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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Charles J. McCutchen, Circuit Court Judge
The Honorable 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.

Progressive Direct Insurance Company…………………………………..... Third Party

of which Progressive Direct Insurance Company is the Appellant.

**INITIAL BRIEF OF RESPONDENT**

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**II.** Whether Progressive's deliberate engineering of the contempt order — acknowledged in its own appellate brief — bars this appeal under the invited error doctrine.

**III.** Whether Judge McCutchen abused his discretion in finding that a *Tyger River* policy-limits demand letter does not automatically trigger work product protection for all subsequent claim log notes when Progressive's adjusters continued active settlement negotiations for weeks after the demand, no defense counsel was retained for over five weeks, and settlement negotiations did not break down until April 7, 2025 — particularly in the absence of any binding South Carolina appellate authority supporting the contrary position.

**IV.** Whether Progressive waived its in camera review argument by failing to raise it before the August 20, 2025 hearing, and whether the invited error doctrine bars Progressive from challenging a privilege-evaluation procedure it obtained in its Rule 59(e) motion and then deliberately refused to use.

**V.** Whether Respondent independently demonstrated substantial need under Rule 26(b)(3), SCRCP, for materials in Progressive's exclusive possession reflecting its investigation into Davidson's conduct and alleged impairment.

**VI.** Whether Judge McCutchen's $500.00 cost award pursuant to Rule 37(a)(4), SCRCP, was an abuse of discretion.

**VII.** Whether Judge Van Slambrook's $2,125.00 attorney's fee award pursuant to Rule 37(b)(2), SCRCP, was an abuse of discretion.

**VIII.** Whether Judge Van Slambrook's per diem sanction of $25.00 per day for seventy-one days of deliberate noncompliance, totaling $1,775.00, was an abuse of discretion.

## STATEMENT OF THE CASE

This action arises from a November 22, 2024 hit-and-run collision in which Defendant Timothy James Davidson struck Respondent Richard Kenneth Weatherford, Jr. and fled the scene. (Pl.'s Suppl. Mem. in Supp. of Rule to Show Cause, Aug. 13, 2025, at 1.) Davidson claimed a medical emergency; Respondent's investigation revealed three prior DUI convictions and a fourth charge reduced to reckless driving, and a statement from Davidson's adult son that his father "had a drinking problem." (Pl.'s Suppl. Mem. in Supp. of Rule to Show Cause, Aug. 13, 2025, at 1–2.) Respondent filed an Amended Complaint on March 18, 2025. (Amd. Summons & Complaint, filed March 18, 2025).

Respondent served a subpoena duces tecum on March 21, 2025 seeking the claim file of Davidson's insurer, Appellant Progressive Direct Insurance Company ("Progressive"). The subpoena sought materials created in the ordinary course of business <u>prior</u> to Progressive's retention of counsel and, by its own terms, excluded "subjective mental impressions, analysis, opinions, evaluations, and/or financial evaluations and reserves setting of Progressive Direct Insurance Company and/or its legal counsel." (Respondents Motion and Rule to Show Cause - attached as Ex A Subpoena Duces Tecum to Progressive Direct Ins. Co., filed May Mar. 20, 2025.)

Progressive produced some documents but withheld claim log notes, asserting work product protection for all entries created after February 18, 2025 — the date of Respondent's *Tyger River* demand letter — and separately asserting irrelevance for coverage and reserve notes. (Progressive's Initial Privilege Log, Ex. B to Pl.'s Rule to Show Cause.) Progressive served an initial privilege log applying that blanket date-based cutoff without document-by-document analysis. (Progressive's May 5, 2025,Response Letter/Initial Privilege Log, Ex. B to Pl.'s Rule to Show Cause.) Respondent moved for a Rule to Show Cause. (Pl.'s Rule to Show Cause, May 20, 2025.)

At the August 20, 2025 hearing, Progressive argued its work product position but never requested in camera review. (Hr'g Tr., Aug. 20, 2025.) On September 19, 2025, Judge McCutchen granted Respondent's motion. (Order Granting Rule to Show Cause, Sept. 19, 2025.) The Order found Progressive's date-based cutoff "arbitrary," noting that Progressive's adjusters actively engaged in settlement negotiations on March 6, April 4, and April 7, 2025; that settlement negotiations did not break down until April 7; that an Answer was filed on April 8; and that Progressive's position was inconsistent with prior rulings against Progressive Direct on substantially similar arguments— including a ruling against the same law firm in *Brown v. Owens* (C.A. No. 2022-CP-39-01116) (Order Granting Rule to Show Cause, Sept. 19, 2025.), a copy of which Respondent provided to defense counsel on June 23, 2025 — nearly two months before the August 20 hearing. (Pl.'s Memorandum in Support of Rule to Show Cause, July 10, 2025.) The Court set the appropriate cutoff date as April 7, 2025 — when negotiations finally collapsed — and awarded $500 in costs under Rule 37(a)(4), SCRCP. (Order Granting Rule to Show Cause, Sept. 19, 2025.)

On September 26, 2025, Progressive filed a Rule 59(e) Motion to Alter or Amend — criticizing Judge McCutchen for not conducting in camera review and offering for the first time to provide its claim log "for the Court's in camera review … upon the Court's request." (Progressive's Mot. to Alter or Amend, pp. 2-3, Sept. 26, 2025.) The motion disclosed for the first time that Progressive did not retain defense counsel until March 24, 2025 — more than five weeks after the February 18 cutoff it had applied. (Progressive's Mot. to Alter or Amend, p. 4, Sept. 26, 2025.)

On October 8, 2025, Judge McCutchen entered an Amended Order accommodating Progressive's request. The Court directed Progressive to produce the entire claims handling file through April 7, 2025 and, to the extent Progressive contended any materials were privileged, to submit an updated privilege log to the Court and opposing counsel within twenty days. (Amended Order, pp. 9-10, Oct. 8, 2025.) As Judge Van Slambrook later found, the Amended Order provided "the very relief Progressive sought in its Motion to Alter or Amend." (Order of Contempt, p. 4, Jan. 28, 2026.)

Progressive produced nothing, submitted no privilege log, and paid no costs. (Order of Contempt, Jan. 28, 2026.) At the January 7, 2026 contempt hearing before Judge Van Slambrook, when asked directly whether Progressive was inviting contempt by willfully refusing to comply, counsel answered: "Yes, Your Honor." (Tr. at 6:7–10.) Appellant's Counsel then 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."

(Tr. at 6:10–20.) Progressive's own appellate brief repeats the admission: "Progressive Direct declined to comply with the Circuit Court's Orders so as to accept an appealable order holding it in contempt." (Appellant's Br. at 12.) As explained below, no toothpaste leaves the tube when a judge reviews a privilege log.

On January 28, 2026, Judge Van Slambrook held Progressive in civil contempt, finding: (1) noncompliance "was not merely willful — it was intentional and strategic"; (2) Progressive "cannot claim justification for ignoring an accommodation it sought and received"; and (3) "[h]aving failed to submit the privilege log this Court ordered, Progressive has waived any claim of privilege for the materials covered by the October 8, 2025 Amended Order." (Order of Contempt, Jan. 28, 2026.) The Court awarded $500 in previously ordered costs, $2,125 in attorney's fees representing 4.25 hours at $500 per hour, and a $25 per diem sanction for seventy-one days of deliberate noncompliance, totaling $1,775. (Order of Contempt, Jan. 28, 2026.)

Progressive's appellate brief challenges only Judge McCutchen's underlying privilege rulings. It presents three arguments directed at those orders and asks this Court to reverse them. It does not separately challenge Judge Van Slambrook's Findings of Fact or Conclusions of Law, the privilege waiver finding, the attorney's fee award, or the per diem sanction. Progressive filed its Notice of Appeal on February 11, 2026. (Notice of Appeal, Feb. 11, 2026.). Respondent moved to dismiss the appeal; this Court denied that motion. Appellant filed its initial brief on June 24, 2026 and this brief follows.

## STANDARD OF REVIEW

Discovery sanctions are reviewed for a clear abuse of discretion. *Halverson v. Yawn*, 328 S.C. 618, 621, 493 S.E.2d 883, 884 (Ct. App. 1997); *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 541–44, 489 S.E.2d 679, 681–82 (Ct. App. 1997). In the discovery-sanctions context, an abuse of discretion may be found only where the appellant shows the trial court's decision was "without reasonable factual support" and resulted in prejudice to the appellant. *Halverson*, 328 S.C. at 621, 493 S.E.2d at 884. More broadly, an abuse of discretion occurs only when the trial court's order "is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495 (2016); accord *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The appellant bears the burden of demonstrating abuse and of presenting a sufficient record. *Halverson*, 328 S.C. at 621, 493 S.E.2d at 884.

Progressive argues that rule interpretation is reviewed de novo and that interpretation of Rule 26(b)(3) therefore commands no deference. But the dispute here is not about what the phrase "in anticipation of litigation" means — *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010), supplies that standard and Judge McCutchen applied it correctly. The question is whether his application of that standard to the facts of this case was an abuse of discretion. That is a mixed question reviewed under the deferential abuse-of-discretion standard, not de novo.

Civil contempt orders are reviewed under the same abuse-of-discretion standard and reversed only if based on "incorrect law or inadequate evidence." *Campione v. Best*, 435 S.C. 451, 458, 868 S.E.2d 378, 381 (Ct. App. 2021). As demonstrated below, Judge Van Slambrook's contempt order rests on the correct legal standard and on overwhelming, largely uncontested evidence.

## ARGUMENT

### I. Progressive had no legitimate basis to refuse compliance because no disclosure of the disputed privileged materials was ever ordered or imminent

The right to refuse a discovery order, suffer contempt, and appeal that contempt order rests on a specific justification: Once privileged material is disclosed to an adversary, the privilege is permanently destroyed and no appellate remedy can restore it. That irreversibility — and only that irreversibility — supplies the rationale for the refuse-and-appeal strategy Progressive employed here. *See Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). That rationale has no application to this case. The October 8, 2025 Amended Order did not require Progressive to disclose any materials it claimed were privileged. It required Progressive to submit an updated privilege log to the Court and to opposing counsel — a list of withheld documents with the basis for each claim of privilege. Submitting a privilege log to opposing counsel does not disclose privileged material. It discloses only that certain documents exist and that Progressive claims a privilege over them. The Court would then review the documents privately, in camera, before deciding whether any production to Respondent was warranted. If the Court found the materials privileged, no production to Respondent would occur. If it found them producible, Progressive could refuse that production order, accept contempt at that stage, and appeal with a genuine irreversibility argument in hand.

Progressive refused step one — the privilege log — to avoid reaching the in camera step, and then invoked the refuse-and-appeal strategy as though irreversible disclosure had been imminent. It was not. The tube Progressive claimed to be protecting never came close to being opened. A party that manufactures the conditions for appellate review, in circumstances where compliance would have caused no irreversible harm, cannot claim the benefit of a doctrine designed to prevent that harm. The invited error doctrine, addressed in Argument II, independently bars relief.

## II. Progressive engineered the contempt order it now appeals

Progressive's own appellate brief settles the nature of this appeal. In Section VI, Progressive states: "Progressive Direct declined to comply with the Circuit Court's Orders so as to accept an appealable order holding it in contempt." (Appellant's Br. at 12.) That statement is a judicial admission that the contempt was deliberate and strategic — not a principled defense of privilege, not an impossible choice between disclosure and contempt, but a calculated litigation maneuver. South Carolina does not permit a party to invite a ruling and then attack 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). In *State v. Pam*, a prosecutor who deliberately created an adverse ruling to generate an appellate test case was denied review because "[t]he adversary system cannot countenance such maneuvers." 101 Wn.2d 507, 511–12, 680 P.2d 762 (1984), overruled on other grounds by *State v. Olson*, 126 Wn.2d 315 (1995).

Progressive's counsel invoked a "toothpaste" metaphor to explain the refusal: once the toothpaste is out of the tube, justice has been served, inequity has occurred, and it cannot be undone. (Tr. at 6:10–20.) The metaphor is proper; the application is wrong. The toothpaste stays in the tube through every step of the applicable sequence until a court orders production to the adversary. No toothpaste leaves the tube when a judge privately reviews a privilege log. No toothpaste leaves the tube when opposing counsel reviews an index identifying withheld documents and the privilege asserted. Progressive could have submitted the privilege log, obtained in camera review, and refused compliance only if and when the Court ordered actual production to Respondent. It refused step one to avoid reaching step four.

The refusal itself is telling. A party with genuinely privileged materials participates in the in camera procedure designed to protect them, because that procedure prevents disclosure to the adversary. The only risk a compliant party faces is a judicial determination that its materials do not qualify for the protection claimed. Progressive's refusal to submit the updated privilege log — before any document was reviewed, before any production to Respondent was ordered — is more consistent with a party that feared judicial scrutiny than one protecting legitimate privilege. This Court should not reward that strategy.

Progressive argues that it did not request a privilege log procedure but rather in camera review of redacted documents. Its complaint is with a label, not a procedure. Progressive asked the circuit court to evaluate its privilege claims before ordering any production to Respondent — which is precisely what a privilege log and in camera review accomplish. Whether that process is called a privilege log procedure, an in camera review procedure, or anything else changes nothing about what Progressive requested and what it refused to do.

That refusal had consequences. When Progressive disclosed for the first time in its Rule 59(e) motion that counsel was purportedly retained on March 24, 2025, the Amended Order required an updated document-by-document privilege log — the threshold step necessary for any meaningful in camera review. Progressive refused, leaving this Court with no updated log and no documents to evaluate.

## III. Judge McCutchen did not abuse his discretion in finding that the Tyger River demand did not automatically trigger work product protection

Before addressing the specific findings, two threshold points frame the merits analysis.

First, Respondent is unaware of any binding South Carolina appellate authority holding that claim log notes created by a liability insurer after receipt of a *Tyger River* demand letter, during ongoing settlement negotiations with the claimant's counsel, are protected work product. That absence of authority is not, standing alone, the basis for affirmance — it matters because *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010), already supplies the binding legal standard, and Progressive does not identify any authority holding that Judge McCutchen misapplied it to these facts. The South Carolina Court of Appeals and Supreme Court have not addressed this specific factual scenario, precisely because discovery orders of this kind are rarely appealed and each case is factually different. The cases that do exist — *Brown v. Owens*, *Holder v. Lebo*, and the other circuit court orders cited in the September 19, 2025 Order — apply the *Tobaccoville* standard uniformly against Progressive's position and represent the considered judgment of experienced circuit judges confronting materially identical facts. Progressive cannot show Judge McCutchen's findings were "controlled by an error of law" when it cannot point to a single binding South Carolina authority holding that his application of the governing standard to these facts was wrong. The convergence of circuit court authority supporting his ruling is itself evidence that his decision fell well within the range of reasonable judicial judgment and discretion.

Second, Progressive presents this dispute as a rule-interpretation question commanding de novo review. It is not. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010), supplies the legal standard: the question is whether documents were prepared "because of the prospect of litigation." Judge

McCutchen applied that standard. **Whether his application to the specific facts of this case — the ongoing settlement discussions, the five-week gap before counsel retention, the April 7 breakdown — constitutes an abuse of discretion is a fact-intensive inquiry reviewed deferentially**.

Progressive's proposed bright line also produces results that cannot be reconciled with common sense or with the text of Rule 26(b)(3). A lawsuit may be filed and never served. A lawsuit may be filed while the insurer's adjuster continues to negotiate with Respondent's own counsel thereafter— as happened here. The September 19, 2025 Order found expressly that Progressive's adjusters contacted Respondent's counsel for settlement discussions on March 6, April 4, and April 7, 2025 — all after this lawsuit was initiated on March 10, 2025. An adjuster who calls Respondent's counsel for settlement negotiations on April 4 is not preparing for litigation regardless of whether a complaint sits unfiled in the clerk's office. She is trying to prevent it. The primary motivating purpose of her notes from that call is settlement, not litigation preparation — and that is true whether the call happens on March 9 or March 11. The date a complaint is filed is an administrative act. It does not instantaneously transform an adjuster's state of mind. Rule 26(b)(3) protects documents prepared because of the prospect of litigation — a standard that looks to the creator's purpose, not to courthouse records the creator may never have seen. *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530. Judge McCutchen applied exactly that standard when he found that Progressive's adjusters remained in claims evaluation mode through April 7 — the date negotiations actually collapsed and the purpose of any further notes actually shifted. That is a fact-specific finding reviewed for abuse of discretion, not a legal error subject to de novo correction.

Progressive isolates one imprecise sentence from the September 19, 2025 Order — that "South Carolina law does not recognize any 'work-product' privilege for pre-litigation files created by insurance adjusters" — and treats it as the categorical rule this Court must reverse. (Sept. 19, 2025 Order at 4.) Read in isolation, that sentence overstates the law: Rule 26(b)(3), SCRCP contains no post-filing cutoff, and *Tobaccoville* looks to whether a document was prepared because of the prospect of litigation, not to whether a lawsuit has already been filed. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010). But that sentence did not drive Judge McCutchen's ruling. The very next paragraphs of the Order apply the correct *Tobaccoville* standard to this record: Progressive continued active settlement negotiations with Respondent's counsel on March 6, April 4, and April 7, 2025, and did not retain defense counsel until after that conduct occurred. (Sept. 19, 2025 Order at 4–5.) Those findings — not the isolated sentence Progressive extracts — support the conclusion that Progressive's post-demand conduct constituted routine claims handling rather than litigation preparation. Because the record independently supports the correct result, this Court may affirm on that basis regardless of any imprecision in the Order's language. See Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723–24 (2000).

Third, Progressive asserts that the circuit court relied "solely" on first-party case law in rejecting its work product claim. That characterization is refuted by the September 19, 2025 Order itself. Judge McCutchen quoted *Holder v. Lebo* twice at length — a third-party automobile liability case decided by then-Circuit Judge Hill. He relied centrally on *Brown v. Owens* — a third-party automobile liability claim against Progressive Direct handled by the same law firm now representing it on appeal — quoting it for the finding that Progressive's demand-letter cutoff was "arbitrary and contradicted by Progressive's own actions and words." He cited *Moulton v. Lowe's Home Centers* — Judge Van Slambrook's own prior third-party order —for the proposition that claim file contents remain discoverable when created during routine claims handling. Judge McCutchen relied on *Langdon v. Champion*, 752 P.2d 999, 1005–06 (Alaska 1988), for the rule that the work product cutoff occurs when "the insurance adjuster assigned the file to an attorney for the insured's defense." The only first-party case in the Order, *Harper v. Auto-Owners*, appeared in the background discussion of general principles and did not drive the holding. Progressive has inverted the Order's actual reasoning: it elevates the one background citation while ignoring the multiple directly-on-point third-party orders that provided the persuasive authority for the result. This Court can verify that by reading the September 19, 2025 Order.

Before addressing each finding, one correction is necessary to Progressive's characterization of what was withheld. Progressive presents this as a dispute over two narrow categories: coverage-and-reserve notes irrelevant to a car crash, and a modest set of post-demand notes created in anticipation of litigation. The second category is not modest. It encompasses every claim log entry from February 18 through April 7, 2025 — the most active investigative period of this claim. Progressive's privilege log identifies these entries only as claim log pages "000015-000001" for the period February 8 through April 15, 2025 — a reversed and unintelligible page range that leaves the Court and Respondent unable to determine how many pages were withheld or what they contain. A privilege log that cannot answer those basic questions fails its purpose and provides no evidentiary basis for the protection Progressive claims. (Progressive's Response Letter/Initial Privilege Log, Ex. B to Pl.'s Rule to Show Cause.) Those entries likely would document what Progressive's investigators learned about Davidson's three prior DUI convictions and a fourth charge reduced to reckless driving; his adult son's statement that his father "had a drinking problem"; the basis for Davidson's claimed medical emergency; and whatever Progressive's adjusters discovered to prompt an abrupt reversal — from refusing to tender property damage limits to offering full limits on April 4, 2025, without receiving any new medical records. (Progressive Claims Information Letter from Jessica Diorio, Mar. 6, 2025, Ex. E to Pl.'s Suppl. Mem.; Email from Jennifer

Taylor, Apr. 4, 2025, Ex. F to Pl.'s Suppl. Mem.) Progressive characterizes these materials as limited and peripheral. What an eleven-week claim log from this period would actually contain is anything but.

**a. Progressive's February 18, 2025 cutoff was arbitrary.**

The September 19, 2025 Order found that Progressive's blanket demand-letter cutoff lacked factual and legal support, and that conclusion is backed by Progressive's own admissions. South Carolina does not recognize a rule that receipt of a demand letter automatically renders all subsequent claim file materials protected work product. As then Circuit Judge Garrison Hill explained in *Holder v. Lebo*, C.A. No. 2011-CP-23-4455 (C.P. Greenville Cty. Feb. 21, 2012) (Hill, J.) — quoted by Judge McCutchen in the September 19, 2025 Order:

> "[T]he phrase in anticipation of litigation means something more than the possibility that a lawsuit looms. Some courts have unthinkingly, blithely gestured to our 'litigious society' and waved on the conclusion that an insurance adjuster anticipates litigation with every breath"; "such a notion … cannot long withstand the scrutiny of reason." (*Holder v. Lebo*, C.A. No. 2011-CP-23-4455 (C.P. Greenville Cty. Feb. 21, 2012), quoted in Order Granting Rule to Show Cause, Sept. 19, 2025.)

The standard requires inquiry into whether each document was created with anticipated litigation as the primary motivating purpose — not whether a demand letter had arrived.

> A useful guidepost adopted by courts in evaluating when anticipation of litigation genuinely begins is the date the insurer assigned the file to defense counsel — because a seasoned adjuster who genuinely anticipates litigation retains a lawyer without delay and does not continue unilaterally investigating without legal guidance. *Holder v. Lebo*, C.A. No. 2011-CP-23-4455 (C.P. Greenville Cty. Feb. 21, 2012) (Hill, J.); see also *Wikel v. Wal-Mart Stores, Inc.*, 197 F.R.D. 493, 495 (N.D. Okla. 2000) ("[I]nvolvement of an attorney is a highly relevant factor" to the anticipation of litigation inquiry).

Respondent does not contend that work product protection requires attorney involvement. Rule 26(b)(3), SCRCP, extends protection to materials prepared by or for a party's insurer, consultant, or agent, without regard to whether counsel has been retained. But the absence of counsel remains highly probative evidence of an adjuster's purpose. As Judge Hill explained, "it is not necessary to have retained counsel to invoke protection of the work product doctrine," but "the point at which counsel was engaged is relevant" because a seasoned adjuster who genuinely anticipates litigation "will not delay in hiring a lawyer." *Holder v. Lebo*, C.A. No. 2011-CP-23-4455 (C.P. Greenville Cty. Feb. 21, 2012) (Hill, J.). Progressive's own decision not to retain counsel until March 24, 2025 is not, standing alone, dispositive, but it corroborates the objective indicia already in the record — continued settlement negotiations, routine investigatory conduct, and the absence of any litigation-specific activity until negotiations broke down on April 7.

Progressive did not retain defense counsel until purportedly March 24, 2025 — more than five weeks after the February 18 cutoff it applied to its own claim log. (Progressive's Mot. to Alter or Amend, p. 4, Sept. 26, 2025.) That delay, under this formulation, is evidence that Progressive itself did not genuinely anticipate litigation on February 18.

Progressive's argument reduces to this: the presence of *Tyger River* language in the demand letter proves anticipation as of February 18. That argument proves too much. *Tyger River* demand language is not specific evidence of anticipated litigation in this particular claim — it is boilerplate that appears in virtually every third-party automobile policy-limits demand in South Carolina. Every experienced adjuster processes this language routinely. Adopting Progressive's rule would effectively immunize claims investigation from discovery in virtually every South Carolina automobile tort case — precisely the result Judge Hill warned against. (*Holder v. Lebo*, C.A. No. 2011-CP-23-4455 (C.P. Greenville Cty. Feb. 21, 2012), quoted in Order Granting Rule to Show Cause, Sept. 19, 2025.)

The demand letter Progressive characterizes as creating an "objectively reasonable anticipation of litigation" was, on its face, a conditional offer of settlement — not a threat of suit. The word "settlement" appears throughout the letter. Its own closing paragraph states it was "submitted for settlement purposes only in this underlying claim." The bad faith language Progressive emphasizes was conditional and prospective: it described what the letter would be used to establish only if Progressive refused to tender and only if a subsequent excess verdict were obtained against Davidson. That contingency had not triggered on February 18. It could only trigger if Progressive chose not to pay.

That is the critical point Progressive's brief omits entirely. Progressive controlled whether litigation would follow. A party that chooses the path leading to litigation cannot treat the moment it received the settlement offer as the moment it reasonably anticipated that litigation. Under Progressive's logic, every insurer that receives a Tyger River demand and declines to tender would automatically immunize its entire post-demand investigation from discovery — precisely because it chose to litigate rather than settle. Moreover, the lawsuit that followed named Davidson —

not Progressive — as the defendant. Progressive was never sued. The bad faith exposure Progressive feared could arise only years later, after a verdict against Davidson exceeding policy limits and an assignment of Davidson's bad faith claim to Respondent — a remote, multi-step contingency that had not occurred and cannot be manufactured into an immediate anticipation of litigation on February 18, 2025.

**b. Progressive continued routine claims handling after the demand.**

The September 19, 2025 Order found that Progressive's adjusters communicated with Respondent's counsel on March 6, April 4, and April 7, 2025 — all after this lawsuit was filed on March 10, 2025 — and that these discussions confirmed Progressive "remained in claims evaluation mode, not litigation preparation mode, until negotiations finally collapsed on April 7, 2025." (Order Granting Rule to Show Cause, Sept. 19, 2025.) Progressive argues that simultaneous negotiation and anticipation of litigation can coexist, which is true as a general matter — but the question is what Progressive actually did on this claim. The record shows its adjusters were attempting to settle the case on specific dates after both the demand letter and the filing of the lawsuit. Progressive adds that it transferred the claim to a "litigation adjuster" on February 18 as further proof of anticipated litigation. (Appellant's Br. at 5.) But the same adjuster then continued negotiating settlement on March 6, April 4, and April 7. Whatever title Progressive attached to the assignment, the external conduct is what the September 19, 2025 Order correctly evaluated.

In *Brown v. Owens*, C.A. No. 2022-CP-39-01116 (C.P. Pickens Cty. Sept. 27, 2023) (Kinlaw, J.), Progressive and the same law firm now representing it made this identical argument before Judge Kinlaw — claiming a specific demand-letter date as the point at which the claim file became protected work product. Judge Kinlaw found that cutoff "arbitrary and contradicted by Progressive's own actions and words," because Progressive continued to investigate the claim, gather information, and negotiate with Respondent's counsel after receiving the demand. (*Brown v. Owens*, C.A. No. 2022-CP-39-01116 (C.P. Pickens Cty. Sept. 27, 2023).)[1] Progressive received Judge Kinlaw's order on June 23, 2025 — nearly two months before the August 20, 2025 hearing at which it pressed the identical argument again before Judge McCutchen — as Respondent's September 18, 2025 supplemental authority letter to Judge McCutchen confirmed. (Pl.'s Letter re: Suppl. Authority, Sept. 18, 2025.) The September 19, 2025 Order quoted *Brown v. Owens* and stated: "The circumstances in the present case mirror those in Owens. The same law firm representing Progressive in Owens is making these same arguments in the present case." (Order Granting Rule to Show Cause, Sept. 19, 2025.) The same conclusion was reached by Judge Culbertson just weeks earlier, on June 9, 2025, in *Currie v. Lackey*, Case No. 2024-CP-08-02427 (C.P. Berkeley Cty. June 9, 2025) (Culbertson, J.) — another Berkeley County case in which both the plaintiff's counsel and State Farm continued to investigate, analyze, and evaluate the claim after the offer of settlement letter. Judge Culbertson found the insurer's assertion that work product protection attached as of the settlement offer date "without merit" and ordered production of all pre-litigation claims file materials through the date defense counsel was retained. (*Currie v. Lackey*, Case No. 2024-CP-08-02427 (C.P. Berkeley Cty. June 9, 2025).) A party that recycles a losing argument on materially identical facts, after receiving adverse

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[1] *Brown v. Owens*, C.A. No. 2022-CP-39-01116 (C.P. Pickens Cty. Sept. 27, 2023) (Kinlaw, J.), *Holder v. Lebo*, C.A. No. 2011-CP-23-4455 (C.P. Greenville Cty. Feb. 21, 2012) (Hill, J.), and *Currie v. Lackey*, Case No. 2024-CP-08-02427 (C.P. Berkeley Cty. June 9, 2025) (Culbertson, J.), are circuit court orders cited not as precedent but for the reasoning Judge McCutchen quoted and applied in the September 19, 2025 Order, and for the pattern they document: that substantially identical arguments were previously considered and rejected against Progressive and its counsel. (Order Granting Rule to Show Cause, Sept. 19, 2025.) As *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530, and Rule 26(b)(3), SCRCP, supply the binding legal standards, the circuit court orders serve only to illustrate their consistent application to facts materially identical to those presented here.

rulings against itself and the same firm, cannot claim its position was substantially justified.

**c. Selective production waived work product protection for the post-demand period.**

Progressive represented that it produced 715 pages of claim file materials. Of those 715 pages, 554 were Respondent's own documents — medical records, bills, and correspondence produced back to Respondent in multiple copies. Progressive thus produced only approximately 161 pages of actual claim file material while simultaneously withholding claim log notes from the same period and holding out the 715-page figure as evidence of a full and good-faith production. Under In re *Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988), selective disclosure constitutes selective waiver. The evidentiary support for this finding is Progressive's own production. (Progressive's Initial Privilege Log and Document Production, Ex. B to Pl.'s Rule to Show Cause.)

**d. The coverage and reserve order was correctly tailored.**

Progressive characterizes the coverage-and-reserve ruling as ordering production of purely financial, proprietary information. That characterization misstates the order. The September 19, 2025 Order expressly permitted redaction of "pure financial reserves amounts unrelated to factual investigation." (Order Granting Rule to Show Cause, Sept. 19, 2025.) What it required was coverage and reserve information bearing on Progressive's actual investigation of the claim — what adjusters learned about Davidson's conduct, his alleged impairment, and the factual basis for Progressive's coverage positions and changes in position. Rule 26(b)(1), SCRCP, extends to any matter "reasonably calculated to lead to the discovery of admissible evidence." Coverage notes reflecting an adjuster's factual investigation are reasonably calculated to lead to admissible evidence about those same facts. The order's targeted permission to redact purely financial amounts demonstrates the care with which it was drawn.

## IV. Progressive waived its in camera argument and cannot challenge the procedure it obtained and then refused to use

Progressive never requested in camera review before or during the August 20, 2025 hearing. It raised the argument for the first time in its Rule 59(e) motion, filed after Judge McCutchen ruled against it. Under *Floyd v. Thornton*, 220 S.C. at 425–26, 68 S.E.2d at 339, an argument withheld until after an adverse ruling is waived and not preserved for appeal. Progressive should have requested in camera review when it filed its response to Respondent's Motion and Rule to Show Cause — not after Judge McCutchen ruled against it. Rule 59(e) is not the vehicle for requesting new forms of relief that were available at the original hearing and simply not sought. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009).

When Progressive did raise in camera review in its Rule 59(e) motion, Judge McCutchen granted the request. (Am. Order, Oct. 8, 2025.) The Amended Order required Progressive to submit a privilege log to the Court and opposing counsel — the mechanism that makes document-by-document in camera review possible. Judge Van Slambrook's contempt order found that the Amended Order provided "the very relief Progressive sought in its Motion to Alter or Amend" and that "Progressive cannot claim justification for ignoring an accommodation it sought and received." (Order of Contempt, Jan. 28, 2026.) Under *Stokes-Craven* and *Halverson*, that finding is entitled to deference.

Progressive relies on *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495–96 (2016), for the proposition that a trial court abuses its discretion by resolving a privilege dispute without in camera review. That case does not require reversal or remand here for three independent reasons.

First, *Stokes-Craven* is factually inapposite. There, the trial court made a positive privilege determination while expressly noting it had "not received a privilege log of these communications" — it was operating in a complete factual vacuum. Id. **Judge McCutchen's factual conclusions did not rest on the contents of the withheld documents. They rested on what Progressive did in the record: continued settlement discussions on specific dates; a blanket cutoff predating Progressive's own counsel's retention by five weeks; selective production from the same period as the withheld materials; and the *Brown v. Owens* pattern. None of those findings required reading the withheld documents**.

Second, *Stokes-Craven* does not create a sua sponte obligation to conduct in camera review regardless of what the parties requested. Because Progressive never raised the argument before the hearing, it is not preserved for appeal under *Floyd* and *Johnson*.

Third, remand for in camera review is moot. *Stokes-Craven* remanded with instructions to "conduct an in camera hearing, review the requested information, and issue a specific ruling." 416 S.C. at 537, 787 S.E.2d at 496. The Amended Order gave Progressive exactly that remedy. Progressive refused it. **Judge Van Slambrook found privilege waived by that refusal.** (Order of Contempt, pp. 5-6, Jan. 28, 2026.) **There are no surviving privilege claims to remand for review.**

Progressive's initial privilege log did not satisfy the Amended Order. It applied a blanket February 18 cutoff with no document-by-document analysis. Progressive's own Rule 59(e) motion disclosed that counsel was not retained until March 24, 2025, meaning materials withheld from February 18 through March 23 could not have been attorney-client privileged. (Progressive's Mot. to Alter or Amend, p. 4, Sept. 26, 2025.) The Amended Order required a proper privilege log measured against the correct legal standard. Progressive refused to provide it.

Progressive's brief contains a footnote asserting Respondent failed to comply with Rule 45(a)(4), SCRCP, by not serving a copy of the subpoena on Davidson before serving it on Progressive. (Appellant's Br. at 5, n.1.) This argument was never raised before the circuit court and is not preserved. *Floyd*, 220 S.C. at 425–26, 68 S.E.2d at 339. Davidson retained counsel, participated in discovery, and has actively defended this case since April 2025. No prejudice exists and no remedy is available.

## V. Respondent independently demonstrated substantial need

Even if the withheld materials were work product — which they are not — Judge McCutchen correctly found Respondent independently demonstrated substantial need under Rule 26(b)(3), SCRCP. The Rule permits production of fact work product upon a showing of substantial need and inability to obtain the substantial equivalent without undue hardship.

Progressive's threshold argument — that the circuit court was required to determine whether the withheld entries were fact or opinion work product before considering substantial need — fails on the state of Progressive's own privilege log. Rather than identify entries individually, Progressive's Initial Privilege Log lumps the entire disputed period — February 18 through April 15, 2025, nearly two months — into a single undifferentiated line item, asserting six different bases (work product, anticipation of litigation, mental impressions, strategy, confidentiality, attorney-client privilege, and legal conclusions) without specifying which basis applies to which entry. (Progressive's Initial Privilege Log, Ex. B to Pl.'s Rule to Show Cause.) A log that cannot identify which claim log notes, if any, contain an adjuster's mental impressions as opposed to routine factual investigation gives the circuit court nothing to analyze — the very problem Progressive now asks this Court to fault the circuit court for not resolving. The log's own stated bases are, moreover, internally inconsistent with the record: it claims attorney-client privilege and describes the entries as prepared after suit was filed for materials dating back to February 18, 2025 — three weeks before suit was filed on March 10, 2025, and over a month before Progressive retained counsel on March 24, 2025. Progressive cannot claim attorney-client privilege for a period in which it had no attorney, or that documents were prepared after suit was filed for documents that predate the suit by weeks. Progressive's own log defeats the threshold distinction it asks this Court to import.

Davidson fled the scene immediately after the collision. He claimed a medical emergency. His adult son told Respondent that his father "had a drinking problem" — a statement made before Davidson knew litigation was possible and directly inconsistent with his medical-emergency defense. Davidson's record reveals three prior DUI convictions and a fourth charge reduced to reckless driving. Progressive's adjusters investigated Davidson in the immediate aftermath of the November 22, 2024 collision — speaking with Davidson, documenting his account of the incident, and investigating the plausibility of his claimed medical emergency — all before any lawsuit was filed and before formal discovery was available. Whatever Davidson told Progressive's adjusters at that time, and whatever their investigation revealed about his alcohol history and conduct at the scene, likely exists in the withheld claim log. That contemporaneous investigative record is in Progressive's exclusive possession. (Pl.'s Suppl. Mem. in Supp. of Rule to Show Cause, Aug. 13, 2025, at 4–5.)

Respondent cannot replicate that record through deposition of Davidson. Davidson is a self-interested witness whose account of why he fled the scene is the central liability question in this case. His post-litigation account directly contradicts his son's contemporaneous statement. No deposition of Davidson can replicate what Progressive's adjusters documented in the immediate aftermath of the collision before any party anticipated litigation. The withheld materials represent the only contemporaneous, pre-litigation record of Davidson's account and of Progressive's investigation into whether alcohol contributed to this collision. That is the model case for substantial need under Rule 26(b)(3), SCRCP.

Progressive argues that Davidson is available for deposition and that Respondent acknowledged seeking the materials partly for "impeachment purposes." (Appellant's Br. at 31.) Neither point defeats substantial need. The availability of a deponent does not eliminate need for contemporaneous investigative notes that may contain facts the deponent is unaware of, did not observe, or may not accurately recall years after the event. And materials that would serve impeachment purposes are not disqualified from protection under the substantial need doctrine — they may simultaneously constitute the only contemporaneous record of facts that go directly to liability. The fact that Respondent identified impeachment value in the materials is a consequence of their evidentiary significance, not a basis for withholding them.

## VI. Judge Van Slambrook's independent findings and sanctions are not separately challenged in Progressive's brief and are independently supported by the record

Progressive's entire brief is directed at reversing Judge McCutchen's underlying privilege rulings. Its conclusion asks this Court to "reverse the orders of the Circuit Court" and, in the alternative, remand to Judge McCutchen for in camera review. (Appellant's Br. at 37.) Progressive does not separately challenge Judge Van Slambrook's Findings of Fact, his Conclusions of Law, the privilege waiver finding, the attorney's fee amount, the per diem sanction, or the legal basis for any of those rulings. It does not mention Judge Van Slambrook by name in any of its three argument sections. Its theory appears to be that reversal of Judge McCutchen's orders automatically unravels the contempt order as a derivative consequence.

That theory fails for a reason Progressive's brief never addresses. Judge Van Slambrook's January 28, 2026 Order rests on independent findings that do not depend on whether Judge McCutchen's privilege analysis was correct. Among those independent findings: Progressive criticized Judge McCutchen for not conducting in camera review; Progressive requested the privilege log and in camera review procedure in its Motion to Alter or Amend; Judge McCutchen granted that request; Progressive then refused to utilize the very procedure it had requested; and Progressive's stated purpose was to manufacture an appealable contempt order. (Order of Contempt, Jan. 28, 2026.) Even if this Court were to reverse Judge McCutchen's underlying privilege rulings — which it should not — the privilege waiver finding, the attorney's fee award, and the per diem sanction would each require independent analysis that Progressive's brief never provides. Progressive gave this Court no basis to disturb those rulings because it never briefed them.

**a. The $500 cost award** under Rule 37(a)(4), SCRCP, was entered by Judge McCutchen as part of the September 19, 2025 Order. The Rule directs that when a motion to compel is granted, the court shall require the opposing party to pay the movant's reasonable expenses, including attorney's fees, unless the opposition was substantially justified. The September 19, 2025 Order found that Progressive's withholding was not substantially justified — a finding supported by the record evidence of Progressive's continued settlement negotiations, the arbitrary demand-letter cutoff, and the prior ruling against Progressive and the same law firm in *Brown v. Owens* on materially identical arguments, provided to defense counsel on June 23, 2025 — nearly two months before the August 20 hearing at which it pressed the same position again. (Pl.'s Memo in Supp. of Rule to Show Cause, p. 2, July 10, 2025) (Order Granting Rule to Show Cause, Sept. 19, 2025.) Progressive's brief mounts no specific challenge to this finding or to the $500 amount.

**b. The $2,125 attorney's fee award** under Rule 37(b)(2), SCRCP, and the court's inherent contempt power was imposed by Judge Van Slambrook to compensate Respondent for bringing the contempt motion. Judge Van Slambrook found the requested fees — 4.25 hours at $500 per hour — "reasonable and necessary under the circumstances as outlined in the filed Affidavit of Compliance and Attorney's Fees." (Order of Contempt, Jan. 28, 2026.) *Poston v. Poston*, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998), authorizes such an award as indemnification to the party who instituted the contempt proceeding, not as punishment. Progressive's brief offers no specific challenge to the hours, rate, or legal basis.

**c. The $1,775 per diem sanction** of $25.00 per day for seventy-one days of deliberate noncompliance was a civil coercive sanction imposed to compel compliance with Judge McCutchen's Amended Order. *Lindsay v. Lindsay*, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997), holds that contempt results from willful disobedience of a court order. Progressive's noncompliance was not merely willful — its counsel admitted on the record and in its appellate brief that the noncompliance was intentional and strategic. The $25 per day rate is modest and the seventy-one-day period runs from October 29, 2025 through January 7, 2026 — the date of the contempt hearing. Progressive's brief does not challenge the daily rate, the number of days, or the legal authority for the sanction.

## CONCLUSION

Progressive's own appellate brief describes what happened: it "declined to comply with the Circuit Court's Orders so as to accept an appealable order holding it in contempt." That strategy rested on the toothpaste metaphor counsel invoked at the contempt hearing — but the tube Progressive feared opening was not the disclosure of privileged documents to Respondent. It was the judicial scrutiny that would determine whether those documents were privileged at all. The refuse-and-appeal strategy exists for parties who face a genuine choice between irreversible disclosure and contempt. It does not exist for parties who manufacture that choice when compliance would have caused no disclosure at all.

Respondent respectfully requests that this Court affirm the contempt order, the costs award, the attorney's fees, the per diem sanction, and the finding that Progressive waived any claim of privilege by refusing to submit the ordered privilege log. Because that waiver finding is unchallenged and independently supported by the record, no privilege claim survives to remand for in camera review, and this Court should deny Progressive's alternative request for remand.

Respectfully submitted,

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