THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appeal from Berkeley County
Court of Common Pleas

The Honorable Charles J. McCutcheon, Circuit Court Judge
The Honorable Dale E. Van Slambrook, Circuit Court Judge

Appellate Case No.: 2026-000301

Richard Kenneth Weatherford, Jr.……Respondent,

v.

Progressive Direct Insurance Company……..Third Party.

of which Progressive Direct Insurance Company is the Appellant.

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

INTRODUCTION

Respondent Richard Kenneth Weatherford, Jr. submits this Reply in further support of his Motion to Dismiss Appeal and in response to Appellant Progressive Direct Insurance Company's ("Progressive") Return filed February 27, 2026.

Progressive's counsel told Judge Van Slambrook exactly why Progressive refused to comply with the Amended Order. At the January 7, 2026 contempt hearing, counsel explained:

> "[T]his is not a situation where justice could possibly be served by complying and then waiting for a final order later on to appeal. This is one that once the toothpaste is out of the tube, and justice has been served, and inequity has occurred, and therefore that can't be undone. Therefore Progressive Direct is not in a position where it feels like it can comply with that order."

(Ex. I to Resp.'s Mot. at 6.) Moments earlier, the Court had asked Progressive's counsel directly: "Progressive is inviting a contempt citation by willfully failing to comply with Judge McCutchen's order; is that right, Mr. Thompson?" Counsel answered: "Yes, Your Honor." (*Id.*)

The toothpaste example reveals the problem with Progressive's entire position. The "toothpaste" Progressive feared was irreversible disclosure of allegedly privileged documents to Respondent. But the Amended Order did not require disclosure to Respondent — it required submission of a privilege log to the Court, the standard mechanism through which in camera review occurs before any disclosure to a party takes place. No toothpaste leaves the tube when a judge reviews a privilege log. Progressive manufactured contempt before the order it actually feared — production to Respondent — was ever entered. The appeal should be dismissed.

ARGUMENT

As a threshold matter, Progressive argues that the January 28, 2026 contempt order is independently appealable as a final order under *Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999), and that this alone defeats the Motion to Dismiss. Respondent does not dispute that a contempt order is a final appealable order. The question, however, is not whether the contempt order is appealable — it is what that contempt order meaningfully puts before this Court. Judge Van Slambrook held Progressive in contempt for three failures: producing no documents, submitting no privilege log, and paying no costs. (Ex. J to Resp.'s Mot. at 2, ¶¶ 6–8.) The first and third obligations carried forward from Judge McCutchen's initial September 19, 2025 Order. The privilege log obligation was new — it was the specific procedural accommodation Judge McCutchen's Amended Order added in direct response to Progressive's own Rule 59(e) motion. It is that new requirement — the one Progressive itself requested and then refused — that forms the heart of this motion to dismiss. Progressive cannot use deliberate refusal of a procedure it demanded as a vehicle to obtain appellate review of the underlying work product ruling it disagrees with.

I. The Order Progressive Refused Required a Privilege Log, Not Production to Respondent.

Progressive correctly notes that *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986), requires only two steps: refuse to comply with a discovery order, and be held in contempt. *Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882. Respondent does not dispute that those two steps occurred here. What Respondent disputes is that

Whetstone immunizes a party that requested a procedure, obtained it, and then deliberately refused to participate in order to engineer the contempt citation *Whetstone* requires so it can seek immediate appeal. Progressive's own footnote concedes that immediate appeal requires "manufactured" contempt. (Return at 7, n.1.) What it cannot explain is why a party that engineers that contempt by refusing the very procedure it demanded should receive the benefit of a pathway designed to protect parties from genuine discovery compulsion.

That harm never arose here. The Amended Order did not require production to Respondent. It required submission of a privilege log to the Court — enabling the Court to evaluate privilege claims in chambers before deciding whether to order production at all. Submitting a log to a judge discloses nothing privileged to an adversary. Progressive refused to comply before any order of production to Respondent was ever entered. That is not the principled refusal *Whetstone* contemplates — it is manufactured appellate jurisdiction. *Whetstone* was never intended to be weaponized in this manner.

By requesting in camera review and then refusing the log necessary to conduct it, Progressive did not just preserve a right—it usurped the trial court's function. If a litigant can request a remedy, receive it, and then declare that remedy 'unacceptable' to trigger an immediate appeal, the trial court loses all power to manage discovery. This effectively converts the Court of Appeals into a 'Discovery Master' for every insurance company dissatisfied with a trial judge's scheduling order.

II. Progressive Waived the In Camera Argument by Failing to Request It Before the August 20 Hearing, Then Obtained the Relief It Asked For and Refused to Use It.

Progressive's Return asserts that Judge McCutchen erred by failing to conduct in camera review before ordering production. (Return at 3.) That argument is waived. Progressive attended the August 20, 2025 hearing, argued its work product position at length, and never once requested in camera review — not in a pre-hearing motion, not orally at the hearing itself. Progressive never mentioned in camera review until after Judge McCutchen ruled against it as Judge Van Slambrook explained in his Contempt Order. (Ex. J to Resp.'s Mot. at 2, ¶ 2.) That timing speaks for itself. A party cannot sit silent on a procedural right, lose on the merits, and then raise that right for the first time on appeal.

Having raised the argument for the first time in its Rule 59(e) motion, Progressive wanted Judge McCutchen to reconsider its privilege claims before ordering production. It got that second bite at the apple. The Amended Order required a document-by-document privilege log submitted to the Court — the threshold step that makes orderly in camera review possible — so the Court could evaluate each claim before deciding what to order produced. As Judge Van Slambrook found, the Amended Order "specifically accommodated Progressive's concerns regarding privilege by ordering the creation of a privilege log — the very relief Progressive sought in its Motion to Alter or Amend." (Ex. J to Resp.'s Mot. at 2, ¶ 4.)

Progressive now tells this Court it "did not request a 'privilege log procedure'" and is "not familiar with the phrase." (Return at 3.) Its complaint is with a label, not

a procedure. Whether the process is called a privilege log procedure, an in-camera review procedure, or anything else changes nothing about what Progressive requested —judicial evaluation of its alleged privilege claims before any production to Respondent — and what it refused to do. South Carolina does not permit a party to obtain a ruling it requested and then complain of it on appeal. "One may not on review complain of a ruling which he has invited or induced the trial court to make." *Floyd v. Thornton*, 220 S.C. 414, 425-26, 68 S.E.2d 334, 339 (1951).

III. Progressive Asked for In Camera Review but Refused the Privilege Log Required to Conduct It — These Positions Cannot Coexist.

The subpoena requested materials created prior to retention of counsel and expressly excluded opinion work product, mental impressions, analysis, opinions, financial evaluations, and reserve information. (Ex. B to Resp.'s Mot) The very protections Progressive claims were stripped away were carved out of the subpoena from the beginning. The Court Ordered production of the claim file prior to retention to counsel (April 7, 2025) with redaction for financial reserve amounts. (Ex. E to Resp.'s Mot at 9).

Progressive argues simultaneously that the Circuit Court denied it an opportunity for in camera review (Return at 4) and that it never requested a privilege log submitted to the Court (Return at 8). These positions are irreconcilable. A privilege log submitted to the Court is not a different form of relief from in camera review — it is the procedural prerequisite without which in camera review cannot occur. To say "I asked for in camera review but not a privilege log" is no different from saying "I asked for a trial but not jury selection." Progressive cannot claim it

was denied in camera review while simultaneously denying it was required to take the step that makes in camera review possible. The attempt to distinguish the two elevates form over substance.

The Amended Order did not strip Progressive of privilege protection. It preserved both attorney-client privilege and work product protection while requiring Progressive to identify specific documents and specific privileges claimed rather than applying a blanket date-based cutoff. (Ex. G to Resp.'s Mot. at 7.) Had Progressive complied, its legitimate privilege claims would have received the in camera review it said it wanted. Its refusal to comply resulted in waiver — a consequence entirely of its own making.

CONCLUSION

He who comes into equity must come with clean hands. Progressive cannot come to this Court seeking appellate review of a procedure it demanded, obtained, and then deliberately refused to use. Permitting this appeal would convert the Court of Appeals into a de facto discovery master for every insurer dissatisfied with a circuit court's privilege ruling.

Progressive never requested in camera review before the August 20 hearing — the argument appeared only after it lost. It then obtained exactly what it asked for in its Rule 59(e) motion and refused to use it. Its quarrel with Respondent's label for that procedure does not change what was requested or granted. The subpoena it defied never sought the entire claim file — it sought ordinary claim handling materials prior to retention of counsel and expressly excluded the very protections

Progressive claims were at stake. And its own counsel confirmed on the record that the refusal was deliberate and strategic, not a principled effort to protect any privilege. That is the definition of invited error.

The *Whetstone* pathway exists to protect parties from genuine discovery compulsion — not to manufacture appellate jurisdiction by requesting procedures and then refusing to participate in them. Respondent respectfully requests that this Court dismiss this appeal and affirm the trial courts' orders, including the finding that Progressive waived any claim of privilege by refusing to submit the ordered privilege log.

Because the only final, appealable order properly before this Court is the January 28, 2026 contempt order, any review should be confined to that order alone. In the alternative, should the Court decline to dismiss the appeal, Respondent respectfully requests that the Court limit the scope of review accordingly and decline to consider the underlying discovery rulings.

Respectfully submitted,

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March 2, 2026
Mount Pleasant, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Charles J. McCutcheon, Circuit Court Judge
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PROOF OF SERVICE

I certify that I have served the Respondent's Reply in Support of Motion to Dismiss Appeal upon all counsel of record by depositing a copy of same in the United States Mail, via US mail and email, on March 2, 2026, addressed to all attorneys of record, addressed as follows:

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Dated: March 2, 2026

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March 2, 2026

VIA EMAIL - (ctappfilings@sccourts.org)
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RE: Richard Kenneth Weatherford v. Progressive Direct Insurance Co.
Appellate Case No.: 2026-000301
Civil Action No.: 2025-CP-08-00820

Dear Ms. Kitchings:

Attached for filing please find the following:

1. Respondent's Reply in Support of Motion to Dismiss Appeal
2. Proof of Service of the Reply in Support of Motion to Dismiss Appeal

Thank you for your attention to this matter.

Very Truly Yours,

s/*Trip Riesen*

Enclosures as stated

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