

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2004-CP-26-0084

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SC Court of Appeals

Crossmann Communities of North Carolina, Inc.
and Beazer Homes Investment Corp.,..... *Appellants,*

vs.

Harleysville Mutual Insurance Company and
Cincinnati Insurance Company,

Of Whom Cincinnati Insurance Company is *Respondent.*

RECORD ON APPEAL - VOLUME II

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STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Crossmann Communities of North
Carolina, Inc., Beazer Homes
Investment Corp., and
Daniel Rogers,

Plaintiffs,

v.

Harleysville Mutual Insurance
Company, Cincinnati Insurance
Company, and Associated Insurors,
Inc., of Myrtle Beach,

Defendants.

COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2004-CP-26-84

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CLERK OF COURT

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NORTH CAROLINA, INC., BEAZER HOMES
INVESTMENT CORP., AND DANIEL ROGERS REGARDING DAMAGES
ISSUES TO BE ADDRESSED ON REMAND**

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INTRODUCTION

This case returns to this Court following the Supreme Court's decision in *Crossmann Communities of N.C., Inc. v. Harleysville Mutual Insurance Co.*, ___ S.E.2d ___, 2011 WL 3667598 (S.C. Aug. 22, 2011) ("*Crossmann*"), affirming this Court's earlier judgment in part but also vacating in part and remanding for an assessment of the two non-settling insurers' liability under the new *pro rata* "time on the risk" approach. In its February 2007 post-trial brief, Defendant Harleysville Mutual Insurance Company ("Harleysville") provided the Court with the basic contours of such a time-on-risk calculation of its liability under its insurance policies. The basic premises of Harleysville's approach are largely undisputed by Beazer, although there is some dispute regarding the details of the methodology Harleysville previously advanced to this Court. Properly calculating each insurer's *pro rata* time on the risk on a building-by-building basis, this Court should enter judgment in favor of the Plaintiffs (collectively "Beazer") and against Harleysville for \$1,666,128, plus post-judgment interest accruing from the date of the original judgment, May 3, 2007.

This Court also should enter judgment against Defendant Cincinnati Insurance Company ("Cincinnati") for \$5,533,872 plus interest. Cincinnati provided Beazer with excess insurance coverage and each of the underlying primary insurance policies has been exhausted. This Court should calculate Cincinnati's excess liability based on the joint-and-several methodology, as Cincinnati failed to appeal this Court's May 3, 2007, judgment declaring that its liability was joint and several. Cincinnati's joint and several share is \$5,533,872. At a minimum, under a *pro rata* methodology, Cincinnati's liability is \$2,996,193.

BACKGROUND

On January 8, 2004, Beazer filed suit in this Court against Harleysville, Cincinnati, and other insurance companies that had sold it commercial general liability ("CGL") insurance policies covering claims arising from five real estate development projects in South Carolina: River Oaks I, River Oaks II, Waterway Village, Buck Creek, and Lightkeepers Village. It is undisputed that Beazer paid \$16,770,750 to settle those underlying homeowner suits. It is also undisputed that those underlying suits alleged "water penetration and progressive damage to otherwise non-defective components of the condominium projects" caused by "exterior components of the condominium projects [that] were negligently constructed" by Beazer's subcontractors. *Crossmann*, 2011 WL 3667598, at *1. The details of the settlements are below:

Project	Payment Date	Amount
RO I	October 24, 2005	\$7,425,000
RO II	March 14, 2006	\$2,826,500
WV	July 5, 2006	\$3,925,000
BC	July 5, 2006	\$2,194,250
LV	November 21, 2006	\$400,000
Total		\$16,770,750

(May 3, 2007 Order at 8, attached as Ex. A.) In this Court, Beazer sought a declaratory judgment that both Harleysville and Cincinnati owed it insurance coverage for this loss, which constituted sums that Beazer became legally obligated to pay because of "property damage" caused by an "occurrence" within the meaning of the CGL insurance policies sold to Beazer by Harleysville and Cincinnati.

Beazer has also incurred substantial unreimbursed losses because of similar construction-related lawsuits based on property damage resulting from unintended water intrusion in homes built in Indiana and Kentucky. These losses are relevant here because Beazer's insurance policies covering South Carolina also covered these Indiana and Kentucky losses. Specifically, Beazer has been legally obligated to pay \$42,743,141 because of water intrusion claims brought against Beazer in Indiana. (See Trinity Water Intrusion Claims — Damages Summary, attached as Ex. B.)¹ And Beazer has been legally obligated to pay over \$13,418,760 because of such water intrusion claims in Kentucky. (Lexington, Kentucky Water Intrusion Claims — Damages Summary, attached as Ex. D.) As a partial offset for these losses, Beazer has received \$17,674,100.03 from responsible subcontractors and also \$12,881,605.88 from its other insurers in Indiana. (Ex. B.) Beazer has been reimbursed \$3,369,248 from its subcontractors and other insurers in Kentucky. (Ex. D.) Beazer and Cincinnati are in the process of memorializing a settlement to resolve Cincinnati's obligations concerning Kentucky and Indiana claims.² Even after this settlement, Beazer will face multimillion-dollar unreimbursed losses in both Indiana and Kentucky.

¹ The March 29, 2006, affidavit filed in this case executed by Beazer's then-Vice President of Risk Management, W. Mark Berry, contains many of the facts and other evidentiary support for Beazer's claims against Harleysville and Cincinnati and is attached as Exhibit C. Because Mr. Berry's affidavit regarding the Indiana and Kentucky matters is out of date, Beazer in this brief cites to damages summaries that Beazer has sent to Cincinnati so that this Court does not make a decision based on stale information.

² The terms of this settlement are confidential and not yet finalized, but Cincinnati is clearly aware of the terms and Beazer is prepared to discuss them with the Court if necessary.

Prior to the trial in this case, Beazer entered into the following settlements with three underlying primary insurers that were at the time Defendants:³

Insurer	Total Settlement
Indiana Ins. Co.	\$2,700,000
Massachusetts Bay Ins. Co.	\$2,900,000
Regent Ins. Co.	\$3,000,000
Total	\$8,600,000

Beazer reasonably allocated \$4.15 million of these settlements to the losses at issue in this case and the remainder to the Indiana and Kentucky losses, leaving Beazer with unreimbursed losses of \$12,620,750 for the construction defect-related claims at issue here.

Immediately prior to the scheduled trial of this matter, Beazer, Harleysville, and Cincinnati entered into a Stipulation that agreed upon material facts and stated the legal issues for the Court's consideration. (See generally Stipulation, attached as Ex. E.) As relevant here, the Stipulation provides:

(1) that, if the water damage to the homes was caused by an "occurrence," then "the damages at the underlying projects that resulted from water intrusion and that meet the definition of 'property damage' in the [Harleysville and Cincinnati] Policies are \$7.2 million"; and

(2) that the damage "began within 30 days after the Certificate of Occupancy was issued for each building" at each project and "progressed until repaired or until Beazer Homes paid to settle the underlying cases."

(Stip. ¶¶ 1, 2.) The parties further agreed that this Court should decide

(1) whether the property damage at issue in the case "arose from an 'occurrence'" within the meaning of Beazer's CGL insurance policies; and

³ Massachusetts Bay and Regent were also defendants in other construction-related, insurance coverage lawsuits, as described below.

(2) whether each insurer faced “joint and several” liability for the damage, or whether their liability was limited to their *pro rata* share of the damage based on their “time on the risk.”

(*Id.* ¶ 8.) The parties also agreed that any party could, if they so chose, seek a direct appeal of the Court’s Order to the Supreme Court.

On May 3, 2007, this Court ruled in favor of Beazer on both legal issues, entering a binding declaratory judgment against both Harleysville and Cincinnati. The Court declared that Beazer’s loss was caused by an “occurrence,” and therefore was covered. (May 3, 2007 Order at 14.) Relying on *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 357 (2002), this Court further declared that each insurer faced “joint and several” liability for the costs arising from this damage. (*Id.* 15–16.) Pursuant to this declaratory judgment, this Court entered a money judgment against Harleysville for \$7.2 million. Although the Court’s declaratory judgment was binding as to Cincinnati, the Court did not award damages against Cincinnati because the award against Harleysville provided complete satisfaction of Beazer’s stipulated damages of \$7.2 million. Harleysville appealed. Cincinnati did not.

On May 19, 2008, Harleysville moved in this Court to alter or amend the judgment to avoid payment of post-judgment interest. On February 6, 2009, Harleysville sought similar relief under South Carolina Rule of Civil Procedure 60(b). On February 20, 2009, this Court denied that motion on the merits, concluding that post-judgment interest applies “as a matter of course” and therefore runs from May 3, 2007. (Feb. 20, 2009 Order at 2–3 (“Post-Judgment Order”) (attached as Ex. F) (quoting *Calhoun v. Calhoun*, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000)).)

Harleysville (but not Cincinnati) appealed this Court’s Order and Judgment to the South Carolina Supreme Court. On August 22, 2011, the Supreme Court affirmed in part, reversed in part, and remanded to this Court. *Crossmann*, 2011 WL 3667598, at *14. The Supreme Court affirmed this Court’s May 3, 2007 ruling that the construction-related property damage claims

against Beazer arose from an "occurrence" and were therefore covered by the Harleysville and Cincinnati insurance policies.⁴ However, the Supreme Court also overruled its prior opinion in *Century Indemnity*, upon which this Court had relied in finding "joint and several" liability. In its place, the Supreme Court adopted a "*pro rata* 'time on the risk'" approach to allocation of damages among responsible insurers. *Id.* at 10–11.

The Supreme Court explained that, under the new *pro rata* approach, the "default rule" is to establish a numerator (the amount of time an insurer provided coverage), a denominator (the total amount of time during which damage progressed), and then multiply that by "the total amount the policyholder has become liable to pay as damages for the entire progressive injury." *Id.* at 13. The Supreme Court recognized that "a strict application of the basic 'time on risk' formula might be inappropriate" here, where the stipulation recognized that the time on the risk varied building-by-building. *Id.* The Supreme Court left it to "the sound discretion of [this] court to determine whether it is necessary to apply the 'time on risk' formula separately to each individual building or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case." *Id.*

ARGUMENT

I. THIS COURT SHOULD ENTER JUDGMENT AGAINST HARLEYSVILLE FOR \$1,666,128 PLUS POST-JUDGMENT INTEREST ACCRUING FROM MAY 3, 2007

As shown below, there is little dispute between Beazer and Harleysville regarding the application of the *pro rata* allocation methodology. On February 13, 2007, Harleysville submitted a brief to this Court calculating that its *pro rata* share of liability to Beazer based on a "time on the risk" methodology was \$1,448,010. (Harleysville Br. 25–26 & Ex. B (Feb. 13,

⁴ The parties' Stipulation, upon which the Court's prior judgment was based, provided that neither Harleysville nor Cincinnati could raise any exclusion in their insurance policies as a means to bar or limit coverage. (Stip. ¶ 6.)

2007) (“Harleysville Br.”), attached as Ex. G.) In reaching that conclusion, Harleysville explained that, for each building at each project, its *pro rata* liability based on the stipulated damages of \$7.2 million is (1) the number of days that Harleysville was the insurer after damage started but before it was repaired (or when Beazer paid to settle the underlying case); divided by the total number of days during which damage occurred; and (2) multiplied by the amount of covered resulting damage at that building.

$$\text{HarleysvilleLiability} = \left(\frac{\text{HarleysvilleTimeOnTheRisk}}{\text{TotalPeriodOfDamage}} \right) \times \text{CoveredDamage}$$

Beazer agrees with Harleysville that this Court should calculate Harleysville’s time on the risk on a building-by-building basis. Beazer also largely agrees with Harleysville’s methodology, although there are some differences between the parties. In particular, Harleysville’s 2007 submission to this Court understated its overall time on the risk, and its methodology for approximating covered damage at each building understated its total liability. Based on the proper calculations set forth below, this Court should conclude that Harleysville’s *pro rata* share is \$1,666,128. This Court also should apply post-judgment interest accruing from May 3, 2007.

A. Harleysville Has Understated Its Time On The Risk

It is undisputed that Harleysville insured Beazer from August 8, 1993, until August 29, 1998. The starting date for damage at each building is also undisputed. The Stipulation provides that the property damage began at each building “within 30 days after the Certificate of Occupancy was issued.” (Stip. ¶ 2.) For most buildings, the date of the certificate of occupancy is known. For the few buildings for which the certificate of occupancy date is unknown, Beazer agrees with Harleysville’s estimates of the date, which are based on the average of the dates at the other buildings. (See Harleysville Br. 25.)

Harleysville's "end" dates for the time-on-risk period set forth in its February 2007 brief were incorrect, however. The Stipulation provides that the damage "progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first." (*Id.*) It is undisputed that buildings 3, 14, and 16 at the Waterway Village project were repaired on specific dates before settlement of the underlying homeowners' association case. But Harleysville has misstated the date on which "Beazer Homes paid to settle" the underlying cases. Payment documentation attached as Exhibit H shows that the correct settlement dates are as follows:

Project	Harleysville's Date	Correct Date
RO I	October 16, 2005	October 24, 2005
RO II	March 23, 2006	March 14, 2006
WV	July 17, 2006	July 5, 2006
BC	November 3, 2006	July 5, 2006
LV	January 3, 2007	November 21, 2006

Lastly, the damage at River Oaks I Building 7 ended on May 7, 2004, when that building was destroyed by fire. Harleysville's calculations do not use this date, but instead use the settlement payment date as the end of the allocation period for this building. Harleysville's time on the risk at each building based on the correct start and end dates is attached as Exhibit I.

B. Harleysville Has Understated Its Share of Liability

The documentary record regarding the amount of covered "resulting damage" at each building is disputed and thus must be approximated. In its February 2007 post-trial brief, Harleysville adopted a simple approach for approximating the damage at each project and, in turn, at each building. (See Harleysville Br. 24-26 & Ex. B.) Harleysville accepted that Beazer's total loss was \$16,770,750, based on the undisputed amounts Beazer paid to settle the

homeowners' suits at each of the underlying projects. And as set forth above, the parties stipulated that "the damages at the underlying projects that resulted from water intrusion and that meet the definition of 'property damage' in the [Harleysville and Cincinnati] Policies are \$7.2 million." (Stip. ¶ 1.) Harleysville divided the two figures, assuming that 43 percent (\$7,200,000 / \$16,770,750) of the settlement amount at each project was covered "resulting damage." (Harleysville Br., Ex. B at 1.)

Harleysville used this figure to estimate the amount of "resulting damage" at each building as follows:

Project	Underlying Settlement	Resulting Share	Resulting Damage	# of Buildings	Damage per Building
RO I	\$7,425,000	x .43 =	\$3,187,693	÷ 43 =	\$74,132
RO II	\$2,826,500	x .43 =	\$1,213,470	÷ 23 =	\$52,760
WV	\$3,925,000	x .43 =	\$1,685,077	÷ 31 =	\$54,357
BC	\$2,194,250	x .43 =	\$942,033	÷ 23 =	\$40,958
LV	\$400,000	x .43 =	\$171,728	÷ 2 =	\$85,864
Total	\$16,770,750		\$7,200,000	122	

Harleysville calculated its total share of the liability across all of the projects by multiplying the damage per building by Harleysville's *pro rata* share of the time on the risk at each building and adding the total. (*Id.*) For example, at Building 2 in the River Oaks I project, Harleysville was on the risk for 953 of the 3558 days during which damage occurred, or 26.8% of the time; 26.8% of the approximated \$74,132 at that building is \$19,856, which represents Harleysville's purported share of the loss at that building. (*Id.* at 2.) Adding Harleysville's losses at each of the buildings and using the correct end dates rather than the end dates that

Harleysville used, this methodology yields covered property damage of \$1,461,960. The detail of the calculations is attached as Exhibit I.

However, the basic methodology advanced by Harleysville in 2007 is inaccurate. Contrary to Harleysville's assumption, the extent of resulting property damage was different at each of the five projects at issue in the Underlying Cases. Indeed, both Beazer and Harleysville have submitted expert testimony and other evidence clearly demonstrating that a disproportionately large share of "resulting" damage occurred at the older River Oaks I development. Beazer submitted the report of its engineering expert, L.G. Lewis, Jr., who had undertaken a detailed inquiry into the damage at each of the projects. (See Report of L.G. Lewis, Jr., H2L Consulting Engineers (Aug. 25, 2006), attached as Ex. J.) Harleysville submitted the report of its expert, David McCandless, who had undertaken a similar investigation. (See Report of David C. McCandless, Dynamic Technical Consultants (Oct. 5, 2006), attached as Ex. K.) Although Mr. Lewis and Mr. McCandless came to quite different conclusions regarding the total amount of covered "resulting damage," both Mr. Lewis and Mr. McCandless made similar assessments of the *relative* amount of covered "resulting damage" at each project.

In particular, both agreed that a disproportionately large share of “resulting damage” occurred at River Oaks I, which also had the largest settlement:

Project	Share of Total Resulting Damage (Lewis)	Share of Total Resulting Damage (McCandless)	Share of Total Resulting Damage (Average)
RO I	66.6%	53.6%	60.1%
RO II	4.0%	19.7%	11.8%
WV	15.2%	4.1%	9.7%
BC	11.2%	19.8%	15.5%
LV	2.9%	2.8%	2.8%
Total	100%	100%	100%

(See Expert Report Summary, attached as Ex. L.) Beazer, Harleysville, and Cincinnati have stipulated that the amount of property damage within the meaning of the Harleysville and Cincinnati Policies is \$7.2 million.

Rather than adopting Harleysville’s unfounded assumption that the share of covered damage was identical at each project, this Court should rely on these experts’ opinions showing that the nature and extent of the resulting damage at each project was different. Furthermore, to avoid a lengthy dispute about which expert was correct, Beazer proposes that this Court choose as a reasonable compromise the average of the experts’ calculations regarding each project’s proportion of resulting damage. For example, Mr. Lewis estimated that 66.6% of the resulting damage occurred at River Oaks I, while Mr. McCandless estimated that 53.6% did. (Ex. L at 1.) The average of 66.6% and 53.6% is 60.1%. Accordingly, it is reasonable to estimate that 60.1% of the stipulated \$7,200,000 in covered “resulting damage” occurred at River Oaks I, or

\$4,329,943. Because there were 43 buildings at that project, it is reasonable to estimate that the covered resulting damage per building was \$100,696.

The details of the damage per building are below and in Exhibit I:

Project	Stipulation Amount	Resulting Share	Resulting Damage	# of Buildings	Damage per Building
RO I	\$7,200,000	x .601 =	\$4,329,943	÷ 43 =	\$100,696
RO II	\$7,200,000	x .118 =	\$853,001	÷ 23 =	\$37,087
WV	\$7,200,000	x .097 =	\$696,534	÷ 31 =	\$22,469
BC	\$7,200,000	x .155 =	\$1,116,081	÷ 23 =	\$48,525
LV	\$7,200,000	x .028 =	\$204,441	÷ 2 =	\$102,221
Total			\$7,200,000	122	

Multiplying the damage per building by Harleysville's *pro rata* share of the time on the risk at each building gives a total of \$1,666,128, as shown in detail on Exhibit I.

C. Harleysville Is Liable for Post-Judgment Interest Running From May 3, 2007

This Court should award post-judgment interest against Harleysville starting from the date of the original judgment: May 3, 2007. Indeed, this Court has already held that post-judgment interest accrues from this date. In its post-trial papers, Harleysville argued to this Court that it was exempt from post-judgment interest. On February 20, 2009, this Court disagreed, holding that post-judgment interest applies "as a matter of course" starting from May 3, 2007. (Post-Judgment Order at 2-3 (quoting *Calhoun*, 339 S.C. at 102, 529 S.E.2d at 18).) Harleysville appealed this judgment to the Supreme Court, which did not disturb this Court's conclusion. Rather, the Supreme Court remanded only to calculate Harleysville's share of liability based on its time on the risk.

This Court should stand by its earlier ruling, which is correct. Under South Carolina law, “[a] money decree or judgment of a court enrolled or entered must draw interest according to law.” S.C. Code Ann. § 34-31-20(B).⁵ Post-judgment interest applies “as a matter of course” automatically, immediately, and without need to request it. *Calhoun*, 339 S.C. at 102, 529 S.E.2d at 18. And *Calhoun* squarely held that interest “runs from the date of the original judgment” even if the size of the judgment is reduced because an appeal is partially successful. *Id.* For example, the original judgment in *Calhoun* was entered in September 1995 for about \$20,000, but was subsequently reduced after a partially successful appeal in 1996 to about \$10,000. The Supreme Court held that interest was owed on \$10,000, accruing from September 1995. *Id.* That same analysis applies here. The original judgment here was entered on May 3, 2007. Accordingly, although Harleysville’s *pro rata* liability will be reduced after its partially successful appeal to \$1,666,128, interest will accrue on that amount from May 3, 2007, the date of this Court’s original judgment.

Harleysville has suggested that, under *Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993), post-judgment interest does not apply because damages must be recalculated on remand. *Babb* was not only decided before *Calhoun*, but also *Babb* is inapposite. In *Babb*, “[t]he original order . . . did not set the amount of Babb’s judgment.” *Babb*, 310 S.C. at 354, 426 S.E.2d at 791. *Babb* thus applied the longstanding rule that post-judgment interest does not accrue if there was no money judgment entered in the first place. *See id.* (citing 45 Am. Jur. 2d Interest & Usury § 69). Indeed, the Court of Appeals has itself read *Babb* as establishing that “[i]nterest at the post-judgment rate does not begin until a judgment is entered in a sum certain.” *Chambers v.*

⁵ Post-judgment interest is “compounded annually.” § 34-31-20(B). The interest rate for each year is announced by a South Carolina Supreme Court order. *Id.* It was 12.25% in 2007 and 11.25% in 2008. *See* S.C. Orders dated Jan. 4, 2008, and Jan. 11, 2007. It has been 7.25% each year since then. *See* S.C. Orders dated Jan. 6, 2011, Jan. 4, 2010, and Jan. 5, 2009.

Pingree, 334 S.C. 349, 353, 513 S.E.2d 369, 372 (App. 1999). Here, this Court *did* enter judgment in a sum certain: \$7.2 million, and that amount was merely reduced as a result of an appeal. Under *Chambers*, *Babb* is inapposite. The controlling precedent is *Calhoun*. And under *Calhoun*, as this Court has already held, post-judgment interest applies “as a matter of course” starting from May 3, 2007. This Court thus should enter judgment against Harleysville for \$1,666,128 plus post-judgment interest running from May 3, 2007.

II. THIS COURT SHOULD ENTER JUDGMENT AGAINST CINCINNATI FOR \$5,533,872

This Court should enter a money judgment against Cincinnati because the primary insurance policies underlying its excess policies have each been exhausted. Cincinnati’s liability is joint and several because it failed to appeal this Court’s May 3, 2007, judgment declaring that its liability was joint and several and it therefore cannot gain the advantage of the *Crossmann* decision regarding *pro rata* liability. Cincinnati’s joint and several share is \$5,533,872. If this Court nonetheless uses a *pro rata* methodology to calculate Cincinnati’s liability, it should enter judgment against Cincinnati for \$2,996,193.

A. Cincinnati Is Liable To Beazer Because the Underlying Insurance Policies Have Been Exhausted and Are “Unavailable”

Cincinnati is liable to Beazer for its share of the \$7.2 million in stipulated property damage because each of the primary insurance policies underlying the Cincinnati excess policies has been exhausted by the payment of claims. Cincinnati provided coverage from August 29, 1998, through September 1, 2002. (Berry Aff. ¶ 6, attached as Ex. B; *see* Cincinnati Policies, attached as Ex. M.) During this four-year period, the following primary insurance policies were applicable:

Insurer	Policy Period	Limit (Per Occurrence)	Limit (Aggregate)
Indiana Ins. Co.	7/1/1998 to 8/29/1998	\$1,000,000	\$2,000,000
Massachusetts Bay Ins. Co.	8/29/1998 to 8/29/1999	\$1,000,000	\$2,000,000
Massachusetts Bay Ins. Co.	8/29/1999 to 8/29/2000	\$1,000,000	\$2,000,000
Regent Ins. Co.	8/29/2000 to 1/1/2001	\$1,000,000	\$2,000,000
Regent Ins. Co.	1/1/2001 to 1/1/2002	\$1,000,000	\$2,000,000

(Berry Aff. ¶¶ 8-10.) A chart visually depicting the underlying policies and Cincinnati's excess policies is attached as Ex. N. As noted, several of the underlying primary insurance policies have limits that may be met either on a per occurrence basis (the "each occurrence limit") or based upon the aggregate total of covered losses for all occurrences (the "aggregate limit"). Under the South Carolina Supreme Court's definition of "occurrence" set forth in its final *Crossmann* opinion, when progressive damage takes place over multiple policy years, as here, it constitutes a single "occurrence" in each policy year. *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, ___ F. Supp. 2d ___, 2011 WL 4434038, at *3-*5 (D.S.C. Sept. 22, 2011).

The Cincinnati Policies obligate Cincinnati to pay Beazer for covered losses when the underlying primary insurance policies are unavailable to respond to the claim. The Cincinnati Policies define "underlying insurance" as "the policies of insurance listed in the Schedule of Underlying Policies and the insurance *available* to the insured under all other insurance policies *applicable* to the 'occurrence.'" (Cincinnati Policies § V.16 (emphases added).) Beazer has exhausted all "applicable" and "available" underlying coverage and thus Cincinnati's coverage obligation is triggered. In a similar insurance coverage case involving Beazer and Cincinnati, the Seventh Circuit Court of Appeals recognized that "a CGL policy can be exhausted when an insured and a CGL insurer enter into a settlement agreement where the primary insurer will pay a

large percentage of the total limit and the insured takes responsibility for the remainder.” *Trinity Homes LLC & Beazer Homes Inves. LLC v. Ohio Cas. Ins. Co. & Cincinnati Ins. Co.*, 629 F.3d 653, 658 (7th Cir. 2010). The excess insurer thus has no obligation to “drop down” and pay the difference if Beazer settles for less than the full policy limits. But where *Beazer* itself pays the remainder of the underlying limits in satisfaction of water intrusion claims, Cincinnati is obligated to cover Beazer’s liability in excess of the underlying limits.

That is precisely what has happened here. As shown below, Beazer has exhausted each of these policies through (1) settlements with the underlying insurers to partially offset Beazer’s losses in this case as well as similar water intrusion losses in Indiana and Kentucky; and (2) out-of-pocket losses in excess of the remaining limits of the underlying policies, namely Beazer’s multimillion-dollar unreimbursed losses in Indiana and Kentucky. *Supra* at 2–3. These unreimbursed losses are more than adequate to fill any gaps left between Beazer’s settlements and the underlying primary policies limits, whether on a per occurrence or on an aggregate basis.

1. The Regent Insurance Company Policies Have Been Exhausted

Regent issued two consecutive policies underlying the Cincinnati Policies in effect from August 29, 2000, through January 1, 2002. (Berry Aff. ¶ 10.) Each Regent policy has a \$1,000,000 “each occurrence limit” and a \$2,000,000 aggregate limit, for combined totals of \$2 million (per occurrence) and \$4 million (aggregate). (*Id.*) Beazer and Regent entered into a settlement of claims arising from Beazer’s significant losses in the Indiana water intrusion lawsuits, with Regent paying Beazer \$3,000,000 to extinguish Regent’s obligations under the policies. (Plaintiffs’ Third Supp. Interrogatory Responses at 3, attached as Ex. O) Regent had also previously made payments of \$151,231.87 under its policies, and thus paid a total of \$3,151,231.87. (*Id.*) These payments apply to Beazer’s losses in Indiana, not the claims at issue in this case.

These payments of \$3.15 million, combined with Beazer's out-of-pocket losses for water intrusion claims in Indiana that were not recovered from any other source, are more than sufficient to exhaust the Regent policies. The property damage here is properly viewed as a single "occurrence," leaving no gap, as the settlement amount is greater than the combined total of \$2 million in per occurrence limits. *Liberty Mut.*, 2011 WL 4434038, at *3-*5. But even relying on the aggregate limits, the Regent policies have been exhausted. In that case, the \$4 million in aggregate limits would be available, leaving a gap of \$848,768.13 that Beazer must fill. Again, it is undisputed that Beazer itself has paid far more than \$848,768 to resolve the underlying property damage claims in Indiana and that no other party has reimbursed Beazer for that amount. (*See supra* at 2-3.) As such, both Regent policy periods have been exhausted, and Cincinnati is obligated to indemnify Beazer for losses in this case in excess of the Regent underlying limits. *See Trinity Homes*, 629 F.3d at 658.

2. The Indiana Insurance Company Policies Have Been Exhausted

Indiana Insurance Company issued two policies that were in effect and covered Beazer's projects from May 29, 1998, when Beazer acquired the Pinehurst Entities, until August 29, 1998, when the policies were cancelled. (Berry Aff. ¶ 8.) Each of Indiana's policies had a \$1,000,000 "each occurrence limit" and a \$2,000,000 aggregate limit. (*Id.*) Cincinnati was the excess insurer starting on July 1, 1998. For 59 days following the Pinehurst acquisition (July 1, 1998, until August 29, 1998), Cincinnati was the excess insurer over a single Indiana Insurance Company policy, and for 33 days (May 29, 1998, until July 1, 1998) it was not. Beazer and Indiana settled their coverage dispute, with Indiana paying Beazer \$2.7 million to extinguish Indiana's obligations under the policies. (*Id.* ¶¶ 15-16; Third Supp. Interrogatory Responses at 3.) This payment applies to Beazer's losses at issue in this case.

The parties did not allocate the \$2.7 million between Indiana's two policies, but on any allocation the Indiana policy underlying the Cincinnati Policies is exhausted. If the \$2.7 million is allocated *pro rata*, with 64% of the settlement allocated to the 59 days where Cincinnati was the excess insurer and 36% where it was not, \$1,731,521.74 would be allocated to exhausting the Indiana policy underlying the Cincinnati Policies.⁶ Even if the settlement is allocated 50/50 between the two periods, \$1.35 million would be allocated to the Indiana policy underlying the Cincinnati Policies. Either figure still exceeds each of the two \$1 million per occurrence limits and therefore exhausts the Indiana policy. Indeed, even if the aggregate limit is used, the Indiana policy is exhausted. Beazer would be required to pay the remaining "gap" of \$268,478 (or \$650,000) between the allocated settlement amount and the \$2 million aggregate limit. Because Beazer has paid far more than these amounts to resolve the underlying claims, the Indiana policy underlying the Cincinnati Policies is still exhausted in any event. See *Trinity Homes*, 629 F.3d at 658.

3. The Massachusetts Bay Insurance Company Policies Have Been Exhausted

Massachusetts Bay Insurance Company issued two policies providing coverage from August 29, 1998, to August 29, 2000. (Berry Aff. ¶ 9.) Each policy had a \$1,000,000 "each occurrence limit" and a \$2,000,000 aggregate limit, or combined totals of \$2 million per occurrence and \$4 million in the aggregate. (*Id.*) Beazer and Massachusetts Bay entered into a settlement of their South Carolina and Kentucky water intrusion claims. In addition to certain indemnity payments Massachusetts Bay had already made to Beazer, Massachusetts Bay paid Beazer \$2.9 million to extinguish all of Massachusetts Bay's obligations under the policies.

⁶ This allocation slightly understates the portion that should be allocated to Cincinnati. Damage began accruing at four buildings during the days where Indiana was underneath Cincinnati (River Oaks II buildings 53, 54, 55, and 56). No damage began during the days when Cincinnati was not the excess insurer.

(Beazer Third Supp. Interrogatory Responses at 3.) Beazer allocated that settlement equally to Kentucky and the claims at issue in this case, with \$1.45 million allocated to each. (*Id.*)

This \$1.45 million settlement, combined with Beazer's substantial out-of-pocket losses from the Kentucky water intrusion claims, are more than sufficient to exhaust the Massachusetts Bay policies. Those policies are thus no longer "available." (Berry Aff. ¶ 26.) If the underlying damages here are a single occurrence in accordance with South Carolina law, the \$1.45 million settlement leaves a \$550,000 gap beneath the combined "per occurrence" limit of \$2 million. Even if the damages arise from more than one occurrence, there is a \$1.1 million gap between the \$2.9 million settlement and the combined aggregate limit of \$4 million. Because Beazer's out-of-pocket losses in Kentucky substantially exceed \$1.1 million, the Massachusetts Bay aggregate limits are exhausted regardless of the number of occurrences. *See Trinity Homes*, 629 F.3d at 658.

B. Cincinnati's Liability Is \$5,533,872 Or, at a Minimum, \$2,996,193

In this Court's May 3, 2007 final Order, this Court issued a binding declaratory judgment against Harleysville and Cincinnati that each insurer's liability was joint and several. Although Harleysville appealed that final judgment to the Supreme Court, Cincinnati chose not to appeal. "[A]n unchallenged ruling, 'right or wrong, is the law of th[e] case . . .'" *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174–75, 525 S.E.2d 869, 871 (2000) (quoting *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970)). A party "may not seek relief from the prior unappealed order . . . because the order has become the law of the case. Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009); *see also, e.g., Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 699

S.E.2d 687 (2010) (“An unappealed ruling is the law of the case”); *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (same); *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) (same). Accordingly, this Court should hold Cincinnati jointly and severally liable for the entirety of the difference between \$7.2 million and the *pro rata* judgment against Harleysville. If this Court enters judgment against Harleysville for \$1,666,128, it therefore should enter judgment against Cincinnati for the remainder of the \$7.2 million in covered property damage, or \$5,533,872.

If this Court were to calculate Cincinnati’s liability based on a *pro rata* calculation, notwithstanding Cincinnati’s failure to appeal this issue, it should impose liability of \$2,996,193. This Court should use the same methodology for calculating Cincinnati’s *pro rata* share that it uses to calculate Harleysville’s *pro rata* share. Cincinnati’s share runs from August 29, 1998 (when its first policy incepted) to September 1, 2002 (when Cincinnati went off the risk).⁷ The total damage per building is calculated as set forth *supra* Part I.B. If this Court uses Harleysville’s methodology to approximate the damage at each building (assuming that 43% of the total settlement at each project is “resulting damage” and then dividing by the number of buildings at that project), Cincinnati’s *pro rata* liability would come to \$3,080,406. (See Ex. I.) But as set forth above, the more accurate approach is for this Court to multiply Cincinnati’s *pro rata* share of the time on the risk for each building by the average damage per building estimated by Mr. Lewis and Mr. McCandless. Based on this methodology, Cincinnati’s *pro rata* liability is \$2,996,193. (*Id.*)

⁷ Cincinnati’s coverage actually started on July 1, 1998, but to prevent receiving a double recovery for a portion of the \$7.2 million, Beazer cannot recover for Cincinnati’s time on the risk before Harleysville’s coverage expired on August 29, 1998.

C. A Judgment Against Cincinnati Will Leave Beazer With Uncompensated Losses in South Carolina

Cincinnati's excess coverage for the periods in which Regent, Indiana, and Massachusetts Bay provided primary insurance may provide Beazer with more than a *pro rata* share of \$7.2 million for certain time periods, but it will not provide a double recovery. The \$7.2 million at issue on remand is not recoverable (and has not been recovered) from any source other than Harleysville and Cincinnati.

A "double recovery" occurs when a party recovers "more than the maximum recoverable loss that the party has sustained." Black's Law Dictionary 1302 (8th ed. 2004). At the time of the settlements with its other primary insurers, it is undisputed that Beazer's maximum recoverable loss was \$16.8 million. Beazer's settlements with its other insurers were for a portion of this larger loss. Of the \$8.6 million Beazer received in settlements, \$4.15 million is allocated to South Carolina, leaving Beazer with a total unrecovered loss in South Carolina of more than \$12,000,000 before resolution of this remand proceeding. (*See* Beazer Pre-Trial Br. at 34 (attached as Ex. P).) There is no overlap between Beazer's recoveries from its other insurers and the \$7.2 million stipulated damage amount with Cincinnati and Harleysville. Just as this Court's original \$7.2 million judgment would provide Beazer less than a full recovery, a \$7.2 million judgment here would be equally incomplete.

Beazer will recover no more than \$7.2 million on remand. However this Court calculates liability, Beazer's pre-interest recovery against Harleysville and Cincinnati will be for no more than \$7.2 million. If this Court applies joint and several liability against Cincinnati because that unappealed ruling is law of the case, the total judgment would be \$7.2 million. If it uses any *pro rata* allocation methodology, the judgment will be smaller because some of the damage at issue here progressed during time periods when neither Harleysville nor Cincinnati was "on the risk."

Beazer cannot recover against these insurers for those time periods under a *pro rata* time-on-risk methodology. Beazer thus will suffer unrecovered losses.⁸

In sum, the primary policies underlying the Cincinnati Policies have been exhausted. (Berry Aff. ¶ 30.) This is true irrespective of whether the damages are deemed to constitute one occurrence or multiple occurrences, and under any allocation formula. Accordingly, none of these primary policies is available to Beazer to respond to any of the underlying lawsuits. (*Id.* ¶ 30.) Likewise, no other primary insurance is “available” to Beazer to cover the underlying lawsuits. (*Id.*) There is no evidence in the record to dispute these facts, and Beazer is therefore entitled to judgment as a matter of law that the underlying policies are exhausted and that the

⁸ Cincinnati may argue that its *pro rata* share of liability should be reduced because the portion of the Massachusetts Bay settlement attributable to Beazer’s South Carolina losses (\$1.45 million) serves to reduce Cincinnati’s share of liability. As set forth *supra*, this is incorrect. There is no overlap between the Massachusetts Bay settlement and the \$7.2 million stipulated here. Indeed, this Court recognized that there was no overlap between these amounts when it entered judgment against Harleysville for the full \$7.2 million. There was no set off then and there is no set off now. In its appeal, Harleysville did not even preserve the issue of set off under a time-on-the-risk methodology. *Crossmann*, 2011 WL 3667598, at *12 n.13. Cincinnati did not appeal at all.

If this Court nonetheless concludes that a set-off is appropriate for Cincinnati, it should set off no more than \$301,416. The \$1.45 million of the Massachusetts Bay settlement that is allocated to South Carolina was paid to Beazer at the time when, under *Century Indemnity*, South Carolina law provided for joint and several liability among triggered insurers. The \$1.45 million settlement thus represents Massachusetts Bay’s settlement of liability that accrued during the full 13-year period when damage was progressing at the underlying projects. Using \$1.45 million as the total measure of damage, Massachusetts Bay’s liability per building based on its *pro rata* time on the risk during its 731-day coverage window of August 29, 1998, to August 29, 2000, can be calculated using the methodologies set forth *supra* Part I.B. Under Harleysville’s methodology for estimating damage at each building, the portion of Massachusetts Bay’s liability that would be set off is \$301,416. Using Beazer’s methodology based on the expert reports, the portion is \$295,971. The detail of the calculations is attached as Exhibit Q.

On any calculation based on time on the risk, there is no overlap between Indiana’s settlement and a recovery against Cincinnati. Indiana went off the risk on August 29, 1998, and Beazer does not seek to recover from Cincinnati under a time on the risk methodology for losses before that date. *Supra* n.7.

Cincinnati Policies are triggered to cover losses occurring during the Cincinnati Policy period in excess of the underlying policy limits.

CONCLUSION

For the reasons set forth above, this Court should award Beazer \$1,666,128 plus post-judgment interest from Harleysville and \$5,533,872 (or \$2,996,193) from Cincinnati.

Respectfully submitted,


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Washington, DC 20006
Attorneys for Respondents/Appellants

November 2, 2011

Exhibit H

BEAZER HOMES USA, INC
MISC WIRE REQUEST

(Not to be used for Land Wires)

RO II

Correspondence

REQUEST DATE

3/13/06

WIRE BY:

3/14/06

REQUESTED BY:

Peggy Caldwell

DIVISION

Corporate

BANK ACCOUNT #

[REDACTED]

AMOUNT

38M

DESCRIPTION

Settlement of Riva Oaks II - HOA

lawsuit - Myrtle Beach

WIRING INSTRUCTIONS:

ACCOUNT NAME

Stanley Law Firm, LLC Trust Acct.

BANK NAME

Coastal Federal Bank

2619 Oak Street
Myrtle Beach, SC

BANK ACCOUNT #

[REDACTED]

ABA ROUTING #

[REDACTED]

APPROVED BY:

Peggy Caldwell
[Signature]

Misc Wire Request Form

BZH105285

ROA 395

BEAZER HOMES USA, INC
MISC WIRE REQUEST

(Not to be used for Land Wires)

REQUEST DATE 7/5/2008 WIRE BY: _____
REQUESTED BY: Carrie Morling DIVISION Corporate Office
BANK ACCOUNT # [REDACTED] AMOUNT 2.8 Million
DESCRIPTION Settlement for Buck Creek Litigation

WIRING INSTRUCTIONS:

ACCOUNT NAME McCutchen, Mumford, Vaught & O'Dea, P.A.--Trust Account II
BANK NAME First Citizens Bank
BANK ACCOUNT # [REDACTED]
ABA ROUTING # [REDACTED]
APPROVED BY: _____

Buck Creek Wire Transfer

BZH105286

BEAZER HOMES USA, INC
MISC WIRE REQUEST

(Not to be used for Land Wires)

REQUEST DATE 10/21/05 WIRE BY: 10/24/05

REQUESTED BY: PJ Caldwell DIVISION Corporate

BANK ACCOUNT # [REDACTED] AMOUNT \$17,425,000

DESCRIPTION Settlement of River Oaks I case.

WIRING INSTRUCTIONS:

ACCOUNT NAME Mullen Wylie LLC

BANK NAME Carolina First Bank

BANK ACCOUNT # [REDACTED]

ABA ROUTING # [REDACTED]

) See attached

APPROVED BY: Peggy Caldwell [Signature]

Misc Wire Request Form

BEAZER HOMES USA, INC
MISC WIRE REQUEST

(Not to be used for Land Wires)

REQUEST DATE 7/5/2008 WIRE BY: _____

REQUESTED BY: Carrie Morling DIVISION Corporate Office

BANK ACCOUNT # [REDACTED] AMOUNT 3.925 Million

DESCRIPTION Settlement for Waterway Village Litigation

WIRING INSTRUCTIONS:

ACCOUNT NAME McCutchen, Mumford, Vaught & O'Dea, P.A.--Trust Account II

BANK NAME First Citizens Bank

BANK ACCOUNT # [REDACTED]

ABA ROUTING # [REDACTED]

APPROVED BY: _____

BZH105287

Waterway Village Wire Transfer

Exhibit I

**HARLEYSVILLE AND CINCINNATI
DAMAGE PER BUILDING**

Project	# of Buildings	Resulting Damage (H'Ville Method)	Resulting Damage (Beazer Method)	Damage per Building (H'Ville Method)	Damage per Building (Beazer Method)
RO I	43	\$3,187,693	\$4,797,988	\$74,132	\$100,696
RO II	23	\$1,213,470	\$290,191	\$52,760	\$37,087
WV	31	\$1,685,077	\$1,097,006	\$54,357	\$22,469
BC	23	\$942,033	\$806,748	\$40,958	\$48,525
LV	2	\$171,728	\$208,067	\$85,864	\$102,221
TOTAL	122	\$7,200,000	\$7,200,000		

ROA 401

**HARLEYSVILLE AND CINCINNATI
LIABILITY PER BUILDING**

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
ROI	2	1996-01-19	2005-10-24	3566	953 (26.7%)	1464 (41.1%)	\$19,812	\$26,911	\$30,435	\$41,340
ROI	3	1996-01-19	2005-10-24	3566	953 (26.7%)	1464 (41.1%)	\$19,812	\$26,911	\$30,435	\$41,340
ROI	4	1996-01-17	2005-10-24	3568	955 (26.8%)	1464 (41.0%)	\$19,842	\$26,952	\$30,418	\$41,317
ROI	5	1996-01-13	2005-10-24	3572	959 (26.8%)	1464 (41.0%)	\$19,903	\$27,035	\$30,383	\$41,271
ROI	6	1996-01-13	2005-10-24	3572	959 (26.8%)	1464 (41.0%)	\$19,903	\$27,035	\$30,383	\$41,271
ROI	7	1996-01-04	2004-05-07	3046	968 (31.8%)	1464 (48.1%)	\$23,559	\$32,001	\$35,630	\$48,398
ROI	8	1995-12-30	2005-10-24	3586	973 (27.1%)	1464 (40.8%)	\$20,115	\$27,322	\$30,265	\$41,110
ROI	9	1995-12-30	2005-10-24	3586	973 (27.1%)	1464 (40.8%)	\$20,115	\$27,322	\$30,265	\$41,110
ROI	10	1995-11-17	2005-10-24	3629	1016 (28.0%)	1464 (40.3%)	\$20,755	\$28,192	\$29,906	\$40,623
ROI	11	1995-11-17	2005-10-24	3629	1016 (28.0%)	1464 (40.3%)	\$20,755	\$28,192	\$29,906	\$40,623
ROI	12	1995-11-17	2005-10-24	3629	1016 (28.0%)	1464 (40.3%)	\$20,755	\$28,192	\$29,906	\$40,623
ROI	13	1995-11-29	2005-10-24	3617	1004 (27.8%)	1464 (40.5%)	\$20,578	\$27,951	\$30,005	\$40,757
ROI	14	1995-02-23	2005-10-24	3896	1283 (32.9%)	1464 (37.6%)	\$24,413	\$33,161	\$27,857	\$37,839
ROI	15	1994-04-03	2005-10-24	4222	1609 (38.1%)	1464 (34.7%)	\$28,252	\$38,375	\$25,706	\$34,917
ROI	16	1994-05-20	2005-10-24	4175	1562 (37.4%)	1464 (35.1%)	\$27,735	\$37,674	\$25,995	\$35,310
ROI	17	1994-05-29	2005-10-24	4166	1553 (37.3%)	1464 (35.1%)	\$27,635	\$37,538	\$26,051	\$35,386
ROI	18	1994-08-27	2005-10-24	4076	1463 (35.9%)	1464 (35.9%)	\$26,608	\$36,143	\$26,627	\$36,168
ROI	19	1994-11-25	2005-10-24	3986	1373 (34.4%)	1464 (36.7%)	\$25,535	\$34,685	\$27,228	\$36,984
ROI	20	1994-12-01	2005-10-24	3980	1367 (34.3%)	1464 (36.8%)	\$25,462	\$34,586	\$27,269	\$37,040

¹ Estimated dates are in bold.

² Actual dates are in bold.

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
ROI	21	1994-12-23	2005-10-24	3958	1345 (34.0%)	1464 (37.0%)	\$25,192	\$34,218	\$27,420	\$37,246
ROI	22	1995-01-13	2005-10-24	3937	1324 (33.6%)	1464 (37.2%)	\$24,930	\$33,864	\$27,567	\$37,445
ROI	23	1997-03-30	2005-10-24	3130	517 (16.5%)	1464 (46.8%)	\$12,245	\$16,633	\$34,674	\$47,099
ROI	24	1997-03-30	2005-10-24	3130	517 (16.5%)	1464 (46.8%)	\$12,245	\$16,633	\$34,674	\$47,099
ROI	25	1995-01-13	2005-10-24	3937	1324 (33.6%)	1464 (37.2%)	\$24,930	\$33,864	\$27,567	\$37,445
ROI	26	1995-01-26	2005-10-24	3924	1311 (33.4%)	1464 (37.3%)	\$24,767	\$33,642	\$27,658	\$37,569
ROI	27	1995-04-23	2005-10-24	3837	1224 (31.9%)	1464 (38.2%)	\$23,648	\$32,122	\$28,285	\$38,420
ROI	28	1995-04-23	2005-10-24	3837	1224 (31.9%)	1464 (38.2%)	\$23,648	\$32,122	\$28,285	\$38,420
ROI	29	1995-04-27	2005-10-24	3833	1220 (31.8%)	1464 (38.2%)	\$23,595	\$32,050	\$28,315	\$38,461
ROI	30	1995-05-06	2005-10-24	3824	1211 (31.7%)	1464 (38.3%)	\$23,477	\$31,889	\$28,381	\$38,551
ROI	31	1995-05-19	2005-10-24	3811	1198 (31.4%)	1464 (38.4%)	\$23,304	\$31,654	\$28,478	\$38,683
ROI	32	1995-06-03	2005-10-24	3796	1183 (31.2%)	1464 (38.6%)	\$23,103	\$31,381	\$28,591	\$38,835
ROI	33	1995-07-23	2005-10-24	3746	1133 (30.2%)	1464 (39.1%)	\$22,422	\$30,456	\$28,972	\$39,354
ROI	34	1995-06-25	2005-10-24	3774	1161 (30.8%)	1464 (38.8%)	\$22,805	\$30,977	\$28,757	\$39,062
ROI	35	1995-07-14	2005-10-24	3755	1142 (30.4%)	1464 (39.0%)	\$22,546	\$30,625	\$28,903	\$39,260
ROI	36	1995-09-10	2005-10-24	3697	1084 (29.3%)	1464 (39.6%)	\$21,736	\$29,525	\$29,356	\$39,875
ROI	37	1995-09-16	2005-10-24	3691	1078 (29.2%)	1464 (39.7%)	\$21,651	\$29,410	\$29,404	\$39,940
ROI	38	1995-09-24	2005-10-24	3683	1070 (29.1%)	1464 (39.8%)	\$21,537	\$29,255	\$29,468	\$40,027
ROI	39	1996-03-03	2005-10-24	3522	909 (25.8%)	1464 (41.6%)	\$19,133	\$25,989	\$30,815	\$41,857
ROI	40	1996-04-19	2005-10-24	3475	862 (24.8%)	1464 (42.1%)	\$18,389	\$24,978	\$31,232	\$42,423
ROI	41	1996-04-13	2005-10-24	3481	868 (24.9%)	1464 (42.1%)	\$18,485	\$25,109	\$31,178	\$42,350
ROI	42	1998-01-30	2005-10-24	2824	211 (07.5%)	1464 (51.8%)	\$5,539	\$7,524	\$38,431	\$52,202
ROI	43	1998-01-30	2005-10-24	2824	211 (07.5%)	1464 (51.8%)	\$5,539	\$7,524	\$38,431	\$52,202
ROI	44	1998-01-30	2005-10-24	2824	211 (07.5%)	1464 (51.8%)	\$5,539	\$7,524	\$38,431	\$52,202
ROI II	45	1999-07-17	2006-03-14	2432	0 (00.0%)	1142 (47.0%)	\$0	\$0	\$24,774	\$17,415

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
RO II	46	1999-06-06	2006-03-14	2473	0 (00.0%)	1183 (47.8%)	\$0	\$0	\$25,238	\$17,741
RO II	47	1999-01-02	2006-03-14	2628	13 (00.5%)	1338 (50.9%)	\$261	\$183	\$26,862	\$18,882
RO II	48	1998-12-02	2006-03-14	2659	0 (00.0%)	1369 (51.5%)	\$0	\$0	\$27,164	\$19,094
RO II	49	1998-11-25	2006-03-14	2666	0 (00.0%)	1376 (51.6%)	\$0	\$0	\$27,231	\$19,142
RO II	50	1998-11-04	2006-03-14	2687	0 (00.0%)	1397 (52.0%)	\$0	\$0	\$27,430	\$19,282
RO II	51	1998-10-14	2006-03-14	2708	0 (00.0%)	1418 (52.4%)	\$0	\$0	\$27,627	\$19,420
RO II	52	1998-09-24	2006-03-14	2728	0 (00.0%)	1438 (52.7%)	\$0	\$0	\$27,811	\$19,550
RO II	53	1998-08-16	2006-03-14	2767	0 (00.0%)	1464 (52.9%)	\$0	\$0	\$27,915	\$19,622
RO II	54	1998-08-01	2006-03-14	2782	0 (00.0%)	1464 (52.6%)	\$0	\$0	\$27,764	\$19,517
RO II	55	1998-07-25	2006-03-14	2789	0 (00.0%)	1464 (52.5%)	\$0	\$0	\$27,695	\$19,468
RO II	56	1998-07-19	2006-03-14	2795	0 (00.0%)	1464 (52.4%)	\$0	\$0	\$27,635	\$19,426
RO II	57	1998-12-20	2006-03-14	2641	0 (00.0%)	1351 (51.2%)	\$0	\$0	\$26,989	\$18,972
RO II	58	1998-12-20	2006-03-14	2641	0 (00.0%)	1351 (51.2%)	\$0	\$0	\$26,989	\$18,972
RO II	59	1998-12-30	2006-03-14	2631	0 (00.0%)	1341 (51.0%)	\$0	\$0	\$26,891	\$18,903
RO II	60	1999-01-10	2006-03-14	2620	28 (01.1%)	1330 (50.8%)	\$564	\$396	\$26,783	\$18,827
RO II	61	1999-01-21	2006-03-14	2609	35 (01.3%)	1319 (50.6%)	\$708	\$498	\$26,673	\$18,750
RO II	62	1999-03-03	2006-03-14	2568	41 (01.6%)	1278 (49.8%)	\$842	\$592	\$26,257	\$18,457
RO II	63	1999-07-02	2006-03-14	2447	0 (00.0%)	1157 (47.3%)	\$0	\$0	\$24,946	\$17,536
RO II	64	1999-07-11	2006-03-14	2438	0 (00.0%)	1148 (47.1%)	\$0	\$0	\$24,843	\$17,463
RO II	65	1999-10-08	2006-03-14	2349	0 (00.0%)	1059 (45.1%)	\$0	\$0	\$23,786	\$16,720
RO II	66	1999-10-30	2006-03-14	2327	0 (00.0%)	1037 (44.6%)	\$0	\$0	\$23,512	\$16,527
RO II	67	2000-01-28	2006-03-14	2237	0 (00.0%)	947 (42.3%)	\$0	\$0	\$22,335	\$15,700
WV	1	1996-08-08	2006-07-05	3618	751 (20.8%)	1464 (40.5%)	\$11,283	\$4,664	\$21,995	\$9,092
WV	2	1996-08-08	2006-07-05	3618	751 (20.8%)	1464 (40.5%)	\$11,283	\$4,664	\$21,995	\$9,092
WV	3	1996-08-08	2003-04-01	2427	751 (30.9%)	1464 (60.3%)	\$16,820	\$6,953	\$32,789	\$13,554

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
WV	4	1996-10-20	2006-07-05	3545	678 (19.1%)	1464 (41.3%)	\$10,396	\$4,297	\$22,448	\$9,279
WV	5	1996-10-27	2006-07-05	3538	671 (19.0%)	1464 (41.4%)	\$10,309	\$4,261	\$22,493	\$9,297
WV	6	1996-11-13	2006-07-05	3521	654 (18.6%)	1464 (41.6%)	\$10,096	\$4,173	\$22,601	\$9,342
WV	7	1996-12-01	2006-07-05	3503	636 (18.2%)	1464 (41.8%)	\$9,869	\$4,079	\$22,717	\$9,390
WV	8	1996-12-08	2006-07-05	3496	629 (18.0%)	1464 (41.9%)	\$9,780	\$4,043	\$22,763	\$9,409
WV	9	1997-01-04	2006-07-05	3469	602 (17.4%)	1464 (42.2%)	\$9,433	\$3,899	\$22,940	\$9,482
WV	10	1996-12-26	2006-07-05	3478	611 (17.6%)	1464 (42.1%)	\$9,549	\$3,947	\$22,881	\$9,458
WV	11	1997-02-16	2006-07-05	3426	559 (16.3%)	1464 (42.7%)	\$8,869	\$3,666	\$23,228	\$9,601
WV	12	1997-04-25	2006-07-05	3358	491 (14.6%)	1464 (43.6%)	\$7,948	\$3,285	\$23,698	\$9,796
WV	13	1997-08-15	2006-07-05	3246	379 (11.7%)	1464 (45.1%)	\$6,347	\$2,623	\$24,516	\$10,134
WV	14	1997-09-20	2003-04-01	2019	343 (17.0%)	1464 (72.5%)	\$9,235	\$3,817	\$39,415	\$16,292
WV	15	1997-09-14	2006-07-05	3216	349 (10.9%)	1464 (45.5%)	\$5,899	\$2,438	\$24,745	\$10,228
WV	16	1997-05-23	2003-04-01	2139	463 (21.6%)	1464 (68.4%)	\$11,766	\$4,864	\$37,204	\$15,378
WV	17	1997-02-27	2006-07-05	3415	548 (16.0%)	1464 (42.9%)	\$8,723	\$3,606	\$23,303	\$9,632
WV	18	1997-01-04	2006-07-05	3469	602 (17.4%)	1464 (42.2%)	\$9,433	\$3,899	\$22,940	\$9,482
WV	19	1997-01-19	2006-07-05	3454	587 (17.0%)	1464 (42.4%)	\$9,238	\$3,819	\$23,040	\$9,524
WV	20	1997-02-05	2006-07-05	3437	570 (16.6%)	1464 (42.6%)	\$9,015	\$3,726	\$23,154	\$9,571
WV	21	1996-12-08	2006-07-05	3496	629 (18.0%)	1464 (41.9%)	\$9,780	\$4,043	\$22,763	\$9,409
WV	22	1996-11-21	2006-07-05	3513	646 (18.4%)	1464 (41.7%)	\$9,996	\$4,132	\$22,653	\$9,364
WV	23	1996-10-16	2006-07-05	3549	682 (19.2%)	1464 (41.3%)	\$10,446	\$4,318	\$22,423	\$9,269
WV	24	1996-09-27	2006-07-05	3568	701 (19.6%)	1464 (41.0%)	\$10,680	\$4,414	\$22,304	\$9,219
WV	25	1996-09-21	2006-07-05	3574	707 (19.8%)	1464 (41.0%)	\$10,753	\$4,445	\$22,266	\$9,204
WV	26	1996-09-08	2006-07-05	3587	720 (20.1%)	1464 (40.8%)	\$10,911	\$4,510	\$22,185	\$9,170
WV	27	1996-08-24	2006-07-05	3602	735 (20.4%)	1464 (40.6%)	\$11,092	\$4,585	\$22,093	\$9,132
WV	28	1998-01-22	2006-07-05	3086	219 (07.1%)	1464 (47.4%)	\$3,858	\$1,595	\$25,787	\$10,659

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
WV	29	1997-11-08	2006-07-05	3161	294 (09.3%)	1464 (46.3%)	\$5,056	\$2,090	\$25,175	\$10,406
WV	30	1997-11-20	2006-07-05	3149	282 (09.0%)	1464 (46.5%)	\$4,868	\$2,012	\$25,271	\$10,446
WV	31	1997-12-05	2006-07-05	3134	267 (08.5%)	1464 (46.7%)	\$4,631	\$1,914	\$25,392	\$10,496
BC	1	1994-06-19	2006-07-05	4399	1532 (34.8%)	1464 (33.3%)	\$14,264	\$16,899	\$13,631	\$16,149
BC	2	1994-04-13	2006-07-05	4466	1599 (35.8%)	1464 (32.8%)	\$14,665	\$17,374	\$13,426	\$15,907
BC	3	1994-01-28	2006-07-05	4541	1674 (36.9%)	1464 (32.2%)	\$15,099	\$17,888	\$13,205	\$15,644
BC	4	1994-11-16	2006-07-05	4249	1382 (32.5%)	1464 (34.5%)	\$13,322	\$15,783	\$14,112	\$16,719
BC	5	1995-03-25	2006-07-05	4120	1253 (30.4%)	1464 (35.5%)	\$12,456	\$14,758	\$14,554	\$17,243
BC	6	1995-12-02	2006-07-05	3868	1001 (25.9%)	1464 (37.8%)	\$10,600	\$12,558	\$15,502	\$18,366
BC	7	1996-08-25	2006-07-05	3601	734 (20.4%)	1464 (40.7%)	\$8,349	\$9,891	\$16,652	\$19,728
BC	8	1996-10-13	2006-07-05	3552	685 (19.3%)	1464 (41.2%)	\$7,899	\$9,358	\$16,881	\$20,000
BC	9	1998-01-14	2006-07-05	3094	227 (07.3%)	1464 (47.3%)	\$3,005	\$3,560	\$19,380	\$22,961
BC	11	1998-05-06	2006-07-05	2982	115 (03.9%)	1464 (49.1%)	\$1,580	\$1,871	\$20,108	\$23,823
BC	12	1997-10-03	2006-07-05	3197	330 (10.3%)	1464 (45.8%)	\$4,228	\$5,009	\$18,756	\$22,221
BC	13	1996-07-04	2006-07-05	3653	786 (21.5%)	1464 (40.1%)	\$8,813	\$10,441	\$16,415	\$19,447
BC	14	1995-04-06	2006-07-05	4108	1241 (30.2%)	1464 (35.6%)	\$12,373	\$14,659	\$14,597	\$17,293
BC	15	1995-07-22	2006-07-05	4001	1134 (28.3%)	1464 (36.6%)	\$11,609	\$13,753	\$14,987	\$17,756
BC	16	1995-12-22	2006-07-05	3848	981 (25.5%)	1464 (38.0%)	\$10,442	\$12,371	\$15,583	\$18,462
BC	17	1996-01-27	2006-07-05	3812	945 (24.8%)	1464 (38.4%)	\$10,154	\$12,029	\$15,730	\$18,636
BC	18	1996-03-03	2006-07-05	3776	909 (24.1%)	1464 (38.8%)	\$9,860	\$11,682	\$15,880	\$18,814
BC	19	1996-11-22	2006-07-05	3512	645 (18.4%)	1464 (41.7%)	\$7,522	\$8,912	\$17,074	\$20,228
BC	20	1996-10-30	2006-07-05	3535	668 (18.9%)	1464 (41.4%)	\$7,740	\$9,170	\$16,963	\$20,096
BC	21	1997-01-12	2006-07-05	3461	594 (17.2%)	1464 (42.3%)	\$7,029	\$8,328	\$17,325	\$20,526
BC	22	1997-02-21	2006-07-05	3421	554 (16.2%)	1464 (42.8%)	\$6,633	\$7,858	\$17,528	\$20,766
BC	23	1997-04-11	2006-07-05	3372	505 (15.0%)	1464 (43.4%)	\$6,134	\$7,267	\$17,782	\$21,068

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
BC	24	1997-09-06	2006-07-05	3224	357 (11.1%)	1464 (45.4%)	\$4,535	\$5,373	\$18,599	\$22,035
LK	20	1993-08-08	2006-11-21	4853	1847 (38.1%)	1464 (30.2%)	\$32,679	\$38,904	\$25,902	\$30,837
LK	28	1994-05-28	2006-11-21	4560	1554 (34.1%)	1464 (32.1%)	\$29,261	\$34,836	\$27,567	\$32,818
TOTAL							\$1,461,930	\$1,666,128	\$3,080,406	\$2,996,193

Exhibit J

In The Matter:

Report By:

**CROSSMANN COMMUNITIES OF NORTH
CAROLINA, INC., ET. AL.**

L. G. LEWIS, JR., P.E., F. NSPE

VS.

**HARLEYSVILLE MUTUAL INSURANCE
COMPANY, ET AL.**

**H2L CONSULTING ENGINEERS
122 EDGEWORTH STREET
GREENVILLE, SOUTH CAROLINA**

A. Introduction.

The purpose of this report is to present results of a cost allocation study undertaken by H2L at the request of King & Spalding LLP, the law firm representing Crossmann Communities in this matter.

In the captioned matter, Plaintiffs argue that they are entitled to coverage under various insurance policies for damages, awards and settlements arising out of certain lawsuits involving a number of residential condominium projects in coastal South Carolina. For each of the underlying lawsuits, there are expert reports which address defect allegations, investigation findings, opinions of causes and damages, and estimates of remedial construction costs.

All of the underlying lawsuits involve, among other things, allegations of water infiltration damages to real property arising from defects of one nature or another in construction of the various buildings. In addition to moisture damage, a number of buildings were also found to be in violation of applicable building code requirements in parts of the actual construction. Some of the alleged code violations would be considered serious and a threat to life safety in the event of fire or excessive wind loads.

H2L was asked to review the various expert reports and associated remedial action construction cost estimates, and to undertake a good faith effort to allocate the estimated construction costs in a manner that might help facilitate identification of those costs covered under the respective insurance contracts. We have completed our review of the documents and our assessment of cost allocations. The results of that effort are presented in the following sections and appendices.

B. Properties Evaluated.

Expert reports and construction cost estimates for the following projects were reviewed and used by H2L for the preparation of this report:

- a) Buck Creek Golf Villas (23 Residential Buildings)
- b) Lightkeepers Village (2 Residential Buildings)
- c) River Oaks I (43 Residential Buildings)
- d) River Oaks II (23 Residential Buildings)
- e) Waterway Village (31 Residential Buildings)

C. Assessment Protocol.

The following protocol was used by H2L in its effort to allocate the estimated remedial construction costs into various categories in a manner to facilitate coverage discussions among the parties.

- a) Each of the investigation reports tendered by the various experts were reviewed in an effort to become familiar with the defect allegations, the extent of investigations, the findings and documentation of alleged defects, and the location and documentation of physical damages.
- b) Where the Plaintiff's experts in the underlying actions differed in their findings and opinions on any single property, the related reports were compared in order to determine the more probable conditions causing damage and the more likely extent of damages. Where we have a Defendant's report in the underlying action, that report was reviewed independently of the Plaintiff reports and addressed separately in the attached appendices.
- c) Because the extent of invasive inspections at the various properties was limited, elevation photographs, where provided, were studied in an effort to assess extent of total wall area occupied by fenestrations (doors and windows), to identify the locations and extent of wall areas impacted by reported flashing deficiencies, and to establish a basis for investigating undisturbed areas predicated upon findings at invasive investigation locations.
- d) Based upon the objective assessments described above, and upon the historical findings of extensive similar investigations by H2L at many similar properties, the remedial cost estimates were analyzed and the work breakdown direct cost items were segregated into one or more of the cost categories established for this report. Cost category descriptions are more fully discussed in the next section of this report.
- e) After tabulating the direct work costs for each cost category, indirect (overhead) and general condition costs were allocated among the categories in the same proportion that direct costs for each cost category bears to the total direct costs.
- f) The direct and indirect costs for each project and building type were calculated and totaled for each cost category.
- g) Where building code violations are cited, H2L identified those which in its opinion posed a serious threat to life safety and placed the estimated remediation cost into a separate cost allocation category for such conditions.
- h) H2L understands that there are discrepancies between the cost to repair amounts that the plaintiffs allege and the amount that Beazer actually paid to settle the lawsuit. While we do not know how the plaintiffs have allocated the settlement amount to repair the property damage at the project, in our experience, the amounts are usually allocated to repair the most serious damage first. For example, cost would first be expended to repair damages that could cause physical harm or peril to life; then to repair damage such as wood deterioration and water intrusion, as well as access cost associated with these items; and then to additional property damage.

D. Cost Allocation Category Descriptions.

- a) General. Each line item of the construction cost estimate for each building or group of buildings within a specific project has been divided into one or more of three principal categories. Costs are further subdivided within each principal category depending upon the type of work to be performed. An explanation of each is presented below.
- b) Category Descriptions.
 - 1) "Defective Work of Subcontractors." H2L understands that all of the construction labor and material installation was provided by Subcontractors, some of which were engaged by the General Contractor. Where the reports confirm deficiencies in the performance of a subcontractor's work, related remediation costs are included in this category. Only costs associated with the exterior cladding assemblies and related construction are included in this category. Where reports cite structural and fire safety code violations, the allocation of such costs are addressed elsewhere.

This category of costs is sub-divided in three component cost columns:

- For costs associated with allegations of defective work product, but for which there appears to be no actual damage to the work product or underlying substrates (and no reasonable expectation of underlying damage based upon the investigation findings and H2L's experience on projects of a similar nature), the remedial construction cost is listed in the first column.
 - Where the reports indicate damage to a subcontractor's work product (such as delamination of EIFS base coat material, for example), but not to the work product of others (such as the underlying substrate materials), remedial construction costs are listed in the second column.
 - Where the reports document water infiltration damage to underlying materials (such as sheathing and/or framing) whether or not there is documentation of the actual source or cause of infiltration, the remedial construction cost for repair or replacement of the actual damaged components is listed in the third column.
- 2) "Access Cost." Cost estimate pricing appearing in the two sub-listing columns of this category represent the cost of removing existing work product that has no record or appearance of damage in order to access underlying areas for repair of known underlying damage (first column)...or in order to determine whether or not there is a presence of underlying damage (second column). Those access costs appearing in the second column have been determined based upon a finding of damage at one location and a reasonable expectation of finding similar damage at other locations consisting of similar components and similar exposure conditions.
 - 3) "Correction of Code Violations." Entries in the two columns of this cost category are intended to address corrective action costs to remedy reported building code violations that relate to structural reliability and fire safety requirements. Where H2L has assessed the code violation as a condition posing serious threat of

physical harm or peril to human life (in the event of fire), the estimated cost of corrective action is listed in the first column...otherwise, corrective action costs appear in the second column of this category.

E. Cost Allocation Study Results.

The Detailed Cost Allocation Reports for each of the projects at issue are presented in Appendix A (for estimates prepared by Plaintiff experts) and Appendix B (for estimates prepared by Defense experts).

F. Reference Documents.

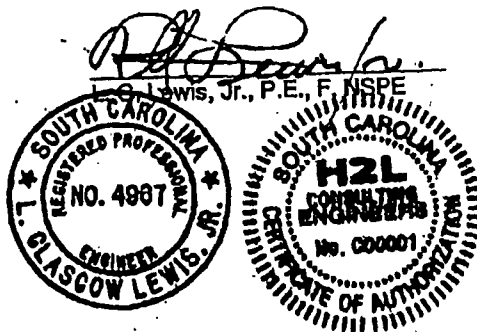
The construction cost estimates used by H2L as the basis for total cost figures found in this report are identified on each allocation report contained in Appendix A and Appendix B. Included among the various expert reports reviewed by H2L are several which deal only with Loss of Use analyses. The Loss of Use values were not considered in preparing the cost allocations developed by H2L.

(End of Report)

H2L CONSULTING ENGINEERS

LGL/II

Attachments - Appendix A
Appendix B



APPENDIX A

ESTIMATES BY PLAINTIFF EXPERTS

ROA 413

Scope by	CSA
Estimate by	Watkins - Oct 05
No. of Stories	3
Type of Bldg Cladding	vinyl siding
Water Infiltration	yes
Code Violations	yes

BUCK CREEK GOLF VILLAS

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo - Walls								
3.01	Remove siding and trim	\$13,362	\$5,345			\$1,336	\$6,681		
3.02	Remove damaged sheathing and all 1st floor sheathing	\$2,250			\$450				\$1,800
3.03	Remove damaged framing	\$450			\$450				
3.04	Remove windows and save	\$2,970				\$2,970			
3.05	Remove SGD and save	\$2,970				\$2,970			
3.06	Remove storage doors and save	\$2,888				\$2,888			
4	Framing and Sheathing Repairs - Walls								
4.01	Replace damaged framing and missing studs	\$650			\$650				
4.02	Replace sheathing	\$4,500			\$4,500				
4.03	Correct joint details, re-nail sheathing and add missing hurricane straps	\$14,828							\$14,828
4.04	Adjust storage room framing	\$4,320			\$4,320				
4.05	Install missing anchors	\$700							\$700
4.06	Reinstall windows	\$7,200				\$7,200			
4.07	Reinstall SGD	\$5,850				\$5,850			
4.08	Reinstall storage room doors	\$5,250				\$5,250			
4.09	Install bldg wrap	\$7,349	\$2,940			\$735	\$3,675		
4.10	Install siding and trim	\$60,129	\$24,052			\$6,013	\$30,065		
4.11	Install soffit and fascia	\$2,763				\$2,763			
5	Stairway and Walkway Repair								
5.01	Walkway Railings	\$1,530						\$1,530	
5.02	Remove carpet	\$2,916				\$2,916			
5.03	Remove sheathing	\$2,556			\$2,556				
5.04	Remove stair components	\$2,400				\$2,400			
5.05	Reslope walkways	\$5,325			\$5,325				
5.06	Reinstall sheathing	\$3,834			\$3,834				
5.07	Rebuild stairs	\$5,520				\$5,520			
5.08	Install waterproofing and flashings	\$9,315		\$9,315					
5.09	Install carpet	\$4,860				\$4,860			
6	Fire Code Compliance								
6.01	Remove Walkway Ceilings	\$1,758						\$1,758	
6.02	Install GWB	\$5,140						\$5,140	
6.03	Install walkway ceilings	\$5,606						\$5,606	
6.04	Rework columns	\$28,000		\$28,000					
7	Roof Repairs								
7.01	Remove roof	\$4,125							\$4,125
7.02	Repair sheathing	\$3,267							\$3,267
7.03	Install felt	\$1,003							\$1,003
7.04	Install shingles, vents	\$9,075							\$9,075
7.05	RSR gutters and downspouts	\$1,190							\$1,190
8	Special Construction								
8.01	Interior repairs	\$31,500				\$5,250	\$26,250		
8.02	Attic repairs	\$6,900	\$6,900						
8.03	Hardware on storage room doors	\$3,000		\$3,000					
Subtotal - Construction		\$277,249	\$39,236	\$40,315	\$22,085	\$58,921	\$66,670	\$14,034	\$35,988
Percentage of Subtotal			14.15%	14.54%	7.97%	21.25%	24.05%	5.06%	12.96%

ROA 414

Scope by Estimate by	CSA
No. of Stories	Wetlans - Oct 05
Type of Bldg Cladding	3
Water Infiltration	vinyl siding
Code Violations	yes
	yes

BUCK CREEK GOLF VILLAS

Item No	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Perti to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1.01	Mobilize equipment	\$1,500	\$212	\$218	\$119	\$319	\$361	\$76	\$195
1.02	Mobilize trailers	\$166	\$23	\$24	\$13	\$35	\$40	\$8	\$22
1.03	Mobilize dumpster	\$110	\$16	\$16	\$9	\$23	\$26	\$6	\$14
1.04	Prune landscaping	\$550	\$78	\$80	\$44	\$117	\$132	\$28	\$71
1.05	Erect scaffolding	\$6,600	\$934	\$960	\$526	\$1,403	\$1,587	\$334	\$657
1.06	Post signs	\$550	\$78	\$80	\$44	\$117	\$132	\$28	\$71
1.07	Building Permits	\$1,811	\$256	\$263	\$144	\$385	\$436	\$92	\$235
2	Prepare Owner Units								
2.01	Remove window and door coverings	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.02	Pull back furniture	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.03	Cover furniture with plastic	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.04	Disconn/reconn electrical	\$3,000	\$425	\$436	\$239	\$638	\$721	\$152	\$369
9	Project General Requirements								
9.01	Forklift Rental	\$4,800	\$679	\$688	\$382	\$1,020	\$1,154	\$243	\$623
9.02	Scaffold Rental	\$5,940	\$841	\$864	\$473	\$1,262	\$1,428	\$301	\$771
9.03	Dumpster & dumpsters	\$2,400	\$340	\$349	\$191	\$510	\$577	\$121	\$312
9.04	Porta-john rental	\$180	\$25	\$26	\$14	\$38	\$43	\$9	\$23
9.05	Diamond Scaffolding	\$3,850	\$545	\$560	\$307	\$818	\$926	\$195	\$500
9.06	Demobilize	\$1,500	\$212	\$218	\$119	\$319	\$361	\$76	\$195
	Subtotal - Overhead	\$32,957	\$4,664	\$4,792	\$2,625	\$7,004	\$7,925	\$1,668	\$4,278
	Total	\$310,206	\$43,900	\$45,107	\$24,710	\$65,925	\$74,595	\$15,702	\$40,268
Total for 23 Buildings		\$7,134,742	\$1,009,702	\$1,037,469	\$568,337	\$1,516,278	\$1,715,690	\$361,152	\$926,117

ROA 415

Scope by Estimate by	Sharnett
No. of Stories	Prime South - July 04
Type of Siding Cladding	3
Water Information	Vinyl Siding
Code Violations	7

RIVER OAKS I

Item No	Description	Line Item	Total Cost (Line Item x 1.25) (See Footnote)	Defective Work of Sub			Access Cost		Correction of Code Violations	
				No Damage to Sub's Work Product or Underlying Mfrs	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Puff to Life	Violations Which pose a Threat to Life Safety
1			1A	2	3	4	5	6	7	8
BUILDING TYPE 1 (14 BUILDINGS)										
CONSTRUCTION COSTS										
25	Demolition									
26	Siding Removal	\$7,980	\$9,950	\$4,975			\$804	\$3,983		
29	Outdoor Carpet	\$1,884	\$2,355	\$1,177			\$208	\$832		
30	Screen at Porches	\$188	\$235	\$117			\$21	\$84		
31	Gutters	\$280	\$350	\$175			\$35	\$140		
32	Shutters	\$200	\$250	\$125			\$38	\$150		
33	Electrical Repair	\$200	\$250	\$125			\$208	\$832		
34	Handrails	\$1,650	\$2,063	\$1,031			\$375	\$1,500		
35	Other	\$3,000	\$3,750	\$1,875						
38	Sheathing	\$2,580	\$3,225			\$3,225				
40	Fronting	\$7,380	\$9,225			\$9,225				
41	Insulation	\$1,050	\$1,313			\$1,313				
42	Sheet Rock	\$4,000	\$5,000			\$5,000				
43	Plumbing	\$2,000	\$2,500				\$2,500			
44	Electrical	\$1,000	\$1,250				\$1,250			
45	Add Nails	\$1,800	\$2,250							\$2,250
46	Hurricane Straps	\$6,280	\$7,850			\$7,850				\$7,850
47	Interior Paint	\$7,500	\$9,375				\$13,750			
48	HVAC	\$11,000	\$13,750							
50	Flashing / Housewrap	\$2,000	\$2,500							
51	Roof	\$2,740	\$3,425			\$3,425				
52	Deck	\$1,088	\$1,360				\$272	\$1,088		
53	Window Head	\$14,805	\$18,506				\$3,851	\$15,655		
54	Int Rope Windows	\$4,181	\$5,226				\$1,048	\$4,181		
55	Components	\$1,780	\$2,225				\$445	\$1,780		
56	Perme Barrier	\$2,782	\$3,478			\$3,478				
57	House wrap	\$4,800	\$6,000			\$6,000				
60	Wall Cladding	\$4,894	\$6,118	\$3,121			\$824	\$3,287		
61	Carpet	\$38,000	\$47,500	\$23,750			\$4,750	\$18,000		
62	Vinyl siding	\$1,000	\$1,250				\$1,250			
63	Exterior painting	\$1,880	\$2,350	\$1,175			\$458	\$1,830		
64	Handrails	\$3,830	\$4,788	\$2,394			\$479	\$1,915		
65	Components	\$4,140	\$5,175	\$2,588			\$518	\$2,070		
67	Sealants	\$3,500	\$4,375			\$4,375				
68	Caulk	\$2,500	\$3,125				\$3,125			
69	Gutters	\$2,800	\$3,500							\$3,500
71	Fire Protection	\$2,800	\$3,500							\$3,500
72	Allic Fire Walls	\$1,530	\$1,913							\$1,913
73	Sheetrock repairs	\$2,000	\$2,500							\$2,500
74	Collar Repairs	\$10,800	\$13,500							\$13,500
77	Lower Wall Moist Proof	\$1,518	\$1,898				\$1,898			
78	Sheathing Removal	\$1,448	\$1,810				\$1,810			
79	Carpet Sheathing	\$1,028	\$1,285				\$1,285			
80	Base and Mesh	\$1,085	\$1,356				\$1,356			
81	Wall finish	\$498	\$623				\$623			
Subtotal - Construction		\$178,248	\$222,811	\$49,270	22.11%	\$49,154	\$36,033	\$66,831	30	\$31,724
Percentage of Subtotal						27.00%	16.17%	29.42%	0.00%	14.24%

Footnote:

The 1.25 Multiplier Used To Identify Total Cost Figures Reflects The Overhead and Profit Applied By the Cost Estimators (Prime South) To The Direct Cost Amounts (Exclusive of O&P) Listed in Column No. 1. Cost Estimates For The Other Projects Were Prepared By Watkins Construction Services. The Column No. 1 Cost Amounts By Watkins Include O&P.

Scope by	Shermet
Estimate by	Prime South - July 04
No. of Stories	3
Type of Strip Cladding	Vinyl Siding
Water Infiltration	Y
Code Violations	Y

RIVER OAKS I

Item No.	Description	Line Item	Total Cost (Line Item x 1.25) (See Footnote)	Defective Work of Sub			Access Cost		Correction of Code Violations	
				No Damage to Sub's Work Product or Underlying Mfrs	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w/ or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Poth to Life	Violations Which pose low Threat to Life Safety
		1	1A	2	3	4	5	6	7	8
BUILDING TYPE 1 (14 BUILDINGS)										
OVERHEAD COSTS										
1	General Conditions									
7	Mobilization		\$11,720	\$2,562	\$0	\$2,568	\$1,865	\$2,878	\$0	\$1,869
14	Equipment		\$29,013	\$6,518	\$0	\$6,400	\$4,692	\$7,274	\$0	\$4,131
19	Protection		\$3,814	\$843	\$0	\$441	\$817	\$869	\$0	\$543
84	Other		\$34,846	\$7,728	\$0	\$7,710	\$5,852	\$8,882	\$0	\$4,978
92	Trim/fin		\$1,875	\$415	\$0	\$414	\$303	\$477	\$0	\$267
95	Landscape		\$9,875	\$1,520	\$0	\$1,517	\$1,112	\$1,747	\$0	\$979
100	Demobilize		\$14,475	\$3,201	\$0	\$3,183	\$2,341	\$3,678	\$0	\$2,081
Subtotal - Overhead			\$102,719	\$22,714	\$0	\$22,880	\$18,612	\$28,108	\$0	\$14,825
Total per building			\$325,530	\$71,884	\$0	\$71,814	\$52,644	\$82,738	\$0	\$48,348
Total for 14 buildings			\$4,557,420	\$1,007,777	\$0	\$1,005,398	\$737,020	\$1,158,340	\$0	\$646,883

Footnote:

The 1.25 Multiplier Used To Identify Total Cost Figures Reflects The Overhead and Profit Applied By the Cost Estimators (Prime South) To The Direct Cost Amounts (Exclusive of OH&P) Listed in Column No. 1. Cost Estimates For The Other Projects Were Prepared By Watkins Construction Services. The Column No. 1 Cost Amounts By Watkins Include OH&P.

Scope by
Estimate by
No. of Stories
Type of Bldg Cladding
Water Infiltration
Code Violations

Sherratt
Prime South - July 04
3
Vinyl Siding
Y
Y

RIVER OAKS I

Item No.	Description	Line Item	Total Cost (Line Item x 1.25) (See Footnote)	Defective Work of Sub			Access Cost		Correction of Code Violations	
				No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others or to Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Pail to Life	Violations Which pose low Threat to Life Safety
1		1A	2	3	4	5	6	7	8	
BUILDING TYPE 2 (29 BUILDINGS)										
CONSTRUCTION COSTS										
28	Demolition	\$7,436	\$9,295	\$4,644			\$830	\$3,718		
29	Siding Removal	\$1,755	\$2,194	\$1,097			\$219	\$978		
30	Screen at Porches	\$169	\$210	\$105			\$31	\$64		
31	Gutters	\$280	\$350	\$175			\$35	\$140		
32	Shutters	\$280	\$350	\$175			\$35	\$150		
33	Electrical Repair	\$300	\$375	\$188			\$38	\$150		
34	Handrails	\$1,000	\$1,250	\$625			\$125	\$500		
35	Other	\$3,000	\$3,750	\$1,875			\$375	\$1,500		
36	Repair Wall Damage									
38	Sheathing	\$2,580	\$3,225			\$3,225				
40	Framing	\$7,360	\$9,200			\$9,200				
41	Insulation	\$1,050	\$1,313			\$1,313				
42	Shed Rink	\$4,000	\$5,000			\$5,000				
43	Electrical	\$2,000	\$2,500				\$2,500			
44	Plumbing	\$1,000	\$1,250				\$1,250			
45	Auto Walls	\$1,800	\$2,250							\$2,250
46	Hurricane Straps	\$6,280	\$7,850							\$7,850
47	Interior Paint	\$7,500	\$9,375			\$9,375				
48	HVAC	\$11,000	\$13,750				\$13,750			
49	Electrical / Plumbing			\$2,500						
50	Roof	\$2,000	\$2,500			\$2,500				
51	Deck	\$2,740	\$3,425			\$3,425				
52	Window Head	\$850	\$1,063				\$248	\$990		
53	Window / Door	\$14,250	\$17,813				\$3,263	\$14,250		
54	Int Reps Wnds	\$3,810	\$4,763				\$653	\$3,810		
55	Components	\$1,780	\$2,225				\$445	\$1,780		
56	Perms-Servis	\$2,880	\$3,600			\$3,600				
57	House wrap	\$4,480	\$5,575	\$2,788		\$2,788				
58	Wall Cladding									
60	Carpet	\$3,518	\$4,398	\$2,194			\$438	\$1,755		
61	Vinyl siding	\$38,000	\$47,500	\$23,750			\$4,500	\$18,000		
62	Exterior painting	\$1,000	\$1,250				\$1,250			
63	Handrails	\$3,000	\$3,750	\$1,875			\$475	\$1,875		
64	Gutters	\$3,830	\$4,788	\$2,394			\$518	\$2,070		
65	Components	\$4,140	\$5,175	\$2,588						
66	Sealants									
67	Caulk	\$3,200	\$4,000			\$4,000				
68	Gutters	\$2,500	\$3,125				\$3,125			
69	Fire Protection									
71	Alex Fire Valve	\$2,880	\$3,600							\$3,600
72	Sheetrock	\$1,530	\$1,913							\$1,913
73	Sheetrock repairs	\$2,500	\$3,125							\$3,125
74	Ceiling Repair	\$10,800	\$13,500							\$13,500
75	Lower Wall Moist Proof									
77	Sheathing Removal	\$1,280	\$1,600			\$1,600				
78	Cement Sheathing	\$1,380	\$1,725			\$1,725				
79	Seal and Mesh	\$885	\$1,106			\$1,106				
80	Waterproof	\$1,002	\$1,253			\$1,253				
81	Wall Finish	\$470	\$588			\$588				
Subtotal - Construction		\$172,545	\$215,431	\$48,543	\$0	\$47,888	\$35,334	\$53,835	\$0	\$31,724
Percentage of Subtotal				21.87%	0.00%	22.28%	16.42%	24.88%	0.00%	14.73%

Footnote:

The 1.25 Multiplier Used to Identify Total Cost Figures Reflects the Overhead and Profit Applied by the Cost Estimators (Prime South) to the Direct Cost Amounts (Exclusive of OHP) Listed in Column No. 1. Cost Estimates for the Other Projects Were Prepared by Watkins Construction Services. The Column No. 1 Cost Amounts by Watkins Include OHP.

ROA 418

Scope by	Sherrill
Estimate by	Pierre South - July 01
No. of Stories	3
Type of Siding Cladding	Vinyl Siding
Water Infiltration	Y
Code Violations	Y

RIVER OAKS I

Item No.	Description	Line Item	Total Cost (Line Item x 1.25) (See Footnote)	Defective Work of Sub		Access Cost		Correction of Code Violations	
				No Damage to Sub's Work Product or Underlying Mfrs	Damage to Sub's Work Product but not to Others	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Part to Life	Violations Which pose a Threat to Life Safety
		1	1A	2	3	4	5	6	7
BUILDING TYPE 2 (29 BUILDINGS)									
OVERHEAD COSTS									
1	General Conditions								
7	Mobilization		\$11,720	\$2,532	\$0	\$2,611	\$1,922	\$2,929	\$0
14	Equipment		\$27,000	\$5,833	\$0	\$6,016	\$4,426	\$6,747	\$0
19	Protection		\$3,939	\$851	\$0	\$476	\$649	\$864	\$0
84	Other		\$35,010	\$7,584	\$0	\$7,800	\$5,742	\$8,944	\$0
92	Terminals		\$1,875	\$406	\$0	\$418	\$306	\$409	\$0
95	Landscaping		\$6,675	\$1,465	\$0	\$1,532	\$1,129	\$1,718	\$0
100	Demobilize		\$13,950	\$3,014	\$0	\$3,106	\$2,298	\$3,408	\$0
	Subtotal - Overhead		\$100,369	\$21,684	\$0	\$22,361	\$16,462	\$25,091	\$0
	Total per building		\$315,800	\$68,227	\$0	\$70,258	\$51,795	\$78,916	\$0
	Total for 29 buildings		\$9,158,200	\$1,978,595	\$0	\$2,040,359	\$1,502,069	\$2,288,569	\$0

ALL BUILDINGS								
	1A	2	3	4	5	6	7	8
SUBTOTAL	\$13,715,620	\$2,868,372	\$0	\$3,045,768	\$2,239,086	\$3,446,898	\$0	\$1,997,492
10% A&E FEE	\$1,371,562	\$296,837	\$0	\$304,577	\$223,909	\$344,690	\$0	\$199,749
TOTAL	\$15,087,182	\$3,265,210	\$0	\$3,350,345	\$2,462,997	\$3,791,589	\$0	\$2,197,241

Footnote:

The 1.25 Multiplier Used To Identify Total Cost Figures Reflects The Overhead and Profit Applied By the Cost Estimators (Pierre South) To The Direct Cost Amounts (Exclusive of O&M/P) Listed in Column No. 1. Cost Estimates For The Other Projects Were Prepared By Watkins Construction Services. The Column No. 1 Cost Amounts By Watkins Include O&M/P.

Scope by	CSA
Estimated by	Watkins - Nov 03
No. of Stories	3
Type of Bldg Cladding	vinyl siding
Water Infiltration	yes
Code Violations	yes

RIVER OAKS II, BUILDINGS 45-56

Item No	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mts	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others or to Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Perv to Life	Violations Which pose low Threat to Life Safety
1			2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo - Walls								
3.01	Remove siding and trim	\$10,690	\$4,276			\$1,069	\$5,345		
3.02	Remove damaged sheathing and all 1st floor sheathing	\$1,675			\$375				\$1,500
3.03	Remove damaged framing	\$175			\$175				
3.04	Remove windows and save	\$2,700				\$450	\$2,250		
3.05	Remove SGO and save	\$2,700				\$2,700			
3.06	Remove storage doors and save	\$2,625				\$2,625			
4	Framing and Sheathing Repairs - Walls								
4.01	Replace damaged framing and missing studs	\$500			\$500				
4.02	Replace sheathing	\$3,750			\$3,750				
4.03	Correct joint details, re-nail sheathing and add missing hurricane straps	\$11,862							\$11,862
4.04	Adjust storage room framing	\$3,600			\$3,600				
4.05	Install missing anchors	\$500							\$500
4.06	Reinstall windows	\$5,940				\$5,940			
4.07	Reinstall SGO	\$4,500				\$4,500			
4.08	Reinstall storage room doors	\$4,200				\$4,200			
4.09	Install bldg wrap	\$6,681	\$6,681						
4.10	Install siding and trim	\$60,129	\$24,052			\$6,013	\$30,065		
4.11	Install soffit and fascia	\$1,700				\$1,700			
5	Stairway and Walkway Repair								
5.01	Remove carpet	\$2,430				\$2,430			
5.02	Remove sheathing	\$2,130		\$2,130					
5.03	Remove stair components	\$1,920	\$1,920						
5.04	Reslope walkways	\$4,260		\$4,260					
5.05	Reinstall sheathing	\$3,195		\$3,195					
5.06	Rebuild stairs	\$4,480	\$4,480						
5.07	Install waterproofing and flashings	\$7,290		\$7,290					
5.08	Install carpet	\$4,860				\$4,860			
6	Fire Code Compliance								
6.01	Remove Walkway Ceilings	\$1,596						\$1,596	
6.02	Install GWB	\$4,112						\$4,112	
6.03	Install walkway ceilings	\$4,766						\$4,766	
6.04	Rework columns	\$28,000		\$28,000					
7	Roof Repairs								
7.01	Remove roof	\$3,685							\$3,685
7.02	Repair sheathing	\$2,970							\$2,970
7.03	Install felt	\$990							\$990
7.04	Install shingles, vents	\$7,280							\$7,280
7.05	RSR gutters and downspouts	\$935							\$935
8	Special Construction								
8.01	Interior repairs	\$27,000				\$4,500	\$22,500		
8.02	Attic repairs	\$6,000	\$6,000						
8.03	Hardware on storage room doors	\$2,700		\$2,700					
Subtotal - Construction		\$244,728	\$47,409	\$47,575	\$4,400	\$40,987	\$60,160	\$10,496	\$29,702
Percentage of Subtotal			19.37%	19.44%	1.83%	16.75%	24.58%	4.29%	12.14%

ROA 420

Scope by Estimate by No of Stories Type of Bldg Cladding Water Information Code Violations	CSA Watsons - Nov 03 3 vinyl siding yes yes

RIVER OAKS II, BUILDINGS 45-56

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mbrs	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Pail to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1 01	Mobilize equipment	\$1,000	\$194	\$194	\$34	\$187	\$246	\$43	\$121
1 02	Mobilize trailers	\$150	\$29	\$29	\$5	\$25	\$37	\$6	\$18
1 03	Mobilize dumpster	\$100	\$19	\$19	\$3	\$17	\$25	\$4	\$12
1 04	Prune landscaping	\$500	\$97	\$97	\$17	\$84	\$123	\$21	\$61
1 05	Erect scaffolding	\$6,000	\$1,162	\$1,166	\$206	\$1,005	\$1,475	\$257	\$728
1 06	Post signs	\$500	\$97	\$97	\$17	\$84	\$123	\$21	\$61
1 07	Building Permits	\$1,200	\$232	\$233	\$41	\$201	\$295	\$51	\$146
2	Prepare Owner Units								
2 01	Remove window and door coverings	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2 02	Pull back furniture	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2 03	Cover furniture with plastic	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2 04	Deconn/reconn electrical	\$2,500	\$484	\$486	\$86	\$418	\$615	\$107	\$303
9	Protect General Requirements								
9 01	Forklift Rental	\$3,600	\$697	\$700	\$124	\$603	\$885	\$154	\$437
9 02	Scaffold Rental	\$5,400	\$1,046	\$1,050	\$185	\$904	\$1,327	\$232	\$655
9 03	Dumpster & dump fees	\$2,400	\$465	\$467	\$82	\$402	\$590	\$103	\$281
9 04	Porta-john rental	\$150	\$29	\$29	\$5	\$25	\$37	\$6	\$18
9 05	Dremantle Scaffolding	\$3,500	\$678	\$680	\$120	\$586	\$890	\$150	\$425
9 06	Demobilize	\$1,000	\$194	\$194	\$34	\$187	\$246	\$43	\$121
	Allowance for Paving, Palm Trees	\$7,130	\$1,381	\$1,386	\$245	\$1,194	\$1,753	\$306	\$865
	Subtotal - Overhead	\$35,130	\$6,805	\$6,829	\$1,206	\$5,864	\$8,638	\$1,507	\$4,264
	Total	\$279,858	\$54,214	\$54,404	\$9,808	\$48,871	\$68,795	\$12,003	\$33,866
	Total for 12 buildings	\$3,358,301	\$650,569	\$652,852	\$115,270	\$582,446	\$825,544	\$144,032	\$407,568

ROA 421

Scope by	CSA
Estimate by	Watkins - Nov 03
No. of Stories	3
Type of Bldg Cladding	vinyl siding
Water Infiltration	yes
Code Violations	yes

RIVER OAKS II, BUILDINGS 57-66

Item No	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Part to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo - Walls								
3.01	Remove siding and trim	\$12,184	\$4,874		\$413	\$1,218	\$8,092		\$1,650
3.02	Remove damaged sheathing and all 1st floor sheathing	\$2,083			\$210				
3.03	Remove damaged framing	\$210				\$675	\$3,375		
3.04	Remove windows and save	\$4,050				\$2,250			
3.05	Remove SGD and save	\$2,250				\$2,000			
3.06	Remove storage doors and save	\$2,000							
4	Framing and Sheathing Repairs - Walls								
4.01	Replace damaged framing and missing studs	\$300			\$300				
4.02	Replace sheathing	\$4,125			\$4,125				\$13,580
4.03	Correct joint details, renael sheathing and add missing hurricane straps	\$13,580							\$500
4.04	Install missing anchors	\$500				\$8,745			
4.05	Reinstall windows	\$8,745				\$8,000			
4.06	Reinstall SGD	\$8,000				\$3,200			
4.07	Reinstall storage room doors	\$3,200							
4.08	Install bldg wrap	\$7,805	\$7,805			\$6,854	\$34,268		
4.09	Install siding and trim	\$68,535	\$27,414			\$3,240			
4.10	Install soffit and fascia	\$3,240							
5	Stairway and Walkway Repair								
5.01	Remove carpet	\$1,873		\$1,220		\$1,873			
5.02	Remove sheathing	\$1,220							
5.03	Remove stair components	\$1,920	\$1,820	\$2,440					
5.04	Reinstall walkways	\$2,440		\$1,830					
5.05	Reinstall sheathing	\$1,830							
5.06	Rebuild stairs	\$4,480	\$4,480	\$5,018					
5.07	Install waterproofing and flashings	\$5,018							
5.08	Install carpet	\$3,345				\$3,345			
6	Fire Code Compliance								
6.01	Remove Walkway Ceilings	\$1,218						\$1,218	
6.02	Install GWB	\$3,220						\$3,220	
6.03	Install walkway ceilings	\$3,854						\$3,854	
6.04	Rework columns	\$33,800		\$33,800					
7	Roof Repairs								
7.01	Remove roof	\$4,556							\$4,556
7.02	Repair sheathing	\$3,072							\$3,072
7.03	Install felt	\$1,224							\$1,224
7.04	Install shingles, vents	\$8,976							\$8,976
7.05	RSR gutters and downspouts	\$908							\$908
8	Special Construction								
8.01	Interior repairs	\$45,000				\$7,500	\$37,500		
8.02	Abc repairs	\$8,000	\$8,000	\$225					
8.03	Hardware on storage room doors	\$225							
8.04	Remove/replace bnck	\$8,028					\$8,028		
	Subtotal - Construction	\$281,892	\$52,493	\$44,333	\$5,048	\$48,700	\$80,163	\$8,092	\$35,084
	Percentage of Subtotal		18.62%	15.73%	1.79%	16.57%	31.98%	2.87%	12.44%

ROA 422

Scope by	CSA
Estimate by	Webbans - Nov 03
No. of Stories	3
Type of Bldg Cladding	vinyl siding
Water Infiltration	yes
Code Violations	yes

RIVER OAKS II, BUILDINGS 57-66

Item No	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Pail to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1.01	Mobilize equipment	\$1,000	\$188	\$157	\$18	\$188	\$320	\$29	\$124
1.02	Mobilize trailers	\$150	\$28	\$24	\$3	\$25	\$48	\$4	\$19
1.03	Mobilize dumpster	\$100	\$19	\$18	\$2	\$17	\$32	\$3	\$12
1.04	Prune landscaping	\$500	\$93	\$79	\$9	\$83	\$180	\$14	\$62
1.05	Erect scaffolding	\$8,000	\$1,117	\$944	\$107	\$994	\$1,919	\$172	\$748
1.06	Post signs	\$500	\$93	\$79	\$9	\$83	\$180	\$14	\$62
1.07	Building Permits	\$1,400	\$261	\$220	\$25	\$232	\$448	\$40	\$174
2	Prepare Owner Units								
2.01	Remove window and door coverings	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.02	Pull back furniture	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.03	Cover furniture with plastic	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.04	Disconn/reconn electrical	\$2,500	\$488	\$393	\$45	\$414	\$800	\$72	\$311
9	Project General Requirements								
9.01	Forklift Rental	\$3,800	\$670	\$568	\$64	\$598	\$1,151	\$103	\$448
9.02	Scaffold Rental	\$3,400	\$1,008	\$849	\$97	\$895	\$1,727	\$155	\$672
9.03	Dumpster & dump fees	\$2,400	\$447	\$377	\$43	\$398	\$788	\$69	\$299
9.04	Portable john rental	\$150	\$28	\$24	\$3	\$25	\$48	\$4	\$19
9.05	Semantic Scaffolding	\$3,500	\$652	\$550	\$63	\$580	\$1,119	\$100	\$435
9.06	Demobilize	\$1,000	\$188	\$157	\$18	\$188	\$320	\$29	\$124
	Allowance for Paving, Palm Trees	\$7,130	\$1,328	\$1,121	\$128	\$1,181	\$2,281	\$205	\$887
	Subtotal - Overhead	\$35,330	\$6,579	\$5,556	\$633	\$5,853	\$11,300	\$1,014	\$4,395
	Total	\$317,222	\$58,072	\$49,889	\$5,880	\$52,553	\$101,463	\$9,108	\$38,458
	Total for 10 buildings	\$3,172,224	\$590,717	\$498,884	\$58,802	\$525,529	\$1,014,628	\$91,082	\$384,591

ROA 423

RIVER OAKS II, BUILDING 67

Scope by Estimate by No. of Stories Type of Bldg Cladding Water Infiltration Code Violations	CSA Watkins - Nov 03 3 vinyl siding yes yes

Code Violations		Access Cost		Correction of Code Violations					
Item No.	Description	Total Cost	Defective Work of Sub		Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Part to Life	Violations Which pose low Threat to Life Safety
			No Damage to Sub's Work Product or Underlying Mfr's	Damage to Sub's Work Product but not to Others					
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo - Walls								
3 01	Remove siding and trim	\$10,238	\$4,095		\$294	\$1,024	\$5,119		\$1,175
3 02	Remove damaged sheathing and all 1st floor sheathing	\$1,469			\$175	\$612	\$3,063		
3 03	Remove damaged framing	\$175							\$1,600
3 04	Remove windows and save	\$3,675							
3 05	Remove SGD and save	\$1,600				\$1,625			
3 06	Remove storage doors and save	\$1,625							
4	Framing and Sheathing Repairs - Walls								
4 01	Replace damaged framing and missing studs	\$250			\$250				
4 02	Replace sheathing	\$2,938			\$2,938				\$11,625
4 03	Correct joint details, re-nail sheathing and add missing hurricane straps	\$11,625							\$500
4 04	Install missing anchors	\$500							
4 05	Reinstall windows	\$8,085				\$8,085			
4 06	Reinstall SGD	\$3,000				\$3,000			
4 07	Reinstall storage room doors	\$2,600				\$2,600			
4 08	Install bldg wrap	\$8,585	\$8,585			\$5,750	\$26,796		
4 09	Install siding and trim	\$57,591	\$23,036			\$2,560			
4 10	Install soffit and fascia	\$2,560							
5	Stairway and Walkway Repair								
5 01	Remove carpet	\$1,673				\$1,673			
5 02	Remove sheathing	\$1,220		\$1,220					
5 03	Remove stair components	\$1,920	\$1,920						
5 04	Reslope walkways	\$2,440		\$2,440					
5 05	Reinstall sheathing	\$1,830		\$1,830					
5 06	Rebuild stairs	\$4,480	\$4,480						
5 07	Rebuild stairs	\$5,018		\$5,018					
5 08	Install waterproofing and flashing								
5 09	Install carpet	\$3,345				\$3,345			
6	Fire Code Compliance								
6 01	Remove Walkway Ceilings	\$1,218						\$1,218	
6 02	Install GWB	\$3,220						\$3,220	
6 03	Install walkway ceilings	\$3,854						\$3,854	
6 04	Rework columns	\$37,200		\$37,200					
7	Roof Repairs								
7 01	Remove roof	\$3,551							\$3,551
7 02	Repair sheathing	\$2,862							\$2,862
7 03	Install felt	\$954							\$954
7 04	Install shingles, vents	\$8,998							\$8,998
7 05	RSR gutters and downspouts	\$935							\$935
8	Special Construction								
8 01	Interior repairs	\$36,000				\$6,000	\$30,000		
8 02	Attic repairs	\$5,000	\$5,000						
8 03	Hardware on storage room doors	\$225		\$225					
8 04	Remove/replace brick	\$8,828					\$8,828		
Subtotal - Construction		\$247,383	\$45,117	\$47,933	\$3,657	\$36,283	\$75,906	\$8,002	\$30,398
Percentage of Subtotal			18.24%	19.38%	1.48%	14.67%	30.68%	3.27%	12.29%

ROA 424

Scope by	CSA
Estimate by	Watkins - Nov 03
No. of Stories	3
Type of Bling Cladding	vinyl siding
Water Infiltration	yes
Code Violations	yes

RIVER OAKS II, BUILDING 67

Item No	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mbls.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
1			2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1.01	Mobilize equipment	\$1,000	\$182	\$194	\$15	\$147	\$307	\$33	\$123
1.02	Mobilize trailers	\$150	\$27	\$29	\$2	\$22	\$46	\$5	\$18
1.03	Mobilize dumpster	\$100	\$18	\$19	\$1	\$15	\$31	\$3	\$12
1.04	Prune landscaping	\$500	\$91	\$97	\$7	\$73	\$153	\$16	\$61
1.05	Erect scaffolding	\$6,000	\$1,094	\$1,163	\$89	\$880	\$1,841	\$196	\$737
1.06	Post signs	\$500	\$91	\$97	\$7	\$73	\$153	\$16	\$61
1.07	Building Permits	\$1,200	\$219	\$233	\$18	\$176	\$368	\$36	\$147
2	Prepare Owner Units								
2.01	Remove window and door coverings	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.02	Put back furniture	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.03	Cover furniture with plastic	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2.04	Disconn/reconn electrical	\$2,500	\$456	\$484	\$37	\$367	\$767	\$62	\$307
9	Project General Requirements								
9.01	Forklift Rental	\$3,800	\$657	\$698	\$53	\$528	\$1,105	\$116	\$442
9.02	Scaffold Rental	\$5,400	\$985	\$1,046	\$80	\$792	\$1,657	\$177	\$684
9.03	Dumpster & dump fee	\$2,400	\$438	\$465	\$35	\$352	\$736	\$79	\$295
9.04	Porta-john rental	\$150	\$27	\$29	\$2	\$22	\$46	\$5	\$18
9.05	Shimelite Scaffolding	\$3,500	\$636	\$676	\$52	\$513	\$1,074	\$114	\$430
9.06	Demobilize	\$1,000	\$182	\$194	\$15	\$147	\$307	\$33	\$123
	Allowance for Paving, Palm Trees	\$7,130	\$1,300	\$1,362	\$105	\$1,046	\$2,188	\$233	\$676
	Subtotal - Overhead	\$35,130	\$6,407	\$6,807	\$519	\$5,152	\$10,779	\$1,149	\$4,317
	Total	\$282,515	\$51,523	\$54,740	\$4,176	\$41,435	\$86,685	\$9,241	\$34,715
	Total for 1 buildings	\$282,515	\$51,523	\$54,740	\$4,176	\$41,435	\$86,685	\$9,241	\$34,715

ROA 425

RIVER OAKS II SUMMARY								05659
	Total Cost	No Damage to Sub's Work Product or Underlying Mtrls.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or wo Damage to Subs Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
	1	2	3	4	5	6	7	8
Bldg 45-56	\$3,358,301	\$650,569	\$652,852	\$115,270	\$562,446	\$825,544	\$144,032	\$407,588
Bldg 57-66	\$3,172,224	\$590,717	\$498,894	\$56,802	\$525,529	\$1,014,629	\$91,062	\$394,591
Bldg 67	\$282,515	\$51,523	\$54,740	\$4,176	\$41,435	\$86,685	\$9,241	\$34,715
Subtotals	\$6,813,041	\$1,292,809	\$1,206,486	\$176,248	\$1,129,411	\$1,926,857	\$244,335	\$836,895
Cont & Profit	\$680,000	\$129,033	\$120,418	\$17,591	\$112,725	\$192,317	\$24,387	\$83,529
Profess Fee	\$340,000	\$64,517	\$60,209	\$8,796	\$56,362	\$96,158	\$12,193	\$41,765
Totals	\$7,833,041	\$1,486,359	\$1,387,112	\$202,635	\$1,298,499	\$2,215,332	\$280,916	\$962,188

Scope by	A & I
Estimate by	Watkins - Feb 04
No. of Stories	2/3
Type of Bldg Cladding	EIFS
Water Infiltration	Y
Code Violations	Y

LIGHTKEEPERS BLDG 20

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mtrls.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Subs Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Penl to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo								
3.1	Remove brick veneer	\$4,500	\$2,700			\$900	\$900		
3.11	Remove EIFS	\$22,478	\$17,982			\$2,248	\$2,248		
3.12	Remove privacy fence	\$600				\$600			
3.13	Remove cedar siding	\$0							
3.2	Remove damaged sheathing	\$11,240			\$11,240				
3.3	Remove damaged framing	\$6,840			\$6,840				
3.4	Remove windows and dispose	\$7,350			\$7,350				
3.41	Remove gable vents and save	\$120	\$120						
3.5	Remove SGD and save	\$0							
3.6	Remove specialty doors & save	\$5,600				\$5,600			
3.61	Remove std. doors and save	\$500				\$500			
3.7	Temp cover	\$6,475				\$6,475			
3.8	Remove drywall	\$8,093			\$8,093				
3.9	Remove insulation	\$674			\$674				
4	Framing and Sheathing at Exterior								
4.1	Replace damaged framing	\$14,860			\$14,860				
4.2	Replace damaged insulation	\$2,427			\$2,427				
4.3	Replace damaged sheathing	\$16,860			\$16,860				
5	Flashing at Doors, Windows & Floorings								
5.1	Wrap window openings	\$6,860				\$3,430	\$3,430		
5.11	Wrap wide doors	\$960				\$480	\$480		
5.12	Wrap std. doors	\$1,680				\$840	\$840		
5.2	Install head flashing at windows	\$2,940				\$1,470	\$1,470		
5.21	Install pan flashing at windows	\$3,430				\$1,715	\$1,715		
5.22	Install head flashing at wide doors	\$540				\$270	\$270		
5.23	Install pan flashing at wide doors	\$720				\$360	\$360		
5.24	Install head flashing at std. doors	\$600				\$300	\$300		
5.25	Install pan flashing at std. doors	\$840				\$420	\$420		
5.3	Reinstall windows - large	\$10,456				\$5,228	\$5,228		
5.4	Reinstall windows - std	\$53,550				\$26,775	\$26,775		
5.5	Reinstall wide doors	\$1,800				\$900	\$900		
5.6	Reinstall std. doors	\$2,640				\$1,320	\$1,320		
5.7	Reinstall gable vents	\$300				\$150	\$150		

Scope by	A & I
Estimate by	Watkins - Feb 04
No. of Stories	2/3
Type of Bldg Cladding	EIFS
Water Infiltration	Y
Code Violations	Y

LIGHTKEEPERS BLDG 20

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or w/o Damage to Subs Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
6.1	Install hardwood	\$103,397	\$82,717			\$10,340	\$10,340		
6.2	Install brick veneer	\$13,414	\$8,048			\$2,683	\$2,683		
6.3	Install cedar siding	\$0							
6.4	Paint cedar	\$0							
6.5	Paint window trim	\$2,658	\$2,126			\$266	\$266		
6.5.1	Paint door trim	\$1,884	\$1,507			\$188	\$188		
7	Roof Repairs								
7.1	Remove/replace shingles - dormers	\$1,500							\$1,500
7.2	Remove/replace shingles - chimneys	\$0							
7.3	Remove/replace shingles - rakes	\$0							
8	Exterior Balconies								
8.01	Remove/Reinstall EIFS	\$2,505	\$2,004			\$251	\$251		
9	Interior Repairs								
9.1	Sheetrock	\$28,978				\$13,489	\$13,489		
9.2	Repair door, window trim	\$8,040				\$4,020	\$4,020		
9.3	Paint sheetrock and trim	\$21,582				\$10,791	\$10,791		
9.4	Reset furniture and clean	\$2,600				\$1,300	\$1,300		
9.5	Reinstall window treatments	\$2,352				\$1,176	\$1,176		
9.5.1	Reinstall door treatments	\$2,160				\$1,080	\$1,080		
10	Misc								
10.1	Landscaping	\$9,000				\$9,000			
10.2	Electrical	\$1,500				\$1,500			
11	Special Construction								
11.1	Rebuild privacy walls	\$1,200				\$1,200			
	Subtotal - Construction	\$396,922	\$117,205	\$0	\$68,364	\$117,463	\$92,389	\$0	\$1,500
	Percentage of Subtotal		29.53%	0.00%	17.22%	29.59%	23.28%	0.00%	0.38%

Scope by	A & I
Estimate by	Watkins - Feb 04
No. of Stories	2/3
Type of Bldg Cladding	EIFS
Water Infiltration	Y
Code Violations	Y

LIGHTKEEPERS BLDG 20

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Subs Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1.1	Mobilize equipment	\$1,000	\$295	\$0	\$172	\$296	\$233	\$0	\$4
1.2	Mobilize trailers	\$150	\$44	\$0	\$28	\$44	\$35	\$0	\$1
1.3	Mobilize dumpster	\$100	\$30	\$0	\$17	\$30	\$23	\$0	\$0
1.4	Erect scaffolding	\$3,693	\$1,090	\$0	\$636	\$1,093	\$860	\$0	\$14
1.5	Post signs	\$250	\$74	\$0	\$43	\$74	\$58	\$0	\$1
1.6	Building Permits	\$1,888	\$557	\$0	\$325	\$559	\$439	\$0	\$7
2	Prepare Owner Units								
2.1	Remove window treatments	\$1,960	\$579	\$0	\$338	\$580	\$456	\$0	\$7
2.11	Remove door treatments	\$1,800	\$532	\$0	\$310	\$533	\$419	\$0	\$7
2.2	Pull back furniture	\$1,600	\$472	\$0	\$276	\$473	\$372	\$0	\$6
2.3	Cover furniture with plastic	\$800	\$236	\$0	\$138	\$237	\$186	\$0	\$3
2.4	Disconn/reconn electrical	\$2,500	\$738	\$0	\$431	\$740	\$582	\$0	\$9
12	General								
12.1	Forklift Rental	\$7,200	\$2,128	\$0	\$1,240	\$2,131	\$1,676	\$0	\$27
12.2	Scaffold Rental	\$8,224	\$2,428	\$0	\$1,416	\$2,434	\$1,914	\$0	\$31
12.3	Dumpster & dump fees	\$4,800	\$1,417	\$0	\$827	\$1,420	\$1,117	\$0	\$18
12.4	Porta-john rental	\$300	\$89	\$0	\$52	\$89	\$70	\$0	\$1
12.5	Trailer rental	\$400	\$118	\$0	\$69	\$118	\$93	\$0	\$2
12.6	Performance Bond	\$5,289	\$1,562	\$0	\$911	\$1,565	\$1,231	\$0	\$20
12.7	Dismantle Scaffolding	\$2,107	\$622	\$0	\$363	\$624	\$490	\$0	\$8
12.8	Demobilize	\$1,000	\$295	\$0	\$172	\$296	\$233	\$0	\$4
Subtotal - Overhead		\$45,061	\$13,306	\$0	\$7,761	\$13,335	\$10,488	\$0	\$170
Total		\$441,982	\$130,511	\$0	\$76,125	\$130,798	\$102,877	\$0	\$1,670

LIGHTKEEPERS BLDG 28

Scope by Estimate by No. of Stories Type of Bldg Cladding Water Infiltration Code Violations	A & I Watkin - Feb 04 2/3 EIFS Y Y

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mtrls.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo								
3.1	Remove brick veneer	\$0				\$2,228	\$2,228		
3.11	Remove EIFS	\$22,283	\$17,828			\$2,000			
3.12	Remove privacy fence	\$2,000							
3.13	Remove cedar siding	\$0							
3.2	Remove damaged sheathing	\$11,143			\$11,143				
3.3	Remove damaged framing	\$2,924			\$2,924				
3.4	Remove windows and dispose	\$2,400			\$2,400				
3.41	Remove gable vents and save	\$360	\$360			\$1,500			
3.5	Remove SGD end save	\$1,500							
3.6	Remove specialty doors & save	\$0				\$1,500			
3.61	Remove std. doors and save	\$1,500				\$5,348			
3.7	Temp cover	\$5,348							
3.8	Remove drywall	\$6,685			\$6,685				
3.9	Remove insulation	\$669			\$669				
4	Framing and Sheathing at Exterior								
4.1	Replace damaged framing	\$6,355			\$6,355				
4.2	Replace damaged insulation	\$2,407			\$2,407				
4.3	Replace damaged sheathing	\$18,714			\$18,714				
5	Flashing at Doors, Windows & Floorings								
5.1	Wrap window openings	\$2,240				\$1,120	\$1,120		
5.11	Wrap wide doors	\$480				\$240	\$240		
5.12	Wrap std. doors	\$840				\$420	\$420		
5.2	Install head flashing at windows	\$960				\$480	\$480		
5.21	Install pan flashing at windows	\$1,120				\$560	\$560		
5.22	Install head flashing at wide doors	\$270				\$135	\$135		
5.23	Install pan flashing at wide doors	\$360				\$180	\$180		
5.24	Install head flashing at std. doors	\$300				\$150	\$150		
5.25	Install pan flashing at std. doors	\$420				\$210	\$210		
5.3	Reinstall windows - large	\$6,000				\$3,000	\$3,000		
5.4	Reinstall windows - std	\$200				\$100	\$100		
5.5	Reinstall wide doors	\$900				\$450	\$450		
5.6	Reinstall std. doors	\$1,320				\$660	\$660		
5.7	Reinstall gable vents	\$400				\$200	\$200		

ROA 430

Scope by	A & I
Estimate by	Watkin - Feb 04
No. of Stories	2/3
Type of Bldg Cladding	EIFS
Water Infiltration	Y
Code Violations	Y

LIGHTKEEPERS BLDG 28

Item No	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or w/o Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
6.1	Install hardwood	\$102,500	\$82,000			\$10,250	\$10,250		
6.2	Install brick veneer	\$0							
6.3	Install cedar siding	\$0							
6.4	Paint cedar	\$0							
6.5	Paint window trim	\$1,110	\$888			\$111	\$111		
6.51	Paint door trim	\$918	\$734			\$92	\$92		
7	Roof Repairs								
7.1	Remove/replace shingles - dormers	\$0							
7.2	Remove/replace shingles - chimneys	\$0							
7.3	Remove/replace shingles - rakes	\$720							\$720
8	Exterior Balconies								
8.01	Remove/Reinstall EIFS	\$0							
9	Interior Repairs								
9.1	Sheetrock	\$22,283				\$11,141	\$11,141		
9.2	Repair door, window trim	\$3,000				\$1,500	\$1,500		
9.3	Paint sheetrock and trim	\$17,826				\$8,913	\$8,913		
9.4	Reset furniture and clean	\$1,950				\$975	\$975		
9.5	Reinstall window treatments	\$768				\$384	\$384		
9.51	Reinstall door treatments	\$1,080				\$540	\$540		
10	Misc								
10.1	Landscaping	\$9,450				\$9,450			
10.2	Electrical	\$1,500				\$1,500			
11	Special Construction								
11.1	Rebuild privacy walls	\$3,000				\$3,000			
	Subtotal - Construction	\$264,200	\$101,808	\$0	\$49,295	\$68,337	\$44,039	\$0	\$720
	Percentage of Subtotal		38.53%	0.00%	18.66%	25.87%	16.67%	0.00%	0.27%

ROA 431

LIGHTKEEPERS BLDG 28

Scope by	A & I
Estimate by	Watkin - Feb 04
No. of Stories	2/3
Type of Bldg Cladding	EIFS
Water Infiltration	Y
Code Violations	Y

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Subs Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1.1	Mobilize equipment	\$1,000	\$385	\$0	\$187	\$259	\$167	\$0	\$3
1.2	Mobilize trailers	\$150	\$58	\$0	\$28	\$39	\$25	\$0	\$0
1.3	Mobilize dumpster	\$100	\$39	\$0	\$19	\$26	\$17	\$0	\$0
1.4	Erect scaffolding	\$2,276	\$877	\$0	\$425	\$589	\$379	\$0	\$6
1.5	Post signs	\$250	\$96	\$0	\$47	\$65	\$42	\$0	\$1
1.6	Building Permits	\$1,354	\$522	\$0	\$253	\$350	\$226	\$0	\$4
2	Prepare Owner Units								
2.1	Remove window treatments	\$640	\$247	\$0	\$119	\$166	\$107	\$0	\$2
2.1.1	Remove door treatments	\$900	\$347	\$0	\$168	\$233	\$150	\$0	\$2
2.2	Pull back furniture	\$1,200	\$462	\$0	\$224	\$310	\$200	\$0	\$3
2.3	Cover furniture with plastic	\$600	\$231	\$0	\$112	\$155	\$100	\$0	\$2
2.4	Disconn/reconn electrical	\$2,500	\$963	\$0	\$466	\$647	\$417	\$0	\$7
12	General								
12.1	Forklift Rental	\$7,200	\$2,774	\$0	\$1,343	\$1,862	\$1,200	\$0	\$20
12.2	Scaffold Rental	\$5,536	\$2,133	\$0	\$1,033	\$1,432	\$923	\$0	\$15
12.3	Dumpster & dump fees	\$4,800	\$1,850	\$0	\$896	\$1,242	\$800	\$0	\$13
12.4	Porta-john rental	\$300	\$116	\$0	\$56	\$78	\$50	\$0	\$1
12.5	Trailer rental	\$400	\$154	\$0	\$75	\$103	\$67	\$0	\$1
12.6	Performance Bond	\$3,604	\$1,389	\$0	\$673	\$932	\$601	\$0	\$10
12.7	Dismantle Scaffolding	\$1,884	\$726	\$0	\$352	\$487	\$314	\$0	\$5
12.8	Demobilize	\$1,000	\$385	\$0	\$187	\$259	\$167	\$0	\$3
Subtotal - Overhead		\$35,695	\$13,755	\$0	\$6,660	\$9,233	\$5,950	\$0	\$97
Total		\$299,894	\$115,563	\$0	\$55,955	\$77,570	\$49,989	\$0	\$817

ROA 432

LIGHTKEEPERS VILLAGE BLDGS 20 & 28 SUMMARY								05659
	Total Cost	No Damage to Sub's Work Product or Underlying Mtrls.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or wo Damage to Subs Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
	1	2	3	4	5	6	7	8
Bldg 20	\$441,982	\$130,511	\$0	\$76,125	\$130,798	\$102,877	\$0	\$1,670
Bldg 28	\$299,894	\$115,563	\$0	\$55,955	\$77,570	\$49,989	\$0	\$817
Subtotals	\$741,876	\$246,074	\$0	\$132,081	\$208,368	\$152,866	\$0	\$2,488
Cont & Profit	\$74,188	\$24,607	\$0	\$13,208	\$20,837	\$15,287	\$0	\$249
Totals	\$816,064	\$270,681	\$0	\$145,289	\$229,205	\$168,153	\$0	\$2,736

Scope by Estimate by No. of Stories Type of Bldg Cladding Water Infiltration Code Violations	CSA Watkins - Oct 05 3 vinyl siding yes yes

WATERWAY VILLAGE

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mfrs.	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Peril to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
CONSTRUCTION COSTS									
3	Selective Demo - Walls								
3 01	Remove siding and trim	\$13,362	\$5,345		\$450	\$1,336	\$6,661		\$1,600
3 02	Remove damaged sheathing and all 1st floor sheathing	\$2,250			\$450				
3 03	Remove damaged framing	\$450				\$2,970			
3 04	Remove windows and save	\$2,970				\$2,970			
3 05	Remove SGD and save	\$2,970				\$2,666			
3 06	Remove storage doors and save	\$2,666							
4	Framing and Sheathing Repairs - Walls								
4 01	Replace damaged framing and missing studs	\$650			\$650				
4 02	Replace sheathing	\$4,500			\$4,500				
4 03	Correct joint details, renew sheathing and add missing hurricane straps	\$14,828							\$14,828
4 04	Adjust storage room framing	\$4,320			\$4,320				\$700
4 05	Install missing anchors	\$700				\$7,200			
4 06	Reinstall windows	\$7,200				\$5,850			
4 07	Reinstall SGD	\$5,850				\$5,250			
4 08	Reinstall storage room doors	\$5,250				\$739	\$3,675		
4 09	Install bldg wrap	\$7,349	\$2,940			\$6,013	\$30,065		
4 10	Install siding and trim	\$60,126	\$24,052			\$2,763			
4 11	Install soffit and fascia	\$2,763							
5	Stairway and Walkway Repair							\$1,530	
5 01	Walkway Railings	\$1,530				\$2,916			
5 02	Remove carpet	\$2,916							
5 03	Remove sheathing	\$2,556			\$2,556	\$2,400			
5 04	Remove stair components	\$2,400							
5 05	Reslope walkways	\$5,325			\$5,325				
5 06	Reinstall sheathing	\$3,834			\$3,834	\$5,520			
5 07	Rebuild stairs	\$5,520							
5 08	Install waterproofing and flashings	\$9,315		\$9,315					
5 09	Install carpet	\$4,860				\$4,860			
6	Fire Code Compliance							\$1,758	
6 01	Remove Walkway Ceilings	\$1,758						\$5,140	
6 02	Install GWB	\$5,140						\$5,608	
6 03	Install walkway ceilings	\$5,608							
6 04	Rework columns	\$28,000		\$28,000					
7	Roof Repairs								\$4,125
7 01	Remove roof	\$4,125							\$3,267
7 02	Repair sheathing	\$3,267							\$1,003
7 03	Install felt	\$1,003							\$9,075
7 04	Install shingles, vents	\$9,075							\$1,190
7 05	RSR gutters and downspouts	\$1,190							
8	Special Construction					\$5,250	\$26,250		
8 01	Interior repairs	\$31,500							
8 02	Atbc repairs	\$6,900	\$6,900						
8 03	Hardware on storage room doors	\$3,000		\$3,000					
	Subtotal - Construction	\$277,249	\$38,238	\$40,315	\$22,065	\$58,021	\$66,670	\$14,034	\$35,088
	Percentage of Subtotal		14.15%	14.54%	7.97%	21.25%	24.05%	5.06%	12.98%

Scope by Estimate by	CSA
No. of Stories	Wedons - Oct 05
Type of Bldg Cladding	3
Water Infiltration	vinyl siding
Code Violations	yes

WATERWAY VILLAGE

Item No.	Description	Total Cost	Defective Work of Sub			Access Cost		Correction of Code Violations	
			No Damage to Sub's Work Product or Underlying Mtl's	Damage to Sub's Work Product but not to Others	Damage to Work Product of Others w or no Damage to Sub's Work Product	Work Necessary to Access Damaged Components	Work Necessary to Determine Presence of Damage	Threat of Physical Harm or Pail to Life	Violations Which pose low Threat to Life Safety
		1	2	3	4	5	6	7	8
OVERHEAD COSTS									
1	Project Mobilization								
1 01	Mobilize equipment	\$1,500	\$212	\$218	\$119	\$319	\$361	\$76	\$195
1 02	Mobilize trailers	\$186	\$23	\$24	\$13	\$35	\$40	\$6	\$22
1 03	Mobilize dumpster	\$110	\$18	\$18	\$9	\$23	\$28	\$6	\$14
1 04	Prune landscaping	\$550	\$78	\$80	\$44	\$117	\$132	\$28	\$71
1 05	Erect scaffolding	\$6,600	\$934	\$980	\$528	\$1,403	\$1,587	\$334	\$657
1 06	Post signs	\$550	\$78	\$80	\$44	\$117	\$132	\$28	\$71
1 07	Building Permits	\$1,811	\$256	\$263	\$144	\$385	\$438	\$82	\$235
2	Prepare Owner Units								
2 01	Remove window and door coverings	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2 02	Pull back furniture	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2 03	Cover furniture with plastic	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
2 04	Disconn/reconn electrical	\$3,000	\$425	\$436	\$239	\$638	\$721	\$152	\$388
9	Project General Requirements								
9 01	Fordift Rental	\$4,800	\$679	\$698	\$362	\$1,020	\$1,154	\$243	\$623
9 02	Scaffold Rental	\$5,940	\$841	\$864	\$473	\$1,262	\$1,428	\$301	\$771
9 03	Dumpster & dump fees	\$2,400	\$340	\$349	\$191	\$510	\$577	\$121	\$312
9 04	Porta-john rental	\$180	\$25	\$26	\$14	\$36	\$43	\$9	\$23
9 05	Diamond's Scaffolding	\$3,850	\$545	\$560	\$307	\$818	\$928	\$195	\$500
9 06	Demobilize	\$1,500	\$212	\$218	\$119	\$319	\$361	\$76	\$195
	Subtotal - Overhead	\$32,957	\$4,664	\$4,782	\$2,625	\$7,004	\$7,825	\$1,668	\$4,276
	Total	\$319,206	\$43,900	\$45,107	\$24,710	\$85,925	\$74,595	\$15,702	\$40,296
Total for 31 Buildings			\$9,616,391	\$1,380,002	\$1,398,327	\$786,019	\$2,043,677	\$2,312,451	\$486,770
									\$1,248,245

ROA 435

Exhibit K



Dynamic Technical Consultants, Inc.

**3200 Glen Royal Road - Suite 102
Raleigh, NC 27617**

**PREPARED FOR:
Pinto, Coates, Kyre & Brown
Post Office Box 4848
Greensboro, NC 27404**

**Crossman Communities of North Carolina
vs.
Harleysville Mutual Insurance Companies**

prepared by:

David C. McCandless, M.S.M.E., P.E.

**DYNAMIC TECHNICAL CONSULTANTS, INC
3200-102 Glen Royal Road
Raleigh, NC 27617**

October 5, 2006

At the request of David Brown of Pinto, Coates, Kyre and Brown, personnel of Dynamic Technical Consultants, Inc. [DTC] have undertaken an analysis pertaining to alleged damages, building code violations and structural deficiencies at multiple residential developments in coastal South Carolina. The developments in question include, and are generally referred to as: River Oaks I, River Oaks II, Lightkeepers Village, Buck Creek Golf Villas, and Waterway Village. It is the understanding of DTC that many of the underlying property damage claims have been resolved, and that the incident litigation pertains to issues regarding insurance coverage.

The scope of this report has been generally limited to an analysis and review of the proposed costs of "repairs" to the subject structures. At various times within the property damage litigation, cost estimates have been produced detailing a scope of work and the associated costs of that work. Detailed review and analysis of the cost estimates has allowed the costs to be broken down into multiple categories:

- i] PDTP - Physical damage to tangible property; This category includes the cost of repair of portions of the structure that have experienced actual damage and/or deterioration relative to the time installation.
- ii] [AC] Access Costs - Access costs includes the costs and expenses associated with "accessing" areas of physical damage. For example, if exterior siding that is undamaged must be removed in order to repair underlying sheathing that is damaged, the costs associated with the siding removal would be an access cost.

- iii] [SCC] Substandard/Code Compliance - Items within this category would include the costs associated with correction of items that have been reported as non-compliant with buildings codes, industry standards, or manufacturer's installation instructions and guidelines.

Attached as an appendix to the report are analysis of the estimates. The raw data gleaned from the estimates is shown below:

	Total	PDTP	%	AC	%	SCC	%
RO-9915	315800	25725	8.2	222577	70.5	67498	21.4
RO-10622	325530	25954	10.0	178381	54.8	96459	35.2
ROII - 45-56	310102	17803	5.7	203662	65.7	88636	28.6
ROII 57-66	351728	17622	5.0	249131	70.8	84975	24.2
ROII #67	312615	16854	5.4	217463	69.6	78299	25.0
Lightkeepers 20	481230	40015	8.3	402734	83.7	38480	8.0
Lightkeepers 28	327903	17672	5.4	294558	90	15672	4.8
Buck Creek	310102	17803	5.7	203662	65.7	88636	28.6
Waterway Village	108157	2743.47	2.9	58629	61.7	46784	49.3

Note: The data for Buck Creek is identical to the data in the Watkins Service Estimate for River Oaks, II-dated October 14, 2005

Further analysis of the above numbers was undertaken in order to apportion the percentage of access costs associated with PDTP. A percentage was determined based upon all repairs $[(PDTP)/(SCC + PDTP)]$ to isolate the percentage of identified repairs directly attributable to physical damage. This percentage was then multiplied by the access costs, to apportion the percentage to access costs consistent with the costs of PDTP repair.

The final column on the attached chart cites the percentage of access costs

attributable to the repair of damaged property. For example, on the 9915 sq. ft. River Oaks building, the total access costs are noted as \$222,577. The total repair costs are \$25,725 + \$67,498 = \$93,223. The percentage of repair costs that are property damage would be $25,725 / (67,498 + 25,725) = 27.6\%$. Then, 27.6% of the total access costs (\$222,577) would be \$61,420.

Percentages and costs are listed as follows:

	PDTP	AC	SCC	AC*PDTP/(PDTP+SCC)	PDTP cost %
RO-9915 29 5128	25725	222577	67498	61420	27.6%
RO-10622 14 3128	32443	178381	114706	39329	22.0%
ROII - 45-56	17803	203662	88636	34064	16.7%
ROII 57-66	17622	249131	84975	42790	17.2%
ROII #67	16854	217463	78299	38517	17.7%
Lightkeepers 20	17004	402734	38480	205303	50.9%
Lightkeepers 28	17672	294558	15672	156114	53.0%
Buck Creek	17803	203662	88636	34064	16.7%
Waterway Village	2743	58629	46784	3247	5.5%

Data sources for the repairs estimates are noted on the Appendix data, with all data itemized and separated based upon the previously discussed and defined categories. Document review in preparation of the report included all data and documents noted/provided as data sources for the Lewis report. In addition, the following documents had been reviewed by the undersigned in this matter [some may be duplicates of the Lewis documents]:

- Documents Bates# KAL00001-00059

-
- ▶ Deposition Testimony of Derek Hodgin dated 8.19.2003
 - ▶ Deposition Testimony of Thomas Carlson dated 10.20.2003
 - ▶ Deposition Testimony of Peter Sherratt dated 7.13.2004
 - ▶ Second Amended Complaint - Case #: 00-CP-26-5193
 - ▶ Second Amended Complaint - Case #: 2004-CP-26-84
 - ▶ Copy of Pinehurst Policy issued by Harleysville
 - ▶ Deposition of Fred Cliff - BZH074445-BZH074397
 - ▶ Deposition of George McGee - BZH073657-071710
 - ▶ Deposition of Ralph Teal - 10.20.2005
 - ▶ Declaratory Judgement Complaint: 7:03-CV-207-F(1)
 - ▶ Defendants Motion to Dismiss/Stay Proceedings 7:03-CV-207-F(1)
 - ▶ Plaintiff Memorandum in Opposition 7:03-CV-207-F(1)
 - ▶ Reply brief in support of Defendant Motion: 7:03-CV-207-F(1)
 - ▶ Waterway Village - Damage Report prepared by Campbell, Schneider - HV1410-1465
 - ▶ Reports and documents for Waterway Village - HV1184-HV1252
 - ▶ Proposal by PrimeSouth dated 7.2.2004 for River Oaks Condominiums
 - ▶ River Oaks II repair estimate based on Campbell, Schneider Reports - KAL 44-59
 - ▶ Watkins Services Estimates for Lighthouse Pointe, #20 & #28 BZH 025718-20,
25739-25741
 - ▶ Supplemental Affidavit of Derrick Harris 4.6.2006

Respectfully submitted,
Dynamic Technical Consultants, Inc.

David C. McCandless, M.S.M.E., P.E.

APPENDIX DATA

River Oaks I River Oaks I

9915 Sq ft -Bldg Type II
Source Date BZH 104057-104059

	Quantity	Unit	Total	Labor hrs	Labor total	Total	Actual total	on document	Physical Damage to Tangible Property	Acceptance	Substandard/Code Compliance
Mobilization											
permit	1	2800	2800	3	84	2884					
dumpster	3	800	2400	1	28	2428					
job tr	3	300	900	8	224	1124					
storage container	3	100	300	1	28	328					
electric phone	1	2500	2500	4	112	2612			9376	11720	1.25
Equipment											
scaffold	3	2700	8100	300	8400	16500					
fork lift	3	1700	5100		0	5100		21600	27000	1.25	
Protection											
plastic tape	6	50	300	48	1344	1644					
silt fence	8	35	280	10	280	560					
barricades	1	50	50	2	56	106					
signs	1	25	25	2	56	81					
floor mats	2	100	200	20	560	760		3151	3938.75	1.25	
Demolition											
siding removal	9915	0.75	7436.25		0	7436.25					
outdoor carpet	2340	0.75	1755		0	1755					
screen porches			0	8	168	168					
gutters/downspouts			0	10	280	280					
shutters			0	10	280	280					
electrical	1	300	300		0	300					
hand rails	1	250	250	50	1400	1650					
other	1	200	200	100	2800	3000		14889.25	18588.56	1.25	
Repair Wall Dmg											
sheathing	50	18	900	50	1680	2580			2580		
framing	1	1200	1200	220	6160	7360			7360		
insulation	10	35	350	25	700	1050			1050		
sheel rock	1	4000	4000		0	4000			4000		
electrical	1	2000	2000		0	2000					
plumbing	1	1000	1000		0	1000					
add nails	1	400	400	50	1400	1800					1800
straps	1	400	400	210	5880	6280					6280
int. paint	1	7500	7500		0	7500					
liveac	1	11000	11000		0	11000		44570	55712.5	1.25	
Flashing/Housewrap											
roof	75	8	600	50	1400	2000					2000
deck/balcony	500	1	500	80	2240	2740					2740
window/door	66	25	1650	450	12600	14250					14250
int rope winds	30	16	480	120	3360	3840			3810		
components	1	100	100	60	1680	1780			1780		
perma barrier	20	50	1000	80	1680	2680					2680
house wrap	12	150	1800	95	2660	4460					4460

[illegible]

River Oaks I

Source Data: BZH104060-104062

Building Type I

	Quantity	Unit	Total	Labor hrs	labor total	Total	Actual total	# on document	Physical Damage to Tang. Property	Access Costs	Substandard/Code Compliance
Mobilization											
permit	1	2800	2800	3	84	2884				2884	
dumpster	3	800	2400	1	28	2428				2428	
job trlr	3	300	800	8	224	1124				1124	
storage container	3	100	300	1	28	328				328	
electric phone	1	2500	2500	4	112	2612				2612	
							9376	11720	1.25		
Equipment											
scaffold	3	3050	9150	320	8960	18110				18110	
fork lift	3	1700	5100		0	5100				5100	
							23210	29012.5	1.25		
Protection											
plastic, tape	6	50	300	48	1344	1644				1644	
silt fence	8	35	280	10	280	560				560	
barricades	1	50	50	2	56	106				106	
signs	1	25	25	2	56	81				81	
floor mats	1	100	100	20	560	660				660	
							3051	3813.75	1.25		
Demolition											
siding removal	10622	0.75	7966.5		0	7966.5				7966.5	
outdoor carpet	3329	0.5	1664.5		0	1664.5				1664.5	
screen porches			0	6	168	168				168	
gutters/downspouts			0	10	280	280				280	
shutters			0	10	280	280				280	
electrical	1	300	300		0	300				300	
hand rails	1	250	250	50	1400	1650				1650	
other	1	200	200	100	2800	3000				3000	
							15309	19136.25	1.25		
Repair Wall Dmg											
sheathing	50	18	900	60	1680	2580				2580	
framing	1	1200	1200	220	6160	7360				7360	
insulation	10	35	350	25	700	1050				1050	
sheet rock	1	4000	4000		0	4000				4000	
electrical	1	2000	2000		0	2000				2000	
plumbing	1	1000	1000		0	1000				1000	
add nails	1	400	400	50	1400	1800				1800	
straps	1	400	400	210	5880	6280				6280	
int. paint	1	7500	7500		0	7500				7500	

hvac	1	11000	11000		0	11000														
Flashing/Housewrap			0		0	0	44570	55712.5	1.25											
roof	75	6	600	50	1400	2000														2000
deck/balcony	500	1	500	60	2240	2740														2740
window/door	69	25	1725	460	12880	14605														14605
lint reps winds	33	15	495	132	3696	4191														
components	1	100	100	60	1680	1760														4191
perma barrier	20	50	1000	64	1792	2792														1760
house wrap	14	150	2100	100	2600	4900														2792
window head	33	5	165	33	924	1089	34097	42621.25	1.25											
Wall Cladding																				1069
carpet	3329	1.5	4993.5		0	4993.5														
vinyl siding	1	38000	36000		0	36000														4993.5
ext paint	1	1000	1000		0	1000														
handrails	1	1000	1000	95	2660	3660														38000
screens	1	750	750	110	3060	3630														
components	1	500	500	130	3640	4140														3660
							55623.5	69529.36	1.25											
Sealants																				
caulk	1	3500	3500		0	3500														
gutters	1	2500	2500		0	2500														
Fire Protection							6000	7500	1.25											
attic fire wells	1	300	300	95	2660	2960														
SR on s.	30	9.3	279	45	1260	1539														2960
sheetrock repair	1	2000	2000		0	2000														1539
ceiling repair	7200	1.5	10600		0	10600														2000
							17299	21623.75	1.25											10600
Lwr Wall Moisture Proofing																				
sheathing removal			0	47	1316	1316														
cement sheating	9	30	270	42	1176	1446														
base & mesh	260	0.5	130	32	696	1026														
waterproof bas	260	0.65	169	32	896	1065														
wall finish	1	50	50	16	446	496														
							5351	6666.75	1.25											
Other labor exp																				
proj. supervision	10	1000	10000		0	10000														
daily clean up	1	50	50	115	3220	3270														
misc			0	36	1006	1008														
contingency	1	6500	6500		0	6500														
delivery	1	2000	2000	165	5180	7180														
							27956	34947.5	1.25											

[illegible]

River Oaks II

Buildings 45-56

Data Source: Watkins Services, Inc - 10.14.2005

						Physical Dmg to	Access	Substandard/Code
Description						Tangible Property	Costs	Compliance
1	Project Mobilization	Bldg						
1.01	Equipment	Bldg	1500.00	1	1500		1500	
1.02	Storage Trailers	Bldg	165.00	1	165		165	
1.03	Dumpster	Bldg	110.00	1	110		110	
1.04	Prune Landscaping	Bldg	550.00	1	550		550	
1.05	Erect Scaffolding	Bldg	6600.00	1	6600		6600	
1.06	Signs & Baricades	Bldg	550.00	1	550		550	
1.07	Permits	Bldg	1811.17	1	1811.17		1811.17	
	Sub total				11286.17			
2	Preparation of Owner Units	Bldg						
2.01	Remove Window and Door coverings	Bldg	SEE 8.01					
2.02	Pull back furniture from walls	Bldg	SEE 8.01					
2.03	Cover Furniture w/ plastic	Bldg	SEE 8.01					
2.04	Disconnect/reconnect electric	Bldg	3000.00	1	3000		3000	
	Sub total				3000			
3	Selective Demolition							
3.01	Remove siding & trim	SF	1.00	13362	13362		13362	
3.02	Remove damaged sheathing and all 1st floor sheathing	SF	1.50	1500	2250	562.5	1687.5	
3.03	Remove dmg framing	LF	2.25	200	450	450		
3.04	Remove window units & save	EA	82.50	36	2970		2970	
3.05	Remove SGD units & save	EA	165.00	18	2970		2970	
3.06	Remove doors and save	EA	137.50	21	2887.5		2887.5	
	Sub total				24889.5			
4	Framing and Sheathing Repairs							
4.01	Replace dmg framing and missing studs	LF	3.25	200	650	325		325

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4.02	Replace dmg sheathing and 1st floor sheathing	SF	3.00	1500	4500	1125	3375	
4.03	Correct joint details, renail sheathing, hurricane straps	SF	1.25	11862	14827.5	3706.875		11120.625
4.04	Adjust storage room door framing	EA	360.00	12	4320			4320
4.05	Install missing anchors	Bldg	700.00	1	700			700
4.06	Reinstall windows w/ flashings	EA	200.00	36	7200			7200
4.07	Reinstall SGD with flashings	EA	325.00	18	5850			5850
4.08	Reinstall entrance & storage room doors with flashings	EA	250.00	21	5250			5250
4.09	Install building wrap #30 lb	SF	0.55	13362	7349.1			7349.1
4.1	Install siding & trim	SF	4.50	13362	60129		60129	
4.11	Install soffit & fascia	SF	6.50	425	2762.5		2762.5	
	Sub total				113538.1			
5	Stairway & Walkway Repair							
5.01	Walkway Railings	LF	7.50	204	1530			1530
5.02	Remove Carpet from Walkway and Stairway	SF	1.80	1620	2916		2916	
5.03	Remove walkway sheathing	SF	2.40	1065	2556		2556	
5.04	Remove all stair components	EA	300.00	8	2400		2400	
5.05	Remove walkway floor joists	SF	5.00	1065	5325		5325	
5.06	Reinstall floor sheathing	SF	3.60	1065	3834		3834	
5.07	Rebuild stair flights	EA	690.00	8	5520		5520	
5.08	Install waterproofing and flashing	SF	5.75	1620	9315			9315
5.09	Install carpet in stairway	SF	3.00	1620	4860		4860	
	Sub total				38256			
6	Fire code compliance							
6.01	Remove walkway ceilings	SF	1.10	1596	1755.6		1755.6	
6.02	Install GWB to code	SF	2.50	2056	5140			5140
6.03	Install walkway ceilings	SF	3.45	1596	5506.2		5506.2	
6.04	Strip columns, replace components, install fire barrier	SF	40.00	700	28000	7000		21000
	properly secure column structure, reclad							
	sub total				40401.8			
7	Roof Repairs							
7.01	Remove roof and dispose	SQ	75.00	55	4125		4125	
7.02	Check sheathing; adjust joints, renail and replace	SQ	59.40	55	3267	1633.5		1633.5
7.03	install #15 felt	SQ	18.24	55	1003.2			1003.2
7.04	Install 3 tab shingles, paint vents	SQ	165.00	55	9075		9075	
7.05	RSR gutters and downspouts	LF	7.00	170	1190		1190	

Sub Total					18660.2			
8 Special Construction								
8.01	Interior-repair of each unit after reconstruction	EA	3500.00	9	31500		31500	
8.02	attic repairs-adjust framing and brace	Bldg	6900.00	1	6900			6900
8.03	Install new hardware on storage room doors	EA	250.00	12	3000	3000		
Sub total					41400			
9 Project General Requirements								
9.01	Forklift Rental	MO	2400.00	2	4800		4800	
9.02	Scaffold Rental	MO	2970.00	2	5940			
9.03	Dumpster & dump fees	MO	1200.00	2	2400			
9.04	Porta-jon rental	M	90.00	2	180			
9.05	Dismantle scaffolding	Bldg	3850.00	1	3850			
9.06	Demobilize site	Bldg	1500.00	1	1500			
Sub total					18670			
Total Each Bullding					310101.8	17802.875	20235.7	20235.425
						0.057	0.657	0.286
						34064.27415		

River Oaks II

Buildings 45-56

Data Source: Watkins Services, Inc 10.14.2005

Description	Unit	Unit Cost	Qty	Total Cost	Physical Damage to Tangible Property	Access Code	Substandard/Code Compliance
1 Project Mobilization	Bldg					1500	
1.01 Equipment	Bldg	1500.00	1	1500		1500	
1.02 Storage Trailers	Bldg	165.00	1	165		165	
1.03 Dumpster	Bldg	100.00	1	110		110	
1.04 Prune Landscaping	Bldg	500.00	1	550		550	
1.05 Erect Scaffolding	Bldg	6000.00	1	6600		6600	
1.06 Signs & Barricades	Bldg	500.00	1	550		550	
1.07 Permits	Bldg	1400.00	1	2021		2021	
Sub total				11496			
2 Preparation of Owner Units	Bldg						
2.01 Remove Window and Door coverings	Bldg	SEE 8.01					
2.02 Pull back furniture from walls	Bldg	SEE 8.01					
2.03 Cover Furniture w/ plastic	Bldg	SEE 8.01					
2.04 Disconnect/reconnect electric	Bldg	3000.00	1	3000		3000	
Sub total				3000			
3 Selective Demolition							
3.01 Remove siding & trim	SF	1.00	15230	15230		15230	
3.02 Remove damaged sheathing and all 1st floor sheathn	SF	1.50	1650	2475	618.75	4856.25	
3.03 Remove dmg framing	LF	2.25	220	495	495		
3.04 Remove window units & save	EA	82.50	54	4455		4455	
3.05 Remove SGD units & save	EA	165.00	15	2475		2475	
3.06 Remove doors and save	EA	137.50	16	2200		2200	
Sub total				27330			
4 Framing and Sheathing Repairs							
4.01 Replace dmg framing and missing studs	LF	3.25	220	715	357.5		357.5

4.02	Replace dmg sheathing and 1st floor sheath	SF	3.00	1650	4950	1237.5		
4.03	Correct joint details, renaill sheathing, hurricane strap	SF	1.25	13580	16975	4243.75		12731.25
4.04	Install missing anchors	Bldg	700.00	1	700			700
4.05	Reinstall windows w/ flashings	EA	200.00	53	10600			10600
4.06	Reinstall SGD with flashings	EA	325.00	24	7800			7800
4.07	Reinstall entrance & storage room doors with flashing	EA	250.00	16	4000			4000
4.08	Install building wrap #30 lb	SF	0.55	15610	8585.5			8585.5
4.09	Install siding & trim	SF	4.50	15230	68535			
4.1	Install soffit & fascia	SF	6.50	810	5265			
	Sub total				128125.5			
5	Stairway & Walkway Repair							
5.01	Walkway Railings	LF	7.50	174	1305			1305
5.02	Remove Carpet Walkway and Stairway	SF	1.80	1620	2916			
5.03	Remove Walkway Sheathing	SF	2.40	610	1464			
5.04	Remove all stair components	EA	300.00	8	2400			
5.05	Reslope Walkway Floor Joists	SF	5.00	610	3050			
5.06	Reinstall floor sheathing	SF	3.60	610	2196			
5.07	Rebuild stair flights	EA	690.00	8	5520			
5.08	Install waterproofing membrane & flashing	SF	5.75	1115	6411.25			6411.25
5.09	Install Carpet in Stairway and Walkway	SF	3.00	1115	3345			
	Sub total				28607.25			
6	Fire code compliance							
6.01	Remove walkway ceilings	SF	1.10	1218	1339.8			
6.02	Install GWB to code	SF	2.50	1610	4025			4025
6.03	Install walkway ceilings	SF	3.45	1218	4202.1			
6.04	Strip columns, replace components, install properly secure column structure, re clad	SF	40.00	840	33600	8400		25200
	sub total				43166.9			
7	Roof Repairs							
7.01	Remove roof and dispose	SQ	75.00	68	5100			
7.02	Check sheathing; adjust joints, renaill and r	SQ	59.40	68	4039.2	2019.6		2019.6
7.03	Install #15 felt	SQ	18.24	68	1240.32			1240.32
7.04	Install 3 tab shingles, paint vents	SQ	165.00	68	11220			

7.05	RSR gutters and downspouts	LF	7.00	165	1155		1155	
	Sub Total				22754.52			
8	Special Construction							
8.01	Interior-repair of each unit after reconstruct	EA	3500.00	15	52500		52500	
8.02	attic repairs-adjust framing and brace	Bldg	6900.00	1	6900		6900	
8.03	Install new hardware on storage room door	EA	250.00	1	250	250		
8.04	Remove and replace Brick veneer	SF	12.00	744	8928		8928	
	Sub total				68578			
9	Project General Requirements						0	
9.01	Forklift Rental	MO	2400.00	2	4800		4800	
9.02	Scaffold Rental	MO	2970.00	2	5940		5940	
9.03	Dumpster & dump fees	MO	1200.00	2	2400		2400	
9.04	Porta-jon rental	M	90.00	2	180		180	
9.05	Dismantle scaffolding	Bldg	3850.00	1	3850		3850	
9.06	Demobilize site	Bldg	1500.00	1	1500		1500	
	Sub total				18670			

Total Each Building	351728.17	17622.1	249131	84975.42
%		0.050	0.708	0.242
		42790.55895		

River Oaks II

Building 67

Data Source: Watkins Services, Inc 10.14.2005

					Physical Damage to	Access	Standard/Code
					Tangible Property	Cost	Compliance
1	Project Mobilization	Bldg					
1.01	Equipment	Bldg	1500.00	1	1500	1500	
1.02	Storage Trailers	Bldg	165.00	1	165	165	
1.03	Dumpster	Bldg	110.00	1	110	110	
1.04	Prune Landscaping	Bldg	550.00	1	550	550	
1.05	Erect Scaffolding	Bldg	6600.00	1	6600	6600	
1.06	Signs & Barricades	Bldg	550.00	1	550	550	
1.07	Permits	Bldg	1822.28	1	1822.28	1822.28	
	Sub total				11297.28		
2	Preparation of Owner Units	Bldg					
2.01	Remove Window and Door coverings	Bldg	SEE 8.01				
2.02	Pull back furniture from walls	Bldg	SEE 8.01				
2.03	Cover Furniture w/ plastic	Bldg	SEE 8.01				
2.04	Disconnect/reconnect electric	Bldg	3000.00	1	3000	3000	
	Sub total				3000		
3	Selective Demolition						
3.01	Remove siding & trim	SF	1.00	12798	12798	12798	
3.02	Remove damaged sheathing and all 1st floor sheathing	SF	1.50	1175	1762.5	440.625	1321.875
3.03	Remove dmg framing	LF	2.25	200	450	450	
3.04	Remove window units & save	EA	82.50	49	4042.5	4042.5	
3.05	Remove SGD units & save	EA	165.00	12	1980	1980	
3.06	Remove doors and save	EA	137.50	13	1787.5	1787.5	
	Sub total				22820.5		
4	Framing and Sheathing Repairs						
4.01	Replace dmg framing and missing studs	LF	3.25	200	650	325	325
4.02	Replace dmg sheathing and 1st floor sheathing	SF	3.00	1175	3525	881.25	2643.75

ROA 455

4.03	Correct joint details, renaill sheathing, hurricane straps	SF	1.25	11625	14531.25	3632.8125	10898.4375
4.04	Install missing anchors	Bldg	700.00	1	700		700
4.05	Reinstall windows w/ flashings	EA	200.00	49	9800		9800
4.06	Reinstall SGD with flashings	EA	325.00	12	3900		3900
4.07	Reinstall entrance & storage room doors with flashings	EA	250.00	13	3250		3250
4.08	Install building wrap #30 lb	SF	0.55	13170	7243.5		7243.5
4.09	Install siding & trim	SF	4.50	12798	57591	57591	
4.1	Install soffit & fascia	SF	6.50	640	4160	4160	
	Sub total				105350.75		
5	Stairway & Walkway Repair						
5.01	Walkway railings	LF	7.50	174	1305		1305
5.02	Remove Carpet from walkway & stairway	SF	1.80	1620	2916	2916	
5.03	Remove Walkway sheathing	SF	2.40	610	1464	1464	
5.04	Remove all stair components	EA	300.00	8	2400	2400	
5.05	Reslope Walkway floor joists		5.00	610	3050	3050	
5.06	Reinstall floor sheathing	SF	3.60	610	2196	2196	
5.07	Rebuild stair flights	EA	690.00	8	5520	5520	
5.08	Install waterproofing membrane & flashings to	SF	5.75	1115	6411.25		6411.25
5.09	Install carpet in stairway & walkway	SF	3.00	1115	3345	3345	
	Sub total				28607.25		
6	Fire code compliance						
6.01	Remove walkway ceilings	SF	1.10	1218	1339.8	1339.8	
6.02	Install GWB to code	SF	2.50	1610	4025		4025
6.03	Install walkway ceilings	SF	3.45	1218	4202.1	4202.1	
6.04	Strip columns, replace components, install fire	SF	40.00	930	37200	9300	27900
	properly secure column structure, reclad						
	sub total				46766.9		
7	Roof Repairs						
7.01	Remove roof and dispose	SQ	75.00	53	3975	3975	
7.02	Check sheathing; adjust joints, renaill and repla	SQ	59.40	53	3148.2	1574.1	1574.1
7.03	install #15 felt	SQ	18.24	53	966.72		966.72
7.04	Install 3 tab shingles, paint vents	SQ	165.00	53	8745	8745	
7.05	RSR gutters and downspouts	LF	7.00	170	1190	1190	
	Sub Total				18024.92		

8 Special Construction							
8.01	Interior-repair of each unit after reconstruction	EA	3500.00	12	42000		42000
8.02	attic repairs-adjust framing and brace	Bldg	6900.00	1	6900		6900
8.03	Install new hardware on storage room doors	EA	250.00	1	250	250	
8.04	Remove and replace brick veneer	SF	12.00	744	8928		8928
	Sub total				58078		
9 Project General Requirements							
9.01	Forklift Rental	MO	2400.00	2	4800		4800
9.02	Scaffold Rental	MO	2970.00	2	5940		5940
9.03	Dumpster & dump fees	MO	1200.00	2	2400		2400
9.04	Porta-jon rental	M	90.00	2	180		180
9.05	Dismantle scaffolding	Bldg	3850.00	1	3850		3850
9.06	Demobilize site	Bldg	1500.00	1	1500		1500
	Sub total				18670		
Total Each Building					312615.6	16853.79	213462.81
						0.054	0.696
						38517.75352	0.250

Lightkeepers Building #20

Source Data BZH 025718-025720

					Physical Dmg to	Account	Correction of Sub-
					Tangible Property	Code	Standard Items
1	Project Mobilization	Bldg					
1.1	Equipment	Bldg	1000.00	1	1000		
1.2	Storage Trailers	Bldg	150.00	1	150		
1.3	Dumpster	Bldg	100.00	1	100		
1.4	Scaffolding	Bldg	3693.00	1	3693		
1.5	Signs & Barricades	Bldg	250.00	1	250		
1.6	Permits	Bldg	1888.06	1	1888.06		
	Sub total				7081.06		
2	Preparation of Owner Units						
2.1	Remove Window Treatments	EA	20.00	98	1960		
2.11	Remove Door Treatments	EA	50.00	36	1800		
2.2	Pull back furniture from walls	Unit	200.00	8	1600		
2.3	Cover Furniture w/ plastic	Unit	100.00	8	800		
2.4	Disconnect/reconnect electric	Bldg	2500.00	1	2500		
	Sub total				8660		
3	Selective Demolition						
3.1	Remove Brick	SF	2.50	0	0		
3.11	Remove EIFS	SF	2.50	8991	22477.5		
3.12	Remove privacy wall	EA	400.00	2	800		
3.13	Remove Cedar Siding	SF	1.75	0	0		
3.2	Remove dmg sheathing	SF	2.50	4496	11240		
3.3	Remove dmg framing	LF	2.85	2400	6840		
3.4	Remove and dispose of windows	EA	75.00	98	7350		
3.41	Remove & save Gable vents	EA	40.00	3	120		120
3.5	Remove SGD units & save	EA	250.00	0	0		0
3.6	Remove and save Doors	EA	200.00	28	5600		5600
3.61	Remove and save Doors	EA	125.00	4	500		500

3.7	Temporary Cover	SF	0.60	10791	6474.6		6474.6
3.8	Remove Drywall	SF	0.75	10791	8093.25		8093.25
3.9	Remove Insulation	SF	0.25	2697	674.25		674.25
	Sub total				70169.6		
4	Framing and Sheathing Exterior						
4.1	Replace dmg framing	LF	3.10	4800	14880	7440	7440
4.2	Replace dmg insulation	SF	0.90	2697	2427.3	2427.3	
4.3	Replace Dmg Sheathing	SF	3.75	4496	16860	8430	8430
	Sub total				34167.3		
5	Flashing at Doors, Windows & Floorlines						
5.1	Wrap window openings	EA	70.00	98	6860		6860
5.11	Wrap wide door openings	EA	80.00	12	960		960
5.12	Wrap standard doors	EA	70.00	24	1680		1680
5.2	Install head flashing at windows	EA	30.00	98	2940		2940
5.21	Install pan flashing at windows	EA	35.00	98	3430		3430
5.22	Install head flashing at wide doors	EA	45.00	12	540		540
5.23	Install pan flashing at wide doors	EA	60.00	12	720		720
5.24	Install head flashing at std doors	EA	25.00	24	600		600
5.25	Install pan flashing at std doors	EA	35.00	24	840		840
5.3	Reinstall windows	EA	1307.00	8	10456		10456
5.4	Reinstall windows - std	EA	595.00	90	53550		
5.5	Reinstall doors - wide	EA	150.00	12	1800		
5.6	Reinstall doors - std	EA	110.00	24	2640		
5.7	Reinstall gable vents	EA	100.00	3	300		
	Sub total				87316		
6	New Exterior Wall Cladding						
6.1	Install new Hardcoat Stucco	SF	11.50	8991	103396.5		103396.5
6.2	Install new brick veneer	M	1242.00	10.8	13413.6		13413.6
6.3	Install new cedar siding	SF	5.50	0	0		
6.4	Paint Cedar	SF	2.40	0	0		
6.5	Paint window trim	LF	1.50	1772	2658		2658
6.51	Paint door trim	LF	3.00	628	1884		1884
	sub total				121352.1		

7	Roof Repairs								
7.01	Remove/replace shingles&flashing at dormers	EA	250.00	6	1500				1500
7.02	Remove/replace shingles&flashing at chimneys	EA	500.00	0	0				
7.03	Remove/replace shingles&flashing at rakes	LF	10.00	0	0				
	Sub Total				1500				
8	Exterior Balconies								
8.1	Remove/Reinstall EIFS	SF	15.00	167	2505		1252.5		1252.5
	Sub total				2505				
9	Interior Repairs								
9.1	Install Sheetrock	SF	2.50	10791	26977.5		26977.5		
9.2	Repaint/Replace door/window trim	EA	60.00	134	8040				
9.3	Prime and Paint Sheetrock and trim	SF	2.00	10791	21582				
9.4	Re-set furniture and clean	Unit	325.00	8	2600				
9.5	reinstall window treatments	EA	24.00	98	2352				
9.51	Reinstall Door treatments	EA	60.00	36	2160				
	Sub total				63711.5				
10	Miscellaneous								
10.1	Landscape Repair	Bldg	9000	1	9000				
10.2	Electrical Unknowns	Bldg	1500	1	1500				
	Sub Total				10500				
11	Special Construction								
11.1	Rebuild Privacy Walls	EA	600	2	1200				
	Sub Total				1200				
12	Project General Requirements								
	Lull	MO	1800	4	7200				
	Scaffold rental	MO	2056	4	8224				
	Dumpter/Fees	MO	1200	4	4800				
	Porta John	MO	75	4	300				
	Storage Trailer rental	MO	100	4	400				
	Performance bonds	Bldg	5288.83	1	5288.83				
	Dismantle Scaffolding	Bldg	2107	1	2107				

Demobilize site	Bldg	1000	1	1000		1000	
Sub Total				29319.83			
Total Each Building				437482.39	18297.3	384982.59	34982.5
5% design				21874.1195	914.865	19210.13	1749.125
5% contingency				21874.1195	914.865	19210.13	1749.125
Total				481230.63	20127.03	424923.45	38480.75
					0.042	0.878	0.080
					145136.7508		

Lightkeepers Building #28

Source Data BZH 025739-25741

					Physical Dmg to	Access	Correction of Sub-
	Description	Unit	Unit Cost	Qty	Total Cost	Tangible Property	Standard Items
1	Project Mobilization	Bldg					
1.1	Equipment	Bldg	1000.00	1	1000		
1.2	Storage Trailers	Bldg	150.00	1	150		
1.3	Dumpster	Bldg	100.00	1	100		
1.4	Scaffolding	Bldg	2276.00	1	2276		
1.5	Signs & Barricades	Bldg	250.00	1	250		
1.6	Permits	Bldg	1354.17	1	1354.17		
	Sub total				5130.17		
2	Preparation of Owner Units						
2.1	Remove Window Treatments	EA	20.00	32	640		
2.11	Remove Door Treatments	EA	50.00	18	900		
2.2	Pull back furniture from walls	Unit	200.00	6	1200		
2.3	Cover Furniture w/ plastic	Unit	100.00	6	600		
2.4	Disconnect/reconnect electric	Bldg	2500.00	1	2500		
	Sub total				5840		
3	Selective Demolition						
3.1	Remove Brick	SF	2.50	0	0		
3.11	Remove EIFS	SF	2.50	8913	22282.5		
3.12	Remove privacy wall	EA	400.00	5	2000		
3.13	Remove Cedar Siding	SF	1.75	0	0		
3.2	Remove dmg sheathing	SF	2.50	4457	11142.5	2125	
3.3	Remove dmg framing	LF	2.85	1026	2924.1		
3.4	Remove and dispose of windows	EA	75.00	32	2400		
3.41	Remove & save Gable vents	EA	40.00	9	360		360
3.5	Remove SGD units & save	EA	250.00	6	1500		1500
3.6	Remove and save Doors	EA	200.00	0	0		0
3.61	Remove and save Doors	EA	125.00	12	1500		1500

3.7	Temporary Cover	SF	0.60	8913	5347.8		5347.8
3.8	Remove Drywall	SF	0.75	8913	6684.75		6684.75
3.9	Remove Insulation	SF	0.25	2674	668.5		668.5
	Sub total				56810.15		
4	Framing and Sheathing Exterior						
4.1	Replace dmg framing	LF	3.10	2050	6355	3177.5	3177.5
4.2	Replace dmg insulation	SF	0.90	2674	2406.6	2406.6	
4.3	Replace Dmg Sheathing	SF	3.75	4457	16713.75	8356.875	8356.875
	Sub total				25475.35		
5	Flashing at Doors, Windows & Floorlines						
5.1	Wrap window openings	EA	70.00	32	2240		2240
5.11	Wrap wide door openings	EA	80.00	6	480		480
5.12	Wrap standard doors	EA	70.00	12	840		840
5.2	Install head flashing at windows	EA	30.00	32	960		960
5.21	Install pan flashing at windows	EA	35.00	32	1120		1120
5.22	Install head flashing at wide doors	EA	45.00	6	270		270
5.23	Install pan flashing at wide doors	EA	60.00	6	360		360
5.24	Install head flashing at std doors	EA	25.00	12	300		300
5.25	Install pan flashing at std doors	EA	35.00	12	420		420
5.3	Reinstall windows	EA	200.00	30	6000		6000
5.4	Reinstall windows - std	EA	100.00	2	200		
5.5	Reinstall doors - wide	EA	150.00	6	900		
5.6	Reinstall doors - std	EA	110.00	12	1320		
5.7	Reinstall gable vents	EA	100.00	4	400		
	Sub total				15810		
6	New Exterior Wall Cladding						
6.1	Install new Hardcoat Stucco	SF	11.50	8913	102499.5		102499.5
6.2	Install new brick veneer	M	1242.00	0	0		
6.3	Install new cedar siding	SF	5.50	0	0		
6.4	Paint Cedar	SF	2.40	0	0		
6.5	Paint window trim	LF	1.50	740	1110		1110
6.51	Paint door trim	LF	3.00	306	918		918
	sub total				104527.5		

7 Roof Repairs						
7.01	Remove/replace shingles&flashing at dormers	EA	250.00	0	0	
7.02	Remove/replace shingles&flashing at chimneys	EA	500.00	0	0	
7.03	Remove/replace shingles&flashing at rakes	LF	10.00	72	720	720
Sub Total					720	
8 Exterior Balconies						
8.1	Remove/Reinstall EIFS	SF	15.00	0	0	0
Sub total					0	
9 Interior Repairs						
9.1	Install Sheetrock	SF	2.50	8913	22282.5	22282.5
9.2	Repaint/Replace door/window trim	EA	60.00	50	3000	3000
9.3	Prime and Paint Sheetrock and trim	SF	2.00	8913	17826	17826
9.4	Re-set furniture and clean	Unit	325.00	6	1950	1950
9.5	reinstall window treatments	EA	24.00	32	768	768
9.51	Reinstall Door treatments	EA	60.00	18	1080	1080
Sub total					46906.5	
10 Miscellaneous						
10.1	Landscape Repair	Bldg	9450	1	9450	9450
10.2	Electrical Unknowns	Bldg	1500	1	1500	1500
Sub Total					10950	
11 Special Construction						
11.1	Rebuild Privacy Walls	EA	600	2	1200	1200
Sub Total					1200	
12 Project General Requirements						
	Lull	MO	1800	4	7200	7200
	Scaffold rental	MO	1384	4	5536	5536
	Dumper/Fees	MO	1200	4	4800	4800
	Porta John	MO	75	4	300	300
	Storage Trailer rental	MO	100	4	400	400
	Performance bonds	Bldg	3604.47	1	3604.47	3604.47
	Dismantle Scaffolding	Bldg	1884	1	1884	1884

Demobilize site	Bldg	1000	1	1000		1000	
Sub Total				24724.47			
Total Each Buildi				298094.14	16065.975	287799.7	14247.5
5% design				14904.707	803.29875	13389.03	712.375
5% contingency				14904.707	803.29875	13389.03	712.375
Total				327903.55	17872.57	281551.73	15672.25
					0.054	0.898	0.048
					156114.5074		

Waterway Village

Data Source: Watkins July 2002 (BZH 46355-56)

Description	Total Cost	Physical Dmg to Tangible Property	Access Costs	Substandard/Code Compliance
1 Remove Roofing, flashing, etc	3685		3685.00	
2 Check sheathing and add nails; repair	737	245.67	245.67	245.67
3 Install felt per code	1006			1006.00
4 Install shingles/flashing per code	7237			7237.00
5 Remove/Replace Gutter	509		509.00	
Sub Total	13174			
1 Remove Siding; air barriers	12824		12824.00	
Remove windows, SGD; renail sheathing, install hurricane straps; properly flash windows, reinstall windows, SGD, trim; repair interior as needed	15726		15726.00	4717.80
3 Remove 1st floor sheathing; install studs; install anchors; new sheathing;	5318	531.80	2127.20	2659.00
4 Reinstall vinyl siding to current codes; reinstall downspouts	20709		10354.50	10354.50
12 Remove vinyl, etc from bottom of Walkway support columns, replace sheathing with treated lumber; replace dmg gypsum fire stop; properly flash; replace and reinstall siding	3135	627.00	1254.00	1254.00
29 Enlarge Attic access in top floor units	1701			1701.00
30 Properly install bath vents	4725			4725.00
24&25 Repair cut roof trusses and install proper fasteners;	2153			2153.00

27&28	Remove siding, trim from support beams at walkways and porches; install fire stop; replace siding and trim				16774			3354.80
31	Add asphalt to curbs				2835			2835.00
32	Remove walkway flooring; install shims to slope floors; reinstall treated flooring and carpet				6405			3202.50
33	Replace hardware on doors; modify PVC discharge				2678	1339.00		1339.00
	Sub Total				94983			
						2743.47	5882.27	46784.27
						0.029	0.617	0.493
	Total				108157			

Buck Creek

Data Source: Lewis Report Data;

	Description	Unit	Unit Cost	Qty	Total Cost	Physical Dmg to	Access	Substandard/Code
						Tangible Property	Costs	
1	Project Mobilization	Bldg						
1.01	Equipment	Bldg	1500.00	1	1500		1500	
1.02	Storage Trailers	Bldg	165.00	1	166		166	
1.03	Dumpster	Bldg	110.00	1	110		110	
1.04	Prune Landscaping	Bldg	550.00	1	550		550	
1.05	Erect Scaffolding	Bldg	6600.00	1	6600		6600	
1.06	Signs & Barricades	Bldg	550.00	1	550		550	
1.07	Permits	Bldg	1811.17	1	1811.17		1811.17	
	Sub total				11287.17			
2	Preparation of Owner Units	Bldg						
2.01	Remove Window and Door cov	Bldg	SEE 8.01					
2.02	Pull back furniture from walls	Bldg	SEE 8.01					
2.03	Cover Furniture w/ plastic	Bldg	SEE 8.01					
2.04	Disconnect/reconnect electric	Bldg	3000.00	1	3000		3000	
	Sub total				3000			
3	Selective Demolition							
3.01	Remove siding & trim	SF	1.00	13362	13362		13362	
3.02	Remove damaged sheathing and all 1e	SF	1.50	1500	2250	562.5	1687.5	
3.03	Remove dmg framing	LF	2.25	200	450	450		
3.04	Remove window units & save	EA	82.50	36	2970		2970	
3.05	Remove SGD units & save	EA	165.00	18	2970		2970	
3.06	Remove doors and save	EA	137.50	21	2887.5		2887.5	
	Sub total				24889.5			
4	Framing and Sheathing Repairs							
4.01	Replace dmg framing and missi	LF	3.25	200	650	325		325

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4.02	Replace dmg sheathing and 1st	SF	3.00	1500	4500	1125	3375	
4.03	Correct joint details, renaill sheathing, h	SF	1.25	11862	14827.5	3706.875		11120.625
4.04	Adjust storage room door framir	EA	360.00	12	4320			4320
4.05	Install missing anchors	Bldg	700.00	1	700			700
4.06	Reinstall windows w/ flashings	EA	200.00	36	7200			7200
4.07	Reinstall SGD with flashings	EA	325.00	18	5850			5850
4.08	Reinstall entrance & storage room door	EA	250.00	21	5250			5250
4.09	Install building wrap #30 lb	SF	0.55	13362	7349.1			7349.1
4.1	Install siding & trim	SF	4.50	13362	60129		60129	
4.11	Install soffit & fascia	SF	6.50	425	2762.5		2762.5	
	Sub total				113538.1			
5	Stairway & Walkway Repair							
5.01	Walkway Railings	LF	7.50	204	1530			1530
5.02	Remove Carpet from Walkway	SF	1.80	1620	2916		2916	
5.03	Remove walkway sheathing	SF	2.40	1065	2556		2556	
5.04	Remove all stair components	EA	300.00	8	2400		2400	
5.05	Remove walkway floor joists	SF	5.00	1065	5325		5325	
5.06	Reinstall floor sheathing	SF	3.60	1065	3834		3834	
5.07	Rebuild stair flights	EA	690.00	8	5520		5520	
5.08	Install waterproofing and flashin	SF	5.75	1620	9315			9315
5.09	Install carpet in stairway	SF	3.00	1620	4860		4860	
	Sub total				38256			
6	Fire code compliance							
6.01	Remove walkway ceilings	SF	1.10	1596	1755.6		1755.6	
6.02	Install GWB to code	SF	2.50	2056	5140			5140
6.03	Install walkway ceilings	SF	3.45	1596	5506.2		5506.2	
6.04	Strip columns, replace compone	SF	40.00	700	28000	7000		21000
	properly secure column structure, reclad							
	sub total				40401.8			
7	Roof Repairs							
7.01	Remove roof and dispose	SQ	75.00	55	4125		4125	
7.02	Check sheathing; adjust joints,	SQ	59.40	55	3267	1633.5		1633.5
7.03	Install #15 felt	SQ	18.24	55	1003.2			1003.2
7.04	Install 3 tab shingles, paint vent	SQ	165.00	55	9075		9075	
7.05	RSR gutters and downspouts	LF	7.00	170	1190		1190	

Sub Total				18660.2			
8 Special Construction							
8.01	Interior-repair of each unit after	EA	3500.00	9	31500	31500	
8.02	attic repairs-adjust framing and	Bldg	6900.00	1	6900		6900
8.03	Install new hardware on storage	EA	250.00	12	3000	3000	
Sub total					41400		
9 Project General Requirements							
9.01	Forklift Rental	MO	2400.00	2	4800	4800	
9.02	Scaffold Rental	MO	2970.00	2	5940	5940	
9.03	Dumpster & dump fees	MO	1200.00	2	2400	2400	
9.04	Porta-jon rental	M	90.00	2	180	180	
9.05	Dismantle scaffolding	Bldg	3850.00	1	3850	3850	
9.06	Demobilize site	Bldg	1500.00	1	1500	1500	
Sub total					18670		
Total Each Building				310102.8	17802.875	293973.5	89838.425
					0.057	0.657	0.286
					34064.44141		

Exhibit L

EXPORT REPORT SUMMARY

LEWIS REPORT

Project	Units	Resulting Damage (Total)	Share
RO I	All	\$3,350,345	66.6%
RO II	45 to 56	\$115,270	
	57 to 66	\$56,802	
	Unit 67	\$4,176	
	All	\$202,635	4.0%
WV	All	\$766,019	15.2%
BC	All	\$563,337	11.2%
LK	Unit 20	\$76,125	
	Unit 28	\$55,955	
	All	\$145,289	2.9%
TOTAL		\$5,027,625	100.0%

ROA 472

McCANDLESS REPORT

Project	Units	# of Units	Resulting Damage (per unit)	Resulting Damage (Total)	Share
RO I	9915	29	\$25,725	\$746,025	
	10622	14	\$25,954	\$363,356	
	All	43		\$1,109,381	53.6%
RO II	45 to 56	12	\$17,803	\$213,636	
	57 to 66	10	\$17,622	\$176,220	
	Unit 67	1	\$16,854	\$16,854	
	All	23		\$406,710	19.7%
WV	All	31	\$2,743	\$85,048	4.1%
BC	All	23	\$17,803	\$409,469	19.8%
LK	Unit 20	1	\$40,015	\$40,015	
	Unit 28	1	\$17,672	\$17,672	
	All	2		\$57,687	2.8%
TOTAL				\$2,068,295	100.0%

ROA 473

Exhibit N

Applicable Primary & Excess Coverage

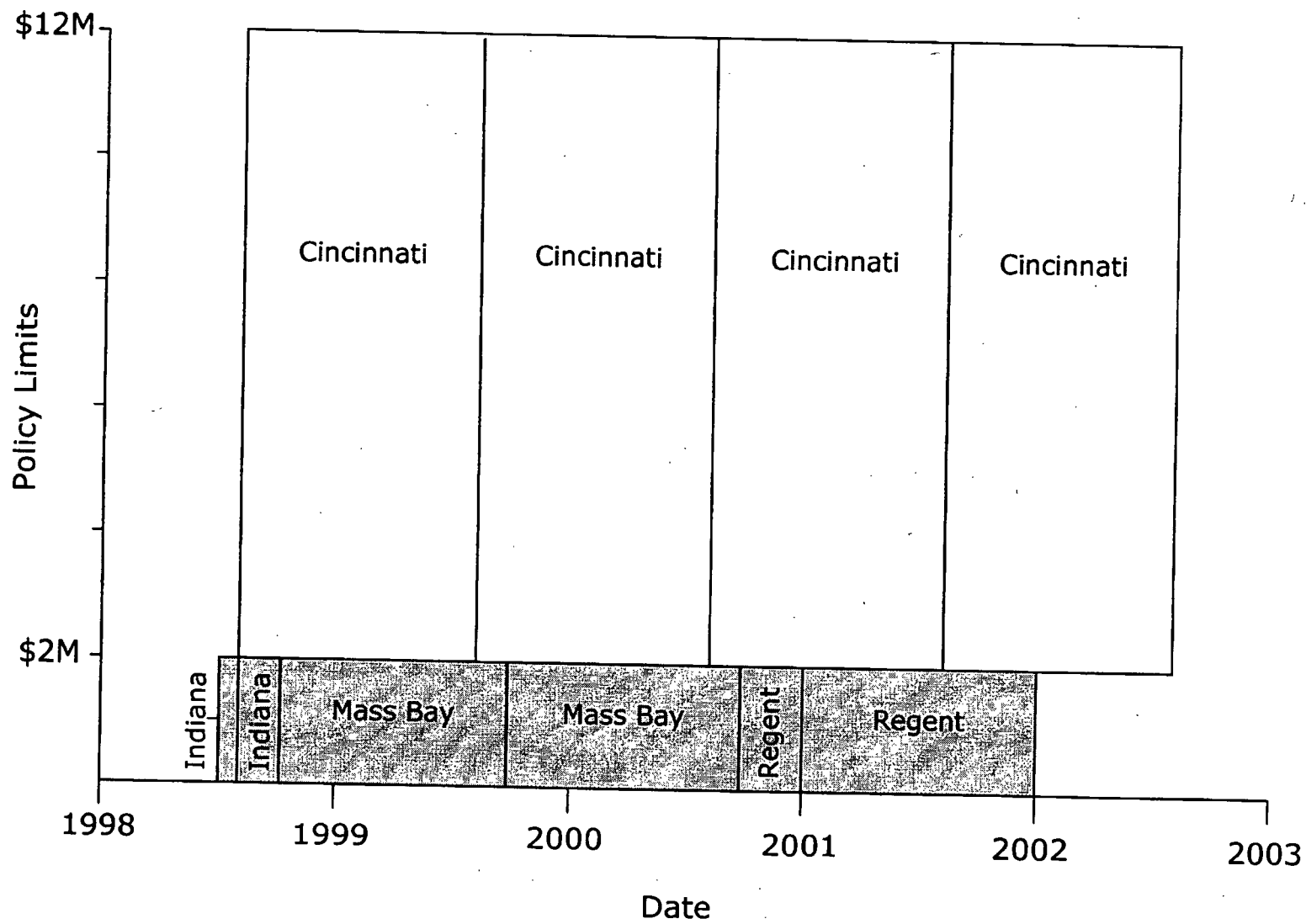


Exhibit P

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CROSSMANN COMMUNITIES
OF NORTH CAROLINA, INC.,
BEAZER HOMES CORP., and
DANIEL ROGERS,

Plaintiffs,

v.

HARLEYSVILLE MUTUAL
INSURANCE COMPANY,
CINCINNATI INSURANCE
COMPANY, and ASSOCIATED
INSURORS, INC. OF MYRTLE
BEACH,

Defendants.

CASE NO. 2004-CP-26-84

PLAINTIFFS' PRE-TRIAL BRIEF

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Pursuant to Rule 16 of the South Carolina Rules of Civil Procedure, Plaintiffs, Crossmann Communities of North Carolina, Inc., Beazer Homes Corp., and Daniel Rogers, hereby submit their Pre-Trial Brief in this action.

I. INTRODUCTION

The Plaintiffs in this insurance coverage dispute are Beazer Homes Corp. ("Beazer"), a residential home builder; Crossmann Communities of North Carolina, Inc. ("Crossmann"), a wholly-owned subsidiary of Beazer; and Daniel Rogers, an employee of Beazer and Crossmann. Plaintiffs Beazer and Crossmann are successors-in-interest by merger to three other South Carolina home building entities -- Pinehurst Builders, Inc. ("Pinehurst"), River Oaks Golf Development, Inc. ("ROGD"), and Buck Creek Development, Inc. ("Buck Creek"). As used herein, "Plaintiffs" refers to the Plaintiffs in this action as well as Beazer's and Crossmann's predecessors-in-interest Pinehurst, ROGD and Buck Creek.

Plaintiffs were named as defendants in seven underlying tort lawsuits that were filed in the Circuit Court for Horry County beginning in 2000 in which various homeowners' associations sought substantial damages from Plaintiffs and others for alleged damages to condominium projects constructed by independent subcontractors (the "Underlying Lawsuits"). Plaintiffs and the other defendants in those Underlying Lawsuits have been able to settle all but two of the Underlying Lawsuits, thereby obviating the need for lengthy trials in those cases. Those settlements called for Plaintiffs to make payment to the plaintiffs in the Underlying Lawsuits, as discussed below.

Plaintiffs purchased insurance coverage in the 1990s and in 2000, 2001, and 2002 to provide financial protection in the event Plaintiffs were sued in cases like the seven underlying property damage lawsuits. Three of Plaintiffs' primary insurers, all of which were at one time defendants in this action, have recognized their coverage obligations to Plaintiffs and have settled Plaintiffs' claims for coverage. Prior defendants Indiana Insurance Company ("Indiana"), Massachusetts Bay Insurance Company ("Massachusetts Bay"), and Regent Insurance Company ("Regent") have paid Plaintiffs' claims and exhausted their respective policies even though they provided coverage for less time and provided far lower limits of coverage than do the policies issued by Harleysville Mutual Insurance Company ("Harleysville"). Nevertheless, Harleysville continues to deny any obligation to indemnify Plaintiffs for any of its losses in any of the Underlying Lawsuits.

In 1993, Defendant Associated Insurors of Myrtle Beach, Inc. ("Associated Insurors") advised Plaintiffs' principal that if he purchased Harleysville insurance policies through Associated, those policies would cover Plaintiffs' losses arising from acts or omissions of subcontractors. That representation has turned out to be hollow, as Harleysville has denied any obligation to indemnify Plaintiffs for any of its losses in any of the Underlying Lawsuits. In the trial of this action, Plaintiffs seek judgment against Harleysville and Associated, as well as against excess insurer Cincinnati Insurance Company ("Cincinnati"), to compensate Plaintiffs for all losses in the underlying cases not already recovered from other insurers. Plaintiffs also seek extra-contractual damages

against Associated Insurors and its principal, Harleysville, for the broken promises about the scope of coverage that would be provided by the Harleysville policies.

II. STATEMENT OF FACTS NOT REASONABLY IN DISPUTE

A. The Parties To This Action

Beazer is in the business of residential real estate development and construction. Beazer is a Delaware corporation with its principal place of business in Atlanta, Georgia. Beazer's parent company acquired and merged with Crossmann Communities, Inc. ("CCI"), another residential home builder, in April 2002. With that acquisition, Beazer succeeded to all of the rights and liabilities of CCI, including all rights under insurance policies issued to CCI and sold by Cincinnati and former defendants Indiana, Massachusetts Bay, and Regent. Prior to the Beazer/Crossmann merger, in May 1998, CCI acquired and merged with Pinehurst, ROGD, and Buck Creek. With that merger, CCI (and then Beazer after the 2002 merger) succeeded to all of the rights and liabilities of Pinehurst, ROGD, and Buck Creek, including rights under its insurance policies. From May 1998 until the acquisition of CCI by Beazer in April 2002, Crossmann was the operating entity in South Carolina for Pinehurst, ROGD, and Buck Creek. Pinehurst, ROGD, and Buck Creek were residential home building entities, formed in 1993 to develop properties in the Myrtle Beach, South Carolina area.

Defendant Harleysville issued \$12 million in primary general liability insurance and \$50 million in excess liability insurance to Pinehurst, ROGD, and Buck Creek as the named insureds from 1993 until August 29, 1998. Cincinnati issued excess liability

policies to CCI and Crossmann as the named insureds for the period, July 1, 1995 - July 1, 2002.¹

Plaintiffs also assert claims against the insurance agent for Harleysville, Associated Insurors. In 1993, one of the principals of Pinehurst and ROGD, Mr. Ralph Teal, Jr., was responsible for procuring the insurance to protect the businesses against claims and losses. As part of that process, Mr. Teal met with Mr. Tom Bailey, an insurance agent and employee of Associated Insurors, in July 1993. (Teal Dep. at 52, 60-61.) During that meeting, Mr. Teal discussed the nature of the businesses and the types of claims the businesses might face. (Teal Dep. at 47-49, 52, 82-83) Mr. Teal explained his companies' plans to develop multi-family condominium projects and provided the names of the entities that were formed to conduct this business. (Id.) Mr. Teal further explained his desire to be "over-insured" and asked Mr. Bailey to describe the coverages he would propose for the businesses' needs as explained by Mr. Teal. (Id.) Mr. Bailey recommended that Mr. Teal place coverage with Harleysville. Mr. Bailey undertook to advise Mr. Teal regarding the scope of various coverages and explained, among other things, that under the Harleysville policies he recommended, "if subcontractors do work and in the future if it becomes a problem, you've got coverage there." (Id.) After hearing Mr. Bailey's recommendation, Mr. Teal requested that Associated Insurors place Harleysville policies to insure Pinehurst and ROGD. (Id.) Mr. Teal and Mr. Bailey were the only two participants in this conversation. Mr. Teal also had other conversations with

¹ As described herein, Regent, Indiana, and Massachusetts Bay, who were defendants in this action when it was first filed, have recognized their obligations to Plaintiffs and have exhausted their policy obligations with payment to Plaintiffs.

Mr. Bailey about the Harleysville coverage after the coverage was placed. Mr. Bailey passed away unexpectedly in 2002. (Gore Dep. at 42.)

Mr. Teal remained a principal at Pinehurst and ROGD until 1998. In May 1998, Pinehurst and ROGD merged with CCI and Mr. Teal and other Pinehurst and ROGD principals sold their interest in the entities. (Teal Dep. at 30-36.) Shortly thereafter, Mr. Teal left the employ of Crossmann and no longer had any ownership or employment interest in Crossmann or the former Pinehurst and River Oaks businesses, long before Harleysville denied Plaintiffs' claims for coverage for the Underlying Lawsuits. (Id.) The Harleysville primary and excess coverage remained in place until after the merger with CCI in 1998.

B. The Insurance Policies Covering Plaintiffs

1. The Harleysville policies

The policy numbers, policy periods, and limits of the Harleysville policies covering Plaintiffs are set forth below:

<u>Policy No.</u>	<u>Policy Period</u>	<u>Limits</u>
CB 9A 5801	7/29/93-7/29/94 7/29/94-7/29/95 7/29/95-7/29/96 7/29/96-7/29/97 7/29/97-7/29/98 7/29/98-8/29/98	\$1,000,000 "each occurrence limit" and a \$2,000,000 "products - completed operations aggregate limit" for each of the six policy periods, for total limits of \$6 million per occurrence and \$12 million "products -- completed operations."

BEC 9A 5801	7/29/94-7/29/95	\$10,000,000 "each occurrence limit" and "products - completed operations aggregate limit" for each of the five policy periods, for a total of \$50 million in excess coverage.
	7/29/95-7/29/96	
	7/29/96-7/29/97	
	7/29/97-7/29/98	
	7/29/98-8/29/98	
GL 705673	10/4/95-10/4/96	\$1,000,000 each occurrence limit and \$2,000,000 general aggregate limit.
	10/4/96-10/4/97	

As explained in more detail below, the Harleysville policies provide coverage to Plaintiffs for those sums that Plaintiffs become legally obligated to pay (such as by the settlement agreements in the Underlying Lawsuits) for "damages" arising from "property damage" caused by an "occurrence." Harleysville's witnesses have testified that "occurrence" means a "mishap" or a "mistake."

Harleysville sold to Pinehurst Policy No. CB9A5801, with commercial general liability ("CGL") coverage in effect from January 29, 1993 through August 29, 1998. On or about June 26, 1998, the name of the insured on Harleysville Policy No. CB9A5801 was changed to Crossmann Communities of North Carolina, Inc. d/b/a Pinehurst Builders. Pinehurst was named as an additional insured under Harleysville Policy No. GL705673. Harleysville Policy No. BEC9A5801 was issued to Pinehurst, Crossmann, and River Oaks. On or about June 26, 1998 the named insured on Harleysville Policy No. BEC9A5801 was changed from Pinehurst to Crossmann Communities of North Carolina d/b/a Pinehurst Builders. On September 8, 1994, River Oaks was added to Harleysville Policy No. BEC9A5801 as an additional insured. Subsequent to CCI's acquisition of Pinehurst, ROGD, and Buck Creek, the Harleysville

policies that were in effect from July 29, 1998 to July 29, 1999 were cancelled, at CCI's request, on August 29, 1998.

2. Plaintiffs' other primary insurance policies

From the time CCI acquired the Pinehurst Entities on or about May 29, 1998, Crossmann and the Pinehurst Entities were covered by primary insurance policies purchased from Indiana, Massachusetts Bay, and Regent. Plaintiffs settled their coverage disputes with Indiana and executed a "Settlement Agreement and Mutual Release" on December 30, 2005, thereby exhausting the Indiana policy. Plaintiffs settled their coverage disputes with Massachusetts Bay and executed a "Settlement Agreement and Mutual Release" on March 14, 2006, thereby exhausting the Massachusetts Bay policies. Plaintiffs settled their coverage disputes with Regent and executed a "Settlement Agreement and Mutual Release" on May 17, 2005, thereby exhausting the Regent policy. Cincinnati was the umbrella insurer whose coverage sits directly above the exhausted primary policies issued by Indiana, Massachusetts Bay, and Regent.

Prior to settling and exhausting their policies, both Massachusetts Bay and Regent were participating with Harleysville in paying South Carolina-based counsel to defend Plaintiffs in all of the Underlying Lawsuits, even though all the Insurers disputed their obligations to indemnify the Plaintiffs under their respective policies. For the period from August 1998 to January 1, 2002, Plaintiffs purchased no primary insurance other

than the Indiana, Massachusetts Bay, and Regent policies,² and all of the Underlying Lawsuits sought an award of damages as a result of property damage that occurred, in part, during that period of time.

3. The Cincinnati umbrella policies

The Cincinnati policies contain similar defense and indemnity obligations as in the Harleysville policies for claims alleging "property damage" caused by an "occurrence" as the other primary policies covering Plaintiffs, except that the Cincinnati excess policies sit above certain of Plaintiffs' primary policies, including the now exhausted primary policies issued by Indiana, Massachusetts Bay, and Regent. The policy numbers, policy periods, and limits of the Cincinnati policies covering Plaintiffs are set forth below:

<u>Policy No.</u>	<u>Policy Period</u>	<u>Limits</u>
CCC 4382766	7/1/95-7/2/98	\$10,000,000 each occurrence limit and aggregate limit for each of the four policy periods providing coverage for the Underlying Lawsuits
CCC 4445840	7/1/98-7/1/01	
	7/1/01-7/1/02	

² The last Harleysville policy, which was in effect from July 29, 1998 to August 29, 1998, overlaps slightly with the Indiana policy, which was in effect from July 1, 1998 to August 29, 1998. The Harleysville policy covered Pinehurst, Buck Creek, ROGD, and Daniel Rogers, but did not cover Crossmann or CCI. The Indiana policy insured CCI, as well as its predecessors-in-interest, Pinehurst, Buck Creek, and ROGD.

C. The Underlying Property Damage Lawsuits Filed Against Plaintiffs And Their Predecessors

Beginning in 2000, Plaintiffs, their predecessors, and others have been sued in seven lawsuits filed in this Circuit Court. Each of the lawsuits generally alleges that there has been property damage at the condominium projects constructed in South Carolina caused by occurrences resulting from the actions or inactions of Plaintiffs and their subcontractors. All but two of the Underlying Lawsuits have been settled. The Underlying Lawsuits are described below.

1. River Oaks I

Construction on the River Oaks I condominium complex began in mid-1993 and was completed during the period from mid-1994 through late 1997. Certificates of occupancy were issued as the buildings were completed. ROGD served as the developer for the River Oaks I complex, while Pinehurst was the general contractor. All of the work at the River Oaks I project was performed by subcontractors.

In 2001, Plaintiffs and certain of their predecessors were sued in Horry County Circuit Court in River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al. ("River Oaks I"). In that complaint, the underlying plaintiffs alleged that the Plaintiffs and the subcontractors negligently constructed the condominium complex at issue, and that acts and omissions in the construction resulted in water infiltration and other conditions occurring after completion of the project. (River Oaks I Third Amended Complaint, at ¶ 16-17, 22.) The River Oaks I plaintiffs alleged that water infiltration and

other conditions caused decay, deterioration, and other property damage that continued during the periods after the units were sold. (Id., ¶ 18.)

The River Oaks I plaintiffs assembled evidence to support their claims of property damage at the complex. The underlying plaintiffs in River Oaks I retained expert witnesses who were prepared to testify that the cost to repair all the damages and other problems at the River Oaks I complex exceeded \$17 million. The River Oaks I case was scheduled to begin trial in Horry County in October 2005. As a result of a mediation that began in September 2005, the River Oaks I plaintiffs reached a settlement of all claims with Plaintiffs in this case in early October 2005. That settlement resulted in the dismissal of all claims against the defendants in River Oaks I. Harleysville and Cincinnati continue to deny any obligation to indemnify Plaintiffs for losses arising from the River Oaks I lawsuit.

2. River Oaks II

Construction on the River Oaks II condominium complex began in 1997 and was completed throughout 1998. Certificates of occupancy for the River Oaks II complex were issued as the buildings were completed. River Oaks Golf Development, and Crossmann after acquiring River Oaks Golf Development, served as the developer for River Oaks II, while Pinehurst and Crossmann (after acquiring Pinehurst) served as the general contractor. All of the work at the River Oaks II project was performed by subcontractors.

The plaintiffs in River Oaks II Horizontal Property Regime et al. v. River Oaks Golf Development, Corp., et al. ("River Oaks II") alleged that Plaintiffs and the subcontractors negligently constructed the condominium complex at issue, which then resulted in water infiltration and other harmful conditions occurring at the complex after completion of the project. The River Oaks II plaintiffs alleged that water infiltration and other conditions caused substantial decay, deterioration, and other property damage that continued during the period after the units were purchased.

Trial of the River Oaks II case was scheduled to begin in mid-February 2006. As a result of a mediation, the River Oaks II plaintiffs and all defendants, including Plaintiffs in this action, settled their disputes, and the River Oaks II case has been dismissed as to all parties. Harleysville and Cincinnati continue to deny any indemnity obligation to Plaintiffs for River Oaks II.

3. Waterway Village

Construction of the Waterway Village condominium complex began in 1995 and was completed in the period from the Summer of 1996 through early 1997. (Waterway Village Compl., ¶ 9.) Certificates of occupancy were issued as the buildings were completed. River Oaks Golf Development served as the developer for Waterway Village, while Pinehurst was the general contractor. All of the work at the Waterway Village complex was performed by subcontractors.

The plaintiffs in Waterway Village at River Oaks Horizontal Property Regime, et al., v. River Oaks Golf Development Corp., et al. ("Waterway Village") allege that

Plaintiffs and the subcontractors negligently constructed the condominium complex, resulting in water infiltration and other conditions leading to property damage after completion of the project. (Id. ¶ 17.) The Waterway Village plaintiffs allege that water infiltration and other conditions caused substantial decay, deterioration, and other property damage that continued during the period after the units were sold. (Id., at ¶ 17 - 18.)

Following mediation in the case, the Waterway Village plaintiffs and all defendants, including Plaintiffs in this case, settled their disputes, and the Waterway Village case has been dismissed as to all parties. Harleysville and Cincinnati continue to deny any indemnity obligation to the Plaintiffs for Waterway Village.

4. Lightkeepers Village

Plaintiffs and their predecessors-in-interest were only involved in the construction of two buildings at the Lightkeepers Village complex. Construction on building 20 at Lightkeepers Village was completed in July 1993, and construction on Building No. 28 was completed in April 1994. (Lightkeepers Village Compl., ¶ 24.) Certificates of occupancy were issued shortly after the buildings were completed. Pinehurst was the general contractor for those two buildings only, and all of the work on buildings 20 and 28 was performed by subcontractors. (Id. ¶ 25.)

In Lightkeepers Village HOA v. Lightkeepers Village, et al., the underlying plaintiffs allege that Plaintiffs in this action and the subcontractors negligently constructed buildings 20 and 28 at the complex, which resulted in water infiltration and

other conditions after the completion of the project. (Id., ¶ 30.) The Lightkeepers Village plaintiffs allege that water infiltration and other conditions caused substantial decay, deterioration, and other property damage that continued during the period after the units in buildings 20 and 28 were sold. (Id., ¶ 23.)

5. Buck Creek

Construction on the Buck Creek condominium complex began in August 1993 and was completed in 1997 and 1998. Buck Creek served as the developer while Pinehurst was the general contractor. (Id.) All of the work at the Buck Creek project was performed by subcontractors. (Id., ¶ 32.)

The plaintiffs in Buck Creek Golf Villas Horizontal Property Regime et al., v. Buck Creek Development, Inc., et al. allege that Plaintiffs in this action and the subcontractors negligently constructed the condominium complex at issue, resulting in water infiltration and other conditions leading to property damage after completion of the project. The Buck Creek plaintiffs allege that such water infiltration and other conditions caused substantial decay, deterioration, and other property damage which continued during the period after the units were sold.

Following mediation of the case, the Buck Creek plaintiffs and all defendants settled their disputes, and the Buck Creek case has been dismissed as to all parties. Harleysville and Cincinnati continue to deny any indemnity obligation to the Plaintiffs for Buck Creek.

6. Rose

Rose v. Lightkeepers Village, originally captioned Vollmar v. Lightkeepers Village, then captioned Beach v. Lightkeepers Village, is a companion class action to the Lightkeepers Village lawsuit alleging loss of use of buildings 20 and 28 in the Lightkeepers condominium complex due to the alleged property damage. This action, like the Lightkeepers Village case, is still pending.

7. Lorenzi

Lorenzi v. River Oaks Golf Development Corp., et al. was a companion class action to the River Oaks II lawsuit alleging loss of use of the buildings in the River Oaks II condominium complex due to the property damage. Lorenzi was settled and dismissed as part of the River Oaks II settlement.

III. STATEMENT OF THE FACTS IN CONTROVERSY

A. Whether Associated Insurors' statements to Mr. Teal about the types of claims and losses that the Harleysville policies would cover were false and misleading.

B. Whether Associated Insurors' statements to Mr. Teal were negligently made.

C. Whether Mr. Teal reasonably relied upon the statements by Associated Insurors' agent in deciding to purchase Harleysville insurance policies through Associated Insurors.

D. The nature and extent of the damages claimed by the underlying plaintiffs with respect to the condominium projects at issue in each of the Underlying Lawsuits.

E. The cost to repair the damages claimed by the underlying plaintiffs with respect to the condominium projects involved in each of the Underlying Lawsuits.

F. The amount of the damages paid by Plaintiffs to defend and settle the Underlying Lawsuits that are covered by the insurance policies issued by Harleysville and Cincinnati.

G. The amount of damages with respect to which Associated Insurers and Harleysville are liable to Plaintiffs as a result of the acts and omissions of Associated Insurers.

IV. STATEMENT OF THE LEGAL ISSUES INVOLVED

A. Coverage Under The Policies

1. The CGL portion of Harleysville's policies covering Plaintiffs are standard form ISO ("Insurance Services Office") policies that obligate Harleysville to defend and indemnify Plaintiffs against any suit seeking damages for "property damage" caused by an "occurrence."

2. The Cincinnati policies contain similar defense and indemnity obligations for claims alleging "property damage" caused by an "occurrence," except that the Cincinnati excess policies sit above certain of Plaintiffs' primary policies. Plaintiffs contend that Cincinnati is obligated to "drop down" and defend and indemnify Plaintiffs

against any suit seeking damages for "property damage" caused by an "occurrence" which the insured is legally obligated to pay as damages in excess of the "underlying insurance."

3. "Property damage" under the Harleysville policies means "[p]hysical injury to or destruction of tangible property including all resulting loss of use" (Policy § V.12.a.), as well as "[l]oss of use of tangible property that is not physically injured." (*Id.* § V.12.b.) Cincinnati's policies contain similar provisions. Each of the Underlying Lawsuits seeks damages from Plaintiffs for property damage.

4. Plaintiffs are covered under the policies if any "property damage" occurs during the policy period so long as such "property damage" was caused by an "occurrence." Harleysville (Policy §§ I.A.1, 2.) The policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in 'bodily injury' or 'property damage.'" (*Id.* § V.9.a.) The policies do not define "accident," but the term is generally understood to mean "an unexpected happening without an intention or design." *See, e.g., R.N. Thompson & Assoc., Inc. v. Monroe Guaranty Ins. Co.*, 686 N.E.2d 160, 164 (Ind. Ct. App. 1997).

5. Representatives of Harleysville have testified in deposition that "accident" means "a mishap" or "mistake."

6. Claims based upon allegations that negligent construction resulted in property damage constitute an occurrence under a CGL policy. *E.g., Okatie Hotel Group; L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 123 n.4

(recognizing that a “CGL policy may [] provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property”); High Country Assocs. v. New Hampshire Ins. Co., 139 N.H. 9, 648 A.2d 474 (1974) (holding that CGL insurance policies provide coverage for damage to buildings caused by continuous exposure to moisture, water, and other potentially harmful conditions).

7. Any policy terms that are ambiguous, that is, susceptible to more than one reasonable meaning, must be interpreted in favor of coverage and against the insurer. Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 170, 594 S.E.2d 511, 518 (2004); Poston v. National Fidelity Life Ins. Co., 303 S.C. 182, 399 S.E.2d 770 (1990).

8. The plaintiffs in the Underlying Lawsuits alleged that negligence by Plaintiffs and the subcontractors resulted in an unexpected happening, or a mishap, without an intention or design, i.e., an “occurrence,” and that the resulting water intrusion and other events caused damage to property and loss of use of that property. The plaintiffs in the Underlying Lawsuits assembled evidence, including expert witness testimony, to support those allegations. While the Defendants may contend that repair of allegedly defective construction itself, standing alone, might not be covered -- a position Plaintiffs dispute -- the damage that results from defective construction is clearly property damage caused by an occurrence.

9. The Harleysville policies obligate Harleysville to indemnify Plaintiffs for all “damages” that Plaintiffs become legally obligated to pay because of

property damage caused by an occurrence. The settlement amounts paid by Plaintiffs to the plaintiffs in the Underlying Lawsuits are such amounts, and are covered in their entirety by the Harleysville and Cincinnati policies to the extent not reimbursed by other insurers.

10. Plaintiffs are also entitled to recover from Defendants the costs incurred in order to gain access to the underlying covered property damage and to replace any items after the repairs have been performed. Lennar Corp. v. Great American Ins. Co., 2005 WL 1324833 n.30 (Tex. App.-Hous. (14 Dist.) June 2, 2005). For example, the cost to remove the siding from a building in order to gain access to rotted wood to make repairs, as well as the costs of replacing the siding once the rotted wood was repaired, is covered under the policies. (Id.) These costs are included as part of the "damages" Plaintiffs are "legally obligated to pay" as a result of the "property damage" caused by an "occurrence," in accordance with the plain language of the policies.

11. In addition to the fact that the evidence from the Underlying Lawsuits satisfies the insuring agreements in the policies because it supports the claimed damages for property damage caused by an occurrence, no exclusion in the policies bars or limits coverage. As an initial matter, the insurer bears the burden of proving the applicability of any exclusions or limitations of coverage, Owens Ins. Co. v. Clayton, 364 S.C. 555, 556 (2005), and exclusions in the insurance policies are to be narrowly construed. (Id.) As summarized below, none of the exclusions in the policies are

applicable to bar or limit Plaintiffs' claims for coverage for losses incurred in the Underlying Lawsuits.

- The "Expected or Intended Injury" exclusion does not apply because the property damage at each of the projects at issue in the Underlying Lawsuits was neither expected nor intended from the standpoint of Plaintiffs. Rather, the plaintiffs in the Underlying Lawsuits alleged that the Plaintiffs were negligent, and such negligence gives rise to Plaintiffs' liability.
- The "Damage to Property" exclusion does not apply because Plaintiffs did not own, rent, or occupy any of the condominium complexes and because, as set forth below, the property is not the insured's "work" as defined by the policies.
- The "Damage to Your Product" exclusion does not apply because the Underlying Lawsuits seek redress for damage to real property.
- The "Damage to Your Work" exclusion does not apply because all of the damages arise out of acts or omissions of subcontractors at the various projects.

B. Allocation Of Covered Losses Among Insurers

1. Each insurer whose policy is triggered by an underlying claim has a joint and several obligation to pay all of the policyholders' defense and indemnity costs for that claim, up to the limits of the policy. As an initial matter, Plaintiffs have the right to select any one of its insurers to pay one hundred percent of all defense costs for potentially covered claims, such as the Underlying Lawsuits. See Sloan Construction Co., Inc. v. Central National Insurance Company of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977) (recognizing that "the duty to defend is personal to each insurer ... [t]he obligation is several and the insurer is not entitled to divide the duty nor require

contribution from another absent a specific contractual right"). In Sloan, the South Carolina Supreme Court, in defining the obligations of insurers under comprehensive general liability insurance policies like the policies at issue in this case, stated that:

each insurer contracted to defend, at its own expense, any suit within the terms of its policy. Where two companies insure the identical risks and both policies provide for furnishing the Insured with a defense, neither [insurance] company, absent a contractual relationship, can require a contribution from the other for the expenses of the defense where one denies liability and refuses to defend. The duty to defend is personal to both insurers; neither is entitled to divide the duty.

Id., 269 S.C. at 187, 236 S.E.2d at 819. This principle is significant because once an insurer exhausts its policy obligations, that insurer no longer is required to pay defense costs. Because there is no right to contribution among co-insurers for defense costs, the share of ongoing defense costs in the Underlying Lawsuits for non-settling Insurers increases each time a co-insurer exhausts its policy. With respect to the Underlying Lawsuits, from 2000 until May 2005, the defense costs were divided equally among Harleysville, Massachusetts Bay, and Regent, with each paying one-third of the defense costs. After the Regent settlement in May 2005, Harleysville and Massachusetts Bay each paid one-half of the defense costs until Massachusetts Bay settled in March 2006. Now Harleysville bears 100 percent of the defense costs for the pending Underlying Lawsuits.

2. With respect to the insurers' indemnity obligations under their policies, the Harleysville primary policies provide that Harleysville will pay those sums that Plaintiffs become legally obligated to pay as damages because of "'property damage'

.... to which this insurance applies.” There is no language in any of the policies limiting Harleysville’s responsibility to indemnification for liability derived solely for that portion of damages taking place only within a specific policy period.

3. Under South Carolina law, the policies in effect “at the time of the injury-in-fact covers all of the ensuing damages.” Joe Harden Builders, Inc. v. Aetna Casualty and Surety Company, 326 S.C. 231, 486 S.E. 2d 89 (1997). The injury-in-fact with respect to the Underlying Lawsuits is the gradual, progressive property damage caused by water intrusion and other conditions at the various condominium projects. The South Carolina Supreme Court has held that any “policy in effect at the time of the injury-in-fact covers all the ensuing damages.” Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 564, 561 S.E. 2d 355, 357 (2002) (quoting from Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 326 D.C. 231, 236, 486 S.E. 2d 89, 91 (1997)). In Century Indemnity, the Court later reiterated its holding, and stated that any insurance policy triggered by a claim “provides coverage for property damage that occurred during the policy period and for any continuing damage.” Id., 348 S.C. at 564, 561 S.E. 2d at 355 (emphasis added).

4. The practical effect of the “joint and several” allocation principle applicable to this case is significant. Pursuant to the plain language in the policies and applicable South Carolina precedent, so long as any covered property damage occurs during a Harleysville policy period, Harleysville must reimburse Plaintiffs for the costs to

remedy that damage and all "continuing damage," even if such damage continues after expiration of a Harleysville policy period.

C. Plaintiffs' Claims Against Associated Insurers

As part of the start up activities for Pinehurst, ROGD, and Buck Creek in 1993, Mr. Teal met with Mr. Bailey of Associated Insurers to discuss the prospect of Mr. Teal doing business with Associated and Mr. Bailey. Associated Insurers was, at all relevant times, the agent of Harleysville for all purposes related to the sale and marketing of Harleysville insurance policies.

During that meeting, Mr. Teal discussed the nature of the businesses and the types of claims the businesses might face. (Teal Dep. at 47-49, 52, 82-83) Mr. Teal explained his companies' plans to develop multi-family condominium projects and provided the names of the entities that were formed to conduct this business. (*Id.*) Mr. Teal further explained his desire to be "over-insured," and asked Mr. Bailey to describe the coverages he would propose for the businesses needs as explained by Mr. Teal. (*Id.*) Mr. Bailey had previously helped resolve an issue with Mr. Teal's homeowners insurance, and Mr. Teal had been reassured by this prior experience. At their 1993 meeting, Mr. Teal reminded Mr. Bailey about that problem and specifically stated that he did not want to repeat that experience with his new businesses that he was looking to insure. Mr. Teal asked Mr. Bailey to describe the circumstances that were covered by the Harleysville policies, which Mr. Bailey undertook to do. (Teal Dep., at 48-49, 70-71, 109-111.)

Mr. Bailey recommended that Mr. Teal place coverage with Harleysville. Mr. Bailey undertook to advise Mr. Teal regarding the scope of various coverages and explained, among other things, that under the Harleysville policies he recommended, "if subcontractors do work and in the future if it becomes a problem, you've got coverage there." (Id.) After hearing Mr. Bailey's recommendation, Mr. Teal requested that Associated Insurors place Harleysville policies to insure Pinehurst and ROGD. (Id.)

Harleysville remained the primary and excess insurer for the Pinehurst Entities through August 1998. Mr. Teal left the employ of the Pinehurst Entities in 1998 soon after Crossmann acquired the Pinehurst Entities by merger. (Teal Dep., at 34-36.) Mr. Teal thereafter had no employment relationship with any of the Plaintiffs, and Mr. Teal left the employ of the Pinehurst Entities long before Harleysville denied coverage for the Underlying Lawsuits.³

The details of Mr. Teal's conversation with Mr. Bailey are uncontroverted. Both Ms. Teresa Hughes and Ms. Kimberly Gore, Associated Insurors' Rule 30(b)(6) corporate representative witnesses, testified that (a) any such representations by Mr. Bailey to Mr. Teal would have been in direct violation of Associated Insurors' rule

³ In 2000, when the Waterway Village underlying lawsuit was filed and in 2001, when the second underlying lawsuit, River Oaks I, was filed, Plaintiffs made demand upon Harleysville to undertake the defense of the lawsuits. Harleysville denied that ROGD was ever listed as a named insured on its policies. As a result, Plaintiffs were forced to hire independent counsel and undertake the defense of those actions on behalf of ROGD. Plaintiffs made repeated demands upon Harleysville to acknowledge ROGD as an insured. In 2002, Harleysville finally acknowledged ROGD as a named insured and assumed the defense. At the April 20, 2006 motions hearing in this case, Harleysville's claims representative stated that Harleysville would reimburse Plaintiffs for these early defense costs incurred by Plaintiffs. Harleysville has not yet done so. Harleysville also failed to advise Plaintiffs that additional discrepancies existed as to the coverage dates. Initially, Harleysville claimed that ROGD was not added as an insured on the general liability policy until October 4, 1995, and that ROGD was not added to the excess policy until July 27, 1994. Harleysville now claims Associated Insurors placed the River Oaks Golf Development Corp. coverage beginning October 4, 1993 and not July 29, 1993 when requested. Further, it has now been learned that Harleysville claims Associated Insurors failed to secure any excess coverage until July 1994.

prohibiting agents from advising potential customers about the nature of the coverage afforded by the insurance policies they sold, and (b) Mr. Bailey did not speak to them about the substance of his discussions with Mr. Teal.⁴ (Gore Dep. 43 - 44; Hughes Dep. 37-38, 57-61.) Both Ms. Hughes and Ms. Gore testified that they were not present at the July 1993 meeting between Mr. Bailey and Mr. Teal, and Associated Insurors has not offered any other witnesses who can refute Mr. Teal's testimony as to what was said at that meeting. (Gore Dep., 39 - 41, 89 - 90.) Harleysville's Rule 30(b)(6) corporate representative also testified that Harleysville had a similar rule that prohibited any Harleysville employee from advising potential customers about the nature of the coverage afforded by their insurance policies. (McCaskill Dep., at 41-48.) Therefore, Mr. Bailey's statements to Mr. Teal regarding the types of claims covered by the Harleysville policies, made in an effort to persuade Mr. Teal to purchase coverage through Associated Insurors, was in direct violation of the rules and procedures of both Associated Insurors and Harleysville.

There is no dispute that Harleysville has not abided by the representations made by its agent, Mr. Bailey, regarding the scope of the Harleysville coverage. There is no dispute that each of the Underlying Lawsuits involves claims that subcontractors negligently constructed the subject properties, and that Plaintiffs are liable for the

⁴ At her deposition, Ms. Gore was asked: "if a customer, potential customer, is ready to pay a premium check to Associated Insurors for a Harleysville policy and right before she signs the check she says am I covered under this policy if the subcontractor pours a bad concrete footer causing water intrusion . . . [i]s it your testimony that the standard practice at Associated Insurors is can't answer that?" Ms. Gore responded "That would be correct." (Gore Dep., 107)

subcontractors' actions. Nevertheless, Harleysville has denied any indemnity obligation in each of the Underlying Lawsuits.

Plaintiffs' claims for negligence, negligent misrepresentation, breach of fiduciary duty, and fraud are all based, in large part, on Mr. Bailey's breach of his duty by undertaking to describe in detail the nature of the coverage that would be afforded by the Harleysville policies and Mr. Teal's reliance on those representations in deciding to purchase the Harleysville policies. By advising Mr. Teal as to the types of claims the Harleysville policies would cover, Mr. Bailey and Associated Insurors became fiduciaries to the Pinehurst Entities and had to advise Mr. Teal regarding the prospective coverage in accordance with the applicable standard of care. Because of Harleysville's denial of coverage, Associated Insurors unjustifiably failed to procure the insurance coverage that was contracted for.

Under South Carolina law, if an insurance agent undertakes to advise the insured about the specifics of coverage or potential coverage, a fiduciary relationship is created between the agent and the prospective insured. Houck v. State Farm Fire and Cas. Ins. Co., 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005) (a "duty may be imposed . . . 'if the agent, nevertheless undertakes to advise the insured'" (citations omitted). "An insurer may assume a duty to advise either by (1) expressly undertaking to advise the insured; or (2) by impliedly undertaking to advise the insured." The agent may impliedly undertake to advise the insured "if the agent received a consideration beyond a mere payment of the premium, the insured made a clear request for advice, or there is a course of dealing over

an extended period of time.” Id. at 14, 620 S.E.2d at 330 (citing Trotter v. State Farm Mut. Auto Ins. Co., 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1987)) (emphasis added).

When Mr. Bailey undertook to advise Mr. Teal about the scope of the coverage that would be provided by the Harleysville policies, hoping that Mr. Teal would rely on these representations and purchase the Harleysville policies through Associated Insurors, Mr. Bailey created a fiduciary relationship with respect to his business dealings with Mr. Teal. Mr. Bailey breached that duty, in violation of his own rule at Associated Insurors and a similar rule at Harleysville, and negligently and fraudulently misrepresented the extent of the coverage that would be afforded by the Harleysville policies when he misinformed Mr. Teal, without qualification, that the policies would cover claims that might arise from the acts or omissions of subcontractors. Plaintiffs have suffered losses in settling the Underlying Lawsuits while Harleysville has denied its coverage obligations, even though the Underlying Lawsuits are precisely the type of claims -- arising from problems with subcontractors -- that Mr. Bailey told Mr. Teal would be covered under the Harleysville policies.

Plaintiffs also seek damages for breach of contract against Associated Insurors because Mr. Bailey undertook to advise Mr. Teal that claims arising from a subcontractor's defective work would be covered. Mr. Teal reasonably relied on that representation in deciding to expend substantial premiums in the purchase of general liability and excess insurance from Harleysville in 1993; therefore, Associated Insurors created a binding contract for that type of insurance coverage. Associated Insurors, and

its principal Harleysville, breached that contract when Associated Insurors failed to procure primary and excess insurance coverage for ROGD beginning in July 1993 and when Harleysville denied its indemnity obligations for the Underlying Lawsuits.

D. Prejudgment Interest

Defendants are also liable to Plaintiffs for pre-judgment interest as provided for by South Carolina law. Prejudgment interest is calculated at the rate of 8.75 percent per annum. S.C. Code Ann. § 34-31-20 (2000). Plaintiffs have made the payments that they were obligated to make to settle each of the Underlying Lawsuits (excluding Lightkeepers Village and Rose, which are still pending), and the amount of pre-judgment interest runs from the date each of those settlement payments was made and accrues continuously until Plaintiffs are reimbursed by Defendants.

E. Cincinnati's Obligation To "Drop Down"

Cincinnati's policies, which are excess policies, are triggered once "the limits of all the listed underlying policies covering a particular claim have been exhausted." Allstate Insurance Co. v. Dana Corp., 759 N.E.2d 1049, 1061-62 (Ind. 2001). The Cincinnati policies obligate Cincinnati to drop down and respond as primary insurance "if the 'underlying insurance' [has] been exhausted by payment of claims" to third parties. (Cincinnati Policy § III.4.b.) "Underlying Insurance" is defined by the Cincinnati Policy to mean "the Policy of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance Policies applicable to the 'occurrence.'" (Id. § V.16.) (emphasis added.) The Underlying Lawsuits allege

continuing damages that occurred over time, including the period of time in which the Regent, Indiana, and Massachusetts Bay policies were the only policies sitting below the Cincinnati coverage. Thus, because the underlying primary policies are exhausted and no longer available, Cincinnati must “drop down” and respond as primary insurance with respect to the Underlying Lawsuits.

Because Plaintiffs reached good faith settlements with Regent, Indiana, and Massachusetts Bay, and because those policies were exhausted by Regent’s payment of \$3,000,000, Indiana’s payment of \$2,700,000, and Massachusetts Bay’s payment of \$2,900,000, the parties’ agreements as to exhaustion should govern. (See discussion infra.) See, e.g., Hooters of Augusta, Inc. v. American Global Ins. Co., 272 F. Supp. 2d 1365, 1380-81 (S.D. Ga. 2003) (holding that because “no one is better positioned to interpret an insurance contract than a party to that contract,” the insured and the primary insurer’s agreement and understanding about the limits of the policy governed whether the policy was exhausted and the excess policy was subsequently triggered); Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1454 (3d Cir. 1996) (recognizing “widely-followed rule” that “the policyholder may recover on the excess policy for a proven loss to the extent it exceeds the primary policy’s limits [T]hat is, settlement with the primary insurer functionally ‘exhausts’ primary coverage and therefore triggers the excess policy – though by settling the policyholder loses any right to coverage of the difference between the settlement amount and the primary policy’s limits”).

Furthermore, Plaintiffs have been legally obligated to pay over \$30,000,000 in damages in connection with settlement of the Colon class action lawsuit, a construction defect class action filed in Indiana state court on behalf of "[a]ll owners of a residential structure in Indiana constructed and marketed by [Beazer's predecessor-in-interest] and/or Beazer Home [sic] Investment Corp. in which a one-inch gap with a vapor barrier does not exist between an exterior brick veneer wall and the surface of the underlying exterior wall." The Colon case also triggered the policies of Regent and the excess insurer above them, Cincinnati. These damage payments in Colon vastly exceed the remaining limits of all of Beazer's primary insurance underlying the Cincinnati coverage. Thus, even if the other primary policies were available -- which they are not -- Cincinnati's defense and indemnity obligations for the Underlying Lawsuits are still triggered, since the damage payments by Plaintiffs would exhaust all primary insurance. See PHICO Ins. Co. v. Aetna Cas. and Surety Co. of America, 93 F. Supp. 2d 982, 993 (S.D. Ind. 2000) ("[a]s the excess insurer, PHICO owed Memorial [the policyholder] a duty - a duty of care if not a duty to defend - once it understood that Aetna's policy limits would be exhausted by the underlying claims").

V. PLAINTIFFS' EXHIBIT LIST

Attached to this Pre-Trial Brief as Exhibit A is a listing of the exhibits that Plaintiffs presently expect to offer into evidence during their case in chief. Plaintiffs reserve the right to offer into evidence any document that was produced by any party in the course of this litigation, as well as any document from the records of the Underlying

Lawsuits. The parties to this action expect to stipulate to the admissibility of many documentary exhibits that will be used at trial.

VI. PLAINTIFFS' WITNESS LIST

Attached to this Pre-Trial Brief as Exhibit B is a listing of the witnesses, including expert witnesses, that Plaintiffs presently expect to call to offer testimony during their case in chief. Plaintiffs reserve the right to call as witnesses any person who was deposed or otherwise designated by any party as having knowledge of facts relevant to any of the issues in this action.

VII. ANTICIPATED EVIDENTIARY ISSUES

A. The parties have stipulated to the authenticity of the documents that were part of the records of the Underlying Lawsuits.

B. In pre-trial motions, Associated Insurors filed a motion in limine to preclude the testimony of Mr. Ralph Teal. That motion was withdrawn during the April 20, 2006 motions hearing. If Associated Insurors re-files such a motion, Plaintiffs will oppose that motion.

C. Harleysville indicated at the October 2, 2006 deposition of one of its expert witnesses, insurance coverage lawyer Michael Aylward, that he will offer testimony at trial as to the law of South Carolina with respect to the insurance coverage legal principles at issue in this case and will opine that, in his opinion, Plaintiffs' claims for coverage are precluded under South Carolina law. Plaintiffs will oppose introduction of

such testimony on the basis that it is improper testimony under South Carolina evidence law because, among other things, it invades the province of the Court and the jury.

D. Plaintiffs may make an offer of proof at trial to admit evidence of Harleysville's payments of prior construction-related property damage claims submitted for coverage by Plaintiffs under the Harleysville policies at issue in this action. At the April 20, 2006 motions hearing, the Court granted Harleysville's motion in limine to bar such evidence, but the Court left open the prospect for Plaintiffs to make an appropriate offer of proof at trial.

VIII. UNUSUAL OR ADDITIONAL MATTERS FOR THE COURT'S ATTENTION

Plaintiffs incurred necessary and reasonable defense costs as a result of work performed by Plaintiffs' national trial counsel in preparing several of the Underlying Lawsuits for trial. Those trial counsel defense costs have not been reimbursed by any insurer. Plaintiffs have also incurred \$50,000 in expert witness fees for the Waterway Village litigation that are have not been reimbursed by any insurer. Defendants are also jointly and severally liable to Plaintiffs for (a) Beazer's attorneys' fees for prosecuting this coverage action and (b) punitive damages in an amount sufficient to punish Harleysville and Associated Insurers and deter future misrepresentations by agents to prospective policyholders in South Carolina.

In addition to the unreimbursed defense costs and other damages discussed above, Plaintiffs seek entry of a judgment by the Court for compensatory damages in the amount

of \$12,841,000 -- the total amount paid by Plaintiffs to settle the Underlying Lawsuits that has not been reimbursed by any insurer. Plaintiffs' compensatory damages claim is shown in detail below.

The following payments have been made on behalf of Plaintiffs to settle the Underlying Lawsuits:

A.	<u>River Oaks I</u>	-	\$ 7,425,000
B.	<u>River Oaks II</u>	-	\$ 2,841,000 ⁵
C.	<u>Buck Creek</u>	-	\$ 2,800,000
D.	<u>Waterway Village</u>	-	\$ 3,925,000 ⁶
TOTAL			\$16,991,000 ⁷

As previously mentioned, Plaintiffs have settled their disputes over coverage with Regent for \$3,000,000, with Indiana for \$2,700,000, and with Massachusetts Bay for \$2,900,000. Based on losses that Plaintiffs faced in states other than South Carolina, Plaintiffs allocated all of the Regent settlement proceeds to partially offset its substantial

⁵ Total settlement amount of \$3,800,000 less contributions of \$958,500 from sub-contractors and/or their insurers.

⁶ Total settlement amount of \$4,700,000 less contributions of \$825,000 from subcontractors and/or their insurers. Includes additional \$50,000 Beazer paid as reimbursement of defense costs paid for expert witness George McGee's expenses that have not been paid by any insurer.

⁷ Beazer also seeks from Harleysville, Associated Insurers, and Cincinnati all costs that may be incurred to settle or satisfy a judgment in favor of the underlying plaintiffs in the Lightkeepers Village action and the companion Rose action.

losses in Indiana, and 50 percent, or \$1,450,000, of the Massachusetts Bay settlement to partially offset significant losses with respect to claims in Kentucky and elsewhere.

Plaintiffs allocated the entirety of the amount received from Indiana as partial reimbursement for the River Oaks II settlement.

As a result of the allocation of the Regent, Massachusetts Bay, and Indiana settlements set forth above, the following payments were made on behalf of Plaintiffs to resolve the Underlying Lawsuits and have not been reimbursed by any insurer or other party:

A.	<u>River Oaks I</u>	-	\$ 5,975,000 (\$7,425,000 - 1,450,000 ⁸)
B.	<u>River Oaks II</u>	-	\$ 141,000 (\$2,841,000 - 2,700,000 ⁹)
C.	<u>Buck Creek</u>	-	\$ 2,800,000
D.	<u>Waterway Village</u>	-	\$ 3,925,000
	TOTAL	-	\$12,841,000

⁸ One-half of the settlement from Massachusetts Bay was allocated as partial reimbursement for Plaintiffs' losses for the River Oaks I settlement.

⁹ The Indiana settlement was allocated in its entirety to partially offset Plaintiffs' losses in the River Oaks II settlement.

Plaintiffs seek these damages, jointly and severally, from Harleysville and Associated Insurors and, to the extent any portion of those damages remains unreimbursed by Harleysville and Associated Insurors, Plaintiffs seek such damages from Cincinnati. Plaintiffs also seek an order obligating the Defendants, jointly and severally, to indemnify Plaintiffs for any judgment or settlement in the Lightkeepers Village case and the companion Rose case. Accordingly, Plaintiffs seek entry of judgment in their favor at trial for \$12,841,000, jointly and severally against all Defendants, plus unreimbursed defense costs, plus pre-judgment interest, attorneys' fees, and punitive damages.

Plaintiffs anticipate that trial of this action can be completed in two full weeks of trial time.

IX. HISTORY OF SETTLEMENT NEGOTIATIONS

As previously stated, Plaintiffs have settled their disputes over coverage with Regent, Indiana, and Massachusetts Bay. These insurers issued policies covering Plaintiffs that are substantially similar to the policies issued by Harleysville and Cincinnati covering Plaintiffs.

A. Settlement With Regent

Regent issued primary insurance underlying the Cincinnati excess coverage for a period of sixteen months, from August 29, 2000 to January 1, 2002. Similar to the Massachusetts Bay and Indiana policies, the Regent Policy had a \$1,000,000 "each occurrence limit" and a \$2,000,000 "products - completed operations aggregate limit."

From 2000 until May 2005, Regent was contributing to the costs of the Plaintiffs' defense with respect to all of the Underlying Lawsuits, as well as to several lawsuits pending against Beazer in Indiana. Regent denied that it had any indemnity obligations under the Policy for the Underlying Lawsuits. In addition, Regent claimed that its one policy had only one set of limits available to the Plaintiffs, and contended that the maximum limit of Regent's potential indemnity obligation to Plaintiffs was \$1 million per occurrence/\$2 million in the aggregate.

Following a mediation, Plaintiffs and Regent agreed to settle their disputes. Pursuant to that settlement, Regent made a cash payment to Plaintiffs of \$3,000,000 (in addition to the more than \$150,000 that Regent had already paid Plaintiffs with respect to claims other than the Underlying Lawsuits). Regent's policies were among the principal primary coverage available to Crossmann and Beazer for the Colon case, a very large property damage case in Indiana, in which Crossmann has already paid over \$30 million in damages, with additional damage payments to be paid in the future. As a result, the entire Regent settlement payment was allocated to partially offset Plaintiffs' substantial losses with respect to Colon and other claims in Indiana. These payments by Regent exhausted Regent's coverage obligations to Plaintiffs. The Settlement Agreement and Mutual Release was executed in May 2005.

B. Settlement With Indiana

Indiana provided primary insurance to Plaintiffs for the Underlying Lawsuits for a period spanning approximately three months, from May 1998, when CCI acquired

Pinehurst, ROGD, and Buck Creek, until August 29, 1998, when the Indiana policy was cancelled by Crossmann. The Indiana Policy had a \$1 million "each occurrence limit" and a \$2 million "products - completed operations aggregate limit." Indiana initially denied that it had any defense or indemnity obligations for the Underlying Lawsuits. In addition to disputing whether Indiana had any obligation to defend and indemnify Beazer, Indiana also claimed that the Plaintiffs were entitled, at most, to one set of annual limits (\$1 million/occurrence, \$2 million/aggregate) pro rated over the three months of coverage provided by Indiana. After depositions of several Indiana claims representatives, Indiana approached Plaintiffs regarding the prospects for resolving their disputes.

Indiana eventually recognized its coverage obligations and agreed to make a cash payment to Plaintiffs of \$2,700,000, which payment exhausted the Indiana coverage. The Settlement Agreement and Mutual Release was executed in December 2005. The entirety of that payment was applied to partially offset Plaintiffs' losses in the River Oak II case.

C. Settlement With Massachusetts Bay

Massachusetts Bay issued two primary insurance policies to Crossmann as the named insured in effect from August 29, 1998 through August 29, 2000. By virtue of the mergers described on page 4 above, these policies cover all the Plaintiffs, and also provide coverage to Crossmann-related entities operating in states other than South Carolina that are not involved in this action. Each annual policy period has a separate

\$1,000,000 "each occurrence limit" and a \$2,000,000 "products - completed operations aggregate limit." From 2000 until March 2006, Massachusetts Bay was contributing to the costs of the Plaintiffs' defense with respect to all of the Underlying Lawsuits, as well as to claims against Beazer in Kentucky. Massachusetts Bay denied that it had any indemnity obligations under the policies for the Underlying Lawsuits.

Following a court-ordered mediation in this case, Plaintiffs and Massachusetts Bay agreed to settle their disputes. Pursuant to that settlement, Massachusetts Bay made a cash payment to Plaintiffs of \$2,900,000 (in addition to the more than \$227,000 that Massachusetts Bay had already paid Beazer with respect to claims other than the Underlying Lawsuits). These payments exhausted the Massachusetts Bay coverage. The Massachusetts Bay payment was allocated 50 percent to the River Oaks I case at issue in this action and 50 percent to claims against Crossmann in states other than South Carolina. The Settlement Agreement and Mutual Release was executed in March 2006.

D. Settlement Negotiations With Harleysville, Cincinnati, and Associated Insurers

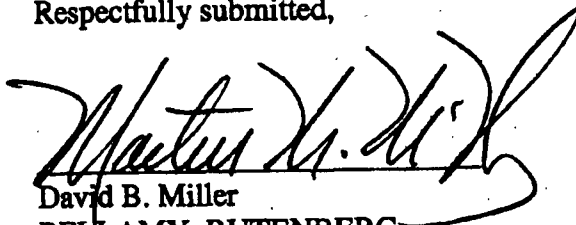
Counsel for Plaintiffs, Harleysville, Cincinnati, and Associated Insurers have attended several Court-ordered mediations in the Underlying Lawsuits since September 8, 2005. Counsel for Plaintiffs, Harleysville, Cincinnati, and Associated Insurers have also attended two Court-ordered mediations in this insurance coverage action -- the first in February 2006 and the second in July 2006. Harleysville has never made an offer of settlement that even approached the payments made by Regent, Indiana, and Massachusetts Bay -- primary insurers whose policy periods were much shorter than

Harleysville's (in Indiana's case, only three months) and whose limits were far less than the \$12 million in Harleysville's primary limits. Cincinnati and Associated Insurors have made offers to settle only at nuisance levels.

X. CONCLUSION

Plaintiffs have strong claims against Harleysville, Cincinnati, and Harleysville's agent, Associated Insurors. Plaintiffs look forward to discussing trial issues with the Court and counsel at the October 16, 2006 pre-trial conference.

Respectfully submitted,



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October 9, 2006

Exhibit Q

MASSACHUSETTS BAY MAXIMUM SET OFF

**MASSACHUSETTS BAY
DAMAGE PER BUILDING**

Project	# of Buildings	Resulting Damage (H'Ville Method)	Resulting Damage (Beazer Method)	Damage per Building (H'Ville Method)	Damage per Building (Beazer Method)
RO I	43	\$641,966	\$966,261	\$14,929	\$22,471
RO II	23	\$244,379	\$58,441	\$10,625	\$2,541
WV	31	\$339,356	\$220,925	\$10,947	\$7,127
BC	23	\$189,715	\$162,470	\$8,248	\$7,064
LV	2	\$34,584	\$41,902	\$17,292	\$20,951
TOTAL	122	\$1,450,000	\$1,450,000		

ROA 518

**MASSACHUSETTS BAY
LIABILITY PER BUILDING**

Project	Unit	Start Date ¹	End Date ²	Days	Mass Bay Days (% of risk)	Mass Bay Liability (H'Ville Method)	Mass Bay Liability (Beazer Method)
RO I	2	1996-01-19	2005-10-24	3566	731 (20.5%)	\$3,060	\$4,606
RO I	3	1996-01-19	2005-10-24	3566	731 (20.5%)	\$3,060	\$4,606
RO I	4	1996-01-17	2005-10-24	3568	731 (20.5%)	\$3,059	\$4,604
RO I	5	1996-01-13	2005-10-24	3572	731 (20.5%)	\$3,055	\$4,599
RO I	6	1996-01-13	2005-10-24	3572	731 (20.5%)	\$3,055	\$4,599
RO I	7	1996-01-04	2004-05-07	3046	731 (24.0%)	\$3,583	\$5,393
RO I	8	1995-12-30	2005-10-24	3586	731 (20.4%)	\$3,043	\$4,581
RO I	9	1995-12-30	2005-10-24	3586	731 (20.4%)	\$3,043	\$4,581
RO I	10	1995-11-17	2005-10-24	3629	731 (20.1%)	\$3,007	\$4,526
RO I	11	1995-11-17	2005-10-24	3629	731 (20.1%)	\$3,007	\$4,526
RO I	12	1995-11-17	2005-10-24	3629	731 (20.1%)	\$3,007	\$4,526
RO I	13	1995-11-29	2005-10-24	3617	731 (20.2%)	\$3,017	\$4,541
RO I	14	1995-02-23	2005-10-24	3896	731 (18.8%)	\$2,801	\$4,216
RO I	15	1994-04-03	2005-10-24	4222	731 (17.3%)	\$2,585	\$3,891
RO I	16	1994-05-20	2005-10-24	4175	731 (17.5%)	\$2,614	\$3,934
RO I	17	1994-05-29	2005-10-24	4166	731 (17.5%)	\$2,620	\$3,943
RO I	18	1994-08-27	2005-10-24	4076	731 (17.9%)	\$2,677	\$4,030
RO I	19	1994-11-25	2005-10-24	3986	731 (18.3%)	\$2,738	\$4,121
RO I	20	1994-12-01	2005-10-24	3980	731 (18.4%)	\$2,742	\$4,127
RO I	21	1994-12-23	2005-10-24	3958	731 (18.5%)	\$2,757	\$4,150

¹ Estimated dates are in bold.

² Actual dates are in bold.

Project	Unit	Start Date ¹	End Date ²	Days	Mass Bay Days (% of risk)	Mass Bay Liability (H'Ville Method)	Mass Bay Liability (Beazer Method)
RO I	22	1995-01-13	2005-10-24	3937	731 (18.6%)	\$2,772	\$4,172
RO I	23	1997-03-30	2005-10-24	3130	731 (23.4%)	\$3,487	\$5,248
RO I	24	1997-03-30	2005-10-24	3130	731 (23.4%)	\$3,487	\$5,248
RO I	25	1995-01-13	2005-10-24	3937	731 (18.6%)	\$2,772	\$4,172
RO I	26	1995-01-26	2005-10-24	3924	731 (18.6%)	\$2,781	\$4,186
RO I	27	1995-04-23	2005-10-24	3837	731 (19.1%)	\$2,844	\$4,281
RO I	28	1995-04-23	2005-10-24	3837	731 (19.1%)	\$2,844	\$4,281
RO I	29	1995-04-27	2005-10-24	3833	731 (19.1%)	\$2,847	\$4,286
RO I	30	1995-05-06	2005-10-24	3824	731 (19.1%)	\$2,854	\$4,296
RO I	31	1995-05-19	2005-10-24	3811	731 (19.2%)	\$2,864	\$4,310
RO I	32	1995-06-03	2005-10-24	3796	731 (19.3%)	\$2,875	\$4,327
RO I	33	1995-07-23	2005-10-24	3746	731 (19.5%)	\$2,913	\$4,385
RO I	34	1995-06-25	2005-10-24	3774	731 (19.4%)	\$2,892	\$4,353
RO I	35	1995-07-14	2005-10-24	3755	731 (19.5%)	\$2,906	\$4,375
RO I	36	1995-09-10	2005-10-24	3697	731 (19.8%)	\$2,952	\$4,443
RO I	37	1995-09-16	2005-10-24	3691	731 (19.8%)	\$2,957	\$4,450
RO I	38	1995-09-24	2005-10-24	3683	731 (19.8%)	\$2,963	\$4,460
RO I	39	1996-03-03	2005-10-24	3522	731 (20.8%)	\$3,099	\$4,664
RO I	40	1996-04-19	2005-10-24	3475	731 (21.0%)	\$3,141	\$4,727
RO I	41	1996-04-13	2005-10-24	3481	731 (21.0%)	\$3,135	\$4,719
RO I	42	1998-01-30	2005-10-24	2824	731 (25.9%)	\$3,865	\$5,817
RO I	43	1998-01-30	2005-10-24	2824	731 (25.9%)	\$3,865	\$5,817
RO I	44	1998-01-30	2005-10-24	2824	731 (25.9%)	\$3,865	\$5,817
RO II	45	1999-07-17	2006-03-14	2432	409 (16.8%)	\$1,787	\$427
RO II	46	1999-06-06	2006-03-14	2473	450 (18.2%)	\$1,933	\$462
RO II	47	1999-01-02	2006-03-14	2628	605 (23.0%)	\$2,446	\$585

Project	Unit	Start Date ¹	End Date ²	Days	Mass Bay Days (% of risk)	Mass Bay Liability (H'Ville Method)	Mass Bay Liability (Beazer Method)
RO II	48	1998-12-02	2006-03-14	2659	636 (23.9%)	\$2,541	\$608
RO II	49	1998-11-25	2006-03-14	2666	643 (24.1%)	\$2,563	\$613
RO II	50	1998-11-04	2006-03-14	2687	664 (24.7%)	\$2,626	\$628
RO II	51	1998-10-14	2006-03-14	2708	685 (25.3%)	\$2,688	\$643
RO II	52	1998-09-24	2006-03-14	2728	705 (25.8%)	\$2,746	\$657
RO II	53	1998-08-16	2006-03-14	2767	731 (26.4%)	\$2,807	\$671
RO II	54	1998-08-01	2006-03-14	2782	731 (26.3%)	\$2,792	\$668
RO II	55	1998-07-25	2006-03-14	2789	731 (26.2%)	\$2,785	\$666
RO II	56	1998-07-19	2006-03-14	2795	731 (26.2%)	\$2,779	\$665
RO II	57	1998-12-20	2006-03-14	2641	618 (23.4%)	\$2,486	\$595
RO II	58	1998-12-20	2006-03-14	2641	618 (23.4%)	\$2,486	\$595
RO II	59	1998-12-30	2006-03-14	2631	608 (23.1%)	\$2,455	\$587
RO II	60	1999-01-10	2006-03-14	2620	597 (22.8%)	\$2,421	\$579
RO II	61	1999-01-21	2006-03-14	2609	586 (22.5%)	\$2,386	\$571
RO II	62	1999-03-03	2006-03-14	2568	545 (21.2%)	\$2,255	\$539
RO II	63	1999-07-02	2006-03-14	2447	424 (17.3%)	\$1,841	\$440
RO II	64	1999-07-11	2006-03-14	2438	415 (17.0%)	\$1,809	\$433
RO II	65	1999-10-08	2006-03-14	2349	326 (13.9%)	\$1,475	\$353
RO II	66	1999-10-30	2006-03-14	2327	304 (13.1%)	\$1,388	\$332
RO II	67	2000-01-28	2006-03-14	2237	214 (9.6%)	\$1,016	\$243
WV	1	1996-08-08	2006-07-05	3618	731 (20.2%)	\$2,212	\$1,440
WV	2	1996-08-08	2006-07-05	3618	731 (20.2%)	\$2,212	\$1,440
WV	3	1996-08-08	2003-04-01	2427	731 (30.1%)	\$3,297	\$2,146
WV	4	1996-10-20	2006-07-05	3545	731 (20.6%)	\$2,257	\$1,470
WV	5	1996-10-27	2006-07-05	3538	731 (20.7%)	\$2,262	\$1,472
WV	6	1996-11-13	2006-07-05	3521	731 (20.8%)	\$2,273	\$1,480

Project	Unit	Start Date ¹	End Date ²	Days	Mass Bay Days (% of risk)	Mass Bay Liability (H'Ville Method)	Mass Bay Liability (Beazer Method)
WV	7	1996-12-01	2006-07-05	3503	731 (20.9%)	\$2,284	\$1,487
WV	8	1996-12-08	2006-07-05	3496	731 (20.9%)	\$2,289	\$1,490
WV	9	1997-01-04	2006-07-05	3469	731 (21.1%)	\$2,307	\$1,502
WV	10	1996-12-26	2006-07-05	3478	731 (21.0%)	\$2,301	\$1,498
WV	11	1997-02-16	2006-07-05	3426	731 (21.3%)	\$2,336	\$1,521
WV	12	1997-04-25	2006-07-05	3358	731 (21.8%)	\$2,383	\$1,551
WV	13	1997-08-15	2006-07-05	3246	731 (22.5%)	\$2,465	\$1,605
WV	14	1997-09-20	2003-04-01	2019	731 (36.2%)	\$3,963	\$2,580
WV	15	1997-09-14	2006-07-05	3216	731 (22.7%)	\$2,488	\$1,620
WV	16	1997-05-23	2003-04-01	2139	731 (34.2%)	\$3,741	\$2,436
WV	17	1997-02-27	2006-07-05	3415	731 (21.4%)	\$2,343	\$1,525
WV	18	1997-01-04	2006-07-05	3469	731 (21.1%)	\$2,307	\$1,502
WV	19	1997-01-19	2006-07-05	3454	731 (21.2%)	\$2,317	\$1,508
WV	20	1997-02-05	2006-07-05	3437	731 (21.3%)	\$2,328	\$1,516
WV	21	1996-12-08	2006-07-05	3496	731 (20.9%)	\$2,289	\$1,490
WV	22	1996-11-21	2006-07-05	3513	731 (20.8%)	\$2,278	\$1,483
WV	23	1996-10-16	2006-07-05	3549	731 (20.6%)	\$2,255	\$1,468
WV	24	1996-09-27	2006-07-05	3568	731 (20.5%)	\$2,243	\$1,460
WV	25	1996-09-21	2006-07-05	3574	731 (20.5%)	\$2,239	\$1,458
WV	26	1996-09-08	2006-07-05	3587	731 (20.4%)	\$2,231	\$1,452
WV	27	1996-08-24	2006-07-05	3602	731 (20.3%)	\$2,222	\$1,446
WV	28	1998-01-22	2006-07-05	3086	731 (23.7%)	\$2,593	\$1,688
WV	29	1997-11-08	2006-07-05	3161	731 (23.1%)	\$2,532	\$1,648
WV	30	1997-11-20	2006-07-05	3149	731 (23.2%)	\$2,541	\$1,654
WV	31	1997-12-05	2006-07-05	3134	731 (23.3%)	\$2,553	\$1,662
BC	1	1994-06-19	2006-07-05	4399	731 (16.6%)	\$1,371	\$1,174

Project	Unit	Start Date ¹	End Date ²	Days	Mass Bay Days (% of risk)	Mass Bay Liability (H'Ville Method)	Mass Bay Liability (Beazer Method)
BC	2	1994-04-13	2006-07-05	4466	731 (16.4%)	\$1,350	\$1,156
BC	3	1994-01-28	2006-07-05	4541	731 (16.1%)	\$1,328	\$1,137
BC	4	1994-11-16	2006-07-05	4249	731 (17.2%)	\$1,419	\$1,215
BC	5	1995-03-25	2006-07-05	4120	731 (17.7%)	\$1,464	\$1,253
BC	6	1995-12-02	2006-07-05	3868	731 (18.9%)	\$1,559	\$1,335
BC	7	1996-08-25	2006-07-05	3601	731 (20.3%)	\$1,674	\$1,434
BC	8	1996-10-13	2006-07-05	3552	731 (20.6%)	\$1,698	\$1,454
BC	9	1998-01-14	2006-07-05	3094	731 (23.6%)	\$1,949	\$1,669
BC	11	1998-05-06	2006-07-05	2982	731 (24.5%)	\$2,022	\$1,732
BC	12	1997-10-03	2006-07-05	3197	731 (22.9%)	\$1,886	\$1,615
BC	13	1996-07-04	2006-07-05	3653	731 (20.0%)	\$1,651	\$1,414
BC	14	1995-04-06	2006-07-05	4108	731 (17.8%)	\$1,468	\$1,257
BC	15	1995-07-22	2006-07-05	4001	731 (18.3%)	\$1,507	\$1,291
BC	16	1995-12-22	2006-07-05	3848	731 (19.0%)	\$1,567	\$1,342
BC	17	1996-01-27	2006-07-05	3812	731 (19.2%)	\$1,582	\$1,355
BC	18	1996-03-03	2006-07-05	3776	731 (19.4%)	\$1,597	\$1,368
BC	19	1996-11-22	2006-07-05	3512	731 (20.8%)	\$1,717	\$1,470
BC	20	1996-10-30	2006-07-05	3535	731 (20.7%)	\$1,706	\$1,461
BC	21	1997-01-12	2006-07-05	3461	731 (21.1%)	\$1,742	\$1,492
BC	22	1997-02-21	2006-07-05	3421	731 (21.4%)	\$1,763	\$1,509
BC	23	1997-04-11	2006-07-05	3372	731 (21.7%)	\$1,788	\$1,531
BC	24	1997-09-06	2006-07-05	3224	731 (22.7%)	\$1,870	\$1,602
LK	20	1993-08-08	2006-11-21	4853	731 (15.1%)	\$2,605	\$3,156
LK	28	1994-05-28	2006-11-21	4560	731 (16.0%)	\$2,772	\$3,359

Project	Unit	Start Date ¹	End Date ²	Days	Mass Bay Days (% of risk)	Mass Bay Liability (H'Ville Method)	Mass Bay Liability (Beazer Method)
TOTAL						\$301,416	\$295,971

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A No. 04-CP-26-0084
	)	
Crossman Communities of North Carolina, Inc., Beazer Homes Investment Corp., and Daniel Rogers,	)	
	)	
Plaintiffs,	)	CINCINNATI INSURANCE COMPANY'S
	)	BRIEF ON ISSUES TO BE CONSIDERED
v.	)	ON REMAND
	)	
Harleysville Mutual Insurance Company,	)	
Cincinnati Insurance Company and	)	
Associated Insurers, Inc. of Myrtle Beach,	)	
	)	
Defendants.	)	
	)	

Cincinnati provided an excess policy which is not triggered until the limits of all underlying coverages have been exhausted.

A. Cincinnati has No Duty to “Drop Down” and Provide Coverage to Plaintiffs

In determining an insurer’s duty to provide coverage to a claim, South Carolina law is quite clear that the parties’ intent is to be measured solely by the language of the policies unless the language is ambiguous. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (when contract is unambiguous, clear, and explicit, it must be construed according to the terms used by the parties). Accordingly, whether an excess insurer is required to “drop down” and defend an insured would depend solely on the terms of the excess insurance contract. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994) (supreme court must enforce, not write, contracts of insurance and must give to policy language, its plain, ordinary, and popular meaning); *see also National Union fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (“whether an excess insurer is required to ‘drop down’ and defend its insured depends solely on how that duty is defined by the terms of the excess

insurance contract"). Plaintiffs' argument that Cincinnati's policies "drop down" to provide coverage fails because the express language of Cincinnati's policies do not obligate Cincinnati in any manner to assume the obligations of a primary insurer (i.e., Harleysville) which has contested coverage and is defending the underlying actions under a reservation of rights. *See B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, supra, at 535, S.E.2d at 330 (1999) (court must give policy language its plain, ordinary, and popular meaning). An insurance policy is to be read like any contract, and the words which it contains are to be given their ordinary meaning.

A section of the CGL policies entitled "Defense and Supplementary Payments", specifically addresses Cincinnati's duty to provide a defense and makes clear that Cincinnati has no duty to defend or indemnify until the limits of all other insurance policies have been paid.

This section states in pertinent part:

We have the right and duty to defend any claim or "suit" against the insured for damages covered by this policy, even if the allegations are groundless, false or fraudulent, when:

- a. The applicable limits of the "underlying insurance" and any other insurance have been exhausted by payment of claims; (CGL Policy, Section C.)

This language unambiguously manifests the parties' intention that Cincinnati's policies only activate following the complete cessation of coverage under all "underlying policies" and "any other insurance." Similarly, other provisions in Cincinnati's policies emphasize the excess nature of the coverage provided. One provision entitled "Other Insurance" states "[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." (See CGL Policy, Section IV.11). Furthermore, a "Products Completed Operations Hazard Limitation" endorsement states:

Exclusions (SECTION I.B.) is modified to add the following:

This policy does not apply to “bodily injury” or “property damage” included in the “products-completed operations hazard” unless such coverage is provided by valid and collectible “underlying insurance” as listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is afforded by such “underlying insurance”.

Cincinnati’s policy clearly and unambiguously makes the insurer’s duty to defend/indemnify consecutive to, rather than concurrent with, the duty of all other insurers (including Harleysville) that provided coverage to Plaintiffs. Consequently, if the policy of any other insurer provides a duty to defend Plaintiffs and the limits of coverage under that policy have not yet been paid, Cincinnati is not obligated to defend. Because Harleysville Insurance provided primary insurance and has not paid up to the limits of its coverage, Cincinnati’s contractual duty to defend, if any, has **not** been triggered. *See e.g., 44A AM. JUR. 2d Insurance* § 1775 (2003) (an insurance company providing excess insurance only is not liable for any part of the loss or damage that is covered by other insurance but is liable for the amount of damage or loss in excess of the coverage provided by other policies of insurance); *National Union fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (Eleventh Circuit found that primary insurer’s refusal to defend the insured did not trigger excess insurer’s duty to defend since the continued existence of primary insurer’s contractual obligation to defend forestalled commencement of excess insurer’s potential coverage). The fact that Harleysville Insurance, an insurer providing both primary and excess coverage, is still a party to this case conclusively establishes that Cincinnati has no obligation to “drop down” and provide coverage. Cincinnati’s duty to defend Plaintiffs is consecutive to, rather than concurrent with, the duty to defend of Harleysville.

Cincinnati’s policies unequivocally establish that its coverage, if any, is excess to “underlying insurance” as well as “any other insurance.” The insurance provided by Harleysville

is precisely the type of “underlying insurance” and “other insurance” to which Cincinnati’s policy refers. Thus, the clear and unambiguous language of Cincinnati’s policies requiring it to defend the insured only if the underlying insurance and any other insurance has been exhausted precludes the interpretation, as offered by Plaintiffs, that Cincinnati is required to “drop down” and defend them. Obviously, it would be absurd to conclude that the limits of the underlying insurance provided by Harleysville, a primary insurer, became exhausted by reason of Harleysville’s decision to contest coverage and defend the underlying actions under a reservation of rights. *See Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (rejecting insured’s contention that underlying insurance was exhausted by reason of primary insurer’s insolvency). A primary insurer’s decision to contest coverage and defend the underlying actions under a reservation of rights is not the same thing as payment or “exhaustion” of policy limits. Moreover, since the language of Cincinnati’s policies states that coverage is triggered only after exhaustion of the underlying policies and any other insurance, Plaintiffs cannot contend that they had a reasonable expectation that Cincinnati would provide coverage before the limits of other insurers had been paid or that it would be obligated under any circumstances to “drop down” to provide such coverage.

Plaintiffs have attempted to bolster their argument that Cincinnati is required to drop down and provide a defense by citing to the holdings of various cases which do not involve the same policy language or factual circumstances present in the instant lawsuit. In fact, the majority of case law holds that an underlying insurer has no duty to drop down and defend or indemnify the insured if the contract does not provide for such coverage. *See 1 Couch on Insurance* § 6:38 (3d. ed.2005). The language of the specific policies is what controls the outcome, and citations to cases in which other courts construed materially different contractual

language involving dissimilar facts are irrelevant and meaningless to the pivotal issue at hand—that issue of course being, does the policy itself by its express terms obligate Cincinnati to “drop down” and provide coverage?

As stated above, under the clear language of the policies, Cincinnati, as an excess liability insurer, is not obligated to contribute to the defense or indemnity of the Plaintiffs for the claims brought against them since all of their insurance has not been exhausted. Because the Plaintiffs’ coverage provided by other insurance has not been exhausted, a duty to drop down and provide coverage has never arisen. Cincinnati’s policies do not require it to provide coverage until and unless the applicable limits of the “underlying insurance” and “any other insurance” have been exhausted by payment of claims. Further, the express language of the policies does not obligate Cincinnati to “drop down” to cover losses and costs simply because another insurer providing “other insurance”, Harleysville, has contested coverage and is defending the underlying actions under a reservation of rights.

Because there is a total absence of any policy language indicating that the parties intended to provide for drop down in a situation such as the case at bar, the Court would be impermissibly adding coverage which was not provided (or intended) by the contract if it were to require a “drop down” of coverage. “It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves ... the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.” *McPherson v. J.E. Sirrine & Co.*, 206 S.E. 183, 33 S.E.2d 501 (1945), citing 17 C.J.S., Contracts, § 296, pp. 702-707. Accordingly, in the case *sub judice*, Cincinnati is not required to drop down and provide coverage to fill a void that may be left by another insurer,

Harleysville, who has thus far chosen to contest coverage and defend the underlying actions under a reservation of rights. An excess insurer's liability should not be increased by the decision of a primary insurer (which of course has a more immediate obligation than the excess insurer) to contest coverage and defend underlying actions under a reservation of rights unless the excess insurance policy explicitly requires such. The fundamental purposes of excess insurance is to protect the insured against excess liability claims, not to insure against whether all other carrier's providing insurance to the insured will actually provide coverage.

Because the terms of Cincinnati's policies are unambiguous, they must be interpreted according to their plain meaning. Simply stated, Cincinnati did not contract to provide "drop down" coverage when, as is the case here, an underlying insurer with a primary coverage obligation has decided to contest coverage and is defending the underlying actions under a reservation of rights. Rather, Cincinnati's excess liability coverage is invoked only after the underlying limits and limits of all other insurance have been exceeded. Because Harleysville has not paid its limits and is still a party to this lawsuit, Cincinnati's policy does not drop down to cover the gap created by Harleysville's decision to contest coverage and defend the underlying actions under a reservation of rights.

Importantly, Cincinnati is not attempting to escape any contractual responsibility. Rather, it is simply asking that the Court enforce the unambiguous language of its policies which make clear that the insurance to be provided by Cincinnati is true excess coverage over and above any type of primary coverage. See 8A J. Appleman, *Insurance Law & Practice*, § 4909.85 at 452, 453-54 (1981) ("Therefore, umbrella coverages, almost without dispute, are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses"). The liability of an excess carrier does not attach

until all primary policy limits are exhausted. Likewise, liability of the excess carrier does not "drop down" if a primary insurer decides to contest coverage and defend under a reservation of rights.

An additional point of significance is that the Cincinnati policies issued to Plaintiffs contain, as most excess policies do, a provision requiring the insured to maintain specified levels of underlying insurance. (See CGL Policy, Section IV.10). This provision states:

10. Maintenance of Underlying Insurance

While this policy is in effect, the insured shall maintain in force the "underlying insurance" listed in the Schedule of Underlying Policies as collectible insurance. The terms, conditions and endorsements of "underlying insurance" will not materially change and renewals or replacements of "underlying insurance" will not be more restrictive in coverage. Limits of "underlying insurance" will not be reduced except for any reduction or exhaustion in the aggregate limits of insurance due to payment of claims. In the event you fail or neglect to maintain "underlying insurance" as required, this policy will apply as though such underlying insurance was in force and collectible at the time of the "occurrence."

The limits of "underlying insurance" shall be deemed applicable regardless of any defense which the insurer who provides the "underlying insurance" may assert because of the insured's failure to comply with any Condition of the policy or the inability of the insurer to pay by reason of bankruptcy or insolvency.

Thus, the obligation to maintain viable primary insurance rests with the insured Plaintiffs. In this case Harleysville has underlying limits of \$12 million. In addition, Indiana, Regents, and Massachusetts Bay have settled for less than their policy limits. Cincinnati has served discovery, to determine how the proceeds of the settlements have been utilized, but has received no information to show that the funds were used to pay claims that are arguably covered by the various policies.

An excess policy is excess because there are underlying policies. For Cincinnati to be ordered to provide primary coverage where an existing primary insurer has decided to contest coverage and is defending under a reservation of rights, would render the underlying limits and

clear language of Cincinnati's excess insurance policies illusory and would obligate Cincinnati to provide insurance coverage much greater than that for which it bargained. *See e.g., First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*, 803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent of policy to provide excess coverage illusory); *see also Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured and noting that an excess liability insurer obviously does not anticipate this heavy onus); *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (excess insurer had no duty to "drop down" and assume primary insurer's coverage obligations where primary insurer was insolvent).

B. Cincinnati does not have a Joint and Several Obligation to Defend or Indemnify Plaintiffs Since Coverage Under Cincinnati's Policies has not been Triggered.

Plaintiffs claim that Cincinnati has a joint and several obligation to defend and indemnify them in the underlying lawsuits. Plaintiffs' claim must be rejected because it is based upon the false assumption that insurance coverage under Cincinnati's policies has actually been triggered when in fact the coverage provided by Cincinnati's policies has not been activated. Thus, the entire premise for Plaintiffs' argument that Cincinnati owes a joint and several duty of defense/indemnification to the Plaintiffs is hopelessly flawed.

It is undisputed that Harleysville provided primary insurance to Plaintiffs and that it has not paid up to the limits of its coverage on the Plaintiffs' behalf in the underlying lawsuits. It is further undisputed that the insurance provided by Cincinnati to Plaintiffs is excess insurance. An excess policy is excess quite simply because it has underlying limits and is not triggered until

those limits have been exhausted. The applicable underlying limits have not been paid out in the instant case because Harleysville has thus far chosen to contest coverage while defending the underlying actions under a reservation of rights. *See* 46 CJS *Insurance* § 1138 (2005) (excess or umbrella policy is not required to contribute to the payment of a settlement until all other applicable policies have been exhausted.) Neither has Harleysville been dismissed as a party from the instant litigation. Since Harleysville has not paid out the limits of its coverage and is still a party to this case, the excess coverage provided by Cincinnati's policies has never been triggered.

Plaintiffs' arguments appear to be based upon the mistaken notion that Harleysville and Cincinnati have equal obligations to defend/indemnify them when in fact these two insurers are not at the same insuring level—that is, Harleysville has provided primary coverage which has not been exhausted and Cincinnati has provided secondary excess coverage that is untriggered. It is elementary that an excess insurer's duty to defend is consecutive to, rather than concurrent with, a primary insurer's duty. 46 CJS *Insurance* § 1152 (2005) ("An excess insurance company has no duty to participate in insured's defense until primary coverages are exhausted"); *see also* 46 CJS *Insurance* § 1138 (2005) ("'Primary coverage' is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability, and 'excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.")

The unambiguous language of Cincinnati's policies makes clear that Cincinnati has no duty to defend or indemnify until the limits of all other insurance policies have been paid. The policies provide in relevant part:

We have the right and duty to defend any claim or "suit" against the insured for damages covered by this policy, even if the allegations are groundless, false or fraudulent, when:

- b. The applicable limits of the "underlying insurance" and any other insurance have been exhausted by payment of claims; (CGL Policy, Section C.)

Similarly, another provision in Cincinnati's policies entitled "Other Insurance" states "The insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." (See CGL Policy, Section IV.11). Furthermore, a "Products Completed Operations Hazard Limitation" endorsement states:

Exclusions (SECTION I.B.) is modified to add the following:

This policy does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" unless such coverage is provided by valid and collectible "underlying insurance" as listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is afforded by such "underlying insurance".

This plain and easily understood policy language manifests the intention of Cincinnati and the insured Plaintiffs to make Cincinnati's coverage excess coverage that does not activate until the complete cessation of coverage under all "underlying policies" and "any other insurance."

Plaintiffs' arguments ignore the clear language of Cincinnati's policies making its coverage excess and requiring that all underlying insurance be exhausted. Nothing in Cincinnati's policies obligates it to provide primary coverage or to provide "drop down" coverage. See *Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured.) Cincinnati's policies make it abundantly clear that it has no obligation to provide defense or indemnification until and unless the applicable limits of the "underlying

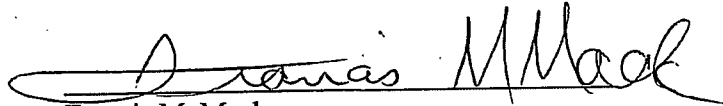
insurance” and “any other insurance” have been exhausted by payment of claims. Furthermore, there is absolutely no language in the policies that would obligate Cincinnati to “drop down” in the place of the primary insurance policies issued by Indiana, Massachusetts Bay and Regent to cover defense or indemnification costs, when the full coverage under these policies has not been paid.

Simply stated, Cincinnati did not contract to provide “drop down” coverage. Rather, Cincinnati’s excess liability coverage is invoked only after the underlying limits and limits of all other insurance have been exceeded. “It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves ... the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.” *McPherson v. J.E. Sirrine & Co.*, 206 S.E. 183, 33 S.E.2d 501 (1945), citing 17 C.J.S., Contracts, § 296, pp. 702-707. A court simply cannot create coverage where none exists. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994) (court must enforce, not write, contracts of insurance and must give to policy language, its plain, ordinary, and popular meaning). Likewise, a court should not order an excess insurer to “drop down” and provide primary coverage in a joint and several manner when there is absolutely no language in the excess insurance policies providing such coverage.

In addition, Plaintiffs are asking the Court to force Cincinnati to provide insurance coverage much greater than that for which the parties to the insurance contract bargained. See e.g., *First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*, 803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent

of policy to provide excess coverage illusory); *see also Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to “drop down” where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured and noting that an excess liability insurer obviously does not anticipate this heavy onus); *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (excess insurer had no duty to “drop down” and assume primary insurer’s coverage obligations where primary insurer was insolvent). Accordingly, Cincinnati is not required to drop down and provide coverage to fill a void potentially left by primary insurers, and Cincinnati does not have a duty to pay all of Plaintiffs’ defense costs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Francis M. Mack", written over a horizontal line.

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ATTORNEYS FOR DEFENDANT,
CINCINNATI INSURANCE COMPANY

Columbia, South Carolina
Dated: November 2, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A No. 04-CP-26-0084
	)	
Crossman Communities of North Carolina,	)	
Inc., Beazer Homes Investment Corp., and	)	
Daniel Rogers,	)	
	)	
Plaintiffs,	)	CINCINNATI INSURANCE COMPANY'S
	)	REPLY BRIEF ON ISSUES TO BE
v.	)	CONSIDERED ON REMAND
	)	
Harleysville Mutual Insurance Company,	)	
Cincinnati Insurance Company and	)	
Associated Insurers, Inc. of Myrtle Beach,	)	
	)	
Defendants.	)	
	)	

Cincinnati provided an excess policy which is not triggered until the limits of all underlying coverages have been exhausted.

A. Cincinnati has No Duty to “Drop Down” and Provide Coverage to Plaintiffs

In determining an insurer’s duty to provide coverage to a claim, South Carolina law is quite clear that the parties’ intent is to be measured solely by the language of the policies unless the language is ambiguous. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (when contract is unambiguous, clear, and explicit, it must be construed according to the terms used by the parties). Accordingly, whether an excess insurer is required to “drop down” and defend an insured would depend solely on the terms of the excess insurance contract. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994) (supreme court must enforce, not write, contracts of insurance and must give to policy language, its plain, ordinary, and popular meaning); *see also National Union fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (“whether an excess insurer is required to ‘drop down’ and defend its insured depends solely on how that duty is defined by the terms of the excess

insurance contract"). Plaintiffs' argument that Cincinnati's policies "drop down" to provide coverage fails because the express language of Cincinnati's policies do not obligate Cincinnati in any manner to assume the obligations of a primary insurer (i.e., Harleysville) which has contested coverage and is defending the underlying actions under a reservation of rights. See *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, supra, at 535, S.E.2d at 330 (1999) (court must give policy language its plain, ordinary, and popular meaning). An insurance policy is to be read like any contract, and the words which it contains are to be given their ordinary meaning.

A section of the CGL policies entitled "Defense and Supplementary Payments", specifically addresses Cincinnati's duty to provide a defense and makes clear that Cincinnati has no duty to defend or indemnify until the limits of all other insurance policies have been paid. This section states in pertinent part:

We have the right and duty to defend any claim or "suit" against the insured for damages covered by this policy, even if the allegations are groundless, false or fraudulent, when:

- a. The applicable limits of the "underlying insurance" and any other insurance have been exhausted by payment of claims; (CGL Policy, Section C.)

This language unambiguously manifests the parties' intention that Cincinnati's policies only activate following the complete cessation of coverage under all "underlying policies" and "any other insurance." Similarly, other provisions in Cincinnati's policies emphasize the excess nature of the coverage provided. One provision entitled "Other Insurance" states "[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." (See CGL Policy, Section IV.11). Furthermore, a "Products Completed Operations Hazard Limitation" endorsement states:

Exclusions (SECTION I.B.) is modified to add the following:

We have the right and duty to defend any claim or "suit" against the insured for damages covered by this policy, even if the allegations are groundless, false or fraudulent, when:

- b. The applicable limits of the "underlying insurance" and any other insurance have been exhausted by payment of claims; (CGL Policy, Section C.)

Similarly, another provision in Cincinnati's policies entitled "Other Insurance" states "The insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." (See CGL Policy, Section IV.11). Furthermore, a "Products Completed Operations Hazard Limitation" endorsement states:

Exclusions (SECTION I.B.) is modified to add the following:

This policy does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" unless such coverage is provided by valid and collectible "underlying insurance" as listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is afforded by such "underlying insurance".

This plain and easily understood policy language manifests the intention of Cincinnati and the insured Plaintiffs to make Cincinnati's coverage excess coverage that does not activate until the complete cessation of coverage under all "underlying policies" and "any other insurance."

Plaintiffs' arguments ignore the clear language of Cincinnati's policies making its coverage excess and requiring that all underlying insurance be exhausted. Nothing in Cincinnati's policies obligates it to provide primary coverage or to provide "drop down" coverage. See *Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured.) Cincinnati's policies make it abundantly clear that it has no obligation to provide defense or indemnification until and unless the applicable limits of the "underlying

This policy does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" unless such coverage is provided by valid and collectible "underlying insurance" as listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is afforded by such "underlying insurance".

Cincinnati's policy clearly and unambiguously makes the insurer's duty to defend/indemnify consecutive to, rather than concurrent with, the duty of all other insurers (including Harleysville) that provided coverage to Plaintiffs. Consequently, if the policy of any other insurer provides a duty to defend Plaintiffs and the limits of coverage under that policy have not yet been paid, Cincinnati is not obligated to defend. Because Harleysville Insurance provided primary insurance and has not paid up to the limits of its coverage, Cincinnati's contractual duty to defend, if any, has **not** been triggered. *See e.g.*, 44A AM. JUR. 2d *Insurance* § 1775 (2003) (an insurance company providing excess insurance only is not liable for any part of the loss or damage that is covered by other insurance but is liable for the amount of damage or loss in excess of the coverage provided by other policies of insurance); *National Union fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (Eleventh Circuit found that primary insurer's refusal to defend the insured did not trigger excess insurer's duty to defend since the continued existence of primary insurer's contractual obligation to defend forestalled commencement of excess insurer's potential coverage). The fact that Harleysville Insurance, an insurer providing both primary and excess coverage, is still a party to this case conclusively establishes that Cincinnati has no obligation to "drop down" and provide coverage. Cincinnati's duty to defend Plaintiffs is consecutive to, rather than concurrent with, the duty to defend of Harleysville.

Cincinnati's policies unequivocally establish that its coverage, if any, is excess to "underlying insurance" as well as "any other insurance." The insurance provided by Harleysville

is precisely the type of “underlying insurance” and “other insurance” to which Cincinnati’s policy refers. Thus, the clear and unambiguous language of Cincinnati’s policies requiring it to defend the insured only if the underlying insurance and any other insurance has been exhausted precludes the interpretation, as offered by Plaintiffs, that Cincinnati is required to “drop down” and defend them. Obviously, it would be absurd to conclude that the limits of the underlying insurance provided by Harleysville, a primary insurer, became exhausted by reason of Harleysville’s decision to contest coverage and defend the underlying actions under a reservation of rights. See *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (rejecting insured’s contention that underlying insurance was exhausted by reason of primary insurer’s insolvency). A primary insurer’s decision to contest coverage and defend the underlying actions under a reservation of rights is not the same thing as payment or “exhaustion” of policy limits. Moreover, since the language of Cincinnati’s policies states that coverage is triggered only after exhaustion of the underlying policies and any other insurance, Plaintiffs cannot contend that they had a reasonable expectation that Cincinnati would provide coverage before the limits of other insurers had been paid or that it would be obligated under any circumstances to “drop down” to provide such coverage.

Plaintiffs have attempted to bolster their argument that Cincinnati is required to drop down and provide a defense by citing to the holdings of various cases which do not involve the same policy language or factual circumstances present in the instant lawsuit. In fact, the majority of case law holds that an underlying insurer has no duty to drop down and defend or indemnify the insured if the contract does not provide for such coverage. See 1 *Couch on Insurance* § 6:38 (3d. ed.2005). The language of the specific policies is what controls the outcome, and citations to cases in which other courts construed materially different contractual

language involving dissimilar facts are irrelevant and meaningless to the pivotal issue at hand — that issue of course being, does the policy itself by its express terms obligate Cincinnati to “drop down” and provide coverage?

As stated above, under the clear language of the policies, Cincinnati, as an excess liability insurer, is not obligated to contribute to the defense or indemnity of the Plaintiffs for the claims brought against them since all of their insurance has not been exhausted. Because the Plaintiffs’ coverage provided by other insurance has not been exhausted, a duty to drop down and provide coverage has never arisen. Cincinnati’s policies do not require it to provide coverage until and unless the applicable limits of the “underlying insurance” and “any other insurance” have been exhausted by payment of claims. Further, the express language of the policies does not obligate Cincinnati to “drop down” to cover losses and costs simply because another insurer providing “other insurance”, Harleysville, has contested coverage and is defending the underlying actions under a reservation of rights.

Because there is a total absence of any policy language indicating that the parties intended to provide for drop down in a situation such as the case at bar, the Court would be impermissibly adding coverage which was not provided (or intended) by the contract if it were to require a “drop down” of coverage. “It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves ... the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.” *McPherson v. J.E. Sirrine & Co.*, 206 S.E. 183, 33 S.E.2d 501 (1945), citing 17 C.J.S., Contracts, § 296, pp. 702-707. Accordingly, in the case *sub judice*, Cincinnati is not required to drop down and provide coverage to fill a void that may be left by another insurer,

Harleysville, who has thus far chosen to contest coverage and defend the underlying actions under a reservation of rights. An excess insurer's liability should not be increased by the decision of a primary insurer (which of course has a more immediate obligation than the excess insurer) to contest coverage and defend underlying actions under a reservation of rights unless the excess insurance policy explicitly requires such. The fundamental purposes of excess insurance is to protect the insured against excess liability claims, not to insure against whether all other carrier's providing insurance to the insured will actually provide coverage.

Because the terms of Cincinnati's policies are unambiguous, they must be interpreted according to their plain meaning. Simply stated, Cincinnati did not contract to provide "drop down" coverage when, as is the case here, an underlying insurer with a primary coverage obligation has decided to contest coverage and is defending the underlying actions under a reservation of rights. Rather, Cincinnati's excess liability coverage is invoked only after the underlying limits and limits of all other insurance have been exceeded. Because Harleysville has not paid its limits and is still a party to this lawsuit, Cincinnati's policy does not drop down to cover the gap created by Harleysville's decision to contest coverage and defend the underlying actions under a reservation of rights.

Importantly, Cincinnati is not attempting to escape any contractual responsibility. Rather, it is simply asking that the Court enforce the unambiguous language of its policies which make clear that the insurance to be provided by Cincinnati is true excess coverage over and above any type of primary coverage. See 8A J. Appleman, *Insurance Law & Practice*, § 4909.85 at 452, 453-54 (1981) ("Therefore, umbrella coverages, almost without dispute, are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses"). The liability of an excess carrier does not attach

until all primary policy limits are exhausted. Likewise, liability of the excess carrier does not "drop down" if a primary insurer decides to contest coverage and defend under a reservation of rights.

An additional point of significance is that the Cincinnati policies issued to Plaintiffs contain, as most excess policies do, a provision requiring the insured to maintain specified levels of underlying insurance. (See CGL Policy, Section IV.10). This provision states:

10. Maintenance of Underlying Insurance

While this policy is in effect, the insured shall maintain in force the "underlying insurance" listed in the Schedule of Underlying Policies as collectible insurance. The terms, conditions and endorsements of "underlying insurance" will not materially change and renewals or replacements of "underlying insurance" will not be more restrictive in coverage. Limits of "underlying insurance" will not be reduced except for any reduction or exhaustion in the aggregate limits of insurance due to payment of claims. In the event you fail or neglect to maintain "underlying insurance" as required, this policy will apply as though such underlying insurance was in force and collectible at the time of the "occurrence."

The limits of "underlying insurance" shall be deemed applicable regardless of any defense which the insurer who provides the "underlying insurance" may assert because of the insured's failure to comply with any Condition of the policy or the inability of the insurer to pay by reason of bankruptcy or insolvency.

Thus, the obligation to maintain viable primary insurance rests with the insured Plaintiffs. In this case Harleysville has underlying limits of \$12 million. In addition, Indiana, Regents, and Massachusetts Bay have settled for less than their policy limits. Cincinnati has served discovery, to determine how the proceeds of the settlements have been utilized, but has received no information to show that the funds were used to pay claims that are arguably covered by the various policies.

An excess policy is excess because there are underlying policies. For Cincinnati to be ordered to provide primary coverage where an existing primary insurer has decided to contest coverage and is defending under a reservation of rights, would render the underlying limits and

clear language of Cincinnati's excess insurance policies illusory and would obligate Cincinnati to provide insurance coverage much greater than that for which it bargained. *See e.g., First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*, 803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent of policy to provide excess coverage illusory); *see also Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured and noting that an excess liability insurer obviously does not anticipate this heavy onus); *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (excess insurer had no duty to "drop down" and assume primary insurer's coverage obligations where primary insurer was insolvent).

B. Cincinnati does not have a Joint and Several Obligation to Defend or Indemnify Plaintiffs Since Coverage Under Cincinnati's Policies has not been Triggered.

Plaintiffs claim that Cincinnati has a joint and several obligation to defend and indemnify them in the underlying lawsuits. Plaintiffs' claim must be rejected because it is based upon the false assumption that insurance coverage under Cincinnati's policies has actually been triggered when in fact the coverage provided by Cincinnati's policies has not been activated. Thus, the entire premise for Plaintiffs' argument that Cincinnati owes a joint and several duty of defense/indemnification to the Plaintiffs is hopelessly flawed.

It is undisputed that Harleysville provided primary insurance to Plaintiffs and that it has not paid up to the limits of its coverage on the Plaintiffs' behalf in the underlying lawsuits. It is further undisputed that the insurance provided by Cincinnati to Plaintiffs is excess insurance. An excess policy is excess quite simply because it has underlying limits and is not triggered until

those limits have been exhausted. The applicable underlying limits have not been paid out in the instant case because Harleysville has thus far chosen to contest coverage while defending the underlying actions under a reservation of rights. *See 46 CJS Insurance* § 1138 (2005) (excess or umbrella policy is not required to contribute to the payment of a settlement until all other applicable policies have been exhausted.) Neither has Harleysville been dismissed as a party from the instant litigation. Since Harleysville has not paid out the limits of its coverage and is still a party to this case, the excess coverage provided by Cincinnati's policies has never been triggered.

Plaintiffs' arguments appear to be based upon the mistaken notion that Harleysville and Cincinnati have equal obligations to defend/indemnify them when in fact these two insurers are not at the same insuring level—that is, Harleysville has provided primary coverage which has not been exhausted and Cincinnati has provided secondary excess coverage that is untriggered. It is elementary that an excess insurer's duty to defend is consecutive to, rather than concurrent with, a primary insurer's duty. *46 CJS Insurance* § 1152 (2005) ("An excess insurance company has no duty to participate in insured's defense until primary coverages are exhausted"); *see also 46 CJS Insurance* § 1138 (2005) ("Primary coverage" is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability, and "excess" or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.")

The unambiguous language of Cincinnati's policies makes clear that Cincinnati has no duty to defend or indemnify until the limits of all other insurance policies have been paid. The policies provide in relevant part:

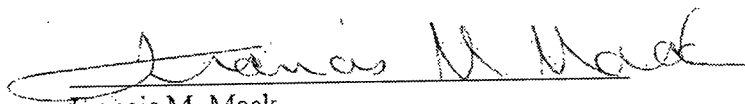
insurance" and "any other insurance" have been exhausted by payment of claims. Furthermore, there is absolutely no language in the policies that would obligate Cincinnati to "drop down" in the place of the primary insurance policies issued by Indiana, Massachusetts Bay and Regent to cover defense or indemnification costs, when the full coverage under these policies has not been paid.

Simply stated, Cincinnati did not contract to provide "drop down" coverage. Rather, Cincinnati's excess liability coverage is invoked only after the underlying limits and limits of all other insurance have been exceeded. "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves ... the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract." *McPherson v. J.E. Sirrine & Co.*, 206 S.E. 183, 33 S.E.2d 501 (1945), citing 17 C.J.S., Contracts, § 296, pp. 702-707. A court simply cannot create coverage where none exists: *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994) (court must enforce, not write, contracts of insurance and must give to policy language, its plain, ordinary, and popular meaning). Likewise, a court should not order an excess insurer to "drop down" and provide primary coverage in a joint and several manner when there is absolutely no language in the excess insurance policies providing such coverage.

In addition, Plaintiffs are asking the Court to force Cincinnati to provide insurance coverage much greater than that for which the parties to the insurance contract bargained. See e.g., *First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*, 803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent

of policy to provide excess coverage illusory); *see also Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured and noting that an excess liability insurer obviously does not anticipate this heavy onus); *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (excess insurer had no duty to "drop down" and assume primary insurer's coverage obligations where primary insurer was insolvent). Accordingly, Cincinnati is not required to drop down and provide coverage to fill a void potentially left by primary insurers, and Cincinnati does not have a duty to pay all of Plaintiffs' defense costs.

Respectfully submitted,



Francis M. Mack

S.C. Bar #3505

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**ATTORNEYS FOR DEFENDANT,
CINCINNATI INSURANCE COMPANY**

Columbia, South Carolina
Dated: December 13, 2011

January 25, 2012

Via Hand Delivery:

The Honorable Steven H. John
Judge, Fifteenth Judicial Circuit
Horry County Courthouse
1301 Second Ave.
Conway, SC 29526

Re: Crossman Communities of North Carolina, Inc. v. Cincinnati Insurance Co., et al
Civil Action No.: 2004-CP-26-0084

Dear Judge John:

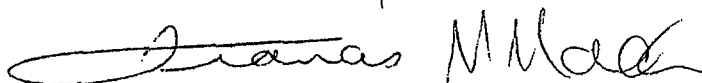
Enclosed please find a draft of a proposed Order on the issues relating to Cincinnati Insurance in the above matter. I have prepared this proposed Order pursuant to your instructions at the hearing in this matter on January 5, 2012.

I will email a copy of this proposed Order to your law clerk in Word format so that any changes or revisions can be made.

Your consideration of this matter is greatly appreciated. If there are any questions, or if we can make any revisions to the Order, please advise.

With kind regards, I am

Sincerely,



FRANCIS M. MACK

FMM/srm

Enclosure

cc: All Counsel of Record (via email only)
Marty McNerney, Esquire (w/ enc.)
David B. Miller, Esquire (w/ enc.)
David L. Brown, Esquire (w/ enc.)
C. Mitchell Brown, Esquire (w/ enc.)
Robert Calamari, Esquire (w/ enc.)

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Crossman Communities of North Carolina,)
Inc., and Beazer Homes Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance Company,)
Cincinnati Insurance Company,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C/A No. 04-CP-26-0084

ORDER

(Cincinnati Insurance)

(Hearing Date - January 5, 2012)

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PROCEDURAL HISTORY

Plaintiffs, Crossmann Communities of North Carolina, Inc. (hereinafter "Crossmann"), Beazer Homes Corp., and Daniel Rogers (hereinafter "Plaintiffs"), filed this action in January 2004 seeking a declaratory judgment, breach of contract damages, and other relief from Defendants Harleysville Mutual Insurance Company (hereinafter "Harleysville"), Massachusetts Bay Insurance Company (hereinafter "Massachusetts Bay"), Regent Insurance Company (hereinafter "Regent"), Indiana Insurance Company (hereinafter "Indiana"), Cincinnati Insurance Company (hereinafter "Cincinnati") (collectively, the "Insurer-Defendants") and Associated Insurors of Myrtle Beach, Inc. (hereinafter "Associated Insurors").

Plaintiffs' Second Amended Complaint sought, among other things, breach of contract damages and entry of a judgment declaring that all Insurer-Defendants' insurance policies provided coverage for defense costs and indemnity costs incurred by or on behalf of Plaintiffs as a result of underlying property damage lawsuits filed against Plaintiffs or their predecessors in South Carolina state court (hereinafter "Underlying Lawsuits").

Defendants Harleysville, Massachusetts Bay, Regent, and Indiana together paid attorneys' fees and other costs incurred to defend Plaintiffs in the South Carolina Underlying Lawsuits. All Defendants, however, initially denied any obligation to indemnify Plaintiffs for any settlements or judgments that may be entered against Plaintiffs in the South Carolina Underlying Lawsuits.

During the course of this case, Plaintiffs reached settlements with Defendants Regent, Indiana, and Massachusetts Bay pursuant to which those insurers made payments to Plaintiffs under their respective insurance policies. As such, those insurers were dismissed from this action pursuant to Partial Stipulation of Dismissal filed June 3, 2005 as to Defendant Regent and Partial Orders of Dismissal and Order Revising Caption filed May 10, 2006 as to Defendants Indiana and Massachusetts Bay.

The three Defendants at trial in January 2007 were Harleysville, Cincinnati, and Associated Insurors. After jury selection, Plaintiffs and Defendant Associated Insurors reached a settlement pursuant to which, among other things, their respective claims against one another were dismissed, without prejudice, pursuant to Consent Order of Dismissal without Prejudice of Defendant Associated Insurors, Inc. of Myrtle Beach filed herein February 9, 2007.

During the first day of trial, Plaintiffs and Defendants Harleysville and Cincinnati entered into a Stipulated Agreement which was entered into the record as Court's Exhibit One (1). The Stipulated Agreement consists of stipulations of certain facts and further identifies specific issues to be resolved by this Court in resolution of this action without submission of the case to the jury. As such, the jury panel was dismissed and all Parties submitted Post-Trial Briefs setting forth their respective positions on the issues specified in Court's Exhibit One (1).

Pursuant to Court's Exhibit one (1), the Parties entered into a Consent Order of Dismissal with Prejudice of Certain Claims against Defendants Harleysville and Cincinnati filed herein March 26, 2007. Pursuant to the Consent Order, Daniel Rogers dismissed his claims against Defendants Harleysville and Cincinnati with Prejudice and all Plaintiffs dismissed their claims against Defendants Harleysville and Cincinnati related to the alleged acts and omissions of Associated Insurors, Inc., of Myrtle Beach, specifically counts 3, 4, 5 and 6, as set forth in Plaintiffs' Second Amended Complaint. The Parties then submitted the case for the Court's determination in accordance with Court's Exhibit One (1).

The Court entered its Final order on May 3, 2007. This Order was appealed to the South Carolina Supreme Court pursuant to the stipulations entered into by the Parties. The Supreme Court issued its decision in Crossmann Communities of North Carolina, Inc., v. Harleysville Mutual Insurance Co., --- SE2d ---, 2011 WL 3667598 (SC Aug. 22, 2011) ("Crossmann II"). The Supreme Court affirmed this Court's earlier judgment in part and vacated it in part. The case was remanded to this Court for an assessment of the two (2) non-settling insurers' liability under the *pro-rata* "time on risk" approach set forth in its opinion.

All Parties submitted briefs on the issues set forth in the Supreme Court decision in its remand to this Court. A hearing on the issues on remand was held before this Court on January 5, 2012.

This Order addresses the issues relating to Cincinnati Insurance Company. A separate Order will be entered as to the issues relating to Harleysville Mutual Insurance Company. The

issues as to the two (2) carriers are distinct since Harleysville is a primary carrier and Cincinnati is an excess carrier. There are also differences in the applicable periods of coverage.

For the reasons set forth below, I find that the Cincinnati excess coverage has not been triggered for the claims that fall within its policy periods.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has jurisdiction over this action and venue is proper in this Court. The Court concludes that, because the Parties argued their various positions with respect to South Carolina law, and for other applicable "choice of law" factors, the substantive law of South Carolina applies to this case.

Cincinnati issued umbrella liability policies (hereinafter "the excess policies") for the period of May 29, 1998 to September 1, 2002 with limits of liability of Ten Million Dollars each occurrence, annual limit and annual aggregate limit.

The Cincinnati excess policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions".

The Cincinnati excess policies define "property damage" as "physical injury to tangible property, including all loss of use thereof".

The South Carolina Underlying Lawsuits were filed against Plaintiffs or their predecessors in South Carolina State Court. These cases were:

- River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al., Case No. 00-CP-26-5193 ("River Oaks I")
- River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932 ("River Oaks II")
- Waterway Village at River Oaks, et al. v. River Oaks Golf Development Corp., et al., Case No. 01-CP-26-535 ("Waterway Village")
- Buck Creek Golf Villas Horizontal Property Regime et al. v. Buck Creek Development Inc., Case No. 02-CP-26-4200 ("Buck Creek")
- Lightkeepers Village Homeowners Ass'n. v. Lightkeepers Village, et al., Case No. 00-CP-26-43 ("Lightkeepers Village")
- Rose et al. v. Lightkeepers Village, et al., Case No. 00-CP-26-5363 ("Rose")

The Plaintiffs in this matter eventually settled all of the South Carolina Underlying Lawsuits by making payments to the homeowner-plaintiffs in those cases in the amounts set forth below:

UNDERLYING LAWSUIT	NET SETTLEMENT AMOUNTS PAID TO HOMEOWNER-PLAINTIFFS
River Oaks I	\$7,425,000
River Oaks II	\$2,826,500
Waterway Village	\$3,925,000
Buck Creek	\$2,194,250
Lightkeepers Village / Rose	\$400,000
TOTAL	\$16,770,750

As set forth in the parties' detailed Post-Trial Statements in this matter, the Parties developed substantial documentary evidence and testimony during discovery regarding the following topics:

- the manner in which the condominium projects at issue in each of the South Carolina Underlying Lawsuits was constructed;
- the nature of the construction defects and property damage complained of by the homeowner-plaintiffs in each of the South Carolina Underlying Lawsuits; and
- the costs to repair each of the condominium projects at issue in the South Carolina Underlying Lawsuits.

The Stipulation entered as Court's Exhibit One (1) provides, in part, as follows:

- (1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies (hereinafter "the Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damages" in the Policies are \$7.2 million. If the trial Court finds that there has been an occurrence or occurrences, then the Court shall find that Plaintiffs' insured loss is \$7.2 million, subject to the Court's rulings on the issues set forth in Paragraphs 8b, 8c, and 8d below:

- (2) The Parties agree that the damage referred to in Paragraph One (1) above began within Thirty (30) days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first.
- (4) The Parties stipulate to the following facts:
 - a. The Insureds under the Harleysville and Cincinnati Policies served as the architect, general contractor and the developer at River Oaks I, River Oaks II, Buck Creek, and Waterway Village.
 - b. The Insureds under the Policies served as the general contractor for Buildings Twenty (20) and Twenty-Eight (28) at Lightkeeper's Village.
 - c. All of the construction work at all of the underlying projects was performed entirely by subcontractors.
- (7) The Parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage cases and the underlying cases which have been produced and exchanged in discovery in this case.
- (13) Cincinnati's applicable policies are excess policies with a "follow form" endorsement applicable to completed operations.

Prior to the scheduled trial in January 2007, Crossmann entered into a Settlement Agreement with three (3) of the primary carriers. The carriers, their policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	\$4 Million
Massachusetts Bay.	Aug. 29, 1998 – Aug. 29, 2000	\$4 Million
Regent	Aug. 29, 2000 – Jan. 1, 2002	\$4 Million

Crossmann settled with these carriers for the following amounts:

Indiana	\$2.7 Million
Massachusetts Bay.	\$2.9 Million
Regent	\$3 Million

Indiana, Massachusetts Bay and Regent are the three (3) underlying carriers for which Cincinnati provided excess coverage.

**THE PARTIES STIPULATED TO \$7.2 MILLION IN POTENTIALLY COVERED
DAMAGES**

The Supreme Court held that:

“negligent or defective construction resulting in damages to otherwise non-defective components may constitute “property damage”, but the defective construction would not. We find the expanded definition of “occurrence” is ambiguous and must be construed in favor of the Insured, and the facts of the instant case trigger the insuring language of Harleysville’s policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulate not to raise the issue, we do not address any policy exclusions and exceptions”. *Crossmann Communities of North Carolina, Inc., v. Harleysville Mutual Insurance Co.*, --- SE2d ---, 2011 WL 3667598 (SC Aug. 22, 2011).

The language in the settling carriers’ policies was similar to the relevant language in the Harleysville policy. Cincinnati’s policy is a “follow form” policy. Accordingly, the potentially covered damages in all of the policies would be similar because the Cincinnati policy follows the form of the settling carriers’ forms.

Crossmann paid a total of Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$16,770,750.00) Dollars to settle the claims in the Underlying Lawsuits. Of this amount, the Parties stipulated that \$7.2 Million resulted from water intrusion and met the definition of “property damages” in the Policies. Stipulation One (1). The balance of the amounts paid, Nine Million, Five Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$9,570,750.00) Dollars, represents the cost to repair “defective construction” as referenced in the Crossmann II Supreme Court decision at Page 24.

Accordingly, Cincinnati’s liability, if any, would be determined utilizing the stipulated amount of \$7.2 Million for the Harleysville and Cincinnati coverage periods.

Harleysville's coverage period is August 8, 1993 to August 29, 1998. Cincinnati's period for excess coverage is May 29, 1998 to September 1, 2002. There were various primary carriers during Cincinnati's period of excess coverage.

**CINCINNATI'S POTENTIAL LIABILITY IS DETERMINED BY THE USE OF THE
"TIME ON RISK" ANALYSIS**

The Supreme Court held that "time on risk" is the appropriate methodology to use when there are multiple carriers with varying policy periods. Crossmann, however, contends that Cincinnati did not join in Harleysville's appeal and that "joint and several" liability as set forth in this Court's May 3, 2007 Order becomes the law of the case as to Cincinnati.

Plaintiffs argued that Cincinnati's liability is joint and several because it did not appeal this Court's May 3, 2007 ruling that a joint and several allocation approach is appropriate. Plaintiffs claim that Cincinnati's joint and several share is \$5,533,872. Their theory is based upon the faulty premise that since Cincinnati did not challenge the Court's ruling regarding the joint and several approach, it is now the law of the case as to Cincinnati.

This argument lacks merit because the law of the case doctrine is not applicable. The Supreme Court has held that a ruling becomes the law of the case "if the **offended** party does not challenge that ruling." *See Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997). (emphasis added). Here, Cincinnati was not offended, aggrieved or otherwise directly affected by the Court's ruling inasmuch as the Court expressly declined to rule whether Cincinnati's policies provided coverage. In its Order of May 3, 2007 this Court stated in relevant part, "because the combined limits of the Harleysville policies covering Plaintiffs exceed the \$7.2 million in stipulated insured losses as found by the Court, the Court need not rule upon whether the excess/umbrella insurance policies covering Plaintiffs and issued by Cincinnati are presently triggered by Plaintiffs' insured losses in the South Carolina Underlying Lawsuits." [May 3, 2007, Order at 16.] Likewise, the Supreme Court's *Crossman II* opinion notes that the Circuit Court did not rule whether Cincinnati's policies provided coverage. *Crossmann*, 2011

WL 3667598 at *18, n.1. The Supreme Court stated, “Because the trial court found Harleysville’s policies were sufficient to indemnify the entire \$7.2 million in stipulated damages, it did not rule on whether Cincinnati’s policies provided coverage ...” *Id.* In sum, there was no adverse ruling as to Cincinnati on the issue of joint and several liability from which to appeal since the Court specifically declined to rule whether Cincinnati’s policies provided coverage at all. Cincinnati was not aggrieved by the Court’s order. Thus, the law of the case doctrine has no application here.

Moreover, in arguing that joint and several liability should be applied, the Plaintiffs are surprisingly asking this Court to apply a legal concept that was explicitly and decisively rejected by our State’s highest court in *Crossman II*. In *Crossman II*, the Supreme Court stated:

In this case, Crossmann argues in favor of a “joint and several” approach to the allocation of damages, while Harleysville advocates a pro rata/“time on the risk” approach. We adopt the pro rata/“time on the risk” approach.

Id. at *34. The Supreme Court also noted that the joint and several approach has been criticized as “inefficient and wasteful of judicial resources.” *Id.* at *35. Further, it concluded that the pro rata approach is more consistent with meeting public policy goals than the joint and several approach. *Id.* at *39. The Supreme Court then remanded and specifically instructed this Court that it was to hold further proceedings consistent with the pro rata/“time on the risk” approach. *Id.* If this Court were to instead now apply a joint and several approach to allocating damages among insurers, as Plaintiffs request, this would be in contravention of the Supreme Court’s directive to this Court and would constitute reversible error.

Crossmann further contends that Cincinnati is jointly and severally liable based upon this Court’s Order dated May 3, 2007, in which judgment was entered on Count II of the Second

Amended Complaint. Crossmann contends that Cincinnati is bound by the judgment entered on County II since it didn't join in Harleysville's appeal.

This argument has no merit. The Order entered judgment on Count II (Declaratory Judgment) and stated "the parties' rights and obligations under the respective policies are as set forth in this Order" (emphasis added). The order specifically stated that the Court did not rule upon whether the Cincinnati policies were triggered.

**THE LIMITS OF THE "UNDERLYING INSURANCE" MAY BE
EXHAUSTED BY PAYMENT OF CLAIMS BY THE CARRIERS OR CROSSMANN
FUNDING THE GAP**

Cincinnati issued excess insurance policies which are not triggered until the policy limits of all underlying and all available coverages have been exhausted. In determining an insurer's duty to provide coverage to a claim, the Parties' intent is to be measured solely by the language of the policies unless the language is ambiguous. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). It is undisputed under South Carolina law that terms in insurance policies that are susceptible to more than one reasonable meaning must be construed by the Court strictly against the insurer and in a manner that favors coverage. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Insurance Co., v. Homestead Ind., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). *Accord South Carolina Farm Bureau Mutual Ins. Co. v. Courtney*, 349 S.C. 366, 563 S.E.2d 648 (220). Accordingly, whether an excess insurer's coverage has been triggered depends on the language of the excess insurance contract. *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (whether an excess insurer's coverage has been triggered depends solely on the terms of the excess insurance contract).

An insurance policy is to be read like any contract, and the words which it contains are to be given their plain and ordinary meaning. The express language of all of the relevant Cincinnati policies plainly state that the coverage is excess to any available insurance and all underlying policies. The Cincinnati policy issued to Plaintiff provides:

A. Insuring Agreement

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages in excess of the “underlying insurance” or for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance” because of:

1. “Bodily injury” or “property damage” covered by this policy occurring during the policy period and caused by an “occurrence”; or
2. “Personal injury” ... covered by this policy committed during the policy period and caused by an “occurrence”

Cincinnati Commercial Umbrella Liability Policy No. CCC 444 58 40, Section I, A.

“Underlying insurance” is defined to mean:

the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the “occurrence.” “Underlying insurance” also includes any type of self-insurance or alternative method by which the insured arranged for funding of legal liabilities that affords coverage that this policy covers.

Id. Section V, 16

Other provisions in Cincinnati’s policies also emphasize the excess nature of the coverage provided. A provision entitled “Other Insurance” states “[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory.” *See* Cincinnati CGL Policy, Section IV, 11.

The policy also includes a Limits of Insurance clause which further explains that the excess coverage provided by Cincinnati is triggered only if the limits of all underlying insurance have been exhausted “by payment of claims”. This clause states that the coverage provided by Cincinnati continues as excess coverage if the limits of underlying insurance are reduced by the payment of claims but not exhausted. The Limits of Insurance clause provides:

a. If the limits of “underlying insurance” have been reduced by payment of claims, this policy will continue in force as excess of the reduced “underlying insurance”; or

b. If the limits of “underlying insurance” have been exhausted by payment of claims, this policy will continue in force as “underlying insurance.”

[Section III, 4(a), (b).]

Under the language of the Cincinnati policies, the “underlying insurance” can be exhausted either by the underlying carriers paying the full limits available or by Crossmann funding the difference between a settlement for less than the full limits and the limits of the relevant policies.

Accordingly, Cincinnati’s policies will be triggered if the amount of damages paid in settlement of the underlying cases, as calculated on the “time on risk” method set forth by the Supreme Court, exceeds the limits of the “underlying insurance” for each policy period.

**CINCINNATI’S POLICY HAS NOT BEEN TRIGGERED FOR
THE VARIOUS PERIODS AT ISSUE**

Cincinnati had coverage for the period May 29, 1998 to September 1, 2002. The underlying insurance, policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	\$4 Million
Massachusetts Bay	Aug. 29, 1998 – Aug. 29, 2000	\$4 Million
Regent	Aug. 29, 2000 – Jan. 1, 2002	\$4 Million

Crossmann has prepared a calculation of Cincinnati’s potential exposure based on the “time on risk” analysis set forth by the Supreme Court. (Exhibit A, attached hereto). Two slightly different methodologies are used; however, the result under both is approximately \$3 Million. The average of the two is Three Million, Thirty-eight Thousand, Three Hundred and no/100 (\$3,038,300.00) Dollars. This represents a reasonable calculation of Cincinnati’s potential exposure based upon its time period of excess coverage.

The Supreme Court provides a default rule for determining damages that occur during a particular period.

“It is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. However, absent such proof, assuming an even progression is a logical default”. *Crossmann II* at Page 41.

The Parties have not presented any evidence that the damage "progressed in some different way". Thus, it is appropriate to allocate the damages during Cincinnati's policy period in equal portions.

Using the method set forth by the Supreme Court and the total potential damages as calculated by Crossmann, the daily allocation of damages is Two Thousand, Seventy-five and 34/100 (\$2,075.34) Dollars. This is arrived at by dividing the total potential damages of Three Million, Thirty-eight Thousand, Three Hundred and no/100 (\$3,038,300.00) Dollars by the number of days of Cincinnati's coverage (1464).

a) Indiana's Policy Period

Cincinnati was excess over Indiana from May 29, 1998 to August 29, 1998 for a total of 92 days. The allocated damage during this period is One Hundred Ninety Thousand, Nine Hundred Thirty-One and 28/100 (\$190,931.28) Dollars. Indiana's limits during this period were \$4 Million. The damage for this period does not exceed Indiana's limits; therefore, Cincinnati's excess policy was not triggered for the period of Indiana's primary coverage.

b) Massachusetts Bay's Policy Period

Cincinnati was excess over Massachusetts Bay from August 29, 1998 to August 29, 2000 for a total of 731 days. The allocated damage during this period is One Million, Five Hundred Seventeen Thousand, Seventy-three and 50/100 (\$1,517,073.50) Dollars. Massachusetts Bay's limits during this period were \$4 Million. The damage for this period does not exceed Massachusetts Bay's limits; therefore, Cincinnati's excess policy was not triggered for the period of Massachusetts Bay's primary coverage.

c) Regent's Policy Period

Cincinnati was excess over Regent from August 29, 2000 to January 1, 2002 for a total of 459 days. The allocated damage during this period is Nine Hundred Fifty-two Thousand, Five Hundred Eighty-one and 06/100 (\$952,581.06) Dollars. Regent's limits during this period were \$4 Million. The damage for this period does not exceed Regent's limits; therefore, Cincinnati's excess policy was not triggered for the period of Regent's primary coverage.

EVEN IF THE FULL AMOUNT OF STIPULATED DAMAGES ARE ALLOCATED TO CINCINNATI'S POLICY PERIOD, CINCINNATI'S POLICY IS NOT TRIGGERED

The Parties in this matter stipulated that the total damages that were potentially covered by the Harleysville's and Cincinnati's policies were \$7.2 Million.

Under the "time on risk" analysis, some of this damage would have occurred either during Harleysville's time period of coverage, which would have been before the Cincinnati policy period or after Cincinnati's excess policy period expired.

But even if one were to allocate the entire \$7.2 million to the Cincinnati policy period, Cincinnati's coverage would not be triggered. Using the \$7.2 Million figure, the daily rate for allocated damages would be Four Thousand, Nine Hundred Eighteen and 03/100 (\$4,918.03) Dollars. The allocated amounts of each primary carrier's would be:

Indiana	92 Days	\$452,458.76
Massachusetts Bay	731 Days	\$3,595,079.90
Regent	459 Days	\$2,257,375.70

The allocated damages of each primary insurer is less than the limits of \$4 Million for each of the underlying policies.

SETTLEMENTS PAID BY THE UNDERLYING INSURERS ARE IRRELEVANT TO CINCINNATI'S LIABILITY

The Parties presented information and various arguments relating to the relevance of the settlement amounts paid by the settling Insurers (Indiana, Massachusetts Bay and Regent).

There are issues raised by Crossmann's internal allocation of these proceeds.

These issues and arguments need not be considered because since the Cincinnati policies define "Underlying Insurance" to include any type of self insurance or alternative methods of funding of Crossmann's liabilities. The relevant comparison, as set forth above, is to compare the damages allocated during the various periods of underlying insurance to the limits of the primary coverage.

IT IS THEREFORE ORDERED, AJUDGED AND DECREED that

For the reasons set forth above and based upon the record herein, the damages allocated to the various policy periods of the underlying primary carriers using the "time on risk" analysis are less than the limits of the underlying insurance. Accordingly, Cincinnati's excess policy has not been triggered for any of these periods.

(Signature Page to Follow)

The Honorable Steven H. John
Presiding Judge, Fifteenth Judicial Circuit

____ day of _____, 2012
Conway, South Carolina

**HARLEYSVILLE AND CINCINNATI
LIABILITY PER BUILDING**

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
ROI	2	1996-01-19	2005-10-24	3566	953 (26.7%)	1464 (41.1%)	\$19,812	\$26,911	\$30,435	\$41,340
ROI	3	1996-01-19	2005-10-24	3566	953 (26.7%)	1464 (41.1%)	\$19,812	\$26,911	\$30,435	\$41,340
ROI	4	1996-01-17	2005-10-24	3568	955 (26.8%)	1464 (41.0%)	\$19,842	\$26,952	\$30,418	\$41,317
ROI	5	1996-01-13	2005-10-24	3572	959 (26.8%)	1464 (41.0%)	\$19,903	\$27,035	\$30,383	\$41,271
ROI	6	1996-01-13	2005-10-24	3572	959 (26.8%)	1464 (41.0%)	\$19,903	\$27,035	\$30,383	\$41,271
ROI	7	1996-01-04	2004-05-07	3046	968 (31.8%)	1464 (48.1%)	\$23,559	\$32,001	\$35,630	\$48,398
ROI	8	1995-12-30	2005-10-24	3586	973 (27.1%)	1464 (40.8%)	\$20,115	\$27,322	\$30,265	\$41,110
ROI	9	1995-12-30	2005-10-24	3586	973 (27.1%)	1464 (40.8%)	\$20,115	\$27,322	\$30,265	\$41,110
ROI	10	1995-11-17	2005-10-24	3629	1016 (28.0%)	1464 (40.3%)	\$20,755	\$28,192	\$29,906	\$40,623
ROI	11	1995-11-17	2005-10-24	3629	1016 (28.0%)	1464 (40.3%)	\$20,755	\$28,192	\$29,906	\$40,623
ROI	12	1995-11-17	2005-10-24	3629	1016 (28.0%)	1464 (40.3%)	\$20,755	\$28,192	\$29,906	\$40,623
ROI	13	1995-11-29	2005-10-24	3617	1004 (27.8%)	1464 (40.5%)	\$20,578	\$27,951	\$30,005	\$40,757
ROI	14	1995-02-23	2005-10-24	3896	1283 (32.9%)	1464 (37.6%)	\$24,413	\$33,161	\$27,857	\$37,839
ROI	15	1994-04-03	2005-10-24	4222	1609 (38.1%)	1464 (34.7%)	\$28,252	\$38,375	\$25,706	\$34,917
ROI	16	1994-05-20	2005-10-24	4175	1562 (37.4%)	1464 (35.1%)	\$27,735	\$37,674	\$25,995	\$35,310
ROI	17	1994-05-29	2005-10-24	4166	1553 (37.3%)	1464 (35.1%)	\$27,635	\$37,538	\$26,051	\$35,386
ROI	18	1994-08-27	2005-10-24	4076	1463 (35.9%)	1464 (35.9%)	\$26,608	\$36,143	\$26,627	\$36,168
ROI	19	1994-11-25	2005-10-24	3986	1373 (34.4%)	1464 (36.7%)	\$25,535	\$34,685	\$27,228	\$36,984
ROI	20	1994-12-01	2005-10-24	3980	1367 (34.3%)	1464 (36.8%)	\$25,462	\$34,586	\$27,269	\$37,040

¹ Estimated dates are in bold.

² Actual dates are in bold.

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
ROI	21	1994-12-23	2005-10-24	3958	1345 (34.0%)	1464 (37.0%)	\$25,192	\$34,218	\$27,420	\$37,246
ROI	22	1995-01-13	2005-10-24	3937	1324 (33.6%)	1464 (37.2%)	\$24,930	\$33,864	\$27,567	\$37,445
ROI	23	1997-03-30	2005-10-24	3130	517 (16.5%)	1464 (46.8%)	\$12,245	\$16,633	\$34,674	\$47,099
ROI	24	1997-03-30	2005-10-24	3130	517 (16.5%)	1464 (46.8%)	\$12,245	\$16,633	\$34,674	\$47,099
ROI	25	1995-01-13	2005-10-24	3937	1324 (33.6%)	1464 (37.2%)	\$24,930	\$33,864	\$27,567	\$37,445
ROI	26	1995-01-26	2005-10-24	3924	1311 (33.4%)	1464 (37.3%)	\$24,767	\$33,642	\$27,658	\$37,569
ROI	27	1995-04-23	2005-10-24	3837	1224 (31.9%)	1464 (38.2%)	\$23,648	\$32,122	\$28,285	\$38,420
ROI	28	1995-04-23	2005-10-24	3837	1224 (31.9%)	1464 (38.2%)	\$23,648	\$32,122	\$28,285	\$38,420
ROI	29	1995-04-27	2005-10-24	3833	1220 (31.8%)	1464 (38.2%)	\$23,595	\$32,050	\$28,315	\$38,461
ROI	30	1995-05-06	2005-10-24	3824	1211 (31.7%)	1464 (38.3%)	\$23,477	\$31,889	\$28,381	\$38,551
ROI	31	1995-05-19	2005-10-24	3811	1198 (31.4%)	1464 (38.4%)	\$23,304	\$31,654	\$28,478	\$38,683
ROI	32	1995-06-03	2005-10-24	3796	1183 (31.2%)	1464 (38.6%)	\$23,103	\$31,381	\$28,591	\$38,835
ROI	33	1995-07-23	2005-10-24	3746	1133 (30.2%)	1464 (39.1%)	\$22,422	\$30,456	\$28,972	\$39,354
ROI	34	1995-06-25	2005-10-24	3774	1161 (30.8%)	1464 (38.8%)	\$22,805	\$30,977	\$28,757	\$39,062
ROI	35	1995-07-14	2005-10-24	3755	1142 (30.4%)	1464 (39.0%)	\$22,546	\$30,625	\$28,903	\$39,260
ROI	36	1995-09-10	2005-10-24	3697	1084 (29.3%)	1464 (39.6%)	\$21,736	\$29,525	\$29,356	\$39,875
ROI	37	1995-09-16	2005-10-24	3691	1078 (29.2%)	1464 (39.7%)	\$21,651	\$29,410	\$29,404	\$39,940
ROI	38	1995-09-24	2005-10-24	3683	1070 (29.1%)	1464 (39.8%)	\$21,537	\$29,255	\$29,468	\$40,027
ROI	39	1996-03-03	2005-10-24	3522	909 (25.8%)	1464 (41.6%)	\$19,133	\$25,989	\$30,815	\$41,857
ROI	40	1996-04-19	2005-10-24	3475	862 (24.8%)	1464 (42.1%)	\$18,389	\$24,978	\$31,232	\$42,423
ROI	41	1996-04-13	2005-10-24	3481	868 (24.9%)	1464 (42.1%)	\$18,485	\$25,109	\$31,178	\$42,350
ROI	42	1998-01-30	2005-10-24	2824	211 (07.5%)	1464 (51.8%)	\$5,539	\$7,524	\$38,431	\$52,202
ROI	43	1998-01-30	2005-10-24	2824	211 (07.5%)	1464 (51.8%)	\$5,539	\$7,524	\$38,431	\$52,202
ROI	44	1998-01-30	2005-10-24	2824	211 (07.5%)	1464 (51.8%)	\$5,539	\$7,524	\$38,431	\$52,202
ROI II	45	1999-07-17	2006-03-14	2432	0 (00.0%)	1142 (47.0%)	\$0	\$0	\$24,774	\$17,415

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
RO II	46	1999-06-06	2006-03-14	2473	0 (00.0%)	1183 (47.8%)	\$0	\$0	\$25,238	\$17,741
RO II	47	1999-01-02	2006-03-14	2628	13 (00.5%)	1338 (50.9%)	\$261	\$183	\$26,862	\$18,882
RO II	48	1998-12-02	2006-03-14	2659	0 (00.0%)	1369 (51.5%)	\$0	\$0	\$27,164	\$19,094
RO II	49	1998-11-25	2006-03-14	2666	0 (00.0%)	1376 (51.6%)	\$0	\$0	\$27,231	\$19,142
RO II	50	1998-11-04	2006-03-14	2687	0 (00.0%)	1397 (52.0%)	\$0	\$0	\$27,430	\$19,282
RO II	51	1998-10-14	2006-03-14	2708	0 (00.0%)	1418 (52.4%)	\$0	\$0	\$27,627	\$19,420
RO II	52	1998-09-24	2006-03-14	2728	0 (00.0%)	1438 (52.7%)	\$0	\$0	\$27,811	\$19,550
RO II	53	1998-08-16	2006-03-14	2767	0 (00.0%)	1464 (52.9%)	\$0	\$0	\$27,915	\$19,622
RO II	54	1998-08-01	2006-03-14	2782	0 (00.0%)	1464 (52.6%)	\$0	\$0	\$27,764	\$19,517
RO II	55	1998-07-25	2006-03-14	2789	0 (00.0%)	1464 (52.5%)	\$0	\$0	\$27,695	\$19,468
RO II	56	1998-07-19	2006-03-14	2795	0 (00.0%)	1464 (52.4%)	\$0	\$0	\$27,635	\$19,426
RO II	57	1998-12-20	2006-03-14	2641	0 (00.0%)	1351 (51.2%)	\$0	\$0	\$26,989	\$18,972
RO II	58	1998-12-20	2006-03-14	2641	0 (00.0%)	1351 (51.2%)	\$0	\$0	\$26,989	\$18,972
RO II	59	1998-12-30	2006-03-14	2631	0 (00.0%)	1341 (51.0%)	\$0	\$0	\$26,891	\$18,903
RO II	60	1999-01-10	2006-03-14	2620	28 (01.1%)	1330 (50.8%)	\$564	\$396	\$26,783	\$18,827
RO II	61	1999-01-21	2006-03-14	2609	35 (01.3%)	1319 (50.6%)	\$708	\$498	\$26,673	\$18,750
RO II	62	1999-03-03	2006-03-14	2568	41 (01.6%)	1278 (49.8%)	\$842	\$592	\$26,257	\$18,457
RO II	63	1999-07-02	2006-03-14	2447	0 (00.0%)	1157 (47.3%)	\$0	\$0	\$24,946	\$17,536
RO II	64	1999-07-11	2006-03-14	2438	0 (00.0%)	1148 (47.1%)	\$0	\$0	\$24,843	\$17,463
RO II	65	1999-10-08	2006-03-14	2349	0 (00.0%)	1059 (45.1%)	\$0	\$0	\$23,786	\$16,720
RO II	66	1999-10-30	2006-03-14	2327	0 (00.0%)	1037 (44.6%)	\$0	\$0	\$23,512	\$16,527
RO II	67	2000-01-28	2006-03-14	2237	0 (00.0%)	947 (42.3%)	\$0	\$0	\$22,335	\$15,700
WV	1	1996-08-08	2006-07-05	3618	751 (20.8%)	1464 (40.5%)	\$11,283	\$4,664	\$21,995	\$9,092
WV	2	1996-08-08	2006-07-05	3618	751 (20.8%)	1464 (40.5%)	\$11,283	\$4,664	\$21,995	\$9,092
WV	3	1996-08-08	2003-04-01	2427	751 (30.9%)	1464 (60.3%)	\$16,820	\$6,953	\$32,789	\$13,554

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
WV	4	1996-10-20	2006-07-05	3545	678 (19.1%)	1464 (41.3%)	\$10,396	\$4,297	\$22,448	\$9,279
WV	5	1996-10-27	2006-07-05	3538	671 (19.0%)	1464 (41.4%)	\$10,309	\$4,261	\$22,493	\$9,297
WV	6	1996-11-13	2006-07-05	3521	654 (18.6%)	1464 (41.6%)	\$10,096	\$4,173	\$22,601	\$9,342
WV	7	1996-12-01	2006-07-05	3503	636 (18.2%)	1464 (41.8%)	\$9,869	\$4,079	\$22,717	\$9,390
WV	8	1996-12-08	2006-07-05	3496	629 (18.0%)	1464 (41.9%)	\$9,780	\$4,043	\$22,763	\$9,409
WV	9	1997-01-04	2006-07-05	3469	602 (17.4%)	1464 (42.2%)	\$9,433	\$3,899	\$22,940	\$9,482
WV	10	1996-12-26	2006-07-05	3478	611 (17.6%)	1464 (42.1%)	\$9,549	\$3,947	\$22,881	\$9,458
WV	11	1997-02-16	2006-07-05	3426	559 (16.3%)	1464 (42.7%)	\$8,869	\$3,666	\$23,228	\$9,601
WV	12	1997-04-25	2006-07-05	3358	491 (14.6%)	1464 (43.6%)	\$7,948	\$3,285	\$23,698	\$9,796
WV	13	1997-08-15	2006-07-05	3246	379 (11.7%)	1464 (45.1%)	\$6,347	\$2,623	\$24,516	\$10,134
WV	14	1997-09-20	2003-04-01	2019	343 (17.0%)	1464 (72.5%)	\$9,235	\$3,817	\$39,415	\$16,292
WV	15	1997-09-14	2006-07-05	3216	349 (10.9%)	1464 (45.5%)	\$5,899	\$2,438	\$24,745	\$10,228
WV	16	1997-05-23	2003-04-01	2139	463 (21.6%)	1464 (68.4%)	\$11,766	\$4,864	\$37,204	\$15,378
WV	17	1997-02-27	2006-07-05	3415	548 (16.0%)	1464 (42.9%)	\$8,723	\$3,606	\$23,303	\$9,632
WV	18	1997-01-04	2006-07-05	3469	602 (17.4%)	1464 (42.2%)	\$9,433	\$3,899	\$22,940	\$9,482
WV	19	1997-01-19	2006-07-05	3454	587 (17.0%)	1464 (42.4%)	\$9,238	\$3,819	\$23,040	\$9,524
WV	20	1997-02-05	2006-07-05	3437	570 (16.6%)	1464 (42.6%)	\$9,015	\$3,726	\$23,154	\$9,571
WV	21	1996-12-08	2006-07-05	3496	629 (18.0%)	1464 (41.9%)	\$9,780	\$4,043	\$22,763	\$9,409
WV	22	1996-11-21	2006-07-05	3513	646 (18.4%)	1464 (41.7%)	\$9,996	\$4,132	\$22,653	\$9,364
WV	23	1996-10-16	2006-07-05	3549	682 (19.2%)	1464 (41.3%)	\$10,446	\$4,318	\$22,423	\$9,269
WV	24	1996-09-27	2006-07-05	3568	701 (19.6%)	1464 (41.0%)	\$10,680	\$4,414	\$22,304	\$9,219
WV	25	1996-09-21	2006-07-05	3574	707 (19.8%)	1464 (41.0%)	\$10,753	\$4,445	\$22,266	\$9,204
WV	26	1996-09-08	2006-07-05	3587	720 (20.1%)	1464 (40.8%)	\$10,911	\$4,510	\$22,185	\$9,170
WV	27	1996-08-24	2006-07-05	3602	735 (20.4%)	1464 (40.6%)	\$11,092	\$4,585	\$22,093	\$9,132
WV	28	1998-01-22	2006-07-05	3086	219 (07.1%)	1464 (47.4%)	\$3,858	\$1,595	\$25,787	\$10,659

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
WV	29	1997-11-08	2006-07-05	3161	294 (09.3%)	1464 (46.3%)	\$5,056	\$2,090	\$25,175	\$10,406
WV	30	1997-11-20	2006-07-05	3149	282 (09.0%)	1464 (46.5%)	\$4,868	\$2,012	\$25,271	\$10,446
WV	31	1997-12-05	2006-07-05	3134	267 (08.5%)	1464 (46.7%)	\$4,631	\$1,914	\$25,392	\$10,496
BC	1	1994-06-19	2006-07-05	4399	1532 (34.8%)	1464 (33.3%)	\$14,264	\$16,899	\$13,631	\$16,149
BC	2	1994-04-13	2006-07-05	4466	1599 (35.8%)	1464 (32.8%)	\$14,665	\$17,374	\$13,426	\$15,907
BC	3	1994-01-28	2006-07-05	4541	1674 (36.9%)	1464 (32.2%)	\$15,099	\$17,888	\$13,205	\$15,644
BC	4	1994-11-16	2006-07-05	4249	1382 (32.5%)	1464 (34.5%)	\$13,322	\$15,783	\$14,112	\$16,719
BC	5	1995-03-25	2006-07-05	4120	1253 (30.4%)	1464 (35.5%)	\$12,456	\$14,758	\$14,554	\$17,243
BC	6	1995-12-02	2006-07-05	3868	1001 (25.9%)	1464 (37.8%)	\$10,600	\$12,558	\$15,502	\$18,366
BC	7	1996-08-25	2006-07-05	3601	734 (20.4%)	1464 (40.7%)	\$8,349	\$9,891	\$16,652	\$19,728
BC	8	1996-10-13	2006-07-05	3552	685 (19.3%)	1464 (41.2%)	\$7,899	\$9,358	\$16,881	\$20,000
BC	9	1998-01-14	2006-07-05	3094	227 (07.3%)	1464 (47.3%)	\$3,005	\$3,560	\$19,380	\$22,961
BC	11	1998-05-06	2006-07-05	2982	115 (03.9%)	1464 (49.1%)	\$1,580	\$1,871	\$20,108	\$23,823
BC	12	1997-10-03	2006-07-05	3197	330 (10.3%)	1464 (45.8%)	\$4,228	\$5,009	\$18,756	\$22,221
BC	13	1996-07-04	2006-07-05	3653	786 (21.5%)	1464 (40.1%)	\$8,813	\$10,441	\$16,415	\$19,447
BC	14	1995-04-06	2006-07-05	4108	1241 (30.2%)	1464 (35.6%)	\$12,373	\$14,659	\$14,597	\$17,293
BC	15	1995-07-22	2006-07-05	4001	1134 (28.3%)	1464 (36.6%)	\$11,609	\$13,753	\$14,987	\$17,756
BC	16	1995-12-22	2006-07-05	3848	981 (25.5%)	1464 (38.0%)	\$10,442	\$12,371	\$15,583	\$18,462
BC	17	1996-01-27	2006-07-05	3812	945 (24.8%)	1464 (38.4%)	\$10,154	\$12,029	\$15,730	\$18,636
BC	18	1996-03-03	2006-07-05	3776	909 (24.1%)	1464 (38.8%)	\$9,860	\$11,682	\$15,880	\$18,814
BC	19	1996-11-22	2006-07-05	3512	645 (18.4%)	1464 (41.7%)	\$7,522	\$8,912	\$17,074	\$20,228
BC	20	1996-10-30	2006-07-05	3535	668 (18.9%)	1464 (41.4%)	\$7,740	\$9,170	\$16,963	\$20,096
BC	21	1997-01-12	2006-07-05	3461	594 (17.2%)	1464 (42.3%)	\$7,029	\$8,328	\$17,325	\$20,526
BC	22	1997-02-21	2006-07-05	3421	554 (16.2%)	1464 (42.8%)	\$6,633	\$7,858	\$17,528	\$20,766
BC	23	1997-04-11	2006-07-05	3372	505 (15.0%)	1464 (43.4%)	\$6,134	\$7,267	\$17,782	\$21,068

Project	Unit	Start Date ¹	End Date ²	Days	H'ville Days (% of risk)	Cincy Days (% of risk)	H'Ville Liability (H'Ville Method)	H'Ville Liability (Beazer Method)	Cincy Liability (H'Ville Method)	Cincy Liability (Beazer Method)
BC	24	1997-09-06	2006-07-05	3224	357 (11.1%)	1464 (45.4%)	\$4,535	\$5,373	\$18,599	\$22,035
LK	20	1993-08-08	2006-11-21	4853	1847 (38.1%)	1464 (30.2%)	\$32,679	\$38,904	\$25,902	\$30,837
LK	28	1994-05-28	2006-11-21	4560	1554 (34.1%)	1464 (32.1%)	\$29,261	\$34,836	\$27,567	\$32,818
TOTAL							\$1,461,930	\$1,666,128	\$3,080,406	\$2,996,193

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF HORRY)

FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2004-CP-26-84

Crossmann Communities of North)
Carolina, Inc., Beazer Homes)
Investment Corp., and)
Daniel Rogers,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance)
Company, Cincinnati Insurance)
Company, and Associated Insurors,)
Inc., of Myrtle Beach,)

Defendants.)

**BRIEF OF PLAINTIFFS CROSSMANN COMMUNITIES OF NORTH CAROLINA,
INC., BEAZER HOMES INVESTMENT CORP., AND DANIEL ROGERS
REGARDING CINCINNATI'S JOINT AND SEVERAL LIABILITY AND THE
EXHAUSTION OF THE UNDERLYING INSURANCE**

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Exhibit J	March 2006 Affidavit of W. Mark Berry
Exhibit K	Plaintiffs' Third Supp. Responses
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Exhibit N	Plaintiffs' Pre-Trial Witness List
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Exhibit Q	Cincinnati Reply Br. on Remand (Dec. 14, 2011)

INTRODUCTION

In their November 2, 2011 initial Brief on Remand, Plaintiffs (collectively “Beazer”) showed that Defendant Cincinnati Insurance Company (“Cincinnati”) was bound by the Court’s May 3, 2007 Final Judgment holding that (a) the Underlying Lawsuits arose from an “occurrence” under the Cincinnati (and Harleysville) policies and (b) the triggered Cincinnati policies are jointly and severally liable for those damages not assessed by the Court against Harleysville. (May 3, 2007 Order at 10-14, 15, 18, attached as Ex. A.) Cincinnati never appealed from the Court’s May 2007 Order, and that Final Judgment is thus law of the case as to Cincinnati.

Cincinnati argues that the Court’s 2007 Final Judgment on Count II of Plaintiffs’ Second Amended Complaint, entered against Cincinnati and from which Cincinnati never appealed, is not binding. Cincinnati does not deny that the Court issued a declaratory judgment against it providing that the property damage in the Underlying Lawsuits was caused by an “occurrence” and that a joint-and-several allocation methodology should apply. But Cincinnati argues that this judgment was not adverse to Cincinnati, and thus Cincinnati had no obligation to appeal. Cincinnati’s argument is contrary to well-settled South Carolina law. The Court’s 2007 Final Judgment on the “occurrence” issue was plainly adverse to Cincinnati. And, among other things, the Court’s Judgment states that “judgment is entered on Count II” — the declaratory judgment count encompassing both the “occurrence” and allocation rulings — “in favor of Plaintiffs and against Defendants.” (*Id.* at 18.)

Throughout the pre-trial proceedings in this case, Beazer consistently and repeatedly requested a declaration from the Court of joint and several allocation under Count II of the Second Amended Complaint. On March 30, 2006, Beazer filed with the Court a motion for partial summary judgment on Count II, that stated: “Plaintiffs seek a declaration that each

Harleysville and Cincinnati policy triggered by an Underlying Lawsuit is obligated, jointly and severally, to pay all losses . . . arising from the Underlying Lawsuits.” (See Plaintiffs’ Memo. Regarding the Insurers’ Joint and Several Obligation to Pay Defense and Indemnity Costs (Mar. 30, 2006) (“Plaintiffs’ Allocation Br.”) at 6, attached as Ex. B; *see also id.* at 1: “Plaintiffs in this motion seek entry of an Order declaring that . . . each insurer has a joint and several obligation to defend and indemnify . . .”). Then, on October 9, 2006, in its Pre-Trial Brief, Beazer identified “allocation of covered losses among insurers” as a legal issue to be addressed, and once again stated that “[e]ach insurer whose policy is triggered by an underlying claim has a joint and several obligation to pay all of the policyholders’ defense and indemnity costs for the claim, up to the limits of the policy.” (Plaintiffs’ Pre-Trial Br. (Oct. 9, 2006) at 20, attached as Ex. C.)

Before trial, Beazer and Cincinnati agreed in the January 29, 2007 Stipulation that, “in the event the Court finds that there was an occurrence or occurrences,” the Court was to determine how the stipulated \$7.2 million in insured damages was to be allocated, “whether by ‘joint and several’ or by ‘time on the risk.’” (Stipulation (Jan. 29, 2007) at ¶ 8.b, attached as Ex. D.) After the Stipulation was entered but before the Court issued its judgment, Cincinnati argued to the Court that if the Court found that the property damage arose from an “occurrence,” then all triggered policies should be jointly and severally liable for all covered losses. (Cincinnati’s Memo. of Authority on Stipulated Issues (Feb. 13, 2007) (“Cincinnati Issues Br.”), attached as Ex. I) When this Court entered the May 3, 2007 Final Judgment, there could not have been any doubt that its judgment on Count II in favor of Plaintiffs and against Cincinnati meant that the Court found Cincinnati to be jointly and severally liable if one of Cincinnati’s policies was triggered. Cincinnati elected not to appeal that Order. However, Harleysville appealed that Order and the result is that Harleysville’s liability has been altered to damages associated with its

time on the risk for the stipulated damage period. Because Cincinnati did not appeal, this Court's May 3, 2007 Final Judgment remains fully intact. Thus, on remand, Beazer seeks nothing more than enforcement of the Court's Final Judgment that embodies Cincinnati's position on allocation and from which Cincinnati never appealed.

Cincinnati's second argument -- that it owes Beazer no coverage at all because the underlying primary insurance policies have not been exhausted -- is also without merit. The undisputed record evidence shows that all the policies underlying Cincinnati's coverage are exhausted. Beazer outlined the undisputed evidence on exhaustion in its Pre-Trial Statement filed with the Court in December 2006, and was prepared to prove exhaustion to the Court and the jury before the Parties entered into the Stipulation. (Plaintiffs' Pre-Trial Br., Ex. C.) In its November 2, 2011 Brief on Remand, Beazer showed in great detail how each of the underlying policies was exhausted by the underlying insurers' settlements, and that any gaps, or modest "settlement discounts," were filled by Beazer's substantial uninsured losses in South Carolina, Indiana, and Kentucky -- all of which are also covered under the Cincinnati excess policies at issue. (Plaintiffs' Brief Regarding Damages Issues to be Addressed on Remand (Nov. 2, 2011) ("Plaintiffs' Remand Br."), attached as Ex. E.) Cincinnati does not dispute any of the evidence Beazer relied upon and set forth in Beazer's 2006 Pre-Trial Statement or in the November 2, 2011 Initial Remand Brief. Indeed, the undisputed evidence in the record at the time of this Court's Final Judgment in May 2007 was itself more than sufficient to establish exhaustion. Cincinnati also raises no response whatsoever to any of Beazer's arguments supporting exhaustion. Instead, Cincinnati has made the indefensible argument that because the underlying policies in the case at bar were exhausted by a combination of payments made by the insurers, as well as Beazer itself, that coverage under Cincinnati's policies has somehow not been triggered.

This language is inconsistent with the plain language of the Cincinnati policies and therefore Cincinnati's position should be rejected. The underlying insurance policies have been exhausted and, as a result, Cincinnati is liable to Beazer.

BACKGROUND

On January 8, 2004, Beazer sued Harleysville, Cincinnati, and other insurance companies that had sold commercial general liability ("CGL") insurance policies covering claims against Beazer arising from five real estate development projects in South Carolina. It is undisputed that the Harleysville policies covered only Beazer's losses in South Carolina, whereas the policies sold by Cincinnati and all the other insurer-defendants in this case (except for Indiana Insurance Company) covered Beazer for losses in South Carolina as well as in other states, most notably in Indiana and Kentucky. In Count II of its Second Amended Complaint, Beazer sought a declaratory judgment that its underlying losses "are covered under each of the [insurance] Policies," that "no exclusion in any of the Policies bars coverage," and that each insurer "has an immediate duty to defend and indemnify" Beazer in the underlying lawsuits. (Plaintiffs' Second Amended Complaint at 23, attached as Ex. F.) Beazer subsequently settled with the insurer-defendants other than Harleysville and Cincinnati.

Beazer and the two non-settling insurers, Harleysville and Cincinnati with the Court's assistance, later stipulated that if there was an "occurrence" under the Policies, the amount of covered damages that met the definition of "property damage" in the Harleysville and Cincinnati Policies to be divided amongst Harleysville and Cincinnati was \$7.2 million. (Court's Ex. 1). In opposing Beazer's claims in this Court, both Harleysville and Cincinnati argued that they had no coverage obligation at all because there had been no "occurrence," as required by their policies. (Harleysville's Mem. in Supp. of Mot. for Summ. Judgment (March 30, 2006) ("Harleysville SJ Br.") at 9-19, attached as Ex. G; Cincinnati's Memo. in Opposition to Plaintiffs' Mot. for Partial

Summ. Judgment Regarding the Insurers' Joint and Several Obligation to Pay Defense and Indemnity Costs (April 10, 2006) ("Cincinnati Allocation Br.") at 7-12, attached as Ex. H.) Harleysville also argued that, if there had been an "occurrence," its liability should be based on a "time on the risk" allocation methodology. (Harleysville SJ Br. 27-29, Ex. G.) Cincinnati, by contrast, expressly agreed with Beazer that "[e]ach insurer whose policy is triggered . . . has a joint and several obligation to pay all of the policyholders' defense and indemnity costs" (Cincinnati's Memo. of Authority on Stipulated Issues (Feb. 13, 2007) ("Cincinnati Issues Br.") at 9, attached as Ex. I.)

Cincinnati, as an excess insurer, also argued that it had no liability to Beazer because the insurance policies sitting beneath Cincinnati's policies were not exhausted. Unlike the Harleysville policies, the Cincinnati policies covered Beazer for losses in Indiana, Kentucky, and South Carolina. Beazer was prepared to address the defense of no exhaustion at the trial scheduled for January 2007. In its Pre-Trial Brief, Beazer discussed the applicable insurance policies (Plaintiffs' Pre-Trial Br. at 6-9, Ex. C) and the Underlying Lawsuits (*id* at 10-15) in detail. The Exhibit List attached to Plaintiffs' Pre-Trial Brief contained documents that detailed the settlements that extinguished the obligations of the underlying insurance companies (Indiana Insurance Company, Massachusetts Bay Insurance Company, and Regent) to Beazer including: (1) Mark Berry's Affidavit, listed as Plaintiffs' Trial Exhibit 121 (Berry Aff., attached as Ex. J); (2) Plaintiffs' Third Supplemental Responses to Harleysville Mutual Insurance Company, Cincinnati Insurance Company, and Associated Insurers' Interrogatories, listed as Plaintiffs' Trial Exhibit 137 (Plaintiffs' Third Supp. Responses, attached as Ex. K); and (3) the Regent Settlement Agreement and Mutual Release, listed as Plaintiffs' Trial Exhibit 144 (Regent Settlement, attached as Ex. L). (Plaintiffs' Pre-Trial Exhibit List, attached as Ex. M.) In

addition, Plaintiffs' Third Supplemental Interrogatory Responses, set forth the evidence that, as of July 24, 2006, Beazer had paid more than \$38,000,000 in uninsured losses for property damage claims in the State of Indiana, and \$6,000,000 for property damage claims in the State of Kentucky. (Plaintiffs' Third Supp. Responses at 3–4, Ex. K.) To the extent any additional detail of exhaustion was necessary, Beazer listed Mark Berry as a witness on Plaintiffs' Trial Witness List and was prepared to call him to testify at trial. (Plaintiffs' 2006 Pre-Trial Witness List, attached as Ex. N.)

On May 3, 2007, this Court entered its Final Judgment, ruling “in favor of [Beazer]” and “against Defendants Harleysville and Cincinnati.” (May 3, 2007 Order at 18, Ex. A.) This declarative portion of the Court's Final Judgment binds the litigants as a Final Judgment, and a party can only escape the binding effect of such a Final Judgment if it pursues a timely appeal of the judgment. Specifically, this Court entered a judgment declaring that, contrary to Cincinnati's position, the property damage in the Underlying Lawsuits was caused by an “occurrence.” This Court also ruled that the Harleysville and Cincinnati policies, once triggered, were jointly and severally liable for Beazer's entire \$7.2 million loss, up to the limits of their insurance policies. (*Id.* at 15.) Accordingly, the Court entered a money judgment against Harleysville in the stipulated damages amount of \$7.2 million. Because Harleysville's primary policies were liable for all of Beazer's stipulated losses, the Court did not award money damages against Cincinnati, and therefore did not need to address the issue of whether the insurance policies sitting beneath the Cincinnati policies were exhausted.

Harleysville filed a timely appeal of the Court's May 2007 Judgment, challenging the Court's rulings on the meaning of “occurrence” and adoption of the joint and several allocation methodology. Although the Court had entered a declaratory judgment “against Defendan[t] . . .

Cincinnati” on the “occurrence” issue, Cincinnati did not appeal. Cincinnati also did not appeal the ruling on joint-and-several allocation methodology, which Cincinnati had asked this Court to adopt and which was favorable to Cincinnati at the time.

On appeal, the South Carolina Supreme Court ruled that the Court correctly determined that the property damage in the underlying lawsuits was caused by an “occurrence.” *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011). On the allocation issue, however, the Court overruled its prior controlling case law and held that Harleysville’s liability for Beazer’s losses should be calculated based on its “time on the risk.” *Id.* at 50. The Supreme Court remanded for this Court to calculate Harleysville’s damages -- and only Harleysville’s damages -- based on this new allocation methodology. *Id.* at 63–64.

On remand, Beazer, Harleysville, and Cincinnati submitted briefs to the Court on November 2, 2011. In its brief, Beazer argued that once a Cincinnati policy was triggered, Cincinnati was jointly and severally liable for all losses not assessed against Harleysville because Cincinnati did not appeal the Court’s May 2007 Final Judgment, thus making that judgment the law of the case that was binding on Cincinnati. (Plaintiffs’ Remand Br. (Nov. 2, 2011) at 19–20, Ex. E.) By contrast, Cincinnati did not take any position on this issue or attempt to change its longstanding position, first advanced in its February 2007 Brief to this Court (Exhibit I hereto), that its liability should be joint and several once its coverage obligation was triggered. (*See* Cincinnati’s Brief on Issues to be Considered on Remand (Nov. 2, 2011) (Cincinnati’s Remand Br.”), attached as Ex. O.) Indeed, Cincinnati did not even address this issue in its Reply Brief on Issues to be Considered on Remand, which it filed on December 14, 2011, more than a month after Beazer filed its Remand Brief. (*See* Cincinnati Reply Br. on Remand, Ex. Q.) Cincinnati

first contested application of the joint and several allocation ruling in its most recent remand brief.

ARGUMENT

I. CINCINNATI IS JOINTLY AND SEVERALLY LIABLE FOR BEAZER'S LOSSES NOT ASSESSED AGAINST HARLEYSVILLE

It is law of the case that Cincinnati is jointly and severally liable for the portion of Beazer's \$7.2 million loss for which Harleysville is not liable, which as shown in Beazer's November 2, 2011 brief is \$5,533,872. (Plaintiffs' Remand Br. at 19-20, Ex. E.) At the outset, Cincinnati does not dispute that this Court's May 3, 2007 Final Judgment provided that any Cincinnati policy triggered by Beazer's losses was jointly and severally liable up to the limits of the Cincinnati policies. Throughout the pre-trial briefing to the Court leading up to the May 2007 Final Order and Judgment, Beazer linked its request for a declaration of joint and several liability to Count II of the Second Amended Complaint, the Count where Beazer asked the Court for a declaration of the Parties' rights and obligations under the insurance policies. For example, on March 30, 2006, Beazer filed a motion for partial summary judgment on Count II, stating point-blank: "Plaintiffs seek a declaration that each Harleysville and Cincinnati policy triggered by an Underlying Lawsuit is obligated, jointly and severally, to pay all losses . . . arising from the Underlying Lawsuits." (*See* Plaintiffs' Allocation Br. at 6, Ex. B; *see also id.* at 1) ("Plaintiffs in this motion seek entry of an Order declaring that . . . each insurer has a joint and several obligation to defend and indemnify . . .").

After the Parties entered into the Stipulation that is Court's Exhibit 1 (Stipulation, Ex. D), the Court asked for briefs on the legal issues raised in the Stipulation that were to be resolved by the Court. One of those issues was allocation, and Cincinnati argued in its brief to the Court that allocation should be based on a joint-and-several methodology. Cincinnati thus agreed with

Beazer, and opposed Harleysville, on this point. In its May 2007 Final Judgment, the Court agreed with Cincinnati and Beazer, and entered the declaratory judgment “in favor of [Beazer]” and “against Defendants Harleysville and Cincinnati” and stating that Beazer’s losses “are to be allocated in accordance with the joint and several methodology.” (May 3, 2007 Order at 15, 18, Ex. A.)

The Court’s May 3, 2007 Final Judgment is law of the case against Cincinnati. Quite simply, “an unchallenged ruling, right or wrong, is the law of th[e] case. . . .” *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174-75, 525 S.E.2d 869, 871 (2000) (quotation marks omitted); *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (same).¹

Cincinnati primarily argues that it can escape from its decision not to seek an appeal because it was not “offended” or “aggrieved” by this Court’s Final Judgment and Order and thus had no obligation to appeal. (Cincinnati Proposed Order, at 8, attached as Ex. P.) Cincinnati is wrong. A party is “aggrieved” and must appeal a judgment unless it is content to be bound by it when that judgment “operates on his or her rights of property or bears directly on his or her interest.” SCACR 201(b); *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (S.C. App. 2002). The word “aggrieved” includes “a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Beaufort Realty Co.*, 346 S.C. at 301. A declaratory judgment may be adverse to a party

¹ Cincinnati does not deny that the Court’s 2007 Final Judgment was “unchallenged” by it. The law-of-the-case doctrine applies with full force to a non-appealing party where, as here, another party appealed and was partially successful on appeal. For example, in *Glenn v. Worthy*, 169 S.C. 263, 168 S.E. 705 (1933), the trial court entered judgment against each of the six defendants (who were minors) and assessed damages of \$25 each. Five of the defendants appealed, and on appeal the damages award was reduced from \$25 each to \$20.83 each. *Id.* at 720. But one defendant “did not appeal,” and she was “therefore bound” under the law of the case doctrine to pay the original judgment amount of \$25. *Id.*

notwithstanding that there is no accompanying award of damages. *E.g., Lowcountry Open Land Trust v. State*, 347 S.C. 96, 99, 552 S.E.2d 778 (2001).

Cincinnati focuses on the fact that the Court did not decide whether Beazer exhausted its primary insurance and thus whether Cincinnati's excess coverage obligation had been triggered. (Cincinnati Proposed Order at 8–9, Ex. P.) But exhaustion was only one issue before the Court, and the declaratory judgment that the Court entered on the meaning of “occurrence” plainly aggrieved Cincinnati. Cincinnati fought long and hard to convince the Court that there had been no “occurrence” and, as a result, that none of its policies had been triggered. The Court instead decided that there had been an “occurrence,” thereby satisfying the key predicate to coverage under Cincinnati's policies. (May 3, 2007 Order at 10–14, Ex. A.) The Court thus entered a judgment declaring that \$7.2 million in property damage, as that term is defined in the Cincinnati policies, had been caused by an “occurrence.” (*Id.* at 14.) And this Court's May 3, 2007 Order states that it is a ruling “in favor of” Beazer and “against” Cincinnati. (*Id.* at 18.) Given Cincinnati's arguments in this remand proceeding, Cincinnati was similarly aggrieved by the entry of judgment in Beazer's favor on the joint and several allocation methodology.

Cincinnati argues that Beazer is “asking this Court to apply a legal concept that was explicitly and decisively rejected” by the South Carolina Supreme Court. (Cincinnati Proposed Order at 9, Ex. P.) But the whole point of the law-of-the-case doctrine is that once an issue is fully and finally decided as between two litigants, that decision binds the parties, and prevents a party who fails to appeal from taking advantage of subsequent developments in the law. *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174–75, 525 S.E.2d 869, 871 (2000); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010). Under this doctrine, the only way Cincinnati would be entitled to take advantage of a

possible favorable ruling from the South Carolina Supreme Court *was if it had joined the appeal to that Court.* A party to a final judgment is not entitled to a free ride on another party's appellate efforts. Cincinnati did not appeal here. Cincinnati is therefore bound by this Court's original Final Judgment and Order.

Applying the law of the case doctrine on the facts of this case is also unusually fair. Although the Court's May 2007 Final Judgment on the "occurrence" issue was adverse to Cincinnati, the ruling on joint-and-several allocation was initially what Cincinnati had asked for. Indeed, Cincinnati argued that "[e]ach insurer whose policy is triggered by an underlying claim has a joint and several obligation to pay all of the policyholders' defense and indemnity costs for that claim, up to the limits of the policy." (Cincinnati Issues Br. at 9, Ex. I.) Under that allocation rule, Harleysville was obligated to pay \$7.2 million and thus there was no remaining amount of this stipulated damage for Cincinnati to cover and its liability was zero. But Harleysville appealed to the Supreme Court, arguing that the correct rule was based on "time on the risk." And there was no doubt that, if Harleysville prevailed in its appeal on any issue, a remand proceeding before this Court was possible, and that Cincinnati could face substantial liability on remand. Cincinnati, however, made a conscious decision not to appeal, thereby accepting that the May 2007 Final Judgment would be binding on them in any remand.

Furthermore, in its first two briefs filed with the Court on remand, Cincinnati did not challenge Beazer's contention that Cincinnati was bound by the Court's prior ruling on joint and several liability. Instead, Cincinnati in its first two briefs on remand rested its arguments entirely on exhaustion. (Cincinnati November 2, 2011 Remand Br. at 9; Cincinnati's Reply Brief on Issues to be Considered on Remand (Dec. 14, 2011) ("Cincinnati Reply Br. on Remand") at 10-14, attached as Ex. Q.) In light of these circumstances, there is no cause for this Court to

entertain Cincinnati's marked shift from its longstanding position that allocation of covered loss between Harleysville and Cincinnati should be based on a joint and several methodology, as set forth in the Court's May 2007 Final Judgment and Order. Accordingly, the Court should enter judgment for Beazer and against Cincinnati in the amount of \$5,533,872.00 (the Parties' stipulated damage amount of \$7.2 million, less Harleysville's liability as determined by a time-on-risk allocation).

II. IF THE COURT CALCULATES CINCINNATI'S LIABILITY BASED ON ITS TIME ON THE RISK, CINCINNATI'S LIABILITY TO BEAZER IS \$3,038,300

Cincinnati does not dispute that, if this Court finds that its coverage obligation has been triggered, its liability under the joint-and-several methodology should be the difference between the stipulated covered damages amount of \$7.2 million less the amount of covered property damage assessed against Harleysville, which Beazer has calculated to be \$5,533,872. (Plaintiffs' Remand Br. (Nov. 2, 2011) at 14, Ex. O.) Cincinnati argues, however, that if its policies are triggered and if its liability is calculated based on pro rata time on the risk, Cincinnati's total liability would be \$3,038,300. (Cincinnati Proposed Order at 12, Ex. P.) Beazer agrees that this is a reasonable estimate of Cincinnati's liability under a time-on-the-risk methodology. Although Beazer believes that Cincinnati is bound by the Court's 2007 Final Judgment, which includes the joint and several allocation ruling, in the event this Court disagrees and instead determines that Cincinnati's liability to Beazer should be calculated based on the time on risk allocation method, Beazer does not dispute Cincinnati's calculation of its liability in that regard.

III. CINCINNATI'S COVERAGE OBLIGATIONS ARE TRIGGERED BECAUSE THE UNDERLYING INSURANCE POLICIES HAVE BEEN EXHAUSTED

Cincinnati argues that it owes Beazer nothing because the primary insurance policies that sit below Cincinnati's excess policies have not been exhausted. Cincinnati is wrong, and its

overly simplistic argument completely ignores the evidence that Beazer was prepared to introduce at the January 2007 trial, and is entitled to rely upon on remand, and the undisputed record evidence showing exhaustion.

First, Cincinnati asserts that Indiana, Massachusetts Bay, and Regent each had policy limits of \$4 million covering Beazer. (Cincinnati Proposed Order at 12, Ex. P.) This is misleading. Although the maximum possible aggregate limits for each of the three underlying insurers were \$4 million, the maximum possible “each occurrence” limits were \$2 million for each insurer, and the property damage at issue here is properly characterized as a single “occurrence.” As explained in Beazer’s November 2, 2011 Brief on Remand, “when progressive damage takes place over multiple policy years, as here, it constitutes a single ‘occurrence’ in each policy year,” and thus the lower per occurrence limits of the policies should apply. (Plaintiffs’ Remand Br. at 15, Ex. E (citing *Liberty Mut. Fire Ins. Co. v. J T Walker Indus., Inc.*, __ F. Supp. 2d __, 2011 WL 4434038, at *3-*5 (D.S.C. Sept. 22, 2011)).) In any event, even if the higher aggregate limits apply, the undisputed evidence shows that the underlying insurance has been exhausted.

Second, Cincinnati calculates each underlying insurer’s coverage obligation by calculating their share of \$7.2 million based on their time on the risk. (Cincinnati Proposed Order at 13, Ex. P.) But exhaustion here does not depend on the underlying insurers’ “time on the risk” or the \$7.2 million figure. The \$7.2 million stipulated damages amount is expressly limited to “the Policies,” defined in the Stipulation as those insurance policies issued to Beazer by Harleysville and Cincinnati; it does not apply to policies issued by Indiana, Massachusetts Bay, or Regent. (Stipulation at ¶ 1, Ex. D.) Indeed, the other insurer-defendants to this lawsuit had already settled and been dismissed from the action at the time the Parties entered into the

Stipulation in January 2007. The \$7.2 million stipulated damage amount is a reflection of the Parties' agreement as to the proper amount that could be allocated to Harleysville and Cincinnati at trial, not the total damages that Beazer incurred in connection with losses sustained at the five real estate projects that are the subject of this lawsuit, applicable also to the three settling insurers. As the record indisputably reflects, Beazer's total losses from these Underlying Lawsuits are actually \$16,770,750. (Court's May 3, 2007 Final Order and Judgment, Ex. A hereto, at p.8). Instead, as Beazer explained in its Brief on Remand, "[t]he \$7.2 million at issue on remand is not recoverable (and has not been recovered) from any source other than Harleysville and Cincinnati." (Plaintiffs' Remand Br. at 21, Ex. E.) "At the time of the settlements with its other primary insurers, it is undisputed that Beazer's maximum recoverable loss [for all of its South Carolina-related losses] was \$16.8 million." (*Id.*)

Rather, what matters to exhaustion is the extent of the coverage that the underlying policies provided (\$2 million in total "each occurrence" limits or \$4 million in aggregate limits for each of the three underlying insurers), the amount those insurers paid to Beazer towards those limits, and whether Beazer has uncompensated losses that are sufficient to fill any gaps. "A CGL policy can be exhausted when an insured and a CGL insurer enter into a settlement agreement where the primary insurer will pay a large percentage of the total limit and the insured takes responsibility for the remainder." *Trinity Homes LLC & Beazer Homes Inves. LLC v. Ohio Cas. Ins. Co. & Cincinnati Ins. Co.*, 629 F.3d 653, 658 (7th Cir. 2010). "The excess insurer thus has no obligation to 'drop down' and pay the difference if Beazer settles for less than the full policy limits. But where Beazer itself pays the remainder of the underlying limits in satisfaction of [property damage claims for covered entities] losses in water intrusion claims, Cincinnati is

obligated to cover Beazer's liability in excess of the underlying limits." (Plaintiffs' Remand Br. at 15, Ex. E.)

It is undisputed that the Cincinnati insurance policies at issue in this case cover losses incurred by Beazer and Crossmann Communities, and that Crossmann Communities had very large losses covered by these same Cincinnati policies arising from construction defect lawsuits filed against Beazer and Crossmann in Indiana and Kentucky federal courts. As Beazer explained in detail in its November 2, 2011 Brief on Remand, Beazer sustained "multimillion-dollar un[insured] losses" in South Carolina, Indiana, and Kentucky that are more than sufficient to fill any gaps between underlying insurers' settlement amounts and their total coverage obligations. (*Id.* at 3.) As shown in Beazer's November 2, 2011 Remand Brief,

- Regent Insurance Company paid Beazer \$3,151,231.87, and all of this amount "appl[ies] to Beazer's losses in Indiana." (*Id.* at 16; Cincinnati Proposed Order at 6, Ex. P.) Using Regent's aggregate limits of \$4 million, there is only "a gap of \$848,768.13 that Beazer must fill" from its unreimbursed losses in Indiana or South Carolina, showing that the Regent policies are exhausted, which immediately exposes the Cincinnati policies. (Plaintiffs' Remand Br. 17, Ex. E.)
- Indiana Insurance Company paid Beazer \$2.7 million, and this entire amount applies to Beazer's losses in South Carolina. (*Id.*) Regardless of how this amount is allocated between Indiana's two policy periods, this settlement exhausts both of Indiana's policies because each policy had a \$1 million per occurrence limit, and the \$2.7 million received by Beazer for the South Carolina water intrusion occurrence exceeds Indiana's two \$1 million per occurrence limits, which immediately exposes the Cincinnati policies. (*Id.* at 18.)
- Massachusetts Bay Insurance Company paid Beazer over \$2.9 million for the settlement in this case, and this amount is allocated equally between Kentucky and South Carolina, with \$1.45 million covering the claims at issue here. (*Id.* at 19.) These settlements leave a gap of either \$550,000 or \$1.1 million, depending on whether there were one or more occurrences. (*Id.*) This gap is easily filled by a portion of Beazer's multi-million dollar amount of unreimbursed losses in Kentucky or South Carolina, which immediately exposes the Cincinnati policies.

As explained in detail in Beazer's November 2, 2011 Remand Brief, the minimum gap Beazer must cover is thus \$550,000 (based on the "each occurrence" limits), which Beazer may

fill with losses it paid on its own from either Kentucky or South Carolina. On the other hand, even the most conservative interpretation of the respective policy limits dictates that the maximum gap which Beazer may fill with its own losses in connection with covered claims is \$2,598,768 (based on the aggregate limits). Beazer easily fills that gap with a small portion of its sizeable uninsured losses in South Carolina, Indiana, and Kentucky. All of Beazer's settlements and loss totals are not disputed by Cincinnati and are not refuted in the evidentiary record of this case.

Cincinnati has argued that Beazer's losses from claims in states other than South Carolina are not relevant to demonstrating exhaustion of the underlying insurance policies. This position ignores the undisputed facts and the premise underlying the Stipulation entered into by the Parties. In the January 29, 2007 Stipulation, Beazer, Harleysville, and Cincinnati agreed that if the allocation methodology determined by the Court was the pro-rata, time-on-risk method, then Beazer could "argue that Cincinnati's policies are presently triggered" (Stipulation at ¶ 9, Ex. D) based on "all settlement documents, pleadings, discovery, and depositions, in both the coverage case and the underlying cases which have been produced and exchanged in discovery in this case" (*id.* at ¶ 7). As it turned out, the Court's adoption of the joint and several methodology in its May 3, 2007 Order obviated the need for the Beazer, Cincinnati, and the Court to address the exhaustion issues raised by Cincinnati. However, if the Court allows Cincinnati to take advantage of the pro rata, time-on-risk methodology adopted by the Supreme Court in an appeal that Cincinnati did not join, then the Stipulation clearly permits Beazer to rely upon evidence in the record to show exhaustion of the insurance policies underlying the Cincinnati policies. Indeed, the gravamen of Beazer's claims in this lawsuit seek a declaration that Cincinnati owes it coverage for losses sustained in connection with five real estate projects in South Carolina under

the terms of the applicable Cincinnati policies – such a determination first requires that Beazer's losses are covered occurrences under the policy terms (which the court decided in the May 2007 Final Judgment, from which Cincinnati did not appeal, and as to Harleysville, the Supreme Court of South Carolina has clearly confirmed), and then a determination that Cincinnati's coverage is triggered. Since Cincinnati has stipulated to joint and several liability of \$7.2 million in damages, no analysis of the underlying policies should be required. However, in the event the Court determines otherwise, underlying policies can be proven to have been exhausted by either per occurrence limits or aggregate limits. The latter requires an examination of all of Beazer covered losses for the policies at issue; such losses are demonstrably proven by the evidentiary record in this case.

The record evidence at the time of the Court's entry of May 3, 2007 Order is more than sufficient to demonstrate exhaustion. Beazer presented evidence to the Court in 2007 that it resolved its claims against Regent for a total of \$3,151,231.87 (Plaintiffs' Third Supp. Responses at 3, Ex. K; Regent Settlement Agreement at 5, Ex. L); its claims against Indiana for \$2.7 million (Third Supp. Interrogatory Responses at 3, Ex. K); and its claims against Massachusetts Bay for \$2.9 million (*id.* at 3). In its Third Supplemental Interrogatory Responses, which were listed as exhibit 137 in the Pre-Trial Brief (Plaintiffs' Pre-Trial Exhibit List, Ex. M), Beazer further demonstrated that, as of July 24, 2006, it had suffered more than \$38,000,000 in losses in Indiana and \$6,000,000 in Kentucky that were not reimbursed by any insurer or other entity. (Plaintiffs' Third Supp. Responses, at 3–4, Ex. K). As part of its October 2006 Pre-Trial Brief (Ex. C hereto), Beazer listed Mark Berry as a witness on their Trial Witness List (Plaintiffs' Pre-Trial Witness List, Ex. N.), and he has offered testimony that Beazer expended over \$27.8 million to settle the *Colon* lawsuit in Indiana federal court, and that these damages Beazer paid exceed the

limits of the underlying insurance (Berry Aff., Ex. J hereto, at ¶¶ 29-30). Cincinnati has never disputed the existence and accuracy of Beazer's uninsured losses from covered property damage claims in Indiana or Kentucky, or the fact that the settlements with insurers are substantially smaller than Beazer's total losses, leaving unreimbursed losses that easily cover the gaps described above, under any interpretation of the underlying policies or the Cincinnati policies. The underlying policies are therefore exhausted, triggering Cincinnati's coverage obligation.

It is undisputed that Beazer suffered more than \$848,768.13 in unreimbursed losses in Indiana (the maximum to exhaust the Regent policies), more than \$1.1 million in unreimbursed losses in Kentucky (the maximum to exhaust the Massachusetts Bay policies), and more than \$650,000 in unreimbursed losses in South Carolina (the maximum to exhaust the Indiana policies). Even if the Court were to examine only Beazer's losses in South Carolina, which Beazer submits is improperly narrow, the policies underlying the Cincinnati policies are fully exhausted. It is undisputed that Beazer suffered \$16.8 million in losses in the underlying South Carolina homeowner cases. (Court's May 2007 Judgment, at 8). At the time Beazer settled with Indiana, Massachusetts Bay, and Regent, Beazer's position was that those three insurers owed Beazer its entire loss of \$16.8 million under their policies. Beazer submits that the Court should apply \$6 million of the \$16.8 million in Beazer's total loss to satisfy the \$1 million in per occurrence limits for each of the six policy periods (two each for Indiana, Massachusetts Bay, and Regent) for the policies underlying the Cincinnati policies. That calculation leaves Beazer with \$10.8 million in unreimbursed loss in South Carolina at the time Beazer, Harleysville, and Cincinnati agreed to the Stipulation in January 2007. The amount of property damage loss stipulated to by the Parties in January 2007 -- \$7.2 million -- is less than the total amount of Beazer's loss in South Carolina, and even after Beazer is awarded the damages it seeks in this

remand, Beazer will still have substantial uninsured and unreimbursed losses from the South Carolina cases. And, as stated on pages 12-14 above, the \$7.2 million in stipulated damages was to be divided between Harleysville and Cincinnati. Therefore, even if the Court restricts its analysis to Beazer's South Carolina losses -- which is contrary to the evidence Beazer was prepared to introduce at trial and which the Stipulation contemplated the Court would consider -- the policies underlying the Cincinnati policies are exhausted.

This Court also can find exhaustion based on the record at the time of the May 3, 2007 Order or based on the updated settlement information Beazer presented in its Brief on Remand. Indeed, Cincinnati does not dispute Beazer's calculations in its Brief on Remand regarding the extent of its out-of-state losses, the evidence supporting those calculations, the size of the settlement payments it received from Indiana, Regent, or Massachusetts Bay, or the fact that uncompensated losses can fill any coverage gaps. Quite simply, Cincinnati only argues that Beazer's payment of unreimbursed losses should not be counted toward an exhaustion calculation, an argument which runs contrary to the plain language of the Insuring Agreements in the Cincinnati policies themselves (showing that the Cincinnati policies are triggered by "payment of claims," either by the underlying insurers or by Beazer, in amounts equal to the underlying policy limits), case law (including the December 2010 decision of the United States Court of Appeals for the Seventh Circuit in *Beazer v. Cincinnati*, discussed at page 14 above), and common sense.

CONCLUSION

For the reasons set forth above, this Court should enter a judgment in favor of Beazer and against Cincinnati for \$5,533,872, on the grounds that the Court's May 3, 2007 Final Judgment is the law of the case for Cincinnati, which means that Cincinnati is liable for the entirety of Beazer's stipulated loss of \$7.2 million less the amount awarded by the Court against

Harleysville. In the alternative, and in the event that the Court allows Cincinnati to avoid the law of the case such that a pro rata, time-on-the risk allocation methodology applies, Beazer agrees with Cincinnati's calculation of damages in the amount of \$3,038,300.

Respectfully submitted,



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February 3, 2012

EXHIBIT H

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Crossman Communities of North Carolina, Inc.,
Beazer Homes Investment Corp., and Daniel
Rogers

Plaintiff,

vs.

Harleysville Mutual Insurance Company, Indiana
Insurance Company, Massachusetts Bay
Insurance Company, Regent Insurance
Company, Cincinnati Insurance Company, and
Associated Insurers, Inc. of Myrtle Beach,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CA NO.: 2004-CP-26-84
)

) CINCINNATI INSURANCE COMPANY'S
) MEMORANDUM IN OPPOSITION TO
) PLAINTIFFS' MOTION FOR PARTIAL
) SUMMARY JUDGMENT REGARDING
) THE INSURERS' JOINT AND SEVERAL
) OBLIGATION TO PAY DEFENSE AND
) INDEMNITY COSTS
)

Plaintiffs have moved for partial summary judgment against Defendants Harleysville Mutual Insurance Company ("Harleysville") and Cincinnati Insurance Company ("Cincinnati"), asserting that the insurers have a joint and several obligation to pay the defense and indemnity costs of the Plaintiffs with respect to numerous lawsuits ("underlying lawsuits") that have been brought as a result of Plaintiffs' defective construction of condominium buildings in Horry county, South Carolina. However, Cincinnati's coverage has not been triggered, and it therefore has no duty or obligation, joint and several or otherwise, to defend or indemnify Plaintiffs in connection with the underlying suits.

BACKGROUND

This lawsuit was brought by Plaintiffs as a declaratory judgment action to resolve various issues of insurance coverage regarding six cases that were filed against Plaintiffs related to claims of defective construction on five condominium construction projects. Plaintiffs seek a

declaratory judgment that the defendant insurers are obligated to provide coverage for the damages alleged in the underlying lawsuits. In addition, Plaintiffs seek damages from the insurance company defendants resulting from alleged breach of the insurance policy contract. Since the inception of this case, some of the insurers named as defendants have reached settlements with the Plaintiffs and have been dismissed as parties.

Plaintiffs constructed the five condominium projects in Horry County, South Carolina, at issue in the present case. In each of the underlying lawsuits brought against the Plaintiffs, the claimants have alleged damages to repair defects and deficiencies in the construction of condominium units that Plaintiffs built in Horry County known as River Oaks I, River Oaks II, Waterway Village at River Oaks, Buck Creek Golf Villas, and Lightkeepers Village. Much of the construction work of these condominium units was performed by subcontractors.

The defects and deficiencies in the construction of the units were discovered after the units were sold to individual homeowners. Thereafter, lawsuits were filed against Plaintiffs, seeking damages to repair the alleged defects and deficiencies. These lawsuits have been captioned as follows: 1) *Lightkeepers Village Homeowners Association, Inc. v. Lightkeepers Village, et al.*, Case No. 2000-CP-26-43, Court of Common Pleas, Horry County, South Carolina, filed on January 6, 2000; 2) *River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al.*, Case No. 00-CP-26-5193, Court of Common Pleas, Horry County, South Carolina, filed on November 14, 2000; 3) *Waterway Village at River Oaks Horizontal Property Regime, et al. v. River Oaks Golf Development Corp., et al.*, Case No. 2001-CP-26-535, Court of Common Pleas, Horry County, South Carolina, filed on January 31, 2001; 4) *River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al.*, Case No. 01-CP-26-5932, Court of Common Pleas, Horry County, South Carolina, filed on November 27, 2001; 5) *Buck Creek Golf Villas Horizontal Property Regime, et al. v. Buck Creek Development Inc., et*

al., Case No. 2002-CP-4200, Court of Common Pleas, Horry County, South Carolina, filed on July 26, 2002; and 6) *Rose, et al. v. Lightkeepers Village, et al.*, Case No. 2000-CP-26-5363, Court of Common Pleas, Horry County, South Carolina, filed on September 18, 2002.

In these actions, the defects and deficiencies claimed involved the failure of Plaintiffs and their subcontractors to adhere to requirements of the plans, specifications, industry standards and applicable building codes. As a result of the Plaintiffs' faulty workmanship, the claimants in the underlying cases have brought claims of negligence and breach of express and implied warranties against them. The damages sought by the claimants in the underlying actions are connected to the repair the defects and correction of the deficiencies in the construction of the condominium units.

Cincinnati issued excess policies beginning in July, 1995 and renewed thru July, 2002.

ANALYSIS

I. CINCINNATI DOES NOT HAVE A JOINT AND SEVERAL OBLIGATION TO DEFEND OR INDEMNIFY PLAINTIFFS SINCE COVERAGE UNDER CINCINNATI'S POLICIES HAS NOT BEEN TRIGGERED.

Plaintiffs, in their memorandum in support of their motion for partial summary judgment, repeatedly make the incorrect claim that Cincinnati has a joint and several obligation to defend and indemnify them in the underlying lawsuits. Plaintiffs' claim must be rejected because it is based upon the false assumption that insurance coverage under Cincinnati's policies has actually been triggered when in fact the coverage provided by Cincinnati's policies has not been activated. Thus, the entire premise for Plaintiffs' argument that Cincinnati owes a joint and several duty of defense/indemnification to the Plaintiffs is hopelessly flawed.

It is undisputed that Harleysville provided primary insurance to Plaintiffs and that it has not paid up to the limits of its coverage on the Plaintiffs' behalf in the underlying lawsuits. It is further undisputed that the insurance provided by Cincinnati to Plaintiffs is excess insurance. An

excess policy is excess quite simply because it has underlying limits and is not triggered until those limits have been exhausted. The applicable underlying limits have not been paid out in the instant case because Harleysville has thus far chosen to contest coverage while defending the underlying actions under a reservation of rights. *See* 46 CJS *Insurance* § 1138 (2005) (excess or umbrella policy is not required to contribute to the payment of a settlement until all other applicable policies have been exhausted.) Neither has Harleysville been dismissed as a party from the instant litigation. Since Harleysville has not paid out the limits of its coverage and is still a party to this case, the excess coverage provided by Cincinnati's policies has never been triggered.

Plaintiffs' arguments appear to be based upon the mistaken notion that Harleysville and Cincinnati have equal obligations to defend/indemnify them when in fact these two insurers are not at the same insuring level—that is, Harleysville has provided primary coverage which has not been exhausted and Cincinnati has provided secondary excess coverage that is untriggered. It is elementary that an excess insurer's duty to defend is consecutive to, rather than concurrent with, a primary insurer's duty. 46 CJS *Insurance* § 1152 (2005) ("An excess insurance company has no duty to participate in insured's defense until primary coverages are exhausted"); *see also* 46 CJS *Insurance* § 1138 (2005) ("Primary coverage' is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability, and 'excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.")

The unambiguous language of Cincinnati's policies makes clear that Cincinnati has no duty to defend or indemnify until the limits of all other insurance policies have been paid. The policies provide in relevant part:

We have the right and duty to defend any claim or "suit" against the insured for damages covered by this policy, even if the allegations are groundless, false or fraudulent, when:

- a. The applicable limits of the "underlying insurance" and any other insurance have been exhausted by payment of claims; (CGL Policy, Section C.)

Similarly, another provision in Cincinnati's policies entitled "Other Insurance" states "The insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." (See CGL Policy, Section IV.11). Furthermore, a "Products Completed Operations Hazard Limitation" endorsement states:

Exclusions (SECTION I.B.) is modified to add the following:

This policy does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" unless such coverage is provided by valid and collectible "underlying insurance" as listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is afforded by such "underlying insurance".

This plain and easily understood policy language manifests the intention of Cincinnati and the insured Plaintiffs to make Cincinnati's coverage excess coverage that does not activate until the complete cessation of coverage under all "underlying policies" and "any other insurance."

Plaintiffs' arguments ignore the clear language of Cincinnati's policies making its coverage excess and requiring that all underlying insurance be exhausted. If the Court were to ignore this explicitly clear policy language and rule that Cincinnati has a duty to drop down and provide primary coverage in a joint and several manner, as Plaintiffs are asking the Court to do, Cincinnati respectfully submits that such a ruling would be reversible error. Nothing in Cincinnati's policies obligates it to provide primary coverage or to provide "drop down" coverage. See *Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to

provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured.) Cincinnati's policies make it abundantly clear that it has no obligation to provide defense or indemnification until and unless the applicable limits of the "underlying insurance" and "any other insurance" have been exhausted by payment of claims. Furthermore, there is absolutely no language in the policies that would obligate Cincinnati to "drop down" in the place of the primary insurance policies issued by Indiana, Massachusetts Bay and Regent to cover defense or indemnification costs, when the full coverage under these policies has not been paid.

Simply stated, Cincinnati did not contract to provide "drop down" coverage. Rather, Cincinnati's excess liability coverage is invoked only after the underlying limits and limits of all other insurance have been exceeded. "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves ... the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract." *McPherson v. J.E. Sirrine & Co.*, 206 S.E. 183, 33 S.E.2d 501 (1945), citing 17 C.J.S., Contracts, § 296, pp. 702-707. A court simply cannot create coverage where none exists. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994) (court must enforce, not write, contracts of insurance and must give to policy language, its plain, ordinary, and popular meaning). Likewise, a court should not order an excess insurer to "drop down" and provide primary coverage in a joint and several manner when there is absolutely no language in the excess insurance policies providing such coverage.

In addition, Plaintiffs are asking the Court to force Cincinnati to provide insurance coverage much greater than that for which the parties to the insurance contract bargained. See e.g., *First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*,

803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent of policy to provide excess coverage illusory); *see also Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to “drop down” where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured and noting that an excess liability insurer obviously does not anticipate this heavy onus); *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (excess insurer had no duty to “drop down” and assume primary insurer’s coverage obligations where primary insurer was insolvent). Accordingly, Cincinnati is not required to drop down and provide coverage to fill a void potentially left by primary insurers, and Cincinnati does not have a duty to pay all of Plaintiffs’ defense costs.

II. CINCINNATI HAS NO DUTY TO DEFEND OR INDEMNIFY BECAUSE THE UNDERLYING LAWSUITS AGAINST PLAINTIFFS DO NOT ALLEGE AN “OCCURRENCE” OR ALLEGE COVERED DAMAGES.

Plaintiffs’ argument in favor of imposing joint and several liability for defense and indemnification costs upon Cincinnati is unsound because there has been no “occurrence” to trigger coverage under the CGL policies. Plaintiffs and their subcontractors constructed the condominiums that are the subject of the six underlying lawsuits. As a result of the Plaintiffs’ own faulty workmanship on these condominium buildings, the claimants in the underlying cases have brought claims of negligence and breach of express and implied warranties against them. The damages sought by the claimants in the underlying actions are for the repair of defects and the correction of deficiencies that arose out of Plaintiffs’ faulty workmanship in the construction of the condominiums. The only damages claimed in these underlying lawsuits relate directly to insureds’ own defective work.

Under South Carolina law, a liability insurer owes two separate and distinct duties to the insured: a duty to defend and a duty to indemnify. The allegations of the Complaint determine the insurer's duty to defend. *Hartford Accident and Indemnity Co. v. South Carolina Insurance Co.*, 252 S.C. 428, 166 S.E.2d 762 (1969). If the alleged facts in the complaint fail to bring the case within the policy coverage, the insurer is free of the obligation to defend. *R.A. Earnhart Textile Machinery Division, Inc. v. South Carolina Insurance Co.*, 277 S.C. 88, 282 S.E.2d 856 (1981). There has not been an "occurrence" as defined in the policy. It is alleged that the condominiums were poorly constructed and have deteriorated over time. There is no allegation of an accident. There are only allegations of poor workmanship and failure to comply with applicable building standards.

A general liability policy is intended to provide coverage for tort liability for physical damage to the property of others; it is not intended to provide coverage for the insured's contractual liability which causes economic losses. *C.D. Walters Constr. Co. v. Fireman's Ins. Co.*, 281 S.C. 593, 596, 316 S.E.2d 709, 711 (S.C. Ct. App. 1984). It is for this reason that a general liability insurance policy typically does not cover faulty workmanship, but instead covers faulty workmanship that causes an accident. *Id.* The exclusion of faulty workmanship claims from a CGL policy is supported by the rationale that the contrary result would enable a contractor to be indemnified by his insurer for the cost of repairing or replacing his own faulty work. *See L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 336 S.C. 117, 121, 621 S.E.2d 33, 35 (2005) (the business risks of a general contractor are not covered under a commercial general liability policy); *See also, G.L. Shaw Builders, Inc. v. State Auto Mut. Ins. Co.*, 182 Ga. App. 220, 355 S.E.2d 130 (1987).

When a builder undertakes to construct a building, the builder expects that it will have to erect the structure in a proper manner. *Harbor Court Associates v. Kiewit Construction*

Company, 6 F.Supp.2d 449 (D.Md. 1998). Builders "further expect that if they do not do so, they will have to repair any defects in their work so as to 'deliver' the product they promised to provide." *Id.* Any alleged claims for the cost of repairing the work must be deemed damages which were "expected" by the insureds. *Id.* Cincinnati's policies define "occurrence" as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in "bodily injury" or "property damage." In South Carolina, whether an event is an accident is determined from the standpoint of the insured. *See General Insurance Co. of America v. Palmetto Bank*, 268 S.C. 355, 233 S.E.2d 699 (1977). Because alleged claims for the cost of repairing an insured's defective work is to be "expected" by the insured, in the instant case there has not been an "occurrence" under Cincinnati's policies. Moreover, a CGL policy does not purport to serve the purpose of a builder's performance bond. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 336 S.C. 117, 621 S.E.2d 33 (2005). Consequently a builder's economic loss for poor performance is outside the scope of CGL coverage.

In *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, *supra*, the South Carolina Supreme Court held that "because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence." The Supreme Court addressed the definition of an "occurrence" under the CGL policy and whether or not the deterioration of a roadway constructed by an insured contractor constituted an "occurrence." The Court noted that although cracking of the roadway may have constituted property damage, an "occurrence" as defined under the CGL policy did not take place since the insured's faulty workmanship had damaged the roadway system only. The Court concluded "...because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence."

In the present case, all the damages claimed in the underlying cases are to the work product of the insured. As the *L-J* decision makes clear, when the insured's defective workmanship damages the insured's own work, no accident or occurrence has taken place. The defects and deficiencies alleged by claimants in the underlying lawsuits involve the failure of Plaintiffs to construct adequate systems, failure to adhere to the building specifications, improper installation of building components, failure to provide adequate material, failure to provide material in appropriate places, failure to provide appropriate safety features as required by building codes, and improper construction techniques. Plaintiffs and their subcontractors failed to properly construct the condominium projects consistent with the plans, specifications, industry standards and applicable building codes. Plaintiffs' construction of the condominiums constitutes faulty workmanship which caused damage to the Plaintiffs' own work.

In addition, the Cincinnati policies contain certain exclusions which bar coverage to Plaintiffs. The policies expressly exclude coverage for "'property damage' to 'your product' arising out of it or any part of it." (CGL Policy, Section I, B.5). The policies also bar coverage for "'property damage' to 'impaired property' or property that has not yet been physically injured, arising out of: a) a defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work'..." (CGL Policy, Section I, B.3). "Your work" is defined as: "work or operations performed by you or on your behalf; and materials, parts or equipment furnished in connection with such work or operations" and includes "warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work', and the providing of or failure to provide warnings or instructions." (CGL Policy, Section V.19). Courts have recognized that an insured's work is the entire project for a general contractor or

builder. See, e.g., *Indiana Ins. Co. v. Dezutti*, 408 N.E.2d 1275 (Ind. 1980); *B.A. Green Constrution v. Liberty Mut. Ins. Co.*, 213 Kan. 393, 517 P.2d 563 (1973).

The South Carolina Supreme Court has expressly approved of the use of CGL exclusions that bar coverage for a contractor's faulty workmanship that must be repaired or replaced. In *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002), the Supreme Court was called upon to decide if a "faulty workmanship" exclusion of a general contractor's commercial general liability insurance policy barred coverage for the cost to repair the substrate and framing of a house that was damaged by a subcontractor's improper installation of a stucco exterior. The pertinent policy exclusion barred coverage for damage to that particular part of any property that needed to be restored, repaired, or replaced because the named insured's work (i.e., "your work") was incorrectly performed on it. The phrase "your work" was defined as it is defined in the Cincinnati policies here.

The Court in *Century Indemnity Company* noted that a CGL policy "is not intended to insure business risks, i.e., risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage" and that "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." The court then assessed the arguments of the plaintiff-homeowners in the suit and found that "Based on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision."

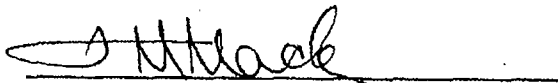
In the instant matter, Plaintiffs are alleged to have built defective condominiums. Plaintiffs made substantial profits on the construction of these condominiums. The claimants in the underlying lawsuits against Plaintiffs sought the cost of repair and replacement of the Plaintiffs' work. As the Supreme Court's ruling in *L-J* indicates, these damages are not

recoverable under a commercial general liability policy. *L-J*, 366 S.C. at 123-24, 621 S.E.2d at 36. There simply was no accident or occurrence from the standpoint of the Plaintiffs since the defects in the condominium buildings were caused by their own negligent acts. Moreover, liability to the condominium owners for failure to properly construct the condominiums should have been reasonably expected by the Plaintiffs.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for partial summary judgment should be denied.

Respectfully submitted,



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CINCINNATI INSURANCE COMPANY

Columbia, South Carolina
Dated: April 10, 2006

EXHIBIT M

PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
1			1/8/2004			Summons for Relief & Complaint w/ attached Exhibit A: Schedule of Insurance; Exhibit B: Amended Summons & Amended Complaint for Rose; Exhibit C: Summons & Complaint for Buck Creek; Exhibit D: Third Amended Summons & Complaint for Lightkeepers Village; Exhibit E: Second Amended Summons & Complaint for River Oaks I; Exhibit F: Summons & Complaint for River Oaks II; Exhibit G: Amended Summons & Complaint for Waterway Village.
2			2/17/2004			Amended Complaint with attached Exhibit A: Schedule of Insurance; Exhibit B: Amended Summons & Amended Complaint for Rose; Exhibit C: Summons & Complaint for Buck Creek; Exhibit D: Third Amended Summons & Complaint for Lightkeepers Village; Exhibit E: Second Amended Summons & Complaint for River Oaks I; Exhibit F: Summons & Complaint for River Oaks II; Exhibit G: Amended Summons & Complaint for Waterway Village
3			2/10/2004			Regent Insurance Co.'s Answer to Complaint, Counterclaim, and Third-Party Complaint and Summons on Third-Party Complaint.
4			2/20/2004			Regent Insurance Company's Interrogatories to Plaintiff & Request for Production to Plaintiff
5			2/20/2004			Regent Insurance Company's Answer to Amended Complaint Counter-claim and Third-Party Complaint
6			2/27/2004			Cincinnati Insurance Company's Request to Produce to Plaintiff & Cincinnati Insurance Company's Interrogatories to Plaintiff
7			2/27/2004			Cincinnati Insurance Company's Answer to Amended Complaint
8			3/17/2004			Indiana Insurance Company's Answer and Counterclaim to Amended Complaint
9			3/17/2004			Massachusetts Bay Insurance Company's Requests for Production of Documents
10			3/17/2004			Massachusetts Bay Insurance Company's Interrogatories to Plaintiff
11			3/17/2004			Massachusetts Bay Insurance Company's Answer to Amended Complaint Counter-claim and Third-Party Complaint
12			3/22/2004			Plaintiffs' Motion to Establish Complex Case Designation

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
13			3/26/2004			Defendant Indiana Insurance Company's Consent to Motion for Complex Case Designation
14			4/15/2004			Plaintiffs' Answer to Regent Insurance Company's Counterclaim
15			4/19/2004			Answer of Associated Insurors, Inc. of Myrtle Beach to Amended Complaint and Cross-Claim Against Harleysville Mutual
16			4/21/2004			Harleysville Mutual Insurance Company's Answer to the Amended Complaint and Counterclaim
17			4/22/2004			Plaintiffs' Amended Answer to Regent Insurance Company's Counterclaim
18			4/22/2004			Plaintiffs' Answer to Massachusetts Bay Insurance Company's Counterclaim
19			4/22/2004			Plaintiffs' Answer to Indiana Insurance Company's Counterclaim
20			4/26/2004			Plaintiffs' First Interrogatories and Plaintiffs' First Requests for Production
21			5/17/2004			Motion for Summary Judgment of Defendant Associated Insurors (w/ Proof of Service attached) with Raymond Schild affidavit
22			5/17/2004			Defendant River Oaks Horizontal Property Regime and River Oaks Homeowners Association's Answer to Massachusetts Bay Insurance Company's Counter-claim and Third-Party Complaint
23			5/17/2004			Third Party Defendants River Oaks Horizontal Property Regime and River Oaks Homeowners Associations First Interrogatories to Third Party Plaintiff Massachusetts Bay Insurance Company and to all Other Defendants
24			5/17/2004			Third Party Defendants River Oaks Horizontal Property Regime and River Oaks Homeowners Associations First Request for Production to Massachusetts Bay Insurance Company and all Other Defendants
25			5/17/2004			Plaintiffs' Responses to Massachusetts Bay Insurance Company's Interrogatories
26			5/17/2004			Plaintiffs' Responses to Massachusetts Bay Insurance Company's Request for Production of Documents
27			5/17/2004			Plaintiffs' Responses to Regent Insurance Company's Interrogatories
28			5/17/2004			Plaintiffs' Objections and Responses to Regent Insurance Company's Requests for Production of Documents
29			5/17/2004			Plaintiffs' Responses and Objections to Cincinnati Insurance Company's Interrogatories

PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
30			5/17/2004			Plaintiffs' Objections and Responses to Cincinnati Insurance Company's Requests for Production of Documents
31			5/26/2004			Plaintiffs' Answer to Harleysville Mutual Insurance Company's Counterclaim
32			5/28/2004			River Oaks II Horizontal Property Regime's and River Oaks II Homeowners Association Inc's Answer to Third-Party Complaint of Regent Ins. Company
33			6/8/2004			Third Party Defendants, Waterway Village at River Oaks Horizontal Property Regime and Waterway Village at River Oaks Homeowners Association, Inc. Answer to Massachusetts Bay Insurance Company's Counter-claim and Third-Party Complaint
34			6/8/2004			Third Party Defendants, Buck Creek Golf Villas Horizontal Property Regime and Buck Creek Golf Villas Homeowners Association, Inc. Answer to Massachusetts Bay Insurance Company's Counter-claim and Third-Party Complaint
35			6/21/2004			Regent Insurance Company's Responses and Answers to Third-Party Defendants River Oaks Horizontal Property Regime and River Oaks Homeowners Association's First Request for Production and First Set of Interrogatories
36			6/24/2004			Indiana Insurance Company's First Set of Interrogatories and First Request for Production to the Co-Defendants and to the Plaintiffs
37			6/24/2004			Regent Insurance Company's Response to Plaintiff's First Requests for Production, and Answer to Plaintiff's First Interrogatories
38			6/25/2004			River Oaks II Horizontal Property Regime's and River Oaks II Homeowners Association Inc's Answer to Third-Party Complaint of Massachusetts Bay Insurance Company
39			6/28/2004			Massachusetts Bay Insurance Company's Answers to Third-Party Defendants' Interrogatories and Response to First Request for Production of Documents
40			6/28/2004			Massachusetts Bay Insurance Company's Answers to Plaintiffs' Interrogatories, and Response to Plaintiffs' Requests for Production of Documents

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
41			7/12/2004			Motion of Defendant Associated Insurors, Inc. for Protective Order From Discovery
42			7/13/2004			Regent Insurance Company's Response to Indiana Insurance Company's First Request for Production
43			7/24/2004			Defendant Harleysville Mutual Insurance Company's First Set of Interrogatories to Plaintiffs & First Requests for Production of Documents to Plaintiffs
44			7/24/2004			Defendant Harleysville Mutual Insurance Company's Answer to Defendant Associated Insurors, Inc. of Myrtle Beach's Cross-claim
45			8/3/2004			Plaintiffs Response to Defendant Indiana Insurance Company's Interrogatories and Requests for Production
46			8/12/2004			Massachusetts Bay Insurance Company's Answer to Indiana Insurance Company's Interrogatories
47			9/10/2004			Order Designating Complex Case
48			9/14/2004			Massachusetts Bay Insurance Company's Privilege Log
49			9/29/2004			Third-Party Defendants River Oaks Horizontal Property Regime and River Oaks HOA's Supplemental Request for Production to Harleysville, MB, Indiana, Regent, Cincinnati, and Associated Insurors.
50			10/19/2004			Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment of Defendant Associated Insurors, Inc. with Supplemental affidavit of Ralph Teal
51			10/25/2004			Plaintiffs' Responses to Defendant Harleysville Mutual Insurance Company's Interrogatories and RFP to the Plaintiff
52			10/25/2004			Supplemental Affidavit of Raymond Schild
53			11/11/2004			Plaintiffs' First Interrogatories & RFP for Associated Insurors, Inc.
54			11/30/2004			Harleysville's Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents
55			12/27/2004			Associated Insurors, Inc. of Myrtle Beach's Requests for Production to Plaintiffs & Interrogatories
56			12/30/2004			Indiana Insurance Company's Responses to Defendant Massachusetts Bay Insurance Company's Requests for Production

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
57			1/3/2005			Plaintiffs' Motion to Compel Discovery (served on Indiana)
58			1/14/2005			Harleysville Mutual Insurance Company's Motion for Protective Order
59			1/14/2005			Indiana Insurance Company's Motion for Protective Order
60			1/18/2005			Associated Insurors' Answers to Plaintiffs First Requests for Production
61			1/18/2005			Associated Insurors' Answers to Plaintiffs First Interrogatories
62			1/24/2005			Cincinnati's Answers to Plaintiffs' First Interrogatories and Responses to Plaintiffs' First Request for Production
63			1/26/2005			Scheduling Order
64			1/27/2005			Indiana's Motion for Protective Order
65			2/7/2005			Amended Notice of Taking Depositions of Gilford Edwards, Ralph Teal, Connie Cox, and Mark Berry.
66			2/11/2005			Plaintiffs Objections and Responses to Associated Insurors' Interrogatories and Requests for Production to Plaintiffs.
67			3/10/2005			Massachusetts Bay Insurance Company's Revised Privilege Log
68			3/31/2005			Harleysville Mutual Insurance Company's Responses to Plaintiffs' Second Set of Interrogatories
69			3/31/2005			Harleysville Mutual Insurance Company's Responses to Plaintiffs' Requests for Admissions
70			4/4/2005			Plaintiffs' Supplemental Objections and Responses to Defendant Associated Insurors, Inc. of Myrtle Beach's Interrogatories; Plaintiffs' Objections and Responses to Defendant Associated Insurors, Inc. of Myrtle Beach's Supplemental Interrogatories; Plaintiffs' Objections and Responses to Defendant Associated Insurors, Inc. of Myrtle Beach's Supplemental Requests for Production; Plaintiffs' Objections and Responses to Defendant Associated Insurors, Inc. of Myrtle Beach's Supplemental Interrogatories; Plaintiffs' Objections and Responses to Defendant Associated Insurors, Inc. of Myrtle Beach's Second Supplemental Interrogatories.
71			4/14/2005			Indiana Insurance Company's Answers to the Second Interrogatories and Responses to the Second Request for Production to Plaintiff
72			4/28/2005			Plaintiffs' Supplemental Notice of Rule 30(b)(6) Deposition directed toward Massachusetts Bay- underwriter (scheduled 5/25/05)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
73			4/28/2005			Cincinnati Insurance Company's 2nd Request to Produce to Plaintiff (regarding settlement between Regent and Plaintiff)
74			5/9/2005			Plaintiffs' Motion to Extend the Deadlines in the Court's Scheduling Order
75			5/16/2005			Plaintiffs' Proposed Second Amended Complaint
76			5/26/2005			Motion to Compel Discovery and Brief in Support of Plaintiffs' Motion to Compel Discovery
77			5/26/2005			Associated Insurers' Motion in Opposition to Plaintiffs' Motion for Leave to Amend Amended Complaint and Memo. in Support.
78			5/26/2005			Harleysville's Memorandum in Opposition to Plaintiffs' Motion to Compel; Affidavit of James Lee Wright, Memo. In Opposition to Plaintiffs' Motion to Amend Amended Complaint
79			5/27/2005			Indiana Insurance Company's Memorandum in Opposition to Plaintiffs' Motion to Compel (P. Best Affidavit)
80			5/27/2005			Affidavit of Terry Johnson with Massachusetts Bay's Opposition to Plaintiffs' Motion to Compel
81			5/31/2005			Reply Brief in Support of Plaintiffs' Motion for Leave to Amend Amended Complaint
82			5/31/2005			Plaintiffs' Responses and Objections to Cincinnati Insurance Company's 2nd Request to Produce to Plaintiff
83			6/2/2005			Plaintiffs' Second Amended Complaint (Exhibit A: Schedule of Insurance; Exhibit B: Amended Summons & Amended Complaint for Rose; Exhibit C: Summons & Complaint for Buck Creek; Exhibit D: Third Amended Summons & Complaint for Lightkeepers Village; Exhibit E: Second Amended Summons & Complaint for River Oaks I; Exhibit F: Summons & Complaint for River Oaks II; Exhibit G: Amended Summons & Complaint for Waterway Village)
84			6/7/2005			Cincinnati Insurance Company's Answer to the Second Amended Complaint
85			6/8/2005			Third Notice of Deposition- Ralph Teal (7/13/05)
86			6/16/2005			Associated Insurers' Answer to the Second Amended Complaint
87			6/17/2005			Massachusetts Bay Insurance Company's Answer to Second Amended Complaint, Counterclaim, and Third-party Complaint
88			6/20/2005			Harleysville's Answer to Plaintiffs' Second Amended Complaint

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
89			6/22/2005			Court Order- Motions to Compel
90			6/27/2005			Defendant Indiana Insurance Company's Supplemental Request for Production to all Defendants
91			6/29/2005			Answer and Counterclaim of Indiana Insurance Company to Plaintiffs' Second Amended Complaint
92			7/8/2005			Plaintiffs' Answer to Defendant Harleysville Mutual Insurance Company's Counterclaim for Declaratory Relief
93			7/15/2005			Plaintiffs' Answer to Defendant Indiana Insurance Company's Counterclaim
94			7/20/2005			Plaintiffs' Answer to Massachusetts Bay Insurance Company's Counterclaim
95			7/26/2005			Signed and Clocked-Copy of First Scheduling Order and a Signed and Clocked-Copy of Judge John's Order regarding Plaintiffs' Motion to Compel Discovery
96			7/27/2005			Harleysville's Responses to Indiana's Supplemental Requests for Production
97			8/24/2005			Plaintiffs' Objections and Responses to Third Supplemental Interrogatories to Plaintiffs from Defendant Associated Insurors, Inc. of Myrtle Beach
98			8/31/2005			Plaintiffs' Supplemental Responses to Defendants Harleysville Mutual Insurance Company, Indiana Insurance Company, Massachusetts Bay Insurance Company, and Cincinnati Insurance Company's Interrogatories and Requests for Documents (Skip Lewis Expert Disclosure)
99			8/31/2005			Harleysville's First Request for Admissions to Plaintiffs
100			8/31/2005			Harleysville's Second Interrogatories and Requests for Production to Plaintiffs
101			9/14/2005			Fifth Notice of Deposition to Ralph Teal, Jr.
102			9/14/2005			Expert Witness Designation by Defendants Harleysville Mutual Insurance Company and Massachusetts Bay Insurance Company Pursuant to First Amended Scheduling Order (Charles Manning, David McCandless, Ted Kalreiss)
103			9/30/2005			Plaintiffs' Responses to Harleysville's First Requests for Admissions
104			10/13/2005			Plaintiffs' Third Supplemental Responses to Harleysville, Indiana, Massachusetts Bay, and Cincinnati's Interrogatories (Disclosure of Pat Wielinski and Donald Brayer)
105			11/14/2005			Associated Insurors' Expert Disclosure (Jerry Hargrove)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
106			11/30/2005			Harleysville's First Supplemental Responses to Plaintiffs' First Request for Production of Documents
107			12/21/2005			Associated Insurers' Second Supplemental Answers to Plaintiffs' First Interrogatories
108			12/30/2005			Notice of Deposition directed to Skip Lewis, Patrick Wielinski, Steve Watkins, Martin Phillips, Peter Sherratt, and Derek Hodgin
109			1/13/2006			Plaintiffs' Supplemental Discovery Response Pursuant to Judge John's Order
110			2/17/2006			Cincinnati's 2nd Interrogatories to the Plaintiffs
111			2/17/2006			Cincinnati's 3rd Request for Production of Documents to Plaintiffs
112			2/21/2006			Associated Insurers' Motion for Summary Judgment
113			2/24/2006			Plaintiffs' Motion for Partial Summary Judgment Against Cincinnati Insurance Company
114			2/24/2006			Harleysville's Motion for Summary Judgment
115			2/27/2006			Cincinnati Insurance Company's Motion for Summary Judgment
116			3/1/2006			Cincinnati's 3rd Interrogatories to the Plaintiffs
117			3/13/2006			Harleysville's Motions in Limine
118			3/30/2006			Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment Regarding the Insurers' Joint and Several Obligation to Reimburse Defense Costs with Exhibit A: <u>Okatie Hotel Group, LLC, v. Amerisure Insurance Company</u>
119			3/30/2006			Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment Against Defendant Cincinnati Insurance Company (Supplemental Affidavit of H. Gilford Edwards with Exhibits and Affidavit of W. Mark Berry with Exhibits were filed contemporaneously with the Motion)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
120			3/30/2006			Supplemental Affidavit of H. Gilford Edwards with Exhibit A: copies of certain photographs assembled by expert witnesses retained by Plaintiffs in River Oaks I; Exhibit B: copies of certain photographs assembled by expert witnesses retained by Plaintiffs in River Oaks II; Exhibit C: copies of certain photographs assembled by expert witnesses retained by Plaintiffs in Waterway Village; Exhibit D: copies of certain photographs assembled by expert witnesses retained by Plaintiffs in Lightkeepers Village; Exhibit E: copy of the Harleysville check made payable to counsel for the Yacht Club plaintiffs; Exhibit F: copies of certain photographs assembled by expert witnesses retained by Plaintiffs in Buck Creek
121			3/30/2006			Affidavit of W. Mark Berry with Exhibit A: Agreement and Plan of Merger among Beazer Homes USA, Inc. Beazer Homes Investment Corp., and Crossmann Communities, Inc.; Exhibit B: Copy of Cincinnati policy CCC 444 58 40 from 1998-2001; Exhibit C: Copy of Cincinnati policy CCC 444 58 40 from 2001-2002; Exhibit D: Indiana Insurance Company policy from 1997-1998; Exhibit E: Indiana Insurance Company policy from 1998-1999; Exhibit F: Massachusetts Bay policy from 1998-1999 and 1999-2000; Exhibit G: Regent policy from 2000-2001; Exhibit H: Regent policy from 2001-2002; Exhibit I: Harleysville policies from 1997-1998 and 1998-August 29, 1998; Exhibit J: Plaintiffs' Schedule of Insurance
122			3/30/2006			Harleysville's Brief in Support of Its Motion for Summary Judgment (with Attachments A-B and Exhibits 1-18)
123			3/30/2006			Memorandum in Support of Motion for Summary Judgment of Defendant Associated Insurers, Inc. of Myrtle Beach (with Ex. A-U)
124			4/10/2006			Cincinnati Insurance Company's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment
125			4/10/2006			Cincinnati Insurance Company's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding the Insurers' Joint and Several Obligation to Pay Defense and Indemnity Costs

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleystown Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
126			4/10/2006			Plaintiffs' Brief in Opposition to Defendant Associated Insurors' Motion for Summary Judgment . Exhibit A: Affidavit and Supplemental Affidavit of Ralph Teal; Exhibit B: Excerpts from the deposition of Ralph Teal; Exhibit C: Excerpts from the deposition of Lee Wright; Exhibit D: Excerpts from the deposition of Kimberly Gore; Exhibit E: Excerpts from the deposition of Teresa Hughes; Exhibit F: Excerpts from the deposition of John McCaskill; Exhibit G: Excerpts from the deposition of Gerald Hargrove; Exhibit H: Excerpts from the deposition of Donald Brayer; Exhibit I: Donald Brayer's Expert Report
127			4/10/2006			Affidavit of Donald John Brayer (submitted with Plaintiffs' Brief in Opposition to Associated Insurors' Motion for Summary Judgment)
128			4/10/2006			Plaintiffs' Brief in Opposition to Harleystown's Motion for Summary Judgment with Exhibit A: <u>Okatie Hotel Group, LLC, v. Amerisure Insurance Company.</u> (Attachments: Affidavit of L. G. Lewis, Jr. and the Appendix of Record Evidence were filed contemporaneously with the Motion)
129			4/10/2006			Affidavit of L. G. Lewis, Jr. and the Appendix of Record Evidence for each of the Underlying Lawsuits were submitted with Plaintiffs' Brief in Opposition to Harleystown's Motion for Summary Judgment
130			4/10/2006			Plaintiffs' Brief In Opposition to Harleystown's Motions in Limine
131			4/10/2006			Plaintiffs' Brief in Opposition to Associated Insurors' Motion in Limine (with Exhibit A: Ralph Teal deposition excerpts and Exhibit B: Kimberly Gore deposition excerpts)
132			4/10/2006			Harleystown's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment with Supplemental Notice of Filing of Exhibits 19-24, which includes the Supplemental Affidavit of Derrick Harris
133			4/13/2006			Associated Insurors' Reply to Plaintiffs Brief in Opposition to Motion for Summary Judgment

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
134			4/18/2006			Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding the Insurers' Joint and Several Obligation to Reimburse Defense and Indemnity Costs with Exhibits A-C (Exhibit A: <u>Okatie Hotel Group, LLC. v. Amerisure Insurance Company</u> ; Exhibit B: <u>Westfield Insurance Company v. Weis Builders, et al</u> ; Exhibit C: <u>Nitterhouse Concrete Products v. Pennsylvania Manufacturers, et al.</u>)
135			4/21/2006			Hearing Transcript from April 21, 2006 hearing on various motions before Judge John
136			6/29/2006			Plaintiffs' 2nd Supplemental Objections & Responses to Associated Insurers' Interrogatories to the Plaintiffs
137			7/24/2006			Plaintiffs' Third Supplemental Responses to Harleysville Mutual Insurance Company, Cincinnati Insurance Company, and Associated Insurers' Interrogatories
138			8/11/2006			Harleysville's Notice of Deposition of L.G. (Skip) Lewis, Jr. P.E.
139			8/31/2006			Notice of Deposition of Jeff Skelley
140			9/12/2006			Amended Notice of Deposition of L.G. Lewis Jr., P.E.
141			9/12/2006			Notice of Deposition of Patrick Wielinski
142			10/2/2006			Notice of Deposition Duces Tecum of Michael Aylward
143			10/4/2006			Notice of Deposition Duces Tecum of David McCandless
144			5/17/2005			Settlement Agreement between Plaintiffs and Regent Insurance Co. Appendix A: Listing of Coverage Actions, Appendix B: Listing of Cumis Lawsuits, Appendix C: Listing of Defended Lawsuits, Appendix D: Regent insurance policies from August 29, 2000-January 1, 2002, Appendix E: Listing of payments for Third-Party claims
145						Settlement Agreement between Plaintiffs and Indiana Insurance Co. Appendix A: Indiana insurance policies from 1997-1998 and 1998-1999

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
146						Settlement Agreement between Plaintiffs and Massachusetts Bay Insurance Co., Appendix A: Listing of the Underlying Lawsuits, Appendix B: Massachusetts Bay insurance policies from 1998-1999 and 1999-2000
147						River Oaks I Settlement Agreement (with Exhibits)
148						River Oaks II Settlement Agreement (with Exhibits)
149						Waterway Village Settlement Agreement (with Exhibits)
150						Buck Creek Settlement Agreement (with Exhibits)
151	BZH052694	BZH052707	N/A	R.V. Buric Construction Consultants	Plaintiffs	Waterway Village Issue Matrix
152	BZH051689	BZH051689	N/A	Unknown	N/A	Waterway Village Summary of Conditions Observed in Destructive Test Areas
153	BZH052595	BZH052660	12/4/2001	Lee Capell-- prepared for Derek Hodgin	Plaintiffs	Mold Investigation for Waterway Village HOA
154	BZH053250	BZH53256	11/7/2002	Martin Phillips	Plaintiffs	Campbell, Schneider & Associates- Repair Phase Observations for Building 3 at Waterway Village
155	BZH053196	BZH053209	1/8/2001	Derek Hodgin	Plaintiffs	Campbell, Schneider & Associates Report of January 8, 2001
156	BZH051744	BZH051752	7/18/2002	Unknown	Plaintiffs	Waterway Village Repair Estimate
157	BZH048993	BZH049488	2/2/2001	Derek Hodgin	Plaintiffs	Plaintiffs' Expert Report- Campbell, Schneider & Associates (Waterway Village)
158	BZH052887	BZH053097	N/A	George McGee (Tom Carlson may have contributed)	Defendants	Allegation/As-Built/As-Planned Documents (Preliminary Scopes of Repair- Waterway Village)
159	BZH051858	BZH051862	8/14/2003	T.J. Tomlinson-- prepared for McGee Consulting	Defendants	Calibogue Estimate (Waterway Village)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
160	BZH031466	BZH031474	4/10/2002	Steve Watkins	Plaintiffs	Watkins Services, Inc.- Buck Creek Golf Villas, Building 1-9 and 11-24 (matrix and cost estimate)
161	BZH031475	BZH031487	4/10/2002	Martin Phillips	Plaintiffs	Buck Creek Deficient Construction Investigation- Campbell, Schneider & Associates Report
162	BZH43509	BZH43515	10/9/2001	Martin Phillips	Plaintiffs	Martin Phillips' Report (Buck Creek)
163	BZH043516	BZH043526	N/A	R.V. Buric Construction Consultants	Plaintiffs	Report documenting the conditions, damages, and conclusions (Buck Creek)
164	BZH043477	BZH043508	8/14/2003	Steve Watkins	Plaintiffs	Repair Cost Estimates (Buck Creek)
165	BZH042318	BZH042329	N/A	R.V. Buric Construction Consultants	Plaintiffs	Buck Creek Issue Matrix
166	BZH103923	BZH103932	3/22/2006	Tom Carlson	Defendants	Buck Creek Preliminary Cost Estimate
167	BZH024704	BZH024878	N/A	Martin Phillips	Plaintiffs	Campbell, Schneider & Associates, LLC- Summary of Visual Survey and Destructive Tests (Vol. II)- Lightkeepers Village
168	BZH024667	BZH024685	August 2003	Bud DeSantis	Plaintiffs	DeSantis Management Group, Inc.- Loss of Use Analysis (Lightkeepers Village)
169	BZH023848	BZH023866	March 2004	Bud DeSantis	Plaintiffs	DeSantis Management Group, Inc.- Loss of Use Analysis (Lightkeepers Village)
170	BZH024620	BZH024666	6/6/2002	Maxcy Nolan III	Plaintiffs	Preliminary Inspection Report (Lightkeepers Village)
171	BZH024480 AND BZH023898	BZH024485 AND BZH023958	12/1/2003	R.V. Buric Construction Consultants	Plaintiffs	Supplemental Report and Matrix of Issues, Volume V: Buildings 27, 28 and 33 (Lightkeepers Village)
172	BZH023963	BZH024055	12/22/2003	Kenneth Lies	N/A	Raths, Raths, & Johnson, Inc.- Investigation of Water Intrusion (Lightkeepers Village)
173	BZH025745	BZH025837	N/A	Robert Gallagher	Plaintiffs	Procon & Associates, Inc.- Repair Estimate (Lightkeepers Village)
174	BZH025930	BZH025931	N/A	George McGee	Defendants	Curriculum Vitae of George McGee
175	BZH025913	BZH025929	9/5/2003	Bill Baker	Third-party	Bill Baker Electric Docs (Lightkeepers Village)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
176	BZH025892	BZH025912	N/A	Philip Shropshire	Plaintiffs	Philip Shropshire (A&I, Inc.) Backup Docs (Lightkeepers Village)
177	BZH025688	BZH025700	2/16/2004	Unknown	Defendants	Calibogue Estimate- Preliminary Remediation Restoration Cost Estimate (Lightkeepers Village)
178	BZH025476	BZH025647	11/26/2003	Philip Shropshire	Plaintiffs	A&I, Inc. Lightkeepers Damages, Volume III
179	BZH025648	BZH025668	11/26/2003	Philip Shropshire	Plaintiffs	A&I, Inc. Lightkeepers Damages, Estimate
180	BZH025669	BZH025687	12/4/2003	Philip Shropshire	Plaintiffs	A&I, Inc. Lightkeepers Damages, Supplemental Estimate
181	BZH024686	BZH024701	7/30/2001	Edward Porcher	N/A	Stantec Report, Building 20 (Lightkeepers Village)
182	BZH024899	BZH024996	November 2001	Martin Phillips		Campbell, Schneider & Associates, LLC- Summary of Visual Survey and Destructive Tests (Vol. I)
183	BZH024342	BZH024345	N/A	R.V. Buric Construction Consultants	Plaintiffs	Matrix of Issues, Building 20 (Lightkeepers Village)
184	BZH023959	BZH023962	10/23/2003	Chris Lumpkin and Drew Brown	Plaintiffs	R. V. Buric Construction Consultants' Report from field determination of water penetration (Lightkeepers Village)
185	BZH024273	BZH024339	6/28/2000	R.V. Buric Construction Consultants	Plaintiffs	Building Problems and Water Intrusion Documentation of Conditions (Lightkeepers Village)
186	BZH025718	BZH025720	2/25/2004	Steve Watkins	Plaintiffs	Watkins Estimate- Total Reclad Estimate for Building 20 (Lightkeepers Village)
187	BZH025739	BZH025741	2/25/2004	Steve Watkins	Plaintiffs	Watkins Estimate- Total Reclad Estimate for Building 28 (Lightkeepers Village)
188	BZH025861	BZH025863	2/27/2004	Steve Watkins	Plaintiffs	Watkins Estimate - Limited Scope Estimate for Building 20 (Lightkeepers Village)
189	BZH025882	BZH025884	2/27/2004	Steve Watkins	Plaintiffs	Watkins Estimate - Limited Scope Estimate for Building 28 (Lightkeepers Village)
190	BZH103933	BZH103939	9/6/2005	Al Best	N/A	Proposal for Lightkeepers Point Retrofit
191	BZH103940	BZH103971	3/10/2005	Steve Watkins	Plaintiffs	Watkins Services, Inc.- Alternate Limited Scope Per Applied Building Sciences, Inc. Report (Lightkeepers Village)
192	BZH076501	BZH076531	8/5/2002	Peter Sherratt	Plaintiffs	Sherratt Report- List of Damages (River Oaks I)
193	BZH076532	BZH076741	N/A	Peter Sherratt	Plaintiffs	Full Report by the Sherratt Company (River Oaks I)

PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
194	BZH103972	BZH104089	N/A	Bobby Wylie, Frank Grimball, and George Mullin (compilation of Plaintiffs' experts prepared for mediation)	Plaintiffs/ Defendants	Damages Notebook from River Oaks I mediation. Contains a damages summary, the Sherratt Report, photographs, Prime South Estimate, A&E Fees, Watkins Services Allowance itemization and the Defendants Scope & Estimate plus fire protection
195	BZH103608	BZH103918	N/A	George McGee	Defendants	McGee Consulting, Summary of Repairs and Preliminary Scope of Repair (River Oaks I)
196	BZH103562	BZH103607	2/26/2005	Brant Hutchinson	Defendants	Gilbert Construction Proposal based on the McGee scope (River Oaks I)
197	BZH036195	BZH036208	7/18/2002	Steve Watkins	Plaintiffs	Repair Cost Estimates based on Campbell, Schneider & Associates Destructive Test Report (River Oaks II)
198	BZH050599	BZH050604	10/1/2003	Steve Watkins	Plaintiffs	Repair Cost Estimates based on Campbell, Schneider & Associates Destructive Test Report (River Oaks II)
199	BZH103919	BZH103922	1/20/2006	Tom Carlson	Defendants	Calibogue Construction Company, Inc. Revised Project Cost Summary (revised from January 19, 2006 project cost summary which did not include estimates for Bldg 57) (River Oaks II)
200	BZH104150	BZH104321	N/A	George McGee	Defendants	McGee Consulting Associates, Inc.'s South Phase & North Phase Preliminary Scope of Work, Buildings 45-67 w/tabs (River Oaks II)
201	BZH064582 AND BZH036077	BZH064651 AND BZH036147	5/6/2004	Alan Lumpkin	Defendants	Professional Engineering Associates' Design Calculations for McGee Consulting (River Oaks II)
202	BZH063596 AND BZH063801	BZH063599 AND BZH063805	4/21/2003	Roland Kohlbeck	Defendants	R-K Engineers- Matrix of Engineers' Report Issues to Subcontractors to Photos and Buildings by Building Permit and CO Dates (River Oaks II)
203	BZH104108	BZH104149	11/23/2004	Roland Kohlbeck	Defendants	River Oaks II- Structural Repairs Scope of Work by R-K Engineers
204	BZH036274	BZH036277	N/A	Steve Watkins	Plaintiffs	River Oaks II- Destructive Testing, Buildings 58, 61 & 51
205	BZH036249	BZH036273	N/A	Steve Watkins	Plaintiffs	River Oaks II- Destructive Testing, Buildings 47, 48, 50, 52-54, 56, 60, 62-66

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
206	BZH104101	BZH104107	7/19/2004	Derek Hodgins	Plaintiffs	Construction Science & Engineering, Inc.- additional visual survey conducted on June 30, 2004 (supplemental report)
207	BZH036278	BZH036316	3/4/2004	Derek Hodgins and Martin Phillips	Plaintiffs	Construction Science & Engineering, Inc.- Supplemental Report (River Oaks II)
208	BZH036148	BZH036216	10/3/2003 and 7/18/2002	Steve Watkins	Plaintiffs	File: Plaintiffs' Repair Estimates (River Oaks II)
209	BZH036217	BZH036316	10/5/2001 and 10/30/2001	Derek Hodgins	Plaintiffs	File: Campbell's Construction Investigation Report (River Oaks II)
210	BZH104322	BZH104329	4/22/2005	David Roady (for Derek Hodgins)	Plaintiffs	File: Applied Building Sciences, Inc.- Testing of Installed Windows (River Oaks II)
211	BZH036050	BZH036071	3/8/2004	Lee Capell	Plaintiffs	File: Lee Capell's Mold Report (River Oaks II)
212	BZH036072	BZH036076	9/17/2003	Joey Prince	Plaintiffs	File: Rhino Estimate (River Oaks II)
213	BZH104090	BZH104100	6/17/2005	Sean Abernathie	Plaintiffs	File: Sean Abernathie's Report (Unit 57A field notes) (River Oaks II)
214			2/18/2005	Emily Sweet	David Brown	Second Amended Notice of Rule (b)(6) deposition to Harleysville with cover letter from Emily Sweet to David Brown
215			8/12/2002	Jamie Burner	Mike Wagner	August 12, 2002 letter from Jamie Bruner to Pinehurst requesting to be a part of their defense with Young, Clement
216			4/21/2004			Harleysville's Answer to Amended Complaint and Counterclaim
217	HV518	HV543	7/19/2002			Certified Policy Request (Harleysville)
218	HV423	HV462	6/13/1994			Application for Harleysville Umbrella Policy for 1994
219	HV83	HV104				7/29/94-1995 declaration pages for Harleysville policy number CB9A5801 to Pinehurst Builders, Inc.
220	HV137	HV173				Harleysville Policy Number CB9A5801 effective 7/29/97 to Pinehurst Builders, Inc.

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
221	HV1	HV82				Harleysville Policy Number CB9A5801 effective 7/29/93 to 7/29/94 issued to Pinehurst Builders, Inc.
222	HV395; HV504	HV426; HV507	8/28/2002			Harleysville Policy Number BEC9A5801 effective 7/29/98 to Crossman Communities
223			11/26/2001			Complaint filed by River Oaks II Horizontal Property Regime and River Oaks Home Owners Association, Inc.
224	HV2078	HV2082	8/9/2002	Jamie Burner	Pinehurst Builders	Reservation of Right letter dated August 9, 2002 from Jamie Bruner - River Oaks II
225	HV2677	HV2687				Spreadsheet regarding River Oaks II damages and estimated costs
226			7/28/2002			Buck Creek Complaint
227	HV914	HV918	9/6/2002	Jamie Burner	Pinehurst Builders	August 6, 2002 Reservation of Rights Letter from Jamie Bruner- Buck Creek
228	BZH042318	BZH042329				Spreadsheet regarding Buck Creek Villas damages and estimated costs
229			7/26/2001			Amended Summons and Amended Complaint in Waterway Village Case
230			3/22/2001	Mac Morgan	Pinehurst Builders	March 22, 2001 reservation of rights letter from Mac Morgan to Pinehurst-Waterway Village
231			1/24/2002			Second amended Summons and Second Amended Complaint regarding River Oaks Horizontal Property Regime, et al.
232			12/20/2000	Mac Morgan	Pinehurst Builders	December 20, 2000 letter from Mac Morgan at Hanover Insurance to Pinehurst regarding possible claim coverage problems
233						Copies of pages from Webster's Encyclopedic Unabridged Dictionary
234	HV1148	HV1155	8/18/2004	Harleysville	Pinehurst Builders	August 18, 2004 supplemental reservation of rights letter- River Oaks I
235			1/20/2002			Third Amended Complaint of Lightkeepers Village Home Owners Association
236			8/9/2002	Jamie Burner	Pinehurst Builders	August 9, 2002 reservation of rights letter from Jamie Bruner- Lightkeepers Village
237	HV1020		9/20/2002	Jamie Burner	William Lawson	September 20, 2002 letter from Jamie Bruner discussing policy placement
238	HV1076		9/10/2001	Jamie Burner	Ed Lawson	September 10, 2001 letter from Jamie Bruner to Ed Lawson requesting documentation for reasons why Crossman or Right-Way are owed a defense

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
239	HV1273		1/14/2003	Jamie Burner	Ed Lawson	Letter dated January 14, 2003 from Jamie Bruner to Ed Lawson requesting information
240	HV992		5/19/2003	Jamie Burner	Ed Lawson	Letter asking for information on experts' review of building damages
241	HV374					Harleysville Renewal Certificate for Commercial Blanket Excess Policy for Pinehurst Builders dated 7/29/97 through 7/29/98
242						Draft of Amended Summons for Lightkeeper's Village Horizontal Property Regime
243			3/10/2003	Harleysville Mutual Ins. Co.	E. Lawson	Copy of check for full and final settlement of all claims related to the Yacht Club at Lightkeepers Village lawsuit
244			2/25/2003	E. Lawson	F. Chmielewski (Harleysville)	February 25, 2003 letter notifying Harleysville that the Yacht Club at Lightkeepers Village lawsuit has been settled for \$300,000
245				Emily Sweet	Steve Leder	Amended Notice of Rule 30(b)(6) Deposition- Massachusetts Bay
246						Massachusetts Bay Policy No. ZDI 5260801 effective 8/29/98-8/29/99
247						Massachusetts Bay Policy No. ZDI 5260801 effective 8/29/99-8/29/00
248			7/1/2002	Rick Hein	Gilford Edwards	July 1, 2002 reservation of rights letter to Gilford Edwards from Rick Hein- Lightkeepers Village
249						Massachusetts Bay Exclusion - Residential Construction
250						Westlaw printout: Acusport v. Massachusetts Bay Insurance Company
251						Spreadsheet re River Oaks II - Myrtle Beach, South Carolina
252						Westlaw printout: Auto-Owners Ins. Co. v. Home Pride Companies, Inc.
253			2/15/2002	Rick Hein	Dan Rogers	February 15, 2002 reservation of rights letter to Daniel Rogers from Rick Hein- River Oaks II
254			6/18/1999			June 18, 1999 letter to Reuelaine Good from Linda M. Merkel
255			9/3/1998	Jay Smith	Vicki Collier	September 3, 1998 letter from Jay Smith with Renewal Instructions for Crossman effective 8/29/1998
256			12/31/1998			Redacted list of Crossman locations by state
257	BZH016939	BZH016940	2/20/2002	Joe DaPore	Dave Laughlin	February 20, 2002 letter from Joe DaPore requesting Young Clement Rivers & Dale to represent the Indiana Insurance Company for River Oaks II
258						CNA Residential Construction Exclusion

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
259	BZH010555	BZH010556	2/17/2003	M. Brittain Travis	Mike Wagner	February 17, 2003 letter regarding payment for Crossman's defense in Buck Creek
260			8/30/2002	Mike Wagner	Gilford Edwards	August 30, 2002 reservation of rights letter from Mike Wagner to Gilford Edwards-Buck Creek
261	BZH017303		8/12/2002	Jamie Burner	Mike Wagner	August 12, 2002 letter from Jamie Bruner to Mike Wagner requesting to participate in Young, Clement's defense of Crossman in River Oaks II
262	BZH089285	BZH089287	5/6/2002	Rick Hein	Mark Smith	May 6, 2002 letter from Rick Hein to Mark Smith enclosing an opinion concerning Regent's obligation to participate in Crossman's defense in the underlying cases
263	BZH091682	BZH091688	5/23/2002	Shasta Cottrell	Shannon Bogard	Fax from Shasta Cottrell to Shannon Bogard dated May 23, 2002 with attached list of claims to South Carolina
264	BZH089499	BZH089505	1/26/2002	Rick Hein	Gilford Edwards	January 26, 2002 reservation of rights letter- River Oaks II
265	BZH089878			Joseph DaPore	Shannon Bogard	Letter from Joe DaPore to Shannon Bogard enclosing list of carriers on policy related cases
266						Massachusetts Bay's Response to Request for Production of Documents by Plaintiffs
267						Massachusetts Bay's Answers to Plaintiffs' Interrogatories
268	MB00814	MB00822	8/9/2002	Rick Hein	Gilford Edwards	August 9, 2002 letter from Rick Hein to Gilford Edwards to supplement the reservation of rights letter sent June 21, 2002 regarding River Oaks I
269	MB00927	MB00920	3/11/2004	Rick Hein	Gilford Edwards	March 11, 2004 letter from Rick Hein acknowledging receipt of lawsuit and explanation of coverage for the Beach case
270			8/9/2002	Rick Hein	Gilford Edwards	August 9, 2002 letter from Rick Hein to supplement the reservation of rights letter sent June 21, 2002 regarding Waterway Village
271						Massachusetts Bay Insurance Company's Revised Privilege Log
272	BZH069001	BZH069029	9/17/2004			Third Amended Complaint- River Oaks I
273	BZH076501	BZH076509	8/5/2002			Excerpts from The Sherratt Company's report on River Oaks I; includes an introduction with a list of defects
274			7/26/2001			Complaint- River Oaks II

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
275			10/5/2001	Campbell, Schneider and Associates	Stanley Law Firm	Campbell, Schneider & Associates' Report detailing the deficient construction investigation of River Oaks II
276						Spreadsheet detailing damages and needed repairs in River Oaks II
277						Complaint- Waterway Village
278	BZH049005	BZH048992	2/2/2001	Campbell, Schneider and Associates	McCutchen, Mumford and Vaught, P.A.	Campbell, Schneider & Associates' Report detailing the deficient construction investigation at Waterway Village
279	BZH048229	BZH048221				Spreadsheet detailing damages and needed repairs in Waterway Village
280	BZH089063	BZH089083	7/26/2002			Complaint- Buck Creek
281	BZH002261	BZH002273	4/10/2002	Campbell, Schneider and Associates	McCutchen, Mumford and Vaught, P.A.	Campbell, Schneider & Associates' Report detailing the deficient construction investigation at Buck Creek
282	BZH002279	BZH002290				Spreadsheet detailing damages and needed repairs in Buck Creek
283			1/30/2002			Third Amended Summons- Lightkeepers Village
284	BZH010576	BZH010586		RV Buric Construction Consultants		RV Buric Construction Consultants' Report detailing the deficient construction investigation of Lightkeepers Village
285	BZH024341	BZH024345	12/1/2003	RV Buric Construction Consultants		Spreadsheet detailing damages and needed repairs in Lightkeepers Village
286	BZH054520	BZH054524	4/17/2002	Harriet Windsor		Part of Merger Agreement
287			1/7/2004			Affidavit of H. Gilford Edwards
288	HV4487		7/22/1998	Connie Cox	Teresa Hughes	July 22, 1998 letter from Connie Cox to Teresa Hughes regarding insurance policies and the merger of Crossman Communities
289	HV4100		1/10/1997	Robert Griffith	Tom Bailey	January 10, 1997 letter from Robert Griffith to Tom Bailey regarding Pinehurst contracts and contactors location information
290	HV1	HV82				Harleysville Policy Number CB9A5801 effective 7/29/93 to 7/29/94 issued to Pinehurst Builders, Inc.
291						Schedule of Insurance (Exhibit A to Original Complaint)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
292			2/9/2005			Plaintiffs' Amended 30 (b)(6) Notice of Rule Deposition directed to Indiana Insurance Company
293			8/11/1997			July 1, 1997-July 1, 1998 Indiana Insurance Policy (42-168-444)
294	HV2677	HV26878				Spreadsheet regarding River Oaks II damages and estimated costs
295			7/30/1998			July 1, 1998- August 29, 1998 Indiana Insurance Policy (42-178-801)
296			3/1/2005	James Lady		Cancellation Request for the 42-178-801 policy from 1998
297						Westlaw printout, Auto-Owners Insurance Company -v- Home Pride Companies, Inc.
298						Westlaw printout, Indiana Insurance Company -v- Alloyd Insulation Co., et al.
299	BZH089960	BZH089968	3/26/2003	Melanie Harris	Peggy Caldwell	Letter attaching the Reservation of Rights letter sent by Michael Brown to Shannon Bogart per her request for coverage information for Crossman claims
300	BZH089398	BZH089400	5/8/2002	Shannon Bogard	David Laughlin	Letter dated May 8, 2002 from Shannon Bogard to Dave Laughlin requesting coverage, defense and indemnification from Indiana Insurance for Crossman
301			1/24/2002			Second Amended Complaint, River Oaks underlying lawsuit
302			11/26/2001			Complaint in the River Oaks II underlying action
303			3/17/2004			Answer and Counterclaim of Indiana Insurance Company to Amended Complaint
304			3/2/2005			Replacement Exhibit No. 13, Case Information Screen
305			1/27/2005			Indiana Insurance Company's Answers to Plaintiffs' First Interrogatories
306			1/28/2005			Indiana Insurance Company's Answers to Plaintiffs' First Requests for Production
307			3/14/2005	James Lady	Marty McNerney	March 14, 2005 letter from Jim Lady supplementing prior discovery requests, discusses treatment of potentially privileged documents
308			3/15/2005	Marty McNerney	James Lady	March 15, 2005 fax attaching response letter accepting offer to review Indiana's claims files for Crossman
309			2/9/2005			Plaintiffs' Amended 30 (b)(6) Notice of Rule Deposition directed to Defendant Indiana Insurance Company
310			8/11/1997			July 1, 1997-July 1, 1998 Indiana Insurance Policy (42-168-444)
311			7/30/1998			July 1, 1998- August 29, 1998 Indiana Insurance Policy (42-178-801)
312	CIN0272		7/22/1992			Notice of Additional Coverage

ROA 629

PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
313	CIN0256	CIN0257	7/1/1994	Linda Merkel	Robert Miller	Letter attaching anniversary adjustment application for Crossman Communities
314	CIN0233	CIN0234				Coding Worksheet
315	CIN0280	CIN0281				Umbrella Typing Worksheet
316	CIN0294		7/8/1992			Record of contact sheet with phone call regarding Deluxe Homes
317	CIN0181		11/19/1998	Clem Auyeung	Jay Smith	November 19, 1998 email from Clem Auyeung to Jay Smith regarding real estate aspect of Crossman Communities account
318	CIN0221		11/25/1996	Jay Smith	Don Fillingame	November 25, 1996 letter from Jay Smith discussing Crossman Communities' Umbrella policy
319	CIN0204		8/7/1997	Jay Smith	Jim Robisch	August 7, 1998 letter from Jay Smith discussing the need to further insure Crossman Communities for development
320	CIN0202	CIN0203	1/20/1998	Jay Smith	Clem Auyeung	January 20, 1998 letter from Jay Smith discussing Crossman Communities policies and attaching another letter from Don Fillingame
321	CIN0182	CIN0185	11/17/1998	Jay Smith	Clem Auyeung	November 17, 1998 email from Jay Smith attaching document entitled "Braodings, Restrictions and Clarification of Coverage"
322	CIN0187		10/9/1998	Linda Merkel	Clem Auyeung	Letter requesting amendment of schedule of underlying policies
323	CIN0191	CIN0192				Copy of commercial insurance application for Cincinnati
324	CIN0079	CIN0083	10/5/2001	Jerry Treft		Handwritten memos and emails from Anne Russo
325	CIN0074	CIN0078	7/27/2001	Anne Russo	Linda Merkel	July 27, 2001 letter attaching application for 7/1/01 policy renewal of Cincinnati policy
326	CIN0026		5/3/2002	Jay Smith	Tyra Stall; Sara Rouse	May 3, 2002 email regarding Crossman Communities' acquisition by Beazer Homes
327	CIN0048	CIN0050	1/21/2002	Jay Smith	Anne Russo	January 21, 2002 email chain regarding old policy searches for Crossman Communities
328	CIN0051		1/18/2002	Anne Russo	Jay Smith	January 18, 2002 email discussing changes to be made to umbrella policy as a result of changes in GL coverage
329	CIN0052		1/15/2002	Jerry Treft	Tim Huntington	January 15, 2002 interoffice memo discussing Crossman policy expiration dates and policy renewal figures
330	CIN0069	CIN0070	10/5/2001			October 5, 2001 Coding Worksheet (Cincinnati)
331	CIN0067	CIN0068	10/2/2001	Sara Rouse	Anne Russo	October 2, 2001 fax attaching umbrella renewal declaration document from Cincinnati

ROA 630

PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
332	CIN0092	CIN0094	7/26/2001			July 26, 2001 handwritten notes and attached schedule modification documentation sheet
333	CIN0106	CIN0107	6/26/2001	Jay Smith	Anne Russo	June 26, 2001 email attaching spreadsheet to convert the historical Umbrella premiums into factors of sales and closings for Crossman
334	CIN0033	CIN0034	12/26/2001			December 26, 2001 Umbrella Worksheet Endorsement from Cincinnati
335	CIN0035	CIN0038	1/2/2002	Jay Smith	Anne Russo	January 2, 2002 fax regarding Crossman changing their underlying General Liability program and attaching general liability policy information
336	CIN24	CIN25	5/7/2002	Jay Smith	Anne Russo	May 7, 2002 email from Jay Smith discussing the effect of Beazer's acquisition of Crossman on the Umbrella
337	CIN0009	CIN0011	9/5/2002	Sara Rouse	Anne Russo	September 5, 2002 fax from Sara Rouse attaching commercial general liability documentation with the addendum of Crossman as a named insured to Cincinnati policy
338	CIN0020	CIN0023	5/8/2002			Notice of Non-renewable of Insurance for Crossman from Cincinnati
339	CIN0005	CIN0006	2/20/2004	Anne Russo	Jay Smith	February 20, 2004 email from Anne Russo discussing changes made to the Crossman Umbrella policy
340			2/18/2005			Plaintiffs' Amended Notice of Rule 30 (b)(6) Deposition directed to Defendant Cincinnati Insurance Company including cover letter from Emily Sweet to Frank Mack
341			1/21/2005			Cincinnati Insurance Company's Answer to Plaintiff's first Interrogatories
342	CIN378	CIN389	9/10/2002	Troy Reichers	Shannon Bogard	September 10, 2002 reservation of rights letter from Troy Reichers- Buck Creek
343	CIN432	CIN443	8/20/2002	Troy Reichers	Shannon Bogard	August 20, 2002 reservation of rights letter from Troy Reichers- Waterway Village
344	CIN539	CIN550	8/20/2002	Troy Reichers	Shannon Bogard	August 20, 2002 reservation of rights letter from Troy Reichers- River Oaks I
345	CN492	CN498	3/19/2002	Troy Reichers	Gilford Edwards	March 19, 2002 reservation of rights letter - River Oaks II
346			2/26/2004			Cincinnati Insurance Company's Answer to Amended Complaint
347			8/10/1995			Declaration Page for Cincinnati Policy No. CCC 4382766 effective 7/1/95-7/1/98
348						Cincinnati Policy No. CCC 4445840 effective 7/1/98-7/1/01

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
349						Cincinnati Policy No. CCC 4445840 effective 7/1/01-7/1/02
350	BZH089557	BZH089563	3/19/2002	Troy Reichers	Gilford Edwards	March 19, 2002 reservation of rights letter - River Oaks II
351			1/21/2005			Cincinnati Insurance Company's Answer to Plaintiff's First Request for Production
352			5/4/2005			Plaintiffs' Third Amended Notice of Rule 30(b)(6) Deposition
353	HV636	HV648	2/16/2004	Harleysville		Amendment to Agency/Company Agreement for flood insurance from Harleysville
354	HV4652	HV4660		Harleysville		Records Management, Retention & Disposition policy at Harleysville
355			11/30/2004			Harleysville's Response to Plaintiffs' First request for Production of Documents
356	HV282	HV295	8/8/2002			Contractors Business Owners Policy Data from Harleysville
357	ASSOC.INS.01 23	ASSOC.INS. 0125	9/23/1998			Handwritten notes regarding General Liability for list of Crossman developments
358	ASSOC.INS.01 36		7/21/1998	John McCaskill	Linda Hughes	July 21, 1998 fax discussing extension of TIP policies for 30 days as well as a request for up to date rates
359	ASSOC.INS.02 20	ASSOC.INS. 0240	3/20/2001	Connie Cox	Tom Bailey	March 20, 2001 fax attaching copies of a civil action and summons for Waterway Village
360	ASSOC.INS.03 22		8/06/97, 9/22/97, 11/06/97	John McCaskill	Linda Hughes	Memo from John McCaskill attaching an umbrella application for Callihan, Teal & Skelley and Charlie Floyd & Ralph Jones
361	ASSOC.INS.09 13	ASSOC.INS. 0914	6/11/1997	Associated Insurers	Pinehurst Builders	June 11, 1997 letter confirming June 10, 1996 meeting to discuss all corporations insured by Associated Insurers, Inc.
362	ASSOC.INS.14 75	ASSOC.INS. 1480	8/5/1997			Pinehurst Builders meeting minutes
363	ASSOC.INS.17 15		6/27/1997	Harleysville	Associated Insurers, Inc.	Memo regarding submission of new business with handwritten notes
364						CNA Residential Construction Exclusion
365	HV544	HV599	7/19/2002			Harleysville Policy No. GL705673 effective 10/4/96-10/4/97
366	HV482	HV503	7/31/1997			Harleysville Policy No. BEC9A5801 effective 7/29/97-7/29/98

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
367	HV432	HV462	6/13/1994			Harleysville Umbrella Policy application for Pinehurst Builders to Associated Insurers, Inc.
368	HV427	HV431	8/21/2002	Jamie Burner	William Hunt	August 21, 2002 email from Jamie Bruner requesting information on the excess policy and the coverage limits
369	HV600	HV629	8/15/1997			Harleysville Policy No. GL705673 effective 10/4/97-10/4/98
370	HV201	HV281	7/29/1998			Harleysville Contractors' Business Owners Policy Declarations
371			4/28/2005			Plaintiffs' Supplemental Notice of Rule 30(b)(6) Deposition Directed to Defendant Massachusetts Bay Insurance Company
372	MB01087	MB01212				Massachusetts Bay 1998-1999 Policy
373	MB01090					Hanover Insurance (Mass Bay) Named Insured Schedule, Policy No. ZDI 5260801 endorsement
374	MB01218	MB013801				Massachusetts Bay 1999-2000 Policy
375						Massachusetts Bay Exclusion-Damage To Work Performed By Subcontractors On Your Behalf
376						Fungi or Bacteria Exclusion on Massachusetts Bay Insurance policy
377						EIFS Exclusion on Massachusetts Bay Insurance policy
378						Exclusion - Residential Construction on Massachusetts Bay Insurance policy
379						Residential Construction Exclusion on Massachusetts Bay Insurance policy
380			5/5/2005			Massachusetts Bay Insurance Company's Response to Plaintiffs' Second Request for Production of Documents
381			8/6/1998	Jay Smith	Vicki Collier	August 6, 1998 letter from Jay Smith attaching additions to the GL & WC Payroll Estimates for 98-99, maps, loss runs, summaries of insurance and named insured of Crossman's South Carolina locations
382			9/20/1999			MBAH level of insurance outline for Crossman Communities dated September 20, 1999
383			11/3/1998	Vicki Collier	Jay Smith	November 3, 1998 email from Vicki Collier to Jay Smith requesting clarification on the mechanics of the Builders Risks Form regarding Crossman Communities, discusses coverage for Crossman
384			6/15/2000	Reuelaine Good	Jay Smith	June 15, 2000 memorandum regarding Crossman Communities' policies and renewal, numbers for calculated workers comp par-plan and builders risk coverage premium charge

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
385			6/28/2000	Jay Smith	Reuelaine Good	June 28, 2000 letter attaching current Subcontractor Agreement for Crossman
386			7/19/2005			Rule 30(b)(6) Notice of Deposition to Associated Insurors (Kimberly Gore)
387			12/23/2003			Affidavit of Ralph Teal
388			1/18/2005			Defendant Associated Insurers, Inc. of Myrtle Beaches' Responses to Plaintiffs' First request for Production
389			10/25/2004	Cynthia Howe	David Miller	October 25, 2004 letter to David Miller attaching Raymond Schild Affidavit
390			5/7/2004			Affidavit of Raymond Schild
391	HV636	HV648	2/25/2004			Amendment to Agency/Company Agreement from Associated Insurors
392			6/16/2005			Answer to Second Amended Complaint by Associated Insurors
393	HV518	HV543	7/19/2002			Certified Policy Request for River Oaks Golf Development
394			5/23/2005			Transcript of John McCaskill
395			7/19/2005			Rule 30(b)(6) Notice to Associated Insurors (Teresa Hughes)
396	ASSOC. INS. 0489	ASSOC. INS. 0490	11/29/1999	Carolyn Hart	Theresa Hughes	November 29, 1999 fax from Carolyn Hart attaching handwritten notes regarding Crossman Builders Risk policy and Crossman looking for better rates
397	ASSOC. INS. 0005	ASSOC. INS. 0006				Client contact record for phone visits stating all entities merged with Crossman, attaching spreadsheet of detailed coverage figures for various represented companies
398	ASSOC. INS. 1597	ASSOC. INS. 1599	12/11/1997	Connie Cox	Teresa Hughes	December 11, 1997 letter attaching memo dated 4-18-97 from Bill Baldree, 4-18-97 statement for Theodore Yeanacopolis showing rental for 12 nights, and 4-3-97 statement for Marty Fischer for 14 nights
399	ASSOC. INS. 0123	ASSOC. INS. 0125	9/23/1998			September 23, 1998 handwritten notes regarding General Liability for list of Crossman developments
400	ASSOC. INS. 0136		7/21/1998	Teresa Hughes	McCaskill	July 21, 1998 fax from Teresa Hughes discussing extension of TIP policies for 30 days as well as a request for up to date rates
401	ASSOC. INS. 0138		6/17/1998	Teresa Hughes	Sue (last name unknown)	Fax regarding builders Risk policy coming up for renewal and list of locations for review with Teresa Hughes' handwritten notes
402	ASSOC. INS. 0145			Teresa Hughes		Handwritten notes regarding July Builders Risk policy with prices
403	ASSOC. INS. 0150			Teresa Hughes		Handwritten notes regarding Pinehurst Builders defense as well as policy numbers

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
404	ASSOC. INS. 0151	ASSOC. INS. 0153	2/18/2004			Computer Printout with Customer History Query Report for River Oaks Golf Development Corp.
405	ASSOC. INS. 0220	ASSOC. INS. 0240	3/20/2001	Tom Bailey	Connie Cox	March 20, 2001 fax from Tom Bailey to Connie Cox attaching copies of a civil action and summons for Waterway Village
406	ASSOC. INS. 0493		8/17/1999	Patty (last name unknown)	Theresa Hughes	August 17, 1999 fax providing notice of the Pyle claim to Associated Insurors
407	ASSOC. INS. 0531		1/8/1999	Gilford Edwards	Barbara Myers	January 8, 1999 letter from Gilford Edwards amending 8-12-98 correspondence acknowledging the receipt of Buck Creek
408	ASSOC. INS. 0913	ASSOC. INS. 0914	6/11/1996	Teresa Hughes	Robert Miller	June 11, 1996 letter from Teresa Hughes to confirm 7-10-96 meeting including list of cases and their policies representing them
409	ASSOC. INS. 0920		7/26/1994	Associated Insurors, Inc.	Harleysville	July 26, 1994 fax from Associated Insurors regarding Pinehurst Builders ERA and Umbrella with policy figures
410	ASSOC. INS. 0999	ASSOC. INS. 1000	12/15/2000			General Liability Notice of Occurrence of Claim for River Oaks I
411	ASSOC. INS. 0475	ASSOC. INS. 0480	8/5/1997			August 5, 1997 meeting notes
412	HV282	HV296	8/8/2002			Contractors Business Owners Policy Data for 7/29/96-7/29/97 policy period on CB 9A 5801 policy
413	ASSOC. INS. 0628		7/23/1997	Teresa Hughes	Connie Cox	July 23, 1997 fax from Teresa Hughes to Connie Cox attaching a binder and copy of part of the application
414	ASSOC. INS. 1345		5/19/1998	Teresa Hughes	Connie Cox	May 19, 1998 fax from Teresa Hughes to Connie Cox regarding suit papers asking to be forward originals once received in office
415			12/23/2003	Ralph Teal		Affidavit of Ralph Teal
416			10/25/2004	Ralph Teal		Supplemental Affidavit of Ralph Teal
417			1/5/2006			Second Amended Notice of Deposition Duces Tecum of Donald Brayer
418			1/6/2006	Donald Brayer		Donald J. Brayer's Expert Report- Opinions and Basis Thereof
419						International Risk Management Institute, Inc. Publication: "Damage to Your Work" from the CGL discussions
420						International Risk Management Institute, Inc. Publication: "Damage to Your Work" from the CGL discussions (in smaller type)

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
421						International Risk Management Institute, Inc. Publication: "Agent's Duty to Review a Customer's Insurance Needs"
422			12/6/2005			FC&S Alert: bulletin outlining key issues. Page 6 contains a section about the L-J, Inc. v. Bituminous Fire & Marine Insurance Company case called "Faulty Workmanship Does Not Constitute an Occurrence"
423			12/5/2005	Donald Brayer		Don Brayer's typed notes from the Deposition of John McCaskill
424			12/5/2005	Donald Brayer		Don Brayer's typed notes from the Deposition of Ralph Teal
425			12/5/2005	Donald Brayer		Don Brayer's typed notes from the Deposition of Lee Wright
426						Don Brayer's file for the case. Contains engagement letter, retainer fee, and billing printouts
427			1/12/2006			Harleysville Mutual Insurance Company's Notice of Rule 30(b)(6) deposition directed to Plaintiff
428			1/23/2006			Plaintiffs' Objections to Defendant's Rule 30 (b)(6) Notice of Deposition
429			7/2/2004	Beazer Investment Corp.		Proposal for work to be performed at River Oaks Condominiums in Myrtle Beach, SC., includes itemized spreadsheet of estimated costs
430			8/5/2002	Peter Sherratt		August 5, 2002 draft letter from Peter Sherratt with a preliminary review of the conditions at the River Oaks Condominiums at the request of the Homeowners Association.
431			11/14/2005			Expert Disclosure of Associated Insurors, Inc.
432			3/8/2006			Notice of Deposition Duces Tecum- Gerald T. Hargrove
433			10/20/2005			Deposition Transcript and Exhibits of Ralph Teal, Jr.
434			1/6/2006	Donald Brayer		Donald J. Brayer's Expert Report- Opinions and Basis Thereof
435			1/1/2005	Gerald Hargrove		American Agent & Broker Publication: "Looking for Answers to the Problem of Construction Defects" by Gerald Hargrove
436			10/25/2004	David Miller		Plaintiffs' Responses to Defendant Harleysville Mutual Insurance Company's Interrogatories to the Plaintiffs
437						Plaintiffs' Responses to Massachusetts Bay Insurance Company's Interrogatories
438	BZH076503					Preliminary Investigation Report- River Oaks I by the Sherratt Company

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PLAINTIFFS' EXHIBIT LIST

Crossmann Communities of North Carolina, Inc., et al. v. Harleysville Mutual Insurance Company, et al.

EX. NO.	BATES BEGIN	BATES END	DATE	AUTHOR	RECIPIENT	DESCRIPTION
439			8/10/1993	Pinehurst Builders		General Specifications for River Oaks Golf & Tennis Resort from August 10, 1993 by Pinehurst Builders & Properties, Inc.
440	BZH050064	BZH050126	5/29/1998			Agreement and Plan of Merger by and among Crossmann Communities of North Carolina, Inc. and The Pinehurst Entities, James T. Callihan, Ralph R. Teal, Jr., Jeffrey H. Skelley, and H. Gilford Edwards
441	BZH048991	BZH049005				Deficient Construction Investigation- Waterway Village- Campbell, Schneider & Associates
442						Deposition Transcript and Exhibits of L.G. (Skip) Lewis
443						Deposition Transcript and Exhibits of Patrick Wielinski
444						Deposition Transcript and Exhibits of Michael Aylward
445						Deposition Transcript and Exhibits of David McCandless
446	BZH042271	BZH402274				Listing of subcontractors at Buck Creek
447	BZH063801	BZH063805				Listing of subcontractors at River Oaks II from Roland Kohlbeck
448						Skip Lewis' Expert Report
449						David McCandless' Expert Report
450						Donald J. Brayer's Expert Report
451						Any and all deposition transcripts and accompanying exhibits of any fact or expert witness from the River Oaks I underlying lawsuit
452						Any and all deposition transcripts and accompanying exhibits of any fact or expert witness from the River Oaks II underlying lawsuit
453						Any and all deposition transcripts and accompanying exhibits of any fact or expert witness from the Waterway Village underlying lawsuit
454						Any and all deposition transcripts and accompanying exhibits of any fact or expert witness from the Lightkeepers Village underlying lawsuit
455						Any and all deposition transcripts and accompanying exhibits of any fact or expert witness from the Buck Creek underlying lawsuit

Plaintiffs also reserve the right to introduce into evidence at trial (a) any document in the record of any of the Underlying Lawsuits, (b) any document exchanged by the parties in discovery in this case, (c) any document used in cross-examination of Defendants' witnesses, (d) summaries of documents and information in accordance with S.C. Rule of Evidence 1006, and (e) other documents that Plaintiffs may obtain before trial from third parties

EXHIBIT N

I. PLAINTIFFS' FACT WITNESSES

- A. Mr. Mark Berry
- B. Ms. Connie Cox
- C. Mr. Gilford Edwards
- D. Excerpts From The Deposition Of Ms. Theresa Hughes
- E. Excerpts From The Deposition Of Mr. John McCaskill
- F. Mr. Jeffrey Skelly
- G. Mr. Ralph Teal
- H. Excerpts From The Deposition Of Mr. Lee Wright
- I. Any Other Witness Whose Deposition Was Taken In This Case
- J. Any Person Identified By Any Party During Discovery As Having Knowledge Relative To The Underlying Lawsuits

II. PLAINTIFFS' EXPERT WITNESSES

- A. Mr. Skip Lewis
- B. Mr. Donald Brayer
- C. Mr. Patrick J. Wielinski
- D. Excerpts From The Deposition Of Mr. David McCandless Of Accident Reconstruction, Inc.
- E. Excerpts From The Deposition Of Mr. Michael Aylward
- F. Excerpts From The Deposition of Mr. Gerald Hargrove

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Crossmann Communities, et al.

IN THE

☒ COURT OF COMMON PLEAS☐ FAMILY COURT

CASE NO.

2004-CP-26-84

☒ Plaintiffs

v.

Harleysville Mutual Insurance, et al.

☐ Defendants

MOTION AND ORDER INFORMATION

FORM AND COVER SHEET

Plaintiff's Attorney:	Bar No	Defendant's Attorney:	Bar No
David B. Miller	10296	Francis M. Mack	
Bellamy Law Firm		Richardons Plowden Carpenter & Robinson	
Telephone: 843-448-2400	Fax:	Telephone:	Fax:
E-Mail:	Other:	E-Mail:	Other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (Complete Sections II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Alter, Amend or ReconsiderEstimated Time Needed: 30 mins Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[Signature] 6-11-12
 Signature of Attorney for ☒ Plaintiff ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

- ☐ EXEMPT: (check reason)
- | | |
|---|--|
| ☐ Rule to Show Cause in Child or Spousal Support | ☐ State Agency v. Indigent Party |
| ☐ Domestic Abuse of Abuse and Neglect | ☐ Post-Conviction Relief |
| ☐ Indigent Status | ☐ Motion for Stay in Bankruptcy |
| ☐ Sexually Violent Predator Act | ☐ Motion for Execution (Rule 69, SCRPC) |
| ☐ Motion for Publication | |
| ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions | |

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE

CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: [Signature]☐ MOTION FEE COLLECTED: _____☐ CONTESTED - AMOUNT DUE: _____Date Filed: 6/14/12

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Crossmann Communities of North
Carolina, Inc., and Beazer Homes
Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance
Company and Cincinnati
Insurance Company,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2004-CP-26-84

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION TO
ALTER, AMEND OR
RECONSIDER PURSUANT TO
RULE 59(e) OF THE SCRPC**

**(CINCINNATI INSURANCE
COMPANY ISSUES)**

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CLERK OF COURT
JUL 11 PM 1:21

CLERK OF COURT
JUL 11 PM 1:21

COUNTY

CERTIFIED COPY

I
PROCEDURAL BACKGROUND

On June 1, 2012, counsel for Plaintiffs received the Court's Order on Remand addressing issues regarding the liability of Cincinnati Insurance Company ("Cincinnati") to Beazer under the Court's May 2007 Final Judgment and Order (the "Cincinnati Remand Order"). Beazer agrees with, and seeks no amendment to, the Court's ruling in the Cincinnati Remand Order that the limits of the "underlying insurance" policies that sit below the Cincinnati excess policies may be exhausted by payment of claims by the insurers or by Beazer. (Cincinnati Remand Order, at 12-14.) This ruling is consistent with the decision of the United States Court of Appeals for the Seventh Circuit in another insurance coverage case between Beazer and Cincinnati under the same Cincinnati insurance policies at issue in this case. *Trinity Homes LLC and Beazer Homes Investment Corp. v. Ohio Casualty Company and Cincinnati Ins. Co.*, 629 F.3d 653 (7th Cir. 2010). In this motion, Beazer seeks relief under Rule 59(e) for the other rulings in the Cincinnati Remand Order.

Specifically, Beazer respectfully submits that pursuant to Rule 59(e) of the SCRCF, the Court should amend the Cincinnati Remand Order and hold that (a) the limits of the insurance policies underlying Cincinnati's excess policies have been exhausted by payment of claims by insurers and by Beazer, and (b) the Court's May 2007 Final Judgment and Order holding that any Cincinnati insurance policy triggered by the underlying homeowner claims against Beazer is jointly and severally liable for all of Beazer's losses not paid by the Harleysville. The grounds for this Motion are set forth below.

II.

ARGUMENT

A. The Court's Order Should Be Amended To Hold That The Limits Of The Policies Underlying Cincinnati's Policies Have Been Exhausted By Claim Payments By Beazer And Insurers For Claims Against Beazer In South Carolina, Indiana, and Kentucky

1. Payments by Beazer or by insurers to resolve third-party claims against Beazer in states other than South Carolina must apply to establish exhaustion

As demonstrated in Beazer's written submissions to the Court on remand, which included substantial record evidence from this case, it is undisputed that:

- Cincinnati's policies provide Beazer with coverage for claims asserted against Beazer in South Carolina, Indiana, Kentucky, and every other state in the country. The primary insurance policies underlying the Cincinnati policies similarly provide Beazer with coverage for claims asserted against Beazer in South Carolina, Indiana, Kentucky, and any other state.¹
- The maximum available limits of all of the underlying insurance policies that are beneath the Cincinnati excess policies is \$12 million.²

¹ The Cincinnati excess policies, in the "Declarations" section, state that "This Policy applies anywhere." (See Cincinnati policy, p.4)

² Each of Indiana Insurance Company, Massachusetts Bay Insurance Company, and Regent Insurance Company sold policies covering Beazer and having limits of \$1 million/occurrence, \$2 million/aggregate for each of their two policy periods. Even if the five underlying lawsuits against Beazer are considered separate occurrences, the maximum available aggregate policy limits are \$12 million.

- As of January 2007, when the Stipulation was entered in this case, undisputed record evidence shows that Beazer and certain of its insurers had paid more than \$30 million to resolve claims against Beazer in Indiana and Kentucky.
- As of January 2007, Beazer had recovered insurance payments from Indiana Insurance Company (\$2.7 million), Massachusetts Bay Insurance Company (\$2.9 million), and Regent Insurance Company (\$3 million) (hereinafter referred to as the "Settling Insurers") totaling \$8.6 million.

(See Beazer's November 2, 2011 Remand Brief, at 3.)

Beazer sustained "multimillion-dollar un[insured] losses" in South Carolina, Indiana, and Kentucky that are more than sufficient to fill any gaps between underlying insurers' settlement amounts and their total coverage obligations." (*Id.* at 3.) The claims payments made by Beazer and its insurers are more than three times larger than the maximum available limits of the insurance policies of the Settling Insurers underlying the Cincinnati excess policies. These claim payments are substantially larger than the amount of claim payments needed to exhaust the limits of the underlying insurance, thereby triggering the Cincinnati policies for the underlying claims at issue in this case.

Cincinnati argued on remand that Beazer's and its insurers' payment of property damage claims in states other than South Carolina are not relevant to demonstrating exhaustion of the underlying insurance policies in this case. The Court in its Cincinnati Remand Order adopted this position without explanation as to why claim payments by Beazer and other insurers in states other than South Carolina should not be applied to exhaust the limits of the underlying insurance which, by the policies' terms, apply

"anywhere." The Court's decision to ignore these substantial and undisputed payments of claims against Beazer in states other than South Carolina for purposes of assessing exhaustion is inconsistent with the Court's ruling that "the limits of the underlying insurance may be exhausted by payment of claims by the carriers or [Beazer] funding the gap between carriers' payments and the policy limits." (Cincinnati Remand Order, at 12) In addition, the Court's Cincinnati Remand Order deprives Beazer of its right to use all record evidence to show exhaustion of the limits of underlying insurance.

In the January 29, 2007 Stipulation, Beazer, Harleysville, and Cincinnati agreed that if the allocation methodology adopted by the Supreme Court on Harleysville's appeal was the pro-rata, time-on-risk method, then Beazer could "argue that Cincinnati's policies are presently triggered" based on "all settlement documents, pleadings, discovery, and depositions, in both the coverage case and the underlying cases which have been produced and exchanged in discovery in this case." (Stipulation at ¶¶ 7, 9)³ As it turned out, this Court's adoption of the joint and several methodology in its May 2007 Final Judgment and Order obviated the need for Beazer, Cincinnati, and the Court to address the exhaustion issues raised by Cincinnati. However, if the Court allows Cincinnati on remand to take advantage of the pro rata, time-on-risk allocation methodology adopted by the Supreme Court in an appeal that Cincinnati did not join, then the Stipulation clearly

³ As shown at pages 8-10 below, because Cincinnati never appealed from this Court's May 2007 Final Judgment and Order, the allocation methodology applicable to Cincinnati is the joint and several methodology as held in the Court's May 2007 Final Judgment and Order, which is the law of the case as to Cincinnati.

permits Beazer to rely upon evidence in the trial record of this case to show exhaustion of the insurance policies underlying the Cincinnati policies. That record evidence is undisputed, and clearly proves that Beazer and its insurers have made claim payments in amounts that exhausted the limits of the underlying policies more than three times over. The Court should therefore amend the Cincinnati Remand Order and rule that Beazer exhausted the limits of the underlying insurance, thus triggering the Cincinnati policies.

2. Even if the Court focuses solely on South Carolina claims against Beazer, the limits of the policies underlying the Cincinnati policies are exhausted

Even if the Court limited its exhaustion analysis solely to third-party property damage claims against Beazer in South Carolina, the limits of the insurance policies underlying the Cincinnati policies are exhausted, thus triggering Cincinnati's liability to Beazer. It is undisputed that Beazer paid \$16,770,750 to settle the underlying property damage claims in South Carolina. (Cincinnati Remand Order, at 6) Approximately half of that amount was paid by the Settling Insurers that were once defendants in this case (Indiana, Massachusetts Bay, and Regent), and the rest was paid by Beazer. Because, as shown above, the "limits of the underlying insurance" can be no more than \$12 million, the limits of the underlying insurance have been exhausted, and Cincinnati's policies are triggered.

In the Cincinnati Remand Order, the Court adopted Cincinnati's contention that

only \$7.2 million is relevant for the exhaustion analysis, and not the actual amount paid by Beazer and insurers -- \$16.77 million -- because the Stipulation provided that \$7.2 million was the amount of "property damage" caused by an "occurrence" under the Harleysville and Cincinnati insurance policies. As explained in Beazer's written submissions on remand and at the March 1, 2012 hearing, limiting the exhaustion analysis to only \$7.2 million not only compounds the error of disregarding payments by Beazer and insurers for claims in states other than South Carolina, but it is a flawed interpretation of the Stipulation.

In 2005 and 2006, Beazer reached settlements in this case with the three Settling Insurers. At that time, Beazer's claims against the Settling Insurers were that each insurer was jointly and severally liable for the entire \$16.77 million loss, up to the limits of their insurance policies. Those claims by Beazer -- based on the entire \$16.77 million loss -- were the claims that were compromised by the Settling Insurers. When Beazer, Harleysville, and Cincinnati entered into the Stipulation in January 2007, the \$7.2 million property damage number was, as the Stipulation plainly states, the damages caused by an "occurrence" under the "Policies", defined in the Stipulation to mean only the insurance policies of Harleysville and Cincinnati. The \$7.2 million stipulated damages figure had nothing to do with the prior settlements between Beazer and the Settling Insurers, and it was error for the Court to construe the Stipulation to apply to the insurance policies of the Settling Insurers by limiting the exhaustion inquiry to only \$7.2 million. Rather, because

the \$7.2 million damages amount only applies to the *Policies* (which defined term in the Stipulation refers only to Harleysville and Cincinnati), the Court should have used for assessing exhaustion the entire amount of the claim payments by Beazer and the Settling Insurers of \$16.77 million, which is more than sufficient to exhaust the limits of the insurance policies underlying the Cincinnati excess policies.

3. The Court should allow limited discovery into the negotiations for the Stipulation

Beazer believes that the Stipulation is clear and provides that the \$7.2 million damages figure applies only to the "Policies" of Harleysville and Cincinnati. Beazer respectfully submits that, in the Cincinnati Remand Order, the Court misapprehended the meaning of the Stipulation. As a result, there appears to be an ambiguity in the Stipulation, and Beazer requests that the Court allow the record of the case to be supplemented with reasonable discovery regarding the intention of the parties in entering into the Stipulation. Beazer will submit a supplemental brief on this issue and propose a schedule for such discovery.

B. Because Cincinnati Did Not Appeal From The Court's May 2007 Final Judgment And Order, Cincinnati Is Bound By That Judgment Which Held, In Part, That Any Triggered Insurance Policy Is Jointly And Severally Liable For All Of Beazer's Loss

It is law of the case that Cincinnati is jointly and severally liable for the portion of Beazer's \$7.2 million loss for which Harleysville is not liable. (See Plaintiffs' November

2, 2011 Remand Br. at 19-20, Ex. E.)⁴ Cincinnati does not dispute that this Court's May 3, 2007 Final Judgment and Order provided that any Cincinnati policy triggered by Beazer's losses was jointly and severally liable up to the limits of the Cincinnati policies. Throughout the pre-trial briefing to the Court leading up to the May 2007 Final Order and Judgment, Beazer linked its request for a declaration of joint and several liability to Count II of the Second Amended Complaint, the Count in which Beazer asked the Court for a declaration of the Parties' rights and obligations under the insurance policies. For example, on March 30, 2006, Beazer filed a motion for partial summary judgment on Count II, stating plainly: "Plaintiffs seek a declaration that each Harleysville and Cincinnati policy triggered by an Underlying Lawsuit is obligated, jointly and severally, to pay all losses . . . arising from the Underlying Lawsuits." (*See* Plaintiffs' May 30, 2006 Allocation Br. at 6, Ex. B; *see also id.* at 1) ("Plaintiffs in this motion seek entry of an Order declaring that . . . each insurer has a joint and several obligation to defend and indemnify . . .").

After the Parties entered into the Stipulation, the Court asked for briefs on the legal issues raised in the Stipulation that were to be resolved by the Court. One of those issues was allocation, and Cincinnati argued in its brief to the Court that allocation should be based on a joint-and-several methodology. (Cincinnati's February 14, 2007 Brief, at p.

⁴ If the Court grants this Rule 59(e) Motion, Cincinnati's liability will be \$7,200,000 less \$1,580,146 (the amount awarded to Beazer pursuant to the Court's May 2012 Remand Order), or \$5,619,834.

14-16) Cincinnati thus agreed with Beazer, and opposed Harleysville, on this point. In its May 2007 Final Judgment and Order, the Court agreed with Cincinnati and Beazer, and entered the declaratory judgment “in favor of [Beazer]” and “against Defendants Harleysville and Cincinnati” and stating that Beazer’s losses “are to be allocated in accordance with the joint and several methodology.” (May 3, 2007 Final Judgment and Order, at 15, 18)

The Court’s May 3, 2007 Final Judgment and Order is law of the case against Cincinnati. South Carolina law is clear that “an unchallenged ruling, right or wrong, is the law of th[e] case. . . .” *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174-75, 525 S.E.2d 869, 871 (2000) (quotation marks omitted); *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (same).⁵

In seeking to avoid the consequences of not appealing, Cincinnati primarily argues that it was not obligated to appeal because it was not “offended” or “aggrieved” by this Court’s May 2007 Final Judgment and Order, and therefore is not bound by that ruling. (Cincinnati Proposed Order, at 8) Cincinnati is wrong. A party is “aggrieved” and must appeal a judgment unless it is content to be bound by it when that judgment “operates on

⁵ Cincinnati agrees with Beazer that the Court’s 2007 Final Judgment and Order was “unchallenged” by it. The law-of-the-case doctrine applies with full force to a non-appealing party where, as here, another party appealed and was partially successful on appeal. For example, in *Glenn v. Worthy*, 169 S.C. 263, 168 S.E. 705 (1933), the trial court entered judgment against each of the six defendants (who were minors) and assessed damages of \$25 each. Five of the defendants appealed, and on appeal the damages award was reduced from \$25 each to \$20.83 each. *Id.* at 720. But one defendant “did not appeal,” and she was “therefore bound” under the law of the case doctrine to pay the original judgment amount of \$25. *Id.*

his or her rights of property or bears directly on his or her interest.” SCACR 201(b); *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (App. 2002). The word “aggrieved” means “a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Beaufort Realty Co.*, 346 S.C. at 301. A declaratory judgment may be adverse to a party, therefore requiring an appeal, unless the party is content to live with the ruling, notwithstanding that there is no accompanying award of damages. *E.g., Lowcountry Open Land Trust v. State*, 347 S.C. 96, 99, 552 S.E.2d 778 (2001). Cincinnati’s decision not to appeal means that Cincinnati is bound by the Court’s May 2007 Final Order and Judgment, including the “joint and several” allocation ruling.

III.
CONCLUSION

Beazer respectfully requests that the Court reconsider its Cincinnati Remand Order and amend that Order to hold that (a) Cincinnati's policies are presently triggered because the limits of the underlying insurance have been exhausted by payment of claims and (b) the Court's May 2007 Final Judgment and Order on the "joint and several" allocation methodology is law of the case as to Cincinnati and therefore binding on Cincinnati in this remand proceeding.

Respectfully submitted,



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STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF HORRY)

FIFTEENTH JUDICIAL CIRCUIT

C/A No. 2004-CP-26-84

Crossmann Communities of North
Carolina, Inc., and Beazer Homes
Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance
Company, and Cincinnati Insurance
Company,)

Defendants.)

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CLERK OF COURT

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS CROSSMANN COMMUNITIES OF
NORTH CAROLINA, INC. AND BEAZER HOMES INVESTMENT CORP.'S MOTION
TO ALTER, AMEND, OR RECONSIDER THE MAY 23, 2012 ORDER AS TO THE
ISSUES RELATING TO CINCINNATI INSURANCE COMPANY**

Plaintiffs, Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corp. (collectively "Beazer"), respectfully submit this Reply Brief in Support of their Motion to Alter, Amend, or Reconsider the May 23, 2012 Order as to the Issues Relating to Cincinnati Insurance Company ("Beazer's Motion").

I. ARGUMENT

Beazer submits this Reply Brief solely to address several misleading statements in Cincinnati Insurance Company's ("Cincinnati") Opposition to Beazer's Motion (hereinafter, "Cincinnati's Opposition"). Specifically, Cincinnati asserts that Beazer "failed to provide to the Court any documentation whatsoever of payments that were made to resolve out-of-state claims," and that Beazer "provided no records to show what payments, if any, were made for potentially covered losses related to ensuing damage versus payments that were made for defective construction." (Cincinnati's Opposition, at 7.) These unsupported assertions are not correct.

The fact is that the record of this case contains ample evidence introduced by Beazer of payments it made to resolve out-of-state construction-related property damage claims in amounts far in excess of the limits of the "underlying insurance." For example, in 2006, during the initial proceedings, Beazer submitted into the record the affidavit of Mr. W. Mark Berry, the Vice President of Risk Management for Beazer at that time. Mr. Berry attested that Beazer paid over \$27,770,073 through January 2006 "for remediation of property damage in connection with the settlement of the Colon lawsuit [the Indiana Coverage litigation]..." (Berry Affidavit, at ¶29.) Beazer also provided Cincinnati with updated summaries of payments made by Beazer to resolve out-of-state claims as this litigation progressed. For example, in its Third Supplementary Responses to Defendants' Interrogatories, Beazer stated that, through July 24, 2006, it expended over \$38,000,000 to resolve construction-related homeowner property damage claims asserted

against Beazer in Indiana and \$6,000,000 to resolve similar claims in Kentucky. (Exhibit K to Beazer's Feb. 3, 2012 Remand Brief, at 3-4.) Finally, Beazer attached summary charts of the payments it made to resolve out-of-state homeowner property damage claims in Indiana and in Kentucky as Exhibits B and D to its November 2, 2011 Remand Brief. Those charts summarized documents from the record of this case that had previously been provided to Cincinnati. This evidence is more than sufficient to meet Beazer's burden with respect to payments it made to resolve out-of-state construction-related property damage claims.

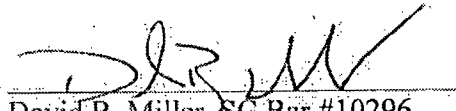
There is also evidence in the record that Beazer's payments to resolve out-of-state claims were for damages that were potentially covered by the Cincinnati policies and the policies of the underlying insurers. For example, in his 2006 Affidavit, Mr. Berry attested that the Indiana action "involved property damage claims by homeowners who claimed that water intrusion had caused damage to their homes." (Berry Affidavit, at ¶29.) These allegations are the same type of allegations asserted against Beazer in the underlying South Carolina property damage claims that are the subject of this action.

In addition, since the time Beazer filed its November 2, 2011 Remand Brief, Cincinnati and Beazer have entered into two separate settlement agreements related to property damage claims by homeowner and homeowner's association plaintiffs that were nearly identical to the underlying lawsuits in this litigation. Both settlement agreements obligated Cincinnati to make substantial payments to Beazer under the very same Cincinnati insurance policies at issue in this litigation. Because insurance companies do not pay claims that they do not believe that they owe, Cincinnati must believe that the limits of the "underlying insurance" have been exhausted by payments made by Beazer and its insurers for covered damages.

II. CONCLUSION

For the reasons set forth above and in Beazer's Motion, Beazer respectfully requests this Court grant its Motion to Alter, Amend, or Reconsider the May 23, 2012 Order as to the Issues Relating to Cincinnati.

Respectfully submitted,



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October 18, 2012.

Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Crossmann Communities of North Carolina, Inc. v. Cincinnati Insurance
Co., et al.
Civil Action No: 2004-CP-26-0084

Dear Ms. Kitchings:

By letter dated October 16, 2012, we filed a Notice of Appeal, however, there were errors in the documents, including an incorrect caption and incorrect Order attached. The lower Court's civil action number, however, was correct. Therefore, we kindly desire to file the following documents:

- 1) Notice of Amended Appeal (original and two copies);
- 2) Proof of Service on the Respondent and lower court (original and two copies);
- 3) Copy of Order (Cincinnati Insurance) dated May 23, 2012; and
- 4) Copy of Order (Cincinnati Insurance) dated September 12, 2012.

Please return the clocked copies of the Notice of Amended Appeal and Proof of Service to me in the self-addressed, stamped envelope enclosed. By copy of this letter and Proof of Service, we are hereby serving all counsel of record.

October 18, 2012

Page 2

Very truly yours,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.



David B. Miller

DBM:ptm
Enclosure as noted

cc: The Honorable Melanie Huggins
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2004-CP-26-0084

Crossmann Communities of North Carolina, Inc.
and Beazer Homes Investment Corp., ... Appellants,

v.

Harleysville Mutual Insurance Company and
Cincinnati Insurance Company, ... Respondent

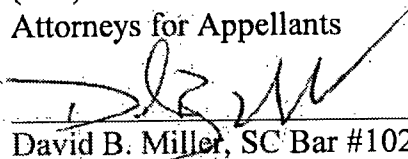
NOTICE OF AMENDED APPEAL
(Cincinnati Insurance Company Issues Only)

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corp. (collectively "Beazer") hereby appeal the Orders of the Honorable Steven H. John as to Cincinnati Insurance Company issues dated May 23, 2012 and September 12, 2012 in this action. The Circuit Court's Orders entered on May 23, 2012 and September 12, 2012 denied Beazer any relief against Cincinnati Insurance Company and entered judgment in favor of Cincinnati and against Beazer on the issues on remand from the South Carolina Supreme

Court in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company*, 395 S.C. 40, 717 S.E.2d 594 (2011). Beazer received written notice of entry of the Circuit Court's September 12, 2012 Order denying Beazer's Motions under Rule 59 of the South Carolina Rules of Civil Procedure on September 28, 2012.

Respectfully submitted,

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Dated: October 18, 2012

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2004-CP-26-0084

Crossmann Communities of North Carolina, Inc.
and Beazer Homes Investment Corp., ... Appellants,

v.

Harleysville Mutual Insurance Company and
Cincinnati Insurance Company, ... Respondent

PROOF OF SERVICE

I certify that I have served one (1) copy of Appellants' Notice of Amended Appeal by depositing the copies in the United States Mail, postage prepaid, on this date addressed to:

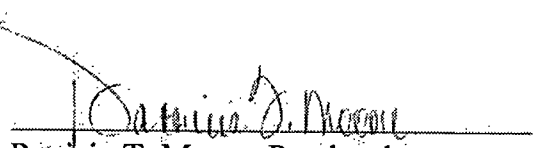
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Dated: October 18, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

C/A No. 04-CP-26-0084

Crossmann Communities of North Carolina,)
Inc., and Beazer Homes Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance Company,)
Cincinnati Insurance Company,)

Defendants.)

ORDER

(Cincinnati Insurance)

Hearing Date – August 27, 2012

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165
ROA 064

This matter is before the Court pursuant to Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corporation's (collectively "Beazer") Motion to Alter, Amend or Reconsider pursuant to Rule 59(e), South Carolina Rules of Civil Procedure. A hearing on this motion was held on August 27, 2012. The motion is directed to and in response to this Court's Order as to Cincinnati Insurance Company ("Cincinnati") dated May 23, 2012. The factual background and procedural history of the case are set forth in the Court's May 23, 2012 Order.

For the reasons set forth below, Beazer's Motion to Alter, Amend or Reconsider is denied.

As set forth in its motion, Crossmann requests the Court to reconsider its May 23, 2012 Order by arguing the following:

1. Payments by Beazer or by insurers to resolve third-party claims against Beazer in states other than South Carolina must apply to establish exhaustion.
2. Even if the Court focuses on South Carolina claims against Beazer, the limits of the policies underlying in the Cincinnati policies are exhausted.
3. Because Cincinnati did not appeal from the Court's May 2007 Final Judgment and Order, Cincinnati is bound by that judgment which held, in part, that any triggered insurance policy is jointly and severally liable for all of Beazer's loss.

In addition, in its brief, Beazer requested limited discovery as to the intent of the parties in entering into the stipulations dated January 29, 2007 and indicated that it would submit a supplemental brief regarding the issue. Beazer did not submit a supplemental brief and did not argue this at the August 27, 2012 hearing. Accordingly, it is deemed abandoned and denied.

While it is undisputed that Beazer paid substantial sums to settle claims in other jurisdictions, Beazer failed to demonstrate what portion of the monies paid, if any, were for covered claims as set forth in *Crossmann Communities of North Carolina, Inc., v. Harleysville*

Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossmann II*"). Further, Beazer has failed to identify what part of any alleged covered claims would be allocated to the Cincinnati policy periods utilizing the pro rata/time on risk methodology as set forth in *Crossmann II*. Only "property damages" caused by an "occurrence" that occurred during Cincinnati's policy period would act to exhaust the underlying CGL limits.

In an effort to show that the amounts paid to settle cases in other states should be considered in this litigation, Beazer relies on statements contained in its Answers to Interrogatories in this matter dated July 24, 2006. (Plaintiff's Exhibit 2 at the August 27, 2012 hearing). The response Beazer relies upon is set forth on page 3 of Plaintiff's Exhibit 2. The discovery response states that in the Indiana and Kentucky cases, Beazer faced "losses arising from third-party claims for property damage caused by acts or omissions of subcontractors." Beazer did not state in its discovery response that any property damage was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period. Further, during the August 27, 2012 hearing, Beazer did not present any evidence to the Court that any property damage in the Indiana and Kentucky cases was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period.

The Court has examined the January 29, 2007 stipulations of the parties, the evidence presented during the course of this litigation and the memoranda submitted by the parties. The Court's Order of May 23, 2012 represents the exercise of "sound discretion . . . to arrive at a reasonable methodology" to determine the underlying damages. *Crossmann II* at 395 SC at 65, 717 S.E.2d at 602.

Beazer has not presented any new or different information that requires modification of the Court's May 23, 2012 order as to the application of payments in other states by Beazer.

As to the second argument presented by Beazer, Beazer previously stipulated that the covered damages were \$7.2 million. While the settlements paid by Indiana, Massachusetts Bay and Regent may have been for covered damages, the Court's May 23, 2012 Order did not allocate these settlements to particular claims. Instead the Court examined the underlying damages using the pro rata/time on risk methodology set forth in *Crossmann II*. Since the damages occurring during Cincinnati's policy periods did not exceed the limits (not amounts actually paid) of the underlying insurance, Cincinnati's excess policies were not triggered.

The third issue is whether Cincinnati's exposure should be determined using the pro rata/time on risk methodology set forth in *Crossmann II*, or whether the Court should use a joint and several approach.

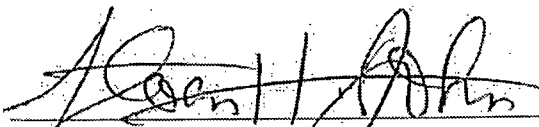
As set forth in Footnote 1 of *Crossmann II*, this Court "did not rule on whether Cincinnati policies provided coverage" in its May 3, 2007 Order. Accordingly, this Court must now follow the methodology established in *Crossmann II*, ie., pro rata/time on risk.

Beazer has not presented any new or different information that requires modification of the Court's May 23, 2012 order on this issue.

The Court has carefully considered the entirety of the January 29, 2007 stipulations, how the stipulations affected the parties' rights, and the record before it. While this Court appreciates the argument of counsel for Beazer, it declines to change its previous ruling and reaffirms the May 23, 2012 Order as to Cincinnati Insurance *in toto*.

Accordingly, the Beazer's Motion to Alter, Amend or Reconsider is denied.

AND IT IS SO ORDERED.


The Honorable Steven H. John
Resident Judge, Fifteenth Judicial Circuit

This 12th day of September, 2012
Conway, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

C/A No. 04-CP-26-0084

Crossmann Communities of North Carolina,)
Inc., and Beazer Homes Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance Company,)
Cincinnati Insurance Company,)

Defendants.)

ORDER

(Cincinnati Insurance)

Hearing Dates - January 5, 2012 and

March 1, 2012

FILED
Horry County
12 MAY 23 PM 1:59
CLERK OF COURT

COUNSEL

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PROCEDURAL HISTORY

Plaintiffs, Crossmann Communities of North Carolina, Inc. (hereinafter "Crossmann"), Beazer Homes Corp., and Daniel Rogers (hereinafter "Plaintiffs"), filed this action in January 2004 seeking a declaratory judgment, breach of contract damages, and other relief from Defendants Harleysville Mutual Insurance Company (hereinafter "Harleysville"), Massachusetts Bay Insurance Company (hereinafter "Massachusetts Bay"), Regent Insurance Company (hereinafter "Regent"), Indiana Insurance Company (hereinafter "Indiana"), Cincinnati Insurance Company (hereinafter "Cincinnati") (collectively the "Insurer-Defendants") and Associated Insurors of Myrtle Beach, Inc. (hereinafter "Associated Insurors").

Plaintiffs' Second Amended Complaint sought, among other things, breach of contract damages and entry of a judgment declaring that all Insurer-Defendants' insurance policies provided coverage for defense costs and indemnity costs incurred by or on behalf of Plaintiffs as a result of underlying property damage lawsuits filed against Plaintiffs or their predecessors in South Carolina state court (hereinafter "Underlying Lawsuits").

Defendants Harleysville, Massachusetts Bay, Regent, and Indiana together paid attorneys' fees and other costs incurred to defend Plaintiffs in the South Carolina Underlying Lawsuits. All Defendants, however, initially denied any obligation to indemnify Plaintiffs for any settlements or judgments that may be entered against Plaintiffs in the South Carolina Underlying Lawsuits.

During the course of this case, Plaintiffs reached settlements with Defendants Regent, Indiana, and Massachusetts Bay pursuant to which those insurers made payments to Plaintiffs under their respective insurance policies. As such, those insurers were dismissed from this action pursuant to a Partial Stipulation of Dismissal filed June 3, 2005 as to Defendant Regent and

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Partial Orders of Dismissal and Order Revising Caption filed May 10, 2006 as to Defendants Indiana and Massachusetts Bay.

The three Defendants at trial in January 2007 were Harleysville, Cincinnati, and Associated Insurors. After jury selection, Plaintiffs and Defendant Associated Insurors reached a settlement pursuant to which, among other things, their respective claims against each other were dismissed, without prejudice, pursuant to a Consent Order of Dismissal without Prejudice of Defendant Associated Insurors, Inc. of Myrtle Beach, which was filed February 9, 2007.

During the first day of trial, Plaintiffs and Defendants Harleysville and Cincinnati entered into a Stipulated Agreement which was entered into the record as Court's Exhibit One (1) (hereinafter "Stipulations"). The Stipulated Agreement consists of stipulations of certain facts and further identifies specific issues to be resolved by this Court in resolution of this action without submission of the case to the jury. As such, the jury panel was dismissed and all Parties submitted Post-Trial Briefs setting forth their respective positions on the issues specified in the Stipulations.

Pursuant to the Stipulations, the Parties entered into a Consent Order of Dismissal with Prejudice of Certain Claims against Defendants Harleysville and Cincinnati as filed March 26, 2007. Pursuant to the Consent Order, Plaintiff Daniel Rogers dismissed his claims against Defendants Harleysville and Cincinnati with Prejudice and all Plaintiffs dismissed their claims against Defendants Harleysville and Cincinnati related to the alleged acts and omissions of Associated Insurors, specifically counts 3, 4, 5 and 6, as set forth in Plaintiffs' Second Amended Complaint. The Parties then submitted the case for the Court's determination in accordance with the Stipulations.

The Court entered its Final Order on May 3, 2007. This Order was appealed to the South Carolina Supreme Court pursuant to the stipulations entered into by the Parties. The Supreme Court issued its decision in Crossmann Communities of North Carolina, Inc., v. Harleysville Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("Crossmann II"). The Supreme Court affirmed this Court's earlier judgment in part and vacated it in part. The case was remanded to this Court for an assessment of the two non-settling insurers' (Harleysville and Cincinnati) liability under the *pro-rata* "time on risk" approach set forth in its opinion.

All Parties submitted briefs on the issues set forth in Crossman II upon its remand to this Court. Hearings on the issues on remand were held before this Court on January 5, 2012 and March 1, 2012.

This Order addresses the issues relating to Cincinnati Insurance Company. A separate Order will be entered as to the issues relating to Harleysville Mutual Insurance Company. The issues as to the two carriers are distinct because Harleysville is a primary carrier and Cincinnati is an excess carrier. There are also differences in the applicable periods of coverage.

For the reasons set forth below, I find that the Cincinnati excess coverage has not been triggered for the claims that fall within its policy periods.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has jurisdiction over this action and venue is proper in this Court. The Court concludes that, based upon the Parties' arguments with respect to South Carolina law, and for other applicable "choice of law" factors, the substantive law of South Carolina applies to this case.

Cincinnati issued umbrella liability policies (hereinafter the "Excess Policies") for the period of May 29, 1998 to September 1, 2002 with limits of liability of Ten Million Dollars per occurrence, annual limit and annual aggregate limit.

The Excess Policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions."

The Excess Policies define "property damage" as "physical injury to tangible property, including all loss of use thereof."

The Underlying Lawsuits were filed against Plaintiffs or their predecessors in South Carolina State Court. These cases were:

- River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al., Case No. 00-CP-26-5193 ("River Oaks I")
- River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932 ("River Oaks II")
- Waterway Village at River Oaks, et al. v. River Oaks Golf Development Corp., et al., Case No. 01-CP-26-535 ("Waterway Village")
- Buck Creek Golf Villas Horizontal Property Regime et al. v. Buck Creek Development Inc., Case No. 02-CP-26-4200 ("Buck Creek")
- Lightkeepers Village Homeowners Ass'n. v. Lightkeepers Village, et al., Case No. 00-CP-26-43 ("Lightkeepers Village")
- Rose et al. v. Lightkeepers Village, et al., Case No. 00-CP-26-5363 ("Rose")

The Plaintiffs in this matter eventually settled all of the South Carolina Underlying Lawsuits by making payments to the homeowner-plaintiffs in those cases in the amounts set forth below:

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UNDERLYING LAWSUIT**NET SETTLEMENT AMOUNTS PAID TO
HOMEOWNER-PLAINTIFFS**

River Oaks I	\$7,425,000.00
River Oaks II	\$2,826,500.00
Waterway Village	\$3,925,000.00
Buck Creek	\$2,194,250.00
Lightkeepers Village / Rose	\$400,000.00

TOTAL**\$16,770,750.00**

As set forth in the Parties' detailed Post-Trial Statements in this matter, the Parties developed substantial documentary evidence and testimony during discovery regarding the following topics:

- the manner in which the condominium projects at issue in each of the Underlying Lawsuits was constructed;
- the nature of the construction defects and property damage complained of by the homeowner-plaintiffs in each of the Underlying Lawsuits; and
- the costs to repair each of the condominium projects at issue in the Underlying Lawsuits.

The Stipulations provide, in part, as follows:

- (1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies (hereinafter "the Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damages" in the Policies are \$7.2 million. If the trial Court finds that there has been an occurrence or occurrences, then the Court shall find that Plaintiffs' insured loss is

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\$7.2 million, subject to the Court's rulings on the issues set forth in Paragraphs 8b, 8c, and 8d below.

(2) The Parties agree that the damage referred to in Paragraph One (1) above began within Thirty (30) days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first.

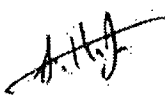
(4) The Parties stipulate to the following facts:

a. The Insureds under the Harleysville and Cincinnati Policies served as the architect, general contractor and the developer at River Oaks I, River Oaks II, Buck Creek, and Waterway Village.

b. The Insureds under the Policies served as the general contractor for Buildings Twenty (20) and Twenty-Eight (28) at Lightkeeper's Village.

c. All of the construction work at all of the underlying projects was performed entirely by subcontractors.

(7) The Parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage cases and the underlying cases which have been produced and exchanged in discovery in this case.

 (8) The parties agree that the following matters are the only issues of law to be addressed ^{by} Judge John. . .

(8)(b) In the event the Court finds that there was an occurrence or occurrences, how shall the \$7.2 million in insured damages referred to in Paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk."

(13) Cincinnati's applicable policies are excess policies with a "follow form" endorsement applicable to completed operations.

Prior to the scheduled trial in January 2007, Crossmann entered into a Settlement Agreement with three (3) of the primary carriers. The carriers, their policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Massachusetts Bay	Aug. 29, 1998 – Aug. 29, 2000	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Regent	Aug. 29, 2000 – Jan. 1, 2002	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate

Crossmann settled with these carriers for the following amounts:

Indiana	\$2.7 Million
Massachusetts Bay	\$2.9 Million
Regent	\$3 Million

Indiana, Massachusetts Bay and Regent are the three (3) underlying carriers for which Cincinnati provided excess coverage.

THE PARTIES STIPULATED TO \$7.2 MILLION IN POTENTIALLY COVERED DAMAGES

The Supreme Court held in *Crossman II* that:

[N]egligent or defective construction resulting in damages to otherwise non-defective components may constitute "property damage", but the defective construction would not. We find the expanded definition of "occurrence" is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulate not to raise the issue, we do not address any policy exclusions and exceptions.

Crossmann II, 395 S.C. at 50, 717 S.E.2d at 594.

The language in the settling carriers' policies is similar to the relevant language in the Harleysville policy. As agreed to in the Stipulations, Cincinnati's policy is a "follow form" policy. Accordingly, the potentially covered damages in the settling carriers' and the excess policies would be similar because the Cincinnati policy follows the form of the settling carriers' policies.

Crossmann paid a total of Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$16,770,750.00) Dollars to settle the claims in the Underlying Lawsuits. Of this amount, the Parties stipulated that \$7.2 Million resulted from water intrusion and met the definition of "property damages" in the Policies. See Stipulation One (1). The balance of the amounts paid, Nine Million, Five Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$9,570,750.00) Dollars, represents the cost to repair "defective construction" as referenced in *Crossmann II*. *Crossman II*, 395 S.C. at 50, S.E.2d at 594. While Crossmann argues that the measure of Cincinnati's potential liability should be Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$16,770,750.00) Dollars, the Court is bound by the parties' Stipulation that the potentially covered damages are \$7.2 Million.

Accordingly, Cincinnati's liability, if any, would be determined utilizing the stipulated amount of \$7.2 Million for the Harleysville and Cincinnati coverage periods.

Harleysville's coverage period is August 8, 1993 to August 29, 1998. Cincinnati's period for excess coverage is May 29, 1998 to September 1, 2002. There were various primary carriers during Cincinnati's period of excess coverage.

**CINCINNATI'S POTENTIAL LIABILITY IS DETERMINED BY THE USE OF THE
"TIME ON RISK" ANALYSIS**

The Supreme Court held in *Crossman II* that "time on risk" is the appropriate methodology to use when there are multiple carriers with varying policy periods. Crossmann, however, contends that Cincinnati did not join in Harleysville's appeal and that "joint and

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several" liability as set forth in this Court's May 3, 2007 Order is now the law of the case as to Cincinnati.

Plaintiffs argued that Cincinnati's liability is joint and several because it did not appeal this Court's May 3, 2007 ruling that a joint and several allocation approach is appropriate. Plaintiffs claim that Cincinnati's joint and several share is \$5,533,872. Their theory is based upon the faulty premise that because Cincinnati did not challenge the Court's ruling regarding the joint and several approach, it is now the law of the case as to Cincinnati.

This argument lacks merit because the law of the case doctrine is not applicable. The Supreme Court has held that a ruling becomes the law of the case "if the **offended** party does not challenge that ruling." *See Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997) (emphasis added). Here, Cincinnati was not offended, aggrieved or otherwise directly affected by the Court's ruling inasmuch as the Court expressly declined to rule whether Cincinnati's policies provided coverage. In its May 3, 2007 Order, this Court stated in relevant part:

because the combined limits of the Harleysville policies covering Plaintiffs exceed the \$7.2 million in stipulated insured losses as found by the Court, the Court need not rule upon whether the excess/umbrella insurance policies covering Plaintiffs and issued by Cincinnati are presently triggered by Plaintiffs' insured losses in the South Carolina Underlying Lawsuits.

May 3, 2007 Order at 16. Likewise, the Supreme Court's *Crossman II* opinion notes that the Circuit Court did not rule whether Cincinnati's policies provided coverage. *Crossman II*. FN1 395 S.C. at 44, 717 S.E.2d at 591. The Supreme Court stated, "Because the trial court found Harleysville's policies were sufficient to indemnify the entire \$7.2 million in stipulated damages, it did not rule on whether Cincinnati's policies provided coverage ..." *Id.* In sum, there was no adverse ruling as to Cincinnati on the issue of joint and several liability from which to appeal because the Court specifically declined to rule on whether Cincinnati's policies provided

coverage at all. Cincinnati was not aggrieved by the Court's order. Thus, the law of the case doctrine has no application here.

Moreover, in arguing that joint and several liability should be applied, the Plaintiffs are surprisingly asking this Court to apply a legal concept that was explicitly and decisively rejected by our State's highest court in *Crossman II*. In *Crossman II*, the Supreme Court stated:

In this case, Crossmann argues in favor of a "joint and several" approach to the allocation of damages, while Harleysville advocates a pro rata/"time on the risk" approach. We adopt the pro rata/"time on the risk" approach.

Id. S.C. at 59, S.E.2d at 599. The Supreme Court also noted that the joint and several approach has been criticized as "inefficient and wasteful of judicial resources." *Id.* S.C. at 60, S.E.2d at 599. Further, the Court concluded that the pro rata approach is more consistent with meeting public policy goals than the joint and several approach. *Id.* S.C. at 63, S.E.2d at 601. The Supreme Court then remanded this matter and specifically instructed this Court that it was to hold further proceedings consistent with the pro rata/"time on the risk" approach. *Id.* at S.C. at 67, S.E.2d at 603. If this Court were to instead now apply a joint and several approach to allocating damages among insurers, as the Plaintiffs request, this would be in direct contravention of the Supreme Court's directive to this Court.

Crossmann further contends that Cincinnati is jointly and severally liable based upon this Court's May 3, 2007 Order, in which judgment was entered on Count II of the Second Amended Complaint. Crossmann contends that Cincinnati is bound by the judgment entered on Count II since it didn't join in Harleysville's appeal.

This argument has no merit. The May 3, 2007 Order entered judgment on Count II (Declaratory Judgment) and stated "the parties' rights and obligations under the respective

policies are as set forth in this Order" (emphasis added). The May 3, 2007 Order specifically stated that the Court did not rule upon whether the Cincinnati policies were triggered.

**THE LIMITS OF THE "UNDERLYING INSURANCE" MAY BE
EXHAUSTED BY PAYMENT OF CLAIMS BY THE CARRIERS OR CROSSMANN
FUNDING THE GAP BETWEEN CARRIERS' PAYMENTS
AND THE POLICY LIMITS**

Cincinnati issued excess insurance policies, which are not triggered until the policy limits of all underlying and all available coverages have been exhausted. In determining an insurer's duty to provide coverage to a claim, the parties' intent is to be measured solely by the language of the policies unless the language is ambiguous. *B.L.G Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). It is undisputed under South Carolina law that terms in insurance policies that are susceptible to more than one reasonable meaning must be construed by the Court strictly against the insurer and in a manner that favors coverage. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Insurance Co., v. Homestead Ind., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). *Accord South Carolina Farm Bureau Mutual Ins. Co. v. Courtney*, 349 S.C. 366, 563 S.E.2d 648 (2002). Accordingly, whether an excess insurer's coverage has been triggered depends on the language of the excess insurance contract. *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F3d 1269, 1273 (11th Cir. 2000) (whether an excess insurer's coverage has been triggered depends solely on the terms of the excess insurance contract).

An insurance policy is to be read like any contract, and the words that it contains are to be given their plain and ordinary meaning. The express language of all of the relevant Cincinnati Excess Policies plainly states that the coverage is excess to any available insurance and all underlying policies. The Cincinnati policy issued to Plaintiff provides:

A. Insuring Agreement

We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered by "underlying insurance" because of:

1. "Bodily injury" or "property damage" covered by this policy occurring during the policy period and caused by an "occurrence"; or
2. "Personal injury" ... covered by this policy committed during the policy period and caused by an "occurrence"

Cincinnati Commercial Umbrella Liability Policy No. CCC 444 58 40, ("Cincinnati Excess Policy") Section I, A.

"Underlying insurance" is defined to mean:

the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the "occurrence." "Underlying insurance" also includes any type of self-insurance or alternative method by which the insured arranged for funding of legal liabilities that affords coverage that this policy covers.

Id. Section V, 16.

Other provisions in Cincinnati's Excess Policies also emphasize the excess nature of the coverage provided. A provision entitled "Other Insurance" states "[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." See Cincinnati Excess Policy, Section IV, 11.

The Excess Policies also include a Limits of Insurance clause that further explains that the excess coverage provided by Cincinnati is triggered only if the limits of all underlying insurance have been exhausted "by payment of claims." This clause states that the coverage provided by Cincinnati continues as excess coverage if the limits of underlying insurance are reduced by the payment of claims but not exhausted. The Limits of Insurance clause provides:

- a. If the limits of "underlying insurance" have been reduced by payment of claims, this policy will continue in force as excess of the reduced "underlying insurance"; or
- b. If the limits of "underlying insurance" have been exhausted by payment of claims, this policy will continue in force as "underlying insurance."

Id. Section III, 4(a), (b).

Under the language of the Cincinnati Excess Policies, the "underlying insurance" can be exhausted either by the underlying carriers paying the full limits available or by Crossmann funding the difference between a settlement for less than the full limits and the limits of the relevant policies.

Accordingly, Cincinnati's Excess Policies will be triggered if the amount of damages paid in settlement of the underlying cases, as calculated on the "time on risk" method set forth by the Supreme Court, exceeds the limits of the "underlying insurance" for each policy period.

**CINCINNATI'S EXCESS POLICIES HAVE NOT BEEN TRIGGERED FOR
THE VARIOUS PERIODS AT ISSUE**

Cincinnati had coverage for the period May 29, 1998 to September 1, 2002. The underlying insurance policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Massachusetts Bay	Aug. 29, 1998 – Aug. 29, 2000	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Regent	Aug. 29, 2000 – Jan. 1, 2002	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate

There is an issue as to whether there has been a single occurrence or multiple occurrences. It is not necessary, however, for the Court to resolve this issue. Based on the stipulated damages of \$7.2 Million, Cincinnati's Excess Policies are not triggered, regardless of whether the \$1 Million per occurrence or \$2 Million annual aggregate limits are used.

The Supreme Court provides a default rule for determining damages that occur during a particular period:

[I]t is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof.

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However, absent such proof, assuming an even progression is a logical default.

Crossmann II, 395 S.C. at 65, 717 S.E.2d at 602.

The parties' experts provided methods of allocating damages pursuant to *Crossman II* and the Stipulations. In general, the damages are allocated evenly over the period from thirty (30) days after the Certificate of Occupancy was issued until repairs were completed or the underlying lawsuits were settled.

The Court must determine the appropriate methodology to use in comparing the limits of the underlying policies to the damages that have been allocated for the various policy periods. While this could be done based on policy years, Crossman contends that the most appropriate method is to use a daily calculation.

The Court finds that the daily method of calculation would be appropriate since Indiana had coverage for less than a full year and Regent had coverage for less than two full years.

Crossmann set forth a methodology for calculating the per day loss on each project in its Brief. The Court finds that, while the methodology is reasonable, the stipulated amount of covered damages must be utilized, rather than the total settlement paid by Crossmann.

The first step is to allocate the stipulated damages among the five underlying lawsuits. This is done by comparing the amount of the settlement in each case to the total settlement amount of \$16,770,750.00. The percentage thus calculated is then applied to the stipulated damages of \$7.2 Million to determine a pro-rata allocation for each settlement. This calculation is shown in Exhibit A.

The next step is to prorate the stipulated loss amount per project over the number of days of progressive loss. The number of days is based upon a commencement date of 30 days after

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the Certificate of Occupancy was issued until repairs were completed or the underlying case was settled (Stipulation No. 2). This calculation is set forth in Exhibit B.

This results in a Daily Loss Amount of \$2,136.00.

The final step is to compare the Daily Loss Amount to the Daily Underlying Policy Limit. If the policy limits of \$1 Million per occurrence, per year is applied, the Daily Underlying Policy Limit is \$2,740.00.

Accordingly, Cincinnati's Excess Policy is not triggered since the underlying limit is greater than the stipulated amount of daily loss. This is reflected in Exhibit C.

It is not necessary for the Court to address the issue of whether the \$2 Million annual aggregate limit for multiple occurrences would apply, since the result would be the same as for the lower limits.

SETTLEMENTS PAID BY THE UNDERLYING INSURERS ARE IRRELEVANT TO CINCINNATI'S LIABILITY

The Parties presented information and various arguments relating to the relevance of the settlement amounts paid by the settling Insurers (Indiana, Massachusetts Bay and Regent).

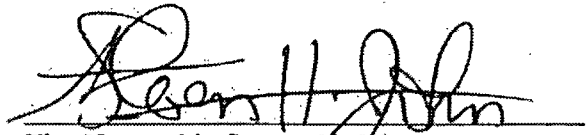
There are issues raised by Crossman's internal allocation of these proceeds.

Crossman unilaterally determined the allocation among policy periods, projects and underlying lawsuits. There also may be inconsistencies between Crossman's position on single occurrence or multiple occurrences for some of the settling Insurers.

These issues and arguments need not be considered because the Cincinnati Excess Policies define "Underlying Insurance" to include any type of self insurance or alternative methods of funding of Crossmann's liabilities. The relevant comparison, as set forth above, is to compare the stipulated damages allocated during the various periods of underlying insurance to the limits of the primary coverage.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

For the reasons set forth above and based upon the record herein, the damages allocated to the various policy periods of the underlying primary carriers using the "time on risk" analysis are less than the limits of the underlying insurance. Accordingly, Cincinnati's Excess Policies have not been triggered for any of these periods.



The Honorable Steven H. John
Presiding Judge, Fifteenth Judicial Circuit

Resident

This 23rd day of May, 2012
Conway, South Carolina

FILED
CLERK OF COURT
12 MAY 23 PM 12:00
CLOCK TIME CANCELLED

EXHIBIT A

SUMMARY OF SETTLEMENTS AND ALLOCATION OF STIPULATED DAMAGES

LAWSUIT	SETTLEMENT AMOUNT	PERCENT OF SETTLEMENT	ALLOCATION OF STIPULATED DAMAGES
River Oaks I	\$7,425,000	44.27%	\$3,187,440
River Oaks II/Lorenzi	\$2,826,500	16.85%	\$1,213,200
Waterway Village	\$3,925,000	23.40%	\$1,684,800
Buck Creek	\$2,194,250	13.08%	\$941,760
Lightkeepers Village/Rose	\$400,000	2.40%	\$172,800
TOTALS:	\$16,770,750	100%	\$7,200,000

EXHIBIT B

CALCULATION OF DAILY LOSS AMOUNTS BY PROJECT

PROJECT	STIPULATED LOSS AMOUNTS		AVERAGE DAYS OF PROGRESSIVE LOSS		PER DAY LOSS
River Oaks I	\$3,187,440	÷	3,659	=	\$871
River Oaks II/Lorenzi	\$1,213,200	÷	2,592	=	\$468
Waterway Village	\$1,684,800	÷	3,316	=	\$508
Buck Creek	\$941,760	÷	3,730	=	\$252
Lightkeepers Village/Rose	\$172,800	÷	4,707	=	\$37
TOTAL:					\$2,136 Loss/Day

EXHIBIT C

CINCINNATI'S TIME-ON-RISK LIABILITY TO BEAZER

UNDERLYING INSURER	DAILY LOSS AMOUNT	DAILY ¹ UNDERLYING POLICY LIMIT	=	CIN. SHARE/DAY	×	DAYS	=	CIN. SHARE
Indiana	\$2,136	\$2,740	=	0	=	92	=	\$0
Massachusetts	\$2,136	\$2,740	=	0	=	730	=	\$0
Bay Regent	\$2,136	\$2,740	=	0	=	459	=	\$0
TOTAL:							=	\$0

¹Policy limits of \$1 Million per occurrence, per year.

2012
ROA 698111

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS NONJURY
COUNTY OF HORRY) (04-CP-26-00084)

Crossman Communities of
North Carolina, Inc.,
Beazer Homes Investment
Corporation, et al

vs.

Harleysville Mutual
Insurance Company,
Cincinnati Insurance
Company, et al

TRANSCRIPT OF RECORD

January 5, 2012
Conway, S. C.

B E F O R E:

HONORABLE STEVEN H. JOHN, Judge.

A P P E A R A N C E S:

DAVID B. MILLER, ESQ.
MARTIN M. McNERNEY, ESQ.
ATTORNEYS FOR PLAINTIFFS

DAVID L. BROWN, ESQ. (for Harleysville)
MITCH BROWN, ESQ. (for Harleysville)
ROBERT C. CALAMARI, ESQ. (for Harleysville)
FRANCIS M. MACK, ESQ. (for Cincinnati)
RICHARD PLOWDEN, ESQ. (for Cincinnati)
ATTORNEYS FOR DEFENDANTS

DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT

(THE FOLLOWING TAKES PLACE ON JANUARY 4, 2012.)

THE COURT: All right. This is -- for the record, while we are -- I'm waiting for my computer to boot up, let's -- the case is (04-CP-26-00084), State of South Carolina, County of Horry, Crossman Communities of North Carolina, Inc., and Beazer Homes Investment Corporation, and Daniel Rogers, Plaintiffs, versus Harleysville Mutual Insurance Company, Cincinnati Insurance Company, and Associated Insurers of Myrtle Beach, Defendants. Of those named parties in the case of (04-CP-26-00084), are all of them still in this case, or have some of them been eliminated at this point in time?

MR. MILLER: Thank you, Your Honor. David Miller. Associated Insurers has been dismissed.

THE COURT: All right. How about Daniel Rogers? Is Daniel Rogers still a party to this case?

MR. MILLER: I believe he has been dismissed as well, Your Honor. These are -- Harleysville and Cincinnati are the remaining parties of interest.

THE COURT: All right. Very good.

All right, and if you would, counsel, for the record, let me start with the Plaintiffs in this matter, the counsel who are present, state who you are, and the party you

represent.

MR. MILLER: Thank you, Your Honor. Again, David Miller, representing the Plaintiffs, Crossman Communities and Beazer. With me is Mr. Marty McNerney, who has been with us before on these proceedings, Your Honor.

THE COURT: Yes sir.

MR. MILLER: And also Mr. Tim Kozik is here. He is with Beazer Homes, and has traveled here from Atlanta to attend today.

THE COURT: All right. Very good.

All right, counsel.

MR. M. BROWN: Your Honor, Mitch Brown, with Nelson, Mullins. I represent Harleysville Insurance Company.

THE COURT: All right. Very good.

MR. DAVID BROWN: Good morning, Your Honor. David Brown. I also represent Harleysville Mutual Insurance Company.

THE COURT: Yes sir.

MR. CALAMARI: Good morning, Your Honor. Bob Calamari, and I also represent Harleysville Insurance Company.

THE COURT: All right. Very good.

MR. MACK: Good morning, Your Honor. Frank Mack with

Richardson, Plowden. We represent Cincinnati Insurance.

THE COURT: All right. Very good.

All right, gentlemen, when we last met, many years ago, I have to be frank with you, I obviously, honestly, didn't want to see y'all again in this particular case, not that I don't want to see you, but in this particular case I honestly did not want to see you again, but that's not where we are.

We had, in that case, some stipulations that were set forth as Court's Exhibit 1. I assume that remains the status quo, a part and partial of this case. Is there any objection to that from any of the parties present?

Plaintiff?

MR. MILLER: Not from the Plaintiffs, Your Honor.

THE COURT: From the Defendant, Harleysville?

MR. DAVID BROWN: No, Your Honor.

THE COURT: From the Defendant, Cincinnati Insurance Company?

MR. MACK: No objection, Your Honor.

THE COURT: All right. Very good.

All right. In that previous case, just some basic underlying facts. The parties had stipulated to an amount of damages, or settlements, and I -- that was the Seven Point Two Million Dollar figure. As I understand it, and believe

this to be part of the facts of this case, I want to make sure it's -- there are a hundred and twenty-two buildings at issue; is that correct from the Plaintiffs' perspective?

MR. MILLER: It is, Your Honor.

THE COURT: From the Defendant, Harleysville?

MR. MITCH BROWN: Yes, Your Honor.

THE COURT: And Defendant, Cincinnati Insurance?

MR. MACK: Yes, Your Honor.

THE COURT: All right. Very good.

All right, the Supreme Court, in its Decision of August 22nd, 2011, stated that -- and held that the proper method for allocating damages in a progressive property damage case is to assign each triggered insurer a prorata portion of the loss based on the insurer's time on risk, and they remanded the matter for further proceedings consistent with a time-on-risk approach. They stated that they would leave it to the sound discretion of the Trial Court -- which hopefully I'll exercise -- to determine whether it is necessary to apply the time-on-risk formula separately, to each individual building, or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case.

Just want to start there, and then I'll let y'all

proceed how you would like to make your arguments. We've got a hundred and twenty-two buildings. Is it the Plaintiffs' position, and are you intending to show to the Court a -- an amount of damage that is peculiar to, and separate for each of the one hundred and twenty-two buildings? Is that what you intend to do?

MR. MILLER: We do, Your Honor, and we've conversed with Harleysville about that, and we've -- both are going to follow a very similar methodology in that regard, and we are able to, I think, fairly simply, take it building by building, and present that to you in a, I think, pretty easy to grasp fashion.

THE COURT: Okay.

MR. McNERNEY: Your Honor, if I may.

THE COURT: Yes sir.

MR. McNERNEY: Cincinnati Insurance Company never appealed from Your Honor's May, 2007, Final Judgment and Order, and the prorated time-on-the-risk methodology that was adopted by the Supreme Court back in August was in a case where only Harleysville was the insured Defendant, and so because Your Honor's ruling in May of 2007 is the law of the case as to Cincinnati the time-on-risk allocation methodology that Mr. Miller, and I believe Mr. Brown will argue about for

Harleysville, does not apply to Cincinnati. They are, instead, bound by the joint and several ruling that Your Honor made in May of 2007 that was never appealed from.

THE COURT: What do you say to that, Mr. Mack?

MR. MACK: Your Honor, in your Order you specifically indicated you were making no ruling on Cincinnati's exposure in the case, but you -- the ruling, on page, let's see, I think it is -- in your ruling you stated, "Because the combined limits of the Harleysville's policies covering Plaintiffs exceed the Seven Point Two Million in stipulated insured losses as found by the Court, the Court need not rule upon whether the excess umbrella insurance policies covering Plaintiffs, and issued by Cincinnati, are presently triggered by Plaintiffs' insured losses in the South Carolina underlying lawsuits." And it's on page sixteen.

Likewise, the Supreme Court, in it's Opinion stated, "Because the Trial Court found Harleysville's policies were sufficient to indemnify the entire Seven Point Two Million in stipulated damages it did not rule on whether Cincinnati's policies provided coverage." Your ruling was very clear that you were not addressing anything relating to Cincinnati. If Crossman had wished you to rule on that they could have filed a motion for reconsideration. They did not. The law in

South Carolina is the prorata time-on-risk analysis, and that's what would apply to Cincinnati in this case, because the earlier ruling did not -- or the earlier Order did not rule on anything related to Cincinnati, other than -- or it was not reached. There was nothing for Cincinnati to appeal. It was not an aggrieved party. We have addressed this in our Briefs. The prorata approach would also apply to Cincinnati, because that's the law in South Carolina.

THE COURT: All right. Mr. McNerney, I appreciate you bringing that to the Court's attention, but in looking at the Court's prior Order, and also what the Supreme Court said in it's Opinion, it says -- the Supreme indicated, "Because the Trial Court found that Harleysville's policies were sufficient to indemnify the entire Seven Point Two Million in stipulated damages it did not rule on whether Cincinnati's policies provided coverage, though it did find that the homeowners in the underlying lawsuit suffered property damage during the Cincinnati policy periods."

I don't believe that I ruling on the matter involving Cincinnati Insurance Company. I don't think my prior Order bound them to the joint and several approach, and obviously the Supreme Court has indicated that joint and several is the incorrect methodology to use, and I decline to use it since,

number one, I don't think I ruled on it to begin with. All right.

MR. McNERNEY: Your Honor, if I could just address those points.

THE COURT: Yes sir.

MR. McNERNEY: The stipulation, and the Court's ruling, I believe, fairly dealt with the exhaustion issue. Cincinnati's argument that the primary policies that sat beneath their excess policies were unavailable, and the stipulation itself says that, if the case comes back that's what we will look at, to see whether the underlying policies are available, and therefore Cincinnati's policy is not -- is not reached. But Your Honor's Order was a declaratory judgment action. We filed a declaratory judgment Complaint against both Cincinnati and Harleysville, and Your Honor's Order from May of 2007 entered a declaratory judgment against Cincinnati, which said that their policies -- the policies are triggered jointly and severally liable for the loss, and they never appealed from that declaratory judgment Order.

THE COURT: All right, sir. Well, I'll tell you what, why don't we leave that, because we are first going to have to decide what kind of -- based on your arguments that you've already submitted to me in writing -- what kind of policy, or

what exactly the coverage was that was provided by Cincinnati, and if I find it to be exclusively excess insurance policy that -- I don't know this is a proper term -- without any kind of dropdown coverage, we are never going to get to the point of the issue about joint and several, or time-on-risk, because there just won't be any coverage; they won't have any exposure in this case, so we will leave that to when we get to them, okay.

MR. McNERNEY: Thank you, Your Honor.

THE COURT: All right. Let's start off then -- why don't you, if you would, I assume -- if I'm incorrect then tell me. Mr. Miller, you are prepared to make your arguments in this matter. How about, if you would, let's stick solely with the issues that involve Harleysville, and we will separate out Cincinnati for after we get done with Harleysville. All right.

MR. MILLER: Thank you, Your Honor. And we had spoken about how to order this also, and if it's suitable to you, we would prefer to go ahead and address the two Harleysville issues that have been briefed to you, and then turn it over to Cincinnati so that those issues are, what is Harleysville's liability, under the time-on-risk analysis. Effectively Harleysville has briefed a post-judgment interest

issue to you.

Mr. Mitch Brown has a flight to catch out of Charlotte, and asked if we would agree to go with the post-judgment interest issue first, such that he could respond to it and head out. I told him that was fine with us, as long as it was fine with you. And so that's the order that we are looking at this morning, and assuming that suits you, that's what we will do.

THE COURT: All right. Go ahead and do that.

MR. MILLER: Your Honor, I'm going to give you a little bit of background. I can tell from your comments that you've already reviewed it. But if you will recall that we have entities that were acquired by Crossman Communities.

I hope you can see that at the angle.

THE COURT: Yes sir. That's fine. That's not a problem at all.

MR. MILLER: Pinehurst, Buck Creek and River Oaks, those were locally-owned developer entities that developed some of the projects that are at issue here, and in May of 1998 they were acquired you Crossman, and then later Crossman was acquired by Beazer, so that, just by way of refresher background, that's how the -- when you see the terms that are in there, that's how they came to be. And there are five

underlying projects at issue, each of which had their own Plaintiffs' construction deficiency underlying lawsuit. Actually there were seven underlying lawsuits, because two of the Plaintiffs' lawyers brought class actions on behalf of the unit owners alleging damages to the interior of the units, so we viewed them as being consolidated with the others, so it's easier to think of it in terms of, there are five projects, with five lawsuits that go with them, and of course what we are here talking about is a progressive damage case, how do we deal with damages that progress over extended periods of time.

This matter came to trial January 29, 2007. We were in this room, and you will recall, at that point the parties entered into this stipulation -- that's a terrible picture of it on the screen -- and that is the stipulation that you referred to earlier.

I think -- if you've got a copy of it in front of you, great, if not I have one I can hand to you.

THE COURT: I've got one.

MR. MILLER: Following that, the parties briefed their positions to you, and we came here and argued our positions to you. You then entered your Order dated May 3rd, 2007, finding there was an occurrence in accordance with -- I think

it was **L-J II** at that time, finding that there was joint and several, in accordance with Century Indemnity, which was controlling at that time, and that there was no setoff, so that you issued your Order in accordance with all the controlling case law as it existed at that time.

Harleysville, in turn, filed reconsideration motion which Your Honor denied, and the appeal that has been going on for years followed. During the course of the appeal Harleysville filed a Rule 60 motion seeking to entertain the argument as to post-judgment interest. The Supreme Court granted leave for Your Honor to hear that Rule 60 motion, then we came back here and we had another argument about that.

You may recall -- to help refresh your memory -- you took a recess from a double-murder trial in order to get that in. That sticks in my mind for some reason. And so we came and we briefed, and came and argued that, and Your Honor then issued your Rule 60 Order denying Harleysville's position that somehow post-judgment interest would not accrue here.

I have a copy of that Order if you need one, Your Honor. If that, that's fine. It's a fairly short Order, and basically what it says is that the case of Calhoun versus Calhoun controls, together with the statute that says post-

judgment interest is -- must accrue from all money judgments entered.

THE COURT: Okay.

MR. MILLER: Okay.

THE COURT: I've got it. Go ahead.

MR. MILLER: And so, ultimately the Supreme Court entered it's decision, and ruled that their, in Crossman -- we call it Crossman II, that there is an occurrence, but that Century Indemnity is overruled; we go into time-on-risk. So that the issues before you today are to establish Harleysville's indemnity liability, to deal with this post-judgment interest matter, and to establish Cincinnati's excess coverage.

I'm going to argue the two Harleysville matters, and Mr. McNerney will present the arguments as regard Cincinnati.

I am now going to skip down to the post-judgment interest matter, if you will bear with me one second. Okay. Got it.

Again, Your Honor, following your Order on the 60(B) motion, Harleysville took a separate appeal from that Order, so that at that point in time we had two appeals pending simultaneously. The Supreme Court consolidated those two appeals into one primary appeal, where we went up several

times, and argued and dealt with the occurrence and time-on-risk versus joint and several issues, and this post-judgment interest issue was also included, by consolidation -- and I have a consolidation Order from the Supreme Court -- on that separate Rule 60 Order that you issued.

The Opinion in Crossman is silent as to post-judgment interest. There is no comment as to that issue, and Harleysville did not seek further clarification or reconsideration from the Court in order to request a ruling on it's separately-filed appeal on that issue. The Court remanded for us to be here today, and that remand language out of the Crossman case is the sentence that you see on the screen here. "We remand to the Trial Court for further consideration of the time-on-risk allocation." There is no remand from the Supreme Court to you today for further consideration of the post-judgment interest issue. That matter was ruled upon by you in 2009, it was appealed from, that appeal was had, the Opinion is silent, and the remand Order makes no grant of authority for Your Honor, on remand, to consider it, and so with that procedural posture, Your Honor, I don't think that we are able to do anything with the post-judgment issue other than what you have already ruled upon, and what was not overturned in the Supreme Court, and

because the language of Crossman limits this remand to consideration of the time-on-risk allocation, I don't think it's before you today. I understand Harleysville has briefed it, and certainly I'm prepared to deal with the merits of their argument, but I don't want to open the door by doing that, unless Your Honor believes that that's appropriate.

THE COURT: All right. Well, let's deal with that threshold issue first then. How about that, Mr. Brown.

MR. MITCH BROWN: Thank you, Your Honor.

Well, I think both parties actually, in the simultaneously to you, discussed whether post-judgment interest was proper, so I'm not sure what he was talking about on that piece of it.

But, Your Honor, I think it's important to look at what your ruling in February actually was, and what that ruling said is -- and I'm looking at the last page of Your Honor's Order. It's ordered that Harleysville's Rule 60(B) motion is denied, and post-judgment interest on the Court's May 3rd, 2007 Order, and judgment shall accrue in Plaintiffs' favor at the statutory rate from May 3rd, 2007 forward, until the judgment is satisfied. So that begs the question, what judgment are you talking about in that Order, and what you are talking about is the May 3rd, 2007 judgment for Seven

Point Two Million Dollars against Harleysville. That judgment, Your Honor, has been reversed by the Supreme Court. There is no ability for Harleysville to quote, satisfy, any judgment at all, because there is no judgment amount that exists.

The only two possibilities, Your Honor, about what happened with the post-judgment interest issue on appeal -- there really isn't -- there's only two. The Supreme Court mentioned it in the background when they were discussing the case. They mentioned the post-judgment interest issue in the background of the Opinion. They affirmed Your Honor on the occurrent issue. They affirmed Your Honor expressly on the pre-judgment interest issue that Your Honor ruled on, they then reversed, expressly, the Seven Point Two Million Dollar judgment amount, and they stated that in the Opinion, the wording of which literally says, quote, "We reverse the Trial Court's Order allocating the entire Seven Point Two Million Dollars in stipulated damages to Harleysville." So, the question -- I'm sorry, Your Honor.

THE COURT: That's all right. But it's -- what they did was reverse the decision allocating the entire Seven Point Two Million Dollars in stipulated damages to Harleysville.

MR. MITCH BROWN: Right.

THE COURT: They did not reverse the decision that some amount of damages are Harleysville's responsibility. They reversed that the entire Seven Point Two Million is Harleysville's responsibility.

MR. MITCH BROWN: I totally agree.

THE COURT: Okay.

MR. MITCH BROWN: Yes sir. And what happens when the Court does that, and remands for a further determination, which is what the Court has done, the Court has to make a new determination about what the amount is that is owed, on remand, after considering what you are going to hear are very different proposals about what those numbers should be, all right.

The case of Babb versus Rothrock directly controls this point, and says that, when there is a remand, after an appeal, there has to be a new determination by the Court, and when that new determination is made post-judgment interest runs from that point, not from the earlier date, which is what Beazer is arguing here.

And getting back -- and I'll hand these cases up, Your Honor, so you can look at them as I go through this -- but to answer the threshold question Mr. Miller is raising, there

are only two possible solu -- possible scenarios here about what happened. The first one is what he is suggesting, which is that, despite the Supreme Court knowing that post-judgment interest was appealed, mentioning it in their Opinion, that they just somehow forgot, or they were derelict in their duties and just didn't say anything about it ---

THE COURT: Or they deliberately decided not to address it.

MR. MITCH BROWN: And the reason they would have deliberately decided not to address it is because it's a moot point. There is no interest that runs from a vacated judgment amount, and that's what the **Babb** case says, and that's -- and the Supreme Court is certainly presumed to know it's own case law, and so therefore it would not have needed to say anything about this issue at all, because there is no reason to talk about it. An analogy would be -- Your Honor, there's a case -- you probably -- there's a well-known case of **Lynch versus Toyota**, where a jury verdict was affirmed by the -- was granted -- a judgment was granted on a jury verdict, rather, and attorneys' fees were awarded by a separate order, to the Plaintiff. The Supreme Court reversed the judgment, didn't say a word about the attorneys' fees, but nobody with a straight face is going to show up and say,

well, I still get the attorneys' fees. I mean, there's no reason to talk about those. Those are obviously wiped out, and that is what we submit, Your Honor, is what happened here. The Supreme Court didn't address it because they didn't need to address it. It was completely moot, and there are many examples I could give you of cases where the Court does not -- if it doesn't need to it doesn't go on and address, you know, obviously the attorneys' fees awarded would be vacated too, obviously this and that. It doesn't need to do that, and therefore, it didn't mention anything about it.

But the only other assumption is what Mr. Miller is asking you to do, which is engage in this idea that the Court just forgot about the issue, or inexplicably chose not to say a word about it, even though they said a -- they wrote a very long Opinion -- they heard this case twice -- this -- all these arguments about post-judgment interest were briefed to them -- and somehow they just decided, well, we are just not going to write anything about that. We don't think that's a reasonable presumption to make about the Court at all. We think the reasonable presumption is to say, we don't need to say anything about it because the judgment amount is gone.

And as I pointed out, Your Honor, with regard to your

actual Order it's not possible to comply with Your Honor's Order, in light of the reversal of the judgment amount, because that judgment amount is inexorably intertwined with what Your Honor ordered in the February Order.

I don't want to go beyond -- we've kind of interrupted Mr. Miller's argument, but -- I don't know if I've answered your question or not on this.

THE COURT: Go ahead, Mr. ---

MR. MITCH BROWN: Go ahead, David.

MR. MILLER: Your Honor, what I'm going to do is go forward and address the applicable law to this issue. I've pointed out that there is a concern about the scope of the remand, and I know you like to be precise on those type matters, so I've pointed that out.

THE COURT: All right. Well, if you look at the statute, 34-31-20, it says, "In all cases of accounts stated, and all cases wherein any sum, or sums of money shall be ascertained and being due, shall draw interest according the law at the legal interest rate...", etcetera. At this point in time, though it's clear some amount is due, the amount has not yet be ascertained. I ascertained an amount, the Supreme Court said the amount was not correct, and so now I have to ascertain an amount, so I don't see how interest can apply if

the amount has not yet been ascertained, as the statute says. It says, "And in all cases wherein any sum, or sums of money shall be ascertained...", means you know what the amount is. At this point in time we don't know what the amount is. That's to be determined, so how can the interest start accumulating on something when you don't know what the amount is?

MR. MILLER: The short answer, Your Honor, is in the case of Calhoun versus Calhoun, which you cited to in your 2009 Order.

The **Babb** case that Harleysville relies upon -- and they also cite from the **Calhoun** case, I would note. The **Babb** case was a 1993 case. That's important. It's a '93 case, with dissimilar facts. That was an action among co-guarantors of a note, one guy, Babb paid it off, and sought contribution from the others. They said, well, what about all that money you stole. The Court found that the setoff for the alleged misappropriation of funds exceeded the note contribution, and entered a zero judgment for Babb. Babb went up on appeal. The Court of appeals reversed the setoff, such that the Trial Court was then required to fix the amount of Babb's award. And in 1993, when the case went back up on when do you begin the post-judgment interest accrual, the Court said in 1993.

As Mr. Brown represented to you, that when further proceedings are required in the trial court to fix the amount, under this scenario, then it doesn't start to run until the amount is fixed in the trial court, similar to the comment you just made. The differences there are that, one, in **Babb**, unlike here, there was no original judgment entered for Babb. It was zero. Here it was Seven Point Two Million Dollars, and as you have noted, the Court said, well, you are not going to get all the Seven Two from Harleysville; you are going to get some of it; go figure out what the sum of it is. And most notably is that **Babb** is a 1993 case. **Calhoun** is a 2000 case. It's a Family Court case where the Appellate Court modified various components of the property division, and the question came up again about when would post-judgment interest begin to accrue. Leading up to 2000, when **Calhoun** was decided, there were many, many, many scenarios that kept coming up in the Courts as to when does it begin to apply, and this patchwork of rules was coming out of the case law. For example, what if a jury verdict was modified by the Court as the Thirteenth Juror, what if it's modified on 59(E), what if there's an appeal by a judgment debtor, by a judgment creditor, cross-appeals, whether the Appellate Court adjusts the amount, whether the Appellate Court remands for

further proceedings. All these different scenarios kept coming up.

So in **Calhoun** the Court specifically recognized that, and undertook to review all of the patchwork, and conclude, we are going to get rid of the patchwork, and we are going to establish a bright line test that controls when post-judgment interest begins to accrue under all of these situations.

And Your Honor, if I may, I'm going to approach and hand you a copy of the **Calhoun** case that I have put ---

THE COURT: I've got it right here. Why don't you just tell me where it is that you want me to look.

MR. MILLER: Well, I've put some highlights in it that will make it easier for you, if that's okay.

THE COURT: All right.

MR. MILLER: And I'm turning to page six of the printed.

THE COURT: All right. Go ahead.

MR. MILLER: And Your Honor, if you look, both on the screen here, and on the top right of the highlighted portions that I've handed you, Harleysville, in it's Brief, has quoted out of **Calhoun**, and what you see on the screen here is the quote that Harleysville has included in it's Brief, and it begins up at the top right of the page I've highlighted.

The paragraphs starts, "Still another line of cases holds that...". Harleysville left that out of their block quote to the Court, and began, "Where a money award has been modified on appeal, whether upward or downward, and the only action necessary in the trial court is compliance, the view has been taken that interest should run from the same date as if no appeal had been taken."

And Your Honor, if you would then look to the lefthand column, where I've got the highlights, what you see is, the Supreme Court, in **Calhoun**, has dropped back to look at all these different confusing rules that had developed through the case law through the years. They say, "This Court has held that interest does not accrue during the pendency of appeal under certain circumstances." This Court has never ruled on other circumstances. Some jurisdictions have held that, when both appeal you get this result, others have held, when both appeal you get that result.

Then the quote Harleysville puts in, "Still another line of cases holds that" When you go to the note 104 on the case, that is the ruling in the case. The case before us is a perfect example of how capu -- complicated, calculating post-judgment interest can become when a money judgment is modified at several different junctures, and why

a bright line rule for the accrual of interest needs to be established. So this is where they do it. They step in and they say, here's all this history, and the history includes **Babb**, and they set forth the Rule, saying that the Rule is, that when a money judgment is finalized, whether in a lower court, or in an appellate court, that's -- so that whether -- Your Honor, whether you finalize it here, or whether it was finalized in the Appellate Court, the interest on that amount, whether it's been modified upward, downward, or remains the same, runs from the date of the original judgment. To the extent this new Rule is inconsistent with prior case law, **Babb**, that case law is overruled.

So, Your Honor, there is the controlling answer to your question, how does it begin to run back in May of '07 when this Court is still to fix the adjusted award per the remand or other of the Supreme Court, that is precisely the procedural scenario that the **Calhoun** case speaks to. The **Calhoun** case reverses prior inconsistent case law, and in fact, even the quote that Harleysville blocked in it's Brief to you is an example of what they are overruling, so that that quote as to, that further proceedings in the Trial Court mean you don't get it, that's specifically overruled in this case.

And so, Your Honor, in addition to the procedural issue, substantively this is a pretty easy one for you. **Calhoun** controls, it says exactly what it says in it's ultimate finding, overruling prior inconsistent holdings, and says that it runs from the date of the original judgment.

So, we've calculated that ---

THE COURT: All right. So your point is that, whatever amount is that the Court rules that Harleysville owes to the Plaintiff, that interest starts to accumulate on that amount from May 3rd of 2007.

MR. MILLER: That is exactly right, Your Honor. If you will look again at the chart, we are going to demonstrate that that amount is One Million Six Hundred Sixty-Six Thousand One Hundred Twenty-Eight Dollars, and I understand you don't enter an award for post-judgment interest, but just so Your Honor can appreciate that it's been so long, running the interest accrual, compounded annually in accordance with the annual orders of the Court, yields an interest amount of Eight Hundred and Nine Thousand Dollars, so it is a significant amount of money that we are talking about here, and that calculation, again, is upon what we are going to show you, which is One Point Six Six Million as Harleysville's liability in this case.

THE COURT: All right. Thank you.

All right, Mr. Brown, then I guess just go to that -- go to that point in **Calhoun** on what they say.

MR. MITCH BROWN: Absolutely. Yes sir.

If I might hand up the **Babb** case to Your Honor.

THE COURT: All right, sir.

MR. MITCH BROWN: I think that's -- that's the only other case you probably need to be looking at.

David, do you have a copy of it?

MR. MILLER: I do.

MR. MITCH BROWN: Your Honor, before I -- so I just don't forget it, on the limited remand issue that Mr. Miller mentioned, the Court ultimately remanded for further proceedings consistent with the Opinion, so I don't think there's any tiny little window of remand that you can do. I think earlier proceedings consistent with your opinion are fine.

But anyway, getting to the -- getting to this issue, if you look at the **Babb** court case, in the section of it relating to post-judgment interest you will see, down near the bottom of the middle paragraph there, on the righthand side, this sentence that begins, "If, after appeal, a further determination by the Trial Court is necessary in order to fix

the amount of an award the award will not draw interest until a determination is made." That is pretty plain -- and I have to borrow a phrase from Mr. Miller -- that makes it pretty simple to me, that this controls what you have to do. You have -- there's no determination yet made where, after an appeal, obviously, is remanded to you to make a further determination of fact, Your Honor. The Supreme Court literally used the word determine. I mean, you can't get any clearer than this. The Court remanded it for you to determine the new amount, and what this case says is that when -- under that fact pattern the award will not draw interest until that determination is made.

Now what Mr. Miller ---

THE COURT: All right. What we've got here is, I issued a set amount, Seven Point Two Million Dollars. The Supreme Court said I used the wrong approach to set the amount of damages. They didn't say damages shouldn't be awarded. They didn't -- that's not what they say. They reversed the Trial Court's Order allocating the damages. All right.

MR. MITCH BROWN: Yes sir.

THE COURT: I don't see their previous ruling as saying that damages shouldn't be awarded, and I don't think

that y'all are going to argue that some amount of damages should be awarded. What happened in **Babb** was, as it says, the original Order of the Master did not set the amount of Babb's judgment against Childs. There wasn't an award. There was no award in the original Order, so judgment can't accumulate on something that's not awarded. Here an amount was awarded. The Supreme Court, in **Calhoun**, says, "The case before us is a perfect example of how complicated calculating post-judgment interest can be when a money judgment is modified at several different junctures before reaching finality, and why a bright line rule for accrual of the interest needs to be established." And then they go on to say that, "The simplest way to resolve it by adopting a rule that, when a money judgment is finalized, whether in a lower court or an appellate court, the interest on that amount, whether it has been modified upward or downward, or remains the same, runs from the date of the original judgment. To the extent this new rule is inconsistent with prior case law that case law is overruled." Whether or not they overruled **Babb** because there was just nothing -- nothing was awarded. Here an amount was awarded, and the Supreme Court says that, "Whether it's modified upward or downward ...," -- obviously in this case it's going to be modified downward, there's no

question about that -- but it will be modified downward --
"...runs from the date of the original judgment."

I disagree with, you know, the point you are making. I do think it is clear, judgment runs -- the post-judgment interest will run from May 3rd, 2007, on whatever amount I award. I awarded an amount, the Supreme Court said the amount is wrong, not that some amount isn't due, some amount is due, the amount is wrong. We are going to adjust it downward. Whatever that amount is, interest is going to run from May 3rd, 2007. That's going to be my decision.

Thank you very much.

MR. MITCH BROWN: Your Honor, thank you.

THE COURT: All right. So, as to that particular issue, however the rest of it is resolved, Mr. Miller, it will be your responsibility to draft an order to that effect.

MR. MILLER: Thank you, Your Honor.

THE COURT: All right. Let's go back then to what amount we are talking about.

MR. MILLER: Okay. And I think Mr. Brown needs to -- to get on the road.

THE COURT: If you need to be -- and that's Mr. Mitch Brown.

MR. MITCH BROWN: Yes sir.

THE COURT: If you need to be excused to meet other obligations you are certainly free to do so, if you so choose to do that.

MR. MITCH BROWN: Thank you, Your Honor.

THE COURT: All right. Yes sir.

All right, Mr. Miller.

MR. MILLER: Thank you, Your Honor. If I can change gears here for one minute.

Your Honor, the next portion of the argument, of course, is to go through the math, and so this is a fairly mechanical presentation.

I'm going to, if I may, Your Honor, approach and hand up a hard copy of what I'm showing on the screen, because I'm not sure how well you are going to be able to see it.

THE COURT: All right.

MR. MILLER: I'm going to try to -- I'm sorry, these -- my pages didn't get numbered, so I'm going to have trouble directing you to specific pages in the hard copy. So I'm going to turn to what I think might be the most helpful to have.

And I'll get it just in a minute.

THE COURT: All right, sir. Thank you.

MR. MILLER: Okay. Your Honor, as you have already

noted, we are remanded here today to fix the amount, and you have recited the basic formula language out of **Crossman**, so I'm not going to repeat it back to you, and also the portion of **Crossman** which affords you some discretion in making sure that it's fairly applied, consistent with the dictates of **Crossman**.

By way of a little bit of further background, as we get into some numbers, Your Honor, if you will recall, the five underlying lawsuits were settled by Beazer, and Beazer paid, out of pocket, to the five Plaintiffs, varying sums totaling Sixteen Point Eight Million Dollars, and as we go forward in doing the math, we'll need to refer back to the settlement amounts in order to resolve one of the few disputes that we have with Harleysville about how to do this math.

Also, there were many other -- if you will remember, Your Honor, that's the payment amounts that were made per underlying lawsuit in settlement of them, and we also had other Defendants in this lawsuit, Indiana, Massachusetts Bay and Regent, and they chose to settle with us during the course of the extended litigation, and they, collectively, paid us Eight Point Six Million Dollars as we went through.

The stipulation, as you've already noted, provides that the resulting loss is Seven Point Two, and that that number

qualifies under the policy definitions of property damage, etcetera, so that your task is to allocate Harleysville's share of Seven Point Two Million Dollars, and that just comes right out of the stipulation.

The Supreme Court's basic formula that they gave us in narrative form can be reduced to this mathematical formula, and I don't think there's any dispute with Harleysville about that. And so what I'm going to do is take each of the three components one at a time, and graphically walk Your Honor through how we've done this, and again, I think there are perhaps only two areas of dispute insofar as the methodology of how we do this. I don't think there is any dispute between the parties as to how you set up these charts and how you compute each category.

And Your Honor, I'm going to start with the days of damage, which is the total days of damage. That was addressed in the stipulation, if you will recall, that the damage begins thirty days after the C.O. was issued for each building, and progressed until it was either repaired, or Beazer paid the seller. So that we can take that and dig up the C.O.s, and we've done that, so this page -- I'm not going to show all the buildings for each illustration. This one is the first page, and here's it's got project. All right,

those are River Oaks I, and then those are the building numbers, and the start date is thirty days after the C.O., building, by building, by building. We went and dug up almost all of the C.O.s. We could not find a few -- that's in bold, where we couldn't find one -- and we have agreed with Harleysville to accept a proposal they made as to well, how can we best guess what the thing is, and we've agreed with them on that, so that those dates are agreed upon, and there's no dispute there.

The end date is the earlier of, until it was repaired, or until Beazer paid the settlement. Okay. So we've got our checks that we wrote -- some of them are wire transfers -- that show the days we settled. And in -- in the earlier charts submitted by Harleysville there were a couple of errors. At the Water Lake Village project those homeowners undertook to repair several buildings while the lawsuit was going on, so that that preceded the settlement date, and that the repair date is the earlier of. And at River Oaks I one of the buildings burned to the ground while we were going through the litigation. I think you could take judicial notice that it stopped leaking after it burned to the ground.

So those corrections are in bold in the in date column, and I really don't think there's going to be any dispute

about this. So that over here on the right where it says, "Days", that is the total days of progressive damage, and that becomes the bottom "Days of Damage" in our formula. Okay.

I'm going to go forward. I'm going backwards. I'm sorry.

Okay. So the next thing to do is set the number of days that Harleysville was on this risk. Harleysville's coverage of the Pinehurst entities, that were -- have been acquired by Crossman, began back in 1993, and that predates the earliest of these buildings, so that they were the carrier during all the times that they were being constructed there. So we can take that start date and simply compute to the end date, which is when the Harleysville policy was canceled, which was August 29, 1998. And so we, again, count up those days -- and that's the one that's in blue, here, and so we've got, building by building, how many days Harleysville was on the risk, and beside that, Your Honor, I've put the percentage that that bears to the total time of risk.

So, when we get to that point we are then ready to allocate the Seven Point Two Million Dollars. Skip that one. Now here the parties have proposed, I believe, two different

ways of doing that. The situation is that we've got five projects, each with multiple buildings, and each that we paid different settlement amounts for, and we've got to take that Seven Point Two and somehow get it to each building, so that we can apply it to the number of days' percentage that they are on the risk, the last step in the process.

One way of doing that, and the method that Harleysville has adopted in it's earlier filings, is to simply do the percentage that the total amount of settlements bear to the Seven Point Two stipulation, and then to apply that across the board by settlement amount. In other words, they are using the settlement amount was the yardstick of how much resultant loss there was at each building. Remember, the stipulation says that the Seven Point Two is the agreed-upon amount of resultant loss at each building, not total loss, so if the shingles aren't nailed on properly, but they are performing, that's not part of the Seven Two. The Seven Two is resultant loss.

And so Harleysville used the settlement amounts which are inclusive of resultant and non-resultant loss to the Plaintiff as one way of doing this. And we looked at that, and went back a little further. In the course of the litigation we predicted, for lack of a better word, that

there was going to need to be an allocation among resultant loss and faulty work standing alone, so we went and hired an expert named Skip Lewis, and Mr. Lewis, in turn, took the underlying expert reports from each homeowners' association Plaintiff, whoever they were -- there were different ones, Derek Hodgin, all the usual guys -- and went through each of them to ferret out what are the Plaintiffs seeking as resultant loss and faulty work standing alone, and Mr. Lewis prepared a chart that allocated the percentages of that.

In response Harleysville hired an expert, as you might guess, and they hired a gentleman named Mr. David McCandless, and Mr. McCandless undertook basically the same exercise, and he also allocated, project by project, the degree of resultant loss versus faulty work standing alone.

Your Honor, I'll tell you that those gentlemen both issued expert reports in those regards, their depositions were both taken in the underlying case, and those matters are in this record that we created shortly after we entered into the stipulation back in the trial in 2007.

THE COURT: All right. Well, let's get to that point we'll -- just to be -- make sure everybody is in agreement on that, then ---

MR. MILLER: So here's what we get.

THE COURT: Hold on a second.

MR. MILLER: I'm sorry.

THE COURT: Mr. Brown, do you agree that those reports and depositions, all that is part of the record.

MR. DAVID BROWN: I agree all that's part of the record.

THE COURT: All right. So I mean, it's proper -- I guess the point, it's proper for the Court to consider it for whatever purpose I want to give it, it's in the record.

MR. DAVID BROWN: I'll have some commentary on that, but it's in the record.

THE COURT: Very good. All right. Go ahead.

MR. MILLER: So, this chart is a summary of those gentlemen's work, and again, those percentages that you see here, and here, this is what Mr. Lewis said the percentage of resultant loss, project by project, is, and this is what Mr. McCandless, Harleysville's expert, says the percentage of resultant loss was, project by project.

Your Honor, we are proposing that you take the middle ground here, and we are happy to do that because we've got competing expert opinion as to how is the Seven Point Two Million truly allocated, and truly allocated by a resultant loss analysis. We have calculated the average share, which

is simply the average between expert Lewis and Expert McCandless, and we are happy to take the middle ground on that to avoid Your Honor having to try to pick one expert over the other, and we think that's a fair method of doing it, and that it falls soundly within the Supreme Court's dictate to you to figure out a reasonable way to get this thing done. We think this is a -- more of a reasonable way, and we are happy to be reasonable in that regard.

So, once we get that done, Your Honor, we can begin to allocate the Seven Point Two Million building by building, and here's how you do it. The Seven Point Two, as you can see on the chart here -- and you've got one in front of you if you can find it -- I'm sorry the pages aren't numbered ---

THE COURT: That's all right.

MR. MILLER: ---Times the average of McCandless and Lewis, divided by the number of buildings in each project, equals the damage per building, same methodology Harleysville used by using the settlement amount as the baseline instead of the expert opinion resultant damage as the baseline.

So, we go project by project, and we then know the allocation of the Seven point Two Million Dollars among each building, at each project, so we go back to your chart -- I think this is the page I had it turned to when I handed it to

you ---

THE COURT: That's fine.

MR. MILLER: ---And we can plug in the last columns, we can now plug in the total damage at each building, and we simply multiply it times Harleysville's percentage that we had calculated a couple of charts back, and that gives us Harleysville's liability on each building, that is, the percentage that their time on the risk relative to the total time of progressive damage, with a properly allocated Seven point Two stipulated damage number.

And, Your Honor, then if you will look how it works, you just go building by building -- now we are in the River Oaks II, Waterway Village comes up, and you continue, and continue, and then those numbers total One Million Six Hundred Sixty-Six Thousand One Hundred Twenty-Eight Dollars, and that is the number that we ask Your Honor to enter as Harleysville's share.

Excuse me, Your Honor, while I get a swallow of water.

THE COURT: That's all right. You do that, and then, before you go on to -- before you go on to your next point I want you to just tell me again the underlying purpose that Mr. Lewis and Mr. McCandless were hired. The underlying purpose was to do what?

MR. MILLER: Was to take the Homeowner Plaintiffs' expert Reports, analyze them, and break out their damage allegations as to whether it was resultant loss, loss resulting from faulty work, and faulty work standing alone.

THE COURT: And you think that ---

MR. MILLER: Because we know that the Court was coming to rule that you are not going to get faulty work standing alone as a covered loss.

THE COURT: Right. And so that's consistent with what the Supreme Court said in **Crossman**.

MR. MILLER: And we could see that coming, and so we undertook to hire those experts to do way back when the case was being tried, and so, of course, in **Newman II**, the Court did make a more clear statement that, you are not getting faulty work standing alone, but you can get loss resultant therefrom, so ---

THE COURT: Okay.

MR. MILLER: ---It did, in fact, fall into the development of the case law, and it is the proper way, because -- and you've got it in the record to back it up -- to accurately allocate the Seven Point Two. I understand Harleysville's method may be a little bit easier, but we believe here that it's necessary that the Court do it

accurately.

THE COURT: All right.

MR. MILLER: Now, Your Honor, if you don't have any other questions about the math ---

THE COURT: No, you go on. Continue on.

MR. MILLER: You may recall that, when we briefed this case to you in 2007, following entry of the Court's Exhibit 1 Stipulation, Harleysville briefed it to you, we briefed it to you, Cincinnati briefed it to you -- Associated was standing on the side at that point -- but at that point in time Harleysville was advocating the time-on-risk approach and, in fact, prepared a graphic chart strikingly similar to the ones you and I just reviewed, and Harleysville had a couple of differences. Those differences were, the Waterway Village buildings that had been repaired, the River Oaks building that burned to the ground, and the settlement dates that we made paid needed to be adjusted -- those are minor matters that are just, I hope, not even disputed here -- and then they used the settlement amount method of allocating the Seven Point Two, whereas we advocate the expert method.

Harleysville concluded that it's share should be One -- approximately One Point Four Four Million, but not much different at all from what we see here, and that is the

position that was briefed to Your Honor, that is the position that was argued to Your Honor, and of course you found for joint and several.

We go to the Supreme Court and in the briefings there Harleysville makes the same argument, and references the same charts and the same exposure under their philosophy of the case, of One Point Four Four Million Dollars. Today, for the first time, they are now arguing for a dramatically different number because they have introduced a new argument for the first time, and that argument is that, for a period of time their coverage overlapped with Indiana Insurance Company -- if you will recall, Your Honor, they were a former party to this case, who settled and got out -- and Harleysville argues in it's Brief to this Court that during that time that Harleysville be excused from any share under it's time-on-the-risk, so when you are counting up their days on the risk component of the basic formula they are cutting them down dramatically saying, no, those days go to Indiana not to us.

Now, Your Honor, first I've got to talk about procedurally how this comes here for the first time. This case was filed in '04. We are hearing this for the first time in a Brief in 2011. It's not in the pleading, they have not pled this position, there is no affirmative defense that

sets this out as an avoidance under Rule 8, they did not make any mention of this in their Counterclaim back against Beazer, and I think very importantly, Your Honor, there is no cross-claim against Indiana. At that point in time Indiana was a party to this lawsuit, and there's no cross-claim against Indiana saying, we think you have to pick up that time, not us.

Of course Your Honor knows that Rule 8(C) requires that they set forth affirmatively any matter constituting an avoidance. They did not. And under Plyler versus Burns that's a waiver of their right to assert it.

And so, Your Honor, I don't want to open the door for a conformity of the pleadings to the proof here. I want to advocate to you as hard as I can that this is an improper time for a whole new position that is inconsistent with the prior positions, both to you and to the Supreme Court, of an unpled matter that simply comes too late for them to come in here and advance a new theory for Your Honor to have to try to figure out, and for you to try to figure it out we are going to have to get the Indiana policy out, we are going to have to look back at the law as it existed over different years, as we went from **L-J** I to II, to **Newman** I to II to **Crossman** I to II, and make a very involved analysis as to how

they advance that their days on the risk are reduced by nearly a full year, under their argument. And so, Your Honor, I think it's improper for it to come up now, and similarly to what I said earlier, I don't want to jump into the merits, although I'm happy to address them -- it's going to take a little while.

THE COURT: All right. Well, hold on -- okay, let's not do that yet.

MR. MILLER: I don't think you can bring this up at this juncture of this lawsuit ---

THE COURT: All right. Hold on one second.

MR. MILLER: ---On remand.

THE COURT: All right. Very good.

I'll turn -- turn to you, Mr. Brown, in just a second. Let me look up something before I ask for some ---

All right. Mr. Brown, why don't we get to -- why don't we get to that particular issue first, whether -- and let's not go talk about how things are calculated. Let's just go to whether or not you can argue that point that you put in your Briefs about your time-on-risk about the Indiana insurance coverage. Let's just go to that particular point, whether or not you can argue that or not.

MR. DAVID BROWN: Fair enough. Thank you, Your Honor.

Again, David Brown, for Harleysville.

I guess first and foremost I would say, the Supreme Court has said, in August of 2011, that the law is a allocated time-on-the-risk formula, and has remanded to this Court for all proceedings consistent with that Opinion, and we are to sort out what the proper time-on-the-risk formula should be. What we are advocating is a method of calculating Harleysville's time-on-the-risk. It's a matter of law. It's a matter of law that is before the Court based upon all the policies that are in the record, including the Indiana policies, the Harleysville policies, and other policies, so it's -- first and foremost I would say, it's part of the remand from the Court to fully consider all allocated time-on-the-risk arguments of the parties.

Secondly, you know, I guess what Beazer is really arguing here is some sort of judicial estoppel type argument that, well, Harleysville took one position in 2007 by arguing for One Point Four Million, and now Harleysville argues for Seven Hundred Thousand, so therefore they should be judicially estopped from arguing something different. Well, first of all, the elements of judicial estoppel, of course, include that Beazer has relied on the prior argument to its detriment, which they haven't done -- they haven't taken any

position to it's det -- to detriment, and indeed, when you go back and look at what was submitted to this Court in 2007 by Beazer, they say that time-on-the-risk could not, and should not be advocated. Now they've come in and said, oh yeah, we can do it. Now that the Supreme Court has said it's got to be done, guess what, now they can have a formula to do it. I'm not here today to argue ---

THE COURT: Okay, but you've never pled it.

MR. DAVID BROWN: We pled, but we ---

THE COURT: All right. Show me in your responsive pleading that this issue is in your responsive pleading.

MR. DAVID BROWN: I think it's the last affirmative defense, which says ---

THE COURT: How about get me a copy of it.

MR. DAVID BROWN: I apologize. I don't have a copy of that handy, Your Honor.

THE COURT: All right. Let's find the -- your original pleading, because that's what we've got to go back to, and see if you are able to talk about it at all, so ---

MR. DAVID BROWN: I can tell you that I ---

THE COURT: You don't have a copy of your pleading; is that what you are telling me?

MR. DAVID BROWN: We looked at it yesterday at Mr.

Calamari's office, but I don't have a copy here with me today.

THE COURT: All right, let's go wheel the cart in, Ma'am, and then we'll spend some time trying to find the original pleading in the Clerk of Court's file.

MR. MILLER: Your Honor, I've got two copies of the thing.

THE COURT: All right. Well, if y'all have got a copy of it that's -- that's what I want. I want to look at it.

MR. MILLER: And this Harleysville's Answer to Plaintiffs' Second Amended Complaint, which was the ultimate pleading.

THE COURT: All right, so let's -- and Mr. Brown, you look at that and make sure that's your responsive pleading.

MR. MILLER: If I could approach.

THE COURT: Yes sir.

MR. MILLER: The Sixteenth affirmative defense ---

THE COURT: Sixteenth. Is that what you are saying, the Sixteenth?

MR. MILLER: Yes, Your Honor.

THE COURT: All right. Very good. Say, "If Harleysville has any coverage under any policy issued to any Plaintiff for damages alleged in the underlying actions,

which alleged coverage is, again, expressly denied, then Harleysville only afford coverage based on it's time-on-risk, and would only have an indemnity obligation consistent with the relationship that it's coverage period bears to the time from the date of injury-in-fact, until the date that the damage is complete."

All right. I see that you are arguing time-on-risk. Okay. I don't see that you are claiming that some other company is responsible for the time-on-risk period, cause that's what you are saying, somebody -- time-on-risk is the proper way to allocation it; some other company is responsible for our time-on-risk.

MR. DAVID BROWN: I would view it as another company being responsible for, quote, our time-on-risk; I would argue it as ---

THE COURT: Well, your policy extended until August 29, 1998, so that's the end date of your policy, so that's when your time-on-risk ends. So, if you are saying August 29, 1998 -- August 29, 1998 is not the right date for -- because that's when your policy ended, correct? I mean, your coverage ended August 29, 1998; no question about that.

MR. DAVID BROWN: That's true.

THE COURT: So, that should be the end date for your

time-on-risk, but you are saying, no, even though we had a policy that covered until August 29, 1998, our time-on-risk doesn't end there; it ended some other time because some other insurance company covered them, so our time-on-risk is not August 29, 1998. Where is that in your pleadings?

MR. DAVID BROWN: It doesn't -- what you just said is not said in the pleadings.

THE COURT: Okay. But isn't that what you are saying?

MR. DAVID BROWN: Well, what I'm saying is that the Court has to look at all of the policies under which the Plaintiff sued, and the two Indiana policies that we are claiming ---

THE COURT: Well, what I have to do is look at your pleading. I have to look at your pleading and say, (D), you have set forth all of these counterclaims, cross-claims, affirmative defenses; you've set them all forth, okay, so I need to find one in your pleading that allows you to argue that time-on-risk is reduced -- we have -- we are arguing time-on-risk, no question that's what your pleadings say, arguing time-on-risk -- Supreme Court says that -- okay, our time-on-risk is reduced because another insurance company covered them.

MR. DAVID BROWN: I guess, two things, one, I'd like

to take a few minutes and review the pleading as a whole. I have not sat down and read the whole thing.

THE COURT: I'll be glad for you to do that.

MR. DAVID BROWN: I've looked at the affirmative defenses to try to respond to the question.

THE COURT: Okay.

MR. DAVID BROWN: But the number two, I guess it begs the question of how one goes about looking at time-on-risk and need an insurer, need any litigant plead all the specificity that we are here arguing about today in the pleading. It is undisputed that we've always argued that we have an entitlement to a right to a set-off for the Two Point Seven Million Dollars that Beazer settled with with Indiana for this period of overlapping coverage. That's not in dispute. That was argued to you back in 2007. That's always been briefed. So this is nothing new, or novel, the notion that Harleysville and Indiana have this period of overlapping coverage, and the notion that Harleysville takes the position that it is entitled to a set-off for that amount is something that's not new in the case.

Now, are those exact words used in the pleading, ---

THE COURT: No, but that's not really what you are arguing. You are not arguing a set-off; you are arguing, I'm

not responsible; it's not that I'm responsible and I get to set it off; you are arguing, I'm not responsible at all because somebody else covered it, and that's what you said in your Brief. You said in your Brief that Indiana coverage, they had the primary because of how your policy is stated, and how their policy is stated, and the case law, so Indiana covered, so we didn't have coverage. That's what you have argued to me in your Brief. You are not arguing a set-off; you are arguing, I'm not responsible.

MR. DAVID BROWN: That's true, because the Two Point Seven Million Dollars that Indiana paid to Beazer for that period of time was enough, indeed, more than enough to cover the damage at that time.

THE COURT: Well, you -- it's not because they paid them any money. Your argument is, they had coverage, we had coverage, because of the terms of the two policies they have to pay; we are not responsible. It's not because they ultimately paid or not paid. That's not the point. It's that, you look at our policy, you look at their policy, because of the case law they have to pay, if anybody is going to pay; we are not responsible; it doesn't matter whether they pay or not; that's their problem; we don't care.

MR. DAVID BROWN: If the damages under the Supreme

Court formula allocated to that period of time, in '97, that we are talking about, basically, '97 or '98, exceeded the amount of the Indiana payment, we would have to pay, we would have to pay, because we -- I'm not saying we don't have any coverage, I'm saying the coverage is excess, and I'm saying that the coverage Indiana afforded during that block was sufficient, and be more than sufficient to cover the allocated time-on-risk during that period of time. So I'm not saying we get to go home because they had coverage, I'm saying we are excess, and the excess layer is not reached.

THE COURT: All right. Either way, where is that in your pleadings? And if you want to take some time to look at the pleading I'll be glad for you to do so.

Why don't we just take a real short break. You look at -- look at the pleading. We'll take a short break, you look at the pleading and you find me somewhere where your argument is in there. Okay.

MR. DAVID BROWN: Very good. Thank you.

(THE FOLLOWING TAKES PLACE AFTER A BREAK.)

THE COURT: All right. Where would you like to point to me?

MR. DAVID BROWN: I guess the following places. First of all, on page thirty-four.

THE COURT: All right.

MR. DAVID BROWN: The Third Affirmative Defense ---

THE COURT: All right.

MR. DAVID BROWN: ---Is a general pleading of all the terms of the policy including -- that include the other insurance policy, so I point that out.

THE COURT: Okay.

MR. DAVID BROWN: And then on page thirty-eight ---

THE COURT: I'll get to that in just a second. Go ahead, thirty-eight. Go ahead.

MR. DAVID BROWN: In addition to the Sixteenth Affirmative Defense, which I have already discussed with the Court, the Seventeenth Affirmative Defense is a preservation, not a specific pleading, but a preservation of the right to raise additional affirmative defenses as matters develop in the case, and obviously the Supreme Court Opinion is a big development in the case.

THE COURT: Okay.

MR. DAVID BROWN: And then finally, on page forty-six, in paragraph thirty-three of our Counterclaim for Declaratory Judgment, Harleysville seeks a general declaration of the rights of the parties under all policies, which we submit would include how those policies interact with the others in

the litigation.

THE COURT: Okay.

All right, Mr. Miller, what do you say to that?

MR. MILLER: Thank you, Your Honor. First, let me clarify -- I'm not so much arguing judicial estoppel as I am demonstrating that none of these pleadings were ever intended to be what they say they are now. This was a very structured decision process for us, and you, and we entered into the stipulation, and we outlined what the Court was going to do, and what you weren't going to do, and going back and digging up the policy from a settled-out co-defendant, and having me stand here and try to argue Indiana's position against Harleysville is prejudicial, and I would submit to the Court, we may well have conducted ourselves differently when we settled with Indiana had Harleysville cross-claimed them, or affirmatively set forth an avoidance, as they are required to do, and we may well have conducted ourselves differently at the time that Court's Exhibit 1, the Stipulation, was entered into, and the Stipulation doesn't talk about going and digging up an Indiana policy.

Now, they are trying to stick some pegs in some holes here. This Third Affirmative Defense makes this general all-conditions-of-the-policy type thing. Well, obviously they

didn't mean the other insurance clause, because the Third Defense, Affirmative Defense, goes on to say, specifically as to an occurrence, property damage, and damages within the period, contractual liability exclusion, your work exclusion, your product exclusion, impaired property exclusion, professional services exclusion, and products completed operation hazard exclusion. Nowhere in that itemization do they say, other insurance clause takes us off of some of this risk. And their own actions demonstrate it better than anything else. They've briefed and argued One Point Four Million to you, they've briefed and argued One Point Four Million to the Supreme Court, and only in the last month or so did they come up with, hey, let's try another angle, and we are prejudiced by it, it's not properly pled, and Your Honor, I just -- I just think it's improper that we are now -- that they are asking that we now be cast to stand up here and try to argue Indiana's policy when they are a settled-out party who is gone because Harleysville didn't see fit to cross-claim against them so that they could make a determination about how their respective policy languages and obligations apply. And so we object to it, and ask that it be excluded, Your Honor.

THE COURT: All right. Final argument on that, Mr.

Brown.

MR. DAVID BROWN: Your Honor, the -- the remand from the Supreme Court asked this Court to determine start date, the end date, and the multiplier under the formula. What we are advancing is an argument as to those things, and we believe that what we've advanced is (A), within the broad mandate from the Supreme Court, and (B), perhaps more importantly, in keeping the discovery taken in this case, of all the insurers, and there has been lots of discussion in this Court, and lots of discussion in discovery about how those policies interact, so we think it's appropriate, and indeed, required for this Court to make a finding that the Supreme Court has asked it to make.

THE COURT: All right. Thank you.

I am going to deny the request of Harleysville to argue the Indiana policy exclusion on these grounds. One, I do not believe that it was properly pled in the -- let's go to the explicit pleading we are talking about so we are clear about that -- the Harleysville Mutual Insurance Company's Answer to Plaintiff's Second Amended Complaint -- that was their last responsive pleading. I do not think it was properly pled to put the Court and the Plaintiffs on notice of the position that Harleysville is now taking in this case, on this date of

January 5th, 2012. To allow Harleysville to do so, I believe that there is extreme prejudice to the Plaintiff in reforming their argument at this point in time to try and include that particular position. The second reason I would deny Harleysville for doing so is that they agreed not to argue it in their Stipulation. As the Supreme Court said in it's Opinion, the parties stipulated to, among other things, the amount of damages that the damage resulting from water intrusion constituted property damage, that the damage began within thirty days after the Certificate of Occupancy was issued for each building, that the damage progressed until repaired, or until Beazer Homes paid to settle the Homeowners' claims, and that the parties would not argue the applicability of any policy exclusions. Therefore, Harleysville cannot now argue it. They stated that, for the purposes of the disposition of this matter at trial they would not raise the applicability of policy exclusions with respect to Judge John's consideration of the issues. They are not so allowed to do so at this point in time, and at this late date.

Thank you very much.

MR. MILLER: Thank you, Your Honor. And with that, that concludes our presentation as to how the math works, and

again, I direct your attention to the overhead -- PowerPoint projector, rather, that we ask Your Honor to enter an award against Harleysville for it's share, in the amount of One Million Six Hundred Sixty-Six Thousand One Hundred Twenty-Eight Dollars. Given the rulings you've made today the only variance left to be considered from Harleysville's prior position, are correcting some dates on repairs, and the fire, etcetera, and the expert method of allocating the Seven Point Two resultant loss versus the -- using the global settlement amount to make that same allocation.

So I think that's all that's left for Your Honor to do insofar as fixing that amount. We think we've set forth the better and more accurate way, given all the work that went into creating those expert Reports -- and they are in the record -- and we ask, Your Honor, that the One Million Six Sixty-Six One Twenty-Eight be this Court's award in this component of this argument.

THE COURT: Thank you.

All right, Mr. Brown, I'll be glad to hear from you.

MR. DAVID BROWN: I guess two things on the latter point, just so the record is clear. But first of all, our -- the other insurance clause is not an exclusion in the policy, so we would want to make that argument for the record, and

make that clear, so by waiving the right to rely upon exclusions that does not have anything to do with the other insurance clause. That's a separate portion of the policy.

But to the larger point ---

THE COURT: But then you pointed me to your affirmative defense that said that. But anyway, go ahead. Go ahead, make your point.

MR. DAVID BROWN: I want to make sure that I'm making a proper proffer to preserve for Appellate review our ability to make that argument here below, and so I would believe that we've done that by submitting in our briefing, and which the Court has ruled upon it's not going to consider.

If -- I would like -- I don't want to waste the Court's time by making an argument that the Court has said is improper, but by the same token, I don't want to face an argument on appeal that I've somehow waived ---

THE COURT: You filed your Brief with the Clerk of Court, correct.

MR. DAVID BROWN: We did, Your Honor.

THE COURT: All right. And I assume all the parties did. The Plaintiff, you filed it?

MR. McNERNEY: Yes, Your Honor.

THE COURT: Mr. Mack.

MR. MACK: Yes sir, Your Honor.

THE COURT: Okay. So, certainly the Brief, the same one you sent to me, that you filed with the Clerk of Court, that encompasses your argument and your presentation, and you are just picking parts of that to bring to the Court's attention at this point in time, so in essence that's your argument; you are just highlighting things to me.

MR. DAVID BROWN: That's correct. What I have here today is -- among other things that I'll get to in a moment, some points I wanted to highlight, consistent with the briefing we submitted to the Court on that other insurance clause analysis. I just want to make clear that I'm preserving for appeal my ability to argue that we should have been allowed to argue that here to this Court.

THE COURT: I understand.

Any objection to that, Mr. Miller?

MR. MILLER: None, Your Honor.

THE COURT: All right. Very good. Go ahead.

MR. DAVID BROWN: All right. Now, turning to what I bel -- I guess remains the primary issue -- what I tried to do, Your Honor, in the presentation -- and have these PowerPoint slides and a print-out copy I'll be glad to hand up. They include both some things I think are far game, and

some things you've excluded, so just have to bear that in mind. I'll be happy to hand up printed copies of a disk. If I could approach.

THE COURT: Yes sir. Absolutely.

Thank you.

MR. DAVID BROWN: We've had a lot of discussion here today on the first line, about the basic formula. I'm not going to belabor that. I assumed that by the time I stood up to talk that would have been well discussed, as I believe it has, from the Opinion itself, and I think the way I've put it here is very similar to the way Mr. Miller did.

The time each insurer provided coverage, over the time the damage progressed, times the amount of covered damage, so I think that is the formula. Both Beazer and Harleysville agree that it should be done on a building by building basis, and both Beazer and Harleysville agree that it should be done on a day by day basis. I know that the Court kind of talked about years versus years, but given the way the policy appears, interaction, C.O. dates, day by day makes more sense.

THE COURT: Day by day. Correct.

MR. DAVID BROWN: All right. And of course, here we have the relevant stipulation about the time that the damage

progressed, the C.O. date plus thirty days. We've discussed that. So what I've tried to do, kind of frankly anticipating I would be standing up after -- as I am now, after Mr. Miller has spoken, and after the Court has obviously been through the Opinion, is to try to say, okay, you've seen Beazer's formula, you've seen Harleysville's formula, what are the differences. Okay, what's really in dispute here. Indeed, the little things that Mr. Miller mentioned, we agree with. Indeed, in our formulas we've put in, for example, the three Waterway Village Buildings that were repaired, we stopped those in 2003, even though the case wasn't settled for a couple of years later because, as Mr. Miller correctly points out, the HOA there repaired three of the buildings in 2003, so we've already accommodated those kind of minor details.

So I think the good news for the Court here is that Beazer and Harleysville agree in a broad brush with the basic methodology, building by building, day by day, start date, end date. I think that falls out naturally from the stipulations that the parties entered back in 2007.

So, what is the difference, what drives the difference in Harleysville's number, which, of course, was Seven Hundred versus One Point Six, and given the Court's ruling that our time frame should go out of -- into '98 as opposed to '97,

I'll have to do the math differently, but I suspect their number was going to be about One Point Three as opposed to One Point Six, so what drives that differential in number? It's really the two things I've listed here. First, what's the multiplier, that is, what is the coverage damage for each building, and how much should be multiplied for the damage at each building, and Harleysville's position that it should be the same for each one, Seven Point Two Million divided by a hundred and twenty-two, equals Fifty-Nine Thousand Sixteen Dollars and Thirty-Nine Cents per building. Beazer maintains that it's a different number for each building, as Mr. Miller suggests. No real surprise. Beazer's calculation -- and I'll come to that and elaborate on it a bit more in a minute -- has the effect of making the buildings that were the most damaged the ones that hit more in the Harleysville's policy period, so being a good advocate for his client, Mr. Miller is basically saying, we've come up with a formula here that maximizes the amount we can get from Harleysville's by coming up with a different formula, building by building, on the weighted analysis per the expert Reports that he described earlier, but make no secret about it, the impact of that, the import of it, is that the buildings that hit more of the Harleysville's policy years, in fact, are the ones

that they are saying, oh, coincidentally, happen to be the most damaged. What we propose is a flat number of Fifty-Nine Thousand Sixteen Dollars and Thirty-Nine Cents per building, and I'll elaborate on that in a moment.

The second differential is the numerator, and of course the Court, by it's ruling, has kind of precluded that argument by saying the numerator is going to be the '98 date, not the '97 date, so I won't -- in respect to the Court's ruling I'll move on from that.

All right. So what is this dispute about the amount of covered damage all about? Once the numerator and denominator are fixed, what is this about -- what is this dispute about? Well, very simply it's this. The parties stipulated as follows: If there was an occurrence or occurrences, under the Harleysville and Cincinnati policies then the damages that resulted from water intrusion met the definition of property damage, or Seven Point Two Million Dollars. We didn't stipulate what the damages were at River Oaks I versus River Oaks II, versus Waterway Village, versus Buck Creek, versus Lightkeeper. Could we have done that in 2007, sure. As the Court has already pointed out, we stipulated about a lot of other things. We stipulated about some things that were very, very precise, including what portions of the

policy would be discussed, or not, what arguments would be allowed to be made to the Court, and not, and what the damages were, and were not, and what we stipulated to is Seven Point Two Million Dollars, and what we know is that we have a hundred and twenty-two buildings. So we would, very simply, suggest to the Court, that the record you have in front of you, which is the Stipulations, the things that go with that, and now a Supreme Court Opinion that has tasked this Court with making determinations about damages. What the -- what you have in front of you is simply a Seven Point Two Million Dollar damage figure divided by a hundred and twenty-two buildings, no more and no less. To do otherwise makes this Court a factfinder. As the Court has correctly pointed out, in the Stipulations we are very specific about what this Court would be allowed to do. "The parties agree that the following issues are the only issues of law to be addressed by Judge John: (A), was there an occurrence, (B), if so, was it joint and several or time-on-risk, (C), if it's time-on-risk then what should the calculation be." We did not preserve for Judge John the issue of setting damages at each of the hundred and twenty-two buildings, we did not preserve for the Court, or stipulate that the Court would be allowed to take Skip Lewis's expert Report, agree with part,

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none or all of it, and take David McCantless's expert Report, agree with part, none or all of it, look at what Derek Hodgins might have done about assessing damages at one of the underlying projects and say, well, I'm going to agree with that and not with the other. We would respectfully state that to do that is beyond the scope of the stipulations. To do that would require a jury, to do that would require factfinding, and it's not within what has been remanded from the Court to do.

So very simply put, if we've got to live with the stipulations, and you know, the Court believes that by -- say we will argue exclusions, we can't talk about the other insurance clause analysis, and Beazer, Your Honor, likewise, have to live with the fact that they didn't preserve for an issue for the Court to consider this issue of deciding an exact damage number for each building.

But more so than just kind of playing, gotcha, as we've had here today from Beazer, that's the evidence in this case, and I simply alluded here to Exhibit 6, to the -- my Affidavit where I submitted documents with my Brief. The fact that it's too much to put in a PowerPoint slide, so I just kind of refer the Court to that exhibit, and be glad to hand up another copy if you would like.

THE COURT: No, I've got it.

MR. DAVID BROWN: But the point here is, you've got to sit back and look at what was going on in these five underlying projects, and what was going on is, you had the same architectural plans used over and over and over again, prepared by Dan Rogers, the inhouse architect at Pinehurst Builders and later Crossman, you had the same superintendents involved, you had all these buildings built under one guy, Jeff Skelley's G.C. license, you had the same subcontractors used over and over again, you had the same pattern over and over and over again, with each of the building. We didn't have something different at River Oaks I versus Waterway Village versus otherwise; it was the same. And in fact, what we've done here in Exhibit 6, just to try to highlight this point, is that we've gone through the expert Reports, both Plaintiff and Defense expert Reports from the underlying cases, and put in, okay, what -- what was alleged by the Plaintiffs against Beazer Homes, and in turn, what exposure did Beazer Homes pay to settle and extinguish that liability. As you will see, it's the same improperly-installed roof shingles at Buck Creek, Lightkeeper Village, River Oaks I, River Oaks II, Waterway Village, it's the same roof flashing at all five. You go through the whole chart, it's the same

structural problems at all five, it's the same lack of firewall protection at all five, it's the same improper flashing at each of the five projects, so the point being, that the record in front of the Court, in terms of what those experts alleged against Crossman slash Beazer in the underlying case, what the exposure was that was being settled, bearing in mind, none of these cases were tried to a jury so that we have a jury determination of what the damages were, that all of those damages were the same from project to project, building to building, the same plans were used, project to project, building to building, the same subcontractors, vendors, material supplies were used over and over and over again. So it should come as no surprise that the experts in those cases say the damages are consistent, the damages are the same in all those buildings, and indeed, when these parties had a chance to stipulate as to what the damages were, the stipulation as to the water intrusion related property damages were Seven Point Two Million Dollars, not Two Million at Buck Creek, Two Point Seven Five at River Oaks I, One Point Seven Eight at River Oaks II, and on and on. The point being, it was Seven Point Two.

So, very simply, coming back to, what is the first area of dispute between the parties? It's the multiplier. And

Harleysville's view that the record in front of you supports a conclusion of Fifty-Nine Thousand Sixteen Dollars and Thirty-Nine Cents per building, and that's without commentary from Harleysville as to whether we would be better or worse based upon what our policies interact with the C.O. dates on a given building. Some dates -- you know, on certain buildings we might be, you know, better -- you know, worse off, some buildings we might be better off, but the record is one twenty-two into Seven Point Two Million Dollars. That's consistent with the stipulations, that's consistent with the record in front of you, so -- and candidly, you know, we can have a discussion about, well, what did David McCantless say about access cost, what did Skip Lewis say about water intrusion damages. If we were in a mediation and Beazer was trying was trying to say, hey, why don't we split that number in half that might be, okay, reasonable enough, but the fact is, that's not where we are. Where we are is, certain issues, and only those issues, were preserved in this Court to consider, and some kind of factfinding about giving more weight or less weight to certain expert Reports, more weight or less weight to damages that are given to building at Buck Creek versus another building at Waterway Village is simply not preserved for this Court to do, and candidly, to do

anything other than Fifty-Nine Thousand Sixteen Dollars and Thirty-Nine Cents per building is going to require a factual determination by this Court that a jury ought to make, and is beyond the scope of what the parties agreed this Court could decide.

THE COURT: All right. Let me ask you a question.

MR. DAVID BROWN: Sure.

THE COURT: And I hate to say it, it might cause me to reconsider what I said about the Indiana thing, that we might have to go in and address that.

Let's look at what the Supreme Court did. "For these reasons we reverse the Trial Court's Order allocating the entire Seven Point Two Million in stipulated damage to Harleysville, and hold that the proper method for allocating damages in a progressive property damage is to assign each triggered insurer a prorata portion of the loss based on the insurer's time-on-risk. We remand for further proceedings consistent with a time-on-risk approach." And they don't have any qualifiers there. They say, "To aid it we provide the guidance, but we remand it for further proceedings consistent with a time-on-risk approach. We leave it to the sound discretion of the Trial Court to determine whether it is necessary to apply the time-on-risk formula separately to

each individual building, or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case -- this particular case."

In doing that -- and again, we are looking at the Stipulations -- let's look at the Stipulations. Number Seven: "The parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery and depositions in both the coverage and the underlying cases which have been produced in exchange in the discovery in this case." So, the record is about as expansive as it can be.

MR. DAVID BROWN: Agreed.

THE COURT: Then we go on, right below it, "In the event that the Court finds there was an occurrence or occurrences, how shall the Seven Point Two Million Dollars in insured damages referred to in paragraph one above be allocated, whether by joint and several, or by time-on-risk."

Next paragraph, "In the event judgment is entered for the Plaintiffs, and that the Court determines that the time-on-risk ..." -- which obviously it's got to be -- "...time-on-risk is the proper allocation method, what is the proper period over which the time-on-risk should be calculated. All parties reserve the right to argue from the applicable facts

and law, the appropriate start date and end date for any prorata time-on-risk on the risk allocation period."

It seems to me, when you combine all that, that I have to look at the record, and if I can determine, from the record, whatever is in it, there is an appropriate method to include each building, and the damage to each building, I have to do that. Now it might make the Court decide whether I like one expert's opinion better than the other expert's opinion, or, in looking at them it seems reasonable to combine their opinions and come out with an average, I don't know, but it seems to me that I have to do that.

It also seems to me that y'all agreed -- "That all parties reserve the right to argue from the applicable facts and law, the appropriate start date and end date for any prorata time-on-risk allocation period." So that seems to mean that the -- that's a specific stipulation, and the stipulation I referred to before was a general stipulation, where you talked about policy exclusions, and you can argue that one way or another, however you want to, but that's a general stipulation. It's qualified by a specific stipulation, so in rereading it it appears that the parties have agreed to allow an argument as to the begin date and the end date. Begin date and end dates -- or obviously the begin

date is not in dispute. The end date is in dispute because y'all have a different argument as to the facts. Again, the record is as expansive as it can be, includes everything, so before I change my decision, do you want to make any statements, Mr. Miller?

MR. MILLER: You know I do, Your Honor. As I mentioned earlier, we entered into a settlement agreement with Indiana, and we entered into a stipulation in reliance upon the case as postured by the pleadings in accordance with the rules, and we didn't do that in any way that opened, or overturns the requirement that a party plead properly, in accordance with rules, what their respective positions are. That would undermine, obviously, the beginning of the rule book. It undermines everything that follows in terms of how do you then know what to prepare for, how do you know what discovery to undertake, etcetera. They didn't plead it, and we conducted ourselves accordingly, including the entering into of this Stipulation, and had it been pled then this stipulation may very well read differently than it does read, but it wasn't, and we have a right to rely on the case as it was postured in the pleadings at the time that this stipulation was entered. And as you know, we had already drawn a jury, or were getting ready to draw a jury, I can't

remember which, but we were all in this room, and it was trial time, and Your Honor asked that we undertake to try to reach a different way of doing it, and we did, through this Stipulation, and we did so having conducted exhaustive discovery, having settled out with other carriers, and having conducted ourselves all through that time period in accordance with the pleadings, and to say that somehow we are now going to be prejudiced, and they are going to circumvent the pleading requirements and be allowed to somehow amend, because in order to calculate time-on-risk, as everybody knows you've got to set a start date and you've got to set an end date, Your Honor, I just believe it's improper.

THE COURT: All right. Tell me specifically how you would say you are prejudiced. How are you prejudiced?

MR. MILLER: Well, it's almost impossible to look it the past and tell me how I might have conducted myself differently. For one thing, had they cross-claimed Indiana, which is how -- you know, if you look at the cases on this what you've got is two carriers fighting out which one is excess and which one is primary. Had Harleysville included Indiana in a cross-claim, and postured the case that way, certainly we would be conducting ourselves differently, and the settlement with Indiana may have been one, non-existent,

or two, we may have preserved some obligations on the part of Indiana to come in there and support it's policy positions, because that's what they are asking me to now do, secondly, in terms of the Stipulation itself, we may not have agreed to the numbers, etcetera, if we had thought that they were going to change -- you know, reserve the right to come in there and do what they are trying to do now. I can't say that we would have even agreed to the Seven Point Two Million Dollars, and so, you know, looking into the past and saying what might you have done differently is an impossible thing to do, but there are many easily envisioned scenarios where their failure to recognize this -- and it's not like this is what they had in mind at the time, Judge, it was after this Stipulation that they submitted the Brief to you with the One Point Four Four in it, after this Stipulation. That's not what the meaning and intent of this language is, as evidenced by Harleysville's own actions of arguing to you that it's different, this One Four Four, no Indiana, arguing to the Supreme Court, One Four Four, no Indiana. So, just as when you are looking at the pleadings -- and you have to conclude, well, that's obviously not what you meant because you conducted yourself in a different fashion after that, the same would apply to this Stipulation. And so before you take

on a -- what's going to be a big task in resolving the conflicts between these two insurance policies, and handicapping me of trying to argue Indiana's insurance policy without them being here, I ask that you give due consideration to what I've said, because I think it's just improper to ask us to do.

THE COURT: All right. As -- just as to that point, Mr. Brown, the prejudice issue.

MR. DAVID BROWN: As to the prejudice issue, let me inject a dose of reality. Beazer, great lawyers, did a great job, they cut the deal of a century with Indiana, okay. They got Two Point Seven Million Dollars from Indiana for the South Carolina losses, and only the South Carolina losses. They have talked about how some of the Mass Bay and Recent settlement money they got later is attributable to losses in Indiana and other states, but they allocated all Two Point Seven Million of the Indiana settlement to South Carolina in their own internal documentation -- and that's in the record in front of you -- precisely because those cases in other states didn't impact these earlier Indiana policy periods. Indiana had a very small time-on-risk that would come nowhere near Two Point Seven Million Dollars under the Supreme Court formula. Even if the Court had affirmed joint and several,

Indiana's joint and several obligation, along with the five other carriers that were involved in this case, wouldn't have come up to Two Point Seven Million Dollars, so kind of dose of reality here, Beazer -- I mean, I shake my head and congratulate them. I'm not disparaging at all. They cut a great deal with Indiana to get Two Point Seven Million Dollars from Indiana somehow to say that they've been somehow prejudiced, that they would have acted differently with Indiana I think kind of defies logic, and defies what really went on in the ground of the case. So ---

THE COURT: All right. So -- and I'm going to take a minute to think about this. The start of all this is your pleading, okay. You've got to at some -- in some way, have allowed yourself to make this argument. Now, assuming that I can construe the stipulation to allow you to make the argument, you had to have first, in your pleading, allowed yourself the ability to make the argument, correct. For this to come up at all now, somewhere in your pleading you had to have placed the other party and the Court on notice of the issue, correct.

MR. DAVID BROWN: I agree.

THE COURT: All right. So let's go to that particular point, because I think we have to get past that point first.

MR. DAVID BROWN: All right.

THE COURT: All right. And I know we passed on -- and if you need to go back to the pleading and you don't have it in front of you and you need it back again -- I think we need to spend some time and look at your pleading, and really look at whether or not you can present this argument to me at all, that it is somewhere, realistically, that this issue can be raised because of your pleading.

MR. DAVID BROWN: Can I respond to that as follows?

THE COURT: Yes sir.

MR. DAVID BROWN: I'm happy to do whatever the Court wants me to do, including looking through the pleading again. I think -- you know, I looked at it during the five or ten minute break we had, and handed it back to the Court, and we've talked about that.

I think the point here, in a broader sense of the Rules of Civil Procedure, is to put the parties and the Court on fair notice of what the arguments and the issues in the case are going to be. Okay. And in order to fully respond to that, candidly, I didn't know this was going to come up till I got here this morning, so this is -- I didn't come prepared to deal with that. As I'm sitting here lots of things run through my mind, not the least of which are, we filed all

kinds of pleadings, all kinds of summary judgment briefs, different kinds of things in this case, and very specifically, my recollection is that we filed -- both Beazer and Harleysville, and for that matter, Cincinnati -- extensive proposed jury instructions, and matters we submitted to the Court as to what we thought the jury should consider were we to try the case, and it's my belief that I -- candidly, without going back and looking through the paperwork -- I don't want to state what's improper --

THE COURT: Well, you -- okay, but you would have to then go to your Stipulation. You said, "The record consists of settlement documents, pleadings, discovery and depositions in both the coverage and underlying cases ..." --

MR. DAVID BROWN: Correct.

THE COURT: "...Which have been produced in exchange in discovery of the case." So you would have to find it in there.

MR. DAVID BROWN: Exactly. And in the pleadings, to include summary judgment filings, to include the pretrial submissions to the Court that both Beazer and Harleysville had made outlining jury instructions and the like -- I would have to find -- have to find it in there, and then -- it's my candid and honest belief standing here -- and cannot point

you to a piece of paper right now that says any more than what I've already talked about in the Answer, no. Okay. So I just want to be honest with you. No.

THE COURT: All right. Okay. All right. Okay, go ahead. I'm sorry.

MR. DAVID BROWN: It's my candid belief that the notion that Harleysville was entitled to, not only an offset, but indeed, to another insurance clause argument with respect to the overlapping coverage is nothing new to the parties in this case. The fact that there are three lines of coverage, a Pinehurst Builders line, a Crossman Communities, Incorporated line, and a Beazer Homes line of coverage, all three of which intersect in different forms and fashions, perform the total coverage picture here, has always been a part of this case, has always been a part of the discussions among the parties, the pleadings, the discovery, the briefing, etcetera, how all that works. Indeed, you know, this case, I guess, became famous or infamous in the Supreme Court on the occurrence issue, but really the big puzzle in this case was always trying to piece together those three different lines of insurance coverage in a way that made sense, and indeed, all these years later, and all these other arguments later, that's what we are left with here today.

So I guess what I would say to the Court is, happy to look at the Answer. I'm not so sure that spending the next two hours is going to yield anything different than what the ten minutes did looking at those particular items we discussed. I don't have with me here today because I didn't know it was -- this was going to come up today, every scrap of paper I've filed in this case. It's a whole room back in my office.

THE COURT: I appreciate the fact that it is. All right. Well, let me ---

MR. DAVID BROWN: So, you know, that's my answer.

THE COURT: All right. All right. All right, let's set that aside for one second. How about -- separating out the Indiana issue, do you need to make any more arguments about what the final numbers should be?

MR. DAVID BROWN: No, I -- if you separate out the Indiana issue -- and I don't have an ability to discuss further the numerator question -- then the only real dispute Beazer and Harleysville have is over the multiplier, and the damages per building, because we've already incorporated into our analysis when the three Waterway Village buildings were repaired, blah, blah, blah. All we are really debating ---

THE COURT: Whether I should use an average, or I

should examine the -- or examine the two Reports, and decide whether one Report or the other is better, or a combination of the two, as opposed to an average.

MR. DAVID BROWN: Exactly.

THE COURT: I mean, that's what I would have to decide.

MR. DAVID BROWN: You would have to decide that, and just to be clear, our position would be, that's a factual determination that is beyond the scope, and a legal determination that the parties preserved for the Court, so that would have to be a jury determination.

MR. MILLER: Your Honor, the Stipulation took care of the jury issue.

THE COURT: It took care of the ---

MR. MILLER: We all agreed this morning we were bound by it still today.

THE COURT: ---Amount. It did not -- it didn't say who was responsible, and the amount each was responsible. I had to determine who was responsible and the amount each person was responsible, if they were responsible at all, so I think it's well within what was presented to me, and well within the remand from the Supreme Court for me to look at the entire record and decide -- I think it's clear we ought

to use a building by building approach, I don't think there's anything -- but I think I should decide whether an average is better, or I need to look at those two Reports and decide whether one Report is better than the other one, or accept the agreement of the Plaintiff to do an average, because that's basically what the Plaintiff has done, correct, Mr. Miller, is, you've said, we agree for the Court to use both Reports, the one that's better for us and the one that's worse for us, and average them out, and that's what we agree for you to do, correct?

MR. MILLER: That's exactly right, Your Honor.

THE COURT: All right. So that's -- you know, I -- it may be that, with that agreement I only have to decide whether it's better to be more -- conduct a closer examination of the facts, or just use an average.

All right, I think I need to -- I don't think they are in here, are they? I don't remember seeing them in your Brief, the two Reports of those two experts.

MR. MILLER: I have not submitted them, Your Honor. What I've done ---

THE COURT: All right. I don't remember seeing them, so I think what I need from y'all is a copy of the two Reports, okay, a copy of the two Reports. I need to read

through them and see what the Court's opinion of them is, and then make a decision whether I'm going to use an average or -
- an average of all the buildings, a hundred and twenty-two into Seven Point Two. When I say an average I'm talking about a hundred and twenty-two into Seven Point Two Million, or look at the two Reports and examine each building according to both reports. All right. That's -- I'd have to make that decision. I think I need to make that decision.

MR. MILLER: And for clarity, Your Honor, they do it by project. It's not a hundred and twenty-two percentages, there's five ---

THE COURT: All right. Well, very good.

MR. MILLER: ---And so it's not quite as daunting as doing it by -- by ---

THE COURT: All right. Well, be that as it may, but I still think -- you know, I'll be frank with you. In looking at the Supreme Court's Opinion I read it to say -- they tried to give guidance to the Bar in general that when you've got an issue here's a way to approach it, but in the remand to Judge John, you better look at the facts of this particular case and make a decision based on the facts of this particular case, and that calls for a closer examination of these Reports, not falling back and using an average. I

really think that's what I'm suppose to do. I'm not saying I'm going to do that, but I just -- I'm just telling you, that's where I think the Supreme Court -- or what they have indicated to me to do. All right. **MR. DAVID BROWN:** If I could say two quick things on that.

THE COURT: Yes sir.

MR. DAVID BROWN: Number one, the Fifty-Nine Thousand Dollar number was not just plunked out of the air. That is -- that comes from the underlying expert Reports, so it is -- it's -- yes, it's Seven Point Two divided by a hundred and twenty-two Million (sic), but it's also, for all the reasons stated in the chart -- and I would like the Court to look at that as well -- I believe that's consistent.

The other point I would make, as you go and look at those in the Cantless and Lewis Reports, I don't think it's fair to say that what they were doing was really an apples to apples comparison with what the Supreme Court has tasked this Court with doing for this reason. Those expert Reports were prepared probably before the Stipulations, as the parties were preparing for trial, and so therefore obviously before the Stipulations, and as what remained very, very much in dispute was, how much of the damages are code violations, things that wouldn't qualify as an occurrence, would not be

covered, Beazer arguing it was all covered, us arguing it wasn't covered, we compromised that. The experts also looked at part at this question on water intrusion damages. When you look at the building by building expert Reports what becomes quickly obviously is that most of the damages are so-called accidents cost, meaning, when you actually drill down to a given building with water intrusion damages, and a repair cost of say a Hundred Thousand Dollars on that building, you might only have Five Thousand Dollars worth of repair wood rot, okay, and you might have Twenty-Five Thousand Dollars of fix code violations, putting in the correct remaining firewalls, etcetera. Most of the cost is going to be things like permitting, scaffolding, mobilization, taking off siding and windows to get into the wood rot, things that, in the case we always kind of commonly referred to as accidents cost, as opposed to - so it's not really quite as simple under Mr. Lewis's formulation nor under Mr. Cantless's there's a nice, neat number saying, okay, here's the wood rot damage, and over here is the code violation damage that wouldn't be occurrence. I just offer that as some food for thought as the Court begins to look at the expert Reports.

THE COURT: All right. Again, not making any decision

on that at this point in time, but I hate the delay this even further, but appears that I'm going to need to do so. I want to give you an opportunity, because it does appear that this is an issue that has come up now, about the Indiana period. I know we are talking about a year, I mean, it's about sometime in '97 to sometime in '98 -- obviously ends August 29, 1998, but it's sometime in '97 to '98 where those two policies appear to overlap -- and to see whether or not, by the underlying pleadings, I can even hear or decide that issue. I want to give you an opportunity to examine the pleadings, and you know, your filed submissions that are in the Clerk of Court's file, things that are in -- the things that are in the Clerk of Court's file, and that's what we are bound by, that's the record. You know, I understand it's all these other -- you added these depositions and the reports, I understand that, but you are bound by what you have filed with the Clerk of Court, okay, so you need to look at that and make sure if you find something, you know, that document itself was filed with the Clerk of Court, if you find something that you think supports your argument, to let you have some time to look at whether or not you can make the argument -- Indiana argument or not, because that's a threshold question, and then I think we'll set some time to

- to argue that particular issue if -- you know, if you are allowed to -- whether or not you can make the argument, and if I say that you can then we will go and address that Indiana issue.

I'll just tell you, I'm inclined at this point in time to -- as I have indicated. I don't know that I'm going to do this. I'm going to look at the Reports. I have to look at the Reports. I'm going to look at them. I'm inclined to be -- to look at the Reports and if I find them detailed enough, to at least say -- if I find them to be detailed I'll probably be leaning in the -- using the chart that -- I'm sorry, that Beazer prepared. Obviously the question then comes, what's the end date, what's the end date, as far as the Indiana issue, and then we'll -- we'll decide that. But again, I think if you just take -- if you try to look at what the Supreme Court is saying to me, not to the Bar in general, but what the Supreme Court is saying to me in it's Opinion, I think they were clear that if, you know, you find facts that -- and be more specific than our generalized formula that we are giving to the Bar at large you better do that, and I really think they made that abundantly clear. So, that's where I am with that particular point.

I guess I need to ask you before I set some arbitrary

date. Mr. Brown, what time do you need to examine your pleadings and come back to me with some kind of filing that says -- you know, because I'm sure you are going to find something, that says you can -- and argue the Indiana policies?

MR. DAVID BROWN: Your Honor, I'll comply with any time frame the Court sets, but it seems to me that, you know, off the top of my head, two or three weeks is probably a reasonable amount of time, but I guess it kind of begs the question of kind of what the Court envisions, that is, simply a letter from me saying here's what I contend, and you say yeah or nay, or an additional briefing on that point, or we all come back together on another date.

THE COURT: We will definitely have to come back on another date. I don't think because -- even if -- even if I decided not to allow you to argue Indiana I still have to make this decision about, you know, the hundred and twenty-two divided into Seven Point Two Million, or using the Reports in some way. I still have to make that decision, so we'll come back at a different date, but I want you to be able to file with me some -- it doesn't have to be -- I'm not talking about ninety pages here -- but something in writing that indicates to me, and points to, you know -- you know, as

shown in paragraph ninety-two of our Amended Complaint we can make this argument, or as filed in our Summary Judgment Motion and the attachment thereto that we filed with the Clerk of Court that says, (X), okay, something that says you can make the argument. I don't think we need to go beyond -- you've already made your arguments about Indiana policy.

MR. DAVID BROWN: Fair enough.

THE COURT: You've already made those argument, okay, I mean, that's already here. I don't need for you to tell me that again. I've had a enough time already trying to wrap my head around what kind of policy is better than the other one, but let's get to the point of whether you can make your argument or not. You've made the argument, let's see whether or not you can actually make it to me or not. All right.

So, what kind of time do you need to do that?

MR. DAVID BROWN: Let's say three or four weeks.

THE COURT: All right. Thirty days.

MR. DAVID BROWN: Sounds good.

THE COURT: Thirty days.

Yes sir, Mr. Miller.

MR. MILLER: Just want to make sure I'm clear.

THE COURT: Yes sir.

MR. MILLER: If you believe the Indiana argument can

be advanced, we'll do that at the same time. In other words, you are not going to receive a brief and decide on ---

THE COURT: No. No, no. We are going to -- I'm going to receive it. If you want to, you know, file anything that says, you know, your examination of the pleadings and ---

MR. MILLER: If I do I'll do it within seven days of receipt of Mr. Brown's, okay.

THE COURT: That's fine. All right, let's do that. All right. And I'll -- well, I'll probably do it when I get back to the -- in the office. I will find the day that I'm going to hold a hearing. Okay. Be prepared at the time of the hearing, so that we are all prepared that -- just assume I'm going to allow the Indiana arguments. I'm not saying I'm gonna, but be prepared, on your side, to argue it, on the Plaintiff's side, just assume that I allow the Indiana argument, so you are prepared on that day to make your arguments, if I allow it, and you know, that's going to be, obviously, an examination of the policies, whether it -- you know, whether or not the -- Harleysville can really claim that their time-on-risk doesn't end in August, but starts with the date of the issuance of the Indiana policies, but we'll -- we'll decide that at that point in time, and I'll give you -- in conjunction with that I'll give you my

decision about the average, or the expert Report, using the expert Report issue. I'll tell you that at the same time.

I need for you, Mr. Miller, to -- as soon as you can, find those two reports and send them to me.

MR. MILLER: I know where they are..

THE COURT: Okay. Well, I'm just saying, just as soon as -- soon as you can, you know, get somebody at your office to find them ---

MR. MILLER: I will. I'll ---

THE COURT: ---You know, just get them over to me so I'll -- I'm going to look at them as quick as I can.

MR. MILLER: I'll have Sandy bring them to Abbie. You will get them.

THE COURT: That's fine.

Now, ---

MR. DAVID BROWN: And just so I'm clear as to one final point.

THE COURT: Yes sir.

MR. DAVID BROWN: On that issue about the expert Reports, are we to come prepared to argue about what those expert Reports mean, or rather just to hear Your Honor's ruling?

THE COURT: I -- do you need to tell me anything other

than what you've already told me about it?

MR. DAVID BROWN: Probably not, but I just want to be clear.

THE COURT: No. I -- what else do you need to tell me? I mean, you've told me what your position is, they've told me what their position is. I've got to look at the Reports and see if they are actually helpful or not.

MR. DAVID BROWN: Fair enough.

THE COURT: If I think that there is sufficient factual basis in there to help me make a decision or I don't, because if I don't think there's enough factual information in there, enough factual basis in there to help me make a decision then I have to fall back and do the -- and do the average, because the facts aren't there to support the Court's decision. All right, so I don't think I really need to hear anything more. I've just got to look at the Reports and make a decision, one way or another. All right.

All right, now, that would take care of the issues between Harleysville and Beazer, correct? There's nothing else outstanding. I already ruled on the post-judgment interest issue. I've ruled on that. That's done and over with. All right. So we'll set that aside for now, and what

I need to now decide is -- and I think I can. I can continue on now with the decision whether or not Cincinnati Insurance, you know, the arguments about the applicability of Cincinnati Insurance policies. Do you agree?

MR. McNERNEY: We are prepared -- yes, Your Honor. One final point on Harleysville.

THE COURT: Yes sir.

MR. McNERNEY: If -- after Mr. Brown submits his filing on the pleadings and whether he can raise this issue, if you -- if Your Honor decides that you are permitted to address the merits of the Indiana set-off issue, Beazer would like the opportunity to put in a short brief in advance of the hearing, because the first time we heard about the Indiana issue was on November 2, when they filed ---

THE COURT: Well, what I'm going to do is, I'm going to find some day that I can set for the hearing, and I'm going to do that relatively -- it might be today or tomorrow. I'm going to at least have my office notify you that the hearing, the next hearing is going to be (X) date, all right. I'm going to tell you what that is, so you will know -- and it's certainly going to extend beyond the thirty days I've given to Mr. Brown, and the additional seven days to respond to Mr. Miller. It's going to extend beyond that, so you will

know that it's out there, and it will be plenty of time for you to send whatever you want to. All right.

MR. McNERNEY: Thank you, Your Honor.

THE COURT: All right, so ---

MR. McNERNEY: I'm prepared to start on Cincinnati's argument. Your Honor, if I could, give me five minutes to address whether the May, 2007 that Cincinnati never appealed from is binding as to the joint and several allocation ruling, because I believe it is. Your Honor did enter judgment on Count Two of the Second Amended Complaint in favor of Beazer, and against both Harleysville and Cincinnati, and I was going to ---

THE COURT: Okay. I'll be glad to do that. Do you have a copy of the Second Amended Complaint?

MR. McNERNEY: I only have one I have marked up, Your Honor, but I do have a few things I would like to hand up if I could, if I could approach.

THE COURT: Okay. But -- okay, but ---

I assume you -- oh, these -- oh, this if from Mr. Mack, okay.

MR. McNERNEY: This is from -- Your Honor, the trial was suppose to start in late January of 2007 ---

THE COURT: You know what this is, Mr. Mack.

MR. McNERNEY: I just handed him a copy, Your Honor.

MR. MACK: It appears to be something I sent. I'm looking over it.

THE COURT: Yes sir. All right, very good.

MR. McNERNEY: The trial was suppose to start in late January of 2007. We did some preliminary culling of the jury panels, and then we entered into the Stipulation, and then the Court directed the parties in February -- or by February of 2007, to submit briefs on the various issues to be addressed, and this is one of the issues that we had raised, Beazer had raised in the Summary Judgment Motions and in our Pre-Trial Brief, is that we were seeking a declaration, or declaratory judgment, that every triggered insurance policy was jointly and severally liable for the entirety of the loss, consistent with the Century indemnification from the Supreme Court in 2002. This is Cincinnati's Brief that went in after the Stipulation was entered, but before Your Honor entered this Court's judgment. And on page nine, Issue Two, says, "In the event that the Court finds that there was an occurrence, or occurrences, how shall the Seven Point Two Million Dollars insured damages referred to be allocated, whether by joint and several or time-on-risk", and this is Cincinnati's Brief. Cincinnati, the second sentence of the

first paragraph it says, "Each insurer whose policy is triggered by an underlying client has a joint and several obligation to pay all of the policyholders defense and indemnity costs of their claim up to the limits of the policy." So Cincinnati was agreeing with Beazer, and the reason they were doing that makes perfect sense, is that if we got a joint and several allocation ruling the entirety of the Seven Point Two Million Dollars of stipulated property damage could be tagged to Harleysville, and it would have done of the financial obligation. But -- and we agreed to that, and we argued it to Your Honor.

If you look at the last page of the Court's May, 2007, judgment -- I heard Mr. Mack earlier state that Cincinnati does not agree by the Court's Order, but there's two -- there's two numbered paragraphs on page Eighteen of the Court's May, 2007, Final Judgment and Order. The first one says that, "For the reasons set forth above, and based on the record, judgment is entered on Count One..." -- which is our Breach of Contract count against all the insurers, in the Second Amended Complaint. It's in favor of the Plaintiffs, and against Defendant, Harleysville, for Seven Point Two Million. Paragraph Two says, "For the reasons set forth above, and based upon the record therein, judgment is entered

on Count Two of Plaintiffs' Second Amended Complaint in favor of Plaintiffs and against Defendants, Harleysville and Cincinnati, and the parties' rights and obligations under the respective policies are as set forth in this Order." It's undisputed Cincinnati filed no notice of appeal, they've never asked for any relief under Rule 60 from that Declaratory Judgment, and one of the issues that we asked for in a Declaratory Judgment, also in the March, 2006, Summary Judgment Motion, was that the Court declare, just like Cincinnati argued in their February, 2007, Brief, that every triggered insurer is jointly and severally liable for the entirety of Beazer's loss, and so we think -- we cited in our Brief, Your Honor, which was filed on November 2nd, the **Charleston Lumber** case from the South Carolina Supreme Court in 2000, which is almost precisely this issue. It was a case that Charleston Lumber was a party to. It went up on appeal, came back on remand, but Charleston Lumber had not appealed an issue that had been ruled against them in the trial case, and on remand sought to make arguments that were different from what the Trial Court had entered, and the Supreme Court said that was improper, because they took no appeal, and so we think that the joint and several allocation ruling as to Cincinnati alone is the law of the case, and governs in these

remand proceedings

THE COURT: All right. I know you said you wrote on it. Do you have your Plaintiff's Second Amended Complaint on your desk somewhere?

MR. McNERNEY: I can put my hand on it right now, Your Honor. I'm sorry.

THE COURT: Okay. Well, that's what I -- I want to read it.

MR. McNERNEY: Okay.

THE COURT: I want to read what Count Two of the Plaintiffs' Second Amended Complaint says, all right, what exactly you were asking for.

MR. McNERNEY: Well, I think the remand -- and if I might, Your Honor, maybe we could do the same short submission to the Court on the same timetable as Harleysville, because I think ---

THE COURT: I don't think that's important -- or not important, it's not necessary. What I need to do is look at the Complaint.

I don't suppose you have a copy of that, Mr. Mack.

MR. MACK: No, Your Honor.

THE COURT: All right. We'll ---

MR. DAVID BROWN: They brought our Answer, but not

their Complaint.

THE COURT: I've got the -- I've got the file. It's in like five buggies in my office, so I suppose we can go back and find the Plaintiffs' Second Amended Complaint. I mean, I note in the Order that I said that the Court found that for each of the condominium projects at issue in the South Carolina underlying lawsuits the property damage was caused by an occurrence as defined by the Harleysville and Cincinnati policies. I need to know what's in Count Two, but what is it that you are asking for? I don't know what is in there.

MR. McNERNEY: In Count Two we ask for a declaration that all of the insured Defendants were liable to defend and to indemnify Beazer for all of the cases. We also asked for a declaration of the parties' rights and obligations under their insurance policies, and that prayer was fleshed out in both pretrial and -- pretrial Briefs, as well as Briefs that were filed in February, 2007, when we were asking the Court to issue these rules to grant our declaratory judgment.

THE COURT: All right. Thank you.

Mr. Mack.

MR. MACK: Just very brief, Your Honor, just reiterating what we pointed out earlier, on page sixteen.

You specifically stated that you were not ruling on whether the Cincinnati policy was triggered. Cincinnati was not aggrieved by this Order. There was no judgment against it as to any of the damages. Again, if Crossman had wanted to have a better definition of this, or a better ruling on it, they could have asked for reconsideration of your Order.

In addition, the Supreme Court, again, reiterated what you set forth in your offer -- in your Order. The lower court did not rule on whether Cincinnati's policies provided coverage. The Plaintiffs did not ask the Supreme Court to reconsider, or elaborate on that language. I think the Supreme Court is -- it is clear the order -- you did not rule on whether the Cincinnati policies provided coverage, and that's why we are still here today.

THE COURT: Well, what -- okay, and --

MR. McNERNEY: Your Honor, I would ask the Supreme Court, in an Order relating to Cincinnati, Cincinnati didn't even ---

THE COURT: Let's just -- let's look at page sixteen. Let's see what it says, okay. Well, you need to start at the bottom of page fifteen. It says, "Because the Court has ruled that the Plaintiffs' insured losses are to be allocated in accordance with the joint and several methodology, and

because the combined limits of the Harleysville policies covering Plaintiffs exceed the Seven Point Two Million in stipulated insured losses, as found by the Court, the Court need not rule upon whether the excess slash umbrella insurance policies covering Plaintiffs, and issued by Cincinnati, are presently triggered by Plaintiffs' insured losses in the South Carolina underlying lawsuit."

I didn't make a decision. I didn't say they were triggered. I did say there was an occurrence, and the Supreme Court said there was an occurrence, but I didn't say whether or not they were triggered, because they couldn't be, because I allocated the whole Seven Point Two Million to Harleysville. Now the Supreme Court said, you can't allocate the whole Seven Point Two Million against Harleysville, so since I can't allocate the whole Seven Point Two Million against Harleysville I think it is clear in the Supreme Court's Order that I now have this issue in front of me. I didn't address it, I didn't rule on it, I didn't say (A) or (B), so -- I think it's clear, I've got to make this decision. All right. **MR. McNERNEY:** If I could make one more point, Your Honor.

THE COURT: Yes sir.

MR. McNERNEY: The first part of the sentence that you

just read, so the Court has ruled that Plaintiffs' insured losses are to be allocated in accordance with the joint and several methodology, that ---

THE COURT: The Court need not -- "The Court need not rule upon whether the excess umbrella policies covered by Cincinnati are presently triggered." Okay. I -- and I said that; but the Supreme Court said, that's wrong, okay. My decision was wrong. I had made no decision about Cincinnati, other than there's an occurrence. I said there's an occurrence. That's clear in the Order. I made no decision about Cincinnati. I said nothing about them. I said I'm not going to address it, so I just don't see how you can make that into, they are not allowed now to argue the point about joint and several. I -- well, I understand your position, don't agree with it, I'm going to allow -- I'm going to -- let's continue on. Okay.

MR. McNERNEY: Yes, Your Honor. Thank you.

And Your Honor, if I may approach. I have a set of the slides that correspond.

THE COURT: That will be great.

MR. McNERNEY: I have one for Mr. Mack.

THE COURT: Okay. All right.

MR. McNERNEY: The issue that was before the Court in

May of 2007 was whether -- this is in Beazer's view at least -- was whether the Cincinnati policies were triggered. And in order to demonstrate that the policies were triggered there are three levels of underlying insurance, there's Indiana, there's Mass Bay, there's Regent, and then there's the Harleysville's policies that overlapped with the Indiana policy for three months. Beazer settled with Indiana, settled with Mass Bay, and settled with Regent. They -- Indiana, Massachusetts Bay and Regent at one time were Defendants in the case, but they settled -- they settled their liability.

We have -- I brought in -- I'll give to Your Honor, and probably introduce into the record, the Settlement Agreements with those three insurers.

THE COURT: Okay.

MR. McNERNEY: They are all in the record, but it will save you the time of ferreting out ---

THE COURT: That will be fine.

MR. McNERNEY: And I'll do those when I --- when I finish.

THE COURT: Okay.

MR. McNERNEY: The policies of these shaded at the bottom have -- these are policies having One Million Dollar

per occurrence limit. This is on page eighteen, Your Honor.

THE COURT: Okay.

MR. McNERNEY: They had One Million Dollars per occurrence per policy period, and then Two Million Dollars in aggregate. What the aggregate limit is, is that's the most those insurers could ever pay for any number of claims from the beginning of time to the end.

Cincinnati's insuring agreement, which is on page twenty, says that Cincinnati has to pay when Beazer -- ultimate net loss, which Beazer is legally obligated to pay as damages in excess of underlying insurance, and the underlying insurance is defined as the insurance that might be responsive to these claims.

Now what's important there -- and we'll get to the -- to a case that we had -- and there's the occurrence language, which is the same as in the Harleysville policy. Your Honor has already found that there's an occurrence, property damage, ultimate net losses, the indemnity claim as to Beazer -- Beazer had.

Now, Cincinnati, in it's Brief, says that they have no obligation to drop down and defend Beazer. They say that Harleysville should do that. We are not seeking any defense costs here, Your Honor. The underlying cases have all been

resolved long ago. The primary insurers with which Beazer settled paid all the defense costs, so to the extent Cincinnati characterizes Beazer's argument is asking them to drop down and defend it's just not relevant, because we don't want any defense costs from them.

Their basic argument is this, Your Honor. I'll get to the numbers in a second. We settled with Indiana for Two Point Seven Million Dollars. We settled with Massachusetts Bay for Two Point Nine Million, but Massachusetts Bay paid some other settlements as well, so their aggregate limit only had Eight Hundred and Seventy Thousand Dollars left and the same -- the same for Regent. So what Cincinnati is saying, in essence, is that Beazer can't ever reach the Cincinnati policies because Beazer accepted in settlement less than the maximum possible policy limits that Beazer could have won from Cincinnati. And Cincinnati's Brief doesn't cite any South Carolina law on this issue, in terms of how you determine when an excess insurer's policies are triggered. We looked for South Carolina law, couldn't find any either. Cincinnati cites us some cases saying that a court can't rewrite an insurance policy, and we agree with that. The Court is well aware from the prior case that, to the extent any portion of an insurance policy is ambiguous the Court is

obliged to adopt the interpretation that favors coverage.

Now, we raised this in our Brief on November 2nd, Your Honor, and Cincinnati didn't address it in the Brief they put in on December the 14th. But Cincinnati and Beazer have already litigated this trigger issue with the Cincinnati excess policy, and it was a case -- this case -- I've got a caption up here -- so Beazer Homes Investment is one of the Plaintiffs, and Cincinnati Insurance Company is one of the Defendants. And this exact issue was briefed. Beazer lost in the trial court. Indiana -- Indianapolis Federal District Court ruled against us, and the Court ruled that, because Beazer had settled with the underlying insurers for somewhat less than the total limits possibly available under those primary insurance policies, Beazer could never trigger the Cincinnati excess policies.

And this is a case not only involving the two parties that are here today before you, Your Honor, this case that was decided by the Seventh Circuit involved the exact same Cincinnati insurance policy insurance contracts that covered Crossman.

And here's where the Seventh Cir -- on slide twenty-four the Seventh Circuit kind of laid out the issue. Cincinnati was arguing to the Seventh Circuit that where the

primary insurer pays in settlement, you know, a hefty percentage of their limits, to compromise their claim to the policyholder, could the policyholder ever get to the excess policy, and Cincinnati's argument was no, because Cincinnati said that the entire policy limit had to be paid by the insurance company itself, the primary insurance company, and what Beazer was arguing is that -- this is on page twenty-five. Beazer was arguing that the CGL policy could be exhausted when an insured -- that's Beazer -- and a CGL insurer, in this instance, Indiana Insurance Company, Massachusetts Bay and Regent, entered into a settlement agreement where the primary insurer will pay a large percentage of the total limit, and the insured takes responsibility for the remainder.

In some of the cases that deal with this issue, Your Honor, they talk about a settlement discount granted by the policyholder to a primary insurer, and how do you deal with the shortfall of the settlement discount. Here, on page twenty-six of the slides, here's how the Seventh Circuit deals with it. I mean, they say that, in situations where Beazer pays out of its own pocket the settlement discount, or the shortfall, as long as the combination of the settlement payments made by the primary insurer, plus

uninsured payments made by Beazer out of it's own pocket, equals the total amount of the underlying insurance that is sufficient to then trigger the Cincinnati excess policies. And again, these are the exact same policies that have been in this case since 2004.

And this -- at the Seventh Circuit argument I believe this public policy issue that's reflected on page number twenty-seven of the printouts -- this is what the panel was the most interested in -- because we posited a hypothetical to the panel that in a situation similar to this one that also an environmental insurance coverage case, or an asbestos insurance coverage case where the policyholder is facing Millions and Millions of Dollars of liability, such that in order to get coverage you have to sue all of your primary insurers plus all of your excess insurers, the position advocated by Cincinnati, which is preclude the policyholder from ever entering into a settlement with the primary insurer. Cincinnati's position is, unless you get the full Four Million Dollars from Regent Insurance Company, and Regent pays that full Four Million Dollars, you can never trigger the excess coverage issued by Cincinnati.

And here the Seventh Circuit said that, since that view by Cincinnati, which they are also advocating to Your Honor

here, would deter parties, both primary and excess insurance, from settling with their CGL insured, and the instance -- Cincinnati's position, taking it to its logical conclusion, would require a policyholder to turn down a settlement offer from a primary insurer that was willing to pay ninety-nine percent of their policy limit, because if they did, and Cincinnati is right, then you've vitiated all of your excess coverage, which would -- you know, it's just not fair, and it's not consistent with the public policy of either Indiana or South Carolina, which is to foster goodfaith settlements in litigation.

And then the Seventh Circuit also dealt in something that you will probably hear Mr. Mack talk about, that there's a punitive effect on Cincinnati unless the underlying insurance company pays the entire maximum policy limit out of its own pocket. The Cincinnati policies sat on top of -- take an example, the Massachusetts Bay primary policies -- and I'll go back to that slide. Massachusetts Bay here, Your Honor, on page eighteen, they have two policies, each with a Two Million Dollar limit. Cincinnati, when they wrote that policy, knew that if Beazer had lawsuits that exceeds Two Million Dollars per year they were on the hook, because that was the underlying insurance. So once Beazer has losses that

fill up these columns, and Cincinnati is triggered, it should -- it doesn't make any difference to Cincinnati whether this Two -- full Two Million Dollars per year is paid by the insurance company alone, or whether it's paid by some combination of Beazer and the insurance companies, and that's exactly what happened here.

And this goes back to the Seventh Circuit's Opinion on page twenty-six of the slide you have, Your Honor, because that -- the ruling that they made that Beazer can reach the Cincinnati policies, these very same Cincinnati policies, are demonstrated -- by demonstrating that it has paid out liabilities which, in combination with the amounts received in settlement from the primary insurers exceed the policy limits, is totally consistent with the insuring agreement in the Cincinnati policy. Cincinnati's insuring agreement says that Beazer is covered under the Cincinnati policies once Beazer is, quote, legally obligated to pay as damages amounts in excess of the underlying insurance. That's what their Cincinnati insuring agreement says.

Now there are some cases, and I've had a few of them, where the excess insurance policy says -- and I'll go back to the insuring agreement, Your Honor, which is on page twenty - Cincinnati has to pay the ultimate net loss which Beazer is

legally obligated to pay as damages in excess of the underlying insurance. I've had some cases where the excess policy insuring agreement says, instead of what Cincinnati's language says, it says that the underlying insurance limit has to be paid by the insurance company, and in those cases the Courts say, well, if you don't get the full policy limit from the insurance company alone, the insuring agreement precludes coverage at the excess level. But that's not what the Cincinnati insuring agreement says, and the Seventh Circuit agreed with that. They agreed with Beazer's position.

On slide twenty-eight, you know -- and argue the Seventh Circuit's ruling which fixed Cincinnati's obligation to respond to claims against Beazer under these very same policies the ruling is not unfair. The Seventh Circuit's ruling is not unfair to Beazer because, as we've heard today, various insurance companies at the primary level have all kinds of coverage defenses, and some of those coverage defenses differ from insurer to insurer in a, you know, reasonable litigation risk assessment would suggest that insurers should settle their claims and policies, but the rule that Cincinnati argues for would penalize the policyholder for doing that, and would -- instead of having

just these parties here Beazer would have been forced to keep Indiana, Regent, Massachusetts Bay as Defendants all the way in to the end of this case, which didn't make any sense.

And the ruling protects the reasonable expectations of Cincinnati. Cincinnati agreed their policies would be trigger once Beazer had losses that exceed the amounts of the underlying insurance, and I'll show that that's happened. This is an argument -- this is a sentence from Cincinnati's November 2nd Brief, and it -- it -- it's -- I think it can be rather -- be consistent with the Seventh Circuit Opinion, although the Cincinnati's Brief doesn't mention the Seventh Circuit Opinion, but Cincinnati said that their coverage is involved only after the underlying limits, and limits of all other insurance have been exceeded. It doesn't say how. And our position, consistent with the Seventh Circuit ruling, is that those limits can be exceeded by a combination of a settlement agreement by the insurance company combined with unreimbursed payments by Beazer.

I think -- well, let's talk about Harleysville for a minute. Cincinnati will say that there's no coverage available if there's any underlying coverage available, is their basic argument. As to Harleysville, they make arguments in their Brief about how Harleysville hasn't

stepped up to it's duty to defend -- hasn't paid us, but Your Honor, based on the Supreme Court's remand Order, is going to fix the maximum total amount of Harleysville's liability in the proceeding that is going to come up in thirty days or so, and so once that number is decided, Harleysville's policies will be unavailable.

The next insurance company is Indiana Insurance Company. They provided three months of coverage. Unfortunately for them their policy periods went -- their policies' anniversary date is in the middle of that three months, so Beazer's argument was that they had two policy periods exposed, each with a Two Million Dollar aggregate limit. One of the reasons we settled with Indiana was, they made the common sense argument that, wait a minute, our policies were suppose to be for twenty-four months, two twelve month periods, and you are only on the hook for three months because we didn't insure any of the Pinehurst operations until May of 1998, so their argument was that the extent reliable at all, it's a much smaller amount. There's no dispute that we settled with Indiana Insurance Company for Two Point Seven Million. Under Beazer's view that's all the limits -- that's more than the limits that we were entitled to. But for purposes of today we will concede that there's a

shortfall at One Point Three Million, between the Four Million Dollar maximum total amount that we could have collected and then the Two Point Seven that Indiana actually pays.

After Indiana went off the rest -- Massachusetts Bay -- two years of coverage, from August of '98 to August of 2000, they had -- also had limits of One Million Dollars per occurrence, and Two Million Dollars in the aggregate. Beazer paid -- I'm sorry -- Massachusetts Bay paid Two Point Nine Million of the maximum Four Million, to be dismissed not only from this case but from the insurance coverage case in Indiana Federal Court. And prior to paying Beazer the Two Point Nine Million Massachusetts Bay had paid almost Two Hundred Thirty Thousand to resolve other claims, and all these numbers are in the Settlement Agreement, Your Honor, which I will bring up. So, under both Beazer and Cincinnati's view there is a shortfall for a settlement discount of Eight Hundred Seventy Thousand Dollars for the Mass -- for the two Massachusetts Bay policy periods.

The last insurance company that underlies the Cincinnati policies here was Regent. Regent, because their policy, in the second term, was canceled, was on the risk for sixteen months. They had two policy periods, each with a

limit of One Million per occurrence and Two Million in the aggregate. Beazer was paid Three Million by Regent to settle the case up in Indiana. They also got dismissed from this case. Regent also paid Beazer slightly over a Hundred and Fifty Thousand Dollars to settle other claims. Beazer's view is that there were no other limits available under the Regent policies because Regent's biggest argument was that their four-month policy period should be -- should be used to prorate the limits that were available. But, you know, for purposes of today we will agree with Cincinnati that there was a shortfall of Eight Hundred and Forty-Eight Thousand for Cincinnati, so this is Cincinnati's best case, is on slide thirty-three, Your Honor. It's the Settlement Discount. There's no discount to Harleysville because Harleysville policy will be unavailable once Your Honor enters the prorated time-on-risk judgment against Harleysville, and the settlement shortfalls the three insurers have settled for, we settled with, total, on Cincinnati's best day, slightly over Three Million Dollars.

On slide thirty-four, Your Honor, we've got copies of Mr. Berry's Affidavit. Mr. Berry was the Risk Manager for Beazer before he left the company about a year ago, and the counsel on the other side of the room know him quite well.

And Mr. Berry signed an Affidavit that is in the record of this case, signed it on March 30th of 2006. Mr. Berry had his deposition taken by various counsel. Mr. Berry's undisputed testimony was that Beazer had incurred Twenty-Seven Million for a mediation of property damage in Indiana construction cases. The cases in Indiana were much larger than the cases here. The same Cincinnati policies that are -- bring Cincinnati as a Defendant in this case were involved in the Indiana case, and so -- and those policies -- it's the same policies' covering Beazer for it's liability, and so there's no dispute that -- and these numbers are not disputed by Cincinnati, at least not in the record, but Beazer had Twenty-Seven Million Dollars in property damage remediation costs in Indiana alone.

Now, the guy -- the Affidavit from Mr. Berry is in the Court's record, and the exhaustion issue is somewhat complicated in terms of what Your Honor -- what we think Your Honor should look at to make this resolution consistent with the Seventh Circuit Opinion. This number is undisputed. It's in the record of the case, but because the Indiana property damage cases continued onward, after Your Honor's decision in May of 2007, there have been additional expenditures and addition recoveries.

Let me get back to where I need.

This data is current through the summer of this year, Your Honor. It was shared with Cincinnati. The Indiana is continued. We provided -- this chart was attached to our November 2nd Remand Brief and served on Cincinnati. The documents that support this, as well as these pages -- these exact pages, were provided to Cincinnati in August of 2011 to facilitate some of the discussion.

The Cincinnati's policies also cover Beazer for losses, construction defect losses that occurred in Kentucky, and in fact, Cincinnati Insurance Company sued Beazer in a declaratory judgment action in Kentucky Federal Court to avoid any obligation for -- for these lawsuits, and this document was provided to Cincinnati on November 2nd as part of that Remand Brief. The exact same document was provided to Cincinnati Insurance Company's representative in August of 2011. And so the uncovered loss in Kentucky is Ten Million, the uncovered loss, indemnity loss, because we are not seeking any -- we are not seeking any defense costs -- the uncovered loss in Indiana most recently is in excess of Twelve Million, and so if you add those lawsuits that Beazer has paid out of it's own pocket, the construction defect claims in Indiana and Kentucky it's slightly north of Twenty-

Two Million, and this is the shortfall number. Let me go back to that second number, you'll see is this settlement shortfall number. On Cincinnati's best day Cincinnati can claim that by compromising -- by Beazer compromising it's claims against these three insurers, Beazer left this much money on the table, in terms of available limits from those insurers, and that's Three Million Dollars, and this chart shows that, even accounting for that money to fill the settlement discount or the shortfall Beazer still has unreimbursed loss covered by these Cincinnati insurance policies of in excess of Nineteen Million Dollars.

I would like to bring up -- Your Honor, I've got -- and put these -- put these numbers in -- these numbers in perspective. The reason that Beazer provided all this information to Cincinnati Insurance Company in August of 2011 is, Cincinnati had prevailed at the trial court level both in the Federal Court in Indianapolis and in Federal Court in Kentucky, that there was no occurrence. These are appealed, and Beazer prevailed in the Sixth Circuit for the Kentucky case, and the Seventh Circuit for the Indiana case, the Seventh Circuit case which we cite in our Brief, and which I have handed -- which I have some slides from. And as a result of the remand Beazer and Cincinnati got serious about

settlement discussions, and I've got the Settlement Agreement here I would like the hand up, if can approach.

THE COURT: Yes sir.

MR. McNERNEY: I'm sure Frank -- Mr. Mack has a copy of that.

This Settlement Agreement was finalized, and specifically paragraph -- Paragraph Eleven specifically allows the parties to use this Agreement in this case, and the Settlement Agreement itself specifically carves out of this Agreement this case. This is a Settlement Agreement entered into between Cincinnati and Beazer that resolves all of Beazer's claims against Cincinnati for losses in Indiana and in Kentucky, and Cincinnati paid, as the Agreement says, Eleven Million Dollars to resolve that liability, specifically leaving this one -- this liability open. And I submit that, you know, insurance companies don't generally pay funds that they don't think they owe, and so Cincinnati appears to have gotten past this failure to exhaust argument, as they paid Eleven Million Dollars to resolve the claims in Indiana and in Kentucky.

So again, any way that the numbers are sliced Beazer still has paid far more than the relatively slight discounts that were granted to the primary insurers that were once

Defendants in this case. There simply is no other underlying insurance available. As you might imagine, the Settlement Agreements with Indiana, Mass Bay and Regent all, in exchange for their sizable payments to Beazer, required an admission by Beazer that the policies were exhausted and no longer available. And so once Beazer fills the settlement shortfalls with all of this liability that it's paid out of it's own pocket, Cincinnati's policies are on the hook.

Prepared the slide before Your Honor rules, at least for now, that the liability of Cincinnati State joint and several, and our position in that setting was that Cincinnati's obligation to Beazer would be the Seven Point Two Million Dollars, less whatever Your Honor ordered Harleysville to pay. We did, in the alternative, in our November 2nd submission, set forth and argue of Cincinnati's liability under a prorated time-on-risk analysis, and that is on -- that is tab I to Beazer's November 2nd, 2011 submission to the Court, and we calculated Cincinnati's prorated time-on-the-risk liability precisely the same way that Miller -- Mr. Miller went through with you earlier today, Your Honor.

Cincinnati has -- because they were on the risk for a long time, and because all of the buildings were closed, either before or during the first Cincinnati policy period,

so Cincinnati actually has a almost Three Million Dollar share of time-on-the-risk responsibility under the methodology that Mr. Miller went through earlier today. And so we ask Your Honor to enter judgment against Cincinnati for whatever amounts Cincinnati -- I'm sorry -- the Court orders Harleysville the pay, subtracted from the Seven Point Two Million, and in the alternative, to Cincinnati's time-on-the-risk allocation as expressed in Exhibit I, is Two Million Nine Hundred Ninety-Six Thousand One Hundred Ninety-Three Dollars, and in the alternative we would ask the Court to enter judgment in that amount in favor of Beazer and against Cincinnati.

And if I could, Your Honor, if I could just bring up the Settlement Agreements. I mean, they are on the record.

THE COURT: Yes sir.

MR. McNERNEY: Okay.

Do you want me to mark these as exhibits?

THE COURT: Yes sir, why don't you do that.

And would that be your argument?

MR. McNERNEY: Well, I also have, Your Honor -- I have Mr. Berry's Affidavit, the Affidavit I went through.

THE COURT: Okay.

MR. McNERNEY: And the Twenty-Seven Million Dollar --

this was the number as of the close of the record in this case. The Twenty-Seven Million Dollar is in Paragraph Twenty-Nine of Mr. Berry's Affidavit.

THE COURT: All right.

(SETTLEMENT AGREEMENTS MARKED COURT'S EXHIBITS 1, 2, 3, AFFIDAVIT OF MR. BERRY MARKED COURT'S EXHIBIT NUMBER 4, CINCINNATI AND BEAZER SETTLEMENT AGREEMENT MARKED COURT'S EXHIBIT NUMBER 5.)

MR. MCNERNEY: Marked as Crossman Exhibit 1, a copy of the Settlement Agreement between Beazer and Indiana Insurance Company. We've marked as Exhibit 2 the Settlement Agreement between Beazer and Regent Insurance Company, Exhibit 3 is a Settlement Agreement between Beazer and Massachusetts Bay Insurance Company, Exhibit 4 is a copy of the Affidavit of W. Mark Berry from March of 2006, plus attachments which is in the record, and then Exhibit 5 is a copy of the Cincinnati and Beazer Settlement Agreement for the Indiana and Kentucky liabilities.

THE COURT: All right. Any objection to those, Mr. Mack?

MR. MACK: No objection, Your Honor. I haven't reviewed the various Settlement Agreements, but I assume they are the documents, so no objection.

THE COURT: All right. Very good. Any other arguments then, Mr. McNerney?

MR. MCNERNEY: Not at this time, Your Honor. Thank you.

THE COURT: All right. Very good.

Let's just take about five minutes and then we'll come back. Thank you.

(THE FOLLOWING TAKES PLACE AFTER A BREAK.)

THE COURT: All right, Mr. Mack.

MR. MACK: Thank you. You have been very patient listening to all this, and I'll try to be relatively brief. I think most of our arguments are set out in our Memoranda. As Mr. McNerney has indicated, there's not really any South Carolina law on some of the issues we are addressing.

And first as to -- a couple of small points. First, as to the Indiana and Kentucky lawsuits, as you know the -- while the insurance policy might have been the same the different states apply different interpretations to policies. There's an extensive amount of litigation that has gone on throughout the nation over the CGL policies, State the Indiana and Kentucky cases were settled on their own merits under Indiana and Kentucky law. It has no real relevance to South Carolina law on the issues.

Secondly, as to the time-on-risk calculation, we don't disagree with the two methodologies that have been used according to the chart prepared. It's roughly Three Million Dollars regardless of whether you use the average of the two experts, or simply the average over a hundred and twenty-two buildings, so Cincinnati's exposure, assuming that their coverage is triggered, and none of the underlying issues go their way, their exposure under the time-on-risk is outlined by the Supreme Court to be approximately Three Million Dollars.

As far as the merits, it's Cincinnati's position, again, we've set this out in our Memoranda. As you had noted Cincinnati is in a fundamentally different position than Harleysville. Cincinnati has excess coverage, not primary coverage, so it's a different analysis. There are two ways of viewing Cincinnati's position in this particular case. Cincinnati policy is very specific -- and we've cited this in our Memo -- underlying coverage must be exhausted by payment of claims. It could have been other language, but the payment of claims has not occurred. Crossman is a sophisticated business entity. This is the coverage they purchases. They could have purchased different coverage, different language, gotten endorsements, the size they are

they could have gotten specific endorsements, but they are basically asking the Court to find coverage that they didn't pay for, and that doesn't exist under the policies.

Now, as to the underlying primary carriers, Crossman decided to settle with these primary carriers for less than their policy limits. In the policy Crossman was required to maintain primary coverage. This has been outlined, again, in the slides. It was a business decision to settle it. They settled for less than what the Supreme Court ultimately decided they would be responsible for. They left roughly Three Point Four Million on the table. As a result of their decision they are responsible for that gap, the Three Point Four Million. Cincinnati isn't arguing that the excess could never be triggered, it's just they get the cushion of the Three Point Four Million before their coverage is triggered.

Another way of looking at it, as far as this specific case is concerned, as used in all the calculations today, Seven Point Two Million is the resultant damage for these five projects. The total amount of the damages, including building code violations and so forth, was Sixteen Point Eight, the total that was paid by Beazer, but Seven Point Two Million of that would be the part that would be covered by policies whether primary or excess.

In this case the primary carriers have paid Eight Point Six Million Dollars. You look at what has been paid by the three carriers, Indiana, Mass Bay, and I'm drawing a blank on the third one, sort of like Mr. Perry at the Presidential -- Regent. So Beazer had total covered damages of Seven Point Two Million Dollars. The three primary carriers have paid Eight Point Six Million. Presumably Harleysville is going to pay some portion of that Seven Point Two Million.

Looking at in the second way, all of the covered damages have been paid. They've been covered by the primary carriers, which is the purpose of, and primary versus excess coverage. Again, Your Honor, we've set it out in our Briefs. We think it's fairly straightforward, and unfortunately South Carolina hasn't -- the Supreme Court hasn't given any guidance on this issue so we are vexing a little bit, but it's our position that Cincinnati does not owe anything, Beazer, either under a strict policy analysis they aren't entitled to coverage, or under a damages analysis they've been fully compensated. In either event, Cincinnati would have no liability.

Thank you, Your Honor.

THE COURT: All right.

Any reply?

MR. McNERNEY: Yes, Your Honor. I've put up slide number fifteen from the packet I have handed you, and this -- I don't think there's any dispute, and I don't think Mr. Mack disputes -- that in order to resolve all of the cases in South Carolina against Beazer, Beazer paid the homeowners Sixteen Point Seven Seven Zero Million. At the time Beazer compromised it's claims with Indiana Insurance Company, Massachusetts Bay Insurance Company and Regent, Beazer's claim was that each of those insurers owed the full amount of that Sixteen Point Seven Seven Million Dollars, and that each was jointly and severally liable for the entirety of that Sixteen Point Seven Seven Million. Beazer settled -- Mr. Mack said Eight Point Six Million. It's in the record that Beazer -- because those policies covered losses in other states that Eight Point Six Million is really Four Point One Five Million attributable to the South Carolina cases, and Beazer is not going to have a double recovery, as Your Honor ruled in May of 2007 when Harleysville advanced the setoff argument but Beazer will still have loss. This is a collateral source. The Seven Point Two stipulated resulting damage number was right before trial, didn't involve at all Indiana Insurance Company, Massachusetts Bay or Regent.

As I understand Mr. Mack's argument that Cincinnati has

a cushion of Three Million plus -- and I think as the cost data makes clear -- Beazer has more than satisfied that cushion with these losses that occurred in both Indiana and Kentucky, which were also covered by the Cincinnati policies, or that are -- the reason Cincinnati is a Defendant in this case.

I will say that the substantive law that was applicable to the Indiana cases, and to the Kentucky cases, is the **Sheehan Construction** case from the Indiana Supreme Court that was decided in late 2010, and I think that, on the occurrence issue, is almost exactly like **Crossman II**, and that only resultant damage is covered, and after that -- after the Sixth Circuit and Seventh Circuit reversed, and sent the Cincinnati cases back to the Trial Court, is when we started exchanging this information on loss that's on slides thirty-five and thirty-six.

So I guess in conclusion Beazer clearly has losses in excess of Twenty-Seven Million Dollars. That was in the record of this case, wasn't disputed by Cincinnati. I don't believe Cincinnati ever dispute the loss numbers from either Kentucky or Indiana, and in fact, you know, was kind of the springboard for getting the settlement that we've marked as an exhibit, and as a result any settlement shortfall has been

filled several times over, and Cincinnati is now triggered and is liable for it's share of the property damage.

THE COURT: All right.

MR. McNERNEY: Thank you, Your Honor.

THE COURT: All right, gentlemen, let me take a couple of minutes and look at a couple of things, see if I have any additional questions that I need to -- I need to ask you at this point in time, but let me -- we'll just take a short break and I'll come back and let you know if I need -- need to ask any other questions about this. Okay.

MR. McNERNEY: I can hand up the Seventh Circuit case that I took the slide from, Your Honor.

THE COURT: All right. That's fine. That will be great.

Thank you. Okay. All right, thank you, gentlemen.

(THE FOLLOWING TAKES PLACE AFTER A BREAK.)

THE COURT: All right. Mr. Mack, let me ask you a question. Let's just skip over policy question for now. Not saying that I have made any decision, I just need to ask you a question. When does Cincinnati's time-on-risk start, what date?

MR. MACK: The coverage started on August 29, 1998 ---

THE COURT: 1998.

MR. MACK: ---And ended September 1, 2002.

THE COURT: September 1, 2002.

MR. MACK: Yes, Your Honor.

THE COURT: All right. And started August 29, 1998.

MR. MACK: That's correct.

THE COURT: Now, you had May 29th ---

MR. MILLER: May 29th.

THE COURT: I know Beazer had May 29th.

MR. MACK: Let me check, Your Honor.

THE COURT: All right. Of '98.

MR. McNERNEY: Your Honor, I think -- and Mr. Mack can correct me if I'm wrong -- I think the Cincinnati policy period actually started before May 29, of 1998, but Cincinnati's policy is only on the risk for the Pinehurst liabilities here in South Carolina as of the date that Crossman acquired Pinehurst, which is May 29th of 1998.

THE COURT: All right. So let's just assume -- okay. All right. May 29, 1998. All right. So again -- and we'll get back to the policy -- the policy question in just a minute.

All right. It starts on May 29th, 1998, it ends on September 1, 2002. Now, assume -- let's just say for the -- assume for the sake of argument that excess coverage is

triggered, would we not have to look at, you know, the maximum amount of the insurance coverage from May 29, 1998 until the end date of September 1, 2002, see what damage, or what amount was paid to settle the claims in that time period, see what amount was paid to settle the amount of claims in that time period. You've got to subtract the maximum amount of the insurance coverage from the total amount that was paid in that time period, and wouldn't that be the exposure to Cincinnati? Skip over the policy question. All right. You've got time-on-the-risk for this time period, you -- the underlying coverage, however it's calculated, pays up to that amount. There is -- assuming there is something above that underlying coverage, isn't that what Cincinnati -- isn't that what the excess coverage is there for?

MR. MACK: Yes, Your Honor.

THE COURT: All right. I haven't -- I'll just tell you, I've been struggling on this part of it. In seeing what those calculations are, again, we've got to skip over the policy question, okay. We'll get back to that. But it seems to me that what you have to do is look at the maximum amount of coverage that was available to Beazer from the underlying company, the maximum amount of the policy from May 29th, 1998

to September 1, 2002, see what the maximum amount available there. You look at -- and you have to go to, you know, those projects, and see, and make some calculation as to what was paid to cover the damage between May 29th, 1998 and September 1, 2002, subtract those two and see if there is some difference. Okay.

Now, the policy question is, from the policy, does the insurance policy that Cincinnati gave to Beazer -- we'll just call them Beazer, through it's Pinehurst, Crossman, Beazer -- we'll just call them Beazer -- does it say you must exhaust the underlying coverage before Cincinnati pays? If it says you have to exhaust the underlying coverage before Cincinnati pays Cincinnati doesn't owe a dime, because in no circumstance was the total amount of the underlying insurance ever paid through -- up to the policy limits. Now, if it doesn't use that kind of explicit language I would say it's ambiguous, and it could mean one thing, or it could mean another. It could mean that, or it could mean, when you reach the policy limit, whether it's by the underlying insurance company paying it, and Beazer paying it, when you get to that and there's something left over, then we are responsible. It could mean that.

So, Mr. Mack, your policy, can you find your policy and

tell me what's the language in your policy? I mean, is it clear like that, you've got to exhaust your underlying coverage before we pay you a dime, something to that effect?

MR. MACK: Your Honor, and we reference this in our Brief, and it talks about the underlying insurance have been reduced by payment of claims. It uses the specific language, payment of claims.

THE COURT: Okay. I don't suppose we have a copy of the policy anywhere.

MR. MACK: We do have it attached to one of the ---

THE COURT: Okay. Can you tell me what that is?

MR. MACK: It would be section -- it's Exhibit (M) in Mr. McNerney's Brief, Crossman's Brief.

THE COURT: Okay. All right. (M). And then we need to look at ---

MR. MACK: Section Three: Limits of Insurance.

THE COURT: All right. Hold on a second. Get to that. All right. Oh, Section Three. I was looking at paragraph three. Okay. I'm sorry. Section Three.

MR. MACK: And it's on page seven of fifteen.

THE COURT: All right. Section Three: Limits of Insurance. All right. All right, so 4(B) of Section Three, 4(B).

MR. MACK: 4(A) and (B) are the two that reference.

THE COURT: (A) and (B). Okay. Yes, (A) says, "If the limits of the underlying insurance has been reduced by payment of claims this policy will continue in force as excess. So it's just saying -- I appreciate what 4(A) says, but it seems to me the applicable section is 4(B). "If the limits of the underlying insurance have been exhausted by the payment of claims this policy will continue in force as the underlying insurance." So, it doesn't say -- at least I don't read it to say -- it could say this, but I don't read it to explicitly say, you must exhaust the underlying coverage before Cincinnati pays. 4(B) could be, you exhaust it by payment of claims. Now the payment of claims can be made by the underlying insurance company all by themselves, or it could be made by the underlying insurance company and Beazer. That's how payment of claims. You've got a claim made and for whatever reason, both of them decide to pay the claim, it's satisfied, the -- how could I construe it otherwise, Mr. Mack?

MR. MACK: The whole reference is to the underlying insurance, the underlying policies, and they would have to be exhausted by payment of claims.

THE COURT: All right. It says, "Subject to the

limits described in Two, Three above, and the terms and conditions of the underlying insurance ..." -- is underlying insurance defined somewhere earlier?

MR. MACK: Yes, Your Honor, and I -- and it may be under the section under definitions. It's on page thirteen of fifteen. Number Sixteen is the definition of underlying insurance.

THE COURT: All right. Sixteen. I see. "Underlying insurance means the policies of insurance listed in the schedule of underlying policies, and the insurance available to the insured under all other insurance policies applicable to the occurrence. Underlying insurance also includes all types -- or any type of self insurance, or alternate method by which the insured arranges for funding of legal liabilities that affords coverage that this policy covers." So doesn't that then say that it's not only any insurance that you've bought, but the covered party can decide, I want to be self-insured, or I want to use this alternative method, meaning I pay, for the funding of legal liabilities. Okay. It seems to me -- Mr. Mack, don't you -- well, you can tell me how -- just tell me what you think those say. You combine that with 4(B) in Section Three.

MR. MACK: I certainly understand your interpretation,

and just right offhand I haven't analyzed that particular issue.

THE COURT: All right. Well, I believe -- and what the Court is going to rule, is that the insurance policy, it either clearly says that the underlying insurance can be a combination of another company and the insured paying up to the limits, or it's ambiguous. Either way, it includes the definition that, once the policy limits, once that maximum amount is reached, that triggers Cincinnati's exposure. So, I'm just picking a figure. In 1999 Massachusetts Bay was on the hook for Two Million Dollars. However that Two Million Dollars -- if in 1999 Two Million Dollars was reached, either Massachusetts Bay paid it, or it was a combination of Massachusetts Bay and Beazer, paid it, and you get to that Two Million Dollars, you've got the limit. Then you have to decide, in that time period, was there any amount paid to the people that brought the lawsuits, the people that were damaged, was there any amount paid above that Two Million Dollars. If there's any amount paid above that Two Million Dollars, then Cincinnati is responsible for it. I don't think I've got the figures in front of me to make that calculation, but basically you are looking at the time period.

So Mr. McNerney, I'm looking to you and Mr. Miller here, all right, for that time period, May 29, 1998, to 9/1/02, y'all have to look at the calculations, and look at what coverage was afforded, from May 29, 1998, to September 1, 2002, what insurance was afforded, the underlying insurance, what is the maximum amount that was there for that time period. You might have to look at it building by building, I don't know, or project by project, but you are going to have to see, was there any amount, in each of that policy periods -- because you've got Indiana, Massachusetts Bay and Regent, you've got all three of them in that time period -- you've got to see if there's any amount that was paid in that policy period above their limits. If it was, then Cincinnati is responsible for it, you know, up to, you know, what the ultimate exposure was, Ten Million, so we are never going to get there.

MR. MCNERNEY: Your Honor, if I can just respond briefly. I think you reached the exact same conclusion the Seventh Circuit reached, is this payment of claims language, which is key, and the Seventh Circuit reached, and here Your Honor reached, that the policy doesn't specify who has to pay the -- make the payment of claims, can be anybody other than Cincinnati.

THE COURT: Well, you know, it might, or honestly, if you look at the definition of underlying insurance it might explicitly say it's any combination thereof, so I'm saying, either way ---

MR. McNERNEY: I believe it does. I believe it does.

THE COURT: ---Either way -- either way, either it explicitly says it's a combination, or it's unclear whether or not it's a combination. Either way, then it has to be construed by insurance law against Cincinnati.

MR. McNERNEY: And I agree with that, obviously, Your Honor, but the one point I do want to make about the exhaustion of the underlying, is that these Massachusetts Bay and Regent policies, and also the Cincinnati policies, covered Beazer for these same types of construction defect losses in Indiana and Kentucky, and those go in to fill whatever gap is ---

THE COURT: Well, I don't -- I don't agree with that. I don't think that's before me, okay, I don't think that's before me. What's before me is what occurred in these five projects that we've been talking about. I think that's the only thing that's before me. When I look at the pleadings, and when I look at what's the underlying decision, and what I was involved with, I'm not -- I'm not saying interested in --

I'm not concerned with, and it does not affect my ruling what happened in some other state.

MR. MCNERNEY: Well, Your Honor, I would submit that your -- the Stipulation specifically says that if the case comes back Cincinnati can argue whether the underlying policies are exhausted. When we prepared for trial back in 2006, we submitted Mr. Berry's Affidavit, which we've marked as an exhibit -- it's in those two binders there -- and Mr. Berry goes through great detail about how the underlying policies covered losses in other states. He puts in the damage number that has never been controverted by Cincinnati --

THE COURT: Well, I appreciate that. I just don't see that -- how I honestly have the authority, jurisdiction, nor do I believe it's involved in the underlying pleadings of this case, what happened in any other state. The only thing that I am concerned with, that I see from the pleadings in these matters, and what was presented to me was what happened in these five projects. That's all I'm concerned with, what happened in South Carolina. That's what I'm concerned with. Okay. And I'm not ruling on, and my decision doesn't affect anything that happened in some other state. I just don't see that as part of what we are here about. I understand you

believe that, but I just don't -- I don't see that. I don't understand that. I just -- I don't accept that. All right.

MR. McNERNEY: Well, Your Honor ---

THE COURT: So -- all right, go ahead.

MR. McNERNEY: Well, the Stipulation had the Seven Point Two Million Dollar damage figure was -- to come back and to allocate it among Harleysville. Cincinnati was not a party to the Supreme Court appeal, so their remand doesn't have anything to do with Cincinnati. If Cincinnati didn't appeal to the -- they weren't a party in the Supreme Court proceeding, either case, and so the way I read the Stipulation, and the way we certainly understood it is, if it comes back on a time-on-the-risk that we were going to argue about the exhaustion of the Cincinnati policies, and this uncontroverted evidence about Beazer's losses from other states, which led to this Settlement Agreement that Indiana and Cincinnati executed last November was going to be fair game.

THE COURT: I appreciate that. I don't understand that. I'm just telling you, that's -- I don't understand that to be part of it. You paid, what, Sixteen -- for the five projects there was paid something like, what, Sixteen Point Seven Million Dollars? What was paid? Y'all ---

MR. McNERNEY: Yes, Your Honor, Sixteen Point Seven Seven Million.

THE COURT: All right. Yes. There was a figure here somewhere in one of these ---

MR. McNERNEY: Yes, I have it here, Your Honor, on the slides I handed you. Beazer settled ---

THE COURT: There was a slide. It said how much you got. ---

MR. McNERNEY: Well, where is it? I've got it. There it is right there.

THE COURT: Okay. There is it. All right. So that's what -- that's what I believe the underlying cases ultimately involve, the River Oaks I, River Oaks II, Waterway Village, Buck Creek, Lightkeepers Village, the policies that were introduced were about those projects, the projects that Pinehurst, Crossman, Beazer built, okay. I don't understand this case to be about anything that happened in Indiana or Kentucky. I don't see it in the pleadings. I don't think it's part of this case. I'm just telling you, I don't think it's part of this case. I may be wrong. I'm just telling you, I don't think it's part of this case.

All right. So, what I'm telling you is, what I see is, Cincinnati's time-on-risk for those five projects goes from

May 29, 1998 to September 1, 2002, all right. You've got to see, for that time period, what was the underlying coverage, whatever the amount was that's the -- that's covered by this definition in Cincinnati's policy, so once that Two Million, Four Million, whatever it was, whatever it -- was reached. During that time period if there was an excess amount paid to settle River Oaks, or Lightkeepers Village, or whoever, then Cincinnati is responsible for it, they are responsible for that excess. You know, that may be too simplistic, but it seems to me to be a proper interpretation of what was in the pleadings, what was presented to me, the projects that were involved, the settlements that were paid, the insurance coverage that's involved. What I believe we were here about was, was Cincinnati's responsibility for those five projects. I don't think the case was about Kentucky or Indiana or whatever, I just don't think it was. Again, may be wrong. That's fine. The Supreme Court can decide otherwise.

MR. McNERNEY: Well, we can undertake to take this Sixteen Point Seven Seven Million, Your Honor, and see what was paid above that.

MR. MACK: Your Honor, I -- the Seven Point Two Million is the appropriate number. The Seven Point Two is what is within the coverage of the policies. The Sixteen

Point Seven includes code violations, things which are not covered by any of the policies.

MR. McNERNEY: I disagree with that, Your Honor. At the time the primary insurers settled with us our argument against them, and I think South Carolina law certainly permitted us to make that argument, is that all the insurers owed us a hundred percent of the settlement payments, and we asked for that in our Complaint and our Amended Complaint.

THE COURT: All right. And then that goes to -- you've got a question the amount that was paid -- let me go -- where is the Stipulation? Hold on a second.

All right. Eight (B) says, in the Stipulation, in the event the Court finds there was an occurrence or occurrences, how shall the Seven Point Two Million Dollars in insured damages be allocated, whether by joint or several, or time-on-risk. All right. It's got to be time-on-risk, so ---

MR. MACK: Stipulation One, Your Honor, specifically sets out what the Seven Point Two Million covers.

THE COURT: All right, so, I think that's right. So for the time period, May 29, 1998, to 9/1/02, that's Seven Point Two Million Dollars in that time period. It's not from the beginning, it's for that time period. That's what it -- that's what it says. That's Cincinnati's time-on-risk, so

the amount of -- the amount is Seven Point Two Million Dollars. Those are the damages.

Again, you don't just -- you can't just total up the amount of the underlying insurance coverage and subtract it, you have to calculate it for that time period for the projects and then subtract for each period, because there are different periods here. There's a period where Indiana had it, there's a period that Massachusetts Bay had it, there's a period that Regent had it. So, I don't see how you can go -- you just can't subtract the two figures.

MR. McNERNEY: Your Honor, the Seven Point Two Million is a stipulated figure between Harleysville and Cincinnati, and in terms of determining whether the ---

THE COURT: Y'all didn't sign that?

MR. McNERNEY: In terms of determining whether the underlying insurance is available I think we are entitled to assign an appropriate portion of the Sixteen Point Seven Seven Million, because that's what the insurers ---

THE COURT: Okay. If there is an occurrence, under Harleysville and Cincinnati policies, then the damages at the underlying projects that resulted from water intrusion, and that meet the definition of property damage, is Seven Point Two Million Dollars.

MR. McNERNEY: And that's limited to the Harleysville and Cincinnati policies. It's a capital (P) in this stipulation.

THE COURT: Okay. Then Mr. Mack represents Cincinnati.

MR. McNERNEY: I understand that, Your Honor, but in order to demonstrate that some portion of the Sixteen Point Seven Seven Million that was paid by Massachusetts Bay, we are not stuck with the Seven Point Two Million in deciding --

THE COURT: Well, the Sixteen Point Seven Million that was paid was paid for other time periods also.

MR. McNERNEY: - Some of it was, yes, Your Honor.

THE COURT: Okay. So, what y'all agreed to was, for May 29, 1998, to 9/01/02, the damage was Seven Point Two Million Dollars. That's what you agreed to. I don't know if that's right, wrong or indifferent. I don't know. You agreed to that, so that's where you are. Y'all are going to have to do the calculations.

MR. McNERNEY: Okay. We can do that, Your Honor.

THE COURT: So, Mr. Mack, Mr. McNerney, Mr. Miller, y'all can do your separate calculations. Both of you can submit a proposed order to me. I know, Mr. Mack, you won't

agree with part of it, that it's either ambiguous or it specifically allows it, but that's the Court's ruling, so you've got to put that in there. All right. And then you do your calculations, submit the figures. I don't know what they are going to turn out to be because, you know, they are not here. Could be that Cincinnati doesn't owe a dime, I don't know, but y'all do the calculations, submit your order.

How long do you -- thirty days, thirty days. Y'all have thirty days to submit your proposed order to me. All right.

MR. MACK: Yes, Your Honor.

THE COURT: All right. And if you will just put in there just some reference to our standard law about interpretation of contracts, if it's, you know, conflicted or, you know, then it's construed against the insured, and you know, just the standard insurance language that we -- you would have. All right.

MR. McNERNEY: Your Honor, may I mention -- I think I mentioned in my presentation on Exhibit I to our November 2, submission has a building by building calculation of Cincinnati's prorated time-on-the-risk.

THE COURT: If you think you've already done it, that's fine.

MR. McNERNEY: Well, I think we will ~~***~~

THE COURT: Okay.

MR. McNERNEY: We will certainly do it again.

THE COURT: You submit your proposed order and I'll look at both of them. Okay.

MR. MACK: Thank you, Your Honor.

MR. McNERNEY: Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

MR. DAVID BROWN: Thank you, Your Honor.

THE COURT: All right. And I'll get back to you either this afternoon or tomorrow as to when that hearing is going to be that we talked about earlier involving Beazer and Harleysville. All right, gentlemen.

And that post-judgment interest issue, Mr. Miller, we'll just reserve that. I don't think -- see any necessity of doing a separate order. Let's wait until we resolve that other one, unless you want to do a separate order.

MR. MILLER: I'll go ahead and send in another one on that.

MR. DAVID BROWN: I think we would prefer for it to be all one order.

THE COURT: I think it would be easier. I just think -- let's just put it all in one order, the post-judgment

interest and whatever we decide. We will put it all in one order, all right. I think that would be the easiest for when it gets reviewed again.

MR. MILLER: Okay. Thank you, Your Honor.

MR. DAVID BROWN: Thank you, Your Honor.

THE COURT: Thanks, gentlemen.

-----END OF REQUESTED TRANSCRIPT OF RECORD-----

C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the **MOTION HEARING** of the captioned case, relative to appeal, in the **COURT OF COMMON PLEAS NON-JURY** for **HORRY COUNTY, SOUTH CAROLINA**, on the **5th day of January, 2012**.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

February 20, 2012

**DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT**