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 AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANTS XL INSURANCE AMERICA, INC. AND XL SPECIALTY INSURANCE COMPANY ON ISSUE OF NUMBER OF ACCIDENTS

THIS MATTER comes before the Court on Defendants XL Insurance America, Inc. and XL Specialty Insurance Company's (the "XL Defendants") Amended Motion for Partial Summary Judgment of Defendants XL Insurance America, Inc. and XL Specialty Insurance Company on Issue of Number of Accidents ("Motion" or "Motion for Summary Judgment," ECF No. 679).

THE COURT, having considered the Motion, briefs, exhibits, affidavits, depositions, arguments of counsel, and all other appropriate matters of record, concludes that the Motion for Summary Judgment should be **DENIED**.

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).

---

[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.

Smithfield and Murphy-Brown subsequently entered into a global settlement with all of the property owners. (SAC ¶ 47.)

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 necessary to understand the layers of insurance coverage that Plaintiffs possessed during the years at issue.

A. Primary Coverage

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. Defendant ACE American Insurance Company ("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

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

settlement with Plaintiffs, resulting in a dismissal of all claims asserted by Plaintiffs against it. (ECF No. 508.)

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.)

B. Excess Coverage

1. Zurich First-Layer Excess Policies

13. Defendant American Guarantee & Liability Insurance Company ("Zurich") issued first-layer excess policies (the "Zurich Policies") to Plaintiffs for four consecutive annual policy periods spanning from 30 April 2010 through 30 April 2014. ("Zurich Policies," ECF Nos. 515.11–14.) The Zurich Policies have a $25 million policy limit. (ECF Nos. 151.11–12, at p. 2; ECF Nos. 151.13–14, at p. 5.)

14. The Zurich Policies provide excess coverage that follows form to the underlying Primary Policies "to the extent such terms and conditions are not inconsistent or do not conflict with the terms and conditions" in the Zurich Policies.

(*See, e.g.,* ECF No. 515.12, at p. 35.)[6] Furthermore, the Zurich Policies contain the following language:

> Notwithstanding anything to the contrary . . . , if underlying insurance does not apply to damages, for reasons other than exhaustion of applicable limits of insurance by payment of loss, then [the Zurich Policies] do[ ] not apply to such damages.

(*See, e.g.*, ECF No. 515.12, at p. 35.)

2. XL Specialty First-Layer Excess Policy

15. Defendant XL Specialty Insurance Company ("XL Specialty") issued a first-layer excess policy to Plaintiffs for the policy period 30 April 2014 through 30 April 2015. ("XL Specialty Policy," ECF No. 515.25.) The XL Specialty Policy has a $25 million policy limit. (ECF No. 515.25, at p. 11.)[7]

3. Great American Second-Layer Excess Policies

16. Defendant Great American Insurance Company of New York ("Great American") issued second-layer excess policies to Plaintiffs for five consecutive annual policy periods spanning from 30 April 2010 through 30 April 2015. ("Great American Excess Policies" or "Second Layer Excess Policies," ECF Nos. 515.15–19.) The Second Layer Excess Policies provide excess coverage that follows form to the

[6] A "follow-form" excess insurance policy "covers a liability loss that exceeds the underlying limits [of the underlying policy] only if the loss is covered by the underlying insurance." 1 LNPG: NEW APPLEMAN NORTH CAROLINA INSURANCE LITIGATION § 10.09[2] (LexisNexis 2022). Unless the policy specifies otherwise, a follow-form policy "is subject to the exact same provisions of the underlying policy." *Id*. at [1].

[7] The Zurich Policies and the XL Specialty Policy are collectively referred to as the "First Layer Excess Policies."

First Layer Excess Policies and cover losses up to $25 million in excess of the First Layer Excess Policies' limits. (*See, e.g.,* ECF No. 515.15, at p. 14.)

4. ACE P&C Third-Layer Excess Policies

17. Defendant ACE Property & Casualty Insurance Company ("ACE P&C") issued third-layer excess policies to Plaintiffs for five consecutive annual policy periods spanning from 30 April 2010 through 30 April 2015. ("ACE P&C Excess Policies" or "Third Layer Excess Policies," ECF Nos. 515.20–24.) The Third Layer Excess Policies provide excess coverage that follows form to the First Layer Excess Policies and cover losses up to $25 million in excess of the Second Layer Excess Policies. (*See, e.g.,* ECF No. 515.20, at p. 5.)

5. XL Insurance Fourth-Layer Excess Policies

18. Defendant XL Insurance America, Inc. ("XL") issued fourth-layer excess policies to Plaintiffs for four consecutive annual policy periods spanning from 30 April 2010 through 30 April 2014. ("XL Excess Policies" or "Fourth Layer Excess Policies," ECF Nos. 515.26–29.) The Fourth Layer Excess Policies provide excess coverage that follows form to the First Layer Excess Policies and cover losses up to $25 million in excess of the Third Layer Excess Policies. (*See, e.g.,* ECF No. 515.29, at p. 14.)

C. Lawsuit

19. 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.)

20. 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.)

21. 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.)

22. 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[.]" *Id.* at **54.

23. 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. (ECF No. 646.) In its Order and Opinion, the Court made the following rulings: (1) the Court granted Plaintiffs' motion requesting a ruling that ACE[8] was estopped from asserting coverage defenses based on its breach of the duty to defend; (2) the Court denied Defendants' Motion for Partial Summary Judgment requesting a ruling that coverage under any policy was barred by the lack of an "accident" based on the Court's determination that a genuine issue of material fact existed on that issue; (3) the Court granted, in part, and denied, in part, Plaintiffs' and Defendants' Motions for Partial Summary Judgment based on the "Pollution Exclusion" contained in Defendants' various insurance policies; and (4) the Court granted, in part, and denied, in part, XL Specialty's Motion for Partial Summary Judgment based on the "Known Injury" provision contained within its policy. (ECF No. 646, at pp. 60–61.)

24. On 3 January 2023, the Court entered an Order denying Plaintiffs' Rule 54(b) Motion for Reconsideration/Clarification and Rule 59(e) Motion to Amend Regarding Summary Judgment Ruling. (ECF No. 669.)

[8] By this time, ORIC was no longer a party to this litigation by virtue of its settlement with Plaintiffs.

25. On 3 March 2023, the XL Defendants filed the Motion for Summary Judgment that is currently before the Court. (ECF No. 679.)

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

LEGAL STANDARD

I. Summary Judgment

27. 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).

28. 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).

29. 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

30. "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 and 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.*

31. "[I]t is well settled in North Carolina that insurance policies are construed strictly against insurance companies and in favor of the insured." *State Cap. 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, 702–03 (1992) (citation omitted).

32. 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).

33. 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, 253–54 (1951)).

ANALYSIS

34. As noted above, in its 5 August 2022 Order and Opinion the Court denied Defendants' Motion for Partial Summary Judgment seeking a ruling that no coverage exists under *any* of the policies at issue on the theory that the injuries giving rise to the Underlying Lawsuits did not arise from an "accident" pursuant to the definition of that term in the policies. Specifically, Defendants contended that all of the injuries suffered by the property owners were either—from the standpoint of Plaintiffs—intentional or substantially certain to occur such that they could not properly be characterized as "accidents". The Court determined that a genuine issue of material fact existed on that issue that must be decided by a jury. (ECF No. 646, at p. 27.)

35. The central issue with regard to the present Motion is whether—assuming a jury ultimately finds that the property owners' nuisance injuries were, in fact, caused by an "accident" under the terms of the relevant policies—there were *multiple* "accidents" as opposed to a *single* one.

36. As the XL Defendants explain in their briefs, this issue is significant because in the event the Court rules that the Underlying Lawsuits were based on multiple accidents, then "the primary auto policies' deductibles would have to be paid, and their per accident limits exhausted, for each such accident, before the excess insurers could possibly owe any payment." (ECF No. 680, at p. 3.)[9]

37. The XL Defendants argue that the record unambiguously discloses that the Underlying Lawsuits stemmed from 89 separate accidents.[10] They base this argument on their assertion that the underlying nuisance injuries arose due to the operation of 89 separate farms (and the accompanying trucks serving those farms), each of which created nuisance conditions. As a result, the XL Defendants contend, "the nuisance conditions created by the trucks that served each of the hog farms at issue must be considered to be separate 'accidents' within the meaning of the relevant policy language." (ECF No. 680, at p. 1.)

38. Conversely, both Plaintiffs and ACE contend that on these facts there was only one "accident" pursuant to the language of the policies—that is, Plaintiffs' centralized policies and procedures regarding the operation of their farms, including their trucking operations.

---

[9] Although a ruling in the XL Defendants' favor on this issue would therefore benefit the other excess insurers in this case, none of them have joined the XL Defendants' Motion.

[10] Despite making this argument, the XL Defendants have expressly reserved their right to argue at trial that the Underlying Lawsuits did not, in fact, arise from *any* accidents at all based on their contention that the nuisance injuries were either intentional or substantially certain to occur from the standpoint of Plaintiffs. ACE has likewise preserved its right to make this same argument at trial.

39. As a threshold matter, the parties disagree as to whether this issue is appropriate for summary judgment. The XL Defendants argue that there are no disputes of material fact underlying this issue and that a ruling at the present time is appropriate. Plaintiffs disagree, contending that such an issue is better resolved after the finder of fact determines whether there has, in fact, been an accident under the policies to trigger coverage.

40. The Court is satisfied that no genuine issue of material fact exists regarding this issue and that it is instead purely a question of law. The Court, in its discretion, concludes that a ruling on the issue presented at this time is appropriate. *Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, 2020 NCBC LEXIS 70, at **13 (N.C. Super. Ct. Jun. 5, 2020) ("In the circumstances of this case, the Court concludes that addressing [the Motion for Partial Summary Judgment] at this time will not result in an advisory opinion and is instead a prudent use of the Court's time and resources.").

41. The Court begins its analysis by examining the relevant language of the insurance policies at issue.

42. The ACE and ORIC Auto Policies provide that the insurers "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or property damage' to which this insurance applies, caused by an '*accident*' and resulting from the ownership, maintenance or use of a covered 'auto'. " (*See, e.g.,* ECF No. 515.1, at p. 16; ECF No. 515.3, at p. 40 (emphasis added).)

43. The ACE Auto Policy and the ORIC Auto Policies in effect from 30 April 2010 to 30 April 2014 have a $2 million limit per "accident" with a $1 million deductible per "accident," with no aggregate limit, and the ORIC Auto Policy in effect from 30 April 2014 to 30 April 2015 has a limit of $3 million per "accident" with a $1 million deductible per "accident" and no aggregate limit. (*See, e.g,* ECF No. 515.1, at pp. 2, 46; *see also* 2014–2015 ORIC Auto Policy, ECF No. 515.6, at p. 7.) As described above, various insurers provided layers of excess coverage that are triggered when the coverage limits under a primary policy are exhausted. (*E.g.,* ECF No. 515.25, at p. 21.)

44. The relevant policies state that "[a]ll 'bodily injury', 'property damage' and 'covered pollution cost or expense' resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one 'accident'." (*E.g.,* ECF No. 515.1, at p. 19; ECF No. 515.3, at p. 43.) (emphasis added).)

45. In interpreting essentially identical policy language, our Supreme Court has held that North Carolina courts should apply a "cause" test to determine whether the subject injury involves one or multiple occurrences. *See Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 303 (2000).

46. *Gaston* involved an insurance coverage dispute arising from a products liability action seeking damages related to the rupture of a pressure vessel used in the manufacture of certain types of dyes utilized in diagnostic medical imaging. As a result of the rupture, the leakage of a chemical used in the heating process

contaminated over sixty tons of dye. *Id.* at 295, 302. In analyzing the issue of whether the damage had resulted from one occurrence or multiple ones, the Supreme Court ruled that "[i]n determining whether there was a single occurrence or multiple occurrences, we look to the cause of the property damage rather than to the effect." *Id.* at 303. Applying this principle, the Supreme Court concluded that although a rupture of the pressure vessel contaminated "multiple dye lots" and the damage "extend[ed] over two policy periods[,]" there was only one occurrence under the policy—the injury-causing rupture of the machinery. *Id.* at 303–04.

47. Although *Gaston* is the most relevant case from our Supreme Court on this issue, it is factually dissimilar to the present case. Here, conversely, property owners suffered repeated exposure to conditions over multiple policy periods without a sudden and one-time triggering event akin to the sudden rupture of machinery.

48. However, the Fourth Circuit has interpreted *Gaston* as standing for the proposition that North Carolina's "cause" test allows for the utilization of a "proximate cause" theory in cases—like the present one—where there is no single one-time event giving rise to the injuries at issues.

> North Carolina courts have adopted a cause test to determine how many occurrences an event encompassed. *See Gaston Cnty.*, 524 S.E.2d at 565. Under this type of test, the number of occurrences "is determined by the cause or causes of the resulting injury." *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982). The cause test stands in opposition to the effect test, which treats each injury as a separate occurrence.
>
> . . .
>
> Courts have adopted various formulations of the cause test. Under the "proximate cause theory," courts consider an event to constitute one occurrence when "there was but one proximate, uninterrupted, and

continuing cause which resulted in all of the injuries and damage." *Id.* at 1496 (quoting *Appalachian Ins. Co.*, 676 F.2d at 61) (internal quotation marks omitted). In contrast, courts employing the "liability event theory" look to the immediate event or events that gave rise to liability to determine the number of occurrences.

. . .

Duke argues extensively that *Gaston County Dyeing Machine Co. v. Northfield Insurance Co.* supports its argument that the Supreme Court of North Carolina determines the number of occurrences by pinpointing the most immediate cause or causes of the harm. In *Gaston County*, the Supreme Court of North Carolina considered whether the rupture of a pressure vessel and the resulting contamination of multiple lots of medical imaging dye qualified as a single occurrence or multiple occurrences. . . . Duke contends that *Gaston County* supports its position that the Supreme Court of North Carolina looks to the most immediate cause of the injury to determine the number of occurrences because the court considered the valve rupture—not more remote causes, such as the vessel's defective design or manufacturing—to be the accident.

. . .

Duke overlooks the *Gaston County* court's conclusion that the incident involved a single occurrence because, when "all subsequent damages flow from the single event, there is but a single occurrence." *Id.* at 565. This statement evokes the proximate cause theory.

. . .

[W]e believe the Supreme Court of North Carolina would find that this case involves one occurrence . . . . First, there is no reason to suspect that the Supreme Court of North Carolina would not apply the test that it enunciated in *Gaston County* to determine the number of occurrences in contexts other than trigger of coverage. Numerous other courts have applied a similar test to determine the number of occurrences in cases analogous to this one, including the United States District Court for the Eastern District of North Carolina in a case interpreting North Carolina law. *See W. World Ins. Co. v. Wilkie*, No. 5:06–CV–64–H, 2007 WL 3256947, at *4–5 (E.D.N.C. Nov. 2, 2007); *see also, e.g., Fireman's Fund Ins. Co. v. Scottsdale Ins. Co.*, 968 F. Supp. 444, 448 (E.D. Ark. 1997) (concluding that preparation of contaminated food was one occurrence despite multiple sales of that food); *Doria v. Ins. Co. of N. Am.*, 210 N.J. Super. 67, 509 A.2d 220, 224–25 (N.J. Super. Ct. App. Div. 1986) (holding that insureds' failure to properly fence their pool was one occurrence regardless of the number of resulting injuries). Second,

> *Koikos v. Travelers Insurance Co.*, 849 So.2d 263 (Fla. 2003)—the primary case that Duke relies on to support its contention than an occurrence is the "most immediate cause of the injury"—has been discredited by other courts. *See Wilkie*, 2007 WL 3256947, at *3–4 (declining to apply *Koikos* in part because it was inconsistent with *Gaston County*); *Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147, 938 A.2d 286, 295 (2007). There is no indication that the Supreme Court of North Carolina would adopt the rule that the Florida Supreme Court developed in *Koikos* rather than turning to the standard it enunciated in *Gaston County*.

Mitsui Sumitomo Ins. Co. of Am. v. Duke Univ. Health Sys., Inc., 509 F. App'x 233, 238–40 (4th Cir. 2013).

49. The Court agrees that the Fourth Circuit's analysis in *Mitsui* is fully consistent with the Supreme Court's analysis in *Gaston*. The Court likewise finds instructive a number of cases decided by courts in other jurisdictions applying this test to facts that are analogous (albeit not identical) to those present here in which a company's policies gave rise to multiple injuries over a period of time.

50. For example, in *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3rd Cir. 1982), the insured company engaged in acts of discrimination against multiple claimants. The Third Circuit examined whether the company's employment policies had resulted in one or multiple occurrences for purposes of an applicable insurance policy. *Id.* at 61. The Third Circuit held that under a proximate cause analysis, "there was but one occurrence for purposes of policy coverage." *Id.* This was so because "the injuries for which [the insured] was liable all resulted from a common source: [the insured's] discriminatory employment policies." *Id.* The court declined to undertake any analysis of whether those policies were implemented by different company officials or whether there were any individualized circumstances

in the specific incidents of discrimination at issue. *See id.* Instead, the court found the common identifying cause that set the events giving rise to liability in motion and determined that such an event was one occurrence. *See id.*

51. In so holding, the Third Circuit stated:

> The fact that there were multiple injuries and that they were of different magnitudes and that injuries extended over a period of time does not alter our conclusion that there was a single occurrence. As long as the injuries stem from one proximate cause there is a single occurrence. *Champion Int'l. Corp. v. Continental Casualty Co.*, 546 F.2d 502, 505-506 (2d Cir. 1976), cert. denied, 434 U.S. 819, 98 S. Ct. 59, 54 L. Ed. 2d 75 (1977). Indeed, the definition of the term "occurrence" in the Appalachian policy contemplates that one occurrence may have multiple and disparate impacts on individuals and that injuries may extend over a period of time.

Id.

52. The Third Circuit has also rejected the notion that a different analysis is appropriate when the applicable injuries occur in "different geographic regions" if they otherwise arose from a single proximate cause. *See Sunoco, Inc. v. Illinois Nat. Ins. Co.*, 226 F. App'x 104, 108 (3rd Cir. 2007). In that case, Sunoco sued its insurer after Sunoco was named as a defendant in 77 lawsuits "based on Sunoco's manufacture and distribution of gasoline containing MtBE[.]" *Id.* at 105. In analyzing whether the insured's conduct constituted a single occurrence under the proximate cause theory, the Third Circuit stated as follows:

> The underlying seventy-seven cases before us are not identical. They allege contamination in different geographic regions, they resulted from a variety of sources including gas tank leaks and accidental spills from pipelines, and the plaintiffs vary from individuals to governmental entities. However, despite these differences, all of the injuries alleged, save one, arose from a single occurrence. Each of the plaintiffs in the cases presented in the record allege the same cause of action: injuries resulting from the hazardous manufacture of gasoline containing MtBE

> and failure to warn. . . . [E]ach plaintiff suing Sunoco was exposed to the same general harmful condition—gasoline containing MtBE—which resulted in contaminated ground water. *Treesdale*, 418 F.3d at 336. It is irrelevant how each plaintiff came into contact with the MtBE as the same alleged negligent act of using MtBE was the proximate cause of the harm. *Union Carbide*, 399 F. Supp. at 21.

Id. at 108.

53. This approach has also been followed by other courts applying a proximate cause test. *See, e.g., Bd. Of Cty. Cmm'rs v. Marcas L.L.C.*, 415 Md. 676, 695 (2010) (holding that a company's "numerous negligent acts" in a private nuisance and trespass action "were so uniform, routinized, and regularized, and occurred at such steady and frequent intervals, that they merged into one continuous 'same occurrence.' "); *Certain Underwriters at Lloyd's v. S. Nat. Gas. Co.*, 142 So. 3d 436, 457 (Ala. 2013) (affirming a trial court finding that there was a single occurrence when a "routine operation" of a gas pipeline system caused injuries across multiple time periods to multiple persons).

54. Similarly, the evidence here is clear that the injuries suffered by the property owners stemmed from central, uniform policies and procedures decided upon and implemented by Plaintiffs in operating their farms—including their trucking operations. The injuries suffered by the property owners did not materially vary based on differences in the various farms owned or operated by Plaintiffs. To the contrary, these injuries were based on exposure to conditions that were essentially the same in all material respects. (*See* ECF No. 646, at p. 5 ("The Underlying Claimants all alleged, *inter alia*, that Murphy-Brown's [Concentrated Animal Feeding Operations] and associated trucking operations had resulted in noxious

odors, hog waste, pests (flies, vermin, and buzzards), dust, truck traffic, noise and lights—denying the use and enjoyment of their properties.").)

55. The proposition that the primary causal factor leading to the homeowners' injuries was the set of policies and procedures implemented by Plaintiffs is consistent with the analysis in *McKiver*. The Fourth Circuit stated there that Plaintiffs were "solely responsible for [their contract growers'] trucking schedule and for the decision of where to site the facility's entrance road that passed near [the claimants'] properties." *McKiver*, 980 F.3d at 970.

56. Indeed, the record in this case shows the existence of a centralized trucking operation coordinated by Plaintiffs. Plaintiffs conducted extensive training for each of their truck drivers in southeastern North Carolina based on standardized policies and procedures for transporting animals and feed as detailed in a Commercial Driver License ("CDL") Handbook. (CDL Handbook, ECF No. 728.5; Murphy-Brown Training Lesson Plan, ECF No. 728.6.)

57. Moreover, "between 2002 and 2014, the scheduling and dispatching of [Plaintiffs'] drivers and trucks – whether for hauling live animals, hog feed, or mortalities – was coordinated from one of Murphy-Brown's centralized transportation offices located in Warsaw, Rose Hill, Kenansville, and/or Clinton, North Carolina." (Searles Decl., ECF No. 728.4, ¶ 6.) This means that individual farms had little to no control over the individual traffic patterns of Plaintiffs' trucks. Plaintiffs also used the same types of trucks—which did not differ in any material

way—for hauling animals and feed and routinely purchased similar replacement vehicles. (Searles Dep., ECF No. 728.2, at 267:1–268:20; Searles Decl. ¶ 18.)

58. In sum, the undisputed evidence before the Court reflects a "uniform, routinized, and regularized" set of practices resulting from the operation of Plaintiffs' farms that "occurred at such steady and frequent intervals" that they are appropriately treated as a single "accident" for purpose of the insurance policies at issue. *Marcas*, 415 Md. at 695.

59. Moreover, the Court's ruling is fully consistent with the relevant policy language as the injuries suffered by the property owners in the Underlying Lawsuits clearly resulted from "continuous or repeated exposure to substantially the same conditions[.]" (*E.g.,* ECF No. 515.1, at p. 19; ECF No. 515.3, at p. 43.)

60. The Court has carefully considered the competing arguments offered by the XL Defendants and finds them to be without merit. The Court also finds the cases from other jurisdictions relied upon by the XL Defendants to be unpersuasive.

61. The Court therefore **DENIES** the XL Defendants' Motion for Summary Judgment and rules as a matter of law that the underlying injuries suffered by the property owners that formed the basis for the Underlying Lawsuits are properly treated as one—as opposed to multiple—accidents under the insurance policies at issue.

CONCLUSION

THEREFORE, the Amended Motion for Partial Summary Judgment of Defendants XL Insurance America, Inc. and XL Specialty Insurance Company on Issue of Number of Accidents is **DENIED.**

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

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