STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 02793

MURPHY-BROWN, LLC and SMITHFIELD FOODS, INC.,

Plaintiffs,

v.

ACE AMERICAN INSURANCE COMPANY; ACE PROPERTY & CASUALTY INSURANCE COMPANY; AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY OF NEW YORK; XL INSURANCE AMERICA, INC.; and XL SPECIALTY INSURANCE COMPANY,

Defendants.

ORDER AND OPINION ON ACE AMERICAN INSURANCE COMPANY'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF DEFENSE COSTS ALLOCATION

THIS MATTER comes before the Court on Defendant ACE American Insurance Company's ("ACE") Amended Motion for Partial Summary Judgment on the Issue of Defense Costs Allocation ("Motion" or "Motion for Summary Judgment," ECF No. 674).

THE COURT, having considered the Motion, the briefs, arguments of counsel, and all appropriate matters of record, concludes that the Motion should be **GRANTED**, in part, and **DENIED**, in part.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Michael W. Mitchell, and Reed Smith, LLP, by Evan T. Knott, John D. Shugrue, Andrew M. Barrios, David Cummings, and Ashley B. Jordan, for Plaintiffs Murphy-Brown, LLC, and Smithfield Foods, Inc.

Bailey & Dixon, LLP, by John T. Crook and David S. Coats, and Clyde

& Co. US LLP, by Marianne May, Shane Calendar, Daren McNally, Luke Barlow, and Thomas Carruthers, for Defendants ACE American Insurance Company and ACE Property & Casualty Insurance Company.

Maynard Nexsen, PC, by James W. Bryan, Brett Becker, and David S. Pokela, for Defendant American Guarantee & Liability Insurance Company.

Phelps Dunbar, LLP, by Thomas Contois, Justine Tate, Robert M. Kennedy, and Christy M. Maple, for Defendants XL Insurance America, Inc. and XL Specialty Insurance Company.

Cranfill Sumner & Hartzog, LLP, by Theodore B. Smyth, and Clyde & Co. US, LLP, by Bruce D. Celebrezze and Jason Chorley, for Great American Insurance Company of New York.

Davis, Judge.

FACTUAL AND PROCEDURAL BACKGROUND

1. "The Court does not make findings of fact on motions for summary judgment; rather, the Court summarizes material facts it considers to be uncontested." *Hyosung USA Inc. v. Travelers Prop. Cas. Co. of Am.*, 2021 NCBC LEXIS 115, at **3 (N.C. Super. Ct. Dec. 16, 2021) (cleaned up).

2. The core set of facts underlying this litigation are not in dispute.

3. The Plaintiffs in this lawsuit are Smithfield Foods, Inc. ("Smithfield") and Smithfield's wholly owned subsidiary Murphy-Brown, LLC ("Murphy-Brown").[1] (Sec. Am. Compl. ["SAC"], ECF No. 444.2, ¶¶ 12–13.) "Smithfield is the largest hog and pork producer in the world." (SAC ¶ 13.)

[1] In this Opinion, Smithfield and Murphy-Brown are often referred to collectively as "Plaintiffs."

4. In 2013, property owners in eastern North Carolina who lived close to Smithfield's farming operations began filing lawsuits against Plaintiffs[2]—first in state court in 2013 and later in federal court beginning in 2014.[3] (SAC ¶¶ 28–31.) Each of these lawsuits consisted of similar allegations—that is, the assertion by the property owners that Plaintiffs' hog farming operations had resulted in both physical invasions of their property and the loss of the use and enjoyment of that property. (SAC ¶¶ 33–35.) The property owners alleged that Plaintiffs' hog farming operations had resulted in nuisance conditions such as odor, dust, noise, insects and pests, and buzzards. (SAC ¶ 34.) The property owners also asserted that Plaintiffs' trucks had caused excessive traffic, odor, noise, dust, and light. (SAC ¶ 35.)

5. The United States District Court for the Eastern District of North Carolina conducted five "bellwether" trials. (SAC ¶¶ 40–47.) Each of these trials resulted in verdicts for the property owners against Smithfield and Murphy-Brown. (SAC ¶¶ 40–47.) On appeal from one of the resulting judgments, the United States Court of Appeals for the Fourth Circuit largely affirmed the judgment entered by the district court.[4] *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937 (4th Cir. 2020). Smithfield and Murphy-Brown subsequently entered into a global settlement with all of the property owners. (SAC ¶ 47.)

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[2] Those lawsuits are occasionally referred to herein as the "Underlying Lawsuits."

[3] Shortly before the filing of the federal suits, the property owners' state court actions were voluntarily dismissed. (SAC ¶ 30.)

[4] The district court's punitive damages award was vacated due to an evidentiary error, and the case was remanded for rehearing on that issue. But in all other respects the district court's judgment was affirmed. *McKiver*, 980 F.3d at 977.

6. In the present lawsuit, Plaintiffs have sued various insurers who provided primary and excess insurance coverage for their operations between 2010 and 2015. Plaintiffs contend that these insurers should be held liable for the amounts Plaintiffs paid to settle the Underlying Lawsuits as well as the attorneys' fees and other costs Plaintiffs expended in defending the actions.

7. In order to analyze the present Motion, it is first necessary to understand the insurance coverage that Plaintiffs possessed during the years at issue.

8. Plaintiffs' first layer of coverage during the relevant policy periods consisted of commercial general liability policies and business auto policies.[5] Each of the Primary Policies is described below.

9. ACE issued a commercial general liability policy ("GL Policy") and a business auto policy to Plaintiffs for the policy period of 30 April 2010 through 30 April 2011. ("ACE Auto Policy," ECF No. 515.1; "ACE GL Policy," ECF No. 515.2.)

10. Old Republic Insurance Company ("ORIC") issued a GL policy and a business auto policy to Plaintiffs for four consecutive policy years from 30 April 2011 to 30 April 2015. ("ORIC Policies," ECF Nos. 515.3–10.) Although ORIC was originally named as a defendant in this lawsuit, it ultimately entered into a settlement with Plaintiffs, resulting in a dismissal of all claims asserted by Plaintiffs against it. ("ORIC Dismissal," ECF No. 508.)

[5] The policies comprising the primary layer of insurance coverage are on occasion referred to herein collectively as the "Primary Policies."

11. The ACE GL Policy and the ORIC GL Policies (collectively, the "Primary GL Policies") were essentially "fronting policies," meaning that they constituted a form of self-insurance in which the insured's deductible amount equaled the policy limits of $5 million. (ACE GL Policy; ORIC GL Policies, ECF Nos. 515.7–10.)

12. The ACE Auto Policy and the ORIC Auto Policies (collectively, the "Primary Auto Policies") each have policy limits of $2 million with a deductible of $1 million, with the exception of one ORIC policy for the period of 30 April 2014 through 30 April 2015, which has a policy limit of $3 million and a deductible of $1 million. (ACE Auto Policy; ORIC Auto Policies, ECF Nos. 515.3–6.)

13. Plaintiffs also possessed several layers of *excess* insurance coverage during the relevant time period. However, although the excess coverage available to Plaintiffs is highly relevant to several other issues in this case, it has no bearing on the present Motion. Therefore, the Court need not describe the excess coverage in any degree of detail.

14. Plaintiffs filed an initial Complaint in this action on 5 March 2019. (ECF No. 4.) On the following day, this lawsuit was designated as a mandatory complex business case. (ECF No. 3.)

15. Plaintiffs filed an Amended Complaint on 19 March 2019. (ECF No. 9.) On 12 January 2021, the Court granted leave for Plaintiffs to file a Second Amended Complaint, which is currently the operative pleading in this matter. (ECF No. 453.)

16. The SAC contains seven claims: (1) a breach of contract claim against ACE for breach of its duty to defend the Underlying Lawsuits under the ACE Auto

Policy; (2) a breach of contract claim against ORIC for breach of its duty to defend the Underlying Lawsuits under the ORIC Auto Policies; (3) a claim seeking a declaratory judgment that ACE and ORIC are "obligated to defend and/or reimburse the . . . defense costs incurred by [Plaintiffs]" from the Underlying Lawsuits; (4) a claim seeking a declaratory judgment that "ACE is estopped from asserting any coverage defenses" under the ACE Auto Policy; (5) a claim seeking a declaratory judgment that "ORIC is estopped from asserting any coverage defenses" under the ORIC Auto Policies; (6) a breach of contract claim against all Defendants for breach of their duty to indemnify Plaintiffs "under their respective Policies in connection with the settlement made by [Plaintiffs] with the [Underlying] Claimants"; and (7) a breach of contract claim against all Defendants with respect to their duty to indemnify for "fail[ing] and refus[ing] to make the full limits of their respective policies available so as to enable [Plaintiffs] to settle the [Underlying Lawsuits]." (SAC ¶¶ 73–121.)

17. On 22 December 2020, this Court entered partial summary judgment for Plaintiffs on their first and second claims, ruling that ORIC and ACE's "failure to provide a defense [in the Underlying Lawsuits] constitutes a breach of their respective duties to defend." *Murphy-Brown, LLC v. Ace Am. Ins. Co.*, 2020 NCBC LEXIS 154, at **4–25 (N.C. Super. Ct. Dec. 22, 2020). The Court concluded "that a duty to defend exists under Defendants' Primary Auto Polices[.]" (22 December 2020 Order and Opinion, at pp. 43–44.)

18. Following a settlement of all claims between Plaintiffs and ORIC, Plaintiffs filed a voluntary dismissal of its claims against ORIC on 1 November 2021. (ORIC Dismissal, ECF No. 508.)

19. On 5 August 2022, the Court entered an Order and Opinion that addressed various motions for summary judgment filed by the parties on a variety of issues in this case—all but one of which are irrelevant to the present Motion. (ECF No. 646.) The one relevant ruling made by the Court in that Opinion was that the Court granted Plaintiffs' Motion requesting a ruling that ACE was estopped from asserting coverage defenses based on its breach of the duty to defend. (ECF No. 646, at pp. 60–61.)

20. On 3 March 2023, ACE filed the Motion that is currently before the Court. (ECF No. 674.)

21. The Motion came before the Court for a hearing on 18 July 2023 and is now ripe for decision.

LEGAL STANDARD

I. Summary Judgment

22. It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (quoting N.C. R. Civ. P. 56(c)). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l*

Mortg. Corp., 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (citation and internal quotation marks omitted).

23. On a motion for summary judgment, "[t]he evidence must be considered 'in a light most favorable to the non-moving party.' " *McCutchen v. McCutchen*, 360 N.C. 280, 286 (2006) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004)). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985).

24. The party moving for summary judgment may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369–70 (1982) (quoting N.C. R. Civ. P. 56(e)). If the nonmoving party does not satisfy its burden, then "summary judgment, if appropriate, shall be entered against [the nonmovant]." *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (quoting N.C. R. Civ. P. 56(e)).

II. Rules of Construction – Contracts of Insurance

25. "An insurance policy is a contract[,] and its provisions govern the rights and duties of the parties thereto." *C. D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 142 (1990) (citing *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380 (1986)). Thus, general contract interpretation rules apply when interpreting an insurance policy. *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295 (2020). "In North Carolina, determining the meaning of language in an insurance policy presents a question of law for the Court." *Id.*

26. "[I]t is well settled in North Carolina that insurance policies are construed strictly against insurance companies and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 546 (1986) (citations omitted). Accordingly, "a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978). In addition,

> [t]hose provisions in an insurance policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction. However, the converse is true when interpreting the exclusionary provisions of a policy; exclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured.

N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 702 (1992).

27. An ambiguity exists when "in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970). In those circumstances, our Supreme Court has instructed that "any ambiguity or uncertainty as to the words used in the policy should be construed

against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295; *see also Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506 (1978). Further, when otherwise unambiguous policy language "become[s] ambiguous as applied to the various causes of loss set forth in the policy, the ambiguity will be construed against the insurer." *Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 102 (1971).

28. Nevertheless, "[i]f a court finds that no ambiguity exists, . . . the court must construe the document according to its terms." *Accardi*, 373 N.C. at 295*; see also Woods*, 295 N.C. at 506 ("[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein."); *Cowell v. Gaston Cty.*, 190 N.C. App. 743, 746 (2008) (stating that "the language used in the policy is the polar star that must guide the courts") (quoting *McDowell Motor Co. v. New York Underwriters Ins. Co.*, 233 N.C. 251, 253 (1951)).

ANALYSIS

29. As noted above, the Court has ruled in this case both that (1) ACE breached its duty to defend Plaintiffs in the Underlying Lawsuits; and (2) as a result of that breach, ACE is estopped from asserting coverage defenses in its Auto Policy.

30. In its 5 August 2022 Order and Opinion, the Court summarized its rulings with regard to ACE as follows:

> Therefore, the Court, having found that ACE is estopped from asserting coverage defenses contained in its Auto Policy, hereby CONCLUDES

> that Plaintiffs' motion seeking summary judgment in its favor on the fourth claim in the SAC is GRANTED.
>
> Accordingly, ACE shall indemnify Plaintiffs for the settlement of the Federal Court Lawsuits up to the ACE Auto Policy's $1 million policy limit (in net of the deductible) and for defense costs incurred in connection with the Underlying Lawsuits in an amount to be determined.

(ECF No. 646, at p. 22.)

31. In a footnote, the Court then stated the following:

> Plaintiffs do not dispute ACE's right to contest the reasonableness of the defense costs incurred in connection with the Underlying Lawsuits. That issue is not addressed in this Order and Opinion. Nor is ACE's entitlement to a credit for the amount of defense costs attributable to ORIC currently before the Court.

(ECF No. 646, at p. 22 n. 15.)

32. Thus, the Court's 5 August 2022 Order and Opinion did not rule on the issue of how the award of defense costs in this case would be allocated. That issue forms the basis for ACE's present Motion.

33. ACE first argues that—despite the Court's prior ruling that it is estopped from asserting coverage defenses in its Auto Policy—it is still entitled to challenge the reasonableness of the defense costs incurred by Plaintiffs in defense of the Underlying Lawsuits.[6] Plaintiffs disagree, arguing that the ramifications of the Court's above-referenced rulings are that ACE must pay *all* defense costs incurred by Plaintiffs without the need for any reasonableness determination. The Court agrees with ACE on this issue.

[6] To be clear, ACE is not asking for a determination as to the reasonableness of those defense costs in the present Motion. Instead, ACE seeks a ruling that it will be entitled to challenge the reasonableness of those defense costs at trial.

34. Although the Court has not identified any decision in which the courts of our State have expressly analyzed the issue in any detail, our Supreme Court has stated that an insurer who breaches its duty to defend is liable for the insured's *reasonable* defense costs. *See, e.g., Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 219 (1970) ("It is well settled that an insurer who wrongfully refuses to defend a suit against its insured is liable to the insured for sums expended in payment or settlement of the claim, for *reasonable* attorneys' fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend.") (emphasis added).

35. Moreover, this principle is reflected in a leading insurance treatise, which notes that "[i]nsureds and the lawyer seeking attorney's fees for the insurer's breach of its duty to defend have the burden of proving the *reasonableness* of the hourly rates, given the character and complexity of the litigation, the attorney's experience and other qualifications, and the locale of the legal services." *Couch on Ins.* § 205:76 (3rd. ed. 2023) (emphasis added).

36. In seeking a contrary ruling, Plaintiffs primarily rely on *Taco Bell Corp. v. Continental Cas. Co.*, 388 F.3d 1069 (7th Cir. 2004), in which the Seventh Circuit held—based on the facts of that case—that an insurer who had breached its duty to defend was not entitled to contest the reasonableness of the insured's defense costs. *Id*. at 1075–77.

37. However, a number of courts in other jurisdictions have allowed an insurer in breach of its duty to defend to challenge the reasonableness of the insured's

attorneys' fees. *See, e.g., Olin Corp. v. Ins. Co. of N. Am.*, 218 F. Supp. 3d 212, 228 (S.D.N.Y. 2016) ("Where an insurer has breached its duty to defend, the insured's fees are presumed to be reasonable and the burden shifts to the insurer to establish that the fees are unreasonable."); *Innovative Mold Sols., Inc. v. Cent. Mut. Ins. Co., Inc.*, 277 F. Supp. 3d 222, 225–26 (D. Mass. 2017) (awarding reasonable attorneys' fees to the insured despite a permitted reasonableness challenge by an insurer in breach of its duty to defend); *Gustafson v. Am. Fam. Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 167293, at *15–17 (D. Colo. Nov. 26, 2012) (holding that a breaching insurer may challenge the reasonableness of defense costs but bears the burden of proof in doing so). Moreover, and more importantly, Plaintiffs have failed to identify any case in which a North Carolina court has adopted the reasoning of *Taco Bell*.

38. Therefore, the Court **GRANTS** ACE's Motion on the issue of ACE's ability to challenge the reasonableness of Plaintiffs' defense costs incurred in defending the Underlying Lawsuits.[7]

39. The remaining portion of ACE's Motion concerns how Plaintiffs' defense costs should be allocated between ACE's policies and ORIC's policies.

40. As set out above, the Court has ruled in this case that both ACE and ORIC breached their duty to defend Plaintiffs in the Underlying Lawsuits, and ORIC—unlike ACE—subsequently settled all of Plaintiffs' claims against it.

41. ACE argues that "after a determination is made regarding reimbursable defense costs, any such defense costs must then be allocated among all triggered

[7] The Court need not—and does not—make any determination at the present time on which party will bear the burden of proof of showing reasonableness at trial.

policy years from 2010 through 2015 . . . . [A]fter allocating reimbursable defense costs across all triggered policy years, an allocation between primary coverage for each triggered policy year is also required." (ECF No. 674, at pp. 2–3.)

42. Plaintiffs, conversely, contend that "[a]lthough ACE is entitled to a credit for defense costs paid by ORIC, ACE is liable for all of [Plaintiffs'] defense costs not reimbursed by ORIC up to its 50% 'equal share'." (ECF No. 731, at p. 8.)

43. Research has not disclosed any decisions from our Supreme Court specifically analyzing the issue of defense costs allocation among multiple insurers where one or more of them have breached their duty to defend.[8] However, our Court of Appeals addressed such an issue in *Ames v. Continental Cas. Co.*, 79 N.C. App. 530 (1986).

44. *Ames* was a declaratory judgment action seeking a determination of applicable insurance coverage under a malpractice policy issued by Continental Casualty Company ("Continental") to an accounting firm called A.M. Pullen and Company ("Pullen"). Continental had issued Pullen a series of "occurrence" policies with liability limits of $1 million each. Effective 30 November 1971, Pullen terminated its coverage with Continental and subsequently obtained coverage under a "claims made" insurance policy issued by Lloyd's, London ("Lloyd's") with a liability

[8] Although ACE cites to the Supreme Court's recent opinion in *Radiator Specialty Co. v. Arrowood Indemnity Co.*, 383 N.C. 387 (2022) in support of its argument that the allocation of defense costs between itself and ORIC should be made on a *pro rata* basis, the Supreme Court's analysis in *Radiator Specialty* did not address the allocation of defense costs among insurers at all—much less under circumstances where one or more of the insurers had been found to have breached their duty to defend the insured.

limit of $10 million. The Lloyd's policy remained in effect from 1 December 1971 throughout the relevant time periods for purposes of the lawsuit. *Id.* at 533.

45. A former client filed a professional malpractice action against Pullen for alleged acts occurring between 1967 and 1973. Pullen and Lloyd's initiated the declaratory judgment action against Continental, asserting that the policies issued by Continental to Pullen provided coverage for acts or omissions forming the basis for the former client's negligence suit. Pullen and Lloyd's sought a declaration that Continental owed a duty to defend Pullen in the malpractice action and to pay any judgment rendered against Pullen in that lawsuit up to the full extent of Continental's policy limits. The malpractice suit was ultimately settled for $5,250,000, and Lloyd's incurred $724,659.52 in defense costs. "Continental did not participate in either the defense or the settlement of the [malpractice] action." *Id.* at 533–34.

46. On appeal, Continental argued, among other things, that Lloyd's had not sufficiently shown that any portion of the settlement represented payment for negligent acts occurring during 1971. *Id.* at 538. The Court of Appeals rejected this argument, stating the following:

> Continental had a duty to defend Pullen where on the face of the complaint Pullen was being sued for acts which occurred during the period of Continental's coverage. Continental had the opportunity to raise these defenses during the [underlying] litigation, but as we have previously determined, Continental unjustifiably refused to defend Pullen in that action. When an insurer without justification refuses to defend its insured, the insurer is estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith by the insured of the action brought against him by the injured party. . . . By denying liability and refusing to defend claims covered by

> the insurance policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured. . . .
>
> In view of Continental's wrongful breach of the policy contract we find it unnecessary to discuss whether Lloyd's has failed to show that any amount of the settlement represents payment for wrongful acts occurring in 1971.

Id. at 538.

47. After establishing the consequences of Continental's breach of the duty to defend, the Court of Appeals then addressed the issue of defense costs allocation between the two insurers, holding as follows:

> The trial court awarded Lloyd's $138,030.40 for reimbursement of defense costs. This figure is equal to a 19% share of the settlement figure for which the trial court determined Continental was responsible. Continental contends it owes no obligation to contribute to Lloyd's defense costs, claiming Lloyd's was obligated as a primary insurer to defend Pullen under its policy. Lloyd's in its cross-appeal contends the trial court erred in failing to reimburse Lloyd's for the full amount of its defense costs, claiming Continental was the primary insurer and thus obligated to defend Pullen.
>
> We hold both parties had a duty to defend Pullen and thus the defense costs should be shared equally. . . . We have determined Continental was the primary insurer for acts or omissions occurring on or before 30 November 1971. The . . . complaint alleged damages as a result of reliance upon financial statements produced by Pullen during the coverage period of the Continental policy. Lloyd's was the primary, and only, insurer for the period following 30 November 1971. The . . . complaint also alleged damages arising from the period of the Lloyd's policy coverage. *Thus, under North Carolina law, both insurers had a duty to defend Pullen. . . . In view of this fact, we believe that equity dictates that the defense costs be shared equally among the two insurers.*

Id. at 539–40 (emphasis added).

48. Several federal courts applying North Carolina law have followed *Ames* in addressing how multiple insurers must share the burden of reimbursing defense

costs incurred by the insured where an insurer has breached the duty to defend. *See St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 241 (4th Cir. 1990) ("As to costs of defense, under *Ames*, once it is shown that [the insurer] breached its duty to defend, the remedy for the breach is that it should share equally in the costs of defending [the insured]."); *Med. Mut Ins. Co. of NC v. Am. Cas. Co. of Reading, PA*, 721 F. Supp. 2d 447, 464–65 (E.D.N.C. 2010) ("[Insurer in breach of the duty to defend] must share equally in the defense costs [with the other insurer].").

49. Here, the Court likewise believes that *Ames* is the most relevant North Carolina case on this issue and that its rationale supports a finding that ACE and ORIC should share equally the defense costs at issue. Such a result is also consistent with the public policy of disincentivizing insurers from failing to provide a full and complete defense of their insureds in the event that a duty to defend exists under their policies.

50. The Court therefore **CONCLUDES** that ACE is liable for a 50% share of Plaintiffs' reasonable defense costs from the Underlying Lawsuits—subject to any credit to which ACE may be entitled based on ORIC's contribution to Plaintiffs' defense costs.[9]

[9] In light of this ruling, the Court need not address any of ACE's other allocation-related arguments contained in its briefs.

CONCLUSION

THEREFORE, ACE's Motion for Summary Judgment is **GRANTED**, in part, and **DENIED**, in part, as follows:

1. ACE is not estopped from challenging the reasonableness of Plaintiffs' defense costs incurred in defending the Underlying Lawsuits; and
2. ACE is liable for a 50% share of Plaintiffs' reasonable defense costs, subject to any credit to which ACE may be entitled based on ORIC's contribution to those defense costs.

SO ORDERED, this the 7th day of August, 2023.

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