

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

**AXIAL CORPORATION and
WESTLAKE CHEMICAL
CORPORATION,**

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 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
CONCERNING PLAINTIFFS' ALLEGED DAMAGES AS MOOT**

This matter came before the Court this 16th day of April, 2024. The 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, by counsel, have filed Defendants' Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages. The Plaintiffs, Axial Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), by counsel, Jessica L.G. Moran, Esq., and Jeffrey V. Kessler, 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, James A. Varner, Sr., 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 Plaintiff Westlake Chemical Corporation (hereinafter “Plaintiff” or “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.; *see also* Defs’ Mot., p. 1, 3. 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. On or about November 23, 2021, Defendants filed the instant Defendants’ Motion for Summary Judgment Concerning Plaintiffs’ Alleged Damages, seeking a summary judgment ruling that Plaintiffs’ failure to distinguish their alleged damages from pre-existing corrosion precludes them from recovering any of their alleged damages, Plaintiffs cannot recover for any damages that did not occur between August 27 and August 30, 2016, including all claimed damages for equipment still in use at the Natrium plant, Plaintiffs’ damages did not exceed the applicable deductible at any point during the Policy Period, and Plaintiffs therefore cannot

recover any alleged damages under the Policy, Plaintiffs' claim for estimates (\$226 million) and contingency (\$46 million) related to the replacement of equipment still in use or operation at the Natrium plant is dismissed because Plaintiffs have failed to prove that these claim figures are related to "direct physical loss or damage", Plaintiffs' recovery, if any, for costs incurred after August 28, 2018 (or not incurred at all) are limited to ACV, and Plaintiffs had not adequately supported their claim as of April 9, 2019 when Defendants denied Plaintiffs' March 20, 2019 claim for \$278,505,078. *See* Defs' Mot., 29-30. Further, Defendants argue the law of collateral estoppel precludes the parties from relitigating the issue of property damage to the Natrium plant caused by the August 2016 chlorine rupture, acknowledges Defendants have filed a motion for partial summary judgment to enforce the Pennsylvania verdict on this ground, and argue the instant motion will be rendered moot if the Court grants that motion for partial summary judgment. *Id.* at 9.

4. On a prior day, Plaintiffs filed their Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages, arguing it has put forward sufficient evidence to carry its burden under Georgia law and it is for the jury to weigh this evidence against Defendants' contrary evidence to determine the compensable amount of Westlake's damage. *See* Pls' Resp., p. 30.

5. On or about January 18, 2022, Defendants filed their Reply in Support of Their Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages.

6. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for summary judgment. 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).

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).

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

Here, Defendants seek the following relief: a summary judgment ruling that Plaintiffs' failure to distinguish their alleged damages from pre-existing corrosion precludes them from recovering any of their alleged damages, Plaintiffs cannot recover for any damages that did not occur between August 27, 2016 and August 30, 2016, including all claimed damages for equipment still in use at the Natrium plant, Plaintiffs' damages did not exceed the applicable deductible at any point during the Policy Period, and Plaintiffs therefore cannot recover any alleged damages under the Policy, Plaintiffs' claim for estimates (\$226 million) and contingency (\$46 million) related to the replacement of equipment still in use or operation at the Natrium plant is dismissed because Plaintiffs have failed to prove that these claim figures are related to "direct physical loss or damage", Plaintiffs' recovery, if any, for costs incurred after August 28, 2018 (or not incurred at all) are limited to ACV, and Plaintiffs had not adequately supported their claim as of April 9, 2019 when Defendants denied Plaintiffs' March 20, 2019 claim for \$278,505,078. *See* Defs' Mot., 29-30. Further, Defendants argue the law of collateral estoppel precludes the parties from relitigating the issue of property damage to the Natrium plant caused by the August 2016 chlorine rupture, acknowledges Defendants have filed a motion for partial summary judgment to enforce the Pennsylvania verdict on this ground, and argue the instant motion will be rendered moot if the Court grants that motion for partial summary judgment. *Id.* at 9.

As the Court has determined in its Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible that as a matter of law, Plaintiffs' claim for damage to the Natrium plant and equipment has been determined to be \$5.9 million, prior to the application of the appropriate \$3.75 million deductible, the Court agrees with Defendants and finds the relief

requested in the instant motion moot. The Court agrees with Defendants that this motion was brought in the alternative, and the Court, having granted the Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible, now finds the issues in the instant motion to be moot.

Therefore, the Court finds the instant motion must be DENIED and dismissed as MOOT.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages is hereby DENIED AS MOOT. 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.



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