

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No. 2004-CP-26-0084

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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.*

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**APPELLANTS' FINAL BRIEF**

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**I. STATEMENT OF THE ISSUES ON APPEAL**

1. Did the Circuit Court err in determining that the limits of the insurance policies underlying the Cincinnati Policies were not exhausted by payment of claims when it is undisputed that Beazer and insurers other than Cincinnati paid over \$55 million to resolve homeowner construction defect property damage claims caused by an occurrence, which is far more than the limits of all insurance policies underlying the Cincinnati Policies?
  
2. Did the Circuit Court err when it held that Cincinnati was not bound by the 2007 Final Judgment in this case in favor of Beazer and against Cincinnati holding that any Cincinnati insurance policy triggered by a lawsuit against Beazer is jointly and severally liable for Beazer's entire loss, when Cincinnati did not appeal from that adverse 2007 Final Judgment?

## II. INTRODUCTION

This is an appeal from a final judgment and orders entered by the Circuit Court on remand that Cincinnati Insurance Company (“**Cincinnati**”) has no insurance coverage obligation to Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corp. (collectively, “**Beazer**”) for costs incurred by Beazer to repair “property damage” caused by an “occurrence” at several condominium projects in Horry County, South Carolina.<sup>1</sup>

Cincinnati sold umbrella commercial general liability (“**CGL**”) insurance policies to Crossmann Communities of North Carolina, Inc., as the first named insured, including Policy Number CCC 444 58 40, which was in effect from July 1, 1998 to July 1, 2002 (the “**Cincinnati Policies**”). The Cincinnati Policies provide coverage for Beazer’s losses arising from third-party claims made by homeowners for “property damage,” anywhere in the country, that is caused by an “occurrence.”<sup>2</sup> The defense and indemnity payment obligations in Cincinnati’s umbrella policies are triggered after the applicable limits of the “Underlying Insurance” are exhausted by “payment of claims.” [Cincinnati Policies, pp.

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<sup>1</sup> The property damage to the condominium projects in Horry County that is the subject of this litigation relates to seven lawsuits filed by homeowner plaintiffs that are referred to collectively herein as the “*Underlying Lawsuits*.”

<sup>2</sup> In an earlier appeal from the original 2007 Final Judgment in this case, the Supreme Court of South Carolina in 2011 held that when negligent or defective construction results in damage to otherwise non-defective components of a building, the resulting “property damage” is caused by an “occurrence” and covered under policies like those issued by Cincinnati. *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 47-50, 717 S.E.2d 589, 592-94 (2011) (“*Crossmann II*”). By way of example, if a window was negligently installed and allowed water to leak in and damage the floor, siding, or other components of the building, the resulting water damage to the floor, siding, or other components would be caused by an “occurrence,” and therefore covered “property damage” under general liability policies like the Cincinnati Policies at issue in this case.

BZH104335, BZH104339 (emphasis added) (R. pp. 1017, 1021).] It is undisputed that (a) payments made by the insurance companies that issued the Underlying Insurance policies and (b) payments made by Beazer to settle homeowners' property damage claims serve to exhaust the Underlying Insurance. [May 23, 2012 Order, p. 14 (R. p. 70) (“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 [Beazer] funding the difference between a settlement for less than the full limits and the limits of the relevant policies.”).] The maximum potential “limits” of the Underlying Insurance that were available to Beazer were \$6 million per-occurrence, and \$12 million aggregate limits (*see* chart on page 20 herein for further detail).

Beazer filed this action in 2004 seeking coverage under the Cincinnati Policies and the policies of other insurers issued to various Beazer entities, for the property damage claims alleged in the *Underlying Lawsuits*. All of the insurance companies that were originally defendants in the case below have paid a fair share of Beazer's losses except for Cincinnati, which has refused to make any payments to Beazer.

Trial of this action began on January 29, 2007, but after jury selection and before opening statements, the Parties<sup>3</sup> reached an agreement that stipulated to

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<sup>3</sup> Beazer initially sued Harleysville Mutual Insurance Company (“**Harleysville**”), Indiana Insurance Company (“**Indiana**”), Massachusetts Bay Insurance Company (“**Massachusetts Bay**”), Regent Insurance Company (“**Regent**”), and Cincinnati. However, by the time of trial, the insurers other than Cincinnati and Harleysville had reached settlements with Beazer, and only Harleysville and Cincinnati remained as trial defendants and entered into the Stipulation.

certain facts, and also identified certain questions of law for the Circuit Court to answer. [Jan. 29, 2007 Stipulation (“**Stipulation**”) (R. p. 2228).] That Stipulation included an agreement of the Parties that if the Circuit Court found that the damages alleged in the *Underlying Lawsuits* were caused by an “occurrence” or “occurrences” as defined in the Cincinnati and Harleysville Policies, the total “insured loss” under the policies issued by Harleysville and Cincinnati was \$7.2 million. [Stipulation, ¶ 1 (R. p. 2228).]

The Circuit Court answered the questions of law set forth in the Stipulation and entered a final order and judgment against Cincinnati and Harleysville on May 3, 2007. [May 3, 2007 Final Order (“**2007 Final Judgment**”) (R. p. 1).] The 2007 Final Judgment held that:

- The property damage to the condominium projects that were the subject of the *Underlying Lawsuits* was caused by an “occurrence” or “occurrences” as defined in the Cincinnati and Harleysville Policies [2007 Final Judgment, p. 14 (R. p. 14)];
- Any insurance policy triggered by claims in the *Underlying Lawsuits* was jointly and severally<sup>4</sup> liable for the entirety of Beazer’s loss, up to the limits of such policies [*id.*, pp. 15-16 (R. pp. 15 -16)];
- Because the Harleysville Policies were primary policies and the Cincinnati Policies were umbrella policies,<sup>5</sup> Harleysville was liable for the full amount of the \$7.2 million in covered damages stipulated to by Harleysville and Cincinnati [*id.*].

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<sup>4</sup> Under the joint-and-several method of allocation, an insurer may be obligated to cover “all sums [the policyholder] becomes legally obligated to pay[,] if property damage occurs during the policy period.” *Crossmann II*, 395 S.C. 40, 52, 717 S.E.2d 589, 595 (2011). The alternative method of allocation is the time-on-the-risk method, pursuant to which the insurer is obligated to cover “the amount of property damage that occurred during the policy period.” *Id.*

<sup>5</sup> Cincinnati’s umbrella policies have defense and indemnity payment obligations that are triggered after the applicable limits of the “Underlying Insurance” are exhausted by “payment of claims.” By contrast, a primary insurance policy may be triggered without exhaustion of other available insurance.

Because the Circuit Court awarded all the damages against Harleysville, the Court did not rule on whether the insurance underlying the umbrella Cincinnati Policies had been exhausted and whether Cincinnati had a present obligation to provide coverage.

Harleysville appealed the Circuit Court's 2007 Final Judgment, but Cincinnati did not appeal. In 2011, the Supreme Court of South Carolina affirmed the 2007 Final Judgment that the property damage in the *Underlying Lawsuits* was caused by an "occurrence" or "occurrences" as that term was used in the Harleysville and Cincinnati Policies. *Crossmann II*, 395 S.C. 40, 47-50, 717 S.E.2d 589, 592-94 (2011). On the "joint and several" allocation issue, however, the Supreme Court reversed the Circuit Court, and held that insured losses should be allocated according to a time-on-the-risk methodology. The Supreme Court remanded the case to the Circuit Court for further proceedings. *Id.*, at 63-64.

On remand, the Circuit Court entered judgment against Harleysville in the amount of \$1,580,146 (Harleysville's time-on-the-risk share of the stipulated damages alleged in the *Underlying Lawsuits*), plus post-judgment interest. [Final Order as to Defendant Harleysville Mutual Insurance Company, May 23, 2012 ("**May 23, 2012 Order (Harleysville Issues)**"), p. 29 (R. p. 47).] After the Circuit Court issued its May 23, 2012 Order, Beazer and Harleysville resolved their disputes over coverage for the *Underlying Lawsuits*, and Harleysville is not involved in this appeal.

After the Circuit Court applied the *Crossmann II* time-on-the-risk method of allocation on remand, because Harleysville was not responsible for the entire amount of the Harleysville/Cincinnati stipulated damages, it became necessary for the Circuit Court to determine whether the Cincinnati Policies were triggered by exhaustion of the Underlying Insurance as set forth in the Cincinnati Policies. [Stipulation ¶ 9 (R. p. 2229).] The Circuit Court determined that the limits of the Underlying Insurance were not exhausted by payment of claims, and ruled that Cincinnati had no obligations to Beazer. [Order (Cincinnati Insurance), May 23, 2012 (“**May 23, 2012 Order**”) (R. pp. 70-72).]

As shown herein, on remand the Circuit Court made two errors in ruling that Cincinnati was not liable to Beazer.

First, the Circuit Court erred in determining that the limits of the Underlying Insurance were not “exhausted” by payment of claims, and therefore that Cincinnati owed no obligation to Beazer. As shown below, the Circuit Court disregarded undisputed evidence of substantial payments to settle homeowner property-damage claims made by Beazer to resolve construction-defect claims for property damage by homeowners in states other than South Carolina. The Circuit Court disregarded those out-of-state payments even though they were made to remedy “property damage” covered under the Cincinnati Policies and even though Cincinnati’s Policies expressly “appl[y] anywhere.” [Cincinnati Policies, p. BZH104335, (R. p. 1017).] Uncontroverted evidence shows payments to settle homeowner property damage claims by (1) Beazer and (2) other insurers of Beazer whose policies underlie the Cincinnati Policies that totaled more than \$55

million -- amounts that far exceed the limits of any Underlying Insurance sitting beneath the Cincinnati Policies under any method of analysis.

Second the Circuit Court erred in holding that Cincinnati was not bound by the ruling in the 2007 Final Judgment that any Harleysville or Cincinnati Policy triggered by the *Underlying Lawsuits* was jointly and severally liable for all of Beazer's losses. As shown below, Cincinnati did not appeal the 2007 Final Judgment and was bound by that ruling under the doctrine of the law of the case.

This Court should reverse the decisions of the Circuit Court on remand with respect to Cincinnati and hold that (a) the limits of the policies of insurance underlying the Cincinnati Policies have been exhausted and (b) that Cincinnati is liable for insured damages under a joint-and-several method of allocation. In the alternative, this Court should reverse the decision of the Circuit Court and hold that (a) the limits of the insurance policies underlying the Cincinnati Policies have been exhausted and (b) that Cincinnati is liable for its share of the damages under a time-on-the-risk method of allocation.

### **III. STATEMENT OF THE CASE**

#### **A. The Parties And Their Relationships**

Beazer is the successor-in-interest to several entities that were engaged in construction and real estate development in South Carolina and in other states in the 1990s and 2000s. In 2002, Beazer acquired Crossmann Communities, Inc. ("**Crossmann**") by merger. [Affidavit of W. Mark Berry, ¶ 5 (R. p. 2220).] At the time of the merger, Crossmann was the corporate parent of Crossmann Communities of North Carolina, Inc. [*Id.*, ¶ 4 (R. p. 220).] By 1998, Crossmann had acquired Pinehurst Builders, Inc. ("**Pinehurst**"), River Oaks Golf

Development Corporation (“**River Oaks**”), and Buck Creek Corporation (“**Buck Creek**”) by merger. [*Id.*] Pinehurst, River Oaks, and Buck Creek were the real estate developers and general contractors for the construction of condominium projects in South Carolina.

Cincinnati sold umbrella general liability insurance policies to Crossmann, as the first named insured, including Policy Number CCC 444 58 40, which was in effect from July 1, 1998 to July 1, 2002. [Cincinnati Policies (R. p. 1013, 1045).] The Insuring Agreement in the Cincinnati Policies provides that Cincinnati is obligated to pay for covered “property damage” upon exhaustion of the applicable limits of the “Underlying Insurance” by “payment of claims.” [Cincinnati Policies, pp. BZH104335, BZH104339 (R. pp. 1017, 1021).] The Circuit Court’s remand order notes that “Indiana, Massachusetts Bay and Regent are the three (3) underlying carriers for which Cincinnati provided excess coverage.” [May 23, 2012 Order, p. 8 (R. p. 64).]

#### **B. The Underlying Lawsuits**

Beginning in 2000, Beazer was sued by groups of homeowners in seven construction defect lawsuits in Circuit Court in Horry County, South Carolina seeking damages for property damage resulting from negligent and defective construction. The homeowner plaintiffs in each of those *Underlying Lawsuits* generally alleged that there was substantial property damage at the condominium projects caused by occurrences resulting from the actions or inactions of Beazer’s subcontractors in constructing the projects. [2007 Final Judgment, p. 12 (R. p. 12) (“...the Court finds that the damages complained of by the homeowner plaintiffs as alleged in each of the South Carolina Underlying Lawsuits were

caused by ‘occurrences,’ i.e., an ‘accident, including repeated exposure to the same general harmful conditions.’”].]

After extensive discovery and motions practice, Beazer settled each of the *Underlying Lawsuits* by reaching agreements with the homeowner plaintiffs shortly before the trials were scheduled. It is undisputed that Beazer directly paid a total of \$16,770,750 to settle the *Underlying Lawsuits*. [2007 Final Judgment, p. 8 (R. p. 8).] Beazer commenced this action by a Summons and Complaint filed on January 8, 2004 to recover all amounts paid to settle the *Underlying Lawsuits*. [Summons and Complaint (R. p. 82).]<sup>6</sup>

**C. Beazer’s Settlements With Certain Insurers Prior To The January 2007 Trial Below**

Prior to the January 2007 trial of this case, all of Beazer’s insurers except for Harleysville and Cincinnati had paid Beazer under their respective insurance policies for a portion of Beazer’s losses and, as a result, were dismissed from this action with prejudice. It is undisputed that Beazer’s insurers other than Harleysville and Cincinnati paid the following amounts to resolve homeowner property-damage claims under their policies, including the *Underlying Lawsuits*:

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<sup>6</sup> Beazer filed a Second Amended Complaint on June 2, 2005. [Second Amended Complaint (R. p. 124).]

<b>Insurer</b>	<b>Total Payment Amount</b>
Indiana	\$2,700,000 <sup>7</sup>
Massachusetts Bay	\$3,127,597 <sup>8</sup>
Regent	\$3,151,231 <sup>9</sup>
<b>Total =</b>	<b>\$8,978,828</b>

Cincinnati did not object to or otherwise challenge any of the settlements.

**D. Beazer’s Settlements Of Construction Defect Property Damage Cases In States Other Than South Carolina**

In addition to payments made to settle the *Underlying Lawsuits* in South Carolina, it is undisputed that Beazer also paid large sums to settle similar homeowner construction-defect claims alleging property damage in states other than South Carolina. In 2006, Beazer submitted an affidavit from Mr. Berry, then Beazer’s vice president of risk management and insurance programs, in the record before the Circuit Court below. Mr. Berry testified in his affidavit that as of January 2006, Beazer had “expended over \$27,770,073... for remediation of property damage in connection with the settlement of [*Colon v. Trinity Homes, LLC and Beazer Homes Investment Corp.*, Case No. 29D02-0404-PL-374 (the “*Indiana Litigation*”).” [W. Mark Berry Affidavit, ¶ 29 (R. p. 2226).] In his affidavit, Mr. Berry further testified that the homeowner plaintiffs in the *Indiana Litigation* asserted claims “that water intrusion had caused damage to their homes,” and that Beazer’s payments were for “remediation of property damage.” [*Id.*] Because Beazer’s costs to resolve the *Indiana Litigation* were ongoing when Mr. Berry’s affidavit was filed in early 2006, throughout the proceedings before

<sup>7</sup> Indiana Settlement, December 29, 2005, p. 3 (R. p. 1538).

<sup>8</sup> Massachusetts Bay Settlement, March 14, 2006, pp. 4, 6 (R. pp. 1909, 1911).

<sup>9</sup> Regent Settlement, May 17, 2005, pp. 5, 7 (R. pp. 1262, 1264).

the Circuit Court below Beazer submitted updated summaries of the costs incurred to repair property damage in the *Indiana Litigation*, and the final total was over \$42.7 million. [Trinity Water Intrusion Claims Damage Summary (R. p. 2231).]<sup>10</sup>

Beazer also made payments to resolve property damage claims asserted against Beazer by homeowners in Kentucky. Beazer's payments for these claims exceeded \$13 million (the "**Kentucky Claims**"). [Lexington Water Intrusion Claims Damage Summary (R. p. 2234).] The Kentucky Claims involved similar allegations of water-related property damage.

Finally, it is undisputed that, under the very same Cincinnati Policies at issue in this case, Cincinnati paid Beazer \$11 million to settle Beazer's claims for coverage for construction-defect property damage losses for the *Indiana Litigation* and the Kentucky Claims. [Beazer-Cincinnati Settlement, Nov. 14, 2011, p. 6 (R. p. 2240).]

**E. The Original Trial Court Proceedings Against Harleysville And Cincinnati**

Trial against Harleysville and Cincinnati began on January 29, 2007. Before opening statements, Beazer, Harleysville, and Cincinnati entered into an agreement and stipulated to certain facts and also framed several legal issues for the Circuit Court's consideration and resolution. [Stipulation (R. p. 2228).] The Stipulation obviated the need for a trial.

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<sup>10</sup> Cincinnati was a defendant in the *Indiana Litigation*, and Beazer's claims against Cincinnati in the *Indiana Litigation* were made under the same Cincinnati Policies at issue in this case. Cincinnati thus had access to all facts and information regarding Beazer's payment of \$42.7 million to the homeowner plaintiffs for property damage in the *Indiana Litigation*.

Pursuant to the Stipulation, the Circuit Court was to decide whether the “property damage” at the South Carolina condominium projects that were the subject of the *Underlying Lawsuits* was caused by an “occurrence” within the meaning of the Harleysville and Cincinnati Policies. If the Circuit Court found that the property damage was caused by an occurrence, then the Court was to determine whether the covered damages were to be allocated between the insurers pursuant to the “joint and several” methodology or the “pro rata time on risk” methodology. In the event that the Circuit Court found an “occurrence” under the insurance policies, the Stipulation provided 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.” [Stipulation, ¶ 1 (R. p. 2228).]

**F. The Circuit Court’s 2007 Final Judgment**

The Parties submitted extensive briefs to the Circuit Court after agreeing to the Stipulation. The Circuit Court issued its Final Judgment on May 3, 2007. In that judgment, the Circuit Court found that there was “property damage” caused by an “occurrence” or “occurrences” at each of the projects at issue in the *Underlying Lawsuits*, and that Beazer’s “insured loss [under the Harleysville and Cincinnati Policies] was \$7.2 million.” [2007 Final Judgment, p. 14 (R. p. 14).] The Circuit Court also entered judgment “on Count II of Plaintiffs’ Second Amended Complaint in favor of Plaintiffs and against Defendants Harleysville and Cincinnati...,” and held that allocation of the insured losses was to be in accordance with the “joint and several” methodology. [*Id.*, pp. 15-18 (R. pp. 15-

18).] Pursuant to that Count II for declaratory judgment, the Circuit Court entered a money judgment against Harleystown for \$7.2 million.

The Circuit Court did not address exhaustion of the Underlying Insurance “[b]ecause the Court... ruled that Plaintiffs’ insured losses are to be allocated in accordance with the joint and several methodology, and because the combined limits of the Harleystown policies covering Plaintiffs exceed the \$7.2 million in stipulated insured losses ....” [*Id.*, pp. 15-16 (R. pp. 15-16).]

### **G. Harleystown’s Appeal**

Harleystown filed a timely appeal of the Circuit Court’s 2007 Final Judgment, challenging the rulings on the meaning of “occurrence” and the Circuit Court’s declaration on Count II of the Second Amended Complaint adopting the joint-and-several method of allocation. Cincinnati did not appeal.

On the appeal by Harleystown, in 2011 the South Carolina Supreme Court ruled that the Circuit Court correctly determined that the property damage at the projects that were the subject of the *Underlying Lawsuits* was caused by an “occurrence” or “occurrences” as that term is defined in the Harleystown Policies. *Crossmann II*, 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011). On the allocation issue, however, the Supreme Court overruled prior controlling case law and held that Harleystown’s liability for Beazer’s losses should be calculated based on Harleystown’s “time on the risk.” *Id.*, at 50. The Supreme Court remanded the case to the Circuit Court for further proceedings. *Id.*, at 63-64.

## H. Proceedings On Remand

On remand the Circuit Court held that:

- The language in the Cincinnati Policies that the limits of the underlying insurance must be exhausted by “payment of claims” was ambiguous, and should be interpreted in favor of coverage and against Cincinnati. [March 1, 2012 Hearing Transcript, p. 105, lines 11-20 (R. p. 945); May 23, 2012 Order, p. 12 (R. p. 68)];
- The limits of the Underlying Policies could be paid by either insurance companies other than Cincinnati, Beazer, or by some combination of Beazer and other insurers. [May 23, 2012 Order, p. 14 (R. p. 70)];
- The damages alleged in the *Underlying Lawsuits* that resulted from water intrusion and that met the definition of property damage in the Harleysville and Cincinnati Policies totaled \$7.2 million. [May 23, 2012 Order, p. 9 (R. p. 65)];
- Cincinnati was not bound by the joint-and-several holding in the 2007 Final Judgment [May 23, 2012 Order, pp. 9-12 (R. pp. 65-68)];
- The Underlying Insurance was not exhausted, and as a result, Cincinnati owed no coverage obligation to Beazer [May 23, 2012 Order, pp. 14-16 (R. pp. 70-72)].

In its exhaustion analysis, the Circuit Court did not consider any of the payments Beazer made to resolve homeowner property damage claims in states other than South Carolina.

On June 11, 2012, Beazer filed a timely Motion to Alter or Amend or Reconsider the Court’s May 23, 2012 Order. [Plaintiffs’ Motion To Alter, Or Amend, Or Reconsider Pursuant To Rule 59(e) Of The SCRCP (Cincinnati Insurance Company Issues) (“**Beazer’s Motion to Alter or Amend**”) (R. p. 640).]

On September 12, 2012, the Circuit Court issued an Order, concluding that “Beazer [did] not present[] any new or different information that require[d] modification of the Court’s May 23, 2012 order...” [Sept. 12, 2012 Order, at p. 4 (R. p. 80).]

#### **I. Beazer’s Current Appeal**

Beazer filed and served a timely Notice of Appeal on October 18, 2012. [Amended Notice of Appeal (R. p. 657).] Beazer appeals from the Circuit Court’s Orders of May 23, 2012 and September 12, 2012 with respect to Cincinnati and seeks reversal of those Orders below and also entry of judgment for Beazer and against Cincinnati in the amount of \$5,619,854,<sup>11</sup> in accordance with the joint-and-several method of allocation. In the alternative, Beazer seeks reversal of the Cincinnati Orders below and entry of judgment for Beazer and against Cincinnati in the amount of \$3,038,300 under a pro-rata-time-on-risk allocation methodology. [Cincinnati Proposed Order, p. 12 (R. p. 561).]

#### **IV. ARGUMENT**

##### **A. The Limits Of The Insurance Underlying The Cincinnati Policies Have Been Exhausted By Payment Of Claims**

##### **1. The Insurance Underlying The Cincinnati Policies Has Been Exhausted Under The Joint-And-Several Method of Allocation, And Cincinnati’s Liability Is \$5,619,854**

The Circuit Court erred in ruling that the limits of the Underlying Insurance were not exhausted. Insurance policies are contracts and are interpreted

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<sup>11</sup> Cincinnati’s liability to Beazer is the Parties’ stipulated damage amount under the Harleysville and Cincinnati Policies for the *Underlying Lawsuits* -- \$7.2 million -- less Harleysville’s indemnity liability as determined by the Circuit Court on remand by a time-on-risk allocation of \$1,580,146. [May 23, 2012 Order, p. 29 (Harleysville Issues) (R. p. 47).]

according to the principles of contract law. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008). Whether an excess insurer's coverage has been triggered depends on the relevant language of the excess insurance policy. *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (noting that whether an excess insurer's coverage has been triggered depends solely on the terms of the excess insurance contract).<sup>12</sup> If the policy provisions governing the exhaustion of the underlying insurance are ambiguous, South Carolina law requires that those exhaustion provisions be construed in favor of coverage and against the insurer. *See Crossmann II*, 395 S.C. 40, 47, 717 S.E.2d 589, 593 (2011). Any doubt as to the extent of coverage must be resolved in favor of the policyholder. *See, e.g., Auto-Owners Ins. Co. v. Madison at Park West Property Owners Ass'n, Inc.*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011) ("However, 'if doubt exists as to the extent or fact of coverage,' South Carolina courts have long held that 'where the clause is one of inclusion it should be broadly construed for the benefit of the insured while in exclusion cases the same clause is given a more restricted interpretation[.]'"") (emphasis added).

Cincinnati's Policies are umbrella liability policies that are triggered upon the "payment" of the applicable limits of the "Underlying Insurance." The Insuring Agreement in the Cincinnati Policies provides that Cincinnati is obligated to pay upon exhaustion of the "Underlying Insurance":

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<sup>12</sup> Beazer has located no reported judicial decisions interpreting South Carolina law that address issues relating to exhaustion of underlying insurance for purposes of triggering an excess insurer's policies.

[Cincinnati] 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” or “advertising injury” covered by this policy committed during the policy period and caused by an “occurrence.”

This coverage applies anywhere.

[Cincinnati Policies, p. BZH104335 (emphasis added) (R. p. 1017).] The Policies further provide that:

[Cincinnati has] 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...

[Cincinnati Policies, p. BZH104339 (R. p. 1021).] “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 arranges for funding of legal liabilities that affords coverage that this policy covers.

[Cincinnati Policies, p. BZH104347 (R. p. 1029).]

The Cincinnati Policies specify that the insurance coverage “applies anywhere” (*i.e.*, for any covered claims asserted in any state against Beazer), and also specify that exhaustion of the underlying insurance is by “payment of

claims.” On remand, the Circuit Court properly found this language in the Cincinnati Policies was ambiguous. [March 1, 2012 Hearing Transcript, p. 105, lines 11-20 (R. p. 945) (“I find that to be confusing and/or ambiguous, so I think with the contract law and insurance law, the policy must be construed to the benefit of the insured and against the insurance company that there is coverage....”); *see also* May 23, 2012 Order, p. 12 (R. p. 68).]

Given the ambiguity of the relevant passages in the Cincinnati Policies, the Circuit Court correctly determined that those Policies are “triggered,” and Cincinnati has a duty to defend and indemnify Beazer, when the applicable limits of the Underlying Policies are paid either by: (1) the underlying insurers, (2) Beazer, or (3) a combination of the underlying carriers and Beazer. [May 23, 2012 Order, p. 14 (R. p. 70) (“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.”).] Cincinnati also lost this issue in a federal appeals court decision in another insurance coverage case between Beazer and Cincinnati involving the very same insurance policies at issue in this case and concerning similar underlying construction defect property damage claims at issue in the *Indiana Litigation. Trinity Homes, LLC and Beazer Homes Invs., LLC v. Ohio Cas. Ins. Co. and Cincinnati Ins. Co.*, 629 F.3d 653, 658-59 (7th Cir. 2010).

“Payments of claims” includes payments made to resolve claims against Beazer in states other than South Carolina. In its September 12, 2012 Order, the

Circuit Court suggested that claim payments made by Beazer to resolve claims in states other than South Carolina would count towards exhaustion of the Underlying Insurance as well. [September 12, 2012 Order, pp. 2-3 (R. pp. 78-79).] The Circuit Court in its final remand Order, however, erroneously refused to credit the substantial claims payments made by Beazer to homeowner plaintiffs in other states when addressing the exhaustion of Underlying Insurance issue. As explained below, this error requires reversal of the Circuit Court's remand Order.

The "Underlying Insurance" consists of the following insurance policies and limits:

Underlying Insurer	Insurance Policy Limits	Applicable Coverage Periods	Number of Policy Periods <sup>13</sup>	Total Limits of Underlying Policies
Indiana Ins. Co.	\$1M per occurrence \$2M aggregate	7/1/1997 through 8/29/1998	2	\$2M per-occurrence limits \$4M aggregate limits
Massachusetts Bay Ins. Co.	\$1M per occurrence \$2M aggregate	8/29/1998 through 8/29/2000	2	\$2M per-occurrence limits \$4M aggregate limits
Regent Ins. Co.	\$1M per occurrence \$2M aggregate	8/29/2000 through 1/1/2002	2	\$2M per-occurrence limits \$4M aggregate limits

\$6M per occurrence  
\$12M aggregate

**TOTAL LIMITS OF UNDERLYING INSURANCE =**

[May 23, 2012 Order, p. 8 (R. p. 64).]<sup>14</sup>

<sup>13</sup> The limits available to Beazer under the primary policies underlying the Cincinnati Policies are less than the limits in the chart above. For example, the second Indiana policy period lasted only from July 1, 1998 to August 29, 1998, and not for a full year. As a result, the number of policy periods and the total amount of the insurance limits “available” to Beazer are lower than what is listed in this chart. The same is true for the Regent policy, as the second Regent policy period was cancelled after only four months. The Circuit Court acknowledged that certain policies have shorter periods and that the full limits should not be considered. [May 23, 2012 Order, p. 15 (R. p. 71) (“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.”)] Resolution of issues related to the available policy limits for these abbreviated policy periods is not necessary because Beazer’s payments to settle the homeowner property damage claims against it dwarf the underlying limits available under any scenario.

<sup>14</sup> Harleysville also issued primary insurance to Pinehurst as the first named insured. [Harleysville Policies (R. p. 1074).] The Harleysville Policies were effective from July 29, 1993 through August 29, 1998, with limits of \$1 million per occurrence and \$2 million in the aggregate per 12-month policy period. [*Id.*, pp. HV1, HV83, HV105, HV119, HV137, HV174 (R. pp. 1074, 1156, 1178, 1192, 1210, 1247).] Although Cincinnati previously argued that the Underlying Insurance was not exhausted because not all of the Harleysville Policies were exhausted [*see, e.g.*, Cincinnati Insurance Company’s Memorandum Of Authority On Stipulated Issues, February 13, 2007 (“Cincinnati Issues Br.”), pp. 9-10 (R. p. 354-55)], Beazer does

The Stipulation entered into by Beazer and Cincinnati in January 2007 provided that if the allocation methodology in this case was the *pro rata* time-on-the-risk methodology, then Cincinnati and Beazer could argue, and the Circuit Court could decide, whether the limits of Underlying Insurance were exhausted. [Stipulation, ¶ 9 (R. p. 2229).] The 2007 Final Judgment did not reach that particular question, however, because under the joint-and-several method of allocation originally adopted by the Circuit Court, Harleysville was responsible for the full amount of the stipulated damages. However, as shown below, in the remand proceedings before the Circuit Court, Beazer presented ample evidence to demonstrate exhaustion of the Underlying Insurance under any reasonable analysis.

It is undisputed that Beazer and the insurers of Beazer whose policies constitute Underlying Insurance have made “payments of claims” far in excess of the limits of the Underlying Insurance. Unrebutted evidence in the record shows that Beazer made claim payments to settle homeowner construction defect property damage claims filed against Beazer in Indiana of more than \$42.7

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not need to establish full exhaustion of the limits of the Harleysville Policies. The Cincinnati Policies define “Underlying Insurance” as “the insurance available to the insured under all other insurance policies applicable to the ‘occurrence’.” [Cincinnati Policies, p. BZH104347 (R. p. 1029).] That term is ambiguous and should be construed against Cincinnati. *See, e.g., Auto-Owners Ins. Co. v. Madison at Park West Property Owners Ass'n, Inc.*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011). Based on the Circuit Court’s ruling as to Harleysville, Harleysville was obligated to pay Beazer only \$1,580,146 in indemnity payments because that was the full amount of damage that took place during the period its policies were in effect. [May 23, 2012 Order (Harleysville Issues), p. 29 (R. p. 47).] As such, no additional amount from the Harleysville Policies is “available” to Beazer. However, even if the Court finds that the full amount of the stated limits of the policies issued by Harleysville to Pinehurst is currently “available” to Beazer (5 full periods and a sixth “stub,” or shortened, policy period), Beazer’s payments to resolve the *Indiana Litigation* alone exhaust the maximum limits of Underlying Insurance (\$12 million per occurrence, \$24 million aggregate).

million. [Trinity Water Intrusion Claims Damage Summary (R. p. 2231).] Beazer also made claim payments of more than \$13 million to homeowners to resolve homeowner construction-defect property damage claims in Kentucky that were similar to the claims in the *Underlying Lawsuits*.<sup>15</sup> [Lexington Water Intrusion Claims Damage Summary (R. p. 2234).] These amounts far exceed both the maximum \$6 million per-occurrence limits and the maximum \$12 million aggregate underlying limits of the primary policies illustrated in the Table on page 20 above.

On remand, Cincinnati also argued to the Circuit Court that there was no exhaustion of the Underlying Policies because, even though it is undisputed that Beazer made the payments detailed above, those payments were not made to repair damages covered by the Underlying Policies. Under the Supreme Court of South Carolina's ruling in *Crossmann II*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011), only "negligent or defective construction resulting in damage to otherwise non-defective components" is covered damage under the Cincinnati Policies and the Underlying Policies. Cincinnati claims that the payments Beazer made to resolve the *Indiana Litigation* and the Kentucky Claims were not for "property

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<sup>15</sup> Although Harleysville and Cincinnati 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," Indiana, Regent, and Massachusetts Bay did not sign the Stipulation, and the Stipulation in no way applies to those insurers. [Stipulation, ¶ 1 (R. p. 2228).] In that regard, it is undisputed that Beazer paid \$16.77 million to resolve the *Underlying Lawsuits*, which were covered under the Indiana, Regent, and Massachusetts Bay insurance policies. At the time Beazer settled with Indiana, Massachusetts Bay, and Regent, Beazer claimed that those insurers were obligated to pay Beazer the entire amount of \$16.77 million paid by Beazer to settle the *Underlying Lawsuits*. [2007 Final Judgment, p. 8 (R. p. 8).] Accordingly, Beazer maintains that it should be allowed to count the entire \$16.77 million in settlement payments to resolve the *Underlying Lawsuits* towards exhaustion of the Underlying Insurance.

damage” caused by an “occurrence.” The evidence shows that this argument by Cincinnati is without merit.

Evidence in the record shows that to resolve homeowner construction-defect litigation filed against Beazer in the *Indiana Litigation (Colon v. Trinity Homes, LLC and Beazer Homes Investment Corp., Case No. 29D02-0404-PL-374)*, Beazer made payments of over \$42.7 million dollars to homeowner plaintiffs. [Trinity Water Intrusion Claims Damage Summary (R. p. 2231).] In 2006, Beazer submitted an affidavit into the Circuit Court record attested to by Mr. Berry, Beazer’s former Vice President of Risk Management. [W. Mark Berry Affidavit, March, 29, 2006 (R. p. 2219).] Mr. Berry testified in that affidavit that the Indiana construction defect litigation against Beazer “involved property damage claims by homeowners who claimed that water intrusion had caused damage to their homes” and “triggered the Regent policy underlying the Cincinnati excess policy, and also triggered the Cincinnati policy.” [*Id.*, ¶ 29 (R. p. 2226).] As of January 2006, Beazer had expended \$27,770,073 to remediate the property damage at issue in the *Indiana Litigation*. [*Id.*] Mr. Berry plainly attested that these payments were to remedy “property damage.” [*Id.*] In *Crossmann II*, the Supreme Court held that “negligent or defective construction resulting in damage to otherwise non-defective components may constitute ‘property damage.’” *Crossmann II*, 395 S.C. 50. As described in Mr. Berry’s Affidavit, the repairs associated with the *Indiana Litigation* were made to remedy water intrusion that resulted in “property damage,” which in the context of

*Crossmann II* means they were not solely for defective construction but rather were payments made for damages caused by an “occurrence.”

Because Beazer made more claim payments to repair property damage in the *Indiana Litigation* after the submission of Mr. Berry’s Affidavit to the Circuit Court in early 2006, Beazer updated the claims payment figures as the case progressed. In its Third Supplemental Responses to Defendants’ Interrogatories, Beazer stated that through July 24, 2006, Beazer had expended over \$38 million to resolve construction-related homeowner property damage claims asserted against Beazer in Indiana. [Beazer’s Third Supplemental Responses, July 24, 2006, p. 3 (R. p. 341).] Finally, during the remand proceedings below, Beazer submitted to the Circuit Court updated summaries of the damages paid in the *Indiana Litigation*, which showed that Beazer made total claim payments to settle property damage claims in the *Indiana Litigation* of more than \$42.7 million. [Trinity Water Intrusion Claims Damage Summary (R. p. 2231).] This evidence had already been produced to Cincinnati in connection with the *Indiana Litigation* (*Trinity Homes, LLC and Beazer Homes Invs., LLC v. Ohio Cas. Ins. Co. and Cincinnati Ins. Co.*, 629 F.3d 653, 658-59 (7th Cir. 2010)), so Cincinnati has knowledge of all the facts related to these claim payments.

It is also undisputed that Beazer paid over \$13 million to resolve similar homeowner construction-defect property damage claims against Beazer in Kentucky. [Lexington Water Intrusion Claims Damage Summary (R. p. 2234).] In its Third Supplemental Responses to Defendants’ Interrogatories, Beazer stated that through July 24, 2006, Beazer expended over \$6 million to resolve

construction-related homeowner property damage claims asserted against Beazer in Kentucky. [Beazer's Third Supplemental Responses, July 24, 2006, p. 4 (R. p. 342).] During the remand proceedings, Beazer submitted to the Circuit Court updated summaries showing that Beazer paid a total of more than \$13 million to resolve the Kentucky property damage claims. [Lexington Water Intrusion Claims Damage Summary (R. p. 2234).] Those summaries had already been produced to Cincinnati in connection with coverage litigation in *Trinity Homes, LLC and Beazer Homes Invs., LLC v. Ohio Cas. Ins. Co. and Cincinnati Ins. Co.*, 629 F.3d 653, 658-59 (7th Cir. 2010).

Faced with this evidence, Cincinnati never introduced any evidence to the contrary. Rather, the facts in Mr. Berry's affidavit and in Beazer's sworn interrogatory responses are undisputed, and are more than sufficient to meet Beazer's initial burden of showing that the limits of the Underlying Insurance are exhausted. It was then incumbent upon Cincinnati to submit some evidence into the record to support its claim that the more than \$55 million paid by Beazer to homeowner plaintiffs to settle their property damage claims was not to settle property damage claims, but rather was paid for some other purpose. In that regard, Cincinnati's "failure to exhaust" argument is a limitation on the coverage provided by the Cincinnati Policies to Beazer, and under South Carolina law, the Circuit Court was obliged to accord every benefit of the doubt to Beazer. *See, e.g., Auto-Owners Ins. Co. v. Madison at Park West Property Owners Ass'n, Inc.*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011) ("However, 'if doubt exists as to the extent or fact of coverage,' South Carolina courts have long held that 'where the

clause is one of inclusion it should be broadly construed for the benefit of the insured while in exclusion cases the same clause is given a more restricted interpretation[.]” (emphasis added). Cincinnati’s failure to offer any evidence disputing the nature of the property damage claim payments by Beazer compels the conclusion that the limits of the Underlying Insurance are exhausted.

Cincinnati further argued that the damages associated with the *Indiana Litigation* and the Kentucky Claims do not count towards exhaustion of the Underlying Insurance because Beazer did not show what part of the damages took place during the period of the Cincinnati Policies. [September 12, 2012 Order, pp. 2-3 (R. pp. 78-79).] However, such proof is not required under the joint-and-several method of allocation that Cincinnati is bound by pursuant to the doctrine of the law of the case. Beazer must only demonstrate that some of the property damage took place during the period of the Cincinnati Policies. *See, e.g., Crossmann II*, 395 S.C. 40, 52, 717 S.E.2d 589, 595 (2011) (noting that under the joint-and-several method of allocation, once its policies are triggered, an insurer is obligated to cover “all sums [the policyholder] becomes legally obligated to pay[,] if property damage occurs during the policy period.”).<sup>16</sup> Beazer can make that showing. The *Indiana Litigation* was filed against Beazer in 2002, and the homeowner plaintiffs complained of property damage occurring at their homes in the years prior to the case being filed. *Trinity Homes, LLC and Beazer Homes Invs., LLC v. Ohio Cas. Ins. Co. and Cincinnati Ins. Co.*, 629 F.3d 653, 655 (7th Cir. 2010). Cincinnati’s Policies (the same policies at issue in this appeal and in

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<sup>16</sup> However, as shown on page 30-31 herein, Beazer has demonstrated that the damage took place during the Cincinnati Policy periods.

the *Indiana Litigation*) were in effect from July 1, 1998 through July 1, 2002. This fact shows that the property damage at issue in the *Indiana Litigation* occurred in large part during the Cincinnati Policies' periods. In addition, it is undisputed that in 2011, Cincinnati paid Beazer \$11 million for insured property damage losses in Indiana and Kentucky under these same Cincinnati Policies. [Beazer-Cincinnati Settlement (R. p. 2240).] Insurers obviously do not pay money they do not think they owe, and Cincinnati's payment to Beazer of insurance proceeds under the Policies at issue here is further evidence that the limits of the Underling Insurance is exhausted.

"Payments of claims" by the Underlying Insurers and by Beazer far exceed the maximum per-occurrence limits of \$6 million and the maximum aggregate limits of \$12 million in the Underlying Policies. In fact, the payments by Beazer to remediate the property damage in the *Indiana Litigation* alone are sufficient to exhaust the limits of the Underlying Insurance under any scenario. Accordingly, the Cincinnati Policies are triggered, and under the joint-and-several method of allocation, Cincinnati must pay to Beazer the amount of the \$7.2 million in stipulated damages not covered by Harleysville, which is \$5,619,854.

**2. Alternatively, Applying The Time-On-The-Risk Method Of Allocation, The Insurance Underlying The Cincinnati Policies Is Exhausted And Cincinnati Must Pay \$3,038,300**

Although, as shown below, the joint-and-several method of allocation should apply to Cincinnati because it did not appeal the 2007 Final Judgment, the Cincinnati Policies are still triggered by exhaustion of the Underlying Insurance if the time-on-the-risk method of allocation applies to the Underlying Policies.

Cincinnati calculated that \$3,038,300 of the \$7.2 million in covered damages stipulated to by Harleysville and Cincinnati took place during the period that the Cincinnati Policies were in effect, and under the time-on-the-risk method of allocation, Cincinnati should pay that amount to Beazer. [Cincinnati Proposed Order, p. 12 (R. p. 561).]

As noted above, the Cincinnati Policies are triggered upon exhaustion of the Underlying Insurance. [Cincinnati Policies, pp. BZH104335, BZH104339 (emphasis added) (R. pp. 1017, 1021).] “Underlying Insurance” is defined to mean:

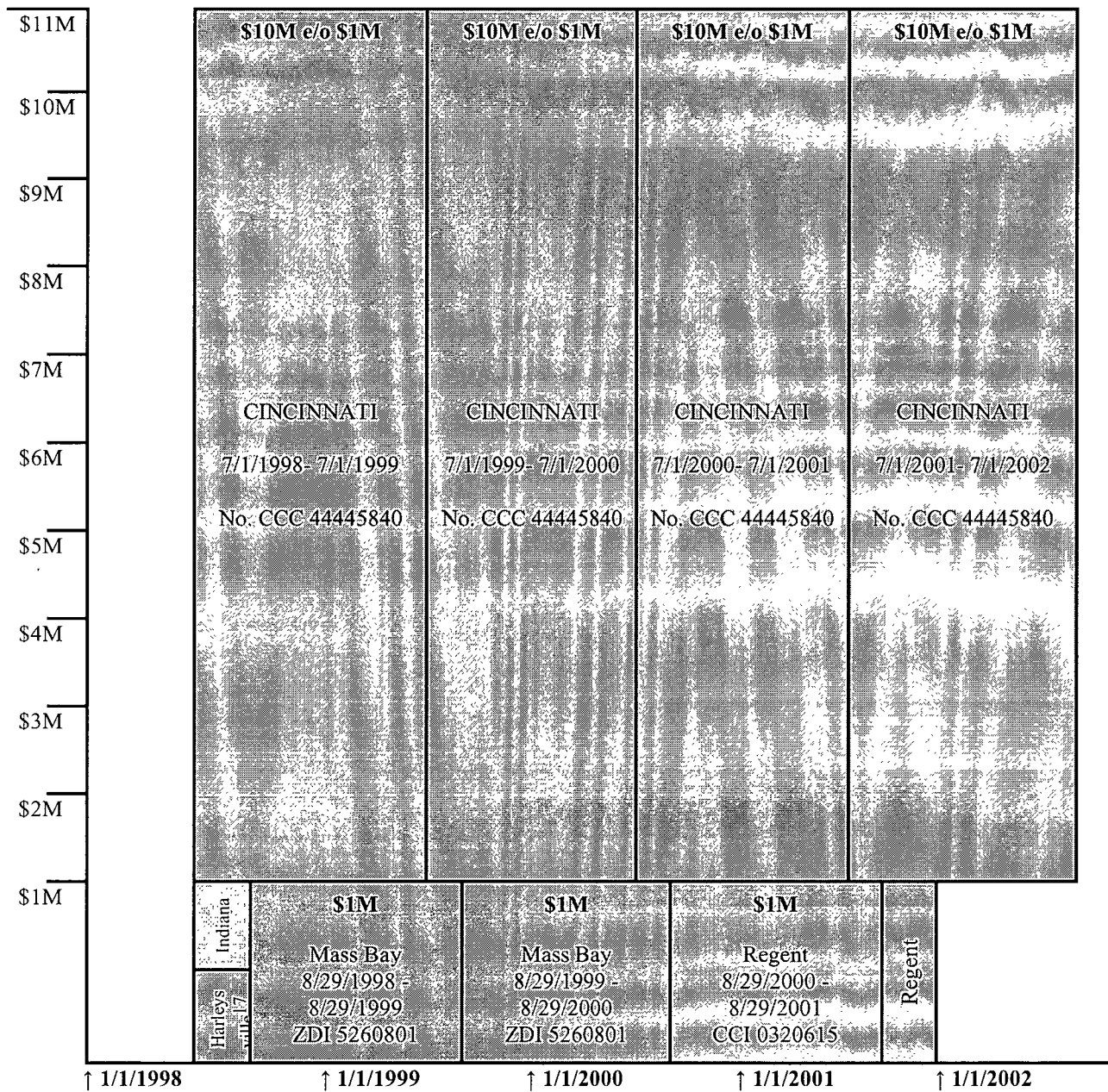
...the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the “occurrence”. “Underlying insurance” also includes any type of self-insurance or alternative method by which the insured arranges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

[Cincinnati Policies, p. BZH104347 (R. p. 1029).] Under a joint-and-several allocation framework, the insurance “applicable to the ‘occurrence’” is all the insurance available to Beazer during the period its policies were in effect. As detailed in pages 15 - 26 above, Beazer has made the requisite showing under this standard.

Under a time-on-the-risk allocation framework, all the property damage that takes place in a single policy year is a separate occurrence. *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, 817 F. Supp. 2d 784, 789 (D.S.C. 2011) (“The only interpretation of ‘occurrence’ able to reconcile all of the policy language in a manner consistent with *Crossmann II* is that all of the damage that happens in one policy year constitutes a single ‘occurrence,’ and therefore progressive

environmental damage creates ‘a ‘separate’ occurrence in each policy year.’”). Accordingly, under this approach, each policy period for the insurance policies underlying the Cincinnati coverage is analyzed separately for purposes of exhaustion.

For example, in the Cincinnati Policy period from January 1, 2000 through January 1, 2001, Beazer only needs to introduce evidence showing exhaustion by payment of claims for the portion of the Regent Policy that sits below Cincinnati in that year and the portion of the Massachusetts Bay Policy that also sits below that year. The Underlying Insurance is illustrated in the coverage chart below:



The yearly per-occurrence limit for each Underlying Policy was \$1 million. [Indiana Settlement, p. 1 (R. p. 1536); Massachusetts Bay Settlement, p. 5 (R. p. 1910); Regent Settlement, p. 6 (R. p. 1263).] Under *Liberty Mut. Fire*

<sup>17</sup> The Circuit Court did not identify Harley'sville as an Underlying Insurer. [May 23, 2012 Order, p. 8 (R. p. 64) (“Indiana, Massachusetts Bay and Regent are the three (3) underlying carriers for which Cincinnati provided excess coverage.”).] In any event, the total limit of Underlying Insurance during the 7/1/1998 through 7/1/1999 Cincinnati Policy Period is \$1 million per-occurrence and \$2 million in the aggregate.

*Ins. Co. v. J.T. Walker Indus., Inc.*, 817 F. Supp. 2d 784, 789 (D.S.C. 2011) and *Crossmann II*, 395 S.C. 40 (2011), the per-occurrence limits must be applied because the construction defect property damage claims constitute one occurrence per policy period. Even if the \$2 million aggregate limit for each policy period is used, however, Beazer need only demonstrate claim payments for property damage of \$2 million per policy period.

As mentioned above, Beazer made claim payments of over \$42.7 million to resolve the *Indiana Litigation*, which was for property damage claims as demonstrated by Mr. Berry's unrefuted affidavit. Beazer also paid over \$13 million to resolve property damage claims in Kentucky. The payments Beazer made in connection with the *Indiana Litigation* and for the Kentucky Claims dealt with property damage during the periods of the Cincinnati Policies at issue in this litigation.

The property damage associated with the *Indiana Litigation* is alleged to have occurred during the period the Cincinnati Policies were in effect, and Beazer's payments made to settle with the Indiana homeowner plaintiffs went to remediate that property damage. "As part of that [the *Indiana Litigation*] settlement, Beazer agreed to repair water damage to a number of homes caused by faulty subcontractor work.... These defects allowed water to enter the homes, which in turn resulted in physical damage to the residences and health problems for the occupants." *Trinity Homes, LLC v. Ohio Cas. Ins. Co.*, 629 F.3d 653, 655-56 (7th Cir. 2010). The suit was related to water damages that began when the buildings were constructed. As Beazer's sworn and unrefuted Third

Supplemental Responses note, Beazer made payments to homeowner plaintiffs where “the initial sale of the home took place between June 1, 1998 and October 31, 2002...” [Beazer’s Third Supplemental Responses, p. 3 (R. p. 341).]

The property damage associated with the Kentucky Claims is also alleged to have occurred during the period the Cincinnati Policies were in effect. Cincinnati filed suit against Beazer in federal court in Kentucky for a declaration that it owed no coverage obligation to Beazer for the Kentucky Claims. That federal court noted that “[b]etween 1998 and 2002, Cutter Homes Ltd., a subsidiary of defendant Crossmann Communities Inc.... acted as general contractor for the construction of approximately 148 houses in the Beaumont subdivision in Lexington, Kentucky.” *Cincinnati Ins. Co. v. Crossmann Communities P’ship*, 621 F. Supp. 2d 453, 455 (E.D. Ky. 2008), *vacated and superseded by Cincinnati Ins. Co. v. Beazer Homes Investments, LLC*, 399 Fed. Appx. 49 (6th Cir. 2010).

In fact, Cincinnati settled with Beazer over Cincinnati’s liability under the Policies for the *Indiana Litigation* and Kentucky Claims. [Beazer-Cincinnati Settlement (R. p. 2235).] That settlement is strong evidence that even Cincinnati believes the Underlying Insurance is exhausted.

Because the Underlying Insurance was exhausted for each Cincinnati Policy period by the payments Beazer and other of its insurers made in connection with the *Indiana Litigation* and the Kentucky Claims, Cincinnati’s liability under the time-on-the-risk method of allocation is the entire amount of the damages that Cincinnati calculated to have taken place during the period its Policies were in

effect, which is \$3,038,300, and Beazer is entitled to judgment against Cincinnati in that amount. [Cincinnati Proposed Order, p. 12 (R. p. 561).]

**B. The Trial Court Erred In Reversing Its Joint-And-Severally-Allocation Judgment As To Cincinnati Because Cincinnati Did Not Appeal From The Original 2007 Final Judgment**

Under the well settled doctrine of the law of the case, a party is bound by a final judgment that affects its rights if the party does not appeal. *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). As a result, Cincinnati is jointly and severally liable for that portion of Beazer’s loss not paid by Harleysville because Cincinnati did not appeal from the 2007 Final Judgment, which included the Circuit Court’s ruling that any triggered insurance policy is jointly and severally liable for Beazer’s entire loss.

The 2007 Final Judgment plainly provided that any insurance policy issued by Harleysville or Cincinnati that was triggered by the claims in the *Underlying Lawsuits* was jointly and severally liable up to the limits of those policies. Throughout the pretrial briefing leading up to the 2007 Final Judgment, Beazer linked its request for a declaration of joint-and-severally 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. On March 30, 2006, Beazer filed a motion for partial summary judgment on Count II of the Second Amended Complaint, stating: “... [Beazer] seek[s] 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’ Memorandum Of Law In Support Of Their Motion For Partial Summary Judgment Regarding The Insurers’ Joint And Several Obligation To Pay Defense And Indemnity Costs (“**Beazer’s Allocation Br.**”), p. 6 (R. p. 333); *id.*, p. 1 (R. p. 328) (“...[Beazer] in this motion seek[s] entry of an Order declaring that... each insurer has a joint and several obligation to defend and indemnify....”).]

In its 2007 Final Judgment, the Court agreed with Beazer and entered the declaratory judgment “in favor of [Beazer]” and “against Defendants Harleysville and Cincinnati” and stated that Beazer’s losses “are to be allocated in accordance with the joint and several methodology.” [2007 Final Judgment, pp. 18, 15 (R. pp. 18, 15).]

The Court’s 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).<sup>18</sup>

Cincinnati primarily argues that it is relieved from the consequences of its decision not to appeal because it was not “offended” or “aggrieved” by the Circuit

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<sup>18</sup> It is immaterial that Harleysville successfully appealed the joint-and-several ruling in the 2007 Final Judgment as it related to Harleysville’s obligations to Beazer. The doctrine of law of the case applies with full force to a non-appealing party where another party appeals and is partially successful on appeal. *See, e.g., Glenn v. Worthy*, 169 S.C. 263, 168 S.E. 705 (1933).

Court's 2007 Final Judgment and Order, and thus had no obligation to appeal. [Cincinnati Proposed Order, p. 8 (R. p. 557).] However, a party is "aggrieved" when a judgment "operates on his or her rights of property or bears directly on his or her interest." Rule 201(b) SCACR; *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 notwithstanding that there is no accompanying award of damages. *See, e.g., Lowcountry Open Land Trust v. State*, 347 S.C. 96, 99, 552 S.E.2d 778 (2001).

Cincinnati argues that, because the Circuit Court in its 2007 Final Judgment did not decide whether the limits of the underlying primary insurance policies were exhausted, and thus whether Cincinnati's excess coverage obligation had been triggered, Cincinnati was not "aggrieved." [Cincinnati Proposed Order, pp. 8-9 (R. pp. 557-58).] But exhaustion of the policies underlying the Cincinnati Policies was only one issue before the Circuit Court, and the declaratory judgment that the Circuit Court entered in Beazer's favor on the meaning of the "occurrence" language plainly aggrieved Cincinnati. Cincinnati fought long and hard to convince the Circuit Court below that the claims in the *Underlying Lawsuits* did not arise from an "occurrence" and, as a result, that none of its policies had been triggered. The Circuit Court instead decided that the property damage had been caused by an "occurrence," thereby satisfying the key predicate to coverage under Cincinnati's Policies, as well as

Harleysville's Policies. [2007 Final Judgment, pp. 10-14 (R. pp. 10-14).] The Circuit 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.*, p. 14 (R. p. 14).] In fact, the 2007 Final Judgment states that it is a ruling "in favor of" Beazer and "against" Cincinnati. [*Id.*, p. 18 (R. at p. 18).] Cincinnati was similarly aggrieved by the 2007 Final Judgment in Beazer's favor on the joint-and-several method of allocation because, in the event that the Supreme Court remanded the case to the Circuit Court for any reason, Cincinnati's liability would be greater under a joint-and-several allocation methodology than under a *pro rata* time-on-risk allocation methodology.

Applying the doctrine of law of the case to the facts of this case is more than fair to Cincinnati. Although the Circuit Court's 2007 Final Judgment was adverse to Cincinnati on the "occurrence" issue, the ruling on joint-and-several allocation was the allocation methodology that Cincinnati requested the Court to adopt. In its briefing to the Circuit Court, 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 Insurance Company's Memorandum Of Authority On Stipulated Issues, Feb. 13, 2007 ("**Cincinnati Issues Br.**"), p. 9 (R. p. 354).] 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 pay, and the Circuit Court therefore ruled that Cincinnati was not liable for money damages. But Harleysville appealed to the

Supreme Court, arguing that the correct rule was a time-on-the-risk allocation rule. At the time Cincinnati determined not to appeal, there was no doubt that if Harleysville prevailed in its appeal, on any issue, a remand proceeding before this Court was possible and Cincinnati could face substantial liability on remand. Cincinnati, however, made a conscious decision not to appeal, thereby accepting that the Circuit Court's 2007 Final Judgment would be binding on Cincinnati in any remand.

Furthermore, in its first two briefs filed with the Circuit Court on remand, Cincinnati did not challenge Beazer's contention that Cincinnati was bound by the Circuit Court's prior judgment on joint-and-several liability and instead, rested its arguments entirely on the exhaustion of underlying insurance issue. [Cincinnati Insurance Company's Brief On Issues To Be Considered On Remand, Nov. 2, 2011 ("**Cincinnati's Remand Br.**") (R. p. 532); Cincinnati Insurance Company's Reply Brief On Issues To Be Considered On Remand, December 13, 2011 ("**Cincinnati Reply Br. On Remand**"), pp. 10-14 (R. pp. 545-548).]

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 the Circuit Court's 2007 Final Judgment. The doctrine of law of the case requires that Cincinnati be bound by the joint-and-several allocation methodology, set forth in the Circuit Court's 2007 Final Judgment, and the Circuit Court's ruling on remand to the contrary must be reversed.<sup>19</sup>

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<sup>19</sup> Beazer also incorporates the arguments it made regarding Cincinnati's joint-and-several liability and exhaustion of the Underlying Insurance during the remand proceedings. *See* Brief Of Plaintiffs Crossmann Communities Of North Carolina, Inc., Beazer Homes Investment Corp., And Daniel Rogers Regarding Damages

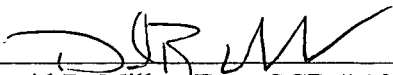
## V. CONCLUSION

Based on the foregoing, Beazer respectfully requests that the Court reverse the May 23, 2012 Order and the September 12, 2012 Order of the Circuit Court on the Cincinnati remand issues, hold that the limits of the insurance policies underlying the Cincinnati Policies are exhausted, and also hold that Cincinnati is liable to Beazer for its share of the damages under the joint-and-several method of allocation, in the amount of \$5,619,854. In the alternative, the Court should reverse the May 23, 2012 Order and the September 12, 2012 Order of the Circuit Court, hold that the limits of the insurance policies underlying the Cincinnati Policies are exhausted, and also hold that Cincinnati is liable to Beazer for its share of the damages under the time-on-the-risk method of allocation, in the amount of \$3,038,300.

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Issues To Be Addressed On Remand, November 2, 2011 (“**Beazer’s Remand Br.**”) (R. p. 366); 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, February 3, 2012 (“**Beazer’s Second Remand Br.**”) (R. p. 571); 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, August 20, 2012 (R. p. 653).

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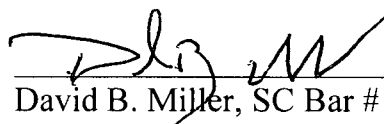
Myrtle Beach, South Carolina  
June 18, 2013.

**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that Appellants' Final Brief complies with  
Rule 211(b), SCACR.

Respectfully submitted,

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June 18, 2013

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