

February 9, 2024

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

Via Electronic Filing: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

Re: *Peter D. Protopapas, as Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. v. Travelers Casualty and Surety Company et al.*,  
Appellate Case No. 2021-000648

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Dear Ms. Kitchings:

We write on behalf of Appellants regarding Respondents' February 7, 2024 letter notifying the Court of "supplemental authority," specifically *Portrait Homes - South Carolina, LLC v. Penn. Nat'l Mut. Cas. Ins. Co.*, No. 2020-000735, 2023 WL 8610277 (S.C. Ct. App. Dec. 13, 2023) ("*Portrait Homes*"). Pursuant to Rule 208(b)(7), SCACR, Appellants hereby respond "promptly and similarly limited" as follows:

*First*, Respondents never argued below, and have not briefed to this Court, the argument referenced in their letter. *See* Final Brief of Respondents at 28–29. Nor did the trial court consider or rule on any such argument. The argument is waived. *See Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (per curiam) ("[A]n appellate court cannot address an issue unless it is raised to, and ruled upon by, the trial court.").

*Second*, the *Portrait Homes* ruling cited in Respondents' February 7, 2024 letter is not yet a final, enforceable ruling. In *Portrait Homes*, there is a pending petition for rehearing, and on February 2, 2024, the Court of Appeals requested a response to the rehearing petition.

*Third*, contrary to Respondents' statement, for which they provided no support, the relevant language in the policies at issue here is substantially identical to the language in *Crossmann II*, not *Portrait Homes*. As in *Crossman II*, the policies in this case "limit the insurer's obligation to pay to sums that are attributable to . . . damage that occurred during the policy period." *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 60, 717 S.E.2d 589, 600 (2011) (*Crossman II*); *cf.*, e.g., R. pp. 1108–12 ("The company will pay . . . all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies . . .") Bodily injury "means bodily injury, sickness or disease sustained by any person **which occurs during the policy period**, including death at any time resulting therefrom . . ." (emphasis added); R. pp. 1371–74 ("The company will indemnify the

insured for ultimate net loss ... which the insured shall become legally obligated to pay as damages because of A. Personal Injury ... to which this policy applies, caused by an occurrence ....” Occurrence “means an accident, including injurious exposure to conditions, which results, **while this policy is in force**, in personal injury ....”) (emphasis added); R. pp. 1382–86 (“The company will indemnify the insured for ultimate net loss ... which the insured shall become legally obligated to pay as damages because of A. Personal Injury ... to which this policy applies, caused by an occurrence .... This policy applies only to personal injury ... **which occurs during the policy period** ....”) (emphasis added).

In short, the policies here **do not** include the additional provision in the *Portrait Homes* policies; that is, they do not say that “‘damage’ which occurs during the policy period ... includes any continuation, change or resumption of that” damage “after the end of the policy period.” *Portrait Homes*, 2023 WL 8610277, at \*10 (cleaned up). Thus, the *Crossman II* admonitions remain intact here: (1) any alteration to the default allocation rule must “remain faithful to the premise that each insurer is responsible only for a pro rata of portion of the total loss, and each pro rata portion must be defined by the insurer’s time on the risk,” and (2) courts cannot “shift losses from one policy period to another in order to create coverage were none was purchased.” *Crossman II*, 395 S.C. at 66, 717 S.E.2d at 603 (including n. 16).

Sincerely,

**Womble Bond Dickinson (US) LLP**

/s/ M. Todd Carroll

M. Todd Carroll

Partner

cc: All Counsel of Record