Brakebush Bros., Inc. v. Certain Underwriters at Lloyd's of London - Novae 2007 Syndicate Subscribing to Pol'y No. 93PRX17F157, 2024 NCBC Order 65.

STATE OF NORTH CAROLINA

DAVIE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 367

BRAKEBUSH BROTHERS, INC. AND HOUSE OF RAEFORD FARMS,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON - NOVAE 2007 SYNDICATE SUBSCRIBING TO POLICY WITH NUMBER 93PRX17F157; HALLMARK SPECIALTY INSURANCE CO.; EVANSTON INSURANCE CO.; MAXUM INDEMNITY CO.; HUDSON SPECIALTY INSURANCE CO.; LIBERTY SURPLUS INSURANCE CORPORATION; IRONSHORE SPECIALTY INSURANCE CO.; and CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON -BRIT SYNDICATE 2987 SUBSCRIBING TO POLICY WITH NUMBER PD-l0972-00,

Defendants.

ORDER ON PRE-TRIAL MOTIONS

1. **THIS MATTER** is before the Court on Defendants' Motion to Exclude Plaintiffs' Expert Kenneth D. Ritter ("Defendants' Motion to Exclude Ritter's Testimony," ECF No. 232); Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Experts, Timothy Eplee and Jerome Hammar ("Plaintiffs' Motion to Exclude Eplee and Hammar," ECF No. 235); Plaintiffs Motions in *Limine* (ECF No. 278); and Defendants First through Twelfth Motions in *Limine* (ECF Nos. 296–306, 310) (collectively, "Motions").

2. The broader factual and procedural background of this case is discussed in greater detail in prior opinions of the Court. (*See e.g.*, ECF Nos. 93, 184, 215.)

3. The Motions have been fully briefed, came on for a hearing via Webex on 8 October 2024 at which all parties were represented by counsel, and are now ripe for resolution.

ANALYSIS

4. "A Motion in limine seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]" *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 792 (2007) (cleaned up). The Court's rulings on motions *in limine* are interlocutory and "subject to modification during the course of the trial." *Id.* (cleaned up).

5. North Carolina Rule of Evidence 402 states that, unless barred by specific limitations, "[a]ll relevant evidence is admissible[.]" N.C. R. Evid. 402. Irrelevant evidence, on the other hand, is always inadmissible. *Id.* Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of [an] action more probable or less probable[.]" N.C. R. Evid. 401. Thus, trial judges are given "great freedom to admit evidence . . . if it has any logical tendency to prove any fact that is of consequence." *State v. Wallace*, 104 N.C. App. 498, 502 (1991) (cleaned up).

6. That said, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,

or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403.

7. Ultimately, the Court has " 'wide discretion' " when ruling on motions *in limine*. *Hopkins v. MWR Mgnt. Co.*, 2017 NCBC LEXIS 92, at *7 (quoting *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 792 (2007).

A. Motions to Exclude Expert Testimony

i. Defendants' Motion to Exclude Plaintiffs' Expert Kenneth D. Ritter

8. In this Motion, Defendants seek to exclude Kenneth Ritter, Plaintiffs' sole designated expert witness in this case, from testifying at trial. Plaintiffs intend to offer expert testimony at trial from Ritter, the managing director of a company called BDO, regarding "the reasonableness and accuracy of the replacement cost amount[s]" in Brakebush's insurance claim resulting from the fire damage at issue to the Mocksville plant formerly owned by Plaintiff House of Raeford Farms ("Raeford") and currently owned by Plaintiff Brakebush Brothers, Inc. ("Brakebush"). (Ritter Dep., at 7, 123–24, ECF No. 214.3.)

9. In a nutshell, Defendants argue that (1) Ritter is unqualified to testify as an expert witness on this subject; (2) his opinions are unreliable because he failed to conduct an independent investigation into the areas upon which his opinions are based—instead basing his opinions almost entirely upon information and methodologies supplied by other individuals (namely, Plaintiffs' representative, Carey Brakebush); and (3) his opinions impermissibly "parrot" those of Carey Brakebush.

10. “The Court evaluates a motion to exclude an expert’s testimony under Rule 702 of North Carolina Rules of Evidence, which is now virtually identical to its federal counterpart[.]” *Loyd v. Griffin,* 2023 NCBC LEXIS 34, at *6 (N.C. Super. Ct. Mar. 6, 2023). Subsection (a) of Rule 702 states:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
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> (1) The testimony is based upon sufficient facts or data.
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> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

11. North Carolina courts apply the Rule 702(a) factors in accordance with the United States Supreme Court’s analysis in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See State v. McGrady*, 368 N.C. 880, 890 (2016) (“In its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3).”).

12. “The focus of the trial court's inquiry ‘must be solely on [the] principles and methodology’ used by the expert, ‘not the conclusions that they generate.’ ” *See Loyd*, 2023 NCBC LEXIS 34, at *7 (quoting *Daubert*, 509 U.S. at 595). Moreover, “ ‘questions relating to the bases and sources of an expert’s opinion affect only the weight to be assigned that opinion rather than its admissibility.’ ” *Id.* (quoting *Pope*

v. Bridge Broom, Inc., 240 N.C. App. 365, 374 (2015)). In practice, this means that the Court " 'does not examine whether the facts obtained by the [expert] witness are themselves reliable—whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.' " *Id.* (quoting *Pope*, 240 N.C. App. at 374).

13. Our Supreme Court has also observed that "[t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony[,]" and that trial courts exercise considerable discretion when applying the three factors. *McGrady*, 368 N.C. at 890. Likewise, when applying the principles set forth in *Daubert*, the Court "may seek guidance from federal case law." *Loyd*, 2023 NCBC LEXIS 34, at *8 (cleaned up).

14. First, Defendants seek to exclude Ritter's testimony on the ground that he is unqualified to testify as an expert witness on the subject at issue.

15. Although Ritter's educational background does not render him qualified to serve as an expert witness in this case, Rule 702(a) also allows for expert witnesses to be qualified by virtue of their work experience. *See* N.C. R. Evid. 702(a). The record reflects that Ritter has worked as a property loss insurance advisor since 1976. (ECF No. 234.2.) He has "45 years of experience working with remediation contractors and the costs that they charge[.]" (Ritter Dep., at 26.) His experience includes work with both insurance companies and policyholders, and he has lectured at professional conferences on a number of insurance-related subjects, including topics relating to the calculation of replacement cost value. (Ritter Dep., at 38; "Ritter

CV," ECF No. 234.2.) Moreover, Ritter has prior experience testifying as an expert witness in insurance-based lawsuits—at least one of which involved calculating losses on a replacement cost value basis. (Ritter CV; Ritter Dep., at 24.)

16. The Court finds that Defendants have failed to establish that Ritter is not qualified to testify as an expert witness in this case.

17. Second, Defendants contend that Ritter conducted only a cursory investigation into the damage to the Mocksville plant from the subject fire and instead obtained the bulk of the information that forms the basis for his opinions from Carey Brakebush and other Brakebush representatives. Similarly, Defendants assert that he failed to undertake his own "like kind and quality" analysis regarding the machinery and equipment damaged in the fire.

18. Ritter acknowledges that he did, in fact, rely on information supplied by Carey Brakebush in the course of his work in this case, but testified that he also relied on other sources as well, such as "scope damage assessment letters that were prepared by J.S. Held[,]" as well as extensive photographs, videos, and documents. (Ritter Dep., at 130.) Ritter also visited the Mocksville plant after he was retained as an expert witness in order to gain a greater familiarity with the plant and its machinery and equipment. (Ritter Dep., at 110.)

19. Ritter further testified as to the work he has done in this case in a declaration filed on 4 December 2023, which reads, in relevant part:

> As I stated in my report dated November 17, 2022, as a property loss insurance advisor and an expert in the field of measuring damages resulting from a variety of causes, including property damages, I was asked to quantify and document the real and business personal property

> damage losses as a result of the December 2017 fire. My BDO team worked with Brakebush representatives to gain an understanding of the circumstances surrounding the fire and to identify relevant information and documents necessary to measure the property damage losses associated with the Incident.
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> …
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> As I explained in my November 2022 report, in developing my opinion with respect to the claim at issue in this case, I reviewed hundreds of documents spanning thousands of pages, including financial information, the actual repair and replacement cost information, invoices, spreadsheets, specifications, allocations, pre- and post-loss drawings, pre- and post-loss photos, and other data supporting the repair and replacement of the damaged real and personal property as a result of the fire at issue, including whether the repair and replacement of the damaged real and personal property was of a like kind and quality to the property damaged.
>
> In addition to that document review, I conducted a walkthrough of the Mocksville Plant and met with key Brakebush representatives such as Carey Brakebush, Terri Jaster, and Bob Randall to develop a greater understanding of the losses.

(Declaration of Kenneth Ritter Supp. Pls.' Op. Defs.' Mot. Exclude Pls.' Expert Kenneth D. Ritter ¶¶ 7, 13–14, ECF No. 239.)

20. It is well-settled that expert witnesses are permitted to obtain data from other sources. Rule 703 of the North Carolina Rules of Evidence provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. R. Evid. 703; *see also Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374 (2015) ("[E]xperts may rely on data and other information supplied by third parties. . . even if the data were prepared for litigation by an interested party. Unless the expert's opinion is too speculative, it should not be rejected as unreliable merely because the

expert relied on the reports of others." (cleaned up)); *Loyd v. Griffin*, 2023 NCBC LEXIS 34, at *10 (N.C. Super. Ct. March 6, 2023) (same); Kerry *Bodenhamer Farms, LLC v. Nature's Pearl Corp.*, 2018 NCBC LEXIS 239, at *8 (N.C. Super. Ct. Dec. 20, 2018) ("Although KB Farms argues that Ghaedian should have performed a more thorough and independent investigation, our Court of Appeals has held that experts may rely on data and other information supplied by third parties even if the data were prepared for litigation by an interested party. It is also reasonable for an expert to make assumptions so long as those assumptions are sufficiently grounded in available facts. Arguments that the expert's assumptions are unfounded typically go to the weight, not the admissibility, of the testimony." (cleaned up)).

21. Thus, the exclusion of Ritter's testimony is not appropriate simply because he relied upon information he received from others about the damage to the plant from the fire. Nor is he required to have had personal familiarity with the condition of the Mocksville plant prior to the fire.

22. Third, Defendants have not shown that Ritter's opinions consist of nothing more than him "vouching" for the opinions reached by Carey Brakebush.

23. We have previously held that

> [e]xperts cannot merely vouch for the opinions of others. Vouching occurs when an expert merely "parrots" or "rubber stamps" an opinion from another witness. . . . Experts cannot merely vouch for the opinions of others. *See, e.g., State v. Bullock*, No. COA10-320, 2010 N.C. App. LEXIS 2058, at *7 (N.C. Ct. App. Nov. 2, 2010) ("[E]xpert testimony is not admissible to vouch for a witness's credibility."); *see also, e.g., Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 664 (S.D.N.Y. 2007) ("[T]he expert witness must in the end be giving his *own* opinion."); *FrontFour Capital Grp. LLC, v. Taube*, C.A. No. 2019-0100-KSJM, 2019 Del. Ch. LEXIS 97, at *50 (Del. Ch. Mar. 11,

> 2019) ("[The expert] opined that the process used by various investment banks was reasonable, but an expert cannot simply vouch for the work of someone else.") . . . [s]ee*, e.g., Iconics, Inc. v. Massaro*, 266 F. Supp. 3d 461, 469 (D. Mass. 2017) ("Nor may an expert 'parrot' the conclusions of other witnesses, although an expert may rely on other witness's testimony or other expert conclusions to form an opinion."); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 544 (C.D. Cal. 2012) ("[A]n expert can appropriately rely on the opinions of others if other evidence supports his opinion and the record demonstrates that the expert conducted an independent evaluation of that evidence."); *Therasense, Inc. v. Becton, Dickinson & Co.*, No. C 04-02123 WHA, 2008 U.S. Dist. LEXIS 124780, at *18 (N.D. Cal. May 22, 2008) ("[T]he expert might scrutinize a . . . test, its protocol, and its participants so carefully that it would be reasonable to rely on it after the fact.").

Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd., 2020 NCBC LEXIS 56, at **223 (N.C. Super. Ct. Apr. 27, 2020) (cleaned up).

24. In his declaration, Ritter testified that after his review of the materials set out above, he "then prepared analyses and spreadsheets measuring and documenting Brakebush's property damage losses." (Ritter Declaration ¶ 15). During his deposition, Ritter testified at length on this issue, repeatedly explaining that he independently verified the reasonableness of Brakebush's calculations, rather than simply rubber-stamping them. (*See*, *e.g.*, Ritter Dep., at 128, 149, 164–65.)[1]

25. In sum, the record reveals that Ritter formulated his opinions only after reviewing hundreds of documents spanning thousands of pages—along with a wealth of photographs and videos—and after visiting the Mocksville plant in person. Furthermore, he performed an independent valuation of the property damage loss based on his experience in the industry in order to arrive at conclusions regarding

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[1] Indeed, the Court notes that Ritter's assessment of the total amount of Brakebush's property loss differed from Brakebush's calculations by approximately $1.5 million.

the reasonableness of Brakebush's insurance claim. His expert testimony is therefore admissible. *See Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 2020 NCBC LEXIS 56, at **223–24 (N.C. Super. Ct. Apr. 27, 2020) (an expert who performs "detailed, independent analyses using customary valuation techniques" and who "rel[ies] on his training and expertise" in forming his opinions may offer such opinions at trial).

26. To be sure, Defendants have raised a number of issues with respect to alleged deficiencies in Ritter's analysis that can—and no doubt will—provide fodder for a vigorous cross-examination of him at trial. However, these issues go to the weight of Ritter's testimony as opposed to its admissibility. As we have previously stated:

> [C]ourts "should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citing *Cavallo v. Star Enter.*, 100 F.3d 1150, 1158-59 (4th Cir. 1996)). Importantly, expert testimony, like all other admissible evidence, "is subject to being 'tested by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.' " *Id.* (quoting *Daubert*, 509 U.S. at 596).
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> . . .
>
> [Moreover,] questions relating to the bases and sources of an expert's opinion affect only the *weight* to be assigned that opinion rather than its *admissibility*. In other words, this Court does not examine whether the facts obtained by the [expert] witness are themselves reliable -- whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.

Loyd, 2023 NCBC LEXIS 34, at *7–9 (emphasis added).

27. Therefore, Defendants' Motion to Exclude Ritter's Testimony is **DENIED**.

ii. Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Experts, Timothy Eplee and Jerome Hammar

28. Plaintiffs request that the Court enter an order *in limine* prohibiting Timothy Eplee and Jerome Hammar—Defendants' two expert witnesses—from testifying at trial regarding certain topics. Specifically, Plaintiffs request that both Eplee and Hammar be (1) precluded from testifying about Brakebush's state of mind or motivations in connection with its insurance claim following the subject fire to the Mocksville plant; (2) prohibited from testifying about their experiences handling prior, unrelated fire insurance claims at Raeford's facilities in Teachey, North Carolina (the "Teachey Plant") and Maxton, North Carolina (the "Maxton Plant"); and (3) barred from offering duplicative expert testimony at trial in which one of them merely parrots the other's opinions. The Court will take each of these three issues in turn.

1. Testimony Regarding Brakebush's Intent

29. Plaintiffs seek the exclusion of any testimony by Eplee or Hammar purporting to opine on the allegedly fraudulent intent of Brakebush in submitting its insurance claim in this action.

30. It is well established that expert witness testimony regarding a party's intent, motive, or state of mind is improper. *See, e.g.*, *Yates v. J.W. Campbell Elec. Corp.*, 95 N.C. App. 354, 360 (1989) ("We think that Mr. Kirk has ventured out of his areas of expertise by giving an opinion as to the defendant's state of mind as being in 'substantial disregard for the lives and safety of motorists' and characterizing its conduct as 'active.' These are legal conclusions, and as a specialist in civil

engineering, highway design, and traffic engineering, the witness is not competent to render an opinion on legal questions."); *Smith v. Wyeth-Ayerst Labs. Co.*, 278 F. Supp. 2d 684, 700 (W.D.N.C. Apr. 16, 2003) ("[T]he jury, not the witnesses, should consider the facts and make its own determination regarding Defendant's intent."); *BorgWarner, Inc. v. Honeywell Intern., Inc.*, 750 F. Supp. 2d 596, 611 (W.D.N.C. Sept. 27, 2010) ("The Court further concludes that Goolkasian's [expert] opinion regarding intent . . . also should be excluded. Honeywell's intent . . . is a question for the trier of fact to decide and does not require the admission of expert testimony.").

31. Accordingly, this portion of Plaintiffs' Motion is **GRANTED**. Although Defendants' expert witnesses shall be permitted to offer otherwise admissible testimony from which a *jury* could conclude that Brakebush's insurance claim was fraudulent, they shall not be permitted to testify as to their own opinions regarding Brakebush's intent, motive, or state of mind.

2. Testimony Regarding the Teachey and Maxton Plants

32. Plaintiffs have asked the Court to exclude evidence by Eplee or Hammar relating to the handling of Raeford's insurance claims with regard to the Teachey or Maxton plants on the ground that such evidence lacks legal relevance in that it has no bearing on the damage to the *Mocksville* plant (which is the only relevant issue in this action). Plaintiffs further submit that they would suffer undue prejudice if this evidence were admitted, and that jury confusion would result from the introduction of such evidence. Plaintiffs contend that Defendants seek to offer this evidence in order to contrast the "reasonableness" of Raeford with regard to the insurance claims

submitted in connection with fire damage at the Teachey and Maxton plants with the "unreasonableness" of Brakebush regarding the insurance claim for the Mocksville plant fire damage that is at issue here.

33. The Court agrees with Plaintiffs that any slight probative value that may exist as to evidence regarding the Teachey or Maxton plants introduced for this purpose would be substantially outweighed by the danger of unfair prejudice to Plaintiffs.

34. Therefore, to the extent that Plaintiffs seek an order prohibiting Defendants' expert witnesses (along with their other witnesses) from testifying about insurance claims submitted by Raeford in connection with the Teachey or Maxton Plants for the above-referenced purpose, Plaintiffs' Motion is **GRANTED**.

35. However, in the event that Defendants seek to introduce evidence regarding the Teachey or Maxton plants for some other purpose, then Defendants shall make that request known to the Court *outside of the presence of the jury* so that the Court may make a ruling on the admissibility of the evidence at that time. Accordingly, to the extent that Plaintiff's Motion seeks a ruling prohibiting any mention of the Teachey or Maxton plants for *any* purpose, the Court **DEFERS** any such ruling until trial.

3. Duplicative Testimony

36. Plaintiffs next request that the Court prohibit Eplee or Hammar from offering duplicative expert testimony that merely "parrots" opinion testimony given by the other. This portion of Plaintiffs' Motion appears to be based upon several

exchanges that occurred during Hammar's deposition. The first exchange occurred during his testimony about a "rear dock" that was installed at Brakebush's Mocksville plant after the fire. That exchange reads in relevant part as follows:

> Q. Why do you think that's incorrect?
>
> A. I spoke to Tim Eplee about it.
>
> Q. So this is Mr. Eplee's opinion and not yours?
>
> A. Yes.

("Hammar Depo.," at 215, ECF No. 236.1.) The second exchange reads:

> Q. And so then, again, my question would be, you know, can you give me everything that you're basing that assessment on?
>
> A. Input from Tim.
>
> Q. To what extent did you and Mr. Eplee work together in preparing your expert report?
>
> A. I called him once to ask what specific pieces of equipment, I think three pieces, is he covering or am I covering.
>
> Q. Okay.
>
> A. And that was it. We didn't discuss outcomes or approaches whatsoever. We were just discovering the scope within each of our coverages.
>
> Q. And so to the extent that you did offer an opinion as to the correct percentage to be used in this case, you would simply be adopting Mr. Eplee's opinion; is that right?
>
> A. Pretty much, yes.
>
> Q. Does that apply -- we've been talking about the electrical, does that apply to the electrical?
>
> A. In that case, yes.

Q. Okay. Are there other portions of the claim that that applies to as well where you may have included some costs that you're adopting Mr. Eplee's view?

A. There could be, yes, but I don't have the specifics right now.

(Hammar Depo., at 77–78.)

37. Plaintiffs contend that this testimony suggests that Hammar intends to offer opinion testimony at trial that simply parrots the opinions of Eplee. As discussed above in the Court's analysis of Defendants' argument seeking to exclude the expert testimony of Ritter, an expert witness is not permitted to simply repeat the opinion of another person.

38. Accordingly, the Court concludes that Hammar shall be precluded from offering opinions at trial that do nothing other than repeat opinions offered by Eplee as to which Hammar has no proper basis for offering opinion testimony under Rules 702 and 703.[2] Accordingly, this aspect of Plaintiffs' Motion is **GRANTED**.

B. Plaintiffs' Motions in *Limine*

i. First Motion

39. Plaintiffs' First Motion in *Limine* seeks the exclusion of evidence about other insurance claims previously submitted by either Plaintiff on the grounds that such evidence is irrelevant to this case and would be unduly prejudicial.

40. Courts have generally held in similar contexts that other insurance claims submitted by the same insured or handled by the same insurance company lack legal relevance at trial. *See, e.g.*, *Burley v. Homeowners Warranty Corp.* 773 F.

[2] The Court's ruling likewise prohibits Eplee from simply parroting an opinion reached by Hammar.

Supp. 844, 858 (S.D. Miss. 1990) ("Without question, if evidence of other claims were allowed by the court, there would be, in effect, a mini-trial on each such claim. That is wholly unacceptable where the only claims that are material are the claims of the plaintiffs in this litigation. In sum, the admission of such evidence would be unduly time-consuming, unfairly prejudicial and unnecessarily confusing and will not be permitted").

41. The Court likewise finds that evidence regarding other insurance claims submitted by Plaintiffs lacks probative value. Alternatively, assuming such evidence possesses any slight probative value, that probative value is substantially outweighed by the likelihood of undue prejudice to Plaintiffs and the potential for jury confusion. Accordingly, this Motion is **GRANTED** subject to the caveat referenced above in connection with Paragraph 35.

ii. Second Motion

42. Plaintiffs' Second Motion in *Limine* requests an order prohibiting Defendants from offering any evidence or argument at trial that the two companies—J.S. Held and Crawford & Company (the "Consultants")—who performed work investigating the extent of the fire damage at the Mocksville plant and adjusting the fire loss insurance claim were not Defendants' agents.

43. "There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435 (2005). The existence of a principal-

agent relationship is typically a question of fact for the jury. *See Vares v. Vares*, 154 N.C. App. 83, 87 (2002) ("The question of agency is a factual one and therefore generally a matter for the jury[.]").

44. Plaintiffs contend that the evidence points to the existence of an agency relationship between Defendants and the Consultants because (1) Defendants themselves conducted no investigation of the fire loss at the Mocksville plant separate from the work performed by their Consultants; (2) Defendants had control over the Consultants' work and paid their bills; and (3) during discovery, Defendants, on at least one occasion, asserted a work product privilege over documents relating to the Consultants' work.

45. However, at no time during this litigation has the Court been asked to rule as a matter of law on the issue of whether an agency relationship existed between Defendants and the Consultants. The Court does not believe that such a ruling would be appropriate at the motion in *limine* stage.

46. Accordingly, Plaintiffs' Second Motion in *Limine* is **DENIED**.

iii. Third Motion

47. Plaintiffs' Third Motion in *Limine* requests that the Court enter an order prohibiting the introduction of evidence regarding discovery disputes that have existed between the parties in this case. Plaintiffs contend that evidence as to such disputes lacks relevance and would only serve to prejudice them in the eyes of the jury.

48. The Court agrees with Plaintiffs that evidence of prior discovery disputes lacks legal relevance to the issues for resolution by the jury in this case and should not be the subject of *substantive* evidence. However, in appropriate circumstances, statements or conduct occurring in connection with discovery disputes (or that form the basis for such disputes) can properly be the subject of impeachment by the opposing party.

49. Therefore, Plaintiffs' Third Motion in *Limine* is **GRANTED** in part and **DENIED** in part.

iv. Fourth Motion

50. Plaintiffs' Fourth Motion in *Limine* requests that the Court enter an order prohibiting Defendants from introducing evidence of the price Brakebush paid Raeford to purchase the Mocksville plant and of Raeford's allocation of values regarding the plant that is contained within the Asset Purchase Agreement ("APA") evidencing the sale of the plant.

51. At the 8 October hearing, Plaintiffs' counsel effectively conceded that the purchase price and the bulk of the provisions in the APA are admissible at trial.

52. Plaintiffs' primary concern with this evidence appears to be the potential for prejudice they would suffer if the jury mistakenly believes that the purchase price or the statement of values associated with the Mocksville plant—as set out in the APA—are synonymous with the replacement cost value of the portions of the plant that were damaged in the subject fire.

53. However, the Court is not presently persuaded that this concern is a sufficient basis to preclude the admission of this evidence at trial. Any potential for confusion should be eliminated by Plaintiffs' ability to offer evidence on this subject at trial. Because such evidence is relevant and is not substantially outweighed by the danger of unfair prejudice to Plaintiffs or the likelihood of jury confusion, Plaintiffs' Fourth Motion in *Limine* is **DENIED**.

C. Defendants' Motions *in Limine*

i. First Motion

54. Defendants' First Motion *in Limine* requests that the Court enter an order prohibiting the introduction of evidence of any prior claims, lawsuits, or complaints against Defendants that allege the improper handling of insurance claims.

55. The Court agrees that such evidence lacks relevance and, alternatively, assuming any slight probative value exists from such evidence, it is substantially outweighed by the danger of unfair prejudice to Defendants. Therefore, Defendants' First Motion in *Limine* is **GRANTED**.

ii. Second Motion

56. Defendants' Second Motion in *Limine* requests that the Court enter an order prohibiting the introduction of evidence concerning the "financial condition and comparative wealth of the parties."

57. "Courts . . . routinely bar references to one party's financial resources, or lack thereof, on prejudice grounds." *Vitaform, Inc. v. Aeroflow, Inc.*, 2023 NCBC LEXIS 57, at *4 (N.C. Super. Ct. April 6, 2023).

58. Therefore, Defendants' Second Motion in *Limine* is **GRANTED**, and both sides are prohibited from introducing evidence concerning the financial condition or wealth of the parties.

iii. Third Motion

59. Defendants' Third Motion in *Limine* requests that the Court enter an order excluding the testimony of any fact witnesses not previously identified and disclosed during discovery.

60. The Court agrees that no party shall be permitted to offer the testimony of any witnesses not previously identified and disclosed during discovery (absent prior approval by the Court upon a showing of good cause). The Court notes that this issue has now likely been resolved through the parties' exchange of witness and exhibit lists pursuant to the Court's Pre-Trial Scheduling Order (ECF No. 277).

61. Therefore, Defendants' Third Motion in *Limine* is **GRANTED**.

iv. Fourth Motion

62. Defendants' Fourth Motion in *Limine* requests that the Court enter an order excluding the testimony of any expert witnesses not previously identified and disclosed during discovery.

63. The Court agrees that no party shall be permitted to offer the testimony of any expert witness not previously identified and disclosed during discovery.

64. Therefore, Defendants' Fourth Motion in *Limine* is **GRANTED**.

v. Fifth Motion

65. Defendants' Fifth Motion in *Limine* requests that the Court enter an order excluding any evidence of industry standards, causation, damage, or other opinions of Plaintiffs' expert witness not disclosed prior to trial.

66. The Court agrees that no party shall be permitted to offer opinions from their respective expert witnesses that have not previously been identified and disclosed during discovery.

67. Therefore, Defendants' Fifth Motion in *Limine* is **GRANTED**.

vi. Sixth Motion

68. Defendants' Sixth Motion in *Limine* requests that the Court enter an order excluding any evidence of damages in the form of records, reports, bills, or other documentation of damages not produced during discovery, along with all journals, articles, materials, and other literature not produced by Plaintiffs during discovery or cited or relied upon by Plaintiffs' expert in his deposition.

69. The Court agrees that no party shall be permitted to introduce documentary evidence not previously identified and disclosed during discovery (absent prior approval by the Court upon a showing of good cause). The Court notes that this issue has likely been resolved through the exchange of witness and exhibit lists pursuant to the Court's Pre-Trial Scheduling Order (ECF No. 277).

70. Therefore, Defendants' Sixth Motion in *Limine* is **GRANTED**.

vii. Seventh Motion

71. Defendants' Seventh Motion in *Limine* requests that the Court enter an order prohibiting Plaintiffs (or their witnesses) from introducing or otherwise referencing "any argument, statement or suggestion by counsel at any phase of the trial purporting to apply general safety rules or principles, any use of the 'reptile theory' and any 'golden rule' arguments or implication that the jury should 'send a message' to the defendants or to the community at large or consider how this case might impact them or persons they know and any arguments or implication that insurance companies are inherently dishonest, unfair or miserly in dealing with insureds." (Seventh Mot., at 1–2.)

72. As one court has noted, the so-called "Reptile Theory appears to be in use by the plaintiffs' bar in some states as a way of showing the jury that the defendant's conduct represents a danger to the survival of the jurors and their families. The Reptile Theory encourages plaintiffs to appeal to the passion, prejudice, and sentiment of the jury." *Brooks v. Caterpillar Global Mining Am.*, NO. 4:14CV-00022-JHM, 2017 U.S. Dist. LEXIS 125095, at *24 (W.D. Ky. Aug. 8, 2017) (cleaned up). In other words, arguments that embrace the "Reptile Theory" encourage jurors to "decide a lawsuit in favor of the [plaintiff] based upon fear, generated by plaintiff's counsel, that a verdict in favor of the defendant will harm the safety of the community, and, thus, the juror." *Randolph v. Quiktrip Corp.*, No. 16-1063-JPO, 2017 U.S. Dist. LEXIS 76103, at *12 (D. Kan. May 18, 2017) (cleaned up).

73. Similarly, the "golden rule" argument asks jurors to "put themselves in the position of" the plaintiff. *See Fox-Kirk v. Hannon*, 142 N.C. App. 267, 278–79 (2001).

74. The Court agrees that any such arguments (as well as any arguments generally disparaging insurance companies) are improper and that both sides shall be precluded from making them at trial.

75. With regard to Defendants' request to exclude evidence of "general safety rules," however, the Court finds that this portion of the Motion is phrased too broadly and, as such, is not a proper basis for a motion in *limine*. Any issues at trial involving attempts by the parties to offer evidence as to "safety rules" will be ruled upon by the Court at that time.

76. Accordingly, Defendants' Seventh Motion in *Limine* is **GRANTED** in part and **DENIED** in part as set forth above.

viii. Eighth Motion

77. Defendants' Eighth Motion in *Limine* requests that the Court enter an order excluding any deposition testimony offered as direct evidence without advance disclosure to Defendants.

78. The Court agrees that (absent prior approval by the Court upon a showing of good cause) no party shall be permitted to introduce deposition testimony that has not been identified pursuant to the Court's Pre-Trial Scheduling Order (ECF No. 277).

79. Therefore, Defendants' Eighth Motion in *Limine* is **GRANTED**.

ix. Ninth Motion

80. Defendants' Ninth Motion in *Limine* requests that the Court enter an order excluding any opinion testimony by lay witnesses concerning issues or matters properly within the scope of expert testimony.

81. Rule 701 of the North Carolina Rules of Evidence expressly allows lay witnesses to offer opinion testimony during trial in appropriate circumstances. Specifically, Rule 701 states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. R. Evid. 701.

82. The Court cannot determine—in advance of trial—whether any disputed issue will arise where a party argues that lay opinion testimony is admissible under Rule 701. The Court will rule on any such issues at trial as they are raised.

83. Therefore, Defendants' Ninth Motion in *Limine* is **DENIED**.

x. Tenth Motion

84. Defendants' Tenth Motion in *Limine* requests that the Court enter an order excluding the following: any exhibits, diagrams, illustrations, photographs, models, videotapes, images, recreations, representations, summaries, chronologies, timelines, or other documents that misrepresent, enlarge, enhance, distort, modify,

change, or otherwise inaccurately or unfairly represent or display information, or that include audio or voice commentary.

85. Although the Court will not permit any party to admit evidence that improperly, inaccurately, or unfairly represents information, this Motion is phrased so broadly that the Court cannot grant it in its entirety. Just as one example, under appropriate circumstances, it may be permissible for a party to have a witness testify about a photograph that has been "enlarged" for greater visibility. Disputes about whether such exhibits are permissible can be resolved on a case-by-case basis at trial.

86. Therefore, Defendants' Tenth Motion in *Limine* is **GRANTED** in part and **DENIED** in part.[3]

xi. Eleventh Motion

87. Defendants' Eleventh Motion in *Limine* requests that the Court enter an order precluding Plaintiffs (or their witnesses) from testifying or otherwise making arguments tending to show Brakebush's consideration or understanding of USDA regulations during the preparation and submission of its insurance claim.

88. Defendants assert that testimony or arguments concerning USDA regulations fall squarely within the realm of expert testimony and that Plaintiffs' expert (Ritter) admitted in his deposition that he lacks any such expertise. (Tenth Mot., at 2–3.)

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[3] With regard to the portion of this Motion referencing evidence that includes "audio or voice commentary" at the 8 October hearing, counsel for Plaintiffs stated that they did not intend to offer any such evidence. Therefore, this portion of the Motion appears to be moot.

89. To the extent that Defendants are seeking an advance ruling that *any* mention of USDA regulations would be improper, the Court cannot grant the Motion in the abstract. Defendants have put in issue Brakebush's intent in connection with the contents of its insurance claim by virtue of their counterclaim alleging that the claim was fraudulently submitted. Therefore—at a minimum—Plaintiffs could, in theory, seek to rebut that claim by offering evidence that their actual motivation for including certain portions of their insurance claim was based upon their understanding of what USDA regulations required. *See*, *e.g.*, *Cypress Chase Condo. Ass'n "A" v. QBE Ins. Corp.*, 2013 U.S. Dist. LEXIS 40347, *28 (S.D. Fla. 2013) (holding that where insurer's fraud defense hinged on whether the insured had submitted a proof of loss statement in good faith, the insured was entitled to offer lay witness testimony as to his belief that specific provision of building code required replacement of undamaged glass on property because this testimony "goes to Plaintiff's reasoning for including the costs on the undamaged property in its [proof of loss] statement.").

90. As a result, the Court will have to rule on any issues as to the admissibility of evidence referencing USDA regulations at trial on a case-by-case basis.

91. Therefore, Defendants' Eleventh Motion in *Limine* is **DENIED**.

xii. Twelfth Motion

92. Defendants' Twelfth Motion *in Limine* requests that the Court enter an order precluding Plaintiffs from admitting the entirety of Ritter's expert report into

evidence or publishing the entirety of the report to the jury. Alternatively, Defendants request an instruction limiting the scope of the documents and testimony included with and relied upon in Ritter's report to those forming the bases of his opinion.

93. Expert witness reports are not admissible as substantive evidence because they contain inadmissible hearsay. *See* N.C. R. Evid. 801(c) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); N.C. Rule Evid. 802 ("Hearsay is not admissible except as provided by statute or by these rules."). However, under appropriate circumstances, statements in expert reports may be used by the opposing party for impeachment purposes.

94. Additionally, exhibits to expert reports (that are not independently admissible) can be used for the limited purpose of showing what the expert relied upon in forming his opinions.

95. Subject to the above, Defendants' Twelfth Motion in *Limine* is **GRANTED**.

CONCLUSION

THEREFORE, THE COURT, in the exercise of its discretion, **ORDERS**, as follows:

1. Defendants' Motion to Exclude Plaintiffs' Expert Kenneth D. Ritter is **DENIED**.

2. Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Experts, Timothy Eplee and Jerome Hammar is **GRANTED** in part and **DEFERRED** in part, as set forth above.
3. Plaintiffs' First Motion *in Limine* is **GRANTED** subject to the caveat referenced in Paragraph 35.
4. Plaintiffs' Second Motion *in Limine* is **DENIED.**
5. Plaintiffs' Third Motion *in Limine* is **GRANTED** in part and **DENIED** in part, as set forth above.
6. Plaintiffs' Fourth Motion in Limine is **DENIED.**
7. Defendants' First Motion *in Limine* is **GRANTED**.
8. Defendants' Second Motion *in Limine* is **GRANTED**.
9. Defendants' Third Motion *in Limine* is **GRANTED**.
10. Defendants' Fourth Motion *in Limine* is **GRANTED**.
11. Defendants' Fifth Motion *in Limine* is **GRANTED**.
12. Defendants' Sixth Motion *in Limine* is **GRANTED**.
13. Defendants' Seventh Motion *in Limine* is **GRANTED** in part and **DENIED** in part, as set forth above.
14. Defendants' Eighth Motion *in Limine* is **GRANTED**.
15. Defendants' Ninth Motion *in Limine* is **DENIED**.
16. Defendants' Tenth Motion *in Limine* is **GRANTED** in part and **DENIED** in part, as set forth above.
17. Defendants' Eleventh Motion *in Limine* is **DENIED**.

18. Defendants' Twelfth Motion *in Limine* is **GRANTED**.

SO ORDERED, this the 16th day of October, 2024.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases