

In the Circuit Court of Marshall County, West Virginia

**AXIALL CORPORATION,
Westlake Chemical Corporation,**
Plaintiffs,

v.

Case No. CC-25-2019-C-59
Judge Christopher C. Wilkes

**NAT'L. UNION FIRE INS CO OF
PITTSBURGH,
ACE AMERICAN INSURANCE
COMPANY,
Great Lakes Insurance SE,
Navigators Management Co, Inc,
Allianz Global Risks US Ins Co ET
AL,**
Defendants

**ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING LEGAL ISSUES RELATING TO THE CALCULATION OF
DEFENDANTS' LIABILITY UNDER THE POLICIES AS MOOT**

This matter came before the Court this 16th day of April, 2024. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation, by counsel, have filed Plaintiffs' Motion for Partial Summary Judgment Regarding Legal Issues Relating to the Calculation of Defendants' Liability Under the Policies. 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 argued 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. Meanwhile, on or about November 23, 2021, Plaintiffs filed the instant Plaintiffs' Motion for Partial Summary Judgment Regarding Legal Issues Relating to the Calculation of Defendants' Liability Under the Policies, which is Plaintiffs' damages motion for partial summary judgment. Plaintiffs argued "there are related threshold questions grounded in the language of the relevant Policies that can and should be decided by the Court, as a matter of law. These questions are: what constitutes compensable property damage under the Policies; and what does the policy language provide regarding the basis on which Westlake can recover a monetary payment for covered property damage?". See Pls' Mot., p. 2. Further, Plaintiffs asked that this Court issue an order stating that as a matter of law and a conclusion that damages

under the Policies are as follows: "(1) 'physical loss or damage' compensable under the Policies constitutes a physical change in the condition of the property from a satisfactory state to an unsatisfactory state, occasioned by an accident or fortuitous event; with no requirement that the property fail in service or lose all functionality; (2) Westlake is entitled to recover the costs of repairing or replacing any property that has suffered damage as a result of the Tank Car Rupture, including any additional damage to equipment that was in a less-than-pristine condition prior to the Tank Car Rupture; and (3) for any equipment that requires replacement, in circumstances where an exact one-for-one replacement is impossible due to advances in technology, Westlake is entitled to the functional replacement cost." *Id.* at 3; *see also* Pl's Prop. Ord. ("...this Court concludes that damages are to be calculated under the policies as follows...").

7. On or about December 21, 2021, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Legal Issues Relating to the Calculation of Defendants' Liability Under the Policies, arguing the motion should be denied because Plaintiffs have failed to satisfy their burden that their claimed damages constitute direct physical loss or damage during the policy period due to the chlorine release and that pre-existing damage is not covered. *See* Defs' Resp., p. 9, 11. Further, Defendants argue Plaintiffs' recovery, if any, would be limited to actual cash value, based on the Policies. *Id.* at 16. In its request for relief, Defendants asked this Court to deny the instant motion, and grant Defendants' Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages, which they incorporated by reference. *Id.* at 18.

8. On or about January 18, 2022, Plaintiffs' filed their Reply, arguing the instant motion and Defendants' Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages are not mirror images of each other and averring that "Westlake's

Damages Motion is a motion for partial summary judgment that asks the Court to issue rulings on two discrete purely legal issues: (1) the meaning and application of the Basis of Recovery provision in the Policies; and (2) the application of Georgia law with respect to the valuation of damaged property. *See Reply*, p. 2.

9. Meanwhile, on December 17, 2021, Defendants filed a Notice of Appeal of three November 19, 2021 coverage summary judgment decisions^[1] in this civil action.

10. On or about January 26, 2024, a Notice of Dismissal and Order of the West Virginia Supreme Court of Appeals was issued, dismissing the Insurers' appeal of the aforementioned November 2021 Partial Summary Judgment Orders concerning coverage. The Court held a Status Conference on February 7, 2024. The Supreme Court issued its Mandate, certifying its opinion as final on or about March 5, 2024.

11. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial 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

Plaintiffs argue this Court should issue an order stating that as a matter of law and a conclusion that damages under the Policies are as follows: “(1) “physical loss or damage” compensable under the Policies constitutes a physical change in the condition of the property from a satisfactory state to an unsatisfactory state, occasioned by an accident or fortuitous event; with no requirement that the property fail in service or lose all functionality; (2) Westlake is entitled to recover the costs of repairing or replacing any property that has suffered damage as a result of the Tank Car Rupture, including any additional damage to equipment that was in a less-than-pristine condition prior to the Tank Car Rupture; and (3) for any equipment that requires replacement, in circumstances where an exact one-for-one replacement is impossible due to advances

in technology, Westlake is entitled to the functional replacement cost." *Id.* at 3; *see also* Pl's Prop. Ord. ("...this Court concludes that damages are to be calculated under the policies as follows...").

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 finds the relief requested in the instant motion moot. 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 Plaintiffs' Motion for Partial Summary Judgment Regarding Legal Issues Relating to the Calculation of Defendants' Liability Under the Policies 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.

[1] On November 19, 2021, the Court denied the Insurers' Coverage Summary Judgment Motions and granted Westlake's cross motions on the "corrosion," "faulty workmanship," and "contamination/pollution" exclusions.

/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.courtsww.gov/e-file/ for more details.