

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

This matter came before the Court this 23rd day of May, 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 to Strike Supplemental Expert Report of Alice V. Edwards and Exhibits Thereto, and for Expedited Hearing. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), 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 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.

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

3. April 30, 2021 was the cut-off date for incurred costs that was captured in Plaintiffs’ expert, Alice V. Edwards’s, original report. See Pl’s Resp., p. 2.

4. On December 17, 2021, Defendants filed a Notice of Appeal of three November 19, 2021 coverage summary judgment decisions[\[1\]](#) in this civil action.

5. 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.

6. Thereafter, the Court held a Status Conference on February 7, 2024. At the status conference, conference was had regarding whether any discovery was necessary. Counsel requested limited discovery into information that relates to additional costs associated with ongoing repairs of equipment damaged as a result of the rupture that have been incurred since the Insurers filed their appeal in December 2021. The Court gave leave of sixty days for limited discovery to disclose an update on damages. Defendants would then have until July 19, 2024 for discovery related to Plaintiff's supplemental damages information.

7. The Supreme Court issued its Mandate, certifying its opinion as final on or about March 5, 2024.

8. On April 8, 2024, Plaintiffs served a supplemental expert report signed by Alice Edwards. See Def's Mot., p. 2; see *also* Def's Mot., Ex. A. The Supplemental Report details incurred costs through February 29, 2024. See Pl's Resp., p. 3.

9. On or about April 22, 2024, Defendants filed the instant motion, seeking this Court to strike the Supplemental Report and exhibits. See Defs' Mot., p. 4. In the alternative, Defendants argue they should be allowed the opportunity to supplement their own expert opinions in response to the Supplemental Report. *Id.*

10. On or about May 7, 2024, Plaintiffs filed Plaintiffs' Brief in Opposition to Defendants' Motion to Strike Supplemental Report of Alice V. Edwards, arguing that the Supplemental Report was served consistent with the parties' discussion at the conference and the Court's directive, and that the Report merely updates certain damages figures given the passage of time since the April 30, 2021 cut-off date for incurred costs that was captured in her original report, and provides documentary support for the same. See Pl's Resp., p. 2. Plaintiffs do not oppose Defendants'

alternative request for an opportunity to supplement their expert opinions in response to Ms. Edwards's Supplemental Report. *Id.* at 8. Plaintiff avers it would then reserve the right to take depositions of the Insurers' experts regarding the opinions set forth in any such supplemental report served by them. *Id.*

11. On or about May 16, 2024, Defendants filed their Reply, arguing the Supplemental Report is not limited to the additional incurred costs through February 29, 2024, but also discusses additional information relevant to and support of future costs which should not be allowed. See Reply, p. 2. Defendants aver fact discovery is over, and Plaintiffs should not be allowed to supplement the factual record with new information or opinions regarding future costs. *Id.* at 3-4.

12. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Under West Virginia law, trial courts have broad discretion to impose and enforce discovery deadlines. See *Sheely v. Pinion*, 490 S.E.2d 291, 295 (W. Va. 1997). Rule 26(e) of the West Virginia Rules of Civil Procedure governs supplementation of responses. Rule 26(e)(1) provides, in pertinent part:

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:

...

(B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

W. Va. R. Civ. P. 26(e)(1)(B).

Defendants argue the April 8, 2024 Supplemental Report is untimely under the Scheduling Order. See Def's Mot., p. 3. Further, Defendants argue the Supplemental Report is outside of the scope of this Court's directive as it discusses additional facts, such as additional equipment purportedly harmed, and provides additional analysis to support the estimates that form the bulk of Plaintiffs' claim, even though the claim damages number itself remains unchanged. *Id.* Defendants also argue Plaintiffs should have supplemented their responses to Defendants' written discovery request pertaining to damages, rather than serving the Supplemental Report. *Id.* at 2.

Finally, Defendants argue Plaintiffs are attempting to bolster a damages claim, the majority of which is irrelevant because it is unrecoverable as a matter of law because the Court has already ruled that Plaintiffs' damages resulting from the tank car leak on August 27, 2016 are "\$5.9 million as a matter of law, prior to the application of the appropriate \$3.75 million deductible." *Id.* at 3-4.

On the other hand, Plaintiffs argue the Supplemental Report is timely as it was served in the timeframe discussed at the February 7, 2024 status conference. See Pls' Resp., p. 4-5. In doing so, Plaintiffs argue the Day Order from the February 7, 2024 status conference did not direct that the damages update be in the form of written discovery responses, rather than an updated damages expert report; however, Plaintiffs averred they have "no issue with" serving a supplemental interrogatory response encompassing the updated damages figures. *Id.* at 5. Plaintiffs also argue that the Supplemental Report is within the scope of the discovery contemplated at the February 7, 2024 status conference because it does pertain to updated damages figures, in that it updates the claimed damages relating to damaged equipment that has already been repaired or replaced, and that Defendants ignore the difference between that and

damaged equipment that has yet to be repaired or replaced. *Id.* at 5. Further, Plaintiffs allege the damages information is relevant, because if the Superior Court of Pennsylvania modifies the judgment or remands the Pennsylvania litigation back to the trial court level, the Court's collateral estoppel ruling may be rendered moot. *Id.* at 6.

Defendants argue in Reply that Plaintiffs ignore the Court's collateral estoppel ruling and relitigating an issue upon which a jury has already returned a verdict would be unnecessarily duplicative and waste of judicial resources. See Reply, p. 4. With regard to the interrogatory responses, Defendants averred in the Reply that the Response did not offer a justification for why Plaintiffs elected to submit a supplemental expert report concerning the entirety of their alleged damages in this case, as opposed to discrete, sworn interrogatory responses limited only to any recent incurred costs. *Id.* at 1-2.

Here, the Court does not find the April 8, 2024 Supplemental Report as untimely as the issue of limited discovery into updated damages due to the passage of time from the aforementioned appeal was discussed at the status conference.

The Court addresses Defendants' argument that the Supplemental Report is outside of the scope of this Court's directive as it discusses additional facts, such as additional equipment purportedly harmed, and provides additional analysis to support the estimates that form the bulk of Plaintiffs' claim, even though the claim damages number itself remains unchanged. See Def's Mot., p. 2.

Although the issue of damages is settled in this case through the Court's collateral estoppel ruling, the Court notes this is merely a discovery ruling, pertaining to the existence of the Supplemental Report in the record. Therefore, the Court finds there no reason to strike it from the record. This is not an admissibility ruling. As Defendants pointed out in a footnote, they reserve all rights to challenge the admissibility of the opinions of Ms. Edwards in accordance with applicable law. See Def's Mot., p. 3. The

Court notes again that the existence of and the measure of damages to the Plant has been settled by the Pennsylvania jury and adopted by this Court. That the Plant was damaged is a seminal fact determined by the Pennsylvania jury and is applied here.

In sum, the Court finds the Supplemental Report shall not be stricken.

With regard to Defendants' argument regarding whether a supplemental discovery response should have been provided, the Court's notes from the status conference reflect the parties were directed to supplement with regards to Interrogatories related to damages, but the Court notes the Day Order stated that Plaintiffs were "given sixty days of the entry of this Order to supplement any updated damages figures given the passage of time, and after that supplementation, Defendants will have until July 19, 2024 to complete any discovery." See Ord., 2/7/24, ¶2. However, pursuant to the plain language of Rule 26(e) of the West Virginia Rules of Civil Procedure's duty to supplement, this Court directs that Plaintiffs also serve a supplemental interrogatory response encompassing the updated damages figures within ten (10) days of the entry of this Order.

The Court also notes Defendants' alternative request for relief, which was not objected to by Plaintiffs, that Defendants should be allowed the opportunity to supplement their own expert opinions in response to the Supplemental Report, is granted. The deadline for this limited inquiry into discovery remains July 19, 2024 at this time. If the alternative relief and remaining discovery related to updated damages figures cannot be reasonably completed by this date, the parties are instructed to seek leave from this Court regarding the same.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion to Strike Supplemental Expert Report of Alice V. Edwards and Exhibits Thereto, and for

Expedited Hearing is hereby DENIED. It is further hereby ADJUDGED and ORDERED that Plaintiffs serve a supplemental interrogatory response encompassing the updated damages figures within ten (10) days of the entry of this Order. 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.courtswv.gov/e-file/ for more details.