Murphy-Brown, LLC v. ACE Am. Ins. Co., 2025 NCBC Order 19.

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19CVS002493-910
MURPHY-BROWN LLC and SMITHFIELD FOODS, Inc., Plaintiffs, v. ACE AMERICAN INSURANCE COMPANY, Defendant.	**ORDER ON MOTIONS *IN LIMINE* TO EXCLUDE EXPERT WITNESSES**

THIS MATTER is before the Court on Plaintiffs Murphy-Brown LLC and Smithfield Foods, Inc.'s (collectively, "Plaintiffs") Motions *in Limine* to Exclude Defendant's Expert Witnesses John S. Pierce ("Motion to Exclude Pierce," ECF No. 840) and Michael Brychel ("Motion to Exclude Brychel," ECF No. 842) and Defendant Ace American Insurance Company's ("Ace") Motion *in Limine* to Strike and Exclude the Reports and Testimony of Plaintiffs' Expert Witness Steven DeGeorge ("Motion to Exclude DeGeorge," and, collectively, the "Motions to Exclude" or the "Motions," ECF No. 844.)

Having considered the Motions to Exclude, the supporting and opposing briefs, the arguments of counsel, the applicable law, and all other appropriate matters of record, the Court concludes that the Motions should be **GRANTED in part**, **DENIED in part**, and **DISMISSED as moot in part** for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

1. A complete recitation of the facts and legal issues previously addressed in this case can be found in the Court's prior orders and opinions. *See Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 93 (N.C. Super. Ct. Aug. 7, 2023); *Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 94 (N.C. Super. Ct. Aug. 7, 2023); *Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2023 NCBC LEXIS 96 (N.C. Super. Ct. Aug. 7, 2023).

2. As the Court's prior opinions in this case explain, Plaintiffs originally sued various insurers who provided them with primary and excess insurance coverage for their eastern North Carolina-based hog farming operations between 2010 and 2015. *See Murphy-Brown, LLC*, 2023 NCBC LEXIS 93, at *3–4. In a nutshell, Plaintiffs contend in their Second Amended Complaint ("SAC," ECF No. 444.2)—which was filed on 12 January 2021, (*see* ECF No. 453, at 3), and is their operative pleading—that these insurers were obligated to indemnify Plaintiffs for amounts paid to settle certain underlying nuisance actions filed by property owners living near Plaintiffs' hog farms (the "Underlying Lawsuits") and to reimburse Plaintiffs for the attorneys' fees and related costs expended by them in defending the Underlying Lawsuits (the "Defense Costs"). (SAC ¶¶ 73–121.)

3. Following various rulings by the Court and a number of settlements that have taken place as to other Defendants, the only remaining Defendant in this case is Ace.

4. In a previous Order and Opinion on Plaintiffs' Motion for Partial Summary Judgment (ECF No. 446), this Court determined that Ace breached its contractual duty to defend Plaintiffs in the Underlying Lawsuits, is estopped from asserting any coverage defenses under its policies, and is required to reimburse Plaintiffs for the reasonable amount of Defense Costs they incurred in connection with the Underlying Lawsuits.[1] *See Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2020 NCBC LEXIS 154 (N.C. Super. Ct. Dec. 22, 2020).

5. The sole issue for trial—which is scheduled to begin on 28 April 2025—is the reasonable amount of Defense Costs that Plaintiffs incurred and paid to defend the Underlying Lawsuits. That issue will be decided by a jury.

6. With regard to that issue, both sides have retained and designated expert witnesses to review the billing invoices generated by Plaintiffs' counsel in the Underlying Lawsuits and to opine as to their reasonableness.

7. Plaintiffs have retained Steven DeGeorge, who is a licensed North Carolina attorney at the law firm of Robinson, Bradshaw & Hinson, P.A. in Charlotte, North Carolina. (Expert Report of R. Steven DeGeorge, ECF No. 587.13.)

8. Ace has retained John "Jack" Pierce, who is an attorney licensed in California and who practices at the law firm of Hinshaw & Culbertson LLP in San Francisco, California. (Expert Opinion of John S. Pierce, Esq., "Pierce Report," ECF No. 535.1, at 6; Pierce Deposition, ECF No. 897.1, at 5.) In connection with his

[1] An issue to be decided in a forthcoming post-trial motion is whether, and to what extent, Ace is entitled to receive a credit for the share of Defense Costs paid by another of Plaintiffs' insurers, Old Republic Insurance Company.

retention as an expert witness, Pierce enlisted the assistance of Michael Brychel, an attorney affiliated with the legal auditing firm, Stuart Maue, with regard to his review of the invoices at issue. (Pierce Depo. at 133; Declaration of Michael Brychel, "Brychel Declaration," ECF No. 863, at 1.)

9. On 18 February 2025, the parties filed the present Motions to Exclude. In these Motions, each side seeks to exclude (either in whole or in part) the opinion testimony of the opposing side's expert witnesses.

10. The Court held a hearing on the Motions on 19 March 2025 at which all parties were represented by counsel.

11. Having been fully briefed, the Motions are now ripe for resolution.

LEGAL STANDARD

12. "The Court evaluates a motion to exclude an expert's testimony under Rule 702 of [the] 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) (cleaned up). Subpart (a) of Rule 702 states as follows:

> (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.
>
> (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).

13. 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), and its progeny. *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).").

14. "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.'" *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." *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374 (2015) (cleaned up). 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.* (cleaned up).

15. 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 the trial court exercises 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." *Brakebush Bros., Inc. v. Certain Underwriters at Lloyd's of London – Novae 2007 Syndicate*

Subscribing to Pol'y with No. 93PRX17F157, 2024 NCBC LEXIS 137, at *5 (N.C. Super. Ct. Oct. 16, 2024) (cleaned up).

ANALYSIS

I. Burdens of Proof at Trial

16. Because portions of Plaintiffs' briefs—and their counsel's arguments at the 19 March 2025 hearing—suggest that they have partially misunderstood the Court's prior rulings as to the parties' respective burdens of proof at trial, the Court deems it appropriate to address this issue at the outset.

17. In its previous Orders, this Court determined that: (1) Ace breached its duty to defend Plaintiffs in the Underlying Lawsuits, (2) Ace is estopped from asserting any coverage defenses in its policies, (3) the only issue remaining for trial is whether the Defense Costs paid by Plaintiffs in the Underlying Lawsuits were reasonably incurred, and (4) at trial, Ace will be permitted to contest the reasonableness of those Defense Costs. (ECF Nos. 446, 646, 758; *see also Murphy-Brown,* 2023 NCBC LEXIS 96, at *12, 21; *Murphy-Brown, LLC*, 2020 NCBC LEXIS 154, at *54.)

18. In a subsequent Order, the Court addressed the issue of the parties' respective burdens of proof at trial. The Court ruled that

> At trial, Plaintiffs shall have the initial burden of showing that they incurred and paid the Defense Costs at issue with regard to the Underlying Lawsuits. Once Plaintiffs make such a showing, the Defense Costs will be presumed reasonable, and ACE shall then have the opportunity to offer evidence rebutting that presumption.

(ECF No. 801; *see also Murphy-Brown, LLC v. ACE Am. Ins. Co.*, 2024 NCBC LEXIS 129, at *9 (N.C. Super. Ct. Sept. 25, 2024).)

19. In so holding, the Court rejected Plaintiffs' argument—relying heavily on a case from the Seventh Circuit Court of Appeals, *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069 (7th Cir. 2004)—that Ace should be completely prohibited from challenging the reasonableness of the Defense Costs that Plaintiffs actually paid.

20. Specifically, Plaintiffs urged this Court to adopt the following portion of the *Taco Bell* analysis:

> When Taco Bell hired its lawyers, and indeed at all times since, Zurich was vigorously denying that it had any duty to defend—any duty, therefore, to reimburse Taco Bell. Because of the resulting uncertainty about reimbursement, Taco Bell had an incentive to minimize its legal expenses (for it might not be able to shift them); and where there are market incentives to economize, there is no occasion for a painstaking judicial review. The affidavit of the firm that picked through Taco Bell's legal bills is excruciatingly detailed.
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> . . .
>
> Furthermore, although Zurich's policy entitled it to assume Taco Bell's defense, in which event Zurich would have selected, supervised, and paid the lawyers for Taco Bell in the Wrench litigation, it declined to do so—gambling that it would be exonerated from a duty to defend—with the result that Taco Bell selected the lawyers. Had Zurich mistrusted Taco Bell's incentive or ability to economize on its legal costs, it could, while reserving its defense that it had no duty to defend, have assumed the defense and selected and supervised and paid for the lawyers defending Taco Bell in the Wrench litigation, and could later have sought reimbursement if it proved that it had indeed had no duty to defend Taco Bell. So presumably it had some confidence in Taco Bell's incentive and ability to minimize legal expenses. We add that the duty to defend would be significantly undermined if an insurance company could, by the facile expedient of hiring an audit firm to pick apart a law firm's billing, obtain an evidentiary hearing on how much of the insured's defense costs it had to reimburse.

Taco Bell Corp., 388 F.3d at 1075–77 (internal citations omitted).

21. However, in its 7 August 2023 Order and Opinion, this Court expressly declined to follow the reasoning of the Seventh Circuit in *Taco Bell*. *See Murphy-*

Brown, 2023 NCBC LEXIS 96, at *14–16 (noting that "Plaintiffs ha[d] failed to identify any case in which a North Carolina court has adopted the reasoning of *Taco Bell*").

22. Notwithstanding the Court's prior ruling, Plaintiffs continue to make assertions in connection with the present Motions to Exclude—and other related filings—that are based on the reasoning set out in *Taco Bell*.

23. Based on this Court's rejection of the analysis in *Taco Bell*, neither Plaintiffs' counsel nor any of its witnesses will be permitted to offer argument or testimony to the effect that (1) if Ace had not breached its duty to defend, it could have "assumed the defense and selected and supervised and paid for the lawyers" in the Underlying Lawsuits; or (2) the fact that Plaintiffs paid the subject invoices without any expectation of repayment serves as evidence that they have been "market tested" and are thus reasonable.

24. The Court now turns to the present Motions to Exclude.

II. Motion to Exclude Pierce

25. Plaintiffs request that this Court exclude Pierce from offering any expert testimony at trial. Alternatively, they contend that if he is allowed to testify as an expert witness, the Court should prohibit him from offering certain opinions contained in his written expert reports.

26. In support of their Motion, Plaintiffs assert that Pierce: (a) is not qualified to render an expert opinion under Rule 702(a); (b) improperly relied on Brychel's work product to the point that he is simply "vouching" for Brychel's own

opinions; (c) failed to properly consider the factors governing the reasonableness of attorneys' fees as set out in Rule 1.5 of the North Carolina Rules of Professional Conduct; (d) used unreliable data to calculate reasonable hourly rates for Plaintiffs' attorneys in the Underlying Lawsuits; (e) improperly applied a blanket reduction to certain redacted time entries; (f) improperly applied a blanket reduction to block billed and vaguely worded time entries; (g) failed to consider evidence relevant to Plaintiffs' alternative fee agreements; and (h) improperly opined on issues of law.

27. The Court will address each of Plaintiffs' arguments in turn.

A. Qualifications

28. Pierce is a licensed attorney who is a "capital partner" at the law firm of Hinshaw & Culbertson LLP in San Francisco, California. (Pierce Report at 6.) He is a trial attorney with more than forty-four years of experience litigating complex commercial disputes, including over 300 cases in which the reasonableness of attorneys' fees and costs has been "the central issue." (Pierce Report at 6.) He is also a member of the American Bar Association's Torts and Insurance Practice Section and a member of the Council for Litigation Management. (Pierce Report at 6.)

29. In addition to his litigation practice, Pierce has worked for twenty-nine years as an arbitrator, consultant, and expert on a variety of cases, including toxic tort and pollution cases, complex environmental contamination and coverage disputes, mass tort litigation, asbestos litigation, breast implant litigation, complex commercial and business disputes, and fee shifting cases. (Pierce Report at 6–7.) He has been retained as an expert witness in cases involving fee-related disputes in

various jurisdictions, including Michigan, Texas, Washington, D.C., Arizona, Florida, Indiana, Hawaii, Illinois, Minnesota, New York, New Jersey, Georgia, Vermont, Massachusetts, Washington, Oregon, and California. (Pierce Report at 7.) As such, he has reviewed and analyzed over $4 billion in law firm invoices relating to legal fees and costs incurred in litigation matters. (Pierce Report at 7.)

30. Pierce has presented on the topics of litigation management and the reasonableness of attorneys' fees to the Council for Litigation Management, the Litigation Management Institute, the American Conference Institute, the American Bar Association, the Institute of London Underwriters, and the International Bar Association. (Pierce Report at 6.)

31. Despite his experience, Plaintiffs nonetheless assert that Pierce lacks the required "scientific, technical or other specialized knowledge" under Rule 702(a) to opine as to the reasonableness of the attorneys' fees incurred in the Underlying Lawsuits. Specifically, Plaintiffs contend that this is so because (1) Pierce is not licensed in North Carolina, (2) he has no experience litigating any cases in North Carolina courts, and (3) he has no experience litigating hog farm nuisance cases. The Court disagrees.

32. "An expert's testimony is not helpful to the jury and, therefore, is inadmissible, when the expert does not use specialized knowledge to help the jury understand the evidence or determine a fact in issue." *Intersal, Inc. v. Wilson*, 2024 NCBC LEXIS 17, at *4–5 (N.C. Super. Ct. Feb. 2, 2024) (citing *Braswell v. Braswell*, 330 N.C. 363, 377 (1991) ("When the jury is in as good a position as the expert to

determine an issue . . . [the expert's testimony] is not helpful to the jury.")). Accordingly, our Supreme Court has stated that the key inquiry is whether "the witness ha[s] enough expertise to be in a better position than the trier of fact to have an opinion on the subject[.]" *McGrady*, 368 N.C. at 889 (cleaned up).

33. Based on his decades of experience as a complex commercial litigator, coupled with his experience consulting on attorneys' fees cases, the Court is satisfied that Pierce has at least *some* specialized knowledge regarding billing practices within the legal industry so as to be helpful to the jury in determining the reasonableness of Plaintiffs' Defense Costs.

34. Any concerns Plaintiffs may have as to Pierce's lack of experience in the specific area of hog farm litigation or his unfamiliarity with North Carolina litigation goes to the weight that the jury should give his opinions—which Plaintiffs can explore on cross-examination—rather than on whether such opinions are admissible.

35. Accordingly, Plaintiffs' Motion to Exclude is **DENIED** on this ground.

B. "Vouching" for Brychel

36. Plaintiffs assert that even if Pierce is qualified under Rule 702(a), his opinions are nevertheless unreliable because he "took information and opinions provided" by Brychel and "presented them as his own[.]" (Pls.' Br., ECF No. 841, at 15.) Specifically, Plaintiffs argue that Pierce inappropriately relied on Brychel's use of a "proprietary software program" that Pierce could not independently validate or test for accuracy—essentially making him a "mouthpiece" for Brychel's opinions. (Pls.' Br. at 17.)

37. This Court has previously stated as follows:

> Vouching occurs when an expert merely "parrots" or "rubber stamps" an opinion from another witness. *See In re Wagner*, 2007 U.S. Dist. LEXIS 22769, at *10 (E.D. Pa. Mar. 29, 2007); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808–09 (N.D. Ill. 2005). Experts cannot merely vouch for the opinions of others. *See, e.g., State v. Bullock*, 2010 N.C. App. LEXIS 2058, at *7 (N.C. Ct. App. Nov. 2, 2010) (unpublished) ("[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 Cap. Grp. LLC, v. Taube*, 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."). . . . *See, 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.*, 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 *223–24 (N.C. Super. Ct. Apr. 27, 2020); *see also Brakebush Bros., Inc.*, 2024 NCBC LEXIS 137, at *5.

38. To determine if—and to what extent—Pierce may be impermissibly "vouching" or "parroting" the opinions of Brychel, the Court looks to the record evidence of Brychel's involvement.

39. When questioned at his deposition about Brychel's involvement, Pierce testified as follows:

But when I get the invoices, I then decide, Is the volume of the invoices sufficient that I'm going to need some assistance?

I do use only one audit firm. I've worked with a lot of them around the country, and I found that Stuart [M]aue has a very sophisticated, proprietary software program that I'm familiar with and I utilize in my cases, and I work with pretty much only one person there. He's a lawyer named Mike Brychel, former Cook County prosecutor and civil lawyer for a number of years.

So once I determined -- I look at the invoices, saw some issues, then I basically asked Mike to load them, and Mike Brychel loads [them] into his proprietary software program.

While he's loading them, I go through the invoices, start identifying issues that I see, block billing, administrative and clerical. You know, I spot issues because I can't really see the whole database at one time. And then communicate to him some ideas I have in terms of where the audit should go and what I think might be issues coming up. . . .

So I do that, and then what I do is I ask Mike to produce some preliminary exhibits. The preliminary exhibits that I ask him to produce, which give me a pretty good idea of where things are. . . .

Frequently we find there are some discrepancies in the bills, and so I ask Mike and his staff to do a mathematical calculation to determine whether there are any discrepancies . . .

The next thing I want to see is the summary of the expenses. I want to know what expenses there were, how they were characterized, did they bill for LEXIS, Westlaw? Did they bill for First Class airfare, something like that? So I did -- I ask that all to be put together for me, . . .

Then I want -- as I mentioned earlier, I want to find out what the rate -- what the rates were for the lawyers, and if and when they were increased or decreased, and so that's another preliminary exhibit I get.

I want -- wanted to know the nature and extent of block billing, so Mike does two things for me. He'll put together all block billing of all the lawyers, and then I ask him eventually to break it down. . . .

And those are the -- that's the methodology that I generally do. By that time, I've got a pretty good feel for the rates, the timekeepers, who's billed what, what their daily hours are. Then I will ask -- I will

see things in the bills and ask him to do some -- you know, I'll see some slight variance of billing, I'll see some filing or administrative clerical stuff; ask him to do an initial report which I'll look at and modify.

I'll want to know if there are redactions, and he'll provide me with a list of all those billing entries that are totally redacted or partially redacted, and I segregate those.

. . .

I don't rely exclusively on what they do. I'm a part of the process that looks at them, edits them, modifies them as they go on.

I mean, one exhibit -- take block billing. The first block billing exhibit they'll give me will be all block billing, and then I will tell them to modify to reflect only one hour or more of block billing. They will send me some administrative and clerical tasks, and I'll tell them keywords that I want them to use to look at that I've seen in the invoices, and when I see patterns that occur with respect to certain timekeepers, I may ask for a complete list of all the billing entries of that timekeeper. So I get a nature of the work that timekeeper is doing so that I can make a determination whether to characterize -- or quantify the administrative and clerical tasks.

So I don't rely on their exhibits as they produce them entirely. I'm part of the process of modifying them.

. . .

It's a collaborative effort. I will look at the invoices. I will see certain tasks that I think are administrative or clerical. I'll look at the timekeeper. I'll ask for that timekeeper's other entries. I'll find other things they're doing: Labeling, Bates labeling, organizing, delivering matters, you know, downloading documents, things that don't require you know, people who are delivering documents to the courthouse billing at hourly rates. These are all things that I will look at. You know, and I will provide Mike Brychel with those words, and he'll do searches at my direction.

Now, some of them he'll see, so it's a bit of a collaborative effort on the part of it, and he'll put together some preliminary exhibits and we'll go through it and cut and eliminate some and add some others.

(Pierce Depo. at 133–44.)

40. In opposing Plaintiffs' Motion to exclude Pierce's testimony, Ace has submitted a declaration from Brychel in which he testified that he "did not author any portion of [] Pierce's expert report or rebuttal report" and summarized his involvement in this case as follows:

> Stuart Maue was provided with invoices submitted by Plaintiffs to upload into Stuart Maue's software.
>
> Once those invoices were uploaded, [] Pierce directed me to prepare preliminary summaries and detailed charts regarding certain categories of costs.
>
> These reports and exhibits contain basic data, such as the total amounts billed on all invoices or fees billed by timekeepers, and are fundamentally recapitulations of the law firm billing entries.
>
> [] Pierce reviewed those summaries and provided me further direction as to what additional information he needed to offer his expert opinions [regarding] the reasonableness of Plaintiffs' legal fees.

(Brychel Decl. at 2.)

41. Rule 703 of the North Carolina Rules of Evidence permits an expert to rely on evidence—whether admissible or not—if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" N.C. R. Evid. 703. Accordingly,

> [a]n expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify. . . . Analysis becomes more complicated if the assistants aren't merely gofers or data gatherers but exercise professional judgment that is beyond the expert's ken. . . . The *Daubert* test must be applied with due regard for the specialization of modern science. A scientist, however, well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science.

Bouygues Telecom, S.A. v. Tekelec, 472 F. Supp. 2d 722, 728 (E.D.N.C. 2007) (cleaned up); *see also Sulfuric Acid Antitrust Litig.*, 237 F.R.D. 646, 658 (N.D. Ill. 2006) (noting

that "[u]nder the liberalizing thrust of [Federal] Rule [of Evidence] 703, experts are entitled to use assistants in formulating expert opinion[s]").

42. Based on the record that is currently before the Court on this issue—which consists of Pierce's deposition testimony and Brychel's declaration—it appears that Brychel merely performed organizational and computational functions at Pierce's direction as opposed to formulating opinions of his own that were then merely "parroted" by Pierce.

43. Federal courts have held that an expert's reliance on the work of assistants is permissible under similar circumstances. *See, e.g., Derrickson v. Cir. City Stores, Inc.*, 1999 U.S. Dist. LEXIS 21100, at *17–18 (D. Md. Mar. 19, 1999) (allowing an expert to rely on the tables created from "data that was subjected to various selection, aggregation and weighting processes performed by [the expert's] assistant" when the expert "told his assistant in general terms what manipulations and analyses he wanted performed on the data"); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 30, 37 (D.D.C. 2004) (noting that the expert "does not need to personally write computer code in order for a resulting analysis to be admissible" if the expert can "determine if the programming was performed as [he] requested and if any significant mistakes were made in the programming").

44. Moreover, Plaintiffs will have the opportunity to cross-examine Pierce on the role Brychel played in his analysis, and based on that testimony, the jury will be able to determine the appropriate weight to give Pierce's opinions. *See In re Sulfuric Acid Antitrust Litig.*, 237 F.R.D. at 658 (noting that "[c]ross-examination will

reveal whether there was adequate supervision and whether relying on such assistance was standard practice in the field").

45. Accordingly, Plaintiffs' Motion to Exclude is **DENIED** on this ground.

C. Consideration of the Rule 1.5 Factors

46. Plaintiffs next assert that Pierce's testimony should be excluded because when he formed his opinions, he "ignored" the applicable law—namely, the factors enumerated in Rule 1.5(a) of the North Carolina Rules of Professional Conduct.

47. Our Court of Appeals has made clear that a determination as to "[t]he reasonableness of attorney[s'] fees in this state is governed by the factors found in Rule 1.5[.]" *Ehrenhaus v. Baker*, 216 N.C. App. 59, 96 (2011). Rule 1.5 states, in relevant part, as follows:

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) the fee customarily charged in the locality for similar legal services;
> >
> > (4) the amount involved and the results obtained;
> >
> > (5) the time limitations imposed by the client or by the circumstances;
> >
> > (6) the nature and length of the professional relationship with the client;

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

N.C. R. Prof. Conduct 1.5(a). Contrary to Plaintiffs' assertions, a thorough review of Pierce's expert reports demonstrates that he did, in fact, consider the application of the Rule 1.5(a) factors.

48. When describing the methodology he utilized in conducting his analysis, Pierce stated as follows:

> In determining whether attorneys' fees and expenses are reasonable, I rely, in part, on a number of factors that are generally recognized and accepted by courts in almost every jurisdiction as the standards for whether legal fees and expenses are reasonable.
>
> Those factors have been adopted by the courts in North Carolina which largely follow the ABA Model Rules of Professional Conduct. More specifically, they are embodied in North Carolina Rules of Professional Conduct, Rule 1.5[] which prohibits a lawyer from entering into an agreement for, charge, or collect an illegal or clearly excessive fee.

(Pierce Report at 8.)

49. Throughout his analysis Pierce clearly considered and applied at least some of the Rule 1.5(a) factors. For example, Pierce's analysis focuses heavily on "the time and labor required" (factor 1) and the "fee customarily charged in the locality" (factor 3). Plaintiffs' assertions that Pierce simply "ignored" the Rule 1.5(a) factors altogether are unfounded.

50. Furthermore, to the extent that Plaintiffs contend that Pierce failed to give proper consideration to certain other Rule 1.5 factors, the Official Comments to Rule 1.5 make clear that the factual circumstances of a particular case may not call for the application of each and every factor. *See* N.C. R. Prof. Conduct 1.5(a) off. cmt.

1 ("The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance.").

51. Moreover, Plaintiffs will be free to cross-examine Pierce as to any failure on his part to expressly consider certain factors set out in Rule 1.5.

52. Accordingly, Plaintiffs' Motion to Exclude is **DENIED** on this ground.

D. Reasonableness of Hourly Rates Charged

53. Next, Plaintiffs contend that Pierce's opinions relating to the reasonableness of the rates charged by the lawyers in the Underlying Lawsuits should be excluded as a result of their assertion that (1) he based his opinion on a "Forum Rate Rule" unrecognized by North Carolina law; and (2) he relied on certain documents known as "Real Rate Report" surveys in assessing the hourly rates charged by Plaintiffs' attorneys in the Underlying Lawsuits, which are fundamentally flawed.

54. First, as to the "Forum Rate Rule," Pierce states in his expert reports that the "locality" contemplated in Rule 1.5(a)(3) is "the district in which the case was brought." (Pierce Report at 41–42.) Pierce, therefore, conducted his analysis of the reasonableness of the hourly rates at issue by focusing on the prevailing market rate for such work in the Eastern District of North Carolina—the federal district in which the Underlying Lawsuits were brought. (Pierce Report at 42–43.)

55. The Court is unable to conclude that Pierce's methodology in doing so merits the exclusion of his opinion on this issue. Although North Carolina courts do not appear to have ever adopted the "Forum Rate Rule" by name, our appellate courts

have recognized that "community rates in the geographic area of the litigation are relevant to the reasonableness determination." *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 244–47 (2013) (finding it "unreasonable to force [a party] to pay a fee that includes rates double those billed in the community where the litigation took place for work that seemingly did not require such a premium") (cleaned up).

56. Whether Pierce may have failed to consider other relevant factors (i.e. relating to the complexity and scope of the litigation) that could potentially justify an out-of-state attorney billing at higher rates can be explored on cross-examination.

57. Second, in formulating his opinion regarding the prevailing market rate for legal work in the Eastern District of North Carolina, Pierce relied primarily on the Real Rate Report surveys for 2014 through 2020. (Pierce Report at 43.) The Real Rate Report surveys are published by Wolters Kluwer and report on the hourly rates charged by lawyers in different practice areas throughout North Carolina. (Pierce Report at 43, 45; *see also Abrego v. City of Los Angeles*, 2017 U.S. Dist. LEXIS 181391, at *13 (C.D. Cal. June 16, 2017) (describing the Real Rate Report surveys).)

58. Plaintiffs assert that the Real Rate Report surveys are unreliable because they "use broad categories to classify billing rates," rely on anonymously submitted data, and have been criticized by other courts for using an "opaque methodology." (Pls.' Br. at 6–7.) However, Plaintiffs have failed to identify any North Carolina appellate cases holding that the Real Rate Report surveys are *per se* unreliable.

59. Furthermore, although Plaintiffs are correct that some courts in other jurisdictions have criticized reliance on the Real Rate Report surveys, other courts have found them "persuasive" as to the reasonableness of rates charged by attorneys in a particular locality. *Compare Abrego*, 2017 U.S. Dist. LEXIS 181391, at *14 (stating that the "Court finds the [Real Rate Report] persuasive here, as it is based on actual legal billing, matter information, and paid and processed invoices from more than 80 companies—not just on posted or advertised rates") *and Sabinsa Corp. v. Herbakraft, Inc.*, 2022 U.S. Dist. LEXIS 219396, at *13 (D.N.J. Dec. 5, 2022) (concluding that reliance on the Real Rate Report surveys to determine a reasonable hourly rate was not an abuse of discretion), *with Hicks v. Vane Line Bunkering, Inc.*, 2013 U.S. Dist. LEXIS 55043, at *25 (S.D.N.Y. Apr. 16, 2013) (stating that "the [c]ourt finds the Real Rate Report[] to be generally unhelpful to determine the rate in the relevant community" for various reasons, including because "[t]he report's methodology is opaque") *and Cortes v. Juquila Mexican Cuisine Corp.*, 2021 U.S. Dist. LEXIS 60374, at *11 (E.D.N.Y. Mar. 29, 2021) (noting that "the helpfulness of the Real Rate Report is less than certain").

60. As a result, the Court believes that Plaintiffs' concerns regarding the reliability of the Real Rate Report surveys go to the weight rather than the admissibility of Pierce's opinion on the hourly rates issue.

61. Accordingly, Plaintiffs' Motion to Exclude is **DENIED** on this ground.

E. Redacted Time Entries

62. During fact discovery in this case, Plaintiffs produced voluminous invoices and billing entry narratives from the four different law firms that it engaged in defense of the Underlying Lawsuits. Prior to production of these invoices to Ace, however, Plaintiffs' counsel in the present lawsuit deemed it appropriate to redact certain billing entry narratives on the invoices. These redactions fell into two categories. First, for time entries as to which Plaintiffs concede are unrelated to the Underlying Lawsuits and for which they are therefore not seeking reimbursement from Ace, Plaintiffs' counsel redacted those narratives in blue (the "Blue Redactions"). Second, for certain billing entries for which Plaintiffs contend they *are* seeking reimbursement at trial, Plaintiffs' counsel nevertheless redacted in black (the "Black Redactions") certain words that they apparently believed contained privileged information of a highly sensitive nature.

63. In Pierce's expert reports, he opines that the time entries that were redacted in full are non-compensable and applied a 100% reduction to all such billing entries whose narrative descriptions were completely redacted. (Pierce Report at 28–30; *see also* Pierce Rebuttal Report at 13.) As to the time entries with only partial redactions—whether in blue or in black—Pierce applied a 30% "across-the-board reduction" based on his inability "to determine what task ha[d] actually been performed." (Pierce Report at 28–30; *see also* Expert Rebuttal Report of John S. Pierce, Esq., "Pierce Rebuttal Report," ECF No. 535.2, at 13.)

64. Plaintiffs assert that these opinions should be excluded because Pierce admitted that the redactions precluded him from being able to determine what tasks had been performed, and that without such information, he could not have formed a reliable opinion as to their reasonableness.

65. At the outset, the Court notes that both sets of redactions were made, not by Plaintiffs' attorneys in the Underlying Lawsuits, but rather, by Plaintiffs' present counsel during discovery in *this* lawsuit. Therefore, if Ace had any concerns about receiving redacted copies of certain invoices, it had a full and fair opportunity at that time to object to the existence of the redactions, demand the production of unredacted copies, and—upon Plaintiffs' refusal to provide them—seek intervention from the Court. However, while Ace may have requested that Plaintiffs produce fully unredacted time entries during discovery, it is undisputed that Ace never sought judicial intervention—either through the process set out in Rule 10.9 of the North Carolina Business Court Rules or through a motion to compel—to force Plaintiffs to produce them.

66. The time for asserting such an objection has long since passed, and as a result, Ace has lost its opportunity to complain about the redactions.

67. As a practical matter, however, Plaintiffs have repeatedly represented to the Court—both in their filings and at hearings—that they are not seeking reimbursement for fees based on time entries bearing the Blue Redactions. Therefore, any opinions by Pierce on the reasonableness of fees associated with time

entries that are completely redacted in blue would serve only to confuse the jury given that Plaintiffs are not seeking reimbursement for them.

68. With regard to the existence of words on time entries for which Plaintiffs *are* seeking reimbursement that are redacted in black, Pierce shall not be permitted to opine on whether the existence of the Black Redactions renders those time entries impermissibly vague. This is so because, as noted above, the redactions were made by Plaintiffs' current attorneys during discovery, and Ace has forfeited the right to complain about them.

69. As a result, Pierce shall not be permitted to opine that the existence of blue or black redactions on the invoices at issue render them unreasonable.

70. Accordingly, this portion of Plaintiffs' Motion to Exclude is **GRANTED**.

F. Vague and Block-Billed Time Entries

71. In his expert reports, Pierce also applies a 30% across-the-board reduction for billing entries that he identifies as having "vague" narrative descriptions—that is, narratives that lack sufficient detail so as to "precisely communicate[]" the work that was performed. (Pierce Report at 54.)

72. Plaintiffs' Motion to Exclude seeks to prevent Pierce from offering an opinion on this subject. Plaintiffs' argument on this point appears to be an example of their continued improper reliance on *Taco Bell* and their ensuing contention that Ace should not be permitted to argue at trial that the time entries on the invoices at issue are unreasonable on grounds such as vagueness. However, as set out earlier in

this Order, the Court declines to adopt the reasoning of *Taco Bell* and therefore rejects this contention by Plaintiffs.

73. North Carolina courts have allowed challenges to the reasonableness of claimed attorneys' fees based on vagueness in time entry narratives. *See, e.g., Woodcock v. Cumberland Cnty. Hosp. Sys., Inc.*, 2023 NCBC LEXIS 54, at *15–16 (N.C. Super. Ct. Apr. 3, 2023) (declining to award fees "for billing entries that are too vague to allow for a reasonableness determination of the labor expended"); *Ford v. Jurgens*, 2022 NCBC LEXIS 59, at *13–14 (N.C. Super. Ct. June 15, 2022) (noting that "descriptions of tasks performed" that were "vague or otherwise undescriptive . . . made it difficult for the [c]ourt to conduct the necessary analysis"); *Red Valve, Inc. v. Titan Valve, Inc.*, 2019 NCBC LEXIS 124, at *13, 16 (N.C. Super. Ct. Mar. 19, 2019) (applying a 50% reduction to time entries which were "not supported by sufficient explanation or documentation").

74. The same is true as to Pierce's opinions concerning specifically identified "block-billed" time entries.

75. Block-billing is a practice in which "time entries aggregate multiple tasks without providing the hours expended for each separate task." *Vitaform, Inc. v. Aeroflow, Inc.*, 2024 NCBC LEXIS 21, at *11 (N.C. Super. Ct. Feb. 5, 2024). Pierce specifically asserts that block-billing is an "inflationary practice" that has been largely abandoned by law firms. (Pierce Report at 11–12.)

76. North Carolina courts have allowed challenges to the reasonableness of claimed attorneys' fees based on the practice of block-billing. *See, e.g., Ekren v. K&E*

Real Est. Invs., LLC, 2014 NCBC LEXIS 57, at *17 (N.C. Super. Ct. Nov. 10, 2014) (criticizing the use of block billing and applying a reduction based on an "estimat[ion] [of] the hours expended for each separate task"); *Bucci v. Burns*, 2022 NCBC LEXIS 137, at *15 (N.C. Super. Ct. Nov. 17, 2022) (noting that block billing "makes it difficult to assess whether the time spent with respect to each task was reasonable" (cleaned up)); *W&W Partners, Inc. v. Ferrell Land Co.*, 2020 NCBC LEXIS 35, at *19 (N.C. Super. Ct. Mar. 23, 2020) (applying a reduction to the requested fees because "the [c]ourt's ability to determine exactly how much time was spent by each of the[] timekeepers [was] limited by the block-billing").

77. The Court therefore cannot say that Pierce should be barred from offering opinions at trial as to the unreasonableness of certain time entries based on vagueness in billing entries (resulting from block-billing or otherwise).

78. Accordingly, Plaintiffs' Motion to Exclude on this ground is **DENIED**.

G. Alternative Fee Arrangement Invoices

79. Plaintiffs further seek to exclude Pierce's opinions concerning eight invoices submitted by the law firm McGuireWoods in the Underlying Lawsuits between 17 June 2016 and 28 February 2017 (collectively, the "McGuireWoods Invoices"), which were billed under an alternative fee arrangement rather than being based on an hourly rate.

80. As to these invoices, Pierce concludes that the attorneys' fees contained in the McGuireWoods Invoices are not recoverable because they "contain no billing detail describing the nature of the services that were provided" and demonstrate a

"complete absence of billing detail[.]" (Pierce Report at 31–32; *see also* Pierce Rebuttal Report at 13.)

81. However, at the 19 March 2025 hearing, counsel for Ace conceded that detailed narrative time entries corresponding to the McGuireWoods Invoices had, in fact, been produced to Ace during discovery.

82. From the record, it is unclear whether Ace's counsel failed to forward these detailed time entry narratives to Pierce or, alternatively, whether they were submitted to Pierce but simply were not reviewed by him prior to finalizing his expert reports. In any event, because (through no fault of Plaintiffs) Pierce did not review the detailed narrative time entries corresponding to work done under the alternative fee arrangement—a necessary step in his methodology—he cannot have formed a reliable opinion as to their reasonableness. (*See* Pierce Report at 32 ("The *complete absence of billing detail* prohibits me from evaluating the nature of the work performed, the reasonableness of the time that was spent to complete it or the necessity of the task that was performed.").)

83. Therefore, the Court agrees with Plaintiffs on this issue and concludes that Pierce will not be permitted to offer his opinions as to the reasonableness of fees reflected in the McGuireWoods Invoices.

84. Accordingly, Plaintiffs' Motion to Exclude is **GRANTED** as to Pierce's opinions concerning the reasonableness of fees billed under the alternative fee arrangement.

H. Opinions on Legal Issues

85. Plaintiffs' final argument targets Pierce's opinions that the portions of the Defense Costs associated with defending claims in the Underlying Lawsuits related to Plaintiffs' non-trucking operations and to the punitive damages being sought in that litigation are not subject to reimbursement under North Carolina law.

86. His opinions on these issues are impermissible for two reasons.

87. First, and most basically, expert witnesses are not permitted to offer opinions on legal issues or to discuss the facts, analyses, or holdings in other cases—whether those cases arose in North Carolina or elsewhere. *See Liberty Mut. Fire Ins. Co. v. Michael Baker Int'l, Inc.*, 2022 U.S. Dist. LEXIS 61263, at *25–26 (D. Utah Mar. 31, 2022) (holding that an expert "must testify as to his own opinions about attorneys' fees, not the opinions of various courts" and excluding testimony not based on "his expertise and a review of documents in the record" (cleaned up)); *see also Huawei Techs. Co., Ltd. v. Huang*, 2019 U.S. Dist. LEXIS 78765, at *30–31 (E.D. Tex. May 9, 2019) (noting that "an expert should not be permitted to give opinions that reiterate what the lawyers offer in argument" (cleaned up)).

88. This is so because

> such testimony invades not the province of the jury but "the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983), *cert. denied*, 464 U.S. 894 (1983). It is for the court to explain to the jury the given legal standard or conclusion at issue and how it should be determined. To permit the expert to make this determination usurps the function of the judge. The second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion.

HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 587 (1991); *see also Smith v. Childs*, 112 N.C. App. 672, 680 (1993) (noting that while a "legal expert may testify regarding the factual issues facing the jury, he is not allowed to either interpret the law or to testify as to the legal effect of particular facts" (cleaned up)).

89. Second, the Court has already ruled that Ace is estopped from asserting any coverage defenses based on its policy provisions. (ECF No. 646, at 60–61.) Moreover, North Carolina law is clear that where certain claims in a lawsuit against an insured party are covered by an insurance policy while other claims are not, the duty to defend requires the insurer to defend the insured against all claims asserted in the action. *See, e.g., Wash. Hous. Auth. v. N.C. Hous. Auths. Risk Retention Pool*, 130 N.C. App. 279, 283 (1998) (noting that "[w]here a complaint contains multiple theories of recovery, some covered by the policy and others excluded by it, the insurer still has a duty to defend" (cleaned up)); *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 255 (4th Cir. 2003) (applying North Carolina law and stating that "[w]here a complaint alleges multiple claims and injuries, some of which are covered and some of which are not, an insurer is obligated to defend its insured against all claims made in the lawsuit" (cleaned up)).

90. Accordingly, Plaintiffs' Motion to Exclude is **GRANTED** as to Pierce's opinions regarding legal issues.[2]

[2] As noted below, the prohibition on opining on legal issues at trial or discussing case law shall apply equally to Plaintiffs' expert witness, DeGeorge.

III. Motion to Exclude Brychel

91. Plaintiffs have also moved to exclude any expert testimony at trial from Brychel on the ground that he was never disclosed as an expert witness by Ace.

92. However, Ace has made clear that Brychel is not an expert witness in this case.

93. Indeed, following the 19 March 2025 hearing, counsel for Ace informed the Court that Ace will not be calling Brychel to testify in any capacity at trial.

94. Accordingly, Plaintiffs' Motion to Exclude Brychel is **DISMISSED as moot**.

IV. Motion to Exclude DeGeorge

95. Finally, Ace seeks to exclude Plaintiffs' expert, DeGeorge, from offering expert testimony at trial. Specifically, Ace takes issue with several portions of DeGeorge's expert reports in which he appears to opine on the appropriate burden of proof in this case and whether Ace—by virtue of having breached its duty to defend—has waived its ability to challenge the reasonableness of the Defense Costs. In addition, DeGeorge's expert reports (like those of Pierce) discuss case law regarding various issues.

96. The Court agrees that certain opinions expressed by DeGeorge in his expert reports involve legal issues that are not appropriate for expert testimony.

97. As discussed above, the Court will not permit *any* discussion of case law or legal principles from witnesses (expert or otherwise) at trial.

98. Therefore, DeGeorge shall be prohibited from offering opinions at trial as to legal propositions and from referencing case law during his testimony.

99. However, Ace has failed to identify any other basis under Rule 702 to exclude DeGeorge from testifying as an expert in this case. *See Am. Can! v. Arch Ins. Co.*, 597 F. Supp. 3d 1038, 1047–48 (N.D. Tex. 2022) (noting that courts "routinely allow testimony from experts within the [] industry to testify about the ordinary practices and usages of the industry, while specifically barring testimony that states a legal conclusion" and holding that a motion "to strike the entire [expert] report" on the basis that its states a legal conclusion "is much too broad to cure whatever specific issues may exist therein" (cleaned up)).

100. Therefore, Ace's Motion to Exclude as to DeGeorge is **GRANTED in part** and **DENIED in part**.

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Plaintiffs' Motion to Exclude as to Pierce is **GRANTED in part**, and Pierce shall be prohibited from offering any opinions as to the following:
    a. the reasonableness of the existence of redactions on the invoices at issue;
    b. the reasonableness of fees billed under the alternative fee arrangement between Plaintiffs and their attorneys in the Underlying Lawsuits; and
    c. any legal issues

2. Plaintiffs' Motion to Exclude as to Brychel is **DISMISSED as moot**.

3 Ace's Motion to Exclude as to DeGeorge is **GRANTED in part**, and DeGeorge shall be prohibited from offering opinions on any legal issues.

4 In all other respects, the Motions to Exclude are **DENIED**.[3]

SO ORDERED, this the 26th day of March 2025.

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

[3] Although the present Motions do not expressly ask the Court to exclude at trial the admission into evidence of the expert reports prepared by Pierce or DeGeorge, the parties are advised that the Court does not intend to allow the admission of those reports as they are inadmissible under the North Carolina Rules of Evidence. *See Brakebush Bros., Inc.*, 2024 NCBC LEXIS 137, at *31–32 (noting that "[e]xpert reports are not admissible as substantive evidence because they contain inadmissible hearsay"); *see also* N.C. R. Evid. 801(c) and 802.