judgment Regarding Damages is hereby DENIED.

Rescar and AllTranstek's Motion in Limine to Preclude Plaintiff From Introducing Speculative Damages Evidence and Testimony Regarding Unincurred Replacement Costs

13. Next, regarding Rescar and AllTranstek's Motion *in Limine* to Preclude Plaintiff From Introducing Speculative Damages Evidence and Testimony Regarding Unincurred Replacement Costs, the Court finds said motion is hereby DENIED. In this motion, AllTranstek

and Rescar seek the exclusion of evidence and testimony regarding the replacement value of the property that Covestro has not replaced to date, and which, Defendants argue, Covestro shows no signs of replacing. *See Motion in Limine*, 10/2/23. The Court heard oral argument on this motion from Ms. Gorman and Mr. Goodwin.

14. With regard to this request, and to the issue of replacement versus cleaning, the Court concludes the parties are entitled to put on evidence in order to establish whether or not the subject facility parts should have been cleaned/restored or replaced. This determination shall be for the jury to decide. AllTranstek and Rescar are free to present evidence and argument to the jury regarding the inappropriateness of this choice. For this reason, the Court finds this motion *in limine* is DENIED.

Plaintiff Covestro LLC's Motion in Limine to Preclude Evidence or Argument Regarding the Damages Award in the Pennsylvania Action

15. Next, the Court took up Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Regarding the Damages Award in the Pennsylvania Action, which was argued at the Pretrial Conference by Mr. Goodwin, Ms. Gorman, Mr. Whalen, and Mr. Kessler. The Court concludes this Motion shall be GRANTED.

16. In this motion, Covestro sought a pretrial ruling from this Court that precludes Defendants from introducing any evidence or making any reference to the damages awarded to Axiall in the Pennsylvania case. *See Motion in Limine*, p. 5. The Court agrees with Covestro that such evidence would be irrelevant, and any relevance would be outweighed by its prejudicial effect. *Id.*

17. As the Court found above, Covestro's damages claims are plainly different than Axiall's damages claims in the Pennsylvania action. Also, importantly, in the Pennsylvania action, Axiall was found negligent and 40% at fault, while in this case, Covestro is an innocent party, a neighboring plant who suffered property damage. *Id.* at 7. The Court also notes that Covestro seeks a damages award for property damage, but it has no damages claims for third

party payments or lost profits. *Id.*; *see also*, Compl. Also, as Covestro points out in its motion, there are no allegations that Covestro was somehow responsible for the subject chlorine release. *Id.*

18. Accordingly, this Motion shall be GRANTED.

AllTranstek and Rescar's Motion for Partial Summary Judgment on Plaintiff's Claim for Punitive Damages Against Defendants

19. Next, the Court heard AllTranstek and Rescar's Motion for Partial Summary Judgment on Plaintiff's Claim for Punitive Damages Against Defendants, which was argued by Ms. Gorman and Mr. Goodwin.

20. The Court notes its recitation of the Rule 56 standard for summary judgment is found above.

21. With regard to punitive damages, West Virginia code states:

(a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes 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 Ann. § 55-7-29 (West).

22. Further, the West Virginia Supreme Court of Appeals held:

“[w]e now hold that, pursuant to West Virginia Code § 55-7-29(a), an award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes 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.

Jordan v. Jenkins, 245 W. Va. 532, 555, 859 S.E.2d 700, 723 (2021).

23. The Court also considers that Pennsylvania's standard for punitive damages is very similar to West Virginia's. Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct. *Dubose v. Quinlan*, 2015 PA Super 223, 125 A.3d 1231 (2015), *aff'd*, 643 Pa. 244, 173 A.3d 634 (2017). Reckless or wanton misconduct "means that 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." *Lomas v. Kravitz*, 2015 PA Super 267, 130 A.3d 107, 128–29 (2015), *aff'd*, 642 Pa. 181, 170 A.3d 380 (2017).

24. Here, the Court considers the evidence proffered by AllTranstek and Rescar, the Transcript evidencing Judge Ward's granting of the Defendants' motion for non-suit on the issue of punitive damages. This evidenced that during the trial in the Pennsylvania action, Judge Ward, after considering the evidence, determined the evidence of the conduct of these Defendants was legally insufficient to submit the issue of punitive damages to the jury.

25. The Court considers that the conduct at issue in the Pennsylvania action is the same conduct at issue here. This Court has adopted, by operation of collateral estoppel, the negligent apportionment of fault findings in the Pennsylvania action. In fact, Covestro sought the application of collateral estoppel to the Pennsylvania verdict. *See* Mot. for Partial Summ. J., 10/2/23, p. 4.

26. Therefore, Covestro will rely on this Court's application of collateral estoppel of the jury's negligence findings in the Pennsylvania case. The evidence of conduct presented in the Pennsylvania action, the same evidence of conduct that will be used in this case, was considered by Judge Ward, and was determined to be legally insufficient to submit the issue of punitive damages to the jury. *Id.* Accordingly, this Court adopts Judge Ward's ruling regarding punitive damages, namely, that Defendants are not, as a matter of law, liable for punitive

damages.

27. The Court recognized, as discussed during oral argument, that it previously entered an Order Denying AllTranstek and Rescar's Motion for Summary Judgment on Claims of Plaintiff Covestro LLC, in which it declined to find, at that point, that no genuine issue of material fact remained regarding Covestro's claim for punitive damages. *See*, Ord., 11/18/20. Importantly, since that time, the Court considers the evidence with regard to Judge Ward's ruling. Judge Ward heard evidence related to the examples the Court described in its November 2020 Order. Although this Court found in its November 18, 2020 summary judgment order, issues of fact remained, because Judge Ward heard the evidence with regard to Defendants' conduct, this Court finds that at this point, no genuine issue of material fact remains regarding the appropriateness of the punitive damages as applied to the conduct alleged in this case surrounding the subject chlorine release.

28. For these reasons, this motion is GRANTED.

Rescar and AllTranstek's Motion in Limine to Preclude Undated Photographs

29. Next, the Court heard argument on Rescar and AllTranstek's Motion *in Limine* to Preclude Undated Photographs from Ms. Gorman and Ms. Butcher. The Court declines to issue any advisory opinions, and DENIES this motion. The parties made clear at oral argument that they understand their obligations with regard to laying the necessary foundation for all exhibits, including photographic evidence.

Plaintiff Covestro LLC's Motion in Limine to Preclude Evidence or Argument Concerning Covestro's Insurance Adjuster's Statement Regarding Restoration

30. The Court next heard oral argument on Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Concerning Covestro's Insurance Adjuster's Statement Regarding Restoration from Ms. Butcher, Ms. Gorman, and Mr. Shepard.

31. In this motion, Covestro seeks a "pretrial ruling that excludes Defendants from

introducing any evidence provided by Covestro's insurance adjuster regarding restoration including but not limited to the Clean-Co Estimate and TRIPOS Reports". *See Motion in Limine*, 10/2/23, p. 3.

32. Specifically, Covestro proffers that Covestro's insurance company hired a third-party, TRIPOS Enterprises, LLC to investigate the damage to the cladding at Covestro's facility, and as part of this investigation, Dr. Marc Zupan, of TRIPOS, authored a Report which provided recommendations for cleaning and restoring the cladding. *Id.* at 2. Covestro also proffers that Covestro subsequently asked a company called Clean-Co Systems for an estimate for cleaning the tank and cladding, as an alternative to replacing the cladding (TRIPOS then evaluated this estimate resulting in another TRIPOS Report). *Id.*

33. For the same reasons the Court stated with regard to its ruling on Rescar and AllTranstek's Motion *in Limine* to Preclude Plaintiff From Introducing Speculative Damages Evidence and Testimony Regarding Unincurred Replacement Costs, the Court finds said motion is hereby DENIED.

34. Again, with regard to the issue of replacement versus cleaning, the Court concludes the parties are entitled to put on evidence in order to establish whether or not the subject facility parts should have been cleaned/restored or replaced. This Court declines to make a pretrial ruling excluding evidence of replacement damages. The jury may consider this evidence, and the reasonableness of replacing the cladding instead of restoring it.

35. The Court also notes and considers that AllTranstek and Rescar proffered that their expert received and relied upon the TRIPOS Reports and Clean-Co Estimate. *See Resp.*, 10/9/23, p. 4.

36. The Court makes this determination with regard to the issue of cleaning versus restoration with the caveat that the parties do not mention insurance, noting that Covestro's insurance company is the party that obtained Dr. Zupan's TRIPOS Reports and the Clean-Co

Estimate.

37. Although Covestro argues that the reports would necessarily imply the existence of insurance coverage, the does find this argument persuasive, given the Court's limitation instruction. The evidence should be utilized without mentioning insurance. For all of these reasons, this motion is DENIED.

Plaintiff Covestro LLC's Motion in Limine to Preclude Cumulative Expert Testimony Proffered By Rescar and AllTranstek

38. The Court next heard oral argument on Plaintiff Covestro LLC's Motion *in Limine* to Preclude Cumulative Expert Testimony Proffered By Rescar and AllTranstek by Ms. Butcher and Ms. Gorman.

39. This motion surrounds the testimony of two engineer experts for AllTranstek and Rescar, Steven Clarke and Edward Blessman. Covestro seeks a "pretrial ruling precluding AllTranstek and Rescar from calling both Clarke and Blessman because their proposed testimony and opinions are unnecessarily cumulative". *See Motion in Limine*, 10/2/23, p. 2, 3. On the other hand, AllTranstek and Rescar argue they are entitled to offer testimony from any experts necessary to defend Covestro's damages claim against them. *See Resp.*, 10/9/23, p. 1.

40. With regard to the proposed testimony of Clarke and Blessman, AllTranstek and Rescar explained that Clarke will be offering opinions with regard to the cumulative impact on the metal surfaces from years of operating a chemical plant, and to the functionality and condition of the stainless steel based on the history of the operations. *Id.* at 1-2. Clarke will also testify as to his opinion that the cladding does not need replaced due to the chlorine release. *Id.* at 2. AllTranstek and Rescar proffered Blessman will be offering opinions with regard to the condition of the facility and alleged damage to the stainless steel. *Id.*

41. The Court also notes that due to the COVID-19 Pandemic, the site inspection taking place in June 2020, and Dr. Clarke's residing in Canada/travel restrictions in place, only Blessman was able to attend the inspection in-person, while Dr. Clarke attended remotely. *Id.*

Defendants argue this further supports the need for both to testify at trial. *Id.*

42. The Court is cognizant of cumulative testimony, but recognizes that the proffered opinions and testimony of Clarke and Blessman are similar but not identical. As to the areas of their testimony where the expert testifies, opines, and speaks to identical issues, it should be precluded. But where the expert testifies, opines, and speaks to different issues, it should be allowed. This will require an objection and determination at the time of testimony. The Court declines to make any pretrial or blanket limitations. The Court concludes Defendants may have both their experts testify in this area, as the Court does not find it is unnecessarily cumulative. The Court finds the motion shall be DENIED.

AllTranstek and Rescar's Motion to Continue Trial

43. Finally, the Court heard argument on AllTranstek and Rescar's Motion to Continue Trial by Ms. Gorman and Ms. Butcher.

44. In this motion, Defendants seek a continuance of this trial until the Pennsylvania appeal is concluded, which they anticipate will be March 2024. Defendants argue the appeal could affect the Pennsylvania Court's jury verdict which found that AllTranstek and Rescar are contractually bound to indemnify Axiall for third party claims incurred as part of the chlorine release. *See Resp.*, 10/9/23, p. 3. They also contend Axiall will take a backseat at trial in reliance of the contractual indemnification determination. *Id.*

45. The Court finds that the trial here is to determine what, if any, damages Covestro should be awarded. Defendants' arguments regarding prejudice to them due to the pending appeal of the contractual dispute between Rescar/AllTranstek and Axiall in no way prejudices them from offering a full defense in this action. If Axiall takes a backseat at this trial, and later the indemnification proceedings are overturned, it does so at its peril. Axiall, and not AllTranstek and Rescar, will bear the effects of that alleged decision.

46. The Court also notes that once a damages determination is found by the jury in

this civil action, the Court may execute judgment at a later date.

47. In sum, the Court has not been shown that good cause has been shown to continue this trial, and the Court DENIES the motion to continue.

48. The Court now takes up the pending motions wherein the parties rested upon their written pleadings: Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Regarding Insurance Payments; Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence and Argument to Covestro's Wealth or Status; Plaintiff Covestro LLC's *in Limine* to Preclude Defendants From Introducing Evidence or Making Argument Refuting Their Negligence; and Plaintiff Covestro LLC's Motion *in Limine* to Limit the Testimony Proffered By Defendants Rescar and AllTranstek's Expert, Howard Silverstone. The Court will take up the motions in turn.

Plaintiff Covestro LLC's Motion in Limine to Preclude Evidence or Argument Regarding Insurance Payments

49. First, with regard to Plaintiff Covestro LLC's Motion *in Limine* to Preclude Evidence or Argument Regarding Insurance Payments, Covestro seeks that evidence and argument of payments Covestro received from its insurance company be precluded. *See Motion in Limine*, 10/2/23, p. 1-2.

50. On the other hand, AllTranstek and Rescar argue that admission of this type of evidence does not violate the collateral source rule because they are not attempting to take advantage of Covestro having property damage insurance or pursue an offset. *See Resp.*, 10/9/23, p. 2. Instead, they claim it's relevant to the credibility of Covestro's damages claim and the credibility and veracity of Covestro's damages experts. *Id.* at 1.

51. The West Virginia Rules of Evidence provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." W. Va. R. Evid. 401.

52. The collateral source rule excludes payments from other sources to plaintiffs

from being used to reduce damage awards imposed upon culpable defendants. Syl. Pt. 11, *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603 (1983); Syl. Pt. 1, *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 436 (2014). The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party.” Syl. Pt. 7, *Ratlief v. Yokum*, 167 W.Va. 779, 280 S.E.2d 584 (1981); Syl. Pt. 3, *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 436 (2014).

53. As a rule of evidence, the collateral source rule precludes a defendant “from introducing evidence that some of the plaintiff’s damages have been paid by a collateral source”. *Kenney v. Liston*, 233 W. Va. 620, 627, 760 S.E.2d 434, 441 (2014). Because the likelihood of misuse by the jury clearly outweighs the probative value of evidence of collateral benefits, the “induction of collateral sources into the jury’s consciousness for whatever purpose is to be avoided.” *Id.* Otherwise, “the jury may well reduce the damages based on the amounts that the plaintiff has been shown to have received from collateral sources.” *Id.*

54. Here, the Court finds evidence or argument regarding payments that Covestro received from its insurance company are irrelevant and violative of the collateral source rule. They cannot be used to reduce any damages awards under the collateral source rule. Any probative value would be greatly outweighed by the prejudicial effect, as the jury could take the payments into consideration. For these reasons, the Court finds this motion shall be GRANTED.

Plaintiff Covestro LLC’s Motion in Limine to Preclude Evidence and Argument to Covestro’s Wealth or Status

55. Next, the Court turns to Plaintiff Covestro LLC’s Motion *in Limine* to Preclude Evidence and Argument to Covestro’s Wealth or Status. Covestro asks this Court to preclude evidence or argument regarding Covestro’s wealth and status, including, but not limited to, Covestro’s financial condition or comparisons of its wealth with that of the other parties, arguing such evidence is irrelevant and prejudicial. *See Motion in Limine*, 10/2/23, p. 1-2.

56. Under Rule 401 of the West Virginia Rules of Evidence, “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action”. W. Va. R. Evid. 401. A court may exclude even “relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. W. Va. R. Evid. 403.

57. Pursuant to Rules 401 and 403 of the Rules of Evidence, the Court finds this motion should be GRANTED. This evidence and argument should be precluded from the trial in this matter as it is irrelevant to the issue to be decided, which is what, if any, damages did Covestro’s facility sustain as a result of the subject chlorine release. Further, any relevance it could have would be greatly outweighed by its prejudicial effect. For these reasons, the motion is GRANTED.

Plaintiff Covestro LLC’s in Limine to Preclude Defendants From Introducing Evidence or Making Argument Refuting Their Negligence

58. Next the Court discusses Plaintiff Covestro LLC’s *in Limine* to Preclude Defendants From Introducing Evidence or Making Argument Refuting Their Negligence, which seeks to preclude Defendants from introducing evidence or argument refuting this Court’s negligence ruling, wherein this Court found the jury’s finding regarding negligence should be given collateral estoppel effect in this action. *See Motion in Limine*, 10/2/23, p. 2-3.

59. Pursuant to Rules 401 and 403 of the Rules of Evidence, the Court finds this motion should be GRANTED. Any such references are irrelevant in light of this Court’s prior rulings. Negligence and apportionment of fault were already established and Defendants are not permitted to relitigate this issue at trial. To do so would cause jury confusion. For all of these reasons, this motion is GRANTED.

Plaintiff Covestro LLC’s Motion in Limine to Limit the Testimony Proffered By Defendants

60. Finally, the Court addresses Plaintiff Covestro LLC's Motion *in Limine* to Limit the Testimony Proffered By Defendants Rescar and AllTranstek's Expert, Howard Silverstone. Mr. Silverstone is a forensic accountant. Covestro seeks to limit the testimony of this expert wherein he would be precluded from opining that the stainless steel components could have been cleaned rather than replaced. *See Motion in Limine*, 10/2/23, p. 3. Covestro contends Silverstone relies on Covestro's cleaning estimate, parrots this estimate, and goes beyond his expertise. The probative value of this sort of testimony would be greatly outweighed by the risk of unfair prejudice.

61. The court finds Mr. Silverstone must testify within his area of expertise, forensic accounting. As he (admittedly) is not an expert with respect to the effects of chlorine contamination on any surface material, he shall not be permitted to opine on which path should have been taken regarding cleaning versus replacement of facility component parts. AllTranstek and Rescar have at least two other experts, as evidenced by the motion *in limine* regarding cumulative expert testimony, to testify as to the damage to facility parts. He shall be permitted to opine in the area of expertise, forensic accounting. Silverstone will not be permitted to testify regarding whether Covestro needed to replace certain component parts, as his area of expertise does not qualify him to make such an opinion.

62. The Court GRANTS this motion and ORDERS that Mr. Silverstone's testimony is limited in that he is precluded from making any references regarding whether the replacement of any component parts was necessary or whether any component parts of Covestro's plant facility could have been cleaned. Silverstone is permitted to testify with regard to the cleaning estimate and the impact of the estimate on his opinions in this case. *See Resp.*, 10/9/23, p. 3.

63. After addressing motions, conference was had regarding the proposed *voir dire* questions submitted to the Court, and the proposed jury instructions, including Instruction #6 and

Mr. Goodwin's objection in his bench brief, and the Court advised it would have a tentative charge out to counsel this week, which would be subject to change by the undersigned after the evidence has come in. Ms. Gorman inquired as to the availability of the jury questionnaires, and her question was referred to the Marshall County Circuit Clerk.

64. Conference was had regarding the parties mediating the case again with Don O'Dell.

65. The Pretrial Conference was then adjourned.

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.

ENTERED this 18th day of October 2023.

[1] The Court notes the Order Granting Plaintiff's Motion to Set a Trial Date, Order Denying Defendants' Motion to Stay, and Order Setting Trial Date entered on or about December 22, 2022 scheduled the Pretrial Conference to be held before the undersigned in the Marshall County Courthouse. *See* Ord., 12/22/23, p. 2. By the parties' agreement, the Pretrial Conference was held with all counsel appearing via Zoom.

/s/ Christopher C. Wilkes
Circuit Court Judge
2nd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.