THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Steven H. John, Circuit Court Judge

Civil Action No. 04-CP-26-0084

Crossmann Communities of North Carolina, Inc.
And Beazer Homes Investment Corp., ...Appellant,

vs.

Harleysville Mutual Insurance Company and
Cincinnati Insurance Company,

Of whom Cincinnati Insurance Company is.....Respondent.

FINAL BRIEF OF RESPONDENT CINCINNATI INSURANCE COMPANY

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Statement of the Case

This appeal involves a commercial general liability ("CGL") policy coverage dispute. Plaintiffs, Crossmann Communities of North Carolina, Inc. ("Crossmann"), Beazer Homes Investment Corp. ("Beazer"), and Daniel Rogers (collectively the "Plaintiffs"), filed this action in Horry County on January 8, 2004. Plaintiffs later filed a Second Amended Complaint on June 2, 2005. [R. pp. 124-318]. Plaintiffs' Second Amended Complaint sought a declaratory judgment, damages for breach of contract, and other relief from Defendants Harleysville Mutual Insurance Company ("Harleysville"), Massachusetts Bay Insurance Company ("Massachusetts Bay"), Regent Insurance Company ("Regent"), Indiana Insurance Company ("Indiana"), Cincinnati Insurance Company ("Cincinnati") and Associated Insurors of Myrtle Beach, Inc. ("Associated Insurors"). [*Id.*]

Plaintiffs' claims arise out of five condominium projects in Horry County that Plaintiffs and their subcontractors constructed. After groups of condominium homeowners filed construction defect lawsuits against Beazer, the Plaintiffs brought the present action, claiming that coverage existed under policies issued by the defendant insurers. Cincinnati filed an Answer, asserting that the damages alleged in the underlying complaints do not fall within the coverage of the underlying policies and within the coverage of the Cincinnati's Excess Policies. [R. pp. 319–327].

Prior to trial, Indiana, Massachusetts Bay, and Regent made settlement payments to the Plaintiffs, and these three insurance companies were dismissed from the case. Trial of the action began on January 29, 2007. After jury selection, Plaintiffs and Associated Insurors reached a settlement pursuant to which, among other things, their respective claims against each other were dismissed, without prejudice.

After jury selection, but before opening statements, the Plaintiffs and the remaining defendants, Harleysville and Cincinnati, entered into a written Stipulation Agreement that agreed upon certain facts and set forth a statement of the legal issues to be resolved by the Circuit Court without submission of the case to the jury. [R. pp. 2228-2230]. Accordingly, the jury panel was dismissed.

Pursuant to the Stipulations, the Parties entered into a Consent Order of Dismissal with Prejudice of Certain Claims against Harleysville and Cincinnati, which was filed on March 26, 2007. In accordance with this Consent Order, Plaintiff Daniel Rogers dismissed his claims against Harleysville and Cincinnati with prejudice. The remaining parties then submitted Post-Trial Briefs setting forth their respective positions on the insurance coverage issues specified in the Stipulations, and the case was submitted for the Court's determination. [R. pp. 346-65].

On May 3, 2007, the Circuit Court ruled the property damage at issue in the underlying lawsuits arose from an occurrence and that coverage had been triggered. [R. pp. 1-18]. The court also concluded that each primary insurer faced joint and several liability. [R. pp. 15-16]. The court entered a judgment against Harleysville for $7.2 million, and Harleysville appealed the court's ruling to the South Carolina Supreme Court. The Circuit Court did not award damages against Cincinnati. Harleysville appealed the trial court's order, and Plaintiffs filed a cross-appeal from the court's denial of its request for pre-judgment interest.

On January 7, 2011, the Supreme Court issued an Opinion finding no coverage. A rehearing petition was subsequently granted. On August 22, 2011, the Supreme Court withdrew its initial opinion and 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 the Circuit Court's ruling that the property damage at issue arose out of

an "occurrence." However, the Supreme Court reversed the Circuit Court's conclusion that "joint and several" liability should be applied, and instead, the Supreme Court adopted the pro rata "time on the risk" approach to allocating damages among insurers. *Crossmann II*, 395 S.C. at 63. The Supreme Court remanded the case, instructing that further proceedings be held to determine a proper allocation of damages consistent with the pro rata/time on the risk approach. 395 S.C. at 67.

Following remand, a hearing was held before the Circuit Court on January 5 and March 1, 2012. The court issued an Order dated May 23, 2012, which addressed the coverage liability of Cincinnati. [R. pp. 57-76]. The court held that 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, and therefore Cincinnati's Excess Policies were not triggered for any of these periods. [R. p. 73; p. 76].

Plaintiffs filed a Motion to Alter, Amend or Reconsider pursuant to Rule 59(e), SCRCP. A hearing on this motion was held on August 27, 2012, and the court denied the motion by Order dated September 12, 2012. Plaintiffs filed and served a Notice of Appeal on October 16, 2012.

Statement of Facts

Plaintiffs' declaratory judgment action involves questions of insurance coverage for five condominium projects that Plaintiffs constructed in Horry County from 1992 through 1999. These projects are known as River Oaks I, River Oaks II, Waterway Village at River Oaks, Buck Creek Golf Villas, and Lightkeepers Village. Certain exterior components of the condominium projects were defectively constructed by subcontractors, which resulted in water penetration and damage to the condominium buildings.

In 2001, condominium unit homeowners filed suit against Plaintiffs after they discovered

various significant construction defects and resulting problems with the units. These lawsuits were captioned as: 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.

The homeowners alleged in these lawsuits that Plaintiffs defectively constructed the units, and as a result, the units experienced substantial decay and deterioration. Plaintiffs eventually settled with the homeowners for $16,770,750. Plaintiffs made the following payments in settlement of these homeowners' lawsuits:

River Oaks I lawsuit	$7,425,000
River Oaks II lawsuit	$2,826,500
Buck Creek lawsuit	$2,194,250
Waterway Village lawsuit	$3,925,000
Lightkeepers Village lawsuit	$ 400,000

After the present lawsuit was filed against the various insurance companies that issued policies to the Plaintiffs, three of these named defendant insurers settled the claims against them

prior to trial. The settling insurers and the amount each paid to Plaintiffs in exchange for a release are as follows:

Indiana Insurance Company	$2.7 million
Regent Insurance Company	$3.0 million[1]
Massachusetts Bay Ins. Co.	$2.9 million

The settlement payments made by these insurers were below the policy limits. Indiana Insurance Company had issued two policies that were in effect during 1998, with a total aggregate limit for both policies of $4 million. Massachusetts Bay issued two policies providing coverage from August 1998 to August 2000, with a total aggregate limit for both of $4 million. Regent issued two consecutive policies in effect from August 2000 to January 2002, with a total aggregate limit for both of $4 million. Harleysville Mutual Insurance Company, a primary insurer with the largest aggregate limits among the defendant insurers at $12 million, declined coverage and proceeded to trial.

Cincinnati, which had issued excess policies only, also declined coverage on the basis that the coverage provided by its policies had not been triggered. 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 language 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"

[1] Plaintiffs assert that Regent also provided payments under the policies of $151,231.87 prior to settlement.

("Cincinnati Excess Policy") [R. p. 1050].

"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.

[R. p. 1061]

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." [R. p. 1058]

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."

[R. p. 1055].

As mentioned above, Indiana Insurance Company, Massachusetts Bay, and Regent entered into settlements with the Plaintiffs prior to trial. These three settling 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

As a result of the settlement payments made by Indiana, Massachusetts Bay, and Regent, these three insurance companies were dismissed from the case. Prior to trial, the remaining parties entered into a written Stipulation that agreed upon certain facts and set forth a statement of the legal issues for the Court's consideration. Among the facts stipulated was that there was $7.2 million in "property damage" at the condominium buildings at issue. [R. p. 2228]. The parties also agreed that the Court should determine whether the property damage at issue arose from an "occurrence" within the meaning of the applicable CGL policies, and whether each insurer faced joint and several liability for the damage or whether the liability was limited to their pro rata share of the damage based on their "time on the risk." [R. p. 2229]. The relevant portion of the Stipulation provided:

> 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 1 above began within 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 20 and 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:

a. Did the property damage giving rise to Plaintiffs' claims for coverage arise from an "occurrence";

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;"

c. In the event judgment is entered for Plaintiffs, and that the Court determines that "time on the risk" is the proper allocation method, what is the proper period over which the "time on the risk" should be calculated. All parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any pro rata time on the risk allocation period. Alternatively, in the event that judgment is entered for the Plaintiffs and the Court determines that "joint and several" is the proper allocation method, whether Harleysville or Cincinnati is entitled to any set-off under South Carolina law in light of Plaintiffs' settlement with other insurers and, if set-off is appropriate, the amount of any such set-off.

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13. Cincinnati's applicable policies are excess policies with a "follow form" endorsement applicable to completed operations.

[R. pp. 2228-30].

On May 3, 2007, the Circuit Court ruled that the property damage at issue arose from an occurrence. [R. p. 14]. Relying on *L–J, Inc. v. Bituminous Fire & Marine Insurance Co.,* 366 S.C. 117, 621 S.E.2d 33 (2005), the court concluded the progressive damage "that resulted from, and was in addition to, the subcontractors' negligent work itself" was caused by an "occurrence." The trial court found the issue of allocation was controlled by *Century Indemnity Co. v. Golden Hills Builders, Inc.,* 348 S.C. 559, 561 S.E.2d 355 (2002), *overruled by Crossman II,* and it determined that *Century Indemnity* mandated a "joint and several" approach and, therefore, ordered Harleysville to indemnify Plaintiffs for the full $7.2 million in stipulated damages. [R. pp. 15-16].

The trial court's Order expressly declined to rule whether Cincinnati's policies provided coverage.[2] As part of its ruling, the court stated:

> 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.

[R. p. 16].

On appeal, although the Supreme Court affirmed the trial court's ruling that the property damage at issue arose out of an "occurrence", the Supreme Court reversed the court's conclusion that "joint and several" liability should be applied. The Supreme Court remanded the case, instructing that further proceedings be held to determine a proper allocation of damages consistent with the pro rata/time on the risk approach. *Crossman II,* 395 S.C. at 67. The Supreme Court's *Crossman II* opinion specifically noted that there had been no ruling on the

[2] Plaintiffs did not file a motion to alter or amend pursuant to Rule 59(e), SCRCP, asking Judge John to address this issue in his ruling.

liability, if any, of Cincinnati. *Crossman II*, FN1 395 S.C. at 44. 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.*

On remand the trial court determined the limits of the underlying insurance were not exhausted by payment of claims, and therefore, Cincinnati owed no obligation to Plaintiffs.

The trial court found that while Crossmann paid a total of $16,770,750 to settle the homeowners' claims, the Plaintiffs and the remaining insurers (Harleysville and Cincinnati) subsequently stipulated that damages of only $7.2 million resulted from water intrusion and met the definition of "property damages" in the Policies. [R. p. 2228]. Therefore, the court found the balance of the amounts paid (i.e., $9,570,750) represented the cost to repair "defective construction." [R. p. 9]. The court stated that it is bound by the parties' Stipulation that the potentially covered damages are $7.2 million, and accordingly, Cincinnati's liability, if any, would be determined utilizing the stipulated amount of $7.2 million for the Harleysville and Cincinnati coverage periods. [R. p. 14].

The court concluded that based on the stipulated damages of $7.2 million, Cincinnati's Excess Policies were not triggered, regardless of whether the $1 million per occurrence or $2 million annual aggregate limits are used. [R. p. 14].

The court adopted Crossmann's proposed methodology for calculating the per day loss on each project. However, in calculating the per day loss, the court found that, the stipulated amount of covered damages must be utilized, rather than the total settlement paid by Crossmann to the claimants.

The court began its calculations by allocating the stipulated damages among the five

underlying lawsuits, which was done by comparing the amount of the settlement in each case to the total settlement amount of $16,770.750.00. This percentage was then applied to the stipulated damages of $7.2 million to determine a pro-rata allocation for each settlement. The court's calculations were as follows:

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**

[R. p. 74].

Next, the court prorated 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 thirty (30) days after the Certificate of Occupancy was issued until repairs were completed or the underlying case was settled. [R. p. 2228]. This results in a Daily Loss Amount of $2,136.00, as shown in the chart below, which was utilized by the court.

CALCULATION OF DAILY LOSS AMOUNTS BY PROJECT

PROJECT	TOTAL LOSS AMOUNT		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**

[R. p. 75].

The court then reached a daily underlying policy limit of $2,740, which was calculated by using the policy limits of $1 million per occurrence, per year, for each of the three underlying policies by Indiana, Massachusetts Bay, and Regent.

CINCINNATI'S TIME-ON-RISK LIABILITY TO BEAZER

UNDERLYING INSURER	DAILY LOSS AMOUNT	–	DAILY UNDERLYING POLICY LIMIT	=	CIN. SHARE/ DAY	x	DAYS	=	CIN. SHARE
Indiana	$2,136		$2,740	=	0	=	92	=	$0
Massachusetts Bay	$2,136		$2,740	=	0	=	730	=	$0
Regent	$2,136		$2,740	=	0	=	459	=	$0
							TOTAL	=	**$0**

[R. p. 76].

Accordingly, based upon the above calculations, the trial court correctly concluded Cincinnati's Excess Policy is not triggered since the underlying limit is greater than the stipulated amount of daily loss, as reflected above.

Standard of Review

In *Crossmann II*, the Supreme Court stated that the trial court is entitled to exercise its "sound discretion . . . to arrive at a reasonable methodology" to reach a reasonable approximation of the amount of property damage that occurred during the policy periods. *Crossmann II*, 395 S.C. at 65, 717 S.E.2d at 602 ("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.") Accordingly, any review of the trial court's chosen methodology and calculations should be reviewed under the deferential abuse of discretion standard of review.

In addition, it is well-established that "A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Insurance Co. v. Newman,* 385 S.C. 187, 684 S.E.2d 541 (2009). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Id.* "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.*

Argument

A. The trial court correctly concluded the limits of the underlying primary policies have not been exhausted and Cincinnati's excess policy coverage has not been triggered.

The trial court properly calculated the daily damages for each of the five projects at issue and compared this to the daily underlying policy limits of the Indiana, Massachusetts Bay, and Regent policies. The court correctly found that the daily loss amount is less than the daily underlying policy limits. The trial court's calculations are consistent with the guidance provided by the Supreme Court in *Crossmann II*. In addition, the court's calculations are also consistent with the proposed methodology advanced by the Plaintiffs and their experts.

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. Accordingly, as was correctly noted by the trial court, Cincinnati's Excess Policies would be triggered only 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 had coverage for the period May 29, 1998 to September 1, 2002. As stated previously, 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

The default rule adopted by the Supreme Court in *Crossmann II* for determining damages that occur during a specific period of time generally assumes the damage occurred in equal portions during the time period that it progressed. *Crossmann II*, 395 S.C. at 65, 717 S.E.2d at

602. The parties in this case have stipulated that damages should be allocated during the period thirty days after the certificate of occupancy was issued until repairs were completed or the underlying lawsuits were settled. [R. p. 2228].

Following the Supreme Court's remand of this case, the Plaintiffs presented to the trial court its proposed methodology for determining whether the underlying policy limits had been exhausted by comparing the limits of the underlying policies to the damages that have been allocated for the various policy periods. The Plaintiffs' methodology involves a daily calculation of damages on each of the five projects at issue in this litigation (River Oaks I, River Oaks II, Waterway Village, Buck Creek, Lightkeepers Village/Rose). The court essentially employed the same methodology advanced by Plaintiffs for comparing the limits of the underlying policies to the damages that have been allocated for the various policy periods. Accordingly, the Plaintiffs have no legitimate grounds to complain about the court's calculations insofar as the Court adopted the Plaintiffs' chosen methodology.

1. The parties stipulated that the total amount of insured damages is $7.2 million.

Plaintiffs argue the underlying primary policies have been exhausted because they and their insurers paid $16,770,750 to settle the condominium homeowners' lawsuits filed in South Carolina, and they also paid other additional sums to settle claims against them for defective construction projects in Indiana and Kentucky. Plaintiffs contend the trial court should have used this $16,770,750 figure, rather than $7.2 million, in assessing whether the underlying polices had been exhausted. Plaintiffs' position is in direct conflict with the parties' Stipulation stating that the damages at the underlying projects resulting from water intrusion and meeting the definition of "property damage" totaled $7.2 million. [R. p. 2228]. Stipulation 1 provides in relevant part, "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 ..." [R. p. 2228].

The remainder of any amounts over and above $7.2 million paid by Plaintiffs to resolve claims against them in South Carolina or elsewhere merely represents the costs associated with remedying Plaintiffs' own defective construction, which is expressly excluded from coverage by the policies. Therefore, the fact that Plaintiffs may have paid more than $7.2 million to settle claims against it in South Carolina or elsewhere is irrelevant inasmuch as Plaintiffs and the other parties have already stipulated that the insured loss is $7.2 million.

This Stipulation is clear and unambiguous. Nevertheless, Plaintiffs claim that it should be ignored altogether. Plaintiffs contend the $7.2 million stipulated damages figure had nothing to do with prior settlements between Beazer and the settling insurers, and that it was error for the trial court to construe the Stipulation so as to limit the exhaustion inquiry to only $7.2 million. Plaintiffs' position is that this $7.2 million figure only applies to their claims against Harleysville and Cincinnati and does not represent Plaintiffs' entire insured loss.

Yet there is absolutely no language in the Stipulation that says the $7.2 million figure only applies to their claims against Harleysville and Cincinnati or that the figure does not represent Plaintiffs' entire insured loss. Nor is there any language in the Stipulation stating that the $7.2 million figure should be disregarded in analyzing whether the underlying primary coverage was exhausted. The absence of such language is determinative.

At the time the Stipulation was agreed upon and entered, the question of whether underlying coverage had been exhausted was a central issue in dispute due to the fact that Cincinnati's policies provide excess coverage that is triggered only if the limits of the primary policies are exhausted. Plaintiffs are now asking the Court to read into the Stipulation conditions and qualifiers that were never included therein. "Interpretation of a contract is governed by the

objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." *Laser Supply and Services, Inc. v. Orchard Park Associates*, 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009).

2. Payments made by Plaintiffs or their insurers to resolve claims in other states have no bearing on this case because Plaintiffs failed to provide any evidence to show which payments, if any, were for covered damages.

Plaintiffs argue that the trial court, in analyzing whether the underlying policy limits were exhausted, should have considered payments that were made to resolve claims against them in Indiana and Kentucky. However, the trial court appropriately disregarded these payments.

Plaintiffs failed to provide records to show that any payments, or even any portions thereof, were made for potentially covered losses related to ensuing damage versus payments that were made for defective construction. In *Crossmann II*, the Supreme Court recognized this distinction by stressing that payments made to remove or remedy deficient work is not "property damage" under a CGL policy. The Court stated, "We emphasize the difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" *Crossmann II*, 395 S.C. at 49, 717 S.E.2d at 593.

Plaintiffs argue that the affidavit of Mark Berry, a former Beazer officer, establishes that payments made in the Indiana litigation were to remedy "property damage", and therefore the Cincinnati policy was triggered. [Appellant's Initial Brief, p. 23.] However, the affidavit of Mr. Berry is self-serving and conclusory. Moreover, neither Berry's affidavit, nor any other evidence submitted by Plaintiffs includes any information concerning the specific payments and amounts of any alleged covered losses related to resulting damage as opposed to costs associated with defective construction.

It is axiomatic that the burden of proof rests upon the party who asserts the affirmative of an issue. *Ford v. Atlantic Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143 (1932) (the burden of proof rests upon him who has the affirmative of the issue). Plaintiffs have failed to satisfy their burden of proof. Moreover, where there is a dispute over insurance coverage, the insured carries the burden of demonstrating that coverage exists, *Danby of North America, Inc. v. Travelers Ins. Co.*, 25 Fed.Appx. 186 (4th Cir. 2002), and consequently, in the case of an excess policy the insured has the burden of proving that underlying limits have been exhausted.

In this case, the parties stipulated that only $7.2 million of the $16,770,750 paid by Plaintiffs to settle the South Carolina lawsuits was for covered damages at the underlying projects that resulted from water intrusion and that met the definition of "property damage". [R. p. 2228]. In comparison, Plaintiffs provided no similar information regarding covered damages for the out-of-state settlements on the Kentucky and Indiana claims.

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 required by *Crossmann II*. Only "property damage" caused by an "occurrence" during Cincinnati's policy period would act to exhaust the underlying CGL limits.

In sum, there is no proper basis for Plaintiffs to argue that the payments made on the Indiana and Kentucky claims exhausted the underlying coverage and triggered Cincinnati's excess policy because, as to those claims, Plaintiffs did not provide evidence to the trial court regarding whether property damage was caused by an "occurrence" as defined in *Crossmann II*, or whether an "occurrence" took place during Cincinnati's policy period.

B. The trial court properly applied the pro-rata/time on risk method when determining the potential liability of Cincinnati.

Plaintiffs argue that Cincinnati's liability is joint and several because it did not appeal the

trial court's May 3, 2007, ruling that a joint and several allocation approach should be applied. Plaintiffs' theory is based upon the flawed premise that since Cincinnati did not challenge on appeal the trial court's ruling regarding the joint and several approach, it is now the law of the case as to Cincinnati.

Plaintiffs' position is inconsistent with the parties' Stipulation 8(c), which recognized that all parties reserved the right to argue the appropriate start date and end date for any pro rata time on the risk allocation period if the court determined that time on the risk is the correct method to be applied. Stipulation 8(c) states "In the event ... the Court determines that 'time on the risk' is the proper allocation method ... [a]ll parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any pro rata time on the risk allocation period." [R. p. 2229]. This stipulation envisioned the exact situation that occurred here when the Supreme Court ultimately determined that pro-rata/time on the risk is the proper allocation method. All of the parties, including Cincinnati, maintained the right, pursuant to this Stipulation, to present arguments on remand regarding the application and manner in which pro-rata/time on the risk should be employed in this case.[3]

In addition, Plaintiffs' argument lacks merit because the law of the case doctrine is not applicable here. 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). Here, Cincinnati was not offended, aggrieved, or otherwise directly affected by the trial court's ruling inasmuch as the court expressly declined to rule whether Cincinnati's policies provided coverage.

[3] Furthermore, Cincinnati's right to argue that its excess policies were not triggered was preserved by Stipulation 9, which states in part, "The parties agree that Cincinnati can argue to the Court that the underlying insurance has not been exhausted and that Cincinnati has no obligation to 'drop down' and cover Plaintiffs for losses in the Underlying Lawsuits ..." [R. p. 2229].

Plaintiffs' brief admits as much. Plaintiffs' brief states "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." [Appellant's Initial Brief, p. 5]. In addition, the trial court's Order of May 3, 2007 states 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." [R. p. 16].

Likewise, the Supreme Court's *Crossmann II* opinion notes that the trial court did not rule whether Cincinnati's policies provided coverage. *Crossmann II*, fn.1 395 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.* Thus, there was no adverse ruling as to Cincinnati on the issue of joint and several liability from which to appeal since the trial court specifically declined to rule whether Cincinnati's policies provided coverage at all.[4] Cincinnati was not aggrieved by the trial court's order, and therefore, the law of the case doctrine has no application here.

Moreover, in arguing that joint and several liability should be applied, the Plaintiffs are asserting that the Court of Appeals should apply a legal concept that was unequivocally rejected by the Supreme Court in *Crossmann II*. In *Crossmann II*, the Supreme Court stated:

[4] "Only a party aggrieved by an order, judgment, or sentence may appeal." Jean H. Toal, *Appellate Practice in South Carolina*, 108 (2d. ed. 2002); S.C. Code § 18-1-30 (1985); Rule 201(b), SCACR. Where a party has not been injuriously affected by the judgment, he has no standing to appeal. *Cisson v. McWhorter*, 255 S.C. 174, 177 S.E.2d 603 (1970).

> 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.

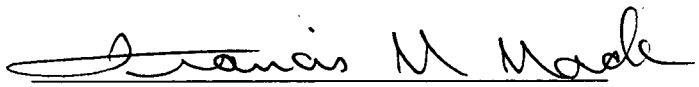
395 S.C. at 59, 717 S.E.2d at 599. The Supreme Court also noted that the joint and several approach has been criticized as "inefficient and wasteful of judicial resources." 395 S.C. at 60, 717 S.E.2d at 599. Further, it concluded that the pro-rata approach is more consistent with meeting public policy goals than the joint and several approach. *Id.*, S.C. at 63, S.E.2d at 601. The Supreme Court then remanded and specifically instructed the trial court that it was to hold further proceedings consistent with the pro-rata/"time on the risk" approach. *Id.* If the trial court had applied a joint and several approach for allocating damages among insurers, as Plaintiffs advocate here, this would have been in contravention of the Supreme Court's directive in *Crossmann II* that a pro-rata/"time on the risk" method must be used.

Conclusion

The trial court correctly ruled that Cincinnati's excess policies have not been triggered because the limits of the underlying primary insurance were never exhausted.

Accordingly, Respondent Cincinnati Insurance Company respectfully requests that the Court of Appeals affirm in its entirety the trial court's Order dated May 23, 2012, which found Cincinnati has no coverage liability.

Respectfully submitted,



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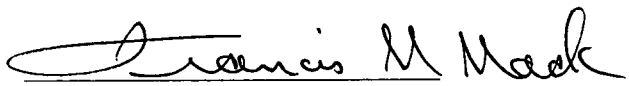
Columbia, South Carolina
June 13, 2013

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

Respectfully submitted,



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