

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Charles J. McCutchen, Circuit Court Judge
Dale E. Van Slambrook, Circuit Court Judge
Civil Action No. 2025-CP-08-00820

Appellate Case No. 2026-000301

Richard Kenneth Weatherford, Jr.,Respondent,

v.

Timothy James Davidson, Defendant, and Progressive Direct Insurance Company Third Party,

of which Progressive Direct Insurance Company is the Appellant.

**APPELLANT PROGRESSIVE DIRECT INSURANCE COMPANY’S RETURN
TO RESPONDENT RICHARD KENNETH WEATHERFORD, JR.’S
MOTON TO DISMISS APPEAL**

Appellant Progressive Direct Insurance Company respectfully submits this Return to Respondent’s Motion to Dismiss Appeal.

This appeal arises out of three Circuit Court orders pertaining to Appellant’s response to a subpoena *duces tecum* issued by Respondent. The first two orders instructed Appellant to produce full and complete copies of its insurance claim file to Respondent. The third order placed Appellant in contempt of court for declining to do so. Pursuant to well-settled South Carolina law, the contempt order is immediately appealable because it is a final order. Moreover, the underlying

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discovery orders are immediately appealable because Appellant did not continue in the litigation but instead declined to comply with the Circuit Court's orders and was ultimately placed in contempt of court as a result. For these reasons, Appellant's appeal is properly before this Court, and the Court should deny Respondent's Motion.

BACKGROUND

Respondent and Defendant Timothy Davidson were involved in an automobile accident on November 22, 2024. On March 10, 2025, Respondent filed a lawsuit against Defendant Davidson, alleging that Defendant Davidson drove negligently and while intoxicated, made an ill-advised left turn, and struck the driver's side of Respondent's vehicle. Appellant is Defendant Davidson's insurance carrier. Appellant hired defense counsel to represent Defendant Davidson in the underlying lawsuit.

On or around March 22, 2025, Respondent served a subpoena *duces tecum* on Appellant, commanding production of Appellant's entire insurance claim file related to the November 22, 2024 accident. Appellant timely produced every physical document in its claim file but withheld and/or redacted two categories of claim log notes: (1) notes concerning insurance coverage and/or loss reserves; and (2) notes created after February 18, 2025, the day Appellant received Respondent's *Tyger River* demand letter threatening a lawsuit against its insured. Appellant submitted a privilege log with its production. Alleging the response to be incomplete, Respondent filed a Motion for Rule to Show Cause against Appellant, which Appellant opposed. The Circuit Court held a hearing on the motion on August 20, 2025.

On September 19, 2025, the Circuit Court issued an Order granting Respondent's Motion for Rule to Show Cause and compelling Appellant to: (1) produce all claim log notes and materials in Appellant's file created prior to April 7, 2025; and (2) pays costs in the amount of \$500.00.

Appellant filed a Rule 59(e) Motion to Alter or Amend and for Relief from Prior Order, citing numerous errors. Among other things, Appellant asserted that the Circuit Court failed to review Appellant's claim log notes *in camera* before concluding that the notes were not entitled to work product protection. This, among other conclusions reached by the Circuit Court, was error. In its Motion, Appellant requested an order ruling "that [Appellant] need not produce any further materials in response to [Respondent's] Subpoena and is not required to pay [Respondent's] costs." Appellant requested in the alternative "a rehearing once the Court has had the opportunity . . . to review the withheld items *in camera*, which can be submitted at the Court's request for *in camera* review." Exhibit F to Respondent's Motion. Contrary to the unsupported statement in Respondent's motion, Appellant did not request a "privilege log procedure" and is not familiar with the phrase "privilege log procedure" or what that might entail.

On October 8, 2025, the Circuit Court issued an Amended Order. While the Amended Order purported to "grant in part" Appellant's request for relief, it expressly endorsed the prior order and rejected all of the substantive relief Appellant requested in its Rule 59(e) Motion. By way of example, the Amended Order stated the following:

- "An insurance company cannot in good faith argue that the entirety of its claim file was accumulated in anticipation of litigation."
- "[Appellant] is reminded is that such materials must have been the *type created outside the ordinary course of business and significantly motivated by anticipated litigation*" (emphasis in original).
- "This Court takes a stance in line with Judge Kinlaw as stated in the Court's September 27, 2023, Order Granting Plaintiff's Motion to Compel against [Appellant] in the case of *Brown v. Owens*." (referring to a prior order from another circuit court).
- "[Appellant] in the present case has again selected an arbitrary date contradicted by its own actions and words."
- "This repeated argument and tactic *reaffirm this Court's prior ruling* that [Appellant] was not substantially justified in withholding information from production, and that such withholding is inconsistent not only with South Carolina discovery law as a whole,

but also with prior rulings specifically against [Appellant] on substantially similar arguments.” (emphasis added).

See Exhibit G to Respondent’s Motion.

Based on these conclusions, the Circuit Court again ordered Appellant to “produce a complete copy of the materials requested in [Respondent’s] subpoena through April 7, 2025, as previously ordered.” *Id.* Additionally, the Circuit Court ordered Appellant to submit a privilege log listing every item it claimed was privileged or protected – which Appellant had already done in the first instance. The Circuit Court did not vacate or alter its prior order, nor did it agree to review the withheld materials *in camera*. The Circuit Court did not provide Appellant an opportunity to produce the withheld materials to the court for *in camera* review, despite Appellant’s offer to do so. To the contrary, the Circuit Court: (1) reiterated its previous erroneous rulings; (2) expressly rejected Appellant’s position; and (3) affirmed the prior order’s assessment of costs, finding Appellant’s position was not “substantially justified.” Contrary to Respondent’s motion, under no conceivable reading of the Amended Order did the Circuit Court grant the “very relief [Appellant] sought” in its Motion.

Appellant did not comply with either of the Circuit Court’s orders because Appellant believes the orders to be contrary to South Carolina law and compliance would be unreasonably prejudicial. On October 30, 2025, Respondent filed a motion requesting that Appellant be held in contempt of court. Appellant filed a response in opposition to the motion, reiterating its prior arguments and explaining that, in order to pursue the issue on appeal, it must refuse to comply. On January 28, 2026, the Circuit Court issued an Order holding Appellant in contempt and awarding monetary sanctions. Appellant served its Notice of Appeal on February 11, 2026. Respondent filed this Motion to Dismiss on February 18, 2026.

ARGUMENT

Respondent's motion asks this Court to dismiss the appeal on the basis that Appellant allegedly did not follow the procedure set out by the Supreme Court in *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). However, this is incurred. The appeal is properly before this Court, and the Court should deny Respondent's motion.

I. The Circuit Court's January 28, 2026 Contempt Order is an immediately appealable final order under South Carolina law.

As a threshold matter, *Whetstone* establishes the procedure for appealing interlocutory discovery orders. *Whetstone* does not modify – or even relate to – a party's right to appeal a final order. A contempt order standing alone is *always* immediately appealable because it constitutes a final order under South Carolina law. *See e.g. Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999) (“[A] contempt order also is a final order that is immediately appealable.”); *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009); *McCain v. Brightharp*, 399 S.C. 240, 251, 730 S.E.2d 916, 922 (Ct. App. 2012).

In this case, the Circuit Court issued an order holding Appellant in contempt of court on January 28, 2026. Appellant's Notice of Appeal includes an appeal from that order. For this reason alone, notwithstanding the *Whetstone* decision, appeal of the contempt order is proper, and Respondent's Motion must be denied. *See, e.g., Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 28, 911 S.E.2d 406, 410 (2025) (finding appellants “waived appellate review of all discovery orders prior to the [final] order granting sanctions” because they continued to participate in discovery rather than immediately refusing to comply with the prior orders, suffering contempt, and appealing from the contempt finding); *Davis v. Parkview Apartments*, 409 S.C. 266, 280-81, 762 S.E.2d 535, 543 (2014) (finding plaintiffs who were sanctioned for discovery abuse had waived review of the underlying discovery orders “by

providing incomplete responses and causing delay through other tactics” while “continu[ing] to accept the circuit court’s formulation of discovery” instead of preserving their objections to the prior discovery orders by immediately refusing to comply with the prior orders, suffering contempt, and appealing from the contempt finding). *See also, e.g., Jones v. Robinson*, Op. No. 2023-UP-369, 2023 WL 7685902 at *5-6 (Ct. App. Nov. 15, 2023) (unpublished) (noting that appeal from contempt order was properly before the court, even where underlying discovery orders upon which the contempt order was issued were not).

II. The Circuit Court’s September 19, 2025 Order and October 8, 2025 Order are immediately appealable under *Whetstone* because Appellant refused to comply with the Orders and was held in contempt of court.

Appellant tracked the procedure for appealing a discovery order established by the Supreme Court in *Whetstone*. As such, the discovery orders underlying the Circuit Court’s contempt order are properly before this Court, and the Court may consider their merits. Respondent’s attempt to scale down the *Whetstone* rule as applied to this case is legally incorrect and factually unsubstantiated for two reasons.

A. Respondent’s argument is irrelevant.

Respondent mischaracterizes the legal standard derived from the *Whetstone* decision. As it pertains to interlocutory discovery orders, “[i]nstead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal or ***refuse to comply*** with the order and appeal after he is ***held in contempt for his failure to comply***.” *Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881-882 (emphasis added). This two-step directive is unambiguous. To immediately appeal a discovery order (and avoid forfeiting the right to appeal), one must: (1) refuse to comply with the discovery order; and (2) be held in contempt of court based on such refusal. Despite Respondent’s unsupported contentions to the contrary, nothing in the *Whetstone* decision limits this rule to any particular set of facts, specific

conduct engaged in by the contemnor, or the like. For instance, contrary to Respondent's mischaracterization, *Whetstone* did not even "address[] a specific problem" where "compliance would disclose the material before any appellate review." Resp.'s Mot. at 6. Rather, the Supreme Court in *Whetstone* simply explained why contempt must be entered before a non-party may appeal a discovery order. Pursuant to S.C. Code Ann. § 18-1-30, the focus is the legal injury. "A non-party suffers no legal injury when he is ordered to participate in discovery. The necessary legal injury does not arise until he is held in contempt. *Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882. Thus, in order to appeal an interlocutory discovery order, a non-party must first be held in contempt of court. There is no doubt that both of the *Whetstone* conditions are present in this case. Appellant did not do what the Circuit Court ordered it to do and, on January 28, 2026, it was held in contempt as a result.

Respondent dedicates the majority of his argument to the irrelevant notion that Appellant "manufactured" this appeal.¹ According to Respondent, Appellant's conduct below did not mirror the procedure prescribed by the Supreme Court in *Whetstone*. However, while this is factually inaccurate, it is not even relevant. *Whetstone* plainly established that a non-party may appeal a discovery order if: (1) it does not comply with the order and (2) it is held in contempt on that basis. Again, this is precisely what occurred in this case. It does not matter what the Amended Order compelled Appellant to do or whether the Amended Order left Appellant in a more favorable or less favorable position. What matters under *Whetstone* is that Appellant declined to comply with that Order and was held in contempt.

¹ Under South Carolina law, any immediate appeal of a discovery order must be "manufactured." The law requires a person seeking to appeal to refuse to comply and be held in the contempt. To the extent Respondent's position is that Appellant's acquiescence somehow defeats its right to appeal, the position is at odds with well-settled South Carolina law.

B. Respondent’s argument misstates the underlying procedure.

Even if the Court is inclined to consider matters irrelevant to the *Whetstone* analysis, the result remains the same. The apparent theme of Respondent’s Motion – that Appellant obtained, then failed to accept, the exact relief it requested from the Circuit Court – is simply inaccurate. The September 19, 2025 Order instructed Appellant to produce its entire claim file and remit payment in the amount of \$500.00 for costs. In its Rule 59(e) motion, Appellant asked the Circuit Court to do one of two things: (1) vacate the September 19, 2025 Order and enter an Order ruling that Appellant need not produce any more materials; or (2) conduct *in camera* review of the withheld materials and hold a rehearing after it completed its review. Appellant did **not** ask the Circuit Court to again order it to produce “a complete copy of the materials requested in [Respondent’s] subpoena.” Oct. 8, 2025 Order at 7 - Exhibit G to Respondent’s Motion. It did **not** ask the Circuit Court to order Appellant to “create a privilege log . . . to be submitted to the Court and opposing counsel.” *Id.* And it did **not** ask the Circuit Court to affirm its prior award of costs against Appellant. The October 8, 2025 Amended Order is merely an extension of the September 19, 2025 Order. It adopted all of the flawed substantive findings and conclusions of the first order, even including several pages of commentary admonishing Appellant for taking a position the Circuit Court incorrectly deemed “inconsistent with South Carolina law.” The Amended Order in no way “gave [Appellant] exactly what it asked for” – quite the opposite.

C. Taking the actions suggested by Respondent would have waived the right to appeal.

The Supreme Court, and this Court, have specified that any act complicit with a discovery order may jeopardize the right to appeal. *See Innovative Waste Mgmt.* 445 S.C. at 28, 911 S.E.2d at 410; *Davis* 409 S.C. at 280, 762 S.E.2d at 543; *Jones*, Op. No. 2023-UP-369, 2023 WL 7685902 at *5-6. Here, unlike the contemnors in *Innovative Waste Management*, *Davis*, and *Jones*,

Appellant rejected the Circuit Court's formulation of discovery by declining to comply with the Amended Order. As a result, it was placed in contempt of court. Therefore, pursuant to *Whetstone* and its progeny, the Circuit Court's discovery orders are appealable.

CONCLUSION

For the reasons set forth above, the underlying discovery orders are immediately appealable, Appellant's appeal is properly before this Court, and the Court should deny Respondent's Motion to Dismiss Appeal.

MURPHY & GRANTLAND, P.A.

s/Jay Thompson

Jay Thompson, S.C. Bar No. 75030
W. Tradd Stover, S.C. Bar No.: 106444
Post Office Box 6648
Columbia, SC 29260
Tel: (803) 782-4100
Fax: (803) 782-4140
jay.thompson@murphygrantland.com
stover@murphygrantland.com

Counsel for Appellant

February 27, 2026
Columbia, South Carolina

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Richard Kenneth Weatherford, Jr.,Respondent,

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PROOF OF SERVICE

I certify that I have served Appellant Progressive Direct Insurance Company's Return to Respondent Richard Kenneth Weatherford, Jr.'s Motion to Dismiss Appeal via email and by U.S. Mail to counsel for the Respondent on February 27, 2026.

Frederick "Trip" W. Riesen, III, Esq. RIESEN DURANT, LLC 613 Long Point Road, Suite 100 Mt. Pleasant, SC 29464 Email: trip@riesendurant.com <i>Attorney for Respondent</i>	Raymond D. Turner, Esq. CLARKSON, WALSH & COULTER, P.A. 497 St. Andrews Boulevard Charleston, SC 29407 Email: ray.turner@clarksonwalsh.com <i>Attorney for Defendant Timothy J. Davidson</i>
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[signature page attached]

MURPHY & GRANTLAND, P.A.

s/Jay Thompson

Jay Thompson, Esquire, S.C. Bar No. 75030

W. Tradd Stover S.C. Bar No.: 106444

Post Office Box 6648

Columbia, SC 29260

Tel: (803) 782-4100

Fax: (803) 782-4140

jay.thompson@murphygrantland.com

stover@murphygrantland.com

Counsel for Appellant

Columbia, South Carolina

February 27, 2026



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SC Court of Appeals

Jay Thompson
Phone: (803) 454-1255
jay.thompson@murphygrantland.com

February 27, 2026

SENT VIA EMAIL - ctappfilings@sccourts.org

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

Re: Richard Kenneth Weatherford, Jr., Respondent v. Timothy James Davidson, Defendant, and Progressive Direct Insurance Company, Third Party, of which Progressive Direct Insurance Company is the Appellant
Appellate Case No: 2026-000301
Our File No.: 1115-5924

Dear Ms. Kitchings:

Attached for filing, please find Appellant Progressive Direct Insurance Company's Return to Respondent Richard Kenneth Weatherford, Jr.'s Motion to Dismiss Appeal. By copy, we are serving all counsel of record with same.

Thank you for your attention to this matter.

Yours truly,

s/Jay Thompson

Jay Thompson

JTT/tmb

Attachments

Cc: All Counsel of Record (via email only)